In the Matter of the Compensation of
CAROLYN L. FARRUGGIA, Claimant
WCB Case No. 15-03074
ORDER ON REVIEW
Scott M McNutt Jr, Claimant Attorneys
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Reviewing Panel: Members Johnson and Lanning.

The self-insured employer requests review of those portions of Administrative Law Judge (ALJ) Kekauoha's order that: (1) set aside its "ceases" denial of claimant's combined low back condition; and (2) set aside its denial of claimant's new/omitted medical condition claim insofar as it pertained to L2-3 through L4-5 degenerative arthritic conditions. On review, the issue is compensability. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact."

CONCLUSIONS OF LAW AND OPINION

The ALJ found that claimant's work-related injury incident had not ceased to be the major contributing cause of the disability or need for treatment of claimant's combined condition, which the employer had accepted as a "lumbar strain combined with pre-existing non-compensable lumbar degenerative arthritic conditions/spondylosis from L2-3 to L4-5." Reasoning that the employer had not carried its burden, under the Court of Appeals decision in *Brown v. SAIF*, 262 Or App 640 (2014),[1] the ALJ set aside the employer's "ceases" denial.

Turning to the new/omitted medical condition claim, the ALJ reasoned that a preponderance of the medical evidence established that claimant's disc herniations at L2-3 and L3-4 were part of the "preexisting condition" component of the accepted combined condition. Because the work injury remained the major contributing cause of claimant's disability and need for treatment of the combined condition, the ALJ set aside the employer's denial of claimant's L2-3 and L3-4

[1] The Supreme Court's decision in *Brown v. SAIF*, 361 Or 241 (2017), which reversed the Court of Appeals, issued after the ALJ's order.

disc herniations. Because the parties stipulated at hearing that the degenerative disc disease and degenerative scoliosis at L2 through L5 were encompassed in the "preexisting condition" component of the accepted combined condition, the ALJ also set aside the employer's denial of those conditions.

"Ceases" Denial

A carrier may deny an accepted combined condition if the otherwise compensable injury ceases to be the major contributing cause of the combined condition. ORS 656.262(6)(c); *see also* ORS 656.005(7)(a)(B) (if an otherwise compensable injury combines with a preexisting condition to cause or prolong disability or a need for treatment, the combined condition is compensable only insofar as the otherwise compensable injury is the major contributing cause of the disability or need for treatment of the combined condition). The carrier bears the burden to establish a change in the claimant's condition or circumstances such that the otherwise compensable injury was no longer the major contributing cause of the disability or need for treatment of the combined condition. ORS 656.266(2)(a); *Wal-Mart Stores, Inc. v. Young*, 219 Or App 410, 419 (2008).

In analyzing a "ceases" denial under ORS 656.262(6)(c), we evaluate only the contributions of the component parts of the combined condition (*i.e.*, the otherwise compensable injury and the statutory preexisting condition). *Vigor Indus., LLC v. Ayres*, 25 Or App 795, 803 (2013). In *Brown v. SAIF*, 361 Or 241, 282 (2017), the court explained that the correct inquiry under ORS 656.262(6)(c) was whether the previously accepted condition (rather than the work-related injury incident) remained the major contributing cause of the claimant's disability or need for treatment of the combined condition. The court reasoned that a carrier may deny the accepted combined condition if the "otherwise compensable injury" (*i.e.*, the medical condition that the carrier previously accepted) ceases to be the major contributing cause of the combined condition. *Id*.

Here, to carry its burden of proof, the employer relies on the opinions of Drs. Dewing and Harris, who examined claimant at its request, and Dr. Won, claimant's attending physician. As explained below, the medical evidence supports the employer's burden of proof.

Dr. Dewing opined that claimant had sustained a lumbar strain that combined with her preexisting condition, but that the preexisting condition was the major contributing cause of her need for treatment as of May 8, 2014, four months after the work accident. (Ex. 14-6). Reasoning that strains typically resolve within

"a few months" and that claimant had "no findings such as muscular spasm or focal muscular tenderness" at the time of his examination, Dr. Dewing concluded that the "lumbar injury of January 6, 2014 had resolved." (Ex. 51-1). His opinion supports the conclusion that the accepted "lumbar strain" had resolved and, thus, ceased to be the major contributing cause of claimant's disability or need for treatment of the accepted combined low back condition.

Dr. Harris opined that claimant's accepted lumbar strain was medically stationary without permanent impairment. (Ex. 30-12). He explained, "Although [claimant] may very well have sustained a lumbar strain at the time of the work event, such injuries are expected to heal over the course of eight weeks or so, and there is no evidence an ongoing strain diagnosis is present." (Ex. 30-13). He also opined that at the time of his examination, claimant's preexisting condition was the major contributing cause of her ongoing disability and need for treatment. (Ex. 30-15). Dr. Harris concluded that claimant's lumbar strain had resolved by the time of Dr. Dewing's May 8, 2014 examination. (Ex. 48-4). Dr. Harris's opinion also supports the conclusion that the accepted "lumbar strain" ceased to be the major contributing cause of claimant's disability or need for treatment of the accepted combined low back condition.

