
In the Matter of the Compensation of
RAFAEL HERNANDEZ-GUZMAN, Claimant
WCB Case No. 14-01502
ORDER ON REVIEW
Shlesinger & deVilleneuve, Claimant Attorneys
SAIF Legal Salem, Defense Attorneys

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

Claimant requests review of that portion of Administrative Law Judge (ALJ) Crummé's order that upheld the SAIF Corporation's denial of claimant's combined low back condition. On review, the issue is compensability.

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

On September 27, 2012, claimant, a ranch hand, had low back pain while riding in a pickup truck across a dry canal. (Tr. 11). On October 5, 2012, he was seen by Dr. Wenner for low back and right leg pain, described as "similar to the pain he has had all along just worse." (Ex. 74).

Claimant had previously injured his low back in 2001. In 2002, he underwent an L5-S1 arthrodesis with hardware, which failed. (Exs. 12, 22). In 2004, Dr. Wenner removed the hardware and performed a new arthrodesis. (Ex. 23). Claimant subsequently developed a left lower extremity complex regional pain syndrome (CRPS) condition. (Exs. 42-7, 49-1). In 2006, he underwent spinal cord stimulator implantation, which ultimately failed. (Exs. 49, 63). In 2009, a new spinal cord stimulator was implanted. (Ex. 65). In November 2011, Dr. Wenner reported that claimant had intractable back and leg pain that had persisted for many years and failed extensive measures, including surgery and a spinal cord stimulator. (Exs. 71, 72). Dr. Wenner refilled claimant's pain medication prescription so that claimant could continue to work. (Exs. 71, 133-2).

In November 2012, Dr. Skrzynski, an orthopedic surgeon, performed an examination at SAIF's request. Dr. Skrzynski opined that claimant had a lumbar strain superimposed on preexisting lumbar spondylosis and injury with postoperative complication. (Exs. 79-4, 81-3).

SAIF accepted a lumbar strain. (Ex. 82).

In June 2013, Dr. Kitchel, an orthopedic surgeon, performed an examination at SAIF's request. Dr. Kitchel opined that the work injury combined with a preexisting "failed lumbar spine surgery syndrome and chronic pain disorder" condition to cause and prolong claimant's disability and need for treatment. (Ex. 96-9). Dr. Kitchel further opined that the work injury was the major contributing cause of the need for treatment when claimant first sought care, but ceased being the major contributing cause six months after the injury; *i.e.*, by March 27, 2013. (*Id.*)

Dr. Wenner agreed that the prior surgery was a component of claimant's condition. (Ex. 97-2). He further reasoned, however, that claimant was working until the 2012 injury, when "something happened" that led to claimant's current symptoms. (*Id.*) He suspected that there was some loosening of and discomfort from the hardware. (*Id.*) He proposed that the hardware be removed, due to the 2012 injury. (*Id.*)

On March 14, 2014, SAIF accepted a combined condition, beginning on September 27, 2012, based on information that claimant's injury and/or accepted lumbar strain condition combined with one or more preexisting conditions, including a preexisting failed lumbar spine surgery syndrome with chronic pain disorder. (Ex. 106).

In the same document, SAIF issued a "ceases" denial, asserting that, as of March 27, 2013, the injury was no longer the major contributing cause of the combined condition. (Ex. 106). Claimant requested a hearing challenging SAIF's denial.

In May 2014, Dr. Skrzynski opined that claimant's 2012 and 2013 lumbar CT scans showed a natural progression of adjacent segment disease and lumbar spondylosis.¹ (Ex. 107-2). She stated that there were no acute or new CT findings that could be ascribed to the 2012 work event. (*Id.*) She also concurred with Dr. Kitchel's diagnoses and major contributing cause opinion. (Ex. 107-3, -4, -5, -6).

¹ A December 2012 lumbar CT scan showed a stable postoperative lumbar spine with a complete L5-S1 facet joint fusion, a small L5-S1 osteophyte, mild bilateral L5-S1 foraminal narrowing that was similar to a 2006 lumbar CT scan, and mild bilateral L4-5 facet joint osteoarthritis. (Ex. 84-1). A November 2013 lumbar CT scan also showed stable L5-S1 postoperative changes, as well as an L3-4 disc bulge, L4-5 disc osteophyte complex, small L5-S1 disc osteophyte complex, and L5-S1 (mild right and moderate left) neural foraminal narrowing. (Ex. 101-2).

