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In the Matter of the Compensation of  
**EDWIN OWEN, Claimant**  
WCB Case No. 14-03409  
ORDER ON REVIEW  
Dibartolomeo Law Office PC, Claimant Attorneys  
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Weddell, Johnson and Somers. Member Weddell dissents.

Claimant requests review of Administrative Law Judge (ALJ) Jacobson's order that upheld the SAIF Corporation's denials of his new/omitted medical condition claims for various combined low back conditions. On review, the issue is compensability.

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

On December 11, 2013, claimant injured his back at work when he slipped on ice and fell on a concrete surface. (Tr. 32-33). SAIF accepted a lumbar strain. (Exs. 13A, 17A).

In February 2014, claimant was evaluated by Dr. Johnson, a neurosurgeon. (Ex. 14). Claimant stated that he had immediate back pain when he fell, and over the next few days he began developing pain and numbness into his legs. (*Id.*) Based on a "post-injury" MRI, Dr. Johnson diagnosed L5-S1 spondylolisthesis resulting in severe bilateral foraminal narrowing and compression of the L5 nerve roots. (*Id.*) He noted that these findings appeared to be a chronic problem, though claimant had no significant prior low back history. (Ex. 14-3). He recommended physical therapy and massage, but advised that an L5-S1 fusion would likely be necessary if claimant's symptoms did not resolve. (*Id.*)

In March 2014, claimant was evaluated by Dr. Shanno for a second neurosurgical opinion. (Ex. 16). Dr. Shanno diagnosed a "grossly unstable grade 2 spondylolytic spondylolisthesis at L5-S1," stating that an L5-S1 fusion would be necessary for claimant's condition to improve. (Ex. 16-3).

In April 2014, claimant requested acceptance of "foramen stenosis" as a new/omitted medical condition. (Ex. 19). Dr. Klatt, the attending physician, noted that, although this was the condition on which the neurosurgeon proposed to operate, it might not have been caused by claimant's fall at work. (Ex. 19-3).

On April 29, 2014, claimant was evaluated by Dr. Frank, a neurosurgeon, at SAIF's request. (Ex. 20). Dr. Frank diagnosed a lumbar strain and preexisting L5-S1 spondylolisthesis and spondylosis. (Ex. 20-9). Given the lack of prior symptoms and onset at the time of injury, Dr. Frank considered the work injury to be a material contributing cause of claimant's symptoms from the L5-S1 spondylolisthesis. (Ex. 20-10). He opined that the work injury combined with claimant's preexisting L5-S1 spondylolisthesis, and that the major contributing cause of the combined condition was the preexisting condition. (Ex. 20-12).

In May 2014, Dr. Shanno concurred with Dr. Frank's report. (Ex. 22). However, Dr. Shanno opined that claimant may have worsened his "spondy" when he fell. (Ex. 22-2).

In July 2014, Dr. Klatt concurred with Dr. Frank's diagnosis and conclusions regarding the major contributing cause of claimant's disability and need for medical treatment. (Ex. 24).

On July 8, 2014, SAIF denied the "foramen stenosis" claim. (Ex. 26).

On July 17, 2014, claimant initiated new/omitted medical condition claims for L5-S1 spondylolisthesis as a combined condition, L5-S1 bilateral foraminal stenosis as a combined condition, radiculopathy at L5-S1 and radiculopathy at L5-S1 as a combined condition. (Ex. 28).

On August 19, 2014, SAIF denied the claim for L5-S1 radiculopathy alleging that the condition was not compensably related to the work injury. SAIF denied the remaining "combined condition" claims stating that the requests were not clearly specified. (Ex. 31).

