

In the Matter of the Compensation of
MARSHALL A. BEACHELL, Claimant
WCB Case No. 09-02813
ORDER ON REVIEW

Swanson Thomas & Coon, Claimant Attorneys
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Reviewing Panel: Members Biehl and Lowell.

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

We adopt and affirm the ALJ's order with the following supplementation.

In March 2009, claimant, a laborer, experienced low back pain after lifting and carrying a compressor hood cover that weighed approximately 70-75 pounds.¹ He woke up the next day with significant back pain. (Tr. 14, 15). Although claimant's back pain did not subside, he continued to work until March 30, 2009, when he sought medical treatment from his primary care physician, Dr. Webb. (Ex. 44).

Dr. Webb noted lumbosacral tenderness, reduced range of motion, and positive straight leg raise on the left. (Ex. 44-2). He recommended physical therapy and restricted claimant to light-duty work. (*Id.*) When claimant returned to Dr. Webb on April 7, 2009, he completed an 827 form, indicating that he had not previously injured the same body part.² (Ex. 46-1). Noting the same objective findings as on the first examination, Dr. Webb suspected a herniated disc and recommended an MRI. (Ex. 47). The MRI suggested an L5-S1 posterior midline annular tear. (Ex. 49).

At the employer's request, claimant was examined by Dr. Holley, who opined that the March 2009 work incident, whichever date it occurred, was the major contributing cause of claimant's low back disability and need for treatment. (Ex. 56-9).

¹ Although claimant and the employer's witnesses suggested differing dates for the date of injury, the employer's records indicate that he was injured on March 18, 2009. (Tr. 46; Ex. 43B-5).

² Claimant was treated for a low back strain from December 2004 through February 2005. When treatment concluded, he was asymptomatic and released to regular work without restrictions. (Exs. 1, 40).

Dr. Puziss examined claimant in May 2009. (Ex. 60). He diagnosed L5-S1 herniated disc/strain, torn annulus with discogenic pain, and chronic lumbar and lumbosacral sprain/strain, all attributable to claimant's work incident. (Exs. 60, 68-2).

Dr. Gullo, at Dr. Puziss's request, performed a discogram, which was abnormal at the L5-S1 level, showing extravasation into and through the annulus fibrosis into what appeared to be a small right paracentral disc protrusion. (Ex. 71A). This protrusion/bulge impinged on claimant's thecal sac. (*Id.*)

The employer denied the claim for a low back condition. Claimant requested a hearing.

The ALJ set aside the employer's denial, reasoning that, notwithstanding claimant's poor memory for dates, he had been consistent in his description of the mechanics of the injury. Determining that claimant's objective findings supported the injury diagnosis, the ALJ found claimant's low back condition compensable.

On review, the employer argues that claimant was not truthful regarding several aspects of the claim. Additionally, the employer contends that the ALJ should have analyzed the claim as a "combined condition." Based on the following reasoning, we affirm the ALJ's decision.

To prove the compensability of an injury, claimant must show that the work incident was a material contributing cause of his disability or need for treatment. ORS 656.005(7)(a); ORS 656.266(1); *Albany Gen. Hosp. v. Gasperino*, 113 Or App 411, 415 (1992). He must prove both legal and medical causation by a preponderance of the evidence. *Harris v. Farmer's Co-op Creamery*, 53 Or App 618 (1981); *Carolyn F. Weigel*, 53 Van Natta 1200 (2001), *aff'd without opinion*, 184 Or App 761 (2002). 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. *Darla Litten*, 55 Van Natta 925, 926 (2003).

We begin by addressing the evidence regarding legal causation, which depends on the credibility of claimant's testimony. In determining the credibility of a witness's testimony, we normally defer to an ALJ's demeanor-based credibility findings. See *Erck v. Brown Oldsmobile*, 311 Or 519, 526 (1991) (Board generally defers to the ALJ's determination of credibility when it is based on the ALJ's opportunity to observe the witness). However, when the ALJ's

credibility determination is not based on demeanor, but on an objective evaluation of the substance of the witness's testimony, we may reach our own independent determination of credibility.³ *Coastal Farm Supply v. Hultberg*, 84 Or App 282, 285 (1987); *Michael A. Ames*, 60 Van Natta 1324, 1326 (2008). Here, the ALJ's credibility determination was based on the substance of claimant's testimony. Therefore, we reach our own credibility determination based on the record.

