

COURT OF APPEALS OF OREGON

Robinson v. Nabisco, Inc.

143 Or. App. 59 (1996) · Decided August 28, 1996

SUMMARY

The Oregon Court of Appeals held that an injury sustained during an independent medical examination related to a compensable workers’ compensation injury is compensable as a consequential condition only if the original injury was the major contributing cause of the new condition. The court distinguished injuries arising directly from medical treatment and affirmed the Workers’ Compensation Board’s upholding of the employer’s partial denial.

CASE DETAILS

COURT	Court of Appeals of Oregon
WRITING FOR THE COURT	Deits, P. J.; Landau, J.; Muniz, J.
JURISDICTION	Oregon
DECIDED	August 28, 1996
DISPOSITION	affirmed
PROCEDURAL POSTURE	Claimant sought judicial review of a Workers’ Compensation Board order upholding the employer’s partial denial of compensability for a herniated disc injury sustained during an independent medical examination.
STANDARD OF REVIEW	Judicial review of the Workers’ Compensation Board’s legal interpretation and application of ORS 656.005(7)(a)(A).
PRECEDENTIAL VALUE	Published Oregon Court of Appeals decision; precedential within the court’s jurisdiction unless subsequently limited or overruled.
PARTIES	Robinson v. Nabisco, Inc.

TOPICS

- workers compensation
- statutory interpretation
- legislative intent
- administrative law

PRACTICE AREAS

- workers compensation
- administrative law
- statutory interpretation

QUESTIONS PRESENTED

1. Whether an injury sustained during a carrier-requested independent medical examination is compensable as a consequential condition under ORS 656.005(7)(a)(A) merely because the compensable injury necessitated the examination.
2. Whether the original compensable injury must be the major contributing cause of the consequential condition resulting from an injury sustained during an independent medical examination.
3. Whether the court's treatment-injury rule from *Barrett Business Services v. Hames* should be extended to injuries sustained during independent medical examinations.

HOLDINGS

1. An injury sustained during a carrier-requested independent medical examination is not automatically compensable as a consequential condition merely because the examination was necessitated by a compensable injury.
2. The rule deeming the original compensable injury to be the major contributing cause of an injury directly resulting from reasonable and necessary medical treatment does not extend to an injury sustained during an independent medical examination.
3. Claimant failed to establish that the original compensable injury was the major contributing cause of the consequential herniated disc condition and need for surgery; the Board therefore correctly upheld the employer's partial denial.

KEY QUOTATIONS

"Under ORS 656.005(7)(a)(A), any injury or condition that is not directly related to the industrial accident is compensable only if the major contributing cause is the compensable injury." (63-64)

"We held where a claimant suffers an injury as the direct result of reasonable and necessary treatment of a compensable injury, the compensable injury is properly deemed the major contributing cause of the new condition for purposes of ORS 656.005-(7)(a)(A)." (65-66)

"It simply does not flow as "directly and inexorably" from the compensable injury as does an injury arising out of medical treatment for the compensable injury." (66-67)

FACTUAL BACKGROUND

Claimant sustained a compensable low-back injury while working on an assembly line in 1981, and her workers' compensation claim was repeatedly reopened and reclosed as her symptoms continued. During a carrier-requested independent medical examination on June 23, 1992, a physician moved claimant's left leg beyond the position she had reached, causing immediate left low-back and hip pain. Subsequent imaging revealed a left-sided L5-S1 disc herniation, and claimant underwent surgery in March 1993. The Board found that the major contributing cause of the need for surgery was the new injury sustained during the IME, rather than the original compensable injury.

PROCEDURAL HISTORY

Claimant's employer partially denied liability for claimant's left L5-S1 herniated disc and related surgery. Following a hearing, the administrative law judge upheld the denial, concluding that claimant had not shown that the original compensable injury was the major contributing cause of the consequential injury. The Workers' Compensation Board adopted and affirmed the ALJ's order and reaffirmed its conclusion on reconsideration. The Oregon Court of Appeals affirmed.

