In the Matter of the Compensation of
ROBERT A. MENDEZ, Claimant
WCB Case No. 10-06326
ORDER ON REVIEW
David B Wagner, Claimant Attorneys
David Runner, SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Lowell, Weddell, and Herman.

Claimant requests review of Administrative Law Judge (ALJ) Naugle's order that upheld the SAIF Corporation's denial of his injury claim for an L4-5 disc herniation with radiculopathy. On review, the issue is compensability. We reverse.

FINDINGS OF FACT

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

CONCLUSIONS OF LAW AND OPINION

On September 9, 2010, claimant, a certified nursing assistant (CNA), filed a form 801, describing a low back injury that occurred on August 11, 2010. He reported that while helping an approximately 300-pound patient back to his chair, the patient began to lean forward. Claimant caught him by the left arm and waist to keep him from falling. (Ex. 11). Testifying that he did not feel immediate pain, claimant stated that he awoke the next morning with mild low back pain, which progressively worsened. (Tr. 7, 9).

Claimant first received medical treatment on August 15, 2010, when he reported severe low back pain, but did not recall any "unusual" activity or injury preceding the onset of pain. (Ex. 2). Dr. Bird noted that claimant had no prior history of back problems.[1] On August 17, 2010, claimant was treated by Dr. Colbry, who noted that he "does not remember any trauma or heavy lifting, but does work as a * * * CNA." (Ex. 3).

Dr. Truong, who saw claimant on August 20, 2010, reported that his pain "may be secondary to questionable trauma sustained several weeks ago." (Ex. 4).

[1] Claimant was in a motor vehicle accident in 2002, in which he suffered a left lower back muscle strain. (Ex. 1). Claimant testified that he has had no treatment or back problems since that time. (Tr. 8).

There was no further explanation of what that "trauma" might be. Chart notes from medical providers dated August 24, 2010 and August 30, 2010, indicated that claimant was not sure what had caused his condition. (Exs. 5, 8).

On September 9, 2010, claimant was examined by Dr. Wrobel, whose chart note described his history as helping the 300-pound patient. (Ex. 10). This same history was recorded by Mr. Oliver, a physician's assistant, on September 16, 2010, and by Dr. Ingle on September 23, 2010. (Exs. 13, 18).

An MRI revealed disc protrusions at L4-5 and L5-S1. (Ex. 9). SAIF denied the claim for an L4-5 disc herniation and radiculopathy, and claimant requested a hearing. (Ex. 19).

The ALJ upheld SAIF's denial. In so doing, the ALJ gave greater weight to claimant's testimony than to the contemporaneous medical records, and concluded that the work incident happened as claimant had described at hearing (and to Dr. Wrobel, Mr. Oliver, and Dr. Ingle). Thus, the ALJ reasoned, claimant had established legal causation. However, the ALJ determined that Dr. Ingle's medical opinions did not establish medical causation.

On review, claimant contends that Dr. Ingle's opinions, when viewed in their entirety, and in context, support the compensability of his claim. Based on the following reasoning, we agree.

To prove the compensability of an injury, claimant must show that the work incident was a material contributing cause of his disability or need for treatment. ORS 656.005(7)(a); ORS 656.266(1); *Albany Gen. Hosp. v. Gasperino*, 113 Or App 411, 415 (1992). He must prove both legal and medical causation by a preponderance of the evidence. *Harris v. Farmer's Co-op Creamery*, 53 Or App 618 (1981); *Carolyn F. Weigel*, 53 Van Natta 1200 (2001), *aff'd without opinion*, 184 Or App 761 (2002). Legal causation is established by showing that claimant engaged in potentially causative work activities; whether those work activities caused his condition is a question of medical causation. *Darla Litten*, 55 Van Natta 925, 926 (2003).

SAIF does not contest the ALJ's finding that claimant established legal causation. As framed by the parties, the compensability issue turns on whether the opinion of Dr. Ingle, the only physician to address medical causation, is sufficient to satisfy claimant's burden of proof.

In his September 23, 2010 chart note, Dr. Ingle diagnosed an L4-5 disc protrusion with radiculopathy. Based on claimant's reported history of helping the 300-pound patient, Dr. Ingle opined that the disc protrusion was probably work related. (Ex. 15-2).

Subsequently, in an October 2010 concurrence letter to SAIF, Dr. Ingle agreed that, considering claimant's "medical history" (as related to him by SAIF), he could not state to a degree of medical probability that the August 2010 work incident was "the material cause of [claimant's] disability and/or need for medical treatment." (Ex. 18).

However, SAIF's letter contained inaccurate information as to when claimant first gave a detailed account of how his work injury occurred. (Ex. 18). It stated that claimant did not do so until his September 16, 2010 visit with Mr. Oliver, yet, claimant's September 9, 2010 form 801 gave a detailed description of helping steady a 300-pound patient. (Ex. 11). Claimant also gave this history to Dr. Wrobel on the same date. (Ex. 10).

The ALJ gave greater weight to claimant's testimony (which confirmed the history he had given to Dr. Ingle) because it was unrebutted, given under oath, and was subject to cross-examination. (Tr. 12). Having reviewed the record, we find no reason to disagree with the ALJ's basis for favoring claimant's testimony, and likewise conclude that the alleged work event occurred in the manner described by claimant. *See William J. Cook*, 58 Van Natta 625, 626 (2006) (we do not necessarily rely on the contemporaneous medical records if we find other evidence, such as the witness's testimony, more persuasive).

Based on the correct history of claimant's work incident, Dr. Ingle stated in his March 2011 final report that if claimant caught a 290-300 pound patient, four to six inches taller, with his left arm as he leaned forward, the mechanism of injury was capable of causing a herniated disc. (Ex. 25).

Accordingly, because we agree with the ALJ's basis for giving greater weight to claimant's testimony, we find Dr. Ingle's September 2010 and March 2011 reports, which were based on an accurate history, sufficient to establish medical causation. (Exs. 15, 25). Therefore, we conclude that claimant has satisfied his burden of proving a compensable injury. Thus, 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 $9,000, payable by

SAIF. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by the record and claimant's appellate briefs), 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, 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).

ORDER

The ALJ's order dated June 10, 2011 is reversed. SAIF's denial is set aside and the claim is remanded to SAIF for processing according to law. For services at hearing and on review, claimant's counsel is awarded an assessed fee of $9,000, 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.

Entered at Salem, Oregon on February 10, 2012