
In the Matter of the Compensation of
SHELBY N. ZOON, Claimant
WCB Case No. 17-01371
ORDER ON REVIEW
Edmunson Barnhart Knight PC, Claimant Attorneys
SAIF Legal, Salem, Defense Attorneys

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

Claimant requests review of Administrative Law Judge (ALJ) Poland's order that upheld the SAIF Corporation's denial of her new/omitted medical condition claim for an L5-S1 disc herniation. On review, the issue is compensability. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," which are summarized and supplemented below.

On March 30, 2016, claimant, a 19-year-old Certified Nursing Assistant (CNA), sustained a compensable injury when she and a co-worker were using a draw sheet to pull a 400-pound patient up in bed. (Tr. 8). At the time of the injury, claimant felt a pulling sensation across her low back. (*Id.*)

On April 7, 2016, claimant sought treatment at an urgent care facility. (Tr. 9). Ms. Sinclair, a licensed professional nurse, reported that claimant complained of "low back pain that radiates into her hip, muscle spasm in her hip and back that increases with prolonged sitting or when attempting to move/lift patients at work." (Ex. 4-1).

Dr. Hindmarsh, a family medicine specialist with the facility, then examined claimant. (*Id.*) She reported that claimant's pain did not radiate and that she had no leg pain or "perianal numbness, tingling or weakness." (*Id.*) Dr. Hindmarsh diagnosed a back strain. (*Id.*) She released claimant to work with a 10-pound lifting restriction. (Ex. 5).

On April 27, 2016, SAIF accepted a lumbar strain. (Ex. 9).

On April 13, April 27, and May 11, claimant treated conservatively with Ms. Robinson, a physician's assistant. (Exs. 7, 11, 13). Over the course of several weeks, Ms. Robinson reported that claimant's pain had significantly improved. (Ex. 11). She continued to have muscle spasms and cramping pain to her lower back, worse on the right than the left. (*Id.*) Claimant had been working light duty without significant difficulty. (*Id.*) She denied numbness or tingling. (*Id.*)

On May 11, 2016, Ms. Robinson reported that claimant's "symptoms have almost completely resolved." (Ex. 13). Claimant was given a full-duty work release. (Ex. 12).

On May 25, 2016, claimant reported that her symptoms had "completely resolved." (Ex. 15). She had returned to "full duty" without any difficulties, except for some occasional soreness after a full shift, which she described as normal for her (a baseline). (Ex. 14).

Although claimant had been released to her regular duties, she continued to experience some "soreness and pain" in the right side of her lower back. (Tr. 10). She was careful at work not to aggravate her injury. (*Id.*) However, within the first few weeks of her regular duties, she began to have very severe right leg and hip pain. (*Id.*) Her leg pain began as localized numbness and tingling in the upper thigh region and eventually radiated down her right leg and foot. (Tr. 11).

Initially, claimant did not attribute her right hip and leg pain to her March 2016 work injury, because "she did not feel" her symptoms were related to her back and they were "much more severe" than at the time of her injury. (Tr. 11-12). Dr. Knight ordered an lumbar MRI.

On October 13, 2016, claimant was examined by Ms. Palma, a family nurse practitioner. (Ex. 15a-1). Ms. Palma acknowledged that claimant had been evaluated with occupational medicine and her back issues seemed to resolve and her claim was closed. (*Id.*) But, Ms. Palma noted that, several months after the claim closed, claimant reported some low back pain, which subsided with medication, but when "she returned back pain radiating to the right buttock and down the right leg has been more persistent." (*Id.*) Claimant described "numbness and tingling occurring down the right leg extending along the posterior lateral aspect down to the foot," with no apparent weakness. (*Id.*) She was diagnosed with "lumbar back pain with radiculopathy affecting right lower extremity." (*Id.*) Ms. Palma ordered a lumbar x-ray and a lumbar MRI. (Ex. 15a-2). Claimant's lumbar x-ray showed "mild degenerative endplate changes at L5-S1," otherwise unremarkable. (Ex. 16-2).

On October 18, 2016, Dr. Pederson, an occupational medicine specialist, examined claimant. (Ex. 17). He reported that claimant had previously been treated for an acute lumbar strain and that all of her symptoms had resolved. (*Id.*) He diagnosed “recent development of right lower extremity radicular pain and paresthesias.” (*Id.*) Because claimant “did not have any radicular complaints after her injury in March and because of her full recovery fairly quickly and absence of symptoms for a month after being released” to regular work, Dr. Pederson did not relate the right leg symptoms to the March 30, 2016 lumbar strain. (*Id.*) He also recommended a lumbar MRI. (*Id.*)

On November 29, 2016, Dr. Pederson examined claimant and continued to diagnose “right lower extremity radicular pain.” (Ex. 22). (*Id.*) Because SAIF had denied the request for an MRI and continued physical therapy, Dr. Pederson referred claimant to her primary care physician for continued treatment of her radicular pain.

