
In the Matter of the Compensation of
JUSTIN JOHNS, Claimant
WCB Case No. 14-01221, 13-06095
ORDER ON REVIEW
Glen J Lasken, Claimant Attorneys
Chad Kosieracki, Defense Attorneys

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

The self-insured employer requests review of that portion of Administrative Law Judge (ALJ) Otto's order that set aside its denial of claimant's occupational disease claim for a low back condition. On review, the issue is compensability.

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

Claimant began working as a firefighter and EMT paramedic in 2006. (Tr. 12). This job involved many "tweaks" to his back. (Tr. 20). In 2009 and 2010, he treated with Dr. Belza for low back pain. (Exs. 1, 3, 5, 6). In a November 2011 work incident, he "fought with" a stretcher carrying a very heavy patient to prevent it from falling. (Tr. 19-20). That incident resulted in low back pain, and he filed an incident report. (Ex. 8; Tr. 20).

In 2013, on referral from Dr. Belza, claimant sought treatment from Dr. Kitchel for low back pain. (Ex. 9). A July 2013 MRI noted a central disc protrusion at L5-S1, abutting the right passing S1 nerve root. (Ex. 14). Claimant filed injury and occupational disease claims for a low back condition, which the employer denied. Claimant requested a hearing.

Reasoning that Dr. Belza had attributed claimant's L5-S1 disc bulge to claimant's work activities in general, rather than a particular work incident, the ALJ analyzed the L5-S1 disc bulge as an occupational disease under ORS 656.802(2)(a). Finding Dr. Belza's opinion most persuasive, the ALJ determined that the L5-S1 disc bulge was compensable as an occupational disease.

On review, the employer contends that claimant's occupational disease claim is based on the worsening of a preexisting condition, and is therefore subject to ORS 656.802(2)(b). Additionally, the employer argues that the opinions of Drs. Toal and Rosenbaum, who examined claimant at the employer's request, are more persuasive than that of Dr. Belza. As explained below, we disagree with the employer's contentions.

Claimant bears the burden to establish the compensability of his occupational disease claim by showing that employment conditions, including work-related injuries, were the major contributing cause of the disease. *See* ORS 656.266(1); ORS 656.802(2)(a); *Kepford v. Weyerhaeuser Co.*, 77 Or App 363, 365-66 (1986). Additionally, if the occupational disease claim is based on the worsening of a preexisting condition, claimant must prove that employment conditions were the major contributing cause of the combined condition and pathological worsening of the disease. ORS 656.802(2)(b).

Considering claimant's history of low back problems and the conflicting medical opinions regarding causation, we conclude that the causation issue presents a complex medical question that must be resolved by expert medical opinion. *Uris v. State Comp. Dep't*, 247 Or 420, 426 (1967); *Barnett v. SAIF*, 122 Or App 279, 283 (1993). We give more weight to those medical opinions that are well reasoned and based on complete information. *Somers v. SAIF*, 77 Or App 259, 263 (1986).

We first address the employer's contention that this claim should be subject to the additional requirements of ORS 656.802(2)(b) because it is based on the worsening of a preexisting condition. Dr. Belza, on whose opinion we rely for reasons discussed below, opined that claimant had an L5-S1 disc bulge that was superimposed on mild preexisting degeneration. (Ex. 22-2). He attributed claimant's symptoms to the L5-S1 disc bulge, and described the degenerative findings as "essentially incidental." (Ex. 47-3-4). He did not opine that claimant's work activities caused the degeneration. (Ex. 27-5). However, he opined that the L5-S1 bulge was a separate condition that resulted from work activities, and not from degeneration. (*Id.*) His opinion, therefore, "concern[ed] the compensability of the disc injury, not the compensability of the underlying mild degeneration." (*Id.*)

Dr. Belza's opinion supports the conclusion that even if claimant's preexisting degeneration qualifies as a "preexisting condition" under ORS 656.005(24)(b),¹ his occupational disease claim is not based on a worsening of that preexisting condition. Instead, the claim is based on a separate condition that, unlike the preexisting degeneration, was caused by employment conditions.

