

In the Matter of the Compensation of  
**DARRYL WRAY, Claimant**  
WCB Case No. 15-00001TP  
THIRD PARTY ORDER  
David Lefkowitz, Claimant Attorneys  
Ronald W Atwood PC, Defense Attorneys

Reviewing Panel: Members Curey and Weddell. Member Curey specially concurs.

The self-insured employer, as a paying agency, has petitioned the Board to resolve a dispute concerning whether it is entitled to a share of a settlement claimant has recovered stemming from injuries he sustained as a result of a nonwork-related motor vehicle accident (MVA). *See* ORS 656.580(2); ORS 656.593(3). We conclude that the employer is entitled to assert a “third party” lien for its claim costs attributable to the MVA.

FINDINGS OF FACT

In April 2007, claimant, a police officer, was compensably injured. (Exs. 1, 2). He sought treatment with Dr. Canzler, his attending physician. (Exs. 2, 3, 4). The employer accepted the claim for a thoracolumbar strain, and then closed the claim in July 2007 without a permanent disability award. (Exs. 5, 7).

In August 2009, claimant returned to Dr. Canzler for complaints of worsening thoracolumbar and lower lumbar pain, and pain down his right leg and foot. (Exs. 8 through 12). In September 2009, Dr. Ordonez, a neurosurgeon on referral, performed a bilateral L4-5 decompression and microdiscectomy. (Ex. 22).

In February 2010, the employer accepted an L4-5 disc herniation. (Ex. 33). A March 29, 2011 Notice of Closure awarded 11 percent permanent whole person impairment. (Ex. 46).

Claimant continued to seek treatment periodically in 2011 and 2012 for low back and right radicular pain. (Exs. 48, 50, 51, 53, 56, 59). In April 2012, claimant began experiencing persistent left leg pain (in addition to continued low back symptoms), and sought treatment with Dr. Canzler. (Exs. 64, 67, 69). On June 12, 2012, he underwent a “reexploration and micro discectomy at L4-5 on the left,” and “reexploration and decompression of L4-5 level on the right.” (Ex. 73). By November 2012, claimant had returned to light duty work and was “doing

pretty well.” (Ex. 84). However, he continued to have flare-ups of low back and mostly left-sided leg pain. (Exs. 87, 88, 89, 90, 92, 96). On July 16, 2013, Dr. Ordonez performed another L4-5 decompression and microdiscectomy. (Ex. 100). By October 2013, claimant was reporting “momentary sharp pain in the low back” about “once a week,” but denied any pain or tingling in the left leg. (Ex. 107).

On October 11, 2013, claimant was involved in an “off-work” MVA. (Ex. 108). On October 14, 2013, he treated with Dr. Ordonez for right-sided neck and low back pain, and left leg symptoms. (*Id.*) An October 17, 2013 MRI revealed enhancing soft tissue density adjacent to the left L5 nerve root in the post-surgical area, medial displacement of the L5 nerve root, similar to a prior study,<sup>1</sup> and likely irritation of the left L5 nerve root. (Ex. 111).

On August 11, 2014, claimant was evaluated at Dr. Brett’s office for a neurosurgical consultation by Physician Assistant (PA) Heen. (Ex. 110). PA Heen reported that claimant was recovering from his June 2013 lumbar surgery and “was still having some back pain that significantly worsened with his [MVA] in 10/2013.” (Ex. 130-1). PA Heen’s impression was that the MVA “pathologically worsened [claimant’s] preexisting lumbar condition causing his current symptoms of low back and left leg pain and numbness.” (Ex. 130-3).

An August 22, 2014 MRI showed a probable L4-5 disc protrusion in the left lateral recess, thought to be abutting the left L5 nerve root. (Ex. 131).

On August 27, 2014, Dr. Brett became claimant’s attending physician and filed a new/omitted medical condition claim for a recurrent L4-5 disc herniation. (Exs. 133, 134). On October 20, 2014, Dr. Brett performed an L4-5 re-exploration with laminectomy, excision of the left-sided lesion, excision of a recurrent left disc herniation and transverse interbody fusion. (Ex. 139).

