

In the Matter of the Compensation of
CORA M. GOETZINGER, Claimant

WCB Case No. 01-04631

ORDER ON REVIEW

Cary et al, Claimant Attorneys
Sheridan Levine LLP, Defense Attorneys

Reviewing Panel: Members Lowell, Bock, and Phillips Polich. Member Phillips Polich dissents.

Claimant requests review of Administrative Law Judge (ALJ) Martha Brown's order that upheld the insurer's denial of an injury claim for a low back condition. On review, the issue is compensability.

Claimant is a convenience store clerk. (Ex. 3). On January 28, 2001, she was on her knees stocking the bottom shelf of a cooler with 2-liter soda bottles. (*Id.*) As she stood up, she felt a pulling sensation in her right lower back. (*Id.*) Claimant filed a claim. (*Id.*)

Claimant initially treated with Dr. Irvine, who diagnosed SI joint strain. (Ex. 5). Due to complaints of radiating pain, Dr. Irvine referred claimant to Dr. Andersen, an orthopedist. (Exs. 9; 11). Dr. Anderson suspected nerve root involvement at a "relatively high lumbar location," and recommended an MRI. (Ex. 11-3).

The MRI (as interpreted by Dr. Johnson) demonstrated a "nodule" extending into the right-sided neuroforamina at L2-3. (Ex. 16-1). Dr. Johnson believed that the "nodule" represented either a free disk fragment, a synovial cyst, or a small neoplasm. (Ex. 16-1; 16-2). The MRI also demonstrated mild degenerative disk disease at T11-12, and moderate degenerative facet changes at L3-L4. (Ex. 16-2).

On March 8, 2001, Dr. Dorsen performed a neurosurgical evaluation. (Ex. 21). Dr. Dorsen believed that claimant had a right L2-3 intraspinal mass lesion and recommended a laminectomy to remove the mass. (Ex. 21-2).

In April 2001, claimant was evaluated by Drs. Strum and Farris at the insurer's request. (Ex. 25). Drs. Strum and Farris agreed that claimant should have surgery to remove the L2-3 mass lesion. (Ex. 25-7). Regarding the cause of claimant's condition, Drs. Strum and Farris opined that: (1) the mechanism of the work event was inconsistent with the production of a musculoskeletal injury; and

(2) the mechanism of the work event was “quite consistent” with the onset of symptoms related to preexisting degenerative changes in the lumbar spine. (Ex. 25-6).

The insurer denied the claim. (Ex. 26). Claimant requested a hearing.

On June 12, 2001, Dr. Dorsen performed a right L2-3 laminectomy. (Ex. 31). The surgery revealed the mass lesion to be a disc fragment. (Exs. 31; 32).

At hearing, claimant asserted that her disc lesion was not a “combined” condition, and thus reasoned that the “material contributing cause” standard was applicable to her claim. The insurer contended that claimant’s disc lesion was a “combined” condition, and thus asserted that the “major contributing cause” standard was applicable.

The ALJ relied on the opinion of Dr. Anderson and determined that preexisting degenerative changes in claimant’s L2-3 disc had combined with the work event to cause claimant’s disability and need for treatment. Consequently, the ALJ applied the major contributing cause standard set forth in ORS 656.005(7)(a)(B). Finding persuasive medical evidence that the major cause of claimant’s low back condition was the preexisting degenerative condition, the ALJ concluded that claimant had failed to establish the compensability of the claimed condition. Accordingly, the ALJ upheld the insurer’s denial.

On review, claimant asserts that the ALJ erred in concluding that the disputed condition was a combined condition. More specifically, claimant asserts that the medical record does not support the conclusion that there were preexisting degenerative changes in the L2-3 disc.

ORS 656.005(7)(a)(B) provides that if an injury combines at any time with a preexisting condition to cause or prolong disability or a need for treatment, the combined condition is compensable if the work injury was the major contributing cause of the disability and/or need for treatment of the combined condition. A combined condition occurs when a new injury combines with an old injury or a preexisting condition to cause or prolong either disability or a need for treatment. *Multifoods Specialty Distribution v. McAtee*, 333 Or 629 (2002). Thus, in order for there to be a “combined condition,” there must be at least two conditions that merge or exist harmoniously. *Luckhurst v. Bank of America*, 167 Or App 11 (2000).

Therefore, to determine whether this claim involves a “combined condition,” we examine the medical record for a persuasive medical opinion that the condition suffered by claimant in the September 2000 work injury merged or existed harmoniously with a preexisting condition. In the absence of such an opinion, ORS 656.005(7)(a)(B) is not applicable. ORS 656.005(7)(a); *Beverly Enterprises v. Michl*, 150 Or App 357 (1997); *Frances K. Coney*, 54 Van Natta 176 (2002); *William J. Barabash*, 50 Van Natta 1561 (1998).

