
In the Matter of the Compensation of
RONALD D. IGOU, JR., Claimant
WCB Case No. 14-00648, 14-00647, 13-03195
ORDER ON REVIEW
Hansen Malagon, Claimant Attorneys
Radler Bohy et al, Defense Attorneys

Reviewing Panel: Members Curey, Weddell, and Somers.

Claimant requests review of that portion of Administrative Law Judge (ALJ) Smitke's order that upheld the self-insured employer's denial of claimant's injury claim for a right shoulder/cervical condition.¹ On review, the issue is compensability. We affirm in part and reverse in part.

FINDINGS OF FACT

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

CONCLUSIONS OF LAW AND OPINION

In January 2013, claimant, a caregiver in a residential care facility, while assisting a resident, felt a sharp twinge of pain in the right trapezius and neck area with radiating pain. The resident lost his balance while getting out of an above-ground ball pit, which had a wall approximately 3 feet high. (Tr. 54). As the resident began to fall, claimant held on to him, pulling claimant's arm.

A coworker, who witnessed the incident, testified that the resident had "become dead weight," with the resident going one direction and claimant the other. (Tr. 11). The coworker heard claimant scream in pain. (Tr. 12). Claimant told her that he had a "crink" in his neck and pain shooting down the right side of his arm. (*Id.*)

Claimant continued his shift, but told the coworker that he was in pain and had difficulty grasping or lifting anything with his right hand. (Tr. 13). They agreed that she would do any tasks that required lifting and claimant would do the lighter tasks. (*Id.*) He was able to finish his shift with this accommodation. (*Id.*; Tr. 56).

¹ On review, claimant does not challenge the ALJ's decision to uphold the employer's denial of his occupational disease claim for the disputed conditions. Nor does he challenge the ALJ's decision to uphold the employer's denial of a January 25, 2013 injury claim.

A few days later, claimant sought treatment at an emergency department for worsening symptoms. The initial intake notes stated that claimant was seeking treatment for chronic back pain. (Ex. 4). However, according to subsequent notes and Dr. McKeown's chart note, claimant was seeking treatment for upper back pain, which occurred after lifting a patient. (Ex. 6). Claimant was discharged and instructed to follow-up with his primary care provider. (Ex. 6).

Claimant continued to work with his coworker's assistance with heavy tasks. He reported the injury to the employer's human resources department on March 13, 2013 (some two months after the incident). (Ex. 19A). Claimant was reluctant to file the claim because he was optimistic that he would not require further medical treatment and that his symptoms would resolve quickly. (Tr. 56-57). He was also apprehensive about filing a claim because he did not understand the process and had concerns about whether he would be able to keep his job. (Tr. 58).

Claimant's medical treatment proceeded with an MRI, EMG-NCS testing and ultimately a C8 foraminotomy. (Exs. 22, 40F, 47). Claimant's treating physician, Dr. Kane, believed that he had an acute C8 radiculopathy due in major part from the work incident.

Drs. Thompson and Dickerman examined claimant on behalf of the employer. They found that discrepancies regarding the date of the injury weighed against a work injury. (Exs. 27, 42). Drs. Thompson and Dickerman diagnosed significant preexisting cervical spondylosis to which they ascribed the major contributing cause of claimant's disability/need for treatment of the radicular symptoms.

In upholding the employer's denials, the ALJ found that the employer had met its burden of proving that the otherwise compensable injury was not the major contributing cause of claimant's disability or need for treatment of his combined right shoulder and preexisting cervical condition.

Regarding the denial of claimant's January 18, 2013 work injury, claimant contends that the employer did not establish the existence of a preexisting condition. He also argues that the opinion of his attending physician, Dr. Kane, is more persuasive than the opinions of Dr. Thompson and Dr. Dickerman. For the following reasons, we agree with claimant's contentions.

