

In the Matter of the Compensation of  
**MARCELINO CAMACHO, Claimant**

WCB Case No. 11-01741

ORDER ON REVIEW

Dunn & Roy PC, Claimant Attorneys  
James B Northrop, SAIF Legal, Defense Attorneys

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

Claimant requests review of Administrative Law Judge (ALJ) Pardington's order that upheld the SAIF Corporation's denial of his injury claim for low back and thoracic strains. On review, the issue is compensability.

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

On February 15, 2011, claimant sought chiropractic treatment for mid- and low-back symptoms. (Ex. 2-1). The chiropractic clinic's intake form recorded that, on February 4, 2011, claimant had been unloading pallets weighing 70-80 pounds from a forklift, with both hands in front of him, when he felt a "pop" and low back pain. (Tr. 2-2). The intake form also stated that claimant was asymptomatic before this incident. (Ex. 2-4). Claimant also completed an 827 form reporting the injury. (Ex. 1). The description of the accident on the 827 form was not written in English. (*Id.*)

On March 24, 2011, claimant completed another 827 form that stated, in English, that claimant felt a pop in his lower back when pulling a pallet jack, with a 50 pound load, backward. (Ex. 20). That day, Dr. Heitsch also recorded that claimant's symptoms arose when he was pulling a pallet jack. (Ex. 21-2).

On April 5, 2011, SAIF denied claimant's injury claim. (Ex. 22). Claimant requested a hearing.

On October 11, 2011, Dr. Thompson, a chiropractor who had treated claimant on several occasions in February, March, and April 2011, opined that claimant had sustained thoracic sprain/strain, lumbar sprain/strain, lumbosacral sprain/strain, and sacroiliac sprain as a result of his February 4, 2011 work incident. (Ex. 26-3). He based that opinion on the history of claimant lifting pallets weighing 70-80 pounds, with both hands in front of him. (Ex. 26-1). Dr. Thompson opined that the work activity was the major contributing cause of the conditions. (*Id.*)

Claimant did not testify at the hearing. Citing *Zurita v. Canby Nursery*, 115 Or App 330, 334 (1992), *rev den*, 315 Or 443 (1993), the ALJ reasoned that the documentary record alone did not carry claimant's burden of proof. Accordingly, the ALJ upheld SAIF's denial.

On review, claimant contends that *Zurita* allows him to carry his burden of proof without testifying and that the documentary record is sufficient to do so. As explained below, we agree with the ALJ's conclusion.

Claimant bears the burden to prove the compensability of his injury by establishing that his work incident was a material contributing cause of his disability or need for treatment. *Olson v. State Indus. Accident Comm'n*, 222 Or 407, 414-15 (1960). That burden includes the requirement that he establish both "legal causation," by showing that he engaged in potentially causal work activities, and "medical causation," by showing that those activities caused claimant's disability or need for treatment. See *Harris v. Farmer's Co-op Creamery*, 53 Or App 618, 621 (1981); *Darla Litten*, 55 Van Natta 925, 926 (2003).

In *Zurita*, the court affirmed our order that had found that a claimant who had not testified, but instead relied on the medical record, had not carried his burden of proving the compensability of his injury claim. 115 Or App at 334. In reaching our conclusion, we had accorded weight to the claimant's statements to his doctors regarding how he had hurt his back, reasoning that hearsay relating to diagnosis and treatment carried strong indicia of reliability. *Froylan L. Zurita*, 43 Van Natta 1382,1385 (1991). However, we had accorded little weight to the claimant's statements to his doctors that he had hurt his back at work, because that hearsay evidence did not carry such indicia of reliability. *Id.*

Reviewing the legislative history of ORS 656.310(2), the *Zurita* court concluded that medical reports are *prima facie* evidence only of medical matters. 115 Or App at 334. The court then noted that we are not bound by the rules of evidence and "may receive hearsay evidence and evaluate its weight under the circumstances of the case." *Id.* Thus, the court explained that:

"A claimant may testify personally or present other witnesses or he/she may rely on statements contained in medical reports. However, in the latter instance, a claimant runs the risk that the reports may not be sufficient to carry the burden of proof on work connectedness." *Id.*

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Therefore, the court held that we had not erred in finding that the claimant had failed to prove that he was injured on the job. *Id.*

Thus, the *Zurita* court distinguished between hearsay statements in medical reports that concern medical matters, for purposes of diagnosis or treatment, and hearsay statements in medical reports regarding other circumstances of an injury. Whereas such statements are considered *prima facie* evidence of medical matters if they were made for purposes of diagnosis or treatment, we are free to find such statements insufficient if they were made for purposes other than diagnosis or treatment.

