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In the Matter of the Compensation of  
**NICOLE ARENAS-REDINGER, Claimant**  
WCB Case No. 13-03752  
ORDER ON REVIEW  
Bottini Bottini & Oswald, Claimant Attorneys  
Gress & Clark LLC, Defense Attorneys

Reviewing Panel: Members Weddell and Curey.

Claimant requests review of Administrative Law Judge (ALJ) Lipton's order that: (1) upheld the self-insured employer's denial of claimant's new/omitted medical condition claim for a low back condition; and (2) upheld the employer's denial of claimant's combined low back condition. On review, the issue is compensability. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact."

CONCLUSIONS OF LAW AND OPINION

New/Omitted Medical Condition

Claimant injured her low back in March 2013 when she was stocking items. She had been lifting crates of milk and eggs from overhead (the crates held four one-gallon milk containers) and placing them on the floor. (Ex. 48a-1-2; *see also* Exs. 29-1, 41-2). She then began stocking 16-ounce salsa containers. When she did so, she "was leaning forward a little bit, indicating perhaps a flexion of about 15 to 25 degrees when performing that activity, when she developed sudden, low back, sharp pain, intense, which she rates as a 10 on a scale of 0 to 10."<sup>1</sup> (Ex. 41-2). "[S]he had difficulty straightening up, and was stuck in this semi bent position." (*Id.*)

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<sup>1</sup> Claimant subsequently relayed slightly different accounts of her work injury to Drs. Brett and Carr. Dr. Brett reported that claimant had lifted a large box of six salsa containers. (Ex. 29-1). Dr. Carr reported that claimant had first stacked some crates of milk and eggs, with each crate containing about four one-gallon milk containers, and then began stocking salsa containers. (Ex. 48a1-2). Claimant testified that she had stocked "milk and eggs and then the salsa." (Tr. 7). Thus, both physicians had a somewhat inaccurate history of claimant's work injury, although both understood that she had been stocking items that morning. We do not consider this discrepancy significant.

Later the same day, claimant sought treatment at an urgent care clinic. (Ex. 3-1). The clinical impression was low back pain and acute left sciatica. (Ex. 3-2). She was prescribed pain medication, muscle relaxants and ibuprofen. (*Id.*) As early as four days after her injury, claimant complained of shooting pain down the back of her left leg. (Ex. 6-2). Claimant was initially diagnosed with a lumbar strain with left sciatica. (*Id.*) The employer accepted a low back strain. (Ex. 33-1).

An April 29, 2013 MRI showed a “L5-S1 moderate left lateral recess stenosis secondary to broad-based disc bulge left paracentral-foraminal disc protrusion component. Mass effect upon the exiting left S1 nerve root and correlate with left S1 radiculopathy.” (Ex. 25-2).

Claimant requested that the employer accept a “left L5-S1 disc herniation with left S1 nerve root impingement.” (Ex. 36). After the employer denied her claim, claimant requested a hearing.

At the hearing, the parties stipulated that claimant’s work injury was a material contributing cause of her disability/need for treatment for her condition. (Closing Arguments, Tr. 1). In upholding the employer’s denial, the ALJ concluded that claimant’s work injury was not the major contributing cause of her L5-S1 disc herniation and left S1 nerve impingement. In reaching this conclusion, the ALJ found the opinion of Dr. Brett, claimant’s treating neurosurgeon, unpersuasive because of an inaccurate history of the injurious event. In contrast, the ALJ was persuaded by the opinion of Dr. Carr, an orthopedic surgeon who examined claimant after her surgery at the employer’s request, finding that he had a more accurate history of the work injury event.

On review, claimant contends that Dr. Brett’s opinion is more persuasive and, thus, the employer has not established that her work injury was not the major contributing cause of her disability and need for treatment for her L5-S1 disc herniation and S1 nerve impingement. Based on the following reasoning, we agree with claimant.

