

FILED: December 05, 2012

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of
Ernesto R. Armenta, Claimant.

ERNESTO R. ARMENTA,
Petitioner,

v.

PCC STRUCTURAL, INC.,
Respondent.

Workers' Compensation Board
0701193

A141790

Argued and submitted on October 20, 2011.

Donald M. Hooton argued the cause and filed the briefs for petitioner.

P.K. Runkles-Pearson argued the cause for respondent. With her on the brief was Stoel Rives LLP.

Before Ortega, Presiding Judge, and Sercombe, Judge, and Hadlock, Judge.

SERCOMBE, J.

Reversed and remanded.

1 SERCOMBE, J.

2 Claimant seeks judicial review of an order of the Workers' Compensation
3 Board (the board) upholding employer's denial of occupational disease claims for cervical
4 radiculopathy and lumbar radiculopathy. Claimant contends that the board erred in
5 finding that an expert opinion admitted into evidence for purposes of rebuttal did not
6 address any condition at issue and therefore would not be considered in determining
7 whether claimant's work activities were the major contributing cause of his claimed
8 conditions. Specifically, claimant asserts that, although the expert addressed claimant's
9 alleged lumbar radiculopathy and its cause, the board unreasonably found otherwise and
10 thereby erred in misinterpreting the expert's opinion and disregarding it as rebuttal
11 evidence. We review the board's order for substantial evidence and errors of law, and to
12 determine whether its analysis comports with substantial reason. ORS 656.298(7); ORS
13 183.482(8); *SAIF v. Martinez*, 219 Or App 182, 184, 182 P3d 873 (2008). For the
14 reasons set forth below, we conclude that the board erred in disregarding claimant's
15 rebuttal evidence and, accordingly, reverse and remand for reconsideration.

16 Employer is in the business of metal fabrication, and claimant began
17 working at its plant on September 25, 2000. Before working for employer, claimant had
18 been employed briefly as a cannery supervisor and for 10 years as a punch-press operator
19 with some limited, light grinding duties. Claimant began work in employer's "large
20 parts" division as a belt grinder--grinding large pieces of metal by hand and with the aid
21 of machinery. After three years, he transitioned to a position working with titanium,

1 performing similar work on both large and small parts. Claimant's work activity
2 throughout the course of his employment involved continuous exposure to vibrations,
3 repeated bending and stooping, relatively heavy lifting, and use of substantial physical
4 force to control the grinders, metal parts, and hoists used to lift them. Claimant often
5 worked between 10 and 12 hours per day and testified, simply, that it was "[h]eavy
6 work."

7 Approximately three years after beginning work for employer, claimant
8 began to experience pain in his arms and legs, and then eventually in his neck, shoulders,
9 and lower back. Assuming that it would subside naturally, claimant did not seek
10 treatment for approximately two years; however, in December 2005, he reported his
11 symptoms to Dr. Harvey. After a follow-up visit on January 5, 2006, Harvey diagnosed
12 claimant with cervical radiculopathy, released him from work due to his medical
13 condition, and noted that, in addition to pain, claimant was experiencing numbness
14 radiating into his right arm. A subsequent MRI of claimant's cervical spine revealed a
15 posterior disc protrusion at C4-5, mild cervical spondylosis, and bony narrowing of the
16 right C5-6 nerve root canal. Claimant continued to obtain treatment from Harvey through
17 April 2006, participating in physical therapy, taking multiple medications, and receiving
18 a series of epidural steroid injections that, for the most part, failed to alleviate his
19 symptoms. During the same period of time, claimant additionally complained of
20 weakness in his thighs, pain in his right leg, and pain in both hips. Harvey opined that
21 claimant's condition "seem[ed] to be work related."

