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

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

Claimant requests review of Administrative Law Judge (ALJ) Pardington's order that affirmed an Order on Reconsideration that did not grant permanent impairment and work disability awards for a low back condition. On review, the issues are preclusion and permanent disability (impairment and work disability).

We adopt and affirm the ALJ's order with the following supplementation.

On February 27, 2011, claimant injured his left lower back while installing a satellite dish for the self-insured employer. (Ex. 85-2). In an accident/incident report, he explained that he was on a ladder installing the dish overhead when a gust of wind blew the dish to his right side, causing a need to "readjust" his body on the ladder. (Ex. 87-2). In doing so, he felt a "series of clicks and pops" in his back and a "shooting pain" down his left leg. (*Id.*)

On March 17, 2011, claimant signed a "new injury" claim for a low back strain. (Ex. 92). On April 1, 2011, the employer denied the claim for a "low back" injury occurring on February 27, 2011, on the basis that the injury did not arise out of or in the course of employment. (Ex. 95). The employer also asserted that the "primary contributing cause" of the disability/need for treatment was due to "preexisting conditions." (*Id.*)

In February 2012, a prior ALJ's order set aside the employer's April 1, 2011 denial. Applying the major contributing cause standard for a "combined condition," the prior ALJ determined that persuasive medical evidence established an "otherwise compensable injury," and that the "preexisting condition" was not the major contributing cause of the "combined condition" on the date of injury. (Ex. 102-5, -6). On review, we adopted and affirmed the ALJ's order. *Jason Griffin*, 64 Van Natta 1954 (2012). Neither the prior ALJ's order nor our findings and conclusions specifically identified the condition to be accepted or the

“preexisting condition” component of the “combined condition.”¹ Thereafter, the employer accepted a “LUMBAR STRAIN formerly denied, now accepted.” (Ex. 104) (emphasis in original).

In March 2012, Dr. Ward opined that claimant’s lumbar strain had resolved without permanent impairment or work restrictions, and was no longer the major contributing cause of claimant’s disability or need for treatment. (Ex. 103-1). In February 2013, Dr. Ward reiterated that claimant’s lumbar strain was medically stationary. (Ex. 105). He also reported that claimant would “continue to work his regular job” and treat “as needed.” (*Id.*)

A June 11, 2013 Updated Notice of Claim Acceptance at Closure identified the accepted condition as a lumbar strain. (Ex. 108). A June 2013 Notice of Closure awarded no permanent disability. (Ex. 109). Claimant requested reconsideration, and sought an updated opinion from Dr. Ward.

In August 2013, based on claimant’s counsel’s representations that, as a result of a litigation order, the accepted condition was a “lumbar strain combined with instability of L4-5,” Dr. Ward opined that the accepted condition (as described by claimant’s counsel) was also medically stationary. (Ex. 111). Dr. Ward also concluded that claimant’s “preexisting low back pathologies, including L4-5 instability,” were medically stationary and without physical permanent impairment or work restrictions. (Ex. 112-1).

On October 9, 2013, a medical arbiter panel performed an examination. The panel identified a range of motion deficit, attributing 100 percent to underlying degenerative disc disease and “residual effects of [the] lumbar surgery” at the L4-5 level. (Ex. 113-7). When provided information from the Appellate Review Unit (ARU) that the carrier had been ordered by litigation to accept “a lumbar strain combined with instability of L4-5,”² the panel opined that claimant was

¹ The prior ALJ’s order contained the following findings, which we adopted. In 2004, claimant underwent a left-sided L4-5 laminotomy and discectomy. (Ex. 102-2). In 2008, Dr. Ward diagnosed “instability at L4-5.” (Ex. 102-3). Dr. Ward opined that the lumbar strain “combined with [the] preexisting condition.” (Ex. 102-4). Dr. Ward considered the work injury to be the major cause of the need for treatment. (Ex. 102-5). The prior ALJ’s findings, which we adopted, support the proposition that the “preexisting condition” was “instability at L4-5.”

