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In the Matter of the Compensation of  
**JACKIE S. JACOBSON, Claimant**  
WCB Case No. 10-00001, 08-05170  
ORDER ON REVIEW  
Black Chapman et al, Claimant Attorneys  
Hornecker Cowling et al, Defense Attorneys

Reviewing Panel: Members Lowell and Biehl.

The self-insured employer requests review of those portions of Administrative Law Judge (ALJ) Smith's order that: (1) found that claimant's injury claim for a low back condition was timely filed under ORS 656.265(4); (2) set aside its denials of the aforementioned claim; and (3) awarded a \$15,000 employer-paid attorney fee. On review, the issues are claim filing, compensability, and attorney fees.<sup>1</sup> We reverse.

FINDINGS OF FACT

Claimant worked for the employer as a phlebotomist. On or about February 1, 2008, she felt a "kind of twinge" in her low back while lifting boxes at work.<sup>2</sup>

Nurse Practitioner Olson, her longtime primary care provider, examined claimant for unrelated bladder concerns on February 13, 2008. (Ex. 1-2). Claimant did not mention a lifting incident, did not complain of back or leg symptoms, and did not tell Ms. Olson that she was taking medication for any such symptoms.

Almost four months later, on May 29, 2008, claimant again sought treatment from Ms. Olson. At this appointment, she described a February 2008 lifting incident "[with] low back pain," followed by ongoing problems. (Ex. 1-2).

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<sup>1</sup> Claimant's motion for supplemental briefing is granted. OAR 438-011-0020(3). Consequently, the parties' supplemental briefs have been considered.

<sup>2</sup> Claimant first had low back problems in 1973 after a motor vehicle accident, from which she recovered. (See Ex. 16-4). In 2004, claimant filed a claim involving low back pain that "went on for months and months." (1Tr. 76; see Ex. 000; 1Tr. 72-75 Ex. 00; 2Tr. 72-73). On December 18, 2007, claimant sought treatment for "sacroiliac" complaints (characterized by buttock pain). (See Exs. 1-1-2, 7). Ms. Olson prescribed Norco (30 pills) and Flexeril (60 pills) for these symptoms, but claimant reported that she took only one pain pill at the time. (Ex. 1-1; see Ex. 2; 2Tr. 30).

A June 26, 2008 MRI revealed mild disc desiccation and narrowing “associated with a broad-based left lateral disc herniation that mildly narrows the left L5-S1 neural foramen” (among other things). (Ex. 3-2). Claimant refilled a Flexeril prescription that day and she filled a Vicodin prescription (30 pills) on July 7, 2008.<sup>3</sup> (Exs. 4, 9-1).

Claimant filed an injury claim on June 26, 2008, indicating that she had experienced a “sharp pain” in her lower back at work in February 2008. (Ex. 5). The employer denied the claim as untimely filed. (Ex. 6). Claimant requested a hearing.

On September 16, 2008, Ms. Olson reported that claimant’s back pain was getting worse at work. (Ex. 9-2). She prescribed Flector (60 pills), a patch, and Zanaflex (60 pills).

On December 2, 2008, Dr. Leadbetter, orthopedic surgeon, examined claimant at the employer’s request. He reported claimant’s chief complaint of constant low back pain with intermittent radiation to the left posterior thigh. (Ex. 12-2). He opined that claimant did not sustain an acute disc herniation at work, because she did not seek treatment for 3 months.

Dr. Wenner examined claimant on December 4, 2008 and became her attending physician. Based on claimant’s history of a lifting incident, with the onset of pain “radiating all the way down her left leg,” and assuming the veracity of that history, Dr. Wenner opined that it was “reasonable to conclude that the disk prolapse happened at that event and [it was] not related to her ‘sacroiliac’ problems that she has had previously.” (Ex. 14A; *see* Ex. 15A).

On January 22, 2009, the employer amended its denial, asserting that claimant’s low back condition was not work related. (Ex. 15). Claimant requested a hearing.

On April 28, 2009, Dr. Wenner noted that claimant’s somewhat fluctuating radiculopathy had “been going on now for a year.” (Ex. 15D).

Dr. Smith, orthopedic surgeon, examined claimant at the employer’s request on August 27, 2009. (Ex. 16). He agreed with Dr. Leadbetter that an acute herniation would have caused claimant to seek treatment far quicker than she did.

