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In the Matter of the Compensation of  
**RENEE L. TRIMPLER, Claimant**  
WCB Case No. 02-00092  
ORDER ON REVIEW  
Welch Bruun & Green, Claimant Attorneys  
Terrall & Terrall, Defense Attorneys

Reviewing Panel: Members Lowell and Biehl.

Claimant requests review of that portion of Administrative Law Judge (ALJ) Otto's order that upheld the self-insured employer's denial of her omitted medical condition claim for a L4-5 herniated disc condition. On review, the issue is compensability. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," except that we do not find that, based on a July 2002 MRI, Dr. Silver changed his opinion regarding causation. Rather, we find that, based on a July 2002 MRI, Dr. Silver changed his opinion that claimant required surgery.

We adopt the ALJ's "Findings of Ultimate Fact," except that we find that the September 2, 2000 industrial injury was the major contributing cause of claimant's L4-5 herniated disc condition.

CONCLUSIONS OF LAW AND OPINION

On September 2, 2000, claimant slipped on a wet floor and fell, landing on her left side buttocks. (Exs. 16; 17). On September 11, 2000, claimant saw Dr. George (initial attending physician), who diagnosed a "LS strain and probable left sciatic nerve contusion." (Ex. 17). Dr. George also considered a "left lumbar radiculopathy S1." (*Id.*) An October 13, 2000 MRI (interpreted by Dr. Warnock) revealed a mild annular bulge at L4-5. (Ex. 27).

On October 30, 2000, Dr. Silver (consulting neurosurgeon) reviewed the MRI and examined claimant. (Ex. 30). His impression was lumbosacral strain and asymptomatic degenerative disc disease at L4-5. (Ex. 30-2). Acknowledging that claimant had sustained a "significant blow" to her left buttock and hip, and further acknowledging that she "has symptoms of nerve root irritation," Dr. Silver opined

that claimant was slowly recovering from a lumbosacral sprain/strain syndrome. (*Id.*)

On November 30, 2000, the employer accepted a “disabling lumbar strain.” (Ex. 32).

In December 2000, claimant was examined by Dr. Jones at the employer’s request. (Ex. 34). Dr. Jones diagnosed preexisting degenerative disc disease at L4-5, lumbosacral sprain, and functional overlay. (Ex. 34-6). Dr. Jones believed that the accepted strain condition was medically stationary. (Ex. 34-7).

Claimant continued to experience pain. An October 9, 2001 MRI (interpreted by Dr. Kocarnik) revealed mild to moderate central protrusion at L4-5, potentially affecting the left L5 nerve root. (Ex. 51). After reexamining claimant and reviewing the October 2001 MRI, Dr. Silver opined that “it was just as likely” that the injurious work event caused a small herniation of claimant’s L4-5 disc as a lumbosacral strain, and recommended a lumbar myelogram and CT scan. (Ex. 56-3).

Dr. Jones reexamined claimant and reviewed the MRI reports on January 9, 2002. (Ex. 60). Dr. Jones believed that the MRI reports did not demonstrate major changes in claimant’s preexisting degenerative disc disease and continued to diagnose functional overlay. (Ex. 60-7). Dr. Jones opined that the myelogram/CT scan (recommended by Dr. Silver) was not unreasonable, but would “most likely be negative.” (*Id.*)

A January 25, 2002 myelogram (interpreted by Dr. Veverka) demonstrated a slight nerve root flattening at L4-5, more prominent on the left than the right. (Ex. 63-1).

In a February 27, 2002 letter to claimant’s counsel, Dr. Silver reasserted his November 19, 2001 opinion that the September 2000 work event produced a small L4-5 disc herniation. Taking into account the preexisting degeneration of the disc and the mechanism of injury, Dr. Silver opined that the September 2000 fall at work was the major contributing cause of claimant’s herniated disc. (Ex. 69).

On March 14, 2002, after reviewing the myelogram/CT scan and Dr. Silver’s letter, Dr. Jones issued an addendum report. (Ex. 70). Dr. Jones noted that no medical examiner had found “objective findings of clear radiculopathy” and that the imaging studies did not demonstrate “clear” nerve root impingement.

