

In the Matter of the Compensation of
LIBOR SYKORA, Claimant
Own Motion No. 03-0055M
OWN MOTION ORDER
John M Hoadley, Claimant Attorneys
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Reviewing Panel: Members Langer and Biehl.

The insurer has submitted claimant's request for claim reopening for a "post-aggravation rights" omitted medical condition, diagnosed as a L4-5 disc bulge, and for a worsening of his previously accepted conditions of lower back strain and sciatica. ORS 656.278(1)(a), (b) (2001). Claimant's aggravation rights have expired. The insurer opposes reopening, contending that claimant's omitted L4-5 disc bulge condition is not related to his previously accepted claim, and that claimant's accepted conditions have not worsened.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact" set forth in the Opinion and Order, and Own Motion Recommendation, as summarized and supplemented below.

Claimant compensably injured his back while working as an auto repair technician in December 1996. One of claimant's treating physicians, Dr. O'Neill, identified an L4-5 disc herniation as a component of claimant's injury. (Exs. 4, 11, 15). The insurer accepted the claim for a lower back strain and sciatica on February 5, 1997. (Ex. 16). The claim was closed by Notice of Closure on June 18, 1997, with no award of permanent disability. (Ex. 19). Claimant's aggravation rights expired on June 18, 2002.

On April 15, 2000, claimant sought treatment with Dr. Krisciunas for low back pain. Claimant testified that in the interval between closure of his claim until this time, he had intermittent back problems, seven to ten times per year, with each episode usually lasting a few days. Dr. Krisciunas reported that the 1996 CT scan demonstrated a herniated disc at L4-5. His diagnosis was recurrence of herniated disc. (Exs. 20, 21). On April 18, 2000, claimant underwent an MRI of the lumbar spine, which revealed degenerative disc disease at L4-5 with loss of disc height and mild disc bulging. (Ex. 22).

On January 30, 2002, claimant underwent an MRI, which revealed partial degeneration of the L4-5 and L5-S1 discs. (Ex. 30A). There was a prominent posterior bulge of the annulus fibrosis at the L4-5 level.

On February 7, 2002, claimant saw Dr. Rosenbaum. (Ex. 39A). Dr. Rosenbaum reported that the MRI scan of January 30, 2002 demonstrated annular bulging at L4-5 and L5-S1, but no abnormalities of clinical significance. (Ex. 39A-2). He diagnosed musculoskeletal symptoms, and referred claimant to Dr. Krisciunas for conservative care as necessary.

Claimant was treated by Dr. Lindquist on February 21, 2002. (Ex. 47). Dr. Lindquist reviewed the January 30, 2002 MRI, finding them consistent with degenerative disc disease at L4-5 and L5-S1 with degenerative disc bulges at both levels. (Ex. 47-3). The clinical examination did not suggest lumbar radiculopathy. Dr. Lindquist opined that it was more likely that the right buttock and right posterior thigh pain were attributable to referred pain from the paralumbosacral musculature. (Ex. 47-3).

On March 25, 2002, claimant attended an insurer-requested medical examination, performed by Dr. Schilperoort. Dr. Schilperoort's history indicated that claimant had intermittent low back pain for approximately ten years. (Ex. 52-3). Dr. Schilperoort reviewed the medical records, the MRI scan of January 30, 2003, and the reports of the MRI scans from 1996 and 2000. (Ex. 52-6). He diagnosed L4-5 and L5-S1 degenerative disc disease, evolutionary and degenerative in nature, preexisting and not causally related to the January 28, 2002 episode. (Ex. 52-6).

On April 11, 2002, Dr. Krisciunas did not concur with Dr. Schilperoort's opinions. (Ex. 55A).

Claimant sought treatment with Dr. Thomas on April 8, 2002. (Exs. 56, 57, 58). Dr. Thomas reviewed claimant's MRI as demonstrating a prominent bulge at L4-5, but no disc herniation. He opined that the bulging disc probably occurred in the 1996 injury.

On August 14, 2002, claimant made a claim for a "bulging disc at the L4-5 level" as a condition omitted from the insurer's acceptance of his 1996 injury claim. (Ex. 60).

On September 13, 2002, Dr. Rosenbaum opined that the MRI scans taken in 1996, 2000, and 2002 revealed essentially the same degree of degenerative disc disease, which he believed in all probability was not caused by the December 3, 1996 work injury. Dr. Rosenbaum concluded that claimant's symptoms were primarily musculoskeletal and functional in origin, and not due to any specific disc pathology.

