

In the Matter of the Compensation of
SHAWN C. RYAN, Claimant

WCB Case No. 11-04121

ORDER ON REVIEW

Moore Jensen & Lesh, Claimant Attorneys

John M Pitcher, Defense Attorneys

Reviewing Panel: Members Lowell and Biehl.

Claimant requests review of Administrative Law Judge (ALJ) Ogawa's order that: (1) upheld the self-insured employer's denials of his injury claim for a low back condition; and (2) declined to award a penalty and attorney fee for allegedly unreasonable denials. On review, the issues are compensability and claim processing. We affirm.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact" with the following exception. On page 2, we replace the second-to-last paragraph with the following:

"Dr. Hurtado, claimant's primary care physician, reported that claimant had previously presented 'with testicular pain that in the end was upper lumbar disc disease with nerve root irritation.' (Ex. 3). He noted that, at the previous examination, claimant had attributed his low back pain to routine bouncing and jostling while driving at work and had denied sustaining any injury. (*Id.*) In a November 2011 summary letter, Dr. Hurtado stated that claimant reported no history of past accidents or injuries to his back, and that claimant related his back pain to his work activities as a log truck driver over a period of time, and not to a specific work injury or event. (Ex. 22). Dr. Hurtado did not provide any causation opinion regarding claimant's low back. (Exs. 3, 22)."

CONCLUSIONS OF LAW AND OPINION

In upholding the employer's denials, the ALJ found that claimant, a log truck driver, did not establish that his July 27, 2011 work injury was a material

contributing cause of his low back condition.¹ The ALJ reasoned that the opinions of Drs. Yodlowski, Williams, and Laycoe, who examined claimant at the employer's request, were more persuasive than that of Dr. McGirr, claimant's treating neurosurgeon.

On review, claimant argues that his July 27, 2011 work injury was a material contributing cause of his disability or need for treatment of his low back condition. He further contends that the employer did not establish that his "otherwise compensable injury" was *not* the major contributing cause of a combined low back condition. For the following reasons, we do not find claimant's low back injury claim compensable.

To establish compensability, claimant must prove that his July 2011 work injury was a material contributing cause of his disability/need for treatment. ORS 656.005(7)(a); ORS 656.266(1). Because this is an initial injury claim, claimant need not prove a specific diagnosis if he proves that his symptoms are attributable to his work. *Boeing Aircraft Co. v. Roy*, 112 Or App 10, 15 (1992); *Mannie Burkman*, 58 Van Natta 2406, 2407 (2006).

If claimant establishes an "otherwise compensable injury," and a "combined condition" is present, the employer must prove that the otherwise compensable injury was not the major contributing cause of claimant's disability or need for treatment of the combined low back condition. ORS 656.266(2)(a); *Jack G. Scoggins*, 56 Van Natta 2534, 2535 (2004). Because of the disagreement between medical experts regarding the cause of claimant's condition, this claim presents a complex medical question that must be resolved by expert medical opinion. *Barnett v. SAIF*, 122 Or App 279, 282 (1993); *Matthew C. Aufmuth*, 62 Van Natta 1823, 1825 (2010). 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).

Claimant has worked as a log truck driver for the employer since February 2008. (Ex. 2). In April 2010, he obtained a lumbar MRI, which revealed a minor L4-5 left paracentral and lateral disc bulge which did not significantly deform the thecal sac or extend into the neural foramen, L5-S1 midline annular bulging, and mild L4-5 and L5-S1 apophyseal joint arthropathy. (Ex. 1).

¹ On August 9, 2011, the employer denied claimant's July 27, 2011 injury claim for a herniated disc. (Ex. 11). Claimant requested a hearing challenging that denial, as well as a penalty and attorney fee for an unreasonable denial. On November 8, 2011, the employer issued a supplemental denial, asserting a "combined condition" defense. (Ex. 23). At hearing, the parties agreed to litigate the "combined condition" denial. (Tr. 1-2).

On July 27, 2011, claimant was driving his log truck on a particularly rough gravel road and, after hitting a large bump, experienced an immediate onset of low back pain with symptoms radiating into his left leg. (Exs. 1A, 2, 3, 4, 6, 14A, 17, 19; Tr. 5-8). That day, claimant sought treatment at an urgent care clinic. Noting that claimant had a history of lumbar disk “diagnosed a year ago on MRI,” but had “been feeling pretty well” until work injury that day, Dr. Kaiser (the urgent care physician) diagnosed “lumbar disk disease with exacerbation.” (Ex. 1A).

