In the Matter of the Compensation of
NICHOLAS J. WATTS, Claimant
WCB Case No. 15-03227; 15-01614
ORDER ON REVIEW
Thomas Coon Newton & Frost, Claimant Attorneys
Olson & Dickson LLP, Defense Attorneys

Reviewing Panel: Members Lanning and Johnson.

The self-insured employer requests review of those portions of Administrative Law Judge (ALJ) Kekauoha's order that: (1) set aside its denial of a new/omitted medical condition claim for L4-5 and L5-S1 annular tears; and (2) concluded that disputed medical services were compensably related to claimant's work injury. Claimant cross-requests review of that portion of the ALJ's order that upheld the employer's denial of a new/omitted medical condition claim for L4-5 and L5-S1 degenerative disc disease. On review, the issues are compensability and medical services.

We adopt and affirm the ALJ's order with the following supplementation to address claimant's argument that an injury theory should be applied to the L4-5 and L5-S1 degenerative disc disease conditions.

In upholding the employer's denial, the ALJ found that the persuasive medical evidence established that claimant's L4-5 and L5-S1 degenerative disc disease condition developed gradually over time. Because claimant had not filed an occupational disease claim, the ALJ concluded that the new/omitted medical condition claim was not compensable.

On review, claimant contends that the opinion of Dr. Ball, his treating neurosurgeon, persuasively establishes the compensability of his claimed lumbar conditions under an injury theory. Assuming that an injury theory applies, we disagree with his contentions.

To prevail on his new/omitted medical condition claims, claimant must prove that the June 2013 work injury was a material contributing cause of his disability or need for treatment for his claimed conditions.[1] ORS 656.005(7)(a); ORS 656.266(1); *Betty J. King*, 58 Van Natta 977 (2006). If claimant meets that

[1] The parties do not dispute the existence of the L4-5 and L5-S1 degenerative disc disease condition. *See Maureen Y. Graves*, 57 Van Natta 2380, 2381 (2005).

burden and the medical evidence establishes that the "otherwise compensable injury" combined with a "preexisting condition" to cause or prolong disability or a need for treatment, the employer has the burden to prove that the "otherwise compensable injury" (*i.e.*, the "work-related injury incident") was not the major contributing cause of the disability or need for treatment of the combined cervical and lumbar conditions. ORS 656.005(7)(a)(B); ORS 656.266(2)(a); *Brown v. SAIF*, 262 Or App 640, 652 (2014); *SAIF v. Kollias*, 233 Or App 499, 505 (2010); *Jean M. Janvier*, 66 Van Natta 1827, 1832-33 (2014), *aff'd without opinion*, 278 Or App 447 (2016).

Because of the disagreement between medical experts regarding the cause of the need for treatment/disability of the claimed lumbar conditions, the claim presents a complex medical question that must be resolved by expert medical opinion. *Barnett v. SAIF*, 122 Or App 279, 282 (1993); *Matthew C. Aufmuth*, 62 Van Natta 1823, 1825 (2010). More weight is given to those medical opinions that are well reasoned and based on complete information. *See Somers v. SAIF*, 77 Or App 259, 263 (1986); *Linda E. Patton*, 60 Van Natta 579, 582 (2008). As explained below, we find that the medical evidence does not persuasively establish that the work injury was a material contributing cause of the need for treatment/ disability of the L4-5 and L5-S1 degenerative disc disease.

Dr. Ball opined that claimant's June 2013 mechanism of injury was the major contributing cause of the need for treatment for the L4-5 and L5-S1 "disc pathology." (Ex. 88-1). He explained that the "disc pathology" was the L4-5 and L5-S1 degenerative disc disease, including annular tears and bulging discs. (Ex. 88-2). He concluded that "annular tears" probably occurred at the time of injury. (*Id*.) He explained that annular tears can be painful. (Ex. 98-1). Based on the MRI and discogram in conjunction, he opined that it was more likely that the degenerative disc disease and annular tearing were responsible for claimant's symptoms. (Ex. 98-2).

Subsequently, Dr. Ball agreed that degenerative disc disease was a gradual process, and that annular tearing "can" be a part of that process. (Ex. 100-1). However, he added that annular tears may also be the result of trauma. (*Id*.)

In contrast, Dr. Polin, who examined claimant at the employer's request, described claimant's degenerative disc disease as "minimal rather than significant," "modest," and without significant loss of disc height. (Ex. 70-10, -13). Similar to Dr. Ball, he opined that degenerative disc disease develops gradually, and he did not attribute that condition, or the need for treatment/disability, to claimant's June 2013 work injury. (Ex. 99-1-2).

Dr. Mitchell, claimant's treating chiropractor, who began treating him in March 2012, and continued to treat him after his work injury, opined that degenerative disc disease develops gradually. (Ex. 96-1). However, he agreed with Dr. Ball that annular tearing can be traumatic in origin, and he opined that it is not always synonymous with degenerative disc disease. (Ex. 96-1-2). He could not say that claimant's history and symptoms "are" consistent with degenerative disc disease, only that they "could be." (Ex. 96-1).

