

---

In the Matter of the Compensation of  
**CONNIE L. KILBY, Claimant**  
WCB Case No. 10-03519  
ORDER ON REVIEW  
Swanson Thomas & Coon, Claimant Attorneys  
Judy L Johnson, Defense Attorneys

Reviewing Panel: Members Lowell and Biehl.

The self-insured employer requests review of those portions of Administrative Law Judge (ALJ) Pardington's order that: (1) set aside its denial of claimant's new/omitted medical condition claim for a T6-7 disc condition; and (2) awarded a \$12,000 attorney fee under ORS 656.386(1). In her brief, claimant seeks an increase in the ALJ's attorney fee award. On review, the issues are compensability and attorney fees.

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

Claimant sustained a compensable injury on September 18, 2003. The employer accepted a disabling thoracic strain. Claimant treated conservatively with Dr. Graham, who referred her to Dr. Long in 2006.

On October 30, 2008, claimant asked the employer to expand its acceptance to include "thoracic strain injury to T67 disc, without disc protrusion, with slight spinal nerve root and cord irritation." (Ex. 72). On July 15, 2010, the employer denied the claim.

On July 29, 2010, the employer closed the accepted thoracic strain claim with an award of 1 percent unscheduled permanent disability. (Ex. 93).

Claimant requested a hearing, contesting the denial and seeking penalties and attorney fees for allegedly unreasonable claim processing.

The ALJ set aside the denial, based on the diagnoses and opinions of Drs. Long and Slack. The ALJ also assessed a penalty and attorney fees for an untimely denial.

The employer contends that the opinions of Drs. Rosenbaum, Carr, and Swanson, examining physicians, persuasively establish that claimant does not have a T6-7 disc condition. We disagree, based on the following reasoning.

To prove her new/omitted medical condition claim, claimant must establish that the claimed T6-7 disc condition exists and that the work injury was a material contributing cause of the disability or need for treatment for that condition.<sup>1</sup> ORS 656.005(7)(a); ORS 656.266(1); *Maureen Y. Graves*, 57 Van Natta 2380, 2381 (2005). Considering the disagreement between physicians regarding the existence of the claimed T6-7 condition, the case presents a complex medical question that must be resolved by expert medical evidence. *Uris v. State Comp. Dep't*, 247 Or 420, 426 (1967); *Barnett v. SAIF*, 122 Or App 279, 282 (1992). We give more weight to those opinions that are well reasoned and based on the most complete relevant information. *Jackson County v. Wehren*, 186 Or App 555, 559 (2003); *Somers v. SAIF*, 77 Or App 259 (1986).

In the absence of persuasive reasons to the contrary, we generally give greater weight to the opinion of a treating physician when he or she has had a better opportunity to observe and evaluate a claimant's condition over an extended period of time. *Weiland v. SAIF*, 63 Or App 810, 814 (1983). However, we may properly give greater or lesser weight to the opinion of a treating physician, depending on the record in each case. *Dillon v. Whirlpool Corp.*, 172 Or App 484, 489 (2001).

According to Dr. Long, her treating physician, claimant's ongoing problems emanate from a T6-7 disc disruption (or lesion) caused by the 2003 work injury.<sup>2</sup> Based on leaking T6-7 disc material (that he observed on a 2010 discogram) and multiple injection responses, Dr. Long ruled out other disc diagnoses. He explained that leaking of an "inflammatory enzyme called phospholipase A2" (at T6-7) irritated claimant's spinal cord and caused her symptoms. (*See Ex. 100-2*).

Dr. Long opined that the circumstances of the injury (trunk flexion, active contraction of the trunk extensors, and repetitive jerking of the upper trunk into flexion against resistance) were "precisely the circumstances that would load thoracic discs and cause disc disruption." (*Ex. 76-5*).

---

<sup>1</sup> The employer does not contest the ALJ's conclusion (with which we agree) that claimant does not have a legally cognizable "preexisting condition" or a "combined condition" under ORS 656.005(7)(a)(B), ORS 656.005(24)(b), and ORS 656.266(2).

<sup>2</sup> Dr. Slack supported Dr. Long's diagnosis. (*See Ex. 99A*).

Dr. Long also opined that pain from degenerative spondylosis is usually worse in the morning -- unlike claimant's pain, which increases with activity and walking, a pattern very typical of disc injury. (Ex. 95A-3; *see* Ex. 100-3). Thus, Dr. Long discounted degenerative causes in favor of an injury-related T6-7 disc disruption diagnosis.

Drs. Rosenbaum, Swanson, and Carr, examining physicians, provide the opposing opinions. Based primarily on the *absence* of disc-related MRI findings, these doctors opined that claimant's problems were not injury-related. (*See* Exs. 73, 86, 95, 98). Instead, Dr. Rosenbaum attributed claimant's symptoms to degenerative spondylosis, whereas Dr. Carr opined that claimant had no "specific pathology." (*See* Ex. 95-18).