² ARU’s interpretation of the prior ALJ’s order appeared after claimant’s counsel stated that the accepted condition, “as a result of a litigation order, is actually a combined condition of lumbar strain combined with instability of L4-5.” (Ex. 111-1).

not significantly limited in the repetitive use of his lumbar spine due to that condition or its direct medical sequelae. (Ex. 114-1). The panel also clarified that 90 percent of claimant's impairment was due to degenerative disc disease, 10 percent to the "residual effects of the lumbar surgery," and zero percent to the "accepted compensable lumbar strain combined with instability of L4-5." (Exs. 114-1, 115-2).

In its Order on Reconsideration, ARU specifically found that the "accepted condition" was a "lumbar strain combined with instability of L4-5." (Ex. 116-1). Since the medical arbiter panel reported no objective findings of permanent impairment due to the accepted lumbar strain combined with instability of L4-5 or any direct medical sequelae, ARU concluded that no impairment award was allowed under the rating standards. (Exs. 115-2, 116-3). Consequently, the reconsideration order affirmed the Notice of Closure. (Ex. 116-1, -3). Claimant requested a hearing, seeking permanent disability benefits.

Finding that the employer accepted a "lumbar strain," not a combined condition, the ALJ affirmed the reconsideration order. On review, claimant seeks a permanent disability award (impairment and work disability). Relying on *Roseburg Forest Products v. Lund*, 245 Or App 65 (2011), and the doctrine of "issue preclusion," claimant contends that the prior ALJ's order required the carrier to accept a combined condition and argues that the formal Notice of Acceptance should be ignored. Thus, citing *Lund*, claimant argues that the prior ALJ's order precluded the employer from limiting its acceptance to a strain. Claimant further asserts that the "preexisting condition" component of the "combined condition" includes "degenerative disc disease with disc protrusions at L4-5 and L5-S1, prior discectomy at L4-5 and residual instability related to and arising out of that surgical procedure." (Appellant's Brief, p. 7). Because the employer did not deny the major contributing cause of the "combined condition" before closing the claim (*See* ORS 656.262(7)(b)), claimant contends that he is entitled to an "unapportioned" permanent impairment value for the loss of range of motion identified by the arbiter panel. Finally, arguing that he was not released to regular work, claimant seeks a work disability award. For the following reasons, we disagree with claimant's contentions.

As the party challenging the Order on Reconsideration, claimant has the burden to prove error in the reconsideration process. *Marvin Wood Products v. Callow*, 171 Or App 175, 183 (2000). For the reasons expressed below, we find that the record does not satisfy claimant's burden.

With regard to the preclusion argument, we agree with the ALJ's reasoning that the issue in *Lund* was different from the issue currently presented. In *Lund*, a prior final litigation order concluded that the claimant's new/omitted medical condition claim for a right shoulder rotator cuff tear was compensable as a combined condition (including preexisting arthritis). Thereafter, the carrier accepted a right shoulder strain and rotator cuff tear, but not a combined condition. When a Notice of Closure and Order on Reconsideration apportioned the claimant's impairment findings between the strain/rotator cuff tear and the preexisting arthritic condition, the claimant appealed, asserting that he was entitled to a permanent disability award for a combined condition. The court agreed, holding that, in light of the prior compensability litigation, the carrier's acceptance was "properly understood" as accepting a combined condition. 245 Or App at 72.

Also, in *Lund*, because the prior litigation concerned the compensability of a new/omitted medical condition claim, the claimant was required to establish the "existence" of the claimed condition. See *Maureen Y. Graves*, 57 Van Natta 2380, 2381 (2005) (persuasive proof of the existence of the condition is a fact necessary to establish the compensability of a new or omitted medical condition). Thus, the accepted condition, following litigation overturning a new/omitted medical condition denial, was "the condition" that was necessarily claimed and established during that litigation.

