

In the Matter of the Compensation of
KENT L. CRITES, Claimant
WCB Case No. 01-06061, 00-01334
ORDER ON REVIEW
Thomas J Dzieman, Claimant Attorneys
James B Northrop, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Phillips Polich and Lowell.

The SAIF Corporation requests, and claimant cross-requests, review of Administrative Law Judge (ALJ) Stephen Brown's order that: (1) set aside SAIF's *de facto* denial of claimant's medical services claim for his low back condition; (2) upheld Pinnacle-SIMS' denial of claimant's injury claim for the same condition; and (3) declined to assess penalties against either carrier for allegedly unreasonable claim processing. On review, the issues are compensability, responsibility, and penalties. We reverse in part and affirm in part.

FINDINGS OF FACT

We adopt the ALJ's findings of fact with the following supplementation.

Claimant sustained a prior compensable low back injury with SAIF's insured. SAIF accepted the low back claim using the numeric code for an "unclassified" condition, rather than a particular diagnosis. (Exs. 00-3; Gc). Claimant subsequently underwent a right L4-5 laminectomy, which resulted in a 5 percent unscheduled permanent disability award. (Exs. D; L, T).

In October and November 1999, claimant experienced low back pain while crawling under a house performing his work duties as a house inspector. (Exs. 1; 2). After the November 1999 incident, he sought medical treatment from Dr. Hagie, an osteopathic physician, who ordered an MRI to rule out nerve root compressions. (Ex. 1-3). Following a November 1999 MRI, Dr. Hagie referred claimant to Dr. Dunn, a neurosurgeon, for consultation and review of the MRI. (Ex. 4).

Dr. Dunn examined claimant and diagnosed: "[p]reexisting foraminal stenosis and postoperative laminectomy aggravated by industrial injury." Dr. Dunn also diagnosed a strain and recommended continued conservative treatment. If that failed, Dr. Dunn thought claimant might need a two level fusion. While he did not think the 1999 "industrial injury" was the major cause of the need

for a two level fusion, Dr. Dunn opined that the “strain and the treatment [claimant] is undergoing at this point is the result of his recent injury.” (Ex. 11-2).

On January 4, 2000, Pinnacle (as claim administrator for claimant’s 1999 employer) denied compensability, contending that “there is insufficient evidence to establish the fact that you have sustained a compensable lower back condition from your work exposure with [the employer].” (Ex. 21).

On February 16, 2000, claimant underwent an insurer-arranged medical examination (IME) by Drs. Woodward and Williams. (Ex. 38). They diagnosed: (1) lumbar spondylosis, preexisting; (2) right L4-5 discectomy, remote; and (3) lumbar strain, resolved. (Ex. 38-4). Moreover, Drs. Woodward and Williams concluded that claimant had sustained injuries on October 5, 1999 and in early November 1999 which combined with his preexisting conditions and opined that the major contributing cause of the combined condition was the injury “at that time.” However, they also concluded that the major contributing cause of the present condition was the preexisting condition. (Ex. 38-5).

On March 1, 2000, after re-reviewing the MRI, Dr. Dunn determined that conservative treatment had failed and that claimant required a discectomy at L5-S1, as well as a laminotomy and foraminotomy at L4-5. Dr. Dunn considered the L5-S1 herniated disc to be “more than 51 [percent] of the cause for [claimant’s] need for surgery.” (Ex. 42). Dr. Dunn concluded that: “I do believe [claimant’s] work activities, combined with his preexisting condition, caused his disability and need for medical treatment. I do feel that it is a reasonable medical probability that the work activities were the major contributing cause to the need for the treatment of the combined condition.” (Ex. 42A).

On March 13, 2000, Dr. Dunn performed a bilateral laminectomy and foraminotomy at L4-5 and right L5-S1 laminectomy and foraminotomy. Dr. Dunn did not find a herniated disc at L5-S1. (Ex. 45).

