
In the Matter of the Compensation of
JANICE ANGLIN, Claimant
WCB Case No. 01-00999
ORDER ON REVIEW
Scott M McNutt Sr, Claimant Attorneys
VavRosky MacColl et al, Defense Attorneys

Reviewing Panel: Members Lowell and Phillips Polich.

The self-insured employer requests review of Administrative Law Judge (ALJ) Black's order that set aside its denial of claimant's injury claim for lumbar radiculopathy and recurrent disc herniation at L5-S1. On review, the issue is compensability. We reverse.

FINDINGS OF FACT

We adopt the ALJ's findings of fact with the following changes. In the first paragraph on page 2, we change claimant's job to "district administrator." In the second paragraph on page 2, we change the last sentence to read: "Dr. Goodwin explained that the surgery involved a very small incision and muscle splitting rather than actual stripping from the lamina and spinous process. (Ex. 6)." In the first paragraph on page 4, we change the second sentence in the quoted section to read: "She was moving books from the shelf and tended to twist to the left side repeatedly, even reaching on her toes." In the last paragraph on page 5, we change the citation after the second sentence to "(Ex. 27A)."

CONCLUSIONS OF LAW AND OPINION

The issue in this case is compensability of claimant's recurrent disc herniation at L5-S1. In 1997, she herniated the L5-S1 disc without any apparent injury or inciting event. (Tr. 6; Ex. 2). Dr. Goodwin performed a left L5-S1 microendoscopic discectomy in September 1997. (Ex. 5). Claimant testified that she was back to normal after the surgery, although she did not lift heavy objects. (Tr. 10).

On December 7, 2000, claimant was rearranging the office library, which involved reaching, lifting and reshelving large three-ring binders, when she experienced low back and left leg pain. (Tr. 10-13). Dr. Goodwin diagnosed a recurrent left L5-S1 disc herniation and performed surgery on January 18, 2001. (Ex. 16).

The employer denied compensability on the grounds that claimant's work activities were not the major contributing cause of her lumbar radiculopathy and recurrent disc herniation at L5-S1, and also because her condition did not arise out of or in the course of her employment. (Ex. 18). The ALJ relied on the opinions of Drs. Gurney, Pylman and Sandell and found the claim compensable.

On review, the employer argues, among other things, that the persuasive medical evidence establishes that claimant's preexisting L5-S1 defect was the major contributing cause of her combined L5-S1 condition. Claimant does not dispute the ALJ's application of ORS 656.005(7)(a)(B) in this case. See *Multifoods Specialty Distribution v. McAtee*, 333 Or 629, 634 (2002) (a combined condition occurs when a new injury combines with an old injury or a preexisting condition to cause or prolong either disability or a need for treatment).

A determination of the major contributing cause involves the evaluation of the relative contribution of different causes of claimant's disability or need for treatment and deciding which is the primary cause. *Dietz v. Ramuda*, 130 Or App 397, 401 (1994), *rev dismissed* 320 Or 416 (1995). Although work activities that precipitate a claimant's injury or disease may be the major contributing cause of the condition, that is not always the case. *Id.* The medical expert must take into account all contributing factors in order to determine their relative weight. *SAIF v. Strubel*, 161 Or App 516, 521 (1999).

Claimant relies on the opinions of Drs. Gurney, Pylman and Sandell to establish compensability. For the following reasons, we find that those opinions are not sufficient to establish that her December 2000 work activities were the major contributing cause of disability or need for treatment for the recurrent L5-S1 disc herniation.

In evaluating the medical evidence, we may give greater weight to the opinion of the treating physician, depending on the record in each case. See *Dillon v. Whirlpool Corp.*, 172 Or App 484, 489 (2001). Here, we are persuaded by the opinion of Dr. Goodwin because of his opportunity to observe claimant over an extended period of time, and because he performed both of her back surgeries. See *Argonaut Insurance Co. v. Mageske*, 93 Or App 698, 701 (1988); *Weiland v. SAIF*, 64 Or App 810 (1983).