In some cases, we have applied the *Zurita* rationale and found that the claimants failed to establish the cause or circumstances of injuries when they relied on medical records to do so. *E.g.*, *Lawrence E. Phillips*, 56 Van Natta 3366, 3367 (2004); *Janette Valles-Key*, 55 Van Natta 2280, 2285 (2003); *William K. Young*, 47 Van Natta 742, 744 (1995); *Brian W. Scott*, 47 Van Natta 319, 320 (1995). However, in other cases we have found such hearsay statements sufficient to carry the claimants' burden of proof, despite *Zurita's* holding that we are not required to do so. *E.g.*, *Jerry B. Eads*, 64 Van Natta 451, 454-55 (2012).

Thus, the *Zurita* rationale does not prohibit us from considering hearsay statements found in the medical records when evaluating such "non-medical" questions.<sup>1</sup> Rather, it allows us to find such statements sufficient or insufficient to carry claimant's burden of proof, depending on the circumstances of the particular case.

Applying *Zurita* to the present case, we conclude that claimant's statements to his medical providers regarding the circumstances of his injury are the type of hearsay that we may consider and evaluate under the circumstances of the case. Nevertheless, based on our review of this particular record, we conclude that those statements are insufficient to prove causation.

As noted above, claimant's initial 827 form was not written in English. However, the chiropractic clinic's intake form recorded that claimant's symptoms arose when he had been *lifting* pallets weighing 70-80 pounds, with both arms in front of him. However, claimant's March 24, 2011 827 form, and Dr. Heitsch's chart notes, recorded that claimant's symptoms arose when he was *pulling* a pallet *jack* with a 50 pound load.

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<sup>1</sup> SAIF did not object to, or attempt to narrow the grounds for admission of, the exhibits containing the hearsay at issue. *See William A. White*, 58 Van Natta 412, 413 (2006) (carrier's *Zurita* argument not considered where carrier neither objected to, nor attempted to narrow the grounds for admission of, hearsay statements and did not dispute legal causation at the hearing).

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Thus, the record contains inconsistencies in claimant's account of his work injury. The record does not resolve those inconsistencies, and claimant did not offer testimony addressing them. Therefore, even if we give full weight to claimant's hearsay statements, the record does not establish precisely how his injury occurred.

The dissent concludes that the inconsistencies in the record are not material, and that claimant has proven causation regardless of which history is accurate. *See Jackson County v. Wehren*, 186 Or App 555, 560-61 (2003) (a history is complete if it includes sufficient information on which to base an opinion and does not exclude information that would make the opinion less credible). Nevertheless, Dr. Thompson's opinion supporting compensability was specifically based on the history of claimant lifting pallets weighing at least 70 pounds in front of him. (Ex. 26-1). He explained that such activity "puts a lot of strain in the middle and lower part of the back" because of both the awkward nature of the pallet and the mechanics of lifting with both hands extended forward. (Ex. 26-2). Dr. Thompson did not address whether simply pulling a pallet jack with a 50 pound load would also be sufficient to cause claimant's injury. Under such circumstances, we conclude that Dr. Thompson's opinion is not sufficient to carry claimant's burden of proof unless claimant's work injury involved lifting heavy pallets. *See Miller v. Granite Constr. Co.*, 28 Or App 473, 478 (1977) (medical evidence based on inaccurate information was insufficient to carry the claimant's burden of proof).

Further, claimant cannot alternatively rely on Dr. Heitsch's opinion to establish causation. Dr. Heitsch merely recorded that claimant's symptoms arose when pulling the pallet jack and claimant's treatment occurred in the context of a workers' compensation claim; he did not comment on causation. (Ex. 21-1-2).

