

In the Matter of the Compensation of
MICHAEL COINER, Claimant

WCB Case No. 11-03217

ORDER ON REVIEW

Welch Bruun & Green, Claimant Attorneys
MacColl Busch Sato PC, Defense Attorneys

Reviewing Panel: Members Lowell and Biehl.

The self-insured employer requests review of those portions of Administrative Law Judge (ALJ) Pardington's order that: (1) denied its request to continue the hearing for the presentation of a further rebuttal medical report; and (2) set aside its denial of claimant's injury claim for a C6-7 disc condition. On review, the issues are the ALJ's evidentiary ruling and compensability.

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

Evidence

On review, the employer argues that the ALJ erred in not allowing it a rebuttal report as to the causation issues presented by Dr. Collada's November 30, 2011 concurrence report. The employer contends that it has the right to the last presentation of evidence under ORS 656.266(2)(a).

We need not address this evidentiary issue, because we would reach the same conclusion concerning compensability even if we did not consider Dr. Collada's November 30, 2011 concurrence report. *See Robert L. Destefano*, 64 Van Natta 1179 (2012).

Compensability

The employer argues that claimant is not a credible witness and that he did not sustain a work-related injury. According to the employer, the coworkers who testified on claimant's behalf were biased toward helping him. The employer contends that we should rely instead on claimant's initial medical records, which did not mention a work injury.

We have generally given weight to an ALJ's credibility determination where that determination is based on an evaluation of a witness's demeanor. *See Erck v. Brown Oldsmobile*, 311 Or 519, 526 (1991) (on *de novo* review, it is a good practice for an agency or court to give weight to the fact finder's credibility assessments).

Based on their demeanor in testifying, the ALJ concluded that the testimony of all witnesses, including claimant and his coworkers, was entirely credible. The ALJ acknowledged that claimant falsely told the operations manager on April 26, 2011 that he had never previously filed a workers' compensation claim or had prior neck treatment. Nevertheless, the ALJ reasoned that did not defeat legal causation because claimant's coworkers corroborated his history of strenuous work activity on April 1, 2011. The ALJ was also persuaded by claimant's testimony that he did not report a work injury to his initial medical providers because he at first did not intend to file a workers' compensation claim due to being a relatively new employee.

On *de novo* review, we find no persuasive reason to not defer to the ALJ's credibility assessment. After considering the employer's arguments and reviewing the record, we agree with the ALJ's analysis and conclusion that claimant sustained a work-related injury on April 1, 2011. With respect to any inconsistencies, we do not find them sufficient to defeat claimant's claim where, as here, the record as a whole and the corroborating testimony of his coworkers supports his testimony. *See Westmoreland v. Iowa Beef Processors*, 70 Or App 642 (1984), *rev den*, 298 Or 597 (1985); *Crystal R. Emig*, 60 Van Natta 198, 199 (2008); *see also William J. Cook*, 58 Van Natta 625, 626 (2006) (we do not necessarily rely on the contemporaneous medical records if we find other evidence, such as the witness's testimony, more persuasive). Because we agree with the remainder of the ALJ's reasoning regarding the compensability issue, 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 issue (as represented by claimant's respondent's brief and his attorney's uncontested attorney 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 438-015-0019; *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 March 20, 2012 is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$4,000, 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 August 30, 2012