
In the Matter of the Compensation of
FRANCISCO ELIAS-VARGAS, Claimant
WCB Case No. 11-02079
ORDER ON REVIEW
Schoenfeld & Schoenfeld, Claimant Attorneys
Gilroy Law Firm, Defense Attorneys

Reviewing Panel: Members Weddell, Langer, and Somers. Member Langer dissents in part.

The self-insured employer requests review of those portions of Administrative Law Judge (ALJ) Kekauoha's order that: (1) set aside its denial of claimant's new/omitted medical condition claim for bilateral lumbar radiculopathy; (2) set aside its denial of claimant's occupational disease claim for facet arthropathy/facet syndrome; and (3) awarded a \$20,000 employer-paid attorney fee under ORS 656.386(1). Claimant cross-requests review of those portions of the ALJ's order that: (1) upheld the employer's denial of his combined lumbar strain condition; and (2) awarded the \$20,000 employer-paid attorney fee. On review, the issues are compensability and attorney fees.

We adopt and affirm the ALJ's order with the following supplementation to address the lumbar radiculopathy and facet conditions.

In setting aside the employer's denial of claimant's new/omitted medical condition claim for bilateral lumbar radiculopathy, the ALJ found that claimant proved the existence of the claimed condition, and that his February 3, 2010 work injury was a material, and the major, contributing cause of his disability/need for treatment.¹ In setting aside the employer's denial of claimant's occupational disease claim for facet arthropathy/facet syndrome, the ALJ found that claimant's work activities were the major contributing cause of the claimed condition.

On review, the employer argues that claimant's bilateral lumbar radiculopathy condition is not compensable because the claimed condition does not exist. The employer also contends that claimant's work activities were not the major contributing cause of the facet conditions. We address the employer's arguments in turn.

¹ The employer has accepted claimant's lumbar and thoracic strains, and a lumbar strain combined with preexisting noncompensable degenerative disc disease. (Exs. 18, 55, 91).

New/Omitted Medical Condition

Finding that “radiculopathy” encompassed “radiculitis,” the ALJ determined that claimant established the existence of the claimed bilateral lumbar radiculopathy condition. In doing so, the ALJ found the medical opinions of Drs. Hanson, Miller, Teed, and Stapleton to be more persuasive than the contrary opinion of Dr. Lorish.²

Relying on the opinion of Dr. Lorish, the employer argues that claimant has not established the existence of the claimed bilateral lumbar radiculopathy condition based on objective findings. For the following reasons, we disagree.

Because this is a new/omitted medical condition claim, claimant must establish the existence of the claimed condition by “medical evidence supported by objective findings.” ORS 656.005(7)(a); ORS 656.266(1); *Maureen Y. Graves*, 57 Van Natta 2380, 2381 (2005). “Objective findings” are defined as “verifiable indications of injury or disease that may include, but are not limited to, range of motion, atrophy, muscle strength, and palpable muscle spasms,” and do not include “physical findings or subjective responses to physical examinations that are not reproducible, measurable or observable.” ORS 656.005(19).

Because of the disagreement between physicians regarding the existence of the claimed condition, the case presents a complex medical question that must be resolved by expert medical evidence. *Barnett v. SAIF*, 122 Or App 279, 282 (1992); *Charles W. Smith*, 61 Van Natta 4, 8 (2009). The determination of whether “objective findings” are present is a legal issue, so a physician’s opinion that no objective findings are present is not controlling if medical findings satisfying the statutory definition are nevertheless present. See *Pedro Lopez-Rodriguez*, 57 Van Natta 1733 (2005); *Joseph Martinez*, 56 Van Natta 495, 498 (2004).

