

In the Matter of the Compensation of
LEVI CLOW, Claimant
WCB Case No. 15-01587
ORDER ON REVIEW
Alvey Law Group, Claimant Attorneys
Sheridan Levine LLP, Defense Attorneys

Reviewing Panel: Members Weddell, Curey, and Somers.

Claimant requests review of Administrative Law Judge (ALJ) Brown's order that: (1) found that the self-insured employer's denial of claimant's new/omitted medical condition claim for a thoracic disc herniation was procedurally valid; and (2) upheld the employer's denial. On review, the issues are claim processing and compensability. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," with the following supplementation.

Claimant compensably injured his lumbar and thoracic spine on November 5, 2014. He had a prior low back strain that had resolved, but "nothing like" his then-current pain/symptoms. (Ex. 4). He had never previously had thoracic area pain. (Ex. 35-1).

X-rays of the lumbar and thoracic spine were taken on December 1, 2014. The lumbar spine was within normal limits with no acute bony abnormality. A radiologist reported that the thoracic spine showed "[m]idthoracic kyphosis with mild wedging of adjacent vertebral bodies. This may represent old trauma. Possible Scheuermann's disease." (Ex. 9).

A December 22, 2014 thoracic spine MRI revealed a tiny disc extrusion centrally at T7-8, which indented the ventral thecal sac and touched the spinal cord, with no significant central canal or neural foraminal stenosis. There was mild wedging noted at T7, T8, and T9. (Ex. 21-2). A lumbar spine MRI was normal. (Ex. 20-1).

The employer accepted a lumbar strain on December 31, 2014. (Ex. 27).

On January 27, 2015, Dr. Miller performed an examination on referral from claimant's attending physician. He noted that claimant's mid-thoracic back pain started at work and that he had never had thoracic area pain before, although he

had a history of “prior spine injury.” (Ex. 35-1). Dr. Miller explained that claimant’s T7-8 disc herniation was not large, but that claimant had “moderate kyphosis through his spine due to unrelated issues which causes the thoracic cord to drape over the back of the disks and specifically the [T7-8] disc herniation exacerbating the compression.” (*Id.*) Dr. Miller assessed intervertebral disc prolapse and spinal stenosis of thoracic region. (Ex. 35-3). He stated that claimant had a symptomatic T7-8 disc herniation “that occurred during a work incident. I think it is a work injury.” (*Id.*) He also noted that claimant “distinctly has degenerative wedging starting at the level just above his disc herniation * * *.” (*Id.*)

Claimant was evaluated by Ms. Duke, family nurse practitioner, on February 2, 2015. She noted that claimant was losing feeling in his legs and had severe pain. Her assessment was thoracic back pain, disc disorder of thoracic region, and spinal stenosis. (Ex. 36-2).

On February 2, 2015, claimant requested acceptance of a “Thoracic Disc Herniation” as a new/omitted medical condition. (Ex. 39).

On February 3, 2015, Dr. Miller requested authorization to perform a T7-8 discectomy. “Spinal stenosis, thoracic region” was listed as the diagnosis. (Ex. 38).

On February 13, 2015, Dr. Borman examined claimant at the employer’s request. Dr. Borman found objective findings of thoracic kyphosis and noted that imaging studies demonstrated significant thoracic spinal abnormalities including contiguous vertebral body wedging of the thoracic spine, as well as a small disc extrusion at T7-8 that “confirms his thoracic spinal kyphosis.” (Ex. 40-10). For diagnosable conditions, Dr. Borman listed prior existing Scheuermann’s kyphosis of the thoracic spine associated with anterior vertebral body wedging and significant thoracic kyphosis. He stated that the kyphosis was also associated with degenerative disc problems at the mid-thoracic spine region. Dr. Borman opined that the work injury reasonably and logically could have caused a thoracic spine strain with the lifting episode, and that the thoracic strain was a material cause of claimant’s subsequent need for treatment. (*Id.*)

Dr. Borman reported that claimant had significant preexisting arthritic conditions in the lumbar spine. When asked to identify the preexisting condition, he identified “Scheuermann’s kyphosis of thoracic spine at T7, T8, T9.” (Ex. 40-10-11). He noted that claimant’s arthritic condition was “well

documented” on his “thoracic spine [MRI] study and his lumbar spine x-rays.” (Ex. 40-11). He concluded that the preexisting conditions “combined with the work injury to cause disability and need for treatment,” and that the “initial disability and need for treatment was the work event of November 5, 2014.” (*Id.*) However, Dr. Borman opined that claimant’s current disability/need for treatment was his Scheuermann’s kyphosis with vertebral wedging of the mid-thoracic spine. (*Id.*) When asked to explain the change in circumstances to support his opinion that the work injury was no longer the major contributing cause, Dr. Borman responded: “[Claimant] has no further spinal tenderness; specifically, no tenderness in his thoracic spine. Therefore, thoracic spine muscular strain related to the November 05, 2014 work event has resolved” and claimant’s current need for treatment was due to “this thoracic spine abnormality that pre-dated the November 05, 2014 work event.” (Ex. 40-11-12).

