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In the Matter of the Compensation of  
**RODNEY R. ERICKSON, Claimant**  
WCB Case No. 12-05867  
CORRECTED ORDER ON REVIEW  
Ransom Gilbertson Martin et al, Claimant Attorneys  
Sather Byerly & Holloway, Defense Attorneys

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

It has come to our attention that copies of our May 23, 2014 Order on Review contained a clerical error. Specifically, Page 9 was missing from the order. To correct this oversight, we withdraw our prior order and replace it with the following order. The parties' rights of appeal shall begin to run from the date of this order.

Claimant requests review of that portion of Administrative Law Judge (ALJ) Pardington's order that upheld the self-insured employer's denial of claimant's new/omitted medical condition claim for a combined low back condition. On review, the issue is compensability. We reverse.

#### FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," summarized as follows.

In April 2012, claimant sustained a work-related low back injury, while carrying a roll of carpet. He treated with Dr. Marier for back pain. (Ex. 4). The employer accepted a lumbar strain. (Ex. 16).

In May 2012, claimant consulted Dr. Yam, a neurosurgeon. (Ex. 7). Dr. Yam diagnosed a lumbar strain and preexisting asymptomatic L5-S1 spondylolisthesis, which had become symptomatic. (Exs. 7, 10).<sup>1</sup> In June 2012, Dr. Yam determined that the lumbar strain had improved, but that the spondylolisthesis remained symptomatic. (Ex. 9).

In July 2012, Dr. Williams, a neurosurgeon, performed an examination at the employer's request. Finding no muscle spasm or other evidence of a lumbosacral strain, Dr. Williams opined that the work-related lumbar strain had resolved.

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<sup>1</sup> Claimant was diagnosed with L5-S1 spondylolisthesis in 2010. (Exs. 1A, 1E-6).

(Exs. 11-4, -6, -7, 25-2). Dr. Williams concluded that the 2012 injury combined with the preexisting L5-S1 spondylolisthesis, and that the preexisting condition was the major contributing cause of claimant's current condition, disability, and need for medical treatment. (Ex. 11-6, -7, -8).

Dr. Bergquist, a neurosurgeon, performed a file review at the employer's request. Acknowledging that the 2012 injury may have contributed to the preexisting spondylolisthesis becoming symptomatic, Dr. Bergquist did not consider the compensable injury a material contributing cause of the combined condition and concluded that the preexisting condition was the major contributing cause of the spondylolisthesis and related disability/need for treatment. (Ex. 27-6, -7).

Dr. Yam operated on claimant's lumbar spine in October 2012. Finding an L5-S1 disc herniation and unstable spondylolisthesis, Dr. Yam decompressed the left L5-S1 nerve roots and fused the L5-S1 vertebrae. (Ex. 21).

Claimant made a new/omitted medical condition claim for a "lumbar strain combined with L5-S1 spondylolisthesis," which the employer denied. (Exs. 29, 30). Claimant requested a hearing.

### CONCLUSIONS OF LAW AND OPINION

The ALJ found that claimant established the existence of the claimed "combined condition" and that the work injury was a material contributing cause of the disability and need for treatment for that condition. However, the ALJ concluded that the employer met its burden of proving that the "otherwise compensable injury" was not the major contributing cause of claimant's disability or need for treatment for the combined condition.

On review, claimant asserts that the medical evidence is insufficient to carry the employer's burden of proof. For the reasons that follow, we agree.

Because he expressly sought acceptance of a "combined condition"<sup>2</sup> as a new/omitted medical condition, claimant must initially prove the existence of that condition to establish compensability. ORS 656.005(7)(a); ORS 656.266(1); *Gail*

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<sup>2</sup> Claimant's counsel asked the employer to "amend the acceptance to include 'lumbar strain combined with L5-S1 spondylolisthesis' pursuant to ORS 656.262(6)(d) and/or ORS 656.262(7)(a)." (Ex. 29).

*Moon*, 62 Van Natta 1238, 1239 (2010) (where a claimant initiates a claim for a combined condition, the claimant bears the burden of establishing the existence of that combined condition). If claimant establishes the existence of the “combined condition,” the employer has the burden of establishing that the “otherwise compensable injury” is not the major contributing cause of claimant’s disability/need for treatment of the combined condition. ORS 656.005(7)(a)(B); ORS 656.266(2)(a); *SAIF v. Kollias*, 233 Or App 499, 505 (2010); *Jack G. Scoggins*, 56 Van Natta 2534, 2535 (2004).

