

In the Matter of the Compensation of
JOHNNIE E. JONES, Claimant
WCB Case No. 14-01633
ORDER ON RECONSIDERATION
Dale C Johnson, Claimant Attorneys
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Curey and Weddell.

On May 22, 2015 we withdrew our April 27, 2015 order that reversed an Administrative Law Judge's (ALJ's) order that had upheld the SAIF Corporation's denial of claimant's current combined cervical and low back conditions. We took this action to consider SAIF's contention that we had misinterpreted Dr. Teed's opinion in determining that it had not met its burden of proof under ORS 656.266(2)(a). Having considered SAIF's contentions, as well as claimant's response, we adhere to our prior decision, as supplemented below.

We briefly recount the procedural and factual background of the claim. Claimant has a history of low back and neck injuries that preexisted his September 2013 compensable injury, for which SAIF accepted cervical and lumbar strains. In March 2014, SAIF also accepted, effective September 25, 2013, a cervical strain combined with preexisting spondylosis and a lumbar strain combined with degenerative disc disease and lumbar spondylosis. SAIF then denied the combined conditions, asserting that, as of March 21, 2014, the accepted injury was no longer the major contributing cause of those conditions. Claimant requested a hearing and the ALJ upheld the denial.

On review, we determined that the opinion of Dr. Teed was insufficient to satisfy SAIF's burden of proof under ORS 656.262(6)(c) and ORS 656.266(2)(a) regarding the major contributing cause of the combined lumbar and cervical conditions. Citing *Sherman v. Western Employers Ins.*, 87 Or App 602, 606 (1987), we reasoned, in part, that Dr. Teed's opinion relied on general propositions regarding the expected course for healing strains, rather than on considerations specific to claimant, and was, therefore, unpersuasive.

As SAIF notes, claimant told Dr. Teed that his low back pain had completely resolved and that he was back to a "baseline level." (Ex. 73-2). SAIF states that Dr. Teed's history indicates an "aware[ness]" of claimant's particular circumstances, and that by discussing the expected recovery time for lumbar strains, Dr. Teed was only commenting that claimant's particular course of recovery for his lumbar strain was consistent with that general proposition.

In response, claimant counters that, even though Dr. Teed took a medical history, his opinion does not show an actual application of that history in his analysis. Rather, claimant asserts that Dr. Teed simply concludes that claimant's lumbar and cervical strains followed the expected course of healing, without an adequate explanation for his conclusion.

After further considering this record, in light of the parties' respective positions, we continue to find Dr. Teed's opinion to be inadequately explained. *See Moe v. Ceiling Sys., Inc.*, 44 Or App 429, 433 (1980) (rejecting unexplained or conclusory opinion). Consequently, for the reasons expressed in our previous order, as supplemented herein, we conclude that Dr. Teed's opinion was insufficient to persuasively meet SAIF's requisite burden of proof.

Additionally, the record establishes that claimant reported to Dr. Teed that his back pain was resolved and had returned to a "baseline level." (Ex. 73-2). SAIF's denial was not limited to claimant's low back, but rather also encompassed a combined condition of the cervical spine.

At the time of Dr. Teed's February 2012 examination, claimant had limited range of motion of the cervical spine with pain and tenderness over the paraspinous musculature. (Ex. 73-6). While claimant had chronic cervical spine pain before the work injury, Dr. Teed did not differentiate from symptoms and disability related to the accepted cervical strain or work-related injury incident, as opposed to symptoms and disability attributable to claimant's preexisting cervical spine condition. Instead, at least insofar as claimant's combined cervical condition was concerned, Dr. Teed's opinion appeared to primarily focus on general propositions, rather than claimant's specific circumstances. Such an analysis prompts us to discount the persuasiveness of Dr. Teed's opinion. *See Sherman*, 87 Or App at 606; *Delmy E. Diaz-Galdamez*, 67 Van Natta 846, 849 (2015).

In conclusion, because of the aforementioned deficiencies, as well as the reasons previously expressed in our earlier order, we decline to find Dr. Teed's opinion persuasive. Therefore, we continue to find that SAIF has not met its burden to prove that claimant's work related injury/incident was no longer the major contributing cause of the need for treatment/disability of his combined lumbar and cervical conditions. *See Jason J. Skirving*, 58 Van Natta 323, 324 (2006), *aff'd without opinion*, 210 Or App 467 (2007) (where the carrier has the burden of proof under ORS 656.266(2)(a), the medical evidence that supports its position must be persuasive).

Claimant's attorney is entitled to an assessed fee for services rendered on reconsideration regarding the compensability issue. *See* ORS 656.386(1). In addition, claimant seeks reconsideration of our \$8,500 attorney fee award for his counsel's services performed at the hearing level and on Board review.

After considering the factors set forth in OAR 438-015-0010(4), as well as claimant's request for reconsideration regarding our prior attorney fee award, we find that a reasonable fee for claimant's attorney's services at hearing, on review, and on reconsideration is \$11,000, payable by SAIF.¹ In reaching this conclusion, we have particularly considered the time devoted to the compensability issue (as represented by the record, claimant's appellate briefs, claimant's counsel's fee submission, SAIF's objections, and claimant's response to SAIF's reconsideration motion), the complexity of the issue, the value of the interest involved, and the risk that counsel may go uncompensated.

Accordingly, on reconsideration, as supplemented and modified herein, we adhere to and republish our April 27, 2015 order. The parties' 30-day statutory appeal rights shall begin to run from the date of this order.

IT IS SO ORDERED.

Entered at Salem, Oregon on June 23, 2015

¹ This award is in lieu of our previous attorney fee award.