
In the Matter of the Compensation of
DANIEL MORFIN-MUNOZ, Claimant
WCB Case No. 01-01178
ORDER ON REVIEW
James W Moller, Claimant Attorneys
Johnson Nyburg & Andersen, Defense Attorneys

Reviewing Panel: Members Biehl, Lowell, and Bock. Member Biehl dissents.

The insurer requests review of Administrative Law Judge (ALJ) Crumme's order that set aside its denial of claimant's incarcerated femoral hernia injury claim. On review, the issue is compensability. We reverse.

FINDINGS OF FACT

We adopt the ALJ's findings of fact, with the exception of findings 13, 14 and the "Ultimate Findings of Fact."

CONCLUSIONS OF LAW AND OPINION

In the course of his duties for the employer on December 12, 2000, claimant forcefully pulled on a door that had become stuck in a sander. As he did so, he felt a sharp pain in his right lower abdomen. (Tr. 44). Claimant went to the emergency room that day, and on December 15, 2000, was diagnosed with a symptomatic right inguinal hernia. (Exs. 2,6). He next sought medical attention on March 30, 2001 and was surgically treated the following day. (Exs. 11, 12, 14).

A claim was made on December 13, 2000. The insurer denied claimant's hernia condition on October 12, 2001. Claimant requested a hearing.

Claimant's counsel identified the issue for hearing as compensability of claimant's hernia condition as an injurious event. (Tr.1). Relying on the opinion of Dr. Day, claimant's last treating physician, the ALJ concluded that claimant's December 2000 work injury was the major cause of his disability or need for treatment, discounted a contrary medical opinion for its failure to consider "all of claimant's work activities," and set the insurer's denial aside.

The insurer contends that Dr. Day's medical opinion is unpersuasive and that, because the claim was based on an injurious event rather than an occupational

disease, the contribution of claimant's work activities for the employer prior to the December 12, 2000 pulling incident cannot be considered in support of compensability of an injury claim.¹ We agree.

Claimant concedes that the medical evidence establishes that he had a femoral canal weakness that preexisted the December 12, 2000 event and contributed to the claimed condition. (See Respondent's Brief at 2). The injury claim must therefore be analyzed under ORS 656.005(7)(a)(B).

ORS 656.005(7)(a)(B) provides that if an injury combines at any time with a preexisting condition to cause or prolong disability or a need for treatment, the combined condition is compensable if the work injury was the major contributing cause of the disability and/or need for treatment of the combined condition. To satisfy the "major contributing cause" standard, claimant must establish that his work injury contributed more to the claimed condition than all other factors combined. *See e.g., McGarrah v. SAIF*, 296 Or 145, 146 (1983); *Raul Solano-Alcantar*, 54 Van Natta 42 (2002).

A determination of the major contributing cause involves a weighing of the relative contribution of different causes of claimant's condition and a decision as to which is the primary cause. *See Dietz v. Ramuda*, 130 Or App 397 (1994) *rev dismissed* 320 Or 416 (1995). Resolution of the causation issue presents a complex medical question that must be resolved by expert medical opinion. *See Uris v. Compensation Department*, 247 Or 420 (1967).

Dr. Day concluded that the December 12, 2000 lifting incident was the major contributing cause of claimant's condition. (Ex. 15B-1, 2) When asked to explain his conclusion, Dr. Day replied, "[l]ifting heavy objects of different

¹ At hearing, claimant specifically identified the claim as for an injury and not for occupational disease. (Tr. 1). There was no indication that the parties agreed to litigate the claim on an occupational disease theory. Accordingly, we do not consider whether the claim would be compensable on an occupational disease theory. *See Leah M. Fritz*, 54 Van Natta 632 (2002) (when parties agreed to litigate claim as injury and did not identify occupational disease as issue in preliminary discussion of issues to be litigated, occupational disease claim not considered when raised for first time in closing argument); *Leslie Thomas*, 44 Van Natta 200 (1992); *Michael R. Petkovich*, 34 Van Natta 98 (1982).

The dissent cites *Hewlett-Packard Co. v. Renalds*, 132 Or App 288 (1995), *Dibrito v. SAIF*, 319 Or 244 (1994), and *Daniel S. Field*, 47 Van Natta 1457 (1995) for the proposition that the Board may independently consider compensability based on an occupational disease theory. However, the cited cases support only a general principle that the Board has an obligation to apply the appropriate legal causation standard to determine compensability. None indicates that the Board may override an express and uncontested identification of the theory of compensability.

sizes causing lifting [with] poor body mechanics was the major contributing cause of [claimant's] injury.” (Ex. 15B-2).

The insurer asserts that Dr. Day's opinion is unpersuasive because it is based on an inaccurate history of claimant's work activities and is lacking in analysis. We agree that Dr. Day's opinion is lacking in medical analysis and is not well reasoned.

