
In the Matter of the Compensation of
DAVID D. WALKER, Claimant
WCB Case No. 09-04014, 09-02172, 09-02171, 09-02170
ORDER ON REVIEW
Jodie Phillips Polich, Claimant Attorneys
David Runner, SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Langer, Weddell, and Herman. Member Langer affirms in part and dissents in part.

Claimant requests review of those portions of Administrative Law Judge (ALJ) Riechers's order that: (1) upheld the SAIF Corporation's denial of his occupational disease claim for an L4-5 disc herniation; (2) upheld SAIF's denial of his new/omitted medical condition claim for an L4-5 disc herniation and radiculitis as a consequence of his accepted August 2008 left foot crush injury; and (3) upheld SAIF's denial of his new/omitted medical condition claim for those same conditions as related to his October 2006 work injury. On review, the issue is compensability. We reverse in part and affirm in part.¹

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact." We summarize the pertinent facts as they relate to claimant's "consequential condition" claim.

On August 21, 2008, claimant was pulling a heavy pallet, when the pallet jack handle broke, and the pallet and jack landed on his left foot. (Exs. 73, 76, 78, 79). SAIF accepted a crush injury to the left foot. (Exs. 77, 84).

Before the August 2008 work injury, MRIs of claimant's lumbar spine indicated an L4-5 disc protrusion/herniation. (Ex. 11). Subsequent to the August 2008 work injury, claimant had a limping gait and limited weight bearing because of pain. He treated with Dr. Thomas, who noted increasing right-leg pain and radiculopathy. (Ex. 82). Dr. Thomas took claimant off work because the crush injury to the left foot caused him to put more stress on the right leg, which made his L4-5 herniated disc painful. (Ex. 86).

¹ We adopt and affirm that portion of the ALJ's order concerning claimant's occupational disease claim. Because, for the reasons set forth below, we find the claimed L4-5 disc herniation and radiculitis compensable as a consequential condition under the accepted August 2008 injury, we uphold SAIF's denial of claimant's new/omitted medical condition claim for those same conditions as related to the October 2006 work injury.

Claimant was referred to Dr. Wayson, who treated him in December 2008. (Ex. 89). Dr. Wayson believed that claimant's August 2008 crush injury resulted in an altered gait, which in turn resulted in a worsened L4-5 herniated disc with radiculitis. (Ex. 113A-2, -3). Dr. Wayson concluded that the August 2008 crush injury was the major contributing cause of that worsened disc condition. (*Id.*)

Dr. Carr examined claimant at SAIF's request. He agreed that the August 2008 work injury resulted in an altered gait and a "symptomatic aggravation," but not a "pathologic worsening," of claimant's underlying L4-5 disc herniation. (Ex. 114-8, -9). Dr. Carr concluded that claimant's altered gait, as a result of the August 2008 work injury, was a material contributing cause, but not the major contributing cause, of claimant's symptomatically aggravated L4-5 disc condition with radiculitis. (Ex. 114-17, -18).

SAIF denied claimant's new/omitted medical condition claim for an L4-5 herniated disc with radiculitis as related to the August 2008 work injury. Claimant requested a hearing.

CONCLUSIONS OF LAW AND OPINION

The ALJ upheld SAIF's denial, finding Dr. Wayson's opinion unpersuasive. We disagree with that assessment, reasoning as follows.

No injury or disease is compensable as a consequence of a compensable injury unless the compensable injury is the major contributing cause of the consequential condition. ORS 656.005(7)(a)(A). A consequential condition is "a separate condition that arises from the compensable injury, for example, when a worker suffers a compensable foot injury that results in an altered gait that, in turn results in back strain." *Fred Meyer, Inc. v. Crompton*, 150 Or App 531, 536 (1996). The parties do not dispute that the claimed L4-5 disc herniation should be analyzed on a "consequential condition." Therefore, claimant must prove that the accepted crush injury to the left foot was the major contributing cause of his L4-5 disc herniation with radiculitis. ORS 656.005(7)(a)(A); ORS 656.266(1).