Taking into account claimant's functional overlay, Dr. Jones opined that claimant's "current" symptoms were not related to the September 2000 work injury. (Ex. 70-2).

Dr. Rosenbaum evaluated claimant (at the employer's request) on March 13, 2002. (Ex. 71). After a thorough review of claimant's medical records (including the various imaging studies), and his examination of claimant, Dr. Rosenbaum opined that "this individual has a preexisting condition of degenerative disc disease at L4-5," and "had an industrial injury with a probable herniated disc." (Ex. 71-5). After taking into account functional overlay, Dr. Rosenbaum opined that claimant would benefit from surgery, which he concluded was primarily due to the September 2000 work event. (*Id.*) Dr. Silver concurred with Dr. Rosenbaum's report. (Ex. 78).

On March 27, 2002, the employer declined to accept "L4-5 disc herniation." (Ex. 72).<sup>1</sup> Claimant requested a hearing.

A July 9, 2002 MRI (interpreted by Dr. Zinck) demonstrated interval resorption of the left paracentral disc protrusion at L4-5, and no obvious neural element compromise. (Ex. 81). Based on the "improvement in the MRI scan," Dr. Silver reasoned that "there no longer is an anatomical basis for [claimant's] continuing left lower extremity pain," and ultimately opined that "spine surgery is not presently indicated." (Ex. 83).

Relying on the July 9, 2002 MRI showing resorption of the L4-5 disc protrusion, and Dr. Silver's opinion that there was no longer an anatomical basis for claimant's continuing left leg pain, the ALJ concluded that claimant's current pain symptoms were not related to the September 2000 fall at work. Further reasoning that the July 9, 2002 MRI and Dr. Silver's opinion regarding surgery reflected "on her condition throughout the claim," the ALJ upheld the employer's denial of claimant's L4-5 disc herniation.

On review, claimant asserts that the parties did not agree to litigate the compensability of her "current" back condition. Rather, she contends that the issue presented for resolution was the compensability of her herniated L4-5 disc as an omitted medical condition. Consequently, claimant reasons that the ALJ's

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<sup>1</sup> In doing so, the employer did not deny the compensability of claimant's "current condition." (Ex. 72)

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analysis, which focused on whether the disputed condition was “currently” compensable, was inappropriate. ORS 656.005(7)(a)(B)(1999). As explained below, we agree.

We begin with a discussion of the issues presented for resolution. At the commencement of the hearing, the following colloquy took place:

ALJ: “The issues that I’m going to decide in this case came out of two different denials that the employer issued. The first one is Exhibit 58, and that’s a December 14, 2001 denial of compensability of [claimant’s] aggravation claim relating to her accepted lumbar strain. The second denial is Exhibit 72, and that’s a March 27, 2002 denial of compensability of her L4-5 disc herniation. She’d like me to set aside both of those denials and Award an attorney fee. And if I set aside either one or the other, she’s also going to be withdrawing the penalty issue. Is that a correct statement of the issues, [claimant’s counsel]?”

[Claimant’s counsel]: “That’s correct.”

ALJ: “And no cross-issues for the employer, right?”

[Employer’s counsel]: “That is correct, Your Honor.” (Tr. 2; 3).

Later on during opening statement, claimant’s counsel stated:

“There is no current condition denial here, by the way. The two issues are the scope issues and the aggravation denial of the accepted claim there.” (Tr. 4).

Based on the ALJ’s statement of the issues, as clarified by claimant’s counsel’s subsequent statement (to which there was no objection from the employer’s counsel), we conclude that the parties did not agree to litigate a denial of claimant’s “current” condition.

An “omitted medical condition” is one that was in existence at the time the carrier accepted the claim, but was not included in and therefore omitted from the

Notice of Acceptance. *See Johansen v. SAIF*, 158 Or App 672, *adhered to on recon* 160 Or App 579, *rev den* 329 Or 527 (1999); *Mark A. Baker*, 50 Van Natta 2333 (1998) (defining “new medical condition” under ORS 656.262(7)(a) (1995) and “omitted medical condition” under ORS 656.262(6)(d) (1995)). Therefore, the appropriate analysis is one that determines whether the requested condition (L4-5 herniated disc) was in existence (and otherwise compensable) at the time of claim acceptance (November 30, 2000).

