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In the Matter of the Compensation of  
**MARIYA G. PUKAY, Claimant**  
WCB Case No. 12-02756  
ORDER ON REVIEW  
Guinn & Dalton, Claimant Attorneys  
Sather Byerly & Holloway, Defense Attorneys

Reviewing Panel: Members Lanning, Langer and Herman.

The self-insured employer requests review of Administrative Law Judge (ALJ) Rissberger's order that: (1) found that claimant's left knee injury claim was timely filed under ORS 656.265(1); (2) set aside the employer's denial of claimant's injury claim; and (3) awarded a \$6,000 employer-paid attorney fee. On review, the issues are timeliness, compensability and attorney fees. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact."

CONCLUSIONS OF LAW AND OPINION

In setting aside the employer's denial, the ALJ concluded that claimant's initial claim was not time-barred and that her November 2011 left knee injury was compensable.

On review, the employer argues that untimely reporting bars the claim and that the evidence does not establish that the alleged injury was a material contributing cause of the need for treatment or disability for claimant's claimed condition.

Assuming without deciding that claimant provided timely notice to the employer and that her testimony regarding a November 2011 work-related incident was credible, we are not persuaded that such an incident was a material contributing cause of her need for treatment/disability. We reason as follows.

Claimant, a retail sales clerk, filed a claim on April 10, 2012 for "overuse of legs and back at work, kept hitting the leg into an open drawer." (Ex. 7). She testified that she hit her knee in November 2011, right before Thanksgiving. When asked to demonstrate the area of injury, she indicated the medial aspect of her left leg, just under the kneecap. (Tr. 7-8).

The medical record shows that she saw her primary care physician, Dr. Woo, on November 28, 2011 for diffuse concerns, including left knee pain that was making it difficult for her to walk. Dr. Woo did not record a history or examination findings that claimant had hit her left leg at work as she later described at hearing. (Ex. 2A).

In January 2012, claimant was seen for a sore that developed on her left shin. Dr. Woo took her off work to allow healing. He stated that the wound was not work related. (Ex. 2D).

Claimant did not refer to knee pain until April 2012. (Exs. 2E, 2F, 2G, 3). She told Dr. Chang on April 11, 2012 that she struck and injured her left shin in November 2011 and that she also had some left medial knee pain that made it difficult to walk. She was concerned that perhaps the shin wound had “tracked” to her left knee. She reported no obvious injury to the left knee other than “pivoting.” (Ex. 5-2).

To establish compensability, claimant must prove by a preponderance of evidence that the work incident was a material contributing cause of the disability or need for treatment of her left knee claim. ORS 656.005(7)(a); ORS 656.266(1); *Albany Gen. Hosp. v. Gasperino*, 113 Or App 411, 415 (1992). Claimant must prove both legal and medical causation by a preponderance of the evidence. ORS 656.266(1); *Harris v. Farmer’s Co-op Creamery*, 53 Or App 618 (1981); *Carolyn F. Weigel*, 53 Van Natta 1200 (2001), *aff’d without opinion*, 184 Or App 761 (2002). Legal causation is established by showing that claimant engaged in potentially causative work activities; whether those activities caused claimant’s condition is a question of medical causation. *Darla Litten*, 55 Van Natta 925, 926 (2003).

Because there is medical evidence indicating that claimant’s work activities did not cause her left knee condition, resolution of causation is a complex medical question that must be resolved by expert medical opinion. *See Uris v. Comp. Dep’t*, 247 Or 420 (1967); *Barnett v. SAIF*, 122 Or App 279 (1993). We give more weight to those opinions that are well reasoned and based on complete information. *Somers v. SAIF*, 77 Or App 259, 263 (1986).

Claimant relies on the opinion of Dr. Puziss, who diagnosed work-related left knee medial and bone contusions. (Exs. 24-9, 25). After reviewing Dr. Puziss’s opinion, we do not find it sufficient to establish medical causation.

Dr. Puziss understood that claimant struck her left knee on the corner of a drawer, directly over the anteromedial knee joint; that the area became reddened and there was swelling down the medial shin. (Ex. 24-1). Dr. Puziss did not address Dr. Woo's November 2011 reference to no knee swelling, effusion or warmth. (Ex. 2A, 24-2). Moreover, Dr. Puziss did not refer to claimant's medical records between Dr. Woo's November 2011 and April 2012 visits, which did not mention knee complaints.