An August 16, 2011 MRI showed a left L4-5 extraforaminal disc protrusion with effacement of the L4 nerve root, which was not present on the prior April 2010 MRI. (See Exs. 1, 14, 14A). On October 3, 2011, Dr. McGirr performed an L4-5 discectomy. (Exs. 14A, 14B).

Claimant relies on the opinions of Dr. Kaiser and Dr. McGirr to establish that his July 27, 2011 work injury was a material contributing cause of his disability or need for treatment of his low back condition. He further contends that the opinions of Drs. Yodlowski, Williams, and Laycoe are insufficient to carry the employer’s burden of proving that his “otherwise compensable injury” was *not* the major contributing cause of a combined low back condition.

We agree, for the reasons explained below, that claimant has established an “otherwise compensable injury.”² Nevertheless, we find that a “combined condition” is present, and that the employer has established that the “otherwise compensable injury” was not the major contributing cause of the disability or need for treatment of the combined low back condition.

Dr. Kaiser examined claimant on the date of injury and, noting that claimant had “been feeling pretty well” until the work injury that day, diagnosed “lumbar disk disease with exacerbation.” (Ex. 1A). In a “check-the-box” summary letter, Dr. McGirr agreed that claimant’s July 27, 2011 work activity was a material, and major, contributing cause of his need for low back treatment. (Exs. 15, 16).

Based on the April 2010 MRI report, Dr. Yodlowski, as well as Drs. Williams and Laycoe, stated that claimant had preexisting degenerative changes at L4-5 and L5-S1. (Exs. 1, 17, 19). Although Drs. Yodlowski,

² An “otherwise compensable injury,” as used in ORS 656.266(1) and ORS 656.005(7)(a)(B), “refers to a work-related injury that would be compensable under the material contributing cause standard of proof if not for the fact that it combines with a preexisting condition.” *SAIF v. Kollias*, 233 Or App 499, 502 n 1 (2010).

Williams, and Laycoe believed that claimant's preexisting degenerative condition was the major contributing cause of his low back condition and disability/need for treatment, they did not expressly address whether the work injury was a *material* contributing cause of claimant's disability/need for treatment. (See Exs. 17-6-8, 19-4-6). Nonetheless, they noted that claimant developed an immediate onset of low back pain with symptoms radiating into his left lower extremity after his July 27, 2011 work activity, for which he sought treatment. (*Id.*)

On this record, we find that the medical evidence establishes that claimant's work injury was at least a material contributing cause of his disability/need for treatment.³ *William C. Voodre*, 63 Van Natta 1045, 1049-50 (2011) (physician's opinion that the claimant's preexisting condition was rendered symptomatic by the work injury sufficient to establish material causation); *Lanora J. Rea*, 60 Van Natta 1058, 1063 (2008) (same). Therefore, claimant has established an "otherwise compensable injury." ORS 656.005(7)(a); ORS 656.266(1); *SAIF v. Kollias*, 233 Or App 499, 502 n 1 (2010).

If the claimed 2011 injury involves a "combined condition," the employer must prove that the "otherwise compensable injury" is not the major contributing cause of the disability or need for treatment of the combined condition. ORS 656.005(7)(a)(B); ORS 656.266(2)(a); *Kollias*, 233 Or App at 502-03. The employer's burden under ORS 656.266(2)(a) encompasses proof that: (1) claimant suffers from a statutory "preexisting condition"; and (2) claimant's condition is a combined condition. *Kollias*, 233 Or App at 505. For the following reasons, we find that a "combined condition" analysis applies.

For injury claims, a "preexisting condition" means "any injury, disease, congenital abnormality, personality disorder, or similar condition that contributes to disability or need for treatment." ORS 656.005(24)(a). Except for claims in which a preexisting condition is "arthritis or an arthritic condition," the worker must have been diagnosed with such condition or obtained medical services for symptoms of the condition, regardless of diagnosis, before the initial injury or onset of the new medical condition. ORS 656.005(24)(a)(A), (B).

Here, the April 2010 lumbar MRI (indicated for "Low back pain") revealed an L4-5 left paracentral and lateral disc bulge that did not significantly deform the thecal sac or extend into the neural foramen, L5-S1 midline annular bulging, and

³ See also *Jaymin Nowland*, 63 Van Natta 1377, 1382 n 3 (2011) (the claimant need not prove that his work injury caused the condition itself; rather, the relevant inquiry is whether it caused the disability or need for treatment for the condition).

