

In the Matter of the Compensation of  
**CRAIG SCHOMMER, Claimant**

WCB Case No. 11-01711

ORDER ON REVIEW

Peter O Hansen, Claimant Attorneys

Law Offices of Kathryn R Morton, Defense Attorneys

Reviewing Panel: Members Johnson and Lanning.

The insurer requests review of those portions of Administrative Law Judge (ALJ) Mills's order that: (1) set aside its denial of claimant's new/omitted medical condition claim for a combined bilateral hip impingement condition; and (2) set aside its denial of claimant's new/omitted medical condition claim for a combined bilateral hip strain/degenerative arthritis condition and diaphragm condition. Claimant cross-requests review of those portions of the ALJ's order that upheld the insurer's denials of claimant's "independent" new/omitted medical condition claims for bilateral hip impingement syndrome and left hip capsular tear.<sup>1</sup> On review, the issue is compensability. We affirm in part and reverse in part.<sup>2</sup>

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<sup>1</sup> Claimant moves to dismiss the insurer's request for review as defective, contending that the insurer only served a copy of the request on claimant's attorney, and neglected to serve a copy on claimant. Claimant makes no argument, and the record does not establish, that he was prejudiced by not receiving a copy of the request himself. Accordingly, because timely mailing to a party's attorney (in the absence of prejudice to a party) is sufficient, we have jurisdiction over this matter. See *Argonaut Ins. v. King*, 63 Or App 847, 850-51 (1983) (in the absence of prejudice to a party, timely service of a request for review on the attorney for a party is sufficient compliance with ORS 656.295(2) to vest jurisdiction with the Board); *Nollen v. SAIF*, 23 Or App 420, 423 (1975); *Leslie A. Johansen*, 58 Van Natta 1302, 1303 (2006); *David K. Rowley*, 51 Van Natta 1853 (1999); *Nancy C. Prevatt-Williams*, 48 Van Natta 242 (1996). Therefore, claimant's motion to dismiss is denied.

Alternatively, claimant contends that we should dismiss the insurer's April 1, 2016 "corrected" request for review, and that the scope of review should be limited to the issue of the combined bilateral hip strain/degenerative arthritis condition as specified in the insurer's original review request. The insurer's "corrected" request for review is not valid because it was not filed within 30 days of the ALJ's February 19, 2016 order. See ORS 656.289(3) (ALJ's order is final unless, within 30 days after the date on which a copy of the order is mailed to the parties, one of the parties requests a review by the Board). Nonetheless, the scope of the Board's *de novo* review is not limited to an issue specifically raised in a request for review, but rather encompasses all issues considered by the ALJ's order. See *Destaël v. Nicolai Co.*, 80 Or App 596, 600-601 (1986) (scope of the Board's *de novo* review encompasses all issues considered by the ALJ; it is not limited to issues specifically raised on review); *Roy D. Hodgkin*, 49 Van Natta 1279 (1997) (same). Thus, inasmuch as the insurer's March 21, 2016 request for review was a timely appeal of the ALJ's order, we retain jurisdiction to consider all matters contained within that order, including all of the denials at issue therein. See ORS 656.295(1) (the request for review by the Board of an order of the ALJ need only state that the party requests a review of the order); *William E. Wood*,

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## FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact."

## CONCLUSIONS OF LAW AND OPINION

Finding claimant to be a credible witness based on his demeanor in testifying, the ALJ accepted his testimony regarding the December 2008 work incident and his subsequent complaints and symptomatic course. The ALJ then concluded that the medical evidence from Drs. Bald, Puziss, and Wagner, as supported by claimant's testimony, persuasively established that claimant sustained an "otherwise compensable injury" to his hips as a result of the work incident. The ALJ further determined that the opinions of Drs. Green, Kaesche, and Lawlor were not persuasive, and that the insurer did not prove that the otherwise compensable injury was not the major contributing cause of the disability or need for treatment related to the combined hip conditions.<sup>3</sup>

On review, the insurer contends that the ALJ erroneously found that claimant's crush injury involved both legs, and that he conflated leg complaints with hip complaints. The insurer argues that claimant did not establish an

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40 Van Natta 999 (1988); *see also Jimmie Parkerson*, 35 Van Natta 1247, 1249-50 (1983) (Board has authority to consider a respondent's contentions notwithstanding its failure to cross-request review, as long as a valid request for review remains).

