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Bradley G. Garber's Board Case Update: 06/04/2014

A Couple of Post-*Brown* Cases

Rodney R. Erickson, 66 Van Natta 989 (2014) (ALJ Pardington)

Claimant requested review of an Order that upheld the employer's denial of his new/omitted medical condition claim for a combined low back condition.

Claimant injured his low back in April 2012. His claim was accepted for the condition of **lumbar strain**. In May 2012, Claimant's physician (a neurosurgeon) assessed a lumbar strain and a preexisting asymptomatic L5-S1 spondylolisthesis, which had become symptomatic.

In July 2012, Claimant underwent an IME by Dr. Williams. Dr. Williams found no evidence of ongoing muscle spasm or other evidence of a lumbosacral strain.

He concluded that the lumbar strain had resolved. Dr. Williams also opined that Claimant's lumbar strain had combined with the preexisting L5-S1 spondylolisthesis and that the preexisting condition was the major contributing cause of any ongoing disability or need for treatment.

Claimant then made a new/omitted medical condition claim for a "lumbar strain combined with L5-S1 spondylolisthesis," which the employer denied. Claimant requested a hearing.

After hearing, the ALJ found that Claimant established the existence of the claimed "combined condition" and that the work injury was a material contributing cause of the disability and need for treatment for that condition. The ALJ went on to find that employer had met its burden of proving that the "otherwise compensable injury" was not the major contributing cause of claimant's disability or need for treatment for the combined condition. In conducting its analysis, the Board cited and discussed the recent Court of Appeals case of *Brown v. SAIF*, as follows:

"In *Brown v. SAIF*, ___ Or App ___ (May 8, 2014), the court held that in analyzing a 'ceases' denial under ORS 656.262(6)(c), the 'otherwise compensable injury' refers to a 'work-related injury incident,' as opposed to the accepted condition. Here, in contrast to *Brown*, claimant has requested acceptance of a new/omitted medical condition, which he specifically described as a lumbar strain combined with L5-S1 spondylolisthesis. Because, in this particular case, claimant has claimed a 'combined condition' expressly composed of the already accepted lumbar strain and preexisting L5-S1 spondylolisthesis, we consider the lumbar strain to constitute the 'otherwise compensable injury'"

The fight, in this case, was whether Claimant established the existence of a combined condition. The employer disputed the existence of a combined condition that arose on the date of injury. Dr. Williams had opined that, by the time he examined Claimant, the compensable lumbar strain had resolved and the major

contributing cause of Claimant's then current lumbar condition was his non-work related L5-S1 spondylolisthesis. The Board observed, however, that ORS 656.005(7)(a)(B) specifies that a "combined condition" is compensable "if an otherwise compensable injury combined *at any time* with a preexisting condition to cause or prolong disability or a need for treatment * * *." The Board continued, "Where, as here, the carrier has not accepted a combined condition, the issue is whether the 'otherwise compensable injury' was not the major contributing cause of the disability/need for treatment of the combined condition '**at any time**.'" (emphasis added).

In this case, it was employer's burden of proof to establish that the "otherwise compensable injury" was never the major contributing cause of Claimant's disability or need for treatment. Employer relied on Dr. Williams' opinion, which stated that the 2012 work injury was "never the major cause (51% cause) of the *spondylolisthesis* condition." The Board found that this did not address the "combined condition" (*i.e.*, the otherwise compensable injury combined with the preexisting L5-S1 spondylolisthesis). Under the circumstances, the Board found that Dr. Williams did not address the correct legal standard, and that employer did not carry its burden of proof. **Reversed**

TIP: If the "injury" is a combined condition, or if the "injury" combines with a statutory preexisting condition, *at any time*, the medical opinion needs to establish that the "injury" does not constitute the major contributing cause of disability and/or need for treatment. If you accept a combined condition, at the outset of the claim, that combined condition becomes the "otherwise compensable injury." Don't focus on what has been accepted; focus on the complete injury. Early on, establish what the "injury" is.