1 After filing an initial workers' compensation claim under an industrial
2 injury theory for the herniated disc at C4-5,¹ claimant was referred by employer to Dr.
3 Rabie at an occupational health clinic. Rabie initially addressed claimant's herniated disc
4 and related injury claim, diagnosing cervical radiculopathy due to the herniated disc at
5 C4-5. Thereafter, Rabie continued to treat claimant, diagnosed lumbar radiculopathy in
6 addition to cervical radiculopathy, and referred him to an outpatient neurosurgery
7 consultation with physician's assistant Musacchio. On May 18, 2006, Musacchio
8 identified claimant's condition as "[c]ervical lumbar radiculopathy" and recommended
9 cervical and lumbar MRIs as well as consultation with a neurosurgeon.

10 In the course of evaluating claimant's industrial injury claim, employer
11 wrote to Rabie requesting information pertaining to compensability. Rabie recommended
12 an independent medical examination (IME), and, on May 24, 2006, claimant reported to
13 Dr. Graham for an IME. At that time, claimant reported neck pain, bilateral shoulder
14 tightness, lower back pain, and intermittent numbness both in his right arm and running
15 down his right leg into his heel. While he did not have the benefit of cervical and lumbar
16 MRI scans taken a week later pursuant to Musacchio's recommendation, Graham opined
17 that there were "no objective findings consistent with a radiculopathy" and attributed
18 claimant's symptoms to preexisting degenerative disc disease. Addressing the industrial

¹ That injury claim was denied on June 2, 2006, and is not at issue here. This judicial review relates exclusively to claimant's subsequent occupational disease claims for cervical and lumbar radiculopathies, although, as evidenced below, claimant's assignments of error primarily give rise to analysis of his claim for lumbar radiculopathy.

1 injury claim, he ultimately opined that claimant's symptoms were not caused by "a work
2 injury in December of 2005." Five days later, on May 29, 2006, Rabie concurred with
3 Graham's "diagnoses, physical findings and conclusions" by checking a box on a form
4 letter provided by employer.²

5 The MRIs of claimant's cervical and lumbar spine recommended by
6 Musacchio were conducted on May 31, 2006. The images of claimant's lumbar spine
7 revealed "[m]ultilevel degenerative disc disease at contiguous disc levels from L3 to S1"
8 and "disc bulging and a posterior right paracentral disc protrusion that results in severe
9 (50%) central canal stenosis with focal narrowing of the right lateral recess and potential
10 compression of the right I nerve root" at L4-5.

11 Claimant subsequently met with a neurosurgeon, Dr. Zelaya, pursuant to
12 Musacchio's recommendation. On June 30, 2006, Zelaya advised against surgical
13 intervention and opined as follows regarding claimant's lumbar spine: "In the lumbar
14 area, * * * [claimant] has pretty significant degenerative changes at L5-S1 where the disk
15 is collapsed, and at L4-5 there is a bony spur centrally, but it does not seem to be putting
16 pressure * * * on the nerves." Claimant then met with Dr. Ono for a second opinion on
17 August 31, 2006. Ono opined that claimant "probably has fibromyalgia rather than
18 radiculopathy" and ordered x-rays which showed significant degenerative changes in
19 claimant's lumbar spine. Notwithstanding the x-rays, Ono adhered to his probable

² As claimant notes, that concurrence is inconsistent with Rabie's diagnoses of lumbar radiculopathy and cervical radiculopathy--the same diagnoses, as set forth below, regarding which claimant introduced the rebuttal evidence at issue on review.

1 diagnosis of fibromyalgia.

2 Claimant continued treatment with Rabie, who adhered to his diagnoses of
3 cervical radiculopathy and lumbar radiculopathy, opining that an underlying cause was
4 degenerative disc disease. On January 11, 2007, Rabie spoke with employer and opined--
5 as reflected in a chart note documenting the telephone conversation--that degenerative
6 disc disease in the cervical and lumbar spine is an "intrinsic condition not caused by or
7 pathologically accelerated by work activity." He further opined that claimant's condition
8 was in part caused by work activity, stating, regarding claimant's occupational disease
9 claims, that "this IS a combined condition in which work combined with [degenerative
10 disc disease] to cause [the] current condition * * *." (Uppercase in original.) He stated
11 that the major contributing cause of claimant's combined condition was "progressive
12 ongoing [degenerative disc disease] in both segments of [the] spine."

