

---

In the Matter of the Compensation of  
**JASEN CHAVEZ, Claimant**  
WCB Case No. 01-05938  
ORDER ON REVIEW  
Jon C Correll, Claimant Attorneys  
Schwabe Williamson & Wyatt, Defense Attorneys

Reviewing Panel: Members Lowell and Phillips Polich.

Claimant requests review of Administrative Law Judge (ALJ) Hazelett's order that upheld the self-insured employer's denial of his current low back condition. On review, the issue is compensability. We affirm.

FINDINGS OF FACT

We adopt the ALJ's findings of fact.

CONCLUSIONS OF LAW AND OPINION

Claimant compensably injured his low back on October 21, 1999. The employer initially accepted a lower back strain, but later amended the acceptance to accept a "lumbar strain combined with preexisting multilevel degenerative disc disease." (Exs. 4, 28). On July 9, 2001, the employer issued a current condition denial on the basis that claimant's work injury was no longer the major contributing cause of his need for treatment or disability. (Ex. 29).

The ALJ found that Dr. Kendrick did not have an accurate history that claimant had experienced "chronic unremitting pain" since the October 21, 1999 injury. The ALJ concluded that the medical evidence did not establish that claimant's original injury was the major contributing cause of his ongoing disability and need for treatment.

On review, claimant relies on the opinions of Drs. Wenner and Kendrick to support his argument that his work injury caused a tear in the annular fibers of the L5-S1 disc. Claimant contends that his symptoms have continued since October 21, 1999, and the work injury remains the major contributing cause of the need for treatment.

For the following reasons, we agree with the ALJ that the medical evidence is not sufficient to establish that claimant's October 1999 injury is the major contributing cause of his ongoing disability or need for treatment.

Dr. Kendrick initially examined claimant in January 2001, more than one year after the work injury. He reported that claimant had an acute onset of low back pain on October 21, 1999, and felt that his back "just completely gave out on him." (Ex. 20-1). Dr. Kendrick said that claimant had waxing and waning symptoms over the following six months. (*Id.*) He diagnosed lumbar disc disease at L5-S1 with an annular tear. (Ex. 20-2). After reviewing claimant's discogram, Dr. Kendrick diagnosed multilevel lumbar degenerative disc disease at L3-S1, and mechanical low back pain, most likely due to segmental instability. (Ex. 23).

In an April 9, 2001 report, Dr. Kendrick explained that claimant "obviously has degenerative disease, not all of which was caused by his injury." (Ex. 27). In June 2001, claimant returned to Dr. Kendrick with back pain, as well as pain in his thoracic region. (Ex. 27a). Dr. Kendrick was concerned there was "more going on than simply degenerative disease." (*Id.*)

In a September 13, 2001 letter to claimant's attorney, Dr. Kendrick and Mr. Lachenmyer, PA-C, explained that a large component of claimant's thoracolumbar pain was due to degenerative changes in the lumbar spine, particularly at L5-S1. (Ex. 30-3). They explained that it was "possible that the work injury is most likely the majority of the reason for needing treatment; however, there certainly is some degree of degenerative disc disease as a pre-existing condition." (*Id.*) They said it was "quite possible that the annular tear at L5-S1 was provoked by his on-the-job injury which he describes as occurring in 1999 while repetitively lifting sheets of plywood." (*Id.*)

After claimant's attorney wrote to Dr. Kendrick explaining that he needed an opinion based on reasonable medical probabilities, Dr. Kendrick responded with the following opinion on September 25, 2001:

"[W]e believe that a large component of [claimant's] diffuse thoracolumbar pain is due to the degenerative changes in his lumbar spine particularly that at L5-S1. It is probable that the work injury is most likely the cause for his current need for treatment; however, there certainly is some degree of degenerative disc disease as a pre-existing condition. It is quite probable that the

annular tear at L5-S1 was provoked by his on-the-job injury which he describes as occurring in 1999 while repetitively lifting sheets of plywood.” (Ex. 30-1; underline in original).

In an October 16, 2001 letter to the employer’s attorney, Dr. Kendrick said he had reviewed the reports from Drs. Kather and Moore, which had described no specific injury and the onset of pain at work, but without any heavy activity. (Ex. 31). Dr. Kendrick said that if the history obtained in those chart notes was correct, claimant’s industrial strain was “possibly related to his continuing symptoms, but I certainly could not testify that it was to a medical probability.” (*Id.*) On the other hand, Dr. Kendrick noted that his history was that claimant had a “relatively discreet injury while lifting and twisting some heavy plywood followed by chronic unremitting pain, which had been present from that time until this, then I think that would lead strength to the industrial injury as the cause of his continuing pain in a combined condition with his degenerative disease.” (*Id.*) Dr. Kendrick said the answer depended upon which history was correct. (*Id.*)