Neither party contests the ALJ’s application of a “combined condition” analysis in resolving the dispute. Accordingly, the employer has the burden of proving that the otherwise compensable injury was not the major contributing cause of disability or need for treatment of the combined low back condition. *See* ORS 656.266(2)(a); *Jean M. Janvier*, 66 Van Natta 1827 (2014) (to meet its burden under ORS 656.266(2)(a) in response to a new/omitted medical condition

claim, a carrier must prove that the “otherwise compensable injury” (*i.e.*, the work-related injury/incident) was not the major contributing cause of the disability/need for treatment for the combined condition). We are not persuaded that the employer has met its statutory burden of proof.

Because of the disagreement between physicians regarding the cause of claimant’s disability/need for treatment for the condition, resolution of this matter presents 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) (citing *Uris v. State Comp. Dep’t*, 247 Or 420, 426 (1967)). When presented with disagreement between experts, we give more weight to those opinions that are well reasoned and based on complete information. *Somers v. SAIF*, 77 Or App 259, 263 (1986).

We do not find Dr. Carr’s opinion regarding the major contributing cause of claimant’s disability/need for treatment of her disc condition persuasive. Dr. Carr did not believe that claimant’s symptomology was consistent with the claimed L5-S1 disc herniation or an injury to the S1 nerve root, and that the broad disc bulge at L5-S1 was degenerative in nature. (Ex. 48a-9, -10). Even after reviewing Dr. Brett’s operative findings, which reported “a soft focal disc herniation and annular injury on the left at L5-S1 with left S1 nerve root impingement with the S1 nerve root being edematous, erythematous, and irritable[,]” Dr. Carr continued to opine that claimant’s symptomology was inconsistent with an L5-S1 disc herniation with an S1 impingement. (Exs. 48a-9, -10, 51-1). In the absence of a persuasive response to Dr. Brett’s operative findings, we find Dr. Carr’s opinion lacks adequate explanation. *See Moe v. Ceiling Sys. Inc.*, 44 Or App 429, 433 (1980) (rejecting unexplained or conclusory opinion).

Furthermore, Dr. Brett’s opinion persuasively establishes that the work injury is the major contributing cause of claimant’s disability/need for treatment for her left L5-S1 disc herniation and left S1 nerve root impingement condition. We reason as follows.

Dr. Brett emphasized claimant’s continued “low back and left S1 radiculopathy and pain despite conservative measures with imaging showing disk herniation on the left at L5-S1 with left S1 nerve root impingement in the lateral recess.” (Ex. 39-1). Dr. Brett opined that, following her work injury, claimant had “increasing radicular pain and radiculopathy despite conservative measures including the use of corticosteroids, analgesics, modified bed rest, and abstinence from work” and her “neurologic examination showed deterioration with very

significant weakness, absent ankle reflex, and exquisite nerve root irritation signs.” (Ex. 43-1). Dr. Brett further explained that at “surgery we found a large soft focal herniation with impingement of an edematous and erythematous left S1 nerve root. The soft herniation was not ‘calcified’ nor pre-existing but was produced by her [work] injury[.]” (*Id.*)

Thus, Dr. Brett, relying in part on his observations during surgery, opined that claimant’s disability/need for treatment of her L5-S1 disc herniation with left S1 nerve root impingement was caused in major part by her work injury. (Ex. 43). Given that Dr. Brett had the unique opportunity to observe claimant’s condition at surgery, we defer to his opinion. *See Argonaut Ins. Co. v. Mageske*, 93 Or App 698, 702 (1988) (treating surgeon’s opinion given great weight because he was able to observe the claimant’s shoulder during surgery and had first-hand exposure to and knowledge of the claimant’s condition).

Accordingly, based on our evaluation of the medical evidence, we find that the employer has not proven that the March 2013 work injury was not the major contributing cause of the disability/need for treatment of the L5-S1 disc herniation and S1 nerve impingement combined condition. Therefore, we reverse that portion of the ALJ’s order that upheld the employer’s denial of claimant’s new/omitted medical condition claim.

