
In the Matter of the Compensation of
KENNETH DUKEK, Claimant
WCB Case No. 11-01553
ORDER ON REVIEW
Black Chapman et al, Claimant Attorneys
Julie Masters, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Lowell, Biehl, and Herman.

The SAIF Corporation requests review of Administrative Law Judge (ALJ) Naugle's order that set aside its denial of claimant's low back injury claim. On review, the issue is compensability. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," and offer the following summary.

In August 2010, claimant had an incident walking his dogs which resulted in muscle pain between his shoulder blades. (Tr. 14). A few days later, on August 13, 2010, claimant was playing golf and felt like he had pulled his right hamstring. (Tr. 15). He sought treatment at the emergency room on August 14, 2010, where he complained of right "thigh pain from the back of his leg down."¹ The chart note indicated that claimant had injured his "low back" two days prior. (Ex. 7-1).

Dr. Cohen, the emergency room physician, diagnosed muscle strain/spasm in the right gluteal and hamstring muscles. (Ex. 7-1). Lumbar spine x-rays revealed no fractures, bone abnormalities, or significant degenerative changes compared to an August 2009 pelvic CT scan demonstrating anterior osteophytes at the sacroiliac joints bilaterally, worse on the left. (Ex. 8).

On August 16, 2010, claimant presented to Dr. Suarez with pain in the right buttock area, radiating to the calf. (Ex. 9-1). On examination, Dr. Suarez recorded pain on palpation of the right "lower lumbar," "sacral," and buttock areas. Claimant also had a positive straight-leg test on the right. (Ex. 9-2). Diagnosing "sciatica-type pain," Dr. Suarez prescribed muscle relaxants and instructed claimant on home exercises. (Tr. 17; Ex. 9-2).

¹ Claimant testified that the pain between his shoulder blades had resolved by the time he was seen in the emergency room. (Tr. 14).

In late October 2010, claimant saw Dr. Malak, a podiatrist, for evaluation of a leg-length discrepancy. (Ex. 10). Dr. Malak reported that claimant's CT scan showed sacral iliac joint arthritis with some changes around the "S1 spinal level." (Ex. 10-2). Also noting arthritic changes at "L4 and L5," Dr. Malak opined that the arthritic changes in claimant's hip and "low back" were the source of his current pain. (Ex. 10-3). Recommending that claimant see a neurosurgeon for possible surgery "to reduce some of the pain," Dr. Malak's diagnosis was osteoarthritis of the lower spine with "lumbago."² (Ex. 10-2,-3).

Claimant visited Dr. Suarez again in December 2010, 10 days before the claimed work injury, to obtain refills on his medication. (Tr. 21; Ex. 12). Dr. Suarez noted: "We [previously] saw [claimant] for sciatica, which has not resolved since then." (Ex. 12-1).

On December 17, 2010, claimant experienced low back pain while bending and twisting using a chain saw at work. (Tr. 21; Ex. 13). The emergency room report recorded "Lower back pain radiating down [right] leg, [history] of same." (Ex. 14-1). An MRI revealed an L5-S1 extruded disc fragment affecting the right S1 nerve root. (Ex. 15).

Claimant had his annual physical examination on December 27, 2010, with Dr. Bisgrove. (Exs. 10, 17). Dr. Bisgrove reported that claimant's "main concern this date is that some few months ago he was playing golf and somehow or another managed to injure his back with a described right lower extremity radiculopathy." (Ex. 17-1).

In early January 2011, Dr. Kitchel took a history of "ongoing low back, right buttock, and right leg pain for the last 5 or 6 months," and recommended surgery for claimant's herniated disc. (Ex. 20-1, -4). He subsequently performed a right-sided L5-S1 hemilaminotomy, and right-sided L5-S1 microdiscectomy. (Ex. 30).

Observing that claimant had lumbar degenerative disc changes diagnosed in March 2010, Dr. Kitchel believed that it was medically probable that claimant's herniated disc preceded his December 2010 work incident. (Ex. 31-1). In any event, Dr. Kitchel opined that claimant's work injury combined with his preexisting lumbar condition, but was only a minor contributor to his need for treatment/disability for the combined condition. (*Id.*)

² Lumbago is "pain in the lumbar region." Dorland's Illustrated Medical Dictionary 961 (28th ed 1994).