<sup>2</sup> The insurer moves to strike claimant's respondent's/cross-appellant's brief, asserting that it was untimely filed. *See* OAR 438-011-0020(2). Claimant does not dispute that his brief was untimely filed, but moves to waive the Board's briefing rules. We may waive the rules if we find extraordinary circumstances beyond the control of the party requesting the waiver. OAR 438-011-0030. Claimant explains that the due date for his respondent's/cross-appellant's brief was inaccurately calendared on a holiday. However, it is well settled that, unless the opposing party raises no objection, calendaring errors do not constitute "extraordinary circumstances" justifying the waiver of the Board's briefing rules. *Mary C. Green-Kilburn*, 57 Van Natta 2822 (2005); *Peter A. Roy*, 52 Van Natta 2075, 2076 (2000); *Charles E. Jesse*, 52 Van Natta 1504 (2000). Accordingly, in light of the insurer's objection, claimant's respondent's/cross-appellant's brief is stricken. In addition, because the insurer's motion to strike is granted, the parties' "conditional" briefs (which were submitted in the event the motion was denied) have not been considered.

<sup>3</sup> Dr. Lawlor, a rehabilitation physician, was claimant's attending physician, and began treating claimant in March 2009. (Ex. 10). Although not specifically relied on in the ALJ's analysis, Dr. Weintraub, an orthopedist, examined claimant on June 1, 2010, on referral from Dr. Lawlor. (Ex. 32). Dr. Wagner, an orthopedist, also examined claimant on referral from Dr. Lawlor on October 16, 2012. (Ex. 118). Drs. Bald (orthopedic surgeon), Green (neurologist), and Kaesche (orthopedic surgeon) examined claimant on behalf of the insurer on February 1, 2011, February 13, 2013, and May 30, 2013, respectively. (Exs. 48, 126, 138). Dr. Puziss, an orthopedic surgeon, performed a worker-requested medical examination (WRME) on October 31, 2013. (Ex. 144-3).

otherwise compensable injury to his hips, and disputes the ALJ's analysis of the medical opinions in that regard. The insurer also asserts that the hip impingement condition does not exist. Finally, based on the opinion of Dr. Lawlor, the insurer contends that it met its burden of proof regarding the combined hip conditions. For the following reasons, we disagree with the insurer's arguments.

We first address the insurer's contentions regarding whether the crush injury involved the lower extremities/hips, which hinge principally on claimant's credibility. In determining the credibility of a witness's testimony, we generally defer to the ALJ's demeanor-based credibility findings. *See Erck v. Brown Oldsmobile*, 311 Or 519, 526 (1991) (it is good practice to give weight to a fact finder's credibility assessments). We do not do so, however, where inconsistencies in the record raise such doubt that we are unable to conclude that pertinent testimony is reliable. *See George V. Jolley*, 56 Van Natta 2345, 2348 (2004), *aff'd without opinion*, 202 Or App 327 (2005).

Here, claimant testified that he was injured on December 24, 2008, when a building collapsed and fell on him, and his "entire body was crushed under debris." (Tr. 14, 15). He testified that he sustained injuries to his legs and hips from the incident, and that he first noticed a problem with his hips in the hospital after the injury when his left leg kept falling off the hospital bed--he had no control over it and could not hold it up--and he needed assistance to prop it up in the bed. (Tr. 15, 16). The insurer contends that the contemporaneous medical records are more reliable, and do not suggest a serious "crush" impact to the lower extremities or hips, or support the conclusion that any leg complaints meant that claimant's hips were impacted.

