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In the Matter of the Compensation of  
**JARROD S. DUNN, Claimant**  
WCB Case No. 15-05856, 14-02444, 14-02233  
ORDER ON REVIEW  
Jon C Correll, Claimant Attorneys  
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Curey and Weddell.

The SAIF Corporation requests review of Administrative Law Judge (ALJ) Donnelly's order that set aside its denial of claimant's occupational disease claim for a low back condition. On review, the issues are compensability and responsibility.

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

On September 2, 2004, while working for a prior employer as a sign installer, claimant injured his low back. SAIF, on behalf of the prior employer, accepted a lumbar strain and an L4-5 disc herniation. (Exs. 5, 17).

On September 29, 2005, Dr. Keiper, a neurosurgeon, performed a left L4-5 laminotomy and discectomy, removing all of the loose pulposus. (Ex. 12).

After the surgery, claimant had persistent radiculitis. (Exs. 18, 25, 48). Post-operative MRIs showed residual L4-5 disc protrusion/material, as well as scarring.<sup>1</sup> (Exs. 18, 30-2).

On September 13, 2007, Dr. Kincade, claimant's attending physician, opined that claimant was medically stationary. (Ex. 75). A November 21, 2007 Notice of Closure awarded 13 percent unscheduled permanent partial disability (PPD) benefits. (Ex. 79). On reconsideration, the unscheduled PPD award was increased to 14 percent. (Exs. 79, 83).

In 2009, claimant began working for another employer (also insured by SAIF) as a sign installer. (Tr. 12). His work activities, which involved lifting and frequent bending, were similar to those at his prior employment. (Tr. 11).

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<sup>1</sup> A November 14, 2005 MRI showed a decreased L4-5 disc protrusion and epidural fibrosis, consistent with the recent surgery. (Ex. 15). A May 19, 2006 MRI showed disc material and post-operative scarring with slightly less effect, when compared to the November 14, 2005 MRI. (Ex. 28).

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On July 17, 2013, claimant developed persistent low back pain after using a jackhammer to break up concrete. (Tr. 13; Ex. 100). Despite the pain, he continued to work and did not seek medical treatment. (Tr. 14).

On March 4, 2014, claimant “didn’t feel too good” after “pulling a sign face out of a sign, turning sideways and leaning over the roof to lay it down.” (Tr. 15). The next morning, he had disabling low back pain. (*Id.*)

Claimant went to an emergency room on March 6, 2014. (Ex. 96). There, he completed an 827 form, claiming an injury as a result of using the jackhammer in July 2013, and underwent an MRI. (Ex. 94). Dr. Thiede, the radiologist, reported that the MRI was similar to the May 2006 MRI. (Ex. 97-3).

On March 7, 2014, claimant followed-up with Dr. Ackerman, an occupational medicine specialist. Dr. Ackerman took him off work. (Ex. 100-2).

On March 18, 2014, claimant returned to Dr. Keiper, who opined that the March 6, 2014 MRI showed L4-5 facet hypertrophy and a disc herniation. (Ex. 103-4). Diagnosing lumbar spinal stenosis and a disc herniation, he proposed bilateral laminotomies, medial facetectomies and foraminotomies, and a possible discectomy. (*Id.*)

On April 18, 2014, Dr. Hammel, an orthopedic surgeon, performed an examination at SAIF’s request. Dr. Hammel diagnosed lumbar spondylosis, which he identified as an “arthritic condition.” (Ex. 115-7). He opined that the condition would continue to worsen with aging and concluded that the July 17, 2013 injury was not a material contributing cause of claimant’s need for treatment. (Ex. 115-8). Dr. Ackerman concurred with Dr. Hammel’s opinions. (Ex. 120).

On April 28, 2014, SAIF denied that claimant had sustained a compensable injury on July 17, 2013. (Ex. 117). Claimant requested a hearing.

On April 30, 2014, claimant filed a separate claim, asserting that he injured his back removing the sign face on March 4, 2014. (Ex. 118). On May 12, 2014, SAIF also denied that claim. (Ex. 123). Claimant requested a hearing.

On July 2, 2014, claimant asserted that the accepted 2004 L4-5 disc herniation was a material contributing cause of his current need for treatment. (Ex. 125).