¹ For an occupational disease claim, a "preexisting condition" is "any injury, disease, congenital abnormality, personality disorder or similar condition that contributes to disability or need for treatment and that precedes the onset of the claimed occupational disease, or precedes a claim for worsening in such claims pursuant to ORS 656.273 or 656.278." ORS 656.005(24)(b).

Such circumstances do not support the analysis of claimant's occupational disease claim under ORS 656.802(2)(b). See *Melvin A. Caston*, 58 Van Natta 62, *recons*, 58 Van Natta 585 (2006) (occupational disease claim was not subject to ORS 656.802(2)(b) because, despite the presence of a preexisting condition, the claim was for a different condition rather than a worsening of the preexisting condition).

Accordingly, pursuant to ORS 656.802(2)(a), claimant must show that employment conditions were the major contributing cause of his L5-S1 bulge. As explained below, we conclude that claimant has established the compensability of his claim.

Dr. Belza noted that the November 2011 work incident was only one of many incidents in which claimant suffered "similar minor injuries and tweaks to his back." (Ex. 22-2). He opined that the development of the disc bulge began with the November 2011 incident, and that the totality of such incidents had a cumulative effect. (Exs. 22-2, 27-2). He also opined that, after such incidents, the strenuous nature of claimant's overall work activity also contributed to the worsening of the already-damaged disc. (Ex. 27-3). He concluded that claimant's employment conditions were the major contributing cause of the L5-S1 disc bulge. (Ex. 22-3).

Dr. Belza acknowledged that he would be "disinclined" to attribute the L5-S1 disc bulge to general employment conditions without a specific traumatic event. (Ex. 22-2). However, he identified several factors, such as claimant's relatively young age, the lack of other disc bulges, and the relatively mild nature of the other degenerative changes, as weighing against the attribution of claimant's L5-S1 disc bulge to degeneration. (Exs. 22-2, 27-3). Additionally, he noted the apparent absence of prior off-work injuries or traumas, and opined that claimant's generally good physical condition also suggested that an off-work injury was unlikely. (Exs. 22-2, 27-3-4). He weighed these considerations against the sudden jerking and twisting involved in the November 2011 incident and the "strenuous, sometimes wild and frenetic activities" involved in claimant's regular work. (Ex. 27-4).

The employer argues that Dr. Belza's opinion is not based on accurate information because he did not understand that an MRI first showed a disc bulge in 2009. At that time, an MRI showed degeneration and a "small" L5-S1 disc protrusion. (Exs. 1-1, 2-1). However, claimant was then treating with Dr. Belza, who noted the degeneration and described the bulge as "minor in nature." (Ex. 5). Later addressing claimant's current condition, Dr. Belza described the present

bulge as “significant,” as contrasted with relatively mild degenerative findings. (Ex. 27-3-4). In reaching his conclusion, Dr. Belza considered his earlier treatment of claimant. (Ex. 22-1). Under such circumstances, we conclude that Dr. Belza, who treated claimant in 2009 and 2010, was familiar with, and appropriately considered, claimant’s earlier complaints and degenerative findings.

Noting that Dr. Belza had diagnosed lumbar disc disease in 2009 and signed a “check-the-box” concurrence with Dr. Toal’s initial report, the employer also argues that Dr. Belza changed his opinion without a reasonable explanation. (Exs. 5, 20). However, after reviewing Dr. Belza’s reasoning and his discussion of Dr. Toal’s opinion, we conclude that, to the extent that Dr. Belza’s ultimate opinion is different from Dr. Toal’s initial report, the later explanation is a clarification, rather than an unexplained change of opinion. *See Steven L. Traister*, 67 Van Natta 318 (2015) (later clarification offered the most persuasive articulation of a physician’s opinion, rather than a change from a previously-expressed opinion).