DISPOSITION

affirmed

CASES CITED

- Barrett Business Services v. Hames, 130 Or. App. 190, 193, 196-97, 881 P.2d 816 (1994), rev. denied, 320 Or. 492 (1994)
- Hicks v. Spectra Physics, 117 Or. App. 293, 296-97, 843 P.2d 1009 (1992)
- Kephart v. Green River Lumber, 118 Or. App. 76, 79, 846 P.2d 428 (1993), rev. denied, 317 Or. 272 (1993)
- Williams v. Gates, McDonald & Co., 300 Or. 278, 709 P.2d 712 (1985)

OPINION

DEITS, J.

DEITS, P. J. Claimant seeks review of a Workers' Compensation Board order holding that a herniated disc injury that she sustained during an independent medical exam (IME) was not compensable as a consequence of the compensable low back injury that necessitated the IME.

We affirm. Claimant suffered a compensable injury on April 15, 1981, while working on an assembly line for employer. She was diagnosed with low back strain and leg radiculopathy, both on the right side. She was hospitalized and eventually returned to work.

On February 9, 1982, she was declared medically stationary, her claim was closed and she was awarded time loss benefits. Claimant continued to experience pain on the right side and, on March 14, 1984, her claim was again closed and she was awarded 15 percent permanent partial disability.

The claim was subsequently reopened due to an aggravation of claimant's condition and was reclosed by a third determination order of May 15, 1986, which awarded only additional time loss benefits. On February 18, 1987, claimant and employer stipulated to an increase in claimant's permanent partial disability for a total award of 25 percent.

In January of 1988, she began receiving treatment from Dr. Kemple, who has followed her progress to date. Claimant has not worked since April of 1988. On April 15, 1988, her claim was again reopened and benefits continued until the Board, on its own motion, issued a notice of closure on May 30, 1990.

In April of 1991, claimant received a lump sum payment pursuant to a Disputed Claim Settlement, in which employer denied claimant's upper back injury as a new injury/occupational disease claim, but continued acceptance of her conditions as an aggravation of the original 1981 claim.

On June 23, 1992, claimant was sent to two independent medical examinations. The first was with Dr. Watson, a neurologist, and Dr. Dinneen, an orthopedist. During that examination, which was performed by Watson, claimant told the doctor of significant back problems. Watson had her perform straight leg raising tests while lying on her back. She told him that she could not raise her right leg.

He *62asked her to raise her left leg and, when she did so, Watson moved it past where she had, causing her immediate pain in the left low back and hip area. She told Watson that he had hurt her and reported the same to her daughter that evening.

On July 1, 1992, claimant returned to Kemple for care. Claimant also saw Dr. Gandler, who ordered a lumbar CT scan. On January 6, 1993, Dr. Stoney performed a CT scan which revealed for the first time, significant bulging and left-sided herniation of the L5-S1 disc. Claimant attended a neurosurgical evaluation by Dr. Morris and surgery was recommended.

On February 17, 1993, employer issued a partial denial for claimant's left L5-S1 herniated disc injury and surgery. Claimant subsequently had surgery with Dr. Morris in March of 1993. She requested a hearing on employer's partial denial. A hearing was held in May of 1993.

The administrative law judge (ALJ) upheld employer's partial denial of claimant's surgery and treatment for her herniated disc, concluding that although claimant's testimony was credible, the evidence presented did not prove that her original compensable injury was the major contributing cause of her new consequential injury.¹ On review, the Board adopted and affirmed the AU's order.

The Board subsequently issued an order on reconsideration.² In that order, it held that "if a claimant sustains an injury while attending a carrier-requested medical examination, to be compensable under ORS 656.005(7)(a)(A), the claimant must establish that the compensable injury that necessitated the examination was the major contributing cause of the consequential condition.