The dissent also reasons that even if claimant's work incident simply involved pulling a pallet jack, claimant may prove compensability without a supporting medical opinion because this case does not present a complex medical question. Granted, the record indicates that claimant's symptoms appeared immediately and there is no expert medical opinion that the alleged precipitating event could not have been the cause of the injury. Nevertheless, claimant did not report the injury until over a week after it allegedly occurred. (Ex. 2-2). Further, he did not present testimony addressing other aspects of whether the case presents a complex medical question, such as whether the situation was complicated or

whether he had previously suffered a similar injury.<sup>2</sup> *See Uris v. State Comp. Dep't*, 247 Or 420, 426 (1967); *Barnett v. SAIF*, 122 Or App 279, 283 (1993) (enumerating “relevant factors for determining whether expert testimony of causation is required: (1) whether the situation is complicated; (2) whether symptoms appear immediately; (3) whether the worker promptly reports the occurrence to a superior; (4) whether the worker previously was free from disability of the kind involved; and (5) whether there was any expert testimony that the alleged precipitating event could not have been the cause of the injury”).

As noted above, claimant bears the burden to prove causation. *See* ORS 656.266(1). In light of the record available to us, which includes documentary evidence that contains conflicting accounts of the work injury but does not include testimony resolving that conflict, we are unable to determine the nature of the precipitating work incident. Accordingly, we are unable to conclude that the medical evidence supporting compensability was based on accurate information. Further, we are unable to conclude that the compensability issue presents a noncomplex question that can be resolved without expert medical evidence.

Under such circumstances, we conclude that claimant has not carried his burden of proof. Accordingly, we affirm.

### ORDER

The ALJ's order dated November 2, 2011 is affirmed.

Entered at Salem, Oregon on July 10, 2012

Member Weddell dissenting.

The majority finds that the documentary record is insufficient to carry claimant's burden of proof. Because I would find otherwise, I respectfully dissent.

Claimant did not attend the October 12, 2011 hearing. (Tr. 2). The record does not establish why he did not attend the hearing. However, the record indicates claimant last treated for his low back on April 20, 2011. (Ex. 25-2). At that time, Dr. Heitsch noted that his therapy was going well. (*Id.*)

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<sup>2</sup> The chiropractic clinic's intake form indicated that claimant's past history was “unremarkable” and that he was asymptomatic before the work incident. (Ex. 2-4). It is unclear whether this history considered the possibility that he had previously suffered a similar injury or, instead, simply recorded that claimant's symptoms arose immediately. Again, claimant did not offer testimony to answer this question.

The record contains several statements regarding the manner in which claimant's back condition arose. Claimant signed an 827 form on February 15, 2011. (Ex. 1). Although the details of the incident are unclear because the "Describe accident" section was completed in Spanish, the form clearly alleges that claimant had sustained an injury while working on February 4, 2011. (*Id.*) That day, claimant reported to Dr. Steinke, a chiropractor, that he injured his back while moving pallets from a forklift to a trailer. (Ex. 2-2). Claimant signed a second 827 form on March 24, 2011. (Ex. 20). Although this 827 form identified Spanish as claimant's language preference, the "Describe accident" section was completed in English. (*Id.*) There, claimant described his injury as occurring while he was "unload[ing] a big shipment from a truck trailer with a pallet jack" on February 4, 2011. (Ex. 20). Dr. Heitsch recorded the same history.

Although the descriptions of claimant's injury differed slightly, they consistently attributed his back injury to work. SAIF did not submit contrary documentary evidence or elicit contrary testimony.

Citing *Zurita v. Canby Nursery*, 115 Or App 330, 334 (1992), *rev den*, 315 Or 443 (1993), SAIF contends that we may not consider these accounts because claimant did not offer supporting testimony. SAIF's reliance on *Zurita* is misplaced.