Dr. Toal’s report, with which Dr. Belza concurred, noted the 2009 MRI findings. (Ex. 18-5). Dr. Toal stated that preexisting degeneration had been shown in 2009 and that he could not identify a specific injury caused by the November 2011 work incident. (*Id.*) As discussed above, however, Dr. Belza did not later dispute the existence of the preexisting degeneration, nor did he assert that the L5-S1 disc bulge arose solely from the November 2011 work incident. Instead, he later opined that the L5-S1 disc bulge was a separate condition that had been precipitated by the November 2011 work incident, but further developed as a result of other work-related “tweaks” and work activities, and that the bulge was superimposed on the preexisting degeneration. As Dr. Belza later explained, he considered Dr. Toal’s opinion, and the medical literature on which Dr. Toal’s opinion was based, to address the etiology of the preexisting degeneration, but not the etiology of the disc bulge. (Ex. 27-4-5).

Accordingly, Dr. Belza did not consider his opinion to be inconsistent with Dr. Toal’s. (*Id.*) Insofar as Dr. Belza’s later opinions differ from Dr. Toal’s initial report in some details, we consider his later explanation to clarify his opinion, rather than to change his opinion without explanation.

Thus, Dr. Belza fully considered claimant’s history of preexisting degeneration and weighed it against claimant’s history of work incidents, as well as the generally strenuous nature of claimant’s work. He also considered contrary medical opinions and medical literature regarding degeneration. He explained how

the “tweaking” incidents, along with other work activities, cumulatively caused a disc bulge that was superimposed on the preexisting degenerative condition. His opinion is well explained, based on complete information, and persuasive.

We find Dr. Toal’s opinion less persuasive. As noted above, Dr. Toal opined that claimant had preexisting degenerative disc disease and that the 2013 MRI did not demonstrate any new pathology. (Ex. 18-5). He later opined, based on studies of twins, that “occupational loading” is responsible for between two and seven percent of changes in degeneration. (Ex. 26-1). Thus, he opined that claimant’s work, including frequent heavy lifting and carrying, was not the major contributing cause of claimant’s L5-S1 disc bulge. (*Id.*) He attached a journal article and an excerpt of another journal article in support of his opinions. (Ex. 26-3-12).

Although Dr. Toal explained why he believed “occupational loading” would not, by itself, be responsible for the majority of degenerative changes, he did not address the effect of the numerous minor injuries to which claimant testified. Instead, his opinion appears to be generalized from studies cited in the attached journal article, which did not specifically address the type of minor injuries and strenuous work to which Dr. Belza attributed major causation.² (Ex. 26-1, -10-11). His opinion, thus, did not address the particular circumstances of this claim. *See Sherman v. Western Employer’s Ins.*, 87 Or App 602, 606 (1987) (physician’s comments that were general in nature and not addressed to the claimant’s particular situation were not persuasive).

Additionally, Dr. Toal addressed only the cause of claimant’s overall degenerative condition, which he assumed to include the L5-S1 bulge, without responding to Dr. Belza’s reasoning that the L5-S1 disc bulge was a separate condition that was superimposed on preexisting degeneration. (Ex. 26-1). His failure to address this proposition further reduces the persuasiveness of his opinion. *See Luke Aldrich*, 67 Van Natta 966, 972 (2015) (medical opinion discounted where it did not respond to contrary reasoning).

² Among other variables, one of the studies addressed the effects of driving, another addressed the effects of unspecified “measures of occupational and leisure physical loading” (but not of other unspecified “mechanical forces”), and a third addressed unspecified “occupation, and physical activity.” (Ex. 26-10-11). None of the studies purported to address occupations involving repeated low back “tweaks” and “strenuous, sometimes wild and frenetic activities,” and none of the studies purported to account for all disc bulges. (*Id.*) In the absence of an expert opinion explaining the relevance of these studies, we lack the specialized expertise to draw conclusions from them. *See SAIF v. Calder*, 157 Or App 224, 228 (1998).