Based on the mechanism of claimant’s injury, symptoms, and positive response to lumbar injections, Dr. Stapleton opined that claimant had an irritation of the lumbar nerve root that caused a lumbar radiculopathy. (Ex. 97). He

² Dr. Hanson, chiropractor, began treating claimant in April 2010. (Ex. 72A). Dr. Miller, an osteopath, began treating claimant in December 2011. (Exs. 98C, 99). On October 4, 2011, Dr. Teed, an orthopedist, examined claimant for the purposes of a surgical consultation. (Exs. C, 96C). Dr. Stapleton, a pain management physician, administered claimant’s lumbar epidural steroid injections beginning on June 21, 2010. (Exs. 54, 97). Dr. Lorish, claimant’s attending physician, first treated him on April 14, 2010. (Exs. B, 27, 98A-10).

explained that the same mechanism that caused claimant's strain and stretching of the muscles and ligaments of the low back also caused the lumbar radiculopathy. Drs. Hanson and Miller agreed with Dr. Stapleton's opinion. (Exs. 100, 103, 110).

Dr. Hanson further explained that the pattern of claimant's symptoms and positive clinical diagnostic testing also supported a diagnosis of radiculopathy. Dr. Hanson reasoned that, when claimant strained his lumbar muscles during his work injury, it also caused an irritation of the lumbar nerve root from the discs or facet joints which resulted in lumbar radiculopathy. (Ex. 100-2).

Dr. Miller stated that radiculopathy connotes a nerve irritation. (Ex. 103-2). He explained that, in addition to a lumbar strain, claimant's work injury "created further inflammation of the facet joints and related structures to cause the nerve root to become irritated resulting in radiculitis, or radiculopathy." (*Id.*) Dr. Miller testified that radiculitis is similar to radiculopathy, and that "it's a matter of degree[.]" (Ex. 110-21-22). He acknowledged that claimant's lumbar disc degeneration did not pinch the nerve root or cause gross loss of function. (*Id.*) Nevertheless, Dr. Miller found minimal objective evidence of nerve impingement or neurological disorder on the MRI, as well as during the December 2011 examination. (Ex. 110-14, -21-22). Dr. Miller opined that claimant had evidence of nerve irritation and inflammation in the L5 nerve root distribution, which caused subjective pain radiation and numbness into the dorsal aspect of the foot. (*Id.*)

In contrast, Dr. Lorish did not support a diagnosis of lumbar radiculopathy. According to Dr. Lorish, "a diagnosis of 'lumbar radiculopathy' entails an objective finding of nerve impingement in the lumbar spine." (Ex. 96E-1). Noting the absence of nerve/neural impingement in the MRI, as well as claimant's essentially normal neurological examination findings, Dr. Lorish concluded that claimant did not have objective evidence of a "true" lumbar radiculopathy condition. (Exs. 96E, 98A-9-12). Instead, Dr. Lorish stated that claimant's work injury likely contributed to a symptomatic flare-up of his preexisting and nonwork-related facet arthritis, which manifested as low back pain radiating into his posterior thighs. According to Dr. Lorish, the work injury caused muscular strains, but not an impinged nerve. (Exs. 96E, 98A-4-6).

At deposition, Dr. Lorish explained that claimant had referred pain (*i.e.*, pain generated in the back with symptoms referred into the buttocks and lateral thigh) without anatomical or objective disruption of the nerves. (Ex. 98A-10). He testified that claimant did not have symptoms to suggest nerve impingement or involvement because the primary complaint was that of low back pain with pain

into his buttocks and thighs, with little symptoms below the knee to indicate a radiculopathy condition. (Ex. 98A-10-12). Based on the constellation of events, and claimant's preexisting facet condition, Dr. Lorish concluded that his symptom complex involved a strain and facet problem, rather than "radiculopathy." (Ex. 98A-11-12).

