
In the Matter of the Compensation of
MARTHA GONZALEZ, Claimant
WCB Case No. 16-00611, 16-00609
ORDER ON REVIEW
Dunn & Roy PC, Claimant Attorneys
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Lanning and Johnson.

Claimant requests review of those portions of Administrative Law Judge (ALJ) Naugle's order that: (1) upheld the SAIF Corporation's denial of claimant's new/omitted medical condition claim for an L4-5 disc condition; and (2) upheld SAIF's denial of claimant's new/omitted medical condition claim for L5 radiculitis. On review, the issue is compensability. We affirm in part and reverse in part.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," which we summarize below.

On September 23, 2015, claimant's left forearm was struck by a forklift that was backing up. (Tr. 6-7). She tried to avoid being struck by the forklift, by twisting and turning to the left. (Tr. 8-9, 17-18). Claimant experienced left upper arm pain and back pain radiating down her leg to her foot. (Tr. 13, 15).

Claimant initially treated with Ms. Fredericks, a nurse practitioner, who diagnosed a low back strain and a left forearm contusion. (Ex. 2-2). She noted tightness of the paraspinous muscles along L4-5 on the left side and tenderness with muscle spasm into the left buttock. (*Id.*) She also noted that claimant's upper left forearm had tenderness laterally at the bruised area of the mid forearm, ulnar bone. (*Id.*)

On October 1, 2015, SAIF accepted a lumbar strain and a left forearm contusion. (Ex. 8).

A November 17, 2015 lumbar MRI showed at L4-5 "severe, grade 3, central stenosis caused by facet hypertrophy with a grade 1 degenerative spondylolisthesis and moderate bilateral foraminal stenosis." (Ex. 25-1).

On December 4, 2015, Dr. Brett, a neurological surgeon, evaluated claimant. (Ex. 28-1). He noted that she had “pre-existing but asymptomatic degenerative change in the lumbar spine, particularly at L4-5, with developing degenerative spondylolisthesis.” (Ex. 28-2). He reported that claimant “sustained pathological worsening as a result of her work injury of 9-23-15” which “resulted in annular tearing and disc protrusion and/or worsened spondylolisthesis, now with left L5 nerve root impingement and continued left L5 radiculitis/radiculopathy and pain.” (*Id.*) He recommended surgery, opining that the “major contributing factor to her current condition and need for assessment, treatment and time loss is her work injury.” (Ex. 28-2-3).

On December 16, 2015, SAIF responded to “a claim to formally accept left L4-5 lumbar disc injury” with a denial because the claim did not “clearly specify the location or nature of a specific medical condition.” (Ex. 29-1).

On January 6, 2016, at SAIF’s request, Dr. Kitchel, an orthopedic surgeon, evaluated claimant. (Ex. 32-1). Related to the work injury, he diagnosed a lumbar strain/sprain and left forearm contusion. (Ex. 32-6). Unrelated to the work injury, he diagnosed L4-5 lumbar degenerative spondylolisthesis with significant canal and neural foraminal stenosis. (*Id.*) He also diagnosed “lumbar radiculopathy rendered symptomatic by the September 23, 2015, work injury, but caused in major contributing fashion by underlying degenerative spondylolisthesis and lumbar spinal canal stenosis.” (*Id.*) Dr. Kitchel opined that the work injury was a material contributing cause of the need for treatment of the left L5 radiculitis/radiculopathy. (Ex. 32-7).

In a follow-up visit, Dr. Brett disagreed with Dr. Kitchel’s opinion, and concluded that claimant’s work injury was the major contributing factor of her current condition and need for treatment. (Ex. 33-1). He acknowledged that claimant has some preexisting degenerative change and a slight degenerative spondylolisthesis at L4-5, “but pathological worsening is felt to have occurred with her work injury with annular tearing and disk protrusion and/or worsening of her spondylolisthesis resulting in now ongoing right L5 nerve root impingement/radicular pain and radiculopathy.” (*Id.*)

On January 25, 2016, SAIF denied claimant’s claim for L5 radiculitis. (Ex. 35-1).