Claimant must prove that the January 18, 2013 work injury was a material contributing cause of the disability/need for treatment related to his claimed condition. ORS 656.005(7)(a); ORS 656.266(1); *Tricia A. Somers*, 55 Van Natta 462, 463 (2003). If claimant establishes an “otherwise compensable injury,” and a “combined condition” is present, the employer must prove that the otherwise compensable injury was not the major contributing cause of claimant’s disability or need for treatment of the combined condition. ORS 656.266(2)(a); *SAIF v. Kollias*, 233 Or App 499, 505 (2010); *Jack G. Scoggins*, 56 Van Natta 2534, 2535 (2004). The “otherwise compensable injury” means the “work-related injury incident.” See *Brown v. SAIF*, 262 Or App 640, 652 (2014); see also *Jean M. Janvier*, 66 Van Natta 1827, 1832-33 (2014) (applying the *Brown* definition of an “otherwise compensable injury” to initial claims and claims under ORS 656.266(2)(a)).

Because of the disagreement between medical experts regarding the cause of claimant’s condition, this claim presents a complex medical question that must be resolved by expert medical opinion. *Barnett v. SAIF*, 122 Or App 279, 282 (1993); *Mathew C. Aufmuth*, 62 Van Natta 1823, 1825 (2010). In evaluating the medical evidence, we rely on those opinions that are both well reasoned and based on accurate and complete information. *Somers v. SAIF*, 77 Or App 259, 263 (1986); *Linda Patton*, 60 Van Natta 579, 582 (2008).

The employer argues that claimant has not established an “otherwise compensable injury.” In doing so, the employer asserts that the history regarding the mechanism of injury and onset of symptoms provided by claimant was so variable that Dr. Kane’s causation opinion was based on an inaccurate history.

However, Dr. Kane relied on the set of facts which were ultimately established at hearing.² Therefore, his opinion was based on a sufficiently accurate history. 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 the opinion and does not exclude information that would make the opinion less credible). Furthermore, when Dr. Thompson and Dr. Dickerman were provided

² The ALJ found that claimant testified credibly based on his demeanor and his testimony was further corroborated by his coworker and his wife. In conducting our review of this record, we find no reason to disregard that finding. See *Erck v. Brown Oldsmobile*, 311 Or 519, 526 (1991) (on *de novo* review, it is a good practice for an agency or court to give weight to the factfinder’s credibility assessments). The date of injury, mechanism of injury and described onset of symptoms that claimant testified to are the same ones on which Dr. Kane rendered his opinion.

with hypothetical facts that conformed to the facts established at hearing, they both essentially acknowledged that the described work injury would be a material cause of claimant's need for treatment/disability of his cervical condition. (Ex. 41-12, 44-10).

Having found that claimant has established an "otherwise compensable injury," we turn to claimant's argument that the opinions of Dr. Thompson and Dr. Dickerman are unpersuasive, and therefore, insufficient to sustain the employer's burden to show that the otherwise compensable injury (*i.e.* the work-related injury/incident) was not the major contributing cause of claimant's disability/need for treatment for his combined condition. *See Brown*, 262 Or App at 652; *Janvier*, 66 Van Natta at 1832-33. Because the employer has the burden of proof under ORS 656.266(2)(a), the medical evidence supporting its position must be persuasive. *Jason V. Skirving*, 58 Van Natta 323, 324 (2006), *aff'd without opinion*, 210 Or App 467 (2007).

In rendering his initial opinion, Dr. Thompson assumed that claimant had sought emergency treatment for neck/back and arm pain two days before the work injury, which he understood to have occurred on January 25, 2013. He explained that these symptoms indicated that claimant had a disc herniation before the work injury. (Ex. 39-2).

In his deposition, Dr. Thompson was asked to assume that claimant had been asymptomatic before the work incident and that the initial emergency department evaluation was several days after the work incident. (Ex. 41-10). Claimant's counsel asked Dr. Thompson to further assume that claimant experienced no symptoms and received no medical treatment before the work incident, that he screamed when it happened, that he had immediate upper back, neck and right arm pain, and that the incident was seen by an independent witness. (Ex. 41-12). Dr. Thompson then stated that this would cause some question in his mind, and that he would find that the work injury would then certainly be a material cause of claimant's need for treatment. (*Id.*) Nevertheless, he continued to opine that the preexisting condition was the major cause of claimant's need for treatment.

