IN THE COURT OF APPEALS OF THE
STATE OF OREGON

In the Matter of the Compensation of
Michael Harrison, Claimant.

SAIF CORPORATION
and Central Oregon Truck Company,
Petitioners,

v.

Michael HARRISON,
Respondent.

Workers' Compensation Board
1501839; A164670

Argued and submitted February 15, 2018.

Julie Masters argued the cause and filed the briefs for petitioners.

R. Adian Martin argued the cause and filed the brief for respondent.

Before Hadlock, Presiding Judge, and Aoyagi, Judge, and Mooney, Judge.*

MOONEY, J.

Affirmed.

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* Mooney, J., *vice* DeHoog, J.

MOONEY, J.

This is a "combined condition" workers' compensation case on judicial review from the Workers' Compensation Board (board). The primary issue before the board was whether claimant's preexisting knee condition combined with his otherwise compensable on-the-job knee injury in such a way as to render his claim uncompensable. On that question, the board was presented with conflicting expert medical opinions regarding the major contributing cause of the combined condition. In setting aside SAIF Corporation's (SAIF) decision to deny this claim, the board concluded, among other things, that SAIF did not carry its burden of proof. SAIF now seeks judicial review of the board's order that reversed its denial of the claim.

SAIF acknowledges that it bore the burden of proof to establish that the work injury was not the major contributing cause of the combined condition and need for treatment. It argues primarily that the record lacks substantial evidence and reason to support the board's decision to accept the expert opinion of claimant's medical expert, Dr. Schwartz, over that of SAIF's medical expert because, in SAIF's view, Schwartz's opinion was based on an inaccurate understanding of the mechanism of claimant's injury, rendering his opinion unreliable. Claimant responds that the record was sufficient to support the board's decision. We agree with claimant and, therefore, affirm.

We review legal issues for errors of law and factual issues for substantial evidence. ORS 183.482(8)(a), (c); *SAIF v. Williams*, 281 Or App 542, 543, 381 P3d 955 (2016). "[S]ubstantial evidence supports a finding when the record, viewed as a whole, permits a reasonable person to make the finding." *Garcia v. Boise Cascade Corp.*, 309 Or 292, 295, 787 P2d 884 (1990). "As part of our review for substantial evidence, we also review the board's order for substantial reason—that is, we determine whether the board provided a rational explanation of how its factual findings lead to the legal conclusions on which the order is based." *Arms v. SAIF*, 268 Or App 761, 767, 343 P3d 659 (2015).

Generally, "an injury is compensable and arises out of and in the course of employment under ORS 656.005(7)

if the work is a material contributing cause of the injury." *Coleman v. SAIF*, 203 Or App 442, 446, 125 P3d 845 (2005). The claimant carries the burden of proof. ORS 656.266(1). However, when an otherwise compensable injury combines with a preexisting condition to cause or prolong a disability or the need for treatment, the combined condition is compensable only if the otherwise compensable injury is the major contributing cause of the disability or need for treatment. ORS 656.005(7)(a)(B). Once a claimant establishes an otherwise compensable injury, the employer bears the burden of proof to establish that the otherwise compensable injury is not the major contributing cause of the disability or the need for treatment of the combined condition. ORS 656.266(2)(a).

Here, SAIF does not dispute that claimant met his initial burden to establish an otherwise compensable injury. Rather, it contends only that the board erred in determining that SAIF had not met its own burden to prove that the work injury was not the major contributing cause of claimant's disability or need for treatment. ORS 656.266(2)(a).

The historical facts concerning claimant's preexisting knee condition are not materially in dispute. In 1985, claimant injured his left knee in a dirt bike accident. In 1988, while working as a pipefitter, claimant injured his left knee in a work-related incident, filed a workers' compensation claim, and received medical and surgical treatment (arthroscopic surgery with debridement of a meniscus). After that, and continuing through 2013, claimant noticed occasional swelling and fluid in his left knee that sometimes caused him to limp and sometimes did not. His knee did not interfere with his work activities during that period.

