
In the Matter of the Compensation of
TIFFANY GOOING, Claimant
WCB Case No. 15-01603
ORDER ON REVIEW
Glen J Lasken, Claimant Attorneys
MacColl Busch Sato PC, Defense Attorneys

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

Claimant requests review of Administrative Law Judge (ALJ) Smitke's order that upheld the self-insured employer's denial of claimant's new/omitted medical condition claim for an L5-S1 disc condition. On review, the issue is compensability. We affirm.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact" with the following summary and supplementation.

In 2007, before the work injury, claimant injured her back, ultimately requiring an L5-S1 microdiscectomy for a herniated disc. (Tr. 17; Ex. 10-2). Claimant testified that her back and right leg pain resolved after the 2007 surgery. (Tr. 17). She subsequently had "minor flare up pain" and neck symptoms that required chiropractic treatment. (Tr. 21; Ex. 5).

On January 28, 2014, claimant was evaluated by Mr. Garza, a nurse practitioner. (Ex. 2). Claimant described left-sided low back pain radiating into her left leg. (Ex. 2-3). Mr. Garza diagnosed sciatica and restricted claimant from work. (Ex. 2-4). Mr. Garza recorded a history of back pain worsening "over the last few weeks" and that claimant "denie[d] any known trigger," but felt that lifting at work had "exacerbated her back issues." (Ex. 2).

In February 2014, Ms. Farris (a physician's assistant) obtained x-ray imaging. (Ex. 5). Ms. Farris diagnosed lumbar radiculopathy and lumbar degenerative disc disease based on x-ray. (Ex. 5-4). She recommended an MRI and continued claimant's work restrictions. (*Id.*) Ms. Farris recorded that claimant's low back pain began when she carried tables and garbage cans at work several weeks earlier. (Ex. 5-1).

On February 19, 2014, an MRI showed L5-S1 disc degeneration and a “broad-based central disc extrusion.” (Ex. 7).

In March 2014, claimant was evaluated by Dr. Hammel at the employer’s request. (Ex. 10). His diagnosis included lumbar strain related to the January 2014 work injury and a disc herniation related to claimant’s 2007 surgery. (Ex. 10-5). Based on his examination, Dr. Hammel did not consider claimant to have objective findings consistent with radiculopathy. (Ex. 10-6). However, he considered the work-related lumbar strain to be the major contributing cause of claimant’s need for treatment.

On March 5, 2014, claimant received an L5 injection, which resulted in minimal relief of her symptoms. (Ex. 11).

On March 26, 2014, the employer accepted a lumbar strain. (Ex. 12).

In April 2014, Ms. Farris did not concur with Dr. Hammel’s opinion, stating that claimant was “unable to do any work due to recent disc herniation.” (Ex. 14).

In May 2014, Dr. Paulson became claimant’s attending physician. (Ex. 18-5). He diagnosed lumbar radiculopathy and lumbar degenerative disc disease. (*Id.*) He recommended further EMG/NCS studies. (*Id.*) Based on those studies, Dr. Paulson diagnosed a “probable mild left S1 radiculopathy.” (Ex. 21-3). He also diagnosed a motor and sensory axonal neuropathy (also described as a “peripheral neuropathy”) that was not related to the work injury. (Exs. 25-5, 27-4).

In September 2014, claimant was evaluated by Dr. Tien, a neurosurgeon. He noted that claimant’s condition was improving with physical therapy, and recommended further conservative treatment. (Ex. 31-5).

On September 29, 2014, claimant was evaluated by Dr. Kitchel at the employer’s request. (Ex. 34). He diagnosed a work-related lumbar strain, preexisting degenerative disc disease, and an L5-S1 central disc herniation causally related to the preexisting condition, not the work injury. (Ex. 34-6). He explained that claimant’s preexisting degenerative disc disease was an arthritic condition that combined with the work-related lumbar strain injury to cause her disability and need for treatment. (Ex. 34-8). He considered the work-related lumbar strain to be the major contributing cause of claimant’s need for treatment for 90 days, after

which the preexisting lumbar disc degeneration became the major contributing cause of need for treatment. (Ex. 34-9). He considered claimant's current work restrictions to be entirely related to the preexisting condition. (Ex. 34-10).

