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In the Matter of the Compensation of  
**RUBEN J. BARBOZA, SR., Claimant**  
WCB Case No. 12-03635  
ORDER ON REVIEW  
Dunn & Roy PC, Claimant Attorneys  
Chad Kosieracki, Defense Attorneys

Reviewing Panel: Members Langer, Lanning, and Herman. Member Lanning dissents.

Claimant requests review of Administrative Law Judge (ALJ) Ogawa's order that upheld the self-insured employer's denial of his occupational disease claim for a right knee condition. On review, the issue is compensability.

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

In upholding the employer's denial of claimant's right knee medial meniscus tear, the ALJ found the medical opinion of Dr. Baldwin, an orthopedic surgeon who examined claimant on behalf of the employer, more persuasive than that of Dr. Forsythe, an orthopedic surgeon who performed a partial medial menisectomy. In making this finding, the ALJ determined that Dr. Forsythe's causation opinion was couched in terms of medical possibility rather than medical probability.

On review, claimant makes a number of arguments regarding why Dr. Forsythe's opinion was sufficient to satisfy claimant's burden of proof. For the following reasons, we find those contentions unpersuasive.

To establish a compensable occupational disease, employment conditions must be the major contributing cause of the disease. ORS 656.802(2)(a). Resolution of the compensability question presents a complex medical question that must be resolved by expert medical opinion. *Barnett v. SAIF*, 122 Or App 279, 282 (1993). 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); *Linda Patton*, 60 Van Natta 579, 582 (2008).

Here, claimant argues that Dr. Forsythe's opinion is more persuasive on the causation issue because he observed claimant's right knee condition during the surgical procedure he performed and was able to conclude that the meniscus tear was not caused by degenerative factors. We disagree.

Generally, we give special deference to a claimant's treating surgeon due to the unique opportunity to observe the claimant's condition firsthand. *Argonaut Ins. Co. v. Mageske*, 93 Or App 698, 702 (1988). However, for the following reasons, we decline to do so here.

We acknowledge that Dr. Forsythe was in an advantageous position for determining whether or not claimant's meniscus tear was degenerative. However, he was not in a superior position to determine whether the cause of the meniscus tear was due to an occupational disease (a small tear that worsened through cumulative work activities), as advocated by Dr. Forsythe, or whether it was due to an acute tear related to a non-work related event, as posited by Dr. Baldwin. That issue turns on the relative persuasiveness of the physicians' causation analyses. We agree with the ALJ's conclusion that Dr. Baldwin's opinion was better reasoned and hence more persuasive.

Claimant also contests the ALJ's conclusion that Dr. Forsythe's opinion was couched in terms of medical possibility. Claimant cites Dr. Forsythe's medical report and deposition testimony indicating that work activities were the major contributing cause of his medial meniscus tear. (Exs. 48-3, 50-9,-11).

However, Dr. Forsythe testified that, without a documented acute injury event at work (which this record lacks), it would be "hard to prove" that the meniscal tear was work related. (Ex. 50-9). Moreover, Dr. Forsythe testified that he agreed that he was "assuming" that the tear was work related because claimant's work was heavy and he did not engage in any off-work activity. (Ex. 50-14). Finally, as the ALJ noted, Dr. Forsythe testified that the causation issue was "all guesswork." (Ex. 50-12).

Having considered Dr. Forsythe's opinion in its totality, we find that his causation opinion was not expressed to a degree of medical probability, as opposed to medical possibility. Thus, we conclude that the opinion is unpersuasive and insufficient to satisfy claimant's burden of proof. Accordingly, we affirm.

### ORDER

The ALJ's order dated February 11, 2013 is affirmed.

Entered at Salem, Oregon on July 26, 2013

Member Lanning dissenting.

The majority affirms the ALJ's order finding that claimant's occupational disease claim is not compensable. In doing so, it agrees with the ALJ's determination that Dr. Forsythe's medical opinion is not persuasive. Because I would reach the opposite conclusion, I respectfully dissent.

Claimant has the burden of proving that his occupational disease claim is compensable. ORS 656.266(1). To prove medical causation, claimant must show that employment conditions were the major contributing cause of his meniscus tear. ORS 656.266(1); ORS 656.802(2)(a). The medical causation presents a complex medical question that must be resolved by expert medical evidence. *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 that are well reasoned and based on complete information. *Somers v. SAIF*, Or App 259, 263 (1986). Based on the following reasoning, I would conclude that claimant has established medical causation.

At surgery, Dr. Forsythe found no degenerative changes that could explain claimant's meniscus tear, which led him to reasonably conclude that claimant sustained a small meniscus tear due to rigorous work activity that gradually worsened the meniscal tear. Unlike the majority, however, I am persuaded by Dr. Forsythe's opinion, given that he was in an advantageous position as claimant's treating surgeon and provided a well-reasoned opinion (which was based in part on his surgical findings). *See Argonaut Ins. v. Mageske*, 93 Or App 698, 702 (1988) (treating surgeon's opinion persuasive given his first-hand exposure to and knowledge of the claimant's condition).

Moreover, contrary to the majority's determination, I would find that Dr. Forsythe's opinion was expressed to a degree of medical probability. *See Gormley v. SAIF*, 52 Or App 1055, 1060 (1981) (persuasive medical opinions must be based on medical probability, rather than possibility). I reason as follows.

The majority and the ALJ cite Dr. Forsythe's testimony that the causation question was "all guesswork." (Ex. 50-12). However, I would find based on my review of Dr. Forsythe's entire opinion that it establishes to a degree of medical probability that claimant's vigorous work activities were the major contributing cause of the disputed right knee meniscus tear.

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As the majority acknowledges, Dr. Forsythe opined in his written report that, to a degree of medical probability, claimant's work activities were the major contributing cause of the meniscus tear. This opinion was based on claimant's history, the mechanism of injury, examination findings and MRI findings. (Ex. 45-3). While Dr. Forsythe's testimony allowed for some uncertainty, the overall thrust of that testimony was that, to a degree of medical probability, claimant's work activity was the major contributing cause of the meniscus tear. (Ex. 50-9, -11).

As for the testimony cited by the majority, it reflects nothing more than a frank admission by Dr. Forsythe that he is not certain that work activity was the major cause. However, it is well settled that medical certainty is not required to prove medical causation. *See SAIF v. Strubel*, 161 Or App 516, 521-22 (1999) (medical opinions are evaluated in context and based on the record as a whole to determine sufficiency); *Robinson v. SAIF*, 147 Or App 157, 160 (1997) (medical certainty is not required; a preponderance of evidence may be shown by medical probability).

In conclusion, I would find the medical opinion of Dr. Forsythe, claimant's treating surgeon, sufficient to satisfy his burden of proof. Because the majority concludes otherwise, I must dissent.