
In the Matter of the Compensation of
DARRELL L. MCKAY, Claimant
WCB Case No. 10-06230, 10-00089
ORDER ON REVIEW
Merkel & Associates,
Sheridan Levine LLP,

Reviewing Panel: Members Langer, Biehl, and Herman. Member Langer dissents.

The self-insured employer requests review of Administrative Law Judge (ALJ) Mills's order that set aside its denial of claimant's new/omitted medical condition claim for an L5-S1 disc bulge and nerve root compression. On review, the issue is compensability. We affirm.

FINDINGS OF FACT

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

CONCLUSIONS OF LAW AND OPINION

Relying on the opinions of Drs. Tesar, Bernier, and Hill, the ALJ set aside the employer's denial. On review, the employer contends that Drs. Bergquist, Warnock and Denekas provided the more persuasive medical opinions.¹ The employer further contends that claimant's L5-S1 condition should be analyzed as a "combined condition."

Although we agree with the employer that a "combined condition" analysis is appropriate, we conclude that the opinions of Drs. Tesar, Bernier, and Hill persuasively establish the compensability of that "combined condition."² We reason as follows.

¹ Although the employer relies on Dr. Warnock's opinion, that opinion addressed disc conditions at L3-4 and L4-5, but not L5-S1. (*See Ex. 302*). Accordingly, we do not find that opinion probative with respect to the claimed condition at issue on review.

² ORS 656.005(24) (defining "preexisting condition") and ORS 656.266 (assigning the burden of proof concerning a "combined condition") were amended in 2001 and apply to claims with a date of injury on or after January 1, 2002. Or Laws 2001, ch 865, § 22(1). Because claimant's date of injury preceded January 1, 2002, we do not apply the 2001 amendments to this claim. *Susan M. Black*, 57 Van Natta 392, 395 n 4 (2005).

A “combined condition” is compensable where the otherwise compensable injury is the major contributing cause of the disability/need for treatment of that combined condition. ORS 656.005(7)(a)(B). That determination is a complex question requiring expert medical evidence. *Barnett v. SAIF*, 122 Or App 279, 282 (1993). We give more weight to those opinions that are both well reasoned and based on complete information. *Somers v. SAIF*, 77 Or App 259, 263 (1986). A history is complete if it includes sufficient information on which to base the physician’s opinion and does not exclude information that would make the opinion less credible. *Jackson County v. Wehren*, 186 Or App 555, 560 (2003).

Here, Drs. Tesar, Bernier, and Hill opined that claimant’s compensable 2000 work injury was the major contributing cause of his need for treatment for the claimed L5-S1 disc condition, including Dr. Hill’s 2001 L5-S1 nerve root decompression surgery. (See Exs. 107, 110, 121, 127, 128, 129, 314). We agree with the ALJ that these physicians provided well reasoned and persuasive medical opinions.

The employer contends, however, that we must disregard those opinions because they did not take into consideration the nature of claimant’s L5-S1 condition before the compensable 2000 work injury. We disagree with the employer’s position.

Dr. Tesar’s opinion (with which Drs. Bernier and Hill concurred) acknowledged an L5-S1 spondylitic defect and spur that predated the work injury. (Exs. 121, 127-129). Dr. Tesar believed that it combined with the work injury and that the work injury was the major contributing cause of that “combined condition” and need for treatment. (Ex. 127). Moreover, Dr. Tesar acknowledged that preexisting degenerative disc disease was a factor in causing claimant’s combined condition and need for treatment. (Ex. 127-2). Ultimately, however, Dr. Tesar concluded that the work injury was the major factor in claimant’s need for treatment for the claimed L5-S1 condition. (*Id.*)

Dr. Bernier, claimant’s attending physician since 1994, reviewed medical reports and imaging studies from 1994 through 2009. (Ex. 314-1).³ He acknowledged the presence of a preexisting L5-S1 spondylitic defect and spur, as

³ Thus, we disagree with the employer’s position that the opinions supporting claimant’s claim did not consider “pre-2000” imaging studies. Likewise, we do not agree that Dr. Bernier, as claimant’s treating physician since 1994, was unaware of claimant’s “radicular” symptoms before the 2000 work injury. To the contrary, Dr. Bernier expressly acknowledged such symptoms. (See, e.g., Ex. 29-1, 58; see also Ex. 48).

had Drs. Tesar and Hill. (Ex. 314-2). Dr. Bernier reiterated that the work injury was the major cause of the L5-S1 combined condition and need for treatment, including Dr. Hill's surgery. (Ex. 314-3). Consequently, we find that Drs. Tesar, Bernier, and Hill sufficiently considered the "pre-2000-injury" nature of claimant's L5-S1 disc condition. We further find that those opinions provided the best assessment of the cause of claimant's disability/need for treatment for the claimed L5-S1 condition.

