
In the Matter of the Compensation of
KEVIN J. GIBSON, Claimant
WCB Case No. 01-03073
ORDER ON REVIEW
Patrick K MaCkin, Claimant Attorneys
James B Northrop, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Biehl, Phillips Polich, and Bock.¹

The SAIF Corporation requests review of that portion of Administrative Law Judge (ALJ) Kekauoha's order that set aside its denial of claimant's current combined low back condition. Claimant cross-requests review of that portion of the ALJ's order that declined to assess penalties for an allegedly unreasonable denial. On review, the issues are compensability and penalties.

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

The ALJ set aside SAIF's denial of claimant's current "combined" low back condition based on the opinion of claimant's treating physician, Dr. Takacs. On review, SAIF first contends that Dr. Takacs' opinion is unpersuasive because she failed to explain a change in her opinion. *See Kelso v. City of Salem*, 87 Or App 630 (1987) (a physician's change of opinion, if adequately explained, does not necessarily render the opinion unpersuasive). We disagree.

Dr. Takacs has been claimant's treating physician since 1991. (Ex. 13). On December 28, 2000, Dr. Takacs wrote that claimant's October 20, 2000 compensable injury had caused only a worsening of his preexisting lumbar strain condition (from 1991). (Ex. 54). Dr. Takacs later stated that, while claimant's October 2000 injury was the cause of his need for treatment and inability to return to work, his "major problem" from a "medical," as opposed to "legal" point of view, was his preexisting condition. (Ex. 61-2). However, Dr. Takacs then agreed that the major cause of claimant's need for treatment, compared to his preexisting conditions, was his October 2000 injury. (Ex. 73).

Because the medical evidence is that claimant's October 2000 compensable injury has "combined with" one or more preexisting conditions, he must prove that

¹ After consultation with the Department of Justice, this Board has chosen to exercise its right to issue orders as a panel of three pursuant to ORS 656.718(2) and (3).

his injury remains the major contributing cause of his disability or need for treatment for the combined condition. ORS 656.005(7)(a)(B); *SAIF v. Nehl*, 148 Or App 101, *on recon* 149 Or App 309 (1997). Dr. Takacs' later report detailed above meets claimant's burden of proof in this regard. (Ex. 73). We find that Dr. Takacs' earlier distinction between "medical" and "legal" causation in her prior letters simply reflects an admitted confusion with the standard of proof where a combined condition is involved. (*See* Ex. 54-2). When Dr. Takacs has expressed an opinion regarding the relationship between claimant's compensable injury and his need for medical treatment or disability, Dr. Takacs' ultimate conclusion has been consistent and sufficient to satisfy the correct legal standard from *SAIF v. Nehl*. (Exs. 56, 73).

SAIF next contends that Dr. Takacs relied on an impermissible "precipitating cause" analysis, citing *Dietz v. Ramuda*, 130 Or App 397, 401 (1994), *rev dismissed* 321 Or 416 (1995). We disagree with SAIF's contention.

Dr. Takacs at one point compared claimant's October 2000 injury to "the proverbial straw that broke the camel's back" as a cause of claimant's need for treatment. (Ex. 61-2). If Dr. Takacs' opinion rested solely on such an analysis, we would be inclined to find it unpersuasive. *See Dietz v. Ramuda*, 130 Or App at 401; *Aaron D. Todd*, 51 Van Natta 1965 (1999). However, when specifically asked to state the major contributing cause of claimant's disability and need for treatment in comparison to several preexisting conditions, Dr. Takacs twice confirmed that the injury was the major cause. (Exs. 56, 73). We therefore find that Dr. Takacs' final opinion did not rely entirely on a "precipitating cause" analysis and is persuasive.²

Finally, on claimant's cross-request on the issue of penalties, we affirm the ALJ's order based on the following reasoning. At the time of its April 18, 2001 denial, at a minimum, SAIF had received Dr. McKillop's April 11, 2001 file review, in which Dr. McKillop stated that claimant's preexisting low back conditions had become the major contributing cause of claimant's combined low back condition as of December 13, 2000. (Ex. 65-5). In light of Dr. McKillop's opinion, we conclude that SAIF had a legitimate doubt as to the continued compensability of claimant's combined low back condition at the time of its denial.

² Based on our disposition of SAIF's arguments on these bases, we need not address claimant's arguments that SAIF's denial should be set aside in light of the court's decision in *State Farm v. Lyda*, 150 Or App 544 (1997), or that SAIF's denial was precluded by its earlier stipulation to accept claimant's lumbar strain condition. (Ex. 57).

See Brown v. Argonaut Insurance, 93 Or App 588, 592 (1988). Its denial was not unreasonable.

Claimant's attorney is entitled to an assessed fee for services on review regarding the compensability issue. ORS 656.382(2). 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 regarding the compensability issue is \$2,040, payable by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the issue (as represented by claimant's respondent's brief and claimant's attorney's uncontested statement of services), the complexity of the issue, and the value of the interest involved.

ORDER

The ALJ's order dated August 14, 2001 is affirmed. For services on review, claimant's attorney is awarded \$2,040, payable by SAIF.

Entered at Salem, Oregon on April 24, 2002