
In the Matter of the Compensation of
KYLE A. WESTON, Claimant
WCB Case No. 01-06503
ORDER ON REVIEW
Steven M Schoenfeld, Claimant Attorneys
Reinisch Mackenzie et al, Defense Attorneys

Reviewing Panel: Members Bock, Phillips Polich, and Lowell. Member Lowell dissents.

The self-insured employer requests review of Administrative Law Judge (ALJ) Davis' order that set aside its denial of claimant's occupational disease claim for a repetitive use strain condition. On review, the issue is compensability. We affirm.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact" and "Findings of Ultimate Facts."

CONCLUSIONS OF LAW AND OPINION

From July 1999 to May 2001, claimant's work activities consisted of using grinders to remove irregularities from metal airplane parts; *i.e.*, "burring." (Tr. 7). Claimant's workday was 8 hours in length. (*Id.*) During that time he was allowed a half-hour lunch and two 10-minute breaks. (*Id.*)

In the fall of 2000, claimant began to experience aching pain in his neck and in both shoulders and arms. (Tr. 16). On May 4, 2001, claimant saw Dr. Gavlick for those problems. (Ex. 3). Dr. Gavlick found normal range of cervical motion and normal range of shoulder motion bilaterally. (*Id.*) Dr. Gavlick also noted "no specific palpation tenderness about neck, upper back or shoulders." (*Id.*) Although Dr. Gavlick opined that the examination did not "point towards a specific medical condition," he did prescribe physical therapy and recommend an ergonomic evaluation of claimant's work station. (*Id.*)

The same day claimant filed a claim for sprain/strain of his neck, shoulder, and arms. (Ex. 1).

On May 9, 2001, claimant saw Dr. George.¹ (Ex. 9). Dr. George found reduced range of motion in claimant's neck, shoulders, elbows, wrists, and hands. (*Id.*) Dr. George diagnosed repetitive strain injury. (*Id.*) In follow-up on May 23, 2001, Dr. George found decreased cervical range of motion and mild paracervical muscle spasm. (Ex. 20). Dr. George's working diagnosis remained repetitive strain injury. (*Id.*)

In June 2001, claimant saw Dr. Radecki (at Dr. George's request) for an evaluation of his hand complaints. (Ex. 35-1). EMG testing (interpreted by Dr. Radecki) revealed no evidence of either median or ulnar nerve slowing or cervical radiculopathy. (Ex. 35-2).

On June 21, 2001, Dr. George opined that claimant's repetitive strain of the neck, arms, and hands had objectively resolved. Dr. George released claimant to regular duty work with a recommendation that he not do prolonged repetitive and vibratory intense jobs. (Ex. 36-2).

In July 2001, the employer denied the claim asserting that: (1) the "injury" lacked objective findings; and (2) there was insufficient evidence that "any injury" arose out of and in the course of claimant's employment. (Ex. 41). Claimant requested a hearing.

On August 12, 2001, claimant was evaluated (at Dr. Eidenberg's request) by Dr. Puziss.² (Ex. 42). On examination, Dr. Puziss noted few objective findings, but did report a "reversed cervical lordosis" (seen on x-ray), which he opined demonstrated "ongoing strain or subtle spasm." (Ex. 42-2). Dr. Puziss diagnosed the following conditions: (1) overuse syndrome shoulders and wrists; (2) left rotator cuff tendinitis; (3) mild bilateral posterior shoulder capsular tightness; and (4) chronic cervical strain. (*Id.*) Dr. Puziss indicated that he agreed with Dr. George. (*Id.*) In response to written questions from claimant's counsel, Dr. Puziss opined that the major contributing cause of claimant's strain condition was "overuse" resulting from his work activities. (Ex. 45). Dr. Puziss recommended a job change. (*Id.*)

¹ Dr. George practices in the same clinic as Dr. Gavlick. (Exs. 3; 9).

² Dr. Eidenberg is claimant's family physician. (Tr. 24).

Likewise, Dr. Eidenberg opined (based on claimant's history and a description of claimant's job activities) that the major cause of claimant's repetitive strain condition was his work activities. (Ex. 44).

The ALJ relied on the findings of Dr. George, as well as the opinions of Drs. Eidenberg and Puziss, and concluded that the major contributing cause of claimant's repetitive strain conditions was his work activity. Consequently, the ALJ set aside the employer's denial.

Claimant seeks to establish the compensability of his repetitive strain conditions as an occupational disease. Therefore, he must prove that his work activities were the major contributing cause of the disease, not just the major contributing cause of the disability or treatment associated with it. ORS 656.802(2)(a). To satisfy the "major contributing cause" standard, claimant must establish that his work activities contributed more to the claimed conditions than all other factors combined. *See, e.g., McGarrah v. SAIF*, 296 Or 145, 146 (1983).