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<sup>3</sup> Claimant had prior prescriptions for Flexeril and “Norco” from December 2007. (Ex. 1-1). *See* n 4, *infra*.

Noting claimant's long history of sacroiliac discomfort, which he felt was due to lumbosacral degeneration, Dr. Smith opined that the work incident caused a preexisting degenerative condition to become symptomatic. However, according to Dr. Smith, "the acute stress from lifting the heavy boxes would have resolved within a few weeks, leaving her residual trouble due primarily to the preexisting degenerative changes."<sup>4</sup> (*Id.* at 7).

Dr. Wenner concurred with Dr. Smith's opinion. (Exs. 17, 17A-1).

On September 22, 2009, Dr. Wenner reported that claimant's lower extremity symptoms had largely resolved, but because of her degenerative change and disc space narrowing, she would probably have persistent low back discomfort with increased activity. (Ex. 17A-1; *see* Exs. 23, 25).

Drs. Wenner and Smith were deposed. (Exs. 27, 28).

Dr. Dunn, a neurosurgeon, reviewed claimant's records, spoke with her by telephone, and concurred with a letter prepared by claimant's attorney. Dr. Dunn indicated that work activities in January or February 2008 were a material cause of claimant's need for treatment in May 2008 and thereafter. (Ex. 29).

### CONCLUSIONS OF LAW AND OPINION

Based on claimant's uncontested request, a hearing on the timeliness issue was held first, in March 2009.<sup>5</sup> Claimant described her injury-related symptoms as a "kind of twinge" in her back. (1Tr. 60).<sup>6</sup> She did not testify that the February 2008 lifting incident involved a "pop" in her back, or that she had symptoms

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<sup>4</sup> After reviewing claimant's MRI and despite acknowledging that there was no way to tell the age of the herniation, Dr. Smith opined that "[t]he changes at L5-S1 appeared to be older than February 2008." (Ex. 18-2).

<sup>5</sup> We recognize that, considering the parties' respective positions, it was permissible for the ALJ to conduct the initial hearing (for the timeliness issue) and keep the record open for the introduction of additional "compensability" evidence following the ALJ's determination on the "timeliness" issue. Nonetheless, we question the necessity of holding a reconvened hearing for the introduction of further "testimonial" evidence. Instead, we would have considered it more appropriate (as well as more efficient) for the parties to have presented all of their testimonial evidence (on all disputed issues) at the initial hearing and then kept the record open for the submission of documentary evidence on the compensability issue.

<sup>6</sup> Testimony taken at the two hearings is cited herein as "1Tr" and "2Tr" respectively.

radiating into her left foot within a couple days. After the ALJ issued an interim order finding the claim was timely filed, a second hearing convened in May 2010, to litigate the compensability issue.

After that hearing, the ALJ issued an Opinion and Order republishing his Interim Order. The ALJ's order set aside the employer's denials (on timeliness and causation grounds). The ALJ also awarded a separate \$7,500 attorney fee for claimant's attorney's service in prevailing against each denial.

On review, the employer contends that claimant's injury claim was not timely filed, because she did not give the employer adequate timely notice of the injury. *See* ORS 656.265(4). The employer also argues that the medical evidence does not establish that claimant sustained a compensable injury. Finally, the employer challenges the ALJ's attorney fee awards as excessive.

We need not decide the "timeliness" or attorney fee issues because (even if the claim was timely filed), claimant did not prove medical causation. We reason as follows.

Claimant has the burden of proving, by a preponderance of the evidence, that the claimed February 2008 work incident was a material contributing cause of her disability/need for treatment.<sup>7</sup> ORS 656.005(7)(a); ORS 656.266(1); *Steven L. Blanchard*, 60 Van Natta 453, 453 (2008). Ordinarily, claimant need not prove a specific diagnosis to establish compensability. *See Sheryl L. Lane*, 62 Van Natta 2014, 2026 (2010) (in an initial injury claim, a claimant need not prove a specific diagnosis if she proves that her symptoms are attributable to the injury) (citing *Boeing Aircraft Co. v. Roy*, 112 Or App 10, 15 (1992)). Here, however, claimant must prove the compensability of her L5-S1 herniated disc condition, because the medical evidence in this particular record attributes her need for treatment only to this specific condition.<sup>8</sup> *See K-Mart v. Evenson*, 167 Or App 46, 51-52 (2000) (an injury claim may be compensable if the injury requires only medical services); *compare see Larry D. Robinson*, 59 Van Natta 172, 177 (2007) (abdominal strain that did not materially result in disability/need for treatment was not compensable).

