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In the Matter of the Compensation of  
**JASON C. GRIFFIN, Claimant**  
WCB Case No. 13-05593  
**ORDER ON RECONSIDERATION**  
Hooton Wold & Okrent LLP, Claimant Attorneys  
MacColl Busch Sato PC, Defense Attorneys

Reviewing Panel: Members Weddell, Curey, and Somers. Member Weddell dissents.

On July 2, 2015, we withdrew our June 2, 2015 order that affirmed an Administrative Law Judge's (ALJ's) order affirming an Order on Reconsideration that did not grant permanent impairment and work disability awards for claimant's low back condition. We took this action to consider claimant's motion for reconsideration. Having received the self-insured employer's response and claimant's reply, we proceed with our reconsideration.

We previously held that claimant's permanent impairment was based on his accepted lumbar strain (rather than a combined low back condition) because a prior final litigation order (setting aside the employer's initial injury claim denial) had determined only that claimant's low back injury was compensable and remanded the claim to the employer for acceptance and processing, without specifying the condition to be accepted. Relying on *Mannie Burkman*, 58 Van Natta 2406, 2407 n 1 (2006), we reasoned that the specific identity of the accepted condition following litigation overturning a compensability denial is a claim processing matter to be addressed by the carrier in the first instance, pursuant to ORS 656.262.

On reconsideration, claimant reiterates that the prior litigation established that he has a combined condition, and asks that we infer that the employer's acceptance of a lumbar strain was as a "combined condition." Because the employer did not deny a combined condition before closure, claimant reasserts that all permanent impairment identified by the medical arbiter should be attributed to his compensable combined condition without apportionment. After reconsideration, we adhere to our prior decision.

As we previously explained, the prior litigation decided only that claimant's injury claim was compensable, not the scope of the employer's "post-litigation" acceptance or any subsequent claim processing matters. Furthermore, although, for purposes of determining the initial compensability of claimant's injury, the prior order applied a "combined condition" analysis in setting aside the employer's

denial, that order determined only that the employer had not established that the “otherwise compensable injury” was not the major contributing cause of claimant’s disability/need for treatment of the combined condition. In doing so, the prior order accepted the parties’ positions that the claim was for a “combined condition,” without actually deciding whether there was a “preexisting condition” and a “combined condition.” See ORS 656.005(7)(a)(B); ORS 656.266(2)(a); *SAIF v. Kollias*, 233 Or App 499, 505 (2010) (the carrier’s burden under ORS 656.266(2)(a) encompasses establishing that (1) the claimant has a “preexisting condition,” and (2) a “combined condition.”).

Under these circumstances, we do not consider the employer’s unsuccessful reliance on a “combined condition” defense in the initial compensability hearing to preclude its post-litigation acceptance of an independent (non-combined) condition.<sup>1</sup>

Impairment is awarded based on the accepted conditions at the time of closure, and their direct medical sequelae. *Stuart C. Yekel*, 67 Van Natta 1279, 1284 (2015). Moreover, ORS 656.262(6)(d) and ORS 656.262(7)(c) provide a separate process for addressing disputes over the scope of the accepted conditions when the claim is closed.

In particular, ORS 656.262(7)(c) requires that an Updated Notice of Claim Acceptance be issued at claim closure that specifies which “conditions” are compensable. That statute refers to ORS 656.262(6)(d), which concerns objections to acceptance notices where a “condition” has been incorrectly omitted.

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<sup>1</sup> Claimant argues that our decision gives “tacit approval” to “gamesmanship,” “substantially eliminates the ‘one bite at the apple’ standard, and throws finality in judicial proceedings in the forum out the window.” We disagree.

