
In the Matter of the Compensation of
AMANDA COOPER, Claimant
WCB Case No. 14-02678
ORDER ON REVIEW
Alvey Law Group, Claimant Attorneys
MacColl Busch Sato PC, Defense Attorneys

Reviewing Panel: Members Ousey and Johnson.

Claimant requests review of Administrative Law Judge (ALJ) Otto's order that upheld the insurer's denial of her injury claim for a low back condition. On review the issue is compensability.

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

In upholding the denial, the ALJ found that the insurer had met its burden of establishing that the March 31, 2014 work injury was not the major contributing cause of claimant's need for treatment/disability for her combined low back condition. *See* ORS 656.005(7)(a)(B); ORS 656.266(2)(a).

On review, citing *SAIF v. Brown*, 361 Or 241 (2017),¹ claimant argues that there can be no "legally cognizable" combined condition unless the carrier first accepts a condition. Relying on *Brown's* definition of an "otherwise compensable injury" as a particular medical condition that has been accepted, claimant contends that a carrier must accept a condition before a combined condition analysis under ORS 656.005(7)(a)(B) is appropriate. For the following reasons, we disagree with claimant's contentions.

Brown analyzed the meaning of the phrase "otherwise compensable injury" in ORS 656.005(7)(a)(B) in the context of a "ceases" denial under ORS 656.262(7)(b). 361 Or at 282. When viewed in that context, we do not interpret *Brown* as holding that the phrase "otherwise compensable injury" *always* means a previously accepted condition.² Significantly, *Brown* did not change the well-established process for determining the compensability of a combined condition in an *initial injury claim*.

¹ *Brown* issued after the ALJ's order in this case.

² In *Brown*, the court acknowledged that the workers' compensation statutes sometimes appear to use the term "injury" as distinct from the accepted conditions and expressly reserved judgment on the meaning of that phrase in the medical services context. 361 Or at 253-54, 282.

In *SAIF v. Drews*, 318 Or 1 (1993), the Supreme Court set forth the application of ORS 656.005(7)(a)(B) in an initial injury claim (in the context of a responsibility case) as follows:

“‘Compensable injury’ encompasses an application of the criteria found in ORS 656.005(7)(a), including the limitations found in subparagraphs (A) and (B) of that statute, in making an *initial* determination of compensability. If the accidental injury described in paragraph (a) combines with a preexisting condition, a determination is made under subparagraph (B) whether the accidental injury described in paragraph (a) is the ‘major contributing cause of the disability or need for treatment.’” 318 Or at 313. (Emphasis supplied).

Similarly, in *Tektronix, Inc. v. Nazari*, 117 Or App 409 (1992), *recons*, 120 Or App 590 (1993), the Court of Appeals explained the application of ORS 656.005(7)(a)(B) in the context of an initial injury claim as follows:

“ORS 656.005(7)(a)(B) uses the term ‘compensable’ to define what is compensable, creating a certain incongruity within that subparagraph. Read in its entirety, however, it is clear that the legislature intended ORS 656.005(7)(a) to define a compensable injury as an injury arising out of and in the course of the employment, subject to the two ‘limitations’ stated in subparagraphs (A) and (B). * * *. Likewise, under ORS 656.005(7)(a)(B), when a work-related injury combines with a preexisting condition to cause disability or a need for treatment, the work-related injury is compensable *only if* it is the *major* contributing cause of the disability or need for treatment.” 117 Or App at 412-13. (Emphasis in original).

On reconsideration, the court explained its earlier decision:

“In our original opinion, we disagreed with the Board’s analysis that [ORS 656.005(7)(a)(B)] was applicable only in the processing of claims. We read subsection (7)(a)(B) to establish the substantive requirements for

the compensability of any claim in which the injury combines with a preexisting condition to cause disability or a need for treatment. * * *.

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“We conclude that [ORS 656.005(7)(a)(B)] is applicable in the context of an initial injury claim if the injury combines with a preexisting, noncompensable condition to cause or prolong disability or a need for treatment. If, in an initial claim, there is disability or a need for treatment as a result of the injury alone, then the claim is compensable if the injury is a material contributing cause of the disability or need for treatment. If, in an initial claim, the disability or need for treatment is due to the combination of the injury and a preexisting, noncompensable condition, then the injury is compensable only if it is the major contributing cause of the disability or need for treatment.”³ 120 Or App at 593-94.