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<sup>7</sup> We do not reach the question of whether claimant's condition is a "combined condition" (such that the burden of proof shifts to the employer), because we find the medical evidence insufficient to carry claimant's initial burden of proving material causation. *See Milford L. Tarter*, 58 Van Natta 1897, 1898-99 (2006) (Where the medical evidence was insufficient to prove that the work injury was at least a material cause of the claimant's treatment or disability, the burden of proof did not shift to the carrier under ORS 656.266(2)(a)).

<sup>8</sup> Dr. Wenner explained that "herniation," "bulge," and "prolapse" all refer to the same condition in this case and claimant's L5-S1 disc condition was the reason for her need for treatment. (*See Ex. 27-9*).

Because claimant did not seek treatment for months after the claimed event, and considering the divergence of medical opinions, the compensability issue presents a complex question of medical causation. Consequently, persuasive medical evidence is required to prove the claim. *See Uris v. State Comp. Dept.*, 247 Or 420, 426 (1967); *Barnett v. SAIF*, 122 Or App 279, 283 (1993).

The opinions expressed by Drs. Leadbetter, Dunn and Wenner address the relationship between claimant's L5-S1 disc condition and the February 2008 lifting incident.<sup>9</sup> Dr. Dunn reviewed claimant's records and spoke to her for about 30 minutes by telephone in May 2010. Based on claimant's findings in May 2008, her sedentary lifestyle, the mechanism of the February 2008 lifting incident, a reported concurrent "popping" sensation, and claimant's June 2008 MRI findings, Dr. Dunn opined that the lifting incident probably caused a disc herniation. (Ex. 29-3). In reaching this conclusion, Dr. Dunn also relied on his experience that people sometimes have herniations with no symptoms other than back pain, and they sometimes have a disc injury without herniation. We do not find Dr. Dunn's opinion persuasive for the following reasons.

First, at the March 2009 hearing regarding the timeliness of claim filing, claimant testified that she "felt [her] back kind of twinge." As noted, she did not testify that she experienced a "pop" or other symptoms. (1Tr. 60). However, at the May 2010 "compensability" hearing, claimant testified that she "felt that twinge or pop or whatever. I – I mean I felt my back and it started freezing up right there." (2Tr. 27). These variations in testimony cast doubt on whether Dr. Dunn's opinion was based on an accurate history regarding the onset of claimant's symptoms.<sup>10</sup> *See Miller v. Granite Construction Co.*, 28 Or App 473,

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<sup>9</sup> Dr. Smith opined that the work incident caused claimant's preexisting degeneration to become symptomatic but, after a few weeks, her residual trouble was due primarily to the preexisting degeneration. Dr. Wenner concurred. (*See Exs. 16, 17, 17A-1*). These opinions do not support a conclusion that the work incident was a material cause of claimant's need for treatment for her L5-S1 disc herniation.

<sup>10</sup> We do not question the ALJ's finding that claimant and all witnesses testified credibly. (*See Opinion and Order*, pp. 20, 33). However, claimant's descriptions of her symptoms varied over time, as noted. Moreover, although she stated that her back "froze up" and she took pain medication after the work incident, she did not mention the incident, the symptoms, or the medication when she was examined by her primary care provider 12 days later. Under these circumstances, we are not persuaded that claimant was a reliable historian. *See William R. Squires*, 60 Van Natta 1894, 1897, n 1 (2008). (Although not disregarding the ALJ's demeanor-based credibility finding concerning claimant's testimony, the record raised sufficient doubt to cause Board to be unpersuaded that claimant's complaints were attributable to a claimed work incident.)

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476 (1977) (medical opinions are only as reliable as the history provided by the claimant); *Latonya M. Bias*, 60 Van Natta 905, 905 (2008) (persuasiveness of medical evidence depends on accuracy of history).

