

In the Matter of the Compensation of  
**ROBERT D. RUNGE, JR., Claimant**  
WCB Case No. 15-01863  
ORDER ON REVIEW  
Glen J Lasken, Claimant Attorneys  
Lyons Lederer LLP, Defense Attorneys

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

The self-insured employer requests review of Administrative Law Judge (ALJ) Kekauoha's order that: (1) set aside its denial of claimant's current combined neck and low back conditions; and (2) awarded a \$7,000 employer-paid attorney fee. On review, the issues are compensability and attorney fees.

We adopt and affirm the ALJ's order with the following supplementation regarding the compensability issue.

Relying on the opinion of claimant's attending physician, Dr. Norris, the ALJ set aside the employer's denial of claimant's current combined neck and low back conditions.

On review, the employer contends that Dr. Norris's opinion is unpersuasive. Specifically, the employer argues that whether claimant had ongoing symptoms related to the work injury does not establish that the "otherwise compensable injury" remained the major contributing cause of the need for treatment for the combined conditions. *See* ORS 656.262(6)(c); ORS 656.266(2)(a).

ORS 656.262(6)(c) provides that, after acceptance of a combined condition, a carrier may deny the combined condition if the otherwise compensable injury "ceases" to be the major contributing cause of the combined condition. In *Brown v. SAIF*, 262 Or App 640, 656 (2014), the court held that the proper inquiry under ORS 656.262(6)(c) is whether the claimant's "work-related injury incident," not the accepted condition(s), ceased to be the major contributing cause of the need for treatment or disability for the combined condition. *See Shawn M. Smith*, 66 Van Natta 1381, 1382 (2014) (a carrier may deny an accepted combined condition under ORS 656.262(6)(c) if the work-related injury incident ceases to be the major contributing cause of the combined condition).

To satisfy the “ceases” requirement in ORS 656.262(6)(c), the carrier must prove a change in the claimant’s condition or circumstances since the acceptance of the combined condition such that the work-related injury incident is no longer the major contributing cause of the disability or need for treatment for the combined condition. ORS 656.266(2)(a); *Wal-Mart Stores, Inc. v. Young*, 219 Or App 410, 419 (2008); *Brown*, 262 Or App at 656; *Smith*, 66 Van Natta at 1382. The effective date of the combined condition acceptance provides the baseline for determining whether there has been a change in the claimant’s condition or circumstances. *Oregon Drywall Sys. v. Bacon*, 208 Or App 205, 210 (2006).

Determination of this issue presents a complex medical question that must be resolved by expert medical opinion. *See Barnett v. SAIF*, 122 Or App 279 (1993). When medical experts disagree, 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).

Here, regardless of the persuasiveness of Dr. Norris’s opinion, the ALJ found the opinions of Drs. Bell, Tesar, and Kitchel unpersuasive and based on flawed reasoning. We adopt the ALJ’s reasoning with respect to the persuasiveness of their opinions.

Therefore, based on such reasoning, the employer did not meet its burden to prove that the “work-related injury incident” ceased to be the major contributing cause of the combined condition. *See* ORS 656.262(6)(c); *Brown*, 262 Or App at 656; *Smith*, 66 Van Natta at 1382. Consequently, we affirm.

Claimant’s counsel is entitled to an attorney fee for services on review. ORS 656.382. After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable fee for claimant’s attorney’s services on review is \$3,500, to be paid by the employer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant’s respondent’s brief), the value of the interest involved, and the risk that claimant’s counsel might 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 denial, to be paid by the employer. *See* ORS 656.386(2); OAR 438-015-0019; *Gary E. Gettman*, 60 Van Natta 2862 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

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ORDER

The ALJ's order dated August 20, 2015 is affirmed. For services on review, claimant's attorney is awarded \$3,500, payable by the employer. Claimant is also awarded reasonable expenses and expenses for records, expert opinions and witness fees, if any, incurred in finally prevailing over the employer's denial, to be paid by the employer.

Entered at Salem, Oregon on April 1, 2016

Member Curey dissenting.

The majority affirms the ALJ's compensability decision. Because I would find that the medical evidence establishes that the "otherwise compensable injury" had ceased to be the major contributing cause of the combined condition, I respectfully dissent. I reason as follows.

