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In the Matter of the Compensation of  
**HERMAN R. RAMBO, Claimant**  
WCB Case No. 15-00656  
ORDER ON REVIEW  
Jodie Phillips Polich, Claimant Attorneys  
Gress, Clark, Young, & Schoepper, Defense Attorneys

Reviewing Panel: Members Ousey, Johnson, and Wold. Member Johnson dissents.

Claimant requests review of Administrative Law Judge (ALJ) Reichers's order that upheld the self-insured employer's denial of his injury claim for a low back condition. On review, the issue is compensability. We reverse.

FINDINGS OF FACT

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

In 2010, claimant, a truck driver, compensably injured his low back and the employer accepted a lumbosacral strain and right lumbar L4-5 disc herniation. (Ex. 10). He had two surgeries to address the disc herniation. (Ex. 9-2). His claim was closed in June 2011 with an award of 15 percent permanent impairment. (Ex. 9-1).

Between June 2011 and January 2015, claimant was not treated for any low back pain. (Tr. 22).

On January 5, 2015, while in Canada on the "back-haul" of a work trip, claimant slipped on some ice, his legs came up from underneath him, and he "landed completely" on his back. (Tr. 12). At the time of the work injury, claimant was also suffering from flu symptoms, including aches and pain. (*Id.*) During his return trip that day, he contacted the employer to report that he had been hurt when he slipped on some ice. (*Id.*) He also requested a local run when he returned because of his flu symptoms. (Tr. 12-13). He drove about 800 miles over two days to finish his trip. (Tr. 24).

Claimant experienced some low back soreness following his fall at work, but he was also "achy" due to the flu. (Tr. 15, 16, 28). He did not seek treatment in Canada because he was sick and wanted to get back home as soon as possible and deal with it at home. (Tr. 14). He also was unsure of how to get treated in Canada, and he had limited funds and food. (*Id.*) When he arrived home, claimant did not immediately return to work because he had the flu. (Tr. 13).

Claimant testified that, after the fall at work, he felt pain “[f]rom my mid-back down and mainly around where I would consider the L4 and 5 area because that’s where I’ve had the situation before.” (Tr. 16).

At home on Saturday, January 10, 2015, while wrapping a cord around a shop vacuum, he felt a “pop” in his back and his “legs gave out and [he] collapsed.” (Tr. 15, 18). Claimant was examined by Ms. Custer, a family nurse practitioner, who recorded complaints of mid to lower back pain and intermittent tingling in the right leg. (Ex. 12-1). Claimant reported “back/body” aches all week. (*Id.*) Ms. Custer’s history included the January 10, 2015, shop vacuum incident, the January 5, 2015 work injury, and claimant’s previous compensable back injury and surgeries. (*Id.*) Her examination findings included point tenderness at L4-5, pain with palpation to the right lower back at L4-5, paraspinous muscle tension, and pain in right lower back with extension, lateral flexion, and lateral twisting. (Ex. 12-2). She diagnosed a soft tissue strain. (*Id.*)

On January 14, 2015, Dr. Smith examined claimant, taking a history of the slip and fall at work and the shop vacuum incident. (Ex. 17-1). Claimant reported that, after the work fall, he had “pain in back from top of back to bottom.” *Id.* Claimant also described being unable to distinguish cold and flu symptoms from back pain related to his fall at work. (*Id.*) He acknowledged the more acute symptoms followed the shop vacuum incident. (*Id.*) Dr. Smith recorded tenderness with bending forward, right lateral flexion, and palpation of the right lumbar spine region. (Ex. 17-3).

Dr. Smith did not attribute the more acute lumbar symptoms to the work injury, because they occurred five days later at home due to the shop vacuum incident. (Ex. 17-3). He believed that claimant’s symptoms immediately after the work injury were not severe enough for medical treatment and may not have been reported, but for the later shop vacuum incident. (*Id.*) By history, Dr. Smith diagnosed a back contusion and mild strain. (*Id.*) He also diagnosed a lumbar strain, concluding that it was not related to the work injury and may be a combined condition. (*Id.*)

After the employer denied his injury claim, claimant requested a hearing. (Ex. 22-1).

