

In the Matter of the Compensation of
JOHN M. ENGLISH, Claimant

WCB Case No. 11-05186

ORDER ON REMAND

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

This matter is before the Board on remand from the Court of Appeals. *English v. Liberty Northwest Ins. Corp.*, 271 Or App 211 (2015). The court has reversed our prior order, *John M. English*, 64 Van Natta 2446 (2012), which had affirmed an Administrative Law Judge's (ALJ's) order that upheld the insurer's denial of claimant's new/omitted medical condition claim for multiple left knee conditions. In reaching our conclusion, we determined that claimant had not established that his *accepted* left knee medial hamstring strain and/or lateral compartment contusion was the major contributing cause of his claimed consequential left knee conditions. Relying on *Brown v. SAIF*, 262 Or App 640, *rev allowed*, 356 Or 397 (2014), the court has concluded that ORS 656.005(7)(a)(A) requires that the "compensable injury" (*i.e.*, the "work-related injury incident") be the major contributing cause of the consequential condition. Consequently, the court has remanded for reconsideration of the claimed consequential condition under the aforementioned standard. Having received the parties' supplemental briefs, we proceed with our review.

FINDINGS OF FACT

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

Claimant injured his left knee at work in June 2010, and the insurer accepted a nondisabling left knee medial hamstring strain and a left knee lateral compartment contusion. (Exs. 1, 9). In September 2010, claimant's attending physician, Dr. Van Tassell, added a snapping patella to his assessment. (Ex. 11).

¹ Member Langer was a member of the initial review panel. Because Member Langer is no longer on the Board, Member Johnson has participated in this review.

Around July or August 2011, claimant had a non-work incident where he stepped off a deck with his left foot and his left knee popped and gave out, causing him to fall to the ground. He was diagnosed with additional knee conditions resulting from the new injury. (Exs. 12, 14, 15).

On October 14, 2011, claimant requested acceptance of the following new/omitted medical conditions: left snapping patella; left knee instability and joint effusion; left bucket-handle tear of the medial meniscus; left partial tear of the proximal ACL; and left grade 1 tear/injury of the MCL. (Ex. 20). The insurer denied the new/omitted medical condition claim on November 8, 2011. (Ex. 21).

On November 18, 2011, Dr. Leadbetter² indicated that claimant's 2010 injury was not related to the 2011 deck incident, as instability was not previously diagnosed. (Ex. 22).

On December 1, 2011, in response to correspondence from claimant's counsel, Dr. Van Tassel stated that the claimed new/omitted medical conditions should not be accepted as part of the original 2010 claim. He also concluded that claimant had not sustained a pathological worsening of his left medial hamstring strain and left knee lateral compartment contusion. (Ex. 23).

Subsequently, claimant's counsel sought clarification of Dr. Van Tassel's opinion. Dr. Van Tassel responded on January 24, 2012, by agreeing with the statement that "Yes, [claimant's] June 26, 2010 injury is what caused his knee to buckle resulting in the fall down the steps causing his LEFT knee instability, joint effusion, snapping patella, bucket handle tear of the medial meniscus, partial tear of the proximal ACL, grade 1 tear/injury of the MCL." (Ex. 24-2). He also provided a dictated response, explaining that claimant's records revealed persistent feelings of instability and buckling of his knee from the time of the 2010 injury, indicating that it was the probable cause of the hamstring strain leading to his buckling and weakness, and that the "[h]amstring strain and his buckling weakness may have been the etiology of his secondary event when he fell going down some steps." (Ex. 24-3).³

² Dr. Leadbetter performed a records review on September 27, 2011, after claimant did not appear for an insurer-arranged medical examination appointment.

³ Drs. Leadbetter and Van Tassel agreed that claimant's post-2011 knee conditions were not caused directly by the original 2010 injury. (Exs. 17, 19). Rather, as the court noted, the issue is whether "the [2011] fall was caused by [claimant's] knee buckling and [] the buckling was caused by the 2010 injury." *English*, 271 Or App at 212.

Dr. Leadbetter disagreed with Dr. Van Tassel's opinion that claimant's accepted conditions from the June 2010 injury were the cause of claimant falling down and injuring his knee, as the accepted conditions would have healed before the second injury. (Ex. 25).

CONCLUSIONS OF LAW AND OPINION

Finding Dr. Van Tassel's opinion unpersuasive because it was based on possibilities (not probabilities), the ALJ concluded that claimant had not established compensability of the claimed consequential conditions. Consequently, the ALJ upheld the insurer's denial.

On review, we agreed with the ALJ's assessment of the medical opinions and concluded that claimant failed to prove that "his *accepted* left knee medial hamstring strain and/or lateral compartment contusion was the major contributing cause of his claimed consequential knee conditions." *English*, 64 Van Natta at 2446 (emphasis in original). Claimant petitioned for judicial review.