We discount Dr. Rosenbaum's opinion for similar reasons. Dr. Rosenbaum addressed the cause of claimant's degenerative spondylosis, which, he stated, "over the past 25 years has not been associated with physical exertional activity with regards to causation" by medical literature. (Ex. 23-6). He did not address the proposition that the bulge was a separate condition that was superimposed on preexisting degeneration, or that claimant's work involved a series of injurious "tweaks" that caused bulging and allowed the "exertional activity" involved in firefighting to contribute further. We find Dr. Belza's opinion more persuasive than Dr. Rosenbaum's.

Finally, we acknowledge that Dr. Kitchel, who examined claimant three times in 2013 on referral from Dr. Belza, concurred with Dr. Toal's initial opinion. (Ex. 21). He did not explain the basis of his agreement or otherwise opine that employment conditions were not the major contributing cause of claimant's L5-S1 disc bulge. Considering Dr. Belza's response to Dr. Toal's opinion, we do not find that Dr. Kitchel's concurrence weighs persuasively against compensability.

Accordingly, we conclude that Dr. Belza's opinion persuasively establishes that claimant's employment conditions were the major contributing cause of his L5-S1 disc bulge. Therefore, 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 \$4,000, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's respondent's brief), the complexity of the issue, the value of the interest involved, and the risk that claimant's counsel may 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, to be paid by the employer. *See* ORS 656.386(2); OAR 438-015-0019; *Gary E. Gettman*, 60 Van Natta 2862 (2008). The procedure for recovering this award, if any, is described in OAR 438-015-0019(3).

ORDER

The ALJ's order dated December 14, 2014 is affirmed. For services on review, claimant's attorney is awarded a reasonable attorney fee of \$4,000, payable by the employer. Claimant is awarded reasonable expenses 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 July 20, 2015

Member Johnson dissenting.

The majority reasons that the opinion of Dr. Belza, who treated claimant in 2009 and 2010, persuasively establishes that employment conditions were the major contributing cause of claimant's L5-S1 disc bulge. Because I find the contrary medical opinions of Drs. Toal and Rosenbaum, who examined claimant at the employer's request, more persuasive, I respectfully dissent.

To begin, I note that in November 2009, claimant stated that he had a 12-month history of lower back pain and a six-month history of pain radiating into his right lower extremity. (Ex. 1-1). A December 2009 MRI showed a "small broad-based disc protrusion" that "lateralize[d] to the right" at L5-S. (Ex. 2-1). In February 2010, Dr. Belza diagnosed "lumbar disc disease," noting that the MRI demonstrated "moderate changes at L5-S1 as well as a disc bulge on the right." (Ex. 5). His physician's assistant described claimant's L5-S1 disc condition as "[d]egenerative disc disease" in March 2010. (Ex. 7). In July 2013, an MRI showed a "[r]ight paracentral disc protrusion at L5-S1." (Ex. 14).

Dr. Belza initially concurred with Dr. Toal's opinion that the 2013 MRI did not show new pathology. (Exs. 18-5, 20). He did not subsequently discuss the 2009 MRI finding of an L5-S1 disc bulge. (Exs. 22, 27). However, he ultimately opined that claimant's L5-S1 disc bulge had been precipitated by a November 2011 work incident. (Ex. 27-3).

As the physician who treated claimant in 2009 and 2010, and specifically noted the L5-S1 disc bulge at that time, Dr. Belza should have been in a good position to address claimant's preexisting condition and any differences between

the 2009 and 2013 MRIs.³ However, Dr. Belza did not explain why he believed that claimant's current L5-S1 disc bulge was different from the bulge shown in 2009, nor did he explain why he had described the degenerative changes as "moderate" in 2010, but described claimant's preexisting condition as "minimal" in 2014. (Exs. 5, 27-4). Dr. Toal's opinion that the 2013 MRI did not show a new pathology, and Dr. Belza's concurrence with that opinion, is un rebutted.