On January 30, 2015, Dr. Smith reported that claimant’s symptoms were “clearly worsening” and ordered an MRI. (Ex. 23-1-2). Dr. Smith also requested an independent medical examination to determine causality. (Ex. 23-2). He indicated that claimant’s lower back problems were not work-related because his

present symptoms followed the shop vacuum incident at home and not the fall at work, which Dr. Smith characterized as not very significant. (*Id.*) Dr. Smith acknowledged claimant's complaints of flu-like symptoms, including coughing. (*Id.*) Dr. Smith was uncertain about whether claimant's back pain was from a bad cough/coughing fit or from the fall. (*Id.*)

Dr. Smith interpreted the MRI as showing impingement "due to foraminal stenosis," a chronic condition, and reiterated that claimant did not have any significant lumbar symptoms until after the shop vacuum incident at home. (Ex. 25).

Claimant returned to his primary care physician, Dr. Barich, for further treatment. (Ex. 25a-1). Dr. Barich noted "back pain," which had not improved since the January 5, 2015 fall. (*Id.*) Dr. Barich diagnosed lumbar disc disease with radiculopathy. (*Id.*) Because claimant's symptoms continued to progress, Dr. Barich referred him to a surgeon. (Ex. 25a-2).

On April 14, 2015, at the employer's request, Dr. Toal, an orthopedic surgeon, examined claimant. (Ex. 28-1). He recorded a history of claimant's previous compensable back injury and surgeries, the January 5, 2015 fall at work, and the January 10, 2015, shop vacuum incident at home. (Ex. 28-1-2). Describing the fall at work, claimant said he was walking across a parking lot when he slipped, "striking his mid-to-low back on the ground." (Ex. 28-2). He reported a small amount of pain in the right lumbar region and right medial elbow pain. (*Id.*) He was "more achy" than injured because of his flu symptoms. (*Id.*)

Dr. Toal agreed with Dr. Smith that, if not for the at-home shop vacuum incident, it was not likely that claimant would have sought medical care. (Ex. 28-7). Therefore, Dr. Toal opined that claimant's January 5, 2015, fall at work was not a material cause of his need for treatment. (*Id.*) He also reasoned that, "[t]o the extent that [claimant] sustained any compensable injury on 01/05/15, there is a combination between the work event and his preexisting lumbar pathology to both cause and prolong his disability and need for treatment." (Ex. 28-8). But, "[b]ecause his current symptoms are not objectively different from those for which he has been treated in the past, the 01/05/15 work incident was never the major contributing cause of his need for treatment." (*Id.*) Dr. Smith concurred with Dr. Toal's report. (Ex. 29).

In May 2015, Dr. Sandquist, a neurosurgeon, examined claimant and noted a history of falling on ice and landing on his back in January 2015. (Ex. 28b-1). Claimant reported that, since his fall, he had noticed multiple occasions of a

popping sensation in his low back, the first of which led him to collapse on the ground. (*Id.*) Dr. Sandquist opined that claimant “likely has symptoms relating to the impingement of the L4 V nerve root likely due to his spondylosis there may be a component of spondylolisthesis.” (Ex. 28b- 2). Dr. Sandquist referred claimant for an epidural steroid injection. (*Id.*) He diagnosed lumbar radiculopathy and thoracic or lumbosacral neuritis or radiculitis, unspecified. (*Id.*)

In a concurrence letter drafted by claimant’s attorney, Dr. Barich agreed that “the cause of [claimant’s] current back injury is his 1-5-2014 [sic] fall, and not the incident at home 5 days later where he bent over wrapping a cord around a shop vac.” (Ex. 31-1). Dr. Barich opined that claimant’s previous 2010 low back injury and resulting surgeries, as well as his degenerative disc disease, were not a significant cause of his current need for treatment. (Ex. 31-1-2). He based his opinion on claimant’s successful recovery from the surgeries and return to his very physical work duties for the last four to five years, without incident, before the January 5, 2015, injury. (*Id.*) Dr. Barich concluded that the January 5, 2015, injury was the major contributing cause of his disability/need for treatment based, in part, on the length and severity of his symptoms. (Ex. 31-2, -3). In determining the major contributing cause, Dr. Barich considered the prior injury/surgery, and degenerative disc disease, as well as the shop vacuum incident. (Ex. 31-2).

