

In the Matter of the Compensation of
CURTIS V. SHORT, Claimant
WCB Case No. 02-01242
ORDER ON REVIEW
Merkel & Associates, Claimant Attorneys
Garrett Hemann et al, Defense Attorneys

Reviewing Panel: Members Langer and Phillips Polich.

Claimant requests review of Administrative Law Judge (ALJ) Tenenbaum's order that upheld the insurer's denial of his current low back condition, including L5-S1 fusion surgery. On review, the issue is compensability.

We adopt and affirm the ALJ's order with the following supplementation.

The ALJ upheld the insurer's denial of claimant's current low back "combined condition" and need for treatment. In doing so, the ALJ found the medical evidence insufficient to establish that, as of February 4, 2002, the date of the insurer's denial, claimant's work injury was the major contributing cause of claimant's need for treatment at L5-S1.¹

On review, claimant contends that the opinions of his initial treating physician, Dr. Moroye, and his treating orthopedic surgeon, Dr. Treible, persuasively establish that his compensable injury continues to be the major contributing cause of his current condition and need for treatment. We disagree.

In order to prevail against the insurer's "current condition" denial, claimant must establish that the compensable work injury remains the major contributing cause of his need for treatment and/or disability for his current combined condition. *See* ORS 656.005(7)(a)(B); *SAIF v. Nehl*, 148 Or App 101, *on recon* 149 Or App 309 (1997); *Jerold D. Glover*, 51 Van Natta 169 (199) (combined condition compensable only so long as due in major part to work injury); *Danny B. Conner, on remand* 48 Van Natta 1227, 1228 (1996) (same).²

¹ Claimant's low back claim was initially accepted for "[l]eft low back strain." (Ex.12). On February 1, 2002, pursuant to ORS 656.005(7)(a)(B), the insurer modified its acceptance to include "low back strain combined with preexisting degenerative condition in the form of anterolisthesis/spondylolisthesis at L5- on S1 and preexisting degenerative disk disease at L4-5 and L5-S1." (Ex. 37). The insurer denied claimant's current condition on February 4, 2002. (Ex. 38).

² ORS 656.005(7)(a)(B) provides:

The statute requires evaluation of the relative contribution of different causes, including the precipitating cause, to determine which is the primary or major contributing cause. *See Dietz v. Ramuda*, 130 Or App 397, 401 (1994), *rev dismissed* 321 Or 416 (1995). Because of claimant's preexisting conditions and the possible alternative causes for his current low back combined condition, resolution of this matter is a complex medical question that must be resolved by expert medical opinion. *See Uris v. Compensation Department*, 247 Or 420, 424-26 (1967); *Barnett v. SAIF*, 122 Or App 279 (1993).

When there is a dispute between medical experts, more weight is given to those medical opinions which are well reasoned and based on complete information. *See Somers v. SAIF*, 77 Or App 259, 263 (1986). In addition, absent persuasive reasons to the contrary, generally we give greater weight to the opinion of claimant's attending physician. *Weiland v. SAIF*, 63 Or App 810 (1983); *Darwin B. Lederer*, 53 Van Natta 974 n 2 (2001). We accord such deference because the attending physician generally has had a better opportunity to observe and evaluate a claimant's condition over an extended period of time. *Harry L. Lyda*, 48 Van Natta 1300, 1302 (1996). However, we properly may or may not give greater weight to the opinion of the treating physician, depending on the record in each case. *Dillon v. Whirlpool Corp.*, 172 Or App 484, 489 (2001).

Claimant argues that Dr. Treible's and Dr. Moroye's opinions are entitled to greater weight "inasmuch as they saw and treated claimant over a protracted period of time." (App. Brief p.5). Claimant further contends that "their opinions [were] not simply based on a 'temporal analysis' but rather [were] based upon the history of injury, treatment history, as well as evaluation of various radiological and diagnostic studies." (App. Brief p. 5).

We do not find the opinions of Dr. Treible and/or Dr. Moroye persuasive for the reasons expressed by the ALJ, as well as for the following reasons.