On January 23, 2001, Pinnacle denied responsibility for, in addition to the compensability of, claimant’s low back condition. Pinnacle asserted that responsibility might rest with SAIF. (Ex. 67).

On February 13, 2000, claimant wrote to SAIF, enclosing a copy of Pinnacle’s denial, and requested that SAIF accept responsibility under its claim for claimant’s “current condition and need for treatment.” (Ex. 67B). At the time

of hearing on April 9, 2002, SAIF had not issued a denial of compensability or responsibility. (O & O p. 5).

Claimant requested a hearing regarding Pinnacle's compensability and responsibility denials and SAIF's *de facto* denial of compensability and responsibility, seeking penalties against Pinnacle and SAIF.

CONCLUSIONS OF LAW AND OPINION

The ALJ upheld Pinnacle's denials, finding there had been no "new injury." The ALJ determined that the major cause of claimant's need for treatment in 1999 was the "SAIF" injury and its surgical sequelae, and that therefore, responsibility remained with SAIF. The ALJ declined to assess a penalty against Pinnacle because there were no "amounts then due." Finally, the ALJ declined to assess a penalty against SAIF, finding no statutory violation in its claim processing.

On review, both SAIF and claimant contend that the ALJ erred in determining that claimant did not sustain a new compensable injury. They argue that the persuasive medical evidence established that claimant's 1999 work injury combined with his preexisting conditions, and is the major contributing cause of his need for treatment for the combined condition. SAIF also contests the ALJ's determination that the claim is compensable as it relates to its accepted injury.

Compensability

We find that: (1) claimant sustained a new work-related low back injury in 1999; (2) this new injury combined with his preexisting condition; and (3) the 1999 injury was the major contributing cause of his disability and need for medical treatment. Therefore, we reverse the ALJ's order finding SAIF responsible for claimant's low back condition based on the following reasoning.

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).

To determine whether this claim involves a "combined condition," we examine the record for a persuasive medical opinion that the condition suffered by claimant in the October/November 1999 work injuries 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).

Because of the possible alternative causes for claimant's current low back condition, resolution of this matter is a complex medical question that must be resolved by expert medical opinion. *Uris v. Compensation Department*, 247 Or 420 (1967). In considering differing medical opinions as to causation, more weight is given to those which are well reasoned and based on complete information. *See Somers v. SAIF*, 77 Or App 259, 263 (1986). In evaluating medical opinions, we generally defer to the treating physician and surgeon, absent persuasive reasons to do otherwise. *See Argonaut Ins. Co. v. Mageske*, 93 Or App 698, 701 (1988); *Weiland v. SAIF*, 64 Or App 810 (1983).

There are essentially three medical opinions addressing causation in this record: (1) Dr. Dunn, claimant's treating orthopedic surgeon; (2) Drs. Woodward and Williams, orthopedic surgeon and neurosurgeon, who performed an IME at Pinnacle's request; and (3) Drs. Stanford and Watson, orthopedic surgeon and neurologist who performed a "chart review" at Pinnacle's request. (Exs. 38; 42; 42A; 54A; 61A; 64; 65; 66; 67E; 68).

Drs. Woodward and Williams concluded that the work injuries in October and November 1999 combined with claimant's preexisting conditions and were the major contributing cause of the need for treatment at that time. They also concluded that the major contributing cause of claimant's need for treatment *at the time of the IME* was the preexisting condition. (Ex. 38-5). We do not rely on the opinion of Drs. Woodward and Williams because they deferred to Dr. Dunn, as the treating surgeon, regarding his surgical findings. (Exs. 38; 61A; 65; 66; 67E-18).

Moreover, we find the opinion of Dr. Stanford and Dr. Watson unpersuasive because it was based on an incomplete medical record.¹ (Ex. 54A). At the time of Dr. Stanford's deposition, he still had not been provided with the complete medical record and he never commented on the surgical findings. Therefore, we find his deposition testimony unpersuasive. (Ex. 64-4).

