
In the Matter of the Compensation of
RAMON M. MALDONADO, Claimant
WCB Case No. 14-04365
ORDER ON REVIEW
Dunn & Roy PC, Claimant Attorneys
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Weddell and Curey.

Claimant requests review of that portion of Administrative Law Judge (ALJ) Naugle's order that upheld the SAIF Corporation's denial of claimant's new/omitted medical condition claim for a worsened low back spondylytic defect/spondylolysis condition. On review, the issue is compensability. We reverse.

FINDINGS OF FACT

On February 28, 2013, claimant sustained a compensable low back injury when he shook dirt off of a 50-pound tree root ball and experienced the sudden onset of low back pain. (Ex. 3). X-rays showed L5 grade 1 spondylolisthesis with suspected spondylolysis and degenerative changes at L5-S1. (Ex. 4).

In April 2013, Dr. Mohabeer, occupational medicine, diagnosed lumbar conditions including sprain/strain, herniated disc, spinal stenosis, spondylolisthesis, and radiculopathy. (Exs. 8, 11-5). He opined that the February 2013 work injury was the major contributing cause of claimant's condition/need for treatment. (*Id.*)

A lumbar MRI showed L3-4 canal stenosis, bilateral L5 neural foraminal stenosis, bilateral L5 spondylolysis and grade 1 spondylolisthesis, posterior annular bulges/protrusions at all lumbar levels, and posterior tears at L2-3 and L4-5. (Ex. 10). Electrodiagnostic studies reflected no neurological abnormalities. (Ex. 13).

In May 2013, Dr. Brett, orthopedic surgeon, diagnosed an L3-4 disc protrusion and worsened L5-S1 spondylytic spondylolisthesis with bilateral L5 impingement. (Ex. 14-1). He noted preexisting L5-S1 conditions, but opined that the February 2013 injury was the major contributing factor in the development of his L3-4 cauda equina compression, bilateral L5 radiculitis, and radiculopathy at L5-S1 "resulting in a pathological worsening with his lifting incident of 02/28/2013." (Ex. 14-3).

On follow-up, Dr. Mohabeer concluded that the MRI showed multiple post-traumatic lumbar pathologies, including L5-S1 herniated disc, spondylolisthesis, spinal stenosis, and nerve root impingement. (Exs. 11-5, 15-5). He correlated these findings to claimant's current work-related symptomatology. (Ex. 11-5).

Dr. Duff, orthopedic surgeon, performed an examination at SAIF's request. (Ex. 18). He diagnosed an acute lumbar strain related to the February 2013 injury, multilevel degenerative disc disease, L4-5 and L5-S1 central and foraminal stenosis, and L5-S1 grade 1 spondylolisthesis. (Ex. 18-5). He opined that the imaging study findings were idiopathic and degenerative "with the spondylolisthesis being an added development anomaly frequently associated with back complaints in middle age." (Ex. 18-6). He questioned whether the work injury was ever a material contributing cause of claimant's need for treatment, but indicated that "the history as presented today would support the work injury being the precipitating factor in the current disability." (Ex. 18-7). He further noted that, assuming there was an injury, it would have combined with his preexisting conditions. (Ex. 18-8). Dr. Duff concluded that the preexisting degenerative and arthritic changes were the major contributing cause of the disability. (*Id.*)

In June 2013, Dr. Brett determined that claimant had an annular injury, L3-4 disc herniation, and probable pathological worsening of his preexisting spondylolytic spondylolisthesis at L5-S1. (Ex. 24).

In August 2013, Dr. Vessely, orthopedic surgeon, performed an examination at SAIF's request. (Ex. 29). He diagnosed L5-S1 spondylolisthesis, significant multilevel spondylosis, and a February 2013 work injury with inconsistencies. (Ex. 29-8). He did not find any "acute changes in his lumbar spine that [he] would relate to an injury process." (Ex. 29-10). He determined that claimant's conditions were related to degeneration, genetics, and natural aging. (*Id.*) He did not believe that claimant's condition and clinical status had any relationship to what occurred on February 28, 2013. (Ex. 29-10, -11). He opined that claimant's work incident did not meet the "material level of causation," and concluded that there was no "combined condition." (Ex. 29-11).

