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In the Matter of the Compensation of  
**LAWRENCE FILLINGER, Claimant**  
WCB Case No. 14-01445  
ORDER ON REVIEW  
Patrick K Mackin, Claimant Attorneys  
Gress & Clark LLC, Defense Attorneys

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

Claimant requests review of Administrative Law Judge (ALJ) Crummé's order that: (1) upheld the self-insured employer's denial of his current combined low back condition; and (2) declined to award penalties and attorney fees for an allegedly unreasonable denial. On review, the issues are claim processing, compensability, penalties, and attorney fees.

We adopt and affirm the ALJ's order with the following modification and supplementation regarding the compensability issue. We replace the fourth full paragraph on page five of the ALJ's order with the following: "Dr. Fischer concluded that the work-related injury incident ceased to be the major cause of claimant's disability or need for treatment for his combined condition." We supplement the compensability issue as follows.

Claimant has an extensive history of chronic low back problems, including postlaminectomy syndrome, multilevel lumbar degenerative disc disease, left-sided radiculopathy, and L5-S1 surgery. (Exs. 1-16). His treatment included opioid medications and pain management programs. (Exs. 3, 5, 6, 11). Claimant was still using high dose narcotic medication at the time of injury. (Ex. 13).

On December 12, 2013, claimant was lifting some parts at work when he felt a spasm in his left low back with electric shocks into his left lower leg to toes. (Ex. 11). The employer ultimately accepted a "lumbar strain combined with preexisting degenerative lumbar disc disease (effective December 12, 2013)." (Ex. 51).

On March 25, 2014, the employer denied claimant's current combined condition on the basis that "the otherwise compensable lumbar strain ceased to be the major contributing cause of the need for treatment and disability of your combined condition and that the preexisting condition has become the major contributing cause." (Ex. 52). Claimant requested a hearing.

In upholding the employer's denial, the ALJ found that the employer met its burden of proving a change in claimant's accepted combined low back condition such that the otherwise compensable injury ceased to be the major contributing cause of the combined condition, and disability or need for treatment thereof. The ALJ reasoned that the opinion of Dr. Fischer, claimant's attending physician, was more persuasive than that of Dr. Swartz, who examined claimant at the employer's request.

On review, citing *Brown v. SAIF*, 262 Or App 640 (2014), claimant contends that the employer did not show a change in his condition such that the "otherwise compensable injury" was no longer the major contributing cause of the disability/need for treatment of the combined condition. Based on the following reasoning, we disagree.

Under ORS 656.262(6)(c), a carrier may deny a combined condition if the otherwise compensable injury ceases to be the major contributing cause of the combined condition. The "combined condition" consists only of the "otherwise compensable injury" and statutory preexisting conditions. *Vigor Indus., LLC v. Ayres*, 257 Or App 795, 806 (2013).

In *Brown*, the court concluded that the correct inquiry under ORS 656.262(6)(c) was whether the claimant's "work-related injury incident" (and not the accepted condition) remained the major contributing cause of the disability/need for treatment of the combined condition. 262 Or App at 656. Therefore, a carrier may deny the accepted combined condition if the "otherwise compensable injury" (*i.e.*, the work-related injury incident) ceases to be the major contributing cause of the combined condition. *See Rogelio Barbosa-Miranda*, 66 Van Natta 1666, 1667 (2014).

In accordance with the *Brown* rationale, to support its denial under ORS 656.262(6)(c), the employer must prove a change in claimant's condition or circumstances such that the "otherwise compensable injury" is no longer the major contributing cause of the disability or need for treatment of the combined condition. ORS 656.266(2)(a); *Washington County-Risk v. Jansen*, 248 Or App 335, 345 (2012); *Wal-Mart Stores, Inc. v. Young*, 219 Or App 410, 419 (2008). The effective date of the combined condition acceptance provides the baseline for determining whether there has been a "change" in claimant's condition or circumstances. *Oregon Drywall Sys. v. Bacon*, 208 Or App 205, 210 (2006).

Determination of this issue presents a complex medical question that must be resolved by expert medical opinion. *See Barnett v. SAIF*, 122 Or App 279 (1993). When medical experts disagree, we give more weight to those opinions that are well reasoned and based on complete information. *See Somers v. SAIF*, 77 Or App 259, 263 (1986).

Here, the employer accepted claimant's combined lumbar strain condition effective December 12, 2013. (Ex. 51). Accordingly, the employer must establish a change in claimant's condition or circumstances between December 12, 2013 and March 25, 2014, the effective date of its denial, such that the otherwise compensable injury (*i.e.*, the work-related injury incident) ceased to be the major contributing cause of the disability/need for treatment of claimant's combined lumbar condition. ORS 656.262(6)(c); *Shawn M. Smith*, 66 Van Natta 1381 (2014).