mild L4-5 and L5-S1 apophyseal joint arthropathy. (Ex. 1). Drs. Yodlowski, Williams, and Laycoe opined that the 2010 MRI findings showed early degenerative changes, consistent with degenerative disc disease. (Exs. 17-7-10, 19-4-6). They further explained that claimant's 2010 preexisting degenerative changes progressed into a herniation in 2011. (*Id.*) Additionally, when claimant first sought treatment on July 27, 2011, Dr. Kaiser noted that claimant had a known history of "lumbar disk disease" diagnosed on the 2010 MRI, and assessed "lumbar disk disease with exacerbation" after the 2011 work injury. (Ex. 1A). Further, in August 2011, Dr. Hurtado noted that claimant had previously "presented several months back with testicular pain that *in the end was upper lumbar disc disease with nerve root irritation.*" (Ex. 3-1) (emphasis added). Because claimant was diagnosed with, or obtained medical services for symptoms of degenerative low back conditions before his July 2011 work injury, and based on the medical opinions that the preexisting conditions "contributed" to claimant's disability/need for treatment, we find that the employer has established a statutory "preexisting condition." ORS 656.005(24)(a).⁴

Moreover, Dr. Yodlowski, Williams, and Laycoe opined that claimant's 2011 work injury combined with the preexisting conditions, and that the preexisting conditions were the major contributing cause of claimant's disability and need for treatment for the combined low back condition as of July 27, 2011. (Exs. 17, 19, 24, 25). In the absence of a contrary medical opinion, we find that the employer has persuasively established that claimant's low back condition is a "combined condition." See *Luckhurst v. Bank of Am.*, 167 Or App 11, 16-17 (2000) (to constitute a "combined condition," two conditions must merge or exist harmoniously); *Glenn E. Perry*, 63 Van Natta 2076, 2080 (2011) (where medical opinions addressed the claimant's condition as his work injury combined with preexisting conditions, and there is no contrary medical evidence, a "combined condition" analysis applies).

Next, we address whether the employer has proved that the "otherwise compensable injury" is not the major contributing cause of the disability or need for treatment of the combined condition. ORS 656.005(7)(a)(B); ORS

⁴ We also note that Dr. McGirr stated that the August 2011 MRI showed a disc herniation "in the extra foraminal space on the left at L4-5 with contact and compromise of the existing left L4 nerve root[.]" which was "not present" in claimant's previous MRI. (Ex. 14A-1). At surgery, Dr. McGirr reported that "considerably degenerative material" was removed from the disc space underneath the nerve root. (Ex. 14B). We find Dr. McGirr's operative report further supportive of a conclusion that claimant's preexisting condition "contributed" to his disability/need for treatment.

656.266(2)(a); *Kollias*, 233 Or App at 502-03. We look to the medical evidence supporting the employer's denial. *Jason J. Skirving*, 58 Van Natta 323, 324 (2006), *aff'd without opinion*, 210 Or App 467 (2007) (where the employer has the burden of proof under ORS 656.266(2)(a), the medical opinions supporting the employer's denial must be persuasive).

Drs. Yodlowski, Williams, and Laycoe concluded that claimant's preexisting lumbar degenerative disease condition was the major contributing cause of his disability and need for treatment of his combined low back condition. In doing so, they considered claimant's prior history, his preexisting low back conditions, the mechanism of his July 2011 work injury, and the progression of symptoms. (Exs. 17, 19, 24, 25).

Citing *Robert Prabucki*, 61 Van Natta 1877 (2009), *aff'd*, 240 Or App 384 (2011), claimant argues that the opinions of Drs. Yodlowski, Williams, and Laycoe are not persuasive. Specifically, he contends that, because they did not believe that he sustained a work injury, their discussion of a hypothetical "combined condition" did not adequately weigh the relative contribution of his work injury. (Exs. 24, 25). *Prabucki* is distinguishable.

In *Prabucki*, the claimant's injury claim was based on an onset of neck symptoms while he loaded a truck at work, and experienced increased symptoms after sneezing. In discounting the opinions of two examining physicians, we explained that their opinions were based on an incorrect history of an onset of symptoms associated with sneezing rather than work, and that they opined that "any activity" that was a precipitating cause would have combined with the claimant's preexisting degenerative cervical conditions. Thus, we concluded that they discussed a hypothetical combined condition without weighing the contribution from the claimant's work injury. *Id.* at 1880-82.