Dr. Sweeney, chiropractor, opined that claimant's MRI showed degenerative, preexisting spondylosis and a pars defect, which he described as a fracture of part of the vertebrae and not acutely caused by the work injury. (Ex. 32-2, -3).

In August 2013, Dr. Mohabeer signed a concurrence letter, diagnosing L5-S1 spondylolisthesis, which was a slippage of the vertebrae and caused pinching of a nerve. (Ex. 33-2). He indicated that the condition was not surgical or symptomatic until it likely worsened with claimant's work injury, causing further slippage. (*Id.*) He further concluded that claimant had an L4-5 disc protrusion, caused in major part by claimant's February 2013 work injury. (Ex. 33-3). Finally, he stated that claimant's "worsened spondylolysis in the lower back, was caused in major part by his work injury." (*Id.*)

Dr. Brett also signed a concurrence letter, opining that claimant had "spondylosis at L5-S1 which allowed the L5 disc to slip forward onto the S1 vertebrae." (Ex. 34-2). He indicated that "this spondylolysis was the breakage of bones and likely was a congenital or abnormality that was present at birth[.]" (*Id.*) He then stated that, "in [my] opinion, the spondylolisthesis was a preexisting condition." (*Id.*) However, he further noted that the MRI showed significant slippage, and concluded that claimant's work injury worsened his spondylolisthesis, which caused it to further slide forward. He explained that the traumatic L5-S1 disc protrusion "actually allow[ed] that slippage to occur more rapidly and it was a combination of the disc protrusion and the spondylolisthesis that caused the impingement of the bilateral L5 nerve roots at that level." (*Id.*) He concluded that "the major contributing cause of that combination of the preexisting spondylolysis, the progression of the spondylolisthesis, the degenerative changes and the disc protrusion, [was] his work activities as occurred on 02/28/2013[.]" (Ex. 34-3).

In October 2013, pursuant to an approved stipulation, SAIF agreed to accept the claim for lumbar strain/sprain, L3-4 disc protrusion, and L5-S1 disc protrusion. (Ex. 39). SAIF issued a Notice of Acceptance accepting those conditions. (Ex. 40). It did not accept a "combined condition."

In November 2013, claimant began treating with Dr. Blake, physiatrist, who did not detect objective findings of nerve root impingement at any level on either side of the lumbar spine. (Ex. 42-4). In December 2013, Dr. Blake noted that Dr. Collada, neurosurgeon, had reviewed claimant's medical records and concluded that he did not have evidence of surgical problem and declined to evaluate him. (Ex. 43-1).

In February 2014, Dr. Rosenbaum examined claimant on referral and reviewed the April 2013 MRI. (Exs. 44-1, 45, 47-2). Dr. Rosenbaum diagnosed lumbar spondylolysis, spondylolisthesis, and L3-4 herniated disc with probable

bilateral lumbar radiculopathy. (Ex. 47-2). He requested an opportunity to review claimant's initial treatment records to determine whether the lumbar symptoms originated from the injury. (*Id.*)

In March 2014, Dr. Blake concluded that any need for surgery or work release was due to preexisting conditions and not claimant's work injury. (Ex. 49-1-2).

Subsequently, Dr. Keenen, orthopedic surgeon, evaluated claimant. (Ex. 51). He opined that the "current spinal condition [was] due to a work related accident." (Ex. 51-1). He diagnosed preexisting L5-S1 isthmic spondylolisthesis that was asymptomatic and materially worsened by the February 2013 work injury. (Ex. 51-3).

In October 2014, Dr. Vessely authored an addendum concerning a fusion for "spondylolisthesis at L5-S1." (Ex. 53-1). He explained that the L5-S1 preexisting spondylolisthesis slippage would have occurred at a very early age because claimant had a pars defect on the April 2013 MRI. (*Id.*) He concluded that there was no evidence of a traumatic destabilization of the L5-S1 spondylolisthesis or neurological deficit. (Ex. 53-2). He did not diagnose an L5-S1 disc protrusion. (*Id.*)

Subsequently, claimant initiated a new/omitted medical condition claim for his spondylolytic defect/spondylolysis condition, which SAIF denied in December 2014. (Exs. 54A, 55A).

