
In the Matter of the Compensation of
RICK D. BEEHLER, Claimant
WCB Case No. 10-02996, 08-04707
ORDER ON REVIEW
Jodie Phillips Polich, Claimant Attorneys
Cummins Goodman et al, Defense Attorneys

Reviewing Panel: Members Weddell, Lowell, and Herman.

Claimant requests review of that portion of Administrative Law Judge (ALJ) Kekauoha's order that upheld the self-insured employer's denial of his injury claim for a low back condition.¹ On review, the issue is compensability. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact."

CONCLUSIONS OF LAW AND OPINION

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); *David J. Tikunoff*, 62 Van Natta 2359, 2361 (2010). If, however, the carrier asserts that a claimed condition is a "combined condition," it 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 the major contributing cause of the disability/need for treatment of a combined condition. ORS 656.005(7)(a)(B); ORS 656.266(2)(a); *SAIF v. Kollias*, 233 Or App 499, 505 (2010); *Tikunoff*, 62 Van Natta at 2361; *Jack G Scoggins*, 56 Van Natta 2534, 2535 (2004).

Because of the conflicting medical opinions, expert medical opinion must be used to resolve this compensability issue. *Barnett v. SAIF*, 122 Or App 279, 282 (1993); *Linda Patton*, 60 Van Natta 579, 582 (2008). Where the medical evidence is divided, we give more weight to those medical opinions that are both well reasoned and based on complete and accurate information. *Somers v. SAIF*,

¹ On review, claimant does not raise the compensability of a previously alleged February 2, 2008 work injury. Therefore, we do not address the timeliness of his request for hearing on the employer's denial of that injury claim.

77 Or App 259, 263 (1986). Absent persuasive reasons not to do so, we generally give greater weight to the treating physician's opinion. *Weiland v. SAIF*, 64 Or App 810, 814 (1983); *Roberto Gomez*, 61 Van Natta 143, 144 (2009). Finally, a surgeon's observations at surgery may be entitled to deference due to the unique opportunity to observe the claimant's condition firsthand. *Argonaut Ins. v. Mageske*, 93 Or App 698, 702 (1988); *Dodi L. Burlingham*, 62 Van Natta 1700, 1704 (2010).

Here, we do not find persuasive reasons to disregard the opinion of claimant's treating physician and surgeon, Dr. Adler. Dr. Adler opined that claimant, a long-haul truck driver, sustained an L3-4 disc herniation as a result of putting chains on tires on February 8, 2008. (See Exs. 120-24, 125; Tr. 28). Although claimant had degenerative disc disease that predated the February 8, 2008 work incident, Dr. Adler opined that the work incident, and not the degenerative condition, was the major contributing cause of the L3-4 disc herniation and claimant's disability/need for treatment. (Exs. 120-34, -35, 125-2).

Dr. Adler supported his opinion with his operative findings. Specifically, he stated that, when he exposed the disc fragment, it was "under pressure" and "extruded itself," which made its removal easier. (Ex. 120-39). Dr. Adler explained that such a presentation suggests that the disc "acutely herniated," as opposed to being present for a long period of time. (Ex. 120-40). Dr. Adler explained that the acuteness or chronic nature of a herniated disc could not be determined by an MRI scan. (Ex. 120-45, -46).

Dr. Adler disagreed with Drs. Bergquist and Green, who examined claimant at the employer's request, concerning the contributory roles of the work incident and claimant's degenerative disc condition to the L3-4 disc herniation. Drs. Bergquist and Green believed that the February 8, 2008 work incident either did not contribute or was "largely irrelevant" to the L3-4 herniated disc. (See Exs. 118-14, 126-27). Although Dr. Bergquist acknowledged that claimant's L3-4 disc most likely herniated at the time of the February 8, 2008 work activity, he characterized the activity itself as "largely irrelevant" to the herniation, reasoning that discs could herniate at any time, and that people are "always doing something when a disc herniates, even if it's sleeping." (Ex. 126-27). Dr. Green did not believe that the L3-4 disc herniated with work activities on February 8, 2008, but rather that "all" of claimant's low back conditions existed before the February 8, 2008 work incident. (Ex. 118-14). Both Drs. Bergquist and Green assigned most, if not all, of the contributory cause of claimant's L3-4 disc herniation to the preexisting degenerative disc condition. (Exs. 118-14, 123-2, -3, 126-25 through 29).

