

In the Matter of the Compensation of
ROBERT C. EVANS, III, Claimant

WCB Case No. 13-04105

ORDER ON REVIEW

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

Claimant requests review of Administrative Law Judge (ALJ) Ogawa's order that: (1) upheld the SAIF Corporation's denial of claimant's new/omitted medical condition claim for L4-5 and L5-S1 disc herniations and annular tears; and (2) upheld SAIF's denial of claimant's current combined low back condition. On review, the issue is compensability.

We adopt and affirm the ALJ's order with the following supplementation regarding whether the medical opinions supporting SAIF's burden of proof satisfy the standard articulated in *Brown v. SAIF*, 262 Or App 640 (2014).

Relying on the opinions of Drs. Rosenbaum, examining physician, and Bert, treating surgeon, the ALJ determined that SAIF met its burden of proving that claimant's otherwise compensable injury was no longer the major contributing cause of his combined lumbar strain condition. Therefore, the ALJ upheld SAIF's denial.

On review, claimant asserts that SAIF did not meet its burden of proof for a "ceases" denial because the opinions of Drs. Rosenbaum and Bert did not adequately address the "work-related injury incident" requirement of *Brown*. For the following reasons, we agree with the ALJ that the opinions of Drs. Rosenbaum and Bert satisfy the *Brown* standard.

Under ORS 656.262(6)(c), a carrier may deny an accepted combined condition if the "otherwise compensable injury" ceases to be the major contributing cause of the disability/need for treatment of the combined condition. In *Brown*, the court held that the correct inquiry under ORS 656.262(6)(c), is whether the claimant's "work-related injury incident" (not the accepted condition) remains the major contributing cause of disability or need for treatment of the combined condition. 262 Or App at 656; *Shawn M. Smith*, 66 Van Natta 1381,

1382 (2014) (a carrier may deny an accepted combined condition under ORS 656.262(6)(c), if the “work-related injury incident” ceases to be the major contributing cause of the combined condition).

To support its denial, SAIF must prove a change in claimant’s condition or circumstances since the acceptance of the combined condition, such that the “work-related injury incident” is no longer the major contributing cause of disability/need for treatment of the combined condition. ORS 656.266(2)(a); *Wal-Mart Stores, Inc. v. Young*, 219 Or App 410, 419 (2008); *Brown*, 262 Or App at 656; *Smith*, 66 Van Natta at 1382.

Considering the possible alternative causes of the combined low back condition, the issue presents a complex medical question that must be resolved by expert medical evidence. *See Barnett v. SAIF*, 122 Or App 279, 283 (1993). We give more weight to those opinions that are both well reasoned and based on complete and accurate information. *Somers v. SAIF*, 77 Or App 259, 263 (1986).

Dr. Rosenbaum examined claimant on March 26, 2013. In his report, Dr. Rosenbaum stated: “work injury was consistent with the causation of a lumbar strain,” and “[t]his is a combined condition of the claimant’s lumbar strain from the work event with his preexisting spondylosis.” (Ex. 25-7). In response to the following question, “If there was such a combining, please explain why the described work incident was, or was not, the major contributing cause of the disability or need for treatment resulting from the combined condition, when [claimant] first sought care following the work incident,” Dr. Rosenbaum stated, “Assuming the accuracy of the claimant’s history as there are no objective findings, then the subjective symptoms are consistent with a lumbar strain and this was the major contributing cause of the need for treatment.” (Ex. 25-7-8).

Dr. Rosenbaum was then asked,

“If the work incident was, at least for a time, the major contributing cause of the disability or need for treatment resulting from the combined condition, does the work incident continue to be the major contributing cause of [claimant’s] current disability or need for treatment? If the injury is no longer the major contributing cause of the disability or need for treatment resulting from the combined condition, when did it cease to be the major cause?” (Ex. 25-8).

Dr. Rosenbaum responded, “The work injury continues to be the major contributing cause of the need for treatment. This is assuming the accuracy of the claimant’s subjective symptoms with regard to the diagnosis of a lumbar strain.” (*Id.*)

Subsequently, in a concurrence letter, Dr. Rosenbaum agreed that “in light of new combined condition precedent,” in his opinion, “claimant’s work-related injury on February 11, 2013 is no longer the major contributing cause of his disability or need for treatment as to the accepted condition (lumbar strain).” (Ex. 51-2).

