

In the Matter of the Compensation of
STEVEN T. BOSTICK, Claimant

WCB Case No. 11-04685

ORDER ON REVIEW

Hollander & Lebenbaum, Claimant Attorneys

Maher & Tolleson LLC, Defense Attorneys

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

Claimant requests review of those portions of Administrative Law Judge (ALJ) Riechers's order that: (1) upheld the self-insured employer's denial of his current combined cervical condition; and (2) did not award penalties and attorney fees for the employer's allegedly unreasonable denial. On review, the issues are compensability, penalties, and attorney fees.

We adopt and affirm the ALJ's order with the following supplementation.

Claimant has preexisting cervical spine disc pathology and spondylotic change, which has been chronically symptomatic since a 2006 work injury. On or about May 14, 2011, he suffered another work injury when a vertical elevator door came down on his neck and shoulders. (Ex. 98). The employer accepted a cervical strain. (Ex. 105). Subsequently, on November 8, 2011, it modified its notice of acceptance to accept "cervical strain combined with preexisting and non-compensable spondylitic [*sic*] change," effective the date of injury. (Ex. 129A). The next day, the employer issued a denial, stating that the injury had ceased to be the major contributing cause of the need for treatment and disability of the combined condition. (Ex. 131). Claimant requested a hearing.

The ALJ upheld the employer's denial, finding that it was supported by three medical experts: Dr. Denekas, who examined claimant at the employer's request, and Drs. Abraham and Jacqmotte, who were treating physicians. On review, claimant contends that none of these physicians believed that a compensable combined condition ever existed. Asserting that these opinions were contrary to the "law of the case," he argues that the employer has not met its burden of proving its "ceases" denial under ORS 656.262(6)(c). *See Kuhn v. SAIF*, 73 Or App 768, 772 (1985) (opinion that conflicts with the law of the case is wrong as a legal matter). Additionally, claimant asserts that the medical record does not document a change in his accepted condition, such that the work injury was no longer the major contributing cause of the disability/need for treatment of the combined condition. Based on the following reasoning, we affirm.

A carrier may deny an accepted combined condition if the “otherwise compensable injury” ceases to be the major contributing cause of the disability/ need for treatment of the combined condition. ORS 656.005(7)(a)(B); ORS 656.262(6)(c); ORS 656.266(2)(a); *SAIF v. Kollias*, 233 Or App 499, 505 (2010); *Jack G. Scoggins*, 56 Van Natta 2534, 2535 (2004). Thus, the employer bears the burden to show a change in circumstances or a change in condition such that claimant’s otherwise compensable injury ceased to be the major contributing cause of the combined condition. *Wal-Mart Stores, Inc. v. Young*, 219 Or App 410, 414 (2008); *State Farm Ins. Co. v. Lyda*, 150 Or App 554, 559 (1997), *rev den*, 327 Or 82 (1998); *Aquilino Orozco*, 60 Van Natta 2716, 2718 (2008).

Here, Dr. Denekas examined claimant on August 12, 2011, three months after the work injury. Dr. Denekas specifically stated that claimant’s compensable injury combined with his preexisting cervical spondylosis “to cause or prolong the disability or need for treatment.” (Ex. 114-10). He further opined that the preexisting condition was the major contributing cause of claimant’s “current disability and need for treatment,” and “if a cervical strain was accepted, this condition is medically stationary.” (Ex. 114-10,-11).

Subsequently, claimant requested that the employer accept a combined condition consisting of “cervical strain combined with pre-existing spondylotic change.” (Ex. 117). Both Dr. Abraham and Dr. Jacqmotte concurred with Dr. Denekas’s August 12, 2011 report. (Exs. 127-1, 128-2).

On November 22, 2011, in the context of an opinion concerning claimant’s newly claimed condition of cervical radiculopathy, Dr. Denekas also addressed the combined cervical strain condition. (Ex. 134B-3). He reiterated that “it would be appropriate to state that the injury did combine.” (Ex. 135-3).