After reviewing claimant's testimony and documentary evidence, we agree with the ALJ that it is more likely than not that claimant suffered a work-related injury. Claimant admits that he did not initially report his March 18, 2009 injury as occurring at work. Explaining that he was a fairly new employee and that the employer was extremely safety conscious, claimant felt that he might "burn his bridges" with his employer by filing a workers' compensation claim.⁴ (Tr. 16).

Initially, claimant did not believe that the injury was serious. Moreover, as he testified, "I'm not a sissy; * * * I don't need to file a claim for a strained muscle." (Tr. 53). Eventually, on April 7, 2009, when Dr. Webb informed him that he might require surgery, claimant decided to file the claim.

In some cases, we have found a claimant's initial reluctance to file a claim not dispositive on the issue of compensability. *E.g.*, *Glenn T. Cox*, 60 Van Natta 3227, 3228 (2008) (the claimant did not report a work injury for fear of losing job); *see also Mark Dumas*, 59 Van Natta 2055, 2057-58 (2007) (the claimant did not report a work injury because he underestimated the seriousness of the condition).

Here, we consider claimant's explanation for his delayed filing to be reasonable. Further, while the delay in reporting the injury arguably undermines the credibility of claimant's testimony that he was injured in March 2009, such a delay is insufficient to support a conclusion that claimant was not a credible witness.⁵ *See George R. Forkner*, 58 Van Natta 3039, 3041 (2006) (the claimant did not initially report injury because the employer tried to avoid filing claims).

³ We agree with the ALJ's determination that the testimony of the employer's two witnesses was contradictory and therefore not persuasive.

⁴ When questioned about his limping (due to his back pain), claimant told coworkers that he had strained his back, but did not attribute it to an on-the-job incident. (Tr. 69, 72).

⁵ We also note that the record does not contain credible evidence that would persuasively rebut claimant's history of how he was injured.

In reaching this conclusion, we note that claimant was consistent in describing how the injury occurred. Moreover, the employer's records corroborate that claimant performed the work activity (lifted the compressor hood cover) that he described as leading to the injury. (Ex. 43B-5). Accordingly, we agree with the ALJ that it is more likely than not that claimant's injury occurred as he described.

We also do not consider claimant to have been untruthful because he checked the box on his 827 form, indicating he had not previously injured the same body part. (Ex. 46-1). Claimant admitted and discussed his prior low back injury in his recorded statement. (Ex. 52A-37-38). He explained that his prior injury was located in the tailbone area, which had become misaligned, or "tilted," and resolved in a few months after conservative treatment and physical therapy. (*Id.*) Rather than the tailbone, claimant's current pain concerns his beltline area, as described by Dr. Webb, and indicated on the pain chart that he marked for Dr. Puziss. (Exs. 44-1, 58-3). Claimant stated that he considered these two separate injuries to be in a "different back part." (Tr. 49).

Admittedly, claimant does not have an accurate memory for dates. The record contains inconsistencies based on his shifting recollections concerning the date of injury and his first visit to Dr. Webb. However, claimant explained that his incorrect recollection of when he first sought treatment affected his resulting date calculations. (Tr. 28, 29).

Nonetheless, claimant remembered that he had first seen Dr. Webb approximately one and a half weeks after the injury. The employer's records indicate that the injurious activity occurred on March 18, 2009, and Dr. Webb's chart notes confirm that claimant was seen on March 30, 2009, which would be consistent with claimant's "week and a half" recollection. (Exs. 43B-5, 44). As such, we do not consider the alleged inconsistencies in claimant's history to be decisive.

In sum, we find claimant's testimony to be sufficiently credible and reliable to establish that he sustained a work injury. Consequently, we conclude that he has met his burden of proving legal causation.

Turning to the medical causation issue, the employer contends that claimant's imaging studies, combined with his prior treatment for low back and radicular symptoms, were sufficient to establish the "preexisting condition" component of a "combined condition." We disagree, reasoning as follows.

Claimant must prove that the March 2009 work incident was a material contributing cause of disability or need for treatment. ORS 656.005(7)(a); ORS 656.266(1); *Tricia A. Somers*, 55 Van Natta 462, 463 (2003). If claimant meets that burden and the medical evidence establishes that the “otherwise compensable injury” combined at any time with a “preexisting condition” to cause or prolong disability or a need for treatment, the employer has the burden to prove that the “otherwise compensable injury” is not the major contributing cause of claimant’s disability or need for treatment of the combined condition. ORS 656.005(7)(a)(B); ORS 656.266(2)(a); *Wanda Rockwell*, 58 Van Natta 1247, 1248 (2006); *Jack G. Scoggins*, 56 Van Natta 2534, 2535 (2004).