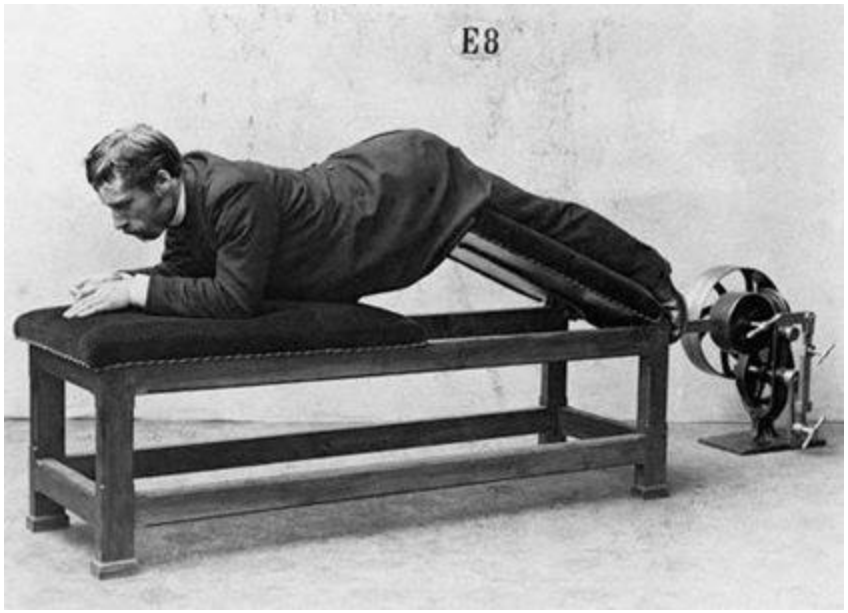
Roxie J. Bartell–Fudge, 66 Van Natta 1009 (2014) (ALJ Riechers)

Claimant requested review of an Order the upheld SAIF's "ceases" denial of her combined cervical spine condition, and upheld SAIF's denial of her new/omitted conditions claim for C6-7 disc herniation and radiculopathy.

After Claimant's injury, his claim was accepted for the conditions of **cervical, thoracic and lumbar strains.** Subsequently, based on evolving medical evidence, SAIF modified the scope of claim acceptance to accept a **cervical strain combined with one or more preexisting conditions including: cervical spondylosis**. It denied the combined condition on the basis that the cervical strain was, no longer, the major contributing cause of the combined condition.

A couple of IME doctors determined that, at a point in time, the cervical strain component of the combined condition had resolved and that the cervical spondylosis (including a C6-7 disc herniation and radiculopathy) constituted the major contributing cause of any ongoing disability or need for treatment. Employer denied the current/combined condition.

Here's the new "boiler plate" analysis that we may expect from the Board:



" * * * A carrier may deny an accepted combined condition in the other compensable **injury** 'ceases' to be the major contributing cause of the combined condition. * * * The word 'ceases' presumes a change in the worker's condition or circumstances such that the otherwise compensable **injury** is no longer the major contributing cause of the combined condition. * * * Under ORS 656.262(6)(c), the carrier bears the burden to show a change in the worker's condition or circumstances such that the 'work-related injury incident'

ceased to be the major contributing cause of disability/need for treatment of the combined condition. *See Brown v. SAIF*, 262 Or App 640 (May 7, 2014)."

In this particular case, the Board found that employer's medical evidence did not establish that the "otherwise compensable injury" (*i.e.,* the accidental work-related injury incident) was no longer the major contributing cause of Claimant's disability/need for treatment of her combined condition. Consequently, SAIF did not carry its burden of proof under ORS 656.266. **Reversed**

Note: In this case, SAIF accepted a combined condition. That combined condition, then, became the "work-related injury." It, then, was SAIF's burden to prove that the <u>combined condition</u> was, no longer, the major contributing cause of Claimant's disability/need for treatment.