The ALJ considered claimant to be a credible witness based on his demeanor in testifying. Therefore, the ALJ concluded that claimant did sustain a crush injury that involved his lower extremities and hips, as supported by the presence of post-injury leg complaints before the hips became the focus of those complaints. (Exs. 7, 7A-1, 8A, 10, 11, 13). The ALJ reasoned that the credible evidence also established that claimant was active before the work injury and had no prior hip complaints.<sup>4</sup>

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<sup>4</sup> Claimant, who was almost 65 at the time of hearing, testified that he had coached basketball for 40 years and was an active member of a basketball league, playing around the country and the world, and would normally play about three to five nights a week. He was also an avid water-skier, hiker, biker, and runner. He did not have any problems with either of his hips before the work injury. (Tr. 15).

After reviewing the record, we agree with the ALJ's credibility determination and conclusion regarding the mechanism of claimant's injury and injury to the lower extremities/hips. *See Erck*, 311 Or at 526. Moreover, Drs. Bald, Puziss, Weintraub, Wagner, and Lawlor all believed that the mechanism of injury involved a traumatic crush injury that was consistent with causing trauma to the hips. (Exs. 32, 48-10, 53, 118, 144, 151-5, 152-18, -30, -32). Thus, their opinions were based on a "crush" injury to the body, consistent with claimant's testimony, and they all determined that he sustained an otherwise compensable injury to the hips that combined with his preexisting bilateral arthritic hip condition to cause a need for treatment/disability. (Exs. 53, 56, 144, 145, 151, 152). Moreover, Drs. Wagner, and Puziss noted that there were contemporaneous complaints by claimant of hip pain related to his initial trauma. (Exs. 118, 144). Because the record as a whole supports claimant's account of his injury and symptomatic history involving the lower extremities and hips, any minor inconsistencies in the contemporaneous medical records are not sufficient to defeat his claim. *See Westmoreland v. Iowa Beef Processors*, 70 Or App 642 (1984), *rev den*, 298 Or 597 (1985); *Marta Munoz Vignau*, 67 Van Natta 362, 363 (2015) (discrepancies in the record as to the mechanism of injury did not lead to conclusion that the claimant's account of the injurious event was not credible); *Shawn Hines*, 61 Van Natta 1744, 1747 (2009) (same).

We turn to the issue of medical causation. To establish the compensability of his new/omitted medical condition claims, claimant must prove that the claimed conditions exist, and that his work injury was a material contributing cause of the disability or need for treatment for the claimed conditions. ORS 656.005(7)(a); ORS 656.266(1); *Betty J. King*, 58 Van Natta 977, 977 (2006); *Maureen Y. Graves*, 57 Van Natta 2380, 2381 (2005). Where a claimant seeks acceptance of a "combined condition," he must prove the existence of that combined condition. *See Gail Moon*, 62 Van Natta 1238, 1239 (2010). If the claimant establishes the existence of the claimed "combined condition," the insurer has the burden of establishing that the "otherwise compensable injury" is not the major contributing cause of the claimant's disability/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); *see also Jean M. Janvier*, 66 Van Natta 1827, 1832-33 (2014), *aff'd without opinion*, 278 Or App 447 (2016) (applying the *Brown* definition of an "otherwise compensable injury" to new/omitted medical condition claims under ORS 656.266(2)(a)).

Because of the disagreement between medical experts regarding the cause of claimant's conditions, and need for treatment/disability, the claim presents a complex medical question that must be resolved by expert medical opinion. *Barnett v. SAIF*, 122 Or App 279, 282 (1993); *Matthew C. Aufmuth*, 62 Van Natta 1823, 1825 (2010). More weight is given to those medical opinions that are well reasoned and based on complete information. *See Somers v. SAIF*, 77 Or App 259, 263 (1986); *Linda E. Patton*, 60 Van Natta 579, 582 (2008).

As discussed above, the credible evidence and the opinions of Drs. Bald, Puziss, Weintraub, Wagner, and Lawlor all support a conclusion that claimant sustained an otherwise compensable hip strain injury that combined with his preexisting bilateral arthritic hip condition to cause a need for treatment/disability. (Exs. 53, 56, 141, 144, 145, 151, 152). We find these opinions persuasive, and sufficient to establish that claimant sustained an otherwise compensable hip strain injury as a result of the work-related incident.