Dr. Miller did not concur with Dr. Borman’s report. (Ex. 41).

On February 27, 2015, the employer modified its acceptance to accept, effective November 5, 2014 (the date of injury), lumbar and thoracic strains “combined with preexisting lumbar and thoracic degenerative spine and T7-8 disc disease/herniation and Sheuermann’s [*sic*] kyphosis to cause the initial need for medical treatment of [claimant’s] lumbar and thoracic strain conditions.” (Ex. 42).

On March 2, 2015, the employer issued a denial. The first paragraph of the denial stated that the employer had “received medical evidence * * * indicating the major contributing cause of your current condition and need for treatment and/or disability is no longer your accepted lumbar strain. Rather, it appears your current condition and need for treatment and/or disability is due in major part to a pre-existing T7-8 disc herniation, lumbar and thoracic degenerative spine and disc disease and Sheuermann’s [*sic*] kyphosis.” (Ex. 44-1). The denial then stated that the employer was denying “T7-8 disc herniation, lumbar and thoracic degenerative spine and disc disease and Sheuermann’s [*sic*] kyphosis, *effective 11/5/2014.*” (*Id.*; emphasis supplied). The denial was based “in whole or in part” on Dr. Borman’s opinion. Finally, the denial stated that “[t]he accepted portion of your claim will continue to be processed pursuant to Oregon Law.” (*Id.*) Claimant requested a hearing.

At hearing, the parties agreed that the issue was compensability of claimant’s “back condition,” with the “primary issue” a T7-8 disc herniation. (Tr. 1). In opening statements, claimant’s position was that the employer’s denial was an impermissible “back-up” denial because it listed the date of injury as the

effective date, which meant that the claim as a whole was never compensable. (Tr. 2). The employer responded that while the denial “may not be perfect,” it was:

“clear in its context following a Modified Notice of Acceptance accepting a combined condition. It responds to two things; one, the independent medical examination which finds the combined condition, and two, a request to accept as a new or omitted condition a T7-8 disc herniation, and ultimately finds that these conditions exist, but are not caused in major part by the independent inj—by the accepted industrial injury, but instead are caused by the preexisting conditions satisfactory to the arthritic process.” (Tr. 3).

CONCLUSION OF LAW AND OPINION

The ALJ upheld the employer’s denial, finding that it was procedurally valid, and that Dr. Borman’s opinion persuasively established the requisite “change of circumstances” justifying the denial.

On review, claimant contends that the employer’s denial was an improper “back up” denial, because it was “effective November 5, 2014,” which was the date of acceptance of the compensable strain injuries. Consequently, he argues that the denial effectively denied the compensable conditions, and must be set aside. On the merits, claimant contends that he has persuasively established the compensability of his T7-8 disc herniation. For the following reasons, we agree that claimant’s T7-8 disc herniation is compensable as a new/omitted medical condition.

We begin by addressing the validity of the employer’s March 2, 2015 denial. As noted above, the employer explained at hearing that its March 2, 2015 denial responded to both the accepted combined condition and a new/omitted T7-8 disc herniation claim. (Tr. 3). Claimant did not object to that characterization, but continued to argue that the denial was invalid. We disagree with claimant’s contention that the denial denied the previously compensable conditions. Rather, we interpret the denial to: (1) assert that the lumbar and thoracic strain conditions were both part of a combined condition from the initial date of injury; (2) provide that the conditions that the work injury combined with (T7-8 disc herniation, lumbar and thoracic degenerative spine and disc disease, and Sheuermann’s

kyphosis) were never independently compensable (hence the November 5, 2014 effective date listed after these conditions); and (3) assert that the compensable injury had ceased to be the major contributing cause of the combined conditions as of the date of the denial (in the absence of an effective date relating to the “ceases” portion of the denial).

Such an interpretation is consistent with the context in which the denial was issued, and with the parties’ description of the issues at hearing and the employer’s explanation of what it intended to deny.¹ Accordingly, under these particular circumstances, we consider the denial to be a valid “ceases” denial, effective the date of the denial, as well as a denial of the T7-8 disc herniation independently, effective November 5, 2014 (the date of claimant’s work injury).² Moreover, because the parties agreed to litigate the compensability of those conditions in the event the denial was found valid, we address the merits of the “ceases” and new/omitted T7-8 disc herniation denials.

