
In the Matter of the Compensation of
FRANKLIN D. JANTZEN, Claimant
WCB Case No. 14-04913, 14-03397
ORDER ON RECONSIDERATION
Julene M Quinn LLC, Claimant Attorneys
SAIF Legal Salem, Defense Attorneys

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

On May 6, 2016, we withdrew our April 13, 2016 order that reversed that portion of an Administrative Law Judge's (ALJ's) order that upheld the SAIF Corporation's denial of claimant's new/omitted medical condition claim for L3-4, L4-5 and/or L5-S1 disc pathology. We took this action to consider SAIF's motion for reconsideration. Having received claimant's response (which opposes SAIF's request), we proceed with our reconsideration.

In our prior order, we determined that SAIF had denied claimant's new/omitted medical condition claim for "L3-4, L4-5 and/or L5-S1 disc pathology" on the basis that it did not sufficiently describe a "condition." Finding that claimant's request was for a "condition," we set SAIF's denial aside. *See Young v. Hermiston Good Samaritan*, 233 Or App 99, 104 (2008) (a "medical condition" is "the physical status of the body as a whole * * * or one of its parts").

On reconsideration, SAIF contends that the parties agreed at the outset of the hearing to litigate the compensability/causation of the claimed condition, thereby expanding the basis of its denial.¹ In response, claimant asserts for the first time that the basis for SAIF's denial was limited to claiming that the claimed condition did not qualify as a "condition" under ORS 656.267. Based on the following reasoning, we conclude that the disputed issues included the compensability/causation of the claimed condition.

In general, a carrier is bound by the express language of its denial. *Tattoo v. Barrett Bus. Serv.*, 118 Or App 348, 351 (1993). However, the parties may by express or implicit agreement try an issue that falls outside the express terms of a denial. *See Weyerhaeuser Co. v. Bryant*, 102 Or App 432, 435 (1990) (when it was apparent from the record that the parties tried a case by agreement with a particular issue in mind, it was improper for the ALJ and Board not to decide the

¹ SAIF raises other arguments, but, because we conclude that "causation" of this claimed condition was contested, it is unnecessary to address those additional contentions.

issue); *Judith M. Morley*, 46 Van Natta 882, 883, *recons.*, 46 Van Natta 983 (1994) (where the claimant had not relied to his detriment on express language in the carrier's denial and had, through conduct, acquiesced in litigating a causation issue, the causation issue was considered); *see also Maureen Y. Graves*, 57 Van Natta 2380, 2382 (2005) (where the claimant's counsel did not object to the carrier's counsel's description of the issues in opening remarks, carrier's denial considered to have been amended to include a contention challenging the existence of the claimed condition).

Here, SAIF's September 16, 2014 denial asserted that claimant's new/omitted "L3-4, L4-5, and/or L5-S1 disc pathology" claim did not "clearly specify the location or nature of a specific medical condition." (Ex. 35). However, at the beginning of hearing, claimant's counsel described the issues with regard to the disc pathology claim as whether there was an occupational disease, an injury related to the 2010 work event, a new injury in 2014, "or, from SAIF's perspective, it's not related at all." (Tr. 3, 4). SAIF's counsel did not object to this description of the issues, but also described SAIF's denial as "raising kind of an alternative theory that the request is invalid because it doesn't * * * clearly request * * * a condition." (Tr. 4).

Under these circumstances, the record supports a conclusion that the parties agreed at the outset of hearing to litigate the "compensability/causation" issue regarding the "L3-4, L4-5, and/or L5-S1 disc pathology" claim. This conclusion is consistent with the parties' closing arguments, as well as the ALJ's order, all of which addressed the compensability/causation of the claimed condition. Moreover, on appeal of the ALJ's compensability decision, both parties addressed the "compensability/causation" issue (without contending that the disputed issue was limited to whether a "condition" had been claimed).

Accordingly, for the foregoing reasons, we conclude that the "compensability/causation" issue was raised, litigated, and addressed by the ALJ's order. Consequently, we proceed to the merits. *See Bryant*, 102 Or App at 435; *Carolyn Otey*, 64 Van Natta 2394, 2395 (2012) (where the parties argued causation of the claimed condition to the ALJ, the compensability issue was not limited to whether the disputed condition existed).

In upholding the denial of L3-4, L4-5, and/or L5-S1 disc pathology as a new/omitted medical condition, the ALJ concluded that SAIF had met its burden of proof to establish that the preexisting condition was the major contributing cause of claimant's need for treatment of the denied condition. In doing so, the

ALJ assumed (without deciding) that the 2010 injury was a material cause of claimant's need for treatment for the claimed condition. We adopt and affirm this portion of the ALJ's order with the following supplementation.

To prevail on his new/omitted medical condition claim, claimant must prove that the claimed condition exists and that the 2010 work injury was a material contributing cause of the disability/need for treatment of the condition. See ORS 656.005(7)(a); ORS 656.266(1); *De Los Santos v. Si Pac Enters.*, 278 Or App 254, 258 (2016); *Graves*, 57 Van Natta at 2381. If he establishes an "otherwise compensable injury" and a "combined condition" is present, SAIF must prove that the otherwise compensable injury was not the major contributing cause of claimant's disability or need for treatment of the combined lumbar disc condition. ORS 656.266(2)(a); *SAIF v. Kollias*, 233 Or App 499, 505 (2010); *Jack G. Scoggins*, 56 Van Natta 2534, 2535 (2004). The "otherwise compensable injury" means the "work-related injury incident." See *Brown v. SAIF*, 262 Or App 640, 652 (2014); see also, *Jean M. Janvier*, 66 Van Natta 1827, 1832, 33, *aff'd without opinion*, 278 Or App 447 (May 18, 2016) (applying the *Brown* definition of an "otherwise compensable injury" to initial and new/omitted medical condition claims under ORS 656.266(2)(a)).

