
In the Matter of the Compensation of
LESLEY P. COX, Claimant
WCB Case No. 10-05829
ORDER ON REVIEW
Bottini Bottini & Oswald, Claimant Attorneys
Sheridan Levine LLP, Defense Attorneys

Reviewing Panel: Members Lowell, Weddell, and Herman.

Claimant requests review of that portion of Administrative Law Judge (ALJ) Jacobson'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 reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," as supplemented and summarized as follows.

Claimant was compensably injured on April 7, 2009, when he was knocked to the ground by a stack of falling doors. The employer accepted the following conditions: "[r]ight olecranon fracture/dislocation and left forearm fracture and radial shaft fracture and chin laceration." (Ex. 72).

Claimant underwent surgery for the right arm fracture on April 8, 2009, and for the left arm fracture on April 10, 2009. (Exs. 7, 11). He first noticed shoulder pain after the April 8 surgical procedure. (Tr. 12-13).

Claimant began physical therapy on May 1, 2009. (Ex. 23). The therapist noted, *inter alia*, that claimant had been experiencing "occasional shoulder pain in the morning rated 6 of 10." (Ex. 23-1). On May 11, 2009, the therapist noted that claimant still had shoulder pain, and that the right shoulder "seem[ed] to pop out of joint." (Ex. 26-1).

Claimant continued to receive treatment for his right shoulder pain, and began treating with Dr. Gerry on August 3, 2009. Dr. Gerry noted that claimant "had shoulder pain since the beginning after his injury." (Ex. 47-1).

In January 2011, Dr. Gerry stated that claimant had "some type of shoulder condition related to" the April 2009 work injury. (Ex. 75-1). Dr. Gerry "doubt[ed]

that [claimant had] a rotator cuff tear in either shoulder[,]” but “recommend[ed] a right shoulder MRI to clarify [claimant’s] right shoulder condition.” (*Id.*)

Thereafter, Dr. Gerry reviewed a January 9, 2011 MRI that demonstrated a right rotator cuff tear, attributing it to the April 2009 work injury. (*See* Exs. 74B, 77A, 80). Dr. Gerry believed that the work injury was “clearly” the “primary” and “major cause” of the right rotator cuff tear, noting that claimant sustained a “significant injury involving his [right]¹ shoulder and arm from his work injury.” (Ex. 80).

Dr. Borman, who examined claimant at the employer’s request in February 2010 for conditions other than the right shoulder, subsequently performed a records review concerning claimant’s shoulder complaints. (Ex. 77). Dr. Borman initially noted that it was “possible” that claimant had a “rotator cuff pathology,” but added that he could not conclude with reasonable medical probability that claimant had a right rotator cuff tear without “convincing objective evidence.” (Ex. 77-1).

After reviewing the January 2011 right shoulder MRI, Dr. Borman agreed that claimant had a right shoulder rotator cuff tear. (Ex. 81-1). Nevertheless, Dr. Borman could not “say with reasonable medical probability whether [that] tear [was] related to [the] April 7, 2009 injury,” noting that claimant “did not have any right shoulder complaints at the time of [the] injury[,] and that [the] right shoulder complaints did not arise until later.” (*Id.*)

The employer denied claimant’s new/omitted medical condition claim for a right shoulder rotator cuff tear. Claimant requested a hearing.

CONCLUSIONS OF LAW AND OPINION

To prevail on his new/omitted medical condition claim for a right rotator cuff tear, claimant must establish that the work injury is a material contributing cause of his disability/need for treatment for that claimed condition.² ORS 656.005(7)(a); ORS 656.266(1). Because of the divergent medical opinions

¹ Although Dr. Gerry’s opinion used the word “left” in this sentence, we consider this to be a scrivener’s error, and that Dr. Gerry intended to use the word “right.” Other portions of Dr. Gerry’s opinion expressly identified symptoms associated with claimant’s *right* shoulder, and not the left shoulder. (Ex. 80). Likewise, Dr. Gerry’s previous chart notes and opinions consistently emphasized *right* shoulder symptoms over any left shoulder symptoms. (*See, e.g.,* Exs. 47, 52, 57, 74, 75).

² There is no dispute that the claimed right rotator cuff tear exists. *See Maureen Y. Graves*, 57 Van Natta 2380, 2381 (2005) (proof of the existence of the condition is a fact necessary to establish the compensability of a new/omitted medical condition).

regarding the cause of the claimed condition, expert medical opinion must be used to resolve the compensability issue. *Barnett v. SAIF*, 122 Or App 279, 282 (1993); *Linda Patton*, 60 Van Natta 579, 582 (2008). In evaluating the medical evidence, we rely on those opinions that are both well reasoned and based on accurate and complete information. *Somers v. SAIF*, 77 Or App 259, 263 (1986).