On September 15, 2015, Dr. Sandquist performed surgery, including a right L4 laminectomy and inferior L4 to superior L5 facetectomy with complete foraminotomy. (Ex. 31B-1). His post-operative diagnosis remained a right L4 radiculopathy and L4-5 foraminal stenosis. (*Id.*) During the surgery, Dr. Sandquist found a “fragment of bone residual,” which he could not remove without undue compression on the L4 nerve, so he exposed the nerve fully in order to remove it. (*Id.* at 2).

In a concurrence letter drafted by the employer’s attorney, Dr. Toal reiterated his opinion that the January 5, 2015, work incident was not a material cause of claimant’s need for treatment and that there was not a combining. (Ex. 32-1). He strongly disagreed with Dr. Barich’s statement that anyone slipping and falling on ice and landing on one’s back was going to sustain an injury to their back. (*Id.*) He described the statement as “nonsensical” and referred to ice skaters and hockey players falling on the ice without injury. (*Id.*) Assuming that there was a combined condition, Dr. Toal explained that the “fact that claimant had no symptoms following the [January 5, 2015,] fall is the best evidence that the fall could not be the major contributing cause of the need for medical treatment.” (Ex. 32-2). He also concluded that claimant’s preexisting lumbar pathology

was far more likely to be the major contributing cause of the need for medical treatment, as claimant did have “objective pathology that would plausibly explain his ongoing symptoms.” (*Id.*)

In a concurrence letter drafted by claimant’s attorney, Dr. Sandquist opined that, based on his surgical observations, it was medically probable that claimant’s January 5, 2015, fall caused the “bone fragment to go into the L4 nerve causing irritation of the nerve root.” (Ex. 33-1). He also concluded that claimant’s low back condition was a combined condition, because of his previous injury and degenerative disc disease, with the January 5, 2015, fall at work being the major contributing cause of his disability/need for treatment. (Ex. 33-1-2). He based his opinion on claimant’s history, the mechanism of the work injury, the preexisting low back condition (including his degenerative disc disease, prior on-the-job injuries, and subsequent surgeries), objective clinical exam findings, the correlation of symptoms (severity and length) with the slip and fall injury; and observations during the September 15, 2015, surgery. (*Id.*)

During his deposition, Dr. Sandquist explained that “[y]ou can have a nerve injury and then delayed onset of symptoms.” (Ex. 34-16). He also reasoned that the mechanism of injury of the slip and fall, which was much more violent than wrapping a cord around a shop vacuum, was more likely to have caused the L4 nerve irritation. (*Id.*) He noted that claimant’s pathology was mainly stenosis and arthritis, which meant something happened during some event that caused nerve irritation. (*Id.*) Dr. Sandquist added that the bending over to wrap a cord “would not predispose you toward irritation of a nerve.” (Ex. 34-16-17). He explained: “That mechanism is generally done so by extension of the back rather than forward flexion.” (Ex. 34-17). Thus, Dr. Sandquist believed that something irritated the nerve before the shop vacuum incident. (*Id.*)

In a conversation with the employer’s attorney, Dr. Toal reiterated his opinion that the major contributing cause of claimant’s need for treatment was his preexisting lumbar spondylosis. (Ex. 35-5). He described the shop vacuum incident as “trivial” and acknowledged that the “bending forward is not a typical cause of nerve root irritation or sciatica.” (*Id.*) He concluded that the January 5, 2015 fall at work was not the major contributing cause of claimant’s need for treatment/disability for his low back, because he had no immediate symptoms after the fall. (Ex. 32-1-2).

#### CONCLUSIONS OF LAW AND OPINION

In upholding the employer’s denial, the ALJ found that claimant did not establish that his January 5, 2015, work injury was a material contributing cause

of his disability/need for treatment for his low back condition. The ALJ concluded that Dr. Toal's opinion, with which Dr. Smith concurred, was more persuasive than the opinions of Drs. Barich and Sandquist.

On review, claimant contends that his low back injury claim is compensable. For the following reasons, we agree.

Claimant bears the initial burden to prove that his work injury was a material contributing cause of his disability/need for treatment of his low back condition. ORS 656.005(7)(a); ORS 656.266(1); *Cesar Alegria-Delsid*, 65 Van Natta 2429 (2013). The standard for a "material contributing cause" is a "substantial cause, but not necessarily the sole cause or even the most significant cause." See *Knaggs v. Allegheny Techs.*, 223 Or App 91, 93-94 (2008); see also *Summit v. Weyerhaeuser Co.*, 25 Or App 851, 856 (1976) ("material contributing cause" means something more than a minimal cause; it need not be the sole or primary cause, but only the precipitating factor); *John P. Monroe*, 60 Van Natta 317, 320 (2008) (same).