On November 20, 2002, Dr. Schilperoort stated that review of the MRI films and Dr. Rosenbaum's September 13, 2002 report had not caused him to change his opinion. He also indicated that the amount of degenerative disc disease displayed in the 1996 and 2002 MRIs was virtually identical. He opined that it was unlikely that the bulging disc at L4-5 was caused by work activity on either December 3, 1996 or January 28, 2002.

On January 27, 2003, Dr. Thomas opined that the major contributing cause of claimant's L4-5 disc bulge was the December 1996 injury. (Ex. 62). He based his opinion on the fact that claimant had not previously experienced back problems before the December 1996 injury, that he experienced pain immediately afterward, and on the consistency of the mechanism of injury with the bulging disc condition. Dr. Thomas also stated that the fact that the MRI taken weeks after the injury showed that the discs from L1 to L4 were not degenerated made it unlikely that the cause of the L4-5 disc problem was primarily degenerative in nature.

On February 3, 2003, Dr. O'Neill stated the fact that claimant had not previously had back problems and that the work activity was consistent with his injury were two factors that supported his 1997 opinion that claimant's L4-5 herniated disc was related to his December 1996 injury. (Ex. 64). Dr. O'Neill's opinion would not change if later MRI scans showed no progression of the injured disc. (Ex. 64).

A hearing was convened on February 3, 2003. Following the hearing, the ALJ submitted a letter to the parties and the Board, noting the parties' concerns regarding possible jurisdictional conflicts regarding claimant's hearing request. The issues at the hearing included the compensability of the "post-aggravation rights" omitted medical condition claim. *See Pamela A. Martin*, 54 Van Natta 1852 (2002) (applying *James J. Kemp*, 54 Van Natta 491 (2002), Board determined that the Hearings Division did not have jurisdiction over a "post-aggravation rights" new medical condition claim).

On March 24, 2003, we issued an order consolidating the Own Motion matter concerning the “post-aggravation rights” omitted medical condition claim with the pending litigation. On August 8, 2003, the ALJ issued an Opinion and Order addressing, in part, the compensability of claimant’s L4-5 disc bulge as a “post-aggravation rights” omitted medical condition. The ALJ concluded that claimant’s L4-5 disc bulge was compensable, and awarded a \$3,750 attorney fee to claimant’s attorney. In addition, the ALJ submitted an Own Motion Recommendation, recommending that claimant’s 1996 claim be reopened pursuant to ORS 656.278(1)(b) (2001).

CONCLUSIONS OF LAW AND OPINION

We received the insurer’s Own Motion Recommendation on March 10, 2003.¹ As such, the Own Motion Board can now proceed with its review of claimant’s “post-aggravation rights” omitted medical condition claim pursuant to ORS 656.278(1)(b) (2001), and worsening claim pursuant to ORS 656.278(1)(a) (2001).

The requirements for reopening a claim for a “post-aggravation rights” new or omitted medical condition are: (1) the new or omitted medical condition claim must have been initiated after the expiration of the claimant’s aggravation rights under ORS 656.273; and (2) the new or omitted medical condition must be accepted or compensable. *William E. Hartzog*, 54 Van Natta 593 (2002); *James J. Kemp*, 54 Van Natta 491, 507-08 (2002).

Here, the claim for an omitted medical condition involving claimant’s low back was initiated in August 2002, after the expiration of his aggravation rights under ORS 656.273. Thus, we address the compensability of claimant’s “post-aggravation rights” omitted medical condition (L4-5 disc bulge).

The insurer contends that claimant had preexisting degenerative disc disease that combined with his December 1996 injury, and that claimant must prove that his injury was the major contributing cause of his disability or need for treatment

¹ In accordance with OAR 438-012-0030, the carrier is obligated to either voluntarily reopen the claim for the processing of the new and/or omitted medical condition claim or file an Own Motion Recommendation (either recommending for or against reopening). For “post-aggravation rights” new or omitted medical condition claims arising *on or after* September 1, 2003, if the carrier issues a denial pursuant to *amended* OAR 438-012-0024, the provision is not applicable here because the “post-aggravation rights” new or omitted medical condition claim was initiated *before* September 1, 2003. See *Keith A. Broeckel*, 55 Van Natta 3572 (2003).

of his combined condition. In addition, the insurer argues that the mechanism of injury, *i.e.*, bending over reaching into an engine compartment, was too mild to cause a disc to bulge or herniate.