In December 2014, Dr. Vessely authored a second addendum, indicating that claimant had a preexisting congenital spinal defect with slippage occurring in his late teenage years. (Ex. 54-1). He explained that pathological aggravation/destabilization is an extremely painful process. (Ex. 54-2). He noted that claimant lacked flexion/extension views to show destabilization or a bone scan to show increased pickup in the pars intraarticularis. (*Id.*) He concluded that the MRI showed "no acute findings in the areas of the pars intraarticularis; that is, any edema noted in the defect area, no radial lucency to indicate a fracture line or discontinuity of the fibrous tissue in this area." (*Id.*) Because claimant did not have acute findings on MRI, he delayed in seeking treatment for three weeks, and his presentation showed a great deal of inconsistency, Dr. Vessely opined that claimant's work injury did not pathologically aggravate his preexisting spondylolisthesis. (*Id.*)

In January 2015, SAIF wrote Dr. Blake, indicating that the claim was accepted for lumbar strain, L3-4 disc protrusion, and L5-S1 disc protrusion. (Ex. 55-1). SAIF further indicated that it denied the request to formally accept L5-S1 spondylolisthesis and a worsening of the spondylolytic defect/spondylolysis. (*Id.*) Dr. Blake agreed with Dr. Vessely's reasoning that the work injury was "not a material cause of any worsening of the underlying condition or of any of the conditions claimed above, nor [was] the injury or the accepted conditions a material cause of any symptoms or disability arising from those conditions claimed above." (*Id.*) He further indicated that the "conditions above" were preexisting and part of an arthritic condition involving inflammation of the joints. (*Id.*)

Subsequently, Dr. Sabahi, radiologist, reviewed the record and diagnostic images. (Ex. 56). He understood that the claim was accepted for a lumbar strain, L3-4 disc protrusion, and an L5-S1 disc protrusion, and that claimant had "asked [SAIF] to accept" L5-S1 spondylolisthesis and a worsening of the spondylolytic defect/spondylolysis. (Ex. 56-1). He opined that there was no worsening of either of claimant's underlying conditions that SAIF was "asked to accept," and that those preexisting conditions were the major cause of the need for treatment/disability. (*Id.*) He explained that "sudden traumatic forward slippage of L5 over S1 would cause considerable stretching and micro-tears of the supporting surround soft tissues and ligaments at this level, which would manifest as edema or tiny foci of hemorrhage on MRI, which is remarkably absent on [claimant's] April 18, 2013 MRI." (Ex. 56-3). In addition, he indicated that "sudden slippage of the bone at the level of the pars interarticularis defect would be expected to result in some marrow edema associated with it, which [he did] not see." (Ex. 56-4). He explained that if claimant's stenosis (due to spondylolysis and spondylolisthesis) occurred suddenly due to the February 2013 work injury, it would produce nerve root contusions and significant neurological findings, which were absent. (*Id.*) Finally, Dr. Sabahi reasoned that claimant's delay in seeking medical attention for three weeks after the injury did not correlate with a pathologic worsening of his preexisting conditions. (*Id.*)

Dr. Sabahi further opined that claimant's preexisting conditions were part of an arthritic condition involving inflammation of the joints. (Ex. 56-1). Although he concluded that claimant had no specific trauma, he acknowledged that claimant's work injury resulted in at least a lumbar strain. (Ex. 56-4). He further determined that it was reasonable to assume a combined condition from the work activities with claimant's preexisting L5-S1 spondylolysis and spondylolisthesis, but he did not believe that the work injury was ever the major contributing cause of the need to treat those combined conditions. (*Id.*)

