
In the Matter of the Compensation of
LUCILA DELOS-SANTOS, Claimant
WCB Case No. 11-03363
ORDER ON RECONSIDERATION
Schoenfeld & Schoenfeld, Claimant Attorneys
MacColl Busch Sato PC, Defense Attorneys

Reviewing Panel: Members Weddell, Johnson, and Somers.¹ Member Weddell concurs in part and dissents in part.

On May 21, 2014, we affirmed an Administrative Law Judge's (ALJ's) order that: (1) denied claimant's request to reopen the hearing record; and (2) upheld the insurer's denials of her new/omitted medical condition claims for "L4-5 pathologies" including an "L4-5 disc bulge protrusion and annular tear," and "radiculopathy/radiculitis." We have since received claimant's attorney's request for reconsideration.²

On reconsideration, claimant contends that ORS 656.005(7)(a) does not contain a requirement regarding the "existence" of a claimed condition. Relying on *Boeing Aircraft Co. v. Roy*, 112 Or App 10 (1992), she argues that she need not prove a specific diagnosis, as long as she proves that her symptoms are attributable to the work injury.

Claimant's reliance on *Roy* is misplaced. In *Roy*, the claim was for an initial injury and the court explained that a claimant need not prove a specific diagnosis if the symptoms are attributable to the work. 112 Or App at 15. The holding in *Roy* applies to *initial* compensability claims.

Here, in contrast, the parties litigated the compensability of *new/omitted* medical condition claims that included "radiculopathy/radiculitis." To establish compensability of her new/omitted medical condition claim for radiculopathy/radiculitis, claimant must first prove that the condition exists. *See Maureen Y. Graves*, 57 Van Natta 2380, 2381 (2005) ("proof of the existence of

¹ Member Langer was a member of the initial reviewing panel. Because Member Langer's term has expired, Member Johnson has participated in this review.

² Before receiving claimant's attorney's request for reconsideration, we had received claimant's letter that expressed dissatisfaction with our decision. There is no indication that claimant's attorney or the insurer have received copies of claimant's letter. Therefore, copies have been included with claimant's attorney's and the insurer's counsel's copies of this letter.

the condition is a fact necessary to establish compensability of a new or omitted medical condition.”). We adhere to our prior opinion that claimant must establish the existence of the claimed radiculopathy/radiculitis.

Claimant also argues that we found that her claim for radiculopathy/radiculitis was a consequential condition, but she did not frame the issue that way. According to claimant, a material contributing cause standard applies.

We disagree with claimant’s interpretation of our previous order. In our prior decision, we explained that, to the extent that claimant was arguing that we must decide the issue of radiculopathy/radiculitis without any regard to the L4-5 disc condition, our standard of review was based on the medical evidence and the record. Although a claimant’s theory of compensability is the starting point, we review the entire record to determine the appropriate standard of review. *E.g.*, *Daniel Suing*, 56 Van Natta 2600, 2601 (2004) (citing *Dibrito v. SAIF*, 319 Or 244, 248 (1994)); *Daniel S. Field*, 47 Van Natta 1457, 1458 (1995) (“it is our obligation as a fact finder to apply the appropriate legal standards to determine the compensability of a worker’s claim.”). In other words, our analysis depends on whether the *medical evidence* relates the radiculopathy/radiculitis to the L4-5 disc condition.

We determined that the medical evidence was not sufficient to establish the existence of radiculopathy/radiculitis. Alternatively, even assuming the existence of radiculopathy/radiculitis, we concluded that claimant did not establish that her work injury was a material contributing cause of her disability/need for treatment for that condition.

In reaching that conclusion, we analyzed the medical opinions and determined that Dr. Sobota’s opinion did not support the conclusion that claimant’s radiculopathy arose directly from the work injury, which would have implicated a material contributing cause standard. *See Margaret O. Henry*, 65 Van Natta 1447 (2013) (because the medical opinion supported the conclusion that the sciatic nerve injury arose directly from the work injury, a material contributing cause standard applied).

We explained that Dr. Sobota testified that, based on medical probability, claimant’s radiculopathy was caused by the L4-5 herniated disc. (Ex. 59-9, -10, -11). Her reports consistently documented a herniated lumbar disc with radiculopathy. (Exs. 44A, 44B, 46, 47A, 48, 49A, 60). We concluded that Dr. Sobota opined that the radiculopathy/radiculitis arose as a *consequence*

of the L4-5 disc condition, which implicated a “consequential condition” theory of compensability. See ORS 656.005(7)(a)(A) (“[n]o injury or disease is compensable as a consequence of a compensable injury unless the compensable injury is the major contributing cause of the consequential condition”); *Albany General Hospital v. Gasperino*, 113 Or App 411 (1992) (distinguishing between a condition caused by the industrial accident, and a consequential condition, which is caused in turn by the compensable injury).

In our previous order, we determined that the L4-5 disc condition was not a “compensable injury.” Furthermore, we reasoned that Dr. Sobota’s opinion did not support the conclusion that the accepted lumbar or sacroiliac strain was the major contributing cause of claimant’s radiculopathy/radiculitis. See ORS 656.266(1); ORS 656.005(7)(a)(A).

On reconsideration, we adhere to our opinion that Dr. Sobota’s opinion is not sufficient to establish compensability of claimant’s radiculopathy/radiculitis. Dr. Sobota testified that the most likely cause of claimant’s L5 radiculopathy was her disc, but she acknowledged that there “are other causes of radiculopathy besides disk problem.” (Ex. 59-10). We are not persuaded by Dr. Sobota’s opinion regarding “other causes” because it is conclusory and lacks adequate explanation. See *Moe v. Ceiling Systems, Inc.*, 44 Or App 429, 433 (1980) (rejecting unexplained, conclusory opinion). For the reasons expressed in our previous decision, we continue to find that the medical evidence in support of the claimed conditions insufficient to establish the compensability of those conditions.

Accordingly, our May 21, 2014 order is withdrawn. On reconsideration, as supplemented, we republish our May 21, 2014 order. The parties’ 30-day rights of appeal shall begin to run from the date of this order.

IT IS SO ORDERED.

Entered at Salem, Oregon on June 20, 2014

Member Weddell dissenting in part.

For the reasons expressed in my previous dissenting opinion, I continue to disagree with the majority’s conclusion that the new/omitted medical condition claim for “radiculitis” is not compensable. I express no opinion regarding the majority’s application of the holding in *Maureen Y. Graves*, 57 Van Natta 2380 (2005), to this case.