In November 2014, Dr. Lynch, an orthopedic surgeon who performed an examination for the carrier responsible for the 2001 injury, diagnosed a 2012 “straining” injury that combined with the preexisting condition. (Ex. 116-18). Dr. Lynch opined that the 2012 work incident was the major contributing cause of the “initial combined condition,” but he agreed with Dr. Kitchel’s opinion that the “combined condition ceased to be the major contributing cause six months subsequent to that incident.” (Ex. 116-19). He also attributed claimant’s then-current need for treatment and disability to the 2001 injury. (Ex. 116-18).

Dr. Wenner maintained that the 2012 work incident was still impacting claimant, who had not been able to work since the incident. (Ex. 117-2). Dr. Wenner surmised that there may have been a worsening of claimant’s CRPS. (*Id.*) He also suggested that claimant’s spinal cord stimulator may have become dysfunctional. (Ex. 118-2).

In January 2015, claimant consulted Dr. O’Sullivan, the surgeon who had implanted his spinal cord stimulator in 2006. (Exs. 65, 120-1). Dr. O’Sullivan suspected an injury to the disc above the L5-S1 fusion. (Ex. 120-2). He opined that the major cause of claimant’s ongoing disability and need for treatment was the 2012 work injury, when claimant had not been able to work. (Ex. 126-2).

In December 2015, Dr. Wenner maintained that the 2012 injury was the major cause of claimant’s ongoing need for treatment. (Ex. 133). In doing so, he relied on claimant’s inability to work after the 2012 work event and the absence of any evidence that the injury had ceased to be the major cause of the need for treatment. (Ex. 133-2).

Relying on the opinions of Drs. Kitchel, Skrzynski, and Lynch, the ALJ concluded that SAIF had satisfied its burden of proof and upheld its “ceases” denial. In doing so, the ALJ determined that these physicians addressed the standard articulated in *Brown v. SAIF*, 262 Or App 640 (2014), *rev allowed*, 356 Or 397 (2014). The ALJ also reasoned that the physicians found that the 2012 injury/incident caused a lumbar sprain/strain (not any other condition), which probably healed. In particular, the ALJ noted that Dr. Kitchel considered the normal healing process for a lumbar strain/sprain in weighing the major cause at the time of cessation. The ALJ also observed that these physicians specifically cited the increase in symptoms after the 2012 work event in concluding that, initially, the 2012 injury was the major cause of the combined condition.

Turning to the contrary opinions of Drs. Wenner and O’Sullivan, the ALJ determined that those physicians relied on an unpersuasive precipitating-cause analysis. The ALJ acknowledged that Dr. Wenner had observed claimant’s condition for more than 10 years, but concluded that this advantage did not overcome the analytical deficiency in his opinion. The ALJ also reasoned that Dr. Wenner’s suggestions that the 2012 incident possibly caused various other injuries was insufficient to meet the “medical probability” standard. *See Gormley v. SAIF*, 52 Or App 1055 (1981).

On review, claimant contends that the evidence does not establish the existence of a legally cognizable “preexisting condition” or a change in his condition or circumstances, such that the “otherwise compensable injury” (*i.e.*, the work-related injury incident) was no longer the major contributing cause of the disability/need for treatment. Based on the following reasoning, we disagree with claimant’s contentions.

A carrier may deny an accepted combined condition if the otherwise compensable injury “ceases” to be the major contributing cause of the combined condition. ORS 656.262(6)(c). In determining whether such cessation has occurred, we examine only the otherwise compensable injury and the statutory preexisting condition. *Vigor Indus., LLC v. Ayres*, 257 Or App 795, 803 (2013).

To qualify as a “preexisting” condition in an initial injury claim, a condition must contribute to disability or a need for treatment and, unless the condition is arthritis or an arthritic condition, the claimant must have been diagnosed with, or received medical services for the symptoms of, the condition before the work injury. ORS 656.005(24)(a)(A). The “otherwise compensable injury” means the “work-related injury incident.” *Brown*, 262 Or App at 652.

