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In the Matter of the Compensation of  
**JEAN M. JANVIER, Claimant**  
WCB Case No. 12-01017  
ORDER ON REVIEW  
Alvey Law Group, Claimant Attorneys  
Lyons Lederer LLP, Defense Attorneys

Reviewing Panel: Members Curey, Weddell, and Somers.

Claimant requests review of Administrative Law Judge (ALJ) Mills's order that upheld the self-insured employer's denial of claimant's new/omitted medical condition claims for combined C5-6 and C6-7 conditions. On review, the issue is compensability.<sup>1</sup> We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," which we summarize as follows.

In November 2010, while moving a patient, claimant, a certified nursing assistant, felt a "pop" and pain in her neck radiating into her left shoulder with numbness and tingling in her small and ring fingers. (Ex. 2-1). A CT myelogram showed a C5-6 surgical fusion<sup>2</sup> and C6-7 osteophytes, including a disc osteophyte complex, with canal and foraminal stenoses. (Ex. 3-2).

The employer accepted a cervical strain and processed the claim to closure in June 2011. (Exs. 18, 37).

In July 2011, Dr. Sandquist performed C5-6 and C6-7 discectomies and a fusion. (Ex. 37D).

Claimant initiated new/omitted medical condition claims for an "otherwise compensable injury" combined with preexisting failed C5-6 fusion, an "otherwise compensable injury" combined with preexisting C6-7 arthritis, and a C6-7 "disc condition." (Ex. 42). Asserting that there was insufficient evidence to support the claims, the employer issued a denial. (Ex. 43). Claimant requested a hearing.

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<sup>1</sup> The employer moves to strike portions of claimant's reply brief, asserting that it refers to facts not contained in the evidentiary record or the hearing file. In response, claimant denies that she made unsupported representations and argues that the record supports her position. In reviewing this matter, we have considered only those representations supported by the evidentiary record.

<sup>2</sup> Claimant had a 1995 surgical fusion following a motor vehicle accident. (Tr. 11).

Dr. Rosenbaum, a neurosurgeon, examined claimant at the employer's request. Determining that the work injury combined with the preexisting C5-6 fusion and C6-7 spondylosis,<sup>3</sup> he opined that claimant's initial need for treatment was due to the compensable cervical strain. (Ex. 24-6). Finding that the injury did not cause the failed C5-6 fusion or a pathological worsening of the C6-7 disc, he concluded that claimant's need for surgery was due to preexisting conditions. (Exs. 24-6, 35-2, 49-4).

Dr. Lorish, a physical medicine specialist and claimant's treating physician, did not agree. (Exs. 27, 45-6). He also determined that claimant's work injury combined with her preexisting C5-6 and C6-7 conditions, but concluded that the work injury was the major contributing cause of her need for surgery. (Ex. 45-7, -8).

Dr. Sandquist, claimant's treating neurosurgeon, opined that her work injury combined with her preexisting failed C5-6 fusion and C6-7 arthritic changes to cause or prolong disability/need for treatment and that the injury was the major contributing cause of the disability/need for treatment of her combined conditions. (Ex. 46-2, -3).

Dr. Dietrich, a neurosurgeon, and Dr. Wilson, a neurologist, examined claimant at the employer's request. (Ex. 29). Finding the work-related cervical strain medically stationary and identifying no impairment, Drs. Dietrich and Wilson did not consider the work injury to be the major contributing cause of claimant's need for surgery. (Ex. 29-13).

### CONCLUSIONS OF LAW AND OPINION

The ALJ determined that claimant established the existence of the claimed "combined conditions" and that the work injury was a material contributing cause of her disability/need for treatment for those conditions. The ALJ also reasoned that the employer met its burden of proving that the work injury was not the major contributing cause of claimant's disability/need for treatment of the combined conditions. Therefore, the ALJ upheld the employer's denial of claimant's new/omitted condition claims.<sup>4</sup>

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<sup>3</sup> Dr. Rosenbaum identified claimant's spondylosis as "arthritis." (Ex. 49-3). *See SAIF v. Hopkins*, 349 Or 348, 364 (2010) (defining "arthritis" as "inflammation of one or more joints, due to infectious, metabolic, or constitutional causes, and resulting in breakdown, degeneration, or structural change").

