In the Matter of the Compensation of
GARY L. DALE, Claimant
WCB Case Nos. 12-01635, 12-01634, 12-01633, 12-01632, 12-01631, 12-00551, 12-00446
ORDER ON REVIEW
Philip H Garrow, Claimant Attorneys
Julie Masters, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Langer and Lanning.

Claimant requests review of those portions of Administrative Law Judge (ALJ) Dougherty's order that: (1) upheld the SAIF Corporation's denial of his combined thoracic and lumbar conditions; (2) upheld SAIF's "back-up" denial of his T-11 compression fracture; and (3) upheld SAIF's denial of his medical services claim for physical therapy. On review, the issues are compensability, "back-up" denial, and medical services. We affirm.

FINDINGS OF FACT

We adopt the ALJ's findings of fact with the following changes. On page 6, we replace the fifth full paragraph with the following: "A November 7, 2011 thoracic MRI was interpreted as showing moderate bridging osteophytes of the thoracic spine and thoracic spondylosis. (Ex. 70)." On page 7, we replace the last paragraph with the following: "On December 30, 2011, Dr. Swift again recommended physical therapy for residual back pain. He noted that claimant's pain was 'terrible' and 'focal at the T11 level.' (Ex. 77)."

CONCLUSIONS OF LAW AND OPINION

Combined Conditions

On January 24, 2012, SAIF accepted the following combined conditions, effective February 16, 2009: thoracic contusion combined with multilevel thoracic degenerative disc disease, thoracic strain combined with multilevel thoracic degenerative disc disease, and lumbar strain combined with multilevel lumbar degenerative disc disease. (Ex. 80). On the same date, SAIF denied the combined thoracic and lumbar conditions on and after March 1, 2010. (*Id*.) Claimant requested a hearing.

The ALJ determined that Dr. Bald's opinion persuasively established that claimant's compensable injury was no longer the major contributing cause of the disability/need for treatment for the combined conditions as of March 2010. The ALJ was not persuaded by Dr. Swift's opinion because it lacked adequate explanation.

On review, claimant notes that Dr. Bald relied on Dr. Harrington's records and contends that Dr. Bald's opinion is not persuasive because he was not aware that Dr. Harrington later determined that his conditions were not medically stationary. He argues that the medical evidence does not show a change in his conditions between the February 2009 injury and March 1, 2010.

SAIF responds that, although Dr. Harrington rescinded his opinion that claimant's conditions were medically stationary on March 1, 2010, the record shows that claimant's treatment after that date was not directed to his accepted lumbar or thoracic conditions. Rather, SAIF contends that claimant was treated after March 1, 2010 for right T11 radiculopathy and L4 and L5 radiculopathy.

After the carrier accepts a combined condition, it may deny the combined condition if the otherwise compensable injury ceases to be the major contributing cause of the combined condition. ORS 656.262(6)(c), (7)(b). In combined condition injury claims, the carrier bears the burden to prove such a cessation. ORS 656.266(2)(a); *Washington County-Risk v. Jansen*, 248 Or App 335 (2012); *Wal-Mart Stores, Inc. v. Young*, 219 Or App 410, 419 (2008). SAIF relies on the opinion of Dr. Bald to support its "ceases" denial.

In January 2012, Dr. Bald examined claimant on behalf of SAIF and reviewed his medical records. He provided a detailed summary of Dr. Harrington's "post-injury" treatment of claimant. (Ex. 79-2, -3, -4). Dr. Bald explained that Dr. Harrington's reports established that claimant's thoracic contusion, thoracic strain, and lumbar strain were medically stationary as of March 1, 2010. (Ex. 79-11; *see* Ex. 18). He noted that claimant had completed two full courses of physical therapy at that time and had noted considerable subjective and objective improvement. Dr. Bald determined that claimant's overall pain level had improved dramatically, and his examination had returned effectively to normal, with normal ranges of motion in the thoracic and lumbar spines, and a normal neurological examination. He also noted that claimant had resumed his regular work as of March 1, 2010, and required only occasional pain medication. (Ex. 79-11, -15). Dr. Bald concluded that the work injury was not the major contributing cause of claimant's combined thoracic and lumbar spine conditions and need for treatment after March 1, 2010. (*Id*.)