Also on September 29, 2014, Dr. Paulson noted that claimant's symptoms and activity tolerance had worsened. (Ex. 35-6). He recommended another lumbar MRI. (*Id.*)

In October 2014, Dr. Johnson, a radiologist, noted that another MRI findings were similar to the February 2014 MRI. (Ex. 38-2).

On October 29, 2014, Dr. Paulson disagreed with Dr. Kitchel's opinion. He diagnosed an L5-S1 central disc protrusion, and opined that claimant's preexisting lumbar spondylosis, degenerative disc disease, and facet osteoarthritis were not work-related. (Ex. 42-2).

In December 2014, Dr. Paulson obtained a left lower extremity EMG, which he interpreted as normal. (Ex. 45).

In February 2015, claimant initiated a new/omitted medical condition claim for "central disc bulge at L5-S1."

On February 19, 2015, Dr. Paulson responded to a concurrence letter drafted by claimant's counsel. (Ex. 49). He indicated that he diagnosed an L5-S1 disc protrusion/extrusion, not a lumbar strain. (Ex. 49-2). He opined that claimant's 2007 low back injury and surgery would predispose her to further low back problems, but were not the major contributing cause of her current condition. (*Id.*) He considered the extent of claimant's recovery since 2007 and the absence of an ongoing need for medical treatment between the injury incidents to support his opinion. (Ex. 49-2). Additionally, he concluded that claimant's mechanism of injury and timing of her symptoms were consistent with a work-related disc protrusion/extrusion. (Ex. 49-3).

On March 13, 2015, Dr. Griffin, who had examined claimant in October 2014, opined that claimant's symptoms following her lifting incidents were consistent with a lumbar strain. (Ex. 54). Based on his review of the medical record, his examination, and the MRI and EMG testing, Dr. Griffin could not correlate the L5-S1 disc bulge with the work injury. (Ex. 54-2).

In April 2015, the employer denied claimant's new/omitted condition claim. Claimant requested a hearing. (Ex. 51).

On April 6, 2015, Dr. Hammel explained that claimant's L5-S1 disc bulge was part of her preexisting degenerative disc and joint disease. (Ex. 52). He reasoned that claimant's age, prior surgery, and the lack of objective evidence correlating her condition with her work activities weighed against a work-related cause of her condition. (Ex. 52-2). Moreover, he did not consider the L5-S1 disc bulge to be causing radiculopathy or a need for medical treatment. (*Id.*)

On the same day, Dr. Kitchel similarly explained that claimant's L5-S1 disc bulge was caused by preexisting degenerative disc disease. (Ex. 53). He explained that claimant's chiropractic treatment after the 2007 surgery was consistent with the waxing and waning of symptoms due to claimant's arthritic condition. (Ex. 53-2). Dr. Kitchel also noted that the MRI showed diffuse disc degeneration at both L4-5 and L5-S1. (*Id.*) He explained that such diffuse findings at multiple levels were consistent with degenerative change. (*Id.*)

On June 29, 2015, Dr. Hammel explained that, while claimant had symptoms from her preexisting degenerative disc and joint disease, he did not consider the L5-S1 central disc bulge to be specifically symptomatic. (Ex. 56-2). He noted that an EMG study showed an axonal motor and sensory neuropathy, which was due to a non-work related health condition.¹ (*Id.*) Dr. Hammel further explained that claimant's symptoms were inconsistent with an acutely caused disc bulge. (*Id.*) He reasoned that an acutely caused disc bulge would have caused immediate and significant symptoms that claimant would have correlated with a specific event, rather than the series of activities that she described. (Ex. 56-3).

