
In the Matter of the Compensation of
FRANK R. LARSEN, Claimant
WCB Case No. 15-04013, 15-01687, 14-01242
ORDER ON REVIEW
Furniss Shearer & Leineweber, Claimant Attorneys
Lyons Lederer LLP, Defense Attorneys

Reviewing Panel: Members Weddell and Curey.

The self-insured employer requests review of that portion of Administrative Law Judge (ALJ) Kekauoha's order that set aside its denial of claimant's current cervical combined condition. In his respondent's brief, claimant contests that portion of the ALJ's order that upheld the employer's denial of his occupational disease claim for cervical conditions. On review, the issue is compensability. We reverse in part and affirm in part.¹

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact" with the following summary.

Claimant, age 53 at the time of hearing, had worked for the employer for 33 years, with the last 15 to 20 years as a delivery driver. (Tr. 6-7). As a delivery driver, he was responsible for transporting freight, linens, and other materials. (*Id.*) He drove a large truck and handled eight carts, each of which could weigh as much as 1,000 pounds. (*Id.*; Exs. 6-1, 58-4).

In July 28, 2011, claimant helped fill-in for two drivers. (Tr. 7). The door on the truck was wooden and very heavy. (Tr. 8). In his prior experience with this door, it did not function properly and he had to pull it forcefully. (*Id.*) In the interim, and unbeknownst to claimant, the door had been fixed. (*Id.*) When he pulled forcefully on the door, it flew up and back down, striking him on the top of the head. (*Id.*) The blow knocked him to the ground, but he finished his shift. (*Id.*) He did not file an injury claim at that time.

Subsequently, claimant developed a severe headache that lasted for days, neck pain, and symptoms in the left shoulder and arm. (Tr. 8-9). His left shoulder and arm pain progressively worsened. (Tr. 10).

¹ We adopt and affirm that portion of the ALJ's order concerning the compensability of claimant's occupational disease claim for cervical conditions.

In November 2011, Ms. Dunsmuir, a nurse practitioner, evaluated claimant, noting worsening neck and left arm pain with numbness and tingling down the left arm.² (Ex. 1). X-rays of his cervical spine showed degenerative disc changes, osteophyte formation, uncovertebral joint degeneration, and neural foraminal narrowing at C5-6 and C6-7. (Ex. 3-2).

Claimant filed a claim for overuse with a “date of injury” of October 18, 2011. (Exs. 4, 5). In January 2012, the employer accepted the claim for a “cervical strain.” (Ex. 16).

On December 1, 2011, Dr. George, an occupational medicine specialist, documented a history of onset of neck and shoulder pain one to two months before October 18, 2011, and diagnosed a cervical strain with left C6 radiculopathy. (Ex. 6-1). He ordered a cervical MRI, which showed a C5-6 disc protrusion causing severe left foraminal narrowing, with likely impingement of the left C6 nerve, and moderately severe right C6-7 foraminal stenosis. (Exs. 6-2, 8).

Subsequently, Dr. Brett, a neurosurgeon, diagnosed C5-6 and C6-7 spondylotic and disc disease with left C6 nerve root impingement. (Ex. 9). He opined that claimant’s work as a delivery driver was the major contributing factor to the development of his cervical spondylosis and disc disease with nerve root impingement and his need for surgery. (*Id.*) He recommended a C5-7 anterior cervical discectomy and fusion. (Ex. 13).

In January 2012, claimant reported his July 2011 work injury to Dr. George, and confirmed that he sought no treatment for that incident and continued to work. (Ex. 15). Claimant reported that he noticed left arm tightness after that incident, which he initially attributed to putting his left arm on top of the steering wheel. (*Id.*) He further reported that on October 18, 2011, he was stretching his left arm when he felt “pops” in his left neck associated with very severe left arm pain.³ (*Id.*)

Dr. Rosenbaum, a neurosurgeon, examined claimant and noted the July 2011 work incident with subsequent development of persistent neck, left shoulder and left arm symptoms.⁴ (Ex. 17-1). He diagnosed a left C6 radiculopathy and

² Ms. Dunsmuir reported the worsening of pain was “over the last month,” with “no definite injury.” (Ex. 1-4).