<sup>4</sup> The ALJ analyzed claimant's new/omitted medical condition claim for a C6-7 disc condition as part of the combined C6-7 condition. Claimant does not challenge that analysis on review, identifying the issues as the compensability of her claimed "combined conditions." Under these circumstances, we consider the denied combined C5-6 and C6-7 condition claims to include the C6-7 disc condition.

On review, claimant asserts that the existence of the claimed new/omitted conditions was not in dispute<sup>5</sup> and that she proved that the work injury was a material contributing cause of the disability/need for treatment of those conditions. Claimant also contends that the medical evidence is insufficient to carry the employer's burden of proof under ORS 656.266(2)(a).

The employer responds that claimant did not prove the existence of the claimed combined conditions or, alternatively, that it proved that the "otherwise compensable injury" was never the major contributing cause of claimant's disability/need for treatment. We do not agree, reasoning as follows.

To prevail on her new/omitted medical condition claims, claimant must prove that her claimed conditions exist. *Maureen Y. Graves*, 57 Van Natta 2380, 2381 (2005). Moreover, because she is seeking the acceptance of "combined conditions" as new/omitted medical conditions, she must prove the existence of those "combined conditions;" *i.e.*, that the "otherwise compensable injury" combined with a statutory "preexisting condition" to cause/prolong disability/need for treatment. ORS 656.266(1); ORS 656.005(7)(a)(B); *Ronald R. Kimble*, 65 Van Natta 720 (2013) (because the claimant initiated a new/omitted medical condition claim for a "combined condition," he had the burden of proving the existence of the "combined condition"). If claimant establishes the existence of the claimed "combined conditions," the employer has the burden of proving that the "otherwise compensable injury" is not the major contributing cause of claimant's disability/need for treatment of the combined conditions. ORS 656.005(7)(a)(B); ORS 656.266(2)(a); *SAIF v. Kollias*, 233 Or App 499, 505 (2010); *Rodney R. Erickson* 66 Van Natta 989, 991 (2014); *Jack G. Scoggins*, 56 Van Natta 2534, 2535 (2004).

Considering the possible alternative causes of the combined cervical conditions, resolution of these matters is a complex medical question that must be resolved by expert medical opinion. *See Barnett v. SAIF*, 122 Or App 279 (1993). We give more weight to those opinions that are well reasoned and based on complete information. *See Somers v. SAIF*, 77 Or App 259, 263 (1986). Absent persuasive reasons to do otherwise, we have tended to give greater weight to the opinion of claimant's treating physician, although we may give more or less weight

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<sup>5</sup> Asserting that the ALJ correctly decided that the employer had not timely raised a defense that her claims were not for "conditions," claimant contends that this defense cannot be considered on review. We need not resolve that procedural issue because, after considering the employer's contentions, for the reasons expressed below, we are persuaded that claimant has met her burden under ORS 656.005(7)(a) and ORS 656.266(1).

to the treating physician's opinion, depending on the record in each case. *Dillon v. Whirlpool Corp.*, 172 Or App 484, 489 (2001); *Weiland v. SAIF*, 64 Or App 810, 814 (1983). An attending surgeon is generally entitled to deference where the surgeon's unique opportunity to view the claimant's condition first hand forms the basis for a causation opinion. *Argonaut Ins. Co. v. Mageske*, 93 Or App 698, 702 (1988).

