

In the Matter of the Compensation of  
**CYNTHIA A. STILWELL, Claimant**

WCB Case No. 08-01221

ORDER ON REVIEW

DiBartolomeo Law Office PC, Claimant Attorneys  
Radler Bohy et al, Defense Attorneys

Reviewing Panel: Members Weddell, Langer, and Herman. Member Weddell dissents.

Claimant requests review of Administrative Law Judge (ALJ) Fulsher's order that upheld the self-insured employer's denial of claimant's new/omitted medical condition claim for a right rotator cuff tear. On review, the issue is compensability.

We adopt and affirm the ALJ's order with the following supplementation.<sup>1</sup>

First, we find Dr. Nairn's "possible" rotator cuff injury assessment in February 2007 insufficient to establish that a tear existed at that time. (*See* Ex. 30). *See Gormley v. SAIF*, 52 Or App 1055, 1060 (1981) (persuasive medical opinions must be based on medical probability, rather than possibility).

Second, like the ALJ, we are unpersuaded by Dr. Denes's opinion.<sup>2</sup>

Third, we acknowledge that Dr. Heusch, osteopath, examined claimant in July 2008 and diagnosed a right rotator cuff tear (among other things) that he related to claimant's February 2007 work injury. (Ex. 103A-5-7, -10). However, because Dr. Heusch issued this opinion without the benefit of Dr. Denes's post-surgical opinions (including Dr. Denes's observation that the tear was "somewhat

---

<sup>1</sup> The second sentence in the third full paragraph on page 3 is corrected to indicate that claimant had a second right shoulder *MRI* on March 27, 2008.

<sup>2</sup> When deposed, Dr. Denes acknowledged that it was difficult to tell whether a tear was degenerative or traumatic and impossible to determine when claimant's rotator cuff tear started. (Ex. 124-32, -34). Nevertheless, based on the appearance of the tear at surgery, Dr. Denes clarified that he had agreed that the tear he surgically repaired did not appear older than six months, because there was "an element of" the tear that appeared to have occurred within six months. (*Compare* Ex. 113-1 and Ex. 124-32). Thus, according to Dr. Denes, the tear must have worsened over a year after the work injury. We do not find this explanation for relating the "somewhat fresh" tear to the remote injury persuasive, because it is speculative. (*See id.* at 32-34). *See Gromley v. SAIF*, 52 Or App 1055, 1060 (1981) (persuasive medical opinions must be based on medical probability, rather than possibility).

fresh, not older appearing than six months”), we cannot say that Dr. Heusch’s opinion was based on complete information. (*See* Ex. 113-1). Consequently, we do not find it persuasive. *SAIF v. Strubel*, 161 Or App 516, 521-22 (1999) (medical opinions evaluated in context and based on the record as a whole to determine their sufficiency).

Accordingly, for these reasons, as well as those expressed by the ALJ, we affirm the ALJ’s order that upheld the employer’s denial of claimant’s new or omitted medical condition claim for a right rotator cuff tear.

### ORDER

The ALJ’s order dated February 18, 2010 is affirmed.

Entered at Salem, Oregon on November 1, 2010

Member Weddell, dissenting.

The facts of this case are relatively straightforward. Claimant had no shoulder problems before she injured her right shoulder at work on February 22, 2007. She sought medical treatment promptly. Dr. Nairn diagnosed a right shoulder injury and suspected an underlying rotator cuff tear. (Ex. 30). When claimant’s right shoulder problems persisted, two MRIs were performed.

The first MRI was negative. (Ex. 48). However, the second MRI used a different technology and showed a partial intrasubstance tearing of the rotator cuff (among other things). (Ex. 93).

Dr. Heusch diagnosed a probable right rotator cuff tear, due to the work injury. (Ex. 103A).

Dr. Denes performed surgery on claimant’s right shoulder on September 17, 2008, and observed the rotator cuff tear. He acknowledged that it was impossible to determine when the tear started. (Ex. 124-32). However, based on the appearance of the tear at surgery, Dr. Denes opined that “an element” of claimant’s tear appeared to have occurred within 6 months of the surgery (*i.e.*, 13 months after the work injury). (*Id.* at 32-34). Based on claimant’s history of symptoms and the operative findings, Dr. Denes opined that the tear began with the injury and progressed thereafter with continued shoulder use. (*See id.* at 13-14).

---

Because Dr. Denes's opinion is consistent with claimant's history and findings, I find it reasonable, well-reasoned, and based on complete information. Thus, the opinion is not only persuasive, it is also based on the doctor's surgical findings. Under these circumstances, Dr. Denes's opinion is sufficient to carry claimant's burden of proof, even without affording it the special weight that it deserves. *See Argonaut Ins. Co. v. Mageske*, 93 Or App 698, 702 (1988) (opinion of treating surgeon accorded greater weight because of the surgeon's opportunity to observe the claimant's condition during surgery).

In reaching this conclusion, I particularly stress that it is claimant's burden to prove the claim with a preponderance of evidence establishing medical *probability*. *See Robinson v. SAIF*, 147 Or App 157, 160 (1997) (medical certainty not required; a preponderance of evidence may be shown by medical probability); *Kenneth L. Edwards*, 58 Van Natta 761, 762 (2006) (a claimant's burden of proof is met when a medical opinion determines the cause of a condition to a reasonable degree of medical probability on a more likely than not basis). For the reasons expressed above, I believe that Dr. Denes's opinion more than satisfies this evidentiary standard.

In sum, I would rely on Dr. Denes's persuasive opinion and set aside the employer's denial. Consequently, I respectfully dissent from the majority's contrary decision.