Because of claimant’s preexisting condition and the possible alternative causes for his disability/need for treatment of his combined condition, resolution of this matter is a complex medical question that must be resolved by expert medical opinion. See *Barnett v. SAIF*, 122 Or App 279 (1993). We give more weight to those opinions that are well reasoned and based on complete information. See *Somers v. SAIF*, 77 Or App 259, 263 (1986). Where the carrier has the burden of proof under ORS 656.266(2)(a), the medical evidence supporting its position must be persuasive. *Jason J. Skirving*, 58 Van Natta 323, 324 (2006), *aff’d without opinion*, 210 Or App 467 (2007).

A “combined condition” exists where an “otherwise compensable injury” combines with a “preexisting condition” to cause or prolong disability or need for treatment. ORS 656.005(7)(a)(B). Here, claimant has claimed a “combined condition” composed of a lumbar strain and his preexisting L5-S1 spondylolisthesis. (Ex. 29). The employer has previously accepted the lumbar strain. (Ex. 16). In these particular circumstances, an “otherwise compensable injury” has been established.<sup>3</sup>

The parties do not dispute the proposition that claimant has preexisting L5-S1 spondylolisthesis. The employer, however, does not concede that claimant has established a combined condition. For the following reasons, we disagree.

Here, Dr. Williams opined that claimant’s 2012 injury combined with the preexisting condition, explaining that the work-related muscular strain caused the preexisting spondylolisthesis to become symptomatic, resulting in disability and

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<sup>3</sup> In *Brown v. SAIF*, \_\_\_ Or App \_\_\_ (May 8, 2014), the court held that in analyzing a “ceases” denial under ORS 656.262(6)(c), the “otherwise compensable injury” refers to a “work-related injury incident,” as opposed to an accepted condition. Here, in contrast to *Brown*, claimant has requested acceptance of a new/omitted medical condition, which he specifically described as a lumbar strain combined with L5-S1 spondylolisthesis. Because, in this particular case, claimant has claimed a “combined condition” expressly composed of the already accepted lumbar strain and preexisting L5-S1 spondylolisthesis, we consider the lumbar strain to constitute the “otherwise compensable injury.”

need for treatment. (Exs. 11-6, -7, 25-2). Similarly, Dr. Yam concluded that the 2012 lumbar strain combined with preexisting spondylolisthesis to cause the spondylolisthesis to become symptomatic and require surgery. (Ex. 24A-2, -3). Finally, Dr. Bergquist opined that the 2012 injury can be considered a precipitating cause of the “combined condition.” (Ex. 27-7). These opinions persuasively establish the existence of a combined condition that contributed to claimant’s need for treatment.

Because the evidence supports the existence of an “otherwise compensable injury” that combined with a statutory preexisting condition to cause a need for treatment, we turn to whether the employer met its burden to prove that “the otherwise compensable injury” was never the major contributing cause of claimant’s disability/need for treatment of the combined condition.

The employer relies on the opinions of Drs. Williams and Bergquist to meet its burden. Dr. Williams opined that the compensable strain resolved and that the major contributing cause of claimant’s “*current* lumbar condition is his non-work related congenital developmental L5-S1 spondylolisthesis.” (Ex. 11-7). Yet, ORS 656.005(7)(a)(B) specifies that a “combined condition” is compensable “if an otherwise compensable injury combines *at any time* with a preexisting condition to cause or prolong disability or a need for treatment \* \* \*.” *See Oregon Drywall Systems, Inc. v. Bacon*, 208 Or App 205, 209-10 (2006) (a combined condition may arise “at any time”). Where, as here, the carrier has not accepted a combined condition, the issue is whether the “otherwise compensable injury” was not the major contributing cause of the disability/need for treatment of the combined condition “at any time.” *See Stephen D. Smith*, 58 Van Natta 2247 (2006) (medical opinion that the work injury was the major contributing cause of the claimant’s lumbar strain, but that subsequently, a degenerative disc condition was the major contributing cause of treatment/disability did not support a combined condition denial in the absence of a combined condition acceptance, citing *SAIF v. Belden*, 155 Or App 568, 573 (1998), *rev den*, 328 Or 330 (1999)).

