

In the Matter of the Compensation of
ROBERT PRABUCKI, Claimant

WCB Case No. 08-01518

ORDER ON REVIEW

Schoenfeld & Schoenfeld, Claimant Attorneys
Maher & Tolleson LLC, Defense Attorneys

Reviewing Panel: Members Biehl and Lowell.

The self-insured employer requests review of Administrative Law Judge (ALJ) Otto's order that: (1) sustained claimant's objection to admission of a medical report; and (2) set aside its denial of claimant's injury claim for a C4-5 disc herniation. On review, the issues are evidence and compensability.

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

Claimant's job as a "coffee route representative" involved loading a truck with coffee and other beverages and accoutrements and delivering them to customers. While loading products into his truck on the morning of December 11, 2007, he developed neck pain. His pain was worsened by a sneeze. He did not seek medical treatment that day.

On December 16, 2007, claimant sought emergency-room treatment. The emergency-room chart notes described claimant's pain as gradual in onset, with sneezing as a possible mechanism of injury. A December 27, 2007 MRI revealed a disc herniation at C4-5, as well as mild to moderate spondylosis at the C5-6 and C6-7 levels.

On January 9, 2008, claimant filed a claim for neck and right arm pain. The employer denied claimant's C4-5 disc herniation on February 26, 2008. Claimant requested a hearing.

The hearing convened on May 29, 2008, and was continued to allow the submission of additional evidence into the record. Among the post-hearing exhibits submitted was a July 2, 2008 addendum report by Dr. Duff, an employer-arranged medical examiner. (Ex. 21). Claimant objected to admission of the report on the ground that the employer was not entitled to the last presentation of evidence because a combined condition had not been established.

The ALJ found that no combined condition had been established and sustained claimant's objection. Further, the ALJ found that claimant's work activities of December 11, 2007 were the major contributing cause of the C4-5 disc herniation and set aside the employer's denial.

On review, the employer contends that Dr. Duff's July 2008 report should be admitted into evidence because it bears the burden of proving the presence of a "preexisting condition." The employer also contends that claimant's account of his injury is not credible and that claimant did not experience a potentially injurious work event. Alternatively, the employer contends that any work injury combined with a preexisting arthritic condition that was the major contributing cause of the combined condition. For the following reasons, we disagree with the employer's contentions.

Evidence

ORS 656.283(7) provides that an ALJ is not bound by common law or statutory rules of evidence and may conduct a hearing in any manner that will achieve substantial justice. The ALJ has broad discretion with regard to the admissibility of evidence at hearing. *Brown v. SAIF*, 51 Or App 389, 394 (1981); *Debra A. Gillman*, 58 Van Natta 2041 (2006). We review the ALJ's evidentiary ruling for abuse of discretion. *SAIF v. Kurcin*, 334 Or 399 (2002); *Charlotte A. Landers*, 60 Van Natta 1432, 1434 (2008).

Here, even if we considered the disputed evidence, it would not affect the outcome of this case. As explained below, we would find claimant's C4-5 disc herniation compensable regardless of whether we consider Dr. Duff's report. Accordingly, we need not decide whether the ALJ abused his discretion in deciding the evidentiary issue. *See Douglas D. Flath*, 59 Van Natta 1412 (2007).

Compensability

Claimant bears the initial burden to prove that he sustained a work injury that was a material contributing cause of his disability or need for treatment. ORS 656.005(7)(a); ORS 656.266(1); *Olson v. State Indus. Accident Comm'n*, 222 Or 407, 414-15 (1960). If claimant carries his initial burden, and the record establishes the presence of a combined condition, the burden shifts to the employer to prove that the otherwise compensable injury was not the major contributing cause of claimant's disability or need for treatment of the combined condition. ORS 656.266(2)(a); *Jack G. Scoggins*, 56 Van Natta 2534, 2535 (2004).

Claimant testified that he experienced the initial onset of symptoms while loading his truck on the morning of December 11, 2007. (Tr. 13-14). The employer disputes this account and contends that claimant did not experience the onset of symptoms during work. Thus, the employer contends that claimant has not carried his initial burden of proof.

Although the ALJ gave weight to claimant's testimony, he did not make a demeanor-based credibility finding. Therefore, we examine the record to evaluate the credibility of claimant's testimony. *Coastal Farm Supply v. Hultberg*, 84 Or App 282, 285 (1987). The employer asserts that claimant's testimony is contrary to previous accounts that claimant had provided.

When claimant first sought treatment for his neck symptoms on December 16, 2007, the medical record described the onset of his symptoms as gradual. (Ex. 3-1). Although claimant noted the possibility of an injury, the only possible mechanism of injury noted in the medical record was sneezing. (*Id.*) Chart notes dated December 19, 2007 again noted the possibility of an injury, but again described only sneezing as a possible mechanism of injury. (Ex. 4-1).

The first indication in the medical record that claimant's neck condition could be work-related is in a January 7, 2008 report from Dr. Soldevilla, a neurosurgeon who would later operate on claimant's C4-5 disc. At that time, Dr. Soldevilla did not record a specific work-related incident but, instead, simply stated, "At this point, we will ask for Workman's Comp approval for surgical intervention." (Ex. 7-2). Claimant's first account of an injurious work event appeared on his January 9, 2008 claim form. (Ex. 8).

The employer contends that given claimant's initial attribution of symptoms to sneezing, and the absence of a description of a work injury until January 9, 2008, his testimony regarding the work injury is not credible. We disagree.