Dr. Goodwin began treating claimant in September 1997, when she sought treatment for a back and left leg pain that started without any inciting injury. (Ex. 2). He explained that claimant was on vacation and had developed back

stiffness. (*Id.*) Dr. Goodwin believed that claimant had a significant L5-S1 disc herniation. On September 19, 1997, he performed a discectomy and removed fragments from the disc space. (Exs. 3, 5). By October 24, 1997, Dr. Goodwin reported that claimant was doing very well after physical therapy. (Ex. 7).

In January 2001, claimant returned to Dr. Goodwin because of left leg numbness and tingling. (Ex. 13). He diagnosed a recurrent disc herniation and recommended surgery. (Exs. 13, 15). Dr. Goodwin performed surgery on January 18, 2001 and found a significant left disc herniation under the S1 nerve root. (Ex. 16).

In a later report, Dr. Goodwin explained that the major cause of claimant's recurrent disc herniation was the preexisting L5-S1 disc herniation, not the book-moving event in December 2000. (Ex. 25). He explained that there was a significant weakness in the annulus that allowed the original disc herniation, which was not work-related. (*Id.*) He said that the surgery went through the weakness in the annulus fibrosis, and he had removed the disc material that had extruded plus loose nucleus pulposus within the disc. (*Id.*) Dr. Goodwin did not believe that claimant's work injury was the major cause of the disability or need for treatment of the recurrent L5-S1 herniation. (*Id.*)

Dr. Goodwin's opinion is supported by that of Dr. Rosenbaum, who agreed with Dr. Goodwin's conclusion. Dr. Rosenbaum reasoned that, although the work incident may have contributed to the L5-S1 disc herniation, the major contributing cause was claimant's initial disc herniation and breakage of the outer annular fibers. (Ex. 27-4, -5).

Although claimant relies on the opinions of Drs. Gurney, Pylman and Sandell, we are not persuaded by their opinions. Dr. Gurney, claimant's family practitioner, acknowledged that claimant had a preexisting condition at L5-S1, but said that the major cause of her "condition" was the December 7, 2000 "book moving event." (Ex. 24). Because he provided no explanation for his opinion, we find that his opinion is entitled to little weight. *See Blakely v. SAIF*, 89 Or App 653, *rev den* 305 Or 672 (1988); *Moe v. Ceiling Systems*, 44 Or App 429 (1980).

Dr. Sandell initially examined claimant in late April 2001, more than four months after the December 2000 work incident. He reported that her injury occurred "while she was moving a lot of heavy manuals in a bookshelf." (Ex. 26D-1). He commented that claimant's "second surgery, coming as it did,

was to be somewhat expected since she had had prior surgery at that level which makes it more difficult to do surgery at that same level.” (Ex. 26D-2). He explained:

“[Claimant] feels that this condition is work related. In a sense it may be since she feels she was symptomless up until the bookshelf incident. She did have a pre-existing condition however which is well documented, but certainly the cascade that has led to her surgery and current problems stemmed historically from the lifting of the manuals at the bookshelf.” (Ex. 26D-3).

In a later report, Dr. Sandell reviewed Dr. Rosenbaum’s opinion and agreed “in general” with him. He explained:

“However, I would point out that it is certainly arguable that had [claimant] not stretched, lifting the heavy manuals, she might not have had the recurrence of the disc. Therefore, the mechanism of the injury to cause a recurrence of the disc could be argued as being the primary and major cause of bringing her to surgery the second time. True, she had an underlying previous condition which may predispose her towards having a recurrent disc, but it takes some kind of mechanism to bring that to the fore, and that would be the industrial injury that occurred when she lifted the manuals most recently in December of the year 2000. Had that industrial mechanism not occurred, then it could be argued she would not have had the recurrent disc. On that basis, you could say that 100% of her need for surgery and the subsequent pain that she has was a result of the second incident is due to the industrial injury.” (Ex. 28).

