
In the Matter of the Compensation of
CATHERINE REID, Claimant
WCB Case No. 07-03804
ORDER ON REVIEW
Malagon Moore et al, Claimant Attorneys
Bruce A Bornholdt, SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Biehl and Langer.

The SAIF Corporation requests review of those portions of Administrative Law Judge (ALJ) Myzak's order that: (1) set aside its denial of claimant's new/omitted medical condition claim for a C5-6 disc injury; and (2) set aside its denial of her current combined cervical condition. On review, the issue is compensability. We affirm in part and reverse in part.

FINDINGS OF FACT

We adopt the ALJ's findings of fact with the following changes. In the second paragraph on page 1, we change the second sentence to explain that SAIF accepted a nondisabling cervical sprain resulting from the April 7, 2004 injury. (Ex. 8).

CONCLUSIONS OF LAW AND OPINION

C5-6 Disc Injury

We adopt and affirm that portion of the ALJ's order, with the following supplementation, which set aside SAIF's denial of claimant's new/omitted medical condition claim for a C5-6 disc injury.

We supplement the ALJ's order to respond to SAIF's argument that the opinions of Drs. Karasek and Keiper were not persuasive because they did not consider claimant's "off-work" neck incident in assessing causation. SAIF refers to Dr. Thrall's November 22, 2005 chart note, which explained that claimant was doing well until last month "when she noticed another pop in her neck while she was laying down at home." (Ex. 28-2).

Dr. Thrall's chart note was discussed in Dr. Dietrich's May 16, 2007 report, which was reviewed by Drs. Karasek and Keiper. (Ex. 53-4, *see* Exs. 57, 57A-2, 58). However, we find no medical evidence indicating that claimant's "off-work" neck incident caused the C5-6 disc condition.

In *Jackson County v. Wehren*, 186 Or App 555, 561 (2003), the court explained that a physician's 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. Here, because there is no medical evidence that claimant's "off-work" neck incident was causally related to her C5-6 disc injury, the failure of Dr. Karasek and Dr. Keiper to specifically discuss the contribution of that incident is not significant. See *David L. Sullivan*, 60 Van Natta 1169 (2008) (because there was no medical evidence that the claimant's two part-time jobs were causally related to his CTS condition, physician's failure to discuss the contribution of those two jobs was not significant); *Dale E. Lawson*, 55 Van Natta 2976 (2003) (although the physician was not aware of the claimant's off-work activities, there was no medical evidence that any off-work activities contributed to the causation of the disc conditions). We agree with the ALJ's analysis that claimant's C5-6 disc injury was compensable.

Current Combined Cervical Condition

On May 7, 2004, SAIF accepted a nondisabling cervical sprain resulting from claimant's April 7, 2004 injury. (Ex. 8). On June 13, 2006, SAIF issued a denial of claimant's "combined cervical condition." (Ex. 36). After litigation, SAIF's June 13, 2006 denial was set aside as procedurally invalid. (Exs. 48, 50, 59).

On May 5, 2008, SAIF issued a modified notice of acceptance and current combined condition denial. SAIF explained that, beginning on April 7, 2004, the accepted "cervical strain"¹ combined with "one or more preexisting conditions including: cervical disc disease." SAIF accepted a "combined condition" beginning April 7, 2004. SAIF further explained that medical information indicated that on or about June 13, 2005, the accepted injury was no longer the major contributing cause of the "combined cervical condition." SAIF denied that condition on and after June 13, 2005. (Ex. 60).

The ALJ set aside SAIF's denial, reasoning that SAIF had not established that there was a "preexisting condition" that "combined" with the otherwise compensable injury. Alternatively, the ALJ concluded that the medical evidence was insufficient to sustain SAIF's burden of proving that the otherwise compensable injury ceased to be the major contributing cause of the accepted combined cervical condition.

¹ It is unclear why SAIF changed the acceptance from a "cervical sprain" to a "cervical strain." (Exs. 8, 60).

On review, SAIF contends that the medical evidence establishes a “combined condition” and that, based on Dr. Rosenbaum’s opinion, it has sustained its burden of proof. Claimant argues that SAIF is unable to prove the requisite change of circumstances.

