
In the Matter of the Compensation of
ALLISON WILSON, Claimant
WCB Case No. 10-06836
ORDER ON REVIEW
Glen J Lasken, Claimant Attorneys
Andersen & Nyburg, Defense Attorneys

Reviewing Panel: Members Langer and Weddell.

The insurer requests review of Administrative Law Judge (ALJ) Rissberger's order that: (1) set aside its denial of claimant's new/omitted medical condition claim for a left wrist condition; and (2) awarded an insurer-paid attorney fee under ORS 656.386(1). On review, the issues are compensability and attorney fees.

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

After claimant was compensably injured in September 2006, the insurer accepted right thumb contusion, right wrist scapholunate ligament tear, and right dorsal wrist ganglion. Dr. Verheyden, claimant's attending physician, performed right wrist surgery in December 2006 and again in February 2007.

Claimant was released to modified work on March 16, 2007. She returned to work with varying restrictions on right upper extremity use, ranging from no use to a 15-pound lifting restriction. Claimant never returned to regular work.

In August 2007, Dr. Verheyden noted that claimant complained of left wrist pain that had developed over the previous week or two. A December 2007 MRI confirmed a left wrist ganglion cyst. Dr. Verheyden noted that claimant was continuing her modified work.

A Claim Disposition Agreement (CDA) concerning the September 2006 injury claim was approved on March 3, 2008. The CDA provided that claimant released all rights to all workers' compensation benefits, including attorney fees, arising out of the claim and any subsequent new medical condition claim, except for medical services.

In October 2010, claimant filed a new/omitted condition claim for a left wrist ganglion cyst, which the insurer denied. Claimant requested a hearing.

Finding that Dr. Verheyden's opinion persuasively established that the left wrist condition was compensable as a consequential condition, the ALJ set aside the insurer's denial. The ALJ also awarded an attorney fee under ORS 656.386(1).

On review, the insurer contends that Dr. Verheyden's opinion does not persuasively establish that the accepted right wrist condition was the major contributing cause of the left wrist ganglion. Alternatively, the insurer contends that claimant's attorney should receive no assessed fee because the CDA released claimant's rights to such attorney fees. For the following reasons, we disagree with the insurer's contentions.

Compensability

Claimant contends that her work restrictions resulting from her accepted right wrist conditions resulted in an overuse of her left wrist, causing her ganglion cyst. Thus, this claim is one for a "consequential condition." See *Fred Meyer v. Crompton*, 150 Or App 531, 536 (1996); *Barnett Bus. Servs. v. Homes*, 130 Or App 190, rev den, 320 Or 492 (1994). Therefore, claimant must prove that her compensable right wrist injury was the major contributing cause of the left wrist condition. ORS 656.005(7)(a)(A); ORS 656.266(1).¹

Because of disagreement between experts regarding the cause of the left wrist condition, the compensability issue presents a complex medical question to be resolved by expert medical opinion. See *Uris v. State Comp. Dep't*, 247 Or 420, 426 (1967); *Barnett v. SAIF*, 122 Or App 279, 283 (1993). When presented with disagreement between experts, we give more weight to those opinions that are both well reasoned and based on complete information. *Somers v. SAIF*, 77 Or App 259, 263 (1986). Absent persuasive reasons to do otherwise, we give greater weight to the conclusions of a treating physician because of the treating physician's better opportunity to evaluate a claimant's condition. *Weiland v. SAIF*, 64 Or App 810, 814 (1983). Nevertheless, we may give the treating physician's opinion more or less weight, depending on the record in each case. *Dillon v. Whirlpool Corp.*, 172 Or App 484, 489 (2001).

Dr. Verheyden opined that claimant's left wrist condition developed as a result of her favoring her injured right hand after returning to work. (Ex. 30-2). He noted that claimant's work limitations initially restricted her from using her

¹ The existence of the left wrist ganglion cyst is not disputed. See *Maureen Y. Graves*, 57 Van Natta 2380, 2381 (2005) (claimant must prove the existence of a claimed new/omitted medical condition).

right hand in any meaningful manner, and that her subsequent use of her right hand at work was limited. (*Id.*) As a result of claimant's restrictions, Dr. Verheyden explained that she had to work using her left hand in a "busy repetitive" manner. (*Id.*)

