
In the Matter of the Compensation of
RYAN J. JONES, Claimant
WCB Case No. 14-00356, 13-06207
ORDER ON REVIEW
Schoenfeld & Schoenfeld, Claimant Attorneys
Reinisch Wilson Weier, Defense Attorneys
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Curey, Weddell, and Somers. Member Weddell dissents.

Claimant requests review of that portion of Administrative Law Judge (ALJ) Jacobson's order that: (1) upheld the compensability and responsibility denials issued by the SAIF Corporation on behalf of Kuni West Slope Motors (SAIF/Kuni) for a low back injury; and (2) upheld the responsibility denial issued by Rustom Automotive-Broadway Kia (Broadway Kia), and its claims processor, Empire Pacific Risk Management, for the same condition. On review, the issue is compensability and, potentially, responsibility.

We adopt and affirm the ALJ's order with the following change and supplementation. In the second paragraph on page 5, we replace the third sentence with the following: "Dr. Rosenbaum explained that claimant had been diagnosed with a strain after the September 19, 2013 event, but the primary cause of his need for treatment was the preexisting spondylosis condition."

We provide the following summary of the pertinent facts.

On March 11, 2013, claimant compensably injured his back while working for Broadway Kia as an auto mechanic. Broadway Kia accepted a disabling thoracolumbar strain. (Ex. 11A). On May 15, 2013, he was released to full duty work. (Ex. 12-3).

After returning to regular work, claimant had a significant increase in low back pain. (Tr. 7-8, 16-19). On May 21, 2013, he sought physical therapy, complaining of pain in the chest and left thoracic area. (Ex. 13). He resigned from Broadway Kia in late May 2013 and decided to seek lighter duty work. (Tr. 7, 19). The Broadway Kia claim was closed on June 4, 2013, without a permanent disability award. (Ex. 13A).

By the end of June 2013, claimant's symptoms were subsiding. (Tr. 7-8). Claimant began working as a security officer, but he experienced muscle soreness. (Tr. 8-10, 20-22). On July 2, 2013, he sought treatment for back pain and was placed on work restrictions. (Ex. 14). Claimant resigned from the security position after about a week because he was concerned that he might get injured. (Tr. 9-10, 20-22).

Claimant was off work for about three to four weeks and did not have back symptoms. (Tr. 9-10). After a pre-employment physical, he began working for Kuni in early August 2013. (Tr. 10-11, 23). After the first two to three weeks at Kuni, he began working overtime and experienced general muscle soreness. (Tr. 11, 12, 29). He iced his back occasionally, but did not take medication. (Tr. 12, 29). Claimant wore a back brace while working at Kuni. (Tr. 24, 29).

On September 19, 2013, while holding a torque wrench and leaning slightly forward as he lowered himself in a squatting position, claimant had a sharp pain in his back. (Tr. 13, 14, 24-26). He was not applying pressure on the wrench at that time. (Tr. 13-14, 24). His back symptoms were in the same location as the March 2013 injury. (Tr. 15, 25-26). He was treated by Dr. Schwartz.

In October 2013, Dr. Lohman examined claimant on behalf of Broadway Kia. (Ex. 21). Dr. Rosenbaum examined him in January 2014 on behalf of SAIF/Kuni. (Ex. 28). Claimant was also examined by Dr. Frank on behalf of SAIF/Kuni. (Ex. 31A).

Claimant filed an aggravation claim with Broadway Kia and an injury claim with SAIF/Kuni. (Exs. 15, 24, 25). After the claims were denied (Exs. 23, 29, 31), claimant requested a hearing.

The ALJ found that the medical evidence established that claimant's September 19, 2013 injury at SAIF/Kuni was at least a material contributing cause of his disability/need for treatment for his back condition. The ALJ also determined that SAIF/Kuni had established a statutory "preexisting condition" that combined with the otherwise compensable injury to cause or prolong disability or a need for treatment. Based on the opinion of Dr. Rosenbaum, the ALJ concluded that SAIF/Kuni established that the September 2013 injury was not the major contributing cause of claimant's disability or need for treatment of the combined condition.

On review, claimant does not challenge the ALJ's finding that he has a statutory "preexisting" condition. But he contends that SAIF/Kuni did not establish the existence of a "combined" condition. Citing *Luckhurst v. Bank of Am.*, 167 Or App 11 (2000), claimant argues that, to constitute a combined condition, two conditions must merge or coexist harmoniously. He contends that the medical evidence does not explain how the work injury combined or merged harmoniously with the preexisting conditions to cause disability/need for treatment. If a combined condition is found to exist, claimant contends that SAIF/Kuni did not satisfy its burden of proving that the "otherwise compensable injury" was not the major contributing cause of the disability/need for treatment of the combined condition. For the following reasons, we disagree with claimant's contentions.