On December 20, 2013, claimant began treating with Dr. Fischer for increased low back and left leg complaints after his December 12, 2013 work injury. (Ex. 16). Dr. Fischer noted claimant's history of chronic pain from the prior L5-S1 laminectomy, and indicated that he complained of persistent numbness from his previous L5-S1 disc herniation in an S1 injury pattern. (Ex. 16-1). She diagnosed a lumbar spine sprain, "clearly and acute on chronic injury." (Ex. 16-4-5). Dr. Fischer recommended an MRI to assess for worsening of his condition. (Ex. 16-5).

On January 3, 2014, Dr. Fischer stated that claimant's repeat MRI showed worsening of the L3-4 disc protrusion since the 2011 MRI<sup>1</sup> causing compression at the left L4 nerve root, which "mildly corresponds to [claimant's] symptoms, specifically pain that radiates from the low back to the anterior left thigh."<sup>2</sup> (Ex. 25-1). In addition to the lumbar spine sprain, Dr. Fischer diagnosed lumbar radiculopathy. (Ex. 25-2).

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<sup>1</sup> A March 2011 lumbar spine MRI showed interval development of mild disc bulges at L1-2 and L2-3, stable diffuse bulging with flattening of the anterior thecal sac at L3-4, interval development of a lateral disc protrusion at L4-5 with central canal narrowing and impingement of the left L5 nerve root abutting the intrathecal left S1 nerve root with mild endplate spurring, and evidence of prior surgery with left hemilaminotomy at L5-S1 with minimal endplate spurring. (Ex. 4).

<sup>2</sup> The December 21, 2013 MRI showed, in relevant part, L3-4 mild circumferential broad-based disk bulging and an asymmetrical disk protrusion in the left paracentral/left lateral region causing some mild impression in the region of the left L4 nerve root, which was described as "a new finding since the prior [2011] study." (Ex. 19-2). The MRI report also indicated that there was no evidence of impression against the left L3 nerve root within the left L3-4 neural foramen. (*Id.*)

On January 14, 2014, Dr. Fischer expressed “concern for significant pain behavior and disability[,]” and recommended claimant follow up with his primary care physician for his back pain “which is beyond his workers compensation claim.” (Ex. 31-2). Dr. Fischer also stated that claimant’s “symptoms were perhaps exacerbated by his work injury on 12/12/13 however it is not my clinical opinion that this continues to be the major contributing cause for his need for treatment.”

That same day, Dr. Fischer responded to a letter from the employer. (Ex. 38). She stated that the diagnosis directly related to claimant’s work injury was a lumbar strain. (Ex. 38-1). In response to the question, “In your clinical opinion does the injury of 12/12/13 continue to be the major contributing cause for [claimant’s] need for treatment[,]” Dr. Fischer checked the “No” box. (*Id.*) She also stated that claimant’s preexisting degenerative disc disease was the major contributing cause of his current need for treatment, and that the industrial injury “temporarily” aggravated his preexisting chronic condition. (*Id.*)

In an April 2014 concurrence/summary letter, Dr. Fischer explained that “the work injury of December 12, 2013, was a minor strain injury that had caused a brief, symptomatic flare-up of the preexisting condition.” (Ex. 56-1). She also confirmed that, by March 14, 2014, the effects of the lumbar strain had subsided and ceased to be the major contributing cause of claimant’s need for medical treatment, at which point the major contributing cause of claimant’s need for treatment was his preexisting condition. (Exs. 55, 56-1-2).

We find Dr. Fischer’s opinion to be thorough, based on complete information, and well reasoned. First, Dr. Fischer’s opinion persuasively establishes that the lumbar strain was the work injury that resulted from the work accident that caused claimant’s disability and need for treatment, and which combined with the preexisting condition. Dr. Fischer did not believe that the “work-related injury incident” caused 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. Fischer referred to the “lumbar strain” and “work injury” in a synonymous manner. We therefore consider her opinion to adequately address the full effect of the “work-related injury incident” in determining causation as required by *Brown*. See *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”); *Smith*, 66 Van Natta at 1384 n 1 (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”); *Mauricio G. Maravi-Perez*, 66 Van Natta 1352, 1355 (2014) (where the acceptance identified a strain as the “otherwise compensable injury,” a denial under ORS 656.262(6)(c) was supported by medical evidence indicating that the “work injury” was the strain and that the strain had resolved).<sup>3</sup>