We acknowledge that Dr. Denekas also stated that the “major contributing cause * * * would have been the preexisting degenerative changes” and, at most, the work injury “caused an increase in symptoms in regard to a combined condition and the work event was not the major contributing cause of the overall condition.” (*Id.*) Yet, unlike Dr. Denekas’s earlier opinion, such a statement does not address the major contributing cause of claimant’s disability or need for treatment of the accepted combined condition.¹ Accordingly, we do not interpret

¹ Moreover, it is unclear whether Dr. Denekas included in his November 2011 assessment the newly claimed radiculopathy condition.

Dr. Denekas's November 2011 statement as a departure from his August 2011 assessment that claimant's cervical strain combined with the preexisting condition, and that the preexisting condition was the major contributing cause of the then-current disability/need for treatment, while the cervical strain had become medically stationary. (*See* Ex. 114-10, 11).

Moreover, neither of claimant's treating physicians, Drs. Abraham and Jacquemotte, commented on Dr. Denekas's later report. Instead, they concurred with Dr. Denekas's August 2011 report. Thus, even if Dr. Denekas's opinion could arguably be considered inconsistent, the opinions from these other physicians were not. Finally, none of these physicians stated that the compensable cervical strain was never the major contributing cause of disability/need for treatment of the combined condition or that his preexisting degenerative condition was always the major contributing cause of his disability/need for treatment for his combined condition. Consequently, we are not persuaded that these medical opinions are inconsistent with the proposition that claimant had an initially compensable combined condition.

Claimant also contends that the employer has not proven the requisite change in his condition, such that the accepted cervical strain was no longer the major contributing cause of the combined condition. We disagree. Dr. Abraham initially diagnosed a cervical contusion-sprain on May 16, 2011. (Ex. 92-2). Dr. Jacquemotte, who became claimant's treating physician, opined that at a June 14, 2011 examination, claimant's cervical strain had resolved. (Ex. 128-1). Additionally, although Dr. Denekas did not diagnose a cervical strain, he allowed that, if such a strain had been accepted, it was medically stationary without impairment when he examined claimant on August 12, 2011. (Ex. 114-11).

Therefore, based on these opinions, we are persuaded that there was a change of circumstances, consisting of the resolution of claimant's cervical strain, which is sufficient to support the employer's denial of claimant's current combined condition. *See Ray Murdoch*, 63 Van Natta 2411 (2011) (upholding combined condition denial where the carrier established that the accepted cervical strain was no longer the major contributing cause of the combined condition). Accordingly, we affirm.

ORDER

The ALJ's order dated April 30, 2012 is affirmed.

Entered at Salem, Oregon on February 14, 2013

Member Lanning dissenting.

The majority concludes that the ALJ properly upheld the employer's denial of claimant's current combined cervical condition. Because I agree with claimant's arguments to the contrary, I respectfully dissent.

Implicit in the employer's acceptance of a combined condition as of the date of injury is the determination that the "otherwise compensable injury" (here, the cervical strain) was, for at least some period of time, the major contributing cause of the disability/need for treatment of the combined condition. Claimant contends that the opinions of Drs. Denekas, Abraham, and Jacqmotte do not persuasively support the employer's denial, because none of them believed that his work injury (cervical strain) was *ever* the major contributing cause of the disability/need for treatment of a compensable combined condition. Based on the following reasoning, I agree.