Following our decision, the court issued its opinion in *Brown*, which held that the term "compensable injury," as defined in ORS 656.005(7)(a), is not limited to the accepted condition, but refers to the "work-related injury incident." 262 Or App at 656. Here, the court has determined that our order reflected the application of an incorrect legal standard regarding a "consequential condition" analysis, in light of *Brown*. *English*, 271 Or App at 214. Therefore, the court has reversed and remanded for reconsideration. *Id.* at 215. Consistent with the court's mandate, we proceed with our reconsideration.

To establish the compensability of the claimed consequential conditions, claimant must prove that his compensable injury is the major contributing cause of the claimed conditions. ORS 656.005(7)(a)(A); ORS 656.266(1); *Fred Meyer, Inc. v. Crompton*, 150 Or App 531, 536 (1997); *Rex M. Butler*, 67 Van Natta 216, 217 (2015). "Compensable injury" under ORS 656.005(7)(a)(A) means the "work-related injury incident." *English*, 271 Or App at 215; *Brown*, 262 Or App at 656; *Denise Petersen*, 67 Van Natta 1023, 1025 (2015). The determination of major contributing cause involves the evaluation of the relative contribution of the different causes of claimant's condition and a decision as to which is the primary cause. *Dietz v. Ramuda*, 130 Or App 397, 401 (1994), *rev dismissed*, 321 Or 416 (1995); *Linda E. Patton*, 60 Van Natta 579, 581 (2008).

On remand, under the “*English-Brown*” standard, we continue to find the record insufficient to satisfy claimant’s burden of establishing the compensability of his claimed consequential conditions. We reason as follows.

First, Dr. Van Tassel’s opinion does not persuasively establish that the “work-related injury incident” was the major contributing cause of the claimed knee conditions. Dr. Van Tassel initially agreed with claimant’s counsel’s statement that the “June 26, 2010 injury is what caused [claimant’s] knee to buckle resulting in the fall down the steps causing his LEFT knee instability, joint effusion, snapping patella, bucket handle tear of the medial meniscus, partial tear of the proximal ACL, grade 1 tear/injury of the MCL.” (Ex. 24-2). However, he also provided a dictated statement as part of his response, stating that claimant’s “hamstring strain and his buckling weakness may have been the etiology of his secondary event when he fell going down some steps.” (Ex. 24-3). Dr. Van Tassel’s more specific explanation, in his own words, supports a finding that he only considered the accepted hamstring strain when evaluating the compensability of the consequential conditions. Because Dr. Van Tassel did not consider the overall contribution from the work-related injury incident, his opinion does not persuasively meet claimant’s burden of proof under the “*English-Brown*” standard.

In any event, even if his opinion was interpreted as encompassing the work-related incident in determining causation, Dr. Van Tassel states that the compensable injury “may have” caused the 2011 fall, resulting in the new knee injuries. (Ex. 24-3). Because such an opinion is couched in terms of “possibility,” it is not sufficient to establish medical causation in terms of medical probability, even under the “*English-Brown*” standard. See *Gormley v. SAIF*, 52 Or App 1055 (1981) (persuasive medical opinions must be based on medical probability, rather than possibility); *Kyle G. Anderson*, 61 Van Natta 2117, 2117-18 (2009) (the words “can be” and “may be” indicate only possibility, not medical probability).

In reaching this conclusion, we acknowledge that “magic words” are not required to establish compensability, where the record as a whole satisfies a claimant’s burden of proof. *McClendon v. Nabisco Brands, Inc.*, 77 Or App 412 (1986); see *Anna C. Blaga*, 55 Van Natta 527, 529 (2003). However, considering the complexity of this medical causation issue and the statutorily required “major contributing cause” standard, under these particular circumstances, we do not consider an opinion couched in terms of possibility sufficient to persuasively establish compensability of the claimed left knee conditions. See *Gormley*, 52 Or App at 1060-61; *Anderson*, 61 Van Natta at 2117-18.

Finally, Dr. Van Tassel subsequently indicated that claimant's left knee conditions should not be accepted as part of the June 2010 claim. (Ex. 23). However, after being asked to "clarify" his opinion, Dr. Van Tassel stated that claimant complained of persistent feelings of instability and buckling of his knee after the 2010 injury, which suggested that it was the probable cause of a hamstring strain, and that the hamstring strain and buckling weakness may have been the cause of the second "stair-falling" event. (Ex. 24).

Assuming this opinion is based on the requisite medical probability (and sufficiently considered the work-related injury incident), we find it inadequately explained. Specifically, Dr. Van Tassel did not provide an explanation for this apparent change of opinion from his previous observation that the current knee conditions should not be accepted as part of the original injury claim (Ex. 23), and the record does not establish that he received "new information" that otherwise might explain the change. For this reason, as well as those previously discussed, we do not find Dr. Van Tassel's opinion persuasive. *See Moe v. Ceiling Systems*, 44 Or App 429, 433 (1980) (unexplained medical opinions are not persuasive); *Francisco R. Mejia*, 61 Van Natta 1265, 1268, *recons*, 61 Van Natta 2005 (2009) (no reasonable explanation for changed opinion where a physician did not explain the change, and the record did not establish that the physician received "new information" that otherwise might explain the changed opinions).