Claimant again sought treatment with her family nurse practitioner, Ms. Palma, who assessed “lumbar back pain with radiculopathy affecting right lower extremity.” (Ex. 23-2). She ordered a lumbar MRI. (*Id.*)

A December 23, 2016, lumbar MRI showed a “large broad-based central and paracentral disc protrusion with superimposed extruded component at L5-S1, resulting in moderate-to-severe central canal stenosis and demonstrating severe mass effect on the right S1 traversing nerve,” which clinically correlated to right S1 radicular symptoms. (Ex. 25-2).

On January 24, 2017, Dr. Noonan, a neurosurgeon, examined claimant and reviewed her lumbar MRI. (Ex. 26a-1). Dr. Noonan diagnosed a “large central and slightly right-sided herniation at L5-S1[.]” (*Id.*) He reasoned that claimant, who was 19 years old at the time of the March 2016 work injury involving her low back, has “gone on to a large disc herniation at L5-S1,” which in all probability the work injury was “at least a contribute factor to her disc herniation.” (Ex. 26a-2).

Claimant requested acceptance of a new/omitted medical condition of L5-S1 herniated disc. (Ex. 26).

On February 28, 2017, at SAIF’s request, Dr. Carr, an orthopedic surgeon, examined claimant. (Ex. 30). He reported that claimant’s MRI showed degenerative disc disease at L4-5 and L5-S1, and an extruded disc herniation at L5-S1. (Ex. 30-9). He also reported that, following her work injury and its

resolution by May 2016, she had “no symptoms which would be considered suggestive of an L5-S1 disc herniation on the right.” (*Id.*) He opined that the “diagnosed conditions of degenerative disk disease and subsequent herniated disk are not related to the described mechanism of injury of March 30, 2016.” (Ex. 30-11). He further opined that the March 30, 2016 work injury was not a material contributing cause of disability/need for treatment related to the L5-S1 disc herniation. (Ex. 30-12).

In a March 21, 2017 chart note, Dr. Noonan acknowledged that claimant had been undergoing physical therapy and had two epidural steroid injections for her L5-S1 herniated disc. (Ex. 31-1).

SAIF denied the claim for an L5-S1 herniated disc. (Ex. 32-1). Claimant requested a hearing.

CONCLUSIONS OF LAW AND OPINION

In upholding SAIF’s denial, the ALJ found that claimant’s work injury was not a material contributing cause of the disability/need for treatment for the claimed L5-S1 disc herniation. *See* ORS 656.005(7)(a). On review, claimant contends that Dr. Noonan’s opinion persuasively establishes the compensability of her claimed condition. Based on the following reasoning, we agree.

To establish the compensability of her new/omitted medical condition claim for an L5-S1 disc herniation, claimant must prove that the claimed condition exists and that her March 2016 work injury (accepted for a lumbar strain) was a material contributing cause of the disability or need for treatment of the claimed condition. ORS 656.005(7)(a); ORS 656.266(1); *Betty J. King*, 58 Van Natta 977 (2006); *Maureen Y. Graves*, 57 Van Natta 2381 (2005).

The parties stipulated that the L5-S1 disc herniation exists. (Tr. 2). Thus, our first inquiry is whether claimant’s March 2016 work injury was a material contributing cause of her disability/need for treatment of the L5-S1 disc herniation. ORS 656.005(7)(a); ORS 656.266(1); *Albany Gen. Hosp. v. Gasperino*, 113 Or App 411, 415 (1992).

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).

Here, claimant relies on the opinion of Dr. Noonan, her treating neurosurgeon, who opined that the March 2016 work injury was a material contributing cause of her disability/need for treatment for her L5-S1 disc herniation. In response, the employer refers to the opinions of Dr. Pederson, claimant's former treating physician, and Dr. Carr, an orthopedic surgeon, who examined claimant at SAIF's request, which do not support a work connection. For the following reasons, we are more persuaded by Dr. Noonan's opinion.

