

In the Matter of the Compensation of
TERRI J. CHURCH, Claimant
WCB Case No. 10-02818
ORDER ON REVIEW
Doblie & Associates, Claimant Attorneys
Travis L Terrall, Defense Attorneys

Reviewing Panel: Members Lowell, Biehl, and Herman. Member Lowell dissents.

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

We adopt and affirm the ALJ's order with the following changes. In the first full paragraph on page 9, we change the second sentence to clarify that the employer disputes the ALJ's description of the work incident. In the first full paragraph on page 13, we delete "only" from the first sentence and include the following footnote:

"In addition, Dr. Martinson addressed the 'major contributing cause' standard, explaining that claimant's work incident was the major contributing cause of the combined condition and need for treatment. (Ex. 20A). Although Dr. Grossenbacher believed that claimant had a 'combined condition,' he did not specifically address the 'major contributing cause' standard. For the reasons explained by the ALJ, we find that the medical evidence is not sufficient to sustain the employer's burden of proving that the otherwise compensable injury was not the major contributing cause of the disability/need for treatment for the combined left shoulder condition. *See* ORS 656.266(2(a)); *Jason J. Skirving*, 58 Van Natta 323, 324 (2006), *aff'd without opinion*, 210 Or App 467 (2007) (medical evidence supporting the carrier's denial must be persuasive)."

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 \$3,000, 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), 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 Gettman*, 60 Van Natta 2862 (2008).

ORDER

The ALJ's order dated December 12, 2011 is affirmed. For services on review, claimant's attorney is awarded \$3,000, 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 July 17, 2012

Member Lowell dissenting.

In finding the claim compensable, the majority adopts the ALJ's interpretation of claimant's mechanism of injury, as well as the conclusion that she established that the work injury was a material contributing cause of her left shoulder condition, despite the fact that the medical providers did not have an accurate description of the work incident. Because I disagree with the majority's analysis of the work incident, as well as the medical evidence, I respectfully dissent.

On June 28, 2009, claimant, a bus operator, assisted a customer in a wheelchair onto the bus she was driving. She filed an incident report that day, explaining that she hurt her shoulder when "assisting a wheelchair passenger that had become high centered on ramp." (Ex. A). Claimant testified that she went to the emergency room after work that day, but after waiting for four hours, she got frustrated and went home. She did not seek medical treatment for her shoulder until February 4, 2010. (Ex. 1).

Claimant was treated by Dr. Martinson. Dr. Strum examined claimant on behalf of the employer. Dr. Grossenbacher performed an examination at claimant's attorney's request.

The initial question is whether the physicians had an accurate understanding of claimant's mechanism of injury. The majority acknowledges that claimant changed her testimony regarding the injury after viewing the employer's video of the work incident. Based on the video and claimant's revised testimony, the majority determines that the doctors did not have an entirely accurate description of the work incident. Nevertheless, the majority finds that the historical inaccuracy is not fatal to the claim, reasoning that the revised testimony did not undermine Dr. Grossenbacher's opinion, with which Dr. Martinson concurred, that the work incident was a material contributing cause of her disability/need for treatment for a left shoulder strain and anterior impingement. I disagree, for the following reasons.

When claimant first sought medical treatment in February 2010, more than seven months after the work incident, Dr. Martinson reported that claimant injured her left shoulder when she "lifted an occupied wheelchair at work to move it back on the ramp[.]" (Ex. 4-1).

Dr. Strum reported that claimant "manually lifted the wheelchair about 2 inches so that the rear wheel was back on the ramp." (Ex. 10-1). Dr. Strum understood that claimant lifted the wheel. (Ex. 22-15).

Dr. Grossenbacher reported that claimant was injured while "lifting a person in a wheelchair on the ramp of her bus." (Ex. 24-1).

At hearing, claimant agreed that Dr. Strum correctly understood that she manually lifted the wheelchair about two inches so that the rear wheel was back on the ramp. (Tr. 24; *see* Ex. 10-1). She told Drs. Martinson and Grossenbacher the same description. (Tr. 24). Claimant explained that there was an edge/rim on the ramp that was about two inches at the top of the ramp near the door. (Tr. 25). She had to lift the wheel that was off the ramp back over the edge and onto the ramp. (Tr. 25-26). Although her hands were on both handles on the back of the wheelchair, she did the lifting with her left hand. (Tr. 26). Once the customer was on the ramp, he was able to scoot himself back up.