On September 2, 2014, Dr. Johnson performed an L5-S1 fusion and decompression of the L5 and S1 nerve roots. (Ex. 34). The post-operative diagnoses were unchanged from Dr. Johnson's original assessment. (*Id.*)

In October 2014, Dr. Johnson gave a transcribed statement in response to questions from claimant's attorney. (Ex. 38). In addition to L5-S1 spondylolisthesis, Dr. Johnson confirmed that bilateral L5 radiculopathy would also be an accurate diagnosis given claimant's foraminal narrowing and pain complaints. (Ex. 38-7). He stated that individuals with preexisting spondylolisthesis would probably be more susceptible to developing symptoms after a fall such as claimant's. (Ex. 38-8). Dr. Johnson described claimant's nerve

roots as being red and inflamed; however, such changes did not indicate to him whether the nerve root irritation was acute or chronic. (Ex. 38-9). He noted claimant's history of a 2012 motor vehicle accident (MVA), but did not consider that incident to contribute to claimant's lumbar condition. (Ex. 38-10). Referring to claimant's strenuous work activities, Dr. Johnson commented that claimant's ability to engage in such activities supported the conclusion that the MVA did not contribute to claimant's lumbar spine condition. (Ex. 38-11). Dr. Johnson opined that the work injury was the major contributing cause of the need for the surgery. (Ex. 38-12).

In December 2014, Dr. Frank opined that claimant's L5-S1 nerve root irritation had likely been present but "subclinical" before the work injury, and that claimant would have had motion at L5-S1 before the work injury due to the spondylolisthesis. (Ex. 39). He considered the work injury to be the "straw that broke the camel's back" and finally caused claimant's radicular symptoms. (Ex. 39-2). He reiterated his opinion that the preexisting conditions were the major contributing cause of the combined condition. (*Id.*)

In January 2015, Dr. Klatt opined that the major contributing cause of claimant's condition was the injury event, which he understood to be falling off a ladder. (Ex. 40-2). He explained that the preexisting spondylolisthesis rendered the L5-S1 nerve roots more susceptible to injury, and that claimant's fall likely caused excessive movement of the vertebral bodies resulting in pathologically irritated nerve roots. (*Id.*)

In February 2015, Dr. Frank opined that claimant's spondylolisthesis caused ongoing irritation of the nerve roots after the work injury, and this required mechanical alteration of claimant's spine in the form of decompression and stabilization. (Ex. 41). He considered the need for treatment to be due to claimant's preexisting spondylolysis, spondylolisthesis and spondylosis, and therefore, he did not consider the work injury to be the major contributing cause of the need for treatment. (*Id.*)

The ALJ determined that claimant's requests for acceptance of L5-S1 spondylolisthesis as a combined condition, L5-S1 bilateral foraminal stenosis as a combined condition, and radiculopathy at L5-S1 as a combined condition were reasonably clear such that SAIF should have inferred that claimant was requesting those conditions as preexisting conditions combined with the "otherwise compensable injury." Accordingly, the ALJ found claimant's combined condition requests to satisfy the requirements for new/omitted condition claims under ORS 656.267.

Turning to the merits of the claims, the ALJ relied on the opinions of Drs. Johnson and Frank to determine that claimant established that the work injury was a material contributing cause of the need for treatment of the L5 radiculopathy condition. However, the ALJ was persuaded that Dr. Frank's opinion established that the work injury was not the major contributing cause of the need for treatment of the combined condition because claimant's nerve root inflammation would not be able to improve due to the preexisting mechanical defects in claimant's lumbar spine. Therefore, the ALJ determined that SAIF established that the "otherwise compensable injury" was not the major contributing cause of the combined L5-S1 radiculopathy and spondylolisthesis conditions.

Finally, the ALJ determined that there was insufficient evidence to establish that the otherwise compensable injury was either a material or major contributing cause of the need for treatment of the foraminal stenosis condition, either independently or as a combined condition.

On review, claimant contends that Dr. Frank's opinion does not persuasively establish that the work injury was not the major contributing cause of claimant's need for treatment of the denied low back conditions. *See* ORS 656.266(2)(a); *Nicole Arenas-Redinger*, 66 Van Natta 1868, 1870 (2014). Based on the following reasoning, we disagree.