Claimant testified that before he sought treatment for his neck, he had sneezed, which increased his symptoms. (Tr. 19). He also testified that he attempted to carry on despite the pain, but that his symptoms continued to increase. (Tr. 15-16). He testified that when he first sought emergency room treatment on December 16, 2007, he had mentioned both his work and the sneeze, but had directed the focus of the interview to the resolution of his symptoms. (Tr. 18-19). Thus, he explained, he was not asked for, and did not provide, a thorough history of the events associated with his symptoms.

Ms. Kaer, a friend who accompanied claimant to the emergency room on December 16, 2007, corroborated claimant's account. She testified that although claimant was asked what had happened, the focus of the discussion was the nature and history of his symptoms. (Tr. 36). She also testified that although claimant did not describe a specific work-related mechanism of injury, he mentioned his work. (*Id.*)

Claimant's explanation for the apparent inconsistency between his testimony and the emergency-room chart notes, that he had mentioned sneezing but was not asked to provide a detailed history, is reasonable and corroborated by other testimony.

The employer also argues that an earlier statement by claimant regarding the mechanism of injury was inconsistent with claimant's testimony. In his earlier statement, claimant associated the onset of his symptoms with lifting overhead and putting merchandise in the corner of the truck. (Ex. 12-10). The employer contends that, contrary to this account, claimant testified that his injury occurred while he was throwing merchandise into the truck.

Claimant testified that loading his truck in the morning was a rushed event that sometimes involved throwing merchandise into the truck, as well as thoughtfully organizing and stacking it. (Tr. 13). He also testified that stacking involved awkward positions and reaching. (*Id.*) He testified that his symptoms occurred in the course of this activity. (*Id.*)

Claimant did not testify that his symptoms arose when he threw merchandise into the truck. Rather, he testified that his symptoms arose while he was loading the truck, an activity that included carrying, throwing, lifting, and organizing. His testimony is consistent with his earlier statement that specifically identified lifting as an activity associated with the onset of symptoms.

After reviewing the record, we conclude that it supports claimant's testimony that his symptoms arose while he loaded his truck on the morning of December 11, 2007 and gradually worsened thereafter. Under such circumstances, we find claimant's testimony credible.

Accordingly, we turn to the relationship between the work event and claimant's C4-5 disc herniation. Considering the competing medical opinions regarding causation, compensability is a complex medical question that requires resolution by expert medical evidence. *Uris v. State Comp. Dep't*,

247 Or 420, 426 (1967); *Barnett v. SAIF*, 122 Or App 279, 283 (1993). We give more weight to those medical opinions that are well reasoned and based on complete information. *Somers v. SAIF*, 77 Or App 259, 263 (1986).

Dr. Greenberg, claimant's attending physician, and Dr. Soldevilla, a treating surgeon, both opined that the cervical disc herniation was caused by claimant's work activities. (Exs. 18-1; 19-1). They based their opinions on the onset of pain while claimant loaded heavy items into a vehicle, with progression of pain afterward and with an increase in pain associated with sneezing. (Exs. 18-1; 19-1). As noted above, this history is supported by claimant's testimony.

Dr. Duff and Dr. Denekas, another employer-arranged medical examiner, both opined that the herniation was not work related. (Ex. 14-6). Claimant's history associated the onset of pain with a day of working, but not with a particular work-related incident. (Ex. 14-2). Dr. Duff and Dr. Denekas stated that the initial chart notes described a history of a pinched neck nerve after coughing. (Ex. 14-3). They concluded that the onset of symptoms was associated with sneezing or coughing rather than work, and based their causation opinion on that history. (Ex. 14-6).

Because we have found claimant's testimony credible, we find that the opinions of Drs. Greenberg and Soldevilla were based on accurate information, whereas the opinions of Drs. Duff and Denekas were not. Based on the persuasive opinions of Drs. Greenberg and Soldevilla, we conclude that claimant has carried his initial burden of proof.

Drs. Denekas and Duff, however, also opined that "any activity" that was the precipitating cause would have combined with preexisting degenerative disease to cause the cervical disc herniation. (Ex. 14-7). They further opined that the preexisting degeneration was the major contributing cause of the combined condition. (*Id.*) Based on their opinions, the employer argues that the otherwise compensable injury was not the major contributing cause of claimant's disability or need for treatment.

Assuming the existence of combined condition, we do not find that the employer has carried its burden of proof. Drs. Denekas and Duff consistently reiterated their belief that claimant's symptoms were not associated with work,

but were associated with sneezing instead. (Exs. 14-7, 17A, 20, 21-1). Thus, they discussed a hypothetical “combined condition” without weighing the contribution of claimant’s work injury. (Ex. 14-7).

To persuasively establish the major cause of a combined condition, a medical opinion must consider the relative contribution of all causes and determine which cause, or combination of causes, contributed more than all other causes combined. *Smothers v. Gresham Transfer, Inc.*, 332 Or 83, 133 (2001); *Dietz v. Ramuda*, 130 Or App 397, 401-02 (1994), *rev dismissed*, 321 Or 416 (1995). Because Drs. Denekas and Duff did not weigh the relative contribution of claimant’s work injury to the herniation, their opinions do not prove that the otherwise compensable injury was not the major contributing cause of claimant’s disability or need for treatment of the combined condition. ORS 656.266(2)(a). Accordingly, we affirm.

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 \$2,500, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant’s respondent’s brief), the complexity of the issues, and the value of the interest involved.

Finally, claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by the employer. *See* ORS 656.386(2); OAR 438-015-0019; *Gary E. Gettman*, 60 Van Natta 2862 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

ORDER

The ALJ’s order dated December 5, 2008 is affirmed. For services on review, claimant’s attorney is awarded an assessed fee of \$2,500, to be paid by the employer. Claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by the employer.

Entered at Salem, Oregon on July 21, 2009