Furthermore, under ORS 656.266(2)(a), the carrier has the “burden of proof” to establish that the “otherwise compensable injury” was never the major contributing cause of the disability/need for treatment of the “combined condition.”

To attempt to meet its “burden of proof,” the carrier relies on Dr. Williams’s opinion, which states that the 2012 work injury was “never the major cause (51% cause) of the *spondylolisthesis* condition.” Even assuming that Dr. Williams’s reference to a “condition” could be interpreted as encompassing “disability/

need for treatment,”<sup>4</sup> the opinion does not address the “combined condition” (*i.e.*, the otherwise compensable injury combined with the preexisting L5-S1 spondylolisthesis). Instead, it only refers to the preexisting “spondylolisthesis” condition. (Ex. 25-2). Similarly, Dr. Bergquist’s conclusion that the 2012 injury was never the major contributing cause of the disability/need for treatment of claimant’s *L5-S1 spondylolisthesis* does not address the major contributing cause of claimant’s disability/need for treatment of the “combined condition.” (Ex. 27-7).

Under such circumstances, the opinions of Drs. Williams and Bergquist did not address the appropriate legal standard. Consequently, we consider their opinions to be insufficient to meet the employer’s requisite burden of proof. *See James L. Burch*, 58 Van Natta 2450, 2451 (2006) (a physician’s opinion, that a disc herniation was not caused by the work injury but was a manifestation of disc degeneration, did not address the appropriate legal standard); *cf. Jill Crawford*, 56 Van Natta 3194 (2004) (a physician’s opinion encompassed all components of the legal standard for a “combined condition,” including treatment and disability, where it was apparent from the physician’s opinion that the physician was fully apprised of the correct legal standard that an injury must be the major contributing cause of the need for treatment or disability of a combined condition).

There are no other opinions that support the employer’s position. Under these circumstances, the employer has not satisfied its burden of proving that the “otherwise compensable injury” was never the major contributing cause of the disability/need for treatment of the combined low back condition. Accordingly, we reverse that portion of the ALJ’s order that upheld the employer’s denial of claimant’s new/omitted medical (combined) condition claim and set aside the denial.

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 438-015-010(4) and applying them to this case, we find that a reasonable attorney’s fee for claimant’s attorney’s services at hearing and on review is \$6,500, payable by the employer. In reaching this conclusion, we have particularly

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<sup>4</sup> *See Robinson v. SAIF*, 147 Or App 157 (1997) (no need to distinguish between the major cause of the claimant’s combined condition and the major cause of the claimant’s need for treatment where the record established that they were the same); *cf. SAIF v. Nehl*, 148 Or App 101, *recons*, 149 Or App 309 (1997) (distinguishing between the major cause of the claimant’s combined condition and its need for treatment where the evidence established there was a difference between the two).

considered the time devoted to the case (as represented by the record and claimant's appellant's brief), 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 new/omitted medical (combined) condition denial, to be paid by the employer. *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 October 25, 2013 is reversed in part and affirmed in part. That portion of the ALJ's order that upheld the employer's denial of claimant's new/omitted medical (combined) condition claim is reversed. The employer's denial is set aside and the claim is remanded to the employer for processing according to law. The remainder of the ALJ's order is affirmed. For services at hearing and on review, claimant's attorney is awarded an assessed fee \$6,500, 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 new/omitted medical (combined) condition denial, to be paid by the employer.

Entered at Salem, Oregon on May 28, 2014

Member Langer dissenting.

Concluding that the medical evidence is insufficient to carry the employer's burden to prove that the otherwise compensable injury was not the major contributing cause of claimant's disability or need for treatment for the combined condition, the majority reverses the ALJ's conclusion to the contrary. Because I would affirm the ALJ's order, I respectfully dissent.

Claimant sustained a work injury accepted as a lumbar strain. (Ex. 16). After his physician, Dr. Yam, diagnosed preexisting L5-S1 spondylolisthesis that had become symptomatic, claimant filed a claim for "lumbar strain combined with L5-S1 spondylolisthesis" as a combined condition (Ex. 29), which the employer denied (Ex. 30).

