In the Matter of the Compensation of
KRISTINA REDFERN, Claimant
WCB Case No. 11-02955
ORDER ON REVIEW
Bottini Bottini & Oswald, Claimant Attorneys
Law Office of Thomas A Andersen, Defense Attorneys

Reviewing Panel: Members Lowell and Biehl.

Claimant requests review of Administrative Law Judge (ALJ) Jacobson's order that upheld the insurer's denial of her new/omitted medical condition claim for a low back condition. On review, the issue is compensability. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact."

CONCLUSIONS OF LAW AND OPINION

As a result of claimant's October 15, 2010 work injury, the insurer accepted a lumbosacral strain. After an MRI showed the presence of an L5-S1 disc herniation, claimant requested acceptance of that condition as a new/omitted medical condition. After the insurer denied the new/omitted medical condition claim, claimant requested a hearing.

Reasoning that claimant had not proven that the October 15, 2010 injury was a material contributing cause of her disability or need for treatment related to the L5-S1 disc herniation, the ALJ upheld the insurer's denial. On review, claimant contends that the evidence persuasively supports compensability. We agree with claimant's contention.

Claimant bears the initial burden of proving the compensability of her L5-S1 disc herniation as a new/omitted medical condition by establishing that her work injury was a material contributing cause of her disability or need for treatment of that condition.[1] *See* ORS 656.005(7)(a); ORS 656.266(1); *Olson v. State Indus. Accident Comm'n*, 222 Or 407, 414-15 (1960); *Nina Prisakara*,

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[1] The insurer does not dispute the existence of the L5-S1 disc herniation. *See Maureen Y. Graves*, 57 Van Natta 2380, 2381 (2005) (the claimant bears the burden to prove the existence of the claimed new/omitted medical condition).

64 Van Natta 344, 345 (2012). If claimant makes that showing, but the otherwise compensable injury combined with a preexisting condition, the insurer may prove that the combined condition is not compensable by showing that the otherwise compensable injury was not the major contributing cause of the disability or 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).

The causation issue presents a complex medical question that must be answered by expert medical evidence. *Uris v. State Comp. Dep't*, 247 Or 420, 426 (1967); *Barnett v. SAIF*, 122 Or App 279, 283 (1993). When presented with disagreement among 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). Absent persuasive reasons to do otherwise, we generally give more weight to the opinions of treating physicians because of their greater opportunity to observe the claimant's condition. *Weiland v. SAIF*, 64 Or App 810 (1983). However, we may give more or less weight to a treating physician's opinion depending on the record in each case. *Dillon v. Whirlpool Corp*., 172 Or App 484, 489 (2002).

To establish compensability, claimant relies on the opinions of Dr. Brett, who became her attending physician in April 2011, and Dr. Guilleux, who had been her attending physician before that time. We find their opinions persuasive.

Dr. Brett opined that claimant's October 2011 work accident caused the L5-S1 herniation. (Ex. 10). He explained that the herniation resulted in right S1 radiculopathy and pain, reduced right ankle reflex, and nerve root irritation signs. (*Id.*) He concluded that the work injury was sufficient to cause the injury, and that it did so in combination with "minor" degenerative changes. (Ex. 14, 19-2). He further noted that claimant's symptoms began with the work injury. (Exs. 9-2, 19-1). Recommending surgery, Dr. Brett opined that the work injury was the major contributing cause of claimant's current condition and need for treatment and an annular tear, which resulted in nerve root impingement and irritation with ongoing back and right leg pain and required surgery. (Exs. 10, 14). During the operation, Dr. Brett observed the herniation with right S1 nerve root impingement and described the nerve root as "being quite edematous, erythematous, and irritable." (Ex. 21-1). He also described his findings as consistent with his causation opinion. (Ex. 21-2).

Dr. Guilleux concurred with Dr. Brett's opinion. (Ex. 20-2). Based on claimant's history, the mechanism of the work injury, his clinical examination findings, the MRI findings and their correlation with claimant's symptoms, and

the presence, and continuation, of symptoms after the work injury, Dr. Guilleux opined that the work injury was the major contributing cause of claimant's L5-S1 herniation and need for treatment. (Ex. 20-2).

The insurer cites the contrary opinion of Dr. Strum, an insurer-arranged medical examiner. Dr. Strum opined that his clinical examination showed only "a very mild degree of right S1 nerve root dysfunction," but no evidence of nerve root impingement or S1 radiculopathy. (Exs. 11-9, 18-2). Citing several studies, he stated that the concept of traumatic disc injury had been disproven. (Exs. 11-10, 18-2). Dr. Strum acknowledged that the onset of claimant's symptoms coincided with the work event, but opined that the temporal relationship was "truly coincidental" and did not establish causation. (Exs. 11-10, 23-2-3). Noting the presence of age-related degeneration in claimant's spine, he opined that claimant's disc bulge was part of that degenerative process. (Exs. 11-7-9, 24-2). Thus, Dr. Strum concluded that claimant's disability and need for treatment was related entirely to her age-related degeneration. (Exs. 11-9-10, 23-2).

