
In the Matter of the Compensation of
HARRY K. MCINTOSH, Claimant
WCB Case No. 99-09277
ORDER ON REVIEW
Mustafa T Kasubhai PC, Claimant Attorneys
Sather Et Al, Defense Attorneys

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

Claimant requests review of Administrative Law Judge (ALJ) Stephen Brown's order that upheld the insurer's partial denial of claimant's injury claim for an L4-5 disc condition. On review, the issue is compensability. We reverse.

FINDINGS OF FACT

Claimant works for the employer as a truck driver. His work duties include driving as much as 8,000 miles per week and loading and unloading trucks. On June 1, 1998, claimant injured his low back unloading a fiberglass bathtub that weighed 150-200 pounds. (Tr. 10-11). Dr. Zelaya diagnosed a sacroiliac joint strain and provided conservative treatment. The insurer accepted a "lumbar strain."

Claimant returned to his regular work in August 1998. The insurer's coverage ended on December 31, 1998. (Ex. 69).

Claimant's symptoms continued and fluctuated. He experienced low back pain and right buttock pain, intermittently, for over a year. Then his symptoms changed and worsened sometime after June 7, 1999.

Dr. Dunn first examined claimant for his low back on August 5, 1999. (Ex. 57; *see also* Exs. 1, 2). He diagnosed a herniated disc at L4-5.

Claimant filed a claim and the insurer denied it.

¹ 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.

CONCLUSIONS OF LAW AND OPINION

The issue is whether claimant's current low back condition is compensably related to the accepted June 1, 1998 low back injury.

As a general rule, an injury claim is compensable if the claimed work incident is a material cause of the condition. *See* ORS 656.005(7)(a). However, if an otherwise compensable injury combines at any time with a preexisting condition, the resultant disability and/or need for treatment is only compensable if the work injury is its major contributing cause. *See* ORS 656.005(7)(a)(B).²

In this case, claimant is subject to the "major cause" standard of proof under ORS 656.005(7)(a)(B), because the persuasive evidence establishes that preexisting foraminal stenosis combined with the 1998 injury to cause his current L4-5 condition. (*See e.g.*, Ex. 67).

Dr. Dunn, claimant's treating physician, provides the expert evidence supporting the claim. Dr. Schilperoort, examining physician, provides the only contrary evidence. (Exs. 73, 75). We do not find the latter opinion persuasive for several reasons. First, Dr. Schilperoort relied on "prominent" non-organic pain signs, findings otherwise absent from the record. Second, the doctor initially related claimant's ongoing symptoms to "pre-existing degenerative changes," while the remainder of the record indicates that any such changes are mild at most and minimally contributory. (*See* Exs. 73-8, 79-19, 81-54-5).

We also note that Dr. Schilperoort opined that claimant's 1998 strain resolved without impairment or worsening. Later, after reviewing claimant's MRI, Dr. Schilperoort related claimant's symptoms to spinal stenosis, with no contribution from a "very minimal disc herniation." (Ex. 75-2). We find Dr. Schilperoort's ultimate conclusion inadequately explained in light of his prior and contemporaneous references to claimant's allegedly "non-organic" or "nonanatomic" findings. In sum, we find Dr. Schilperoort's opinions unpersuasive because they are inadequately explained and his findings are unsupported elsewhere in the record.³

² In addition, the carrier responsible for a work injury is not responsible for a worsened condition if its major contributing cause is an off-work injury or an injury under later coverage. *See* ORS 656.273(1); 656.308(1). Here, there is no persuasive evidence of either.

³ For example, Dr. Schilperoort did not address the fact that claimant has had the same *type* of symptoms ever since the 1998 work injury. (*See* Exs. 81-33, -35).

The ALJ found Dr. Dunn's opinion supporting the claim unpersuasive, reasoning that the doctor relied on an inaccurate history that claimant's condition worsened *progressively* and his *leg* symptoms continued following the 1998 injury.⁴ The ALJ also concluded that Dr. Dunn's opinion was logically inconsistent and upheld the insurer's partial denial for lack of persuasive supporting medical evidence. We read Dr. Dunn's opinion differently and reach the opposite result.