Dr. Noonan opined that claimant's work injury, which occurred when she lifted a 400-pound patient, resulted in her accepted lumbar strain and, more than likely, was a material contributing cause of disability/need for treatment of the L5-S1 disc herniation condition (confirmed by the December 2016 MRI). (Exs. 25-2, 34-2). Based on claimant's clinical presentation, including immediate onset of low back pain, with radiation towards her right hip, the heavy mechanism of injury, the progression of radicular symptoms, and her young age, Dr. Noonan concluded that, more than likely, she injured the annulus in her L5-S1 disc from which disc material gradually extruded, resulting in the L5-S1 disc herniation. (*Id.*) According to Dr. Noonan, it is not unusual for pain and symptoms to subside and worsen following a disc herniation, that disc herniations have a fairly variable clinical course, and that nothing in claimant's clinical course caused him to be suspect of the relationship between the work injury and the L5-S1 disc herniation.¹ (Ex. 34-2).

We acknowledge that claimant initially did not relate the gradual onset of severe leg and hip pain in June and July to the March 30, 2016 work injury.² Nonetheless, although she testified that her hip pain was the same "feeling" that she

¹ We disagree with the dissent's contention that Dr. Noonan had a materially inaccurate medical history because he referenced claimant's "persistent symptoms," with only a "mild resolution" of those symptoms, in his January 2017 chart note. (Ex. 26a). As detailed in his May 2017 concurrence opinion, however, Dr. Noonan correctly understood that claimant had an immediate onset of symptoms following the March 2016 work injury, that her symptoms improved with physical therapy, but within weeks of returning to full duty her symptoms gradually became much more severe, leading to the December 2016 MRI, which revealed the L5-S1 herniated disc. We are persuaded by Dr. Noonan's explanation that the heavy mechanism of injury (moving a 400-pound patient), with an immediate onset of low back pain, which radiated to the trochanter, supports his opinion that the March 2016 injury caused an annulus injury of the L5-S1 disc, which allowed disc material to gradually extrude, leading to the development of the L5-S1 disc herniation. (Ex. 34-2).

² The dissent has quoted that portion of claimant's testimony.

had initially experienced following her work injury, she did not relate the hip and leg pain to the injury because the pain was gradual in onset, much more severe, and not accompanied by low back pain. (Tr. 17, 19, 20). Notwithstanding claimant's initial impression, Dr. Noonan persuasively described the history of claimant's complaints in explaining the relationship between claimant's work injury and her L5-S1 disc herniation. (*Id.*)

In contrast, we are not persuaded by the contrary medical opinions. Dr. Carr opined that claimant's March 2016 work injury was not a material cause of her disability/need for treatment of the L5-S1 disc herniation. (Ex. 30-11). Dr. Carr's reasoning, however, is primarily based on generalizations. For instance, he explained that "recent studies have indicated that almost all, if not all, disk herniations occur in the presence of a pre-existing degenerative disk disease," "occur spontaneously," and "are not related to specific activities." (Ex. 30-9). Those general statements, which are supported by references to a 2006 "Caragee" study and a 2010 "Suri" study, do not address claimant's particular circumstances. (*Id.*) Thus, we discount the persuasiveness of Dr. Carr's opinion. *See Sherman v. Western Employer's Ins.*, 87 Or App 602, 606(1987) (physician's comments that were general in nature and not addressed to the claimant's situation in particular were not persuasive); *Jeanette M. Barber*, 62 Van Natta 1112, 1116 (2010) (same).

In addition, Dr. Carr did not adequately address Dr. Noonan's opinion that claimant's heavy mechanism of injury is consistent with causing an annular disc injury from which disc material gradually extruded, culminating in the L5-S1 disc herniation. Thus, we further discount Dr. Carr's opinion. *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).

Finally, Dr. Pederson's opinion was focused on the relationship between claimant's accepted lumbar strain and the L5-S1 herniated disc, not the relationship between the work injury and the herniated disc. (Ex. 17). Accordingly, we do not consider his opinion to be probative concerning the compensability of the L5-S1 herniated disk insofar as it concerns claimant's work incident.

Thus, for the reasons explained above, we are persuaded by Dr. Noonan's opinion that claimant's March 2016 work injury was a material contributing cause of disability/need for treatment of her L5-S1 disc herniation.³ Accordingly, we reverse the ALJ's order and set aside SAIF's denial.

³ The existence of a "combined condition" is neither asserted nor established by this record. Consequently, we do not apply ORS 656.266(2)(a) and ORS 656.005(7)(a)(B).