Dr. Anderson believed that work activity (standing up after kneeling on the floor) precipitated claimant’s disc herniation. (Ex. 39-11). However, Dr. Anderson also believed that such an event would not be sufficient to rupture a healthy disc. (Ex. 39-14). Taking that into account, along with the radiology evidence of degenerative changes at T11-12 and L3-4, Dr. Anderson opined that claimant had degenerative changes at L2-3 that preexisted her disc herniation. (Exs. 34A; 37; 39-14). Dr. Anderson’s analysis is consistent with the opinions of Dr. Irvine, and Drs. Strum and Farris. (Exs. 25-6; 34; 38).

In contrast to the opinions of Drs. Anderson, Irvine, Strum and Farris, Dr. Dorsen did not believe that “any preexisting condition was present resulting in [claimant’s] need for treatment or disability.” (Ex. 36). Dr. Dorsen based his opinion on the absence of degenerative changes at L2-3 (as noted on imaging studies) and the absence of a history of prior problems.¹ (*Id.*)

We note that in expressing his causation opinion, Dr. Dorsen was attempting to respond to the medical issues raised by Drs. Strum and Farris. (*Id.*) However, in doing so, Dr. Dorsen failed to discuss whether claimant’s work activity was sufficient to herniate a disc in the absence of preexisting degenerative changes. Without such an explanation, and considering the contrary medical opinions in the record, we find that Dr. Dorsen’s opinion is merely an unsupported conclusion, and as such, not persuasive. *Moe v. Ceiling Systems, Inc.*, 44 Or App 429 (1980).

Based on our review of the record, we find, as did the ALJ, that Dr. Anderson’s opinion, as supported by the opinions of Drs. Irvine, Strum and Farris persuasively establish that claimant’s disc condition is a “combined” condition. Consequently, we conclude that the major contributing cause standard set forth in ORS 656.005(7)(a)(B) is applicable to this claim. Applying that

¹ Because Dr. Dorsen did not base his opinion on his own surgical observations, we conclude that he is not in a more advantageous position to offer an opinion on this issue than any of the other physicians. See *Argonaut Insurance Co. v. Mageske*, 93 Or App 698, 701 (1988).

standard, and adopting the reasoning of the ALJ, we further conclude that claimant has failed to establish the compensability of her lumbar disc condition.

ORDER

The ALJ's order dated February 7, 2002 is affirmed.

Entered at Salem, Oregon on September 11, 2002

Board Member Phillips Polich dissenting.

I disagree with the majority's conclusion that claimant's L2-3 disc lesion was a "combined" condition. Consequently, I find that a material contributing cause standard and not the major contributing cause standard is applicable to this claim. Applying that standard, I conclude, unlike the majority, that claimant has established the compensability of the disputed disc condition. Accordingly, I respectfully dissent.

I begin by noting that although the April 2001 MRI (as interpreted by Dr. Johnson) demonstrated degenerative disc disease at T11-12, it failed to disclose any degenerative disc disease at L2-3. (Ex. 16-2). I also note that in their interpretation of the same MRI, Drs. Strum and Ferris identified degenerative changes at T11-12, L1-2, and L4-5, but not at L2-3. (Ex. 25-5; 25-6). The above-listed findings of Drs. Johnson, Strum, and Ferris are consistent with the findings of Dr. Irvine (attending physician); *i.e.*, no objective evidence of a preexisting condition causing claimant's present condition. (Ex. 38-2). Dr. Dorsen (attending surgeon) also did not believe that claimant had any significant degenerative changes at L2-3. (Ex. 36).

In cases where the carrier has alleged a "combined condition," it is the carrier's burden to establish the existence of such a condition. *See Beverly Enterprises v. Michl*, 150 Or App 357 (1997). Here, there is no objective evidence that claimant had any preexisting degenerative disc disease at L2-3. In the absence of a preexisting condition at L2-3, there can be no "combined condition" at that level.

I acknowledge that the majority and the ALJ relied on the opinion of Dr. Anderson. However, even Dr. Anderson could not identify any objective evidence to support his assumption that there was a preexisting degenerative condition at L2-3. Consequently, his opinion that there was a preexisting degenerative

condition present at L2-3 is merely an unsupported conclusion, and as such, is insufficient to establish the existence of a “combined condition.” See *Moe v. Ceiling Systems, Inc.*, 44 Or App 429, 433 (1980).

Because I find that the medical evidence does not establish the presence of a "combined condition," I conclude that a "material contributing cause" standard is appropriate in this case. *William R. Richardson*, 54 Van Natta 847 (2002); *Maria R. Luna*, 53 Van Natta 1651 (2001); See *Ronald L. Ledbetter*, 47 Van Natta 1461 (1995) (major contributing cause standard of ORS 656.005(7)(a)(B) applies only if there is evidence that a compensable injury combined with a preexisting condition). Applying this standard, I further conclude that Dr. Dorsen’s opinion is sufficient to prove the compensability of claimant’s L2-3 disc condition. Because the majority concluded otherwise, I respectfully dissent.