After reviewing the record, we are more persuaded by the opinions of Drs. Polin and Mitchell, who did not, to a reasonable degree of medical probability, attribute claimant's L4-5 and L5-S1 degenerative disc disease, need for treatment, or disability to the June 2013 work injury. Specifically, Dr. Mitchell only thought it possible that claimant's history and symptoms were consistent with the degenerative disc disease. Moreover, he treated claimant before and after his June 2013 work injury. Consequently, he was in an advantageous position to comment on the compensability of the claimed degenerative disc disease condition. *See Kienow's Food Stores v. Lyster,* 79 Or App 416, 421 (1986) (greater probative weight accorded to the physician's opinion, who had observed the claimant's condition before and after the pivotal event); *Kevin G. Gagnon*, 64 Van Natta 1498, 1500 (2012) (physician's longitudinal history with the claimant rendered his opinion more persuasive). Furthermore, Dr. Mitchell's opinion is bolstered by that of Dr. Polin, who did not find anything significant on the MRI or the discogram to relate claimant's degenerative disc disease or need for treatment/disability to his June 2013 work injury.

We acknowledge that Dr. Ball disagreed with the opinions of Drs. Polin and Mitchell. (Exs. 94A, 98-2, 100). Yet, Dr. Ball's opinion with respect to the need for treatment for claimant's low back distinguished the degenerative disc disease condition and annular tear condition, and also primarily focused on the symptomatology of the claimed annular tear condition. Specifically, he indicated that the annular tears were probably caused by the June 2013 work injury and that they were not always synonymous with degenerative disc disease, thus differentiating the conditions. (Exs. 88-2, 100). This distinction between the degenerative disc disease and annular tear conditions is consistent with Dr. Mitchell's opinion that annular tears can be traumatic in origin. (Ex. 96-1-2).

Moreover, Dr. Ball noted that annular tears can be painful, but did not render the same conclusion regarding the degenerative disc disease. (Ex. 98-1). Although he concluded that the June 2013 work injury was the major contributing cause of the need for treatment for both conditions, we consider Dr. Ball's opinion to be

conclusory with respect to the degenerative disease in that he did not persuasively explain whether that condition was symptomatic, as opposed to the annular tears. *See Moe v. Ceiling Sys., Inc*., 44 Or App 429, 433 (1980) (rejecting unexplained or conclusory opinion); *Gary D. Smith*, 60 Van Natta 2527, 2528 (2008) (treating surgeon's opinion lacked persuasive force because it was unexplained). In light of Dr. Polin's opinion that the degenerative disc disease was "insignificant" and Dr. Mitchell's opinion that did not attribute claimant's need for treatment/disability to his degenerative disc disease to a medical probability, we consider Dr. Ball's opinion unpersuasive with respect to the degenerative disc disease condition.

In sum, based on the above reasoning, as well as that expressed in the ALJ's order, the record does not persuasively support the compensability of claimant's new/omitted medical condition claim for L4-5 and L5-S1 degenerative disc disease. Accordingly, we affirm.

Claimant's attorney is entitled to an assessed fee for services on review concerning the compensability of his L4-5 and L5-S1 annular tear conditions. ORS 656.382(2). 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 on review concerning these issues is $4,000, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to these issues (as represented by claimant's briefs, his counsel's fee submission, and the employer's position), the complexity of the issues, the value of the interest involved, the risk that counsel may go uncompensated, and the contingent nature of the practice of workers' compensation law.

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 656.382(2); OAR 438-015-0019; *Gary E. Gettman*, 60 Van Natta 2862 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

Claimant's attorney is also entitled to a "contingent" assessed fee for services on review regarding the medical services issue.[2] ORS 656.382(2). *See Antonio L. Martinez*, 58 Van Natta 1814 (2006), *aff'd*, *SAIF v. Martinez*, 219 Or

[2] If a "propriety" dispute is currently pending before WCD, or if a request to resolve such a dispute is filed with WCD within 30 days of this order, our attorney fee award will remain "contingent" until WCD resolves the "propriety" dispute subject to its jurisdiction. However, if no such dispute is currently pending with WCD or no request to resolve such a dispute is filed with WCD within 30 days of this order, claimant will have finally prevailed against the denial, and our attorney fee award shall become payable. *See Stephen H. Moore*, 66 Van Natta 812, 817 n 7 (2014).

App 182 (2008). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this issue, we find that a reasonable "contingent" fee for claimant's attorney's services on review is $1,000, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the issue (as represented by claimant's briefs, his counsel's fee submission, and the employer's position), 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, we make a similar "contingent" award of reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the medical services denial, to be paid by the employer in the event that claimant finally prevails against all aspects of the medical services dispute. *See* ORS 656.382(2); OAR 438-015-0019; *Gary E. Gettman*, 60 Van Natta 2862 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

ORDER

The ALJ's order dated June 3, 2016 is affirmed. For services on review concerning the compensability of the L4-5 and L5-S1 annular tear conditions, claimant's attorney is awarded an assessed attorney fee of $4,000, payable by the employer. Claimant is also awarded expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the compensability denial, to be paid by the employer. For services on review concerning the medical services dispute, claimant's attorney is awarded an assessed attorney fee of $1,000, payable by the employer, contingent on claimant prevailing over all aspects of the medical services dispute as described in this order. Claimant is also awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the medical services denial, to be paid by the employer, contingent on claimant prevailing over all aspects of the medical services dispute as described in this order.

Entered at Salem, Oregon on February 27, 2017