Dr. Moroye was claimant's treating physician from February 8, 2001 through September 17, 2001. (Exs. 6; 7; 9; 13; 15; 18A; 20; 21; 22; 25). On

"If an otherwise compensable injury combines at any time with a preexisting condition to cause or prolong disability or a need for treatment, the combined condition is compensable only if, so long as and to the extent that the otherwise compensable injury is the major contributing cause of the disability of the combined condition or the major contributing cause of the need for treatment of the combined condition.

September 18, 2001, Dr. Treible became claimant's treating physician. (Exs. 24; 25). In January and February 2002, when he gave his opinions regarding the cause of claimant's low back condition, Dr. Moroye was no longer actively involved in claimant's treatment. (Exs. 33; 39).

Furthermore, Dr. Moroye did not engage in an evaluation of the different potentially causative factors; rather, he based his opinion solely on a temporal analysis.³ See *Diana L. Fordyce*, 53 Van Natta 86 (2001) (opinions based on a purely "temporal" analysis are unpersuasive). Dr. Moroye's opinion is also unpersuasive for additional reasons. Dr. Moroye did not state that claimant's work injury was the major contributing cause of his disability or need for treatment. See ORS 656.005(7)(a)(B). Finally, Dr. Moroye's opinion is not well-explained. See *Sharon R. Caron*, 54 Van Natta 705, 707 (2002); *Dena L. McGage*, 53 Van Natta 1097 (2001); *Carol A Bryant*, 53 Van Natta 795, 796 (2001).

We turn to Dr. Treible's opinion. Dr. Treible did not begin treating claimant until approximately 7 months following the work injury. (Exs. 24; 25). See *McIntyre v. Standard Utility Contractors, Inc.*, 135 Or App 298, 302 (1995) (a treating physician's opinion is less persuasive when the physician did not examine the claimant immediately after the injury); *Cindy L. Rieves*, 55 Van Natta 1227, 1230 (2003). Therefore, his status as attending physician did not afford him any particular advantage in evaluating the cause of claimant's current combined condition.

Furthermore, on September 18, 2001, Dr. Treible opined that claimant had "a preexisting L5-S1 spondylolisthesis which *may* have been acutely destabilized as a consequence of his work associated injury." (Ex. 24-2) (Emphasis added). However, "Flexion/Extension" x-rays of the lumbar spine, taken that same day, revealed a "stable appearance of L5-S1 spondylolisthesis" (Ex. 23).

Dr. Treible also commented: "I obtained flexion and extension views of

³ Dr. Moroye stated:

"At this point, I do feel that [claimant's] current discomfort is related to the injury from a year ago. I do agree that he most likely had a preexisting spondylolisthesis. However, this was exacerbated clearly from the injury in that he did not have pain prior to this and that the pain was continued in essentially the same fashion from the initial injury. I do feel it is more likely that not that this is related to the claim." (Ex. 39).

[claimant's] lumbar spine today which failed to reveal any significant mobility at the area of the spondylolisthesis." (Ex. 24-1). Dr. Treible ordered a CT myelogram which also revealed no instability on flexion/extension views. (Exs. 24-2; 27). Nevertheless, on claimant's follow-up appointment in October 2001, Dr. Treible recommended an L5-S1 fusion, stating:

"[I]t is my opinion that the major contributing cause for the need of this treatment is a consequence of the work injury which has led [claimant] to develop a destabilized L5-S1 spondylolisthesis." (Ex. 28).

Dr. Treible never explained why he thought there was a destabilized L5-S1 spondylolisthesis despite the lack of objective evidence to support his opinion. (See Exs. 23; 24-1; 27; 31-3, -6-8; 34-1; 40; 44-4-6).

Finally, none of the medical opinions, other than Dr. Thompson's August 21, 2002 opinion, addressed the contribution of claimant's metastatic prostatic carcinoma (discovered during claimant's May 21, 2002 low back surgery) to claimant's ongoing low back symptoms and need for treatment. (See Exs. 46; 47; 48; 48A; 49; 51; 54; 55).

Therefore, we conclude that claimant has failed to establish the compensability of his current combined low back condition and/or need for medical treatment related to his current low back condition. Accordingly, we affirm the ALJ's order.

ORDER

The ALJ's order dated December 19, 2002 is affirmed.

Entered at Salem, Oregon on July 8, 2003