If claimant makes that showing, and the medical evidence establishes that the "otherwise compensable injury" combined with a preexisting condition to cause or prolong disability or a need for treatment, the carrier may prove that the combined condition is not compensable by showing that the "otherwise compensable injury" was 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, 2525 (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."

The causation issue presents a complex medical question that must be resolved by expert medical evidence. See *Uris v. State Comp. Dep't*, 247 Or 420, 426 (1967); *Barnett v. SAIF*, 122 Or App 279, 283 (1993). When presented with disagreement between experts, we give more weight to those opinions that are well reasoned and based on complete information. *Somers v. SAIF*, 77 Or App 259, 263 (1986).

We may give more weight to the opinion of an attending physician or operating surgeon by virtue of their better opportunity to observe a claimant's condition. See *Argonaut Ins. Co. v. Mageske*, 93 Or App 698, 702 (1988) (more weight given to treating physician who had opportunity to observe the claimant's condition during surgery); *Weiland v. SAIF*, 64 Or App 810, 814 (1983) (more

weight given to treating physician because of a better opportunity to evaluate the claimant's condition). However, we may or may not give greater weight to the attending physician's opinion depending on the record in each case. *Dillon v. Whirlpool Corp.*, 172 Or App 484, 489 (2001).

The parties agree that claimant sustained two potentially injurious events, *i.e.*, the January 5, 2015, fall at work and the January 10, 2015, shop vacuum incident at home. The initial issue is whether claimant established that the fall at work was a material contributing cause of his disability/need for treatment for his low back condition. ORS 656.005(7)(a). For the following reasons, we find that claimant has met his burden of proof through the opinions of Dr. Barich, his treating physician, and Dr. Sandquist, his operating surgeon.

Drs. Barich and Sandquist ultimately opined that the January 5, 2015, fall at work was at least a material contributing cause of claimant's disability/need for treatment of his low back condition. (Exs. 31-1, 33-1). For the following reasons, we find their opinions persuasive.

Dr. Barich acknowledged claimant's 2010 injury/surgeries and his preexisting degenerative disc disease, but opined that the fall at work was at least a material contributing cause of disability/need for treatment because, for the last four to five years, claimant had been able to do his regular, very physical work duties without incident, up until the fall at work. (Ex. 31-1-2). Dr. Barich also acknowledged the shop vacuum incident at home, but reasoned that such a "regular" activity was unlikely to have resulted in the onset of acute lumbar symptoms in the absence of a previous back injury, which was consistent with claimant's history of a fall at work that injured his back five days earlier. (Ex. 31-2). We find his opinion to be well reasoned and based on an accurate history. *Somers*, 77 Or App at 263.

Dr. Barich's opinion is also supported by the opinion of Dr. Sandquist. Dr. Sandquist opined that, based on his surgical observations, including a bone fragment irritating the L4 nerve root, the work fall was at least a material contributing cause of disability/need for treatment. (Ex. 33-1-2). We find Dr. Sandquist's opinion to be persuasive, because it was based on his direct surgical observations. *See Mageske*, 93 Or App at 702.

During his deposition, Dr. Sandquist acknowledged the delay in claimant's lumbar symptoms. (Ex. 34-8, -10). Dr. Sandquist reasoned, however, that the fall at work was more likely the cause of claimant's nerve injury because it was a more violent mechanism of injury than the shop vacuum incident. (Ex. 34-20-21). He

further explained that the shop vacuum incident likely would not have caused a nerve injury because it involved forward flexion and not back extension. (Ex. 34-16-17). We find Dr. Sandquist's opinion to be based on a sufficiently accurate history, which included consideration of claimant's previous injury/surgeries, preexisting conditions, the fall at work, a delay in severe symptoms, and the shop vacuum incident. (Exs. 33, 34-7). His opinion also considered the bases of Dr. Toal's contrary opinion.