13 On February 13, 2007, employer denied compensability of claimant's
14 occupational disease claims for cervical radiculopathy and lumbar radiculopathy.
15 Claimant requested a hearing, which commenced on May 16, 2007. At the hearing, the
16 administrative law judge (ALJ) admitted an employer-prepared summary of Rabie's
17 findings and opinions. Rabie had signed the summary the day before the hearing,
18 reaffirming his diagnoses of cervical radiculopathy and lumbar radiculopathy and his
19 opinion that those conditions were caused by a combination of degenerative disc disease
20 and claimant's work activities. In addition, Rabie opined that claimant's degenerative
21 disc disease "has resulted in disc bulges, which in turn *compress his nerve roots causing*

1 *pain (radiculopathy)*" (emphasis added) and that the underlying degenerative disc disease
2 resulted "from a combination of [claimant's] particular genetic make up, smoking habit,
3 and age[.]" He further opined that claimant's degenerative disc disease had "not been
4 caused by or pathologically worsened by his work activities" and rejected Ono's tentative
5 diagnosis of fibromyalgia.

6 Claimant, bearing the burden of proof in an occupational disease claim,
7 ORS 656.266, sought a continuance in order to rebut Rabie's opinion with a report from
8 Dr. Gritzka, with whom he had an evaluation scheduled in early July. After denying
9 claimant's request for a continuance, the ALJ granted claimant's request to admit
10 Gritzka's report after the hearing for the sole purpose of rebutting Rabie's opinion. *See*
11 OAR 438-007-0023 (party bearing the burden of proof on an issue is entitled to the "last
12 presentation of evidence and argument on the issue"). In so doing, the ALJ limited
13 claimant's presentation of Gritzka's opinion to "actual rebuttal"--specifically limiting
14 consideration of the report "to the issues of cervical and lumbar radiculopathy."

15 Gritzka evaluated claimant on July 5, 2007, with claimant continuing to
16 report substantial neck and back pain along with pain and numbness radiating into his
17 arms and right leg. Gritzka performed a physical examination and reviewed claimant's
18 medical records, most notably the MRI of claimant's lumbar spine conducted on May 31,
19 2006. Regarding that MRI, Gritzka stated, "This study was interpreted by the radiologist
20 to show potential *compression of the L5 nerve root*; I agree with that interpretation."
21 (Emphasis added.) Ultimately, Gritzka provided the following diagnosis:

1 "1. Mild cervical degenerative spondylosis with C4-5 intervertebral disk
2 protrusion.

3 "2. Lumbar degenerative spondylosis.

4 "a. Moderate to moderately severe intervertebral disk
5 degeneration and disk space collapse [at] L5-S1.

6 "b. Intervertebral disk herniation [at] L4-5 lateralized primarily to
7 the right.

8 "Based on the evaluation today, [claimant] does not have a cervical
9 radiculopathy. He does have pain in his right lower extremity that is most
10 probably related to the intervertebral disk herniation at L4-5 lateralized to
11 the right and compressing the *right L5 nerve root condition*."

12 (Emphasis added.) Gritzka thus disagreed with Rabie as to the existence of cervical
13 radiculopathy but diagnosed, using terminology nearly identical to Rabie's as discussed
14 further below, lumbar radiculopathy related to degenerative disc disease. Gritzka further
15 opined, rebutting Rabie's opinion as to causation, that "it is conclusory to attribute
16 [claimant's] cervical and lumbar complaints * * * [to] aging and 'genetic factors.'"
17 Rather, Gritzka offered an opinion as to causation similar to Harvey's, albeit explained in
18 more detail, concluding, "In my opinion, more probably than not, the major contributing
19 cause of [claimant's] cervical condition and lumbar condition [is] his work activities
20 operating a grinder for [employer]." He opined that claimant's work activities did in fact
21 "contribute[] to a pathological worsening of" degenerative disc disease ("[t]o the extent
22 that [claimant] had 'preexisting degenerative disk disease in his cervical and/or lumbar
23 spine'") and, addressing claimant's lumbar condition specifically, opined that "the major
24 contributing cause of [claimant's] lumbar condition and need for treatment [is] his work