First, we do not find that Dr. Dunn relied on a history of ongoing *leg* symptoms or a gradual worsening in forming his causation opinion. Instead, we find that claimant had, and Dr. Dunn relied on, a history of ongoing fluctuating low back symptoms, often including right *buttock* pain, "sacroiliac joint" pain, and eventually right leg pain along with worsened low back pain.⁵ (See Exs. 10, 15, 49-2, 62, 63, 66, 79-12-13, 81-33, *see also* Ex. 49-4). Although claimant's initial and subsequent symptoms were consistent with his initial "sacroiliac strain" diagnosis, they were also consistent with structural damage to the disc, specifically an L4-5 annular tear.⁶ (See Exs. 79-12-13, -16, 81-10-11; -20-23, -37-38). According to Dr. Dunn, claimant's inability to bear weight on his right leg after the injury signified a disc damage. (Ex. 80-16-19.) Dr. Dunn also explained that he included buttock symptoms and "sacroiliac" symptoms as encompassed within "leg" symptoms or part of the *same type* of symptoms claimant had intermittently ever since the 1998 work injury. (Exs. 81-24, -35; *see* Ex. 81-58; *see also* Exs. 16, 17, 24, 29, 34, 37).

Thus, Dr. Dunn clearly and persuasively opined that claimant had the same *type* of symptoms for over a year after the injury, followed by a worsening in 1999.

⁴ ALJ also found that Dr. Dunn changed his theory of causation: from disc herniation to annular tear at the time of [the 1998] injury, with frank herniation or bulging in the summer of 1999." (Opinion and Order, p.5.) We do not discount Dr. Dunn's reasoning on this basis, because any such change is well-articulated: Dr. Dunn explained that an injury may cause an undiagnosed annular tear that bulges or herniates later, without a significant new cause and that is what happened in claimant's case. (Ex. 80-57-8; *see also* Ex. 63).

⁵ In that sense, claimant's symptoms were progressive—*i.e.*, they worsened, but not gradually.

⁶ Dr. Zelaya suspected that claimant might have herniated a disc with the July 1998 injury, but concluded that was "not proven," because claimant's symptoms improved before he returned to work 2 months later. (See Exs. 5, 38). Dr. Zelaya did not consider an annular tear and, as Dr. Dunn explained, expert understanding of how a disc herniation may occur after an annular tear has changed in recent years. *See n. 3, supra.* (Exs. 81-20, -57-58; *see also* 81-25).

(See Ex. 81-40; see also Exs. 73-4, -8). Claimant's 1999 worsened condition included right *leg* symptoms; *i.e.* in addition to the ongoing buttock/gluteal symptoms. (See Ex. 81-60; see also *id.* at 65). This conclusion is consistent with the record. And it supports Dr. Dunn's theory that the 1998 injury included an annular tear that progressed to a disc herniation around September 1999. (See Exs. 63, 66, 67, 81-25-26, -33, -44, -48, -52, -58, -60-61). Based on that theory, along with claimant's objective findings, test results, and the lack of significant intervening events, Dr. Dunn opined that the injury remains the major cause of claimant's current condition. (Ex. 81-68-9). In reaching this conclusion, Dr. Dunn considered and ruled out contributory degeneration and discounted claimant's stenosis and events since the 1998 injury. (See Exs. 79-8-11, -15, 81-8, -15, -29, -31-34, -45-6, -49-56, -61-62, -71).⁷ We find Dr. Dunn's opinion persuasive and we rely on it. Accordingly, we conclude that claimant has carried his burden of proof.

Claimant's attorney is entitled to an assessed fee for services at hearing and on review. ORS 656.386(1). 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 at hearing and on review is \$5,500, payable by the insurer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by the record and claimant's appellate briefs), the complexity of the issue, the value of the interest involved, and the risk that counsel may go uncompensated.

ORDER

The ALJ's order dated August 8, 2001 is reversed. The insurer's partial denial is set aside and the claim is remanded to it for processing according to law. For services at hearing and on review, claimant is awarded a \$5,500 attorney fee, to be paid by the insurer.

Entered at Salem, Oregon on July 17, 2002

⁷ He also opined that claimant's work activities after June 7, 1999 were the major contributing cause of claimant's worsening. (Ex. 81-69-71).