Agreeing with Dr. Lorish's opinion that claimant was "neurologically intact" and that there was no objective evidence of nerve impingement, Dr. Teed opined that "bilateral lumbar radiculopathy" was an inaccurate diagnosis. (Ex. 102-2). At deposition, Dr. Teed clarified that claimant was "neurologically intact" at the time of his October 2011 examination, but that "radiculopathy isn't necessarily not neurologically intact." (Ex. 107-2-3). In doing so, Dr. Teed reasoned that a nerve root may be irritated, but not necessarily "shut down." (*Id.*) Dr. Teed also did not question Dr. Stapleton's diagnosis of lumbar radiculopathy during the lumbar injections.³ (*Id.*) He explained that radiculitis is inflammation of the nerve, and that "a radiculopathy is a pathology of the nerve, which could be radiculitis." (Ex. 107-3). Dr. Teed also noted that claimant had pain with straight leg raising, which is a sign of radicular irritation. (*Id.*)

We find the medical opinions of Drs. Stapleton, Hanson, Miller, and Teed to be more persuasive than that of Dr. Lorish.⁴ Those physicians explained why claimant's symptoms and response to treatment supported a diagnosis of radiculopathy. Further, Drs. Hanson and Miller acknowledged claimant's lumbar facet conditions and explained that the inflammation in the facet joints caused nerve root irritation and radiculopathy. Although Dr. Lorish opined that claimant did not have true lumbar radiculopathy because there was no objective evidence of nerve impingement, he neither addressed nor disputed the contrary medical opinions that radiculopathy and radiculitis involved irritation or inflammation of the nerve root. Moreover, the multiple examination findings from Drs. Stapleton, Hanson, Miller, and Teed support a diagnosis of radiculopathy based on "objective findings." ORS 656.005(19); *Lopez-Rodriguez*, 57 Van Natta at 1734.

³ Dr. Stapleton also opined that claimant's response to the lumbar injections supported a conclusion that claimant had lumbar radiculopathy and nerve root irritation. (Ex. 97).

⁴ We acknowledge that Dr. Miller agreed that the physician who saw claimant closer in time to the February 2010 work injury would be in a better position to assess the effects of the injury than a physician who saw him nearly two years after the injury. (Ex. 110-18-19). Nevertheless, notwithstanding this potential advantage, we find Dr. Miller's opinion (in conjunction with the opinions of Drs. Hanson, Stapleton, and Teed) to be more persuasive than that of Dr. Lorish, for the reasons expressed below.

Based on the foregoing reasons, we agree with the ALJ's determination that the claimed radiculopathy condition also encompasses radiculitis. Accordingly, we find that claimant has established the existence of his claimed condition, and that his work injury was a material, and the major, contributing cause of the disability/need for treatment of that condition.

Occupational Disease

In setting aside the employer's denial of claimant's occupational disease claim for facet arthropathy/facet syndrome, the ALJ found the opinions of Drs. Miller and Hanson to be more persuasive than those of Drs. Lorish and Teed. Furthermore, relying on Dr. Miller's opinion, the ALJ found that claimant's work activities were the major contributing cause of the facet condition.

To establish the compensability of his occupational disease claim, claimant must prove that employment conditions were the major contributing cause of the facet condition. ORS 656.266(1); ORS 656.802(2)(a); *Lori M. Lawrence*, 60 Van Natta 727, 728 (2008). Based on the following reasoning, we agree with the ALJ's reasoning that claimant has satisfied his burden of proof.

Claimant worked for the employer, a bakery, for approximately 13 years as a production worker/pan feeder. This required him to repetitively lift pans weighing up to 14 pounds while bending, twisting, and reaching from ground-to-overhead levels. Claimant estimated that he would move up to 3,000 pans in one and one half hours. He often worked more than 40 hours per day. (Tr. 18-29; Exs. A, AA).

Here, Drs. Lorish and Teed opined that claimant's age and genetics were the major contributing cause of the facet condition. (Exs. 96, 96C, 96E, 98A, 104, 105, 107, 111, 112). In contrast, Drs. Miller and Hanson opined that claimant's work activities were the major contributing cause of his facet condition. (Exs. 100, 110, 113, 114).⁵ For the following reasons, we find that Dr. Miller's opinion, as supported by Dr. Hanson, persuasively establish the compensability of claimant's occupational disease claim.