In weighing the work injury against claimant’s preexisting condition, Dr. Fischer considered: (1) the severity of the preexisting condition; (2) claimant’s past low back problems and treatment; (3) the mechanism of the work incident; (4) the nature of an exacerbation or temporary flare of symptoms (as opposed to a worsening of the preexisting condition); and (5) claimant’s complaints, findings, and course of treatment. (Exs. 31, 38, 55). While Dr. Fischer noted that the current MRI showed a worsening of the L3-4 disc protrusion from the 2011 MRI, and that this worsened disc “mildly correspond[ed]” to claimant’s symptoms, she did not believe that the December 2013 injury was the cause of that worsening, but only of a “symptomatic flare-up” of claimant’s preexisting condition.<sup>4</sup> (Ex. 56-1).<sup>5</sup>

Dr. Fischer also persuasively explained that the effects of the work injury/strain changed such that it was no longer the major contributing cause of the disability/need for treatment of the combined condition. While claimant had

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<sup>3</sup> We agree with claimant that Dr. Swartz’s opinion that the work injury and preexisting condition each contributed 50 percent to the need for *surgery* was too narrow to interpret as support for the injury no longer being the major contributing cause of the disability/need for treatment of the combined condition. However, we agree with the ALJ’s reasoning that Dr. Fischer’s opinion is the most persuasive and satisfies the employer’s burden under ORS 656.266(2)(a).

<sup>4</sup> Dr. Oji, surgical consultant, similarly stated that although claimant had “bulging” at L3-4, his pain was mostly in the L5 and S1 dermatome, and therefore he did not think the L3-4 level was causing symptoms. (Ex. 34).

<sup>5</sup> We disagree with the dissent that Dr. Fischer’s statement that claimant had an “acute on chronic injury” means more than what it describes. Based on Dr. Fischer’s opinion as a whole, the term “acute” would refer to the contribution from the work injury, and “chronic” to the preexisting condition. We interpret Dr. Fischer’s opinion to be describing a combined condition, which was compensable for a period of time. Her opinion that the otherwise compensable injury later ceased to be the major contributing cause of claimant’s disability/need for treatment of the combined condition, and that it only caused a symptomatic flare-up of the preexisting condition, is consistent with an initial “acute on chronic” characterization.

ongoing symptoms/complaints, Dr. Fischer explained that these were attributable to the preexisting degenerative problems. (*Id.*) Considering Dr. Fischer's opinion in its totality, we conclude that her conclusion that claimant's lumbar strain had resolved was not only based on generalities concerning musculoskeletal strain injuries, but also on her understanding of claimant's medical history, imaging studies, and consideration of her own examination findings, which revealed no objective evidence of a lumbar strain by March 2014. (Exs. 36, 45, 49). By the time of Dr. Fischer's March 14, 2014 examination, claimant's low back had no "significant tenderness on palpation." (Ex. 49). This finding was consistent with the "statistical" pattern of a four to six week recovery period for musculoskeletal strains. *Bradley S. Clark*, 60 Van Natta 1557, 1558 (2008) (physician's opinion found persuasive where it addressed the claimant's specific circumstances rather than generalities).

Moreover, although Dr. Fischer did not explicitly refute or disagree with Dr. Swartz's April 2014 opinion, she addressed the causation issue in a persuasive manner based on the same information as Dr. Swartz. Therefore, we do not discount Dr. Fischer's opinion for an alleged failure to rebut Dr. Swartz's opinion. Finally, Dr. Fischer's opportunity to examine and treat claimant closer in time to the injury placed her in a more advantageous position to evaluate his condition relative to the injury. *See McIntyre v. Standard Utility Contractor's Inc.*, 135 Or App 298, 302 (1995) (a treating physician's opinion is less persuasive when the physician did not examine the claimant immediately after the injury); *Anthony A. Miner*, 62 Van Natta 2538, 2540 (2010) (physician who treated the claimant after the work injury was in a better position to evaluate his injury-related conditions than physician who examined him three months later).

In conclusion, we find Dr. Fischer's opinion to be the most persuasive. Consequently, the employer has met its burden of proving the requisite change in claimant's condition or circumstances such that the "otherwise compensable injury" (*i.e.*, the work-related injury incident) ceased to be the major contributing cause of his disability/need for treatment of the combined low back condition. Accordingly, we affirm.

#### ORDER

The ALJ's order dated July 11, 2014 is affirmed.

Entered at Salem, Oregon on May 28, 2015

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Member Weddell dissenting.

The majority finds that the employer met its burden to prove that claimant's otherwise compensable injury was no longer the major contributing cause of claimant's need for treatment. Because I disagree with the majority's reasoning, I respectfully dissent.