We first address whether claimant’s preexisting “cervical disc disease” qualifies as a legal “preexisting condition” under ORS 656.005(24)(a) and whether it “combined” with the cervical strain.

For injury claims, “a preexisting condition” is defined by ORS 656.005(24)(a) as “any injury, disease, congenital abnormality, personality disorder, or similar condition that contributes to disability or need for treatment.” Except for claims in which a preexisting condition is “arthritis or an arthritic condition,” for there to be a “preexisting condition,” the worker must have been diagnosed with such condition or obtained medical services for symptoms of the condition, regardless of diagnosis, before the initial injury. ORS 656.005(24)(a)(A).

The record does not establish that claimant was diagnosed or treated with cervical disc disease before the April 2004 injury. Therefore, it may only be a legal “preexisting condition” if it was “arthritis or an arthritic condition.” ORS 656.005(24)(a). “Arthritis” and “arthritic condition” are statutory terms that are defined as a matter of law. *Karjalainen v. Curtis Johnson & Pennywise, Inc.*, 208 Or App 674, 681-82 (2006). A condition is “arthritis or an arthritic condition” if it involves inflammation of one or more joints. *Id.* at 685. Thus, claimant’s preexisting cervical disc disease is a legal “preexisting condition” only if it involves inflammation of one or more joints. *See Danny Kalaveras*, 61 Van Natta 964 (2009); *Adam M. Karjalainen*, 59 Van Natta 3076, 3078 (2007) (on remand).

In a December 1, 2008 concurrence letter from SAIF, Dr. Rosenbaum, examining neurosurgeon, explained that claimant had “degenerative joint disease of the cervical spine and that degenerative disc disease and spondylosis or degenerative osteoarthritis are components of this condition.” Dr. Rosenbaum opined that this condition involves an “inflammation of the synovial lining of the facet joints.” (Ex. 47).

Thus, Dr. Rosenbaum concluded that claimant’s preexisting cervical condition involved an “inflammation of the synovial lining of the facet joints[,]” which constitutes a legal “preexisting condition” under ORS 656.005(24)(a).

Dr. Karasek did not persuasively rebut Dr. Rosenbaum's opinion. Dr. Karasek said that arthritis is defined as an inflammatory process involving the cartilage of a synovial joint and would not strictly apply to the disc. But he also said that degenerative change in the disc is commonly referred to as part of the osteoarthritic process and that "whether or not to call this arthritis was a matter of debate." (Ex. 62). Based on Dr. Rosenbaum's opinion, we find that claimant had a legal "preexisting condition."

We turn to the issue of whether the medical evidence establishes the presence of a "combined condition." Such a condition occurs when an otherwise compensable injury combines with a preexisting condition to cause or prolong either disability or a need for treatment. ORS 656.005(7)(a)(B); *Multifoods Specialty Distrib. v. McAtee*, 333 Or 629, 634 (2002). For a "combined condition" to exist, two conditions must merge or exist harmoniously. *Luckhurst v. Bank of America*, 167 Or App 11, 16-17 (2000).

Dr. Rosenbaum concluded that claimant's initial need for treatment was her cervical strain, which combined with her preexisting arthritis. (Exs. 33-8, 47). We find no persuasive medical evidence rebutting Dr. Rosenbaum's opinion. Thus, based on Dr. Rosenbaum's opinion, we find that the record establishes the existence of a "combined condition."

Under ORS 656.262(6)(c), a carrier may deny an accepted combined condition if the otherwise compensable injury ceases to be the major contributing cause of the combined condition. The effective date of the combined condition acceptance provides a baseline for determining whether a worker's condition has changed so that the otherwise compensable injury is no longer the major contributing cause of the disability or need for treatment of the combined condition. *Oregon Drywall Systems, Inc. v. Bacon*, 208 Or App 205, 210 (2006).