On June 30, 2015, Dr. Griffin opined that claimant's L5-S1 disc pathology was more accurately categorized as a central disc "protrusion" than a central disc "bulge." (Ex. 57-1). He opined that claimant's symptoms were most consistent with a lumbar strain, rather than the L5-S1 disc protrusion. (Ex. 57-2). Dr. Griffin did not think claimant's need for medical treatment was related to the disc protrusion. (*Id.*) Additionally, he did not consider claimant's mechanism of injury to be forceful enough to cause a disc protrusion, although the injury was consistent with a lumbar strain. (*Id.*)

Dr. Kitchel opined that claimant's lack of report of a traumatic event in 2007 was evidence of preexisting degenerative disc disease. (Ex. 58). He considered her "flare-up" of symptoms in 2012 to be consistent with the progression of

¹ Claimant acknowledges that the cause of these symptoms is not related to her 2014 work injury.

degenerative disc disease. (*Id.*) He opined that claimant's description of her onset of symptoms was inconsistent with an acute disc bulge, which would have resulted in sudden and immediate onset of significant symptoms at the time of the injury. (Ex. 58-2).

Claimant testified that her 2007 back injury was the result of a fall she suffered while at a gym. (Tr. 17). She explained that the day after that fall her symptoms were "very severe," but that her symptoms resolved after surgery. (*Id.*) Regarding the January 2014 work injury, claimant testified that she experienced pain while completing her work duties over the course of one day. (Tr. 13-16). She testified that the next day, her pain was so severe that she "could barely move." (Tr. 16).

CONCLUSIONS OF LAW AND OPINION

The ALJ reasoned that claimant's new/omitted condition claim was limited to a "central disc bulge at L5-S1."² The ALJ concluded that the medical record did not establish the existence of the claimed "central disc bulge at L5-S1" because the medical experts used other terms to describe claimant's L5-S1 pathology. Accordingly, the ALJ upheld the denial.

On review, claimant contends that the physicians used the various terms for claimant's disc pathology interchangeably, and that her new/omitted condition claim encompassed the L5-S1 pathology, however termed. Furthermore, claimant contends that the disc pathology, however termed, is compensable. The employer does not contest the existence of pathology at L5-S1. However, it argues that only a disc "bulge" is at issue, and that no such "bulge" exists. Further, the employer contends that any L5-S1 disc pathology is not compensable.

Based on the following reasoning, we agree that the various terms for claimant's L5-S1 pathology were used interchangeably. However, we conclude that claimant has not proven the compensability of that condition.

² At hearing, claimant's counsel described the issue as the compensability of claimant's "disc injury at L5-S1" which, he explained, had been variously described using different terms. (Tr. 8). The employer's counsel stated that it only considered the "central disc bulge at L5-S1" to be at issue "at this point." (Tr. 9). In closing arguments, claimant's counsel continued to maintain that the various terms used for the L5-S1 disc pathology were interchangeable. (Tr. 28). The employer's counsel maintained that claimant was required to prove the existence of a disc "bulge" and that claimant's L5-S1 pathology was not a "bulge." (Tr. 38).

To prevail on a new/omitted medical condition claim, claimant must prove that the claimed condition exists and that the work injury was a material contributing cause of the disability/need for treatment of the condition. *See* ORS 656.005(7)(a); ORS 656.266(1); *Maureen Y. Graves*, 57 Van Natta 2380, 2381 (2005). Considering the disagreement between experts regarding causation and need for treatment of the claimed L5-S1 disc condition, the compensability issue presents complex medical questions that must be resolved by expert medical opinion. *Barnett v. SAIF*, 122 Or App 279, 283 (1993). When presented with disagreement among experts, we give more weight to those opinions that are well reasoned and based on complete and accurate information. *Somers v. SAIF*, 77 Or App 259, 263 (1986).

Dr. Paulson diagnosed claimant's L5-S1 disc pathology as a protrusion. (Exs. 32, 42, 49).³

Dr. Griffin stated that, based on his review of MRI imaging from February 2014 and October 2014, claimant's disc pathology was "more appropriately categorized as a central disc protrusion rather than a central disc bulge." (Ex. 57).

Both Drs. Hammel and Kitchel initially described claimant's L5-S1 disc pathology as a "herniation," or "central disc herniation." (Exs. 10-5, 34-6). In later concurrences, Drs. Hammel and Kitchel described claimant's condition as a "central disc bulge." (Exs. 52, 53, 56, 58).