If claimant's L4-5 disc bulge condition was the product of a "combined condition" under ORS 656.005(7)(a)(B), he must show that his work injury was the major contributing cause of his disability and/or need for treatment of the combined condition. *SAIF v. Nehl*, 148 Or App 279, 283 (1993). In the absence of a "combined condition," claimant need only prove that the alleged injury was a material contributing cause of the need for treatment. *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).

Based on the record, we find that claimant has met his burden of establishing the compensability of his L4-5 disc bulge, regardless of whether the claim is analyzed as a direct result of the injury, under a material contributing cause standard, or as a "combined" condition, under the major contributing cause standard.

Because of the possible alternative causes for claimant's L4-5 disc herniation condition, this matter involves a complex medical question that must be resolved by expert medical opinion. *See Uris v. Compensation Dept.*, 247 Or 420 (1967). When, as here, there is a dispute between medical experts as to causation, more weight is given to those medical opinions that are well reasoned and based on complete information. *Somers v. SAIF*, 77 Or App 259, 263 (1983). Absent persuasive reasons to the contrary, we give greater weight to the opinion of claimant's treating physician. *Weiland v. SAIF*, 64 Or App 810 (1983); *Darwin B. Lederer*, 53 Van Natta 974 n2 (2001). However, we properly may or may not give greater weight to the opinion of the treating physician depending on the record in each case. *Dillon v. Whirlpool Corp.*, 172 Or 484, 489 (2001).

The insurer relies on the opinions of Drs. Rosenbaum, Schilperoort, Lindquist and Fiks. Claimant relies on the opinions of Drs. O'Neill and Thomas.

Dr. Rosenbaum treated claimant on one occasion in February 2002. (Ex. 39A). He reviewed a January 2002 MRI, and diagnosed musculoskeletal symptoms. On September 10, 2002, Dr. Rosenbaum opined that claimant's MRI scans in 1996, 2000 and 2002 essentially revealed the same degree of degenerative disc disease, which he did not believe was caused by claimant's December 1996

injury. (Ex. 60A). He stated that claimant's symptoms were primarily musculoskeletal with functional overlay.

Dr. Rosenbaum did not appear to have an accurate description of claimant's December 1996 injury, nor did he discuss any potential relationship, or lack thereof, between the injury and claimant's L4-5 disc bulge. *Somers*, 77 Or App at 263. The fact that claimant's symptoms in 2002 may have been musculoskeletal does not explain whether or not claimant's L4-5 disc bulge is due to the December 1996 injury. As such, we do not find Dr. Rosenbaum's opinion persuasive.

Similarly, Dr. Schilperoort, who examined claimant on behalf of the insurer, agreed with Dr. Rosenbaum that claimant's 1996, 2000, and 2002 MRI scans revealed essentially the same degree of degenerative disc disease. He opined that claimant's current condition was due in major part to degenerative disc disease, and that it was medically unlikely that claimant's bulging disc at L4-5 was caused by his work activity on either December 3, 1996 or January 28, 2002. (Ex. 61). However, Dr. Schilperoort did not provide a persuasive explanation as to the relationship, or lack thereof, between claimant's December 1996 injury and his L4-5 disc bulge. In addition, his opinion is based on an inaccurate history. Dr. Schilperoort stated that claimant had experienced back problems for ten years prior to 2002, however, the record establishes that claimant's first episode of back pain was his injury in December 1996. (Ex. 52). As a result, we do not find Dr. Schilperoort's opinion persuasive. *Somers*, 77 Or App at 263.

Dr. Lindquist, who reviewed claimant's "most recent" MRI, also opined that the findings were consistent with degenerative disc disease at L4-5 and L5-S1, with degenerative disc bulge at both levels. (Ex. 47-3). However, Dr. Lindquist did not appear to review claimant's MRI scans, except for his "most recent" scan. In addition, she did not provide any explanation as to the relationship, or lack thereof, between claimant's December 1996 injury and his L4-5 disc bulge when she opined that the disc bulge was degenerative. *Somers*, 77 Or App at 263. Accordingly, we do not find Dr. Lindquist's opinion persuasive.²

In contrast, we find that the opinions of Drs. Thomas and O'Neill, claimant's treating physician, persuasively establish the compensability of

² The insurer also relies on the opinion of Dr. Fiks, who diagnosed claimant's condition as lumbosacral disk degeneration. (Ex. 51). However, Dr. Fiks did not provide any explanation for his diagnosis, or discuss the relationship, or lack thereof, of claimant's condition to his L4-5 disc bulge. As a result, Dr. Fiks' opinion is not persuasive.