1 activities over time at [employer's plant]."³

2 The ALJ admitted Gritzka's report into evidence; however, he determined
3 that Gritzka "did not diagnose lumbar radiculopathy or address the cause of such a
4 condition" and concluded that "Gritzka's opinions regarding the cause of claimant's
5 lumbar or cervical conditions were not directed at his radiculopathies * * *. Therefore,
6 they will not be addressed." Ultimately, in an opinion and order issued on July 16, 2008,
7 the ALJ found that there was "no persuasive expert medical evidence supporting
8 claimant's contention that his work activities were the major contributing cause of his
9 cervical and lumbar radiculopathies[,] " and approved employer's denials of both
10 occupational disease claims.

11 The board adopted and affirmed the ALJ's order, further stating, regarding
12 the ALJ's treatment of Gritzka's report, "Based on the ALJ's express language that the
13 rebuttal report was limited to addressing claimant's cervical and lumbar radiculopathies,

³ Gritzka also discussed "vibrational occupational hand syndrome" in support of his opinion as to causation. On that point, he stated:

"The intervertebral disk herniation at C4-5, more probably than not, is the result of vibration transmitted through [claimant's] upper extremities to his cervical spine. With regard to [claimant's] low back, he describes first, that his grinder sometimes would buck or jerk, shaking his whole body and also that he had to operate the grinder sometimes in a stooped over or ben[t] position. Flexion of the lumbar spine compresses the L4-5 and L5-S1 intervertebral disk spaces particularly. In a situation where one would work in a position of lumbar flexion and was subjected to whole[-]body vibration and an occasional jerking episode, biomechanically one would expect that forces would be concentrated at the L4-5 and L5-S1 levels that would lead, over time, to (at least) worsening of degenerative changes and disk herniations at L4-5 and L5-S1."

1 we conclude that it was within the ALJ's discretion^[4] to exclude evidence that did not fall
2 within the limited purpose for which the record remained open." (Citations omitted.)
3 Beyond discussion of procedural matters not at issue on review, the board did not provide
4 any additional explanation regarding its decision not to consider Gritzka's opinion or its
5 determination that Gritzka's opinion did not address claimant's alleged cervical or lumbar
6 radiculopathies.

7 On review, claimant argues first that Gritzka in fact diagnosed lumbar
8 radiculopathy given his "finding of nerve root compression in the lumbar spine."⁵
9 Claimant further challenges the board's adoption of the ALJ's determination that Gritzka
10 "offered no opinions regarding the cause of claimant's alleged lumbar radiculopathy[.]"
11 contending that Gritzka addressed, diagnosed, and provided an opinion as to causation of
12 that condition. Accordingly, claimant argues, the board erred in adopting the ALJ's
13 finding that Gritzka's report did not address any condition to which rebuttal evidence was

⁴ As noted, Gritzka's report was not "exclude[d]" by the ALJ, but rather was simply not considered--based on an understanding of its contents--in determining the major contributing cause of claimant's conditions. Accordingly, the board erroneously addressed the ALJ's treatment of Gritzka's opinion as an evidentiary ruling subject to an abuse of discretion standard. We address the standard of review applicable to this case in detail below.

⁵ Claimant concedes that Gritzka did not diagnose cervical radiculopathy. However, he argues that, even with regard to cervical radiculopathy, the report falls within the scope of the rebuttal evidence permitted by the ALJ given that Gritzka addressed the cause of the degenerative changes underlying claimant's cervical condition. In other words, claimant argues that Gritzka provided an alternative explanation as to causation of the same degenerative process identified by Rabie as the cause of claimant's cervical radiculopathy. We need not decide that issue, as we conclude that, in any event, Gritzka directly addressed claimant's alleged lumbar radiculopathy.