Dr. Verheyden stated that ganglion cysts most commonly occur spontaneously or as the result of trauma or arthritis. (Ex. 29-2). He also opined that overuse activities can exacerbate an underlying condition, such as arthritis or a partial ligament tear or sprain to cause a ganglion cyst. (*Id.*)

Although claimant's hand was occasionally bumped, provoking increased pain, Dr. Verheyden opined that such bumps were not contributory because they occurred after the ganglion cyst had already developed. (Ex. 30-2). Reasoning that claimant's left wrist symptoms began during her "modified work" period, and noting that there were no other rigorous or strenuous activities or injuries to which her ganglion cyst could have been attributed, Dr. Verheyden related the condition, in major part, to claimant's modified work. (Exs. 28-2, 30-2).

Dr. Verheyden's history is supported by the contemporaneous record. From claimant's first release to modified work through August 2007, Dr. Verheyden imposed restrictions on claimant's right hand use at work, ranging from no use to a 15-pound lifting limit. (Exs. 7E, 7F, 8-1, 11, 12). The modified job description that Dr. Verheyden approved indicated that only the left hand/arm would be used, and that work would involve frequent hand/wrist work, grasping, and fine manipulation. (Ex. 7H). Dr. Verheyden repeatedly expressed concern that claimant would not only be unable to ever return to regular work, but would continue to have wrist problems if she continued her modified work. (Exs. 7F, 12, 13).

Thus, the record indicates that claimant's left wrist complaints arose after she had been working for almost five months without being able to significantly use her right hand. Further, although Dr. Verheyden did not discuss claimant's specific work activities in his causation opinion, the record indicates that he was familiar with her work restrictions and the duties involved in her modified work.

Dr. Verheyden's history is consistent with claimant's testimony. Claimant testified that when she returned to work, she was initially restricted from using her right hand, but was eventually allowed to use her right hand for light duty. (Tr. 9). Her modified job involved carrying thin pieces of veneer to a machine that made rolls of veneer, and feeding boards of veneer through the machine with her left

hand. (Tr. 10). The boards were very thin, and the work was very fast paced. (*Id.*) Her work activities did not significantly change when she used her right hand. (Tr. 12). Her left wrist symptoms arose when she was doing this modified work. (*Id.*)

During this period, claimant did not participate in other activities involving her hands or wrists, nor did she experience any injuries to her left hand or wrist. (Tr. 13). Although claimant occasionally bumped her hand, exacerbating her symptoms, the bumps were minor and did not result in persistent changes in symptoms. (*Id.*)

The insurer contends that Dr. Verheyden's opinion is unpersuasive because he acknowledged that ganglion cysts usually result from causes other than overuse, and did not explain why he believed that claimant's left wrist condition resulted from overuse rather than a more common cause. The insurer also asserts that Dr. Verheyden's explanation of the mechanism of injury is unpersuasive because he opined only that overuse can exacerbate an underlying condition, the presence of which is not established by the record, rather than as the sole cause of a ganglion cyst.² The employer's contentions notwithstanding, we find Dr. Verheyden's opinion persuasive.

Although Dr. Verheyden acknowledged that ganglion cysts are not usually caused by overuse, he explained that it was a reasonable mechanism of injury. He also explained why claimant's history indicated that her ganglion cyst resulted from overuse related to her work restrictions for her right hand/wrist condition.

Further, based on his explanation of the mechanism of injury and claimant's history, we interpret Dr. Verheyden's opinion to support the existence of all conditions necessary for overuse to cause a ganglion cyst. His opinion need not establish that claimant's work restrictions were the *sole* cause of the ganglion cyst, but only that they were the *major* cause. Based on clinical examination, imaging studies, claimant's work activities and symptoms, and the mechanism of injury, he did so. We find his explanation persuasive.

² The insurer also notes that the record does not indicate that claimant experienced a left wrist injury involving stress applied to the scapholunate ligament or wrist hyperextension, which Dr. Verheyden described as the typical injury causing the development of a ganglion cyst. (Ex. 29-2). However, although Dr. Verheyden described various possible causes of ganglion cysts, he persuasively attributed claimant's ganglion cyst to overuse rather than to a "typical" injury.