We interpret Dr. Rosenbaum’s opinion as establishing that the lumbar strain was the work injury that resulted from the work accident that caused claimant’s disability/need for treatment, and which combined with the preexisting condition. Dr. Rosenbaum did not discuss any other conditions that would constitute “otherwise compensable injuries.” Thus, in considering the nature of claimant’s work injury and his ongoing need for treatment, Dr. Rosenbaum referred to the “lumbar strain,” “work event” and “work injury” in a synonymous manner. We therefore consider his opinion to have adequately addressed the full effects of the “work-related injury incident” in determining causation as required by *Brown*. See *Cassandra R. Stockwell*, 67 Van Natta 94 (2015); *Jean M. Janvier*, 66 Van Natta 1827, 1833 n 8 (2014) (physician’s use of the terms “work injury” and “cervical strain” interchangeably satisfied *Brown*); *Barbosa-Miranda*, 66 Van Natta at 1669 n 1 (“ceases” opinion referring to “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) (*Brown* standard satisfied where physician referred to “work exposure,” “acute event,” and the “injury” ceasing to be the major contributing cause of the combined condition); *Smith*, 66 Van Natta at 1384 n 1 (2014) (physician found to have considered the work-related injury incident in determining major contributing cause when he referred not only to a lumbar strain, but also to the “work injury”).

We also find that Dr. Bert’s opinion supports Dr. Rosenbaum’s opinion that the work-related injury/incident was no longer the major contributing cause of the combined condition and need for treatment. When Dr. Bert examined claimant on April 3, 2013, claimant stated that he had some degree of discomfort since the 2007 and 2008 injuries, but nothing as severe as he had currently. Claimant complained of unremitting pain since the February 2013 work injury. Dr. Bert found reduced range of motion, but normal strength and sensation.

(Ex. 28). In August 2013, Dr. Bert noted that claimant continued to have severe pain, and that he had nothing more to offer in the way of treatment except a chronic pain management program. (Ex. 41).

In concurrence letters, Dr. Bert agreed that, as of August 7, 2013, the lumbar strain was medically stationary and no longer the major contributing cause of claimant's disability and need for treatment. (Exs. 43, 45, 46). Dr. Bert believed that claimant's current symptoms and clinical findings related to his underlying degenerative disc disease. Although claimant continued to have symptoms, Dr. Bert stated that the work-related lumbar strain was no longer the major cause of claimant's need for treatment. Rather, the lumbar strain showed the expected improvement with treatment and the passage of time. (Ex. 45). Dr. Bert opined that the disc pathology was the major cause of the combined condition. (Ex. 46).

Although Dr. Bert did not specifically address whether the "work injury" remained the major contributing cause of the disability/need for treatment of the combined condition, his opinion is probative. As with Dr. Rosenbaum, his opinion establishes that the lumbar strain was the work injury that resulted from the work accident. Thus, by his opinion that the lumbar strain was no longer the major contributing cause of the disability or need for treatment, Dr. Bert effectively opined that the work injury/incident was no longer the major cause of the disability or need for treatment of the "combined" lumbar strain condition.

Accordingly, we find the opinions of Drs. Rosenbaum and Bert sufficient under *Brown* to satisfy SAIF's burden of proof under ORS 656.266(2)(a). Moreover, for the reasons expressed in the ALJ's order, we agree that their opinions are persuasive and sufficient to prove that there was a change in claimant's condition such that the work injury ceased to be the major contributing cause of claimant's disability/need for treatment for his combined low back condition. Therefore, we affirm.

ORDER

The ALJ's order dated September 2, 2014 is affirmed.

Entered at Salem, Oregon on May 22, 2015

Member Weddell dissenting.

The majority finds that the SAIF Corporation established that the otherwise compensable injury ceased to be the major contributing cause of claimant's disability/need for treatment. The majority also upholds the denial of claimant's new/omitted medical condition claims for L4-5 and L5-S1 disc conditions. Because I find Dr. Rosenbaum's opinion does not address the appropriate legal standard and is unpersuasive as compared to the opinion from claimant's treating physician, Dr. Bert, I would set aside the "ceases" denial and find claimant's new/omitted condition claims to be compensable.