Consistent with the reasoning expressed in *Drews* and *Nazari*, in *Slater v. SAIF*, 287 Or App 84, 86-87 (2017), a decision which issued after *Brown*, the court provided an overview of the relevant law regarding a “combined condition”:

“Ordinarily, a claimant establishes compensability of a work injury by proving ‘that the work related injury is a ‘material’ cause of the disability or the need for treatment.’ *Brown v. SAIF*, [361 Or 241, 250 (2017)]. However, when ‘an otherwise compensable injury’ combines with a qualifying ‘preexisting condition to cause or prolong disability or a need for treatment,’ the

³ Subsequently, in 2001, the legislature amended ORS 656.266 to shift to the carrier the burden of proving that the “otherwise compensable injury” is not, or is no longer, the major contributing cause of disability or a need for treatment. See ORS 656.266(2)(a); Or Laws 2001, ch 865, § 2. Nonetheless, that amendment does not change the fundamental structure that ORS 656.005(7)(a)(B) provides for analysis of a “combined condition” in an initial compensability determination.

resulting condition is a ‘combined condition’ * * *. *Id.* (quoting ORS 656.005(7)(a)(B)).” *Slater*, 287 Or App at 86-87.

Likewise, we have applied the *Brown* rationale and have upheld denials of combined conditions without requiring a carrier to accept a condition before denying the compensability of a combined condition. *E.g.*, *Cynthia H. Falk*, 69 Van Natta 1634, 1637-38 (2017) (acknowledging that, under *Brown*, “‘the injury’ component of the phrase ‘otherwise compensable injury’ in ORS 656.005(7)(a)(B) refers to a medical condition, not an accident,” and upholding the denial of an injury claim because the carrier had proved that the work injury was not the major contributing cause of the combined condition); *Judy M. Munstenteiger*, 69 Van Natta 1616, 17-18 (2017); *Michelle D. Johnson*, 69 Van Natta 1607, 1609-10 (2017); *Martha Gonzalez*, 69 Van Natta 1009, 1023-24 (2017); *see also Christine M. Howland*, 69 Van Natta 1096, 1097 (2017) (applying the *Brown* rationale and upholding a denial of a new/omitted medical condition claim because the carrier had proved that the “otherwise compensable injury” was not the major contributing cause of disability/need for treatment).

The rationale applied in the aforementioned cases is in accordance with the explanation set forth in *Brown* that ordinarily, it is the claimant’s burden to establish that a particular injury is compensable. ORS 656.266(1). In doing so, the court observed that, in an initial injury claim, the claimant must prove that the work-related injury is a “material” cause of the disability or the need for treatment. *Brown*, 361 Or at 250-52 (citing *SAIF v. Sprague*, 346 Or 661, 663-64 (2009)). However, the *Brown* court identified “at least two exceptions” to a claimant’s burden, the first of which is applicable in this case.

“The first such exception is triggered if an ‘otherwise compensable injury’—that is, an injury that would otherwise be compensable but for the exception—combines with a preexisting condition to create what is known as a ‘combined condition.’” *Id.* at 251.

Specifically, in these “combined condition” cases, the *Brown* court explained that the burden is altered in the following two respects:

“First, if a compensable injury combines with a preexisting condition, it is compensable only if the *major* contributing cause—not just the material cause—of the

resulting combined condition is the compensable injury. ORS 656.266(2)(a). Second, it is the employer’s burden to establish that the work-related compensable injury is *not* the major contributing cause of the combined condition.” 361 Or at 251. (Emphasis in original).

Again, we acknowledge that the *Brown* court did not directly address the process for establishing the compensability of a combined condition in an initial injury or a new/omitted medical condition claim. However, considering the aforementioned *Brown* reasoning, as well as the earlier case precedent previously summarized, including *Drews* (which was not disavowed in *Brown*), we do not interpret *Brown* as requiring the acceptance of a condition as a prerequisite for the creation of a “combined condition” and the application of ORS 656.005(7)(a)(B) and ORS 656.266(2)(a). To the contrary, the *Brown* decision does not advance such an interpretation of the statutory scheme.

Turning to this case, we agree with the ALJ’s evaluation of the medical evidence and the conclusion that claimant’s March 31, 2017 industrial injury combined with her preexisting spondylosis (an arthritic condition) to prolong her disability or need for treatment. Thus, to support its denial of claimant’s combined low back condition, the insurer has the burden to prove by a preponderance of the evidence that the “otherwise compensable injury” was not the major contributing cause of the disability or need for treatment of the combined condition. ORS 656.005(7)(a)(B); ORS 656.266(2)(a); *Brown*, 361 Or at 251 (citing *Hopkins v. SAIF*, 349 Or 348, 351-52 (2010) (describing burden in combined condition cases)).

Based on the aforementioned reasoning, as well as the reasons expressed in the ALJ’s order, we conclude that the insurer has met its statutory burden. Accordingly, we affirm.

ORDER

The ALJ’s order dated January 10, 2017 is affirmed.

Entered at Salem, Oregon on December 13, 2017