In contrast, Dr. Toal, whose opinion, with which Dr. Smith concurred, opined that claimant's fall at work was not even a material cause of his disability/need for treatment of his low back condition. (Exs. 28-7, 29, 32-1). Throughout his opinion, however, Dr. Toal relied on a history of claimant having had no low back symptoms for five days after the fall, with the onset of his acute symptoms occurring when he was wrapping the cord around the shop vacuum. (Exs. 28-7, 32-2). Dr. Toal opined that claimant would not have sought medical treatment but for the shop vacuum incident. (*Id.*) For the following reasons, we do not find Dr. Toal's opinion persuasive.

Because Dr. Toal's causation opinion is specifically related to a lack of low back symptoms following the fall at work, we consider that issue first in evaluating his opinion. Here, although questioning the reliability of claimant's testimony of low back pain following his fall at work, the ALJ did not make any demeanor-based credibility findings. When the issue of credibility concerns the substance of a witness's testimony, we are equally qualified to make our own determination of credibility. *Coastal Farms Supply v. Hultberg*, 84 Or App 282 (1987). Inconsistencies with medical records do not automatically diminish the probative value of a witness's testimony. We do not necessarily rely on such records if we find other evidence, such as a witness's testimony, more persuasive. *See Timothy G. Gilman*, 64 Van Natta 1815, 1816-17 (2012); *William J. Cook*, 58 Van Natta 625, 626 (2006).

Claimant testified that he had some lower back pain following his January 5, 2015, fall at work. (Tr. 15, 16, 28). According to claimant, the fall caused pain "[f]rom my mid-back down around where I would consider the L4-and 5 area because that's where I've had the situation before."<sup>1</sup> (Tr. 16). Claimant's acute lumbar symptoms, however, occurred five days later, on January 10, 2015, when he was bending over a shop vacuum to wrap a cord. (Tr. 18, 25-26).

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<sup>1</sup>We acknowledge claimant's testimony that his severe low back pain, numbness, and loss of sensation, arose after the shop vacuum incident. (Tr. 25-26). Claimant explained that, after the fall at work, he could not distinguish low back pain from the fall from his flu symptoms because he was sick with a fever at that time. (Tr. 29).

On the same day as the shop vacuum incident, claimant sought treatment for his low back pain from Ms. Custer, a family nurse practitioner. (Ex. 12-1). Ms. Custer reported a history of “back/body aches all week.” (*Id.*) Dr. Smith also reported a history of back pain following the fall at work, though tolerable enough for claimant to drive the 800 miles home. (Ex. 17-1). Thus, based on our review of the record, we disagree with the employer’s contention that claimant did not have *any* low back pain until after the January 10, 2015, shop vacuum incident.

Because we have concluded that claimant’s testimony and the contemporaneous medical records establish that he had some low back pain following the fall at work and before the shop vacuum incident, we discount the persuasiveness of Dr. Toal’s causation opinion because he had an inaccurate understanding of claimant’s symptom presentation after the work injury. *See Miller v. Granite Const. Co.*, 28 Or App 473, 476 (1977) (a medical opinion that is based on an incomplete or inaccurate history is unpersuasive).

Moreover, Dr. Toal described the shop vacuum incident as “trivial,” and acknowledged that the mechanism of injury for the shop vacuum incident was unlikely to have caused nerve irritation. (Ex. 35-5). Yet, based on the onset of claimant’s acute symptoms immediately after the shop vacuum incident, he concluded that, but for that incident, claimant would not have sought medical treatment for his low back condition. (Ex. 28-7). We find such reasoning to be speculative and internally inconsistent. Thus, we further discount the persuasiveness of his opinion. *Howard L. Allen*, 60 Van Natta 1423, 1424-25 (2008) (internally inconsistent medical opinion, without explanation for inconsistencies, found unpersuasive).

Finally, Dr. Toal did not adequately address Dr. Sandquist’s explanation that with a nerve injury there can be a delayed onset of symptoms. (Ex. 34-16). As noted earlier, Dr. Toal’s opinion was substantially based on the delay in the onset of claimant’s acute symptoms. Yet, he did not rebut Dr. Sandquist’s explanation that symptoms of a nerve injury may be delayed. (Exs. 28, 32). Moreover, Dr. Toal agreed with Dr. Sandquist that the mechanism of injury of claimant’s fall at work (where his feet came out from underneath him and he landed completely on his back) was more likely to have caused nerve irritation than the shop vacuum incident, because the fall was more violent and a nerve injury is “generally done so by extension of the back rather than forward flexion.” (Exs. 34-16-17, 35-4-5). Because Dr. Toal did not adequately rebut Dr. Sandquist’s explanation for the delay in the onset of neurologic symptoms and agreed with Dr. Sandquist that the most likely mechanism of injury was the fall at work, we do not find his opinion persuasive. *See Janet Benedict*, 59 Van Natta 2406, 2409 (2007), *aff’d without*