⁵ The parties do not dispute that claimant has a facet condition (also referred to as facet syndrome and facet arthritis/arthropathy) which required treatment. ORS 656.802(2)(d). There is also no dispute that claimant's more than 13 years of work activities, which required repetitive bending and twisting, contributed to the facet condition.

Drs. Lorish and Teed opined that claimant had an asymptomatic facet condition that predated the February 2010 work injury, and that his work activities caused the preexisting facet condition to become symptomatic while performing those activities. (Exs. 96C-2, 96E-1, 98A-5-9, -13, 104, 105). Both physicians also agreed that claimant's work activities were the type of activities that, over a period of time, will create wear and tear on the facets. (Exs. 96C-2, 98A-7-13, 107-4).

Dr. Lorish stated that it was difficult to "attribute all the degeneration to solely [claimant's] work related activities" because the causes of degeneration are multifactorial, including genetics. (Exs. 98A-7-13). Similarly, Dr. Teed opined that claimant's age and genetics contributing to the facet condition. (Exs. 96C, 104, 107-5, -10-11). According to Dr. Teed, "putting the majority of the blame on [claimant's] work duties and not considering the overall genetic contribution and outside activities is not really possible." (Ex. 96C-2).

Dr. Miller disagreed with the opinions of Drs. Lorish and Teed. He opined that claimant's work activities, particularly the repetitive bending and twisting, caused cumulative "microtrauma" to the lumbar spine and were the major contributing cause of his facet condition. (Ex. 110-16-18). Dr. Miller noted that there was no evidence that claimant had any previous problems or injury/trauma to his lumbar spine before the February 2010 work injury, but also stated that claimant "freely admits to years of off-and-on" mild symptoms before his work injury, and that his low back would be sore after work. (Exs. 110-17-18, 113-2). Dr. Miller did not consider claimant's history to be inconsistent. (Ex. 113-2).

We acknowledge claimant's testimony that he did not have any low back problems before the February 2010 work injury. (Tr. 53). However, when considered in context with Dr. Miller's opinion, we interpret claimant's testimony to mean that he had no prior injury or trauma to his low back, rather than having no prior low back pain complaints.

Dr. Hanson also attributed claimant's work activities to the development of the facet condition. (Exs. 77A, 100, 114). Considering the nature of claimant's work activities, Dr. Hanson was surprised that claimant did not have an acute episode earlier. (Exs. 77A, 114). He explained that the loading and shearing forces are very difficult on the spine, especially when repeated excessively, causing the breakdown of the facet joints which result in the development of facet arthritis. (Ex. 114). Asked if he agreed that "there is nothing inconsistent with [claimant's] facet arthritis being caused by overuse with work his symptoms

coming on acutely in one day,” Dr. Hanson commented, “Unclear.” (Ex. 114-1-2). In doing so, he added, “Acute flare-ups of chronic conditions are common in those who do manual labor. [Claimant] likely was unaware he had arthritic change until this acute episode [*i.e.*, the work injury,] prompted evaluation.” (Ex. 114-2). Considering claimant’s particular circumstances, Dr. Hanson concluded that work activities during the years of his employment (*i.e.*, the repetitive bending, twisting, and lifting/grabbing) were the major contributing cause of the facet condition. (Exs. 77A, 100, 114).

We find the opinion of Dr. Miller, as supported by Dr. Hanson, to be more persuasive than those of Drs. Lorish and Teed. We acknowledge Dr. Miller’s statement that claimant had “off-and-on” mild symptoms before his work injury, whereas claimant had denied having prior problems with his low back. (Exs. 110-18, 113-2). Nevertheless, Dr. Miller agreed that claimant had no evidence of prior low back problems that he would consider to be inconsistent with his understanding of claimant’s history.⁶ (Ex. 113-2). Moreover, Drs. Miller, Lorish, Hanson, and Teed agreed that claimant had an asymptomatic facet condition before his work injury, and that his work activities made that condition symptomatic. (Exs. 98A, 107, 110, 114). Therefore, we find Dr. Miller’s opinion to be based on a sufficiently accurate history, and well reasoned. *See Jackson County v. Wehren*, 186 Or App 555, 561 (2003) (a history is complete if it includes sufficient information on which to base the physician’s opinion and does not exclude information that would make the opinion less credible); *see also Somers v. SAIF*, 77 Or App 259, 263 (1986) (relying on those medical opinions that are well reasoned).

