
In the Matter of the Compensation of
JUAN A. ARENAS-RAYA, Claimant
WCB Case No. 12-00138
ORDER ON REVIEW
Hollander & Lebenbaum, Claimant Attorneys
Holly O'Dell, SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Lanning and Lowell.

The SAIF Corporation requests review of those portions of Administrative Law Judge (ALJ) Poland's order that: (1) set aside a *de facto* denial of an L5-S1 disc herniation/extrusion; and (2) set aside its February 9, 2012 "ceases" denial of a previously accepted combined lumbar strain condition. Claimant cross-requests review of that portion of the ALJ's order that upheld SAIF's denial of a new/omitted medical condition claim for lumbar spondylosis. On review, the issue is compensability. We affirm in part and reverse in part.

FINDINGS OF FACT

On September 29, 2010, claimant, a construction supervisor, was digging holes for trees. Because the ground was very hard, he was using picks and a shovel to soften the soil. He felt a pain in the right side of his low back and into this left leg. (Tr. 27).

On October 6, 2010, claimant sought treatment with Dr. Bliven, who diagnosed a lumbar sprain and strain. He also noted claimant complained of numbness, weakness and radiating pain in the bilateral buttocks and thighs to the knees, left worse than right. (Ex. 4-1). Five days later, claimant sought treatment with Dr. Erickson, who noted similar findings. (Ex. 5-1). He diagnosed lumbar radiculopathy and prescribed physical therapy. (Ex. 5-2).

An October 2010 MRI revealed a large L5-S1 disc extrusion, impinging on the S1 nerve root, and mild bilateral L5-S1 neural foraminal stenosis predominately due to broad based disc bulge. (Ex. 6). Reviewing the MRI, Dr. Erickson explained that the nerve was impinged bilaterally and again diagnosed radiculopathy. (Ex. 7).

The claim was initially accepted for a lumbar strain. (Ex. 9).

On March 2, 2011, Dr. Rosenbaum performed an L5-S1 microlumbar discectomy and laminectomy. (Ex. 13). He explained that, while he initially believed the herniated disc was secondary to claimant's injury, surgery revealed that the disc had calcification, indicating a long standing pathologic process. According to Dr. Rosenbaum, this would be a "variation" of lumbar spondylosis with earlier disc protrusion that was not previously symptomatic. (Ex. 14-1). He opined that claimant had a "combined condition" consisting of the "injury" combined with the preexisting spondylosis with disc protrusion, with the "injury" being the major contributing cause of the disability and need for treatment of the combined condition. (Ex. 14-2).

A May 20, 2011 MRI showed decompression of the L5-S1 disc extrusion, persistent asymmetry and mild encroachment of the L5-S1 nerve root, with no other evidence of central canal stenosis. (Ex. 15).

On October 21, 2011, Dr. Vessely examined claimant at SAIF's request. He diagnosed a lumbar strain by history, an acute L5-S1 disc herniation resulting in S1 radiculopathy, nonanatomic left leg numbness, and preexisting L5-S1 lumbar spondylosis with an associated large disc protrusion. He concluded that claimant's lumbar strain had resolved, as there was no "manifestation" of that condition on examination. Dr. Vessely noted that claimant's tenderness was not significant, and that his complaints were not consistent with a lumbar strain. He concluded that claimant's lumbar strain was medically stationary, with no impairment. (Ex. 17-8).

Dr. Vessely also explained that claimant's report of something "happening in his back" at work followed by severe pain and progressive radiculopathy was consistent with the event causing an extruded disc. However, considering that Dr. Rosenbaum did not find a fragment at surgery, and that a fragment was not present in the second MRI, he opined that the disc condition had spontaneously resolved. (Ex. 17-9). He also agreed that claimant had a combined condition involving an "on the job extruded disc fragment at L5-S1" combined with the "degenerative process occurring both in the disc and the apophyseal joint." (Ex. 17-10). Although concluding that the work injury initially caused claimant's need for treatment, Dr. Vessely opined that as of the date of his examination, the cause of claimant's ongoing need for treatment/disability was the preexisting condition. (Ex. 17-11).

On October 31, 2011, SAIF modified its acceptance to include L5 radiculopathy. (Ex. 19).

