

In the Matter of the Compensation of
DONALD R. MOLINE, JR., Claimant
WCB Case No. 01-04092, 01-01659
ORDER ON REVIEW
Floyd H Shebley, Claimant Attorneys
Scheminske et al, Defense Attorneys

Reviewing Panel: Members Lowell and Biehl.

Claimant requests review of Administrative Law Judge (ALJ) Podnar's order that: (1) upheld the insurer's partial denial of claimant's current cervical and lumbar conditions; (2) found that claimant's injury claim was not prematurely closed; and (3) declined to address his contention that the denial was an improper "back up" denial. On review, the issues are compensability, premature closure, and scope of review.¹ We affirm.

FINDINGS OF FACT

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

CONCLUSIONS OF LAW AND OPINION

Scope of Review

As a preliminary matter, we consider claimant's contention that the ALJ should have addressed his argument that the insurer's February 21, 2001 partial denial of claimant's current cervical and lumbar conditions was an improper "back up" denial of his accepted left elbow chip fracture and thoracic strain conditions. In this regard, claimant argues that the "back up" denial question is not a new issue, merely another theory of compensability. We disagree and conclude that the ALJ properly declined to determine whether the denial was a "back up" denial, because the issue was first raised during closing arguments.

¹ In addition, in WCB Case No. 01-01659 (the compensability case), claimant asks us to consider certain documents (Exs. 41A, 43, 43AA, and 43AC) that were submitted and admitted only in WCB Case No. 01-04092 (the premature closure case). (We note that Ex. 39E in WCB Case No. 01-04092 was admitted in WCB Case No. 01-01659 as Ex. 38.) The insurer responds that we have no authority to consider evidence not in the record in the compensability dispute and moves to strike claimant's references to the disputed documents. We need not resolve these evidentiary issues, or address the insurer's motion, because the result would be the same even if the disputed evidence had been admitted in WCB Case No. 01-01659 and considered. *See William R. Shaw*, 54 Van Natta 524 n. 2 (2002).

At the outset of the hearing in WCB Case No. 01-01659, the parties agreed that the issues were “compensability of a February 21 denial of current condition * * * * * based on degenerative condition” and penalties for an allegedly unreasonable denial (and attorney fees). (Tr. 2-3). Claimant did not argue that the denial should be set aside because it was a denial of accepted conditions or that the insurer needed to prove “fraud, misrepresentation or other illegal activity” for the denial to be proper. As noted, claimant did not raise those arguments until closing arguments. Consequently, we decline to reach the “back up” denial issue on review. *See Lazlo Toth*, 52 Van Natta 2042 n. 1 (2000); *Patricia M. McKinzey*, 51 Van Natta 1933 (1999).

Compensability and Penalties

We begin with a summary of the pertinent procedural and medical history.

Claimant had cervical degenerative disease and radiculopathy by July 1998. He filed a claim for a neck injury in October 1998. In December 1998, Dr. Brett recommended an anterior cervical discectomy, foraminotomy, and neural compression, along with interbody fusion at C5-6 and C6-7. On March 22, 1999, the insurer denied claimant’s cervical condition on causation grounds. That denial became final. Consequently, as of March 22, 1999, claimant’s then-current cervical condition was not compensable.

On June 29, 2000, claimant sustained an injury at work, when he was knocked about 8 feet from the back of his garbage truck to the ground by an open gate or door of a passing truck. He sought medical treatment and filed a claim. The insurer accepted a nondisabling cervical, thoracic, and lumbar strain with left elbow chip fracture. (Ex. 35).

Dr. Bernier, osteopath, has treated claimant for cervical, thoracic and lumbar pain, among other things, since 1996. In December 2000, Dr. Bernier referred claimant to Dr. Kuether for a neurological consultation. On February 21, 2001, the insurer notified claimant that it was “amending accept[ance] to read as: “Combined Conditions for Cervical and Lumbar strains sustained 6/29/00 with pre-existing degenerative disease for multiple levels.” (Ex. 43). The same day, the insurer issued a partial denial that identified claimant’s compensable cervical and lumbar strains and asserted that preexisting degenerative disc disease was the major contributing cause of claimant’s current condition and need for treatment. (Ex. 44). The denial also notified claimant that his claim qualified for closure.

A February 27, 2001 Notice of Closure closed the claim and terminated claimant's temporary disability benefits as of the denial.² A reconsideration order affirmed the closure notice. Claimant requested a hearing from the denial and the reconsideration order. A hearing regarding the denial convened on April 3, 2002 and the ALJ stated that he would address claimant's challenge to the reconsideration order, as well as compensability.