The employer contends that a "combined condition" requires two separate conditions, and that an "otherwise compensable injury" is not a condition. In support of that position, the employer relies on *Luckhurst v. Bank of Am.*, 167 Or App 11 (2000), and *Multifoods Specialty Distrib. v. McAtee*, 164 Or App 654 (1999). We do not find those cases to be particularly instructive. The *Luckhurst* court relied on its decision in *McAtee*, which the court recently distinguished in *Brown v. SAIF*, 262 Or App 640, 653 (2014), as affirmed "on other grounds," "fact specific," and involving a "very different issue – the question of responsibility under ORS 656.308." In doing so, the *Brown* court considered the Supreme Court's affirmation of its decision in *McAtee* to be consistent with its "combined condition" analysis; *i.e.*, in considering a "combined condition" denial, the Supreme Court's "reference to the lumbar strain was a reference to the accidental injury incident." *Id.* at 655. Moreover, the *McAtee* Court of Appeals' reference (as reported in *Luckhurst*) to "two conditions that merge or exist harmoniously" was not adopted by the Supreme Court. 167 Or App at 16-17. Instead, the Supreme Court in *McAtee* referred to "two medical problems simultaneously." *Multifoods Specialty Distrib. v. McAtee*, 333 Or 629, 636 (2002).<sup>6</sup> Finally, neither *McAtee* nor *Luckhurst* addressed the question that we face here; *i.e.*, whether the existence of a claimed new/omitted medical condition has been established.

Therefore, under *Brown*, a "combined condition" exists when a "work-related injury/incident" combines with a "preexisting condition." 262 Or App at 656. Such a description is consistent with the Supreme Court's reference to a "combined condition" as "two medical problems simultaneously." *McAtee*, 333 Or at 636.

Noting that the claimed "combined conditions" refer to an "otherwise compensable injury," the employer also asserts that the claims are not for a "condition" and, as such, claimant has not established the existence of the claimed new/omitted medical conditions. See *Young v. Hermiston Good Samaritan*, 223 Or App 99, 105 (2008) (defining "condition," as used in ORS 656.267(1), as "the

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<sup>6</sup> In light of the Supreme Court's description of the term "combined condition" as "two medical problems simultaneously" and the *Brown* court's interpretation of the *McAtee* holding, the Court of Appeals' pre-*Brown* definition of "combined condition" is of questionable precedential value.

physical status of the body as a whole \* \* \* or one of its parts”). Yet, whether a claim is for a medical “condition” is a question of fact to be decided based on the medical evidence in individual cases. *See Armenta v. PCC Structural, Inc.*, 253 Or App 682, 692 n 7 (2012); *Carl R. Hale*, 65 Van Natta 2316, 2317 (2013). Because claimant has initiated new/omitted medical condition claims for these “combined conditions,” the burden of proving the existence of these claimed conditions rests with her. ORS 656.266(1); ORS 656.005(7)(a)(B); *Kimble*, 65 Van Natta at 720; *Gail Moon*, 62 Van Natta 1238, 1239 (2010) (claimant bears the burden of proving the existence of the claimed combined condition).

Here, Dr. Sandquist opined that “the work injury combined with the preexisting conditions.” (Ex. 46-2). He explained that “work injury” meant “some sort of strain, stress.” (Ex. 48-15). Acknowledging that there “could” have been a cervical strain, he stated that he was “never quite sure as to exactly what that means.” (*Id.*) When asked to describe claimant’s “conditions,” he identified “neck pain but also a sensory cervical radiculopathy is the diagnosis.” (Ex. 48-15, -16). Under these circumstances, we consider Dr. Sandquist’s references to support the proposition that the claimed “combined conditions” represented “the physical status of the body.” As such, we interpret Dr. Sandquist’s opinion to be supportive of the existence of the claimed conditions. *See Jeffrey S. Lyski*, 54 Van Natta 1875, 1876 (2002) (a “condition” was established where an “electrocution” was diagnosed and a trauma specialist opined that the diagnosis was a medical condition); *cf. Manu R. Kamanda*, 65 Van Natta 1571, 1572 (2013) (the medical evidence did not establish a “condition” where the physicians did not observe, diagnose, or treat a “bite”).

Furthermore, the parties do not dispute the proposition that claimant had a preexisting failed C5-6 fusion and C6-7 arthritis. Likewise, Drs. Sandquist, Lorish, and Rosenbaum opined that the work injury combined with these preexisting conditions to cause or prolong disability and give rise to the need for treatment.<sup>7</sup>

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<sup>7</sup> Dr. Sandquist, the treating neurosurgeon, opined that the work injury combined with the preexisting conditions to cause or prolong claimant’s disability and give rise to the need for medical treatment, ultimately in the form of surgery. (Ex. 46-2). His opinion was based on his personal interaction with claimant, her medical history, and his surgical observations. (Ex. 46-2, -3). Specifically, Dr. Sandquist observed a failed C5-6 fusion and collapsed C6-7 disc space, but reasoned that claimant was doing well until the work injury, which threw her into a “symptomatic state” that ultimately required surgery. (Exs. 37D-2, 46-3).