Second, Dr. Dunn relied on a history that claimant used “3-5 each of [pain] medications daily while symptomatic” after the February 2008 injury. (Ex. 29-4-5). According to Dr. Dunn, this drug usage would have effectively masked or suppressed claimant’s disc-related symptoms. (*Id.*) However, claimant indicated that she took pain medication for *back* symptoms, not *leg* symptoms, (2Tr. 37), and Dr. Wenner explained that only leg symptoms reliably establish the existence of a herniation. (*See* Exs. 27-13, 15). Accordingly, we do not find that the “masking theory” supports an injury-related disc herniation.

Moreover, we do not find Dr. Dunn’s opinion that herniations may or may not have symptoms helpful in evaluating causation. Under these circumstances, we consider Dr. Dunn’s opinion inadequately reasoned and unpersuasive.<sup>11</sup>

Furthermore, the opinions of Drs. Wenner and Leadbetter do not establish that the claimed February 2008 incident was a material cause of claimant’s L5-S1 disc condition in May 2008 (the date of her first medical treatment) or thereafter. We reason as follows.

Dr. Wenner examined claimant many times and thoroughly evaluated her history. He opined that claimant’s disc condition was injury-related if the herniation occurred at the time of the injury, but the condition was not injury-related if the herniation occurred later. (*See* Ex. 27-19-20). In analyzing the cause of the L5-S1 disc condition, Dr. Wenner particularly considered the timing of claimant’s disc-related symptoms and her delay in seeking treatment.

Dr. Wenner believed that claimant did not have enough disc prolapse to cause nerve injury in December 2007 (the last time claimant sought treatment for her back before the claimed February 2008 incident), but instead concluded that she developed an L5-S1 disc prolapse sometime between December 2007 and December 2008 (when he first examined her 10 months after the February 2008 work incident). (*See id.* at 26). However, Dr. Wenner also explained that it was unlikely that the disc herniated before she sought treatment in May 2008 “or she

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<sup>11</sup> We also note that Dr. Dunn never examined claimant.

would have had issues with it. \* \* \* \* \*Because typically with that, you don't put up with it. It's very uncomfortable and you go tell somebody."<sup>12</sup> (*Id.* at 7; *see id.* at 12).

Dr. Wenner was also "bothered" by claimant's history of ongoing symptoms without treatment, and he was concerned about whether he correctly understood that claimant had *leg* symptoms ever since her injury. (*See id.* at 10, -19, -30-31). He explained that back pain would not be due to herniation and thigh pain would be due to degeneration, whereas leg pain due to a disc condition would go all the way to the foot. (Exs. 14A, 27-13, -15, -20, -28; *see also* Ex. 11-2; 2Tr. 38). In any event, Dr. Wenner opined: "Truly the main inconsistency in this is just the length of time it took for [claimant] to seek attention." (Ex. 27-12).

Thus, even if claimant had disc-related symptoms during the 4 months before she sought medical treatment, Dr. Wenner found the delay in seeking treatment inconsistent with the existence of an injury-related L5-S1 disc herniation. Dr. Leadbetter similarly opined that the February 2008 work incident did not cause a disc herniation, based on this delay. (Ex. 12). We find this reasoning persuasive, because it is consistent with the contemporaneous medical record and effectively unrebutted (*i.e.*, Dr. Dunn's "masking theory" is speculative as explained herein). Accordingly, we find that Dr. Wenner's opinion does not support a conclusion that the February 2008 work incident was a material cause of claimant's need for treatment for an L5-S1 disc herniation.

Accordingly, absent persuasive medical evidence supporting the compensability of claimant's L5-S1 disc condition, we are not persuaded that claimant's February 2008 work incident was a material contributing cause of her need for medical treatment/disability for her L5-S1 disc condition. Consequently, we reverse.

### ORDER

The ALJ's order dated July 28, 2010 is reversed. The employer's denial is reinstated and upheld. The ALJ's \$15,000 attorney fee award is reversed.

Entered at Salem, Oregon on April 25, 2011

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<sup>12</sup> Claimant did not tell Ms. Olson, her primary care provider, about the claimed work injury 12 days after the incident (or that she was taking medication for her back at the time), and she did not seek medical treatment for her L5-S1 disc herniation until 4 months after the work incident. She testified that she did not think it was important to report something that was going to take time to heal. (*See* 2Tr. 50-51).