
In the Matter of the Compensation of
DARLENE A. REDMOND, Claimant
WCB Case No. 15-03633
ORDER ON REVIEW
Jodie Phillips Polich, Claimant Attorneys
Sather Byerly & Holloway, Defense Attorneys

Reviewing Panel: Members Curey, Lanning, and Wold. Member Curey dissents.

The self-insured employer requests review of Administrative Law Judge (ALJ) Sencer's order that set aside its denials of claimant's new/omitted medical condition claims for a C5-6 annular tear/disc protrusion and C4-5 disc protrusion/bulge. On review, the issue is compensability.

We adopt and affirm the ALJ's order with the following supplementation.

In setting aside the employer's denials, the ALJ found that the preponderance of the evidence supported a conclusion that the work injury was at least a material contributing cause of the need for treatment/disability for the claimed cervical conditions. Applying a "combined condition" analysis, and finding Dr. Ordonez's opinion most persuasive, the ALJ concluded that the employer had not established that the work injury was not the major contributing cause of the need for treatment/disability for the combined C4-5 and C5-6 conditions. *See* ORS 656.266(2)(a).

On review, the employer contends that the opinions of Drs. Rosenbaum, Polin, Berney, and Thiessen were more persuasive than that of Dr. Ordonez.¹ For the following reasons, we disagree with the employer's contentions.

To prevail on her new/omitted medical condition claims, claimant must prove that the conditions exist and that the March 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).² If an "otherwise

¹ For the reasons expressed in the ALJ's order, we decline to rely on Dr. Brett's opinion. Moreover, Drs. Almaraz and Hammel do not specifically address the compensability of the claimed C4-5 and C5-6 disc protrusions and C5-6 annular tear. Consequently, we do not rely on their opinions.

² The parties do not dispute the existence of the claimed conditions.

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 compensability of the claimed conditions, the claims present 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).

Here, the employer contends that Dr. Ordonez’s opinion is insufficient to establish that claimant’s work injury was a material contributing cause of the need for treatment/disability for the claimed cervical conditions. Specifically, the employer asserts that Dr. Ordonez did not persuasively explain how claimant’s onset of shoulder symptoms with a one year “gap” after the work injury were attributable to that event.³

However, on March 26, 2015, Ms. Heen, Dr. Brett’s physician assistant, documented bilateral radiating shoulder pain. (Ex. 31). On April 2, 2015, Dr. Khalsa, a chiropractor, indicated that claimant had left arm pain, and upper trapezius tightness, swelling, and tenderness. (Ex. 34-1, -3). In addition, on that same date, Dr. Brett documented a positive Spurling’s maneuver on the left, “reproducing her left scapular and trapezius pain.” (Ex. 36). Dr. Ordonez considered the onset of symptoms and explained that claimant’s headaches, dizziness, shoulder girdle, neck pain, trapezius, shoulder blade, tip of the shoulders, upper arm, and other shoulder complaints were consistent with, and indicative of, injuries to the fourth, fifth, and sixth cervical nerve roots. (Exs. 56, 90-8-9). Therefore, we decline to discount Dr. Ordonez’s opinion based on the argument advanced by the employer.

³ Dr. Rosenbaum indicated that the change of claimant’s symptoms to the outside of her left shoulder in April 2016, more than a year after the work injury, could be an indication that her arthritic cervical condition was progressing. (Ex. 93-3).

The employer further asserts that Dr. Rosenbaum's opinion, as supported by Drs. Polin, Berney, and Thiessen, is most persuasive.⁴ Specifically, the employer argues that Dr. Rosenbaum had the most complete history because he was able to review claimant's testimony regarding the onset of her shoulder symptoms in April 2016. Nevertheless, Dr. Ordonez had that same history in rendering his causation opinion, which resulted in the opposite conclusion. (Ex. 90). Moreover, as explained above, the record supports a conclusion that claimant had shoulder complaints close in time to the work injury.

The employer further argues that Dr. Rosenbaum persuasively addressed the significance of the findings on the January 2010 MRI and the lack of "acute" findings on the March 2015 MRI, which it argues Dr. Ordonez did not do. Yet, Dr. Ordonez specifically reviewed the imaging studies from January 2010 through April 2016 and concluded that they supported a pathological worsening of the cervical conditions. (Ex. 90-9).

