
In the Matter of the Compensation of
MINKYU YI, Claimant
WCB Case No. 10-06507
ORDER ON REVIEW
Hooton Wold & Okrent LLP, Claimant Attorneys
Ian M Leitheiser, Defense Attorneys

Reviewing Panel: Members Johnson and Weddell.

Claimant requests review of Administrative Law Judge (ALJ) Mills's order that affirmed an Order on Reconsideration that did not award permanent disability or work disability for a low back condition. On review, the issues are claim processing and permanent disability (impairment and work disability). We affirm.

FINDINGS OF FACT

Claimant compensably injured his back on April 16, 2007. The self-insured employer initially accepted a lumbar strain. The employer modified the acceptance on August 17, 2007 to include a lumbar strain combined with preexisting degenerative disc disease. On August 23, 2007, the employer issued a denial on the basis that the lumbar strain was no longer the major contributing cause of claimant's disability as of June 19, 2007. (*See Ex. 52*). Claimant requested a hearing.

A prior ALJ upheld the denial, but we set aside it aside, reasoning that the medical evidence did not support the conclusion that the otherwise compensable injury ceased to be the major contributing cause of the combined condition on June 19, 2007. *Minkyu Yi*, 61 Van Natta 2664 (2009).

On December 14, 2009, the employer denied claimant's combined condition on the basis that the lumbar strain was no longer the major contributing cause of the disability/need for treatment of the combined condition by August 16, 2007. However, a prior ALJ set aside that denial based on claim preclusion principles, reasoning that the employer could have asserted its position at the hearing concerning the first denial. (*Ex. 59*). The employer did not seek review of that order.

On August 11, 2010, the employer issued a third "current condition" denial, explaining that it was "effective immediately" based on recent medical reports. (*Ex. 68*). Claimant requested a hearing, asserting that the third denial, like the

second, was barred by claim preclusion. The court ultimately held that the third denial was barred by claim preclusion. *Yi v. City of Portland*, 258 Or App 526 (2013).

In the meantime, the employer issued a Notice of Closure for the lumbar strain claim on August 12, 2010, which did not award any permanent disability. (Exs. 70, 72, 73). Claimant requested reconsideration. (Ex. 74). A November 3, 2010 Order on Reconsideration affirmed the Notice of Closure. (Ex. 79). Claimant requested a hearing.

CONCLUSIONS OF LAW AND OPINION

The parties submitted the case to the ALJ to be decided on the written record. Claimant argued that, based on the court's holding that set aside the employer's "pre-closure" denial, his preexisting condition should be included in his permanent disability evaluation. As such, he contended that he was entitled to permanent and impairment and work disability awards.

The ALJ confined the permanent disability evaluation to claimant's lumbar strain, which was the only accepted condition at claim closure. In doing so, the ALJ reasoned that, pursuant to the court's holding, the employer would be required to again process the claim to closure, which would then permit a re-evaluation of claimant's permanent disability. In reaching this conclusion, the ALJ cited *Jonathan E. Ayers*, 56 Van Natta 270 (2004), and *Jonathan E. Ayers*, 56 Van Natta 1103, *recons*, 56 Van Natta 1470 (2004). The ALJ affirmed the Order on Reconsideration.

On review, claimant contends that, based on the court's holding, the employer's "pre-closure" denial was invalid and, therefore, his entire permanent impairment (including his combined low back condition) must be rated.

As the party challenging the Order on Reconsideration, claimant has the burden of establishing error in the reconsideration process. *Marvin Wood Products v. Callow*, 171 Or App 175, 183 (2000). We conclude that claimant has not established such error. We reason as follows.

In *Ayers*, before claim closure, the carrier accepted and denied a combined condition. 56 Van Natta at 1103. The claim was closed without an award of permanent partial disability (PPD). *Id.* As of the date of the reconsideration order, the denial remained in effect (but was pending litigation in another proceeding)

and the reconsideration order did not include a determination of any matter subject to the denial. *Id.* at 1104. On review, shortly after we set aside the compensability denial in another proceeding, we affirmed the Order on Reconsideration. *Id.* at 1105. Thereafter, the claimant requested reconsideration of our prior order regarding PPD. 56 Van Natta at 1470.

Citing ORS 656.262(7)(c),¹ we held that “the appropriate time to address permanent disability from a ‘post-closure’ compensable condition is *after the employer has reopened and reclosed the claim.*” *Id.* (emphasis in original). We explained that pursuant to ORS 656.283(7) (renumbered as ORS 656.283(6)), the record in a proceeding regarding PPD is limited to the reconsideration record. In contrast, the record in a hearing regarding compensability is not statutorily limited. We explained:

“[C]ompensability decisions regarding conditions that were denied prior to claim closure should not be considered in a proceeding regarding the extent of permanent disability arising from that closure. The statutory and regulatory structure envisions a system in which the resolution of compensability and extent of disability disputes are resolved in separate proceedings.

“In other words, in the event that the ‘pre-closure’ denial is set aside, the extent of disability resulting from that now ‘post-closure’ compensable condition can be evaluated and, if disputed, litigated in another proceeding expressly designed for the resolution of that particular dispute. Such a process best serves the interests of substantial justice to all parties in that compensability disputes are not litigated in a proceeding involving permanent disability where only the reconsideration record can be considered.” *Id.* at 1471.

Similarly, in *Jonathan M. Humphrey*, 61 Van Natta 357, 358 (2009), we explained that the statutory framework contemplates that objections to a closure are evaluated separately from questions of compensability. In *Humphrey*, the issue before us (premature claim closure) arose out of a Notice of Closure, rather than a denial. We reviewed the premature closure issue based solely on the record

¹ ORS 656.262(7)(c) provides, in part: “If a condition is found compensable after claim closure, the insurer or self-insured employer shall reopen the claim for processing regarding that condition.”

developed on reconsideration. Our review confirmed that the employer's combined condition denial (which asserted that the accepted lumbar strain ceased to be the major contributing cause of the combined low back condition) issued prior to claim closure. Nevertheless, we concluded that such circumstances did not invalidate the Notice of Closure. *Id.* at 359-60; *see also Willie L. Frison*, 63 Van Natta 1331, 1332-33 (2011) (where a combined condition denial that formed the basis of a claim closure was subsequently set aside, such a decision did not invalidate that claim closure; rather, the carrier was obligated to reopen the claim and, when appropriate, close that claim and rate any impairment for the combined condition).

We conclude that this case is controlled by *Ayers* and its progeny. The reconsideration record establishes that the employer's combined condition denial issued before the August 12, 2010 Notice of Closure. The court has held that the employer's denial is precluded by the principles of claim preclusion. Consistent with the statutory scheme, the employer will be obligated to process this denied claim to closure, which may eventually result in a permanent disability award. *See Ayers*, 56 Van Natta at 1471 ("because of this statutory procedure for reopening of the claim for processing, our decision in this case does not deprive claimant of an opportunity to obtain compensation for the 'post-closure' compensable condition"). Thereafter, if claimant disputes the employer's closure, he will then have an opportunity to litigate permanent impairment and work disability. Accordingly, based on the aforementioned reasoning, we affirm.

ORDER

The ALJ's order dated August 25, 2014 is affirmed.

Entered at Salem, Oregon on February 13, 2015