
In the Matter of the Compensation of
BARBARA J. DEBOARD, Claimant
WCB Case No. 14-03132
ORDER ON REMAND
Moore & Jensen, Claimant Attorneys
Sather Byerly & Holloway, Defense Attorneys

Reviewing Panel: Members Woodford and Ousey.¹

This matter is before the Board on remand from the Court of Appeals. *Fred Meyer Stores, Inc. v. DeBoard*, 291 Or App 742 (2018). The court has vacated the Board's order, *Barbara J. DeBoard*, 67 Van Natta 909 (2015), which reversed an Administrative Law Judge's (ALJ's) order that had upheld the self-insured employer's denial of claimant's new/omitted medical condition claim for several thoracic disc bulge conditions. In reaching its conclusion, the Board applied the analysis expressed in *Brown v. SAIF*, 262 Or App 640 (2014), which interpreted the phrase "otherwise compensable injury," as used in ORS 656.266(2)(a), as the "work-related injury incident." The court has remanded for reconsideration in light of *Brown v. SAIF*, 361 Or 241 (2017).

FINDINGS OF FACT

We adopt the ALJ's and the Board's "Findings of Fact" with the following summary and supplementation.

In July 2012, claimant experienced an acute onset of mid-back pain while at work. (Exs. 77B-8, 21). The employer accepted a thoracic sprain. (Ex. 36).

Subsequently, an MRI revealed T6-7, T7-8, and T8-9 disc protrusions. (Ex. 46). On March 7, 2013, claimant initiated a new/omitted medical condition claim for T6, T7-8, and T8-9 disc protrusions. (Ex. 50).

The employer denied the new/omitted thoracic disc protrusion claims. (Ex. 60). Claimant requested a hearing.

¹ Members Weddell, Johnson, and Somers participated in the Board's initial review. Because they are no longer with the Board, Members Woodford and Ousey have participated in this review on remand.

Dr. Bolstad, claimant's attending physician, attributed the thoracic disc protrusions to claimant's work activities. (Exs. 69-2, 69A-1). She acknowledged that claimant had degenerative changes, but concluded that the 2012 work injury was the major contributing cause of the need for treatment of the disc protrusions "because [claimant] was not having these severe symptoms of stabbing ongoing mid back pain radiating to the right" before the injury. (Ex. 69A-1).

Dr. Arbeene examined claimant at the employer's request. Dr. Arbeene opined that claimant did not have disc protrusions; rather, he diagnosed degenerative disc bulges at each of the three claimed levels.² (Ex. 82-2). He conceded that claimant's work activities may have contributed to her symptoms, but opined that the major cause of the disc bulges was the degenerative process resulting from her abnormal spinal curvatures. (Ex. 82-4, -5).

On February 6, 2014, a prior ALJ's order upheld the employer's denial. (Ex. 88-8). The prior ALJ declined to find that a disc "bulge" was the same condition as a disc "protrusion," and determined that claimant had not established the existence of the claimed disc protrusions. (Ex. 88-7).

On review, in a previous decision, we adopted and affirmed the prior ALJ's order. *Barbara J. DeBoard*, 66 Van Natta 978, 979 (2014). We further stated that, even if claimant had established the existence of the claimed conditions, and an "otherwise compensable injury," we would still conclude, based on Dr. Arbeene's opinion, that the otherwise compensable injury was not the major contributing cause of the combined thoracic disc conditions.

The court affirmed our prior decision, reasoning that our finding that claimant did not prove the existence of the claimed disc "protrusion" conditions was supported by substantial evidence. *DeBoard v. Fred Meyer*, 285 Or App 732, 739 (2017). Likewise, it concluded that substantial evidence supported our finding that the "disc bulge" conditions were beyond the scope of claimant's new/omitted medical condition claim for the thoracic disc "protrusions." *Id.* Because the court affirmed our finding that claimant did not prove the existence of the claimed conditions, it did not reach our "alternative holding" concerning the compensability of the claimed conditions. *Id.* at 733 n 1.