Claimant must prove that the work injury is 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). If he makes that showing, and if the otherwise compensable injury combined with a statutory "preexisting condition," SAIF/Kuni has the burden of proving that the combined condition was not compensable by establishing that the otherwise compensable injury was not the major contributing cause of the disability or 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). To carry its burden under ORS 656.266(2)(a), SAIF/Kuni must present persuasive medical evidence. *Jason J. Skirving*, 58 Van Natta 323, 324 (2006), *aff'd without opinion*, 210 Or App 467 (2007).

First, claimant's reliance on *Luckhurst* is misplaced. In *Jean M. Janvier*, 66 Van Natta 1827 (2014), the carrier relied on *Luckhurst* and *Multifoods Specialty Distrib. v. McAtee*, 164 Or App 654 (1999), to argue that a "combined condition" required two separate conditions, and that an "otherwise compensable injury" was not a condition. We acknowledged that the Court of Appeals had previously referred to a combined condition as "two conditions that merge or exist harmoniously" in those two cases. Nevertheless, we explained that in *Multifoods Specialty Distrib. v. McAtee*, 333 Or 629, 636 (2002), the Supreme Court referred to a combined condition as "two medical problems simultaneously."

Furthermore, in *Brown v. SAIF*, 262 Or App 640, 653 (2014), the court considered the Supreme Court's *McAtee* decision to be consistent with its "combined condition" analysis that referred to the accidental injury/incident. Under such circumstances, we concluded that the *Brown* court's description

of a combined condition as a “work-related injury/incident” combining with a “preexisting” condition was consistent with the Supreme Court’s reference to a combined condition as “two medical problems simultaneously.” *Janvier*, 66 Van Natta at 1830.

Thus, consistent with *Janvier*, *Brown*, and *McAtee*, a “combined condition” exists when a “work-related injury/incident” combines with a “preexisting condition.” For the following reasons, we agree with the ALJ’s conclusion that SAIF/Kuni has established the existence of a “combined” condition.

The medical opinions establish that claimant’s September 19, 2013 “work-related injury/incident” at SAIF/Kuni was at least a material contributing cause of claimant’s disability/need for treatment for low back condition. (Exs. 21, 28, 31A, 32). Furthermore, the record establishes that claimant had preexisting thoracolumbar spondylosis. (Exs. 28-8, 31A-15). Dr. Rosenbaum identified claimant’s preexisting thoracolumbar spondylosis as “arthritis” or an “arthritic condition” involving the synovial facet joints and his description of inflammation and metabolic/structural changes is consistent with “arthritis” or an “arthritic condition” under ORS 656.005(24). (Ex. 33-5). See *Schleiss v. SAIF*, 354 Or 637, 652-53 (2013); *Hopkins v. SAIF*, 349 Or 348, 364 (2010).

Moreover, Dr. Rosenbaum explained that the preexisting thoracolumbar spondylosis combined with claimant’s September 19, 2013 work event to cause his disability/need for treatment. (Ex. 28-8). In reaching that conclusion, he was aware that on September 19, 2013, claimant developed low back pain after kneeling down to hand-torque a lug nut. (Ex. 28-1, -7).

Dr. Rosenbaum’s “combined condition” opinion is supported by Dr. Frank, who concluded that claimant’s September 2013 work incident combined with the preexisting lumbar spondylosis. (Ex. 31A-16). In addition, Dr. Lohman agreed that the September 2013 work incident may have produced a minor thoracolumbar strain that combined with the preexisting spondylosis. (Ex. 34).

Based on Dr. Rosenbaum’s opinion, as supported by Drs. Frank and Lohman, we conclude that claimant’s September 2013 “work-related injury/incident” combined with his preexisting condition to cause or prolong the disability/need for treatment.

Next, claimant contends that, if a combined condition exists, SAIF/Kuni did not satisfy its burden of proving that the “otherwise compensable injury” was not the major contributing cause of the disability or need for treatment of the

combined condition. According to claimant, Dr. Rosenbaum ignored the temporal relationship between the acute onset of symptoms and the work injury. For the following reasons, we disagree.