Instead, we rely on the opinion of Dr. Dunn, claimant's treating surgeon, in finding that claimant sustained a new compensable injury in 1999 which resulted in a combined condition, the major contributing cause of which were claimant's October/November 1999 work activities. As the attending surgeon, Dr. Dunn was in the best position to interpret the surgical findings as they relate to the issue of causation. *See Mageske*, 93 Or App at 701; *Jeffrey C. Pella*, 54 Van Natta 250, 251 (2002).

Claimant's SAIF claim involved an L4-5 disc herniation with resultant surgery. Dr. Dunn's opinion is that claimant's 1999 work injuries combined with the prior injury, resultant surgery, and preexisting degenerative changes, with the 1999 work activities being the major contributing cause of a herniated disc at L5-S1 (which reabsorbed), pathological changes at the L4-5 level, and claimant's need for treatment and disability. (Exs. 42; 42A; 68-9 through 10, -14).

In his deposition, Dr. Dunn stated that his original diagnosis had changed, following his review of the November 1999 MRI, to include a herniated nucleus pulposus at L5-S1.² (Ex. 68-6). Dr. Dunn opined that the major contributing cause of the reabsorbed L5-S1 herniated disc and need for surgery was the 1999 work injury.³ (Exs. 42; 68-9-14). Dr. Dunn also concluded that the preexisting

¹ They apparently did not have any of claimant's medical records from the prior injury, Dr. Dunn's surgery report, or the November 1999 MRI studies to review. (Ex. 54A-3 through 4). Dr. Stanford's August 2000 deposition reveals that he still had not been provided with the prior injury records, the surgery report, or MRI. (Ex. 64-4).

² Dr. Dunn's initial diagnoses were "[p]reexisting foraminal stenosis and postoperative laminectomy aggravated by industrial injury." (Exs. 11-2; 68-5). The November 18, 1999 lumbar MRI finding at L5-S1 was described by radiologist Dr. Lewis as a "mild fairly broad-based, minimally greater to the right posterior disk bulge, slightly impressing upon the thecal sac." (Ex. 3).

³ Although Dr. Dunn did not consistently use the term "major contributing cause," taking his reports and deposition as a whole, we interpret his opinion to include that term. In doing so, we note that no incantation of "magic words" or statutory language is required to establish the compensability of a claim, provided the opinion otherwise meets the appropriate legal standard. *Freightliner Corp. v. Arnold*, 142 Or App 98 (1996).

condition at L4-5 was pathologically changed by the 1999 work injury which caused traumatic swelling, which in turn caused a worsening of the “tethering” at that level. (Ex. 68-13, -18).

When he performed surgery in March 2000, Dr. Dunn did not find a herniated disc at L5-S1; however, after reviewing the November 1999 MRI again during his deposition, he reiterated that it was his opinion that claimant did have a herniated disc at that level which had been reabsorbed sometime before the surgery. (Ex. 68-6 through 10). Dr. Dunn explained that claimant had reabsorbed the disc fragment and “basically healed his ruptured disk.” (Ex. 68-7). He further explained that he considered this “totally within the realm of probability,” as he had had 2 patients just that week who had reabsorbed disks despite having had documented MRI findings. (Ex. 68-10). Based on this essentially unrebutted explanation, the lack of a herniated disc at L5-S1 at the time of surgery does not cause us to reject Dr. Dunn’s conclusions.

Accordingly, relying on Dr. Dunn’s opinion, we are persuaded that claimant’s 1999 work injury was the major contributing cause of his need for medical treatment or disability for his “combined” L4-5 and L5-S1 conditions. Consequently, we conclude that claimant has established a compensable injury claim for those conditions. *See* ORS 656.005(7)(a)(B).

Responsibility

With regard to responsibility for claimant's L4-5 and L5-S1 conditions, we first address whether ORS 656.308(1) applies. We conclude that it does not.

ORS 656.308(1) applies if a worker sustains a "new compensable injury involving the same condition as that previously processed as part of an accepted claim." *SAIF v. Yokum*, 132 Or App 18 (1994) (Emphasis added). Based on the following reasoning, we conclude that claimant’s conditions do not involve the same *condition* accepted under the prior SAIF claim.

