

In the Matter of the Compensation of
KELLEY R. BERTRAND, Claimant

WCB Case No. 10-02360

ORDER ON REVIEW

Welch Bruun & Green, Claimant Attorneys
Cummins Goodman et al, Defense Attorneys

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

The self-insured employer requests review of that portion of Administrative Law Judge (ALJ) Riechers's order that set aside its denial of claimant's injury claim for a right shoulder rotator cuff tear. On review, the issue is compensability.

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

In partially setting aside the employer's denial, the ALJ found that claimant established that his February 2010 work injury was at least a material contributing cause of the disability or need for treatment of his right shoulder rotator cuff tear. Applying a "combined condition" analysis, the ALJ found that the opinion of Dr. Denard, who examined claimant at the employer's request, was insufficient to meet the employer's burden of proving that the "otherwise compensable injury" was not the major contributing cause of claimant's disability or need for treatment of a combined rotator cuff tear condition. ORS 656.005(7)(a)(B); ORS 656.266(2)(a).

Claimant has the burden of proving, by a preponderance of the evidence, that his work injury was a material contributing cause of his disability or need for treatment for his right shoulder rotator cuff tear. ORS 656.005(7)(a); ORS 656.266(1); *Steven L. Blanchard*, 60 Van Natta 453, 453 (2008). We agree with the ALJ's determination that the opinion of Dr. Cook, claimant's attending physician, persuasively establishes that claimant's 2010 work injury was at least a material contributing cause of his disability or need for treatment of the rotator cuff tear. ORS 656.005(7)(a); ORS 656.266(1).

The employer argues that claimant's rotator cuff tear is a "combined condition." Consequently, it must prove that: (1) claimant suffers from a statutory "preexisting condition"; (2) his condition is a "combined condition"; and (3) the "otherwise compensable injury" is *not* the major contributing cause of the disability/need for treatment of the combined condition. ORS 656.005(7)(a)(B);

ORS 656.266(2)(a); *SAIF v. Kollias*, 233 Or App 499, 505 (2010).¹ We look to the medical evidence supporting the employer's position. *Jason V. Skirving*, 58 Van Natta 323, 324 (2006), *aff'd without opinion*, 210 Or App 467 (2007).

To constitute a "combined condition," two conditions must merge or exist harmoniously. *Luckhurst v. Bank of Am.*, 167 Or App 11, 16-17 (2000). The two conditions need not integrate into a single condition, but may simply coexist in a close relationship. *Multifoods Specialty Distrib. v. McAtee*, 164 Or App 654, 662 (1999). Nevertheless, the alleged preexisting condition must contribute to disability or need for treatment. ORS 656.005(7)(a)(B), (24)(a), (c).

Here, the alleged preexisting right shoulder conditions are claimant's 2002 injury resulting in a rotator cuff (supraspinatus tendon) tear and repair, and preexisting instability from subsequent dislocation injuries.² ORS 656.005(24)(a)(A), (B). The employer argues that Dr. Denard's opinion and Dr. Cook's opinion "unanimously" establish that claimant's otherwise compensable injury "combined" with his preexisting right shoulder conditions, and that the "otherwise compensable injury" was not the major contributing cause of the disability or need for treatment of a combined rotator cuff condition. For the following reasons, we disagree.

According to Dr. Denard, claimant's rotator cuff tear was a preexisting condition and did not occur at the time of the 2010 work injury. (*See Exs. 54-11-15, 65, 67*). Citing medical literature, he noted that the size of claimant's 2002 rotator cuff tear and the resultant surgery had a "very substantial" (over 90 percent) rate of recurrence. (*Id.*) In March 2010, Dr. Denard opined that claimant's rotator cuff tear was "unrelated to any of the work accidents," and concluded that the tear was "100%" related to the prior 2002 rotator cuff tear injury and repair. (*Ex. 54-11-15*).

¹ An "otherwise compensable injury," as used in ORS 656.266(1) and ORS 656.005(7)(a)(B), "refers to a work-related injury that would be compensable under the material contributing cause standard of proof if not for the fact that it combines with a preexisting condition." *Kollias*, 233 Or App at 502 n 1.