Here, SAIF accepted a combined condition consisting of “the injury and/or accepted condition(s) of lumbar strain” and “one or more preexisting conditions including: preexisting failed lumbar spine surgery syndrome with chronic pain disorder.” (Ex. 106). As described below, the medical record supports the existence of a preexisting low back condition under ORS 656.005(24)(a)(A).

Following his 2001 low back injury, claimant underwent two L5-S1 fusion surgeries and two spinal cord stimulator implantations. (Exs. 12, 23, 49, 65). In June 2009, Dr. Wenner assessed a “failed lumbar surgery syndrome with chronic pain.” (Ex. 66). In November 2011, he reported that claimant had intractable back

and leg pain that had failed surgery and a spinal cord stimulator. (Exs. 71, 72). Explaining that claimant had been able to function by taking pain medication, he refilled claimant's prescription to "keep him on a baseline pain regimen." (Exs. 71, 127-4).

After the 2012 injury, claimant was seen by Dr. Wenner for "increasing" back and right leg pain that was "similar to the pain he has had all along just worse." (Ex. 74). Dr. Kitchel opined that claimant suffered from preexisting failed lumbar spine surgery syndrome and chronic pain disorder that combined with the work injury to cause and prolong disability and need for treatment. (Ex. 96-9). Upon reviewing Dr. Kitchel's conclusions, Dr. Wenner agreed that a "component of [claimant's] problems related to his original surgery." (Ex. 97-2).

This record shows that claimant had previously been diagnosed with/received treatment for symptoms of a low back condition, resulting from a failed lumbar surgery with chronic pain, which continued to contribute to his disability/need for treatment after the 2012 event (in combination with the 2012 injury). As such, claimant had a statutorily recognized "preexisting" condition that combined with the 2012 work injury. ORS 656.005(7)(a)(B); ORS 656.005(24)(a)(A).

We turn to whether there was a change in claimant's condition or circumstances, such that the "otherwise compensable injury" was no longer the major contributing cause of the disability or need for treatment of the combined condition. *See* ORS 656.005(7)(a)(B); ORS 656.266(2)(a). The word "ceases" presumes a change in the claimant's condition or circumstances since the acceptance of the combined condition, such that the "otherwise compensable injury" is no longer the major contributing cause of disability or need for treatment of the combined condition. *See Wal-Mart Stores, Inc. v. Young*, 219 Or App 410, 419 (2008). The effective date of acceptance provides a baseline for determining whether a claimant's condition has changed. *See Oregon Drywall Sys. v. Bacon*, 208 Or App 205, 210 (2006). SAIF has the burden of proof under ORS 656.266(2)(a). *Young*, 219 Or App at 419.

Determination of this issue presents a complex medical question that must be resolved by expert medical opinion. *Barnett v. SAIF*, 122 Or App 279, 283 (1993). When medical experts disagree, we give more weight to those opinions that are well reasoned and based on accurate and complete information. *Somers v. SAIF*, 77 Or App 259, 263 (1986). We may give the treating physician's opinion more or less weight, depending on the record in each case. *Dillon v. Whirlpool Corp.*, 172 Or App 484, 489 (2001).

Here, SAIF identified the effective date of its combined condition acceptance as the date of injury, September 27, 2012. (Ex. 106). The effective date of the denial was March 27, 2013. (*Id.*) Therefore, we review the medical evidence to determine if there was a change in claimant's low back condition between September 27, 2012 and March 27, 2013, such that the work-related injury incident ceased to be the major contributing cause of the disability/need for treatment of the combined condition. For the following reasons, we agree with the ALJ's conclusion that SAIF satisfied its burden.

