

In the Matter of the Compensation of
GREGORY W. HUNT, Claimant

WCB Case No. 01-06883

ORDER ON REVIEW

Mustafa T Kasubhai PC, Claimant Attorneys
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Reviewing Panel: Members Langer, Bock, and Phillips Polich. Member Phillips Polich dissents.

Claimant requests review of Administrative Law Judge (ALJ) Stephen Brown's order that upheld the SAIF Corporation's denial of his injury claim for a low back condition. On review, the issue is compensability.

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

Claimant works in a restaurant as a dishwasher. On the morning of July 7, 2001, while attempting to move a metal cold table, claimant felt a "pop" in his low back. (Exs. 3; 4). Later the same day, the employer sent claimant to Dr. Moore. (Ex. 5). Dr. Moore recorded a history of muscle spasm "in the low back" for which claimant had been taking Soma on a "long term" basis. (*Id.*) Dr. Moore diagnosed "low back strain." (*Id.*)

On July 13, 2001, and for all relevant times thereafter, claimant received treatment for this low back problem from PA Cummins.¹ (Exs. 9; 10; 12; 16; 21). On August 10, 2001, PA Cummins ordered an MRI. (Ex. 12). The MRI (as interpreted by Dr. Walkey) demonstrated degenerative disc disease with posterior bulging at L4-5, and a small central disc herniation at L5-S1. (Ex. 17).

On August 27, 2001, SAIF denied the claim because (among other things) the work incident was not the major contributing cause of claimant's disability or need for treatment. (Ex. 18). Claimant requested a hearing.

On November 14, 2001, claimant was evaluated (at SAIF's request) by Dr. Arbeene, who was unable to identify a specific diagnosis related to the July 2001 work event. (Ex. 19-6). Based on his review of claimant's medical records, including the MRI, and his examination of claimant, Dr. Arbeene opined

¹ PA Cummins was claimant's primary family medical provider.

that claimant was suffering from degenerative disc disease and chronic lower back pain. (Ex. 19-6). Dr. Arbeene further opined that claimant's preexisting problems were the major contributing cause of his disability and need for treatment. (*Id.*)

On December 7, 2001, PA Cummins, responding to an inquiry from claimant's counsel, stated that he had been claimant's primary medical provider since April of 1998. (Ex. 21-1). PA Cummins indicated that the July 7, 2001 caused an acute lumbar strain that likely combined with claimant's chronic back condition to exacerbate his chronic back condition. (*Id.*) However, finding that the muscle spasms that claimant had experienced after the July 7, 2001 work incident were in the area of L4-5 and L5-S1, instead of T-10 to L-2 (the area of chronic spasm), and taking into account the mechanism of injury (which PA Cummins opined was consistent with the development of an acute lumbar strain), PA Cummins concluded that the July 7, 2001 work incident was the major contributing cause of claimant's disability and need for treatment. (Ex. 21-2).

The ALJ determined from the medical record that the work incident of July 2001 resulted in a "combined condition," and that the major contributing cause standard was applicable to this claim. Finding from the MRI that claimant had preexisting degenerative disc problems at L4-5 and L5-S1, and further finding that PA Cummins had failed to evaluate that condition in rendering his ultimate causation opinion, the ALJ concluded that PA Cummins' opinion was not persuasive. Because PA Cummins' opinion was the only opinion in the record supporting the compensability of claimant's combined condition, the ALJ concluded that SAIF's denial should be upheld.

On review, claimant asserts: (1) the July 7, 2001 work incident did not result in a "combined" condition; and (2) PA Cummins' opinion persuasively established that he sustained a compensable injury from the July 7, 2001 work incident. We disagree.

ORS 656.005(7)(a)(B) provides that if an injury combines at any time with a preexisting condition to cause or prolong disability or a need for treatment, the combined condition is compensable if the work injury was the major contributing cause of the disability and/or need for treatment of the combined condition. In *Multifoods Specialty Distribution v. McAtee*, 164 Or App 654, 662 (1999), the court held that a "combined condition" under ORS 656.005(7)(a)(B) may constitute either an integration of two conditions or the close relationship of those conditions, without integration. Thus, in order for there to be a "combined condition," there must be at least two conditions that merge or exist harmoniously.