Under ORS 656.262(6)(c), a carrier may deny an accepted combined condition if the "otherwise compensable injury" ceases to be the major contributing cause of the disability/need for treatment of the combined condition. In *Brown*, the court held that the correct inquiry under ORS 656.262(6)(c), is whether the claimant's "work-related injury incident" (not the accepted condition) remains the major contributing cause of disability or need for treatment of the combined condition. 262 Or App at 656; *Shawn M. Smith*, 66 Van Natta 1381, 1382 (2014) (a carrier may deny an accepted combined condition under ORS 656.262(6)(c), if the "work-related injury incident" ceases to be the major contributing cause of the combined condition).

The ALJ reasoned that Dr. Bert "distinguished between the work-related lumbar strain and the preexisting disc condition in determining the former was no longer the major contributing cause of the combined condition." However, SAIF specifically asked if Dr. Bert would agree that "as of August 7, 2013 the February 11, 2013 *lumbar strain* is no longer the major contributing cause of [claimant's] disability and need for treatment." (Ex. 43) (emphasis supplied). While Dr. Bert responded to the question affirmatively, the scope of the question itself falls short of SAIF's responsibility to process the condition that it actually accepted; *i.e.*, a lumbar strain combined with preexisting lumbar spondylosis. (Ex. 42). SAIF's question also falls short of its burden to determine whether the otherwise compensable injury (*i.e.*, the "work related injury" or incident) is no longer the major contributing cause under *Brown*.¹ This deficiency is particularly notable because, when asked whether the *work injury* was the major contributing cause of claimant's condition, Dr. Bert affirmed that claimant had pathology at

¹ Notably, SAIF's questions were posed to Dr. Bert on July 30, 2013, before the court's decision in *Brown*.

L4-5 and L5-S1, and that disability and need for treatment of that pathology was caused in major part by the work injury. (Ex. 50). Accordingly, Dr. Bert's opinion did not support SAIF's burden regarding the "ceases" denial.

The majority concludes otherwise, stating that Dr. Bert's opinion establishes that the lumbar strain was the work injury. I am unable to so conclude where Dr. Bert's final opinion states that the "work injury combined with a preexisting condition at L4-5 and L5-S1" and that the "accepted work injury is the major contributing cause" of claimant's disability/need for treatment. (Ex. 50). Additionally, to the extent that Dr. Bert's opinion could be read as consistent with Dr. Rosenbaum's opinion equating the lumbar strain with the work injury, I would find such an opinion to be inconsistent and unpersuasive for the reason stated below.

Dr. Rosenbaum's opinion does not persuasively satisfy SAIF's burden. As a threshold issue, I see no explanation from Dr. Rosenbaum explaining a change in claimant's condition or circumstances sufficient to support the "ceases" denial. *See Bacon*, 208 Or App at 210; *Strong*, 62 Van Natta at 1365. Instead, his opinion regarding any change appears to be based solely on the passage of time and the expected course of healing for a lumbar strain, rather than any observations or factors which are specific to claimant. As such, I do not consider Dr. Rosenbaum's opinion to be persuasive. *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 situation in particular were not persuasive); *Judi Whitney*, 61 Van Natta 392 (2009) (medical opinion that presumed a change in the claimant's condition within a certain time frame was not persuasive).

Finally, I am not convinced that Dr. Rosenbaum undertook the medical analysis required by *Brown* and the claim processing in this claim; *i.e.* to determine whether the work-related injury/incident was no longer the major contributing cause of the disability/need for treatment of claimant's accepted combined condition. 262 Or App at 656; *Smith*, 66 Van Natta at 1382. The majority concludes otherwise, finding that Dr. Rosenbaum persuasively equated the lumbar strain with the work injury/incident.

I interpret Dr. Rosenbaum's opinion differently. It is true that Dr. Rosenbaum stated that the work injury caused a lumbar strain and that in his opinion this is the only work-related component of the injury. However, he also stated that claimant has a combined condition consisting of the lumbar strain and preexisting lumbar spondylosis. When asked about the major

contributing cause of disability/need for treatment of the *combined condition*, Dr. Rosenbaum responded that the work injury was the major contributing cause of the need for treatment of the *lumbar strain*. (Ex. 25-8). In his final opinion, on which the majority relies to equate the work injury with the lumbar strain, Dr. Rosenbaum stated that the work-related injury was no longer the major contributing cause “as to the accepted condition (lumbar strain).” (Ex. 51-2).