We acknowledge the dissent's contentions regarding Dr. Ordonez's opinion concerning the claimed annular tear condition. Yet, in responding to Dr. Polin's opinion that the annular tearing was clinically irrelevant, Dr. Ordonez disagreed, explaining that such tears can be extremely painful. (Ex. 90-9). He described how annular tears can allow biochemicals (cytokines) from the disc to come in contact with pain-producing nerve endings in the outer annulus and initiate a painful inflammatory response. (*Id.*) He explained that traumatic injury is capable of annular tears and is relatively common in strenuous occupations. Moreover, he stated that specific movements tend to aggravate the symptoms attributable to annular tears "which is consistent with [claimant's] reports, as well as the fact that [her] cervical pain has not improved with conservative care. [Her] symptoms correlate with known cervical pain referral patterns." (*Id.*)

Ultimately, based on claimant's history, the mechanism of injury, imaging studies, clinical examinations, correlation of symptoms to the claimed conditions, and his review of the records, Dr. Ordonez opined that the major contributing cause of the claimed conditions (including the annular tear) was the March 2015 work injury. (Ex. 90-11). After reviewing Dr. Ordonez's analysis and explanations, we

⁴ The employer contends that the ALJ should have analyzed the persuasiveness of the opinions of Drs. Berney and Thiessen. However, Dr. Thiessen concurred with the opinions of Drs. Polin and Rosenbaum. (Exs. 58, 69). Likewise, Dr. Berney concurred with Dr. Rosenbaum's opinion. (Ex. 86). To the extent that we discuss the opinions of Drs. Rosenbaum and Polin, we incorporate the analysis of the persuasiveness of the opinions of Drs. Berney and Thiessen therein.

conclude that Dr. Ordonez's opinion, when read as a whole, was phrased in terms of "medical probability" and was sufficiently based on claimant's particular circumstances.⁵ See *Roger Packett*, 62 Van Natta 821, 823 (2010) (finding a physician's opinion persuasive because, although it was based on general statistics, the physician also addressed the claimant's medical history, imaging studies, examination findings, and mechanism of injury); see also *Gormley v. SAIF*, 52 Or App 1055 (1981) (persuasive medical opinions must be based on medical probability, rather than possibility).

Accordingly, Dr. Ordonez offered a thorough and well-reasoned opinion, which persuasively establishes that the work injury was a material contributing cause of the need for treatment/disability for the claimed conditions.

Because claimant has established an "otherwise compensable injury," we examine the medical evidence supporting the employer's contention that the March 2015 work injury was not the major contributing cause of the need for treatment/disability for the combined C4-5 or C5-6 disc conditions. ORS 656.266(2)(a).

To meet its burden, the employer primarily relies on the opinions of Drs. Rosenbaum and Polin. Nevertheless, they opined that the work injury was not a material contributing cause of the need for treatment or disability for the claimed cervical conditions. Consequently, we discount their medical opinions. See *Robert Prabucki*, 61 Van Natta 1877, 1881-82 (2009) (where the claimant established an "otherwise compensable injury," physicians' opinions that the claimant's symptoms were not due to the work injury, when discussing a hypothetical "combined condition," did not weigh the contribution of the work injury). Accordingly, because the employer has not met its burden of proof under ORS 656.266(2)(a), we affirm the ALJ's order that found the claimed conditions compensable.

Claimant's attorney is entitled to an assessed fee for services on review. ORS 656.382(2). 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

⁵ The dissent contends that Dr. Ordonez's response concerning the "natural progression of arthritis" was general, rather than specific, to claimant's particular circumstances. Yet, Dr. Ordonez explained that, while he was aware of studies that showed differences in the progression rate of arthritis, he ultimately concluded that there was no "normal rate" for its progression, but that it was tied to personal factors. (Ex. 90-11). Moreover, as explained above, Dr. Ordonez took claimant's particular circumstances into consideration when rendering his final conclusion. (*Id.*) Consequently, we find that his opinion is specific to claimant's particular circumstances.

attorney's services on review is \$4,500, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's respondent's brief and her counsel's uncontested fee submission), the complexity of the issues, the value of the interests 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 denials, to be paid by the employer. 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 December 22, 2016 is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$4,500, 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 denials, to be paid by the employer.

