
In the Matter of the Compensation of
TIMOTHY J. POPPLETON, Claimant
WCB Case No. 17-03905, 17-03572
ORDER ON REVIEW
Glen J Lasken, Claimant Attorneys
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Ousey and Curey

The SAIF Corporation requests review of Administrative Law Judge (ALJ) Kekauoha's order that set aside its denial of claimant's new/omitted medical condition claim for depression. On review, the issues are claim preclusion and compensability.

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

The ALJ analyzed claimant's claim for depression as a consequential condition. *See* ORS 656.005(7)(a)(A). Relying on the opinion of the attending physician, Dr. Williams, the ALJ concluded that claimant established that his accepted head and neck conditions were the major contributing cause of his claimed depression.

On review, citing *Messmer v. Deluxe Cabinet Works*, 130 Or App 254, 258 (1994), *rev den*, 320 Or 507 (1995), SAIF argues that claimant's depression claim as a consequential condition is barred by claim preclusion because an Order on Reconsideration determined that claimant's cervical impairment was 80 percent due to preexisting arthritis. (Ex. 50-4). Because this "claim preclusion" argument was not timely raised at hearing, we decline to address it on review. *See Neftali Soto*, 69 Van Natta 577, 583 (2017); *Kenneth L. Devi*, 48 Van Natta 2349 (1996), *recons*, 49 Van Natta 108 (1997), *aff'd without opinion*, 157 Or App 723 ("claim preclusion" issue not considered because it was not raised until closing arguments).¹

¹ Furthermore, even if SAIF's claim preclusion argument was considered, it would not change the result of this case. Claim preclusion bars litigation of a claim based on the same factual transaction that was or could have been litigated between the parties in a prior proceeding that has reached a final determination. *See Drews v. EBI Cos.*, 310 Or 134, 149 (1990). Claim preclusion does not require actual litigation of an issue, but does require the opportunity to litigate, whether or not the opportunity is used. *Id.* at 140.

Here, the prior litigation concerned the extent of claimant's permanent impairment due to his accepted cervical condition, and the contribution of his preexisting cervical condition. In contrast, the present dispute pertains to the compensability of claimant's new/omitted medical condition claim for depression. To establish the compensability of the denied claim, claimant's accepted conditions must

SAIF further contends that Dr. Williams attributed the cause of claimant's depression to factors other than the accepted conditions, such that his depression is not compensable as a consequential condition. In doing so, SAIF notes that Dr. Williams related claimant's depression in part to "uncertainty associated with the progression of [his] claim and the extent to which he will ever be able to return to work * * * [.]" (Ex. 36-4). Additionally, noting claimant's testimony that he attributed "a lot" of his emotional/psychological difficulties to "know[ing] [he] can't work anymore at this time," SAIF contends that claimant's inability to work/disability also may not be considered as a legally cognizable factor to establish the compensability of his depression condition.

An emotional reaction to pain and disability caused by the compensable injury may be compensable as a consequential condition, but a reaction to claim processing is not considered to be caused by the compensable injury. *Roseburg Forest Prods. v. Zimbelman*, 136 Or App 75, 79 n 2 (1995). Accordingly, we agree with SAIF's contention that "uncertainty associated with the progression of [claimant's] claim" is not a factor that can be considered in analyzing the compensability of claimant's depression as a consequential condition. (Ex. 36-4). While we discount that portion of Dr. Williams's opinion that considered "uncertainty" associated with processing of the claim, considering the opinion in the context of the medical record as a whole, we consider Dr. Williams's opinion to persuasively establish the compensability of the depression condition. *See SAIF v. Strubel*, 161 Or App 516, 521-22 (1999) (medical opinions are evaluated in context and based on the record as a whole to determine sufficiency). We reason as follows.

While SAIF contends otherwise, we do not agree that claimant's inability to work, and attendant concerns about being able to return to work, cannot be considered as contributing factors to the claimed depression condition. *See Zimbelman*, 136 Or App at 79 (emotional reaction to pain and disability caused by compensable injury may be compensable as a consequential condition).

be the major contributing cause of the depression condition. ORS 656.005(7)(a)(A). While the alleged contributions of nonwork-related factors (such as claimant's preexisting cervical condition) may be a factor in analyzing the compensability of the currently claimed depression, the compensability of the condition was not *actually* litigated during the reconsideration proceeding. Further, because the current compensability issue had not been, raised at the time of the Order on Reconsideration, this dispute is not based on the same factual transaction that was, or could have been litigated in the earlier proceeding. *See, e.g., Virginia L. Gould*, 61 Van Natta 2206, 2209 (2009) (declining to apply claim preclusion principles to new/omitted medical condition claim).

Here, claimant was temporarily disabled due to his accepted concussion and cervical strain between August 2016 and April 2017. (Ex. 44). Dr. Williams first observed symptoms of depression as early as November 2016. (Ex. 22). Claimant's inability to work was a focus of Dr. Williams's opinion. (Exs. 36-4, 49A-3, 54-4). As noted above, we acknowledge that Dr. Williams considered claimant's "uncertainty" regarding the progression of his claim as a contributing factor to the depression condition. (Ex. 36-4). However, Dr. Williams's opinion focused on claimant's painful symptoms from his accepted conditions, as well as his inability to work due to the accepted conditions. (Exs. 36-4, 49A-3, 54-4). The actual processing of claimant's claim, as opposed to claimant's pain symptoms and disability, were not the focus of Dr. Williams's support of the claim. (*Id.*) Additionally, claimant attributed his emotional and psychological difficulties to his inability to work, rather than the processing of his claim. (Tr. 10). Accordingly, because the record persuasively establishes that claimant's accepted conditions and resultant disability were the major contributing cause of his depression condition, we affirm.

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 \$4,500, payable by SAIF. 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 counsel may go uncompensated, and the contingent nature of the practice of workers' compensation law.

Finally, 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 SAIF. *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 April 2, 2018 is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$4,500, payable by SAIF. 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 SAIF.

Entered at Salem, Oregon on October 26, 2018