On March 7, 2016, claimant had a lumbar spine CT that showed: (1) Grade 1 degenerative spondylolisthesis at L4-5 with moderate central canal and severe bilateral neural foraminal stenosis; (2) mild narrowing of the central canal and left-sided neural foramen L3-4; and (3) facet arthropathy L3-S1, most severe at L4-5. (Ex. 38-1).

Also on March 7, 2016, claimant had a lumbar spine myelogram that showed severe narrowing of the thecal sac at L4-5, normal L3 nerve roots, both L4 nerve roots are amputated, and a slightly swollen right L5 nerve root. (Ex. 38-3).

On March 29, 2016, at claimant's request, Dr. Puziss performed an examination. (Ex. 38a). He diagnosed: (1) a history of lumbar and lumbosacral sprain/strain; (2) preexisting lumbar degenerative disc disease; (3) preexisting, mild, L4-5 anterolisthesis, degenerative type with resultant facet hypertrophy, and moderately severe spinal stenosis; (4) preexisting bilateral L4-5 foraminal stenosis; (5) left L4 and L5 radiculopathy (secondary to injury); (6) severe obesity; (7) preexisting spinal stenosis, L4-5, with short pedicles; and (8) evidence for left middle sacroiliac facet syndrome. (Ex. 38a-6). Dr. Puziss opined that, given claimant's negative past history, the work injury was the major cause of her L4-5 disc protrusion and L5 radiculopathy. (Ex. 38a-8). He agreed with Dr. Brett that "the L4-5 level is pathologically worsened, which is why she became symptomatic due to the work injury of 09/23/2015." (*Id.*)

On April 8, 2016, Dr. Sabahi, a radiologist, performed a records review at SAIF's request. (Ex. 39). He opined that claimant's imaging abnormalities with regard to the lumbar spine are "all chronic and pre-existing arthritic conditions." (Ex. 39-8). He found no acute abnormalities, no objective evidence of pathologic worsening of the preexisting disease, with no disc extrusions, soft tissue edema, bone marrow edema or other findings to suggest an acute or superimposed process. (*Id.*) Dr. Sabahi opined that the mechanism of injury was not likely to cause any pathological worsening of preexisting disease in claimant's lumbar spine. (*Id.*) He did not "see any objective abnormalities of a disc injury" and the "L4-5 disc shows no annular fissure or disruption or disc edema demonstrated to support an injury on imaging." (Ex. 39-10). He also opined that the "L5 nerve roots do not appear to be significantly compromised based on imaging criteria." (Ex. 39-12). He explained that: "The CT myelogram, which is best modality for showing neural compression, demonstrates contrast filling the L5 axillary sleeves symmetrically without cut off to suggest the possibility of impingement of the L5 nerve roots." (*Id.*)

Dr. Sabahi opined that based on objective diagnostic criteria, there was no L4-5 disc injury and he did not see any objective criteria to account for L5 radiculitis. (Ex. 39-13). He concluded that there was no combined condition and, even assuming a combined condition, the “major cause of the disability and need for treatment resulting from this combined condition would be the pre-existing arthritic condition of the lumbar spine” because the mechanism of injury “would not have resulted in such disability and need for treatment in the absence of this type of degenerative condition.” (Ex. 39-14).

In a concurrence letter prepared by claimant’s attorney, Dr. Brett agreed that it was claimant’s sudden twisting motion while moving forward to avoid being struck by the forklift that caused her low back injury. (Ex. 40-2). He opined that claimant’s work injury combined with preexisting degenerative disc disease to cause her disability and need for treatment of the combined condition. (*Id.*) In his opinion, “the injury was the major contributing cause of the disability and need for treatment of the combined condition, and specifically of a L4-5 disc injury, and a L5 radiculitis.” (*Id.*) He based his opinion on claimant’s “imaging scans, mechanism of injury, examination findings, and medical history.” (*Id.*)

In addition, Dr. Brett determined that claimant’s work injury caused a pathological worsening of her preexisting degenerative lumbar disc pathologies. (Ex. 40-2). Dr. Brett believed that the most reasonable explanation for claimant’s history of post-injury radiculitis was “additional slippage of the L4-5 anterolisthesis resulting from a disc injury at the L4-5 level.” (Ex. 40-3). He concluded that claimant’s work injury was the major contributing cause of the L5 radiculitis, which was supported by objective findings of “decreased lumbar range of motion, a positive straight leg raise test, dipping of the dorsiflexors of the left ankle, and numbness in a L5 dermatome pattern.” (*Id.*)