An opinion that is based on an incomplete or an inaccurate history regarding claimant's condition after the work injury is entitled to little weight. *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 an opinion less credible); *Miller v. Granite Constr. Co.*, 28 Or App 473, 478 (1977) (medical evidence based on inaccurate information was insufficient to prove compensability). In the absence of a discussion regarding this lack of "knee complaint" history for some four months "post-injury," we discount Dr. Puziss's opinion.

Furthermore, in January 2009, Dr. Woo re-examined claimant. Claimant displayed a puncture wound on her left lower extremity, attributing it to accidentally hitting furniture three weeks prior. Dr. Woo reported that the condition was not work related. (Ex. 2D).

Claimant returned to Dr. Woo in April 2012 for back and bilateral leg symptoms, including left knee pain. Dr. Woo suggested that claimant check with Kaiser's occupational health department to see if "this can be taken care of as work-related condition." (Ex. 3). When subsequently asked if claimant's knee problems were related to work, however, Dr. Woo opined that her knee issues were probably degenerative. (Ex. 19-3).

Considering that Dr. Woo was claimant's primary care physician, examined her shortly after the alleged work incident, and periodically thereafter, we consider him to be in a superior position to ascertain the nature of her knee condition and to determine the cause of the condition. *See Dillon v. Whirlpool Corp.*, 172 Or App 484, 489 (2001) (absent persuasive reasons to the contrary, the Board generally gives greater weight to the opinion of the claimant's attending physician); *Joshua D. Kirchem*, 63 Van Natta 1327 (2011); *Teri L. Tigert*, 58 Van Natta 1565, 1567 (2006) (opinion of physicians who examined the claimant closer to alleged injury found persuasive). In contrast, Dr. Puziss examined claimant

approximately one year after the alleged incident and did not address Dr. Woo's observations shortly after the alleged work incident. Under such circumstances, we find Dr. Woo's opinion more persuasive.

Dr. Woo's opinion is also consistent with the opinions of Drs. Chang and Nasson. On referral from Dr. Woo, Dr. Chang reported that a puncture wound on claimant's left shin (which claimant attributed to being struck on a counter at work) had healed and was not tender or swollen. Noting tenderness at the medial joint line and into the medial patellar border of claimant's left knee, Dr. Chang was unsure as to the etiology of the left knee pain, but did not opine that the shin wound had contributed. (Ex. 5).

After an MRI showed a meniscus tear with bone bruise to the tibial plateau, Dr. Chang stated that the bruise "could" represent the strike of the knee to the countertop. (Ex. 12). Nevertheless, an opinion utilizing terms of "possibility," rather than probability, lacks persuasive force. *See Gormley v. SAIF*, 55 Or App 1055, 1060 (1981) (persuasive medical opinions must be based on medical probability, rather than possibility). Finally, on further reflection, Dr. Chang subsequently concluded that the mechanism of injury (striking the knee on the work counter) did not explain the bony contusion inside the knee. Instead, Dr. Chang agreed that the onset of claimant's condition was insidious and probably degenerative. (Ex. 18-2).

Dr. Nasson, who examined claimant on orthopedic referral from Dr. Chang, also opined that the knee condition was degenerative as the onset seemed insidious rather than acute. He also did not relate claimant's knee condition to the "shin – desk drawer injury of 11/11." (Ex. 13-2). Dr. Nasson subsequently acknowledged that the MRI showed some soft tissue swelling outside the joint, below the knee, which "could have been caused" by the traumatic injury described. (Ex. 20-2). Yet, as discussed above, such an observation lacks persuasive weight. *Gormley*, 55 Or App at 1060. In any event, Dr. Nasson concluded that the knee joint changes (bone swelling) were likely not caused by the described work injury. (Ex. 20-2).

Dr. Puziss did not respond to or rebut the opinions of Drs. Woo, Chang and Nasson. In the absence of a persuasive explanation addressing these contrary opinions, we discount Dr. Puziss's opinion. *See Janet Benedict*, 59 Van Natta 2406, 2409 (2007), *aff'd without opinion*, 227 Or App 289 (2009) (medical opinion unpersuasive when it did not address contrary opinions).

In conclusion, based on the foregoing reasoning, we find that the medical record does not persuasively establish that the November 2011 work incident was a material contributing cause of the disability or need for treatment of claimant's left knee conditions. Accordingly, we reverse.

ORDER

The ALJ's order dated January 24, 2013 is reversed. The employer's denial is reinstated and upheld. The ALJ's \$6,000 assessed attorney fee and expense/cost awards are also reversed.

Entered at Salem, Oregon on July 22, 2013