On April 4, 2001, Dr. Kuether performed a C5-6 and C6-7 anterior discectomy and fusion.

The ALJ upheld the insurer's partial denial of claimant's current cervical and lumbar conditions and found that claimant's injury claim was not prematurely closed.

Drs. Bernier and Kuether provide the only medical evidence relating claimant's current need for cervical treatment to his June 29, 2000 compensable injury. The ALJ found these opinions unpersuasive, noting that both doctors relied on claimant having had "no symptoms" or no "significant problems" before his work injury. We agree that the opinions supporting compensability are unpersuasive and we offer the following supplemental reasoning.

We note at the outset that there is no evidence that claimant had disability or need for treatment for his left elbow, thoracic, or lumbar conditions when the partial denial of claimant's current condition issued. However, the record indicates that claimant did have a "combined" cervical condition, involving the June 2000 cervical injury and preexisting cervical degeneration. (*See Exs. 38, 48*).

Dr. Kuether noted that claimant had "some preexisting degenerative changes which can sometimes make a person more prone to these type [sic] of injuries." However, based on an understanding that claimant had no "significant problems with neck pain or any problems with upper extremity pain, numbness or weakness before the work injury," but he did have acute C7 radiculopathy after the injury, Dr. Kuether opined that the injury, not the preexisting degenerative changes, were the major contributing cause of claimant's needed surgery for radiculopathy. (*Ex. 56*). We find Dr. Kuether's conclusion unpersuasive in part because it

² On March 9, 2001, the insurer issued a "Corrected Updated Notice of Acceptance at Claim Closure," which provided that the current accepted conditions were "Cervical and Lumbar Strains due to the injury event on 06/29/00." (*Ex. 47*). There is no indication that claimant objected to the scope of this acceptance.

appears to be based on an inaccurate history that claimant had no significant neck problems and no radicular (arm) symptoms before the injury. The record is replete with evidence of such prior problems. (*See* Exs. 13, 14, 16, 17A, 18, 20). Moreover, Dr. Kuether's reasoning appears to rely primarily on the temporal relationship between claimant's injury and his "post injury" worsened symptoms. We find such reasoning insufficient to establish "major causation." *See David A. Lancaster*, 54 Van Natta 1999, 2000 (2002).

Dr. Bernier similarly related claimant's cervical problems to the work injury rather than preexisting degeneration, in part because claimant had no radiculopathy "just prior to the injury." (Ex. 37B-2, 39B-2). However, we note that claimant complained to Dr. Bernier of neck, back, and left arm symptoms just 6 weeks before the June 2000 work injury. (Ex. 26B-1). Under these circumstances, we are not persuaded that Dr. Bernier's causation opinion is based on an accurate history.

We acknowledge that Dr. Bernier also relied on the nature of the injury and EMG findings, which Dr. Crumpacker described as chronic *and* acute. (*See* Exs. 37A, 37B-1, 39B-1, 42A; *see also* Ex. 36-3). However, Dr. Bernier later "allud[ed] to Dr. Taylor's [sic] report which stated that these EMG changes are acute in nature and not chronic which would indicate to me that they would have happened in a fairly short time frame prior to his EMG which would put it in the time frame of the [work] incident." (Ex. 43A-2; *c.f.* Ex. 37A). Thus, although claimant's cervical condition is clearly a "combined condition," *i.e.*, both chronic and acute, Dr. Bernier eventually relied only on claimant's acute findings in concluding that the condition was injury-related. Considering claimant's longstanding cervical problems, his preexisting significant cervical degeneration, and the fact that this degeneration contributed to the need for surgical surgery, (*see e.g.*, Exs. 38, 48-2), we find Dr. Bernier's opinion unpersuasive, because it does not explain why the doctor believed that the injury contributed *more* to the current condition than did the preexisting degeneration. *See Billie J. Bowers*, 54 Van Natta 1114 (2002).

Accordingly, absent persuasive evidence establishing that the compensable injury was the major contributing cause of claimant's current cervical condition, we uphold the insurer's partial current condition denial. And we further conclude that claimant is not entitled to a penalty for the insurer's allegedly unreasonable denial, because there are no "amounts due" under the claim.

Premature Closure

We find no evidence of a reasonable expectation of improvement in claimant's compensable conditions as of claim closure. Consequently, we agree with, and adopt, the ALJ's opinion that the claim was not prematurely closed. *See Janice K. Connell, 54 Van Natta 405 (2002).*

ORDER

The ALJ's order dated June 10, 2002 is affirmed.

Entered at Salem, Oregon on January 17, 2003