To sustain its requisite burden of proof, SAIF must establish that the work injury was not the major contributing cause of the need for medical treatment/disability for the claimed combined conditions. ORS 656.005(7)(a)(B); ORS 656.266(2)(a); *SAIF v. Kollias*, 233 Or App 499, 505 (2010); *Brian G. McNulty*, 67 Van Natta 1398, 1401 (2015). The "otherwise compensable injury" means the "work-related injury incident." *Brown v. SAIF*, 262 Or App 640, 652 (2014); *see also Jean M. Janvier*, 66 Van Natta 1827, 1832-33 (2014) (applying the *Brown* definition of an "otherwise compensable injury" to new/omitted medical condition claims under ORS 656.266(2)(a)).

Whether the work injury incident was the major contributing cause of disability or need for treatment of the requested low back combined conditions is a complex medical question that must be established by expert medical opinion. *See Uris v. Comp. Dep't*, 247 Or 420 (1967). More weight is given to those medical opinions that are well reasoned and based on complete information. *See Somers v. SAIF*, 77 Or App 259, 263 (1986). We properly may or may not give greater weight to the opinion of the treating physician, depending on the record in each case. *See Dillon v. Whirlpool Corp.*, 172 Or App 484, 489 (2001); *Darwin B.*

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*Lederer*, 53 Van Natta 974, 974 n 2 (2001) (absent persuasive reasons to the contrary, the Board generally gives greater weight to the opinion of the claimant's attending physician).

Because SAIF has the burden of proof under ORS 656.266(2)(a), the medical evidence supporting its position must be persuasive. *Jason V. Skirving*, 58 Van Natta 323, 324 (2006), *aff'd without opinion*, 210 Or App 467 (2007). As reasoned below, we are persuaded that SAIF has met its statutory burden.

Here, Dr. Frank explained that, while he considered the work injury to be a material cause of claimant's need for low back surgery, he considered the preexisting conditions to be the major contributing cause. (Ex. 41). He reasoned that absent claimant's preexisting condition, the L5-S1 nerve irritation resulting from the injury would resolve without the need for surgery. (*Id.*) He opined that, given the extent of claimant's preexisting condition, claimant would not be able to recover without surgically correcting the preexisting "mechanical defect" in his spine. (*Id.*) For the following reasons, we consider Dr. Frank's explanation more persuasive than the countervailing opinions. *See Somers*, 77 Or App at 263.

Drs. Klatt and Johnson concluded that claimant's work injury was the major contributing cause of his combined low back condition and of the need for surgery. (Ex. 38-12; 40-2). However, Dr. Klatt offered his opinion based on his incorrect understanding that claimant fell from a ladder, rather than suffering a ground-level fall. (Ex. 40-2; Tr. 32). Due to his inaccurate understanding of the mechanism of injury, we discount the persuasiveness of Dr. Klatt's opinion. *Miller v. Granite Construction Co.*, 28 Or App 473, 478 (1977) (medical opinion that is based on an incomplete or inaccurate history is not persuasive).

While Dr. Johnson accurately understood the mechanism of injury, we find his opinion attributing the major contributing cause of claimant's need for surgery to the work injury to be inadequately explained and conclusory in comparison to the opinion of Dr. Frank. Whereas Dr. Frank explained that the low back surgery performed by Dr. Johnson addressed claimant's preexisting conditions, and the contribution of the work injury was comparatively minor, Dr. Johnson did not explain the basis of his opinion that the work injury was the major contributing cause of claimant's need for surgery. (Exs. 39; 38-12). The lack of such an explanation causes us to discount Dr. Johnson's opinion. *See Moe v. Ceiling Sys., Inc.*, 44 Or App 429, 433 (1980) (rejecting unexplained or conclusory opinion). Furthermore, Dr. Johnson did not persuasively respond to Dr. Frank's "mechanical

defect” theory. In the absence of a rebuttal opinion, we discount Dr. Johnson’s conclusions. *See Janet Benedict*, 59 Van Natta 2406, 2409 (2007), *aff’d without opinion*, 227 Or App 289 (2009).