Here, however, the ALJ focused on whether the requested condition was the “current” cause of claimant’s ongoing left leg pain complaints, and after concluding that it was not, extended that conclusion to claimant’s “condition throughout the claim.” In other words, the ALJ reasoned that the “current” resorption of the disc, without a change of symptoms, reflected that claimant never had a symptomatic disc.

Because the compensability of claimant’s “current” condition was not the issue presented for resolution, and because there is no medical opinion in the record stating that the absence of a change in symptoms (following disc resorption) establishes that claimant never had a symptomatic disc, we disagree with the ALJ’s analysis. *See SAIF v. Calder*, 157 Or App 224, 228 (1998) (the Board may resort to medical dictionaries to define medical terms and may make reasonable inferences from the medical evidence; however, the Board is not an agency with specialized medical expertise entitled to take official notice of technical facts within its specialized knowledge and its findings must be based on medical evidence in the record).

Claimant does not dispute that the major contributing cause standard is applicable to this claim. (Tr. 6). Therefore, claimant must establish that her work activities contributed more to the claimed condition than all other factors combined. ORS 656.005(7)(a)(B)(1999); *See, e.g., McGarrah v. SAIF*, 296 Or 145, 146 (1983). A determination of the major contributing cause involves the evaluation of the relative contribution of different causes of the disputed condition and deciding which is the primary cause. *See Dietz v. Ramuda*, 130 Or App 397 (1994), *rev dismissed* 320 Or 416 (1995).

Because of possible alternative causes for the disputed disc condition, resolution of this matter is a complex medical question that must be resolved by expert medical opinion. *See Uris v. Compensation Department*, 247 Or 420 (1967). When there is a dispute between medical experts, more weight is given to

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those medical opinions which are well reasoned and based on complete information. *See Somers v. SAIF*, 77 Or App 259, 263, (1986).

Dr. Silver opined, based on the mechanism of injury, that the September 2000 work event was the major contributing cause of claimant's herniated L4-5 disc. Based on similar reasoning, Dr. Rosenbaum opined that the September 2000 work event was the primary factor in claimant's need for surgery. Their opinions are well reasoned and based on complete information. Consequently, we find their opinions persuasive.

Accordingly, based on our *de novo* review of the medical record, we rely on the causation opinions of Drs. Silver and Rosenbaum and find that claimant's fall at work in September of 2000 combined with a preexisting degenerative condition at L4-5 to produce a disc herniation.<sup>2</sup> We further rely on the opinions of Drs. Silver and Rosenbaum to conclude that the injurious work event was the major contributing cause of the herniated disc. Consequently, we conclude that claimant has established the compensability of the disputed disc condition as an "omitted" medical condition.<sup>3</sup>

Accordingly, that portion of the ALJ's order that upheld the employer's denial of claimant's L4-5 herniated disc condition is reversed. The remainder of the ALJ's order is affirmed.

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 \$6,000, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by the record, claimant's appellate briefs, and his counsel's statement of services), the complexity of the issue, the value of the interest involved, and the risk that counsel may go uncompensated.

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<sup>2</sup> Because Dr. Jones' opinion primarily focuses on whether there is an objective basis for claimant's current pain complaints, we do not find his opinion probative on the issue presented for resolution. Accordingly, we do not rely on his opinion.

<sup>3</sup> In other words, we have determined that the employer is required to amend its acceptance to include a herniated L4-5 disc and to process the claim for that condition according to law. In doing so, we make no determination regarding whether the disc condition remains compensable.

ORDER

The ALJ's order dated January 9, 2003 is reversed in part and affirmed in part. That portion that upheld the employer's denial of claimant's herniated L4-5 disc is reversed. The denial is set aside, and the claim is remanded to the employer for processing according to law. The remainder of the ALJ's order is affirmed. For services at hearing and on review, claimant's counsel is awarded an assessed fee of \$6,000, to be paid by the employer.

Entered at Salem, Oregon on August 14, 2003