We turn to the “ceases” denial. In *Brown v. SAIF*, 262 Or App 640 (2014), the court concluded that the correct inquiry under ORS 656.262(6)(c) was whether the claimant’s “work-related injury incident” (and not the accepted condition) remained the major contributing cause of the disability/need for treatment of the combined condition. 262 Or App at 656. Therefore, a carrier may deny the accepted combined condition if the “otherwise compensable injury” (*i.e.*, the work-related injury incident) ceases to be the major contributing cause of the combined condition. See *Rogelio Barbosa-Miranda*, 66 Van Natta 1666, 1667 (2014).

The word “ceases” presumes a change in the worker’s condition or circumstances such that the “otherwise compensable injury” is no longer the major contributing cause of the disability/need for treatment of the combined condition. *Wal-Mart Stores, Inc. v. Young*, 219 Or App 410, 419 (2008). Thus, in accordance with the *Brown* rationale, to support its denial under ORS

¹ The denial also stated that “[t]he accepted portion of your claim will continue to be processed pursuant to Oregon Law.” (Ex. 44-1).

² To the extent the denial also denies “lumbar and thoracic degenerative spine and disc disease and Sheuermann’s [*sic*] kyphosis,” we interpret that portion of the denial as denying those preexisting conditions independently from the date of injury. Because claimant had not made new/omitted medical condition claims for those conditions at the time the denial issued, that portion of the denial denying those conditions as independent claims was premature and invalid. *Altamirano v. Woodburn Nursery, Inc.*, 133 Or App 16, 19-20 (1995) (a denial issued in the absence of a claim is a legal nullity); *Barbara J. Ferguson*, 63 Van Natta 2253, 2258 (2011).

656.262(6)(c), the employer must prove a change in claimant's condition or circumstances such that the "work-related injury incident" ceased to be the major contributing cause of the disability/need for treatment of the combined condition. ORS 656.262(6)(c); *Roxie J. Bartell-Fudge*, 66 Van Natta 1009, 1012 (2014). The "effective date" of the combined condition acceptance determines the baseline for determining whether there has been a change in claimant's condition or circumstances to justify a denial under ORS 656.262(6)(c). *Bacon*, 208 Or App at 210.

Here, the employer accepted the combined condition effective November 5, 2014, and denied the combined condition on March 2, 2015. (Exs. 42, 44). Therefore, the employer must establish that, as of the date of the denial, claimant's combined condition had changed so that the otherwise compensable injury ceased to be the major contributing cause of disability and need for treatment of the combined conditions. See *Cassandra R. Stockwell*, 67 Van Natta 94 (2015) (date denial issued used when evaluating whether there had been a "change" in condition/circumstances); *Jorge M. Chan-Kantun*, 62 Van Natta 2049 (2010) (same).

Determination of this issue presents a complex medical question that must be resolved by expert medical opinion. See *Barnett v. SAIF*, 122 Or App 279 (1993). We give more weight to those opinions that are well reasoned and based on complete information. See *Somers v. SAIF*, 77 Or App 259, 263 (1986).

We do not consider Dr. Borman's opinion sufficient to satisfy the employer's burden of proof. Specifically, in explaining the "change of circumstances" that caused him to conclude that the major cause of claimant's disability and need for treatment was now the preexisting conditions, Dr. Borman noted that claimant had no tenderness in his thoracic (or lumbar)³ spine, which demonstrated a resolved sprain. (Ex. 40-11). Thus, his discussion of the combined condition focused primarily on the resolution of the strain symptoms, and we do not find that it adequately analyzed the "work-related injury incident," as required by *Brown*. See 262 Or App at 656; *Bradley R. Madrid*, 67 Van Natta 2228 (2015); *Sandy Anderson*, 67 Van Natta 1019, 1020 (2015).

³ The employer accepted lumbar and thoracic strain combined conditions. However, the parties' current dispute is focused on the thoracic spine condition. More precisely, as indicated at hearing, the "primary issue" is a "T7-8 disc herniation." (Tr. 1).

Accordingly, on this record, the employer has not satisfied its burden of proof regarding a “ceases” denial. *See Jason J. Skirving*, 58 Van Natta 323, 324 (2006), *aff’d without opinion*, 210 Or App 467 (2007) (where the carrier has the burden of proof under ORS 656.266(2)(a), the medical evidence that supports its position must be persuasive). Consequently, we set aside the employer’s “ceases” denial.