The employer contends that the record establishes that the terms for claimant's L5-S1 pathology are not interchangeable. Citing *Benz v. SAIF*, 170 Or App 22, 25 (2000) and *SAIF v. Calder*, 157 Or App 224, 227-28 (1998), the employer contends that we lack the expertise to conclude that the various terms for claimant's L5-S1 disc pathology are interchangeable. Based on the following reasoning, we conclude that this record establishes that a variety of terms have been used to describe the claimed condition and that the condition exists.

It is claimant's burden to show that the claimed "disc bulge" exists as a new/omitted medical condition, not that it is the best diagnosis to describe her condition. *See Elizabeth Wood*, 66 Van Natta 402, 404-05 (2014); *April L. Shabazz*, 60 Van Natta 2475, 2476-77 (2008).

³ In a concurrence letter drafted by claimant's counsel, Dr. Paulson replaced the term "bulge" with the term "protrusion." (Ex. 49).

Here, Drs. Hammel and Kitchel both opined that claimant had a “central disc bulge,” though they considered it to be unrelated to the January 2014 work injury. (Exs. 53, 56).

We acknowledge that Dr. Griffin opined that claimant’s disc bulge was “more appropriately categorized” as a disc protrusion. (Ex. 57). However, we do not interpret this statement to dispute the existence of the disc bulge. Rather, we interpret Dr. Griffin’s statement to designate the “best diagnosis” according to his opinion. *See Wood*, 66 Van Natta at 404-05.

We also acknowledge that Dr. Paulson crossed out the term “bulge” and replaced it with “protrusion” in his concurrence letter regarding causation of claimant’s L5-S1 condition. (Ex. 49). However, considering this particular record, we do not interpret his preference for the term “protrusion” to dispute the existence of the claimed L5- S1 central disc bulge.

Accordingly, we conclude that the medical record supports a conclusion that the terms “bulge,” “herniation,” “protrusion,” and “extrusion” were used interchangeably. Moreover, the record, read as a whole, establishes the existence of the claimed L5-S1 central disc bulge. *See Wood*, 66 Van Natta at 404-05.⁴

We turn to the medical evidence addressing causation of the need for treatment and disability regarding the denied L5-S1 condition. The physicians’ opinions are divided as to whether the L5-S1 condition also requires medical treatment or contributes to disability. These opinions also disagree whether the 2014 work injury was a material contributing cause of any disability/need for treatment of the L5-S1 condition (however diagnosed).

Claimant relies on the opinions of Dr. Paulson, Mr. Garza, Ms. Farris, and Dr. Tien. Based on the following reasoning, we find their opinions unpersuasive.

Claimant contends that Dr. Paulson’s opinion should be given deference based on his “attending physician” status. Dr. Paulson indicated that he did not diagnose a lumbar strain, and that his diagnosis was an L5-S1 disc protrusion/extrusion. (Ex. 49-2). He opined that claimant’s 2007 low back injury and surgery

⁴ Additionally, we note that the court’s recent decision in *Labor Ready v. Mogensen*, 275 Or App 491, 498 (2015), held that a new/omitted condition claim requires notice of a new or omitted medical condition, rather than a new diagnosis.

would predispose her to further low back problems, but were not the major contributing cause of her current condition. (*Id.*) He concluded that the lifting at work was the major contributing cause of claimant's L5-S1 condition. (Ex. 49-3).

In reaching his opinion, Dr. Paulson considered the extent of claimant's recovery since 2007 and the absence of an ongoing need for medical treatment between the injury incidents. (Ex. 49-2). Additionally, he considered claimant's mechanism of injury and timing of her symptoms to be consistent with a work-related disc protrusion/extrusion. (Ex. 49-3). He concluded that the work injury was the major contributing cause of claimant's L5-S1 disc condition. (*Id.*) Dr. Paulson did not state that his role as attending physician gave him any comparative perspective or insight into the causation of claimant's L5-S1 disc condition.