Luckhurst v. Bank of America, 167 Or App 11 (2000). Whether a “combined condition” exists is a complex medical question. Consequently, that issue must be resolved by expert medical opinion. *See Uris v. Compensation Department*, 247 Or 420 (1967).

Here, because Dr. Arbeene could not identify a diagnosis related to the July 2001 work incident, and because he indicated a combined condition “may” exist, we conclude that Dr. Arbeene’s opinion does not establish the existence of a combined condition. (Ex. 19-6). *See Gormley v. SAIF*, 52 Or App 1055 (1981); *Robert C. Victoria*, 53 Van Natta 781 (2001); *Ted L. Golden*, 51 Van Natta 55, 56 (1999) (“could have” and “may have” indicate only possibility, not medical probability).

On the other hand, PA Cummins opined that the effect of the July 7, 2001 work incident combined with preexisting conditions in claimant’s low back. Because PA Cummins had the opportunity to examine claimant before and after his current claim for a low back condition, he is in an advantageous position to offer an opinion regarding the existence of a combined condition. *See Kienow’s Food Stores v. Lyster*, 79 Or App 416 (1986). Consequently, we conclude that the July 7, 2001 work incident resulted in a “combined” condition, and that ORS 656.005(7)(a)(B) is applicable.

In order to establish that his strain condition is compensable, claimant must show that his work injury was the major contributing cause of the disability or need for treatment of the combined condition. ORS 656.005(7)(a)(B); *SAIF v. Nehl*, 148 Or App 279, 283 (1993). To satisfy the “major contributing cause” standard, claimant must establish that his work activities contributed more to the claimed condition than all other factors combined. *See, e.g., McGarrah v. SAIF*, 296 Or 145, 146 (1983). A determination of the major contributing cause involves the evaluation of the relative contribution of different causes of claimant’s disease and deciding which is the primary cause. *See Dietz v. Ramuda*, 130 Or App 397 (1994), *rev dismissed* 320 Or 416 (1995).

Here, there is MRI evidence (interpreted by Dr. Walkey) demonstrating that claimant has: (1) degenerative disk disease at L4-5 and L5-S1; and (2) a small central disk herniation at L5-S1. (Ex. 17). However, as noted by the ALJ, in rendering his ultimate causation opinion, PA Cummins failed to discuss the contribution, if any, of the lumbar disk conditions to claimant’s combined strain condition. Consequently, especially in light of Dr. Arbeene’s opinion that the preexisting disc conditions account for most of claimant’s problem, we find PA

Cummins' opinion insufficiently explained to be persuasive. *Blakely v. SAIF*, 89 Or App 653, 656, *rev den* 305 Or 972 (1988) (physician's opinion lacked persuasive force because it was unexplained).

ORDER

The ALJ's order dated January 11, 2002 is affirmed.

Entered at Salem, Oregon on September 3, 2002

Board Member Phillips Polich dissenting.

Unlike the majority, I find PA Cummins' opinion persuasive.² Consequently, I respectfully dissent.

I begin by noting that it was PA Cummins' opinion that: (1) the July 2001 work event caused a lumbar strain; and (2) the lumbar strain was an independent injury that aggravated claimant's chronic thoracic back pain condition. However, it is evident from PA Cummins' chart notes and causation opinion that, immediately following the work incident, the condition being treated was a lumbar strain. Because it was the lumbar strain (and not a lumbar disk) that resulted in claimant's need to seek treatment from PA Cummins, I conclude that PA Cummins' failure to comment on the lumbar disk condition does not detract from the persuasiveness of his ultimate causation opinion. Accordingly, I find PA Cummins' opinion persuasive. Consequently, I would conclude that claimant has established the compensability of his lumbar strain condition. Because the majority decides differently, I respectfully dissent.

² I agree with the majority's conclusion that claimant's low back condition is a "combined condition."