Dr. Bald was aware of Dr. Harrington's April 23, 2010 chart note, which explained that claimant had increased symptoms and had recommended a lumbar MRI. (Ex. 79-4). Dr. Bald was also aware that claimant began treating with Dr. Ward in May 2010, and that he continued to have thoracic symptoms. (Ex. 79-4 to -7). In May 2010, Dr. Ward diagnosed T11 radiculopathy with marrow changes of the T11 vertebral body, as well as L4 and L5 radiculopathy. (Ex. 79-5; *see* Ex. 23).

In reaching his conclusion, Dr. Bald did not discuss Dr. Harrington's May 7, 2010 letter, which agreed that claimant's conditions were not medically stationary as of March 1, 2010, and that surgery might improve his condition. (*See* Ex. 22). Dr. Bald did not address the May 27, 2010 Order on Reconsideration, which rescinded the March 15, 2010 Notice of Closure because claimant's condition was not medically stationary. (*See* Ex. 26). Nevertheless, Dr. Bald was aware that claimant's symptoms increased after March 1, 2010, and remained persistently symptomatic after that time, and that he had been off work, and had a series of different injection therapies and medications. (Ex. 79-11). Under these circumstances, we find that Dr. Bald's opinion was sufficiently complete. *See Jackson County v. Wehren*, 186 Or App 555, 561 (2003) (a history is complete if it includes sufficient information on which to base the physician's opinion and does not exclude information that would make the opinion less credible).

Claimant contends that Dr. Bald's opinion is not persuasive because it is the "law of the case" that his conditions were not medically stationary on March 1, 2010.[1]

"Medically stationary" means that "no further material improvement would reasonably be expected from medical treatment, or the passage of time." ORS 656.005(17). We acknowledge that "medically stationary" does not necessarily mean a change of condition for the purposes of a "ceases" denial. *See David A. Thulstrup*, 62 Van Natta 2089, 2093 (2010); *Minkyu Yi*, 61 Van Natta 2664, 2671 n 6 (2009) (compensability of combined condition may or may not coincide with medically stationary date of compensable condition, depending on the facts of each case).

[1] The "law of the case" doctrine is a general principle of law that when a ruling or decision has been made in a particular case by an appellate court, while it may be overruled in other cases, it is binding and conclusive both upon the inferior court in any further steps or proceedings in the same litigation and upon the appellate court itself in any subsequent appeal or other proceeding for review. *Sandra E. Rickon*, 61 Van Natta 311, 314 n 1 (2009), citing *Blanchard v. Kaiser Found. Health Plan*, 136 Or App 466, 470, *rev den*, 322 Or 362 (1995).

Here, in May 2010, Dr. Harrington reported that claimant's condition was no longer medically stationary and that surgery might improve his condition. (Ex. 22). However, there is no indication that surgery was proposed to treat claimant's thoracic contusion, thoracic strain, or lumbar strain. When claimant began treating with Dr. Ward in May 2010, he was diagnosed with right T11 radiculopathy and L4 and L5 radiculopathy. (Ex. 23). Dr. Ward later diagnosed a T11 compression fracture and recommended surgery. (Ex. 40). Dr. Swift diagnosed lumbar and thoracic radiculopathy, and lumbar and thoracic spondylosis. (Exs. 29, 30, 31, 32, 33, 34, 39). Dr. Swift later began diagnosing a T11 compression fracture based on Dr. Ward's report. (Ex. 43). The record does not support the conclusion that claimant continued to need treatment for his accepted thoracic contusion, thoracic strain, or lumbar strain after March 1, 2010.

Thus, although Dr. Bald did not indicate his awareness that Dr. Harrington changed his opinion regarding claimant's "medically stationary" status, the record supports Dr. Bald's conclusion that the work injury was not the major contributing cause of the combined thoracic and lumbar spine conditions and need for treatment after March 1, 2010. (Ex. 79-11, -15). Rather, Dr. Bald determined that the severe preexisting conditions were the major contributing cause of claimant's current symptoms, disability, and need for treatment. (Ex. 79-12).

In a March 2012 concurrence letter, Dr. Swift opined that claimant's work injury was the major contributing cause of claimant's disability/need for treatment through February 21, 2012. (Ex. 87A-2). But Dr. Swift's February 21, 2012 chart note said that the work injury caused a material worsening of claimant's preexisting thoraco-lumbar spondylosis and degenerative disc disease (Ex. 85), which were not the same as the accepted thoracic contusion/strain and lumbar strain combined conditions. Under such circumstances, Dr. Swift's March 2012 concurrence letter is not persuasive because it lacks adequate explanation and is not sufficient to respond to Dr. Bald's opinion regarding the combined conditions. *See Moe v. Ceiling Systems*, 44 Or App 429, 433 (1980) (rejecting conclusory medical opinions).