Here, unlike in *Prabucki*, Drs. Yodlowski, Williams, and Laycoe had an accurate understanding of claimant's work injury and onset of symptoms. (Exs. 17, 19). In her initial report, Dr. Yodlowski stated that claimant "did not describe any accident, incident, or traumatic event in terms of any lifting or other mechanism of injury *except driving in his log truck.*" (Ex. 17-7) (emphasis added). She consistently described claimant's July 27, 2011 work injury in which he was driving his log truck on a particularly rough gravel road, hit a large bump, and experienced an immediate onset of low back pain with symptoms radiating into his left leg. (Ex. 17-2, -4-9). Likewise, Drs. Williams and Laycoe accurately described claimant's mechanism of injury involving his work activities on July 27,

2011. (Ex. 19). Moreover, in their initial opinions, Drs. Yodlowski, Williams, and Laycoe discussed claimant's work activity on the date of injury, and explained the progression of his preexisting condition in light of his work injury. (Exs. 17, 19).

Under these circumstances, we find that Drs. Yodlowski, Williams, and Laycoe adequately weighed the contribution of claimant's work injury when discussing a hypothetical "combined condition." (Exs. 17, 19, 24, 25). Furthermore, for the reasons explained in the ALJ's order, we find their opinions to be well reasoned and persuasive.

Contrary to the opinions of Drs. Yodlowski, Williams, and Laycoe, Dr. McGirr agreed, without explanation, that claimant's July 2011 work injury was the major contributing cause of his subsequent need for low back treatment. (Exs. 15, 16). We agree with the ALJ's determination that Dr. McGirr's opinion was not well reasoned or persuasive. *See Dietz v. Ramuda*, 130 Or App 397, 401 (1994), *rev dismissed*, 321 Or 416 (1995) (the determination of major contributing cause involves the evaluation of the relative contribution of the different causes of the claimant's condition and a decision as to which is the primary cause); *see also Moe v. Ceiling Sys., Inc.*, 44 Or App 429, 433 (1980) (rejecting unexplained or conclusory opinion).

Furthermore, we do not find Dr. McGirr's opinion to be based on a sufficiently accurate history. We reason as follows.

Dr. McGirr was asked to assume that claimant had no low back pain in 2010, and no prior low back injuries or symptoms. (Ex. 15). However, on August 1, 2011, Dr. Hurtado noted that claimant had "presented several months back with testicular pain that in the end was upper lumbar disc disease with nerve root irritation." (Ex. 3). Dr. Hurtado also reported that, at that time, claimant attributed his low back pain to routine bouncing and jostling while driving. (*Id.*) Claimant also acknowledged that, in April 2010, he experienced backaches which he attributed to driving in his log truck, and "ended up getting an MRI," which revealed two herniated discs. (Tr. 15-16; Ex. 4). Moreover, both claimant and his wife testified that, before his July 2011 work injury, claimant complained of "backaches" from driving his log truck. (Tr. 7, 12, 14, 18-19, 21-22, 25).

Under these circumstances, we are not persuaded that Dr. McGirr's opinion was based on a sufficiently accurate history. *See Jackson County v. Wehren*, 186 Or App 555, 561 (2003) (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); *see also Miller v. Granite Constr. Co.*, 28 Or App 473, 476 (1977) (medical opinions are only as reliable as the history provided by the claimant).

Based on the aforementioned reasoning, we find the opinions of Drs. Yodlowski, Williams, and Laycoe to be more persuasive than that of Dr. McGirr. *Somers*, 77 Or App at 263. Accordingly, we find that the employer has met its burden of proving that claimant's "otherwise compensable injury" was not the major contributing cause of the disability or need for treatment of his combined low back condition. ORS 656.005(7)(a)(B); ORS 656.266(2)(a); *Kollias*, 233 Or App at 502-03. Consequently, we affirm.

Finally, we adopt and affirm that portion of the ALJ's order that declined to assess a penalty and attorney fee related to the August 9, 2011 denial. Additionally, at the time of the denial, the medical evidence indicated that claimant had a preexisting lumbar condition, and that claimant believed his low back symptoms were related to "routine bouncing and jostling while driving." (Exs. 1, 1A, 2, 3, 4, 7 through 10). Thus, we find that the employer had a legitimate doubt as to its liability when it denied claimant's claim. *See Int'l Paper Co. v. Huntley*, 106 Or App 107, 110 (1991) (the standard for determining unreasonableness is whether, from a legal standpoint, the carrier had a legitimate doubt as to its liability); *see also Brown v. Argonaut Ins. Co.*, 93 Or App 588, 591 (1988) ("unreasonableness" and "legitimate doubt" are to be considered in light of all the evidence available at the time of the denial); *see also Fern K. Seaburn*, 54 Van Natta 1080 (2002) (a carrier would have legitimate doubt as to compensability if medical evidence available at the time of its denial would not satisfy the required compensability standard).

ORDER

The ALJ's order dated December 8, 2011 is affirmed.

Entered at Salem, Oregon on August 30, 2012