In February 2015, Dr. Lewis, orthopedic surgeon, performed an examination at SAIF's request. (Ex. 57). He diagnosed a resolved lumbar strain, preexisting spondylolisthesis, non-existent accepted L3-4 disc protrusion (instead described as disc bulging at L3-4), non-existent accepted L5-S1 disc protrusion (instead described as a pseudodisc finding associated with spondylolisthesis), and functional overlay with somatic and disability foci. (Ex. 57-9). Dr. Lewis determined that claimant did not have a worsening of his preexisting spinal defect/spondylolysis. (Ex. 57-11, -14). He noted that claimant's preexisting conditions were both arthritic and developmental, that they were secondary to constitutional factors, and that they involved inflammation of a joint. (Ex. 57-12). He had no concerns regarding claimant's delay in seeking medical attention and concluded that the work injury was a material cause, but not the major cause, of claimant's need for treatment for the combined condition. (Exs. 57-11, -13). He determined that claimant did not have a worsening of his spinal defect/spondylolysis based on objective imaging. (Ex. 57-14).

In March 2015, Dr. Blake, after reviewing Dr. Lewis's report and a physical capacity evaluation, acknowledged that the claim was legally accepted for a lumbar strain, L3-4 disc protrusion, and L5-S1 disc protrusion. (Ex. 59). Dr. Blake reasoned that the injury or accepted conditions may have combined with the preexisting conditions, but concluded that the injury/accepted conditions were never the major contributing cause of the need for treatment of either a worsening (whether symptomatic or "for the underlying condition") of the "spondylolytic defect/spondylolysis." (*Id.*)

Dr. Keenen opined that claimant had a cracked pars bone from adolescence, and that it allowed the spondylolisthesis "slippage" to occur in the first place. (Ex. 59A-2). However, based on claimant's mechanism of injury and findings, he concluded that the injury caused a tear in the fibrous connection between the crack in the bone, which allowed the "bones" to move further, causing significant symptoms. (*Id.*) Ultimately, he concluded that there was a pathological worsening of claimant's "spondylolytic defect"/spondylolysis. (Ex. 59A-3).

Dr. Lewis explained that the defect preexisted the injury and, at most, the injury would have been a material contributing cause to the postulated and undocumented changes in the pars defect, but not the major contributing cause. (Ex. 60-1). He concluded that the claimed condition was only "made symptomatic but not caused by the work injury." (Ex. 60-2). Finally, he concluded that the strain "may or may not have combined with this pathology to cause a transient worsening until the strain resolved." (Ex. 60-3).

CONCLUSIONS OF LAW AND OPINION

In upholding SAIF's denial, the ALJ concluded that the opinions of Drs. Sabahi, Lewis, Vessely, and Blake were more persuasive than Dr. Keenen's opinion.¹ Based on these opinions, the ALJ determined that SAIF had met its burden to prove that claimant's work injury was not the major contributing cause of his need for treatment/disability for his combined spondylolytic defect/spondylolysis condition.

On review, claimant argues that Dr. Keenen's opinion persuasively establishes the compensability of his claimed condition, and that the contrasting opinions are unpersuasive. Further, he contends that the other opinions are contrary to the "law of the case" and unpersuasive.² Based on the following reasoning, we agree.

Claimant must prove that his February 2013 work injury was a material contributing cause of the disability/need for treatment related to his claimed condition.³ ORS 656.005(7)(a); ORS 656.266(1); *Tricia A. Somers*, 55 Van Natta 462, 463 (2003). If he establishes an "otherwise compensable injury," and a "combined condition" is present, SAIF must prove that the otherwise compensable injury was not the major contributing cause of claimant's disability or need for treatment of the combined spondylolytic defect/spondylolysis condition. ORS 656.266(2)(a); *SAIF v. Kollias*, 233 Or App 499, 505 (2010); *Jack G. Scoggins*, 56 Van Natta 2534, 2535 (2004). The "otherwise compensable injury" means the "work-related injury incident." *See Brown v. SAIF*, 262 Or App 640, 652 (2014); *see also Jean M. Janvier*, 66 Van Natta 1827, 1832-33 (2014), *aff'd without opinion*, 278 Or App 447 (May 18, 2016) (applying the *Brown* definition of an "otherwise compensable injury" to initial and new/omitted medical condition claims under ORS 656.266(2)(a)).

¹ The ALJ concluded that a denial for "spondylolytic defect/spondylolysis" should be upheld. However, the claimed and denied condition was "spondylolytic defect/spondylolysis."

