

In the Matter of the Compensation of  
**DONALD J. DUGAS, II, Claimant**

WCB Case No. 13-03669

ORDER ON REVIEW

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Reviewing Panel: Members Ousey and Curey.

The insurer requests review of those portions of Administrative Law Judge (ALJ) Lipton's order that: (1) set aside its denial of claimant's new/omitted condition claim for a left shoulder contusion/strain; and (2) awarded a \$12,500 attorney fee. Claimant cross-requests review of those portions of the ALJ's order that upheld the insurer's denials of his new/omitted condition claims for a right lumbosacral facet syndrome and left hip degenerative arthritis.<sup>1</sup> On review, the issues are compensability and attorney fees. We reverse in part, modify in part, and affirm in part.

STATEMENT OF FACTS

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

On November 14, 2006, claimant lost his footing at work and did the "splits," with an audible and painful "pop" in his right hip. (Exs. 1, 2-1). Afterward, he had episodic groin pain, but he did not require medical attention until February 2008, when the pain had become more constant. (Ex. 2-1).

On February 6, 2008, claimant's primary care physician, Dr. Bailey, noted that claimant had an antalgic gait. (*Id.*) On February 21, 2008, Dr. Hoff, a consulting orthopedic surgeon, diagnosed an iliopsoas strain. (Ex. 55-5). In July 2009, Dr. Verzosa, a general practitioner, began treating claimant for right hip bursitis/tendonitis. (Ex. 6). In September 2009, claimant underwent a right hip arthroscopy with extensive synovectomy and labral and chondral debridement. (Ex. 13).

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<sup>1</sup> Claimant disputes the ALJ's evidentiary ruling that excluded a June 2, 2015 e-mail from Mr. Michaels, a licensed acupuncturist and massage therapist, describing his observations and treatment of claimant's left shoulder and right hip, from November 2014 through March 2015. (Proposed Exhibit 90A). We need not resolve the propriety of the ALJ's evidentiary ruling because consideration of the excluded exhibit would not affect the outcome of this case. *See Sandy K. Koehn*, 69 Van Natta 421 n 1 (2017).

The insurer ultimately accepted a right iliopsoas tendon strain and right hip bursitis/tendonitis, labral tear, and chondral delamination. (Exs. 5, 10, 16, 59).

Claimant's right hip continued to be painful following the surgery. (Exs. 31, 48). In 2010, Dr. Wagner, claimant's orthopedic surgeon, opined that claimant's right hip x-rays showed arthritis. (Ex. 31). In 2011, Dr. Wagner noted that new x-rays showed slightly more narrowing of claimant's right hip joint and pronounced cyst formation in the roof of his acetabulum. (Ex. 48).

In 2011, claimant told Dr. Verzosa that he had been having lower back problems since the injury. (Ex. 38-1). Noting that claimant's August 2011 lumbar MRI showed L1-2, L2-3, and L5-S1 disc bulging, as well as L4-5 hypertrophy, Dr. Verzosa diagnosed low back pain, probably referred pain from the right hip, with degenerative changes. (Ex. 46).

In 2013, claimant began having problems with his left hip. (Ex. 63). In May 2013, claimant and Dr. Wagner submitted an 827 form, initiating a new/omitted medical condition claim for "left hip pain, low back, [and] labrum tear." (Ex. 64).

In July 2013, Dr. Laycoe, an orthopedic surgeon, performed an examination at the insurer's request. Dr. Laycoe opined that claimant had preexisting bilateral femoroacetabular impingement, which had progressed to degenerative arthritis in both hips. (Ex. 67-6, -7). Dr. Laycoe did not believe that the 2006 injury caused, or contributed to, the femoroacetabular impingement or degenerative arthritis in the left hip, or that the left hip condition was a consequence of the accepted right hip condition. (Ex. 67-7).

Dr. Wagner disagreed with Dr. Laycoe's opinion. (Ex. 70A). Contending that the medical literature only supported a possible causal relationship between femoroacetabular impingement and arthritis, and reasoning that claimant was extremely active before the work injury and had significant problems afterward, Dr. Wagner concluded that the injury was the major contributing cause of claimant's pain and disability. (*Id.*)

On July 23, 2013, the insurer denied that claimant's low back and left hip pain were caused by the 2006 work injury. (Ex. 68). Claimant requested a hearing.