Based on Dr. Bald's well-reasoned opinion, we conclude that SAIF has established that the otherwise compensable thoracic contusion, thoracic strain, and lumbar strain ceased to be the major contributing cause of the disability or need for treatment of the combined condition. ORS 656.266(2)(a); ORS 656.262(6)(c). Therefore, we affirm.

"Back-up" Denial

We adopt and affirm the portion of the ALJ's order upholding SAIF's "back-up" denial of the T11 compression fracture with the following supplementation.

Under ORS 656.262(6)(a), if a carrier accepts a claim in good faith and "later obtains evidence" that the claim is not compensable or the carrier is not responsible, it may revoke its acceptance of a claim and issue a denial as long as the denial is issued no later than two years after the date of the initial acceptance. If the worker requests a hearing on the "back-up" denial, the carrier has the burden of proving by a preponderance of the evidence that the claim is not compensable or that it is not responsible for the claim. The requirement of "later obtained evidence" in ORS 656.262(6)(a) refers to new material, *i.e.*, something other than the evidence that the carrier had at the time of the claim acceptance. *CNA Ins. Co. v. Magnuson*, 119 Or App 282, 286 (1993). A reevaluation of known evidence, for whatever reason, is not "later obtained evidence" under ORS 656.262(6)(a). (*Id*.)

We supplement the ALJ's order to respond to claimant's argument that this case is similar to *Keith A. Cooper*, 54 Van Natta 366, *recons*, 54 Van Natta 1989 (2002), *aff'd*, 192 Or App 279 (2004).

In *Cooper*, the claimant injured his back at work. An MRI taken one month after the injury showed a healed compression fracture in his low back. After an examining physician opined that the work injury caused the fracture, the carrier accepted that condition. Later, in evaluating a second MRI taken after the acceptance, the examining physician changed his opinion and concluded that the compression fracture must have occurred before the fall. After receiving the examining physician's second opinion, the carrier issued an amended acceptance reaffirming its acceptance of the compression fracture. Six months later, the carrier issued a "back-up" denial of the compression fracture.

The court affirmed our decision that the examining physician's second opinion did not constitute "later-obtained evidence" under ORS 656.262(6)(a). The court explained that "'[l]ater obtained evidence' does not include evidence that the employer either had, or in the exercise of reasonable diligence should have had, at the time of acceptance, nor does it include the restatement, reevaluation, analysis, or confirmation of such evidence." *Id*. at 281-82 (quoting *Barrett Business Services, Inc. v. Stewart*, 178 Or App 145, 151 (2001)).

Because the carrier had the examining physician's second opinion before it issued its amended acceptance, the court concluded that the evidence was not "later obtained" for purposes of ORS 656.262(6)(a). *Id.* at 282.

Here, claimant contends that, as in *Cooper*, the later studies did not show anything that could not have been ascertained from the earlier May 4, 2010 MRI and the December 17, 2010 SPECT scan.

SAIF responds that the lack of change in claimant's edema in "post-acceptance" imaging studies and lack of resolution of his symptoms was new evidence establishing that the edema was not healing and was not due to a compression fracture. SAIF contends that the evidence was new because it was that lack of change that allowed the experts to understand his thoracic spine condition. For the following reasons, we agree with SAIF.

In December 2011, Dr. Sabah, radiologist, reviewed claimant's imaging studies on behalf of SAIF. He explained that a bone contusion or compression fracture would have healed and marrow edema would no longer be expected on the November 2011 thoracic MRI, but it had remained unchanged since the prior thoracic MRI. (Ex. 76-7, -16). The lack of change indicated an active ongoing process and was not compatible with bone contusion or compression fracture, where marrow edema would no longer be expected. (Ex. 76-7). The edema, in conjunction with sclerotic changes seen in the September 2011 CT scan, were most consistent with degenerative reactive marrow changes. (*Id*.) Dr. Sabahi concluded that the T11 compression fracture was a misdiagnosis, explaining that claimant's chronic and progressive thoracic pain was a complication of preexisting Forestier's disease (also known as diffuse idiopathic skeletal hyperostosis),[2] which was not related to the work injury. (Ex. 76-16, -18, -22).