claimant's L4-5 disc bulge on a major contributing cause basis. Dr. O'Neill was claimant's treating physician at the time of his injury. As such, he was the only physician who had the opportunity to examine claimant close in time to the injury. *See Weiland v. SAIF*, 64 Or App 810 (1983) (treating physician's opinion is entitled to greater weight because he or she has had a better opportunity to observe and evaluate a claimant's condition over an extended period of time); *see also McIntyre v. Standard Utility Contractors, Inc.*, 135 Or App 298 (1995) (a treating physician's opinion is less persuasive when the physician did not examine the claimant immediately following the injury). Dr. O'Neill reviewed the December 1996 CT and MRI scans in the course of his treatment at the time. He consistently attributed claimant's L4-5 disc bulge to his December 1996 injury, and based his opinion on the fact that claimant had no prior back problems, as well as claimant's symptoms and the mechanism of injury. (Exs. 7, 15, 64).

While Dr. Thomas did not treat claimant close in time to the injury, he opined that it was probable that the major contributing cause of claimant's L4-5 disc bulge was the December 1996 incident. He based his opinion, in part, on his review of the MRI findings, as well as claimant's lack of back problems prior to the incident, his presentation of symptoms at the time of injury, and the mechanism of injury. Dr. Thomas also explained that the December 1996 MRI did not reveal degenerative findings from L1 to L4, which made it unlikely that claimant's L4-5 disc problem was primarily degenerative in nature. (Exs. 6-3, 62). Drs. Rosenbaum, Schilperoort and Lindquist did not discuss the significance of the lack of degenerative findings at claimant's other levels, nor did they discuss the opinions of Drs. O'Neill and Thomas as a whole.

We find that the opinions of claimant's treating physicians, Drs. O'Neill and Thomas, persuasively establish that the probable major contributing cause of claimant's L4-5 disc bulge condition was his December 1996 injury. As a result, we conclude that claimant L4-5 disc bulge condition is compensably related to his December 1996 injury.³

³ In accordance with OAR 438-012-0030, the employer is obligated to either voluntarily reopen the new and/or omitted medical condition claims or file an Own Motion Recommendation (either recommending for or against reopening). For "post-aggravation rights" new or omitted medical condition claims arising *on or after* September 1, 2003, if the carrier contends that the claim is not compensable, it also must issue a denial pursuant to *amended* OAR 438-012-0024 and OAR 438-012-0070, with review to the Hearings Division. However, those provisions are not applicable here because the "post-aggravation rights" new or omitted medical condition claim was initiated *before* September 1, 2003. *See Keith A. Broeckel*, 55 Van Natta 3572 (2003).

Finally, we find that claimant is entitled to an assessed attorney fee award pursuant to ORS 656.386(1) (1997). Because the employer did not respond to claimant's L4-5 disc bulge condition claim under the Board's Own Motion rules, there was a "denied claim" under ORS 656.386(1)(b)(C) (1997). *See Shirlee Samel*, 55 Van Natta 2634, 2646 (2003). Moreover, we have found claimant's "post-aggravation rights" new or omitted medical condition claim compensable. Thus, we find that claimant has finally prevailed in a review by the Own Motion Board regarding that "denied claim," thereby satisfying both requirements for an award of an assessed reasonable attorney fee. ORS 656.386(1)(a) (1997); *Samel*, 55 Van Natta at 2647. Accordingly, claimant is entitled to an assessed fee under ORS 656.386(1)(a) (1997).

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 regarding the "post-aggravation rights" new or omitted medical condition (L4-5 disc bulge) is \$4,500, payable by the insurer. In reaching this conclusion, we have particularly considered the time devoted to the new or omitted medical condition claim issue (as represented by the hearing record and claimant's written arguments), the complexity of the issue, the value of the interests involved, and the risk that claimant's counsel might go uncompensated.

Accordingly, we authorize the reopening of claimant's "post-aggravation rights" new or omitted medical condition claim (L4-5 disc bulge) for the insurer to provide benefits in accordance with law.⁴ *See* ORS 656.278(1)(b) (2001). When claimant's new or omitted medical condition is medically stationary, the insurer shall close the claim pursuant to OAR 438-012-0055. Claimant's attorney is awarded a \$4,500 assessed attorney fee, payable by the insurer.

IT IS SO ORDERED.

Entered at Salem, Oregon on March 24, 2004

⁴ In light of our "post-aggravation rights" new medical condition claim determination, claimant's ORS 656.278(1)(a) (2001) claim for a "worsening" of his lower back strain and sciatica will not be reopened. The medical evidence establishes that claimant's current condition is an L4-5 disc bulge, rather than a "worsening" of the previously accepted conditions.