

In the Matter of the Compensation of
GARY SHEPHERD, Claimant
WCB Case No. 14-02393
ORDER ON REVIEW
Edward J Hill, Claimant Attorneys
SAIF Legal, Salem, Defense Attorneys

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

Claimant requests review of Administrative Law Judge (ALJ) Fisher's order that upheld the SAIF Corporation's denial of his injury claim for a right shoulder and neck condition. On review, the issue is compensability.

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

In January 2014, claimant experienced right shoulder pain after lifting 40- to 80-pound steel components at work. (Tr. 9). Claimant developed neck pain, numbness, and tingling in his arm and fingers. (Tr. 11). At the end of January 2014, claimant was laid off. (*Id.*)

On February 17, 2014, claimant was evaluated by Dr. Cooper, who recommended evaluation by a neurologist. (Ex. 1-3). Claimant filed an 827 form and initiated the claim. (Ex. 1-1).

On February 18, 2014, claimant was evaluated by Dr. Palla, a neurologist. (Ex. 2). Dr. Palla diagnosed right C5-6 radiculopathy and recommended a cervical MRI. (Ex. 2-3). An MRI showed disc bulges at C3-4, C4-5, and C5-6. (Ex. 4).

In May 2014, claimant was evaluated by Dr. Staver at SAIF's request. (Ex. 8). Dr. Staver diagnosed a cervical strain and preexisting degenerative disc disease. (Ex. 8-5). Dr. Staver concluded that the described work injury was initially a material contributing cause of disability and need for treatment of a cervical strain. (Ex. 8-6). He explained that at the time of claimant's first medical evaluation, the cervical strain was resolving and claimant's symptoms were more consistent with a cervical radiculopathy. (Ex. 8-7). He considered claimant's preexisting condition to be the major contributing cause of claimant's need for treatment. (*Id.*)

On May 15, 2014, SAIF denied claimant's claim. (Ex. 10).

In February 2015, Dr. Palla concurred with Dr. Staver's opinion. (Ex. 13).

On February 11, 2015, claimant was evaluated by Dr. Brett, who diagnosed disc injuries with right C3, C4, C5, and C6 radiculopathy due to the January 2014 work injury. (Ex. 13A-3). Dr. Brett recommended a laminectomy and foraminotomy on the right from C3 to C6. (Ex. 13B). He explained that claimant had preexisting spondylosis, but also had increased disc protrusion and a radiculopathy due to the work injury. (*Id.*)

In August 2015, claimant was evaluated by Dr. Puziss. (Ex. 16). Dr. Puziss diagnosed "history of right cervical strain" causing C6 radiculopathy, a C5-6 right disc protrusion, C5-6 foraminal stenosis, and preexisting cervical degenerative spondylosis and arthritis. (Ex. 16-7). Dr. Puziss considered the cervical strain to be the cause of claimant's C6 radiculopathy, and disagreed with Dr. Staver's opinion attributing claimant's symptoms to the preexisting condition because claimant had been asymptomatic before the work injury. (Ex. 16-9).

Based on the opinions of Drs. Staver, Palla, and Puziss, the ALJ concluded that claimant had established an otherwise compensable injury. However, based on the opinions of Drs. Staver and Palla, the ALJ concluded that SAIF had established that claimant had a combined condition and that the work injury was not the major contributing cause of claimant's need for treatment/disability following the January 2014 work-related injury. Accordingly, the ALJ upheld SAIF's denial.

On review, claimant contends Dr. Staver's opinion does not persuasively satisfy SAIF's "combined condition" burden of proof, and that its denial should be set aside. In particular, he asserts that Dr. Staver's opinion is not adequate to establish the existence of a combined condition, and does not establish a change in claimant's condition. Claimant further argues that Dr. Staver changed his opinion regarding the status of claimant's cervical strain, and that his opinion was otherwise unpersuasive in light of Dr. Puziss's opinion. Based on the following reasoning, we disagree with claimant's contentions.

SAIF does not contest that claimant met his initial burden to show that the work injury was a material contributing cause of his disability/need for treatment. ORS 656.005(7)(a); ORS 656.266(1); *Brown v. SAIF*, 262 Or App 640, 646 (2014); *Knaggs v. Allegheny Techs.*, 223 Or App 91, 95-96 (2008). However, if an otherwise compensable injury combined with a preexisting condition, the carrier may establish that the combined condition is not compensable by proving

that the otherwise compensable injury (*i.e.*, the work incident) was not the major contributing cause of the disability or need for treatment of the combined condition. ORS 656.005(7)(a)(B); ORS 656.266(2)(a); *Brown*, 262 Or App at 652-53; *Jean M. Janvier*, 66 Van Natta 1827, 1832 (2014); *Jack G. Scoggins*, 56 Van Natta 2534, 2535 (2004).