On July 31, 2014, Dr. Rosenbaum, a neurosurgeon who performed an examination at SAIF's request, opined that claimant had preexisting lumbar spondylosis and prominent functional overlay. (Ex. 127-8). Reasoning that the 2014 MRI report did not describe a herniated disc and that claimant's functional overlay and spondylosis would account for his symptoms, Dr. Rosenbaum did not believe that there was any significant relationship between claimant's current condition and the 2004 injury. (Ex. 127-10).

On September 11, 2014, SAIF (on behalf of the prior employer) denied that claimant's need for medical treatment was compensably related to the accepted conditions in the 2004 claim. (Ex. 128). Claimant requested a hearing.

On December 9, 2014, Dr. Keiper opined that the 2004 injury was both a material cause and the major contributing cause of claimant's disability/need for treatment. (Ex. 130-2). Dr. Keiper also concluded that the July 17, 2013 injury was a material cause and the major contributing cause of claimant's disability/need for treatment and that the March 4, 2014 injury was a material cause, and the major contributing cause, of claimant's disability/need for treatment. (Ex. 130-3).

On January 13, 2015, a prior ALJ upheld SAIF's September 11, 2014 "medical treatment" denial (on behalf of the prior employer). In doing so, the ALJ concluded that claimant's need for medical services was not materially related to the 2004 injury. (Ex. 131-13).

On May 8, 2015, an MRI showed abnormal disc material/epidural granulation tissue in the left L4-5 regions, which, although present on the March 6, 2014 MRI, "might be slightly progressed." (Ex. 132-2). Dr. Simard, the radiologist, recommended further evaluation. (Ex. 132-1).

On September 3, 2015, claimant filed an occupational disease claim for "three successive injuries in 2004, 2013, and 2014 along with the physical demands of my work." (Ex. 132A). On November 2, 2015, SAIF denied that claimant's work was the major contributing cause of his disease. (Ex. 132B). Claimant requested a hearing.

On February 18, 2016, Dr. Sherman opined that claimant has an L4-5 disc herniation, superimposed on degenerative disc disease. (Ex. 133-1). Dr. Sherman believed that the L4-5 disc was less resilient as a result of the prior disc herniation and surgery. (*Id.*) Noting that claimant returned to work in a heavy occupation and suffered two more incidents, resulting in the inability to continue working,

Dr. Sherman could not say that any one incident made the greatest contribution to the current L4-5 disc herniation, but he concluded that the combined effect of the three work incidents, together with claimant's daily heavy work, was the major cause of the current L4-5 disc herniation. (*Id.*)

At hearing, claimant withdrew his appeals from SAIF's denials of his July 17, 2013 and March 4, 2014 injury claims and proceeded only on his occupational disease claim. (Tr. 2, 3). In response, SAIF orally amended its November 2, 2015 denial to include responsibility for claimant's low back condition as an occupational disease. (Tr. 4, 5).

Relying on Dr. Sherman's opinion, the ALJ concluded that claimant's work activity, including the three work injuries, was the major contributing cause of his current L4-5 disc herniation. Accordingly, the ALJ set aside SAIF's November 2, 2015 denial.

On review, SAIF contends that claimant's claim should be analyzed as an "injury." SAIF also argues that Dr. Hammel's opinion is more persuasive than that of Dr. Sherman. Lastly, SAIF contends that the prior employer is responsible under ORS 656.308. As explained below, we disagree with SAIF's contentions.

### Compensability

We first address SAIF's contention that the claim should be analyzed as one for an injury rather than an occupational disease. An occupational disease is distinguished from an injury by its gradual onset, whereas an injury arises suddenly due to an identifiable event or has an onset traceable to a discrete period. *Smirnoff v. SAIF*, 188 Or App 438, 443 (2003). It is the onset of the condition, rather than the onset of symptoms, that distinguishes an occupational disease from an injury. *Id.* at 446.

Considering claimant's history of low back problems and the conflicting medical opinions regarding causation, the compensability issue presents a complex medical question that must be resolved by expert medical opinion. *Uris v. State Comp. Dept.*, 247 Or 420, 426 (1967); *Barnett v. SAIF*, 122 Or App 279, 283 (1993). We give more weight to those opinions that are well reasoned and based on complete information. *Somers v. SAIF*, 77 Or App 259, 263 (1986).

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For the following reasons, we conclude that the medical evidence supports a conclusion that claimant's low back condition, as opposed to his symptoms, developed gradually, rather than as a result of a work event.