We do not find the contrary opinions of Drs. Courogen and Nolan, insurer-arranged medical record reviewers, persuasive. Dr. Courogen opined that the left wrist ganglion was not a consequence of the accepted conditions, but did not offer an explanation for that conclusion. (Ex. 25-4). His conclusory opinion is unpersuasive. *See Moe v. Ceiling Sys., Inc.*, 44 Or App 429, 433 (1980). Dr. Nolan also opined that the left wrist ganglion was not a consequence of the accepted conditions. (Ex. 27-6). He discounted the possibility that the condition was caused by overuse resulting from her work restrictions because “there is simply no evidence that [claimant was] using her left wrist in anything other than a relatively normal way.” (Ex. 27-3). However, as discussed above, claimant’s work restrictions resulted in rapid, repetitive use of her left hand. Thus, Dr. Nolan’s opinion is based on inaccurate information and, therefore, is unpersuasive. *See Miller v. Granite Constr. Co.*, 28 Or App 473, 478 (1977).

Accordingly, based on Dr. Verheyden’s persuasive opinion, we conclude that claimant has proven the compensability of her left wrist ganglion cyst as a consequential condition.³

Attorney Fees

By the terms of the March 3, 2008 CDA, claimant released her rights to “all workers’ compensation benefits allowed by law, including * * * attorney fees * * * potentially arising out of this claim and any subsequent claim for new medical conditions, **except for medical services.**” (Ex. 21-4-5, emphasis in original). The insurer contends that the CDA bars the award of an insurer-paid attorney fee regarding the compensability of the left ganglion cyst. Based on the following reasoning, we disagree.

A claimant may release “all matters and all rights to compensation, attorney fees and penalties potentially arising out of claims, except medical services.” ORS 656.236(1). In *Liberty Northwest Ins. Corp., Inc. v. Watkins*, 347 Or 687 (2010), the court held the exception for medical services also prevents a CDA from resolving a claimant’s right to attorney fees when those fees derive from a subsequent claim for medical services. 347 Or at 693. The insurer contends that no attorney fee is available here because *Watkins* addressed attorney fees related to medical services claims awardable under ORS 656.385(1), whereas the ALJ’s attorney fee award was made under ORS 656.386(1) for prevailing over the insurer’s compensability denial of a new/omitted medical condition claim.

³ As discussed below, under the CDA and ORS 656.236(1), claimant is entitled to medical services for this consequential condition.

Although this case involves a new/omitted medical condition claim rather than a medical services claim, *Watkins* nevertheless applies. The *Watkins* court explained that “a claimant cannot dispose of ‘all matters’ and ‘all rights to compensation, attorney fees and penalties potentially arising out of claims’ where those matters involve medical services.” 347 Or at 695. Such matters are not limited to specific claims for medical services, and may implicate other types of claims. *E.g., Basin Tire Serv., Inc. v. Minyard*, 240 Or App 715 (2011) (CDA did not release claimant’s right to pursue an aggravation claim to obtain medical services where aggravation claim was statutory prerequisite for obtaining medical services). Thus, the *Watkins* rationale extends beyond attorney fees awarded under ORS 656.385(1), and applies to other types of claims if those claims involve medical services. *See Richard L. Headley*, 63 Van Natta 606, 613 (2011) (applying *Watkins* to award an attorney fee under ORS 656.308(2)(d) where medical services claim was denied on responsibility grounds).

Here, the CDA released all of claimant’s rights to compensation other than medical services. Thus, by virtue of the CDA, the present claim is essentially a claim for medical services in the context of a new/omitted medical condition claim. *Headley*, 63 Van Natta at 613. Because claimant has successfully overcome the insurer’s claim denial, it follows that her counsel is entitled to an attorney fee for services rendered in prevailing over that denial.

Accordingly, the ALJ’s award of an assessed fee under ORS 656.386(1) was an appropriate “medical services-related” attorney fee. Further, claimant’s attorney is entitled to an assessed fee for services on review regarding the compensability/medical services issue. 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 \$3,000, payable by the insurer. In reaching this conclusion, we have particularly considered the time devoted to the issue (as represented by claimant’s respondent’s brief), the complexity of the issue, and the value of the interest involved. Claimant’s attorney is not entitled to a fee for services on review regarding the attorney fee issue. *Dotson v. Bohemia, Inc.*, 80 Or App 233, *rev den*, 302 Or 35 (1986).

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 June 24, 2011 is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$3,000, payable by the insurer. Claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial.

Entered at Salem, Oregon on January 20, 2012