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In the Matter of the Compensation of  
**RONALD W. ANDERSEN, Claimant**  
WCB Case No. 05-05484  
ORDER ON REVIEW  
Guinn & Munns, Claimant Attorneys  
Sather Byerly & Holloway, Defense Attorneys

Reviewing Panel: Members Kasubhai and Lowell.

The self-insured employer requests review of Administrative Law Judge (ALJ) Sencer's order that set aside its compensability and responsibility denial of claimant's injury claim for a low back condition. On review, the issues are compensability and responsibility.

We adopt and affirm the ALJ's order with the following changes and supplementation.<sup>1</sup> In the last paragraph on page 3, we delete the fourth sentence.

Compensability

At hearing, claimant asserted that he sustained an injury to his low back when the truck on which he was working slipped off a lift and rolled backwards. Several witnesses testified concerning the circumstances of claimant's July 26, 2005 injury. The ALJ reasoned that, although the testimony varied with respect to the distance the truck traveled backwards after falling off the lift and whether it struck the truck behind it, there was no dispute that the truck did fall off the lift and rolled backwards while claimant was working in the engine compartment. The ALJ found that claimant had reported symptoms to a coworker the night of the injury. In addition, the following day, claimant discussed the incident with the employer's occupational therapist, Mr. Collins.

The ALJ concluded that claimant sustained a work-related injury on July 26, 2005. The ALJ was not persuaded that claimant had sustained an acute injury to his back in the course of off-work gardening activities on July 30 and 31, 2005. The ALJ determined that the medical evidence established that claimant's initial need for medical treatment was related to the July 26, 2005 work incident.

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<sup>1</sup> We note that the transcript of the reconvened hearing states that it was held on November 30, 2006, but the ALJ's order reflects that the hearing was reconvened on January 30, 2006. (Tr. II).

On review, the employer argues that claimant's low back condition was not caused by an incident at work on July 26, 2005. The employer contends that the testimony of other witnesses and contemporaneous records contradicted claimant's testimony regarding the severity of the truck incident. The employer further argues that the medical evidence is not sufficient to establish causation.

Claimant has the burden of proving that an injury is compensable. ORS 656.266. Legal causation is established by showing that claimant engaged in potentially causative work activities; whether those work activities caused claimant's condition is a question of medical causation. *Cai Ling Huang*, 55 Van Natta 3445, 3448 (2003).

Because the ALJ did not make demeanor-based credibility findings of the witnesses, we evaluate the credibility of the witnesses based on an objective evaluation of the substance of the testimony. *Coastal Farm Supply v. Hultberg*, 84 Or App 282 (1987).

We acknowledge that some of claimant's testimony conflicts with testimony from other witnesses. Nevertheless, based on our *de novo* review, we agree with the ALJ's conclusion that claimant sustained a work-related injury on July 26, 2005. With respect to any inconsistent statements, we do not find them sufficient to defeat claimant's claim where, as here, the record as a whole supports his testimony. *See Westmoreland v. Iowa Beef Processors*, 70 Or App 642 (1984), *rev den*, 298 Or 597 (1985).

In addition, we agree with the ALJ that claimant has established medical causation. Claimant must prove that the July 2005 work incident was at least a material contributing cause of his disability or need for treatment associated with his low back. ORS 656.005(7)(a); ORS 656.266(1). Because the medical evidence does not demonstrate that the work incident combined with a preexisting condition to cause or prolong disability or need for treatment, we agree with the ALJ that ORS 656.005(7)(a)(B) does not apply.

Dr. Price and the examining physicians, Drs. Strum and Williams, attributed claimant's initial need for treatment to the July 26, 2005 incident. Although the employer argues that Dr. Price relied on inaccurate facts regarding the injury, we find that he had an adequate understanding of claimant's mechanism of injury on July 26, 2005. (Ex. 29-11, -12, -17).