Dr. Lorish also opined that the work injury combined with the preexisting C5-6 failed fusion and C6-7 degeneration to cause claimant’s symptoms. (Ex. 45-6, -7). As claimant’s attending physician since November 2010, Dr. Lorish was familiar with claimant’s condition. He believed that the nonunion at C5-6 and the findings at C6-7 were made symptomatic by the work injury. (Ex. 45-6).

Asserting that Drs. Sandquist and Lorish relied solely on the temporal relationship between the work injury and claimant's symptoms, the employer contends that their opinions are not persuasive. We disagree with the employer's evaluation of these opinions.

Because claimant was doing well before the injury, Dr. Sandquist believed that the 2010 injury caused symptoms that ultimately required surgery. (Exs. 37D-2, 46-3, 48-16). In providing his opinion, he relied on claimant's medical history and on his surgical observations. (Ex. 46-2, -3). Dr. Lorish reached a similar conclusion. (Ex. 45-6). In doing so, Dr. Lorish relied on the description of the injury as a "pop" coupled with the development of arm pain. (Ex. 47-16). Considering these opinions, we do not interpret Drs. Sandquist and Lorish to have based their assessments solely on a temporal relationship between the work-related event and claimant's complaint. Nevertheless, even if the temporal relationship was the primary basis for their conclusions, such a premise does not cause us to disregard their opinions. See *Allied Waste Indus., Inc. v. Crawford*, 203 Or App 512, 518 (2005), *rev den*, 341 Or 80 (2006) (temporal relationship between a work injury and the onset of symptoms is one factor that should be considered, and may be the most important factor); *Colby Gemma*, 66 Van Natta 1552, 1554 (2014) (medical opinion based on a temporal relationship and the mechanism of injury was persuasive).

Therefore, based on the foregoing reasoning, persuasive medical evidence supports the proposition that claimant's "work-related injury/incident" combined with "preexisting conditions" to cause/prolong disability need for treatment. Therefore, claimant established the existence of the claimed "combined conditions."

We turn to whether the employer met its burden to prove that the "otherwise compensable injury" was not the major contributing cause of claimant's disability/need for treatment of the combined conditions. Under *Brown*, the "otherwise compensable injury" means the "work-related injury incident." 262 Or App at 652. We acknowledge that *Brown* analyzed a "ceases" denial under ORS 656.262(6)(c), whereas here we are presented with new/omitted medical combined condition claims. Nevertheless, in conducting its analysis, the *Brown* court also

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Dr. Rosenbaum opined that the work injury combined with claimant's preexisting conditions. (Exs. 24-6, 35-2). He found confirmation of the combining in claimant's repeat C5-6 fusion and in her C6-7 treatment. (Ex. 49-3, -4).

Finally, Drs. Dietrich and Wilson were asked whether the work injury combined with preexisting conditions, but they did not answer the question. (Ex. 29-12).

applied ORS 656.266(2)(a), which refers to the “otherwise compensable injury” in ORS 656.005(7)(a)(B). *Id.* at 647, 652. The aforementioned statutes are likewise applicable in this case.

Therefore, consistent with the *Brown* rationale, we review the medical evidence to determine whether the employer has established that the “otherwise compensable injury” (*i.e.*, the “work-related injury incident”) was not the major contributing cause of claimant’s disability/need for treatment of the combined conditions. Based on the following reasoning, we are not persuaded that the employer has satisfied its statutory burden.