On September 12, 2014, claimant sent an e-mail to Dr. Wagner's office, relating that he had fallen on his left shoulder, as a result of "'tripping' and stability issues related to [his] hip injury." (Ex. 101-1). He stated it had been

about six weeks and his shoulder was not fully recovered. (*Id.*) He asked if he should be seen by Dr. Wagner, explaining that he had delayed making an appointment because he did not have insurance. (*Id.*)

In February 2015, claimant asked Dr. Puziss to perform an examination. Claimant reported that, since the work injury, he had limped, had lower back pain, and had fallen many times, as a result of his right hip catching and giving way. (Ex. 86-10). He reported that, in July 2014, he slipped and fell while carrying groceries, landing directly on his left shoulder. (*Id.*) Dr. Puziss diagnosed: (1) a history of right hip strain, causing right iliopsoas and greater trochanteric bursitis, acetabular labral tear, and traumatic and degenerative arthritis; (2) a gait abnormality, causing right lumbosacral facet syndrome and subjective aggravation of preexisting left hip degenerative arthritis; (3) a history of multiple left shoulder contusions and/or strains causing chronic left subacromial impingement, left shoulder adhesive capsulitis, and possible left rotator cuff tear; and (4) asymptomatic “AC” arthritis. (Ex. 86-14). He opined that the major cause of claimant’s left hip arthritis was his genetic hip joint deformity with chronic impingement. (Ex. 86-17). He determined that the major cause of claimant’s right L5-S1 facet syndrome was his abnormal gait since the 2006 injury. (Ex. 86-18). He concluded that claimant’s left shoulder conditions were due to the accepted right hip conditions, which had resulted in multiple falls. (*Id.*)

In March 2015, Dr. Dewing, an orthopedic surgeon, performed an examination at the insurer’s request. Dr. Dewing diagnosed post-traumatic arthritis of the right hip, stemming from the work injury and the accepted labral tear and chondral delamination. (Ex. 86A-11). He opined that claimant’s left hip pain was consistent with early arthritis, not industrially related. (Ex. 86A-10). He concluded that claimant’s back pain was probably not industrially related. (Ex. 86A-11). He attributed claimant’s bilateral shoulder pain to rotator cuff pathology, which was likely multifactorial and not industrially related. (*Id.*) He noted that the claimed repeated falls from the right hip giving way were not documented in the medical records. (*Id.*)

Dr. Wagner concurred with both Dr. Puziss’s and Dr. Dewing’s opinions. (Exs. 87, 89).

On May 27, 2015, claimant initiated a new/omitted medical condition claim for traumatic arthritis of the right hip, right lumbosacral facet syndrome, left hip degenerative arthritis, and left shoulder contusion/strain. (Ex. 90).

In June 2015, Dr. Toal, an orthopedic surgeon, performed an examination at the insurer's request. Dr. Toal reviewed claimant's medical records and concluded that claimant had not been diagnosed with or treated for a left shoulder contusion or strain. (Ex. 91-17). He opined that claimant's left shoulder symptoms were likely due to degenerative changes in the rotator cuff tendon. (*Id.*) Dr. Toal also diagnosed lumbosacral facet and left hip arthritis. (*Id.*) He opined that those conditions were not caused by the 2006 injury or a consequence of any accepted condition from that injury. (Ex. 91-18).

On July 22, 2015, the insurer denied that claimant's right hip traumatic arthritis, right lumbosacral facet syndrome, left hip degenerative arthritis, and left shoulder contusion/strain were related to the previously accepted conditions or to claimant's work exposure. (Ex. 92). Claimant requested a hearing.

Claimant testified that he had six or seven significant falls. (Tr. 16). He described falling directly onto his left shoulder in July 2014, as a result of his right hip locking/pain, and receiving acupuncture treatment from Mr. Michaels. (Tr. 17, 24).

In his January 2017 "post-hearing" deposition, Dr. Wagner opined that it was possible, but not probable, that claimant's altered gait caused his left hip arthritis. (Ex. 100-15, -16). He did not know whether claimant's back symptoms originated from a condition in his back or the conditions in his hip. (Ex. 100-18, -19). Lastly, he agreed with claimant's counsel's statement that a fall directly onto the shoulder would be consistent with a bruise or a strain, but he did not recall hearing about a fall in 2014 or treating claimant's left shoulder. (Ex. 100-20, -21).

#### CONCLUSIONS OF LAW AND OPINION

The ALJ set aside the insurer's denial of right hip arthritis and left shoulder contusion/strain. In concluding that claimant's left shoulder contusion/strain was compensable, the ALJ determined that claimant had experienced falls as a consequence of his right hip injury, resulting in left shoulder contusion/strain and acupuncture treatment. Applying the factors in OAR 438-015-0010(4), the ALJ awarded a \$12,500 insured-paid attorney fee concerning the right hip arthritis and left shoulder contusion/strain conditions.