As described above, Dr. Rosenbaum was aware that on September 19, 2013, claimant developed low back pain after kneeling down to tighten a lug nut.¹ (Ex. 28-1, -7). He explained that claimant had been off work for three to four weeks before starting at Kuni and did not have any significant pain at that time. Dr. Rosenbaum reported that, after starting at Kuni, claimant had some diffuse low back soreness, but no recurrence of the marked pain he had experienced in his March 2013 work injury. (Ex. 28-4, -5).

Dr. Rosenbaum was aware that, after the March 2013 injury, claimant's symptoms had recurred when he returned to regular work with his previous employer and also when he attempted a lighter job in a security position. (Ex. 28-7). Dr. Rosenbaum explained that claimant's recurrent symptoms were based on his underlying spondylosis. (*Id.*)

Dr. Rosenbaum acknowledged that the degenerative changes in claimant's thoracic and lumbar spine were mild/minimal. (Ex. 33-6). He explained, however, that there was no strict clinical correlation between the MRI findings and the degree of a person's symptoms. (*Id.*) He had treated patients similar to claimant, who had significant symptoms, but minimal MRI findings. (*Id.*) Dr. Rosenbaum concluded that the primary cause of the need for treatment after the September 19, 2013 event was claimant's preexisting spondylosis. (Ex. 28-7).

In reaching that conclusion, Dr. Rosenbaum relied on the minor nature of the September 19, 2013 work incident, as well as claimant's history of continued variable low back symptoms in May, June, July, and August 2013 that limited his ability to return to his prior job and work as a security guard. (Exs. 28-8, -9, 33-7). Dr. Rosenbaum explained that claimant had diffuse back symptoms after he began working for Kuni and wore a lumbar brace to protect his back. He determined that claimant's history did not support the conclusion that he had a complete resolution of thoracolumbar symptoms between May and September 2013. (Ex. 33-7). Dr. Rosenbaum's understanding of continued back symptoms after the March 2013 work injury was consistent with claimant's testimony.

¹ Dr. Rosenbaum initially reported that claimant gave "extreme pressure" when he was kneeling down to hand-torque a lug nut. (Ex. 28-1). He was later provided with information that claimant did not apply pressure to the wrench, which was consistent with claimant's testimony. (Ex. 33-5; Tr. 24). Dr. Rosenbaum explained that the new history did not change his causation opinion. (Ex. 33-5).

Claimant contends that Dr. Rosenbaum ignored the temporal relationship between the September 2013 work incident and the acute onset of symptoms. We disagree. Dr. Rosenbaum reported that, although claimant had low back soreness from his work activities at Kuni, his back pain after the September 19, 2013 incident was more prominent. (Ex. 28-1). He was aware that claimant sought treatment on that date from Dr. Schwartz. (*Id.*) Dr. Rosenbaum explained that on September 19, 2013, claimant developed a “severe recurrence” of his low back pain, which was identical to his March 2013 symptoms. (Ex. 28-7).

We find that Dr. Rosenbaum adequately considered the temporal relationship between the September work incident and the increased symptoms in evaluating causation. *See Allied Waste Indus., Inc. v. Crawford*, 203 Or App 512, 518 (2005), *rev den*, 341 Or 80 (2006) (temporal relationship between a work injury and the onset of symptoms is one factor that should be considered, and may be the most important factor). Dr. Rosenbaum’s opinion is persuasive because it is well reasoned and based on complete and relevant information. *See Jackson County v. Wehren*, 186 Or App 555, 561 (2003).

Dr. Rosenbaum’s opinion is supported by Dr. Lohman, who explained that claimant’s September 19 work incident involved a minor physical movement, consistent with usual activities of daily living. He opined that claimant’s symptoms were disproportionate to the physical activity. Dr. Lohman concluded that the underlying spondylosis was the major contributing cause of claimant’s disability/need for treatment on September 19, 2013. (Ex. 34).

Claimant relies on the opinion of Dr. Frank, but we are not persuaded by his opinion for the following reasons. Dr. Frank reported that claimant had “no problem” at Kuni for about two months, but also reported that claimant had occasional low back problems and used ice. (Ex. 31A-3). Later in his report, Dr. Frank explained that claimant was “asymptomatic” for two months after “restarting work” at Kuni. (Ex. 31A-15). He concluded that the September 2013 lumbar strain was the major contributing cause of his disability/need for treatment, reasoning that “[t]his is stated because prior to the incident of 09/19/13 there were no symptoms.” (Ex. 31A-16).