Here, we are persuaded that Dr. Wayson's opinion establishes a compensable consequential condition. According to Dr. Wayson, the August 2008 work injury "altered [claimant's] gait by increasing use and weight bearing on his right leg." (Ex. 113A-2). As a result, claimant's low back condition worsened, "irritating the nerves in his low back causing inflammation and increased symptoms." (*Id.*) Dr. Wayson explained that the underlying L4-5 disc herniation

inflammation due to claimant's altered gait from the "crush injury" was the major contributing cause of claimant's "current L4-5 disc condition with radiculitis, including a worsening" and need for treatment. (*Id.*)

SAIF argues that we should not rely on Dr. Wayson's opinion because it "reflected an unexplained change of opinion." Specifically, SAIF contends that in February 2009, Dr. Wayson agreed with Dr. Carr's conclusion that the August 2008 work injury resulted in an "exacerbation" of the underlying L4-5 disc herniation, but was not the "major contributing cause" of a worsened L4-5 herniation with radiculitis. (*See Ex. 99; see also Ex. 97-16 through 19.*)

To begin, we do not interpret Dr. Wayson's February 2009 opinion as wholeheartedly agreeing with Dr. Carr's initial opinion. Dr. Wayson indicated that he agreed with some of Dr. Carr's opinion and disagreed with other portions. (*Id.*) Dr. Wayson also noted that the August 2008 injury "led to an exacerbation, but that the primary *underlying* cause [was] the disc herniation of 2006." (*Id.*) (emphasis added). Although the intended meaning of Dr. Wayson's reference to "the primary underlying cause" is unclear, his February 2009 opinion is consistent with the August 2008 "crush injury" exacerbating or worsening claimant's underlying L4-5 disc herniation.

In any event, subsequent to the February 2009 opinion, Dr. Wayson had the opportunity to review all of the then-available medical records, as well as to personally review the aforementioned 2006 MRIs. (*See Ex. 113A-1.*) Dr. Wayson's subsequent opinion, which we rely on, was issued after having the opportunity to review all of the relevant medical data. Thus, to the extent that Dr. Wayson "changed" his early opinion, we find that the opportunity to personally review and analyze all of the relevant medical data adequately explains any such "change."

SAIF also asserts that Dr. Wayson's opinion is unpersuasive because Dr. Carr opined that the only "true objective findings" of a "worsened" L4-5 disc herniation recorded by Dr. Wayson were "decreased sensation and a positive straight leg raising." (*See Ex. 114-11, -12.*) According to Dr. Carr, both of those findings were present before the August 2008 work injury. (*Id.*)

Dr. Wayson, however, also based his opinion on other findings that did not precede the August 2008 "crush injury," such as "giveaway weakness in [the] right lower extremity" and "increased pain" and inflammation. (*Ex. 113A-2.*) Dr. Wayson specifically noted that these findings were "verifiable and

reproducible.” (*Id.*)² Contemporaneous chart notes support such increased symptoms with radiculopathy after the August 2008 work injury. (*See* Ex. 82). Therefore, we do not conclude that Dr. Wayson’s opinion was based on an inaccurate history.

Finally, we note that Dr. Carr’s opinion is also consistent with a “consequential condition,” in that he believed that the August 2008 “crush injury” to the left foot resulted in an altered gait, which in turn caused a “symptomatic aggravation” of claimant’s underlying L4-5 disc herniation. (Ex. 114-8; *see also* Ex. 97-17, -18). Although Dr. Carr did not believe that the aggravation “rose to a level of a pathologic worsening” or that the August 2008 work injury was the major contributing cause of the claimed L4-5 disc condition with radiculitis, he agreed that the injury materially contributed to a “symptomatic aggravation” and need for treatment. (Exs. 97-17, -18, 114-17, -18). Because we find Dr. Wayson’s opinion better explained and more consistent with claimant’s symptoms and the overall record, we rely on that opinion.

Claimant’s attorney is entitled to an assessed fee for services at hearing and on review concerning SAIF’s denial of the L4-5 herniated disc with radiculitis as a consequence of the August 2008 work injury. ORS 656.386(1). 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 and on review for overcoming that denial is \$11,000 payable by SAIF. In reaching this conclusion, we have particularly considered the time devoted to this issue (as represented by the record, claimant’s appellate briefs, and his counsel’s uncontested fee submission), the complexity of the issue, the value of the interest involved, and the risk that counsel may go uncompensated.

Finally, claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the aforementioned 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, *recons*, 60 Van Natta 139 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

² Although Dr. Carr did not document “giveaway weakness” when he examined claimant, it does not follow that such a finding is incapable of being reproduced.

ORDER

The ALJ's order dated December 23, 2010 is reversed in part and affirmed in part. That portion of the ALJ's order that upheld SAIF's denial of the L4-5 disc herniation with radiculitis as a consequence of the August 2008 work injury is reversed. SAIF's denial under the August 2008 claim is set aside and the claim is remanded to SAIF for processing according to law. For services at hearing and on review concerning that denial, claimant's attorney is awarded an assessed fee of \$11,000, 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 denial, to be paid by SAIF. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on December 23, 2011

Member Langer affirming in part and dissenting in part.

