
In the Matter of the Compensation of
STEPHEN G. FLINT, Claimant
WCB Case No. 15-04397
ORDER ON REVIEW
Dunn & Roy PC, Claimant Attorneys
Kenneth R Searce, Defense Attorneys

Reviewing Panel: Members Weddell and Johnson.

The insurer requests review of the Administrative Law Judge (ALJ) Brown's order that set aside its denial of claimant's new/omitted medical condition claim for L5-S1 stenosis and foraminal narrowing. On review, the issue is compensability.

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

The insurer contends that ORS 656.225(1) applies to this compensability dispute and requires that claimant prove that the work injury was the "major contributing cause of a pathological worsening of the preexisting condition." Based on the following reasoning, we conclude that ORS 656.225 does not apply.

Claimant has the burden of proving the existence and compensability of the claimed new/omitted medical condition. ORS 656.005(7)(a); ORS 656.266(1); *Maureen Y. Graves*, 57 Van Natta 2380, 2381 (2005). If claimant establishes the existence of an "otherwise compensable injury," the burden shifts to the insurer to prove that the otherwise compensable injury was not the major contributing cause of the disability/need for treatment of the combined condition. ORS 656.005(7)(a)(B); ORS 656.266(2)(a). The "otherwise compensable injury" is defined by the work-related injury incident. *Brown v. SAIF*, 262 Or App 640, 652 (2014), *rev allowed*, 356 Or 397 (2014); *Jean M. Janvier*, 66 Van Natta 1827, 1832-33 (2014), *aff'd without opinion*, 278 Or App 447 (2016).

ORS 656.225 addresses the compensability of a "disability solely caused by or medical services solely directed to a worker's preexisting condition." *See Arms v. SAIF*, 268 Or App 761, 768 (2015) (ORS 656.225 creates limitations on compensation rather than entitlement to it). In *Eric S. Sofich*, 67 Van Natta 1700 (2015), we evaluated the applicability of ORS 656.225 to the compensability of new/omitted medical condition claims. Citing *Charles I. Sullenger*, 59 Van Natta 1146 (2007), we noted that ORS 656.225 is limited by its terms to disability

caused by, or medical services solely directed to, a worker's preexisting condition.¹ *Sofich*, 67 Van Natta at 1704. Accordingly, we concluded that where an "otherwise compensable injury" combines with a "preexisting condition," to cause disability/need for treatment, the compensability of the resulting "combined condition" is properly analyzed under ORS 656.005(7)(a)(B) and ORS 656.266(2)(a), not ORS 656.225. *Sofich*, 67 Van Natta at 1703-04.

Here, the issue is the compensability of a new/omitted medical condition claim. The medical evidence establishes that claimant's "otherwise compensable injury" (*i.e.*, the work-related injury incident) combined with a "preexisting condition" to cause disability/need for treatment. In particular, Dr. Kellogg opined that the 2014 work-related injury incident was "the major contributing cause of [claimant's] combined lumbar condition, and specifically his L5-S1 stenosis and foraminal narrowing at L5-S1." (Ex. 30-2, -3). See *Ryan J. Jones*, 67 Van Natta 161, 164 (2015) (a "combined condition" exists when a "work-related injury incident" combines with a "preexisting condition"). Furthermore, Dr. Rosenbaum opined that claimant's condition was a "combined condition with the lumbar strain" and that the "lumbar strain" was the major contributing cause of the disability/need for treatment, which also supports the existence of a "combined condition." (Ex. 27-3; *see also* Ex. 16-6). See *Multifoods Specialty Distrib. v. McAtee*, 333 Or 629, 636 (2002) (characterizing a "combined condition" as "two medical problems simultaneously"); *Janvier*, 66 Van Natta at 1830 (same).

Under these circumstances, we conclude that ORS 656.005(7)(a)(B) and ORS 656.266(2)(a) provide the appropriate analytical framework for resolving the compensability issue. For the reasons expressed in the ALJ's order, we are also persuaded that claimant has established an "otherwise compensable injury" and that the insurer did not meet its burden to prove that the otherwise compensable injury (*i.e.*, the work-related injury incident) was not the major contributing cause of claimant's disability/need for treatment of the claimed conditions. See ORS 656.005(7)(a)(B); ORS 656.266(2)(a); *Brown*, 262 Or App at 652; *Janvier*, 66 Van Natta at 1832-33.

¹ The insurer attempts to distinguish *Sullenger* by arguing that, in this case, the only alleged treatment (spine surgery) relates to the alleged worsening of the preexisting condition and does not relate to the compensable lumbar strain or the "otherwise compensable injury." This, however, is not a medical services claim for the "spine surgery." It is a claim for a new/omitted medical condition. Further, Dr. Rosenbaum opined that the otherwise compensable injury (which he identified as a strain) combined with the preexisting condition, and that the otherwise compensable injury (and not the preexisting condition) was the major contributing cause of claimant's need for treatment. (Ex. 27-3).

Claimant's attorney is entitled to an assessed fee for services on review. ORS 656.382(2). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable fee for claimant's attorney's services on review is \$4,000, payable by the insurer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's respondent's brief), the complexity of the issue, the value of the interest involved, the risk that claimant's counsel may go uncompensated, and the contingent nature of the practice of workers' compensation.

Claimant is also awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by the insurer. *See* ORS 656.386(2); OAR 438-015-0019; *Gary E. Gettman*, 60 Van Natta 2862 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

ORDER

The ALJ's order dated May 12, 2016 is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$4,000, payable by the insurer. Claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by the insurer.

Entered at Salem, Oregon on December 19, 2016