² In 2002, claimant sustained a right shoulder dislocation injury while playing football and sustained a rotator cuff tear, which was surgically repaired by Dr. Cook. (*Exs. 2 through 11*). In 2004, he suffered another right shoulder dislocation injury while playing football. (*Exs. 12 through 16*). In August 2005 and February 2006, claimant sustained work-related right shoulder dislocation injuries. (*Exs. 17 through 43*). The parties do not contend that claimant's prior rotator cuff tear/repair and preexisting instability constitute "arthritis or an arthritic condition." ORS 656.005(24)(a)(A).

Subsequently, Dr. Denard stated that claimant's rotator cuff tear was "causally related" to the 2002 rotator cuff tear and repair, "most likely occurred" at the time of the subsequent 2004 dislocation injury, and causal contribution from the preexisting instability from recurrent shoulder dislocations. (Ex. 65-2). He further opined that claimant's rotator cuff tear, which preexisted the 2010 work injury, was caused by the preexisting instability (from prior dislocation injuries). (Ex. 67). Dr. Denard's opinion was based on claimant's "history of an abnormal rotator cuff prior to 2010," medical literature indicating that the size of claimant's 2002 rotator cuff tear had a recurrence rate of over 90 percent, and the multiple shoulder dislocation injuries before 2010 that likely subjected the rotator cuff to a greater force than the 2010 work injury. (Exs. 65, 67).

Dr. Cook initially agreed with Dr. Denard's March 2010 opinion. (Exs. 55, 57). On April 29, 2010, Dr. Cook performed right shoulder surgery, which consisted of two procedures: a rotator cuff repair, and a capsular repair (modified Putti-Platt capsulorrhaphy). (Ex. 61). Based on his surgical observations, Dr. Cook no longer agreed with Dr. Denard's March 2010 opinion regarding claimant's rotator cuff tear. (Exs. 63, 64).

Dr. Cook explained that his surgical findings indicated that the prior 2002 rotator cuff repair was still intact without significant degeneration. (Exs. 61, 63-2-3, 64). He further noted that the 2010 rotator cuff tear was at a different location than the prior rotator cuff tear and repair and appeared "new and acute," as opposed to a degenerative tear or a re-tear at or near the site of the prior tear and repair. (Exs. 63-2-4, 64). Therefore, Dr. Cook opined that claimant sustained a new rotator cuff tear as a result of his 2010 work injury, and that the work injury was the major contributing cause of the rotator cuff tear and its need for treatment. (*Id.*)

Considering claimant's clinical and medical history, examinations, chronology, and functional capabilities after the initial rotator cuff injury (except for recurrent instability problems), Dr. Cook opined that claimant's 2002 rotator cuff tear/repair was intact and fully functional after recovering from the surgery. (Ex. 66-19, -23, -33-34). He further stated that claimant's rotator cuff tear and preexisting instability/recurrent dislocations were separate and different conditions that required different treatment.³ (*See* Exs. 63, 64, 66-12-15). Dr. Cook

³ Specifically, the April 2010 surgery included a rotator cuff repair to treat claimant's rotator cuff tear, and a capsular repair to treat claimant's dislocation and instability. (Exs. 63, 64).

explained that the mechanism of recurrent dislocations rarely caused injury to the supraspinatus tendon, which was the location of claimant's rotator cuff tear. (Ex. 66-12-15, -33-34).

Dr. Cook's opinion does not establish that claimant's prior 2002 right shoulder rotator cuff tear/repair and preexisting instability (recurrent dislocations) contributed to claimant's 2010 rotator cuff tear or need for treatment. We give greater weight to Dr. Cook's opinion particularly based on his advantage of observing claimant's rotator cuff tear at the 2010 surgery, as well as based on his status as claimant's treating physician and surgeon, for both the 2002 and 2010 right shoulder rotator cuff injuries.⁴ See *Argonaut Ins. Co. v. Mageske*, 93 Or App 698, 702 (1988); *Kienow's Food Stores v. Lyster*, 79 Or App 416, 421 (1986); *Weiland v. SAIF*, 64 Or App 810 (1983); *Lin E. Renfroe*, 62 Van Natta 790, 795 (2010). We also find his opinion that the biomechanics and treatment of claimant's recurrent dislocations (the preexisting instability) were different than those related to the rotator cuff (supraspinatus tendon) tear to be well reasoned and persuasive.⁵ See *Somers v. SAIF*, 77 Or App 259, 263 (1986).