While Dr. Fischer served as claimant's attending physician during the relevant period, her opinion is inadequate to meet the employer's burden of proof and is additionally unpersuasive. My reasoning follows.

In Dr. Fischer's initial assessment of claimant (which occurred before a lumbar x-ray, an updated lumbar MRI and a specialist consultation), she concluded that claimant's injury was "[c]learly an acute on chronic injury." (Ex. 16). Noting a "long discussion [with the claimant] regarding the work-relatedness of his condition," Dr. Fischer reported that she understood "this is a back strain and that it will likely have limited coverage under workers' compensation." (*Id.*)

Claimant had a lumbar MRI three days later, which showed a "new left-sided disc protrusion [at L3-4] that appears to cause some direct impression on the left L4 nerve root." (Ex. 19). In the following weeks, Dr. Fischer commented that she did not consider claimant's work injury to be more than a lumbar strain and that claimant's preexisting condition was the major contributing cause of his ongoing disability and need for treatment. (Ex. 31).

Claimant was eventually examined by Dr. Swartz at the employer's request. Dr. Swartz conducted a physical examination, interview of claimant, reviewed the results of the December 2013 MRI, and submitted a detailed report. Dr. Swartz did not agree with Dr. Fischer's assessment that claimant had a "brief symptomatic flare-up of [his] pre-existing degenerative lumbar degenerative disc disease." (Ex. 54A-7). Dr. Swartz explained that claimant had a new onset of low back and lower extremity pain in a radicular pattern with positive nerve root tension signs, limited lumbar flexion, diminished left ankle reflex and hyperesthesia into the left lower extremity. (Ex. 54A-6). Reasoning that these findings were consistent with the MRI findings that showed a worsened L3-4 disc protrusion, Dr. Swartz concluded that the preexisting condition was not the major contributing factor because the preexisting condition had been worsened by the December 2013 work injury.

To support its “ceases” denial, it is the employer’s burden to show a change in claimant’s condition or circumstances such that the otherwise compensable injury is no longer the major contributing cause of claimant’s disability or need for treatment. ORS 656.262(6)(c), *Brown v. SAIF*, 262 Or App 640 (2014). Because the employer bears the burden of proof, the medical opinion supporting its denial must be persuasive. *Jason J. Skirving*, 58 Van Natta 323, 324 (2006), *aff’d without opinion*, 210 Or App 467 (2007). Whether claimant’s otherwise compensable injury ceased to be the major contributing cause of his disability/need for treatment is a complex medical question that must be established by expert medical opinion. *See Uris v. Comp. Dep’t*, 247 Or 420 (1967).

Here, Dr. Fischer stated that the work injury was limited to a lumbar strain, which temporarily aggravated symptoms caused by claimant’s preexisting lumbar degenerative disease. On the other hand, Dr. Swartz opined that the work injury worsened claimant’s preexisting condition, such that she considered it to be the major contributing cause of claimant’s then-current condition. However, Dr. Fischer did not respond to Dr. Swartz’s opinion, and it is unclear whether she was even aware of it. That omission detracts from Dr. Fischer’s analysis and conclusion.

Finally, I do not find the opinion of Dr. Fischer to be sufficient to satisfy the employer’s burden of proof under *Brown*. In *Brown*, the court concluded that the correct inquiry under ORS 656.262(6)(c) was whether the claimant’s “work-related injury incident” (and not the accepted condition) remained the major contributing cause of the disability/need for treatment of the combined condition. 262 Or App at 656.

Here, claimant has an accepted claim for a lumbar strain combined with preexisting degenerative disc disease. Claimant relies on the opinion of an employer-arranged medical examiner that compared the 2011 and 2013 MRIs, noted a worsened disc protrusion, and found his worsening of radicular symptoms to be consistent with the objective MRI findings. (Ex. 54A). Dr. Swartz provided precisely the analysis that is required under *Brown*; *i.e.* to consider whether the work injury/incident is no longer the major contributing cause of claimant’s need for treatment/disability for the combined condition. (Ex. 54A-7); ORS 656.262(6)(c). In doing so, Dr. Swartz gave detailed reasoning weighing the preexisting condition and the work injury by comparing the MRI imaging and correlating it with claimant’s worsened symptoms.