Dr. Day neither acknowledged claimant's preexisting femoral canal weakness nor weighed its contribution to claimant's condition. Further, he failed to adequately address Dr. Blumberg's contentions that it was not medically probable that claimant's condition resulted from one lifting/pulling incident and that claimant's hernia preexisted the December 2000 event. (Exs. 15-3; 17AA-22). *See Donna F. Brooks*, 50 Van Natta 265, 266 (1998) (physician's failure to respond to opposing opinion that work should not provoke condition, and failure to evaluate relative contribution of uncontested causative factor renders his opinion unpersuasive).

Although Dr. Day's determination of causation is expressed in the “magic words” of the statute, he does not explain how the single pulling event on December 12, 2000 produced claimant's incarcerated femoral hernia. *See Moe v. Ceiling Systems*, 44 Or App 429, 430 (1980); *Dena L. McGage*, 53 Van Natta 1097 (2001). Moreover, Dr. Day's limited explanation that claimant's condition was caused by “lifting objects of different sizes” causing poor body mechanics suggests that claimant's condition was attributable to activities repeated over time rather than the single incident claimed. Therefore, absent further explanation, Dr. Day's reasoning is inconsistent with his ultimate conclusion that claimant's condition was produced by a single injurious event.² Under such circumstances, we decline to rely on Dr. Day's opinion.

The only other opinion causally relating claimant's condition to his employment was authored by Dr. Kiersted. However, Dr. Kiersted's conclusion was based on an inaccurate history as it describes distinct work injuries on December 12, 2000 and March 30, 2001. Claimant credibly testified that he did not work between December 13, 2000 and March 30, 2001, and that he did not suffer a new injury on March 30, 2001. Accordingly, we find Dr. Kiersted's

² Because claimant did not assert that his condition was produced by an occupational disease and expressly identified the claim as for an injurious event, we do not consider the claim under ORS 656.802.

opinion unpersuasive. See *Miller v. Granite Construction Co.*, 28 Or App 473, 478 (1977); *Rosalinda M. Camacho*, 54 Van Natta 1591, 1595 (2002) (medical opinion based on inaccurate history unpersuasive).

In sum, we find Dr. Day's opinion insufficient to establish the compensability of claimant's injury claim and the record contains no other medical opinion supportive of the claim. Accordingly, we conclude that the claim is not compensable. Therefore, we reverse the ALJ's order.

ORDER

The ALJ's order dated December 26, 2001 is reversed. The insurer's denial is reinstated and upheld. The ALJ's attorney fee award is also reversed.

Entered at Salem, Oregon on January 24, 2003

Board Member Biehl dissenting.

The majority reasons that in considering compensability, we are limited by the "injurious event" theory espoused by claimant's counsel at hearing and, thus, may not consider the contribution of claimant's "pre-December 12, 2000" work activities. Because we have an independent obligation to evaluate the evidence and to apply the appropriate legal standards to determine the compensability of a worker's claim, I conclude that evidence of "pre-December 12, 2000" work activities must be taken into account. Considering such evidence, I find the persuasive medical evidence sufficient to establish that claimant's work activities for the employer were the major contributing cause of his femoral hernia condition. Accordingly, I would conclude that a compensable occupational disease has been established. Consequently, I respectfully dissent.

Our first task is always to determine which provisions of the Workers' Compensation law are applicable. The Board's *de novo* review necessarily includes determining which law applies to the facts of a particular case and applying the law as the record/evidence leads it. See *Dibrito v. SAIF*, 319 Or 244, 248 (1994) (it is the Board's obligation as a fact finder to apply the appropriate legal standards to determine the compensability of a worker's claim); *Daniel S. Field*, 47 Van Natta 1457 (1995) (citing *Hewlett-Packard Co. v. Renalds*, 132 Or App 288 (1995)).

Here, the occupational disease theory was squarely presented by the evidence. Dr. Day specifically opined that claimant's work activity lifting heavy objects of different sizes resulting in lifting with poor body mechanics was the major contributing cause of his femoral hernia. (Ex. 15B-2). Dr. Day's opinion is supported by Dr. Kierstead, claimant's treating surgeon, who explained that risk factors predisposing individuals to femoral hernias include, squatting, stooping and pushing or carrying heavy loads. (Ex 20-1). Claimant's testimony adequately established that he engaged in such activities in the course of his duties for the employer. In addition, Dr. Blumberg acknowledged that ongoing activities such as lifting may contribute to the development of a hernia. (Ex. 17AA-22).

Under these circumstances, I conclude that claimant has established a compensable occupational disease. Accordingly, I would affirm the ALJ's decision setting aside the insurer's February 2, 2001 and October 12, 2001 denials.