Dr. Hammel opined that claimant's condition (which he identified as "multifactorial lumbar stenosis") was not "necessarily consistent with the described mechanism of injury of using the jackhammer and unloading blocks of concrete." (Ex. 115-8). Instead, Dr. Hammel described a "worsening" situation with continued work, as claimant's symptoms progressed to a moderate level of pain and disability. (Ex. 115-7). Further reasoning that a minor mechanism of injury could cause a person with lumbar stenosis to have significant pain, Dr. Hammel concluded that the work activities on July 17, 2013 and March 4, 2014 made claimant's back symptomatic. (Ex. 125-2).

Similarly, Dr. Sherman did not attribute the current L4-5 disc herniation to a particular work incident or discrete time period. (Ex. 133-1). Instead, he considered all three work incidents, coupled with the heavy work claimant did, to be the major cause of claimant's condition (which he identified as an L4-5 disc herniation superimposed on degenerative disc disease). (*Id.*) He explained that the disc was less resilient as a result of the 2004 injury and resulting surgery. (*Id.*) He also noted that claimant returned to work in a heavy occupation and suffered two more work-related incidents. (*Id.*)

Drs. Rosenbaum and Keiper had conflicting opinions about the 2014 MRI, but neither opinion supports the application of an injury analysis. Dr. Rosenbaum concluded that the 2014 MRI did not show a recurrent herniation or pathology that would account for claimant's symptoms. (Ex. 127-7, -8, -9). Dr. Keiper opined that the 2014 MRI showed a sizeable disc herniation on the left of L4-5, but he did not provide an opinion regarding the development of the condition (as opposed to the disability/need for treatment). (Exs. 103-4, 130).

SAIF argues that claimant's history and testimony do not support an "occupational disease" analysis. We disagree. For the following reasons, we consider claimant's testimony to be consistent with the medical opinions.

Claimant testified that he had intermittent low back soreness/stiffness following the 2004 injury and surgery. (Tr. 10, 20). Nevertheless, from 2009 until Dr. Ackerman took him off work in March 2014, he performed work that required bending, lifting, and twisting. (Tr. 11, 26). In July 2013, after breaking up concrete with a jackhammer, he developed persistent intense low back pain.

(Tr. 13). Yet, he continued to work and did not seek medical treatment for almost eight months. (Tr. 13, 14). When he developed increased symptoms and disability after removing a sign face on March 4, 2014, he attributed his low back pain to the “jackhammer” work in July 2013. (Tr. 15; Ex. 96-1). He later told Drs. Keiper, Hammel, and Rosenbaum that he developed progressive symptoms in 2013 and 2014. (Exs. 103-1, 115-2, 127-5).

After considering the medical record, as well as claimant’s testimony, we agree with the ALJ’s analysis of the claim as an occupational disease. *See Anne Zoucha*, 68 Van Natta 140 (2016) (the claimant’s engagement in work activity for several weeks before any symptoms prompted her to seek treatment was more consistent with the gradual onset of her conditions); *Paul D. Johnson*, 66 Van Natta 673 (2014) (although the claimant’s symptoms may have arisen during a discrete period of time, the medical evidence showed that his degenerative disc/joint disease condition developed gradually).

We turn to the compensability of claimant’s occupational disease claim. Claimant has the burden to prove that employment conditions, including work-related injuries, were the major contributing cause of his disease. *See* ORS 656.266(1); ORS 656.802(2)(a); *Kepford v. Weyerhaeuser Co.*, 77 Or App 363, 365-66, *rev den*, 300 Or 722 (1986) (prior work injuries may be considered part of overall “employment conditions”). If the occupational disease claim is based on a worsening of a preexisting condition, claimant must prove that employment conditions were the major contributing cause of a combined condition and pathological worsening of the disease. ORS 656.802(2)(b).

The causation issue presents a complex medical question that must be resolved by expert medical opinion. *Uris*, 247 Or at 426; *Barnett*, 122 Or App at 283. We give more weight to those opinions that are well reasoned and based on complete information. *Somers*, 77 Or App at 263.

Dr. Sherman was the only physician who addressed claimant’s occupational disease theory of causation. SAIF argues that his opinion was conclusory, was based on incomplete information, was inconsistent with the MRIs and prior ALJ’s findings, and did not address Drs. Rosenbaum’s and Hammel’s contrary opinions. We disagree.

Claimant testified that he saw Dr. Sherman, a neurosurgeon who practices with Dr. Keiper, one or two times. (Tr. 17). Dr. Sherman opined that the 2015 MRI showed an L4-5 disc herniation, superimposed on degenerative disc disease.