*opinion*, 227 Or App 289 (2009) (medical opinion unpersuasive when it did not address contrary opinion). Dr. Smith, who concurred with Dr. Toal’s medical report, is unpersuasive for the same reasons.<sup>2</sup>

Because we have found that claimant’s fall at work was at least a material contributing cause of his disability/need for treatment, and the employer has raised the “combined condition” issue, it is the employer’s burden to establish a combined condition and that the work injury was not the major contributing cause of disability/need for treatment of the combined condition. ORS 656.005(7)(a)(B); ORS 656.266(2)(a); *Kollias*, 233 Or App at 505; *Scoggins*, 56 Van Natta at 2525. Based on the following reasoning, we conclude that the employer has not met its burden.

To meet its burden, the employer relies on the opinion of Dr. Toal. Yet, Dr. Toal did not support the existence of a combined condition. (Ex. 32-1). Because Dr. Toal did not believe that a combined condition existed, or that claimant’s work injury was a material contributing cause of disability/need for treatment for his low back condition, we are not persuaded that he adequately weighed the relative contribution of the work injury when discussing an assumed combined condition. *See Robert Prabucki*, 61 Van Natta 1877, 1881-82 (2009) (where the claimant established an “otherwise compensable injury,” physicians’ opinions that his symptoms were not due to the work injury, when discussing a hypothetical “combined condition,” did not adequately weigh the contribution of the work injury), *aff’d*, 240 Or App 384 (2011).

Furthermore, Dr. Toal initially reported that, assuming a combination between the work event and claimant’s preexisting lumbar pathology to cause/prolong his disability/need for treatment, the work event was never the major contributing cause of his need for treatment, because his “current” symptoms were not objectively different from those for which he had been treated in the past. (Ex. 28-8). That statement is unexplained, and does not address or weigh claimant’s lack of back problems, and his ability to perform heavy work without symptoms in the interim between his 2010 surgical treatment and the January 5, 2015, work injury. These were important considerations for Drs. Barich and Sandquist in rendering their causation opinions. (Exs. 31, 34-19-21).

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<sup>2</sup> Dr. Smith indicated in his chart notes that claimant’s low back condition likely was not related to his fall at work, yet he also requested an independent medical examination to determine causality. (Ex. 23-2). Although Dr. Smith concurred with Dr. Toal’s report, he offered little independent analysis regarding causation. As we have found Dr. Toal’s opinion does not persuasively weigh against compensability, we reach the same conclusion regarding Dr. Smith’s concurrence. *See Jerry B. Eads*, 64 Van Natta 451, 458 (2012).

Dr. Toal's opinion is also vague. In his opinion, Dr. Toal refers to "current" symptoms. (Ex. 28-8). In doing so, he is unclear as to whether he is referencing claimant's disability/need for treatment as of the exam date (three months post-work injury) or the first treatment date. Dr. Toal's opinion is also ambiguous as to which symptoms he is comparing. In 2010 and 2011, claimant underwent surgical treatment for a right lumbar L4-5 disc herniation, with disc material, including calcified disc material, surgically removed, as well as a right L5 hemilaminectomy. (Exs. 3, 5). Yet, the L4 nerve root was not decompressed. (*Id.*) In contrast, in 2015, Dr. Sandquist performed a right L4 laminectomy, inferior L4 to superior L5 facetectomy, with complete foraminotomy, with microsurgical dissection, to decompress the right L4 nerve root. (31B). Dr. Toal did not explain why he considered claimant's "current" 2015 symptoms (which were addressed by the surgery Dr. Sandquist performed) to be the *same* symptoms that were addressed by the 2010 surgical treatment. Without such an explanation, we further discount Dr. Toal's opinion.

