
In the Matter of the Compensation of
MICHAEL L. JACOBS, Claimant
WCB Case No. 12-02333, 12-00626, 11-04689
ORDER ON REVIEW
Scott M McNutt Sr, Claimant Attorneys
David Runner, SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Weddell and Lowell.

The SAIF Corporation requests review of that portion of Administrative Law Judge (ALJ) Crummé's order that set aside its denial of claimant's occupational disease claim for cervical and lumbar conditions. On review, the issue is compensability. We affirm.

FINDINGS OF FACT

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

While working for SAIF's insured, claimant, who was 49 at the time of the hearing (and who has worked in the logging industry since age 18), suffered two accidents for which he filed claims.¹ In February 2011, he fell off a "delimber" machine, resulting in buttock, neck, and lower back pain. (Tr. 23, 24, 25). In May 2011, claimant was helping lift a 319-pound machinery part when it tipped and the full weight shifted onto him, causing neck and midback pain. (Tr. 28).

In August 2011, claimant sought medical treatment for the neck and back pain, receiving a diagnosis of severe lower spine degenerative joint disease. (Ex. 13). Cervical and lumbar MRIs revealed abnormalities at C3-4 and L5-S1. (Exs. 18, 19).

Dr. Bert, an orthopedic surgeon, became claimant's treating physician in October 2011. Diagnosing preexisting neck and back degeneration with a C3-4 disc herniation and L5-S1 retrolisthesis with osteophytes, he opined that the February and May 2011 work accidents had been the major cause of a worsening of claimant's preexisting conditions. Dr. Bert recommended L5-S1 decompression

¹ SAIF denied both of claimant's injury claims; the ALJ found that one of the claims was untimely filed, and upheld SAIF's denial of the other claim on the merits. These issues are not contested on review.

and fusion surgery.² (Exs. 23, 47). In July 2012, he stated that claimant's work in general, along with the aforementioned work injuries, contributed 51 percent or more to his low back and cervical conditions. (Ex. 47A-3).

In March 2012, claimant filed a claim for an occupational disease involving his current neck and low back pathology. (Ex. 37). SAIF denied the claim, causing claimant to request a hearing.

In April 2012, Dr. Rosenbaum examined claimant at SAIF's request. (Ex. 41). Stating that claimant's cervical and lumbar spondylosis were degenerative, arthritic conditions that preexisted the two work accidents, Dr. Rosenbaum concluded that his lifelong employment had contributed to the symptoms, but not to the pathology of the preexisting conditions. (Ex. 41-13).

Dr. Rosenbaum also submitted medical literature (relating to a study of twins) to support his opinion that repetitive physical activity is not a cause of lumbar spondylosis. (Ex. 44). In response, Dr. Bert asserted that these studies did not address the particular mix of heavy physical activities and injuries that claimant experienced in his employment. (Ex. 47A).

CONCLUSIONS OF LAW AND OPINION

In finding claimant's occupational disease claim compensable, the ALJ found Dr. Bert's opinion to be the most persuasive. On review, SAIF relies on the opinion of Dr. Rosenbaum, and presents several reasons why Dr. Bert's opinion should be discounted. For the following reasons, we agree with the ALJ's conclusion that Dr. Bert's opinion establishes a compensable occupational disease claim.

To prove compensability of an occupational disease, claimant must establish that his employment conditions were the major contributing cause of his cervical and lumbar conditions. ORS 656.802(2)(a); ORS 656.266(1). The major contributing cause means a cause that contributes more than all other causes combined. *Smothers v. Gresham Transfer, Inc.*, 332 Or 83, 133-34 (2001); *McGarrah v. SAIF*, 296 Or 145, 166 (1983).

² Dr. Bert performed claimant's lumbar surgery in July 2012. (Ex. 47). Claimant did not undergo surgery for his cervical condition.

An occupational disease claim may be based on the cumulative effect of all of a claimant's work-related exposure, and prior work injuries may be considered as part of the overall employment conditions. *Hunter v. SAIF*, 246 Or App 755 (2011); *Waste Management v. Pruitt*, 224 Or App 280 (2008); *Christine M. Sloane*, 65 Van Natta 2207 (2013). Determination of the major contributing cause is a complex medical question that must be resolved on the basis of expert medical opinion. *Jackson County v. Wehren*, 186 Or App 555, 559 (2003).

SAIF argues that Dr. Bert's opinion did not weigh all the factors that contributed to claimant's conditions. Specifically, SAIF mentions claimant's prior smoking history and his obesity as causal factors, averring that these possible contributors are mentioned in the medical literature submitted by Dr. Rosenbaum.

Yet, Dr. Rosenbaum did not refer to these factors as potential contributors to claimant's claimed conditions. Moreover, although SAIF notes that Dr. Bert mentioned joint "loading" as "causal" of claimant's spondylosis, this was in the context of a discussion of the loggers he had treated in his practice, who had a higher incidence of degenerative disc disease than did white collar workers, and he made no reference to obesity.³ (Ex. 47A-2).

Without an express medical opinion indicating that claimant's obesity and prior smoking habit were significant factors in claimant's particular case, we decline to discount Dr. Bert's opinion for not discussing them. *See Wehren*, 186 Or App at 563 (medical expert not required to weigh hypothetical causes if not suggested by another expert as contributing to claimant's condition); *see also Dorothy S. Calliham*, 59 Van Natta 137, 138 (2007) (where other medical opinions attached no significance to certain facts, a physician's failure to evaluate those facts did not undermine the persuasiveness of the physician's medical opinion).