The majority reasons that because Drs. Williams's and Bergquist's opinions address the cause of claimant's *spondylolisthesis* condition, they do not address the disability or need for treatment of the combined condition, as required by ORS 656.005(7)(a)(B). Assuming that claimant's lumbar strain combined with his preexisting spondylolisthesis to cause his disability or need for treatment, I find the opinions of Drs. Williams and Bergquist sufficient to establish that the otherwise compensable injury was never the major contributing cause of such disability or need for treatment.

It is well settled that we do not appraise opinions based on "magic words" or particular word-choices. *SAIF v. Alton*, 171 Or App 491, 502 n 6 (2000); *SAIF v. Strubel*, 161 Or App 516, 521-22 (1999); *Liberty N.W. Ins. Corp. v. Cross*, 109 Or App 109, 112 (1991), *rev den*, 312 Or 676 (1992); *Urbano C. Garibay*, 61 Van Natta 1018, 1022 (2009). In addition, "[i]n some cases, the nature of the treatment and the condition may result in the major cause of one being synonymous with the other[.]" *Basin Tire Service Inc. v. Minyard*, 240 Or App 715, 724 (2011); *see also Robinson v. SAIF*, 147 Or App 157, 162 (1997) (noting that, in that case, there was no difference between the major contributing cause of the claimant's hernia and the major contributing cause of the need for treatment of the hernia). Finally, a precipitating cause may be, but is not necessarily, the major contributing cause. *Dietz v. Ramuda*, 130 Or App 397 (1994), *rev dismissed*, 321 Or 416 (1995).

I examine the medical evidence with these principles in mind. Dr. Williams diagnosed preexisting congenital lumbar spondylolisthesis and a "work related event April 6, 2012 producing a lumbar strain and causing a previously asymptomatic L5-S1 spondylolisthesis to become symptomatic." (Ex. 11-6). He further reported that claimant had no evidence of a lumbar strain on his July 23, 2012 examination, but continued to complain of lumbar pain. Dr. Williams concluded that claimant's lumbar strain had resolved, his continued symptoms were due to his L5-S1 spondylolisthesis that remained pathologically unchanged since 2010, the proposed surgical treatment was not attributable to the April 6, 2012 injury and the major contributing cause of claimant's current lumbar condition was his preexisting congenital condition. (Ex. 11-6, -7; *see also* Ex. 24). In addition, Dr. Williams stated that claimant had no permanent impairment attributable to the April 6, 2012 event, but the preexisting condition likely prevented him from returning to regular work. (Ex. 11-8). Dr. Marier, claimant's attending physician, concurred with Dr. Williams. (Ex. 13).

Subsequently, Dr. Williams reiterated that claimant sustained a muscular strain as a result of the work injury, which made his spondylolisthesis symptomatic but did not pathologically worsen it, and that the work injury was never the major contributing cause of the spondylolisthesis condition. (Ex. 25-2).

Similarly, Dr. Bergquist opined that, based on his review of claimant's medical record, claimant's disability and need for treatment was the L5-S1 spondylolisthesis. He stated: "While the accepted injury may have contributed to [that condition] becoming symptomatic, it is the spondylolisthesis that is the main cause of the disability and/or need for treatment. The injury was never the major contributing cause of the disability and need for treatment." (Ex. 27-7).

When deposed, Dr. Bergquist explained that claimant's "basic issue" was a symptomatic L5-S1 spondylolisthesis and, while the lumbar work injury likely was contributory to some degree, "it's not the reason we're here." (Ex. 32-16). The primary reason for his need for treatment was the preexisting condition. (*Id.*)

These medical opinions show that the experts correctly understood that claimant's muscular strain, a direct result of the work accident, combined with the preexisting condition to make it symptomatic. This symptomatic condition required treatment and caused claimant's disability. In the absence of any other contributory lumbar condition or cause of claimant's disability or need for treatment, the experts were unmistakably addressing the cause of claimant's disability and need for treatment of the symptomatic spondylolisthesis when addressing the cause of that condition itself. *Robinson*, 147 Or App at 162.

Accordingly, I conclude that a preponderance of the medical evidence sufficiently supports the employer's burden to establish that the combined condition is not compensable. ORS 656.005(7)(a)(B); ORS 656.266(2)(a). For these reasons, I respectfully dissent.