Dr. Bald agreed with Dr. Sabahi, explaining that the fact that the marrow edema and reactive changes in the T11 vertebral body were unchanged between 2010 and November 2011 suggested that the abnormality was "reactive" bone to the extensive degenerative osteophytes. (Ex. 79-12, -13). He opined that if claimant had incurred a T11 compression fracture, it would have been reflected in progressive healing of the fracture with evolution of the MRI scan findings,

[2] "Diffuse idiopathic skeletal hyperostosis" is a "generalized spinal and extra spinal articular disorder characterized by calcification and ossification of ligaments, particularly of the anterior longitudinal ligament; distinct from ankylosing spondylitis or degenerative joint disease." *Stedman's Electronic Medical Dictionary*, Version 7.0 (2007).

which was not apparent. (*Id*.) Dr. Bald explained that the "medical evidence is very clear at this point" that the edema at T11 was "reactionary" to the extremely large degenerative osteophytes in that area. (Ex. 79-13). He concluded that the medical evidence did not support the conclusion that claimant had sustained a T11 compression fracture. (Ex. 79-11, -12, -13). Rather, he agreed with Dr. Sabahi that claimant had diffuse idiopathic skeletal hyperostosis. (Ex. 79-13, -14).

Dr. Keizer agreed with Drs. Sabahi and Bald that claimant had preexisting diffuse idiopathic skeletal hyperostosis. (Ex. 86). In a deposition, Dr. Keizer explained that he had originally indicated that claimant had a T11 compression fracture. (Ex. 88-17, -18; *see* Ex. 44-18). However, based on later imaging studies and the reports from Drs. Sabahi and Bald, Dr. Keizer concluded that claimant had preexisting Forestier's disease. (Ex. 88-18, -19, -24). Based on the first MRI scan and the bone scan, which showed edema, Dr. Keizer could not determine whether that was reactive edema or acute edema because there was no bony injury. (Ex. 88-28). He testified that acute edema from a bony injury would resolve over time as the bone healed, whereas reactive edema, which is related to inflammation, would persist for a prolonged time. (Ex. 88-13, -28). Dr. Keizer explained that the repeat studies showing that the edema was still present demonstrated that it was reactive and related to an inflammatory process secondary to a degenerative condition, rather than an acute injury. (Ex. 88-24 to -26).

Based on the opinions of Drs. Sabahi, Bald, and Keizer, we agree with SAIF that the lack of change in claimant's thoracic MRI scans and the lack of resolution of his symptoms constitutes "later obtained" evidence within the meaning of ORS 656.262(6)(a)) because it allowed the experts to determine that he did not have a compression fracture at T11. *See Constance D. Wilbourn*, 51 Van Natta 1541 (1999) (because the carrier did not have a surgical report documenting a preexisting right knee condition until after acceptance, that report and later evaluation constituted "later obtained evidence" under ORS 656.262(6)(a)); *Juan J. Basilio*, 48 Van Natta 2294 (1996) (because there was no evidence to indicate that the employer knew or should have known, at the time of acceptance, that the claimant's symptoms could be caused by an underlying inflammatory disease, later medical reports pertaining to that issue constituted "later obtained evidence" within the meaning of ORS 656.262(6)(a)).

Furthermore, for the reasons explained by the ALJ, we agree that SAIF's "back-up" denial was issued within the two year requirement of ORS 656.262(6)(a), and that the medical evidence from Drs. Sabahi, Bald, and Keizer sustained SAIF's burden of proving that the T11 compression fracture was not compensable.[3] Therefore, we affirm.

Medical Services

On January 6, 2012, claimant requested administrative review of SAIF's denial of physical therapy treatment recommended by Dr. Swift. (Ex. 79A). Dr. Swift recommended physical therapy for claimant's thoracic pain. (Exs. 76A, 77, 79B). On January 30, 2012, the Workers' Compensation Division (WCD) issued a Transfer Order for a determination of whether the proposed physical therapy was related to the accepted conditions. (Ex. 83A).

The ALJ concluded that the medical evidence was insufficient to establish that the back pain, for which physical therapy was prescribed, was caused in major part by the compensable conditions. In reaching that conclusion, the ALJ did not include the T11 compression fracture in the analysis, because the "back-up" denial of that condition was upheld.

On review, claimant contends that he is entitled to physical therapy because, at the time it was recommended, his conditions were not medically stationary and SAIF had not issued any denials.