On May 14, 2014, claimant saw Brian Davis, PA-C (Physician Assistant-Certified), at Shasta Orthopedics for stiffness in his left knee accompanied by constant, gradually worsening, moderate pain. X-rays taken that day revealed severe left knee tricompartmental degenerative arthritic changes, with complete collapse of the medial compartment. Claimant was noted to have "slightly decreased" range of motion (ROM) and "normal" quadriceps strength at that visit. Treatment options ranging from conservative (oral pain medications, injectable therapy, moderate exercise) to

total knee arthroplasty (TKA or knee replacement) were discussed. Given claimant's "relative youth and manageable pain," Davis recommended "exhausting conservative treatments before proceeding with TKA." Claimant agreed with that recommendation and his knee was drained and injected with medicine that day. Claimant believed, based on his conversation with Davis, that, through conservative treatment methods, he could avoid a knee replacement for 10 years, until after he retired. He experienced eight to nine months of relief following that injection, at which point he scheduled another appointment at Shasta Orthopedics hoping for another injection. That appointment did not happen because of the intervening injury described below.

Claimant's work injury occurred on February 20, 2015. While working as a truck driver for Central Oregon Truck Company (employer), he injured his left knee when he dropped down[1] from a load of sheetrock on the truck and his left knee locked or twisted, causing acute pain in that knee. Knee x-rays were ordered by the emergency room physician and those studies showed advanced degenerative changes without acute fractures or dislocations. At that point, claimant could "only flex the knee to probably about 100 and 160 degrees." Claimant was prescribed medication and a knee brace.

Claimant had follow-up appointments with his primary care provider, Dolly Brooks, FNP (Family Nurse Practitioner). Brooks ordered an MRI, diagnosed a left knee injury, noted "decreased ROM" and weakness in the left knee, and thereafter authorized time loss. The MRI was read by a radiologist, who reported extensive degenerative tearing of the medial and lateral menisci, arthritic changes, chronic complete tearing of the anterior cruciate ligament (ACL), as well as some ganglion cysts at the posterior joint

[1] In his findings of fact, the administrative law judge (ALJ) stated that "claimant dropped down from his cargo load onto the trailer deck." Neither party challenges the ALJ's findings of fact; therefore, to avoid confusion, we describe the injury as occurring when claimant "dropped down" from the load of sheetrock. ORS 183.482(7) ("Review of a contested case shall be confined to the record, and the court shall not substitute its judgment for that of the agency as to any issue of fact or agency discretion."); ORS 656.298(7) ("The review by the Court of Appeals shall be on the entire record forwarded by the board. Review shall be as provided in ORS 183.482(7) and (8).").

capsule. Claimant was referred back to Shasta Orthopedics for further evaluation.

Before claimant's next appointment at Shasta Orthopedics, he was evaluated (but not treated) by Dr. Dewing, an orthopedic surgeon retained by SAIF. Dewing reviewed medical records and interviewed and examined claimant. Although Dewing had a copy of the MRI report in the medical records he reviewed, he did not have the actual MRI images available to review and he did not review them. His diagnoses included preexisting arthritic conditions dating from 1988 to February 20, 2015. He also described "objective evidence by imaging," including arthritic and degenerative changes, ACL insufficiency, and effusion. He concluded that the knee injury was a "material contributing cause" for claimant's need for treatment and that his preexisting knee condition combined with that work injury "to cause or prolong the disability and need for treatment." However, Dewing also opined that the work injury of "02/20/15 [was] never the major contributing cause of the combined condition." He based that opinion on "the fact that there was ongoing treatment *** for the left knee[,] *** extensive prior surgical treatment and findings consistent with ongoing symptoms from arthritic disease."

