
In the Matter of the Compensation of
BILL J. NEWMAN, Claimant
WCB Case No. 02-06094, 02-06093
ORDER ON REVIEW
Malagon Moore et al, Claimant Attorneys
Sheridan Levine LLP, Defense Attorneys
Johnson Nyburg & Andersen, Defense Attorneys

Reviewing Panel: Members Lowell and Kasubhai.

Kemper Insurance Companies (Kemper) requests review of that portion of Administrative Law Judge (ALJ) Howell's order that: (1) set aside its responsibility denial of claimant's low back condition; and (2) upheld Wausau Insurance Companies' (Wausau's) responsibility denial of the same condition. In its reply brief, Kemper moves to strike Wausau's respondent's brief as untimely filed. On review, the issues are motion to strike and responsibility.

We deny the motion to strike and adopt and affirm the ALJ's order with the following supplementation.¹

The ALJ determined that Kemper, the insurer on the risk prior to October 1, 2001, and the insurer presumptively responsible for claimant's low back condition, was ultimately responsible for claimant's low back condition.² The ALJ reasoned that the medical evidence did not establish that claimant's employment activities after October 1, 2001, when Wausau was on the risk, independently contributed to a worsening of claimant's underlying back condition. In making this determination, the ALJ found most persuasive the medical opinion of an examining physician, Dr. Arbeene, who opined that there had no worsening after that date.

On review, Kemper contends that the medical opinion of Dr. Kokkino, claimant's attending physician, was the most persuasive and establishes

¹ Kemper moves to strike Wausau's respondent's brief because it did not serve a copy on Kemper or its counsel when the brief was filed. OAR 438-005-0046(2)(a) provides that a true copy of anything filed under the Board's rules shall be simultaneously served to each other party, or to their attorneys. Wausau concedes that it failed to timely serve a copy of its respondent's brief on counsel for Kemper. However, noting that it subsequently provided a copy to Kemper (which has filed its reply brief), Wausau opposes Kemper's motion to strike. Inasmuch as no party has been aggrieved by Wausau's untimely compliance with the briefing schedule, we decline to strike Wausau's respondent's brief. *See Robert E. Peterson*, 44 Van Natta 2275 (1992).

² The ALJ initially determined that claimant's low back condition was compensable, a determination that is not contested on review.

independent contribution to claimant's underlying low back condition after October 1, 2001. Thus, Kemper asserts that the ALJ incorrectly decided the responsibility issue. For the following reasons, we disagree with Kemper's assertion.

The parties do not dispute that Kemper was presumptively responsible for claimant's low back condition. Responsibility for claimant's low back condition shifts to a later employment (when Wausau was on the risk) if the "later employment contributed independently to the cause or worsening" of the condition. *MacMillan Plumbing v. Garber*, 163 Or App 165, 170 (1999); *see Bracke v. Baza'r*, 293 Or at 250 (once assigned, responsibility may shift forward if later work activities "contribute to the cause of, aggravate, or exacerbate the underlying disease").

In deciding the responsibility issue, the ALJ determined that Dr. Arbeene's opinion was the most persuasive because he actually reviewed and compared MRI scans taken in August 2001 and April 2002 and concluded that there was no worsening of claimant's underlying low back condition. By contrast, the ALJ determined that Dr. Kokkino had not actually reviewed the MRI scans and had "assumed" a pathological worsening had occurred based on the reports of radiologists.

The key medical reports from Dr. Kokkino are a November 5, 2002 concurrence report and a narrative report written that same day. (Exs. 83, 85). In the concurrence report, Dr. Kokkino agreed that that he had reviewed and compared the above-mentioned MRI scans and that they had showed a pathological change at L5-S1. Dr. Kokkino further agreed that claimant's "post October 1, 2001" employment contributed to a pathological worsening of claimant's left lumbar radiculopathy and that contribution amounted to 20 percent. (Ex. 83-2).

In his narrative report, however, it is not clear that Dr. Kokkino actually reviewed the relevant MRI scans. Dr. Kokkino stated that "MRI reports" led one to believe that the April 2002 MRI scan revealed a disc extrusion, as opposed to the previous scan which only revealed a disc protrusion or bulge. Dr. Kokkino then stated that "without the films in front of me," one would "assume" a pathological change on the MRI. (Ex. 85-1).

Having reviewed the two reports, it appears that Dr. Kokkino was inconsistent, or at least ambiguous, in reporting whether he had actually compared the MRI scans. In contrast, it is clear that Dr. Arbeene had actually reviewed and

compared the film. He characterized the films as “comparable” or the “same.” (Ex. 82-5).

Kemper points to Dr. Kokkino’s statement that there had been a “pathological clinical change.” (Ex. 85-1). However, it is unclear whether Dr. Kokkino was referring to the alleged change in MRI findings or something found in his examination.

Apart from the above ambiguities or inconsistencies, there is another troubling aspect to Dr. Kokkino’s opinion. In his concurrence report, Dr. Kokkino agreed that “post October 1, 2001” work had independently contributed to claimant’s low back condition at L5-S1. However, in the narrative report, he placed the “blame” for the alleged pathological change on a “preexisting condition.” (Ex. 85-1).

In conclusion, having reviewed Dr. Kokkino’s medical opinion, we agree with the ALJ that it is not persuasive. The ALJ properly relied on Dr. Arbeene’s opinion based on an actual review and comparison of the relevant MRI scans. Accordingly, we affirm.

Although the insurers did not offer any specific arguments on the issue of compensability on review, by virtue of our *de novo* review authority over the ALJ’s order, claimant’s compensation was potentially at risk on Board review. *See Michele A Jachalke*, 53 Van Natta 1061, 1062 (2001), *citing Dennis Uniform Manufacturing v. Teresi*, 115 Or App 252, 253 (1992), *mod* 119 Or App 447 (1993). Accordingly, we find that claimant’s attorney is entitled to an assessed fee under ORS 656.382(2) for services on review.

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 on review is \$1,000, payable by Kemper. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant’s respondent’s brief), the complexity of the issue, the value of the interest involved, and the risk that claimant’s counsel might go uncompensated.

ORDER

The ALJ’s order dated October 1, 2003 is affirmed. For services on review, claimant’s attorney is awarded an assessed fee of \$1,000, to be paid by Kemper.

Entered at Salem, Oregon on March 29, 2004