The majority relies on Dr. Wayson's opinion to conclude that claimant's 2008 left foot crush injury was the major contributing cause of his L4-5 disc herniation with radiculitis. Because I disagree with that portion of the majority's order, I respectfully dissent.

Dr. Wayson examined claimant on one occasion in December 2008. Claimant told him about his October 2006 back injury and explained that he had an L4-5 disc herniation after that injury. Dr. Wayson reported that after that injury, claimant suffered "intermittent aggravations that would take him out for awhile" and that he had SI joint injections. Dr. Wayson reported that claimant's August 2008 left foot injury led to an "aggravation of his right leg symptoms." He assessed "persistent complaints of lumbar radiculopathy secondary to a disc herniation" and recommended an L4-5 microdiscectomy. (Ex. 89).

On February 11, 2009, Dr. Wayson reviewed Dr. Carr's January 2009 report and explained that he agreed for the most part and believed that claimant's "primary injury [was] the work injury of October 2006 in which he suffered a progression of his disc herniation at L4-5. I think that that [was] the underlying and the primary cause for his need for treatment." He noted that claimant had remained symptomatic since the 2006 injury and that the 2008 foot injury led to an exacerbation, but the "primary underlying cause" was the 2006 disc herniation. Dr. Wayson believed that the underlying disc herniation continued to be symptomatic. (Ex. 99).

In an August 7, 2009 concurrence letter from claimant's attorney, Dr. Wayson changed his opinion. The letter indicated that Dr. Wayson had reviewed claimant's records and the 2006 MRIs. Dr. Wayson concluded that the August 2008 left foot injury was the major contributing cause of the L4-5 disc herniation and radiculitis/radiculopathy. (Ex. 113A-1, -3). He explained that claimant altered his gait after the August 2008 crush injury and, as a result, his low back condition was worsened, irritating the nerves in the low back and causing inflammation and increased symptoms. Dr. Wayson based his opinion on claimant's history of increased pain after the 2008 injury, as well as his examination findings, which he believed established an actual worsening of the L4-5 disc herniation. (Ex. 113A-2).

Dr. Wayson did not explain why he changed his causation opinion. The majority finds that, to the extent that Dr. Wayson "changed" his early opinion, the opportunity to personally review and analyze all of the relevant medical data adequately explained any such "change."

I am not persuaded that such circumstances provide a sufficient explanation for Dr. Wayson's new opinion. Dr. Wayson had reviewed Dr. Carr's January 2009 report, which had provided a detailed description of the MRIs, as well as an extensive discussion of the medical records. (Ex. 99; *see* Ex. 97-3 to -9, -11). Dr. Wayson's later concurrence letter indicated that he relied on claimant's history and his own examination findings to establish a "worsening" of the L4-5 herniation. (Ex. 113A-2). However, he did not refer to any new information from the 2006 MRIs or medical records that changed his opinion. Because Dr. Wayson did not explain his change of opinion and the record does not provide an adequate explanation for the changed opinion, his opinion is not persuasive. *See Kenneth L. Edwards*, 58 Van Natta 487, 488 (2006) (physician not persuasive where there was no reasonable explanation in the record for the change of opinion); *cf. Kelso v. City of Salem*, 87 Or App 630, 633 (1987) (where there was a reasonable explanation for a physician's change of opinion, that opinion was persuasive).

In any event, even assuming there is a reasonable explanation for Dr. Wayson's change of opinion, his opinion is not persuasive for the following reasons.

The majority finds Dr. Wayson's opinion persuasive because he based his opinion on other findings that did not precede the August 2008 crush injury, such as giveaway weakness in the right lower extremity, increased pain, and inflammation.