Dr. Adler persuasively addressed these contrary opinions. He acknowledged the presence of claimant's preexisting degenerative condition, but explained that the L3-4 disc had not herniated before the February 8, 2008 work incident. (Ex. 120-34, -35). He supported that position by comparing pre- and post-injury imaging studies and by the history and onset of claimant's low back symptoms. (Ex. 120-20 through 24, -31, -32, -49, -50). Moreover, according to Dr. Adler, claimant's degenerative disc condition reduced, rather than augmented, the probability of the disc fragment acutely herniating. (Ex. 120-19, -33).

We find Dr. Adler's opinion, including his response to the contrary opinions of Drs. Bergquist and Green, to be well reasoned and persuasive. Moreover, we give greater weight to his opinion, due to the advantage of being claimant's treating surgeon for the L3-4 disc herniation. *See Mageske*, 93 Or App at 702; *Burlingham*, 62 Van Natta at 1704. Consequently, we find that claimant established an "otherwise compensable injury," and, assuming a "combined condition," that the otherwise compensable injury was the major contributing cause of the disability/need for treatment for a combined L3-4 disc condition. (Exs. 120-34, -35, 125-2).

We disagree with the employer's assertion that Dr. Adler's opinion relied solely on a temporal relationship. Although medical opinions based solely on a temporal relationship are generally not persuasive, the temporal relationship between a work injury and the onset of symptoms is one factor that should be considered. *Allied Waste Indus., Inc. v. Crawford*, 203 Or App 512, 518 (2005), *rev den*, 341 Or 80 (2006); *Timothy K. Friend*, 59 Van Natta 2999, 3004 (2007). Such a relationship may be the most important factor. *See David J. Glennon*, 60 Van Natta 2737, 2738 (2008).

Here, Dr. Adler indicated that the temporal relationship between the February 8, 2008 work incident and the onset of claimant's symptoms was a significant factor in determining the cause of the L3-4 disc herniation. (Ex. 120-29, -30). That is an appropriate factor to consider. *Crawford*, 203 Or App at 518; *Glennon*, 60 Van Natta at 2738; *Friend*, 59 Van Natta at 3004 (2007). In contrast, Drs. Bergquist and Green did not adequately address Dr. Adler's opinion concerning that temporal relationship, rendering those opinions unpersuasive. *See Richard A. Lowe*, 60 Van Natta 2886, 2892 (2008), *aff'd without opinion*, 234 Or App 785 (2010) (medical opinions that did not adequately address opinions regarding the temporal relationship between the work incident and onset of symptoms found unpersuasive).

Moreover, in addition to the significant temporal relationship, Dr. Adler's opinion was also supported by his surgical findings. (Ex. 120-39, -40). Dr. Adler also stated that his opinion was informed by the mechanism of injury, his examination findings, claimant's symptoms, a comparison of imaging studies taken before and after the work incident, other medical records, and his clinical experience. (Ex. 120-16, -17, -20 through 24, -26, -31, -32, -41, -49, -50, -51). Consequently, we do not agree that Dr. Adler's opinion was based exclusively on a temporal relationship between the work incident and the onset of symptoms.

We also disagree with the employer's assertion that Dr. Adler's opinion is "fatally flawed" because he did not consider claimant's history of low back symptoms before the February 8 work incident. The employer acknowledges that Dr. Adler was provided with a history of some previous intermittent low back pain in the years before the work incident. (*See* Ex. 120-30, -31). Dr. Adler then explained why, despite that history, he believed that the February 8, 2008 work incident caused the L3-4 herniated disc, which was not previously present. (Ex. 120-30, -31, -32, -34).²

In sum, based on the more persuasive opinion of Dr. Adler, we find that the February 8, 2008 work incident was the major contributing cause of claimant's disability/need for treatment for his L3-4 disc herniation. Consequently, we reverse.

Claimant's attorney is entitled to an assessed fee for services at hearing and on review. 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 is \$17,000, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the case (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 denial of claimant's February 8, 2008 injury, to be paid by the employer. *See*

² We also disagree with the employer that Dr. Adler's opinion was "internally inconsistent" because he acknowledged that a prior history of back and leg symptoms could, in some cases, complicate pinpointing when a disc herniated. As set forth above, Dr. Adler explained that, in these circumstances, claimant's previous symptoms did not indicate that the L3-4 disc herniated before the February 8, 2008 work incident.

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).

ORDER

The ALJ's order dated June 29, 2010 is reversed in part and affirmed in part. That portion of the ALJ's order that upheld the employer's denial of claimant's February 8, 2008 injury claim is reversed. The employer's denial is set aside and that claim is remanded to the employer for processing according to law. For services at hearing and on review, claimant's attorney is awarded an assessed fee of \$17,000, to be paid by the employer. The remainder of the ALJ's order is affirmed. Claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial of claimant's February 8, 2008 injury claim, to be paid by the employer.

Entered at Salem, Oregon on May 27, 2011