² Dr. Arbeene differentiated a disc "bulge" (the length of the bulging is much greater than its height) from a disc "protrusion" (the height of the bulge or abnormality is basically equal to the base of the disc bulge). He also acknowledged that "if [he] ask[ed] five different doctors what they mean by 'disc bulging' versus 'disc protrusions,' he might get five different answers." (Ex. 82-2, -3).

On June 11, 2014, claimant initiated a new/omitted medical condition claim for T6, T7-8, and T8-9 disc protrusions and T6, T7-8, T8-9 disc bulges. (Ex. 99). On June 18, 2014, the employer denied the new/omitted medical condition claim on the basis that the claimed conditions were previously denied/litigated and not related to the compensable work injury or occupational factors. (Ex. 100). Claimant requested a hearing, which is the basis for the present case.

On September 11, 2014, in response to claimant's inquiry, Dr. Bolstad stated that she used the terms "disc protrusion" and "disc bulge" interchangeably. (Ex. 106-1). She indicated that she had not heard of the differentiation made by Dr. Arbeene between the two terms. (*Id.*) She stated that, in any event, claimant had disc pathology that she would be comfortable describing as either a disc bulge or a disc protrusion at T6, T7-8, and T8-9. (Ex. 106-2). She reiterated her opinion that the work injury was the major contributing cause of the need for treatment for claimant's disc pathology. (*Id.*)

On September 16, 2014, Dr. Arbeene reviewed claimant's updated medical records and concluded that the thoracic disc bulges had not changed or worsened since May 2013. (Ex. 107-1). Dr. Arbeene maintained that the terms "bulge" and "protrusion" describe slightly different disc shapes, but he acknowledged that both terms describe abnormal disc pathology (*i.e.*, extruding disc material) and "more often than not" are used interchangeably. (*Id.*)

CONCLUSIONS OF LAW AND OPINION

Reasoning that either the prior litigation was preclusive or that claimant did not prove the compensability of the claimed thoracic disc "bulge" conditions, the ALJ upheld the employer's denial.

On review, we reversed that portion of the ALJ's order that concluded that the compensability of the disc "bulges" had been fully litigated by the prior Board order. *DeBoard*, 67 Van Natta at 914. In doing so, we reasoned that the prior ALJ's order, which we had adopted, had specifically declined to find that a disc "bulge" was equivalent to a disc "protrusion." *Id.* We acknowledged that the reasoning in our prior order addressed medical "causation." However, we noted that, because our prior order had done so on an alternative basis, the medical causation analysis was not essential to our final decision on the merits. *Id.*

Turning to the merits, we concluded, based on Dr. Bolstad's opinion, that the work injury was a material contributing cause of the disability/need for treatment for the thoracic disc bulge conditions. *Id.* at 915. Assuming, without

deciding, that claimant suffered from a “combined condition,” we concluded that Dr. Arbeene’s opinion was not sufficient to meet the employer’s burden to show that the “otherwise compensable injury” was not the major contributing cause of the need for treatment or disability for the combined condition. *Id.* at 916. In reaching that conclusion, we cited the Court of Appeals decision in *Brown* for the proposition that the “otherwise compensable injury” as used in ORS 656.266(2)(a) means the “work-related injury incident.” *Id.* at 914.

On judicial review, the court rejected the employer’s contention that claimant’s new/omitted medical condition claim for the thoracic disc bulges was barred by issue preclusion. *DeBoard*, 291 Or App at 748. However, it noted that in analyzing the compensability of the claim, we cited the Court of Appeals decision in *Brown*. *Id.* Accordingly, the court considered it appropriate to remand in light of the Supreme Court’s *Brown* decision. *Id.* at 749.

On remand, analyzing the record in accordance with the court’s directive, we continue to find that claimant’s thoracic disc bulge conditions are compensable. We reason as follows.

Claimant must prove that her July 2012 work injury was a material contributing cause of her disability/need for treatment for the claimed thoracic disc bulge conditions.³ ORS 656.005(7)(a); ORS 656.266(1); *Betty J. King*, 58 Van Natta 977 (2006). When an otherwise compensable injury combines with a statutory preexisting condition, the carrier 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); *Jack G. Scoggins*, 56 Van Natta 2534, 2535 (2004). Under the Supreme Court’s decision in *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.⁴

³ The parties do not dispute the existence of the claimed “disc bulge” conditions. See *Maureen Y. Graves*, 57 Van Natta 2380, 2381 (2005).

