

In the Matter of the Compensation of  
**ARLIS R. WHEELER, Claimant**

WCB Case No. 14-04478

ORDER ON REVIEW

Jodie Phillips Polich, Claimant Attorneys  
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Reviewing Panel: Members Weddell and Johnson.

The self-insured employer requests review of that portion of Administrative Law Judge (ALJ) Mills's order that set aside its denial of claimant's new/omitted medical condition claim for bilateral lower extremity radiculopathy. On review, the issue is compensability.

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

The ALJ determined that the claimed bilateral lower extremity radiculopathy condition was a "combined condition" consisting of claimant's compensable injury combined with his preexisting L4-5 collapsed disc, disc bulge, and bilateral foraminal stenosis. The ALJ found that claimant established the existence of the claimed radiculopathy condition, and that his compensable February 2013 injury was a material contributing cause of the disability/need for treatment of that condition. Moreover, the ALJ concluded that the employer had not met its burden of proving that the work injury was not the major contributing cause of the disability/need for treatment of the combined condition. *See* ORS 656.266(2)(a). In doing so, the ALJ relied on Dr. Ordonez's medical opinion, as supported by Dr. Swiridoff, rather than that of Dr. Rosenbaum.<sup>1</sup>

On review, the employer argues that claimant's description of his mechanism of injury was not reliable, and that Dr. Ordonez did not rebut Dr. Rosenbaum's opinion that claimant did not have "true" radiculopathy but, rather, "referred" or "mechanical" low back pain due to his preexisting degenerative arthritic conditions. For the following reasons, we disagree with the employer's arguments.

The ALJ considered claimant to be a credible witness based on his demeanor in testifying. Acknowledging that there were some differences/inconsistencies in the record regarding the specifics of the mechanism of claimant's injury, the ALJ

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<sup>1</sup> On page 2 of the ALJ's order, we change the reference to "Dr. Swindler" to "Dr. Swiridoff." (*See* Ex. 85).

nevertheless found general consistency in the record that claimant (a bus driver) was injured while attempting to assist passengers off the bus when a passenger ran into him from behind and rammed into his back, pushing him forward into a metal rail/bar in front of the dashboard. Thus, the ALJ concluded that there was credible and reliable evidence that claimant's mechanism of injury involved a sudden hyperflexion of his back.

After reviewing the record, we agree with the ALJ's credibility/reliability determination and conclusion regarding the mechanism of claimant's injury. *See Erck v. Brown Oldsmobile*, 311 Or 519, 526 (1991) (on *de novo* review, it is a good practice for an agency or court to give weight to the factfinder's demeanor-based credibility assessments); *Michael A. Ames*, 60 Van Natta 1324, 1326 (2008). Moreover, the opinions of Drs. Swiridoff, Ordonez, and Rosenbaum were based on the general consistency of claimant's injury, as described above. (*See Exs. 85-1, 91-1, 106-2, 185-1, 186-2, 192-1, -6, 193-1*). Because the record as a whole supports claimant's account of his injury, any minor inconsistencies in the contemporaneous medical records are not sufficient to defeat his claim.<sup>2</sup> *See Westmoreland v. Iowa Beef Processors*, 70 Or App 642 (1984), *rev den*, 298 Or 597 (1985); *see also Rafael Rodriguez*, 60 Van Natta 1603, 1611-12 (2008).

We also disagree with the employer's contention that Dr. Ordonez did not rebut Dr. Rosenbaum's contrary opinion that claimant had "referred" or "mechanical" low back pain from preexisting degenerative arthritis, and not "true radiculopathy." (*See Exs. 106-5, 185-8, 187*). Dr. Rosenbaum stated that claimant did not have the diagnosis of radiculopathy because he did not have "classic radiating pain in a radicular pattern of a single dermatome," physical examination findings of a single dermatome, or an MRI scan "which clearly delineates nerve root compression." (Ex. 185-9).