Here, SAIF amended its acceptance to include a combined condition beginning April 7, 2004, the date of injury. (Ex. 60). SAIF denied the combined cervical condition on and after June 13, 2005. (*Id.*) Therefore, the relevant dates for determining whether there has been any "change" in claimant's condition or circumstances are April 7, 2004, the effective date of the combined condition acceptance, and June 13, 2005, the effective date of the combined condition denial. *See Wal-Mart Stores, Inc. v. Young*, 219 Or App 410, 419 (2008) (because ORS 656.262(6)(c) requires that the otherwise compensable injury "ceases to be the major contributing cause" of a combined condition, a change in the claimant's condition is required to support the validity of a later denial).

The accepted condition is a cervical strain combined with preexisting cervical disc disease. (Ex. 60). However, the acceptance of a combined condition is not an outright acceptance of a preexisting condition that has combined with a work-related injury. *Fimbres v. SAIF*, 197 Or App 613, 618 (2005); *Multifoods Specialty Distribution v. McAtee*, 164 Or App 654, 661 (1999), *aff'd*, 333 Or at 629. Thus, SAIF's acceptance of a cervical strain combined with preexisting cervical disc disease did not constitute an outright acceptance of the preexisting cervical disc disease. Rather, it was the "combined condition" that was accepted, and only to the extent that the work injury was the major contributing cause of the disability or the need for treatment of the combined condition. *McAtee*, 164 Or App at 662; *Chris Seiger*, 59 Van Natta 334, 338, *on recons*, 59 Van Natta 940 (2007).

Thus, the issue before us is not whether claimant is still experiencing cervical symptoms. Instead, the pertinent question is whether the accepted *cervical strain* remains the major contributing cause of the disability or need for treatment of the combined cervical condition. SAIF has the burden of proving that the accepted cervical strain component of the combined condition is no longer the major contributing cause of claimant's disability or need for treatment of the combined condition. *See Chris Seiger*, 59 Van Natta at 346.

SAIF relies on the opinion of Dr. Rosenbaum to sustain its burden of proof. Dr. Rosenbaum diagnosed a cervical strain "by history" related to the April 2004 work injury, as well as cervical spondylosis. (Ex. 33-5, -6). He explained that claimant's ongoing symptoms were secondary to cervical spondylosis or degenerative arthritis. He did not believe that claimant continued to suffer from a cervical strain, which he said had reasonably resolved following three months of conservative treatment. (Ex. 33-6). Dr. Rosenbaum explained that the work incident was no longer the major contributing cause of her need for treatment. He noted that claimant said she had ongoing symptoms, but he explained that cervical strain symptoms should resolve reasonably within three months after the injury and, therefore, the ongoing need for treatment was most reasonably directed at claimant's preexisting cervical arthritis symptoms. (Ex. 33-8). He concluded that claimant's cervical strain was medically stationary without impairment. (Ex. 33-9).

In a later concurrence letter from SAIF, Dr. Rosenbaum explained that claimant's cervical strain would have resolved within three months after the April 2004 injury and certainly by October 7, 2004, which was her last examination by Dr. Peterson. (Ex. 47).

Dr. Rosenbaum's opinion is supported in part by Dr. Dietrich, who also examined claimant on behalf of SAIF. Although Dr. Dietrich did not believe claimant had a "preexisting" or "combined" condition, he concluded that claimant's cervical strain had "resolved." He reviewed claimant's medical records and explained that after the work injury, she had full range of motion within 90 days and was considered medically stationary within six months. (Ex. 53-7). Dr. Dietrich concluded that the work incident was a material contributing cause of her disability for a period of 90 days after the injury. (Ex. 53-8).

Claimant argues that Dr. Rosenbaum's opinion is not persuasive because he did not explain any "change" in circumstances and merely asserted, based on statistics, that her cervical strain should have resolved. *See Sherman v. Western Employers Ins.*, 87 Or App 602, 606 (1987).

We do not agree that Dr. Rosenbaum's opinion is based merely on statistics. Dr. Rosenbaum's opinion that claimant's accepted cervical strain had resolved is consistent with the medical reports after the April 2004 injury. Moreover, later medical evidence from claimant's physicians indicated that her current cervical symptoms were related to a C5-6 disc injury, not a cervical strain.