As the majority notes, *Zurita* addressed a circumstance in which a claimant had not appeared at the hearing to offer testimony, but instead relied on the medical record to prove compensability. The record included medical reports that recorded statements that claimant had made regarding both the alleged mechanism of injury (lifting and twisting) and the circumstances of the injury (while working). *Froylan L. Zurita*, 43 Van Natta 1382, 1385 (1991). We noted that there was no requirement that a worker attend a hearing and that an ALJ is not bound by common law or statutory rules of procedure, and may conduct a hearing in any manner that would achieve substantial justice. *Id.*, at 1383; *see also* ORS 656.283(7). We explained that the purpose of that flexibility is to allow consideration of relevant evidence that a reasonable person might rely on in conducting his most important affairs. *Zurita*, 43 Van Natta at 1383. We also noted that under ORS 656.310(2), the contents of medical reports "shall constitute *prima facie* evidence as to the matter contained therein." *Id.* at 1385.

We applied these principles in evaluating the medical evidence on which the claimant relied. We accorded weight to the claimant's statements to his doctors regarding how he had hurt his back, but not to the claimant's statements to his doctors that he had hurt his back at work, because the former statements carried strong indicia of reliability, but the latter statements did not. *Id.*

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In affirming our order, the *Zurita* court noted that we “may receive hearsay evidence and evaluate its weight under the circumstances of the case.” 115 Or App at 334; *see also Armstrong v. SAIF*, 67 Or App 498, 501 n 2 (1984). The court further explained, “A claimant may testify personally or present other witnesses or he/she may rely on statements contained in medical reports. However, in the latter instance, a claimant runs the risk that the reports may not be sufficient to carry the burden of proof on work connectedness.” *Id.* In other words, *Zurita* held that whether hearsay statements contained in the record are sufficient to establish compensability depends on an evaluation of the evidence under the circumstances of each case, rather than on a general rule regarding whether a claimant has offered supporting testimony.

Thus, under *Zurita*, claimant’s previous statements regarding the origin of his injury are the type of hearsay statement that must be evaluated in light of the circumstances of this case. The lack of supporting testimony from claimant is one relevant circumstance. Similarly, however, SAIF’s failure to submit contrary documentary or testimonial evidence is also relevant to our evaluation of the evidence before us. *See Williams v. SAIF*, 99 Or App 367, 370 (1989) (a claimant’s choice not to present testimony does not prevent a carrier from presenting its evidence in defense). In other words, just as claimant ran the risk that the documentary record would be insufficient to prove compensability in the absence of supporting testimony, SAIF ran the risk that the documentary record would be sufficient to prove compensability in the absence of contrary evidence.

Under the circumstances of this case, where the record includes signed statements from claimant as well as his hearsay statements to his medical providers regarding the cause of the injury, claimant’s back condition has consistently been attributed to his work activities, and the record contains no contrary evidence, I would find that claimant has proven the compensability of his back injury.

As the majority notes, claimant’s reports of his injury differed slightly. Although claimant initially reported that he hurt his back lifting pallets, and Dr. Thompson specifically based his opinion supporting compensability on that initial history, claimant later reported that he hurt his back pulling a pallet jack. (Exs. 2-2, 20, 26-3). Nevertheless, there is no evidence that pulling a pallet jack would be a materially different mechanism of injury for purposes of analyzing causation. Therefore, I conclude that Dr. Thompson’s opinion was based on a materially accurate history. *See Jackson County v. Wehren*, 186 Or App 555, 559 (2003).

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Additionally, claimant need not rely on the opinion of medical experts to carry his burden of proof if the causation issue does not present a complex medical question. See *Uris v. State Comp. Dep't*, 247 Or 420, 426 (1967); *Barnett v. SAIF*, 122 Or App 279, 283 (1993). Although the record does not establish that claimant promptly reported his injury to a supervisor, the situation is not complicated. Claimant was asymptomatic before the work incident and had an “unremarkable” history. (Ex. 2-4). He sustained the immediate onset of new back symptoms while either lifting or pulling a heavy load, after which he was diagnosed with back sprain/strain. There is no medical evidence establishing that either work activity would not have caused claimant’s back condition, although SAIF had the opportunity to present such evidence. Under such circumstances, I do not conclude that this case presents a complex medical question requiring resolution by expert medical opinion. Based on the circumstances described by the record, I would find medical causation established even if it were not specifically supported by a medical expert.

Therefore, although claimant did not testify and the record does not establish whether the precipitating event involved lifting, as claimant initially reported, or pulling, as claimant later reported, the record supports compensability in either event. Accordingly, I would reverse the ALJ’s order and set aside SAIF’s denial.