Considering the disagreement among the medical experts regarding the causes of claimant's symptoms, the compensability issue presents a complex medical question that must be resolved by expert medical evidence. *Uris v. State Comp. Dep't*, 247 Or 420, 426 (1967); *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 information. *Somers v. SAIF*, 77 Or App 259, 263 (1986).

Claimant disagrees with the ALJ's conclusion that Dr. Staver's opinion satisfies SAIF's burden of proof. Claimant contends that Dr. Staver's opinion is not persuasive because he did not persuasively explain how claimant's preexisting condition would result in radiculopathy symptoms, or how claimant's preexisting condition and the work injury combined. However, we find Dr. Staver's explanations persuasive.

Dr. Staver opined that claimant had significant degenerative spondylosis at three levels of the cervical spine, which caused central canal narrowing that contributed to the development of nerve root irritation/impingement. (Ex. 12-7). Dr. Staver further explained that minor events could trigger such symptoms in individuals with degenerative conditions of the cervical spine such as claimant's. (*Id.*) He reasoned that claimant's January 2014 work injury would have been such a trigger, and likely resulted in soft-tissue swelling that caused claimant's radiculopathy symptoms, but did not cause any injury to claimant's cervical discs. (*Id.*) Because he considered it unlikely that the work injury contributed to the pathology of claimant's cervical discs, he did not consider it to be the major contributing cause of claimant's need for treatment/disability.

We conclude that Dr. Staver's explanation persuasively addressed the source of claimant's radiculopathy symptoms, as well as the manner in which the work injury combined with claimant's preexisting cervical spine condition to result in his need for treatment/disability.

Citing *Juana Perez-Virgen*, 57 Van Natta 1000 (2005), claimant further contends that Dr. Staver's opinion did not persuasively identify a point at which claimant's condition changed and the work injury was no longer the

major contributing cause of his need for treatment/disability for his cervical spine/shoulder condition. Yet, *Perez-Virgen* concerned a current condition, or “ceases,” denial in which the carrier contended that the claimant’s compensable injury was “no longer” the major contributing cause of her combined condition. 57 Van Natta at 1000.

Here, in contrast, SAIF’s “combined condition” burden concerns the initial compensability of the combined condition, which requires SAIF to show that the work-related injury incident “is not” the major contributing cause of the disability/need for treatment of the combined condition. *See, e.g., Edward K. Merriweather*, 65 Van Natta 2219, 2222 (2013). In other words, SAIF must establish that the work-related injury incident was never the major contributing cause of claimant’s need for treatment/disability for his combined condition.

As previously explained, we conclude that Dr. Staver’s opinion persuasively satisfied SAIF’s burden of proof. Regarding disability, claimant did not miss work due to the work injury. (Ex. 1; Tr. 11). Regarding medical treatment, Dr. Staver observed that claimant’s work injury was initially a material contributing cause of his need for treatment of a cervical strain. Yet, noting that claimant’s symptoms were more consistent with cervical radiculopathy, Dr. Staver explained that claimant’s preexisting condition was the major contributing cause of his need for treatment. (Ex. 12-7).

Claimant contends that Dr. Staver changed his opinion by stating that claimant’s cervical strain was “resolving” after having described it as “resolved.” (Exs. 9, 12-7). While Dr. Staver did concur that the initial effects of the injury had resolved by the time claimant first sought medical treatment, he did not opine that claimant’s work injury, identified as a cervical strain was, at any time, the major contributing cause of his need for medical treatment. (Ex. 9). Moreover, Dr. Staver later clarified that it was more accurate to say that claimant’s cervical strain was “resolving” rather than “resolved” at the time that he first sought medical treatment. (Ex. 12-7). In doing so, he explained that he was correcting an inaccurate statement that claimant’s cervical strain had “resolved.” (*Id.*) We do not consider this clarification to represent an unexplained change of opinion, particularly here, where the clarification is consistent with Dr. Staver’s previously stated opinion that claimant’s work injury was a material contributing cause of his need for medical treatment and his ultimate opinion that the preexisting degenerative condition was the major contributing cause of claimant’s initial need for treatment. (Exs. 8-6, 12-7).

Finally, we disagree with claimant's contention that the opinions of Dr. Brett and Dr. Puziss are more persuasive than that of Dr. Staver.

