In the Matter of the Compensation of
MONIKA M. GAGE, Claimant
WCB Case No. 14-01944
ORDER ON REVIEW
Philip H Garrow, Claimant Attorneys
Sather Byerly & Holloway, Defense Attorneys

Reviewing Panel: Members Curey and Weddell.

Claimant requests review of Administrative Law Judge (ALJ) Brown's order that found that claimant's surgery claim was not causally related to her accepted L5-S1 disc condition. On review, the issue is medical services. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Finding of Fact" and provide the following summary.

In 2005, claimant slipped and fell at work. (Ex. 1). The employer accepted an L5-S1 herniated disc. (Ex. 16).

Thereafter, claimant had five surgeries at L5-S1, including three fusion procedures. (Exs. 21, 28, 60, 65, 115). Dr. Moore, an orthopedic spine surgeon who assumed the role of claimant's attending surgeon in 2007, performed the three fusions. (Exs. 51, 60, 65, 115, 182-2).

In 2013, claimant developed new right buttock pain. (Ex. 160). Her June 2013 lumbar MRI showed an L4-5 facet cyst. (Exs. 161, 176). Dr. Moore proposed surgery to remove the cyst. (Exs. 177, 184).

The employer sought review by the Workers' Compensation Division (WCD), contending that the proposed surgery was not causally related to the accepted condition or appropriate. (Ex. 181). On April 22, 2014, the WCD deferred administrative review regarding appropriateness and transferred the dispute regarding the causal relationship to the Hearings Division. (Ex. 181).

Dr. Moore opined that the L5-S1 fusion accelerated regenerative changes at L4-5 and was the major contributing cause of the L4-5 cyst (*i.e.*, "adjacent segment disease"). (Ex. 185-3). She stated that her opinion was consistent with that of most spine literature and the current thinking in the North American Spine Society, of which she is a member. (Exs. 182-3, 185-3).

In March 2014, Dr. Rosenbaum, a neurosurgeon, performed an examination at the employer's request. He opined that claimant's cyst developed on a degenerative basis rather than secondary to her lumbar fusion. (Exs. 179, 183, 186). He based his opinion on an article published in 2013 in the North American Spine Society's journal that concluded that "given the equivalent rate of adjacent segment disease between different spinal interventions, the authors suspect that adjacent segment disease represents the natural history of spinal degenerative disease in most cases." (Ex. 179-19).

CONCLUSIONS OF LAW AND OPINION

The ALJ determined that the proposed L4-5 surgery was not causally related to the accepted L5-S1 disc condition. In making that determination, the ALJ considered Dr. Moore's opinion to be unpersuasive because Dr. Moore had not explained why her opinion was consistent with that of the North American Spine Society, in light of the study cited by Dr. Rosenbaum.

On review, claimant argues that Dr. Moore was in an advantageous position to assess the relationship of the L4-5 cyst to the work injury. She also contends that Dr. Rosenbaum's opinion was based on "most cases" rather than her individual circumstances. Based on Dr. Moore's opinion, we conclude that the proposed L4-5 surgery is causally related to the accepted L5-S1 disc condition and its treatment. We reason as follows.

ORS 656.245(1)(a) provides:

> "For every compensable injury, the insurer or self-insured employer shall cause to be provided medical services for conditions caused in material part by the injury for such period as the nature of the injury or the process of the recovery requires, subject to the limitations in ORS 656.225, including such medical services as may be required after a determination of permanent disability. In addition, for consequential and combined conditions described in ORS 656.005(7), the insurer or self-insured employer shall cause to be provided only those medical services directed to medical conditions caused in major part by the injury."

Here, the parties do not dispute the ALJ's application of a "consequential condition" analysis. Therefore, the second sentence of ORS 656.245(1)(a) applies. *See SAIF v. Sprague*, 346 Or 661, 673 (2009). Accordingly, we determine whether the proposed surgery is "directed to" a medical condition caused in major part by the June 2005 injury.

It is claimant's burden to prove that her compensable injury, or the treatment for her compensable injury, is the major contributing cause of the L4-5 cyst condition. *See* ORS 656.005(7)(a)(A); *Barrett Bus. Servs. v. Hames*, 130 Or App 190, *rev den*, 320 Or 492 (1994) (when treatment for a compensable injury is the major contributing cause of a new injury, the compensable injury itself is deemed the major contributing cause of the compensable condition); *David A. Marquardt*, 62 Van Natta 969, 974-75 (2010) (the compensable injury must be the major contributing cause of the consequential condition, not just the worsening or need for treatment of the consequential condition).

The determination of major contributing cause involves the evaluation of the relative contribution of the different causes of claimant's condition and a decision as to which is the primary cause. *Dietz v. Ramuda*, 130 Or App 397, 401 (1994), *rev dismissed*, 321 Or 416 (1995). Because of the disagreement between medical experts regarding the cause of claimant's condition, this claim presents a complex medical question that must be resolved by expert medical opinion. *Barnett v. SAIF*, 122 Or App 279, 282 (1993). In evaluating the medical evidence, we rely on those opinions that are both well reasoned and based on accurate and complete information. *Somers v. SAIF*, 77 Or App 259, 263 (1986).