Furthermore, Dr. Miller persuasively rebutted the contrary opinions of Drs. Lorish and Teed that claimant’s age and genetics were the major contributing cause of the facet condition. Noting the duration of time that claimant had been performing the repetitive bending and twisting work activities (*i.e.*, approximately 13 years), Dr. Miller explained that the only relationship between age and the facet condition was the number of years that the causative work activities were performed. (Ex. 110-15-16). He also reasoned that genetics were not relevant in claimant’s particular case because he did not have any potentially causative genetic disorders or diseases. (Ex. 110-15).

⁶ As explained above, we interpret claimant’s testimony that he had no prior problems with his low back to mean that he had no prior injury or trauma, rather than no prior pain symptoms.

In contrast, Dr. Lorish explained that genetics can cause bone spurs at the site of irritation in the joint space, causing the joint to not move as freely as it would in the absence of those degenerative changes. (Ex. 98A-8). However, he acknowledged that claimant did not have bone spurs in his facet joints. (Ex. 98A-8). Similarly, Dr. Teed testified that claimant “more than likely” had a genetic susceptibility – a predisposing factor – to the development of the degenerative facet condition. (Ex. 107-5, -10-11). However, he did not identify any genetic factors that would have caused claimant to develop the facet condition. For these reasons, we do not find that Drs. Lorish and Teed persuasively addressed the relative contribution of age and genetics to claimant’s particular circumstances. *See Sherman v. Western Employer’s Ins.*, 87 Or App 602 (1987) (physician’s comments that were general in nature and not addressed to the claimant’s situation in particular were not persuasive).

In addition, Dr. Teed stated that the major contributing cause of claimant’s low back issues could not be isolated within a reasonable medical probability; yet he identified the major contributing cause of claimant’s facet condition to be age and genetics. (Ex. 104-2-3). Absent further explanation, we consider Dr. Teed’s opinion to be internally inconsistent. *Howard L. Allen*, 60 Van Natta 1423, 1424-25 (2008) (internally inconsistent medical opinion, without explanation for the inconsistencies, was unpersuasive). Consequently, based on the aforementioned reasoning, we do not find the contrary medical opinions of Drs. Lorish and Teed to be well reasoned or persuasive.

Finally, the employer argues that the opinions of Drs. Miller and Hanson are not persuasive because, unlike Drs. Lorish and Teed, they neither reviewed the actual MRI scan, nor explained why the MRI did not support a finding of “trauma/cumulative trauma.” (*See Exs. 111-3, 112-2*). However, the medical opinions are unanimous that the MRI scan showed degenerative changes which took years to develop. In any event, Dr. Miller did review the actual MRI scan and explained the MRI findings, and Dr. Hanson was also provided with the MRI. (Exs. 100-1, 110-3, -7).

Moreover, at deposition, Dr. Teed conceded that there was no way to correlate the MRI findings with claimant’s work activities. (Ex. 107-8). Similarly, Dr. Lorish testified only that he used the MRI to guide his treatment. (Ex. 98A-5-6). Also, neither Dr. Lorish nor Dr. Teed identified the age of the facet degeneration using the MRI scan. Thus, to the extent that the causation opinions of Drs. Lorish and Teed were based on the MRI scans, we find their opinions to be unexplained and conclusory, and we do not discount the opinions

of Drs. Miller and Hanson for not rebutting those opinions. *See Moe v. Ceiling Sys., Inc.*, 44 Or App 429, 433 (1980) (rejecting unexplained or conclusory opinion); *see also Steven L. Blanchard*, 60 Van Natta at 454 (2008) (medical opinion rebuttal is unnecessary where the contrary medical opinion is internally inconsistent).