We are not persuaded by Dr. Sandell’s opinion for several reasons. First, although claimant testified that she was now treating with Dr. Sandell, a treating physician’s opinion is less persuasive when the physician did not examine the claimant immediately after the injury. *See McIntyre v. Standard Utility Contractors, Inc.*, 135 Or App 298, 302 (1995).

In addition, Dr. Sandell's opinion is not well-reasoned. Dr. Sandell said that it takes "some kind of mechanism to bring that to the fore" (Ex. 28); *i.e.*, it takes some kind of mechanism to cause claimant's recurrent disc herniation. However, Dr. Sandell did not explain why claimant's L5-S1 disc herniated in 1997 without any apparent injury or inciting event.

Dr. Sandell indicated it was "arguable" that claimant's injury was the major contributing cause and he said "it could be argued" that, had the industrial injury not occurred, she would not have had a recurrent disc herniation. (Ex. 28). Dr. Sandell's opinion indicates merely the possibility that the work injury was the major contributing cause of claimant's recurrent L5-S1 disc herniation. *See Gormley v. SAIF*, 52 Or App 1055, 1060 (1981) (the doctors' use of the words "could," "can," "it is reasonable to assume" and "we would like to assume" militated against a finding of medical causation in terms of probability). Moreover, we find that his opinion is not persuasive because it was essentially based on a "but for" or "precipitating cause" analysis. *See Dietz*, 130 Or App at 401. We also note that Dr. Sandell said that claimant's second surgery at L5-S1 "was to be expected" because she had prior surgery at that level. (Ex. 26D-2). Based on the foregoing reasons, we find that Dr. Sandell's opinion is insufficient to establish compensability of the recurrent L5-S1 disc herniation.

Claimant also relies on the opinion of Dr. Pylman, who examined her in early April 2001, four months after the December 2000 work incident. He reported that claimant's injury occurred "when she was doing heavy lifting at work[.]" (Ex. 26A). In a later report, Dr. Pylman explained:

"From the description at surgery, she did have scar formation in the area of her recurrent lesion representing a preexisting condition from her first surgery. However, she was asymptomatic prior to her work exposure. Therefore, the work exposure (moving heavy books) is the major (greater than 51%) cause of her recurrent symptoms and need for repeat surgery." (Ex. 27A).

In a June 26, 2001 letter, Dr. Pylman acknowledged that the risk of recurrent disc herniations was estimated at 4 percent, which indicated that the level of the previous operation was more prone to injury and was structurally weaker than a disc without a previous operation. (Ex. 29). Nevertheless, he explained that claimant had been doing well for over three years and, in the absence of the new injury, there was no reason to surmise that she would have had any difficulty with

her back. (*Id.*) He concluded that, although claimant's preexisting condition made her more likely to have an injury, the injury was caused by her work exposure. (*Id.*)

We are not persuaded by Dr. Pylman's opinion because it is not well-reasoned. He said that, in the absence of a "new injury," there was no reason to surmise that claimant would have had any difficulty with her back. (Ex. 29). Dr. Pylman's opinion indicates that some type of injury is required to cause a herniated disc. However, he did not explain why claimant's L5-S1 disc herniated in 1997 without any apparent injury or inciting event. Furthermore, we find that Dr. Pylman's opinion is essentially based on "but for" or "precipitating cause" analysis, which is insufficient to sustain claimant's burden of proving major contributing cause. *See Dietz*, 130 Or App at 401.

In summary, we conclude that the medical evidence is insufficient to establish that claimant's December 2000 work activities were the major contributing cause of the recurrent disc herniation. We therefore reverse the ALJ's order.

ORDER

The ALJ's order dated March 18, 2002 is reversed. The self-insured employer's denial is reinstated and upheld. The ALJ's attorney fee award is also reversed.

Entered at Salem, Oregon on November 25, 2002