Considering the conflicting medical opinion evidence regarding the nature and cause of the claimed condition, the compensability issue presents a complex medical question that must be resolved by expert medical evidence. *Barnett v. SAIF*, 122 Or App 279, 282 (1993). We give more weight to those medical opinions that are well reasoned and based on complete information. See *Somers v. SAIF*, 77 Or App 259, 263 (1986).

Here, Dr. Dreyer attributed claimant's L4-5 disc pathology to "his work injuries and activities, more than anything else (51% or more), even after considering all other possible contributing causes."² (Ex. 38-9). Referring to Dr. Gehling's description of claimant's 2010 lumbar MRI,³ Dr. Dreyer opined that the 2010 injury resulted in an "accelerated protrusion, bulge, or herniation of the

² In relating claimant's L4-5 disc pathology to work injuries and activities, Dr. Dreyer did not address claimant's L3-4 or L5-S1 disc pathology. (Ex. 38-9, -12).

³ Dr. Gehling, a neurosurgeon consulted by claimant in 2011, described claimant's 2010 lumbar MRI as showing an "[L4-5] disc herniation to the left that could potentially compress the left L5 root. On the right, though, the patient clearly has foraminal stenosis due to some foraminal bulging disk and interspace collapse and telescoping of the facet joint." (Ex. 18-4; emphasis added by Dr. Dreyer).

disc * * * , creating an anatomical and structural change to the disc at the L4-5 level.” (Ex. 38-12). He further concluded that “there was a combining of the old and the new conditions, and there was a material and pathological worsening of the old condition, but the major cause of the new and now current condition, was the injury at work in 2010.” (*Id.*) He also identified ongoing work activities and the 2014 work injury as further contributing to the L4-5 disc pathology, and ultimately concluded that the “major contributing cause of claimant’s injury, disability, and need for medical treatment * * * was the work injury of 2014, even after considering all other possible contributing causes.” (*Id.*)

We do not find Dr. Dreyer’s opinion persuasive for the following reasons. Despite supporting the existence of a combined condition, Dr. Dreyer did not explain why claimant’s 2010 injury, as compared to his preexisting condition, was the major contributing cause of the disability/need for treatment for the claimed L3-4, L4-5, and/or L5-S1 disc pathology. *See Dietz v. Ramuda*, 130 Or App 397, 401 (1994) (in determining major contributing cause, an expert must weigh the relevant contribution of each cause); *Moe v. Ceiling Sys., Inc.*, 44 Or App 429, 433 (1980) (rejecting unexplained or conclusory opinion). Moreover, Dr. Dreyer did not explain his inconsistent positions regarding whether the 2010 injury or the 2014 injury was the major contributing cause of the disability/need for treatment. *See Howard L. Allen*, 60 Van Natta 1423, 1424 (2008) (internally inconsistent medical opinion, without explanation for the inconsistencies, was unpersuasive). Finally, as explained below, Dr. Dreyer did not address Dr. Vetter’s contrary opinion. *See Janet Benedict*, 59 Van Natta 2406, 2409 (2007), *aff’d without opinion*, 227 Or App 289 (2009) (medical opinion unpersuasive when it did not address contrary opinions).

Dr. Vetter, an orthopedic surgeon who performed an examination at SAIF’s request, disputed Dr. Dreyer’s opinion. (Ex. 41-2). Dr. Vetter opined that claimant’s 2010 lumbar MRI did not show acute changes, but rather degenerative changes caused by “compressed bones because of end state degenerative disc disease.” (*Id.*) Specifically noting a disc osteophyte, changes in the shape of the vertebral body, and loss of disc space height, Dr. Vetter concluded that these degenerative changes took months, or years, to develop, and were not the result of a singular incident. (Ex. 41-3). He further observed that these changes “represent arthritis or an arthritic condition in that they involve inflammation of one or more joints, due to infectious, metabolic, or constitutional causes, and resulting in breakdown, degeneration, or structural change.” (*Id.*)

Consequently, even assuming the existence of the claimed condition, Dr. Dreyer's opinion does not persuasively establish that claimant's 2010 work injury was a material contributing cause of his disability/need for treatment for any L3-4, L4-5, and/or L5-S1 disc pathology. Therefore, as clarified and supplemented herein, we adopt and affirm that portion of the ALJ's order that upheld SAIF's denial of claimant's new/omitted medical condition claim for L3-4, L4-5, and/or L5-S1 disc pathology.

Accordingly, on reconsideration, we republish that portion of our April 13, 2016 order that found that the claimed condition existed. However, for the reasons expressed above and as set forth in our April 13, 2016 order and the ALJ's order, all of SAIF's denials are upheld.⁴ Consequently, on reconsideration, the ALJ's February 6, 2015 order is affirmed. The parties' 30-day rights of appeal shall begin to run from the date of this order.

IT IS SO ORDERED.

Entered at Salem, Oregon on June 30, 2016

Member Weddell dissenting.

For the reasons expressed in my initial dissenting opinion, I would find the causation opinion of Dr. Dreyer persuasive and that of Dr. Vetter unpersuasive. Accordingly, I would conclude that claimant established a compensable new/omitted medical condition claim for L3-4, L4-5, and/or L5-S1 disc pathology. Because the majority reaches a contrary conclusion, I respectfully dissent.

⁴ In other words, in lieu of that portion of our prior order which reached a contrary conclusion, SAIF's denial of the L3-4, L4-5, and/or L5-S1 new/omitted medical conditions is upheld and our attorney fee/cost awards are rescinded.