⁴ Citing the Supreme Court’s decision in *Brown*, claimant contends that, because an “otherwise compensable injury” refers to an “accepted condition,” a “combined condition” defense is not available at the outset of a new/omitted (or initial) medical condition claim that has not previously been accepted. Further, the court has distinguished the *Brown* rationale when analyzing the application of ORS 656.005(7)(a)(B) to an initial claim where there has not been an accepted combined condition. *Hammond v. Liberty Northwest Ins. Corp.*, 296 Or App 241, 245 (2019). However, neither claimant’s contention nor the *Hammond* decision address the *Brown* court’s preliminary conclusion (which it made before determining that, under the “ceases” denial context, the “otherwise compensable injury” is the “accepted

Because of the disagreement between medical experts, this claim presents a complex medical question that must be resolved by expert opinion. *Barnett v. SAIF*, 122 Or App 279, 282 (1993). In evaluating the medical evidence, we rely on those opinions that are both well reasoned and based on accurate and complete information. *Somers v. SAIF*, 77 Or App 259, 263 (1986).

Here, the record establishes that the 2012 work injury was at least a material contributing cause of claimant’s disability/need for treatment for the claimed thoracic disc bulges. Dr. Bolstad, claimant’s attending physician, opined that the work injury was the major contributing cause of claimant’s need for treatment for the thoracic disc conditions. (Exs. 69A-1, 106-1). In reaching that conclusion, Dr. Bolstad acknowledged that claimant had degenerative changes, but related the need for treatment to the 2012 work injury because “claimant was not having these severe symptoms of stabbing ongoing mid back pain radiating to the right prior to this work related incident.” (Ex. 69A-1).

Although Dr. Bolstad initially stated that the work injury was the major contributing cause of the disc “protrusion” conditions, rather than the disc “bulge” conditions, she later clarified that claimant had disc pathology that she would be comfortable describing as either a disc “bulge” or a disc “protrusion” at T6, T7-8, and T8-9. (Ex. 106-2). In doing so, she reiterated that the work injury was the major contributing cause of the need for treatment for claimant’s disc pathology. (*Id.*) Under such circumstances, we find that Dr. Bolstad’s opinion persuasively establishes that the work injury was at least a material contributing cause of claimant’s need for treatment for the thoracic disc bulge conditions.⁵

condition”) that “the ‘injury’ component of the phrase ‘otherwise compensable injury’ in ORS 656.005(7)(a)(B) refers to a medical *condition*, not an accident.” 361 Or at 272 (emphasis added). *See also Maria I. Pedro*, 71 Van Natta 335, 336 n 2 (2019); *Christine M. Howland*, 69 Van Natta 1096, 1097 (2017) (upholding a carrier’s denial of a new/omitted medical condition claim under a “combined condition” theory pursuant to ORS 656.005(7)(a)(B) in the absence of an accepted condition and applying the rationale articulated in *Brown*, 361 Or at 272); *Amanda Cooper*, 69 Van Natta 1742, 1745 (2017) (upholding a carrier’s denial of an initial injury claim under a “combined condition” analysis pursuant to ORS 656.005(7)(a)(B) in the absence of an accepted condition).

⁵ The employer contends that Dr. Bolstad’s opinion is based on an incomplete history because her opinion does not thoroughly address claimant’s previous back symptoms, which were central to Dr. Arbeene’s opinion. We disagree with the employer’s contention for the following reason.