Entered at Salem, Oregon on June 1, 2018

Member Curey dissenting.

The majority concludes that claimant has established the compensability of her claimed C5-6 annular tear/disc protrusion and C4-5 disc protrusion/bulge conditions. Because I am not persuaded by the opinions of Drs. Ordonez and Brett, and because I consider the contrary opinions of Drs. Rosenbaum and Polin, as supported by the opinions of Drs. Berney and Thiessen,⁶ to be based on a more accurate medical history and more thorough reasoning, I respectfully dissent.

To prevail on her new/omitted medical condition claims, claimant must prove that the conditions exist and that the March 2015 work injury was a material contributing cause of her disability/need for treatment for her claimed

⁶ Drs. Almaraz and Hamel identified degenerative disc disease on the January 2010 MRI, and opined that claimant's preexisting conditions were not aggravated by the work injury, but they did not specifically discuss the claimed conditions. (Ex. 87).

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/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 compensability of the claimed conditions, the claims present 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).

For the following reasons, I am not persuaded that claimant’s March 2015 work injury was a material contributing cause of her need for treatment/disability for her claimed conditions.

Claimant treated at Dr. Brett’s office 11 days after her March 2015 work injury. (Ex. 31). He had previously treated claimant and performed a C6-7 discectomy and fusion in February 2010. (Exs. 9, 31, 36). Ultimately, he determined that claimant had a small central focal C4-5 disc protrusion that was likely asymptomatic. (Ex. 36). Moreover, he indicated that the March 2015 work injury resulted in a C5-6 annular tear and a left central disc protrusion, and was the “major contributing factor” in her need for treatment. (*Id.*)

After reviewing Dr. Brett’s opinion, I find that it does not persuasively establish the compensability of the claimed conditions. Specifically, Dr. Brett’s opinion that the C4-5 disc condition was asymptomatic is insufficient to establish that the March 2015 work injury was a material contributing cause of the need for treatment/disability for that condition. Moreover, although he attributed a C5-6 annular tear and disc protrusion to the work event, he does not provide any reasoning to support his conclusion. Consequently, I find his opinion to be unpersuasive. *Moe v. Ceiling Sys., Inc.*, 44 Or App 429, 433 (1980) (rejecting unexplained or conclusory opinion).

Furthermore, Dr. Ordonez asserted that claimant's March 2015 injury destabilized her cervical spine, exacerbating her "underlying cervical spine conditions," which caused C4-5 and C5-6 level symptoms. (Ex. 90-7). On comparison of the March and September 2015 MRIs, he noted a slight progression of the C5-6 central and left-sided disc protrusion. (Ex. 77A). Dr. Ordonez opined that claimant presented with complaints consistent with C5 and C6 symptoms, although she did not present clinical findings consistent with a C4-5 injury during his evaluations. (Ex. 90-8-9). He determined that claimant had annular tear symptoms when performing specific cervical movements. (Ex. 90-9). Ultimately, Dr. Ordonez concluded that the March 2015 work injury was the major contributing cause of claimant's C4-5 disc bulge, C5-6 disc protrusion, and C5-6 annular tear. (Ex. 90-10, -11).

After considering Dr. Ordonez's opinion, I find it to be unpersuasive. First, throughout his many evaluations of claimant, Dr. Ordonez never diagnosed a C5-6 annular tear. Rather, he later concluded, in a concurrence report, that traumatic injury is "capable" of causing annular tears, which he described as relatively common in people with "strenuous occupations." (Ex. 90-9). Such analysis falls short of determining "medical probability" and only considers general analysis, as opposed to evaluating claimant's particular circumstances. *See Gormley v. SAIF*, 55 Or App 1055 (1981) (persuasive medical opinions must be based on medical probability, rather than possibility); *Jonathan Green*, 60 Van Natta 2815, 2816 (2008) (little weight afforded opinion expressed in terms of medical possibility, rather than probability); *see also Sherman v. Western Employers Ins.*, 87 Or App 602, 606 (1987) (little weight given to comments that were general in nature and not addressed to the claimant's particular situation).