In the concurrence letter from claimant's attorney, Dr. Wayson based his opinion on claimant's history of increased pain after the 2008 injury, as well as his examination findings of decreased sensation in an L5-S1 distribution on the right side, giveaway weakness in the right lower extremity, and positive straight leg raise testing. (Ex. 113A-2). However, Dr. Carr testified that, before the 2008 injury, Dr. Bergquist had documented a positive straight leg raising and decreased sensation in the same distribution. (Ex. 114-12). Dr. Carr also explained that "giveaway weakness" meant that there was either a voluntary or involuntary giving away when testing the muscles, but it did not denote true weakness. (*Id.*) Dr. Carr found no evidence of weakness during his examination. (*Id.*)

Furthermore, Dr. Carr explained that claimant's November 2008 MRI, taken after the August 2008 injury, did not show any change of the L4-5 disc. (Ex. 97-12). He reported that the November 2006 MRI, taken after claimant's October 2006 work injury, showed a very large extruded fragment of disc material extending from L4-5 and down behind the L5 vertebral body. (Exs. 97-11, -12, 114-4). Claimant told Dr. Carr that he continued to have symptoms after the October 2006 work injury. (Ex. 97-3, -12). Dr. Carr found no evidence of any pathologic worsening of the L4-5 disc after the 2008 injury. (Ex. 97-12, -13). He testified that the 2008 MRI showed that the disc fragment was certainly no larger, and, if anything, it was slightly smaller after the 2008 injury than it was in 2006. (Ex. 114-4, -12). Dr. Carr concluded that claimant's August 2008 injury was not the major contributing cause of his L4-5 disc condition. (Exs. 97-19, 114-13, -16, -18).

Thus, the record establishes that claimant had a significant L4-5 disc herniation before the 2008 injury, which was slightly smaller after the 2008 left foot injury. Positive straight leg raising and decreased sensation were documented before the 2008 injury. Dr. Wayson's opinion regarding a pathological worsening of the L4-5 disc herniation is essentially based on his finding, during one examination, of "giveaway weakness." Dr. Wayson's opinion is not persuasive because it did not adequately respond to or rebut Dr. Carr's detailed explanation of why the 2008 injury did not cause a pathological worsening of the L4-5 disc herniation. *See Janet Benedict*, 59 Van Natta 2406, 2409 (2007), *aff'd without opinion*, 227 Or App 289 (2009) (medical opinion unpersuasive when it did not address contrary opinions). Because the medical evidence is not sufficient to establish that claimant's 2008 left foot crush injury was the major contributing cause of his L4-5 disc herniation or lumbar radiculitis, I dissent from that part of the majority's decision.

In addition, I agree with the ALJ's conclusion that claimant's L4-5 disc herniation and radiculitis claim in relation to his October 2006 work injury was precluded. The ALJ reasoned that claimant had previously made a claim for a worsening of the L4-5 condition, which was denied on April 22, 2008, and became final by operation of law. The ALJ determined that the effect of the final April 22, 2008 denial was to preclude the current claim for the L4-5 disc condition because the 2008 MRI, when compared to the November 2006 MRI, showed no change in that condition. The ALJ also reasoned that, because the radiculitis was a product of the L4-5 condition, that claim was precluded as well. For the following reasons, I agree.

The prior request for hearing regarding the April 2008 denial was dismissed with prejudice. Therefore, there was no actual litigation, and issue preclusion does not attach. *Ted B. Minton*, 50 Van Natta 2423 (1998) (issue preclusion not applicable where the request for hearing was dismissed with prejudice and the parties did not actually litigate the substantive merits of the claim).

However, because the April 2008 denial became final "with prejudice" by operation of law, claim preclusion attached. *See Drews v. EBI Cos.*, 310 Or 134, 149 (1990); *David H. McKinley*, 52 Van Natta 890, 891-92 (2000), *aff'd without opinion*, 176 Or App 359 (2001); *see also Oreste A. Chorney*, 50 Van Natta 498, 498 n 1 (1998) (where the claimant withdrew his hearing request from a denial and a dismissal order issued, the denial became final as if it had not been challenged). Thus, claimant is barred from claiming compensation for the same condition which was denied, unless the condition has changed. *See Popoff v. J.J. Newberrys*, 117 Or App 242 (1992) (a previously denied claim is precluded when the denial becomes final); *Liberty Northwest Ins. Corp. v. Bird*, 99 Or App 560 (1989) (when a previously denied claim is reasserted, the question is whether the condition has changed so as to have created a new set of operative facts that previously could not have been litigated); *Chorney*, 50 Van Natta at 498. The medical evidence is reviewed to ascertain whether the claimant's current condition is something other than that previously denied. *See Sherry L. Rose*, 46 Van Natta 293 (1994).