In a concurrence letter prepared by claimant’s counsel, Dr. Puziss agreed that claimant’s work injury, which included “twisting” her body and “lurching” forward, combined with preexisting lumbar disc pathologies to cause her disability and need for treatment. (Ex. 41-1-2). He opined that the work injury was the major contributing cause of the L5 radiculitis and L4-5 disc injury. (Ex. 41-2). He also explained that the “work injury caused a crushing of the L5 nerve root, which caused the nerve to swell with inflammation, and resulted in the radiculitis condition.” (*Id.*) He concluded that the work injury was the major contributing cause of the disability and need for treatment of the combined condition because the swelling of the nerve would not have occurred absent the injury event and claimant was asymptomatic before the injury. (*Id.*)

While acknowledging his earlier statement that claimant's diagnostic studies identified "no particular finding that appears acute," Dr. Puziss explained that "it is impossible to determine if the disc space was narrowed traumatically through the injury event merely by reviewing the MRI, unless there was a pre-injury MRI to contrast it with." (Ex. 41-3). He agreed that, in claimant's case, "there was no disc herniation or extrusion which is often considered an acute pathology identified on the imaging scans." (*Id.*) However, he explained "a degenerative condition can still be pathologically worsened from a traumatic injury, and still retain a degenerative appearance on MRI." (*Id.*) He opined that "the work injury likely resulted in a further slippage of the disc from the anterolisthesis, which further narrowed the space where the nerve travels." (*Id.*) He based his opinion on claimant's failure to improve from her L5 radiculitis condition over time. (*Id.*) He explained that "if the L4-5 disc did not worsen, then the L5 radiculitis would resolve after swelling in the nerve from the injury went down." (*Id.*) Thus, from the persistence of the L5 radiculitis following the injury, he concluded that "the injury event caused further narrowing of the disc space, likely from additional slippage of the disc." (*Id.*) For those reasons, he opined that the work injury was the major contributing cause of an L4-5 disc injury, which pathologically worsened claimant's preexisting L4-5 disc pathologies. (*Id.*)

Dr. Kitchel opined that the diagnostic images of claimant's lumbar spine did not reveal "any evidence of a soft disc herniation or any other acute disc injury." (Ex. 42-6). Regarding the L5 radiculitis, Dr. Kitchel explained that it is "the degenerative long term pathology present in [claimant's] lumbar spine, the lumbar spondylosis, that has pathologically compressed the nerve root[.]" (*Id.*) He explained that:

"When as in the case of [claimant], the nerve is already compressed, it is very easy for the compression to become symptomatic from its previous compressed but asymptomatic state. In that sense the 09/23/15 compensable injury contributed to [claimant's] overall condition, [but] its contribution is small * * * (more of a 'last straw') in comparison to the underlying preexisting degenerative lumbar pathology." (Ex. 42-8).

Thus, Dr. Kitchel reasoned that claimant's work injury was never the major contributing cause of disability/need for treatment of the combined lumbar condition. (*Id.*)

CONCLUSIONS OF LAW AND OPINION

In upholding SAIF's denial of claimant's new/omitted medical condition claim for an L4-5 disc condition, the ALJ concluded that claimant had not established the existence of the claimed condition. In upholding SAIF's denial of claimant's new/omitted medical condition claim for L5 radiculitis, the ALJ concluded that the condition existed, the work injury was a material contributing cause of disability/need for treatment, claimant's preexisting lumbar spondylosis combined with the L5 radiculitis to cause or prolong disability/need for treatment, and the major contributing cause of disability/need for treatment of the combined condition was claimant's preexisting lumbar spondylosis.

On review, claimant contends that the opinions of Drs. Brett and Puziss establish the existence of an L4-5 disc injury and that the work injury was a material contributing cause of its disability/need for treatment. Claimant further asserts that, assuming the L5 radiculitis combined with the preexisting lumbar spondylosis, the opinions of Drs. Brett and Puziss establish that (at least initially) the work injury was the major contributing cause of the disability/need for treatment of the combined condition.