In contrast to *Lund*, here, the prior litigation concerned the initial compensability of claimant's injury claim. The compensability of the claim was not premised on the precise identification of a claimed condition. As such, claimant was not required to prove a specific diagnosis to establish compensability so long as his symptoms were attributable to his work. *Boeing Aircraft Co. v. Roy*, 112 Or App 10, 15 (1992) (a claimant need not prove a specific diagnosis in an injury claim if he proves that his symptoms are attributable to his work); *Donelle Applegate*, 66 Van Natta 1026 (2014) (same). Here, the prior ALJ concluded that claimant suffered an "otherwise compensable injury" that was attributable to his work. The prior ALJ added, however, that claimant's preexisting condition was not the major contributing cause of the "combined condition." The prior ALJ did not specifically identify the components of the "combined condition" or order acceptance of a specific condition, combined or otherwise. (Ex. 102-6).

The specific identity of the accepted condition following litigation that overturns a compensability denial is a claim processing matter to be addressed by the carrier in the first instance, pursuant to ORS 656.262. See *Mannie Burkman*, 58 Van Natta 2406, 2407 n 1 (2006); see also *Braden v. SAIF*, 187 Or App 494 (2003) (Board may not bypass statutory requirements for claim processing).

Here, claimant acknowledges that neither the prior ALJ nor our order specifically defined the scope of his “preexisting condition.” Yet, he contends that the prior ALJ’s findings concerning his “preexisting condition” are binding as a result of “issue preclusion.” We disagree because the prior ALJ’s order did not find a particular condition compensable.

The doctrine of “issue preclusion” precludes future litigation of an issue that was “actually litigated” in an earlier proceeding and “essential to a final decision on the merits” in that proceeding. *Nelson v. Emerald People’s Utility Dist.*, 318 Or 99, 104 (1993); *Drews v. EBI Cos.*, 310 Or 134, 139 (1990); *Furst*, 65 Van Natta at 1665. The *Nelson* court cites three other requirements: the party to be precluded has had a full and fair opportunity to be heard on the issue, the party sought to be precluded was a party or was in privity with a party to the prior proceeding, and the prior proceeding was the type of proceeding to which the court will give preclusive effect. 318 Or at 104.

Here, the issue that was “actually litigated” in the prior proceeding was the compensability of claimant’s initial injury claim, not the scope of acceptance. Although the parties agreed that the claim involved a “combined condition,” and the prior ALJ’s order applied the major contributing cause standard of proof for a combined condition to decide compensability, the parties did not litigate and the prior ALJ’s order did not expressly identify the specific condition that should be accepted or the “combined condition” components to be accepted. (Ex. 102-5, -6). In other words, the specific identity of the “preexisting condition” component of the combined condition was not “essential to a final decision on the merits” in that proceeding. *Nelson*, 318 Or at 104. Rather, consistent with the *Burkman* rationale, the “condition” to be accepted is a claim processing matter.

Moreover, neither the prior ALJ’s order nor our unappealed final order included a finding that any specific condition was compensable. Instead, claimant’s back injury was described as a “strain.” (Ex. 92). The employer’s denial referred to unidentified “pre-existing conditions.” (Ex. 95-1). The prior ALJ’s order remanded “the claim” for acceptance. (Ex. 102-6). In adopting and affirming that order, we found the medical evidence insufficient to establish that the “otherwise compensable injury” was not the major contributing cause of claimant’s disability/need for treatment of the “combined low back condition.” (Ex. 103A-4). As noted, the scope of the “preexisting condition” and the components of the “combined condition” were not identified. Under these

circumstances, the prior litigation order has no preclusive effect insofar as a specific compensable condition (“combined condition” or otherwise) is concerned.³

It is important to note that the dissent focuses on the propriety of the employer’s claim processing rather than the issue before us. The processing by the employer and whether its acceptance of only a lumbar strain was reasonable or unreasonable is not before us. The question here is whether claimant is entitled to a permanent disability award resulting from his compensable injury claim (which has been closed based on an accepted lumbar strain). See *Jeld Wen, Inc. v. Cooper*, 270 Or App 186, 191 (2015) (on behalf of the Workers’ Compensation Division (WCD)/Director, ARU 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)).