On May 20, 2015, claimant was seen by Davis and Schwartz at Shasta Orthopedics. That visit consisted of an interview, physical examination, and review of Dewing's Independent Medical Evaluation (IME) report. They discussed treatment options, including a conservative approach using a "hinged range of motion brace" as well as TKA. Claimant ultimately elected for the TKA, which was performed by Schwartz in October 2015. Schwartz thereafter rendered his opinion that the 2015 work injury was the major contributing cause of the need for treatment.

Claimant filed a workers' compensation claim, which SAIF denied. Claimant subsequently requested a hearing to challenge the denial; claimant was the only witness to testify at the hearing.

After considering the evidence, the administrative law judge (ALJ) issued an opinion and order. The ALJ concluded that claimant presented with a "combined condition,"

which shifted the burden to SAIF to prove that the work injury was not the major contributing cause of the need for treatment. The ALJ noted that the parties presented conflicting expert opinions on that question and then found claimant's doctor, Schwartz, more persuasive. First, the ALJ explained that Schwartz had a better opportunity than Dewing to make pertinent observations when he reviewed the 2015 MRI images and performed surgery on claimant's knee. Second, Schwartz provided a more logical explanation for his major contributing cause opinion than Dewing. Specifically, Schwartz reasoned that claimant had been able to control his symptoms prior to the 2015 injury, whereas, after the 2015 injury, claimant's symptoms "significantly increased and included a new sense of instability." Accordingly, the ALJ set aside the denial of claimant's workers' compensation claim.

SAIF, on behalf of employer, requested review of the ALJ's order, arguing that the ALJ erred in weighing the medical evidence to conclude that SAIF did not prove that the work injury was not the major contributing cause of the need for treatment of claimant's combined left knee condition. Specifically, SAIF contended that Schwartz's opinion was unreliable because it was based on an inaccurate understanding of the mechanism of injury and, therefore, the ALJ should have disregarded Schwartz's opinion.

The board adopted and affirmed the ALJ's order with supplementation, in which it noted that Schwartz's records described the mechanism of injury three ways—"stepped down off of a load," "fell about five and a half feet," and "jumped down out of his truck." Schwartz wrote the first description, while the other two descriptions were provided by claimant's attorney through two concurrence letters with which he agreed. The board acknowledged that the description in the first concurrence letter ("fell about five and a half feet") was inconsistent with claimant's testimony that he "pushed off and landed on his left leg." The board concluded, however, that the description Schwartz initially attributed to claimant ("stepped down off of a load") and the description in the second concurrence letter ("jumped down out of his truck") were "materially consistent" with claimant's testimony ("pushed off" the load) and the description

Dewing provided ("hopped back down"). The board stated that, "[g]iven that Dr. Schwartz endorsed these descriptions both before and after the inconsistent description of claimant falling 'five and [a] half feet,' we do not agree with SAIF's contention that Dr. Schwartz's medical opinion was based on an inaccurate understanding of the mechanism of injury." The board agreed with the ALJ that SAIF had not carried its burden and set aside SAIF's denial of claimant's workers' compensation claim.

SAIF now petitions for judicial review, arguing that "[t]he board erred by considering an erroneous description of claimant's injury to be 'materially consistent' with [claimant's] testimony, and excusing a patently incorrect history on the basis that the expert endorsed a more accurate history at a different time." We understand SAIF to argue that the board's order thus lacks substantial evidence and reason, because the board did not adequately explain how it could reasonably have relied on Schwartz's opinion that claimant's work injury was the major contributing cause of his need for treatment when his descriptions of the mechanism of claimant's injury varied over time and were in conflict.

The evidence properly before the ALJ included as many as nine variant descriptions of how claimant injured his knee: backed off, slipped, stepping down from sheetrock, coming down off the load, pushed himself off, hopped back down, sliding off his stomach, fell five and a half feet, and jumped out of truck.[2]

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[2] The evidence received at the hearing included the following descriptions of how claimant injured his knee:

"He is a truck driver and was *backing off of a pallet of some drywall and slipped* and twisted his left knee." Exhibit 7, Dr. Pope, ED Physician Report, subjective section (Feb 21, 2015) (emphasis added).