Here, Dr. Moore opined that due to accelerated degenerative changes caused by the L5-S1 fusion, the 2005 injury was the major contributing cause of the L4-5 cyst condition. (Ex. 185-3). She attributed the cyst to arthritis that developed in the facet joint directly above the fusion (a so-called "adjacent segment disease"). (Exs. 176, 181A, 182-2). She explained that "the stiff fused segment at L5-S1 increase[d] the rate of facet disease at L4-5." (Ex. 182-3). She asserted that medical literature and the generally accepted thinking in the medical community supported such a causal relationship. (Exs. 182-3, 185-3).

In contrast, Dr. Rosenbaum relied on a 2013 journal article in concluding that claimant's L4-5 cyst "does not represent adjacent segment disease." (Exs. 179-19, 183-2). He reported that the concept of a lumbar fusion causing degeneration at an adjacent segment (*i.e.*, "adjacent segment disease") has been controversial and discussed in the medical literature for years. (Ex. 179-22).

Acknowledging that "adjacent segment disease" had gained general acceptance, he supported the "most recent" conclusion, from the 2013 journal article, that "adjacent segment disease simply represents the evolution of degenerative spinal disease in most individuals." (*Id.*)

As represented by these opinions, there appears to be disagreement within the medical community as to effect of a lumbar spinal fusion on degenerative disease in adjacent spinal levels. We do not have the expertise to determine which medical theory is more prevalent in the medical community. *SAIF v. Calder*, 157 Or App 224, 227-28 (1998). Rather, when medical experts disagree, we give more weight to those opinions that are well reasoned. *Somers*, 77 Or App at 263.

Here, Dr. Rosenbaum relied on the 2013 journal article to conclude that claimant's L4-5 cyst was not caused by her L5-S1 fusion. (Ex. 179-19). The article is not in the record, but Dr. Rosenbaum quoted the final sentence of the authors' conclusion: "[G]iven the equivalent rate of adjacent segment disease between different spinal interventions, the authors suspect that adjacent segment disease represents the natural history of spine degenerative disease in most cases." (Ex. 179-19). Dr. Rosenbaum did not explain why this conclusion applied to claimant's individual circumstances. He provided no other rationale for his opinion that claimant's lumbar fusion was not the major contributing cause of her L4-5 cyst condition. (Exs. 179-22, 183, 186). Under these circumstances, we consider his opinion to be unpersuasive. *See Sherman v. Western Employers 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); *Michael R. Church*, 63 Van Natta 299, 300-01 (2011) (examining physicians' opinions based on general knowledge that degeneration occurs with age found less persuasive than treating surgeon's contrary opinion which was specific to the claimant's particular circumstances).

After reviewing Dr. Rosenbaum's opinion and citation to the 2013 journal article, Dr. Moore maintained her opinion that claimant's L4-5 cyst was the result of arthritis that developed because of the L5-S1 fusion. (Exs. 182, 185). Having reviewed Dr. Moore's opinion, we find that it consistently and persuasively establishes that claimant's L5-S1 fusion was the major contributing cause of her L4-5 cyst condition. (Exs. 181A, 182-3, 185-2, -3).

Finally, the employer does not dispute the proposition that the proposed surgery is directed to the L4-5 cyst condition. ORS 656.245(1)(a); *Sprague*, 346 Or at 673. Therefore, we reverse.

Because claimant has prevailed over the "causation" portion of a disputed medical services claim, but a "propriety" dispute remains pending before WCD, we are authorized to award a contingent attorney fee under ORS 656.386(1) for services at the hearing level and before the Board on review, payable if claimant finally prevails on all aspects of the medical services denial. *Antonio L. Martinez*, 58 Van Natta 1814, 1823-24 (2006), *aff'd*, *SAIF v. Martinez*, 219 Or App 182 (2008). 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 such services is $12,000, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the issue (as represented by the record, claimant's appellate briefs, her attorney's fee submission, and the employer's response), the complexity of the issue, the value of the interest involved, and the risk that counsel may go uncompensated.

We make a similar contingent award of reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing in this dispute, to be paid by the employer in the event that claimant finally prevails against all aspects of the medical services denial. *See* ORS 656.386(2); OAR 483-015-0019; *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 January 16, 2015 is reversed. The proposed surgery is causally related to claimant's June 2005 compensable injury. Claimant's attorney is awarded an assessed fee of $12,000, payable by employer, contingent on claimant prevailing over all aspects of the medical services denial. Claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing, to be paid by the employer, contingent on claimant prevailing over all aspects of the medical services denial.

Entered at Salem, Oregon on June 5, 2015