

---

In the Matter of the Compensation of  
**DAVID J. TIKUNOFF, Claimant**  
WCB Case No. 09-02494  
ORDER ON REVIEW  
Parker Butte & Lane, Claimant Attorneys  
Maher & Tolleson LLC, Defense Attorneys

Reviewing Panel: Members Weddell and Lowell.

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

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," summarized as follows.

Claimant, a truck driver, was compensably injured on January 9, 2009. On that morning, he arrived in Hermiston, Oregon after departing from Portland, Oregon the night before. (Tr. 7). In Hermiston, he changed the trailers and moved the gear to connect the trailers before leaving for Yakima, Washington. In Yakima, he changed trailers again, but had difficulty moving the gear around due to snow and ice conditions. (Tr. 8). After connecting the trailers, he started his return to Portland.

Approximately 45 minutes to an hour after leaving Yakima, he started to feel discomfort on the left side of his low back. (Tr. 10-11). He pulled over in Biggs Junction, Oregon, and, as he was exiting the truck, experienced pain shooting down into his tailbone and left leg. (Tr. 10-11). He could not stand up straight and spent the remainder of the drive to Portland "bent over, holding on to the steering wheel." (Tr. 11-12).

The employer accepted a lumbar strain. (Ex. 12).

Claimant initially treated with Dr. Hutton, who ordered an MRI. (Ex. 1A). It was interpreted by the radiologist as showing an L3-4 disc protrusion compressing the left L3 nerve root, as well as mild L2-5 congenital canal stenosis. (Ex. 4).

---

Claimant was referred to Dr. Gilliland and then to Dr. Sandquist, a neurosurgeon.<sup>1</sup> Dr. Sandquist diagnosed an L3-4 lateral herniated disc with radiculopathy and performed an L3-4 far lateral discectomy. (Ex. 23).

Both Drs. Hutton and Sandquist attributed claimant's disability/need for treatment for his disc condition to the January 2009 work injury. (Exs. 18A, 20, 30-2).

Dr. Rosenbaum examined claimant at the employer's request. (Ex. 16). He also diagnosed an L3-4 lateral herniated disc with left L3 radiculopathy, but disagreed with Drs. Hutton and Sandquist that the condition (or any disability/need for treatment) was related to the January 2009 work injury. (Exs. 16, 26, 31). Rather, Dr. Rosenbaum believed that the disc "spontaneously" herniated unrelated to work activities, and that the herniation arose solely out of a preexisting degenerative process. (*Id.*)

Dr. McNeill performed a records review at the employer's request. (Ex. 27). He agreed with Dr. Rosenbaum that claimant's disc condition or disability/need for treatment was not attributable to the January 2009 work incident. (*Id.*)

The employer denied claimant's request to accept an L3-4 herniated disc with left L3 radiculopathy. (Ex. 17). Claimant requested a hearing.

#### CONCLUSIONS OF LAW AND OPINION

The ALJ set aside the employer's denial, finding that, based on the opinions of Drs. Hutton and Sandquist, claimant had established that his January 9, 2009 work activities were a material contributing cause of the claimed L3-4 condition and the resulting need for treatment. The ALJ subsequently determined that the "otherwise compensable injury" had combined with a "preexisting condition," but concluded that the opinions of Drs. Rosenbaum, McNeill and Miller were insufficient to meet the employer's burden of proving that the work injury was not the major contributing cause of disability/need for treatment for that "combined condition."

---

<sup>1</sup> Claimant also treated with Dr. Miller, who concurred with Dr. Rosenbaum's opinion as described below. (*See* Exs. 14, 18, 19, 21, 24).

On review, the employer contends that claimant has not established an “otherwise compensable injury,” because Dr. Hutton’s opinion was not based on an accurate history. The employer alternatively contends that it has established a “combined condition,” and that the work injury was never the major contributing cause of any disability/need for treatment for that condition. We disagree with the employer’s assertions, reasoning as follows.

To establish a compensable injury, claimant must prove that the work injury was a material contributing cause of the disability/need for treatment for his claimed condition. ORS 656.005(7)(a); ORS 656.266(1); *Tricia A. Somers*, 55 Van Natta 462, 463 (2003). If, however, the employer asserts that the claimed condition is a “combined condition,” the employer must prove that: (1) claimant suffers from a statutory “preexisting condition”; (2) claimant’s condition is a “combined condition”; and (3) the “otherwise compensable injury” is not or is no longer the major contributing cause of the disability/need for treatment of the combined condition. ORS 656.005(7)(a)(B); ORS 656.266(2)(a); *SAIF v. Kollias*, 233 Or App 499, 505 (2010); *Jack G. Scoggins*, 56 Van Natta 2534, 2535 (2004).

Because of the possible alternative causes of claimant’s condition, expert medical opinion must be used to resolve the question of causation. *Barnett v. SAIF*, 122 Or App 279, 282 (1993); *Linda Patton*, 60 Van Natta 579, 582 (2008). In evaluating the medical evidence, we rely on those opinions that are both well reasoned and based on accurate and complete information. *Somers v. SAIF*, 77 Or App 259, 263 (1986); *Patton*, 60 Van Natta at 582.