In addition, Dr. Ordonez never explained how claimant's March 2015 work injury resulted in that condition or its need for treatment. Rather, he merely stated that "movements in specific ways tend to aggravate the symptoms attributable to annular tears," that tears "can be extremely painful," and that they "can allow" cytokines from the disc to come in contact with nerve endings. (Ex. 90-9). Yet again, such analysis is phrased in terms of "possibility" rather than "probability." *Green*, 60 Van Natta at 2816. At most, he stated that claimant's ongoing cervical pain suggested that she had sustained a more serious injury than a cervical strain, and that her reports were consistent with annular tear complaints. In the absence of further explanation, I find his opinion insufficient to establish the compensability of the claimed C5-6 annular tear. *See Moe*, 44 Or App at 433; *Tracy A. Jones*, 69 Van Natta 998, 999 (2017) (rejecting unexplained and conclusory opinion as unpersuasive).

In addition, although he reviewed all of claimant's imaging studies, Dr. Ordonez did not persuasively analyze the significance of the January 2010 MRI, which showed preexisting C4-5 and C5-6 disc conditions, or whether the March 2015 MRI showed "acute" changes. To the extent that Dr. Ordonez relies on a study to suggest that the progression of claimant's disc conditions were not due to the progression of arthritis, such reliance on generalized correlations further reduces the persuasiveness of his opinion. *See Sherman*, 87 Or App at 606. Moreover, he acknowledged a separate study in which all participants had some progression of their arthritis over time, regardless of its symptomatology. Dr. Ordonez never explained the significance in study differences in claimant's particular circumstances or how they support a conclusion that the March 2015 work injury was likely a material contributing cause of the claimed conditions, need for treatment, or disability. Consequently, I further discount his opinion.

Finally, in May 2016, Dr. Ordonez stated the timing and onset of the symptoms were significant in his causation determination. (Ex. 90-7). He stated that claimant had presented (at some point) with C4-5 nerve root irritation, including trapezius symptoms. (Ex. 90-8) He further noted that claimant's recent (April 2016) escalation in shoulder pain at the end of her shoulder and back side of her arm was consistent with a pathological worsening at C4-5. (Ex. 90-9). However, he clarified that she did not present with those symptoms during his evaluations. (Ex. 90-9). It is unclear from Dr. Ordonez's opinion when he believes that claimant initially presented with the C4-5 disc complaints and how that correlates with the March 2015 work injury. Assuming he relied on claimant's history (contained in that report) that the specific shoulder pain began in September 2015 and then worsened in April 2016, Dr. Ordonez did not provide a persuasive explanation for the gap between those dates and the March 2015 work injury.⁷ Under such circumstances, his opinion is unpersuasive.⁸

Even assuming that claimant has met her burden to establish that her March 2015 work injury was a material contributing cause of the need for treatment/disability for the claimed C4-5 and C5-6 disc conditions, I conclude that

⁷ Dr. Rosenbaum indicated that the change of claimant's symptoms to include the outside of her left shoulder in April 2016, more than a year after the work injury, could be an indication that her arthritic cervical condition was progressing. (Ex. 93-3).

⁸ Because claimant has not met her burden of proof through the opinions of Drs. Brett and Ordonez, it is unnecessary to discuss her contentions regarding the persuasiveness of the contrary medical opinions. *See Cesar Penaloza*, 69 Van Natta 661, 666 n 4 (2017) (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); *Lorraine W. Dahl*, 52 Van Natta 1576 (2000) (same).

the employer has met its burden under ORS 656.266(2)(a), based on the persuasive opinions of Drs. Rosenbaum and Polin, as supported by Drs. Berney and Thiessen. I reason as follows.⁹

Dr. Rosenbaum reviewed the most complete record, including claimant's testimony, pictures of her work activities, imaging studies, and medical reports. (Ex. 93). The testimony included a summary that claimant initially had shoulder pain on the "inside" of the shoulder, where it connects to the neck at the spine. (Ex. 93-2). She also confirmed that the pain before April 2016 was located in her neck. (*Id.*) However, in April 2016, her symptoms became much worse and then extended along the back of her left shoulder and down to the upper arm. (*Id.*) Dr. Rosenbaum explained that the gap in onset of the extended left shoulder symptoms suggested that the preexisting cervical arthritis was progressing. (Ex. 93-3). He determined that those symptoms may be related to the C5 nerve root, but that the change in symptoms, so long after the injury, was evidence of her degenerative condition progressing naturally. (*Id.*) In weighing the contribution between the March 2015 work injury and claimant's preexisting condition, he concluded that the cervical conditions were related "far more to her preexisting condition." (Ex. 93-4).