(Ex. 133-1). He understood that claimant had a prior L4-5 disc herniation and surgery. (*Id.*) He opined that the disc was less resilient as a result of that injury and surgery. (*Id.*) He was not surprised that the disc was abnormal in postsurgical MRIs. (*Id.*) He understood that claimant had no significantly disabling pain for several years, had returned to work in a “heavy” occupation, and had two more work incidents, the second taking him off work. (*Id.*) He concluded that the combined effects of the 2004, 2013, and 2014 work incidents, coupled with claimant’s daily heavy work, were the major cause of the current L4-5 disc herniation, with degenerative disc disease playing a lesser role. (*Id.*) He reasoned that “simply stating that the disc herniation is the result of degenerative disease ignores the roles that the prior surgery, hard work, and three injuries played in the breakdown of the disc.” (*Id.*)

Dr. Sherman’s opinion was supported by claimant’s testimony that, after the 2004 injury and 2005 surgery, he had ongoing intermittent back problems, depending on his activity, which worsened after he worked with the jackhammer in 2013. (Tr. 10, 13, 14, 19). Dr. Sherman’s opinion was also consistent with claimant’s description of his work activity as involving lifting (50 pounds or more) and a lot of bending. (Tr. 11).

SAIF contends that the MRIs contradict Dr. Sherman’s opinion that the work activities and the injuries in 2013 and 2014 contributed to claimant’s L4-5 disc herniation. In particular, SAIF points to the absence of pathological change on the 2005, 2006, and 2014 MRIs and the pathological change on the 2015 MRI (after claimant stopped performing heavy work).

Yet, the cause of claimant’s condition is a medical question. The record on review does not provide a medical opinion that supports SAIF’s arguments that Dr. Sherman’s opinion contradicts the MRIs. In the absence of persuasive medical opinion, we are unable to draw a medical conclusion from the MRIs. *See Benz v. SAIF*, 170 Or App 22, 25 (2000) (although the Board may draw reasonable inferences from the medical evidence, it is not free to reach its own medical conclusions); *see also SAIF v. Calder*, 154 Or App 224, 228 (1998) (Board is not an agency with specialized medical expertise and must base its findings on medical evidence in the record).

SAIF also argues that Dr. Sherman’s opinion contradicts the prior ALJ’s order. We disagree. In holding that the 2004 injury was not a material contributing cause of claimant’s need for medical treatment, the prior ALJ’s order did not address the major contributing cause of claimant’s current L4-5 disc

herniation. Dr. Sherman opined that the effects of the 2004 injury (resulting in a disc that was less resilient) combined with the 2013 and 2014 incidents and claimant's heavy work to cause claimant's L4-5 disc herniation. We conclude that Dr. Sherman's opinion does not contradict the prior ALJ's order.

In conclusion, based on our review of this record and the aforementioned reasoning, as well as that expressed by the ALJ's order, we agree with the ALJ's determination that Dr. Sherman's opinion persuasively establishes the compensability of claimant's occupational disease claim under ORS 656.802(2)(a).<sup>2</sup> Consequently, we affirm.

### Responsibility

On review, SAIF (as the insurer for the subsequent employer) contends that, under ORS 656.308(1), SAIF (as the insurer for the prior employer) remains responsible for claimant's L4-5 disc herniation because there is insufficient medical evidence to shift responsibility to the subsequent employer. Based on the following reasoning, we disagree with that contention.

We begin by determining whether ORS 656.308(1) applies to this case. ORS 656.308(1) applies only if claimant's current condition involves the "same condition" involved in the earlier claim. *Smurfit Newsprint v. DeRosset*, 118 Or App 368, 371-72 (1993). "Involving the same condition" (ORS 656.308(1)) means that the new condition "has the earlier compensable injury within or as part of itself." *Multifood Specialty Distribution v. McAtee*, 164 Or App 654, 662 (1999), *aff'd*, 333 Or 629 (2002); *James W. Dunn, Jr.*, 54 Van Natta 294, 296, *recons*, 54 Van Natta 1490 (2002).

We examine the medical evidence to determine whether claimant's current L4-5 disc herniation condition "involves the same condition" as that previously accepted by SAIF for the prior employer.

SAIF accepted an L4-5 disc herniation under the 2004 claim. (Ex. 17). The 2005 preoperative MRI showed an L4-5 disc herniation. (Ex. 7-2). On September 29, 2005, Dr. Keiper removed all of the loose pulposus. (Ex. 12). A November 14, 2005 MRI showed granulation tissue and a decrease in size in the disc protrusion. (Ex. 15).