Dr. Brett explained that claimant’s 2007 injury predisposed him to the pathologic worsening that occurred with his 2013 MVA, which resulted in a re-herniation of his L4-5 disc. (Exs. 134-2, 147-2). He opined that, while the MVA was a “substantial contributing factor” in claimant’s current need for treatment/surgery, the major contributing cause of the need for treatment was his

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<sup>1</sup> A June 2013 MRI showed L4-5 scarring on the left with some mass effect on the L5 nerve root, a recurrent disc fragment lateral to the L5 nerve root, and disc material protruding at the L4-5 foramen on the left. (Ex. 95).

original work injury. (Ex. 134-2). He explained that the 2014 fusion surgery “was necessary because of the accepted workers’ compensation claim. Had this been just a car accident with no prior damage a laminectomy or a discectomy would likely have been the procedure required and the car accident may have not caused the re-herniation if not for the prior accepted claim.” (Ex. 147-3).

The employer denied claimant’s new/omitted medical condition claim for a recurrent L4-5 disc herniation, and claimant requested a hearing.<sup>2</sup> (Ex. 145).

In May 2015, Dr. Canzler explained that claimant’s pattern of recurrent disc herniations “shows the causal significance of the prior disc herniation and surgeries.” (Ex. 150). He noted that, after the 2013 surgery, claimant was doing well until the October 2013 MVA, which “aggravated his condition at L4-5.” (Ex. 150-2). Dr. Canzler acknowledged that a disc herniation is not a common occurrence with a side impact or T-bone MVA, but because claimant had more than one recurrence (in the absence of trauma) and surgery, he had a “severely weakened L4-5 disc.” (*Id.*) Considering claimant’s “long course of treatment for the L4-5 disc prior to the MVA, and the mechanism of the MVA[,]” and based on his long-term treating relationship with claimant and familiarity with his condition, Dr. Canzler concluded that the work-related L4-5 disc herniation and subsequent surgeries were “the major contributing factor to the current condition L4-5 disc herniation[.]” (*Id.*)

On June 4, 2015, the ALJ set aside the employer’s denial of claimant’s new/omitted medical condition claim for his recurrent L4-5 disc herniation. (Ex. 151).<sup>3</sup> The Board has affirmed, agreeing with the ALJ’s conclusion that claimant persuasively established the compensability of his recurrent L4-5 disc herniation as a consequential condition. *Darryl Wray*, 67 Van Natta 2252 (2015), *recons*, 68 Van Natta \_\_\_\_ (issued this date).

Claimant reached a settlement of \$25,000 with the driver of the other vehicle involved in the October 2013 MVA. Following the ALJ’s compensability decision, the employer sought reimbursement from that settlement for its claim costs attributable to the MVA, contending that the MVA exacerbated the effects of claimant’s compensable injury and surgeries. When claimant contested that request, the employer petitioned the Board for resolution of the dispute.

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<sup>2</sup> This request for hearing was consolidated with a prior request regarding a denied 2014 aggravation claim. (*See* Ex. 151).

<sup>3</sup> The ALJ also upheld the employer’s denial of claimant’s aggravation claim. That portion of the ALJ’s order was not contested on review.

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## CONCLUSIONS OF LAW AND OPINION

If a worker is compensably injured due to the negligence or wrong of a third party not in the same employ, the worker shall elect whether to recover damages from the third party.<sup>4</sup> ORS 656.578. If the worker or beneficiaries settle the third party claim with paying agency approval, the agency is authorized to accept as its share of the proceeds “an amount which is just and proper,” provided that the worker receives at least the amount to which he is entitled under ORS 656.593(1) and (2). ORS 656.593(3); *Estate of Troy Vance v. Williams*, 84 Or App 616, 619-20 (1987).<sup>5</sup>

Despite the existence of a noncompensable intervening injury, a paying agency remains responsible for benefits so long as the compensable injury remains a material contributing cause of the worker’s disability and need for medical treatment. *See Grable v. Weyerhaeuser Co.*, 291 Or 387, 393 (1981). When asserting a lien stemming from a “third party” recovery, “[i]t is the paying agency’s burden to establish which expenses, if any, were incurred due to the third party injury rather than the prior accepted claim.” *Rachid Kaady*, 42 Van Natta 1042, 1043 (1990), *aff’d Kaady By and Through Prof’l Liab. Fund v. EBI Cos.*, 110 Or App 45 (1991); *see also Robertson v. Davcol, Inc.*, 99 Or App 542 (1989) (a paying agency is not entitled to a share of settlement proceeds that are expressly not attributable to the compensable injury); *Donna L. Johnson*, 45 Van Natta 1586 (1993) (carrier only entitled to recover reimbursement for its claim costs that were attributable to injuries for which the claimant had received third party damages).