The employer does not dispute that Dr. Hutton opined that the January 2009 work injury was a material contributing cause of disability/need for treatment for claimant’s disc condition. (*See Exs. 18A, 20*). The employer maintains, however, that we should disregard that opinion because it was based on an inaccurate history. *See Miller v. Granite Constr. Co.*, 28 Or App 473, 478 (1977) (little weight accorded to medical opinions that are based on a materially inaccurate history); *Jesse Underwood*, 62 Van Natta 52, 56 (2010) (physician’s opinion unpersuasive where it relied on a materially inaccurate understanding of the claimant’s work activities).

Claimant testified that, while on the return portion of a long drive, he experienced lower left back discomfort, followed by a shooting pain down his leg as he exited his truck. (Tr. 7-11). The ALJ found claimant to be a credible witness based on his demeanor in testifying, a determination to which we defer and with which the employer does not take issue. *See Erck v. Brown Oldsmobile*, 311 Or 519, 526 (1991) (on *de novo* review it is good practice for an agency to give weight

to the fact finder's credibility assessments). Dr. Hutton recorded a history of claimant experiencing severe low back pain "[t]oward the end of a long drive," specifically noting "extreme pain shoot[ing] down [the] left leg" while exiting the truck. (Ex. 1A-1). We find no material discrepancy between claimant's testimony and Dr. Hutton's history; accordingly, we do not discount his opinion on that basis.<sup>2</sup>

The employer next contends that it has established that the claimed condition is properly characterized as a "combined condition," and that the "otherwise compensable injury" was not the major contributing cause of the disability/need for treatment of the combined condition. *See* ORS 656.005(7)(a)(B); ORS 656.266(2)(a); *Kollias*, 233 Or App at 505; *Scoggins*, 56 Van Natta at 2535. In support of that position, the employer relies on Dr. Sandquist's opinion.<sup>3</sup> Dr. Sandquist's opinion establishes that claimant had a statutory preexisting degenerative condition that involved arthritis/joint inflammation.<sup>4</sup> (Ex. 30-2). Dr. Sandquist did not, however, opine that the workplace injury "combined with" that preexisting condition to cause or prolong claimant's disability or need for treatment. *See* ORS 656.005(7)(a)(B) (a "combined condition" exists where the otherwise compensable injury combines "with a preexisting condition to cause or prolong disability or a need for treatment"). Nor does Dr. Sandquist's opinion establish that the compensable work injury "merged" or "existed harmoniously" with the preexisting condition or that there was an "integration" or "close relationship" between the work injury and the degenerative condition. *See Luckhurst v. Bank of Am.*, 167 Or App 11, 17 (2000) (a combined condition may exist where there are "two conditions that merge or exist harmoniously");

---

<sup>2</sup> Moreover, Dr. Sandquist also found that claimant's disability/need for treatment was caused by the January 2009 work injury. (Ex. 30-2, -3). The employer does not dispute the accuracy of Dr. Sandquist's history, which it characterizes as "unassailable." Therefore, regardless of Dr. Hutton's opinion, Dr. Sandquist's opinion establishes an otherwise compensable injury.

<sup>3</sup> Neither Drs. Rosenbaum nor McNeill support a "combined condition." As set forth above, those physicians opined that claimant's herniated disc arose solely out of his degenerative condition, with no involvement from the workplace incident. (*See* Exs. 16, 26, 27, 31). The employer does not assert that these opinions are more persuasive than Dr. Sandquist's, and we do not make such a finding. In light of Drs. Hutton's and Sandquist's opinions that persuasively explained why claimant's work activities contributed to the disability/need for treatment of his disc herniation, Drs. Rosenbaum and McNeill did not adequately explain how the purported "spontaneous" disc herniation, which occurred at work, involved no workplace contribution. As such, we do not rely on Drs. Rosenbaum's or McNeill's opinions. *Oliva Rodriguez*, 61 Van Natta 2972 (2009) (inadequately explained opinion unpersuasive).

<sup>4</sup> *See Gary D. Benedict*, 60 Van Natta 2612, 2613 (2008) (to qualify as preexisting "arthritis or an arthritic condition" under ORS 656.005(24)(a), medical evidence must establish that the alleged preexisting "arthritis" or "arthritic condition" involves both a joint and its inflammation).

---

*Multifoods Specialty Distrib. v. McAtee*, 164 Or App 654, 662 (1999) (a “combined condition” may exist as “either an integration of two conditions or the close relationship of those conditions, without integration”). As such, the employer has not established a “combined condition.”

Moreover, even assuming the presence of a “combined condition,” Dr. Sandquist’s opinion does not establish that the work injury was not the major contributing cause of disability/need for treatment of a combined condition. Dr. Sandquist indicated that claimant’s work activities of “shoving a heavy gear to connect his truck,” as opposed to exiting the truck, were the major contributing cause of his need for treatment. (Ex. 30-3). Although Dr. Sandquist’s understanding of the mechanism of injury differed from that of Dr. Hutton, both concluded that work activities on January 9, 2009 (and not a preexisting degenerative condition) were the major contributing cause of any need for treatment for the claimed disc condition. (*See* Exs. 18A, 20, 30-3).

Under such circumstances, the employer has not satisfied its burden under ORS 656.005(7)(a)(B) and ORS 656.266(2)(a). 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 \$3,500, 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), 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 the employer. *See* ORS 656.386(2); OAR 438-015-0019; *Gary E. 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 March 8, 2010 is affirmed. For services on review, claimant’s attorney is awarded an assessed fee of \$3,500, to be paid 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 September 22, 2010