We agree with the ALJ's reasoning in upholding SAIF's denial of the new/omitted medical condition claim for an L4-5 disc condition. We disagree, however, with the ALJ's reasoning regarding the new/omitted medical condition claim for L5 radiculitis. We reason as follows.

To prevail on her new/omitted medical condition claims, claimant must prove that the conditions exist and that the September 2015 work injury was a material contributing cause of her disability or need for treatment for her claimed conditions. ORS 656.005(7)(a); ORS 656.266(1); *Betty J. King*, 58 Van Natta 977 (2006); *Maureen Y. Graves*, 57 Van Natta 2380, 2381 (2005). If an "otherwise compensable injury" combines with a statutory "preexisting condition," the employer has the burden of establishing that the "otherwise compensable injury" is not the major contributing cause of claimant's disability or need for treatment of the combined condition. ORS 656.005(7)(a)(B); ORS 656.266(2)(a); *SAIF v. Kollias*, 233 Or App 499, 505 (2010); *Jack G. Scoggins*, 56 Van Natta 2534, 2535 (2004). Under *Brown v. SAIF*, 361 Or 241, 272 (2017), "the 'injury' component of the phrase 'otherwise compensable injury' in ORS 656.005(7)(a)(b) refers to a medical condition, not an accident."

Because of the disagreement between medical experts regarding the existence and compensability of the claimed conditions, the claim presents a complex medical question that must be resolved by expert medical opinion. *Barnett v. SAIF*, 122 Or App 279, 282 (1993); *Mathew 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).

L4-5 Disc

Claimant relies primarily on the opinions of Drs. Brett and Puziss to establish the existence of her disputed L4-5 disc condition. For the following reasons, their opinions do not persuasively establish the existence of the claimed condition.

In support of their opinions, Drs. Brett and Puziss relied on the persistence of claimant's L5 radiculitis. They reasoned that claimant's L5 radiculitis would have resolved once the L5 nerve had time to heal, unless she also sustained an L4-5 disc injury. (Exs. 40-3, 41-3). Accordingly, because her L5 radiculitis persisted, they believed that claimant must have sustained an L4-5 disc injury. (*Id.*) Yet, neither Dr. Brett nor Dr. Puziss addressed claimant's significant preexisting L4-5 disc pathology and its relationship to her persistent L5 radiculitis.¹ Without additional explanation for their opinions, we are not persuaded by their reasoning.² *Moe v. Ceiling Systems Inc.*, 44 Or App 429, 433 (1980) (rejecting unexplained or conclusory opinion).

For the above reasons, we conclude that claimant has not established the existence of an L4-5 disc condition. *See Lorraine W. Dahl*, 52 Van Natta 1576 (2000) (if medical opinions supporting compensability are insufficient to meet the claimant's burden of proof, the claim fails, regardless of the persuasiveness of the countervailing opinions). Accordingly, we affirm the ALJ's decision to uphold SAIF's denial of claimant's L4-5 disc claim.

¹ Dr. Kitchel explained that "because the nerve is already compressed in a narrow spot, once it is irritated it most often will not improve symptomatically unless the compression is removed," as a result "the persistence of radicular symptoms cannot be relied upon to determine * * * if there has been a pathological change or worsening of the preexisting degenerative condition." (Ex. 42-7).

² Dr. Puziss also referred to a "disc protrusion" and a "herniated disc," but then acknowledged that claimant's imaging studies did not show any acute disc pathology at L4-5. (Exs. 38a-8, 41-3). This inconsistency provides further reason for finding Dr. Puziss's opinion unpersuasive. *Howard L. Allen*, 60 Van Natta 1423, 1424-25 (internally inconsistent medical opinion, without explanation for the inconsistencies, was unpersuasive).

L5 Radiculitis³

The ALJ found, and SAIF does not appear to dispute, that claimant's L5 radiculitis is an "otherwise compensable injury" and that it combined with a preexisting condition to cause disability/need for treatment of her claimed condition. Consequently, SAIF has the burden to prove that the "otherwise compensable injury" is not the major contributing cause of claimant's disability/need for treatment of the combined condition. ORS 656.005(7)(a)(B); ORS 656.266(2)(a); *Brown*, 361 Or at 251. For the following reasons, we conclude that SAIF has not met that burden.