A determination of the major contributing cause involves the evaluation of the relative contribution of different causes of claimant's disease and deciding which is the primary cause. *See Dietz v. Ramuda*, 130 Or App 397 (1994), *rev dismissed* 320 Or 416 (1995). Because of possible alternative causes for his repetitive strain 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 (1967).

Based on the record presented here (as summarized above), especially considering the agreement among Drs. George, Eidenberg, and Puziss, as well as the absence of any contrary opinions, we find that claimant has established the compensability of his repetitive strain condition.³ Consequently, we agree with the ALJ's conclusion that the employer's denial should be set aside.

³ The employer asserts that the ALJ improperly relied on Exhibit 43 (a response from Dr. George), which had been withdrawn at the commencement of the hearing. We acknowledge the ALJ's reference to Exhibit 43 in the "Conclusions of Law and Opinion" portion of the Opinion and Order. (O&O p. 5). Although we agree with the ALJ's ultimate conclusion (claimant's repetitive strain condition is compensable), we do so based on our *de novo* review, which is independent of and without regard to Exhibit 43.

The employer asserts that there are no “objective findings” supporting the diagnosis of repetitive strain. Consequently, the employer reasons that claimant has failed to establish the compensability of that condition. For the reasons stated below, we reject the employer’s argument.

Objective findings are verifiable indications of injury or disease that may include, but are not limited to, range of motion, atrophy, muscle strength and palpable muscle spasm. ORS 656.005(19). Objective findings do not include physical findings or subjective responses to physical examinations that are not reproducible, measurable or observable. *Id*; *SAIF v. Lewis*, 170 Or App 201, 212 (2000), *rev allowed* 331 Or 692 (2001).

Here, Dr. George expressly reported finding reduced ranges of motion in claimant’s neck, shoulders, elbows, wrists, and hands. (Exs. 9; 20). Such a finding is objective because it is “measurable.” *See Patricia A. Waldo*, 53 Van Natta 539 (2001). Additionally, Dr. George reported finding mild paracervical muscle spasm and Dr. Puziss reported finding a reversed lordosis at C4-5. (Exs. 20; 42-2). Such findings are objective because they are “observable.” *See Carla S. Pederson*, 53 Van Natta 1384 (2001). Thus, contrary to the employer’s argument, the compensability of claimant’s repetitive strain condition has been established by medical evidence supported by objective findings. *See* ORS 656.005(19); ORS 656.802(2)(b).

Claimant’s attorney is entitled to an assessed fee for services on review. 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 is \$1,350, to be paid by the self-insured employer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant’s respondent’s brief, and his counsel’s uncontested fee request), the complexity of the issue, and the value of the interest involved.

ORDER

The ALJ’s order dated January 4, 2002 is affirmed. For services on review, claimant is awarded a \$1,350 attorney fee, payable by the self-insured employer.

Entered at Salem, Oregon on October 1, 2002

Board Member Lowell dissenting.

I disagree with the majority's conclusion that the medical evidence supports the compensability of claimant's occupational disease claim. Accordingly, I respectfully dissent.

I begin by noting that Dr. Radecki reported that claimant exhibited "bizarre" responses when his neck was placed into position for Spurling maneuvers. (Ex. 35-2). Consistent with Dr. Radecki's observations, Dr. George reported that claimant had exaggerated pain symptoms secondary to job dissatisfaction and interpersonal difficulties on the job. (Ex. 36-2).

I also note that during May and June of 2001, claimant kept a log of his daily symptoms. (Ex. A). In his log, claimant reports feeling very tired and fatigued with lots of pain from "head to toe." (Ex. A-6; A-9). Claimant also reported that his supervisor had "no compassion," and was harassing him. (Ex. A-12; A-13). Claimant also described being harassed by a co-worker. (Ex. A-15). Taking into account the observations of Drs. Radecki and George, in addition to claimant's log, I conclude that job dissatisfaction and interpersonal relationships at work are contributory factors to claimant's ongoing symptoms. Because there is no medical opinion in the record that weighed all the contributing factors (including the job dissatisfaction issue) and found claimant's work to be the major cause of the disputed condition, I find the medical evidence insufficient to carry claimant's burden of proof. *Dietz v. Ramuda*, 130 Or App 397 (1994), *rev dismissed* 320 Or 416 (1995).

Accordingly, I would reverse the ALJ and uphold the employer's denial. Because the majority decides otherwise, I respectfully dissent.