Dr. Smith performed a medical records review, noting that claimant had L5-S1 degenerative changes which preexisted both his August 2010 golfing incident and his December 2010 work incident. (Ex. 24). Like Dr. Kitchel, Dr. Smith opined that claimant's December 2010 work injury combined with his preexisting lumbar condition, but the resultant disability/need for treatment was caused in major part by the preexisting lumbar condition. (Ex. 28-1).

In a deposition, Dr. Kitchel opined that, if claimant did *not* have previous low back pain, the December 2010 work incident would be the major contributing cause of his disability/need for treatment of the combined low back condition. (Ex. 32-6). However, if claimant *had* experienced such pain, Dr. Kitchel would adhere to his previously-stated opinion that the work incident was not the major contributor. (Ex. 32-15).

SAIF denied the low back injury claim. Thereafter, claimant requested a hearing. (Ex. 25).

CONCLUSIONS OF LAW AND OPINION

In setting aside SAIF's denial, the ALJ found that claimant's December 17, 2010 work incident was a material contributing cause of his disability/need for treatment for his low back condition. Persuaded by claimant's testimony that he had not experienced low back pain before the December 2010 work injury,³ the ALJ did not find a "combined condition," and determined that the low back injury claim was compensable.

On review, SAIF contends that the "pre-December 2010" medical reports outweigh claimant's testimony that he did not previously receive treatment for low back pain. Asserting that the claim is subject to a "combined condition" analysis under ORS 656.266(2)(a) and ORS 656.005(7)(a)(B), SAIF argues that it has established that claimant's December 2010 work incident was not the major contributing cause of his disability/need for treatment of his combined low back condition. Based on the following reasoning, we agree with SAIF's contentions.

To establish a compensable injury, claimant is required to prove by a preponderance of the evidence that his work injury was a material contributing cause of his need for treatment or disability. ORS 656.005(7)(a); ORS 656.266(1);

³ Claimant testified that his previous pain had been limited to the right buttock with radiation down his right leg, and that, in contrast, his December 2010 work incident caused sudden and severe low back pain. (Tr. 22, 23).

Steven L. Blanchard, 60 Van Natta 453, 453 (2008). A “material contributing cause” is a substantial cause, but not necessarily the sole cause or even the most significant cause. See *Van Blokland v. Oregon Health Sciences Univ.*, 87 Or App 694, 698 (1987).

If claimant meets that burden and the medical evidence establishes that the “otherwise compensable injury” combined at any time with a “preexisting condition” to cause or prolong disability or a need for treatment, SAIF has the burden to prove that the “otherwise compensable injury” is not the major contributing cause of claimant’s disability or need for treatment of the combined condition. ORS 656.005(7)(a)(B); ORS 656.266(2)(a); *Wanda Rockwell*, 58 Van Natta 1247, 1248 (2006); *Jack G. Scoggins*, 56 Van Natta 2534, 2535 (2004).

For purposes of this analysis, we assume that claimant’s December 2010 work-related low back injury was a material contributing cause of his disability/need for treatment for his low back condition and, as such, an “otherwise compensable injury” has been established.

We turn to the question of whether claimant’s “otherwise compensable injury” combined with a preexisting low back condition.⁴ As detailed above, claimant’s prior medical records and testing from several providers include references to low back pain.

For example, an August 2010 emergency room note reported that claimant had “injured his low back;” Dr. Suarez described “sciatica-type pain,” found claimant tender to palpation at the lower lumbar and sacral areas, and noted a positive straight-leg test on the right; and Dr. Malak diagnosed lumbago. (Exs. 7, 9, 10). Even *after* claimant’s December 2010 work injury, Dr. Bisgrove took a history from claimant referring to his August 2010 golfing incident as the cause of his back pain. (Ex. 17-1).

Based on the aforementioned medical records, Dr. Smith stated that claimant’s initial disc herniation probably occurred in August 2010 and that his lumbar degenerative condition had been diagnosed/treated before claimant filed his December 2010 injury claim. (Exs. 24, 28). Dr. Smith characterized claimant’s December 2010 work incident as “simply an aggravation of an ongoing situation.” (Ex. 24-5).