That a claimant is injured during a carrier-requested medical examination establishes that claimant has sustained a consequential condition cognizable under ORS *63656.005(7)(a)(A). What remains to be determined, on a case-by-case basis, is whether the claimant has established by persuasive medical evidence that her original injury is the major contributing cause of her consequential condition.

For the reasons set forth above, we conclude that, in this cas , claimant has not met her burden of proof under that standard.” The Board concluded: “Here the evidence establishes that the major contributing cause of claimant’s need for surgery was the new injury that she sustained during the medical examination. Her treating physician concluded that there was only a remote possibility that her current need for surgery was predominately related to her original compensable injury * * * whereas her treating surgeon was unable to render an opinion regarding whether her original injury was causally related to her current low back condition.” Claimant argues that the Board erred as a matter of law in concluding that her compensable injury was not the major contributing cause of the consequential injury that she sustained during the IME.

Claimant contends that no meaningful distinction can be drawn between an injury incurred during treatment and one suffered during an IME. Claimant reasons, therefore, that because a consequential injury which results from treatment is compensable, *Barrett Business Services v. Hames*, 130 Or App 190,193, 881 P2d 816, rev den 320 Or 492 (1994), a consequential injury sustained during an IME also should be compensable.

The governing statute is ORS 656.005(7), which provides in pertinent part: “(a) A ‘compensable injury is an accidental injury, or accidental injury to prosthetic appliances, arising out of and in the course of employment requiring medical services or resulting in disability or death; an injury is accidental if the result is an accident, whether or not due to accidental means, if it is established by medical evidence supported by objective findings, subject to the following limitations: “(A) No injury or disease is compensable as a consequence of a compensable injury unless the compensable injury is the major contributing cause of the consequential condition.” *64We have previously considered the language of this statute.

Specifically, we have addressed its meaning after an amendment by the 1990 legislature. In *Hicks v. Spectra Physics*, 117 Or App 293, 296, 843 P2d 1009 (1992), we discussed whether the language, “consequence of a compensable injury,” included injuries that did not directly result from the compensable injury, but were the result of activities that would not have been undertaken “but for” the compensable injury.

After reviewing the legislative history of the 1990 amendments, we concluded that the legislature intended to restrict the compensability of such injuries. We said: “Under ORS 656.005(7)(a)(A), any injury or condition that is not directly related to the industrial accident is compensable only if the major contributing cause is the compensable injury.” *Id.* at 297.

(Emphasis in original.) Accordingly, in *Hicks*, we held that where a claimant suffered injuries in an auto accident while returning from treatment of a compensable injury, those accident-related injuries were not compensable under ORS 656.005(7)(a)(A), because the compensable injury was not the major contributing cause of the accident-related injuries. Applying this same rationale in *Kephart v. Green River Lumber*, 118 Or App 76, 79, 846 P2d 428, rev den 317 Or 272 (1993), we

concluded that the injury that the claimant incurred during vocational rehabilitation was not directly related to the compensable injury, but rather, was a consequence of that injury.

Accordingly, we held that the Board correctly applied the major contributing cause standard of ORS 656.005(7)(a)(A) and concluded that the injury that claimant incurred while participating in vocational rehabilitation was not the major contributing cause of the new injury and, therefore, was not compensable.

We specifically noted in Kephart that it made no difference that the claimant was injured while actually involved in vocational training, as opposed to being en route to training. As noted above, claimant relies, in particular, on our decision in Hames.

In that case, the claimant sustained a compensable dislocation of his right shoulder. As part of claimant's therapy for that injury, the treating orthopedic surgeon prescribed "extremely aggressive" physical therapy *65involving rigorous range of motion exercises of the claimant's arm and shoulder. During that therapy, the claimant's right ulnar nerve was injured..

We held that the injury that occurred during physical therapy was compensable. In explaining our conclusion, we recognized the holdings in Hicks and Kephart, but found them to be distinguishable. We noted that the causal connection in Hames between the original compensable injury and the later injury was far more direct than in those earlier decisions.