Dr. Toal had the opportunity to review Dr. Sandquist's 2015 operative report. (Ex. 35-1). He opined that "the pathology removed" by Dr. Sandquist preexisted the work injury. (Ex. 35-2). However, Dr. Toal did not address or compare the relative conditions and surgeries (both at the L4-5 level, the prior surgeries addressing disc herniation/calcification and nerve root compression at L5, the 2015 surgery addressing nerve root compression at L4). Instead, Dr. Toal merely noted that a fall onto the back is not the typical mechanism to cause a disc herniation or loading of the lumbar spine, and because "there's fairly significant preexisting pathology identified on imaging and he's got a history of treatment for back pain and surgery \* \* \* the preexisting lumbar spondylosis was the major contributing cause of his need for treatment if there were a combined condition." (Ex. 35-5).

We find Dr. Toal's "combined condition" opinion to be inadequately reasoned due to its lack of accuracy and specificity when discussing claimant's preexisting condition and course of treatment. Moreover, it is inconsistent in both stating that the January 10, 2015 shop vacuum incident caused the need for treatment and provoked "sciatica," and then stating the January 10, 2015 at home injury was "trivial," and not likely to produce root irritation or sciatica. (Exs. 18-8, 35-4-5). In the absence of an explanation for these apparent inconsistencies, we find Dr. Toal's opinion unpersuasive. *See Allen*, 60 Van Natta at 1424-25. We also find unpersuasive the conclusory manner in which Dr. Toal weighed the relative contribution of claimant's preexisting condition and the work injury in regard to his disability/need for medical treatment. *See Moe v. Ceiling Systems Inc.*, 44 Or

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App 429, 433 (1980) (rejecting unexplained and conclusory opinions). Where the employer has the burden of proof under ORS 656.266(2)(a), the medical opinion supporting the employer's denial must be persuasive. *Tom Darcy*, 59 Van Natta 2125 (2007); *Jason J. Skirving*, 58 Van Natta 323, 324 (2006).

Because Dr. Smith concurred with Dr. Toal's opinion, but offered very little independent analysis, we find Dr. Smith's opinion unpersuasive for the same reasons. See *Jerry B. Eads*, 64 Van Natta 451, 458 (2012) (medical opinion that relied on other provider's opinion and offered very little independent analysis regarding causation found as persuasive as the opinions upon which it relied).

In summary, based on the persuasive opinions of Drs. Barich and Sandquist, we conclude that claimant's fall at work was at least a material contributing cause of his disability/need for treatment of his low back condition. We also conclude that the opinions of Drs. Toal and Smith are insufficient to meet the employer's burden of establishing that the work injury was not the major contributing cause of disability/need for treatment of a combined condition. Accordingly, we set aside the employer's denial of claimant's low back condition.

Claimant's attorney is entitled to an assessed fee for services at the hearing level and on review. 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 is \$14,000. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by the record, claimant's appellate briefs, and his counsel's fee submission<sup>3</sup>), 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 denial, to be paid by the employer, See ORS 656.386(2); OAR 438-015-0019; *Nina Schmidt*, 60 Van Natta 169 (2008); *Barbara Lee*, 60 Van Natta 12, *recons*, 60 Van Natta 169 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

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<sup>3</sup> We are obligated to award a reasonable attorney fee, irrespective of a specific objection to a claimant's counsel's attorney fee request. See *Dennis E. Reynolds*, 69 Van Natta 1456, 1461 n 7 (2017); *Terilynn McNeil-Dane*, 67 Van Natta 246 (2015); *Daniel M. McCartney*, 56 Van Natta 460 (2004).

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ORDER

The ALJ's order dated December 2, 2016 is reversed. The employer's denial is set aside and the claim is remanded to the employer for processing in accordance with law. For services at the hearing level and on review, claimant's attorney is awarded an assessed fee of \$14,000, payable 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 denial, to be paid by the employer.

Entered at Salem, Oregon on April 24, 2018

Member Johnson dissenting.

The majority concludes that claimant's low back condition is compensable. Because I disagree with the majority's analysis of the medical evidence, I respectfully dissent.

Claimant must establish that his work injury was a material contributing cause of his disability or need for treatment of the disputed low back condition. ORS 656.005(7)(a); ORS 656.266(1). To do so, he relies on the opinions of Drs. Barich and Sandquist, his attending physician and orthopedic surgeon, respectfully. However, I do not find those physicians' opinions persuasive because they are based on an inaccurate and incomplete history. *See Miller v. Granite Constr. Co.*, 28 Or App 473, 478 (1977) (medical opinion unpersuasive where it was based on inaccurate information).

