
In the Matter of the Compensation of
LUIS CASTRO-FLORES, Claimant
WCB Case No. 15-02072
ORDER ON REVIEW
Glen J Lasken, Claimant Attorneys
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Weddell and Curey.

Claimant requests review of Administrative Law Judge (ALJ) Crummé's order that upheld the SAIF Corporation's denial of claimant's new/omitted medical condition claim for an "L5-S1 disc herniation."¹ On review, the issue is compensability. We reverse.

FINDINGS OF FACT

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

While working as a dishwasher, claimant was injured when he slipped on grease while he was holding a 50-pound lid. (Tr. 6). He fell onto his right knee. (*Id.*) After he got up, he was hurting in his testicles, back, and right leg. (*Id.*) He continued to have pain in his back and right leg. (*Id.*) He denied having similar symptoms previously. (Ex. 26-2).

Before the February 2014 work injury, claimant had spondylosis and associated spondylolisthesis at L5-S1.² (Exs. 10, 14, 18-7, 26-9). He had not been previously diagnosed with those conditions. (Ex. 27A-15).

After the 2014 work injury, claimant continued to have persistent low back and right leg symptoms. He was initially diagnosed with a lumbar strain and treated conservatively. (Exs. 1, 2, 3, 5, 6).

SAIF accepted a "lumbar strain." (Ex. 4).

¹ Claimant requested acceptance of an "L5-S1 disc herniation" as a new/omitted medical condition claim and SAIF denied the claim for that condition. (Exs. 24, 27). However, the majority of the physicians in the record persuasively explain that claimant has six lumbar vertebrae, meaning that his lumbosacral junction is at the "L6-S1" level. We interpret (as do the parties) both terms "L5-S1" and "L6-S1" in the record to refer to the disputed condition, which we refer to below as an L5-S1 condition.

² Spondylosis refers to "lytic defects of the pars interarticularis." (Ex. 27A-10). Spondylolisthesis refers to the "slippage of one vertebral body over the other." (Ex. 27A-10).

In May 2014, Dr. Ha, an orthopedist, examined claimant. Based on x-rays taken that day, Dr. Ha found “a chronic anterolisthesis at the lumbar/sacral junction.” (Ex. 8-2). He ordered a lumbar MRI. (Ex. 8-3).

A May 2014 MRI (as interpreted by Dr. Johnson, a radiologist) included the following L5-S1 findings: “Bilateral foraminal stenosis are present due to bulging disc and spondylolisthesis.” (Ex. 9).

In February 2015, Dr. Moore, an orthopedic surgeon, examined claimant. (Ex. 22-1). After reviewing claimant’s 2014 MRI, she concluded that the “MRI scan shows a disc herniation eccentric to the right at L5-S1.” (Ex. 22-2). She diagnosed “[p]re-existing spondylolisthesis L5-S1 with a work injury and a disc herniation L5-S1 secondary to work injury.” (*Id.*)

Subsequently, claimant requested acceptance of an “L5-S1 disc herniation” as a new/omitted medical condition. (Exs. 24, 25).

In April 2015, Dr. Saldua, an orthopedic surgeon, examined claimant at SAIF’s request. (Ex. 26). From his review of claimant’s MRI, he found a broad-based L5-S1 disc bulge, which he also termed a disc herniation. (Ex. 26-7). He diagnosed L5-S1 “disc herniations secondary to his spondylolisthesis.” (*Id.*) Dr. Saldua concluded that the work injury was not a material contributing cause of the L5-S1 disc herniation. (Ex. 26-8). Dr. Saldua also opined that claimant’s accepted lumbar strain had sufficiently resolved and that any ongoing treatment was secondary to his preexisting spondylolisthesis. (Ex. 26-9).

In April 2015, SAIF denied claimant’s new/omitted medical condition claim. (Ex. 27-1). Claimant requested a hearing.