Furthermore, the opinion of Mr. Collins, the employer's occupational therapist, establishes that claimant's July 26, 2005 work incident caused a lumbar strain. Mr. Collins saw claimant on July 27, 2005 when he complained of pain in his back and left hamstring. (Tr. II-59). Mr. Collins' chart note said that claimant was "jarred on swingshift last night when leaning backward over a truck tire and the truck began to roll delivering an abrupt force to his extended spine." (Ex. 6). Mr. Collins diagnosed a lumbar strain from blunt trauma. (*Id.*) At hearing, Mr. Collins testified that, based on the July 27th exam, he had no doubt that, as of that date, claimant had sustained a lumbar strain as a result of the work incident. (Tr. II-64, -65).

Although the employer argues that claimant's low back condition was caused by gardening activities at home, the medical opinions do not support that conclusion. Drs. Strum and Williams reported that claimant had some spasm after gardening, but he had already been persistently symptomatic since the July 26, 2005 work incident. (Ex. 20-4). They did not attribute claimant's low back condition to gardening activities. Instead, they concluded that claimant sustained a hyperextension injury at work on July 26, 2005. (Ex. 20-7). *See Jackson County v. Wehren*, 186 Or App 555, 560-61 (2003) (a history is complete if it includes sufficient information on which to base the opinion and does not exclude information that would make the opinion less credible); *Dorothy S. Calliham*, 59 Van Natta 137 (2007) (where other medical opinions attached no significance to certain facts, failure to evaluate those facts did not undermine the persuasiveness of medical opinion).

### Responsibility

Claimant had sustained a previous low back injury on April 5, 2005, while working for Swift Transportation. Swift accepted a thoracolumbar strain. (Ex. 3B).

On review, the employer relies on ORS 656.308(1) and argues that Swift remains responsible for claimant's back condition because he has not established a new compensable injury involving the same condition in order to shift responsibility to the employer. We disagree.

Under ORS 656.308(1),<sup>2</sup> responsibility for a compensable injury remains with an employer "unless the worker sustains a new compensable injury involving the same condition." A new compensable injury "involves the same condition" if the new injury meets either of the following definitions: "6a: to have within or as part of itself: CONTAIN, INCLUDE \* \* \* c: to have an effect on: concern directly: AFFECT \* \* \*." *Multifoods Specialty Distribution v. McAtee*, 333 Or 629, 635 (2002) (quoting *Webster's Third New Int'l Dictionary*, 1191 (unabridged ed. 1993)).

The medical evidence does not support the conclusion that claimant's July 2005 claim involves the "same condition" that was previously accepted in April 2005. To the contrary, Dr. Price testified that the April 2005 injury was not playing a role in claimant's current back symptoms. (Ex. 30-9). Drs. Strum and Williams concluded that the April 2005 lumbosacral strain was objectively resolved and medically stationary, and explained that, because claimant had been asymptomatic for several weeks before the July 26, 2005 injury, that was a "separate" incident. (Ex. 20-4, -7).

Because there is no medical evidence establishing that claimant's July 2005 claim involved the same condition accepted in April 2005, ORS 656.308(1) does not apply and Swift is not responsible. *See Clifford H. McClure*, 57 Van Natta 2241 (2005) (because there was no persuasive medical evidence establishing that the L5-S1 herniated disc "involved" the lumbosacral sprain accepted by a previous carrier, ORS 656.308(1) did not apply). We conclude that the employer is responsible for claimant's low back condition.

Claimant's attorney is entitled to an assessed fee for services on review. ORS 656.382(2). 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 \$2,000, payable by the employer. In reaching this

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<sup>2</sup> ORS 656.308(1) provides, in part:

"When a worker sustains a compensable injury, the responsible employer shall remain responsible for future compensable medical services and disability relating to the compensable condition unless the worker sustains a new compensable injury involving the same condition. If a new compensable injury occurs, all further compensable medical services and disability involving the same condition shall be processed as a new injury claim by the subsequent employer."

conclusion, we have particularly considered the time devoted to the case (as represented by claimant's respondent's brief), the complexity of the issues, and the value of the interest involved.

ORDER

The ALJ's order dated June 2, 2006 is affirmed. For services on review, claimant's attorney is awarded \$2,000, payable by the employer.

Entered at Salem, Oregon on February 14, 2007