

In the Matter of the Compensation of
RODNEY R. ERICKSON, Claimant

WCB Case No. 12-05867

ORDER ON REMAND

Ransom Gilbertson Martin et al, Claimant Attorneys
Sather Byerly & Holloway, Defense Attorneys

Reviewing Panel: Members Johnson, Lanning, and Somers.¹

This matter is before the Board on remand from the Court of Appeals. *Keystone RV Company – Thor Industries, Inc. v. Erickson*, 277 Or App 631 (2016). The court has reversed our order, *Rodney R. Erickson*, 66 Van Natta 989 (2014), which reversed an Administrative Law Judge’s (ALJ’s) order that upheld the self-insured employer’s denial of claimant’s new/omitted medical condition claim for a combined low back condition. In reaching our conclusion, we determined that the opinions of two physicians had only addressed claimant’s work injury’s relationship to his preexisting spondylolisthesis condition and did not specifically refer to his claimed combined condition. Under such circumstances, we reasoned that neither physician’s opinion was sufficient to meet the employer’s burden of proving that claimant’s compensable injury had ceased to be the major contributing cause of his need for treatment/disability for his combined low back condition. Based on the context of the medical record and the disputed issues, the court has determined that our understanding regarding one of the physician’s (Dr. Bergquist’s) opinion was not reasonable. Concluding that our order was not supported by substantial reason, the court has remanded for reconsideration.

FINDINGS OF FACT

We continue to adopt the ALJ’s “Findings of Fact” as supplemented and summarized in our Order on Review and as follows.

In April 2012, claimant sustained a work-related low back injury while carrying a roll of carpet. 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). In June 2012, he determined that the lumbar strain had improved, but that the spondylolisthesis

¹ Member Langer initially participated as a reviewing panel member. Because Member Langer is no longer a member of the Board, Member Johnson has participated in this review.

remained symptomatic. (Ex. 9). He concluded that claimant had probably “converted” an asymptomatic spondylolisthesis to a symptomatic spondylolisthesis. (Ex. 10).

In July 2012, Dr. Williams, a neurosurgeon, performed an examination at the employer’s request. Dr. Williams assessed the work event as producing a lumbar strain and causing a previously asymptomatic L5-S1 spondylolisthesis to become symptomatic. (Ex. 11-6). He opined that the injury combined with the preexisting condition and, initially, claimant required treatment for the work-related lumbar strain. (Ex. 11-7). However, finding no muscle spasm or other evidence of a lumbosacral strain in July 2012, he concluded that the work-related lumbar strain had resolved and that preexisting spondylolisthesis was the major contributing cause of claimant’s current condition, disability, and need for medical treatment. (Ex. 11-8). He also stated that the injury was never the major cause of the spondylolisthesis condition. (Ex. 25-2).

In April 2013, Dr. Bergquist, a neurosurgeon, performed a file review at the employer’s request. Dr. Bergquist acknowledged that the compensable injury may have contributed to the L5-S1 spondylolisthesis becoming symptomatic, but he concluded that the injury was never the major contributing cause of the disability or need for treatment. (Ex. 27-7).

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 L5-1 nerve roots and fused the L5-S1 vertebrae. (Ex. 21).

In 2013, 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/need for treatment for that condition. Based on Dr. Williams’s opinion, the ALJ also 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 and upheld the employer’s denials.

On review, we reversed the ALJ’s order. Based on our evaluation of the medical evidence, we determined that the employer had not met its burden to prove that the “otherwise compensable injury” was not the major contributing

cause of claimant's disability/need for treatment of the combined condition. *Id.* at 992-3. In doing so, we reasoned that Dr. Williams's opinion referred only to the preexisting spondylolisthesis condition and did not address the combined condition (*i.e.*, the otherwise compensable injury combined with preexisting L5-S1 spondylolisthesis). We also reasoned that Dr. Bergquist's conclusion that the 2012 injury was never the major contributing cause of claimant's spondylolisthesis did not address the major contributing cause of claimant's disability/need for treatment of the combined condition. *Id.* at 993. Consequently, we considered their opinions to be insufficient to meet the employer's burden of proof and reversed that portion of the ALJ's order that upheld the employer's denial of claimant's new/ omitted medical (combined) condition claim. *Id.* The employer requested judicial review.

The court concluded that we did not err in determining that Dr. Williams's opinion did not satisfy the employer's burden under ORS 656.266(2)(a). 277 Or App at 636. However, when the court considered Dr. Bergquist's opinion in context, it concluded that "[his] response that '[the] injury was never the major contributing cause of the disability or need for treatment' necessarily addressed the injury's relationship to the symptoms for which claimant sought compensation and was evidence that supported [the] employer's burden under ORS 656.266(2) to show that 'the otherwise compensable injury is not, or is no longer, the major contributing cause of' the disability or need for treatment of the combined condition." *Id.* at 637. Therefore, the court concluded that our order was not supported by substantial reason and reversed and remanded for our reconsideration. Consistent with the court's directive, we proceed with our reconsideration.

As previously noted, claimant satisfied his burden to prove the existence of the claimed new/omitted (combined) condition. Therefore, the employer must establish that the "otherwise compensable injury" (*i.e.*, the "work-related injury incident") was not the major contributing cause of disability/need for treatment of the combined condition. ORS 656.005(7)(a)(B); ORS 656.266(2)(a); *Brown v. SAIF*, 262 Or App 640, 652 (2014); *SAIF v. Kollias*, 233 Or App 499, 505 (2010). Because of the possible alternative causes for the disability/need for treatment of the 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). 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).

After reassessing the evidence, we conclude that Dr. Bergquist's opinion satisfies the employer's burden. Dr. Bergquist opined that the work injury was never the major contributing cause of the disability or need for treatment. (Ex. 27-7). In doing so, he allowed for the possibility that the injury had contributed to the spondylolisthesis becoming symptomatic, but he maintained that the injury was not the "primary reason" claimant needed treatment; rather, "the primary reason is the preexisting condition." (Exs. 27-7, 32-16). He reasoned that the preexisting spondylolisthesis condition caused the disability/need for treatment. (*Id.*) He reviewed claimant's pre-injury and post-injury medical records, including a 2010 lumbar CT and the 2012 lumbar MRI showing the preexisting spondylolisthesis. (Exs. 27-6, 31, 32-10). He observed no evidence of a pathologic worsening. (*Id.*) He accurately understood the mechanism of injury (that claimant was carrying 85 pounds of carpet and fell forward), but noted that the exact nature of that injury had never been made clear. (Exs. 27-2, -7, 32-7). He further noted that there was no evidence of an objective change in the spondylolisthesis condition after the injury. (Ex. 27-7).

We find that Dr. Bergquist's opinion is well reasoned and based on accurate information. Accordingly, his opinion persuasively establishes that the work injury was not the major contributing cause of the disability/need for treatment of the claimed new/omitted (combined) medical condition. Moreover, the record contains no persuasive evidence to the contrary.² Therefore, we conclude that the employer has met its burden of proof under ORS 656.266(2)(a). Consequently, we uphold the employer's denial.

Accordingly, on remand and in lieu of our previous order, we affirm the ALJ's order dated October 25, 2013.

IT IS SO ORDERED.

Entered at Salem, Oregon on July 25, 2016

² Dr. Yam did not answer claimant's counsel's questions about the major contributing cause of claimant's disability/need for treatment, explaining that he considered the injury to have made claimant symptomatic, but he could not be certain that the injury worsened the spondylolisthesis. (Ex. 24A-3).