After viewing the employer's video, however, claimant agreed that it showed her pushing the customer back down the ramp to get him situated. (Tr. 48). Although it appeared as if she pulled him back up the ramp, she explained that the customer used his feet to do that. (*Id.*) Claimant testified that the video changed her recollection "a little bit," but "not that much." (Tr. 49). She explained that she had the left handle, the wheel, and was supporting the customer's weight. (*Id.*)

The video showed that claimant did not lift the wheelchair up onto the ramp. Rather, she helped push the wheelchair back down the ramp so that it could come back up straight on the ramp. (Ex. 32). Claimant's testimony regarding the work incident is not reliable. More importantly, the history claimant shared with the physicians was not accurate.

Although "magic words" are not required for an expert's opinion, our fact finding role does not extend to supplying a medical opinion when the substance of an opinion is significantly in doubt because of an expert's failure to articulate it. *SAIF v. Alton*, 171 Or App 491, 502 n 6 (2000); see *Benz v. SAIF*, 170 Or App 22, 26 (2000) (although we may draw reasonable inferences from the medical evidence, we are not free to reach our own medical conclusions in the absence of such evidence); *SAIF v. Calder*, 157 Or App 224, 228 (1998) (the Board is not an agency with specialized medical expertise and must base its findings on evidence in the record).

Here, the majority has determined that claimant's revised testimony is consistent with the medical opinions supporting compensability. To the contrary, I believe that the medical opinions supporting compensability did not have a sufficiently complete or accurate history. See *Jackson County v. Wehren*, 186 Or App 555, 561 (2003) (a history is complete if it includes sufficient information on which to base the physician's opinion and does not exclude information that would make the opinion less credible); *Miller v. Granite Construction Co.*, 28 Van Natta 473, 476 (1977) (a medical opinion that is based on an incomplete or inaccurate history is not persuasive). The medical evidence is not sufficient to establish that the June 2009 work incident were a material contributing cause of her disability or need for treatment for a left shoulder condition.

Furthermore, even assuming that claimant has established an "otherwise compensable injury," I agree with the ALJ's application of a "combined condition" analysis. However, I would find that the employer established that the work incident was not the major contributing cause of claimant's disability or need for treatment of the combined condition. ORS 656.005(7)(a)(B); ORS 656.266(2)(a); *Jack G. Scoggins*, 56 Van Natta 2534, 2535 (2004). I reason as follows.

Dr. Strum determined that claimant probably sustained a left shoulder strain as a result of the June 2009 work incident that combined with her preexisting conditions to cause or prolong her disability/need for treatment. (Ex. 10-7, -8, -10). However, he concluded that, by the time claimant sought treatment for the work incident in February 2010, the preexisting conditions were the major

contributing cause of her need for treatment. (Exs. 10-8, 21-3). Based on the known biology of the healing of musculoskeletal strain injuries and the natural history of such injuries, Dr. Strum explained that claimant's mild strain would have resolved within four to six weeks after the work incident. (Exs. 10-8, -10, 21-3, 22-34). He did not believe that claimant has sustained a more serious shoulder strain. (Ex. 22-34).

There is no persuasive contrary medical evidence rebutting Dr. Strum's opinion. Dr. Martinson explained that claimant's work incident was the major contributing cause of the combined condition and need for treatment. (Ex. 20A). But Dr. Martinson was not persuasive because he did not respond to Dr. Strum's opinion that the work incident was not the major contributing cause of the combined condition by the time claimant finally sought medical treatment. Although Dr. Grossenbacher believed that claimant had a "combined condition," he did not specifically address the "major contributing cause" standard.

Based on Dr. Strum's opinion, I conclude that, even assuming claimant has established an "otherwise compensable injury," the claim is not compensable because the work injury was not the major contributing cause of her disability/need for treatment for the combined left shoulder condition. Because I would reverse the ALJ's order, I dissent.