On November 1, 2011, Dr. Rosenbaum agreed with Dr. Vessely that claimant's lumbar strain was medically stationary. (Ex. 20).

On November 16, 2011, claimant requested acceptance of "lumbar spondylosis (with disc protrusion with calcification)." (Ex. 23).

On November 22, 2011, Dr. Rosenbaum explained that he considered the disc protrusion to be part of the spondylitic process and that it was changed by the work injury to the extent that it caused acute S1 radiculopathy and required surgery. (Ex. 25-1, -2). But he stated there was no alteration of the underlying spondylosis.¹ He explained that the spondylosis was not caused by the injury, but was an arthritic condition involving inflammation of a joint due to infectious, metabolic, and constitutional changes resulting in breakdown and structural change. (Ex. 25-3).

On December 2, 2011, SAIF modified its acceptance to include S1 radiculopathy. (Ex. 26). The same date, it denied the claim for lumbar spondylosis. (Ex. 27).

On January 9, 2012, claimant requested the acceptance of an L5-S1 disc herniation "as an omitted condition." (Ex. 30).

On January 27, 2012, claimant sought treatment with Dr. Thompson. Based on her review of the record and imaging studies, Dr. Thompson opined that claimant "clearly" had a herniated disc as a result of the work injury, which had resolved by the time the surgery was performed. (Ex. 30A-2). She believed that claimant had pain sensation syndrome/myofascial syndrome due to the prolonged time between the work injury and the surgery. (Exs. 30A-2, 36-1). She later opined that the major contributing cause of claimant's continued symptoms was the work injury. (Ex. 36-1). She explained that claimant's current condition was not the result of arthritis or spondylosis, which would have developed slowly over time, because he did not have back pain before the incident and had a sudden onset of pain following the injury. (Ex. 36-2).

¹ This is consistent with Dr. Rosenbaum's opinion at deposition. There, he agreed that, because claimant had surgery at L5-S1, the level had been pathologically changed. (Ex. 37-22). However, he explained that the "disease itself" had not been altered--"you've added to the disease and made the disease worse in a way, but in a sense you didn't make the disease itself worse. * * * the disease is still there carrying on at the same rate, you've just sped up a little part of the process." (Ex. 37-23).

Dr. Rosenbaum agreed with Dr. Vessely that claimant suffered an L5-S1 disc herniation as a result of the work injury, but opined it was corrected at surgery. (Ex. 31-2). He also agreed that claimant's disc herniation combined with the preexisting condition to prolong disability and need for treatment, but that the injury was no longer the major contributing cause of the disability and need for treatment. (Exs. 31-3, 32). Finally, Dr. Rosenbaum opined that the work injury was not a material contributing cause of the disability/need for treatment of the lumbar spondylosis. (Ex. 31-7).

On February 9, 2012, SAIF modified its acceptance to include a lumbar strain "combined with preexisting L5-S1 spondylosis (including L5-S1 calcification and L5-S1 disc protrusion and/or herniation), resulting in S1 radiculopathy." (Ex. 33). In the same document, SAIF denied the ongoing compensability of the combined condition as of November 1, 2011. (*Id.*)

On March 25, 2012, Dr. Rosenbaum explained that claimant did not have an acute or "free" fragment L5-S1 herniation. Rather, the L5-S1 spondylosis, associated calcification and disc bulge were conditions that existed before the work injury and were arthritic. He agreed the lumbar strain combined with the preexisting condition, resulting in the S1 radiculopathy. He opined that the effects of the work injury had improved to such a point that he would not direct any additional medical treatment to the lumbar strain (or S1 radiculopathy) as of November 1, 2011. He concluded that the "acute results of [the injury]" (*i.e.*, the lumbar strain and S1 radiculopathy) were no longer the major contributing cause of the disability/need for treatment of the combined condition as of November 1, 2011. (Ex. 34).

Thereafter, Dr. Rosenbaum stated that claimant's "accepted radiculopathy" combined with his preexisting spondylosis to cause a need for treatment, and that the radiculopathy was the major contributing cause of claimant's need for treatment. He then stated that the diagnosis "remained that of a combined condition with the major contributing cause of his current symptoms being the work injury and accepted radiculopathy." (Ex. 35-1).