Based on the aforementioned reasoning, we find the opinion of Dr. Frank to persuasively establish that claimant’s work-related injury incident was not the major contributing cause of the disability or need for treatment of the claimed low back combined conditions. Consequently, SAIF has carried its burden of proof under ORS 656.266(2)(a). Accordingly, the ALJ’s order is affirmed.

### ORDER

The ALJ’s order dated May 1, 2015 is affirmed.

Entered at Salem, Oregon on December 10, 2015

Member Weddell, dissenting.

The majority relies on the opinion of Dr. Frank to conclude that claimant’s work-related injury incident was not the major contributing cause of claimant’s need for treatment/disability for his claimed combined lowback conditions. Because I do not find Dr. Frank’s opinion to be persuasive, and SAIF bears the burden of proof regarding the major contributing cause of these claimed combined conditions, I respectfully dissent.

Dr. Frank agreed that claimant’s work injury likely irritated the L5-S1 nerve root and was a material cause of claimant’s need for treatment (specifically, the L5-S1 decompression performed by Dr. Johnson). (Ex. 41). However, Dr. Frank concluded that the work injury was not the major contributing cause of the need for treatment of claimant’s L5-S1 condition because absent claimant’s preexisting condition, the nerve root irritation would be expected to resolve without surgical intervention. Dr. Frank believed that, due to a preexisting condition, claimant was suffering “repeated injury” to the nerve. (Ex. 41). Dr. Frank also characterized claimant’s injury as “the straw that broke the camel’s back.”<sup>1</sup> (Ex. 39).

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<sup>1</sup> I question the consistency of Dr. Frank’s opinion when it analogizes a work injury that, by his own admission, was a material contributing cause rendering “sub-clinical” nerve root inflammation into clinical and disabling radicular symptoms, as being comparable to a “straw.”

Yet, claimant had a new onset of radicular symptoms in the lower extremities, and he had worked for many years in a physically demanding job and otherwise had a physically active lifestyle. (Tr. 12, 13, 37). On the date of injury, claimant took a “violent and awkward” fall on his back onto a hard concrete surface after slipping on ice. (Ex. 14). He felt immediate low back pain, which soon developed into radicular symptoms.

Under such circumstances, I find the basis of Dr. Frank’s opinion stating claimant suffered from “repeated injury” to his L5-S1 nerves and that this preexisting condition was the major contributing cause of claimant’s need for treatment to be inadequately explained. *See Moe v. Ceiling Sys., Inc.*, 44 Or App 429, 433 (1980) (rejecting unexplained or conclusory opinion). I base my conclusion on the following reasoning.

Dr. Frank does not appear to be attributing claimant’s low back and leg symptoms to a natural progression of the preexisting low back condition with a coincidental onset of symptoms. To the contrary, he considers the work injury to be a material cause of the need for treatment. (Ex. 41). Also, Dr. Frank seems to posit a “hypothetical claimant” who does not have preexisting low back pathology, and therefore would have an uncomplicated recovery without the need for surgery. Considering the circumstances surrounding claimant’s fall at work, particularly his new onset of radicular symptoms and the occurrence of such symptoms after his fall, Dr. Frank’s hypothetical does not persuasively explain why the work injury was not the major contributing cause of disability/need for treatment for this particular claimant.

It is SAIF’s burden to provide a persuasive medical opinion explaining how the work injury is not the major contributing cause of claimant’s disability/need for treatment for his combined condition. *See* ORS 656.266(2)(a); *Nicole Arenas-Redinger*, 66 Van Natta 1868, 1872 (2014); *Jason J. Skirving*, 58 Van Natta 323, 324 (2006), *aff’d without opinion*, 210 Or App 467 (2007). For the reasons expressed above, Dr. Frank’s opinion does not adequately provide such an explanation. Therefore, I would conclude that the claimed combined conditions are compensable. Because the majority reaches a different conclusion, I respectfully dissent.