In light of Dr. Thompson's prior opinion that claimant's symptoms were indicative of a disc herniation, but that he deemed the disc herniation to be spontaneous because of his inaccurate understanding that the work injury occurred before claimant sought treatment, we consider his deposition testimony that the work incident was a material cause to constitute a change in his opinion.

Dr. Thompson's original opinion relied heavily on his incorrect understanding of the timing of the work incident and the resulting medical treatment. Having been provided with the correct history and then stating that the work injury was a material, but not the major, contributing cause, it was incumbent on Dr. Thompson to articulate his analysis explaining how he weighed the contribution of the preexisting condition and the work injury.

Dr. Thompson did reason that claimant likely would not have herniated a disc from the described mechanism of injury if he did not have preexisting degenerative spondylosis. (Ex. 41-16). However, we do not consider such an analysis sufficient to establish that Dr. Thompson adequately weighed the potential contributing factors to persuasively determine whether the work injury was not the major contributing cause of claimant's disability/need for treatment as required by ORS 656.266(2)(a). In the absence of a thoroughly explained analysis, we consider Dr. Thompson's opinion unpersuasive. *See Moe v. Ceiling Sys., Inc.*, 44 Or App 429, 433 (1980) (rejecting unexplained or conclusory opinion).

Dr. Dickerman relied on an inaccurate characterization of claimant's symptoms following the injury. For example, on multiple occasions, he reported that claimant was asymptomatic by the time his shift ended on the day of injury. (*See* Ex. 42-22, -25) However, Dr. Dickerman had previously recorded a history that claimant had "some soreness and pain at the end of his shift." (Ex. 42-3). While Dr. Dickerman's report documents two different descriptions of claimant's symptoms at the time he left work, Dr. Dickerman's opinion assumes that claimant was asymptomatic by the time he left work.³ (Ex. 42-25). The record does not support a conclusion that claimant was "asymptomatic" when he left work. His coworker testified that claimant appeared to be in pain and that he had difficulty lifting and grasping with his right arm after the work injury. (Tr. 12-13). Claimant's wife also testified that he was visibly in pain when he returned home after his shift. (Tr. 23). Given that Dr. Dickerman's opinion is based on an inaccurate history, we find it to be unpersuasive. *See Miller v. Granite Constr. Co.*, 28 Or App 473, 478 (1977) (medical evidence that was based on inaccurate information was not persuasive).

³ The source of this history is a recorded investigator interview of claimant, in which he stated that he had no pain by the time he left work, and then he further stated that he had "discomfort." (Ex. 44-12). While claimant's statement is ambiguous, it does not support Dr. Dickerman's conclusion that claimant was "asymptomatic."

Because we do not find the opinions of Dr. Thompson and Dr. Dickerman to be persuasive, the employer has not met its burden of proof under ORS 656.266(2)(a). *See Skirving*, 58 Van Natta at 324. Consequently, based on the aforementioned reasoning, we conclude that claimant's injury is compensable. Accordingly, we reverse the ALJ's order.

Claimant's attorney is entitled to an assessed fee for finally prevailing over the employer's denial of claimant's January 18, 2013 injury. ORS 656.386(1). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable attorney fee award is \$12,500, to be paid by the employer. In reaching this conclusion, we have particularly considered the time devoted to the issue (as represented by the hearing record and claimant's appellate briefs), the complexity of the issue, the value of the interest involved, and the risk that claimant's counsel might go uncompensated.

Finally, claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the injury denial, to be paid by the employer. *See* ORS 656.386(2); OAR 438-015-00129; *Nina Schmidt*, 60 Van Natta 169 (2008); *Barbara Lee*, 60 Van Natta 1, *recons*, 60 Van Natta 139 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

ORDER

The ALJ's order dated November 5, 2014 is reversed in part and affirmed in part. The employer's denial of claimant's January 18, 2013 injury claim is set aside and the claim is remanded to the employer for processing according to law. For services at hearing and on review, claimant's attorney is awarded an assessed fee of \$12,500, payable by the employer. Claimant is awarded reasonable expenses for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the January 18, 2013 injury denial, to be paid by the employer. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on May 27, 2015