"I was *stepping down from sheetrock load* *** after putting *** protectors on load and my left knee *locked or twisted* and felt severe pain in inside of knee. It was painful to bend after this incident. While *coming down from load I was on my stomach*." Exhibit 6, Claimant, Form 801 (Feb 23, 2015) (emphases added).

"*Stepping down from load* onto deck of flat bed, my *left knee twisted* when left foot contacted deck of trailer." Exhibit 9, Brooks, FNP, Doctor's First Report on Occupational Injury or Illness (Feb 26, 2015) (emphases added).

"States he was on his abdomen, trying to come off a load on his trailer, *pushed himself off*, and *twisted his left knee* when his foot hit the deck of the trailer."

Below, the board agreed that "falling" was inconsistent with claimant's testimony that he "pushed off the load" on his stomach. It nonetheless concluded that Schwartz's causation opinion was based on a "materially consistent" understanding of the mechanism of injury, thus rejecting SAIF's argument that Schwartz's opinion was unreliable. SAIF contends that the board's conclusion was not reasonable because Schwartz did not reach a causation opinion until after he had agreed with the statements provided in the two concurrence letters. Basically, SAIF argues that Schwartz's opinion is unreliable because, by the time he rendered his contributing cause opinion, a number of inconsistent descriptions of the event had been documented in various records reviewed by Schwartz. It argues that both times Schwartz marked "yes" next to a mechanism of injury description in a concurrence letter, the descriptions were not consistent with claimant's testimony. Based on that, SAIF contends that the board's order was not supported by substantial evidence and reason. It is our job on review to determine if it was.

Exhibit 12, Brooks, FNP, Primary Treating Physician's Report (PR2) (Feb 26, 2015) (emphases added).

"On that day, he was *on his stomach* on the tarps and *hopped back down*, *sliding off his stomach* to the ground, *twisting his left knee* slightly." Exhibit 24, Dr. Dewing, Independent Medical Examination Report (Apr 16, 2015) (emphases added).

"[H]e *stepped down* off of a load, *twisted his knee* and felt immediate onset of severe pain." Exhibit 27, Dr. Schwartz and Brian Davis, PA-C, Shasta Orthopedics Progress Note (May 20, 2015) (emphases added).

"Mr. Harrison *fell about five and a half feet*." "You believe the work injury, the trauma to the knee from *the fall* worsened his underlying osteoarthritis condition rendering it symptomatic and resulting in his need for treatment and clearly his disability from work." Exhibit 29, Claimant's Attorney, Teleconference Summary (Oct 13, 2015) (emphases added) (also referred to as first concurrence letter; Dr. Schwartz marked "yes" next to both of the statements).

"I'm going towards the front of the truck and I lay on my stomach and I'm getting down from the stomach. I don't go forward, just because of the knee problem. So I was pushing off the load on my stomach, and my left knee—my left foot was the lead foot." Claimant, Testimony at Contested Case Hearing (Nov 5, 2015).

"Mr. Harrison's *jump down out of his truck* on 2/20/15, with the *twisting injury to the knee*, was sufficient to cause the anterior cruciate ligament tear." Exhibit 32, Claimant's Attorney, Telephone Conference Summary (Feb 24, 2015) (emphases added) (also referred to as second concurrence letter; Dr. Schwartz checked "yes" next to the statement).

Our resolution of this combined injury case is governed by certain precepts.[3] Those pertinent here include:

> "[First], determining causation is a complex medical question that can be resolved only by expert medical opinion. [Second], to be persuasive, the opinion regarding the 'major contributing cause' of a *** condition must evaluate the relative contribution of other potential causes to determine whether the compensable injury is primary. *Dietz v. Ramuda*, 130 Or App 397, 401, 882 P2d 618 (1994) (stating rule regarding combined conditions); *SAIF v. Willcutt*, 160 Or App 568, 574, 981 P2d 1288 (1999) (applying *Dietz* to consequential conditions). [Third], when medical experts disagree, the board should place more emphasis on opinions that are well reasoned and based on the most complete relevant information. [Fourth], we review the board's finding that an expert opinion evaluates alternative potential causes and is based on sufficiently complete information for substantial evidence. ORS 183.482(8)(c). [Fifth], if there are doctors on both sides of a medical issue, whichever way the board finds the facts will probably have substantial evidentiary support, and we will reverse the board 'only when the credible evidence apparently weighs overwhelmingly in favor of one finding and the board finds the other without giving a persuasive explanation.'"