Here, based on the persuasive medical evidence, the ALJ found (as affirmed by the Board on review) that claimant’s compensable injury (and pre-2013 resultant surgeries) were the major contributing cause of his new/omitted

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<sup>4</sup> Citing OAR 438-011-0055, claimant contends that the employer is not entitled to assert a “third party” lien because it never filed the requisite Notice of Election lien letter. According to claimant, the employer’s lien is “unperfected.” However, the “written demand” requirement of OAR 438-011-0055 is intended to advise a claimant of his/her “third party” election rights under ORS 656.578. Here, claimant “elected” to pursue a third party action on his own accord. Therefore, the intentions of the rule have been satisfied. Under these circumstances, the lack of a “third party election” letter has no bearing on whether a valid or enforceable lien exists, and does not preclude the carrier from asserting its lien.

<sup>5</sup> Because claimant’s new/omitted medical condition claim for his recurrent L4-5 disc herniation was filed, but not accepted, at the time of the third party recovery, and has now been determined to be compensable, the employer is a “paying agency” for that condition and is entitled to an offset against compensation due for that condition to the extent of any “lien” that would have been authorized under ORS 656.593(3). ORS 656.596; *Clark L. Leonard*, 61 Van Natta 1810 (2009).

recurrent disc condition, notwithstanding the MVA. Dr. Brett explained that claimant's 2007 injury predisposed him to the pathologic worsening that occurred with his 2013 MVA and resulting re-herniated L4-5 disc. (Exs. 134-2, 147-2). He opined that, while the MVA was a "substantial contributing factor" in claimant's current need for treatment/surgery, the major contributing cause of the need for treatment was his original work injury. (*Id.*) He explained that the 2014 fusion surgery "was necessary because of the accepted workers' compensation claim. Had this been just a car accident with no prior damage \* \* \* the car accident may have not caused the re-herniation if not for the prior accepted claim." (Ex. 147-3).

Similarly, Dr. Canzler noted that claimant's pattern of recurrent disc herniations following the 2007 injury (in the absence of trauma) "shows the causal significance of the prior disc herniation and surgeries." (Ex. 150). He noted that the October 2013 MVA "aggravated [claimant's] condition at L4-5." (Ex. 150-2). Dr. Canzler acknowledged that a disc herniation is not a common occurrence with a side impact or T-bone MVA, but because claimant had more than one recurrence (in the absence of trauma) and surgery before the MVA, he had a "severely weakened L4-5 disc." (*Id.*) Considering claimant's "long course of treatment for the L4-5 disc prior to the MVA, and the mechanism of the MVA[.]" Dr. Canzler concluded that claimant's work-related L4-5 disc herniation and subsequent surgeries were "the major contributing factor to the current condition L4-5 disc herniation[.]" (*Id.*)

Thus, the record persuasively establishes that claimant's "post-MVA" medical treatment was related, in both material and major part, to his compensable injury and resultant surgeries. Consequently, notwithstanding the off-work MVA, the employer remains responsible for claimant's "post-October 2013 MVA" disability/treatment as related to the compensable injury and resultant surgeries. *See Grable*, 291 Or 401 ("an employer is required to pay workers' compensation benefits for worsening of a worker's condition where the worsening is the result of both a compensable on-the-job back injury and a subsequent off-the-job injury to the same part of the body if the worker establishes that the on-the-job injury is a material contributing cause of the worsened condition.").

Accordingly, the employer has established its right to assert a "third party" lien for its claim costs attributable to the October 2013 MVA. *See SAIF v. Dooley*, 107 Or App 287, 290 (1992); *Raymond K. Jackson*, 65 Van Natta 1772 (2013); *Julio Mejia*, 44 Van Natta 2140, *recons*, 44 Van Natta 2288 (1992); *Mary E. Bigler*, 44 Van Natta 752 (1992); *Oscar L. Compton*, 44 Van Natta 288 (1992); *Calina Neathery*, 43 Van Natta 2734 (1991). If the parties cannot reach an

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agreement concerning the amount of the employer's "third party" lien and its "just and proper" share of the "third party" settlement, a party may seek Board resolution of that particular conflict. *See* ORS 656.593(3).

**IT IS SO ORDERED.**

Entered at Salem, Oregon on April 15, 2016

Member Curey specially concurring.

As reflected in my dissenting opinion regarding our review of the ALJ's order, I disagreed with the majority's compensability decision. Nonetheless, because it has been determined that the denied new/omitted medical condition claim is compensable, I concur with the determination that the employer is a paying agency entitled to assert a "third party" lien for its claim costs attributable to the October 2013 MVA.