In conclusion, based on the aforementioned reasoning, Dr. Van Tassel's opinion does not persuasively establish that the "work-related injury incident" was the major contributing cause of the claimed consequential conditions. Accordingly, applying the "*English-Brown*" analysis, we are not persuaded that the claimed new/omitted medical conditions are compensable.

Therefore, on remand, we affirm the ALJ's May 30, 2012 order.

IT IS SO ORDERED.

Entered at Salem, Oregon on June 2, 2016

Member Lanning dissenting.

The majority concludes that the record is insufficient to satisfy claimant's burden of establishing that the "work-related injury incident" was the major contributing cause of his claimed consequential conditions. *See English v. Liberty*

Northwest Ins. Corp., 271 Or App 211 (2015); *Brown v. SAIF*, 262 Or App 640, 656, *rev allowed*, 356 Or 397 (2014). Because I disagree with that conclusion, I respectfully dissent.

On remand, considering the “*English-Brown*” standard, I conclude that claimant has established compensability of his claimed consequential conditions based on Dr. Van Tassel’s opinion.

Dr. Van Tassel initially agreed with claimant’s counsel’s statement that the “June 26, 2010 injury is what caused [claimant’s] knee to buckle resulting in the fall down the steps causing his LEFT knee instability, joint effusion, snapping patella, bucket handle tear of the medial meniscus, partial tear of the proximal ACL, grade 1 tear/injury of the MCL.” (Ex. 24-2). He also provided a dictated statement that claimant’s “hamstring strain and his buckling weakness may have been the etiology of his secondary event when he fell going down some steps.” (Ex. 24-3).

I interpret Dr. Van Tassel’s opinion as establishing that the hamstring strain was the work injury that resulted from the work accident that caused claimant’s 2011 fall and resulting conditions. Dr. Van Tassel did not discuss any other conditions that would constitute a “compensable injury.” Thus, in considering the contribution of claimant’s work injury to his claimed conditions, Dr. Van Tassel referred to the “hamstring strain” and the “2010 injury” in a synonymous manner. I therefore consider his opinion to have adequately addressed the full effects of the “work-related injury incident” in determining causation as required by *Brown*. See *Cassandra R. Stockwell*, 67 Van Natta 94 (2015); *Jean M. Janvier*, 66 Van Natta 1827, 1833 n 8 (2014) (physician’s use of the terms “work injury” and “cervical strain” interchangeably satisfied *Brown*).

I acknowledge that Dr. Van Tassel stated in his dictated report that the hamstring strain and buckling weakness “may have been” the cause of his 2011 fall. (Ex. 24-3); see *Gormley v. SAIF*, 52 Or App 1055, 1060 (1981) (persuasive medical opinions must be based on medical probability, rather than possibility); *Kyle G. Anderson*, 61 Van Natta 2117, 2117-18 (2009) (the words “can be” and “may be” indicate only possibility, not medical probability). However, he also agreed that the 2010 injury “is what caused” claimant to fall in 2011, which extends his opinion beyond mere “possibility” (notwithstanding the use of “may have been”). (Ex. 24-2). Therefore, I find his opinion as a whole sufficient to

establish the requisite medical probability.⁴ See *SAIF v. Strubel*, 161 Or App 516, 521-22 (1999) (medical opinions are evaluated in context and based on record as a whole to determine sufficiency); *Verla E. Adams*, 59 Van Natta 2225, *recons*, 59 Van Natta 2502, 2502-03 (2007) (despite a physician’s statement that the mechanism of injury “could” produce a strain, the physician’s opinion as a whole established “probability”). Moreover, “magic words” are not required to establish compensability, where the record as a whole satisfies a claimant’s burden of proof. See *McClendon v. Nabisco Brands, Inc.*, 77 Or App 412 (1986); *Anna C. Blaga*, 55 Van Natta 527, 529 (2003).

The only other medical opinion was that of Dr. Leadbetter. In analyzing causation, Dr. Leadbetter only considered the status of the accepted conditions. (Exs. 17, 25). His opinion, therefore, does not address the proper standard under “*English-Brown*.”

Under these circumstances, I conclude that Dr. Van Tassel’s opinion persuasively establishes that the “work-related injury incident” was the major contributing cause of the claimed consequential conditions. Consequently, I would find the claimed condition to be compensable. Because the majority concludes otherwise, I respectfully dissent.

⁴ Dr. Van Tassel did not attribute claimant’s current knee conditions to anything other than the 2011 fall.