In conclusion, based on the foregoing reasons, we find that claimant has established that his work activities were the major contributing cause of his facet arthropathy condition. Consequently, we affirm.

Claimant's attorney is entitled to an assessed fee for services on review regarding the compensability of his lumbar radiculopathy and facet conditions. 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 regarding these issues is \$3,500, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to those issues (as represented by claimant's respondent's brief and his counsel's uncontested fee submission), the complexity of the issues, the values of the interests involved, and the risk that claimant's counsel might go uncompensated. Claimant's attorney is not entitled to an attorney fee for services on review related to the attorney fee issues. *Dotson v. Bohemia, Inc.*, 80 Or App 233 (1986).

Finally, claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the lumbar radiculopathy and facet condition denials, to be paid the employer. *See* ORS 656.386(2); OAR 438-015-0019; *Gary 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 January 14, 2013 is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$3,500, payable 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 denials, to be paid by the employer.

Entered at Salem, Oregon on December 10, 2013

Member Langer dissenting in part.

I agree with the majority's determination that the employer's combined condition denial should be upheld. However, I disagree with the majority's finding that claimant has established the compensability of his new/omitted medical condition claim for bilateral lumbar radiculopathy, as well as his occupational disease claim for the facet conditions. Consequently, I respectfully dissent in part.

I first address the new/omitted medical condition claim for bilateral lumbar radiculopathy. To establish the compensability of this condition, claimant must establish that the claimed condition exists. ORS 656.005(7)(a); ORS 656.266(1); *Maureen Y. Graves*, 57 Van Natta 2380, 2381 (2005). Because of the disagreement between physicians regarding the existence of the claimed condition, the case presents a complex medical question that must be resolved by expert medical evidence. *Barnett v. SAIF*, 122 Or App 279, 282 (1992)

Unlike the majority, I would find that claimant has not established the existence of the claimed bilateral lumbar radiculopathy. Specifically, I do not find that the claimed "radiculopathy" condition encompasses "radiculitis." I reason as follows.

Dr. Lorish opined that claimant did not have true "lumbar radiculopathy" because he did not have objective findings of nerve impingement in the spine. (Exs. 96E, 98A-9-12). According to Dr. Lorish, radiculopathy is a pinching of the nerve that causes pain typically below the knee and into the foot (which is often much worse than the low back pain itself), and involves reflex loss and weakness. (Ex. 98A-10-11). Noting that claimant's primary complaint was that of low back pain with pain into his buttocks and thighs, with little symptoms below the knee, Dr. Lorish opined that claimant had no evidence of neurological disruption during examinations and in the MRI. (Exs. 96E, 98A-9-12). Instead, he explained that claimant had referred pain – pain generated in the back with symptoms referred into the buttocks and lateral thigh – without anatomical or objective disruption of the nerves. (Ex. 98A-10). According to Dr. Lorish, the work injury caused muscle strains, but not an impinged nerve. (Exs. 96E, 98A-4-6).

Based on the constellation of events, and claimant's preexisting facet condition, Dr. Lorish concluded that claimant's symptom complex involved a strain and facet problem, rather than "radiculopathy." (Ex. 98A-11-12). Dr. Lorish reasoned that claimant's work injury (accepted for lumbar and

thoracic strains) likely contributed to a symptomatic flare-up of the preexisting and nonwork-related facet arthritis, which manifested as low back pain radiating into his posterior thighs. (Exs. 96E, 98A-4-6).

Dr. Lorish began treating claimant two months after the February 2010 work injury and had the advantage of treating claimant for a long period of time. I find Dr. Lorish's opinion that claimant does not have the claimed bilateral lumbar radiculopathy to be well reasoned and persuasive. *See Somers v. SAIF*, 77 Or App 259, 263 (1986); *see also Weiland v. SAIF*, 64 Or App 810 (1983) (in some situations, a treating physician's opinion is entitled to greater weight because of a better opportunity to observe and evaluate a claimant's condition over an extended period of time); *Gary S. Knight*, 63 Van Natta 1206, 1208 (2011) (same).