Dr. Long acknowledged that MRIs were necessary to rule out obvious disc conditions. However, he explained that discography was designed to identify more subtle findings that MRIs do not show, such as the disc disruption that he diagnosed. (*See* Ex. 95A-3; *see also* Exs. 34, 78A, 84).<sup>3</sup>

Dr. Long further explained that claimant's "non dermatomal" symptoms (and the absence of MRI findings) were consistent with his T6-7 disc disruption diagnosis:

"When there is a disc disruption, as in claimant's case, the disc likely produces a bit of inflammation that irritates the spinal cord. There is not enough inflammation to produce any imaging abnormality but it bothers the spinal cord in the same way that it would bother a nerve root. However, spinal cord irritation doesn't follow a dermatomal pattern. As demonstrated by claimant's results from her transforaminal epidural

---

<sup>3</sup> According to Dr. Long, the disc that looked "best" on the MRI was actually the one causing the problem. Once the discogram identified the painful disc, he stated that he was able to confirm that with epidural injection. (Ex. 100-3). Dr. Long also agreed with the following statement:

"Figuring that the partial relief claimant had felt with the T7-8 epidurals might be caused by some migration of the steroid to T6-7, you suspected that if T6-7 was really the painful disc then an epidural at that spot would work better than anything else you had tried. She had one epidural at T6-7 and got 100% symptom relief for at least a week. You find this to be powerful diagnostic evidence that the IME doctors consistently ignore." (*Id.*)

injections [TESIs], the spinal cord nerve irritation at T6-7 was actually causing nerve symptoms in her right buttock and thigh.” (Ex. 95A-3; *see* Ex. 100-2).

The examining physicians did not respond to Dr. Long’s opinion that the mechanism of the 2003 injury was *consistent* with T6-7 disruption and claimant’s symptoms were *inconsistent* with spondylosis.<sup>4</sup>

We find Dr. Long’s opinions well reasoned and persuasive. We also find them more persuasive than the opposing opinions, because they more thoroughly address claimant’s particular circumstances and the opposing opinions do not rebut Dr. Long’s reasoning on these particulars. *See Janet Benedict*, 59 Van Natta 24062409 (2007), *aff’d without opinion*, 227 Or App 2989 (2009) (medical opinion unpersuasive when it did not address contrary opinions).

Finally, the employer argues that Dr. Long’s current diagnosis and causation opinion are inconsistent with his attribution of 100 percent of claimant’s permanent impairment to the accepted thoracic *strain* when the initial injury claim was closed (with a 1 percent permanent disability award). However, Dr. Long was aware that only a strain was accepted at claim closure. Moreover, Dr. Long’s prior opinion concerned claimant’s permanent impairment, whereas his current opinions pertain to the relationship between the T6-7 disc condition and the September 2003 work injury. In any event, to the extent any “inconsistency” exists, we do not consider it sufficient to render Dr. Long’s current opinions unpersuasive.<sup>5</sup> *See Terry L. Drader*, 62 Van Natta 1037, 1040 (2010) (medical opinions that accepted the claimant’s history as established by the prior procedural posture of the claim and addressed the claimant’s condition as of the time of their examinations (years later) did not conflict with the “law of the case”).

Instead, we find Dr. Long’s opinion about claimant’s current condition well-reasoned and persuasive as explained above. *See SAIF v. Strubel*, 161 Or App 516, 521-22 (1999) (medical opinions are evaluated in context and based on

---

<sup>4</sup> In light of the opinions of Drs. Graham, Long, Rosenbaum, and Rice, we do not find that claimant’s complaints are “magnified,” volitional, or psychological in origin. (*See* Exs. 73-8, 76-5, 96, 99). In reaching this conclusion, we note that Dr. Rice has been claimant’s treating psychiatrist since 1997 and Dr. Graham has been claimant’s primary care provider since 1998. *See Weiland v. SAIF*, 63 Or App 810, 814 (1983).

<sup>5</sup> The extent of claimant’s permanent disability award arising out of the July 2010 claim closure is not before us.

the record as a whole to determine sufficiency). Accordingly, based on Dr. Long's opinion, we affirm the ALJ's decision setting aside the employer's denial of claimant's new/omitted medical condition claim for a T6-7 disc condition.

Claimant's attorney is entitled to an assessed fee for services on review. 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 concerning the compensability issue is \$4,000, payable by the employer.<sup>6</sup> In reaching this conclusion, we have particularly considered the time devoted to the issue (as represented by claimant's attorney's uncontested representation and claimant's respondent's brief), the complexity of the issue, and the value of the interest involved.

Finally, claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by the employer. See ORS 656.386(2); OAR 438-015-0019; *Gary E. Gettman*, 60 Van Natta 2862 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

### ORDER

The ALJ's order dated April 22, 2011 is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$4,000, to be paid by the employer. Claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by the employer.

Entered at Salem, Oregon on March 6, 2012

---

<sup>6</sup> Claimant's counsel is not entitled to an attorney fee award for services on review devoted to the attorney fee issue. See *Dotson v. Bohemia, Inc.*, 80 Or App 233 (1986); *Amador Mendez*, 44 Van Natta 736 (1992).