We do not find the contrary opinion of Dr. Kaesche, who concluded that there were no hip injuries related to claimant's injury, to be persuasive. (Ex. 138). As discussed by the ALJ's order, Dr. Kaesche did not adequately consider the change in the status of claimant's hips following the injury (which was an important factor to the physicians who supported an otherwise compensable hip injury), and discounted the more contemporaneous complaints that were consistent with lower extremity issues. *See Allied Waste Indus., Inc. v. Crawford*, 203 Or App 512, 518 (2005), *rev den*, 341 Or 80 (2006) (temporal relationship between a work injury and onset of symptoms is one factor that should be considered, and may be the most important factor); *Miller v. Granite Constr. Co.*, 28 Or App 473, 476 (1977) (medical opinion that is based on incomplete or inaccurate history is not persuasive).

Moreover, we conclude that the opinions of Drs. Bald and Weintraub persuasively establish that, at least for a period of time, the otherwise compensable injury was the major contributing cause of the need for treatment/disability for a combined hip strain/arthrititis condition.

Dr. Bald concluded that the mechanism of claimant's crush injury was consistent with causing injury to the hips. (Ex. 48-10). He explained that the gradual onset of bilateral hip pain, as described by claimant, was more consistent with a symptomatic flare up of his underlying preexisting osteoarthritis of the hips, caused by his fall at work on December 24, 2008. (Ex. 56-1). He opined that the more correct diagnosis for claimant's hip condition was "bilateral hip strain combined with preexisting degenerative osteoarthritis of the hips," and that, at least at the outset, the work injury would have been the major cause of the

disability and need for treatment of this combined condition. (*Id.*) In reaching his opinion, Dr. Bald considered the mechanism of injury, history of leg/hip complaints, imaging studies, and the fact that claimant was active with no hip problems before the injury. (Exs. 48, 56).

Dr. Weintraub concurred with Dr. Bald's opinion. (Ex. 55). He concluded that claimant "obviously suffered a severe impact that affected his hip in some way," and that there was "no question that the injury did produce hip pain." (Exs. 32-2, 53). Dr. Weintraub agreed that claimant had bilateral hip strains that combined with his preexisting osteoarthritis and that, at least at the outset, the work injury was the major contributing cause of the disability and need for treatment of this combined condition. (Ex. 151-9). Like Dr. Bald, Dr. Weintraub considered it significant that claimant's hips became symptomatic after the crush injury, whereas they had not been before, although claimant was a very active individual. (Ex. 151-11).

To support its burden under ORS 656.005(7)(a)(B) and ORS 656.266(2)(a), the insurer relies on the opinion of Dr. Lawlor, whose deposition testimony suggests that she did not believe that the work injury was ever the major contributing cause of a need for treatment related to the hips. (Ex. 152-17). The insurer contends that Dr. Lawlor's opinion is entitled to deference because she was the long-standing attending physician. However, Dr. Lawlor had previously concurred with the opinions of Drs. Wagner and Puziss that the major cause of the disability or need for treatment of combined bilateral hip conditions was the work injury, and had noted that she deferred to their opinions as orthopedic hip specialists. (Ex. 146-3). She reaffirmed this deference in her deposition. (Ex. 152-11). She also stated that she would defer to Dr. Weintraub's causation opinion regarding the need for treatment and the major contributing cause of the hip conditions. (Ex. 152-13, -14, 30). Thus, to the extent Dr. Lawlor's deposition statements suggested that she did not support a major contributing cause relationship, even from the outset of the injury, such statements are inconsistent with portions of her opinion that would support a "major cause" relationship for a period of time. We are unable to reconcile these inconsistencies without further explanation from Dr. Lawlor. Therefore, although Dr. Lawlor treated claimant on multiple occasions, we do not find her causation opinion regarding the "major contributing cause" persuasive.<sup>5</sup>

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<sup>5</sup> The insurer also contends that there was no need for treatment for claimant's bilateral hip condition. It asserts that the only treatment directed to the hips was diagnostic (MRIs and left hip injection), and that Dr. Lawlor's opinion indicates that the work injury did not necessitate any hip treatment. (Ex. 152-16-17). However, the diagnostic services the insurer references were directed to the hip condition, and qualify as treatment for that condition. See *K-Mart v. Evenson*, 167 Or App 46,

Accordingly, we conclude that the record supports compensability of claimant's combined bilateral hip strain/arthritis condition, and we affirm the ALJ's order in that regard.<sup>6</sup> However, for the following reasons, we conclude that the insurer's denial of a combined bilateral hip impingement condition should be upheld.