Claimant contends that Dr. Frank correctly understood that he had occasional low back problems and used ice before the September 2013 injury. However, Dr. Frank stated that claimant had “no problem” at Kuni for about two months. Claimant testified that after his initial two to three weeks at Kuni, he had general muscle soreness and iced his back about once a week. He also wore a

back brace at work. (Tr. 12, 29). Based on this testimony, Dr. Frank did not have an accurate understanding of claimant's back problems in the two months before his injury. In addition, claimant's testimony does not support Dr. Frank's report that claimant heard a "pop" in his low back on September 19, 2013. (Ex. 31A-3). We conclude that Dr. Frank's opinion is based on an inaccurate history and is therefore unpersuasive. *See Miller v. Granite Constr. Co.*, 28 Or App 473, 478 (1977) (medical evidence that was based on inaccurate information was not persuasive).

Claimant also relies on Dr. Schwartz, arguing that we should defer to his opinion because he was the treating physician and was the only physician to consider the temporal relationship between the work injury and the onset of symptoms. However, we are not persuaded by his opinion for the following reasons.

Dr. Schwartz opined that claimant was "doing well" until he had acute back pain on September 19, 2013. (Ex. 32-2). Dr. Schwartz did not indicate whether he was aware of claimant's continuing low back symptoms after the March 2013 injury at the previous employer. Moreover, Dr. Schwartz incorrectly reported on September 19, 2013, that claimant was "lifting a heavy object, pulling and pushing." (Ex. 16). In a later concurrence letter from claimant's attorney, Dr. Schwartz stated that claimant gave him a history of "bending over while handling torque wrench on a tire" with immediate back pain. (Ex. 32-1). He agreed that the mechanism of injury was described in his "chart note" and page 3 of Dr. Frank's February 2014 report. (*Id.*) Dr. Frank reported that claimant bent over to torque a tire and heard a "pop" in his back. (Ex. 31A-3). However, Dr. Schwartz's initial chart note was based on an inaccurate understanding that claimant was lifting, pulling, and pushing a heavy object on September 19, 2013.² Because we are unable to determine which history Dr. Schwartz relied on in evaluating causation, his opinion is not persuasive. *See Miller*, 28 Or App at 478.

² To the extent that Dr. Schwartz was relying on his other chart notes, he recorded different dates regarding the onset of symptoms. His September 23, 2013 chart note explained that the injury occurred that day. (Ex. 17). His October 30, 2013 chart note explained that the onset and duration of claimant's back pain was "7 months ago" and that the trauma occurred at work on March 30, 2013. (Ex. 22). But on December 12, 2013, Dr. Schwartz reported that the onset and duration of claimant's back pain was "3 months ago" and that the trauma occurred at work on September 12, 2013. (Ex. 26). We are unable to reconcile Dr. Schwartz's varying reports of the onset of claimant's back pain.

In sum, based on Dr. Rosenbaum's well-reasoned opinion, we conclude that SAIF/Kuni satisfied its burden of proving that the September 19, 2013 "otherwise compensable injury" (*i.e.*, the work-related injury/incident) was not the major contributing cause of the disability/need for treatment of the combined low back condition. Accordingly, we affirm the ALJ's decision upholding SAIF/Kuni's denials.

ORDER

The ALJ's order dated May 16, 2014 is affirmed.

Entered at Salem, Oregon on January 21, 2015

Member Weddell dissenting.

The majority finds that claimant had a "combined" condition and that the work-related injury incident was not the major contributing cause of the disability/need for treatment of the combined low back condition. Because I disagree with the majority's analysis of the medical evidence, I respectfully dissent.

First, for the following reasons, I conclude that SAIF/Kuni did not satisfy its burden to prove that claimant had a "combined" condition. ORS 656.266(2)(a). The majority relies on Dr. Rosenbaum's opinion, but I do not find his opinion persuasive.

Dr. Rosenbaum reported that claimant developed a severe recurrence of his left low back pain at work on September 19, 2013, but he opined that no objective findings occurred from the "September 19, 2013, pathology." (Ex. 28-7). He explained that it was "expected" that claimant would have a recurrence of symptoms based on his underlying spondylosis. Dr. Rosenbaum also stated that the preexisting thoracolumbar spondylosis combined with the September 2013 work event. (Ex. 28-8). Later in his report, he stated that *if* there was a contribution from the September 2013 event, it was relatively minimal. (Ex. 28-9).

Dr. Rosenbaum's conclusory opinion provides no explanation of how the work-related injury incident combined with the preexisting condition to cause claimant's disability or a need for treatment. He indicated only a *possibility* of a contribution from the September 2013 work injury, which is not sufficient to establish a "combined" condition. *See Gormley v. SAIF*, 55 Or App 1055 (1981) (persuasive medical opinions must be based on medical probability, rather than possibility).