The ALJ upheld the insurer's denial of right lumbosacral facet syndrome and left hip arthritis.<sup>2</sup> In doing so, the ALJ considered Dr. Puziss's unexplained opinion insufficient to prove that the accepted conditions were the major contributing cause of a consequential right lumbosacral facet syndrome. The ALJ also concluded that the medical evidence did not establish that the 2006 injury had caused or worsened claimant's preexisting left hip arthritis.

On review, the insurer contends that claimant did not establish the existence of his claimed left shoulder contusion/strain. The insurer also seeks a reduction in the ALJ's attorney fee award.<sup>3</sup>

In his cross-request, claimant contends that his antalgic gait, resulting from his accepted right hip condition, is the major contributing cause of his disability/need for treatment for right lumbar facet syndrome and left hip arthritis.

We reverse that portion of the ALJ's order that set aside the insurer's denial of claimant's left shoulder contusion/strain and affirm those portions of the ALJ's order that upheld the insurer's denials of right lumbosacral facet syndrome and left hip arthritis.<sup>4</sup> In addition, we modify the ALJ's attorney fee award. Our reasoning follows.

#### Left Shoulder Contusion/Strain

Claimant initiated a new/omitted medical condition claim for a left shoulder contusion/strain based on a "consequential condition" theory. (Tr. 3). Therefore, he must prove that his compensable injury is the major contributing cause of the condition. *See* ORS 656.005(7)(a)(A); ORS 656.266(1); *David A. Marquardt*, 62 Van Natta 969, 974-75 (2010) (compensable injury must be the major contributing cause of the consequential condition, not just the worsening or need for treatment of the condition). He must also establish the existence of the condition. *Robert D. Hanington*, 68 Van Natta 496, 498 (2016) (applying *Maureen Y. Graves*, 57 Van Natta 2380, 2381 (2005), to a new/omitted medical condition claim based on a "consequential condition" theory).

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<sup>2</sup> The ALJ also upheld the insurer's denial of low back and left hip pain. That portion of the ALJ's order is not contested on review.

<sup>3</sup> The insurer does not contest that portion of the ALJ's order that set aside its denial of claimant's right hip arthritis.

<sup>4</sup> That portion of the ALJ's order that set aside the insurer's denial of claimant's right hip arthritis is affirmed.

Because of the disagreement between medical experts, this claim presents a complex medical question that must be resolved by expert medical evidence. *See Barnett v. SAIF*, 122 Or App 279, 283 (1993). A persuasive opinion is well reasoned and based on complete information. *Somers v. SAIF*, 77 Or App 259, 263 (1986).

Claimant relies primarily on the opinion of Dr. Puziss. For the following reasons, we do not find Dr. Puziss's opinion persuasive.

Claimant told Dr. Puziss that he had fallen about 20 times over the past six or seven years, usually when his hip catches and it gives way. (Ex. 86-10). He reported that the fall onto his left shoulder in July 2014 was the worst injury. (*Id.*) For awhile, he had trouble lifting his arm overhead. (*Id.*) While his motion had improved, he advised Dr. Puziss that he still had pain and had not regained full motion. (*Id.*)

Dr. Puziss did not examine claimant until February 23, 2015, some seven months after the alleged July 2014 fall. At that time, claimant had chronic left shoulder impingement and weakness. (Ex. 86-18). Dr. Puziss diagnosed a history of left multiple shoulder contusions and/or strains, causing chronic left subacromial impingement, left shoulder adhesive capsulitis, and possible left rotator cuff tear. (Ex. 86-14). He stated that claimant had fallen many times due to his right hip locking and giving away. (Ex. 6-15). He further stated that claimant had “described multiple falls over many years to multiple examiners[,]” and “[i]t is his multiple falls that ultimately led to the contusions and strains of the left shoulder and consequential conditions.” (Ex. 86-18).

In an opposing opinion, Dr. Toal stated that the left shoulder diagnosis of contusion/strain was incorrect. (Ex. 91-17). He reasoned that the medical records did not show any diagnosis or treatment of a left shoulder contusion/strain. (*Id.*) Likewise, Dr. Dewing observed that claimant's shoulder pain was claimed as a consequence of repeated falls from the right hip giving way, none of which were documented in the medical records. (Ex. 86A-11).