³ Claimant filed his claim for a “date of injury” of October 18, 2011. (Exs. 4, 5).

⁴ Claimant told Dr. Rosenbaum that he “nearly lost consciousness” in the July 2011 incident. (Ex. 17-2).

recommended surgery. (Exs. 17-19). He opined that the July 2011 work injury combined with claimant's preexisting cervical spondylosis, and that the work injury caused the onset of radiculopathy. (Ex. 24).

In February 2012, Dr. Rosenbaum performed a left C5-6 micro posterior cervical laminectomy. (Ex. 26-1). He noted a large complex spur without a soft disk component. (*Id.*) He diagnosed cervical spondylosis with left cervical radiculopathy. (*Id.*)

In August 2012, indicating that claimant had no radiating arm pain or numbness, but had some occasional neck stiffness and headaches, Dr. Rosenbaum declared him medically stationary. (Ex. 28). The employer subsequently closed the claim with a 9 percent permanent impairment award. (Ex. 30). Claimant requested reconsideration and a medical arbiter examination. (*Id.*)

In September 2012, claimant requested acceptance of a "left cervical radiculopathy" condition. (Ex. 32).

In October 2012, Dr. Taylor, an occupational medicine specialist, evaluated claimant for neck and trapezius pain with associated headaches, which had worsened since Dr. Rosenbaum's last examination. (Ex. 34).

The employer modified its Notice of Acceptance to include a "disabling cervical strain which on October 18, 2011, combined with pre-existing spondylosis and degenerative disc disease, resulting in C6 radiculopathy." (Ex. 36).

A medical arbiter panel examined claimant, and determined that he had no impairment related to his cervical strain condition. (Exs. 37, 38). Consequently, claimant's impairment award was reduced to zero. (Ex. 40).

In February 2013, Dr. Taylor declared claimant "medically stationary without permanent impairment from [a] cervical strain." (Ex. 43). Dr. Taylor indicated that claimant had no numbness, tingling, weakness, or radicular pain. (*Id.*)

In February 2014, Dr. Rosenbaum performed an examination at the employer's request. (Ex. 47). Claimant reported neck tightness and some radiation to the suboccipital region with occipital and vertex headaches. (Ex. 47-1). He also complained of bilateral trapezius discomfort, but no radiating arm pain, numbness or paresthesias. (*Id.*) He noted that claimant no longer had a

cervical radiculopathy, and that any additional treatment would be directed at the preexisting spondylosis. (Ex. 47-3). He opined that claimant's combined cervical condition was medically stationary as of August 2012, and had changed such that the preexisting condition had become the major contributing cause of the combined condition and need for treatment. (Ex. 47-2-3). Dr. Taylor concurred with Dr. Rosenbaum's opinion. (Ex. 50).

In March 2014, the employer issued a denial of claimant's current combined condition on the basis that the otherwise compensable cervical strain had ceased to be the major cause of his combined condition. (Ex. 51). Claimant timely appealed that denial.

Subsequently, the employer closed the claim without additional impairment. (Ex. 53).

In July 2014, Dr. Brett performed a C5-7 anterior discectomy and fusion. (Ex. 60). At surgery, he observed preexisting degenerative changes and a superimposed, partially healed sequestered left C5-6 disc herniation, resulting in left C6 nerve root impingement. (*Id.*)

In December 2014, Dr. Brett opined that claimant's work exposure as a delivery truck driver was the major contributing factor in the development of his spondylitic disease and nerve impingement. (Ex. 54).

In February 2015, the employer issued a modified current combined condition denial, stating that claimant's "otherwise compensable injury of October 18, 2011, [had] ceased to be the major cause of your combined condition." (Ex. 55). Claimant timely appealed that denial.