In his August 12, 2011 report, Dr. Denekas stated: "The preexisting condition in my opinion is the major contributing cause of [claimant's] current disability and need for treatment." (Ex. 114-10). Drs. Abraham and Jacqmotte concurred with this opinion. (Exs. 127-1, 128-2). Then, in a subsequent report, Dr. Denekas opined that, even at the time of claimant's initial presentation, the major contributing cause was claimant's preexisting degenerative changes. (Ex. 135-3). Although Dr. Denekas did not specifically state that claimant's preexisting conditions were *always* the major contributing cause of the disability/need for treatment, he explained that claimant had sought treatment for "significant" symptoms just a few days before the work incident, and that these symptoms were essentially in the same location as those he experienced after the work incident. He opined that, at most, it was "possible" that the work event increased the symptoms, but that it was not the major contributing cause of the "overall situation," even immediately after the work incident. (*Id.*)

Moreover, in disagreeing with Dr. Brett's December 2, 2011 report that stated that claimant had increased pain after the work incident, Dr. Denekas stated: "[He] was having 10/10 pain prior to the incident. This would suggest that his pain was intense and not actually increased by the incident of May 13 [*sic*], 2011." Regarding the neck spasm identified by Dr. Brett, Dr. Denekas noted that Dr. Abraham, who examined claimant three days after the work incident, did not document the presence of any spasm. (Ex. 141-2). In light of his comments, and reading Dr. Denekas's reports in context and as a whole, I interpret his opinion to be that claimant's May 2011 work injury was never the major contributing cause

of his disability/need for treatment of the combined condition. *See SAIF v. Strubel*, 161 Or App 516, 521-22 (1999) (medical opinions are evaluated in context and based on the record as a whole to determine sufficiency).

Additionally, although Dr. Jacqmotte, claimant's treating physician, reported the resolution of his work-related cervical strain, she did not acknowledge that the strain was ever a major contributor to his disability/need for treatment. To the contrary, Dr. Jacqmotte stated: "[Claimant] had been treating for his severe degenerative disc disease for years prior to his May 2011 injury, and * * * presented with the same symptoms prior to and after the May 14, 2011 injury." (Ex. 128-1) (emphasis added). Likewise, Dr. Bell, who performed a records review, opined that "[claimant's] clinical presentation following the job injury is not objectively different from prior to the May 14, 2011 injury." (Ex. 136-15). She also noted that, even before the work injury, claimant was taking three oxycodone tablets per day and wore a fentanyl patch for pain. (Ex. 140-1).

As with Dr. Denekas, I conclude that Dr. Bell's and Dr. Jacqmotte's comments support a reasonable inference that they did not, at any time, consider claimant's work incident to be the major contributing cause of his disability/need for treatment of the accepted combined condition. *See Benz v. SAIF*, 170 Or App 22, 26 (2000) (although we may draw reasonable inferences from the medical evidence, we are not free to reach our own medical conclusions about causation in the absence of such evidence); *Loleatha Montague*, 59 Van Natta 1725, 1727 (2007) (same).

Here, however, the employer accepted, effective the date of injury, a combined condition consisting of the cervical strain combined with preexisting spondylotic change. In light of this acceptance, the employer implicitly recognized that claimant's cervical strain was, for some period of time, the major contributing cause of his disability/need for treatment. Because I interpret the opinions of Drs. Denekas, Abraham, Jacqmotte, and Bell not to support the contention that claimant's cervical strain was ever the major contributing cause of his disability/need for treatment, I conclude that their opinions conflict with the "law of the case," and are thus, unpersuasive. *Kuhn*, 73 Or App at 772; *Kayla L. Sjogren*, 61 Van Natta 1024, 1025 (2009) (finding opinions of physicians inconsistent with the employer's acceptance to be contrary to the "law of the case" and therefore unpersuasive).

Consequently, the employer's contention that "the physicians are of the opinion that for a period of time the work injury and the accepted strain were the major cause of the disability or need for treatment," is not supported by the record. (Employer's brief at 4). Therefore, I agree with claimant that the employer cannot rely on the opinions of physicians who did not recognize the existence of a compensable combined condition as a basis to support a change in circumstances in that same combined condition. As a result, I do not believe that the employer has met its burden of proving that claimant's "otherwise compensable injury" ceased to be the major contributing cause of his disability/need for treatment for the combined condition. ORS 656.262(6)(c). Thus, I respectfully dissent.