⁴ For injury claims, a “preexisting condition” is defined by ORS 656.005(24)(a) as “any injury, disease, congenital abnormality, personality disorder, or similar condition that contributes to disability or need for treatment.” ORS 656.005(24)(a)(A) and (B) require that a “preexisting condition” must have been diagnosed or treated before certain events, except if the preexisting condition is arthritis or an arthritic condition. *Ronald A. Bush*, 57 Van Natta 3169, 3169-70 (2005), *aff’d without opinion*, 204 Or App 780 (2006).

Dr. Kitchel concurred with Dr. Smith's opinion that claimant's disc herniation had preexisted his work injury. (Exs. 27, 31). In doing so, Dr. Kitchel noted that claimant had low back pain with radicular symptoms, and a positive straight leg test on the right, all before the December 2010 work injury. (Ex. 31).

After considering these reports, we are persuaded that claimant previously treated for a low back condition (consisting of degenerative disc disease, and probably a herniated disc) that contributed to his subsequent need for treatment for his work-related December 2010 injury. Consequently, based on these medical opinions, along with the accompanying medical record, we find that claimant has a preexisting condition pursuant to ORS 656.005(24)(a).⁵

In reaching this conclusion, we acknowledge the ALJ's assessment that claimant's demeanor was credible while testifying that his complaints were limited to the right leg and buttock area. *See Erck v. Brown Oldsmobile*, 311 Or 519, 526 (1991) (on *de novo* review, it is a good practice for an agency or court to give weight to the factfinder's credibility assessments); *see also Carlos Sanchez*, 59 Van Natta 58, 58-59 (2007) (same). However, the contemporaneous record documenting his complaints and the testing administered in diagnosing the source of symptoms persuasively establishes that claimant had been diagnosed and treated for a low back condition before his December 2010 work injury. *See Martin A. Rigsby*, 63 Van Natta 2180, 2182 (2011) (contemporaneous medical records that documented six initial contacts with medical providers in which no low back injury was reported were more reliable than claimant's testimony). Because the medical record further establishes that this low back condition contributed to claimant's disability or need for treatment, we are persuaded that he had a "preexisting condition."

Accordingly, we turn to whether claimant's preexisting low back condition combined with his December 2010 work injury. As explained above, both Drs. Smith and Kitchel opined that such a combining occurred. (Exs. 28, 31). SAIF, therefore, must establish that claimant's otherwise compensable injury was not the major contributing cause of his disability/need for treatment for the combined condition. ORS 656.266(2)(a). Based on Dr. Kitchel's opinion, we find that SAIF met its burden of proof.

⁵ The record also contains references to arthritis or an arthritic condition in claimant's lumbar and sacral spine. (Exs. 6, 10).

Dr. Kitchel concurred with a SAIF-authored letter that stated: “It is medically probable that the disc herniation preexisted the work event of December 17, 2010, and that whatever contribution the work event made to the need for treatment/disability was minor, and not the major contributing cause.” (Ex. 31-1). Subsequently, at deposition, Dr. Kitchel was asked to assume that claimant did *not* have low back symptoms before his work injury. (Ex. 32-5). Based on that history, Dr. Kitchel agreed that the work injury would be the major cause of claimant’s need for treatment/disability of the combined condition. (Ex. 32-6).

Yet, as explained above, the contemporaneous medical records do not support such an assumption regarding the onset of claimant’s low back pain. Moreover, Dr. Kitchel reiterated that, based on the history as he understood it from claimant and other medical records, that claimant’s December 2010 work injury was not the major contributing cause of his disability/need for treatment for the combined condition. As the treating surgeon, we find Dr. Kitchel’s opinion persuasive. *See Argonaut Ins. Co. v. Mageske*, 93 Or App 698, 702 (1988) (treating surgeon’s opinion given great weight because of ability to observe the claimant’s shoulder during surgery and first-hand exposure to and knowledge of the claimant’s condition).

In conclusion, based on the aforementioned reasoning, we are persuaded that claimant’s otherwise compensable December 2010 work injury was not the major contributing cause of his disability/need for treatment for his combined low back condition. Consequently, the claim is not compensable. Thus, we reverse.

ORDER

The ALJ’s order dated August 29, 2011, as amended August 31, 2011, is reversed. SAIF’s denial is reinstated and upheld. The ALJ’s \$7,000 attorney fee and associated costs awards are reversed.

Entered at Salem, Oregon on March 16, 2012