Drs. Hammel, Kitchel, and Griffin all agreed that claimant's described mechanism of injury and onset of symptoms were consistent with a lumbar strain injury. (Exs. 52, 53, 54). Drs. Hammel and Griffin opined that claimant's lumbar strain explained the onset of her low back pain, and that her symptoms appeared to be "muscular in nature." (Exs. 56-3, 57-2). Because they attributed claimant's symptoms to the lumbar strain, and did not consider her to have sufficient objective findings establishing a left lower extremity radiculopathy, they did not consider the L5-S1 disc condition to be the cause of her need for treatment. Moreover, Drs. Hammel and Kitchel concluded that claimant's L5-S1 disc pathology was consistent with preexisting degenerative disc disease. (Exs. 52, 53). Because Drs. Hammel, Kitchel, and Griffin fully considered and responded to the contrary opinions of Dr. Paulson, we find their opinions 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).

In contrast, Dr. Paulson, without further explanation, stated that he did not diagnose a lumbar strain. (Ex. 49-2). Moreover, he did not respond to the opinions of Drs. Hammel and Griffin correlating the mechanism of injury and onset of symptoms to the occurrence of a lumbar strain. Because Dr. Paulson did not explain the basis of his opinion that claimant did not have a lumbar strain, and did not address the significance of that diagnosis in the analyses of the other examiners, we discount his opinion. *Benedict*, 59 Van Natta at 2409.

Additionally, Dr. Paulson described claimant's extent of recovery and absence of ongoing medical care between the 2007 injury and the 2014 work injury as a "critical factor" in his opinion that the work injury was the major contributing

cause of claimant's L5-S1 disc condition. (Ex. 49-2, -3). However, Dr. Kitchel considered claimant's "flare-up" to be consistent with waxing and waning of symptoms due to degenerative disc disease. (Ex. 58-2). Moreover, Dr. Paulson did not address the "flare-up" of pain that required claimant to seek chiropractic treatment two years before the work injury. (Ex. 5-1). *See Miller v. Granite Construction Co.*, 28 Or App 473, 476 (1977); *Benedict*, 59 Van Natta at 2409.

Dr. Kitchel noted that claimant did not initially describe an event that would be consistent with an acute L5-S1 disc injury. (Ex. 58-5). Specifically, Mr. Garza recorded that claimant had back pain worsening over "the last few weeks" and that she "denies any known trigger," but felt that lifting at work had "exacerbated her back issues." (Ex. 2-1). However, subsequent descriptions stated that claimant's back pain began when she felt a strain in her back while lifting, which required her to stop lifting. (Ex. 5). That inconsistency was not addressed by Dr. Paulson, which calls his medical history into question and further diminishes the persuasiveness of his medical opinion. *See Miller*, 28 Or App at 476.

Dr. Paulson did not examine claimant until April 30, 2014, while Dr. Hammel examined claimant some six weeks earlier, on March 14, 2014, and concluded that claimant's symptoms were caused by her work-related lumbar strain. Therefore, his position as claimant's attending physician did not give him an advantage of earlier evaluation of claimant's "post-injury" condition. *See McIntyre v. Standard Util. Contractors*, 135 Or App 298 (1995) (a treating physician's opinion is less persuasive when the physician did not examine the claimant immediately following the injury); *Amelia Diaz-Gallardo*, 67 Van Natta 347, 350 (2015).

We acknowledge the dissent's assertion that the opinions of Drs. Hammel, Griffin, and Kitchel did not address Dr. Paulson's interpretation of certain EMG findings as consistent with an S1 radiculopathy rather than claimant's peripheral neuropathy. However, our reading of Dr. Paulson's opinion suggests that he primarily relied on the correlation of claimant's low back symptoms with the work injury and the length of time since her prior back injury resolved, rather than his interpretation of EMG findings. (Ex. 49). Moreover, as noted above, the accuracy of Dr. Paulson's medical history, both in terms of the timing of claimant's onset of symptoms in 2014, and her low back symptoms since the 2007 L5-S1 surgery, is questionable. Additionally, the diagnosis of a lumbar strain was an important factor in the explanation, by Drs. Hammel and Kitchel, of the onset of claimant's low back symptoms, and Dr. Paulson's lack of response to their analysis diminished the persuasiveness of his opinion.