#### “Ceases” Denial

On September 4, 2013, the employer accepted a “low back strain combined with preexisting lumbar spondylosis[.]” (Ex. 47-1). On that same date, the employer issued a “ceases” denial stating that a “preponderance of the current medical evidence establishes that [the] otherwise compensable claim has ceased to be the major contributing cause of the need for treatment and disability of the combined condition.” (Ex. 48). Claimant requested a hearing.

Relying on the opinion of Dr. Carr, the ALJ concluded that there was insufficient evidence to find that claimant’s low back strain remained the major contributing cause of her need for treatment and disability as of September 4, 2013, the date of the combined condition denial. On review, claimant contends that the employer did not establish the presence of a combined condition or, even assuming its existence, the otherwise compensable injury ceased to be the major contributing cause of the disability or need for treatment of the combined condition. For the following reasons, we conclude that, even if the employer’s acceptance of a combined condition was proper, it did not satisfy its burden of proving that the otherwise compensable injury ceased to be the major contributing cause of the combined low back condition.

A carrier may deny an accepted combined condition if the otherwise compensable injury “ceases” to be the major contributing cause of the combined condition. *See* ORS 656.262(6)(c). The word “ceases” presumes a change in the worker’s condition or circumstances such that the otherwise compensable injury is no longer the major contributing cause of the combined condition. *See WalMart Stores, Inc. v. Young*, 219 Or App 410, 417-18 (2008).

Under ORS 656.262(6)(c), the carrier bears the burden to show a change in the worker’s condition or circumstances such that the “work-related injury incident” ceased to be the major contributing cause of the disability/need for treatment of the combined condition. *See Brown v. SAIF*, 262 Or App 640 (2014).<sup>2</sup> In determining whether such cessation has occurred, we examine only the otherwise compensable injury and the statutory preexisting condition or its components. *Vigor Indus., LLC v. Ayres*, 257 Or App 795, 803 (2013).

The causation issue presents a complex medical question that must be resolved by expert medical opinion. *Barnett v. SAIF*, 122 Or App 279, 283 (1993). When presented with disagreement among medical experts, we give more weight to those opinions that are well reasoned and based on complete information. *Somers*, 77 Or App at 263. Where the carrier has the burden of proof under ORS 656.266(2)(a), the medical evidence supporting its position must be persuasive. *See Jason J. Skirving*, 58 Van Natta 323, 324 (2006), *aff’d without opinion*, 210 Or App 467 (2007).

Here, Dr. Carr opined that “by the time of the surgery on 6/12/13, the lumbar strain had ceased to be the major contributing cause of any medical treatment for a combined condition.” (Ex. 51-5). Even assuming that Dr. Carr’s opinion satisfies the *Brown* standard, for the reasons previously discussed, we do not find his opinion persuasive.

Instead, we find the opinion of Dr. Brett persuasive. Based on his preoperative and postoperative findings, Dr. Brett opined that “[a]lthough [claimant] does have [a] pre-existing condition, it is her work injury which is the major contributing factor clearly and led to her need for operative intervention after she failed to respond to protracted conservative care over several months.” (Ex. 50-1-2). Again, given that Dr. Brett had the unique opportunity to observe claimant’s condition at surgery, we defer to his opinion. *See Mageske*, 93 Or App at 702.

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<sup>2</sup> The ALJ’s order issued before the court’s decision in *Brown*.

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For the above reasons, we reverse that portion of the ALJ's order upholding the employer's "ceases" denial.

Claimant's attorney 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 \$9,000, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by the record and claimant's appellate briefs), the complexity of the issues, the values of the interests involved, and the risk that counsel may 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 aforementioned denials, 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).

#### ORDER

The ALJ's order dated February 4, 2014 is reversed. The employer's denials are set aside and the claims are remanded to the employer for processing according to law. For services at hearing and on review, claimant's attorney is awarded an assessed fee of \$9,000, to be paid by the employer. Claimant is awarded reasonable expense 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 November 14, 2014