During a deposition, Dr. Rosenbaum acknowledged that the October 2010 MRI showed an L5-S1 disc extrusion. (Ex. 37-6). However, surgery revealed calcification over the disc that made it difficult for him to believe that any kind of extrusion could have occurred. (*Id.*; Ex. 37-11). Thereafter, Dr. Rosenbaum added that there could have been some extrusion from the right toward the center, having reabsorbed before he had performed the surgery.

(Ex. 37-10, -29). But, he believed that occurrence was very uncommon. Moreover, he added it was possible the first MRI was a “false positive.” (Ex. 37-11, -30, -43). Dr. Rosenbaum explained that claimant’s case was confusing regarding the disc involvement, but ultimately concluded that there was radiculopathy from the work injury. (Ex. 37-21, -36). He concluded that the work injury, or “radiculopathy,” was no longer the major contributing cause of the disability and need for treatment. (Ex. 37-45).

CONCLUSIONS OF LAW AND OPINION

De facto Denial

Relying on Dr. Vessely’s opinion, the ALJ set aside a *de facto* denial of an L5-S1 disc herniation. On review, SAIF asserts that there was no *de facto* denial of the L5-S1 disc herniation because it timely accepted it as a preexisting component of a combined condition. Claimant disagrees, asserting that he complied with ORS 656.262(6)(d) in requesting a new medical condition claim in writing and that SAIF’s response amounted to a *de facto* denial. Based on the following reasoning, we reverse this portion of the ALJ’s order.

On January 9, 2012, claimant requested the acceptance of an L5-S1 disc herniation “as an omitted condition.” (Ex. 30). Pursuant to ORS 656.262(6)(a), SAIF had 60 days within which to accept or deny the claim. Within the prescribed time-frame, SAIF issued a modified acceptance including as an accepted component of the combined condition, L5-S1 spondylosis, including an L5-S1 disc herniation. (Ex. 33).

We acknowledge that SAIF’s acceptance of the lumbar strain in combination with the L5-S1 spondylosis, including an L5-S1 disc herniation, as a “combined condition” did not constitute an outright acceptance of the preexisting spondylosis and L5-S1 disc herniation. *See Fimbres v. SAIF*, 197 Or App 613, 618 (2005); *Multifoods Specialty Distribution v. McAtee*, 164 Or App 654, 661 (1999), *aff’d*, 333 Or 629 (2002). Rather, it was the “combined condition” that was accepted, and only to the extent that the lumbar strain injury remained the major contributing cause of the disability or the need for treatment of the combined condition. *McAtee*, 164 Or App at 662. Nevertheless, SAIF’s acceptance of the “combined condition” included the L5-S1 disc herniation as a “preexisting condition” component. Therefore, the claimed condition was a compensable component

of that combined condition until SAIF's denial under ORS 656.262(6)(c). Consequently, there was no *de facto* denial of the L5-S1 disc herniation. That portion of the ALJ's order that set aside a *de facto* denial is therefore reversed.²

"Ceases" Denial

On February 9, 2012, SAIF accepted a lumbar strain "combined with preexisting L5-S1 spondylosis (including L5-S1 calcification and L5-S1 disc protrusion and/or herniation), resulting in S1 radiculopathy." (Ex. 33). In the same document, SAIF denied the ongoing compensability of the combined condition as of November 1, 2011. (*Id.*) For the following reasons, we uphold that denial.

After a carrier accepts a combined condition, it may deny the combined condition if the otherwise compensable injury ceases to be the major contributing cause of the combined condition. ORS 656.262(6)(c), (7)(b). The word "ceases" presumes a change in the worker's condition or circumstances such that the otherwise compensable injury is no longer the major contributing cause of the combined condition. See *Wal-Mart Stores, Inc. v. Young*, 219 Or App 410 (2008); *State Farm Ins. Co. v. Lyda*, 150 Or App 554, 559 (1997).

In combined condition injury claims, the carrier bears the burden to prove such a cessation. ORS 656.266(2)(a); *Washington County-Risk v. Jansen*, 248 Or App 335 (2012); *Wal-Mart*, 219 Or App at 419. In determining whether such a cessation has occurred, we examine only the specific combined condition that was accepted and denied, without regard to other compensable conditions. *Reid v. SAIF*, 241 Or App 496, 503 (2011).