⁴ At deposition, Dr. Cook noted that he had been treating claimant for various conditions since claimant was 15 years old. (Ex. 66-16). Claimant was 27 years old at the time of his 2010 injury. (Ex. 44).

⁵ We acknowledge the employer's reliance on Dr. Cook's November 2010 opinion that claimant's rotator cuff tear combined (coexisted harmoniously) with his preexisting instability, and that each condition "contributed equally to [c]laimant's total disability and need for treatment" because the surgery was directed to "two conditions in equal need of repair, the new rotator cuff tear and the pre-existing capsular instability." (Ex. 64-2). However, the parties agreed at hearing that claimant's right shoulder conditions involved "two pathologies": the "shoulder instability which is part of the dislocation process," and the "rotator cuff tear" relative to the "dislocation event." (Tr. 2-6). The ALJ upheld that portion of the employer's denial pertaining to the right shoulder instability, which is not at issue before us.

Thus, the relevant inquiry is whether claimant's work injury caused the disability or need for treatment for the disputed rotator cuff tear condition. See *Jaymin Nowland*, 63 Van Natta 1377, 1382 n 3 (2011). At deposition, Dr. Cook explained that the 2010 work injury was the major contributing cause of claimant's need for treatment of the *rotator cuff tear* (specifically, the "rotator cuff part of the surgery"), but not the *recurrent dislocation*, and that the instability/dislocation event was unrelated to the rotator cuff. (Ex. 66-15, -17, -34). As discussed above, Dr. Cook considered claimant's rotator cuff tear and his preexisting instability/recurrent dislocations to be separate and different conditions that required different treatment. (See Exs. 63, 64, 66-12-15). Therefore, Dr. Cook's opinion is insufficient to carry the employer's burden of proof under ORS 656.266(2)(a). In any event, even if Dr. Cook's opinion *unpersuasively* supported a conclusion that claimant's otherwise compensable injury was the major contributing cause of his need for treatment, his opinion (regardless of its persuasiveness) is not probative on the issue of whether the otherwise compensable injury *was not* the major contributing cause of the need for treatment for the combined condition, which the employer has the burden to prove. See ORS 656.266(2)(a); *Skirving*, 58 Van Natta at 324.

We also do not find Dr. Denard's opinion that claimant's preexisting conditions contributed to the rotator cuff tear to be persuasive. In attributing claimant's rotator cuff tear to the prior 2002 rotator cuff tear/repair, he relied primarily on medical literature. (Exs. 54-12, 65-3, 67-3-5). *Sherman v. Western Employer's Ins.*, 87 Or App 602 (1987) (physician's comments that were general in nature and not addressed to the claimant's situation in particular were not persuasive). Moreover, Dr. Denard did not persuasively rebut Dr. Cook's opinion regarding the location and nature of the 2002 rotator cuff tear compared to the "new" tear seen at surgery; instead, he responded that Dr. Cook's surgical observation was "difficult to envision given that the original tear involved the entire supraspinatus tendon[.]" (Ex. 65-3).

Furthermore, Dr. Denard initially opined that dislocations were not highly associated with rotator cuff tears. (Ex. 54-11-12). Yet, he later stated that a majority of rotator cuff tears were due to dislocations. (Exs. 65, 67). We find no reasonable explanation for Dr. Denard's change of opinion regarding the contribution from claimant's preexisting instability (from prior dislocations) to his rotator cuff tear. *See Reanna R. Rodriguez*, 59 Van Natta 2865, 2867 (2007) (medical opinion unpersuasive where there was no reasonable explanation for change of opinion).