SAIF responds that subsequent evidence persuasively established that claimant did not have a T11 compression fracture and, therefore, the proposed physical therapy was not directed to or made necessary by that condition. SAIF

[3] Because Dr. Keizer's later opinion was based on new information, we find his changed opinion to be reasonably explained. *See Kelso v. City of Salem*, 87 Or App 630, 634 (1987) (where there was a reasonable explanation in the record for a physician's change of opinion, that opinion was persuasive); *Russell S. Sallee*, 62 Van Natta 2245 (2010) (physician's change of opinion was reasonably explained where the subsequent opinion was based on new information obtained after the physician's earlier opinion).

Dr. Swift continued to diagnose a T11 compression fracture, based on Dr. Keizer's first report. (Ex. 87A-1, -2). Dr. Swift's conclusory opinion is not persuasive because he did not respond to Dr. Keizer's changed opinion or the reports from Drs. Sabahi and Bald, which discussed later imaging studies. *See Janet Benedict*, 59 Van Natta 2406, 2409 (2007), *aff'd without opinion*, 227 Or App 289 (2009) (medical opinion unpersuasive when it did not address contrary opinions).

also argues that the medical evidence does not establish a causal relationship between the accepted conditions and the disputed treatment. For the following reasons, we agree.

ORS 656.245(l)(a) provides, in part:

> "For every compensable injury, the insurer or the self-insured employer shall cause to be provided medical services for conditions caused in material part by the injury for such period as the nature of the injury or the process of the recovery requires, subject to the limitations in ORS 656.225, including such medical services as may be required after a determination of permanent disability. In addition, for consequential and combined conditions described in ORS 656.005(7), the insurer or the self-insured employer shall cause to be provided only those medical services directed to medical conditions caused in major part by the injury."

If the claimed medical service is "for" an "ordinary" condition, the first sentence of ORS 656.245(l)(a) governs the compensability of medical services. *SAIF v. Sprague*, 346 Or 661, 672 (2009); *Cameron J. Horner*, 62 Van Natta 2904, 2905 (2010). If the claimed medical service is "directed to" a consequential or combined condition, the second sentence of ORS 656.245(1)(a) applies. *Sprague*, 346 Or at 673; *Horner*, 62 Van Natta at 2905.

When Dr. Swift recommended physical therapy in November 2011, the accepted conditions were thoracic contusion, thoracic strain, lumbar strain, and T11 compression fracture. (Exs. 11, 46). On January 24, 2012, SAIF accepted thoracic contusion combined with multilevel thoracic degenerative disc disease, thoracic strain combined with multilevel thoracic degenerative disc disease, and lumbar strain combined with multilevel lumbar degenerative disc disease. (Ex. 80). Also on January 24, 2012, SAIF denied the combined thoracic and lumbar conditions on and after March 1, 2010. (*Id.*) On the same date, SAIF issued a "back-up" denial of the T11 compression fracture. (Ex. 82).

As explained above, we agree with the ALJ's decision to uphold SAIF's "back-up" denial of the T11 compression fracture and its "ceases" denial of the combined thoracic and lumbar conditions. Thus, to the extent that the physical therapy was directed at those conditions, they were not a compensable injury, *i.e.*, accepted conditions. *See SAIF v. Swartz*, 247 Or 515, 526 (2011). Moreover,

Dr. Swift concluded that the accepted conditions were medically stationary on February 21, 2012. (Ex. 85; *see* Exs. 84, 87A). As previously noted, "medically stationary" means that "no further material improvement would reasonably be expected from medical treatment, or the passage of time." ORS 656.005(17).

There is no indication that Dr. Swift continued to prescribe physical therapy after he determined that the accepted thoracic and lumbar conditions were medically stationary. As such, the record does not establish that the proposed physical therapy was "for conditions caused in material part by the injury" or "directed to medical conditions caused in major part by the injury[,]" pursuant to ORS 656.245(l)(a). *See Swartz*, 247 Or at 526 (medical services claim not compensable where the medical evidence established that the accepted condition had completely resolved and was no longer a material cause of the claimant's ongoing pain or any of his ongoing conditions); *Dianne R. Weiker*, 64 Van Natta 2086 (2012) (proposed surgery that was not necessary to treat accepted conditions was not a compensable medical service); *Damon M. Bailey*, 63 Van Natta 1133, 1137-38 (2011) (because the medical evidence established that the accepted right scapular strain had resolved and there was no indication that the proposed shoulder surgery was for or directed to the accepted condition, the proposed surgery was not compensable as treatment for the compensable injury). Therefore, we affirm the ALJ's decision regarding the proposed physical therapy.

ORDER

The ALJ's order dated August 23, 2012 is affirmed.

Entered at Salem, Oregon on January 29, 2013