As noted by Drs. Dewing and Toal, the medical record does not document that claimant repeatedly fell from the right hip giving way or left shoulder contusions or strains. (Exs. 86A-11, 91-17). The medical record identifies only two falls. The first fall occurred in 2010, when claimant slipped on ice and fell on his buttocks. (Ex. 37-1). He reported having some right shoulder and low back soreness. (*Id.*) There was no mention of his right hip locking/giving way or a left

shoulder contusion/strain. (*Id.*) The second fall occurred in 2011. Claimant's foot caught on the edge of a stair, and he fell on his hand. (Ex. 40-1). Again, there was no record of right hip involvement or left shoulder complaints.<sup>5</sup> (*Id.*)

Furthermore, Dr. Puziss attributed claimant's left shoulder findings on February 23, 2015, to chronic left subacromial impingement, left shoulder adhesive capsulitis, and possible left rotator cuff tear. (Ex. 86-14, -18). He did not identify any findings that supported the existence of a left shoulder contusion/strain condition, either as reported by claimant or from his review of claimant's medical record, or otherwise explain his diagnosis. *See Moe v. Ceiling Sys., Inc.*, 44 Or App 429, 433 (1980) (rejecting unexplained or conclusory opinion).

In light of the contemporaneous medical record, claimant's version of events is not reliable. It follows that the medical evidence from Dr. Puziss is not based on a complete or accurate history. *See Miller v. Granite Construction Co.*, 28 Or App 473, 478 (1977) (medical opinion that is based on an inaccurate is not persuasive).

No other opinion supports the compensability of the left shoulder claim. Consequently, the record does not persuasively establish that the claimed left shoulder condition is compensable. *See* ORS 656.005(7)(a)(A). Therefore, we reverse that portion of the ALJ's order that set aside the insurer's denial of claimant's new/omitted medical condition claim for a left shoulder contusion/strain condition.

### Right Lumbosacral Facet Syndrome

Claimant advanced his new/omitted medical condition claim for right lumbosacral facet syndrome as a "consequential condition." (Tr. 3). Therefore, he must prove that the condition exists and that his compensable injury is the major contributing cause of the condition. *See* ORS 656.005(7)(a)(A); ORS 656.266(1); *Hanington*, 68 Van Natta at 498; *Marquardt*, 62 Van Natta at 974-75.

Dr. Puziss diagnosed right lumbosacral facet syndrome. (Ex. 86-14). He opined that claimant's injury-related abnormal gait was the major cause of that diagnosed condition. (Ex. 86-18).

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<sup>5</sup> In his September 2014 e-mail to Dr. Wagner's office, claimant described falling on his left shoulder, "as a result of \* \* \* 'tripping' and stability issues related to [his] hip injury." (Ex. 101). He reported having a "stinger" or a "dead arm" type injury. (*Id.*) This e-mail does not establish that claimant had a left shoulder strain/contusion condition.

Dr. Toal opined that Dr. Puziss's diagnosis was incorrect. (Ex. 91-17). Dr. Toal explained that "lumbosacral facet syndrome describes the constellation of symptoms (typically low back pain and pain with lumbar extension) caused by facet arthropathy/arthritis of the lumbosacral spine." (*Id.*) He reported that claimant's 2011 lumbar MRI showed that he had facet arthritis. (Ex. 91-15, -17).

Claimant argues that Dr. Toal's opinion did not consider or refute Dr. Puziss's assertion that claimant's prolonged antalgic gait made his facet degeneration symptomatic, resulting in disability and a need for medical treatment. We disagree with claimant's position. Claimant has advanced his claim based on a consequential condition theory. Therefore, he must establish that the compensable injury is the major contributing cause of the consequential condition, not just its worsening or need for treatment. *See* ORS 656.005(7)(a)(A); *Hanington*, 68 Van Natta at 498.

Dr. Puziss opined that claimant's antalgic gait "is the reason that he has developed right lumbosacral facet syndrome." (Ex. 86-14). He also stated that claimant's abnormal gait pattern is the major cause of his right L5-S1 facet syndrome. (Ex. 86-18). However, his only explanation was that "[t]his is not an uncommon scenario." (Ex. 86-14, -18). After considering Dr. Puziss's comments, we conclude that his opinion lacks sufficient explanation and is not persuasive. *Moe*, 44 Or App at 433.

