
In the Matter of the Compensation of
DONNA M. BUTTERFIELD, Claimant
WCB Case No. 08-05420
ORDER ON REVIEW
Dale C Johnson, Claimant Attorneys
Brian L Pocock, Defense Attorneys

Reviewing Panel: Members Biehl and Lowell.

The self-insured employer requests review of that portion of Administrative Law Judge (ALJ) Donnelly's order that set aside its denials of claimant's new/omitted medical condition claims for low back conditions. On review, the issue is compensability. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," but not the "Findings of Ultimate Fact."

CONCLUSIONS OF LAW AND OPINION

In May 2007, claimant sustained a non-work-related right knee injury, for which Dr. Lamoreaux provided treatment for a severe knee sprain. (Ex. 1). Claimant recovered from the injury and returned to regular work.

In May 2008, claimant suffered a compensable right knee injury, accepted for a right knee contusion. After receiving initial treatment from Dr. Kaiser, she was then referred to Dr. Lamoreaux, who suspected that claimant had radicular pain in the right leg. Claimant subsequently requested that the employer accept a low back injury under the accepted right knee claim. In August 2008, the employer denied claimant's request, which resulted in her hearing request.

In June 2009, claimant requested that the employer accept a "combined" low back condition. The employer also denied that request, which prompted claimant to request a hearing regarding that denial.

In setting aside the employer's denials, the ALJ applied a combined condition analysis and determined that the employer did not satisfy its burden of proving that the otherwise compensable May 2008 injury was not the major contributing cause of the disability and need for treatment of a combined low back condition. In doing so, the ALJ found the medical opinion of Dr. Hacker, a consulting physician, to be the most persuasive because it was based on what the

ALJ determined to be an accurate history that claimant's low back condition was asymptomatic before the May 2008 injury. The ALJ reasoned that the contrary opinion of Dr. Rosenbaum, an examining physician, was unpersuasive because he opined that claimant had preexisting L5 radiculopathy based on his interpretation of Dr. Lamoreaux's May 2007 chart notes. After examining Dr. Lamoreaux's records, the ALJ determined that claimant sustained only a right knee injury in May 2007 and that, therefore, Dr. Rosenbaum's interpretation of Dr. Lamoreaux's May 2007 chart notes was incorrect.

On review, the employer contests the ALJ's evaluation of the medical evidence, arguing that Dr. Rosenbaum's opinion is the most persuasive because it was based on the most complete history and was the best reasoned. We agree.

The employer does not dispute that claimant sustained an otherwise compensable low back injury in May 2008 that combined with a preexisting low back condition. The employer, therefore, has the burden of proving that the "otherwise compensable injury" was not the major contributing cause of claimant's disability/need for treatment for the combined condition. ORS 656.266(2)(a). The determination of major contributing cause involves the evaluation of the relative contribution of the different causes of claimant's condition and a decision as to which is the primary cause. *Dietz v. Ramuda*, 130 Or App 397, 401 (1994), *rev dismissed*, 321 Or 416 (1995). We look to the medical evidence supporting the employer's position that the "otherwise compensable injury" was not the major contributing cause of the disability/need for treatment of the combined condition. *Jason V. Skirving*, 58 Van Natta 323, 324 (2006), *aff'd without opinion*, 210 Or App 467 (2007).

Dr. Rosenbaum provided the medical evidence supporting the employer's position. He opined that, while the May 2008 injury combined with preexisting lumbar spondylosis and spondylolisthesis, the preexisting condition was the major contributing cause of claimant's need for treatment. Dr. Rosenbaum noted that claimant had a history of right L5 radiculopathy in May 2007. (Ex. 22).

Based on his review of Dr. Lamoreaux's May 2007 chart notes, Dr. Rosenbaum believed that claimant had experienced the same radiculopathy in May 2007. (Ex. 25-19). The ALJ discounted Dr. Rosenbaum's opinion because, based on her review of Dr. Lamoreaux's May 2007 chart notes, claimant had only a severe right knee sprain at that time which did not involve the low back. Thus, the ALJ determined that Dr. Rosenbaum had incorrectly interpreted Dr. Lamoreaux's findings in May 2007.

We do not agree with the ALJ's reasoning. Although claimant's symptoms in May 2007 do not refer to a low back injury, we must rely on expert medical evidence. *See SAIF v. Calder*, 157 Or App 224, 227-28 (1998) (the Board is not an agency with specialized medical expertise; its findings must be based on medical evidence in the record). Dr. Rosenbaum's interpretation of Dr. Lamoreaux's chart notes is un rebutted.

Specifically, the record does not contain an opinion by Dr. Lamoreaux that rules out L5 radiculopathy in May 2007. Dr. Lamoreaux was asked whether she concurred with Dr. Hacker's medical opinion that the May 2008 injury was the major contributing cause of an alleged low back disc injury and need for surgery. Dr. Hacker had commented that claimant's preexisting low back conditions were "asymptomatic" before the May 2008 injury.¹ (Ex. 23). Dr. Lamoreaux did not concur with Dr. Hacker's report, but rather stated that she would "defer" to Dr. Hacker's opinion because that was not her area of expertise. (Ex. 24). Given Dr. Lamoreaux's deference to Dr. Hacker's opinion, we conclude that she withdrew from the causation dispute.

Accordingly, we find that Dr. Rosenbaum's medical opinion is well reasoned and persuasive. Moreover, we find Dr. Hacker's contrary opinion to be based on an inaccurate history that claimant's preexisting condition had been "asymptomatic" before the May 2008 injury. *See Miller v. Granite Constr. Co.*, 28 Or App 473, 478 (1977) (medical evidence based on inaccurate information was insufficient to prove compensability); *Lisa M. Lunt*, 62 Van Natta 980, 984 (2010) (medical opinion found unpersuasive because it was based on an inaccurate history regarding the claimant's symptoms). In light of this, we give greater weight to Dr. Rosenbaum's opinion and conclude that it satisfies the employer's burden of proof under ORS 656.266(2)(a). Thus, we reverse.

ORDER

The ALJ's order dated December 17, 2009 is reversed in part and affirmed in part. That portion of the ALJ's order that set aside the employer's August 2008 and 2009 denials is reversed. The employer's denials are reinstated and upheld. The ALJ's \$6,500 attorney fee and costs awards are also reversed. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on June 30, 2010

¹ Dr. Hacker did not address Dr. Rosenbaum's analysis of Dr. Lamoreaux's May 2007 chart notes.