Jackson County v. Wehren, 186 Or App 555, 559-60, 63 P3d 1233 (2003) (first and last internal citations omitted). When reviewing the board's evaluation of expert opinions, "'we do not substitute our judgment for that of the board; rather, we determine whether the board's evaluation of that evidence was reasonable.'" *Williams*, 281 Or App at 548 (quoting *SAIF v. Pepperling*, 237 Or App 79, 85, 238 P3d 1013 (2010)).

In *SAIF v. January*, 166 Or App 620, 998 P2d 1286 (2000), we reviewed a board decision that involved two contradictory opinions of a single medical expert given at different times about whether the claimant's condition was medically stable or worsening. Both opinions in *January*

[3] These precepts have been applied in "combined condition" cases as well as "consequential condition" cases. Although the burden of proof differs depending on which type of case is at issue, both types may require the board to resolve conflicting medical opinions on the question of major contributing cause. The cited precepts apply when resolving such questions in the context of a workers' compensation claim where the relative contribution of potentially causative events must be evaluated.

came in the form of concurrence letters written by lawyers and sent to the expert for confirmation. The second opinion contradicted that same expert's earlier opinion. In reference to the use of conflicting concurrence letters, we stated:

> "It is the factfinder's role to decide which is true. Such inconsistencies may be explained by confusion, or the inconsistency may not exist when the circumstances are better understood. Likewise, given how records are developed in workers' compensation cases, apparent contradictions and inconsistencies sometimes may be due to the leading written questions posed to the experts, coupled with the experts' limited opportunities to clarify their answers."

Id. at 625-26 (internal citations omitted).

We ultimately concluded that

> "[t]he problem here is that the Board did not acknowledge the existence of [the doctor's] subsequent opinion, it did not reconcile her two opinions, and it did not explain why it found [the] opinion of an 'actual worsening' persuasive notwithstanding her agreement that she was treating claimant for a 'waxing and waning' of symptoms."

Id. at 626. Importantly, we clarified that "whether [the] two opinions are fatally inconsistent is for the Board to consider and decide," not the court. *Id.* *January*, thus, prescribes a framework for the board to use when it accepts a medical opinion that contains inconsistencies. It must (1) acknowledge the inconsistencies, (2) reconcile those inconsistencies, and (3) explain why it found that opinion to be more persuasive than that of the other expert.

Unlike the *January* case, the issue here is not whether the board erred by relying on a medical expert who rendered two different opinions that reached inconsistent conclusions on a key medical question. Schwartz rendered one opinion. He considered inconsistent descriptions of the work injury in reaching his opinion, but he did not render inconsistent opinions on the major contributing cause issue. Put another way, the inconsistencies at issue in *January* were in the conclusions rendered by the expert. In this case, the inconsistencies are in descriptions of the work injury, but the conclusion rendered by the expert on the key medical issue did not change. Nevertheless, reference to the precepts

set forth in *January* is helpful in evaluating whether the board properly reconciled the description inconsistencies in assessing whether to accept Schwartz's opinion.

We conclude that the board did so. As conceded by SAIF, the board acknowledged variability in the descriptions of the event in its supplementation. It reconciled those descriptions and explained its conclusion that they were not materially inconsistent:

> "Given that Dr. Schwartz endorsed these descriptions both before and after the inconsistent description of claimant falling 'five and [a] half feet,' we do not agree with SAIF's contention that Dr. Schwartz's medical opinion was based on an inaccurate understanding of the mechanism of injury."