Our decision is consistent with *Braden v. SAIF*, 187 Or App 494, 500 (2003) (the Board may not bypass statutory requirements for claim processing) and *Burkman*, 58 Van Natta at 2408 n 1 (identity of the condition to be accepted is a claim processing matter to be resolved under ORS 656.262); see also *Brenda J. Dillard*, 62 Van Natta 3052, 3054 n 2 (2010) (where initial compensability of a denied claim was not premised on the precise identification of the claimed condition, references to diagnosed conditions in analyzing compensability were not to be interpreted as a directive regarding future claim processing, including any acceptance); cf. *Mitchell R. Drury*, 58 Van Natta 1937 n 1 (2006) (in circumstances where the compensability of specific claimed conditions must be explicitly determined, the Board’s authority encompasses ordering what conditions must be added in an acceptance).

Furthermore, under ORS 656.262(6)(d), claimant’s statutory remedy was to seek either clarification of the acceptance or initiate an omitted medical condition claim by clearly requesting formal written acceptance of the omitted condition. ORS 656.267(1). Thereafter, if a carrier’s response to such a request is determined to be unreasonable, it is subject to the assessment of penalties and attorney fees for such conduct. See ORS 656.262(11)(a).

Furthermore, ORS 656.262(7)(c) provides that if a “condition” is found compensable after claim closure, the carrier shall reopen the claim for processing of that “condition.” That process is in accord with ORS 656.704(3)(a), which distinguishes between the Board’s authority and that of the Director in reviewing decisions. *See Jeld Wen, Inc. v. Cooper*, 270 Or App 186, 191 (2015) (the Workers’ Compensation Division (WCD)/Director is authorized to evaluate impairment/disability due to the compensable injury on closure of the accepted claim, whereas a compensability determination is not within its statutory authority under ORS 656.704(3)(a)).

Here, we have previously determined that the record does not establish claimant’s entitlement to a permanent disability award based on his accepted lumbar strain condition. For the reasons expressed in our prior decision, as supplemented above, we continue to reach that same determination.<sup>2</sup>

Accordingly, on reconsideration, as supplemented herein, we adhere to and republish our June 2, 2015 order, effective this date.<sup>3</sup> The parties’ rights of appeal shall begin to run from the date of this order.

**IT IS SO ORDERED.**

Entered at Salem, Oregon on October 6, 2015

Member Weddell dissenting.

Claimant argues on reconsideration that the only question on review is whether the lumbar strain is, or is not, a combined condition. For the reasons stated in my prior dissent, I continue to find that the record is devoid of any evidence that would establish that the condition that was denied and litigated and

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<sup>2</sup> Alternatively, for the reasons explained in our previous order, if the prior litigation order was interpreted as finding a compensable combined condition, that condition would be a lumbar strain combined with preexisting L4-5 instability. Yet, neither the medical arbiter panel nor the attending physician attributed any permanent impairment to such a condition. (Exs. 112-1, 115-2). Therefore, even if the acceptance was interpreted as a lumbar strain combined with preexisting L4-5 instability, claimant would not be entitled to a permanent disability award.

<sup>3</sup> As previously noted, claimant may object to the “notice of acceptance” or initiate a “new/omitted” medical condition claim (including a claim for a “combined condition”) at any time. *See* ORS 656.262(6)(d); ORS 656.267(1); *Gail Moon*, 62 Van Natta 1238, 1239 (2010) (where a claimant initiates a claim for a “combined condition,” the claimant bears the burden of establishing the existence of that combined condition).

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found compensable was anything but a combined condition. That the employer labeled the condition a “strain” does not change the fact that the medical evidence unanimously supports the conclusion that the “strain” is, in fact, a combined condition.

Claimant argues that the majority opinion gives tacit approval to gamesmanship, “eliminates the ‘one bite at the apple’ standard and throws finality in judicial proceedings in the forum out the window.” The employer does not deny claimant’s allegations or explain why the majority decision will not erode the “one bite at the apple” standard.

In sum, the majority continues to suggest that claimant should file a new/omitted medical condition claim. I find it ironic that the majority, on one hand, finds issue preclusion does not bar the employer from now claiming that it did not accept a combined condition, and, on the other hand, suggests that claimant file a new/omitted medical condition claim for a combined condition, potentially forcing claimant to litigate *exactly* what has already been litigated.