

In the Matter of the Compensation of  
**ROGER K. POOLE, Claimant**

WCB Case No. 10-04681

ORDER ON REVIEW

Bottini Bottini & Oswald, Claimant Attorneys  
Reinisch Mackenzie PC, Defense Attorneys

Reviewing Panel: Members Langer, Biehl and Herman.

The self-insured employer requests review of Administrative Law Judge (ALJ) Pardington's order that set aside its denial of claimant's injury claim for a thoracic condition. On review, the issue is compensability.

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

The ALJ found, based primarily on the testimony of a coworker, Mr. Giradet, that claimant had proven the compensability of his injury claim. On review, the employer argues that there are numerous discrepancies and inconsistencies in claimant's testimony, and that he has not proven legal causation.<sup>1</sup>

Although the ALJ did not make an express demeanor-based finding regarding claimant's credibility, he did find Mr. Giradet's "eye-witness" account to be credible.<sup>2</sup> After considering the employer's contentions, we agree with the ALJ's credibility assessment. *See Coastal Farm Supply v. Hultberg*, 84 Or App 282 (1987) (when the credibility issue concerns the substance of a witness' testimony, Board is equally qualified to make its own determination). Noting the inconsistencies in claimant's testimony and the delay in reporting the claim, the ALJ agreed that there was "ample reason" for the employer to doubt the claim. We agree with that assessment.

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<sup>1</sup> The employer also argues that Mr. Giradet has reason to be biased against the employer. We find this assertion speculative, and, therefore, unpersuasive.

<sup>2</sup> In reaching this finding regarding Mr. Giradet's testimony, the ALJ described him as "calm and straightforward." Such a reference might suggest a "demeanor-based" finding. Nonetheless, we need not resolve that question because, even in the absence of an express demeanor-based finding, we agree with the ALJ's credibility assessment based on our review of this record.

Yet, even if claimant's testimony is not credible in certain respects, the claim can be compensable if the remainder of the record supports his claim. *See Westmoreland v. Iowa Beef Processors*, 70 Or App 642 (1984), *rev den*, 298 Or 597 (1985); *Linda K. Bergeson*, 60 Van Natta 1823, 1826 (2008). Here, we find that claimant's testimony regarding the details of the injury, as corroborated by Mr. Giradet, sufficient to establish that he sustained an injury at work. Thus, claimant has proven legal causation.<sup>3</sup>

Turning to medical causation, we agree with the ALJ's finding that Dr. Back's and Dr. Ragsdale's unrebutted opinions established, by a preponderance of the evidence, that claimant's work injury was a material contributing cause of his disability/need for treatment for his thoracic condition. Thus, 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 \$4,000, 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 and his counsel's uncontested fee submission), the complexity of the issue, 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 438-015-019; *Gary 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 February 10, 2011 is affirmed. For services on review, claimant's counsel is awarded an assessed fee of \$4,000, payable 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 October 11, 2011

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<sup>3</sup> Legal causation is established by showing that claimant engaged in potentially causative work activities; whether those work activities caused claimant's condition is a question of medical causation. *Darla Litten*, 55 Van Natta 925, 926 (2003).