Dr. Teed's opinion also does not establish the existence of the claimed radiculopathy condition. (Exs. 102, 107-2-3). Specifically, Dr. Teed explained that claimant's complaints of low back pain with intermittent pain into the thighs, did not necessarily constitute actual "radiculopathy." (Ex. 107-2-3). Moreover, he agreed with Dr. Lorish's opinion that claimant had no objective evidence of nerve impingement that would support a diagnosis of true "radiculopathy." (Ex. 102). Although Dr. Teed testified that radiculitis is more inflammation of the nerve, he also stated that "a radiculopathy is a pathology of the nerve, which *could be* a radiculitis." (Ex. 107-3) (emphasis added). Dr. Teed further opined that claimant "*seemed* to have some irritation" in the low back. (*Id.*) (Emphasis added). To the extent that Dr. Teed's opinion could be interpreted to be supportive of the existence of the claimed radiculopathy condition, I would find his opinion to be stated in terms of possibility, rather than reasonable medical probability. *See Robinson v. SAIF*, 147 Or App 157, 160 (1997) (medical certainty not required; a preponderance of evidence may be shown by medical probability); *compare Gormley v. SAIF*, 52 Or App 1055, 1060 (1981) (use of the words "could" and "can" militated against a finding of medical causation in terms of probability).

I also do not find that the contrary opinions of Drs. Stapleton, Hanson, and Miller are sufficiently persuasive to establish that the claimed condition exists. I reason as follows.

Diagnosing lumbar radiculopathy, Dr. Stapleton explained that, in all medical probability, claimant's work activities that caused the strain "not only strained the muscles and ligaments of his low back, but also caused an irritation of his lumbar nerve root to cause a lumbar radiculopathy." (Ex. 97). I find Dr. Stapleton's diagnostic opinion to be conclusory and inadequately explained,

particularly in light of the well-reasoned opinion of Dr. Lorish. *See Moe v. Ceiling Sys., Inc.*, 44 Or App 429, 433 (1980) (rejecting unexplained or conclusory opinion).

Dr. Hanson agreed with Dr. Stapleton's diagnosis. In doing so, he opined that when "[claimant] strained his lumbar muscles this also caused an irritation of the lumbar nerve root thereby causing lumbar radiculopathy[,]” and that the employer “called this a lumbar strain.” (Ex. 100-2). I find Dr. Hanson's opinion, at most, indicates that the claimed radiculopathy condition is a symptom of the previously accepted lumbar strain or combined lumbar strain condition. *See Young v. Hermiston Good Samaritan*, 223 Or App 99, 107 (2008) (new/omitted medical condition claim for a symptom of a previously accepted condition may be denied because the symptom is not a new/omitted medical condition).

Dr. Miller began treating claimant in December 2011, nearly two years after the February 2010 injury. (Ex. 98C). Although he had noted that claimant had mild “radicular irritation,” Dr. Miller never diagnosed “radiculopathy” or radiculitis in the course of his treatment. (*See Exs. 98C, 98D, 99, 99A, 99B, 102G, 106, 108*). Furthermore, he testified that claimant did not have neurological symptoms on examination and “certainly not to the state of being a radiculopathy, which would have made me very concerned for a ruptured disc, nerve compromise.” (Ex. 110-3, -9). Asked whether “radiculitis is “similar or different than radiculopathy, Dr. Miller stated that radiculitis was “similar,” and it was “a matter of degree.” (Ex. 110-21). Nevertheless, he further explained that radiculopathy occurs with pinching the nerve and causing gross loss of function. (Ex. 110-22). Although Dr. Miller agreed that claimant had radicular irritation, he did not indicate that claimant had nerve disruption, pinching, or compromise. (Ex. 110-3, -9). Accordingly, Dr. Miller's opinion is insufficient to support the existence of the claimed condition.

