
In the Matter of the Compensation of
MARK LUTON, Claimant
WCB Case No. 10-03063, 10-02303
ORDER ON REVIEW
Dale C Johnson, Claimant Attorneys
Sather Byerly & Holloway, Defense Attorneys

Reviewing Panel: Members Langer and Lanning.

The self-insured employer requests review of that portion of Administrative Law Judge (ALJ) Crummé's order that set aside its denial of claimant's injury claim for a right wrist condition. On review, the issue is compensability. 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 determined that claimant's right wrist claim should be analyzed as an injury claim under ORS 656.005(7)(a). The ALJ reasoned that Dr. Dodds's opinion was the most persuasive and satisfied claimant's burden of proving that work activity from April 5, 2010 to April 7, 2010 was a material contributing cause of treatment/disability for his right wrist condition.

On review, the employer contends that the claim should be analyzed as an occupational disease and that the evidence does not establish that work activities were the major contributing cause of claimant's right wrist condition. For the following reasons, we agree.

To determine whether a claim involves an injury or an occupational disease, we look at the onset of the condition. *See Smirnoff v. SAIF*, 188 Or App 438, 443 (2003). To be considered an injury, the condition must arise from an identifiable event or have an onset traceable to a discrete period.¹ *Active Transp. Co. v. Wylie*, 159 Or App 12, 15 (1999); *Laverne Y. Ballard*, 59 Van Natta 979, 982 (2007).

¹ An injury need not be instantaneous. However, "an injury based on repetitive trauma must develop within a discrete, identifiable period of time due to specific activity." *LP Co. v. Howard*, 118 Or App 36, 40 (1993).

An occupational disease results from conditions that develop over time, rather than suddenly. The determining factor “is whether the condition itself, not its symptoms, occurred gradually, rather than suddenly.” *Smirnoff*, 188 Or App at 449.

Here, claimant was evaluated for right wrist pain following a brief period of repetitive work activity in April 2010. (Ex. 24, Tr. 37, 40-41). Dr. Button, a hand surgeon who examined claimant on behalf of the employer, and Dr. Dodds, claimant’s surgeon, disagreed about the cause of the right wrist pain. Dr. Button attributed the pain to a remote undiagnosed right wrist fracture with residual bony deformity that gradually resulted in a triangular fibrocartilage (TFC) tear. (Exs. 46-5, 64-2, 70). Dr. Dodds attributed the pain to the TFC tear, which he opined became symptomatic when claimant engaged in the brief period of repetitive work activity in April 2010. (Ex. 62-2).

Smirnoff requires us to view the onset of claimant’s symptoms in the context of his separately diagnosed condition (the TFC tear) and to determine whether that condition developed gradually or as a result of a discrete event or discrete period of repetitive work. *Id.* (when the claimant experienced right knee symptoms after kneeling on concrete floors, his claim was analyzed as an occupational disease based on evidence that established that his underlying torn meniscus condition developed over time); *see also Barbara E. Bain*, 56 Van Natta 3887, 3888 (2004) (when the claimant’s thumb became symptomatic while she was lifting a turkey, her claim was analyzed as an occupational disease based on medical evidence that established that her trigger thumb condition arose gradually). Resolution of the disputed issue presents a complex medical question that must be resolved by expert medical opinion. *Barnett v. SAIF*, 122 Or App 279, 283 (1993).

Here, Dr. Button opined that the claimant’s wrist bone deformity wore away the cartilage and, with activities of daily living, compressed and squeezed the TFC, leading to the tear. He opined that, even if claimant reported onset of pain while engaging in repetitive work during a discrete period, the condition responsible for the pain had been developing gradually over a period of years. (Ex. 70-2).

Dr. Dodds did not agree that claimant’s abnormal wrist bone structure was due to a remote fracture. He thought that claimant’s wrist bone structure was a congenital anatomic variant. Yet, Dr. Dodds also opined that the tear developed gradually, explaining that claimant’s wrist bone structure predisposed him for thinning of the TFC with repetitive work activities as well as a lifetime of normal

usage. (Exs. 73, 74). He could not attribute the tear to the work activity in April 2010, opining that “it is unknown when the tear might have occurred.” (Exs. 62-2, 69-2) (emphasis in original).

Based on these medical opinions, we conclude that claimant’s right TFC tear is not traceable to an identified work event or discrete period. Consequently, we find that the claim must be analyzed as an occupational disease.

To establish a compensable occupational disease, claimant must prove that employment conditions were the major contributing cause of his right TFC tear, not just the treatment associated with the tear. ORS 656.266(1); ORS 656.802(2)(a); *Tammy L. Foster*, 52 Van Natta 178 (2000) (pursuant to ORS 656.802(2)(a), a claimant must prove that work activities were the major contributing cause of the disease itself, not just the disability or treatment associated with it). Determining major contributing cause is a complex medical question that must be resolved on the basis of expert medical opinion. *Barnett*, 122 Or App at 283.

Here, Dr. Dodds opined that “previously documented provocative work activities” were the major contributing cause of the need for *surgery* for the right TFC tear. (Ex. 77). He did not state that the work activities were the major contributing cause of the denied *condition*. Such an opinion does not satisfy the legal standard for a compensable occupational disease claim. *Foster*, 52 Van Natta at 178, *see also Richard L. Hubbard*, 63 Van Natta 939 (2011) (the claimant must prove that work activities were the major contributing cause of the condition itself, not just the treatment associated with it). Furthermore, Dr. Button opined that the remote wrist fracture and resulting abnormal bone structure caused the TFC tear. (Ex. 70-2).

Consequently, no medical opinions establish that claimant’s work activities were the major contributing cause of his TFC tear. Therefore, the record does not support a compensable occupational disease claim. Accordingly, we reverse.

ORDER

The ALJ’s order dated November 26, 2012, as reconsidered on January 10, 2013, and February 15, 2013, is reversed in part and affirmed in part. The employer’s May 26, 2010 denial is reinstated and upheld. The ALJ’s \$7,800 attorney fee and cost awards are also reversed. The remainder of the ALJ’s order is affirmed.

Entered at Salem, Oregon on September 4, 2013