Consistent with ORS 656.262(6)(c) and the *Brown* holding, it was incumbent on SAIF to provide a medical opinion which persuasively established that the work-related injury/incident was not the major contributing cause of the disability/need for treatment of the accepted combined condition, and not merely the lumbar strain. Resolution of the lumbar strain is not sufficient to establish that the work-related injury/incident ceased to be the major cause of disability/need for treatment for the combined condition. See *Rebecca Littlefield*, 66 Van Natta 1048 (2014) (finding medical opinion insufficient where it did not address the claimant’s combined condition). Based on the aforementioned reasoning, I am not persuaded that SAIF has presented a medical opinion adequately addressing the requisite standard.

Therefore, the majority’s position requires an additional inference, namely, that the lumbar strain is also synonymous with the “combined condition.” To the extent that the majority would infer that Dr. Rosenbaum’s opinion concluded that the lumbar strain equates to the work-related injury, and equates to the combined condition, I would find such a medical opinion to be unexplained, internally inconsistent and therefore insufficient to meet SAIF’s requisite burden. See *Moe v. Ceiling Sys., Inc.*, 44 Or App 429, 433 (1980) (rejecting unexplained or conclusory opinion); *Howard L. Allen*, 60 Van Natta 1423, 1424-25 (2008) (internally inconsistent medical opinion, without explanation for the inconsistencies, was unpersuasive).

Because Dr. Rosenbaum’s opinion only comments on causation and resolution of a strain, I find no indication that he analyzed the contribution of the work injury to claimant’s need for treatment/disability from the combined condition. The majority chooses to infer that Dr. Rosenbaum’s discussion of the resolution of claimant’s lumbar strain is sufficient to encompass the contribution of the work injury, but I do not find an adequate basis for that inference.

In determining the compensability of claimant’s combined condition, it is necessary to consider the major cause of the need for treatment, and not simply the major cause of conditions directly related to the injury, *i.e.* the lumbar strain.

See Rodney R. Erickson, 66 Van Natta 989, 992-93 (2014); *SAIF v. Nehl*, 148 Or App 101, *recons*, 149 Or App 309 (1997) (distinguishing between the major cause of the claimant's combined condition and its need for treatment where the evidence established there was a difference between the two). Causation of a lumbar strain as opposed to causation of the need for treatment of a combined condition is not simply a matter of substitution of words. Rather, they are different analyses. Because Dr. Rosenbaum's opinion only discusses causation and the expected course of resolution of a lumbar strain in this accepted claim for a combined condition, his opinion is unpersuasive. *See Sherman*, 87 Or App at 606 (physician's comments that were general in nature and not addressed to the claimant's situation in particular were not persuasive). Because Dr. Rosenbaum's opinion is not persuasive, SAIF has not satisfied its burden of proof regarding the "ceases" denial. *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).

Regarding claimant's new/omitted medical condition claims for L4-5 and L5-S1 disc conditions, I would rely on the opinion of Dr. Bert to establish that claimant's work injury was a material cause of his disability/need for treatment of those conditions and I would find Dr. Rosenbaum's opinion insufficient to carry SAIF's burden to prove that the work-related injury/incident was not the major contributing cause of the need for treatment/disability for the combined condition.

Specifically, Dr. Bert explained that claimant's work injury involved an awkward position that placed significant load bearing weight on his spine causing a worsening of the preexisting pathology at L4-5 and L5-S1 resulting in his need for treatment. (Ex. 50). Dr. Rosenbaum neither addressed Dr. Bert's opinion regarding the mechanism of injury nor explained why the work injury was the major contributing cause of the need for treatment for a lumbar strain only. Under such circumstances, I do not consider Dr. Rosenbaum's opinion to be persuasive. *See Janet Benedict*, 59 Van Natta 2406, 2409 (2007), *aff'd without opinion*, 227 Or App 289 (2009) (medical opinion less persuasive when it did not address contrary opinions). I would, therefore, find claimant's new/omitted condition claims to be compensable.

In conclusion, based on the aforementioned reasoning, I disagree with the majority's conclusion that the claimed conditions are not compensable. Consequently, I respectfully dissent.