Finally, claimant bears the initial burden of proof to establish the material cause of her need for treatment or disability for the claimed L5-S1 condition. ORS 656.266(1). Thus, for the reasons expressed above, regardless of the asserted deficiencies in the opinions of Drs. Hammel, Griffin, and Kitchel, claimant has not sustained her burden of proof. *See Lorraine W. Dahl*, 52 Van Natta 1576 (2000) (if medical opinions supporting compensability are insufficient to meet the claimant's burden of proof, the claim is not compensable, regardless of the persuasiveness of countervailing opinions).

Accordingly, we conclude that the opinions of Drs. Hammel, Kitchel, and Griffin are more persuasive than that of Dr. Paulson. Further, based on the following reasoning, we also find the opinions of Mr. Garza, Ms. Farris, and Dr. Tien insufficient to establish compensability of claimant's L5-S1 disc bulge.

Mr. Garza, who examined claimant once after the injury and diagnosed sciatica, did not comment on any of the diagnostic imaging and testing that followed his examination. Moreover, Mr. Garza did not respond to the opinions of Drs. Hammel, Kitchel and Griffin, who did not consider the work injury to be a material cause of claimant's disability/need for treatment for the L5-S1 disc condition. (Exs. 52, 53, 54). *See Somers*, 77 Or App at 263; *Benedict*, 59 Van Natta at 2409. Accordingly, we do not consider Mr. Garza's medical opinion to persuasively satisfy claimant's burden of proof.

Ms. Farris diagnosed lumbar radiculopathy, low back pain, and lumbar degenerative disc disease. (Ex. 5-4). Later, Ms. Farris noted that claimant likely had a left-sided disc herniation affecting the S1 nerve root. (Ex. 8-3). She disagreed with Dr. Hammel's opinion that claimant was capable of light duty work. (Ex. 14). However, Ms. Farris did not respond to Drs. Hammel's and Griffin's opinions that there were no objective findings supporting radiculitis related to the L5-S1 disc. (Exs. 10-7, 54, 57-2). Ms. Farris also did not respond to Dr. Kitchel's opinion that the work injury was not a material cause of claimant's need for treatment of the L5-S1 disc condition because of her preexisting degenerative disc disease. (Ex. 53). Accordingly, Ms. Farris's opinion is insufficient to establish claimant's work injury as a material cause of her disability/need for treatment of the L5-S1 disc condition. *Benedict*, 59 Van Natta at 2409

Dr. Tien diagnosed an L5-S1 central disc herniation, and while he noted a history of "repetitive lifting and bending and twisting activities" at work, he did not discuss the causation of the L5-S1 disc herniation. (Ex. 31). Neither

did Dr. Tien address the physicians' opinions that concluded that claimant's L5-S1 disc was not symptomatic, and that it was caused by preexisting degenerative disc disease. *Benedict*, 59 Van Natta at 2409.

Because we have deemed the medical opinions on which claimant relies to be unpersuasive, we do not find that the 2012 work injury was a material contributing cause of the disability/need for treatment of the claimed L5-S1 disc condition.⁵ Accordingly, we affirm.

ORDER

The ALJ's order dated August 4, 2015 is affirmed.

Entered at Salem, Oregon on April 4, 2016

Member Weddell dissenting.

The majority concludes that the opinions of Drs. Hammel, Kitchel, and Griffin are more persuasive than the contrary opinion of the attending physician, Dr. Paulson. Because I disagree with their causation analysis, I respectfully dissent.⁶

Dr. Paulson diagnosed a central disc protrusion at L5-S1 causing left greater than right sided S1 radiculopathy. (Ex. 42-2). He based his opinion on MRI imaging, EMG testing that he performed, claimant's mechanism of injury, and her history of resolved low back and radiculopathy symptoms since a prior surgery in 2007. (Ex. 49). He commented that claimant's acute symptoms, followed by onset of left-sided radiculopathy, were consistent with the occurrence of a disc protrusion due to the described work activities. (Ex. 49-3).

⁵ Because claimant has not established that the work injury was a material contributing cause of the need for treatment or disability of the denied L5-S1 condition, it is unnecessary to address the employer's "combined condition" burden of proof under ORS 656.266(2)(a). *See, e.g., Kristie F. Ritchey*, 68 Van Natta 46, 50, n 2 (2016).