Considering Dr. Belza's description of the degeneration and bulge in 2009 and the un rebutted evidence that the 2013 MRI showed the same condition that had been revealed by the 2009 MRI, I do not give weight to Dr. Belza's later opinion that the L5-S1 disc bulge was caused by subsequent events, such as the November 2011 work incident. Therefore, Dr. Belza's opinion does not persuasively support claimant's occupational disease claim.

Additionally, I conclude that the opinions of Drs. Toal and Rosenbaum are persuasive.

Dr. Toal noted that the December 2009 MRI showed a disc protrusion and opined that the July 2013 MRI showed no new pathology. (Ex. 18-5). He also determined that claimant's symptoms in October 2013 were subjectively the same as when he sought treatment in 2009. (*Id.*) Despite the November 2011 work incident, he concluded that claimant's L5-S1 disc protrusion was not related to work activity. (*Id.*)

Dr. Toal explained that disc degeneration occurs fastest at L5-S1, where mechanical demands are greatest, and that degeneration is seen in approximately 35 percent of people who are under 40 years old. (Ex. 26-1). He also reasoned that although factors such as occupational loading had traditionally been blamed for degeneration, studies of identical twins showed that occupational loading is responsible for between two and seven percent of degenerative changes. (*Id.*) He supplied medical literature supporting that statement. (Ex. 26-4, -11). This medical literature also stated that disc bulging is an aspect of disc degeneration with a relatively high degree of genetic contribution and that degeneration in the L4-5 and L5-S1 region has a relatively low degree of contribution from physical loading. (Ex. 26-11). The medical literature further reported that degeneration

³ Although Dr. Belza was claimant's treating physician in 2009 and 2010, he referred claimant to Dr. Kitchel for treatment beginning in January 2013. (Exs. 9-1, 15; Tr. 30-31). Thus, Dr. Belza was not in an advantageous position to evaluate claimant's current clinical presentation, or to compare claimant's current condition with his condition in 2009 and 2010.

typically progresses fastest at L5-S1, and that degeneration of at least one level is apparent in approximately 35 percent of individuals younger than 40 years. (Ex. 26-4, -11). Accordingly, despite the heavy lifting involved in claimant's work, Dr. Toal opined that work activities did not constitute the major contributing cause of the L5-S1 disc bulge. (Ex. 26-1).

Dr. Rosenbaum characterized claimant's L5-S1 condition, including the disc bulge, as degenerative spondylosis. (Ex. 23-6-7). He noted that claimant's work activities included the November 2011 incident and multiple other minor injuries that caused low back pain. (Ex. 23-7). Nevertheless, he explained that recent medical literature has associated lumbar spondylosis with age and genetics, but not with physical exertional activity. (*Id.*) He also noted that the disc bulge was not an isolated finding because claimant also had evidence of other degenerative changes at T12-L1, L4-5, and L5-S1. (Ex. 25-1). Accordingly, he concluded that claimant did not suffer from an occupational disease. (Ex. 23-6).

Drs. Toal and Rosenbaum understood the nature of claimant's work, which included both heavy lifting and specific incidents that "tweaked" his back. They discussed claimant's L5-S1 disc bulge as a part of disc degeneration that existed at several levels of claimant's low back, and explained that the current scientific literature has refuted the previously-assumed link between such degeneration and work activities. Their opinions are also consistent with claimant's history, which included a documented degenerative disc bulge at L5-S1 in 2009. I consider their opinions well reasoned, based on complete information, and persuasive.

Further, Dr. Kitchel, who began treating claimant in January 2013 on referral from Dr. Belza, concurred with Dr. Toal's initial opinion that the 2013 MRI did not show a new pathology and that claimant's current symptoms were subjectively the same as when he sought treatment in 2009. (Ex. 21). As claimant's current treating physician, his concurrence adds weight to Dr. Toal's opinion.

Accordingly, I would reverse the ALJ's order and reinstate the employer's denial. Because the majority affirms, I respectfully dissent.