Drs. Barich and Sandquist understood that claimant's low back complaints began soon after his January 5, 2015, fall at work, without reference to the January 10, 2015, shop vacuum incident at home. (Exs. 25-a, 28b). However, claimant testified that his acute low back symptoms did not occur until January 10, 2015, when he was at home. (Tr. 16-17). He was bending down to wrap a cord around a shop vacuum, when his legs "gave out" from underneath him and he "collapsed." (Tr. 18). This is when he first experienced numbness radiating down his right "glute or butt cheek" and in his right foot, which felt like "cotton balls are in between the toes." (*Id.*) It was not until after the shop vacuum incident that claimant had a "5-6" level of back pain and needed medication to sleep. (Tr. 25).

While the majority finds earlier reports of low back pain, I disagree. Claimant testified that he “didn’t feel anything at the time” of his work-related fall beyond aching from the flu. (Tr.14, 25). His low back pain began only after the January 10, 2015, shop vacuum incident. (Tr. 17, 26). Moreover, immediately after the fall at work, claimant was able to continue his work activities uninterrupted, which included driving a commercial truck more than 800 miles in two days. (Tr. 24).

The above history is consistent with the history recorded by Drs. Smith and Toal. (Exs. 17-1, 28-2). They opined that the lack of low back symptoms and of a need for treatment for several days following the work-related fall evidenced that the fall was not a material contributing cause of claimant’s low back condition. (Exs. 17-3, 28-7, 32-2). Drs. Barich and Sandquist have not specifically addressed claimant’s lack of low back pain immediately after the work-related fall, nor have they adequately addressed his ability to complete his work activities without interruption, after which he reported being ill with a cold and flu. Given the other physicians’ focus on the lack of low back symptoms immediately after the work-related fall, the absence of a response from Drs. Barich and Sandquist seriously detracts from the persuasiveness of their opinions. *See Janet Benedict*, 59 Van Natta 2406, 2409 (2007), *aff’d without opinion*, 227 Or App 289 (2009) (medical opinion unpersuasive when it did not address contrary opinions).

I find Dr. Barich’s reasoning to be conclusory and unexplained. He reasoned that claimant’s work-related fall must have caused his low back injury because anyone “slipping and falling on ice on one’s back is going to sustain a [back] injury.” (Ex. 31-2). Dr. Barich’s opinion inadequately addressed the absence of low back pain until several days after claimant’s fall, with its onset and need for treatment immediately after the shop vacuum incident at home. *See Moe v. Ceiling Systems, Inc.*, 44 Or App 429, 433 (1980) (rejecting unexplained or conclusory opinion); *see also Lanora J. Rea*, 60 Van Natta 1058, 1064 (2008) (same),

In his deposition testimony, Dr. Sandquist acknowledged that he did not remember what claimant told him about symptoms following the work event: “He slipped and fell. Obviously painful at the time, I’m sure, no doubt, but I don’t remember him saying anything about that.” (Ex. 34-8). This assumption is not supported by the record.

While Dr. Sandquist clearly saw the slip and fall as a more violent and potentially injurious event than that of wrapping a cord around a shop vacuum, he also did not explain the absence of symptoms until the shop vacuum incident five

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days later, except to postulate that perhaps claimant had a distracting injury, such as a bruised tailbone from the fall, that masked his symptoms. (Ex. 34-11). Again, the record does not support such a masking injury.

Finally, although Dr. Sandquist performed claimant's low back surgery, I am not persuaded that his surgical findings had any relation to his causation opinion. Under such circumstances, I do not give any special deference to his opinion as the treating surgeon. *Deborah A. Jolley*, 64 Van Natta 875, 879 (2012) (no special deference accorded to a treating surgeon's opinion that is not based on surgical findings); *Hollis L. Strickland*, 62 Van Natta 2790, 2793 (2010) (same); *Cf. Argonaut Ins. Co. v. Mageske*, 93 Or App 698, 702 (1988) (special deference given to treating surgeon's opinion relying on surgical observations).

In conclusion, because I find the opinions of Drs. Barich and Sandquist unpersuasive, and no other medical evidence supports compensability, I would conclude that claimant has not met his burden of proving that the work-related fall was a material cause of the disability/need for treatment for the low back condition. Consequently, I would affirm the ALJ's decision to uphold the employer's denial. Accordingly, I respectfully dissent.