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<sup>2</sup> Dr. Sherman ascribed claimant's occupational disease to the combined effects of his work incidents, including the incident in 2004, and daily heavy work, rather than a worsening of a preexisting disease under ORS 656.802(2)(b).

Although Dr. Rosenbaum opined that the November 14, 2005 MRI still showed a significant herniated disc, he also opined that there was “some recurrent or residual protrusion present at L4-5.” (Ex. 127-7, -9). He concluded that claimant ceased being treated for the 2004 injury in 2008, when claimant’s condition was considered medically stationary. (Ex. 127-9). Ultimately, though, he did not “find a relationship of any significance” between claimant’s current condition and the 2004 injury or the 2005 discectomy. (*Id.*) Accordingly, Dr. Rosenbaum’s opinion does not persuasively establish that the current condition involves the previously accepted L4-5 disc herniation.

Dr. Thiede reported that claimant’s March 6, 2014 MRI does not show a “definite new disc extrusion.” (Ex. 97-4). Dr. Hammel agreed with Dr. Thiede’s opinion. (Ex. 115-5). Dr. Hammel also stated that there was no change between the postsurgical MRI in 2005 and the MRI in 2014. (Ex. 115-7). In contrast, Dr. Keiper believed that Dr. Thiede had “under read” the MRI and that it showed a “sizable” L4-5 disc herniation and facet arthropathy. (Exs. 103-4, 130-2). Dr. Sherman believed that the 2015 MRI “clearly shows [an L4-5] disc herniation,” which was superimposed on degenerative disc disease. (Ex. 133-1). He opined that the “combined effects of the 2004, 2013 and 2014 incidents, coupled with the heavy work [claimant] did each day are the major (51%) cause of his current L4-5 disc herniation, with degenerative disc disease playing a lesser role.” (*Id.*)

Based on this record, we conclude that, while claimant’s current condition may involve the same body part as was involved in the prior claim, the physicians’ opinions do not persuasively support a conclusion that claimant’s current condition involves the same condition that was accepted by SAIF under the 2004 claim. Accordingly, ORS 656.308(1) is not applicable. *See Barbara A. Bodell*, 45 Van Natta 345, 346 (1993) (ORS 656.308 did not apply where the same body part (the neck/cervical area) was involved, but not the same condition (different disc levels); *cf. James W. Dunn, Jr.*, 54 Van Natta 294, 297 (2002) (a recurrent disc herniation involved the same condition as an earlier accepted injury where physicians’ opinions established that a prior disc herniation and surgery were the major contributing cause of the recurrent disc herniation). Rather, the last injurious exposure rule (LIER) applies to assign responsibility. *See Lyle H. Brensdal*, 47 Van Natta 2209, 2211 (1995), *aff’d without opinion*, 142 Or App 311 (1996) (when ORS 656.308(1) was not applicable because the claimant’s current conditions were not the “same conditions” as the previously accepted injury, the LIER was applied to assign responsibility).

Presumptive responsibility under LIER is triggered when the worker first seeks medical treatment or experiences temporary disability. *Timm v. Maley*, 125 Or App 396, 401 (1993), *rev den*, 319 Or 81 (1994). The presumptively responsible employer can avoid responsibility if it establishes that conditions at its workplace could not possibly have caused the disability or that the disease was caused solely by conditions at one or more previous employments. *Roseburg Forest Products v. Long*, 325 Or 305, 313 (1997).

Here, claimant experienced disability and sought medical treatment for his current L4-5 disc herniation while working for his subsequent employer (SAIF's insured), making it the presumptively responsible employer. The medical evidence does not establish that claimant's work for the prior employer was the sole cause of his disease or that employment conditions at his subsequent employer could not possibly have caused it. Therefore, responsibility remains with SAIF (as the insurer for claimant's subsequent employer).

#### Attorney Fees/Costs

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 attorney fee award is \$4,500, to be paid by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's respondent's brief), the complexity of the issues, the value of the interest involved, the risk that claimant's counsel may go uncompensated, and the contingent nature of the practice of workers' compensation law.

Finally, claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by SAIF. *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 described in OAR 438-015-0019(3).

#### ORDER

The ALJ's order dated March 31, 2016 is affirmed. For services on review, claimant's attorney is awarded an assessed attorney fee of \$4,500, payable by SAIF. Claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by SAIF.

Entered at Salem, Oregon on December 6, 2016