In July 2015, Dr. Sabahi, a radiologist, reviewed claimant’s medical records and imaging diagnostics at SAIF’s request. (Ex. 27A-1). Based on the imaging studies, Dr. Sabahi diagnosed: “Transitional lumbosacral vertebra with six lumbar vertebral bodies”; “Grade 1 spondylolisthesis due to bilateral spondylosis at L6-S1” (chronic and pre-existing); “Moderately prominent bilateral foraminal stenosis at L6-S1” (chronic and preexisting); “Moderate degenerative disc changes at L6-S1, including desiccation, loss of height, and diffuse disc bulge” (chronic and preexisting); “Small central disc bulge versus protrusion at L1-L2, incidental, chronic, and pre-existing”; and “Degenerative facet arthrosis, most notably at the L5-L6 level” (chronic and preexisting). (Ex. 27A-13).

Dr. Sabahi explained that: “There are no abnormalities demonstrated on the imaging diagnostics to correlate with the work injury sustained on February 14, 2014.” (*Id.*) He found “no evidence for a herniation (protrusion, extrusion, or sequestration), at this L6-S1 level.” (Ex. 27A-14). Thus, he concluded that claimant’s disability/need for treatment of the L6-S1 disc condition was not “materially related” to the work injury. (*Id.*) When asked to address a combined “L5-S1” disc herniation condition, Dr. Sabahi opined that there “is no combined condition with his work injury and the pre-existing disease at L6-S1.” (Ex. 27A-16).

In a July 2015 concurrence letter, Dr. Moore opined that “the major contributing cause of [claimant’s] condition, disability and need for medical care is a herniated disc not the mild pre-existing spondylolisthesis.” (Ex. 28-3-4). She further determined that “the major cause of that disc herniation was the on-the-job injury in question, not the mild predisposing condition.” (Ex. 28-4). Finally, Dr. Moore opined that “the overall major contributing cause of [claimant’s] combined condition is the on-the-job injury which produced the herniation which is producing his disability.” (*Id.*)

CONCLUSIONS OF LAW AND OPINION

In initially upholding SAIF’s denial, the ALJ found that claimant’s work-related injury combined with his preexisting “arthritis” and that SAIF had proven that the work-related injury incident was not the major contributing cause of claimant’s disability/need for treatment of the combined condition. *See* ORS 656.266(2)(a). On reconsideration, the ALJ continued to uphold SAIF’s denial, but reasoned that claimant had not established the existence of the claimed L5-S1 disc herniation.

On review, claimant contends that the physicians used various terms for his L5-S1 disc pathology (*e.g.*, herniation, bulge, protrusion) interchangeably, and that his new/omitted condition claim encompassed such pathology, however termed. Furthermore, he asserts that the L5-S1 disc pathology is compensable. SAIF responds that claimant has not established the existence of an L5-S1 disc herniation and that any such disc condition is not compensable.

To prevail on a new/omitted medical condition claim, claimant must prove that the claimed condition exists and that the work injury was a material contributing cause of the disability/need for treatment of the condition. *See* ORS 656.005(7)(a); ORS 656.266(1); *Betty J. King*, 58 Van Natta 977 (2006);

Maureen Y. Graves, 57 Van Natta 2380, 2381 (2005). If claimant establishes an “otherwise compensable injury” and a combined condition is present, the burden shifts to the employer to establish that: (1) claimant suffers from a statutory “preexisting condition”; (2) claimant’s condition is a “combined condition”; and (3) the “otherwise compensable injury” is not the major contributing cause of the disability/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); *Jean M. Janvier*, 66 Van Natta 1827, 1830 (2014). The major contributing cause contributes more than the other causes combined. *McGarrah v. SAIF*, 296 Or 145, 166 (1983).

Considering the disagreement between experts regarding the existence and causation of the claimed condition, the compensability issue presents complex medical questions that must be resolved by expert medical opinion. *Barnett v. SAIF*, 122 Or App 279, 283 (1993). When presented with disagreement among experts, we give more weight to those opinions that are well reasoned and based on complete and accurate information. *Somers v. SAIF*, 77 Or App 259, 263 (1986).