Moreover, Dr. Rosenbaum did not explain how claimant's previously asymptomatic spondylosis suddenly became symptomatic with a very specific event at work. He did not address Dr. Schwartz's September 19, 2013 findings that claimant had reduced lumbar range of motion and muscle spasm after the work incident. (Ex. 16). Because Dr. Rosenbaum did not adequately address claimant's low back symptoms and change in function after the September 19, 2013 work injury, I find his opinion unpersuasive. *See Allied Waste Indus., Inc. v. Crawford*, 341 Or App 80 (2006) (temporal relationship between a work injury and the onset of symptoms is one factor that should be considered, and may be the most important factor); *Shirley Fong*, 63 Van Natta 1632, 1634 (2011) (same).

There are no other medical opinions sufficient to establish the existence of a "combined" low back condition. As with Dr. Rosenbaum, Dr. Lohman's opinion that the September 2013 work incident "may have" produced a minor thoracolumbar strain that combined with the preexisting spondylosis indicated only the possibility of a "combined" condition. (Ex. 34). Dr. Frank stated that the preexisting lumbar spondylosis combined with the work incident, but he provided no explanation of his opinion. (Ex. 31A-16). Absent further explanation, his opinion is not persuasive.

Thus, I am not persuaded that SAIF/Kuni established a "combined" condition. Furthermore, even assuming that claimant had a "combined" condition, SAIF/Kuni did not present persuasive medical evidence to prove that the "otherwise compensable injury" was not the major contributing cause of the disability/need for treatment of the combined back condition.

According to Dr. Rosenbaum, claimant's September 19, 2013 work injury was never the major contributing cause for his need for treatment. (Ex. 33-5). He acknowledged that the degenerative changes in claimant's thoracic and lumbar spine were "mild and minimal." (Ex. 33-6). He opined that it was "expected" that claimant would have a recurrence of back symptoms based on his underlying spondylosis. (Ex. 28-7). But Dr. Rosenbaum's opinion is not persuasive because he did not adequately address claimant's low back symptoms and change in function after the September 19, 2013 work injury. *See Moe v. Ceiling Sys., Inc.*, 44 Or App 429, 433 (1980) (rejecting unexplained or conclusory opinion). Moreover, Dr. Lohman explained that claimant's lumbar MRI findings did not correlate with the location of claimant's symptoms in the left thoracolumbar junction. (Ex. 21-16).

In a later report, Dr. Rosenbaum discussed the cause of claimant's "continuing" low back condition. (Ex. 33). But the issue before us pertains to the *initial* compensability of claimant's combined back condition, not any subsequent matters. See ORS 656.005(7)(a)(B); *Braden v. SAIF*, 187 Or App 494 (2003) (Board not authorized to find a claim compensable for a discrete period at the initial stage, because to do so might bypass statutory claim processing requirements); *Kristie L. Haas*, 59 Van Natta 2761, 2764 (2007) (only initial compensability of the claimant's post-concussive syndrome was at issue, rather than any issues involving her current post-concussive syndrome condition).

I find Dr. Schwartz's opinion to be more persuasive. In concluding that the September 2013 work injury was the major contributing cause of claimant's disability/need for treatment for his back condition, Dr. Schwartz explained that claimant's lumbar MRI showed only mild degeneration and that the acute onset of back pain on September 19, 2013 could not be attributed in any significant way to underlying arthritis. (Ex. 32). He correctly understood that claimant was doing well until the acute onset of back pain on September 19, 2013, which was a new event that was the major contributing cause of his need for treatment. (*Id.*)

I defer to Dr. Schwartz's opinion, as claimant's attending physician, because he treated him shortly after the September 2013 work injury and continued treating him. See *Dillon v. Whirlpool Corp.*, 172 Or App 484, 489 (2001) (we may give greater weight to the opinion of the treating physician, depending on the record in each case); *Weiland v. SAIF*, 64 Or App 810 (1983) (in some situations, a treating physician's opinion is entitled to greater weight because of a better opportunity to observe and evaluate a claimant's condition over an extended period of time).

In summary, the medical evidence establishes that claimant's September 2013 work injury was at least a material contributing cause of his disability/need for treatment for his low back condition. Because SAIF/Kuni did not sustain its burden of proving that claimant had a "combined" condition or that the "otherwise compensable injury" was not the major contributing cause of the disability/need for treatment of the combined condition, the claim is compensable. See ORS 656.266(2)(a). Because the majority concludes otherwise, I dissent.