Claimant's counsel 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 attorney fee for claimant's services at the hearing level and on review is \$14,000, payable by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by the hearing 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 denial, to be paid by SAIF. *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 July 27, 2017, as corrected on August 1, 2017, is reversed. SAIF's denial is set aside and the claim is remanded to SAIF 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, to be paid by SAIF. 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 SAIF.

Entered at Salem, Oregon on May 31, 2018

Member Johnson dissenting.

The majority concludes that Dr. Noonan's opinion persuasively establishes that claimant's March 2016 work injury was a material contributing cause of her L5-S1 disc herniation. I conclude, however, that Dr. Noonan's opinion is unpersuasive because he relied on a materially inaccurate medical history and did not rebut contrary medical opinions. Thus, I would affirm the ALJ's order that upheld SAIF's denial.

Dr. Noonan relied on claimant's "persistent symptoms" and only "mild resolution" of those symptoms to conclude that the March 2016 work injury was a material/major contributing cause of the L5-S1 disc injury. (Ex. 26a). However, the contemporaneous medical records establish that claimant's initial symptoms did not include radicular symptoms and that her symptoms had "completely resolved" by the time she was released for work without restrictions on May 11, 2016. (Exs. 4, 12, 13, 14, 15).

Claimant did not seek further medical treatment until October 13, 2016, reporting "back pain radiating to the right buttock and down the right leg." (Ex. 15a-1) These complaints were seven months after the March 2016 work injury, and more than five months after she had reported that her symptoms had "completely resolved." (*Id.*) When questioned at hearing about the onset of leg pain, claimant testified that she began to feel leg pain and numbness in June 2016 that progressed through July into her whole leg and foot. She acknowledged that her symptoms in March 2016 were very different than her symptoms in June and July:

Q. [By Claimant's Counsel]: So would you describe these symptoms that you were experiencing in June and July as completely different symptoms from the symptoms you experienced in March of 2016?

A. [Claimant]: Yes. So I actually almost considered this to be a separate injury because of the severity of the leg pain. It did not feel as if it was related to my back; many times I felt like it was a separate injury, some sort of hip fracture or, I mean, that sounds drastic, but it was very severe pain where the hip connects to the—to the socket, it felt like it was not in place right and I was having a lot of like trouble moving that leg. (Tr. 11-12).

In October 2016, claimant sought treatment in occupational medicine for this "separate injury." (Tr. 12).

In contrast to claimant's testimony and the documented record, Dr. Noonan's chart notes record a history of "persistent symptoms" with only "mild resolution" following the work injury. (Ex. 26a-1-2). Under such circumstances, I conclude that Dr. Noonan's opinion is based on an incomplete and inaccurate medical history. Thus, I find his opinion unpersuasive. *See Jackson County v. Wehren,*

186 Or App 555, 560-61 (2003) (a history is complete if it contains sufficient information on which to base an opinion and does not exclude information that would make the opinion less credible); *Miller v. Granite Constr. Co.*, 28 Or App 473, 476 (1977) (medical evidence that was based on inaccurate information was not persuasive); *Beverly A. DeCoite*, 67 Van Natta 240, 244 (2015) (medical evidence based on inaccurate and incomplete information was unpersuasive).

Moreover, I find the opinions of Dr. Pederson, claimant's treating physician when she sought treatment in October 2016, and Dr. Carr, an orthopedic surgeon, to be well reasoned and based on claimant's accurate and complete medical history. Thus, I find their opinions to be persuasive. *See Somers v. SAIF*, 77 Or App 259, 263 (1986) (more weight is given to medical opinions that are well reasoned and based on complete information).

In reaching their conclusions, Drs. Pederson and Carr each underscored claimant's complete resolution of symptoms in May 2016, followed by the absence of low back symptoms for at least a month, to explain that the March 2016 work injury was not even a material cause of her L5-S1 disc herniation, which was not diagnosed until a December 23, 2016 MRI. (Exs. 17, 30-9). Dr. Carr further reasoned that, "even if the disk herniation had occurred at [the time of the March 2016 work injury,] the activity performed would be minor in relationship to the degenerative disk disease and would not cause a herniated disk in an otherwise normal spine." (Ex. 30-11).

I also find Dr. Noonan's opinion unpersuasive because he did not rebut the contrary opinions of Drs. Pederson and Carr. *See Janet Benedict*, 59 Van Natta 2406, 2409 (2007), *aff'd without opinion*, 227 Or App 289 (2009) (physician's opinion unpersuasive when it did not address contrary opinion).

For the above reasons, as well as those expressed in the ALJ's order, I would uphold SAIF's denial. Because the majority concludes otherwise, I respectfully dissent.