Dr. Kitchel examined claimant on June 28, 2013. Following his examination and review of claimant's medical records, Dr. Kitchel concluded that the September 27, 2012 work injury resulted in a lumbar sprain/strain. (Ex. 96-6). He also opined that the work injury combined with a preexisting "failed lumbar spine surgery syndrome with chronic pain disorder" to cause and prolong his disability and treatment. (Ex. 96-8, -9). Based on the records showing no treatment from November 2011 until the 2012 event, Dr. Kitchel determined that the 2012 work injury was the major contributing cause of the need for treatment when claimant first sought care. (Ex. 96-9). Dr. Kitchel further reasoned that the 2012 work injury ceased being the major contributing cause as of six months after the injury, or March 27, 2013, "based on the normal healing process of a lumbar strain/sprain[.]" (*Id.*) He opined that the then-current medical treatment was directed at the preexisting failed spine surgery syndrome and chronic pain disorder, not the lumbar strain/sprain, which was medically stationary and did not require work restrictions or further treatment. (Ex. 96-10). Dr. Kitchel later clarified that his analysis was not limited to the accepted lumbar strain, but rather addressed the contribution from the 2012 work injury episode relative to the preexisting condition. (Ex. 128).

Having reviewed Dr. Kitchel's opinion, we find it to be thorough, based on complete information, well reasoned, and persuasive. We acknowledge that he stated that he based his major cause opinion on the "normal healing process of a lumbar strain/sprain." Yet, he also opined that the preexisting condition combined with the *work injury*, that the *work injury* was the major contributing cause of the need for treatment when claimant first sought care, and that *the work injury* was no longer the major contributing cause of the disability or need for treatment. (Ex. 96-9). Moreover, the only condition he identified as related to the 2012 work injury was a lumbar strain/sprain. (Ex. 96-6). Finally, he stated that he had considered not only the accepted lumbar strain, but, more broadly, the contribution from the 2012 work injury relative to claimant's preexisting conditions. (Ex. 128-1).

After reviewing Dr. Kitchel's reports, we are persuaded that his opinion satisfies the standard articulated in *Brown*. See *Rogelio Barbosa-Miranda*, 66 Van Natta 1666, 1668 n 2 (2014) (physician's consideration of injurious "event," "work injury," and "industrial injury" satisfied the *Brown* standard); *Mauricio G. Maravi-Perez*, 66 Van Natta 1352, 1355 (2014) (medical evidence satisfied the *Brown* standard where physician referred to resolved "lumbar strain," but also acknowledged that the claimant's "work injury" combined with the preexisting condition).

We are also persuaded that Dr. Kitchel's opinion was sufficiently directed at claimant's particular circumstances. Dr. Kitchel identified Dr. Wenner's pursuit of hardware removal to be related to the underlying condition, not the lumbar strain; *i.e.*, the 2012 work injury episode. (Exs. 96-10, 128-1). Dr. Kitchel's opinion followed his review of claimant's prior treatment records, his review of the more recent mechanism of injury, and his examination of claimant's lumbar spine. He concluded that no further treatment was indicated for the lumbar strain injury, which he considered to be medically stationary. (*Id.*); see *Danny Heising*, 61 Van Natta 1269, 1270 (2009) (a physician's conclusion that the claimant's cervical injury was medically stationary six weeks after the work event was sufficiently directed at the claimant's particular circumstances where the physician reviewed the claimant's examination findings and explained that the symptoms primarily involved an underlying arthritis).

We adopt the ALJ's reasoning and conclusions with respect to the opposing opinions of Drs. Wenner and O'Sullivan. Even if their opinions were not based solely on a "precipitating cause" analysis, they did not explain why (other than the temporal relationship) they believed that the injury contributed more to claimant's ongoing low back condition, disability, and need for medical treatment than did the admittedly contributory preexisting conditions. See *James B. Pearson*, 56 Van Natta 1935, 1937-38 (2004) (finding physician's opinion unpersuasive when, apart from noting a temporal relationship, the physician did not explain why the injury contributed more to the claimant's condition than did the admittedly contributory preexisting condition). Under these circumstances, we do not consider their opinions sufficiently persuasive to rebut that of Dr. Kitchel.

Accordingly, we conclude that Dr. Kitchel's opinion, as supported by the opinions of Drs. Skrzynski and Lynch, established the requisite change in condition or circumstances pursuant to ORS 656.262(6)(c). Therefore, we affirm the ALJ's decision upholding SAIF's "ceases" denial.

ORDER

The ALJ's order dated January 22, 2016 is affirmed.

Entered at Salem, Oregon on October 7, 2016

Member Weddell dissenting.