While it is true that the board's explanation of how it reconciled the descriptions was not lengthy or in-depth, it was enough in this case.

The issue here is not whether the board erred by relying on a medical expert who considered variable descriptions of the work injury in reaching his opinion.[4] The question is whether the board provided a reasonable explanation for its decision to rely on Schwartz's conclusion.

The overarching question before the court is whether there is substantial evidence in the record, viewed as a whole, to permit a reasonable person to accept Schwartz's causation opinion over that of Dewing. Because it appeared that Schwartz was aware of variant descriptions of the work injury when he rendered his opinion, the board reconciled those differences as it evaluated his medical opinion evidence. The board gave a rational explanation of how

[4] As SAIF frames the issue, the fundamental problem with the variant descriptions in Schwartz's records is that each description provided implies a different level of downward force on claimant's knee, which would presumably result in varying degrees of injury. While that may be correct in another case, the record in the case before us does not support that framing. Dewing's major contributing cause opinion does not expressly rely on his understanding of the mechanism of injury and the attendant downward force that accompanies that description. As he explains in his IME report, Dewing based his opinion on "the fact that there was ongoing treatment *** for the left knee[,] *** extensive prior surgical treatment and findings consistent with ongoing symptoms from arthritic disease." Therefore, although there was a typical "battle of the experts," they did not "battle" on that particular field.

its factual finding on the inconsistencies (that they are not materially inconsistent) led, in part, to its acceptance of Schwartz's opinion on causation. That is all that was required of it.

Having reconciled the inconsistencies, the board (by adopting the ALJ's August 1, 2016, order and opinion) explained its reasons for finding Schwartz's opinion more persuasive than Dewing's:

> "First, Dr. Schwartz has had a better opportunity than the record proves that Dr. Dewing has had to make pertinent observations of claimant's pathology. Where observations of a claimant are important to a medical question, opinions based on more extensive pertinent observations of a claimant by means such as numerous examinations, review of diagnostic images, or surgical observations may warrant greater weight.
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> "Observations of claimant's left knee pathology are important here because of Drs. Schwartz and Dewing's conflicting opinions about the nature and causes of claimant's left ACL tear and left knee laxity. Dr. Schwartz has had a better opportunity to make pertinent observations of claimant's torn ACL and the rest of his current left knee pathology because he saw both the images from the March 2015 MRI study and he observed that pathology firsthand when he performed claimant's October 2015 total left knee replacement surgery. In contrast, the record does not prove that Dr. Dewing saw either the MRI images or any images from Dr. Schwartz's surgery.
>
> "Second, Dr. Schwartz provides a more logical explanation for his major cause opinion than Dr. Dewing provides for his opinion. Where medical experts' opinions conflict, the Board gives more weight to those opinions that are more thoroughly and logically explained.
>
> "Dr. Schwartz logically explains that claimant's preexisting left knee conditions had been relatively stable. After the 1988 injury and surgery, claimant was able to continue working for about 27 years as a pipefitter and then as a truck driver. He was able to control his symptoms with rest, pain medication, and, more recently, aspiration of fluid and injection of medication into the knee. Dr. Schwartz logically explains that the mechanism of the February 2015 accident was sufficient to cause claimant's ACL tear.

> He logically explains that, following the 2015 accident, claimant's left knee symptoms significantly increased and included a new sense of instability. He became unable to work and required a knee brace. It became necessary to proceed with knee replacement surgery. Based on his surgical observations, Dr. Schwartz concluded that the work injury had acutely injured claimant's left ACL, causing laxity that accelerated the deterioration of his pre-existing conditions."

(Citations omitted.)

Keeping in mind that medical causation is complex and that expert opinion evidence is necessary to resolve it, and being mindful of the board's explanation for its decision to accept Schwartz's opinion over that of Dewing, we conclude that the board's decision was supported by the record and by reason and that evidence weighing in favor of Dewing's opinion was not so overwhelming as to require reversal.

Affirmed.