

In the Matter of the Compensation of
SHELBY J. VANTASSEL, Claimant

WCB Case No. 13-01453

ORDER ON REVIEW

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Reviewing Panel: Members Langer and Lanning.

Claimant requests review of Administrative Law Judge (ALJ) Fulsher's order that upheld the SAIF Corporation's denial of his injury claim for an L5-S1 disc herniation. On review, the issue is compensability.

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

Claimant works for the employer as a supervisor doing excavating, operating equipment, and operating a dump truck. (Tr. 5). He has a prior history of low back problems, dating to 2001. In 2002, claimant had surgery for an L5-S1 disc herniation; he had a second surgery in 2009 for a recurrence of the herniation. (Exs. 21, 60).

On December 10, 2012, claimant got out of a truck at work and felt immediate pain down both legs. (Tr. 6). Dr. Thompson, his attending physician, diagnosed lumbar radiculopathy. (Ex. 69). An MRI showed a recurrent L5-S1 disc herniation. (Ex. 76).

In January 2013, Dr. Vessely examined claimant at SAIF's request. Opining that claimant's preexisting back conditions (consisting of the previous recurrent disc herniations and resulting surgeries) had combined with the work incident, Dr. Vessely believed that the preexisting conditions were the major contributing cause of the disability/need for treatment for the combined disc condition. (Ex. 79-7).

Dr. Sherman saw claimant in February 2013, and recommended an L5-S1 posterior lumbar interbody fusion, which he performed in March 2013. (Exs. 86, 87). He explained that, although claimant's mechanism of injury was not especially traumatic, the sudden onset of severe symptoms in the S1 distribution supported a conclusion that the disc herniation occurred at that moment. Dr. Sherman was unable to "identify any other factors that contributed to [claimant's] worsening or [his] need for surgery." (Ex. 91-2). Dr. Thompson concurred with Dr. Sherman's opinion. (Ex. 94).

SAIF denied the claim, and claimant requested a hearing. (Ex. 80).

In upholding SAIF's denial, the ALJ found that there was a "combined condition," and that, based on Dr. Vessely's opinion, the preexisting condition was the major contributing cause of the disability/need for treatment of the combined condition.

On review, claimant relies on the opinions of Drs. Thompson and Sherman, contending that his preexisting back conditions merely made him susceptible to another disc herniation. Therefore, according to claimant, the record does not establish the presence of a "combined condition" because a statutory "preexisting condition" is absent. Based on the following reasoning, we disagree with claimant's contentions.

ORS 656.005(24)(a) provides that a "preexisting condition" for all industrial injury claims is any injury, disease, congenital abnormality, personality disorder, or similar condition that contributes to disability or need for treatment. However, under ORS 656.005(24)(c), for purposes of industrial injury claims, a condition does not contribute to disability or need for treatment if the condition merely renders the worker more susceptible to the injury.

In support of his position, claimant cites *Murdoch v. SAIF*, 223 Or App 144 (2008), *rev den*, 346 Or 361 (2009). There, the claimant had previously been diagnosed with and treated for diabetes, which included diabetic neuropathy and microvascular disease. He developed a lesion on his foot from rubbing against his work boots, which eventually became infected and required an amputation of the foot. The claimant filed an occupational disease claim that the carrier denied. We upheld the denial. *Kirk J. Murdoch*, 59 Van Natta 666 (2007).

The *Murdoch* court applied ORS 656.005(24)(c) in analyzing whether our conclusion that the claimant's diabetes and diabetic neuropathy were the major contributing cause of his infection and resulting toe amputation was supported by substantial reason. In determining that our conclusion was not supported by substantial reason, the court reasoned that the claimant's diabetic condition "merely render[ed] [him] more susceptible to" the infection, either as a result of a lack of sensation or decreased ability to "mount as strong of a response" to the infection. Because this susceptibility could not, in accordance with ORS 656.005(24)(c), be considered a "cause" for purposes of determining "major contributing cause" under ORS 656.802(2)(a), the court concluded that we had erred in our conclusion. 223 Or App at 149.

In *Murdoch*, the court's reasoning was based on specific medical facts analyzing the contribution of diabetes to the lesion on the claimant's foot, which developed when his foot rubbed against his work boots. Here, in contrast, claimant's herniated disc occurred when he stepped out of his truck. Furthermore, unlike the claimant in *Murdoch*, whose diabetes either masked the effects of the lesion on his foot or decreased his ability to mount a response to the infection, claimant, here, has no preexisting disease that produced a masking effect. Finally, the evidence does not establish that the preexisting back condition impaired claimant's ability to respond to the disc herniation.

In reaching this conclusion, we acknowledge that Drs. Thompson and Sherman opined that claimant's preexisting disc conditions only made him "susceptible" to another disc herniation. (Exs. 91-2, 94-2). Yet, neither physician persuasively explained why just stepping out of a truck would be enough to herniate claimant's disc if the preexisting back conditions were not playing a causative role.

In contrast, Dr. Vessely provided a more thorough and cogent analysis of the contribution of claimant's preexisting conditions to his claimed disc herniation. Although Dr. Vessely's opinion supports the proposition that claimant was indeed "susceptible" to another disc herniation, his reasoning goes beyond mere susceptibility and explains how the preexisting conditions combined with the work injury, and why they are contributing causes of the disability and need for treatment of that combined condition.¹

Dr. Vessely explained that claimant was having no significant symptoms before the work incident, and the morning of the incident had spent five hours sanding in a bent-over position without any problems. Therefore, when claimant did something as minor as getting out of a truck, which would not normally herniate a healthy disc, Dr. Vessely concluded that it was medically probable that the preexisting conditions, by weakening the L5-S1 disc, were the major causes of his disability and need for treatment. (Ex. 79-6).

¹ Like the ALJ, we note that Dr. Vessely specifically used the word "caused" to describe the role played by the preexisting conditions. We therefore distinguish his opinion from that of Drs. Thompson and Sherman, who described only a "susceptibility." As claimant stated, "these cases are fact specific. What may be a susceptibility on one record may be a legitimate contributing factor on another record." We agree. On this particular record, Dr. Vessely's opinion persuasively supports a finding that claimant's preexisting conditions did more than merely render him more susceptible to injury. Rather, his opinion establishes that they are the major contributing cause of the disability/need for treatment of the combined disc condition.

Dr. Vessely described how, during claimant's prior surgeries, his annulus fibrosis would have been cut two different times. He further explained that each time a disc is herniated and cut, it weakens the disc. (Ex. 95-2). In other words, Dr. Vessely concluded that the state of claimant's disc was such that it would only take a minor event to cause the herniation. The work incident, therefore, was, in Dr. Vessely's opinion, only "the straw that broke the camel's back;" it was not the major cause of the herniated disc. (Ex. 79-6).

In sum, we find that Dr. Vessely's opinion persuasively supports a conclusion that claimant's preexisting disc herniations and surgeries were the major contributing causes of his disability/need for treatment and did not merely render him more susceptible to his injury. *See Dennis E. Langley*, 64 Van Natta 1610 (2012) (contrary to the claimant's argument that a preexisting condition merely rendered him more susceptible to an injury, a medical report explaining how the preexisting conditions contributed to cause the work injury persuasively established that the preexisting conditions directly led to the injury, which then required medical treatment). Consequently, SAIF has persuasively met its burden of proving that claimant's otherwise compensable injury was not the major contributing cause of his disability/need for treatment for a combined L5-S1 disc herniation. ORS 656.266(2)(a). Thus, we affirm.

ORDER

The ALJ's order dated October 28, 2013 is affirmed.

Entered at Salem, Oregon on April 2, 2014