In contrast, we are not persuaded by the opinions of Drs. Bergquist and Denekas.⁴ Although both of those physicians stated that the compensable injury was not the cause of the *existence* of the claimed L5-S1 condition, none of them addressed the relevant inquiry of the major contributing cause of the *disability/need for treatment* of that condition. (See Exs. 310-2, 313-8, -9). This omission is particularly significant here, given that the opposing medical opinions acknowledged that the 2000 work injury did not necessarily cause the L5-S1 disc bulge, but did primarily cause claimant's need for treatment for that condition. Consequently, we are not persuaded by Drs. Bergquist's and Denekas's opinions. See *Lowell P. Hubbell*, 62 Van Natta 2446, 2449-50 (2010) (opinion unpersuasive where it did not address the requisite questions concerning the cause of disability/need for treatment of the claimed condition, as opposed to the cause of the condition itself).

Moreover, as explained by the ALJ, Dr. Bergquist's opinion focused on claimant's condition as of 2009; it did not address the relevant inquiry of whether the work injury was the major contributing cause of disability/need for treatment *at any time*, including Dr. Hill's 2001 surgery. (See Ex. 310-2).⁵ That omission further renders Dr. Bergquist's opinion unpersuasive.

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), the complexity of the issue, and the value of the interest involved.

⁴ The employer's brief makes repeated references to an Exhibit "318." However, the record does not contain any such exhibit, as the ALJ admitted only "Exhibits 1 through 314."

⁵ The employer has not accepted a "combined condition" and its denial is not a "ceases" denial issued pursuant to ORS 656.262(6)(c).

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 11, 2011 is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$3,000, 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 November 4, 2011

Member Langer dissenting.

In finding claimant's new/omitted medical condition claim for an L5-S1 disc bulge and nerve root compression compensable, the majority relies primarily on the opinion of Dr. Tesar.⁶ Unlike the majority, I do not find that opinion sufficiently persuasive to establish compensability. I reason as follows.

To persuasively establish the major contributing cause of a condition, an opinion must consider the relative contribution of each cause and determine which cause, or combination of causes, contributed more than all other causes combined. *Dietz v. Ramuda*, 130 Or App 397, 401-02 (1994), *rev dismissed*, 321 Or 416 (1995). Moreover, medical opinions expressed in terms of mere possibility are insufficient to prove compensability of a claim. *Gormley v. SAIF*, 52 Or App 1055, 1060 (1981).

Here, Dr. Tesar stated that the L5-S1 herniated disc "*could have* occurred with the injury of December 31, 2000." (Ex. 127-1) (emphasis added). Similarly, he stated that, "by history," the L5-S1 condition "*appear[ed]* to be related" to the workplace injury. (*Id.*) (emphasis added). I find those statements to be equivocal, and not expressed in terms of medical probability such that they can be relied on to

⁶ Although the majority also relies on the opinions of Drs. Bernier and Hill, those opinions merely concurred with Dr. Tesar's opinion. (*See* Exs. 128, 129, 314). Therefore, compensability of claimant's L5-S1 condition is contingent on the persuasiveness of Dr. Tesar's opinion.

find the claim compensable. *See Gormley*, 52 Or App at 1060; *see also Kenneth L. Edwards*, 58 Van Natta 761 n 1 (2001) (the words “could have” and “may have” indicate only possibility, not medical probability).

Moreover, Dr. Tesar’s opinion did not indicate an adequate awareness of the extensiveness of claimant’s preexisting condition or of similar symptoms that preceded the work injury. Specifically, although Dr. Tesar seemed to find claimant’s bilateral leg symptoms in 2001 significant, such symptoms had previously been reported as early as 1994. (*See Exs. 2, 3, 19, 29, 41, 43, 58*). Dr. Tesar’s opinion, however, did not meaningfully address those earlier bilateral leg symptoms or adequately explain why he concluded that those symptoms in 2001 supported a finding that the L5-S1 condition was related to the December 2000 work injury. (*See Ex. 127*). As such, I would not find, as the majority does, that Dr. Tesar properly understood or considered the relative contribution of each contributing cause of the claimed L5-S1 condition. *See Dietz*, 130 Or App 397 at 401-02.

In sum, because there is no persuasive opinion establishing compensability of claimant’s new/omitted medical condition claim, I would reverse the ALJ’s order and reinstate the employer’s denial. Because the majority determines otherwise, I respectfully dissent.