Claimant began treating with Dr. Norris, his attending physician, in November 2013. (Ex. 6). In April 2014, Dr. Norris determined that claimant was medically stationary. (Ex. 19).

Dr. Bell, neurologist, Dr. Tesar, orthopedic surgeon, and Dr. Kitchel, orthopedic surgeon, examined claimant on the employer's behalf, and diagnosed combined conditions consisting of his October 2013 neck and low back work-related strain injuries and preexisting cervical and lumbar spondylosis. (Exs. 21-8, 32-12, -13). They determined that the strain injuries concluded over a period of three months, but that claimant continued to have residual symptoms due to his spondylosis. (Exs. 21-10, 33-3).

Dr. Bell offered a subsequent opinion, clarifying that, by April 18, 2014, all conditions directly resulting from the October 2013 work injury resolved, and that the "compensable injury" was no longer the major contributing cause of any combined conditions, disability or need for treatment. (Ex. 25-1).

Dr. Kitchel offered a similar opinion that the October 2013 work injury had resolved. (Exs. 32-14, 33-2). He based his opinion on his review of the medical records and imaging studies, claimant's history, and his physical examination. (*Id.*)

Dr. Norris initially concurred with Drs. Bell and Tesar's opinion that claimant's strain injuries concluded over a period of three months, but that he continued to have residual symptoms due to his spondylosis. (Ex. 22). She later clarified that the October 2013 work injury affecting claimant's cervical and lumbar spine had resolved by April 18, 2014. (Ex. 26-1). However, citing her November 2014 chart note, Dr. Norris determined that claimant had "an occasional flair" of headaches, and neck or low back pain, which she considered to be a waxing and waning of symptoms appropriately treated with chiropractic adjustments. (*Id.*) These opinions are inconsistent at best.

Notwithstanding these earlier observations, in June 2015, Dr. Norris signed a concurrence letter opining that claimant continued to suffer the effects of low back and neck strains with associated headaches. (Ex. 30A-2). Dr. Norris agreed that the "major cause" of claimant's continued need for treatment was the work injury and not any preexisting conditions because he was asymptomatic and healthy before the October 2013 injury, he had symptoms close in time to the event, and there was an absence of other injuries or causes that would account for the development of his condition. (Ex. 30A-2, -3). Referencing her March 2014 "occasional flare-ups" letter, Dr. Norris attributed claimant's flares to the work injury. (Ex. 30A-3). She reasoned that an individual can be medically stationary without impairment, but also require ongoing medical care as needed to treat the compensable condition. (*Id.*)

Dr. Kitchel disagreed that the October 2013 work injury continued to be the major contributing cause of claimant's need for treatment. This opinion was based on known physiology and healing of strain/sprain injuries, claimant's underlying cervical and lumbar spondylosis, and Dr. Norris' decision that claimant was medically stationary in April 2014. (Ex. 33-3). Dr. Kitchel attributed claimant's "flare-up" to his spondylosis. (*Id.*)

After reviewing these physicians' opinions, I consider those from Drs. Bell, Tesar, and Kitchel more persuasive. I acknowledge that, absent persuasive reasons not to do so, we tend to give more weight to the opinion of the treating physician because of a greater opportunity to evaluate the injured worker over time. *See Weiland v. SAIF*, 64 Or App 810, 814 (1983). However, whether we give greater weight to the opinion of the treating physician depends on the record in each case. *Dillon v. Whirlpool Corp.*, 172 Or App 484, 489 (2001).

Here, Dr. Norris offered an unexplained change of opinion. She originally opined that the October 2013 otherwise compensable injury had resolved, in spite of her acknowledgment that claimant had occasional symptom flare-ups. (Exs. 22, 26). However, she subsequently opined that claimant's work injury and not his preexisting conditions, remained the "major cause" of his need for treatment. (Ex. 30A-2, -3).