It is claimant’s burden to show that the claimed “disc herniation” exists as a new/omitted medical condition, not that it is the best diagnosis to describe his condition. See *Tiffany Goong*, 68 Van Natta 479, 484 (2016) (the burden to prove that a “disc bulge” existed as a new/omitted medical condition did not require the claimant to prove that it was the best diagnosis to describe her condition); *Elizabeth Wood*, 66 Van Natta 402, 404-05 (2014) (the question is not what diagnosis would best describe the claimant’s injury, but whether the claimed “left foot neuralgia” exists); *April L. Shabazz*, 60 Van Natta 2475, 2476-77 (2008) (evidence regarding “biceps tendonitis” diagnosis supported compensability of the claimant’s new/omitted “rotator cuff strain/sprain” condition where both diagnoses addressed the same condition).

Based on the following reasoning, we are persuaded that a variety of terms (*e.g.*, bulge, herniation, protrusion) have been used to describe the claimed condition, and that the claimed L5-S1 disc “herniation” condition exists.

Dr. Moore reviewed claimant’s 2014 MRI scan and concluded that it showed a “disc herniation eccentric to the right” at L5-S1. (Ex. 22-2). She diagnosed “[p]reexisting spondylolisthesis L5-S1 with a work injury and a disc herniation L5-S1 secondary to work injury.” (*Id.*)

Dr. Saldia diagnosed “L5-S1 disc herniations” secondary to the spondylolisthesis. (Ex. 26-7). He also referred to claimant’s MRI as showing a “broad-based disc bulge at the L5 level.” (*Id.*)

Dr. Johnson interpreted the MRI to reveal L5-S1 findings, including a “bulging disc and spondylolisthesis.” (Ex. 9-1). Dr. Ha opined that claimant’s MRI demonstrated “multilevel disc degeneration” most notably L5-S1; he also referred to claimant’s L5-S1 “pathology.” (Exs. 10-1, 14-1).

Finally, Dr. Sabahi opined that “[d]isc herniation is a loose term, and its use is not recommended in the radiologic literature.” (Ex. 27A-8). He referred to “protrusion, extrusion, and sequestration” to describe “progressively more advanced disc displacements.” (*Id.*) He diagnosed “[m]oderate degenerative disc changes at L6-S1, including desiccation, loss of height, and diffuse disc bulge.” (Ex. 27A-13).

After reviewing the aforementioned opinions, we are persuaded that the physicians’ use of the terms “disc herniation,” “disc bulge,” “degenerative disc,” and “bulging disc” describe the same L5-S1 “condition.” Thus, the L5-S1 disc pathology, however termed, was encompassed in claimant’s new/omitted medical condition claim for an “L5-S1 disc herniation.” *See Goings*, 68 Van Natta at 484-85 (where the medical record established that a variety of terms, such as “bulge,” “herniation,” “protrusion,” and “extrusion” were used interchangeably, the claimant’s new/omitted medical condition claim for a “central disc bulge at L5-S1” encompassed the L5-S1 disc pathology). Moreover, because “bulge” and “herniation” refer to the same low back condition in this case, the aforementioned opinions also establish the existence of the claimed L5-S1 disc herniation. (Exs. 9-1, 14, 22-2, 26-7, 27A-8); *Wood*, 60 Van Natta at 404-05.

We turn to the “causation” question regarding the claimed L5-S1 disc herniation.

Dr. Moore opined that the mechanism of claimant’s injury, which involved a “twisting motion while carrying a heavy weight and falling to the ground placed more than enough force on [claimant’s] lower back to produce this disc herniation and likely was the major contributing cause of his disc herniation.” (Ex. 28-5-6). Dr. Moore explained that the “narrow foramina makes the nerve impingement more likely and perhaps more pronounced, but that pre-existing narrowing is not the cause of the herniation or the impingement.” (Ex. 28-6).