Dr. Brett opined that claimant "sustained increased disc protrusion at one or more levels" as a result of the work injury. (Ex. 13B). He concluded that this resulted in nerve root impingement and foraminal narrowing at C3-4, C4-5, and C5-6. (*Id.*)

In contrast, Dr. Staver explained that it would be unusual for an injury to result in disc pathology at three levels of the cervical spine. (Ex. 12-5). Dr. Staver reasoned that such an injury would result in immediate and severe neck and upper extremity symptoms that would have required claimant to immediately seek medical treatment, rather than waiting for a month. (*Id.*) Dr. Staver further explained that, in contrast, claimant's symptoms lacked acuity such that he hoped for his symptoms to resolve without medical treatment. (Ex. 8-6). We consider Dr. Staver's opinion, in this regard, to be more thoroughly explained than that of Dr. Brett.¹ *Somers v. SAIF*, 77 Or App 259, 263 (1986); *Emory M. Schaffer*, 66 Van Natta 441, 446 (2014).

We also disagree with claimant's contention that Dr. Staver did not persuasively respond to Dr. Puziss's opinion that claimant's lack of symptoms before the work injury supports the conclusion that the work injury was the major contributing cause of the disability/need for treatment of the combined condition. First, Dr. Staver noted claimant's lack of preexisting medical history relative to claimant's cervical spine. (Ex. 8-3). Second, Dr. Staver concluded that the work injury precipitated, and was a material cause of, claimant's need for treatment following the January 2014 work injury. However, due to the extent of claimant's preexisting cervical spondylosis, he determined that the work injury was not the major contributing cause of claimant's disability/need for treatment. (Ex. 8-6, -7). Dr. Staver further explained that claimant's delay in seeking treatment demonstrated that the injury was not severe, which supported his conclusion that the preexisting cervical spondylosis was the major contributing cause. Under such circumstances, we conclude that Dr. Staver sufficiently considered claimant's lack of "pre-work injury" medical history and symptoms regarding his cervical spine. *See, e.g., Gabriela Hernandez*, 67 Van Natta 143, 146 (2015) (physician persuasively explained that preexisting condition was the major contributing cause of the claimant's combined condition despite a lack of "pre-work injury" symptoms).

¹ Dr. Palla, neurologist, concurred with Dr. Staver's opinion. (Ex. 13).

We acknowledge Dr. Puziss's thorough analysis of the causes of claimant's cervical condition, much of which was consistent with Dr. Staver's opinion. However, we ultimately conclude that certain portions of Dr. Puziss's opinion are inconsistent, rendering his opinion less persuasive.

In particular, Dr. Puziss opined that claimant had "some disc protrusion" on the right at C5-6 that "could be preexisting, but could be aggravated, though I could not be certain whether it was aggravated." (Ex. 16-7, -8). Then, later in his report, Dr. Puziss opined, "I agree with Dr. Brett that the patient had a pre-existing asymptomatic spondylitis disease and then sustained an increased disc protrusion which caused continuing nerve root entrapment and impingement, resulting in the cervical radiculitis/radiculopathy, and the history is quite clear in this regard." (Ex. 16-9). We are unable to reconcile Dr. Puziss's initial equivocal statements, regarding the effect of the work injury on claimant's C5-6 disc protrusion, with his later statement that he agreed with Dr. Brett that the work injury increased the disc protrusion, and that the history was "quite clear" in that regard.

Accordingly, we consider his opinion to be inconsistent, and therefore, less persuasive than the opinion of Dr. Staver.² See *Howard L. Allen*, 60 Van Natta 1423, 1424-25 (2008) (internally inconsistent medical opinion, without explanation for the inconsistencies, is unpersuasive); *Abu Dolley*, 67 Van Natta 607 (2015).

Finally, we acknowledge that Dr. Puziss and Dr. Staver both opined that the work injury was at least a material cause of claimant's symptoms and need for treatment in the form of a soft-tissue injury.³ Nonetheless, because of the afore-mentioned inconsistencies in Dr. Puziss's opinion, we ultimately find Dr. Staver's opinion more persuasive, which concluded that the work injury was not the major contributing cause of claimant's symptoms or need for treatment.

² Additionally, Dr. Staver examined claimant in May 2014, while Dr. Puziss did not examine claimant until August 2015. (Exs. 8, 16); 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 (2015).