Dr. Rosenbaum further noted that there were no acute changes on the March 2015 MRI, which revealed a natural progression of her preexisting, degenerative arthritis. (Exs. 61-2, 84-1-2). Although he did not identify an annular tear on imaging, he opined that it would be due to degenerative arthritis, if present. (Ex. 61-2). Dr. Rosenbaum ultimately concluded that claimant's C4-5 and C5-6 disc conditions were related to her preexisting cervical arthritis, reasoning that the C4-5 and C5-6 conditions had preexisted the work injury. (Exs. 61, 84, 93).

Consistent with Dr. Rosenbaum's opinion, Dr. Polin found no acute changes on review of claimant's March 2015 MRI and explained that claimant's arthritis had progressed since the 2010 MRI. (Exs. 50, 85). After considering the January 2010 MRI, he explained that the cervical arthritis had progressed between 2010 and 2015. (Ex. 85). He noted that, if claimant had sustained a C4-5 or C5-6 disc protrusion as a result of the injury, she would have had complaints of numbness, weakness, and pain in the distribution of the fifth or sixth cervical nerve roots. (Exs. 63-2, 85). Yet, on review of claimant's treatment records, he opined that

⁹ Assuming that the March 2015 work injury was a material contributing cause of the need for treatment/disability for the claimed C4-5 and C5-6 disc conditions, the parties do not contest that claimant has statutory preexisting conditions that combined with the "otherwise compensable injury."

there were none. (*Id.*) Consequently, Dr. Polin reasoned that the C4-5 and C5-6 disc conditions were asymptomatic. (*Id.*) Furthermore, Dr. Polin found no objective evidence that claimant had sustained an annular tear as a result of the March 2015 work injury.¹⁰ (Ex. 63-1). After weighing the contribution between the March 2015 work injury and claimant's preexisting conditions, Dr. Polin concluded that the work event was not the major contributing cause of the need for treatment/disability for the claimed C4-5 and C5-6 conditions. (Exs. 63, 85).

Here, my review of the record confirms that Dr. Rosenbaum's well explained and thorough opinion was based on a comprehensive examination of claimant, a complete and accurate history of her symptoms and treatment, and a consideration of the findings on her imaging studies. *See Somers*, 77 Or App at 263. In addition, Dr. Polin provided an opinion consistent with that expressed by Dr. Rosenbaum, with an extensive examination of the medical record and sound reasoning. Under such circumstances, I consider their opinions to be persuasive.

In contrast, Dr. Brett supported a conclusion that the work event was the major contributing cause of the need for treatment/disability for the C5-6 disc conditions. (Ex. 36). In addition, Dr. Ordonez opined that claimant's work injury was the major contributing cause of the need for treatment/disability for the claimed C4-5 and C5-6 conditions. (Ex. 90). Nevertheless, I discount the opinions of Drs. Brett and Ordonez for the reasons stated above.

In sum, I would conclude that the opinions of Drs. Rosenbaum and Polin, as supported by the opinions of Drs. Thiessen and Berney, are most persuasive, and establish that the March 2015 work injury was not the major contributing cause of the need for treatment/disability for the combined C4-5 and C5-6 disc conditions. Consequently, I would find that the claimed conditions are not compensable. Accordingly, I would reverse.

¹⁰ In addition, Drs. Thiessen, who treated claimant close in time to the March 2015 work injury, and Berney, who treated claimant from June 2015 until April 2016, concurred with the opinions of Drs. Polin and Rosenbaum. (Exs. 27, 57, 58, 69, 70, 87B). Moreover, Dr. Berney concluded that a cervical strain explained the condition related to the March 2015 work event documented the change in claimant's condition with the onset of her dysfunctional left shoulder in April 2016. (Exs. 70, 87B). Under such circumstances, I conclude that the opinions of Drs. Thiessen and Berney bolster the opinions of Drs. Rosenbaum and Polin.