In the Matter of the Compensation of
CHRISTOPHER A. KELLOW, Claimant
WCB Case No. 01-02888, 00-07731
ORDER ON REVIEW
Bottini Et Al, Claimant Attorneys
Meyers Et Al, Defense Attorneys
Reinisch Et Al, Defense Attorneys

Reviewing Panel: Members Biehl, Phillips Polich, Langer, Lowell, and Bock.[1]

Pinnacle-Sims, Inc. (Pinnacle) requests review of Administrative Law Judge (ALJ) Mills' order that: (1) set aside its denial of claimant's "new injury" claim for his current L4-5 low back condition; and (2) upheld Travelers Indemnity's (Travelers) denial of claimant's medical services claim for the same condition. On review, the issues are compensability and responsibility.

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

In September 1988, claimant injured his low back while employed by Travelers' insured. The injury was diagnosed as a central disc herniation at L4-5 and protrusion at L3-4. The claim was closed in June 1989 with a 16 percent unscheduled permanent disability award. Claimant aggravated his low back in August 1989. His claim was reopened and then again closed in July 1990.

Claimant began employment with Pinnacle's insured as a cleanup person at a lumber mill in October 1997. While at work on September 8, 2000 he felt pain in his lower back, which gradually worsened and radiated, causing him to leave work before his shift ended. Claimant was ultimately diagnosed as suffering an extruded

[1] Travelers has requested that the Board refrain from issuing an order until such time a member representing the concerns of employers is available to participate in the review process. *See* ORS 656.712(1). Claimant opposes the motion, observing that, pursuant to ORS 656.718(2), a vacancy in Board membership "shall [not] impair the right of the remaining members to exercise all the powers of the board."

On June 7, 2002, pursuant to a notice of public meeting, the Board decided to sit together as a panel of five to review a designated group of cases. This case was one of that limited group. Although reviewed by all of the members, this case does not involve an issue of first impression that has a profound impact on the workers' compensation system.

herniated disc at the left side L4-5. Claimant filed a "new injury" claim on September 13, 2000.[2]

The ALJ determined that claimant's September 8, 2000 injury was the major contributing cause of his disability and need for treatment. ORS 656.005(7)(a)(B). In doing so the ALJ was persuaded by the medical opinions of claimant's treating neurosurgeon, Dr. Brett, and Dr. Gritzka, an orthopedic surgeon to whom claimant was referred by his counsel.

Pinnacle asserts that the medical opinion of Dr. Brett was not persuasive as it was based on an inaccurate history and failed to "truly evaluate" the relative contribution of factors other than claimant's final injury. Further, Pinnacle contends that the medical opinion of Dr. Gritzka should be discounted because it dismissed the contribution of preexisting conditions. We are not persuaded by these arguments.

Because of the possible alternative causes for claimant's low back condition, this matter involves a complex medical question that must be resolved by expert medical opinion. *Uris v. Compensation Department*, 247 Or 420 (1967). When, as here, there is a dispute between medical experts, more weight is given to those medical opinions that are well reasoned and based on complete and accurate medical information. *Somers v. SAIF*, 77 Or App 259, 263 (1986). In evaluating medical opinions, we generally defer to the treating surgeon absent persuasive reasons to the contrary. *Argonaut Insurance Co. v. Mageske*, 93 Or App 698 (1988) (special deference is owed to a treating surgeon due to the unique opportunity to view the claimant's condition firsthand); *Weiland v. SAIF*, 64 Or App 810 (1983). Because Dr. Brett made specific reference to surgical observations of edema and erythema, which he indicated were consistent with the date and mechanism of claimant's September 2000 injury, his opinion is entitled to deference in the first instance. We find no persuasive reason to discount it.

Dr. Brett's opinion was based in part on a history that claimant had been pain free for several years and that his low back and leg pain had "resolved completely" prior to the September 2000 injury. The ALJ noted that this history was entirely consistent with claimant's credible testimony and was not inconsistent with Dr. Gritzka's references to episodic back pain and a symptomatic condition

[2] Because claimant's pain arose over a discrete period, *i.e.*, during a single work shift, we analyze this claim as an injury rather than an occupational disease. *See Valtinson v. SAIF*, 56 Or App 184, 187 (1992) (injury must occur during short, discrete period, but need not be instantaneous).

antecedent to the September 8, 2000 injury, because these references were to previously described incidents of low back pain predating claimant's 1997 employment with Pinnacle's insured. We concur in this analysis.[3] We further agree with the ALJ's conclusion that Dr. Brett's report that claimant had enjoyed "quite excellent health," did not demonstrate reliance on an inaccurate history when pertinent information concerning claimant's prior back problems appeared elsewhere in the same document.