A review of scope of acceptance cases supports our analysis. The scope of the employer’s acceptance is an issue of fact. *Columbia Forest Products v. Woolner*, 177 Or App 632, 642-43 (2001). In determining whether a notice of acceptance constitutes an acceptance of a combined condition, we do not rely on magic words. Rather, “we consider whether the notice apprises the claimant of the nature of the compensable conditions covered by the acceptance.” *Lund*, 245 Or App at 71-72; *Woolner*, 177 Or App at 647. In conducting such an analysis, while the carrier’s own words used to describe the accepted condition constitute significant evidence bearing on the factual issue of whether a “combined condition” was accepted, we also examine other parts of the record in making our factual determination of what was accepted. See *Bonnie J. Woolner*, 54 Van Natta 828, 832 (2002) (on remand).

³ Furthermore, even if we were to find that the prior ALJ’s order found a specific “combined condition” to be compensable, the preexisting condition identified during that earlier proceeding was “L4-5 disc instability,” as opposed to “degenerative disc disease with protrusions at L4-5 and L5-S1, prior discectomy at L4-5 and residual instability related to and arising out of that surgical procedure.” In summarizing Dr. Ward’s opinion that claimant’s work injury was the major cause of his need for treatment, the prior ALJ found that Dr. Ward had diagnosed “L4-5 instability” and considered claimant’s lumbar strain to have “combined with [the] preexisting condition.” (Ex. 102-3, -4). Therefore, if there was any preclusive effect from the prior litigation orders, it pertained to the strain and “L4-5 instability” as a “combined condition.” The medical arbiter panel attributed zero permanent impairment to that condition. (Ex. 115-2).

In *Woolner*, on remand from the court, we concluded that the carrier had accepted a combined condition. We reasoned that the evidence showed that the claimant had a preexisting condition of “multi-directional instability” that “combined with” the accepted injury conditions of right shoulder and cervical strains. Because the carrier expressly accepted a claim for “multi-directional instability, right shoulder and cervical strain,” we concluded that the acceptance pertained to a combined condition.

Here, in contrast, the employer did not expressly accept preexisting conditions. Rather, it accepted only a “lumbar strain.” See *Johnson v. Spectra Physics*, 303 Or 49, 56 (1987) (where there is a written acceptance, the scope of acceptance encompasses only those conditions specifically or officially accepted in writing); *Timothy A. Vinton*, 53 Van Natta 979 (2001), *aff’d without opinion*, 182 Or App 291 (2002) (acceptance was limited to the condition specifically accepted in writing). While Dr. Ward opined that claimant’s “L4-5 previously-diagnosed disc pathology” (*i.e.*, “instability and * * * possibly a disc herniation that may have resolved”) contributed to his disability and need for treatment such that there was a “combined condition” at the time of the “injury event,” he also opined that claimant strained his back, which “combined,” but “the strain was the reason for his injury.” (Ex. 100-8, -30, -31). Dr. Ward’s opinion supports the proposition that the accepted lumbar strain combined with preexisting L4-5 instability, but not that the “lumbar strain” was a “combined condition.” *Cf.* *Michael S. Gallegos*, 58 Van Natta 3079, 3082-83 (2006) (the medical evidence established that the accepted meniscal tear was a “combined condition”). Here, the accepted condition is a strain, and the strain was not a “preexisting condition.”

Furthermore, claimant did not challenge the employer’s acceptance notices under ORS 656.262(6)(d), which states, “An injured worker who believes that a condition has been incorrectly omitted from a notice of acceptance, or *that the notice is otherwise deficient, first must* communicate in writing to the insurer or self-insured employer the worker’s objections to the notice pursuant to ORS 656.267” (emphasis added), or request the acceptance of a new/omitted “combined condition” claim under ORS 656.262(7)(a).⁴

⁴ Under ORS 656.262(6)(d), claimant had a statutory remedy to seek either clarification of the acceptance (if he objected to the Notice of Acceptance) or initiate an omitted medical condition by clearly requesting formal written acceptance of the omitted condition. ORS 656.262(6)(d); ORS 656.267(1). Claimant did neither. On receipt of such an objection or omitted condition claim, the employer would be required to timely respond. Thereafter, if claimant remained dissatisfied, he could request a hearing. Furthermore, if the employer’s conduct was determined to be unreasonable, it could be subject to penalties and attorney fees. See ORS 656.262(11)(a).