² SAIF requests that we consider an April 2015 deposition of Dr. Blake. After the hearing convened, the record was left open for the purpose of deposing Dr. Blake. Although SAIF mentioned the deposition in its closing argument, the ALJ noted that the deposition transcript was never submitted to the Hearings Division for admission into the record. Because Dr. Blake's deposition was neither presented for admission, nor admitted into the record as evidence at the hearing level, we decline to consider it on review. *See Benjamin R. Adams*, 60 Van Natta 3272, 3273 (2008) (because the claimant's affidavits were neither presented at the hearing nor admitted into the record by the ALJ, the Board declined to review the exhibits).

³ The parties agree, and the record establishes, the existence of the condition. *Maureen Y. Graves*, 57 Van Natta 2380, 2381 (2005).

Because of the varying medical opinions, the compensability issue presents a complex medical question that must be resolved by expert medical opinion. *Barnett v. SAIF*, 122 Or App 279, 283 (1993); *Randy M. Manning*, 59 Van Natta 694, 695 (2007). Where, as here, there is a dispute between medical experts, we give more weight to those opinions that are both well reasoned and based on complete information. *Somers v. SAIF*, 77 Or App 259, 263 (1986); *Linda E. Patton*, 60 Van Natta 579, 582 (2008).

There are several causation opinions supporting the denial. Dr. Vessely opined that claimant's preexisting conditions were the major contributing cause for any treatment/disability, although he did not believe that claimant sustained a combined condition. (Ex. 29). Dr. Lewis concluded that claimant's work injury (which he described as a lumbar strain) was a material cause, but not the major cause, of his need for treatment for the combined spondylolytic defect/spondylolysis condition. (Exs. 57-11, -13). Dr. Blake opined that the injury or accepted conditions were never the major contributing cause of the need for treatment of either a worsening, whether symptomatic or pathologic, of the spondylolytic defect. (Ex. 59). Dr. Sabahi concluded that it was reasonable to assume a combined condition from the work injury with claimant's preexisting L5-S1 spondylolysis, but he did not believe that the work injury was ever the major contributing cause of the need to treat that combined condition. (Ex. 56).

In contrast, Drs. Keenen, Mohabeer and Brett support claimant's position. Dr. Keenen opined that claimant sustained a pathological worsening of his spondylolysis (*i.e.*, a tear of the fibrous connection in his preexisting pars fracture as a result of his work injury), which allowed the bones to move further, causing significant symptoms. (Ex. 59A-2-3). He explained that the type of injury claimant sustained, as well as the findings, supported a worsening of his condition. (Ex. 59A-2). Ultimately, based on the mechanism of injury, his review of the medical records (including concurrence and opinion letters of other physicians), review of the imaging studies, and his medical expertise in performing as a surgeon regarding conditions such as claimant's, Dr. Keenen concluded that the major contributing cause of claimant's condition and need for treatment was the spondylolysis and the accepted L5-S1 disc condition. (Ex. 59A-3). Dr. Mohabeer determined that claimant's "worsened spondylolysis in the lower back, was caused in major part by his work injury." (Ex. 33-3). Finally, Dr. Brett opined that the major contributing cause of the "combination of the preexisting spondylolysis, the progression of the spondylolisthesis, the degenerative changes and the disc protrusion, [was claimant's] work activities as occurred on 02/28/2013[.]" (Ex. 34-3).

As previously explained, SAIF accepted claimant's February 2013 work injury, which was described as lumbar strain, L3-4 disc protrusion, and L5-S1 disc protrusion as a result of the parties' stipulation. Yet, Drs. Vessely and Lewis never considered the February 2013 work injury to be injurious, believed that the accepted L3-4 and L5-S1 disc conditions did not exist, and reasoned that the L5-S1 disc condition was the result of degenerative spondylosis. Furthermore, Dr. Blake concurred with their opinions. Likewise, Dr. Sabahi did not consider claimant's work injury to be a "specific trauma."