The majority concludes that the medical opinion of Dr. Kitchel (as concurred with by Drs. Skrzynski and Lynch) is sufficient to satisfy SAIF's burden of establishing the requisite change in the accepted combined condition such that the otherwise compensable injury is no longer that major contributing cause of the combined condition. ORS 656.005(7)(a)(B); ORS 656.262(6)(c); ORS 656.266(2)(b). Because I disagree with that conclusion, I respectfully dissent.

A carrier may deny an accepted combined condition if the otherwise compensable injury "ceases" to be the major contributing cause of the combined condition. ORS 656.262(6)(c). The "otherwise compensable injury" means the "work-related injury incident." *Brown v. SAIF*, 262 Or App 640, 652, *rev allowed*, 356 Or 397 (2014). The word "ceases" means that there has been a change in the claimant's condition or circumstances. *See Wal-Mart Stores, Inc. v. Young*, 219 Or App 410, 419 (2008). Therefore, to support its "ceases" denial, SAIF must prove that there was a change in claimant's combined condition or circumstances, between the acceptance and the denial, such that the work-related injury incident is no longer the major contributing cause of the combined condition. ORS 656.262(6)(c); *Brown*, 262 Or App at 652; *Young*, 219 Or App at 419.

Here, in June 2013, Dr. Kitchel concluded that the work injury was no longer the major contributing cause of claimant's disability or need for treatment. (Ex. 96-9). Dr. Kitchel stated that, "[b]ased upon the normal healing process of a lumbar strain/sprain, I believe it is appropriate to say that injury ceased being the major contributing cause as of six months following the injury or March 27, 2013." (*Id.*) Dr. Kitchel also opined that no further treatment was indicated for the lumbar strain and that claimant was medically stationary with respect to the accepted strain/sprain. (Ex. 96-10). Dr. Kitchel later stated that his analysis was not limited to the lumbar strain and that his opinions considered potential contribution from the 2012 work injury episode relative to the preexisting condition. (Ex. 128).

I do not find Dr. Kitchel's opinions to be sufficient to satisfy the standard under *Brown*. Although Dr. Kitchel attempted to address the work injury, his analysis was dependent on the presumed healing process, the medically stationary status, and the absence of any further need for treatment of a *strain*. He did not explain how those factors applied to claimant's accepted combined condition. SAIF's acceptance of a "combined condition" necessarily recognized that claimant's work injury combined with his preexisting conditions to cause or prolong disability or need for treatment. ORS 656.005(7)(a)(B). Dr. Kitchel's reliance on the "normal" healing process does not show that he recognized the effect that the combining had on causing/prolonging claimant's disability/need for treatment. Therefore, I would not find his analysis persuasive under *Brown*.

Moreover, Dr. Kitchel did not identify any particular change in claimant's condition or circumstances between September 27, 2012 and March 27, 2013. Instead, he presumed that claimant's condition changed based on the passage of time. In doing so, he did not explain why claimant's symptoms and disability/need for treatment persisted after March 27, 2013. Under these circumstances, I do not find his opinion to be persuasive. *See Judi Whitney*, 61 Van Natta 392 (2009) (medical opinion that presumed a change within a certain time frame was not persuasive); *see also Moe v. Ceiling Sys., Inc.* 44 Or App 429, 433 (1980) (rejecting unexplained opinion as unpersuasive).

In contrast, Drs. Wenner and O'Sullivan opined that the 2012 work-related injury incident remained the major contributing cause of claimant's ongoing disability/need for treatment of the combined condition. Their examinations show that claimant's symptoms, work disability, and need for treatment did not change on or about March 27, 2013. (Exs. 97-2, 105-3, 120-1). Moreover, Dr. Wenner explained how the work event potentially affected/combined with the preexisting condition (*i.e.*, by loosening the fusion hardware or making the spinal cord stimulator dysfunctional) to contribute to claimant's ongoing disability/need for treatment. (Exs. 97-2, 118-2).

In light of the foregoing, I would conclude that SAIF did not meet its burden of showing that claimant's 2012 work injury ceased to be the major contributing cause of the disability/need for treatment of his accepted combined condition. Therefore, I respectfully dissent.