³ As previously noted, we acknowledge that observations from both Dr. Puziss and Dr. Staver support a theory that claimant's work injury caused a "soft tissue injury" (cervical strain). Yet, as explained above, we have discounted the opinion expressed by Dr. Puziss. Moreover, based on our earlier reasoning, Dr. Staver has persuasively explained that claimant's work-related injury combined with his preexisting degenerative condition and that the preexisting condition was the major contributing cause of claimant's disability/need for treatment by the time he first sought medical care.

See, e.g., Daniel W. Garris, 67 Van Natta 828, 833 (2015) (opinion not unpersuasive for failing to respond to unpersuasive contrary opinions); *James G. Gilliland*, 64 Van Natta 1062, 1068 (2012), *aff'd without opinion*, 262 Or App 501 (2014) (relying on earlier, more persuasive report though it did not respond to later unpersuasive report).

In sum, on the aforementioned reasoning, we conclude that SAIF has established that the otherwise compensable injury was not the major contributing cause of claimant's need for treatment/disability of his combined cervical condition. Therefore, we affirm the ALJ's order.

ORDER

The ALJ's order dated December 21, 2015 is affirmed.

Entered at Salem, Oregon on June 30, 2016

Member Lanning, dissenting.

The majority concludes that the opinion of Dr. Staver persuasively established that claimant's work injury was not the major contributing cause of his combined cervical condition. Because I disagree with their evaluation of the medical evidence, I respectfully dissent.

If claimant 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 the disability or need for treatment of the combined condition. ORS 656.266(2)(a); *Jack G. Scoggins*, 56 Van Natta 2534, 2535 (2004). The "otherwise compensable injury" means the "work-related injury incident." *Brown v. SAIF*, 262 Or App 640, 652 (2014); *Jean M. Janvier*, 66 Van Natta 1827, 1832-33 (2014) (applying the *Brown* definition of an "otherwise compensable injury" to new/omitted medical condition claims). Because the insurer 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).

Here, Drs. Staver, Brett, and Puziss all agreed that claimant's cervical condition represented a combined condition, and that the work injury was, at least, a material contributing cause of his disability/need for medical treatment.

(Exs. 8-6, 12-6, 13B, 16-9). Dr. Staver explained that it was possible that claimant's January 2014 work injury caused soft tissue swelling that incited claimant's upper extremity radicular symptoms. (Ex. 12-7). Dr. Puziss agreed with that assessment and explained that claimant could have developed inflammation around the nerve root as a result of the work injury. (Ex. 16-8).

Dr. Puziss noted that claimant had no medical history of prior neck or cervical spine complaints. (Ex. 16-9). He also considered claimant's lifting injury to be consistent with a soft tissue injury resulting in claimant's neck and right arm symptoms. (Ex. 16-8). Accordingly, he concluded that claimant's preexisting cervical spondylosis was not the major contributing cause of claimant's disability/need for treatment. (Ex. 16-9).

While the majority discounts Dr. Puziss's opinion due to inconsistencies regarding whether the work injury increased claimant's preexisting disc C5-6 protrusion, claimant does not need to establish the compensability of a specific diagnosis in his initial claim for compensation. *Boeing Aircraft Co. v. Roy*, 112 Or App 10, 15 (1992) (in a case concerning an initial claim, the claimant need not prove a specific diagnosis if he proves that his symptoms are attributable to his work). Separate from Dr. Brett's and Dr. Puziss's opinions regarding the probability of an increased disc protrusion, both Dr. Puziss and Dr. Staver supported the theory that claimant's work injury resulted in a soft tissue injury that led to development of radicular symptoms in his right arm. (Exs. 12-7, 16-8). Based on Dr. Puziss's opinion, I would consider the work injury to be the major contributing cause of the need for treatment and disability for the described soft tissue injury and right upper extremity symptoms.

While Dr. Staver may have persuasively rebutted the theory of Dr. Brett and Dr. Puziss regarding the likelihood of increased disc protrusion, the record contains no rebuttal to Dr. Puziss's diagnosis of a soft tissue injury and his opinion that claimant's lack of prior symptoms weighed against the preexisting condition being the major contributing cause of claimant's cervical condition. (Ex. 16-8, -9). Indeed, Dr. Staver did not respond to Dr. Puziss's report, though SAIF, as the party bearing the burden of proof, certainly had the prerogative to ask him to do so. OAR 438-007-0023 (the party bearing the burden of proof on an issue has the right to last presentation of evidence).

Accordingly, based on the abovementioned reasoning, I would conclude that SAIF did not satisfy its burden to prove that the work injury was not the major contributing cause of claimant's disability and need for treatment, and would set aside the denial. Because the majority concludes otherwise, I respectfully dissent.