Under these circumstances, the record does not support a conclusion that the previous litigation established the compensability of a combined low back condition (which included L4-5 disc instability, degenerative disc disease, and lumbar surgery as “preexisting condition” components of that combined condition). We find that the litigation determined only that claimant’s claim was compensable and the carrier’s Notice of Acceptance identified the only accepted condition, a lumbar strain. Claimant’s preclusion argument fails.⁵

We turn to the rating of claimant’s permanent disability. Based on the following reasoning, we are not persuaded that claimant is entitled to a permanent impairment award.

Absent persuasive evidence to the contrary, we are not free to disregard the medical arbiter’s unambiguous findings. *See Hicks v. SAIF*, 194 Or App 655, 659 (2004), *recons*, 196 Or App 146 (2004). However, where the attending physician has provided an opinion of impairment, and we do not expressly reject that opinion, OAR 436-035-0007(5) permits us to prefer the attending physician’s impairment findings, if the preponderance of the medical evidence establishes that they are more accurate. *SAIF v. Banderas*, 252 Or App 136, 144-45 (2012).

Here, the arbiter panel’s findings appear to be based on the proposition that the prior ALJ’s order concluded that a strain and L4-5 instability were to be accepted. For the reasons expressed above, such an interpretation is not consistent with our interpretation of the prior ALJ’s order or the employer’s acceptance. Therefore, we find persuasive reasons to reject the arbiter panel’s impairment findings, which do not comport with the previous litigation orders.

Dr. Ward, claimant’s attending physician, found no permanent impairment or work restrictions associated with the compensable strain or preexisting low back “pathologies” (including L4-5 instability). (Ex. 112). Dr. Ward treated claimant for significant periods, both before and after the work injury. Under these circumstances, we find that Dr. Ward’s findings are more accurate than those of the arbiter panel and should be used. *See Joseph P. Hapka*, 61 Van Natta 1148, 1169 (2009) (rejecting a medical arbiter panel’s ambiguous report and finding the attending physician to be in the best position to give an opinion regarding the validity of the claimant’s impairment findings). Therefore, given that Dr. Ward

⁵ This order does not preclude claims for any unaccepted conditions that may be accepted or determined to be compensable and rated for permanent disability in the future. Instead, claimant may initiate a new/omitted medical condition claim at any time. ORS 656.267(1); *see* ORS 656.262(6)(d), (7)(c).

found no permanent impairment or work restrictions associated with the compensable strain or preexisting low back conditions, claimant is not entitled to permanent impairment/work disability awards.⁶

Claimant asserts that the surgery is not a condition subject to apportionment. *See Schleiss v. SAIF*, 354 Or 637, 654 (2013) (only the component parts of the combined condition, that is the “otherwise compensable injury” and legally cognizable preexisting conditions, are compared in rating the impairment of the combined condition). Claimant also argues that degenerative disc disease is “consistent” with Dr. Ward’s diagnosis of “slightly unstable spondylolisthesis at L4-5 with degeneration.” (Ex. 66). Yet, neither the arbiter panel nor Dr. Ward expressly supports such a proposition. In the absence of a persuasive medical opinion supporting such a conclusion, we do not reach claimant’s proposed determination. *See Benz v. SAIF*, 170 Or App 22, 26 (2000) (although we may draw reasonable inferences from the medical evidence, we are not free to reach our own medical conclusions in the absence of such evidence); *SAIF v. Calder*, 157 Or App 224, 227-28 (1998) (the Board is not an agency with specialized medical expertise and must base its findings on evidence in the record).⁷

Finally, unlike *Schleiss*, where there was impairment due to the compensable injury, here, the arbiter panel attributed none of claimant’s permanent impairment to the compensable injury.⁸ Where a claimant’s impairment is solely due to causes unrelated to the compensable injury, a permanent impairment award is not appropriate. *See Paula Magana-Marquez*, 66 Van Natta 1300, 1301-02 (2014) (OAR 436-035-0013 did not apply where there was no permanent impairment due to the compensable injury, distinguishing *Schleiss*).