SAIF’s Notice of Claim Acceptance did not specify the accepted condition. Nonetheless, based on the pre-acceptance diagnosis and surgery, we conclude that the accepted condition under the prior SAIF claim was a right-sided disk herniation at L4-5 with resultant laminectomy. (Exs. C; D; Gc; L). The scope of acceptance is a question of fact. *SAIF v. Dobbs*, 172 Or App 446, 451, *on recons* 173 Or App 599 (2001). Where there has been a written acceptance, the scope of acceptance encompasses only those conditions specifically or officially accepted in

writing. *See Johnson v. Spectra Physics*, 303 Or 49, 56 (1987); *Jerry W. Gabbard*, 54 Van Natta 1022 (2002). On the other hand, where there has been an acceptance, but the carrier has not identified the specific condition accepted, we look to the contemporaneous medical records to determine the scope of acceptance. *Gilbert v. Cavenham Forest Industries*, 179 Or App 341, 344 (2002); *Nancy L. Sees*, 54 Van Natta 2017 (2002).

Following the 1999 work events, Dr. Dunn's diagnoses included: (1) lumbar strain; (2) herniated nucleus pulposus at L5-S1; (3) severe bilateral foraminal stenosis at L4-5; and (4) epidural fibrosis at L4-5. Based on the medical record, we are not persuaded that claimant's current L4-5 bilateral foraminal stenosis and epidural fibrosis and L5-S1 conditions are the same as his prior accepted L4-5 disk herniation.⁴ Accordingly, ORS 656.308(1) does not apply. *See Sanford v. Balteau Standard*, 140 Or App 177, 181 (1996); *Morgan S. Cagle*, 53 Van Natta 188, 189 (2001).

Under such circumstances, unless actual causation is established against a specific employer, we turn to judicially created rules regarding assignment of responsibility in successive employments. *See Eva R. Billings*, 45 Van Natta 2142, 2143 (1993). Because the evidence does not lend itself to an "actual causation" determination, we turn to the "last injury rule" to determine responsibility because the "SAIF" injury and the 1999 injury were "successive injuries" involving the *same body part (i.e., low back)*.⁵ *James A. Hoyt*, 52 Van Natta 346 (2000); *Morgan S. Cagle*, 53 Van Natta 188, 189 (2001); *John J. Saint*, 46 Van Natta 2224, 2226 (1994) (Emphasis added).

The last injury rule provides:

"The 'last injurious exposure' rule in successive injury cases places full liability upon the carrier covering the risk at the time of the most recent injury that bears a causal relation to the disability * * * If the second incident contributes independently to the injury, the second insurer is solely liable, even if the injury would have been much less severe in the

⁴ Even if ORS 656.308(1) applies to the L4-5 condition, Dr. Dunn's opinion supports a conclusion that the 1999 work injury was the major contributing cause of the need for treatment/disability. Therefore, responsibility would still shift to the 1999 employer under ORS 656.308(1).

⁵ Assuming that "actual causation" was applied, the result would be the same based on Dr. Dunn's medical opinion.

absence of the prior condition, and even if the prior injury contributed the major part to the final condition." *Hensel Phelps Const. v. Mirich*, 81 Or App 290, 293-94 (1986) (quoting *Smith v. Ed's Pancake House*, 27 Or App 361, 364-65 (1976) (quoting 4 *Larson, Workmen's Compensation Law* sec, 95.12 (1976)); *Hoyt*, 52 Van Natta at 348 (footnote omitted)."

Based on the above-quoted rule, an independent contribution to the current condition by the second injury is required to place full responsibility upon the carrier covering the risk at the time of the second injury. Here, relying on Dr. Dunn's medical opinion, we find that claimant's 1999 injuries independently contributed to his current low back condition. (Exs. 42; 42A; 68-9-10, -12-14, -18-19, -24-25, 27-28, 31).