1 limited, *i.e.*, cervical or lumbar radiculopathy, and thus erred in failing to consider
2 Gritzka's opinion as rebuttal to Rabie's opinion when determining whether the record,
3 "viewed as a whole," ORS 183.482(8)(c), demonstrated that claimant's work activities
4 were the major contributing cause of his claimed conditions. Employer responds that
5 Gritzka made only one "isolated comment" regarding a compressed nerve in claimant's
6 lumbar spine⁶ and argues that he "did not directly address the issue of whether there was
7 a work-related cause for [claimant's] cervical or lumbar radiculopathy." Beyond
8 disputing claimant's assertions regarding the substance of Gritzka's opinion, employer
9 contends that the board's treatment of Gritzka's opinion is governed on review by an
10 abuse of discretion standard and that any error in disregarding the opinion was harmless
11 and should be treated as such. We agree with claimant.

12 We first clarify the applicable standard of review. Employer evaluates the
13 board's treatment of Gritzka's opinion under an abuse of discretion standard, likening it--
14 consistent with the board's order--to adoption of an evidentiary ruling made by the ALJ.
15 However, Gritzka's opinion was in fact admitted into evidence. This was not a situation
16 in which the ALJ could have exercised discretion to reject certain aspects of Gritzka's
17 report. The proper question on review is whether the board's interpretation of Gritzka's

⁶ Insofar as the number of Gritzka's references to spinal nerve root compression is significant, that is simply not the case. Gritzka addressed spinal nerve root compression in reviewing the May 31, 2006, MRI, in concurring with a radiologist's interpretation of that MRI, and in rendering his diagnosis. He also addressed the cause of the pain associated with radiculopathy, as well as the cause of claimant's disc degeneration and other factors underlying and contributing to the alleged lumbar radiculopathy.

1 report was a reasonable one. *See SAIF v. Pepperling*, 237 Or App 79, 84-85, 238 P3d
2 1013 (2010) ("In reviewing the board's evaluation of [an expert's] opinion, we do not
3 substitute our judgment for that of the board; rather, we determine whether the board's
4 evaluation of that evidence was *reasonable*." (Citation omitted; emphasis added.)); *see*
5 *also Asten-Hill Co. v. Armstrong*, 100 Or App 559, 562-63, 787 P2d 890 (1990)
6 (concluding that the board "unreasonably" "misread" and "substantially misstated" an
7 expert's statements, and further identifying "[t]he only reasonable reading" of that expert's
8 opinion); *SAIF v. Paxton*, 154 Or App 259, 263-65, 959 P2d 634 (1998) (the board's
9 finding was not supported by substantial evidence where it unreasonably misinterpreted
10 an expert's opinion regarding the cause of the claimant's hearing loss); *Kenimer v. SAIF*,
11 183 Or App 131, 138, 51 P3d 632 (2002) (finding "only one reasonable interpretation of
12 the basis for [an expert's] opinion").

13 We address claimant's assignments of error together, as the resolution of
14 claimant's first assignment of error--that the board erroneously adopted the ALJ's finding
15 that Gritzka did not diagnose claimant with "a lumbar radiculopathy"--is simply one
16 means of resolving whether the board ultimately erred in determining that Gritzka did not
17 address any condition within the scope of rebuttal permitted by the ALJ (namely, Rabie's
18 diagnoses of cervical and lumbar radiculopathies). "Radiculopathy" is defined as a
19 "[d]isorder of the spinal nerve roots." *Stedman's Medical Dictionary* 1503 (27th ed
20 2000). As claimant correctly points out, Rabie's diagnosis of radiculopathy--that is, "disc
21 bulges, which in turn compress [claimant's] nerve roots causing pain (radiculopathy)"--

1 was addressed directly and unambiguously by Gritzka's report. In evaluating claimant's
2 lumbar MRI and an accompanying radiologist's report, and in formulating his diagnosis,
3 Gritzka addressed "potential compression of the L5 nerve root" and a "right L5 nerve root
4 condition[,] " respectively.