In June 2015, Dr. Brett reiterated his opinion that the major component of claimant's spondylitic disease and soft and hard C5-6 and C6-7 disc protrusions directly resulted from his work activities. (Ex. 56). He reasoned that the work exposure resulted in the development of the osteophyte and nerve impingement that led to the onset of his radiculitis and need for surgery. (*Id.*)

On June 16, 2015, Dr. Rosenbaum performed a second examination at the employer's request. (Ex. 58). He reiterated his opinion that the accepted combined condition had changed such that the preexisting spondylosis and degenerative disc disease had become the major contributing cause of the combined condition. (Ex. 58-8). He reasoned that claimant's radiculopathy

related to the work injury was resolved by his cervical laminectomy. (*Id.*) He opined that the more recent surgery was directed at claimant's preexisting spondylosis. (*Id.*)

In September 2015, Dr. Brett disagreed with Dr. Rosenbaum's opinion. (Ex. 60). Dr. Brett noted that claimant only had temporary relief of his left arm radicular pain following Dr. Rosenbaum's surgery. (Ex. 60-1). He reasoned that Dr. Rosenbaum's surgery was not curative because it did not address the pathology anterior to the nerve root caused by the work injury. (*Id.*) He concluded that the annular injury repaired in surgery in July 2014 was a "direct result" of the October 2011 work injury. (*Id.*) He also concluded that the work injury was the major contributing factor to the need for surgery, and that claimant's "degenerative disc pathology" was not "arthritis" as it did not involve inflammation of a synovial joint. (*Id.*) Finally, he reiterated his opinion that claimant's work activities were the major contributing factor in the development of his spondylitic disease. (Ex. 60-2).

In late September 2015, Dr. Rosenbaum acknowledged that some patients do not obtain full relief of radicular pain from either a posterior or anterior surgical approach. (Ex. 61A-2). However, based on his review of the medical records following the first surgery that noted the absence of left arm radicular symptoms, he adhered to his opinion that the need for claimant's second surgery was directed at preexisting spondylosis and not the work injury. (*Id.*)

In January 2016, Dr. Brett indicated that it was a "moot point" whether claimant "continued to have radicular pain or whether this was temporarily resolved and then returned without any significant new injury." (Ex. 62-1-2). He concluded that, in the absence of a new injury, the work injury remained the major contributing factor causing the "recurrent" radiculitis/radiculopathy and need for treatment. (Ex. 62-2).

CONCLUSIONS OF LAW AND OPINION

In setting aside the employer's combined condition denial, the ALJ determined that Dr. Brett's opinion that claimant's preexisting pathology did not involve a "synovial joint" was more persuasive than Dr. Rosenbaum's opinion. Consequently, the ALJ concluded that the employer had not carried its burden to prove that there was a combined condition involving a legally cognizable preexisting condition. Alternatively, the ALJ determined that, even assuming a combined condition, the employer did not prove that there was a change in

claimant's condition/circumstances such that the work injury was no longer the major contributing cause of the disability/need for treatment for the combined condition.

On review, the employer argues that Dr. Rosenbaum's opinion persuasively supports the existence of a statutory preexisting condition and the current combined condition denial. In response, claimant challenges the combined condition acceptance, contending that the record does not establish that claimant's preexisting condition involved a "joint," as well as the substantive merits of the denial. For the following reasons, we agree with the employer.

A "preexisting condition" under ORS 656.005(24)(a)(A) includes "arthritis," which is defined as "inflammation of one or more joints, due to infectious, metabolic, or constitutional causes, and resulting in breakdown, degeneration, or structural change." *Schleiss v. SAIF*, 354 Or 637, 652-53 (2013); *Hopkins v. SAIF*, 349 Or 348, 364 (2010); *Daniel B. Slater*, 66 Van Natta 335, 337 (2014).

To establish the existence of preexisting arthritis, a carrier must adduce expert testimony that the claimant suffers from "inflammation of whatever joint or joints it contends are affected by the arthritic condition." *Schleiss*, 354 Or at 653; *Hopkins*, 349 Or at 363; see *Staffing Services, Inc. v. Kalaveras*, 241 Or App 130, 137-38, *rev den*, 350 Or 423 (2011) ("despite the existence of medical opinions in the record that [the] claimant's condition is arthritis or arthritic, the board was required to determine in the first instance whether the record was sufficient to establish that [the] claimant suffers from that condition as legally defined"); *Michael Kelson*, 65 Van Natta 32 (2013) (interpreting *Kalaveras* to mean that there is no "arthritis" or "arthritic condition" without evidence of joint inflammation); *Paul D. Beer*, 63 Van Natta 975, *recons*, 63 Van Natta 1191 (2011) (same).