Here, the medical record does not contain persuasive evidence that claimant has a condition that satisfies the statutory requirements of ORS 656.005(24)(a), such that it can be considered a “preexisting condition.”⁶ The parties do not dispute that he has some degenerative disc disease (DDD) at the L5-S1 level, but the record does not establish that claimant had previously been diagnosed with, or received medical treatment for symptoms of this condition. Furthermore, there is no medical evidence establishing that claimant’s L5-S1 DDD was arthritis or an arthritic condition.⁷ To the contrary, Dr. Holley specifically stated that it was not. (Ex. 56-9).

We acknowledge Dr. Holley’s subsequent opinion that claimant’s 2004-05 low back symptoms and need for treatment were “probably” caused in part by L4-5 (as opposed to L5-S1) lumbar spondylosis. (Ex. 69-2). He expressed this opinion in a letter stating that he had reviewed claimant’s prior medical records. (*Id.*) Yet, Dr. Holley offered no explanation or analysis to support that medical opinion, nor did he refer to a specific report/chart note as the basis for his conclusion. As such, his conclusory opinion is not persuasive. *See Moe v. Ceiling Sys., Inc.*, 44 Or App 429, 433 (1980) (rejecting unexplained or conclusory opinion); *see also Lanora J. Rea*, 60 Van Natta 1058, 1064 (same).

⁶ Under ORS 656.005(24)(a), “Preexisting condition” means any injury that contributes to disability or need for treatment provided that: (A) “Except for claims in which a preexisting condition is arthritis or an arthritic condition, the worker has been diagnosed with such condition, or has obtained medical services for the symptoms of the condition regardless of diagnosis.”

⁷ Because claimant’s L5-S1 DDD was not diagnosed or treated before the March 2009 work injury, it would only constitute a “preexisting condition” if it was “arthritis or an arthritic condition,” *i.e.*, the inflammation of one or more joints. *See Adam M. Karjalainen*, 59 Van Natta 3076, 3078 (2007).

Moreover, Dr. Puziss and Dr. Webb persuasively rebutted Dr. Holley's opinion. Dr. Puziss concluded that neither claimant's January 19, 2005 x-ray report, nor the accompanying chart note substantiated a relationship between his prior low back symptoms and L4-5 spondylosis. (Ex. 75-3).⁸ Dr. Webb agreed with Dr. Puziss, opining that claimant did not need or receive treatment for DDD in 2005. (Ex. 76-2). Under such circumstances, we are not persuaded that claimant had a statutory "preexisting condition." In the absence of such a condition, the compensability standards for a "combined condition" are not applicable. See *Virginia L. Gould*, 61 Van Natta 2206, 2210 (2009).

Thus, claimant must establish that his work injury was a material contributing cause of his disability/need for treatment of his claimed low back condition. *Somers*, 55 Van Natta at 463. Dr. Puziss opined that claimant's MRI revealed pathology at L5-S1 that would account for his discogenic pain, and the discogram performed by Dr. Gullo corroborated that this disc was a pain generator. (Ex. 75-3). Dr. Webb agreed with Dr. Puziss's earlier opinion that claimant's L5-S1 disc pathology was attributable to his March 2009 work injury. (Exs. 68-2, 76-2).

The employer argues that the medical opinions were not based on adequate information or appreciation of claimant's previous low back and radicular symptoms. However, Drs. Webb and Puziss formulated their opinions after reviewing the records from claimant's prior back injury claim. Therefore, their opinions that claimant's medical treatment in 2004-05 was for a simple strain unrelated to his current condition are persuasive.

Accordingly, we find that the preponderance of medical evidence establishes that claimant's work injury was a material contributing cause of his need for treatment/disability for his low back condition. Therefore, we affirm.

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 \$3,000, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's respondent's brief, her counsel's fee request and the employer's objection), the complexity of the issue, and the value of the interest involved.

⁸ Dr. Puziss further concluded that claimant's DDD had not combined with his current low back diagnoses. (Ex. 75-3).

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 the employer. *See* ORS 656.386(2); OAR 438-015-0019; *Gary Gettman*, 60 Van Natta 2862 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

ORDER

The ALJ's order dated October 21, 2009 is affirmed. For services on review, claimant is awarded an assessed fee of \$3,000, payable by the employer. 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 the employer.

Entered at Salem, Oregon on August 13, 2010