Dr. Bald did not find evidence of a bilateral hip impingement syndrome. (Exs. 48-10, 56-1). He explained that such a diagnosis is made primarily on clinically verified symptoms, and he did not find evidence of such symptoms during his examination. (Ex. 56-1). Dr. Lawlor agreed with Dr. Bald that the injury did not cause impingement. (Ex. 152).

Drs. Puziss and Wagner arguably supported the existence of an impingement syndrome. (Exs. 144, 145). However, because neither physician addressed Dr. Bald's opinion regarding the lack of clinically verifiable symptoms of an impingement syndrome, we find their opinions regarding the existence of an impingement syndrome unpersuasive. *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).

Accordingly, we do not find that the record persuasively supports the existence of an impingement syndrome. *Graves*, 57 Van Natta at 2381 (proof of the existence of the condition is a fact necessary to establish the compensability of a new or omitted medical condition). Therefore, the insurer's denial of a combined bilateral hip impingement syndrome condition is upheld. Consequently, we reverse that portion of the ALJ's order that set aside the insurer's denial of a combined bilateral hip impingement condition.<sup>7</sup>

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51 (2000) (medical services need not be directed toward the cure of any existing, identifiable disease; diagnostic or other medical services will suffice); *Finch v. Stayton Canning Co.*, 93 Or App 168, 173 (1988) (ORS 656.005(7)(a)--then ORS 656.005(8)(a)--"makes no distinction between [medical] diagnosis and treatment."); *Kenneth M. Klosters*, 57 Van Natta 2048, 2051-52 (2005). Moreover, a preponderance of the medical evidence, as discussed above, establishes that claimant sustained an otherwise compensable hip strain injury that required medical treatment.

<sup>6</sup> As previously noted, claimant's untimely filed respondent's/cross-appellant's brief was not considered on review. Therefore, no attorney fee award under ORS 656.382(2) is warranted for successfully defending the compensability of the combined bilateral hip strain condition. *See Frederic Virtue*, 67 Van Natta 1884, 1885 (2015); *Shirley M. Brown*, 40 Van Natta 879 (1988).

<sup>7</sup> Because we conclude that the bilateral impingement syndrome condition does not exist, we agree with the ALJ's determination that the insurer's denial of that condition as an independent new/omitted medical condition claim should be upheld. We also agree that the denial of left hip capsular tear as a new/omitted medical condition should be upheld, as there is no persuasive medical opinion sufficient to establish the work-relatedness of that condition to a reasonable degree of medical probability.

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Because we are upholding the insurer's October 24, 2011 denial of claimant's combined bilateral hip impingement condition, the ALJ's \$10,000 attorney fee award must be modified.

After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that, in lieu of the ALJ's award, a reasonable fee for claimant's attorney's services at the hearing level concerning the compensability of the bilateral hip strain/degenerative arthritis and diaphragm conditions is \$8,500, payable by the insurer. In reaching this conclusion, we have particularly considered the time devoted to the aforementioned compensability issues (as represented by the record), the complexity of the issues, the value of the interest involved, the benefit secured for claimant, the risk that his counsel may go uncompensated, and the contingent nature of the practice of workers' compensation law.

### ORDER

The ALJ's order dated February 19, 2016 is affirmed in part and reversed in part. That portion of the ALJ's order that set aside the insurer's denial of claimant's new/omitted medical condition claim for a combined bilateral hip impingement condition is reversed. The insurer's denial of that condition is reinstated and upheld. In lieu of the ALJ's \$10,000 attorney fee award, claimant's counsel is awarded an assessed fee of \$8,500, for services at the hearing level, to be paid by the insurer. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on November 18, 2016