Dr. Ordonez noted that Dr. Rosenbaum attributed claimant's bilateral lower extremity radiculopathy, L4-5 collapsed disc, and L4-5 disc herniation to his preexisting spondylitic process. (Ex. 192-4). While he agreed with

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<sup>2</sup> Dr. Ordonez opined that claimant's mechanism of injury involved "a hyper-flexion of the spine, as he was forcefully bent forward stretching the ligaments, putting into motion segments of his spine which were not anticipating this type of motion, resulting in an injury to his lumbar nerves." (Ex. 192-6). According to Dr. Rosenbaum, claimant did not have "true radiculopathy" and, therefore, the mechanism of injury did not cause his condition. (Ex. 185-10). In any event, even after the employer pointed out the apparent differences/inconsistencies in claimant's described mechanism of injury, Dr. Rosenbaum stated that "[r]egardless of the specific mechanism of injury," claimant's preexisting degenerative arthritic changes were a material, and the major, contributing cause of the disability/need for treatment of his claimed conditions. (Ex. 193-1).

Dr. Rosenbaum that claimant's L4-5 collapsed disc and disc bulge (not herniation) preexisted his work injury, Dr. Ordonez opined that claimant sustained a nerve injury, diagnosed as bilateral lower extremity radiculopathy. (*Id.*)<sup>3</sup> Although he did not expressly discuss "referred" or "mechanical" low back pain, Dr. Ordonez described the "classical" picture/presentation of the term "true radiculopathy," and explained that about 70 percent of radiculopathy presentations in clinical practice are not "classical." (Ex. 192-5). According to Dr. Ordonez, the inability to identify the specific nerve root causing the pain does not negate the diagnosis of radiculopathy. (*Id.*) Dr. Ordonez opined that claimant's history, mechanism of injury, examination findings, MRI scans, responses to L4-5 injections, and correlation of his symptoms and his condition supported a diagnosis of bilateral lower extremity radiculopathy. (Ex. 192). We find Dr. Ordonez's opinion to be persuasive because it is well reasoned, based on an accurate history, and addressed the contrary opinion of Dr. Rosenbaum. *See Somers v. SAIF*, 77 Or App 259, 263 (1986).

Based on the foregoing reasons, in addition to those expressed in the ALJ's order, we find that claimant has established the existence of the claimed bilateral lower extremity radiculopathy condition, and that his work injury was a material contributing cause of the disability/need for treatment of the condition. ORS 656.005(7)(a); ORS 656.266(1); *Maureen Y. Graves*, 57 Van Natta 2380, 2381 (2005). Additionally, we agree with the ALJ's evaluation of Dr. Rosenbaum's contrary medical opinion, and find that the employer has not met its burden of proving that the otherwise compensable injury (*i.e.*, the work-related injury incident) was not the major contributing cause of a combined radiculopathy condition. ORS 656.005(7)(a)(B); ORS 656.266(2)(a); *Brown v. SAIF*, 262 Or App 640, 652 (2014); *SAIF v. Kollias*, 233 Or App 499, 505 (2010); *Jean M. Janvier*, 66 Van Natta 1827, 1832-33 (2014). Accordingly, 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 \$4,500, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the case (as

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<sup>3</sup> Dr. Ordonez opined that claimant's work injury combined with his bilateral foraminal stenosis (caused by his preexisting L4-5 disc conditions) resulting in a combined condition diagnosed as bilateral lower extremity radiculopathy. (Ex. 192-5). In doing so, he explained that claimant's injury caused L4-5 nerve root irritation, causing increased swelling/inflammation at the L4-5 level, causing a need for treatment of the bilateral foraminal stenosis. (*Id.*)

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represented by claimant's respondent's brief, his counsel's fee submission, and the employer's objection), the complexity of the issues, the value of the interest involved, and the risk that claimant's counsel might go uncompensated.

Finally, claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the bilateral lower extremity radiculopathy denial, to be paid the employer. *See* ORS 656.386(2); OAR 438-015-0019; *Gary Gettman*, 60 Van Natta 2862 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

### ORDER

The ALJ's order dated August 26, 2015 is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$4,500, payable by the employer. Claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the bilateral lower extremity radiculopathy denial, to be paid by the employer.

Entered at Salem, Oregon on April 14, 2016