⁶ I concur with the majority's analysis concerning whether the claimed L5-S1 disc bulge condition was in existence.

Dr. Paulson distinguished between claimant's peripheral neuropathy and her S1 radiculopathy, noting that the neuropathy was not related to the work injury. (Ex. 27-4). He acknowledged that claimant's prior L5-S1 surgery would result in a weakened disc at that level. (Ex. 49-2). However, he considered the prior disc herniation and surgery to be a predisposing, rather than causative factor of claimant's current L5-S1 disc protrusion. (*Id.*) I consider his reasoning persuasive.

Moreover, I would give Dr. Paulson's opinion more weight based on his role as claimant's attending physician. *See Weiland v. SAIF*, 64 Or App 810, 814 (1983) (unless there are persuasive reasons to do otherwise, we tend to give more weight to the opinion of the claimant's treating physician); *Andrea Gartenbaum*, 67 Van Natta 1851, 1853 (2015) (deference granted to attending physician who examined claimant before symptoms subsided). Further, based on the following reasoning, I would decline to rely on the opinions of Drs. Hammel, Kitchel and Griffin.

Dr. Hammel concluded that there was no "objective evidence" that claimant's work injury caused a worsening of claimant's preexisting degenerative disc disease at L5-S1. (Ex. 52-2). In his initial examination, Dr. Hammel concluded that claimant did not have any objective findings of radiculopathy. (Ex. 10-5). Dr. Hammel did not believe that claimant had an S1 radiculopathy, and attributed her left leg symptoms to the non-work related peripheral neuropathy.

However, Dr. Paulson performed EMG testing that confirmed the presence of S1 radiculopathy, which he considered to be consistent with claimant's L5-S1 disc pathology. (Exs. 19-20). Dr. Paulson distinguished between the S1 radiculopathy and the peripheral neuropathy, attributing them to separate conditions. Accordingly, I am not persuaded by Dr. Hammel's opinion, which conflates symptoms that, Dr. Paulson explained, were due to two separate causes, one of them work-related.

Dr. Griffin opined that claimant did not require medical treatment for her L5-S1 disc pathology, in part, because his physical examination was consistent with peripheral neuropathy, rather than lumbar radiculopathy. (Ex. 57-2). Dr. Griffin also specifically noted that claimant's symptoms of foot numbness attributable to the peripheral neuropathy preexisted the work injury, and were not work-related. However, at the time of his initial examination, Dr. Griffin noted that claimant's radicular left leg pain was resolving with physical therapy. (Ex. 41). Moreover, in explaining his opinion regarding claimant's need for

treatment of the L5-S1 disc pathology, he twice referred to negative EMG findings, which was inconsistent with Dr. Paulson's recorded findings of S1 radiculopathy. (Exs. 54-2, 57-2). Because Dr. Griffin did not examine claimant until her lumbar radiculopathy was resolving, I would discount his opinion. *See Gartenbaum*, 67 Van Natta at 1853.

Dr. Kitchel, who examined claimant some nine months after her work injury, did not substantively discuss the implications of claimant's EMG findings for the compensability of the L5-S1 disc pathology. He did not consider the work injury to be a material cause of claimant's disability/need for treatment, which he related to her preexisting degenerative disc disease. As explained above, I would defer to Dr. Paulson's opinion due to his comparatively advantageous position as the attending physician. *Diana G. Hults*, 61 Van Natta 1886, 1888 (2009) (more weight accorded to diagnostic opinions of physicians who had greater opportunity to observe the claimant's condition over time); *Cornelio Garcia*, 67 Van Natta 893, 896 (2015).

Accordingly, I would find that claimant established that the January 2014 work injury was a material contributing cause of her need for treatment for the L5-S1 pathology, and would set aside the denial.⁷ Because the majority concludes otherwise, I respectfully dissent.

⁷ To the extent that Drs. Hammel, Kitchel, and Griffin discussed the existence and major contributing cause of a combined condition, I would find those opinions insufficient to meet the employer's burden of proof. *See* ORS 656.266(2)(a).