Drs. Saldua and Sabahi opined that the work injury was not even a material cause of claimant's disability/need for treatment of the L5-S1 disc condition. (Exs. 26-8, 27A-14). However, neither physician adequately addressed Dr. Moore's opinion correlating the mechanism of injury and the onset of claimant's symptoms to the occurrence of the L5-S1 disc herniation. Under such circumstances, we discount the opinions expressed by Drs. Saldua and Sabahi. See *Janet Benedict*, 59 Van Natta 2406, 2409 (2007), *aff'd without opinion*, 227 Or App 289 (2009) (medical opinion less persuasive when it did not address contrary opinions).

Based on the aforementioned reasoning, the record persuasively establishes that the February 2014 work-related injury incident was a material contributing cause of claimant's disability/need for treatment related to his L5-S1 disc herniation. Therefore, claimant has established an "otherwise compensable injury."

We turn to the question of whether SAIF has met its burden of proof under ORS 656.266(2)(a). Even if we assume, without deciding, that SAIF has established a statutory "preexisting condition" and the existence of a "combined condition," the medical evidence does not persuasively establish that the "otherwise compensable injury" was not the major contributing cause of the disability/need for treatment of the combined condition. We reason as follows.

Because SAIF has the burden of proof on the major contributing cause issue, the medical evidence supporting its position must be persuasive. See *Jason V. Skirving*, 58 Van Natta 323, 324 (2006), *aff'd without opinion*, 210 Or App 467 (2007).

Here, to meet its burden of proof, SAIF relies on the opinion of Dr. Sabahi. Yet, for the following reasons, we do not find Dr. Sabahi's opinion sufficiently persuasive to meet SAIF's burden of proof under ORS 656.266(2)(a).

Dr. Sabahi opined that, because he found no "acute abnormalities" or "evidence for pathological worsening of pre-existing disease" on claimant's imaging studies, "there is no combined condition with his work injury and the pre-existing disease at L6-S1." (Ex. 27A-16). Dr. Sabahi consistently reiterated his belief that claimant's L5-S1 disc condition was unrelated to his work injury incident, but was associated only with his preexisting condition. (*Id.*)

Because Dr. Sabahi did not believe a combined L5-S1 disc condition existed and he did not address the “major contributing cause” relative to the L5-S1 disc condition and the contribution from claimant’s “otherwise compensable injury,” his opinion does not persuasively address SAIF’s burden under ORS 656.266(2)(a). Moreover, for the reasons discussed earlier, we continue to discount Dr. Sabahi’s opinion because he did not respond to Dr. Moore’s correlation of the mechanism of the work injury (carrying a 50-pound load while falling to the ground) with the onset of claimant’s symptoms to the occurrence of the claimed disc condition. *See Benedict*, 59 Van Natta at 2409 (medical opinion less persuasive when it did not address contrary opinions).

In summary, we find that claimant has proven, by a preponderance of the evidence, that the February 2014 work injury incident was a material contributing cause of the disability/need for treatment of the claimed L5-S1 disc herniation. Furthermore, even assuming that claimant has a combined condition, the medical evidence does not meet SAIF’s burden of proof under a “combined condition” analysis. *See* ORS 656.266(2)(a); *Kollias*, 233 Or App at 505. Therefore, we reverse.

Claimant’s attorney is entitled to an assessed fee for services at hearing and on review. ORS 656.386(1). 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 at hearing and on review is \$12,000, payable by SAIF.³ In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by the record and claimant’s appellate briefs), the complexity of the issue, the value of the interest involved, and the risk that counsel may 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 SAIF. *See* ORS 656.386(2); OAR 438-015-0019; *Nina Schmidt*, 60 Van Natta 169 (2008); *Barbara Lee*, 60 Van Natta 1, *recons*, 60 Van Natta 139 (2008). The procedure for recovering the award, if any, is prescribed in OAR 438-015-0019(3).

³ Claimant’s counsel did not make a request for a specific amount of attorney fees.

ORDER

The ALJ's order dated April 29, 2014, as amended December 8, 2015, and reconsidered February 10, 2016, is reversed. SAIF's denial is set aside and the claim is remanded to it for processing according to law. For services at hearing and on review, claimant's attorney is awarded an assessed fee of \$12,000, to be paid by SAIF. 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 SAIF.

Entered at Salem, Oregon on August 31, 2016