Based on the foregoing reasons, I would find that claimant has not persuasively established the existence of the claimed bilateral lumbar radiculopathy. Although I recognize that claimant may have had an irritation of the nerve root – *i.e.*, “radiculitis”, I am not persuaded that the medical evidence establishes that the claimed “radiculopathy” condition encompasses “radiculitis.” Accordingly, I would uphold the employer's denial of the new/omitted medical condition claim.

Next, I turn to the occupational disease claim for the facet arthropathy condition. The majority finds that the opinions of Drs. Miller and Hanson persuasively support the compensability of claimant's occupational disease claim. For the following reasons, I disagree with the majority's determination.

Dr. Miller opined that claimant's repetitive bending and twisting work activities with the employer caused cumulative "microtrauma" to the lumbar spine and were the major contributing cause of his facet condition. (Exs. 110-16-18, 113). In doing so, he acknowledged that there was no evidence that claimant had any previous problems or injury/trauma to his lumbar spine before the February 2010 work injury. (Ex. 110-17). Yet, Dr. Miller also stated that claimant "freely admits to years of off-and-on" mild symptoms before his work injury, and that his low back would be sore after work. (Exs. 110-18, 113-2). Nevertheless, Dr. Miller did not consider claimant's history to be inconsistent. (Ex. 113-2)

The record raises serious concerns regarding the accuracy of Dr. Miller's history that claimant had soreness (or any other symptoms) in his low back before his work injury. In fact, claimant has consistently denied having any problems with his low back before his February 2010 work injury, and testified as such. (Tr. 53). Consistent with his testimony, there is no documentation of either claimant's complaints, or findings, of soreness/tightness in the low back. In addition, Dr. Miller testified that claimant was a poor historian. (Ex. 110-8). Absent further explanation, I am not persuaded that Dr. Miller relied on a sufficiently accurate history. *See Miller v. Granite Constr. Co.*, 28 Or App 473, 476 (1977) (medical opinions are only as reliable as the history provided by the claimant); *Latonya M. Bias*, 60 Van Natta 905, 905 (2008) (persuasiveness of medical evidence depends on accuracy of history). Moreover, I find no support for the majority's interpretation of claimant's testimony to mean that he had no prior injury or trauma to his low back, but actually had years of low back complaints, as declared by Dr. Miller.

Furthermore, Dr. Miller testified that any activity that loads the spinal tissues and muscles will cause joint irritation and inflammation. (Ex. 110-11-12). Dr. Miller explained that activities of daily living (ADLs) also contribute to the facet condition, and noted claimant's complaints of increased back pain from such as cooking, getting out of bed, and doing house work. (Ex. 110-9, -12-14). Yet, after considering claimant's causative life activities, he found "[e]ssentially nothing, other than his 15 years of repetitive motion work." (Ex. 110-16). In light of Dr. Miller's statement that one cannot exclude any life activity (*e.g.*, gardening

or exercising) as causative, I do not find his opinion that claimant's work activities were the major contributing cause of the facet condition to be well reasoned or persuasive. (*Id.*) See *Somers v. SAIF*, 77 Or App 259, 263 (1986).

Likewise, I do not find Dr. Hanson's opinion to be well reasoned. Other than acknowledging that acute flare-ups of chronic conditions are common in those who do manual labor, Dr. Hanson did not explain why claimant's facet condition – an overuse condition – would cause acute symptoms. Instead, Dr. Hanson simply stated that claimant was likely unaware that he had arthritic changes until the work injury prompted evaluation and that, "Taking into account [claimant's] age, build, etc., I feel that an *acute event* was unavoidable in this set of circumstances." (Ex. 114-2) (emphasis added). I find that Dr. Hanson's opinion is inadequately explained and unpersuasive. *Somers*, 77 Or App at 263.

Based on the foregoing reasons, I disagree with the majority's findings that claimant has established the compensability of his new/omitted medical condition claim for bilateral lumbar radiculopathy, as well as his occupational disease claim for the facet arthropathy condition. Because I would uphold those denials, I respectfully dissent in part.