We turn to the employer’s denial of an “independent” claim for a T7-8 disc herniation. Claimant contends that the medical evidence persuasively establishes the compensability of his T7-8 disc herniation as a new/omitted medical condition.⁴ For the following reasons, we agree.

To prevail on his new/omitted medical condition claim for a T7-8 disc herniation (as separate and distinct from the condition as a preexisting component of a combined condition), claimant must establish that the work injury is a material contributing cause of his disability/need for treatment for that condition.⁵ ORS 656.005(7)(a); ORS 656.266(1); *Kenneth Anderson*, 60 Van Natta 2538, 2545-46 (2008).

Because of the divergent medical opinions regarding the cause of the disability/need for treatment of the claimed condition, expert medical opinion must be used to resolve the compensability issue. *Barnett*, 122 Or App at 282. In evaluating the medical evidence, we rely on those opinions that are both well reasoned and based on accurate and complete information. *Somers*, 11 Or App at 263.

Here, claimant saw Dr. Miller for mid-thoracic back pain on January 17, 2015. (Ex. 35). Dr. Miller noted objective clinical findings of pain with palpation of the right thoracic spine, decreased sensation of the knee and leg into the foot, and a positive Babinski sign. (Ex. 35-2-3). He opined that claimant had a T7-8 disc herniation that occurred during his work injury, causing spinal cord compression with corresponding clinical findings, and recommended a spinal decompression for the thoracic disc problem. (Ex. 35-3). We find Dr. Miller’s opinion persuasive, as he accounted for the sudden onset of claimant’s mid-back

⁴ The employer does not raise a “combined condition” defense related to the T7-8 disc herniation claim.

⁵ The existence of the claimed condition is not in dispute. *See Maureen Y. Graves*, 57 Van Natta 2380, 2381 (2005).

symptoms and radiating pain and need for treatment after the work injury. *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 the onset of symptoms is one factor that should be considered, and may be the most important factor); *Ryan J. Jones*, 67 Van Natta 161 (2015).⁶

Dr. Borman, on the other hand, did not specifically address the compensability of a T7-8 disc herniation as an independent claim, separate and distinct from the condition as a component of the accepted combined condition. *See Anderson*, 60 Van Natta at 2543. Therefore, his opinion is not probative on this issue.

Accordingly, for these reasons, we conclude that Dr. Miller's opinion persuasively supports a conclusion that claimant's work injury was at least a material contributing cause of the disability/need for treatment for the T7-8 disc herniation.⁷ Consequently, we set aside the employer's denial of the claimed condition.

Claimant's attorney is entitled to an assessed fee for services at the hearing level and on review for finally prevailing over the aforementioned denials. 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's services at the hearing level and on review regarding these issues is \$12,000,

⁶ We distinguish this case from *Michael R. France*, 69 Van Natta 389 (2017). In *France*, the carrier had accepted "right shoulder strain combined with pre-existing rotator cuff tear, including pre-existing tear of the supraspinatus tendon." *Id.* at 391. Thereafter, the carrier denied the current combined condition, and that denial became final. The claimant subsequently requested a hearing regarding the compensability of a new/omitted medical condition claim for a right rotator cuff tear. The ALJ found that the condition was not compensable, and we affirmed. In doing so, we explained that the physician's opinion supporting compensability did not address the right rotator cuff tear as an independent condition distinct or separate from its status as the preexisting condition component of the previously accepted and denied combined condition. This conclusion was based on the physician's opinion that the tear was due to a prior failed surgery and existed in some capacity before the work injury. Under such circumstances, we held that the physician's opinion supported compensability of the right rotator cuff tear condition as a "combined condition," which was already accepted and denied, and not as an "independent" claim.

Here, in contrast to *France*, Dr. Miller's opinion persuasively supports a conclusion that the T7-8 disc herniation arose directly from the work injury, and did not exist before that event. Therefore, based on this particular record (which contains the aforementioned persuasive opinion), we find the claimed T7-8 disc herniation compensable as an "independent" new/omitted medical condition.

⁷ As previously noted, the employer does not assert a "combined condition."

payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by the record and claimant's appellate briefs), the complexity of the issues, the values of the interest involved, the risks 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 denials. *See* ORS 656.386(2); OAR 438-015-0019; *Nina Schmidt*, 60 Van Natta 169 (2008); *Barbara Lee*, 60 Van Natta 1, *recons*, 60 Van Natta 139 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

ORDER

The ALJ's order dated December 28, 2015 is reversed. The employer's denials are set aside and the claims are remanded to it for processing according to law. For services at the hearing level and on review regarding the employer's denials, claimant's attorney is awarded an assessed fee of \$12,000, to be paid by the employer. Claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denials.

Entered at Salem, Oregon on March 16, 2017