Here, claimant had a cervical spine x-ray revealing degenerative disc changes of the "uncovertebral joints." (Ex. 3-2). Dr. Rosenbaum reviewed claimant's imaging studies and interpreted the C5-6 and C6-7 degenerative changes as degenerative disc disease and spondylosis, which was "degenerative arthritis of the cervical spine." (Ex. 58-6-8). He concluded that claimant had a combined condition. (Exs. 24, 47-2-3, 58-8, 61A).

Although he agreed that claimant had a combined condition, Dr. Brett apparently believed that, because the spinal joints were not "synovial joints," the degenerative disc disease affecting claimant's cervical spine was not "arthritis." (Ex. 60-1). However, Dr. Brett did not comment on whether the condition

involved “uncovertebral joints,” which were referenced on the MRI that formed the basis for Dr. Rosenbaum’s arthritis finding. Because Dr. Brett did not address these particular joints and limited his conclusion to “synovial joints,” we find his opinion to be unpersuasive. *Hopkins*, 349 Or at 363-64.

Under these circumstances, we conclude that the criterion in *Schleiss* and *Hopkins* was satisfied. Accordingly, we conclude that Dr. Rosenbaum’s opinion, as supported by claimant’s imaging studies, establishes the presence of a “preexisting condition.” It is undisputed that claimant’s work injury combined with his preexisting condition.

In addition, the employer asserts that the medical evidence supports a change in condition or circumstances such that the “otherwise compensable injury” ceased to be the major contributing cause of the disability or need for treatment of the combined condition. We agree.

ORS 656.262(6)(c) authorizes a carrier to deny an accepted combined condition if the “otherwise compensable injury” ceases to be the major contributing cause of the combined condition. The employer bears the burden to show a change in circumstances or a change in condition such that claimant’s “otherwise compensable injury” ceased to be the major contributing cause of the disability or need for treatment of the combined condition. ORS 656.266(2)(a); *Wal-Mart Stores, Inc. v. Young*, 219 Or App 41, 4190 (2008).

The “otherwise compensable injury” is not defined by the carrier’s acceptance, but rather “the work injury resulting from the work accident that caused the disability or need for treatment.” *Brown v. SAIF*, 262 Or App 640, 651 (2014). In determining major causation of the combined condition, only statutory preexisting conditions may be weighed against the “otherwise compensable injury.” *Vigor Indus., LLC v. Ayres*, 257 Or App 795, 806 (2013).

Here, Dr. Rosenbaum first examined claimant in January 2012 and obtained a history that claimant struck his head on a truck door at work, subsequently developing neck and radiating left arm pain. (Ex. 17). Dr. Rosenbaum opined that, because claimant did not have neck and radiating arm pain before the July 2011 work injury, the event caused the onset of radiculopathy and need for treatment. (Ex. 24). He then performed a C5-6 posterior cervical laminectomy after finding a complex spur at that level. (Ex. 26). As of August 2012, claimant had no radiating arm pain or numbness, and Dr. Rosenbaum declared him medically stationary. (Ex. 28).

In February 2014, Dr. Rosenbaum again examined claimant, this time at the employer's request. (Ex. 47). Claimant did not report left arm radicular symptoms, but did indicate limited cervical range of motion and radiating pain to the suboccipital region with associated occipital and vertex headaches. (Ex. 47-1). He attributed these findings to claimant's degenerative spondylosis and not the industrial injury. (Ex. 47-2). Dr. Taylor concurred with Dr. Rosenbaum's report. (Ex. 50).

Dr. Brett provided the medical evidence supporting claimant's position. Dr. Brett performed surgery on claimant in July 2014. (Ex. 54). He opined that claimant's work as a delivery truck driver was the major contributing factor in the development of his spondylitic disease and nerve impingement and "need for operative intervention." He added that claimant's sustained and repetitive exertion resulted in "accelerated degenerative change and the development of soft and hard disc protrusions at C5-6 and [C6-7], as noted at surgery, and the onset of nerve impingement/radiculitis and his need for surgery." (Ex. 54). He subsequently reiterated his opinion that claimant's work exposure was to blame for the development of his conditions and need for surgery. (Ex. 56).