Dr. Won opined that the "strain portion" of claimant's injury had resolved. (Ex. 38-16). His opinion also supports the employer's burden.

Claimant contends that, although the strain itself has resolved, the effects of the strain include a worsening of her preexisting degenerative conditions. However, as discussed above, the employer need only establish that the "otherwise compensable injury" component of the accepted combined condition is no longer the major contributing cause of claimant's disability or need for treatment of the accepted combined condition, when weighed against the "preexisting condition" component of the accepted combined low back condition. *Ayres*, 25 Or App at 803. Because the "lumbar strain" is the only accepted "otherwise compensable injury" component of the accepted combined condition, we weigh only the strain against claimant's "pre-existing non-compensable lumbar degenerative arthritic conditions/spondylosis from L2-3 to L4-5." *See Brown*, 361 Or at 283.

In sum, the medical evidence addressing the accepted lumbar strain unanimously supports the conclusion that the strain resolved and, thus, ceased to be the major contributing cause of claimant's disability or need for treatment of the combined low back condition. Accordingly, we reverse that portion of the ALJ's order that set aside the employer's "ceases" denial.

New/Omitted Medical Conditions

In setting aside the employer's denial of the L2-3 and L3-4 disc herniations, the ALJ reasoned that Dr. Karami's opinion established that the herniations were part of the preexisting degenerative disc disease that combined with the work injury and had been accepted as the "preexisting condition" component of the combined condition. Similarly, the ALJ set aside the employer's denial of the degenerative disc disease and scoliosis at L2 through L5 based on the parties' stipulation at hearing that those conditions were encompassed within the "preexisting condition" component of the accepted combined condition.

The parties do not dispute, and we agree with, the ALJ's conclusion that the disputed new/omitted medical conditions were part of the "preexisting condition" component of the previously accepted combined condition.[2] Therefore, consistent with the reasoning expressed in *Akins v. SAIF*, 286 Or App 70 (2017) (which issued after the ALJ's order), that factual determination leads us to uphold the employer's new/omitted medical condition claim denial. We reason as follows.

The purpose of ORS 656.267, which provides for new/omitted medical condition claims, is to permit a claimant to obtain acceptance of conditions that are not included within the scope of a carrier's acceptance (*i.e.*, conditions that are "new" or "omitted" with respect to an existing Notice of Acceptance). *Akins*, 286 Or App at 73. A carrier is not required to reaccept, and reprocess, a condition that, as a factual matter, has already been accepted. *Id*. at. 74. Thus, if a claimed new/omitted medical condition is, as a factual matter, encompassed within the "preexisting condition" component of the accepted combined condition, the carrier's denial will be upheld on the ground that the claimed condition is not new or omitted. *Id*. (denial upheld where the conditions for which the claimant sought acceptance were included within the accepted combined condition); *Michael R. France*, 69 Van Natta 389 (2017) (new/omitted medical condition denial upheld where the medical evidence did not support the compensability of a condition as distinct or separate from its status as the preexisting component of the previously accepted combined condition).

Here, as discussed above, the parties stipulated that the claimed degenerative conditions from L2 through L5 were encompassed within the "preexisting condition" component of the employer's "combined condition"

[2] On review, claimant contends that her disc herniations are compensable because they are included within the combined condition, which the ALJ's order found to be compensable.

acceptance. Moreover, based on the ALJ's undisputed finding, the claimed L2-3 and L3-4 disc herniations were part of the same "preexisting condition" that was encompassed within the employer's "combined condition" acceptance.

Under such circumstances, we conclude that the L2-3 through L4-5 degenerative arthritic conditions for which claimant filed her new/omitted medical condition claim are neither "new" nor "omitted." Because they were encompassed within the employer's previous acceptance, the employer's denial of the new/omitted medical condition claim was correct. *Akins*, 286 Or App at 74. Accordingly, we reverse that portion of the ALJ's order that set aside the employer's denial of the new/omitted medical condition claims for degenerative disc disease and scoliosis at L2 through L5 and disc herniations at L2-3 and L3-4.

ORDER

The ALJ's order dated June 20, 2016 is reversed in part and affirmed in part. Those portions of the ALJ's order that set aside the employer's "ceases" denial and the employer's new/omitted medical condition claim denial, insofar as it pertained to degenerative arthritic conditions from L2-3 through L5, are reversed. The employer's denials are reinstated and upheld in their entirety. The ALJ's $10,000 attorney fee and cost awards are reversed. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on August 14, 2017