We pointed out that Hames did not involve a "but for" causation link as did Hicks and Kephart. We explained that the new injury in Hames "flowed directly and inexorably from the shoulder injury." We also based our conclusion in Hames on our understanding of the legislative intent in adopting the 1990 amendments. Specifically, we considered whether the legislature intended to effect changes with respect to the compensability of medical treatment injuries, because prior to 1990, Oregon courts had routinely held that new injuries incurred during medical treatment of compensable injuries were themselves compensable.

Id.; see Williams v. Gates, McDonald & Co., 300 Or 278, 709 P2d 712 (1985). See also Larson 1, Workmen's Compensation Law, § 13.21 (1995). We concluded that the legislature did not intend to change the law relating to the compensability of medical treatment injuries.

In particular, we relied on statements made during the legislative discussion that indicated that the change was intended to make "natural consequences" cases compensable. An example used in the legislature's discussion of a "natural consequence" involved circumstances where a person trips over crutches that are being used as a result of a compensable injury.

Based on the apparent legislative intent, we concluded that the legislature intended to include medical treatment cases within the category of "natural consequences" cases. In addition, we

concluded that drawing a distinction between a compensable injury and the treatment of such an injury would be artificial.

Accordingly, we held where a claimant suffers an injury as the direct result of reasonable *66and necessary treatment of a compensable injury, the compensable injury is properly deemed the major contributing cause of the new condition for purposes of ORS 656.005-(7)(a)(A). Id. at 196-97.

In this case, the Board held, and claimant does not dispute, that the major contributing cause of claimant's need for surgery was the new injury that she sustained during the IME. Claimant essentially is urging us to extend our holding in Hames to hold that the compensable injury is properly deemed the major contributing cause of injuries incurred during an IME that has been ordered relating to a compensable injury.

In its decision in this case, the Board first explained that it continued to adhere to its view that in circumstances where medical treatment for a compensable injury is the major contributing cause of a new injury, the compensable injury is deemed to be the major contributing cause of the consequential condition.

The Board refused, however, to extend that rationale to an injury that occurs during an IME. The Board reasoned that such an injury is different from an injury that occurs during treatment. It explained that an injury that occurs during an IME comes within the category of activities "that would not have been undertaken but for a compensable injury." Because of that, the Board concluded that this court's decisions in Hicks and Kephart control and, accordingly, an injury incurred during an IME will not be found compensable unless the evidence shows that the compensable injury is actually the major contributing cause of the consequential condition.

We agree with the Board's reasoning and its conclusion. Admittedly, an injury that occurs during an IME is similar in some respects to an injury arising out of medical treatment. It does flow from the compensable injury.

The difference, however, is a matter of degree. It simply does not flow as "directly and inexorably" from the compensable injury as does an injury arising out of medical treatment for the compensable injury. The break in the causal connection between the original injury, and the injury incurred during the IME in this case, is not as distinct as the accident in Hicks.

The events here come closer to the facts of Kephart, *67where the injury occurred during vocational rehabilitation. In view of our decisions in Hicks and Kephart, as well as the apparent legislative intent to limit what is included as part of the "natural consequences" of an injury, we conclude that in order for an injury incurred during an IME to be compensable as a consequence of a compensable injury, it must be established that the original injury was the major contributing cause of the consequential condition.

As the Board found, the major contributing cause of the new condition here was the activities that occurred during the IME, not the original injury. Accordingly, the Board did not err in upholding employer's partial denial. Affirmed.

The ALJ found that there was "no medical evidence that the major contributing cause of claimant's surgery for the herniated disc at L5-S1 was the initial industrial injury. The major cause of the need for surgery was a new injury that claimant sustained during the independent medical exam or the combination of that injury with some degree of preexisting degenerative disc disease in the spine." We note that the Board was without the benefit of our decision in *Barrett Business Services v. Hames*, 130 Or App 190, 193, 881 P2d 816, rev den 320 Or 492 (1994), when it issued its order on reconsideration in this case.