Dr. Brett disagreed with Dr. Rosenbaum that the C5-6 posterior surgery had resolved claimant's left arm radiculopathy. (Ex. 60). He indicated that Dr. Rosenbaum's surgery was not curative because it did not address the pathology anterior to the nerve root caused by the work injury. (Ex. 60-1). He opined that claimant's need for additional treatment was the result of his "October 2011" work injury. (Exs. 60-1, 62-1). He added that whether claimant's radicular pain had temporarily resolved and then returned without any significant new injury was a "moot point." (Ex. 62-1-2).

In response, Dr. Rosenbaum reviewed the medical records after claimant's surgery, noting that there was no evidence of ongoing radicular pain as of the August 2012 closing examination or the medical arbiter panel examination in October 2012. (Ex. 61A-2). He further indicated that there were no radicular symptoms in January 2013 when claimant finished a course of physical therapy.⁵ (*Id.*) He concluded that Dr. Brett's surgery was primarily for claimant's cervical spondylotic changes, cervicogenic headaches and right-sided symptomatology, which were not caused by the work injury. (*Id.*)

⁵ The record reflects that claimant had an absence of radicular symptoms after Dr. Rosenbaum's surgery from approximately August 2012 until July 2014. (Exs. 28, 37, 41, 43, 47, 61A-2).

After considering the medical opinions, we find Dr. Rosenbaum's well explained and thorough opinion that claimant's work injury ceased to be the major contributing cause of the need for treatment/disability of the combined cervical condition to be most persuasive. *See Somers v. SAIF*, 77 Or App 259 (1986). Moreover, he was in an advantageous position to evaluate claimant over time, because he performed claimant's initial surgery and provided follow-up treatment and evaluations, both before and after Dr. Brett's surgery. Accordingly, we give deference to Dr. Rosenbaum's opinion. *See Kienow's Food Stores v. Lyster*, 79 Or App 416, 421 (1986) (greater probative weight accorded to the physician's opinion who had observed the claimant's condition before and after the pivotal event); *Kevin G. Gagnon*, 64 Van Natta 1498, 1500 (2012) (physician's longitudinal history with the claimant rendered his opinion more persuasive).

In rendering his causation opinion, Dr. Rosenbaum placed great emphasis on the lack of radicular complaints post-surgery, which he had concluded supported a change in circumstance such that the work injury was no longer the major contributing cause of the need for treatment/disability. (Exs. 47, 58, 61A). In response, Dr. Brett opined that Dr. Rosenbaum's surgery was not entirely curative because claimant developed recurrent radiculitis. (Ex. 62-1). However, Dr. Brett's only statement relating the symptoms to the work injury was solely based on a lack of intervening injury. (Ex. 62-2). He did not rebut or address Dr. Rosenbaum's assessment that the gap in radicular complaints supported a change, and that the spondylosis was responsible for claimant's more recent need for treatment. Not addressing a key point in Dr. Rosenbaum's analysis weakens Dr. Brett's analysis and renders it unpersuasive.

Finally, Dr. Brett's opinion is largely inconsistent. Before and after he performed surgery, Dr. Brett opined that claimant's work *activities* as a truck driver were the major contributing cause of his conditions and need for treatment. Without explanation, Dr. Brett subsequently stated that claimant's work *injury* was the primary cause of his conditions and need for surgery. Consequently, Dr. Brett relied on two different theories of causation. Without further explanation, we discount Dr. Brett's opinion. *See Moe v. Ceiling Sys., Inc.*, 44 Or App 429, 433 (1980) (rejecting unexplained or conclusory opinion); *see also Howard L. Allen*, 60 Van Natta 1423, 1424-25 (2008) (internally inconsistent medical opinion, without explanation for the inconsistencies, was unpersuasive).

In sum, for the reasons expressed above, we conclude that the record supports the employer's current combined condition denial. ORS 656.266(2)(a). Thus, we reverse that portion of the ALJ's order that set aside the employer's "ceases" denial.

ORDER

The ALJ's order dated March 7, 2016, as corrected on March 18, 2016, is reversed in part and affirmed in part. The employer's "ceases" denial is reinstated and upheld. The ALJ's \$7,500 attorney fee and cost awards are also reversed. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on October 21, 2016