Based on the aforementioned reasoning, the employer has not persuasively established that claimant's allegedly preexisting conditions contributed to the disability or need for treatment of his rotator cuff tear to create a "combined condition." ORS 656.005(7)(a)(B), (24)(a); ORS 656.266(2)(a); *Kollias*, 233 Or App at 505; *Huong M. Nguyen*, 61 Van Natta 2993 (2009) (no "combined condition" existed where disability and need for treatment related to a work-related back injury was separate and distinct from disability and need for treatment related to an earlier back injury).⁶ Consequently, we affirm.⁷

⁶ Because we are not persuaded that the medical evidence establishes that claimant had a preexisting condition that "combined" with his work injury, a material contributing cause standard applies. *See Jose C. Agosto*, 57 Van Natta 849, 850 (2005), *aff'd without opinion*, 205 Or App 182 (2006) (in absence of medical evidence establishing a combined condition, material contributing cause standard applies).

⁷ We further agree with the ALJ's reasoning that, assuming the employer established a "combined condition," Dr. Denard neither adequately addressed, nor refuted Dr. Cook's biomechanical explanation regarding the contribution from claimant's 2010 work injury to his rotator cuff tear. *See Robert Prabucki*, 61 Van Natta 1877, 1881-82 (2009) (where the claimant established an "otherwise compensable injury," physicians' opinions that the claimant's symptoms were not due to the work injury, when discussing a hypothetical "combined condition," did not weigh the contribution of the work injury), *aff'd*, 240 Or App 384 (2011). Moreover, Dr. Denard concluded that "in all medical probability the rotator cuff tear at the time of surgery in 2010 pre-existed the 2010 work injury[.]" and that "it is not

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 \$3,500, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by the record and claimant's respondent's brief), 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 of the right shoulder rotator cuff tear, to be paid by the employer. *See* ORS 656.386(2); OAR 438-015-0019; *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 March 31, 2011 is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$3,500, 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 of the rotator cuff tear, to be paid by the employer.

Entered at Salem, Oregon on February 10, 2012

Member Langer dissenting.

The ALJ and majority rely on Dr. Cook's opinion to find that claimant sustained his burden of proving that his work injury was a material contributing cause of his disability or need for treatment of his right shoulder rotator cuff tear. The majority also finds that the employer did not establish a "combined condition." Because I disagree with the majority's analysis of the medical evidence, I respectfully dissent.

possible to say that the worker did not have a rotator cuff tear prior to 2010." (Ex. 67-4). By focusing on when claimant's rotator cuff tear occurred, Dr. Denard's opinion addressed the cause of the rotator cuff tear condition itself, not the relevant inquiry of the disability/need for treatment for that condition. *See SAIF v. Nehl*, 148 Or App 101, 106, *recons*, 149 Or App 309 (1997) (distinguishing between the major contributing cause of a combined condition and the major contributing cause of the disability/need for treatment thereof); *Nowland*, 63 Van Natta at 1382 n 3.

The medical causation issue is particularly complex in light of claimant's prior history of multiple right shoulder injuries.⁸ Thus, expert medical opinion must be used to resolve the question of causation. *Uris v. Comp. Dep't*, 247 Or 420 (1967); *Barnett v. SAIF*, 122 Or App 279 (1993).

The employer argues that Dr. Cook's opinion is insufficient to support claimant's burden to prove that his 2010 work accident was a material contributing cause of his rotator cuff tear and need for treatment. I agree.