Dr. Rosenbaum also referenced the possible impact of genetics on claimant's claimed conditions. Nonetheless, there is no indication that he asked claimant if there was a family history of degenerative disc disease (DDD). (Exs. 44-3, 48-4). In contrast, Dr. Bert recorded that claimant's family history was negative.

³ SAIF states that Dr. Bert acknowledged the impact of claimant's weight on his back condition, when he commented that "He is a very large man, weighing 347 lb., and two Norco 10 mg. per day are not doing it." We do not interpret this statement as making a correlation between claimant's weight and his back condition, particularly when Dr. Bert ultimately concluded that claimant's work activities (along with his work injuries) contributed 51 percent or more to his low back and cervical conditions. (Ex. 47A-3).

(Ex. 35A). Moreover, acknowledging that genetics played a part in DDD, he described such a contribution as often difficult to quantify. In any event, regarding claimant's particular circumstances, Dr. Bert estimated a 25 percent contribution from genetics. (Ex. 47A-1, -2).

Concerning the medical literature (of which Dr. Rosenbaum offered only the first page of four different articles published in medical journals), Dr. Bert noted that the literature did not indicate that heavy physical activity could *never* be a cause of lumbar spondylosis. (Ex. 47A-2). Furthermore, Dr. Bert explained that claimant's work activity as a logger (which had been his occupation for some 30 years), subjected him to repetitive heavy lifting at awkward angles with stooping, bending, walking, and climbing over rough ground, and exerted significant forces on his body, causing a gradual breakdown of the spine.⁴ (Ex. 47A-1).

Based on these activities, Dr. Bert further described how claimant's weakened spine caused an unstable disc joint at L5-S1, creating abnormal motion, which, in turn, caused a retrolisthesis (slippage) of L5 onto S1. (Ex. 47A-2). Likewise, Dr. Bert concluded that claimant's two work injuries contributed to his cervical and lumbar conditions. (Ex. 47A-1).

In offering this opinion, Dr. Bert commented that he had observed loggers to have a higher incidence of degenerative disc disease than white collar workers, such as accountants. (Ex. 47A-2). Furthermore, noting the limited number of people in their fifties performing logging activities, Dr. Bert opined that most workers, by that age, have cervical and/or lumbar problems caused by the logging activities and can no longer do that kind of heavy work. (*Id.*)

Notwithstanding these comments, we do not consider Dr. Bert's opinion to be based only on "generalities." *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); *Kathleen P. Quinata*, 66 Van Natta 298 (2014) (same). To the contrary, the record demonstrates that Dr. Bert's opinion was also based on an evaluation of claimant's conditions and complaints, as well as an analysis of his medical and vocational

⁴ Contrary to SAIF's assertion, we find that Dr. Bert had a sufficiently accurate understanding of claimant's work activities to enable him to render an informed opinion. *See Wehren*, 186 Or App at 561 (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).

history, including his physical activities.⁵ (Ex. 47A). Under such circumstances, we find that Dr. Bert's opinion addresses claimant's particular situation, and thus, we find it persuasive.⁶ *See Colleen E. Allen-Schublin*, 63 Van Natta 2572, 2575 (2011).

In sum, after our review, we are persuaded by Dr. Bert's medical opinion that claimant's work activities as a logger, coupled with his two 2011 work-related injuries, constitute the major contributing cause of his cervical and lumbar conditions.⁷ *Hunter*, 246 Or App at 755. Consequently, his occupational disease claim for those conditions is compensable. Thus, we affirm.

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 is \$4,500, payable by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's respondent's brief and his counsel's uncontested fee submission), the complexity of the issues, the value of the interests involved, and the risk that claimant's counsel might go uncompensated.

Claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial of claimant's occupational disease claim for his low back and neck conditions, to be paid by SAIF. *See* ORS 656.386(2); OAR 438-015-0019; *Gary E. Gettman*, 60 Van Natta 2862 (2008).

⁵ SAIF asserts that claimant currently is a "delimber," rather than a logger. Yet, as Dr. Rosenbaum noted: "[C]laimant has worked only in the logging field. He has, however, performed all the various types of physical activities associated with logging, including running heavy equipment but also timber falling." (Ex. 41-11).

⁶ In reaching this conclusion, we note that Dr. Bert did not perform cervical surgery. Consequently, we accord no special deference to Dr. Bert's opinion as a surgeon. *See Argonaut Ins. Co. v. Mageske*, 93 Or App 698, 702 (1998); *David W. Sisco*, 60 Van Natta 1955, 1960 n 3 (2008).

⁷ Although claimant's two work injury claims were denied by SAIF, they may still be factored into the claim for an occupational disease. *See, e.g. Filiberto B. Rosas*, 63 Van Natta 1881 (2011) (although the claimant did not file a claim for a shoulder injury that occurred at work, the time-barred claim could still be considered under ORS 656.802 as "one of a series of traumatic events" for purposes of establishing an occupational disease); *see also Justin B. Espinoza*, 61 Van Natta 2673, 2674-75 (2009) (same).

ORDER

The ALJ's order dated November 7, 2013 is affirmed. For services on review, claimant's counsel is awarded an assessed fee of \$4,500, payable by SAIF. Claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial of claimant's occupational disease claim for his low back and neck conditions, to be paid by SAIF.

Entered at Salem, Oregon on April 11, 2014