Moreover, Dr. Puziss did not have access to claimant's imaging studies. He stated that he relied on radiologists' and other orthopedists' interpretations. (Ex. 86-13). His only reference to claimant's 2011 lumbar MRI was his summary of Dr. Verzosa's September 2, 2011 chart note. His summary stated, "Dr. Verzosa reviewed a lumbar MRI that demonstrated some mild disc bulges at several levels; these were degenerative." (Ex. 86-6). Yet, Dr. Puziss's summary was incomplete. In addition to opining that claimant's 2011 lumbar MRI showed "some disc bulge," Dr. Verzosa specifically noted that the MRI report stated that the "facet shows early hypertrophy with ligamentum flavum hypertrophy at L4-5." (Ex. 46). Moreover, Dr. Verzosa "believe[d] these are all part of degenerative changes" and diagnosed "low back pain, probably referred pain from the right hip, with degenerative changes." (*Id.*)

Likewise, Dr. Toal opined that claimant's 2011 lumbar MRI showed that claimant had "facet arthritis." (Ex. 91-15, -17). He reasoned that the claimed right lumbosacral facet syndrome was not a consequence of any accepted condition,

explaining that “lumbosacral facet syndrome describes the constellation of symptoms (typically low back pain and pain with lumbar extension) caused by facet arthropathy/arthritis of the lumbosacral strain.” (Ex. 91-17, -18).

In analyzing the major cause of claimant’s lumbosacral facet syndrome, Dr. Puziss did not address claimant’s facet arthritis/hypertrophy. In the absence of such reasoning, we do not consider Dr. Puziss’s opinion to be persuasive. *See Janet Benedict*, 59 Van Natta 2406, 2409 (2007), *aff’d without opinion*, 227 Or App 289 (2010) (medical opinion unpersuasive when it did not address contrary opinion).

Therefore, for these additional reasons, as well as those provided in the ALJ’s order, the medical evidence does not persuasively establish that the 2006 compensable injury was the major contributing cause of the claimed right lumbosacral facet syndrome. Consequently, we affirm that portion of the ALJ’s order that upheld the insurer’s denial of right lumbosacral facet syndrome.

#### Left Hip Degenerative Arthritis

Relying on the opinion of Dr. Puziss that his injury-related limp made his preexisting left hip arthritis more symptomatic, claimant renews his argument that he is not required to prove that the compensable injury caused the claimed condition. We disagree with claimant’s argument.

Claimant advanced his new/omitted medical condition claim for left hip degenerative arthritis based on a “consequential condition” theory. (Tr. 3). Therefore, he must prove that his compensable injury is the major contributing cause of that condition, not just its symptoms or the need for treatment.<sup>6</sup> *See* ORS 656.005(7)(a)(A); ORS 656.266(1); *Marquardt*, 62 Van Natta at 974-75.

There is no medical opinion that the compensable injury is the major contributing cause of claimant’s left hip degenerative arthritis. Dr. Puziss opined that the major cause of claimant’s left hip arthritis is his abnormal left hip joint and chronic impingement. (Ex. 86-16, -17). Drs. Laycoe, Dewing, and Toal opined that claimant developed degenerative arthritis in his left hip due to congenital femoroacetabular impingement and not as a result of the compensable

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<sup>6</sup> The parties do not dispute, and the record supports, the existence of claimant’s left hip degenerative arthritis.

injury. (Exs. 67-7, 86A-10, 91-17). Finally, Dr. Wagner opined that it was only possible, not probable, that claimant's altered gait caused the arthritis in his left hip. (Ex. 100-15, -16). *See Gormley v. SAIF*, 52 Or App 1055, 1060 (1981) (persuasive medical opinions must be based on medical probability, rather than possibility).

Accordingly, in the absence of a persuasive medical opinion satisfying the aforementioned statutory requirement, we affirm that portion of the ALJ's order that upheld the insurer's denial of left hip degenerative arthritis.

### Attorney Fees

Because we are reinstating the insurer's denial of claimant's left shoulder contusion/strain, the ALJ's \$12,500 attorney fee award must be modified.<sup>7</sup>

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 claimant's right hip arthritis is \$8,500, payable by the insurer. In reaching this conclusion, we have particularly considered the time devoted to the aforementioned compensability issue (as represented by the hearing record), the complexity of the issue, the value of the interest involved, the benefit secured for claimant, 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 right hip arthritis denial, to be paid by the insurer. *See* ORS 656.386(2); OAR 438-015-0019; *Gary E. Gettman*, 60 Van Natta 2862 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

### ORDER

The ALJ's order dated May 17, 2017 is reversed in part, modified in part, and affirmed in part. That portion of the ALJ's order that set aside the insurer's denial insofar as it pertained to claimant's left shoulder contusion/strain is reversed. The insurer's denial of that condition is reinstated and upheld. In lieu of

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<sup>7</sup> As noted above, that portion of the ALJ's order that set aside the insurer's denial of claimant's new/omitted medical condition claim for right hip arthritis is not contested on review.

the ALJ's \$12,500 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. In lieu of the ALJ's cost award, claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the right hip arthritis denial, to be paid by the insurer. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on December 19, 2017