Dr. Peterson was claimant's attending physician after the April 2004 injury. (Ex. 12). In June 2004, he diagnosed a cervical strain and recommended chiropractic treatment. (Ex. 13). On July 15, 2004, Dr. Peterson explained that claimant's cervical range of motion had improved and he diagnosed a "resolving" cervical strain. (Ex. 16). In early August 2004, Dr. Peterson found that claimant had full cervical range of motion without pain, and again diagnosed a "resolving" cervical strain. (Ex. 19). Dr. Peterson had the same diagnosis on September 9, 2004 and noted "significant improvement." (Ex. 22-1). On October 7, 2004, Dr. Peterson explained that claimant was no longer having any significant neck pain. He noted that her last chiropractic treatment was the following week and she would be medically stationary as of October 14, 2004. (Ex. 22-2).

In early March 2005, claimant sought treatment for neck complaints from Dr. Thrall. His assessment was "recurrent neck pain" that he related to a work injury accepted as a cervical strain. (Ex. 23). In May 2005, he recommended an MRI to rule out any significant neck pathology that might be causing continuing symptoms. (Ex. 26). In November 2005, Dr. Thrall explained that claimant's MRI scan was essentially normal and that it was not clear why claimant continued to have recurrent neck pain. (Ex. 28-2). In December 2005, Dr. Thrall referred claimant to a spine specialist. (Ex. 28-4).

Claimant was treated by Drs. Keiper and Karasek, who diagnosed a C5-6 disc injury. Claimant argues that they noted the “ongoing” nature of her condition, at least with regard to the C5-6 disc condition. But, as we discussed above, the issue is not whether claimant is still experiencing cervical symptoms. Instead, the pertinent question is whether the accepted *cervical strain* remains the major contributing cause of the disability or need for treatment of the combined condition.

For the following reasons, we find that the opinions of Drs. Keiper and Karasek do not persuasively rebut the opinion of Dr. Rosenbaum that claimant’s accepted cervical strain has resolved and was no longer the major contributing cause of the disability or need for treatment of the combined cervical condition.

Dr. Keiper, neurosurgeon, examined claimant in February 2006 and diagnosed a C5-6 disc injury. He did not diagnose a cervical strain or sprain. (Ex. 29). In July 2006, Dr. Keiper opined that claimant had a cervical disc herniation. He said that the “injury” was the major cause of her “current condition and need for treatment,” noting that it “was not a simple strain or sprain.” (Ex. 38).

In a July 2007 letter, Dr. Keiper explained that claimant injured her C5-6 disc during the work incident and that her “current need for treatment and the injury to [the] C5 disc was related to her industrial exposure.” (Ex. 57A). However, Dr. Keiper did not indicate that claimant’s “current” treatment was necessary for the accepted cervical strain. Dr. Keiper’s reports did not persuasively rebut Dr. Rosenbaum’s opinion that claimant’s accepted cervical strain was no longer the major contributing cause of her current combined cervical condition.

Dr. Karasek examined claimant in July 2006, but did not diagnose a cervical strain/sprain. He referred to a minor bulge and desiccation at the C5-6 level. (Ex. 39). He treated claimant’s disc condition with a steroid injection and a discogram. (Exs. 41, 42, 43). After the discogram, he opined that claimant had a painful C5-6 disc. (Ex. 45). On November 27, 2006, Dr. Karasek explained that claimant’s “disc injury” continued to be the major contributing cause of her need for treatment. He did not “believe that this was a simple strain or sprain, but rather a painful disc injury.” (Ex. 46).

In August 2007, Dr. Karasek opined that claimant's work injury was a material factor in her "current" need for treatment. (Ex. 58). On June 16, 2008, Dr. Karasek explained that claimant had a "painful C5-6 disc" and that her neck condition was best characterized as a "traumatic injury to the C5-6 disc." He said that claimant's history was most consistent with a lifting injury to the wall of the C5-6 disc. (Ex. 62). Dr. Karasek's reports did not indicate that claimant's then-current need for treatment or disability was related to the accepted cervical strain.