5 The record thus reflects that, with regard to claimant's lumbar condition,
6 Gritzka's opinion contained prominent language nearly identical to that used by Rabie in
7 referring to radiculopathy. Both physicians referred to pain caused by compression of
8 claimant's spinal nerve roots; Rabie simply included the term "radiculopathy" in
9 parentheses afterward. That one-word parenthetical ultimately constitutes the only
10 discernible difference (excluding theories of causation) between the two experts'
11 language pertaining to claimant's lumbar radiculopathy. There is therefore only one
12 reasonable interpretation of Gritzka's opinion: that it addresses claimant's alleged lumbar
13 radiculopathy. *See Kenimer*, 183 Or App at 138 (finding "only one reasonable
14 interpretation" of an expert's opinion); *cf. Freightliner Corp. v. Arnold*, 142 Or App 98,
15 105, 919 P2d 1192 (1996) (concluding, in the context of causation, that an expert's
16 "testimony as a whole reasonably may be read as [reaching the relevant conclusion]" and
17 "need not be ignored *merely because it fails to include 'magic words'* such as 'major
18 contributing cause'" (emphasis added)). Gritzka's report thus fell "within the limited
19 purpose for which the record remained open," and the board's unexplained determination
20 to the contrary was not reasonable. Consequently, the board erred in disregarding
21 Gritzka's opinion as medical evidence rebutting Rabie's conclusions as to the cause of

1 claimant's alleged lumbar radiculopathy.⁷

2 In sum, Gritzka's opinion, at minimum, addressed claimant's alleged lumbar
3 radiculopathy and its cause. The board's determination to the contrary was not
4 reasonable. Accordingly, because we conclude that the board unreasonably
5 misinterpreted Gritzka's opinion and therefore erred in failing to consider it as rebuttal
6 evidence, we reverse and remand for reconsideration. *See, e.g., Asten-Hill*, 100 Or App
7 at 562-63 (reversing and remanding for reconsideration where the board "misread [an
8 expert's] testimony unreasonably"); *Skochenko v. Weyerhaeuser Co.*, 118 Or App 241,
9 245, 846 P2d 1212 (1993) (citing *Asten-Hill*, 100 Or App 559) ("[W]e cannot say that the
10 Board's misinterpretation of some of the medical evidence did not influence its ultimate
11 conclusion * * *. Accordingly, we must reverse and remand for reconsideration."); *SAIF*
12 *v. Bryant*, 173 Or App 402, 407-08, 21 P3d 1104 (2001) (reaffirming the principle that
13 we reverse and remand for reconsideration when "the Board's misinterpretation of some
14 of the medical evidence may have influenced its ultimate conclusion" (citations

⁷ The board's misinterpretation of Gritzka's opinion is compounded by the fact that radiculopathy is a generalized term that most commonly refers to pain or numbness and can encompass a variety of underlying conditions. In fact, this court has openly debated its status as a "condition," though that is ultimately a question of fact to be decided based on the medical evidence in individual cases. *See Young v. Hermiston Good Samaritan*, 223 Or App 99, 101, 107, 194 P3d 857 (2008) (finding that "radiculopathy," defined by the medical evidence as "*pain that radiates along the course of a nerve root that exits from the spine*," was a "symptom and not a condition" (emphasis added)); *see also City of Eugene v. McCann*, 248 Or App 527, 536, 273 P3d 348 (2012) (citing *Young* and its definition of radiculopathy in distinguishing "diseases from symptoms"). Gritzka addressed the generalized definition of radiculopathy, did not neglect to address the pain and other symptoms associated with it as a condition, and in effect treated it much like this court (and, notably, the board) did in *Young*, 223 Or App at 101, 107.

1 omitted)); *Kenimer*, 183 Or App at 139 (similar).

2 Reversed and remanded.