The ALJ reasoned that the change of opinion was explained by new clinical information that Dr. Norris gained in November 2014 and May 2015. However, Dr. Norris specifically stated that her opinion was based on claimant being asymptomatic and healthy before the October 2013 injury, his symptoms close in time to the event, and an absence of other injuries or causes that would account for the development of his condition. (*Id.*) Moreover, even after claimant's November 2014 treatment, Dr. Norris reported that the work injury had resolved by April 2014. (Ex. 26-1). Dr. Norris did not explain why she subsequently considered claimant's preexisting conditions to be a lesser cause of his need for treatment, especially when she had previously reported that the October 2013 work injury affecting claimant's cervical and lumbar spine had resolved by April 18, 2014. (Ex. 26-1). Without further explanation for these apparent inconsistencies, I discount Dr. Norris's opinion. *See Kenneth L. Edwards*, 58 Van Natta 487, 488 (2006) (unexplained change of opinion renders physician's opinion unpersuasive); *see also Moe v. Ceiling Sys., Inc.*, 44 Or App 429, 433 (1980) (rejecting unexplained opinion); *Brynn Larson*, 67 Van Natta 512, 515 (2015).

Moreover, Dr. Norris relied on an inaccurate history in changing her opinion. Specifically, Dr. Norris assumed that claimant was symptom-free preceding his work injury, but the medical record and claimant's testimony establish that he had intermittent, preexisting treatment for cervical/lumbar symptoms, including headaches.<sup>1</sup> (Tr. 17; Exs. 1, 21-4, 30A-2). The ALJ relied on Dr. Bollom's September 2013 chart note, which did not describe cervical or lumbar symptoms, to establish that Dr. Norris's history that claimant's preexisting condition had resolved was accurate. (Ex. 21-5). However, Dr. Bollom's chart notes after the October 2013 work injury are not focused on claimant's neck/back conditions. (Ex. 32-7). Rather, Dr. Bollom was treating claimant's shoulder condition. (Exs. 21-5, 32-6, -7).

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<sup>1</sup> Although claimant testified that his neck and back symptoms were different, he never indicated that he was symptom-free. (Tr. 17).

Because the medical record and Dr. Norris's history cannot adequately be reconciled, I find that Dr. Norris relied on an inaccurate history to render her causation opinion. Consequently, I find her opinion to be unpersuasive. *See Miller v. Granite Constr. Co.*, 28 Or App 473, 478 (1977) (medical evidence that was based on inaccurate information was not persuasive).

In contrast, the opinions of Drs. Bell, Tesar, and Kitchel are well reasoned and based on complete and accurate information. They based their opinions on known physiology and healing of strain/sprain injuries, claimant's underlying cervical and lumbar spondylosis, his medical treatment record subsequent to his October 2013 work injury, the mechanism of injury, their examinations, and his prior treatment. (*See Exs. 21, 25, 32, 33*).

The ALJ concluded that Drs. Bell, Tesar, and Kitchel relied on flawed reasoning. Specifically, the ALJ found that they incorrectly focused on Dr. Norris's medically stationary determination, which was not synonymous with a need for further medical treatment. However, Dr. Norris not only determined that claimant was medically stationary without impairment; she also opined that the affects of claimant's October 2013 work injury had resolved. (Ex. 26-1). Moreover, it is not the employer's burden to establish that claimant was completely without symptoms, but rather that the major contributing cause of the need for treatment for the combined condition was no longer the otherwise compensable injury. *See Brown*, 262 Or App at 656; *Smith*, 66 Van Natta at 1382. Finally, the physicians' observation of claimant's medically stationary determination was only one factor in their analysis. Consequently, I do not discount their opinions for referencing claimant's medically stationary date.

In addition, the ALJ discounted the opinions of Drs. Bell, Tesar, and Kitchel for stating that strains resolve within months. Yet, as referenced above, these physicians considered a number of factors particular to claimant in determining the cause of his need for treatment, and Dr. Norris also considered the affects of the October 2013 work injury to be resolved. (Ex. 26-1). *See Patricia K. Douthit*, 57 Van Natta 11567 (2005) (physician's opinion based in part on statistical studies not discounted because it also considered the particular facts of the claimant's work injury); *cf. Sherman v. Western Employer's Ins.*, 87 Or App 602 (1987) (physician's comments that were general in nature and not addressed to the claimant's situation in particular were not persuasive). Therefore, I do not discount their opinions on this basis.

Consequently, based on the foregoing reasoning, I would find that the employer met its burden to prove that the “work-related injury incident” ceased to be the major contributing cause of the combined condition. *See* ORS 656.262(6)(c); *Brown*, 262 Or App at 656; *Smith*, 66 Van Natta at 1382. Because the majority finds otherwise, I respectfully dissent.