Initially, Dr. Cook essentially concurred with Dr. Denard's March 2010 report that the rotator cuff tear evidenced in the 2010 MRI was not a material cause of claimant's need for treatment.⁹ (Exs. 54, 55, 57). Dr. Denard opined that the rotator cuff tear was entirely preexisting, and unrelated to the 2010 work injury. (Ex. 54-12). He attributed the rotator cuff tear to claimant's prior 2002 rotator cuff tear and repair, citing medical literature that demonstrated that the size and type of surgery used to treat claimant's 2002 rotator cuff tear had over 90 percent recurrence rate. Dr. Denard further explained why the 2010 work event, in which claimant dislocated his shoulder, likely did not cause the rotator cuff tear diagnosed in 2010. Unlike in people over the age of 35 to 40, anterior shoulder dislocations in younger people, such as claimant, are not highly associated with rotator cuff tears. Moreover, the examination he performed on claimant was more notable for anterior instability, rather than any weakness associated with a rotator cuff tear. (*Id.*)

After performing the April 2010 surgery, Dr. Cook no longer agreed with Dr. Denard's March 2010 opinion regarding claimant's rotator cuff tear. (Exs. 63, 64, 66). He reported a new and acute rotator cuff tear in claimant's right shoulder.

⁸ In September 2002, claimant sustained a right shoulder dislocation injury when he fell on an outstretched arm while playing football. (Ex. 2). In December 2002, he injured his right shoulder again while playing football. (Ex. 4). Dr. Cook diagnosed, and surgically repaired, a complete tear of the supraspinatus tendon (4-cm in size). (Exs. 5 through 9).

In December 2004, claimant sustained another right shoulder dislocation injury while playing football. (Exs. 12 through 16; Tr. 12-13).

In August 2005, claimant suffered a compensable "right anterior shoulder dislocation" injury at work. (Exs. 17 through 32). In February 2006, he sustained another right shoulder dislocation injury at work. (Exs. 33 through 43).

⁹ Dr. Cook did not concur with Dr. Denard's opinion regarding the use of the "Putti-Platt" procedure to treat claimant's right shoulder instability, explaining that he performed a modified procedure that includes the capsular plication, which addressed Dr. Denard's concerns. (Exs. 55-14-15, 55, 57).

(Ex. 63-2). He based his changed opinion on the location of this tear, which was not identical to the previous 2002 tear (Ex. 64-2), as well as on his belief that claimant's right shoulder would not have been functional had his rotator cuff tear preexisted the work incident (Ex. 63-3).

Dr. Denard countered, however, that the precise location of the new rotator cuff tear was difficult to envision, because the original tear involved the entire supraspinatus tendon. Based on the 2010 MRI, the new tear was adjacent to the anchor used to treat the original tear. Dr. Denard further reiterated his prior opinion that a tendon is not normal once it is torn, and that recurrence of tears is very high with "massive rotator cuff tears." (Ex. 65-3). Furthermore, he explained that, because the recurrent tear was very small and affected only one shoulder tendon, claimant could have compensated for that pathology without seeking treatment before 2010. (Ex. 65-4).

Subsequently, Dr. Cook acknowledged that the "new" rotator cuff tear was adjacent to the former repair site. (Ex. 66-23). He believed it was possible either that the tear preexisted the work incident (as Dr. Denard concluded) or that it resulted from it (as he reported after claimant's surgery). (*Id.*) He acknowledged as possible Dr. Denard's scenario that claimant's other supporting shoulder structures could have compensated for the small tear, keeping the rotator cuff fully functional and asymptomatic before the work incident. (Ex. 66-26, -28). While he believed that his changed opinion was "more possible" than Dr. Denard's assessment, Dr. Cook could not say that either scenario rose to the degree of probability. (Ex. 66-23-24). Although he eventually stated that the tear "probably occurred" in February 2010, he then reverted to discussing variations of tears and that it was "possible" that the work incident caused the tear in question. (Ex. 66-30-31).

Under these circumstances, I find that Dr. Cook did not persuasively rebut Dr. Denard's opinion. I cannot say that Dr. Cook unequivocally embraced a theory that, more likely than not, claimant sustained a new rotator cuff tear due to the 2010 work incident and that this new tear had no relationship to his preexisting condition. ORS 656.005(7)(a); ORS 656.266(1).¹⁰ Thus, I would find that claimant did not establish an "otherwise compensable injury," *i.e.*, a new rotator cuff tear. Because the majority concludes otherwise, I respectfully dissent.

¹⁰ Because of that conclusion, I do not address whether the claim would be compensable as a "combined condition."