After the October 1999 injury, claimant sought treatment on December 7, 1999 from Dr. Kather, who reported the following history:

“He complains of sharp, lower back pain. While at work on 10/21/99 he did not have any injury but it came on suddenly, sometime between 3 to 11 PM. At that time he was leveling the load while heating on the steam dryer when he felt a sharp pain in his lower back. There was no sequelae. Patient did not require any therapy or treatment. Then four days ago, a sharp pain returned while he was watching TV. He had five to six sharp pains in his right lateral thigh, radiating from his back. He feels increased low back pain if he places his neck to his chest. He has some popping if he moves his legs and thighs up and down in his lower back and this causes some pain. \* \* \* The back popping began last night.” (Ex. 2-2).

Dr. Kather diagnosed a low back strain/sprain and commented: “Recent injury is unknown; however, there could be inflammation related to an unknown position during sleep or some sort of muscle or ligament irritation.” (*Id.*)

On February 15, 2000, claimant was examined by Dr. Moore, who explained that claimant had been working regular duty and said that “ibuprofen helped take away the pain, but when he doesn’t take it, he does get pain in his low back.” (Ex. 5). Dr. Moore said claimant’s pain was “off and on, sometimes with a feeling of catching in his back.” (*Id.*)

Claimant’s testimony at hearing is inconsistent with the medical reports from Drs. Kather and Moore. Claimant testified that he was pulling sheets of veneer on October 21, 1999 when he had back pain that “felt like it gave out in the bottom of my back.” (Tr. 16). He said it felt like the “bottom half of my body was going to fall off[.]” (*Id.*) His pain persisted for the rest of the shift and was still there the next day. (Tr. 17-18). Claimant testified that his back pain never went away. (Tr. 21, 23).

To the extent claimant's testimony conflicts with the medical record regarding his low back symptoms after the October 1999 injury, we find that the contemporaneous medical records are more reliable. *See Diann C. Harry*, 51 Van Natta 1540, 1541 (1999) (the claimant's contemporaneous reporting regarding the onset of symptoms was more likely accurate than her recollection at hearing). Furthermore, we agree with the ALJ that the medical reports after claimant’s injury do not support the conclusion that he has experienced “chronic unremitting pain” since October 21, 1999. Under these circumstances, Dr. Kendrick’s October 16, 2001 opinion supports only the finding that claimant’s industrial strain is “possibly” related to his continuing symptoms, which is not sufficient to establish compensability. (Ex. 31). *See Gormley v. SAIF*, 52 Or App 1055 (1981) (opinions in expressed in terms of medical possibility rather than medical probability are not persuasive). We are not persuaded by Dr. Kendrick’s earlier reports on causation because they were based on an inaccurate history. *See Miller v. Granite Construction Co.*, 28 Or App 473, 476 (1977).

In any event, we agree with the employer that, even assuming claimant had “chronic unremitting pain” since the injury, Dr. Kendrick merely said that “would lead strength to the industrial injury as the cause of his continuing pain[.]” (Ex. 31). We find that Dr. Kendrick’s opinion is not sufficient to establish that claimant’s work injury is the major contributing cause of his ongoing disability or need for treatment.

Claimant also relies on the opinion of Dr. Wenner to establish compensability. Dr. Wenner first examined claimant in September 2000, almost one year after the work injury. His history indicated that claimant’s pain started

when he was moving wood at work and “felt a pop” while he was twisting. (Ex. 13-1). Dr. Wenner reported that claimant had significant pain in his low back, which had been exacerbated since then by activity. (*Id.*) Dr. Wenner diagnosed an annular tear with internal disc derangement at L5-S1, and he believed the work injury was the major contributing cause of that condition. (Ex. 15). He did not believe claimant had any preexisting conditions or contributing factors. (Ex. 15-1).

Dr. Wenner’s opinion that claimant did not have any preexisting conditions is inconsistent with the medical reports from Drs. Kendrick, Farris and Woodward, who found that claimant had preexisting degenerative disc disease in the lumbar spine, which combined with his work injury. (Exs. 27, 30, 31, 32). Although Dr. Wenner explained in a later report that claimant had “multilevel disease” (Ex. 21), he did not explain whether or not that multilevel disease preexisted the October 1999 injury. Furthermore, we find no evidence that indicates Dr. Wenner was aware of the medical reports from Drs. Kather and Moore, which reported a different history than Dr. Wenner recorded. We find that Dr. Wenner’s conclusory report is not persuasive because it was based on an inaccurate history and lacks adequate explanation.

There are no other medical reports that support compensability of claimant’s current low back condition. We agree with the ALJ that claimant has failed to sustain his burden of proof.

#### ORDER

The ALJ’s order dated March 11, 2001 is affirmed.

Entered at Salem, Oregon on September 25, 2002