Dr. Strum's opinion primarily relied on medical literature that he believed disproved the concept of traumatic disc injury. Where expert analysis, rather than expert observation, is the basis of an opinion, the opportunity to observe a claimant's condition is less relevant to the persuasiveness of the opinion. *Hammons v. Perini Corp.*, 43 Or App 299, 301 (1979). Nevertheless, we do not find Dr. Strum's reliance on the medical literature persuasive.

Dr. Strum identified three "bodies of evidence" as disproving the theory of disc injury: (1) studies demonstrating a very high incidence of disc pathology in asymptomatic individuals; (2) a study that "demonstrated that episodes that would otherwise be considered 'injuries' did not correlate in any fashion with the presence or absence of changes in pathology noted on MRI studies done at the beginning of this five-year prospective study and then at the end of the study"; and (3) a ten-year study of monozygotic twins. (Ex. 11-10). He also reasoned that any causal relationship between specific injuries and the onset of symptoms had been disproven by the fact that symptoms arise without a specific injury more than 50 percent of the time. (Exs. 23-2-3).

Although Dr. Strum described various studies, he did not explain their significance in this particular case. In particular, he did not explain how the presence of disc pathology in asymptomatic individuals was relevant to the cause of disability or need for treatment in symptomatic individuals, as a general principle or in this case. Nor did Dr. Strum explain the relevance of the study of

"episodes that would otherwise be considered 'injuries'" to claimant's particular injury, or the relevance of the MRI studies in that study to claimant's disability or need for treatment. Finally, he did not explain the relevance of the twin study, nor how the absence of an injurious event in the majority of symptomatic cases disproved a causal relationship in the minority of cases where symptoms arose with injuries, or in this particular case. Under such circumstances, we do not find Dr. Strum's opinion that the timing of the onset of claimant's symptoms was "truly coincidental" persuasive. *See Sherman v. Western Employers Ins.*, 87 Or App 602, 606 (1987) (evidence that was general and nature, and not addressed to the particular case, found unpersuasive); *Deborah L. Heer*, 63 Van Natta 1957, 1962 (2011).

Drs. Guilleux and Brett, by contrast, persuasively discussed the nature of claimant's symptoms, the timing of their onset, and the nature of claimant's work injury, as well as the MRI images. Insofar as Dr. Strum disagreed with them regarding the nature of claimant's symptoms, they were in a better position to observe claimant's condition. Dr. Brett responded to Dr. Strum's opinion by specifically identifying his findings of S1 nerve root impingement, including radicular pain. (Ex. 19-1). Dr. Guilleux also identified "continuing right radiculopathy." (Ex. 7-1). Additionally, Dr. Brett explained that his surgical findings were consistent with his opinion. *See Argonaut Insurance Co. v. Mageske,* 93 Or App 698, 702 (1988) (treating surgeon's opinion persuasive given his first-hand exposure to and knowledge of the claimant's condition). We find their opinions persuasive.

Accordingly, we conclude that claimant has proven that her work injury was a material contributing cause of her disability and need for treatment. Further, because we find Dr. Strum's opinion unpersuasive, even if claimant's otherwise compensable injury combined with a "preexisting condition" to cause or prolong her disability or need for treatment, we would not find that the insurer proved that the otherwise compensable injury was not the major contributing cause of claimant's disability or need for treatment of the combined condition. Therefore, we find claimant's L5-S1 disc herniation compensable.

Claimant's attorney is entitled to an assessed fee for services at hearing and on review. ORS 656.386(1). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable fee for claimant's attorney's services at hearing and on review is $10,000, payable by the insurer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by the record, claimant's appellate briefs,

claimant's attorney fee representation, and the insurer's objection), the complexity of the issue, the value of the interest involved, and the risk that counsel may go uncompensated.

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 insurer. *See* ORS 656.386(2); OAR 438-015-0019; *Nina Schmidt*, 60 Van Natta 169 (2008); *Barbara Lee*, 60 Van Natta 1, *on 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 January 13, 2012, as corrected January 26, 2012, is reversed. The insurer's denial is set aside and the claim is remanded to the insurer for processing according to law. For services at hearing and on review, claimant's attorney is awarded an assessed fee of $10,000, payable by the insurer. 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 insurer.

Entered at Salem, Oregon on July 30, 2012