⁶ Alternatively, for the reasons previously expressed, were the prior ALJ/Board order interpreted as finding a compensable combined condition, that condition would be a lumbar strain combined with L4-5 disc instability. Yet, the arbiter panel attributed zero percent of claimant’s impairment findings to the lumbar strain combined with L4-5 instability. (Exs. 113-7, 115-2). Instead, the panel attributed 90 percent to degenerative disc disease and 10 percent to the residual effects of the pre-injury lumbar surgery. (Ex. 115-2). Therefore, regardless of whether the acceptance were interpreted as a lumbar strain or, alternatively, as a lumbar strain combined with preexisting L4-5 instability, there would be no award of permanent impairment or work disability.

⁷ Moreover, as previously explained, the prior litigation order established, at most, claimant’s lumbar strain and “L4-5 instability” as a compensable combined condition. The arbiter panel attributed zero impairment to this combined condition.

⁸ For the reasons previously expressed, we would reach the same determination even if the L4-5 disc instability was considered as part of the “compensable injury/combined condition.”

In conclusion, based on the aforementioned reasoning, the record does not establish claimant's entitlement to a permanent disability award. Therefore, we affirm.

ORDER

The ALJ's order dated April 18, 2014 is affirmed.

Entered at Salem, Oregon on June 2, 2015

Member Weddell dissenting.

The majority concludes that the employer did not accept a "combined condition." Because I do not believe that the record supports such a conclusion, I respectfully dissent.

The scope of an acceptance is a question of fact. *Columbia Forest Products v. Woolner*, 177 Or App 639, 643 (2001); *SAIF v. Dobbs*, 172 Or App 466, 451, *recons*, 173 Or App 599 (2001); *Granner v. Fairview Center*, 147 Or App 406, 411 (1997); *SAIF v. Tull*, 113 Or App 499, 454 (1992).

Relevant to this dispute, on April 1, 2011, the employer denied claimant's injury claim, asserting that the "primary contributing cause of [claimant's] need for treatment or disability is due to pre-existing conditions." (Ex. 95-1). At the hearing, the parties agreed that the claim involved a "combined condition." (Ex. 102-5). Consequently, the prior ALJ applied a "combined condition" analysis in setting aside the employer's "combined condition" denial and remanding the claim for acceptance and processing. (Ex. 102-6).

Furthermore, on review of the prior ALJ's order, neither party challenged the prior ALJ's "finding that claimant had a 'combined condition.'" *Jason Griffin*, 64 Van Natta 1954, 1956 (2012). Consequently, the Board order applied a "combined condition" analysis in affirming the prior ALJ's order. *Id.* In sum, the record conclusively establishes that the parties litigated the compensability of a "combined condition."

An analysis of the physicians' reports existing at the time of the previous litigation provides further support for my conclusion. Dr. Ward, claimant's attending physician, opined that the lumbar strain "immediately combined with his preexisting back conditions, including surgical residuals, to cause his need for treatment and disability." (Ex. 99-1). Later, in addressing whether claimant

had strained his back or aggravated his disc, Dr. Ward testified “that it was somewhat of a combined situation. He obviously has an underlying spine problem that we know about, but it’s my opinion that he strained his back at that time, combined, but * * * at the time the strain was the reason for his injury.” (Ex. 100-8). He attributed claimant’s “problems” on March 2, 2011, in part, to L4-5 instability related to a prior injury, explaining, “[a]bsolutely he has lumbar instability * * * [that] is contributing in a significant way to this injury * * * . However, I do not believe that he would have gone to the emergency room and had a flare-up of his symptoms on that day without the injury where he was working.” (Ex. 100-17, -18, -24, -25). Dr. Ward also opined that previously diagnosed L4-5 disc pathology and instability contributed to claimant’s chronic pain and disability/need for treatment, creating a “combined condition.” (Ex. 100-30, -31). He further identified preexisting L4-5 and L5-S1 degenerative disease and the prior claim as substantial components of claimant’s back condition at the time of the February 27, 2011 injury. (Ex. 100-40).