Therefore, based on Dr. Dunn's opinion, we find that Pinnacle, as the carrier for the second injury employer, is solely responsible for claimant's current low back condition, disability and need for treatment. Accordingly, we set aside Pinnacle's denial and reinstate SAIF's *de facto* denial.

Claimant's attorney is entitled to an assessed fee for services at hearing and on review regarding Pinnacle's compensability and responsibility denials. ORS 656.386(1); ORS 656.308(2)(d). 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 Pinnacle.⁶ 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 issues, the value of the interest involved, and the risk that counsel may go uncompensated.

Penalties

Turning to the penalty issue, we find that a penalty is warranted against SAIF for an unreasonable failure to respond to claimant's medical services claim. This conclusion is based on the following reasoning.

⁶ This attorney fee award is in lieu of the ALJ's \$4,500 attorney fee award payable by SAIF.

On February 13, 2001, claimant's attorney sent a copy of Pinnacle's January 23, 2001 responsibility denial to SAIF and requested that SAIF accept "responsibility" under its accepted claim for "[claimant's] current condition and need for treatment." (Ex. 67B). SAIF did not accept or deny the claim for over a year.

Claimant did not file a new or omitted condition claim pursuant to ORS 656.262(6)(d); however, he did ask SAIF to process the claim based on its accepted condition. (Ex. 67B; 67D). That brings the claim within ORS 656.245.⁷ SAIF's position is that claimant had not requested acceptance of a new or omitted condition. However, that position does not explain its failure to process the medical service claim under the accepted portion of the low back claim.

Therefore, we assess a penalty of 25 percent against SAIF, based on the compensation "then due," as of the date of hearing, under the Pinnacle claim, as a result of our order. *See SAIF v. Whitney*, 130 Or App 429, 432 (1994); *Morgan S. Cagle*, 53 Van Natta 188, 189-190 (2001). One-half of the penalty is to be paid to claimant's attorney. ORS 656.262(11)(a).

We find that a penalty against Pinnacle is not warranted. We reason as follows.

A penalty for unreasonable denial may be assessed against an insurer for unreasonable delay or refusal to pay compensation. ORS 656.262(11). In determining if a denial is unreasonable, the question is whether the insurer had a legitimate doubt as to its liability. *International Paper Co. v. Huntley*, 106 Or App 107 (1991). If the insurer had a legitimate doubt as to its liability, then the denial was not unreasonable. Unreasonableness and legitimate doubt are to be considered in light of all the evidence available to the insurer at the time of the denial. *Brown v. Argonaut Insurance Company*, 93 Or App 588, 591-592 (1988).

Here, at the time of Pinnacle's January 4, 2000 compensability denial, Dr. Dunn had diagnosed "[p]re-existing foraminal stenosis and postoperative laminectomy aggravated by industrial injury." (Ex. 11-2). Because Dr. Dunn referred to a preexisting stenosis condition, we conclude that Pinnacle had a legitimate doubt regarding its liability for claimant's current low back condition.

⁷ SAIF was obligated to respond to a medical services claim under its accepted claim. *See Donald P. James*, 48 Van Natta 424, 426 (1996).

Accordingly, Pinnacle's denial was not unreasonable and a penalty is not warranted.

ORDER

The ALJ's order dated May 9, 2002 is affirmed in part and reversed in part. Pinnacle's denials are set aside and the claim is remanded to Pinnacle for processing according to law. The SAIF Corporation's *de facto* denial is reinstated and upheld. For its unreasonable claim processing, SAIF is assessed a penalty of 25 percent of the amounts then due, under the Pinnacle claim, as of the date of hearing as a result of this order. SAIF is ordered to pay one-half of this penalty to claimant and one-half to claimant's attorney. In lieu of the ALJ's attorney fee award, for services at hearing and on review regarding Pinnacle's denials, claimant's attorney is awarded a fee of \$5,500, payable by Pinnacle. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on March 14, 2003