In a deposition, Dr. Karasek reiterated that claimant had a traumatic injury to the C5-6 disc. (Ex. 63-4). Dr. Karasek reviewed some chart notes after the April 2004 injury that indicated her cervical strain was "resolving." (Ex. 63-14, -15, -16). He explained that the chart notes said the strain was significantly improved and indicated "near resolution." (Ex. 63-17). Dr. Karasek acknowledged that the October 7, 2004 chart note indicated that Dr. Peterson felt claimant had reached a full resolution of her injury. (Ex. 63-17, -18).

Dr. Karasek explained that a strain is usually considered "primarily a muscular injury, with rapid resolution over a six to eight-week period." He noted that the technical description of strain also involved ligamentous injuries.² (Ex. 63-30). Thus, like Drs. Rosenbaum and Dietrich, Dr. Karasek indicated that a strain usually resolves within six to eight weeks. Dr. Karasek did not begin treating claimant until July 2006, more than two years after the April 2004 injury. He did not diagnose claimant with a cervical strain, but instead attributed her ongoing symptoms to a C5-6 disc injury. (Exs. 45, 46, 62). Dr. Karasek did not persuasively rebut Dr. Rosenbaum's opinion that claimant's accepted cervical strain had resolved and was no longer the major contributing cause of the disability or need for treatment of the combined cervical condition.

² We acknowledge that Dr. Karasek indicated that it was possible for a cervical strain to encompass a disc injury. Dr. Karasek explained that the "posterior wall of the disk is ligamentous, so that a diskal injury is consistent with the initial diagnosis of strain, but it is also a more severe injury than is conventionally used – than is conventionally indicated by the term 'cervical strain.'" (Ex. 63-30). Dr. Karasek agreed that it was possible for a cervical strain to encompass a disc injury, but he explained: "I think most physicians don't mean diskal injury when they use the term strain, but they do mean there may be an element of ligamentous injury. And the disk is really part of the posterior longitudinal ligament, the posterior surface of the disk." (Ex. 63-30-, -31).

However, the medical evidence does not establish that the accepted cervical strain "encompassed" a C5-6 disc injury. Dr. Karasek indicated that most physicians did not mean a "diskal injury" when they used the term "strain." Moreover, the medical evidence in this case does not indicate that the diagnosed cervical strain meant a "diskal injury."

In summary, we conclude that, based on Dr. Rosenbaum's opinion and the contemporaneous medical records, claimant's accepted cervical strain had resolved by October 2004. Those reports establish that there was a "change" in claimant's circumstances or condition such that the accepted cervical strain component of the combined condition was no longer the major contributing cause of the disability or need for treatment of the condition

Attorney Fee

We have reversed that portion of the ALJ's order that set aside SAIF's "current combined cervical condition" denial. Accordingly, 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 regarding the C5-6 disc injury is \$6,500, payable by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the issue (as represented by the hearing record and claimant's counsel's attorney fee request), the complexity of the issue, the value of the interest involved, and the risk that claimant's counsel may go uncompensated.

Further, claimant's attorney is entitled to an assessed fee for services on review regarding the compensability of the C5-6 disc injury. 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 regarding the C5-6 disc injury is \$2,500, payable by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the issue (as represented by claimant's respondent's brief and her counsel's attorney fee request), the complexity of the issue, and the value of the interest involved.

Finally, claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by SAIF. *See* ORS 656.386(2); OAR 438-015-0019; *Nina Schmidt*, 60 Van Natta 169 (2008); *Barbara Lee*, 60 Van Natta 1, *on recons*, 60 Van Natta 139 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

ORDER

The ALJ's order dated November 10, 2008 is affirmed in part and reversed in part. That portion of the ALJ's order that set aside SAIF's denial of claimant's "current combined cervical condition" is reversed. SAIF's denial of that claim is reinstated and upheld. In lieu of the ALJ's \$10,000 assessed attorney fee award, claimant's attorney is awarded \$6,500 for services at hearing related to the C5-6 disc injury, to be paid by SAIF. The remainder of the ALJ's order is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$2,500, to be paid by SAIF. Claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the C5-6 disc injury denial, to be paid by SAIF.

Entered at Salem, Oregon on May 14, 2009