Drs. Dietrich and Wilson did not consider the work injury to be the major contributing cause of claimant’s need for surgery. (Ex. 29-13). Yet, in reaching their opinion, these physicians did not accept the proposition that a combined condition existed. (Ex. 29-12). As such, their opinion did not address the proper “combined condition” analysis. In the absence of such an analysis, we find their opinion insufficiently explained and unpersuasive. *See Roxie J. Bartell-Fudge*, 66 Van Natta 1009, 1016 (2014) (finding medical opinion unpersuasive when the physicians did not clearly address the proper “combined condition” analysis); *Victor V. Pierce*, 66 Van Natta 196, 198 (2014) (finding medical opinion unpersuasive when the physician did not expressly analyze the respective contributions of the “otherwise compensable injury” and the statutory “preexisting condition” in determining the major contributing cause of the combined condition). Moreover, in reasoning that there was no identified evidence of a pathological worsening at C5-6 or C6-7, Drs. Dietrich and Wilson did not address the requisite question concerning the cause of any *disability/need for treatment* of the combined conditions. Such a deficiency prompts us to further discount the persuasiveness of their opinions. *See Lowell P. Hubbell*, 62 Van Natta 2446, 2449 (2010) (physician’s opinion unpersuasive where it did not address the requisite questions concerning the cause of the disability/need for treatment of the claimed condition, as opposed to the cause of the condition itself).

In contrast, Dr. Rosenbaum attributed claimant’s initial need for treatment of the combined conditions to the cervical strain.<sup>8</sup> (Exs. 24-6, 49-4, -5). Thus, Dr. Rosenbaum’s opinion supports the compensability of the combined condition,

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<sup>8</sup> In describing claimant’s combined condition, Dr. Rosenbaum referred to the “work injury” as well as the “cervical strain,” using the terms interchangeably. (Ex. 24-6). Under these circumstances, we are persuaded that his opinion satisfies the *Brown* standard. *See Rogelio Barbosa-Miranda*, 66 Van Natta 1666, 1669 n 1 (2014) (“ceases” opinion referring to the “lumbar strain” satisfied the *Brown* standard where the physician also referred to the “work injury” and “industrial injury”); *Samuel D. Allen*, 66 Van Natta 1589, 1592 (2014) (medical evidence satisfied the *Brown* standard where physician referred to “work exposure,” “acute event,” and the “injury” as ceasing to be the major contributing cause of the combined condition).

at least initially. Although Dr. Rosenbaum attributed claimant's later treatment, including surgery, to preexisting conditions, the issue presented to us pertains to the *initial* compensability of claimant's combined cervical conditions, not any subsequent matters. See ORS 656.005(7)(a)(B); *Braden v. SAIF*, 187 Or App 494 (2003) (the Board was not authorized to find a claim compensable for a discrete period at the initial claim stage, because it may not bypass statutory claim processing requirements). Thus, Dr. Rosenbaum's opinion supports the conclusion that the "otherwise compensable injury" was the major contributing cause of the disability/need for treatment of claimant's combined condition, at least initially.

In conclusion, the record does not persuasively establish that the "otherwise compensable injury" was not the major contributing cause of claimant's disability/need for treatment for her combined conditions.<sup>9</sup> Consequently, we reverse the ALJ's order and set aside the employer's denial.

Because claimant has finally prevailed over the employer's denial, her counsel is entitled to an assessed fee for services at hearing and on review. ORS 656.386(1). 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 at hearing and on review is \$20,000, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by the record, claimant's appellate and supplemental briefs, her counsel's submission, and the employer's objections), the complexity of the issues, the nature of the proceedings (a hearing, two post-hearing depositions, written closing arguments, and appellate/supplemental briefs), the value of the interest involved, and benefit secured, and the risk that claimant's counsel might go uncompensated.

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; *Nina Schmidt*, 60 Van Natta 169 (2008); *Barbara Lee*, 60 Van Natta 1, *recons*, 60 Van Natta 139 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

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<sup>9</sup> Because the physicians' opinions on which the employer relies do not persuasively satisfy its burden of proof, it is unnecessary to consider the attending physician's and treating surgeon's opinions, which support the claim. See *Jason J. Skirving*, 58 Van Natta 323, 324 (2006), *aff'd without opinion*, 210 Or App 467 (2007) (where the carrier has the burden of proof under ORS 656.266(2)(a), the medical evidence that supports its position must be persuasive).

ORDER

The ALJ's order dated June 18, 2013 is reversed. The employer's denial is set aside and the claim is remanded to the employer for processing according to law. For services at hearing and on review, claimant is awarded an assessed fee of \$20,000, 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 November 4, 2014