On October 21, 2011, Dr. Vessely concluded that claimant's lumbar strain had resolved, as there was no "manifestation" of that condition on examination. He concluded that claimant's lumbar strain was medically stationary, with no impairment. (Ex. 17-8). Dr. Rosenbaum agreed with Dr. Vessely. (Ex. 20). He explained that the lumbar strain combined with the preexisting spondylosis, but that the effects of the work injury had improved to such a point that he would not

² We note that claimant's request for acceptance of the L5-S1 disc herniation did not seek its acceptance as an "independent" new/omitted medical condition claim. Under such circumstances, SAIF was not obligated to respond to an "independent" claim. See *Michael A. Leonhardt*, 58, Van Natta 451 (2006) (distinguishing between conditions as "independent claims" and as part of a "combined condition").

direct any additional medical treatment to the lumbar strain as of November 1, 2011. Thus, Dr. Rosenbaum concluded that, at that time, the lumbar strain was no longer the major contributing cause of the disability or need for medical treatment of the combined condition (lumbar strain and preexisting spondylosis). (Ex. 34-2).

Therefore, based on the opinions of Drs. Vessely and Rosenbaum, we are persuaded that there was a change of circumstances, consisting of the resolution of claimant's lumbar strain, which is sufficient to support SAIF's denial of claimant's current combined condition. *See Steven T. Bostick*, 65 Van Natta 323 (2013) (resolution of the claimant's cervical strain was sufficient to support the denial of the current combined condition); *Felix V. Roble*, 65 Van Natta 206 (2013) (because the only "otherwise compensable injury" included in the combined condition acceptance was the lumbar strain, the carrier's denial was supported by evidence persuasively establishing that the lumbar strain had ceased to be the major contributing cause of the combined condition, or of the claimant's disability or need for treatment of the combined condition). There are no other persuasive opinions to the contrary.³ Accordingly, that portion of the ALJ's order that set aside SAIF's "ceases" denial is reversed.

Lumbar Spondylosis

On November 16, 2011, claimant requested acceptance of "lumbar spondylosis (with disc protrusion with calcification)," which SAIF denied. (Exs. 23, 27). On review, claimant asserts that he has established compensability of the spondylosis under ORS 656.225 because the medical evidence establishes that it has been pathologically worsened. Based on the following reasoning, we disagree.

Pursuant to ORS 656.225(1), in an accepted injury claims, disability *solely* caused by or medical services *solely* directed to a worker's preexisting condition are not compensable unless "work conditions or events constitute the major contributing cause of a pathological worsening of the preexisting condition."

³ Dr. Thompson opined that the major contributing cause of claimant's continued symptoms was the work injury. (Ex. 36-1). She explained that claimant's current condition was not the result of arthritis or spondylosis, which would have developed slowly over time, because he did not have back pain before the incident and had a sudden onset of pain following the injury. (Ex. 36-2). However, because Dr. Thompson did not address the lumbar strain specifically, her opinion is not determinative regarding the combined lumbar strain condition. *See Reid*, 241 Or App at 503 (under ORS 656.005(7)(a)(B), it is correct to focus on the compensable injury that was shown to have combined with the preexisting condition, and on the actual combined condition that was accepted and then denied).

Here, Dr. Rosenbaum stated that, because claimant had L5-S1 surgery, the level had been pathologically changed. (Exs. 25-1, -2, 37-23). However, he concluded that the underlying spondylosis was not altered. (*Id.*) He also opined that the work injury was not a material contributing cause of the disability or need for treatment of the L5-S1 lumbar spondylosis. (Ex. 31-7). Accordingly, Dr. Rosenbaum's opinion is insufficient to support the "solely caused," "solely directed," "major contributing cause," and "pathological worsening" requirements for compensability of claimant's spondylosis under ORS 656.225. Therefore, we affirm that portion of the ALJ's order.

ORDER

The ALJ's order dated December 5, 2012 is affirmed in part and reversed in part. That portion of the ALJ's order that set aside an asserted *de facto* denial of an L5-S1 disc herniation is reversed. That portion of the ALJ's order that set aside SAIF's combined condition "ceases" denial is also reversed. SAIF's denial is reinstated and upheld. The ALJ's \$8,000 assessed attorney fee award and cost awards for services related to those denials are reversed. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on August 16, 2013