SAIF relies on the opinions of Drs. Kitchel and Sabahi to establish that claimant's work injury was never the major contributing cause of her disability/need for treatment for the combined condition. (Exs. 39-14, 42-8).

According to Dr. Kitchel, claimant's preexisting degenerative conditions were the major contributing cause of the L5 radiculitis because those conditions actually caused the nerve root compression. (Ex. 42-7). Dr. Kitchel's opinion, however, does not adequately explain why claimant was asymptomatic before the injury.⁴ *See Moe*, 44 Or App at 433 (rejecting unexplained or conclusory opinions). Moreover, it is unclear whether Dr. Kitchel reviewed claimant's lumbar myelogram report, which was completed after his examination report. *See Phillip Padfield*, 68 Van Natta 1091, 1095 (2016) (physician's opinion based on inaccurate or incomplete information found unpersuasive); *Carolyn R. Eaton*, 51 Van Natta 1902, 1905 (1999) (opinion found unpersuasive where physician did not review the entire record in formulating his opinion). Finally, Dr. Kitchel did not adequately address Dr. Brett's opinion that the work injury was the major contributing cause of claimant's need for treatment/disability of the combined condition because it caused the swelling of the L5 nerve root and she was asymptomatic before the injury. (Ex. 40-4); *see Janet Benedict*, 59 Van Natta 2406, 2409 (2007), *aff'd without opinion*, 227 Or App 289 (2010) (medical opinion not persuasive when it did not address contrary opinions).

³ In this case, the medical experts use the terms radiculitis and radiculopathy interchangeably. (Exs. 28-2, 38a-9, 39-13, 41-2).

⁴ In contrast to Dr. Kitchel's opinion, both Drs. Brett and Puziss opined that claimant's L5 nerve root was not compressed before the work injury because she was not experiencing lower extremity symptomatology. (Exs. 40-4, 41-2). Thus, they reasoned that the work injury must have been the major contributing cause of her L5 radiculitis. (*Id.*)

Dr. Sabahi, who performed a records review at SAIF's request, described the mechanism of injury as a blow to the left forearm. (Ex. 39-8). Yet, he did not account for claimant's "twisting" and "lurching" in an attempt to avoid the fork lift, which resulted in a lumbar injury. Moreover, Dr. Sabahi opined that there was no objective evidence of the claimed L5 radiculitis condition. (Ex. 39-12). Because Dr. Sabahi did not believe that the claimed condition existed, or that claimant's work injury was a material contributing cause of the disability/need for treatment of that condition, we are not persuaded that he adequately weighed the relative contribution of the compensable injury when discussing an assumed combined condition. *See Cindy R. Johnson*, 68 Van Natta 832, 839 (2016).

Under these circumstances, the opinions of Drs. Kitchel and Sabahi are insufficient to persuasively establish that the "otherwise compensable injury" was not the major contributing cause of claimant's disability/need for treatment for the combined L5 radiculitis condition. Therefore, we conclude that claimant's new/omitted medical condition claim for L5 radiculitis is compensable. *See Jason J. Skirving*, 58 Van Natta 323, 324 (2006) (where the carrier has the burden of proof, the medical evidence supporting its position must be persuasive). Accordingly, that portion of the ALJ's order that upheld SAIF's denial of claimant's claim for L5 radiculitis is reversed.

Claimant's counsel is entitled to an assessed fee for services at the hearing level and on review regarding her claim for L5 radiculitis. ORS 656.386(1). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable fee for claimant's attorney services at the hearing level and on review is \$10,000, payable by SAIF. In reaching this conclusion, we have particularly considered the time devoted to this issue (as represented by the record and claimant's appellate briefs), the complexity of the issue, the value of the interest involved, the risk that 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 L5 radiculitis denial, to be paid by SAIF. *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 October 26, 2016 is affirmed in part and reversed in part. SAIF's denial of claimant's new/omitted medical condition claim for L5 radiculitis is set aside and the claim is remanded to SAIF for processing according

to law. For services at the hearing level and on review regarding the L5 radiculitis claim, claimant is awarded an assessed fee of \$10,000, payable by SAIF. Claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the L5 radiculitis denial, to be paid by SAIF. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on June 6, 2017