Dr. Arbeene’s opinion relied on claimant’s previous back symptoms to conclude that the work injury was not the major contributing cause of the thoracic disc bulge conditions themselves. (Ex. 82-4, -5). However, his opinion did not rely on claimant’s previous symptoms to conclude that the work injury was not a material contributing cause of claimant’s disability/need for treatment for the thoracic disc bulge conditions. Rather, consistent with Dr. Bolstad’s opinion, he noted that claimant experienced an

Moreover, Dr. Arbeene acknowledged that claimant had an increase in symptoms after doing repetitive work on the date of injury. (Ex. 82-3). In opining that the work injury was not the major contributing cause of the disc bulge conditions themselves, he stated that the work injury may have contributed to an increase in claimant's symptoms related to the disc bulge conditions. (Ex. 82-5). Accordingly, Dr. Arbeene's opinion arguably also supports a conclusion that the work injury was a material contributing cause of the disability/need for treatment. *See Summit v. Weyerhaeuser Co.*, 25 Or App 851, 856 (1976); *Jason Griffin*, 64 Van Natta 1954, 1955 (2012) (physician's opinion that the work incident caused a "symptomatic flare" and precipitated symptoms from preexisting chronic mechanical back pain was sufficient to establish material contributing cause).

Based on the aforementioned reasoning, the record persuasively establishes that the 2012 work injury was a material contributing cause of claimant's disability/need for treatment of the thoracic disc "bulge" conditions. Therefore, claimant has established an "otherwise compensable injury."

Consequently, the burden shifts to the employer to establish that: (1) claimant suffers from a statutory "preexisting condition"; (2) claimant's condition is a "combined condition"; and (3) the "otherwise compensable injury" is not the major contributing cause of the disability/need for treatment of combined condition. ORS 656.005(7)(a)(B); ORS 656.266(2)(a); *SAIF v. Kollias*, 233 Or App 499, 505 (2010); *Scoggins*, 56 Van Natta at 2535.

Assuming, without deciding, that claimant suffers from a statutory "preexisting condition" and that her condition is a "combined condition," we find the record insufficient to satisfy the employer's burden under ORS 656.266(2)(a). We reason as follows.

Dr. Arbeene opined that the major contributing cause of the thoracic disc bulges was the degenerative process resulting from claimant's abnormal spinal curvatures. (Ex. 82-4). However, Dr. Arbeene did not address the major

increase in symptoms on the day of the work injury. (Exs. 69A-1, 82-3). Under such circumstances, we consider Dr. Bolstad's opinion to be based on a sufficiently complete and accurate history. *See Jackson County v. Wehren*, 186 Or App 555, 561 (2003) (a history is complete if it includes sufficient information on which to base the opinion and does not exclude information that would make the opinion less credible); *Gregory E. Butler*, 70 Van Natta 1051, 1052 (2018) (where other physician's opinion attached no significance to certain matters in evaluating whether the work injury was a material contributing cause of the disability/need for treatment, a physician's failure to evaluate those matters did not undermine the persuasiveness of the physician's opinion); *Dorothy S. Calliham*, 59 Van Natta 137, 138 (2007) (same).

contributing cause of the *disability/need for treatment* for the combined condition, as opposed to the condition itself. In the absence of such an analysis, we find that Dr. Arbeene's opinion is insufficient to meet the employer's burden of proof. *See Catherine E. Cutler*, 71 Van Natta 432, 434 (2019) (physician's opinion was unpersuasive when it addressed the cause of the claimed condition itself rather than the cause of the disability/need for treatment for the claimed condition).

There are no other opinions that support the employer's position. Consequently, the record does not persuasively establish that the "otherwise compensable injury" was not the major contributing cause of the disability/need for treatment of the combined thoracic disc bulges.

In sum, based on the aforementioned reasoning, the persuasive medical evidence establishes that the claimed thoracic disc bulge conditions are compensable. Therefore, we continue to set aside the employer's denial of the claimed conditions.

Claimant's counsel is entitled to an assessed fee for services before the court and on remand.⁶ 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 before the court and on remand is \$16,000, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's briefs to the court and on remand), the complexity of the issues, the value of the interests involved, the risk that claimant's counsel might 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); ORS 656.388(1); OAR 438-015-0019. The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

Accordingly, on remand, as modified and supplemented herein, our May 27, 2015 order is republished. For services at the court level and on remand, claimant's counsel is awarded a \$16,000 attorney fee, payable by the employer.

IT IS SO ORDERED

Entered at Salem, Oregon on May 23, 2019

⁶ Our previous attorney fee award of \$12,500 for claimant's counsel's services at the hearing level and on review is republished.