Pinnacle next contends that Dr. Brett failed to "truly evaluate" the role of preexisting injury and degenerative change in the causation of claimant's condition.[4] (Appellant's Brief at 5). However, it is apparent from Dr. Brett's reports that he had reviewed imaging reports and medical records concerning claimant's 1988 injury and preexisting degenerative disc disease. He referred to both conditions and, based on the oral history provided by claimant, indicated that the pain from the 1988 pathology had resolved completely. Ultimately, Dr Brett opined that the preexisting degenerative change combined with claimant's work injury to produce the current low back condition, although he accorded it less weight than did Dr. Thompson. (Exs. 67, 72, 74-1) Under these circumstances, we agree with the ALJ's conclusion that Dr. Brett adequately considered all relevant contributors.

Moreover, Dr. Brett's medical opinion is supported by that of Dr. Gritzka. Acknowledging that claimant had a preexisting weakened back at L4-5, Dr. Gritzka opined that claimant's preexisting L4-5 disc problems combined with the work injury sustained on September 8, 2000 to cause a frank rupture at L4-5, resulting in a extrusion of a fragment and compression of a nerve root. Dr. Gritzka concluded that the major contributing cause of claimant's disability and need for treatment was his work injury. Dr. Gritzka explained that the mechanics of shoveling raking and sweeping required claimant to repeatedly bend, lift and twist, resulting in flexion and torsion under load. According to Dr. Gritzka, the association of such activities with back pain and stress to lumbar discs is well known. (Ex. 70-6). Dr. Gritzka specifically acknowledged that the September

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[3] We defer to the ALJ's demeanor-based credibility finding in claimant's favor. *See Erck v. Brown Oldsmobile*, 311 Or 510, 528 (1991); *James E. Board*, 52 Van Natta 442, 443 (2000).

[4] Pinnacle also argues that Dr. Brett's causation opinion is suspect because it was given prior to performing surgery. We note that Dr. Brett's pre-surgery opinion was verified by surgical observations, which he reported were consistent with the mechanics and date of claimant's injury. These findings reinforced the causation opinion rendered before surgery. *See Carol A. Sheesley*, 53 Van Natta 1462 (2001).

2000 imaging identified moderate degenerative changes and that claimant had an antecedent intervertebral disc problem at L4-5. (Ex. 70-2, 6). Importantly, Dr. Gritzka indicated that, in forming his causation opinion, he had taken into consideration all factors contributing to claimant's low back condition. (Ex. 70-6) In light of such circumstances, we are persuaded that Dr. Gritzka considered the role of degenerative changes, although he did not describe it directly. Finally, Dr. Brett reviewed and concurred in the conclusions reached by Dr. Gritzka. (Ex. 72).

Taken together, we find the medical opinions of the two physicians on the subject of causation well reasoned and based on an accurate and complete history, including Dr. Brett's surgical observations. In contrast to the opinions of Drs. Meier and Thompson, they are thorough because they take into account information concerning claimant's particular work activities. Consequently, we find that claimant has established that his work injury on September 8, 2000 was the major contributing cause of his L4-5 condition.

Finally, Pinnacle argues that ORS 656.308(1) applies and requires that responsibility be assigned to Travelers' insured. We need not determine whether ORS 656.308(1) or the "last injurious exposure rule" (LIER) applies because, regardless of whether claimant's current low back condition (left L4-5 herniated disc) is the "same condition" as the compensable condition incurred in 1988 (central L4-5 herniated disc) while he was working for Travelers' insured, we conclude that Pinnacle is responsible for claimant's current low back condition.[5]

Claimant's counsel is entitled to an assessed attorney 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 $1,400, to be paid by Pinnacle. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by the claimant's respondent's brief), the complexity of the issues, and the value of the interest involved.

[5] If we assume that claimant's 2000 left disc herniation involved the "same condition" that was previously processed as part of his 1988 compensable claim with Travelers, Pinnacle would still be responsible for the claim because the persuasive medical evidence establishes that claimant's 2000 injury was the major contributing cause of the left-sided L4-5 disc herniation, as well as his need for treatment or disability.

ORDER

The ALJ's corrected order dated August 20, 2001 is affirmed. For services on review, claimant's counsel is awarded an assessed attorney fee of $1,400, to be paid by Pinnacle-Sims, Inc.

Entered at Salem, Oregon on July 12, 2002