Claimant argues that the only condition that he requested be added to his 2006 injury claim before December 2008 (the date he filed his current new/omitted medical condition claim) was "a worsening of my L4 & L5 disc protrusion," which SAIF specifically denied on April 22, 2008. (Exs. 54, 63). Claimant contends that he never asked, before December 2008, that an "L4-5 disc herniation" or "radiculitis" be formally accepted; nor, he asserts, did SAIF's April 2008 denial of a "worsening of L4-5 disc protrusion" deny those conditions. Finally, claimant

contends that nothing in the record establishes that the conditions denied in SAIF's April 2008 denial are the same conditions for which a claim was made in December 2008.

Contrary to claimant's assertions, my review of the medical evidence establishes that, before and after the April 2008 denial, claimant was seeking treatment for the symptoms from the same condition. I find the opinion of Dr. Carr most persuasive in this regard.³ Dr. Carr considered claimant's L4-5 condition before and after the April 2008 denial. He explained that claimant's back symptoms after August 2008 represented a symptomatic aggravation of his underlying degenerative disc disease, but not a pathological worsening of the L4-5 disc protrusion or radiculitis. (Ex. 97-12). He noted that claimant had radiculitis symptoms relative to L4-5 after both the 2006 and 2008 injuries, which indicated only a symptomatic condition and not a pathology. (*Id.*) In support of his conclusion, Dr. Carr noted that the November 2008 MRI showed no change in the herniated disc at L4-5 when compared to the November 2006 MRI; if anything, he felt the L4-5 disc protrusion looked slightly improved compared to the 2006 MRI. (*Id.*; *see* Exs. 20, 83). Finally, Dr. Carr explained that claimant's decreased sensation and positive straight leg raise testing after the 2008 crush injury did not represent a pathological change or worsening because those findings were present previously, as indicated by Dr. Bergquist's 2007 and 2008 examination findings.⁴ (Ex. 114-12; *see* Exs. 40, 59).

Consequently, I conclude that claimant's present new/omitted medical condition claim for his L4-5 disc herniation with radiculitis is for the same claimed condition that led to the April 2008 denial. Claimant has had the same treatment and diagnoses for his low back since October 2006, and the 2008 MRI showed no change in the L4-5 disc herniation when compared with that from November 2006. Finally, there were no conditions related to claimant's L4-5 disc present at the time of the February 2009 denial that did not already exist when the 2008 denial was issued.

³ Dr. Thomas, claimant's current attending physician, concurred with Dr. Carr's opinion. (Ex. 116).

⁴ Dr. Wayson opined that claimant's altered gait from his 2008 foot injury increased his low back pain to the point that it constituted an actual worsening of the L4-5 disc herniation. As discussed above, I find, as did the ALJ, that this opinion from Dr. Wayson represents an unexplained change of opinion from his earlier conclusion that claimant's underlying disc herniation continued to be symptomatic since the 2006 injury, which was the underlying and primary cause for his need for treatment. In any event, as previously noted, even if Dr. Wayson's change of opinion was explained by the record, I still find it less persuasive than that of Dr. Carr. I note that Dr. Wayson did not respond to or rebut Dr. Carr's opinion explaining why claimant's L4-5 disc herniation had not worsened.

In light of such circumstances, I conclude that claimant's current L4-5 disc condition is the same condition that SAIF denied in 2008, and that condition has not changed. Accordingly, under the doctrine of claim preclusion, claimant is barred from litigating the compensability of his present L4-5 disc herniation and radiculitis.⁵ Cf. *Julie A. Daniels-Linton*, 60 Van Natta 1004, 1005 (2008) (claim not precluded because the current new/omitted medical condition was not the same condition previously denied).⁶

⁵ The medical evidence indicates that the claimed "radiculitis" is merely a symptom of, or secondary to, the L4-5 disc herniation condition. (Exs. 31, 34, 97-12-14). Accordingly, that claim is precluded as well.

⁶ I recognize that a worker may initiate a new/omitted medical condition claim at any time. ORS 656.262(6)(d); ORS 656.267(1); *Evangelical Lutheran Good Samaritan Soc'y v. Bonham*, 176 Or App 490, 498 (2001). However, for the reasons expressed above, I find that claimant's current new/omitted medical condition claim related to the October 2006 injury has already been *initiated* and *denied*, and that denial has become final by operation of law. Under such circumstances, *Bonham* and its progeny do not apply. See *Crecencie Pavon-Valdez*, 56 Van Natta 4020, 4022 (2004) (*Bonham* distinguished where the new medical condition claim for a specific condition had already been initiated and denied before a prior proceeding); see also *Daniels-Linton*, 60 Van Natta at 1005 (if new/omitted medical condition was the same condition as that previously denied, because that denial was final, claim preclusion would bar the current claim).