In the absence of persuasive reasons to the contrary, we generally give greater weight to the opinion of a treating physician where that practitioner has had a better opportunity to observe and evaluate a claimant's condition over an extended period. *Weiland v. SAIF*, 63 Or App 810, 814 (1983); *Shereena Oden*, 62 Van Natta 1754, 1756 (2010); *Angela S. Breitenstein*, 56 Van Natta 174, 177 (2004). However, we may properly give greater or lesser weight to the opinion of a treating physician, depending on the record in each case. *Dillon v. Whirlpool Corp.*, 172 Or App 484, 489 (2001); *Oden*, 62 Van Natta at 1756.

Here, Dr. Gerry began treating claimant's right shoulder symptoms in August 2009, providing him with a better opportunity to observe and evaluate claimant's right shoulder condition over an extended period. Therefore, we give greater weight to that opinion. *Weiland*, 63 Or App at 814; *Oden*, 62 Van Natta at 1756; *Breitenstein*, 56 Van Natta at 177. Although Dr. Gerry did not initially diagnose a rotator cuff tear, he consistently believed that the work injury caused an injury to the right shoulder. (See Exs. 57, 67, 74A, 75, 77A, 80). When the MRI revealed that claimant had sustained a rotator cuff tear, Dr. Gerry attributed that tear to the work injury, emphasizing the significant nature of the work injury, as well as the absence of any notable right shoulder symptoms before that injury. (Ex. 80). We defer to that opinion, which we find well reasoned and based on accurate information.

In contrast, we are not persuaded by Dr. Borman's opinion, which provided little explanation as to why he was unable to attribute the claimed right rotator cuff tear to the April 2009 work injury. (See Ex. 81-1). Moreover, although Dr. Borman believed that claimant only had shoulder complaints some time "later" after the work injury, we find that history inaccurate, given claimant's credible testimony and other record evidence, including chart notes from the physical therapist and Dr. Gerry.³ (See Tr. 12-13; Exs. 23-1, 47-1). Therefore, we do not rely on Dr. Borman's opinion.

³ The ALJ did not make any express credibility findings, either based on demeanor or the substance of claimant's testimony. When, as here, a potential credibility issue concerns the substance of a witness's testimony, we are equally qualified to make our own determination of credibility. *Coastal Farm Supply v. Hultberg*, 84 Or App 282 (1987). As noted above, claimant testified that he first noticed his right shoulder pain within a couple of days of the work injury. (Tr. 12-13). When Dr. Gerry first

Accordingly, based on Dr. Gerry's persuasive opinion, we conclude that claimant's April 2009 work injury was a material contributing cause of his need for treatment for his right shoulder condition. Consequently, claimant's new/omitted medical condition claim for a right rotator cuff tear is compensable. Therefore, we reverse.

Claimant's attorney is entitled to an assessed fee for services at hearing and on review concerning the right rotator cuff tear claim. ORS 656.386(1). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable attorney fee for claimant's counsel's services at hearing and on review is \$11,000 payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the issue (as represented by the record, claimant's appellate briefs, and his counsel's uncontested attorney fee submission), the complexity of the issue, the value of the interest involved, and the risk that counsel may go uncompensated.

Finally, claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the right rotator cuff tear claim denial, to be paid by the employer. *See* ORS 656.386(2); OAR 438-015-0019; *Nina Schmidt*, 60 Van Natta 169 (2008); *Barbara Lee*, 60 Van Natta 1, *recons*, 60 Van Natta 139 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

ORDER

The ALJ's order dated May 18, 2011 is reversed in part and affirmed in part. That portion of the ALJ's order that upheld the employer's denial of the right rotator cuff tear claim is reversed. The employer's denial of that claim is set aside and the claim is remanded to the employer for processing according to law. For services at hearing and on review concerning the employer's right rotator cuff claim denial, claimant's attorney is awarded an assessed fee of \$11,000, 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 right rotator cuff tear claim denial, to be paid by the employer. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on February 8, 2012

evaluated claimant in August 2009, he recorded a similar history. (Ex. 47-1). Likewise, when claimant began physical therapy three weeks after the work injury, the therapist also noted that claimant had been experiencing shoulder pain "rated 6 out of 10." (See Ex. 23-1). Under such circumstances, we do not discount claimant's history of shoulder pain merely because other medical records, which were primarily directed to the fracture conditions then being treated, did not specify shoulder pain.