In addition, Dr. Fuller, who performed an examination at the employer’s request, diagnosed “long-term pre-existing degenerative disc disease [at] L4-5 and L5-S1,” which he described as “severe.” (Ex. 101-13, -16). Considering the mechanism of claimant’s injury to be consistent with a symptomatic flare of his preexisting mechanical back pain, Dr. Fuller opined that the work injury was a material cause of claimant’s disability and need for treatment. (Ex. 101-14). He also opined that the work injury combined with claimant’s preexisting lumbar conditions (identified as L4-5 degenerative disc disease, surgical residuals, and instability) to cause his disability and need for treatment. (Ex. 101-15).

In sum, Drs. Fuller and Ward agreed that claimant’s February 27, 2011 work event combined with significant preexisting L4-5 pathology to cause disability and the need for treatment. The record is devoid of a physician’s opinion contesting the existence of a combined condition.

The employer’s claim processing actions following the prior ALJ’s order further confirm the meaning of that litigation decision. For instance, the employer’s attorney generated evidence from Dr. Ward that claimant’s lumbar strain combined with his preexisting lumbar pathologies to cause disability and need for treatment, but was “self-limiting” and was no longer the major contributing cause of the need for treatment or disability. (Ex. 103-1). Similarly, before closing the claim, the employer’s attorney generated Dr. Ward’s report that, three months after the injury, claimant’s lumbar strain “ceased” to be the major contributing cause of disability and need for treatment of the “combined condition.” (Ex. 107-7).

Considering the employer's "combined condition" denial and the ensuing litigation, it logically follows that the employer would accept a "combined condition" in response to the prior ALJ's directive to process the compensable claim. The only arguable support for proposing that the employer did not process a combined condition is the absence of the words "combined with" or "combined condition" in its acceptance notice. Yet, the absence of those specific words does not compel a finding that the employer did not accept a combined condition. *See Woolner*, 177 Or App at 647 ("a notice of acceptance that fails to employ the specific words 'combined condition' is not – for that reason alone – insufficient as a matter of law to constitute an acceptance of a combined condition for purposes of ORS 656.262(7)(b)"). Based on the facts described herein, I conclude that the employer accepted the condition that was denied and litigated, that is, a "combined condition."

The majority opinion suggests that claimant's remedy would be to challenge the employer's acceptance notices or request the acceptance of a new/omitted "combined condition" claim. Yet, as I have detailed above, claimant has already litigated the compensability of his combined condition and prevailed. Thus, the majority's remedy would force claimant to litigate *exactly* what has already been resolved. Claimant should not be required to repeat this process.

Furthermore, the employer has the statutory obligation to process claims under ORS 656.262, as well as to comply with ALJ/Board orders setting aside its denial. I believe it is fundamentally unfair to essentially relieve the employer of its claim processing obligation in response to an ALJ/Board directive and to shift the responsibility to claimant, to re-claim (and potentially re-litigate) the compensability of his previously claimed condition. I consider this result to be particularly disturbing when the prior litigation involved the higher compensability standard of a "combined condition," from which claimant successfully prevailed. In short, when an ALJ/Board order sets aside a denial, it is reasonable to expect that the carrier will accept the condition that was litigated. The majority's decision undercuts that expectation.

In conclusion, because the employer did not deny the compensable combined condition before closing the claim, I would find that claimant is entitled to a permanent disability award based on his total accepted combined condition. *See* ORS 656.262(7)(b); OAR 436-035-0014(1)(c); *Roseburg Forest Products v. Lund*, 245 Or App 65, 70-71 (2011) (where a prior litigation order concluded that the claimant had a combined condition and that order had become final without the employer issuing a major contributing cause denial, the claimant was entitled to

have impairment rated for the total combined condition); *Timothy L. Wolf*, 56 Van Natta 3480, 3482 (2004) (same). Because the majority reaches a different conclusion, I respectfully dissent.