Notwithstanding these physicians' observations, the parties' approved stipulation established that claimant had sustained a compensable February 2013 "work injury," that his lumbar strain, L3-4 disc protrusion, and L5-S1 disc protrusion conditions existed, and that these were conditions compensably related to the work injury. Because the foundations of the aforementioned physicians' causation opinions are rooted in analyses that are contrary to issues decided as a matter of law, we consider them to be inconsistent with the "law of the case" and unpersuasive. *See Kuhn v. SAIF*, 73 Or App 768, 772 (1985); *Jason T. Hachmuth*, 68 Van Natta 505, 513 (2016).

In contrast, we find Dr. Keenen's opinion that claimant's February 2013 work injury was the major contributing cause of his condition and need for treatment, as supported by Drs. Mohabeer and Brett (who treated claimant close in time to the February 2013 injury),⁴ to be well-reasoned, complete, and consistent with the legal posture of the claim. He explained that claimant's work injury caused claimant's spondylolysis to worsen and tear the fibrous connection in his preexisting pars fracture, which allowed the bones to move further causing significant symptoms. (Ex. 59A-2-3). Dr. Keenen concluded that claimant's condition had worsened after evaluating the "whole picture," which included the mechanism of injury, review of the medical records (including concurrence and

⁴ As previously stated, Dr. Mohabeer determined that claimant's "worsened spondylolysis in the lower back, was caused in major part by his work injury." (Ex. 33-3). Dr. Brett opined that the major contributing cause of the combined spondylolysis condition was claimant's February 28, 2013 work activities. (Ex. 34-3). These opinions are consistent with, and support, Dr. Keenen's opinion.

In addition, Dr. Mohabeer began treating claimant just over one month after his February 2013 work injury. (Ex. 8). Dr. Brett began treating claimant approximately one month after Dr. Mohabeer. Because Drs. Mohabeer and Brett treated claimant close in time to the work injury, their opinions are given greater weight. *See Weiland v. SAIF*, 64 Or App 810 (1983) (treating physician's opinion given greater weight because he or she has had a better opportunity to observe and evaluate a claimant's condition over an extended period of time); *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).

opinion letters of other physicians), physical examination, review of imaging studies, and his medical expertise. (Ex. 59A-3). Under such circumstances, we find Dr. Keenen's opinion to be more persuasive than the opinions of Drs. Blake, Lewis, and Sabahi. *Somers*, 77 Or App at 263.

Consequently, based on the aforementioned reasoning, we conclude that Dr. Keenen's well-reasoned and persuasive opinion establishes that claimant's February 2013 work-related injury-incident was the major contributing cause of his need for treatment for his combined spondylolytic defect/spondylolysis condition. Therefore, claimant has met a material contributing cause standard for proving an otherwise compensable injury and SAIF has not met its requisite burden of proving a "combined condition" defense under ORS 656.266(2)(a). Accordingly, we reverse that portion of the ALJ's order with respect to claimant's spondylolytic defect/spondylolysis condition.

Because claimant has prevailed over SAIF's denial of his spondylolytic defect/spondylolysis condition, his counsel is entitled to an assessed fee for services at hearing and on review regarding this compensability issue. ORS 656.386(1). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this issue, we find that a reasonable fee for claimant's attorney's services at hearing and on review is \$11,000, payable by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the issue (as represented by the record, and claimant's appellate briefs), the complexity of the issue, the value of the interest involved, and the risk that counsel may 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 denial of his spondylolytic defect/spondylolysis condition, to be paid by SAIF. *See* ORS 656.386(2); OAR 438-015-0019; *Nina Schmidt*, 60 Van Natta 169 (2008); *Barbara Lee*, 60 Van Natta 1, *recons*, 60 Van Natta 139 (2008). The procedure for recovering this award, if any, if prescribed in OAR 438-015-0019(3).

ORDER

The ALJ's order dated September 28, 2015 is reversed in part and affirmed in part. SAIF's denial of claimant's spondylolytic defect/spondylolysis condition is set aside and the claim is remanded to SAIF for processing in accordance with the law. For services at hearing and on review, claimant's attorney is awarded an assessed fee of \$11,000, to be paid by SAIF. Claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the spondylolytic defect/spondylolysis condition denial, to be paid by SAIF. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on July 7, 2016