

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Minkyu Yi, Claimant.

Minkyu YI,
Petitioner,

v.

CITY OF PORTLAND,
Respondent.

Workers' Compensation Board
1006507; A158861

Argued and submitted September 27, 2016.

Donald M. Hooton argued the cause and filed the brief for petitioner.

Linh T. Vu argued the cause and filed the brief for respondent.

Before Tookey, Presiding Judge, and DeHoog, Judge, and Sercombe, Senior Judge.*

TOOKEY, P. J.

Affirmed.

* Tookey, P. J., *vice* Flynn, J. pro tempore.

TOOKEY, J.

In this workers' compensation case, claimant seeks review of an order of the Workers' Compensation Board that rejected his request to modify a notice of closure to include an award of impairment for a combined condition. We review the board's order pursuant to ORS 183.482(8)(a) and (c) for substantial evidence, substantial reason, and errors of law, conclude that the board did not err, and therefore affirm.

Claimant was injured at work in April 2007. Employer accepted a claim for a lumbar strain. Employer then modified its acceptance to include a combined condition—lumbar strain combined with preexisting degenerative disc disease. On August 23, 2007, employer denied the combined condition, asserting that the lumbar strain was no longer the major contributing cause of claimant's disability as of June 19, 2007.

The board overturned the denial, reasoning that the medical evidence did not support the conclusion that, as of June 19, 2007, the otherwise compensable injury ceased to be the major contributing cause of the disability or need for treatment of the combined condition. *See* ORS 656.262(6)(c); ORS 656.266(2)(c).

On December 14, 2009, employer denied the combined condition claim a second time, reasoning that, as of August 16, 2007, the lumbar strain was no longer the major contributing cause of disability or need for treatment of the combined condition. An administrative law judge (ALJ) set aside that denial on the ground of claim preclusion. Employer did not appeal the ALJ's order to the board, and it became final.

On August 11, 2010, employer issued a "current condition" denial, and on August 12, 2010, employer closed the claim determining that claimant was medically stationary. The notice of closure did not award claimant any disability benefits for the denied combined condition. *See* ORS 656.268(1)(b).¹ Claimant challenged both the denial and the notice of closure. The two challenges necessarily followed

¹ ORS 656.268(1) provides, in part:

"The insurer or self-insured employer shall close the worker's claim, as prescribed by the Director of the Department of Consumer and Business

different review paths. See ORS 656.267(2)(a) (describing processing and review of new and omitted medical condition claims); ORS 656.268(5) (describing reconsideration process for notice of closure). The denial of the claim was reviewed by an ALJ, then by the board, and, finally, by this court. This court ultimately held that the denial was barred by claim preclusion. *Yi v. City of Portland*, 258 Or App 526, 310 P3d 710 (2013).

Claimant's challenge to the notice of closure followed a separate review path pursuant to ORS 656.268(5): Claimant requested reconsideration of the notice of closure, and the Appellate Review Unit of the Workers' Compensation Division of the Department of Consumer and Business Services upheld the notice of closure in an order on reconsideration. Claimant then requested a hearing. Pending this court's judicial review of the board's order upholding the denial, and on claimant's request, the board held in abeyance the hearing on the order on reconsideration of the notice of closure.

After the issuance of this court's opinion on September 11, 2013, overturning employer's denial of the combined condition claim, the board reactivated claimant's request for hearing on the order on reconsideration of the notice of closure, and the matter proceeded on the documentary record and written argument. Claimant contended that, in light of this court's reversal of the denial, claimant is entitled to compensation for impairment caused by the compensable combined condition. Employer responded that any additional compensation related to the newly-compensable combined condition was not within the scope of the review of the order on reconsideration, because the ALJ (and the board) could not consider events outside the reconsideration

Services, and determine the extent of the worker's permanent disability, *** when:

“(a) ***

“(b) The accepted injury is no longer the major contributing cause of the worker's combined or consequential condition or conditions pursuant to ORS 656.005(7). When the claim is closed because the accepted injury is no longer the major contributing cause of the worker's combined or consequential condition or conditions, and there is sufficient information to determine permanent disability, the likely permanent disability that would have been due to the current accepted condition shall be estimated[.]”

record,² and because the proper avenue for challenging the disability award based on our decision in *Yi* would be available to claimant upon reopening of the combined condition claim, as required by ORS 656.262(7)(c).

The ALJ and the board agreed with employer's contentions and upheld the order on reconsideration of the notice of closure. On judicial review, claimant makes the same arguments that he made to the ALJ and the board, contending that the court should remand the board's order for an award of compensation without apportionment of impairment for the combined condition claim.

Our response to the petition is the same as the board's. In reviewing an order on reconsideration, the ALJ, the board, and the court must consider the record as it existed at the time of the order on reconsideration, ORS 656.283(6). At that time, the combined condition claim had been denied. But that does not mean that claimant will not have an opportunity to assert an entitlement to benefits for permanent disability related to the combined condition. ORS 656.262(7)(c) provides that "[i]f a condition is found compensable after claim closure, the insurer or self-insured employer shall reopen the claim for processing regarding that condition." Our opinion in *Yi*, noted above, overturned employer's denial of the combined condition claim after claim closure, and ORS 656.262(7)(c) required employer to reopen the claim for processing to closure. In light of our opinion in *Yi*, the original notice of closure, which did not attribute impairment to the combined condition, is superseded. But the path for a reevaluation of claimant's disability is not through a modification of that notice of closure, but through the new notice of closure and, if necessary, a second reconsideration proceeding under ORS 656.268(5). The board therefore did not err in rejecting claimant's request to modify the original notice of closure.

Affirmed.

² See ORS 656.283(6) ("Evaluation of the worker's disability by the Administrative Law Judge shall be as of the date of issuance of the reconsideration order[.]"); and ORS 656.268(8)(h) ("After reconsideration, no subsequent medical evidence of the worker's impairment is admissible before the director, the Workers' Compensation Board or the courts for purposes of making findings of impairment on the claim closure[.]").