In contrast, Dr. Fischer, before obtaining a current MRI, concluded that claimant had an “acute on chronic” injury and a “back strain” that would “likely have limited coverage under workers’ compensation.” (Ex. 16-5). In light of the employer’s acceptance of claimant’s combined condition, and Dr. Fischer’s comments that claimant had an “acute on chronic” injury, I find Dr. Fischer’s explanation that claimant had only a back sprain that resolved to be both inadequate to address the employer’s burden regarding the contribution of the work-related injury, and internally inconsistent with her opinion that claimant had an “acute on chronic” injury that exacerbated the symptoms of the preexisting condition. If claimant merely had a lumbar strain, it is unclear why Dr. Fischer described his condition as an “acute on chronic” injury, and it is also unclear why it would exacerbate the symptoms of claimant’s preexisting condition. To the extent that Dr. Fischer characterizes claimant’s condition as an acute on chronic injury, *i.e.* a combined condition, and simultaneously states that his condition is “a back strain \* \* \* that will likely have limited coverage under workers’ compensation,” her opinion is internally inconsistent and therefore unpersuasive. *See Howard L. Allen*, 60 Van Natta 1423, 1424-25 (2008) (internally inconsistent medical opinion, without explanation for the inconsistencies, is unpersuasive).

The majority concludes that Dr. Fischer referred to claimant’s lumbar strain in a manner that was synonymous with the “work injury” or “work-related injury incident” such that *Brown* is persuasively satisfied. I disagree. I do not find Dr. Fischer’s statement that “the work injury \* \* \* was a minor strain injury that had caused a brief, symptomatic flare-up of the preexisting condition” to be an adequate analysis of the major contributing cause of claimant’s need for treatment/disability for the combined condition. Determining that claimant’s work injury *caused* only a lumbar strain is not a substitute for analyzing whether the work injury is no longer the major contributing cause of the need for treatment/disability of the combined condition, particularly where, as in this claim, the physician has opined that the injury exacerbated symptoms of claimant’s preexisting condition.

Causation of a condition or diagnosis as opposed to causation of disability/need for treatment is a well-established distinction in our law. *See Robinson v. SAIF*, 147 Or App 157, 162 (1997). They are separate analyses and should not be considered synonymous in the absence of persuasive evidence that confirms that the physician’s opinion encompassed the appropriate standard. *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).

Given Dr. Fischer's conclusory reasoning, and the absence of any response to Dr. Swartz's opinion addressing the appropriate standard, I cannot conclude that Dr. Fischer was aware of, or appreciated, the controlling standard for determining the ongoing compensability of claimant's combined condition.

I am also not convinced that Dr. Fischer's opinion persuasively established a change in claimant's condition or circumstances to support the employer's denial. The effective date of the combined condition acceptance provides the baseline for determining whether there has been a "change" in claimant's condition or circumstances. *Oregon Drywall Sys. v. Bacon*, 208 Or App 205, 210 (2006). In the absence of evidence showing such a change at the time of the denial's issuance (or its effective date), the denial will be set aside. *Washington County-Risk v. Jansen*, 248 Or App 335, 345 (2012); *Bacon*, 208 Or App at 208-11. The carrier has the burden of proof on this issue. ORS 656.262(6)(c); ORS 656.266(2)(a); *Skirving*, 58 Van Natta at 324.

Here, the combined condition acceptance was retroactively effective to December 12, 2013. (Ex. 51). The current condition denial was effective on March 25, 2014. (Ex. 52). While Dr. Fischer explained that claimant's injury was a "minor strain injury," which resulted in a "brief symptomatic flare-up of the preexisting condition," there is no explanation regarding a change in claimant's condition or circumstances before the March 25, 2014 denial. (Ex. 56). Dr. Fischer also explained that "an acute on chronic injury may require six weeks of therapy, but beyond that I attribute ongoing need for treatment to pre-existing disease." (Ex. 55). Yet, Dr. Fischer points to no objective findings or subjective improvement in claimant's symptoms, but continues the same work restrictions on the day that she considers him to be medically stationary in regard to the lumbar strain. (Exs. 50, 56).

Accordingly, I would find that Dr. Fischer's opinion is unexplained and conclusory, and therefore unpersuasive, in regard to a change in claimant's condition sufficient to support the employer's denial. *See Debra Howard*, 66 Van Natta 980, 984 (2014). Additionally, in determining that the resolution of claimant's lumbar strain after three months was "reasonable," I am not convinced that Dr. Fischer based her opinion on circumstances specific to claimant. (Ex. 55-2); *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).

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In conclusion, based on the aforementioned reasoning, I am not persuaded that the employer has established the statutory requirements to support its “ceases” denial. Dr. Fischer’s opinion does not persuasively rebut Dr. Swartz’s contrary medical opinion that claimant’s work injury remains the major contributing cause of his combined condition. Therefore, I respectfully, dissent.