

In the Matter of the Compensation of  
**VIRGINIA C. BALL, Claimant**  
WCB Case No. 14-05399  
ORDER ON REVIEW  
Jon C Correll, Claimant Attorneys  
Gress & Clark LLC, Defense Attorneys

Reviewing Panel: Members Curey, Lanning, and Somers. Member Curey dissents.

The self-insured employer requests review of Administrative Law Judge (ALJ) Bethlahmy's order that: (1) set aside its denial of claimant's injury claim for a left knee condition; and (2) awarded a \$12,000 assessed attorney fee. On review, the issues are compensability and attorney fees.

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

The ALJ found that claimant sustained an injury while performing her work activities in July 2014. In doing so, the ALJ relied primarily on claimant's testimony, as corroborated by a customer, who testified that he had seen her "gimping" around and overheard her tell the store manager, Ms. Newlun, that she had hurt herself.

On review, the employer contends that claimant's testimony was not credible because it contradicted her earlier recorded statement and the testimony of her coworkers. The employer further asserts that the customer was not a "disinterested witness." For the following reasons, we affirm the ALJ's decision.

To prove a compensable injury, claimant must establish that the July 2014 work incident was at least a material contributing cause of the disability or need for treatment for her left knee condition. ORS 656.005(7)(a); ORS 656.266(1); *Albany Gen. Hosp. v. Gasperino*, 113 Or App 411, 415 (1992); *Tricia A. Somers*, 55 Van Natta 462, 463 (2003).

Claimant must prove both legal and medical causation of her injury claim 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 work activities caused claimant's condition is a question of medical causation. *Darla Litten*, 55 Van Natta 925, 926 (2003).

Here, whether claimant established legal causation hinges principally on her credibility and reliability. In determining the credibility of a witness's testimony, we normally defer to an ALJ's demeanor-based credibility findings. *See Erck v. Brown Oldsmobile*, 311 Or 519, 526 (1991) (it is good practice to give weight to a fact finder's credibility assessments). The ALJ did not make an express demeanor-based credibility finding. Therefore, because the issue of credibility concerns the substance of claimant's testimony, we are equally qualified to make our own substantive credibility determination. *Coastal Farm Supply v. Hultberg*, 84 Or App 282 (1987); *Michael A. Ames*, 60 Van Natta 1324, 1326 (2008). Inconsistencies in the record may raise such doubt that we are unable to conclude that material testimony is reliable. *George V. Jolley*, 56 Van Natta 2345, 2348 (2004), *aff'd without opinion*, 202 Or App 327 (2005).

After conducting our review, we are persuaded that the record supports a conclusion that claimant sustained a work-related injury. Our conclusion is based on the following reasoning.

Claimant testified that, in the morning of July 14, 2014, she slipped on a piece of ice at work and that, later the same morning, she told Ms. Newlun about it in front of a customer. (Tr. 6-7). Although Ms. Newlun testified that claimant did not tell her about her injury on the day it allegedly happened, claimant's "notification" testimony was corroborated by the customer, Mr. Stolfa. (Tr. 29-30). Although Mr. Stolfa could not specify the exact date on which he heard claimant tell Ms. Newlun that she had been hurt, he was able to provide an approximate date of the conversation because it was within "a week or two" of his son's birthday (July 8, 2014). This testimony from a "disinterested" witness corroborates claimant's testimony concerning the date of her injury, as well as her notification to her store manager (Ms. Newlun) of her injury on the same day.<sup>1</sup> (Tr. 29-30).

Mr. Stolfa acknowledged that he was "Facebook friends" with claimant. (Tr. 31). Nevertheless, he considered himself to be just a regular customer and described his relationship with claimant as a "brief acquaintance" from the store. (Tr. 30). Under such circumstances, we agree with the ALJ's reasoning that Mr. Stolfa's testimony reliably corroborated claimant's testimony that she notified Ms. Newlun of the work-related incident on the day it happened, July 14, 2014.

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<sup>1</sup> The employer contends that Mr. Stolfa's testimony is unreliable because it was vague and he has memory problems associated with a history of strokes. However, Mr. Stolfa explained that relevant events, such as his son's July 8 birthday, make it easier for him to remember. (Tr. 29).

Other testimony further supports claimant's version of a work-related injury. Claimant had dinner with Ms. Newlun just two days after her July 14 work incident. (Tr. 8). During dinner, claimant sat on the outside of the table because her left leg was bothering her. (*Id.*) According to claimant, Ms. Newlun offered her a "leg immobilizer" to use when she was not working to see if it would help. (*Id.*)

Although Ms. Newlun denied that she owned or offered claimant a "leg immobilizer," (Tr. 47), claimant's husband recalled a conversation between Ms. Newlun and claimant at dinner regarding a leg brace. (Tr. 35). His testimony also corroborated details of her work-related injury, including the date of the injury and that she had a noticeable limp. (Tr. 34).

Claimant's son and his fiancé testified that when they picked her up from work at the end of her July 14 shift, she was limping. (Tr. 22, 26). Claimant's son recalled asking her what was wrong and her reply that "she had slipped on some ice" and had told her manager, Ms. Newlun, about the incident. (Tr. 23).

Ms. Newlun testified that she did not learn about claimant's alleged work-related injury until early August 2014. (Tr. 38, 41). However, Ms. Newlun acknowledged that she was upset about claimant's injury claim because the employer "already had several Workmen's Comp claims and we were dropped by our insurance company, so we moved to another insurance company and we were trying to make sure that everybody was careful with what they did so we didn't have any other Workmen Comps claims." (Tr. 49).

After considering the employer's contentions and evaluating claimant's testimony within the context of the testimony of other witnesses (particularly Mr. Stolfa) and the record as a whole, we do not consider the inconsistencies in claimant's version of events sufficient to discount her testimony regarding the work-related injury. See *Westmoreland v. Iowa Beef Processors*, 70 Or App 642 (1984), *rev den*, 298 Or 597 (1985); *Crystal R. Emig*, 60 Van Natta 198, 199 (2008) (inconsistencies in the record did not lead to conclusion that the claimant's testimony was not credible). Consequently, we conclude that claimant has established "legal causation" regarding her injury claim.

In challenging medical causation, the employer contends that Dr. Kopp's and Dr. Anderson's unrebutted opinions are based on an incomplete and inaccurate history. However, as explained above, we agree with the ALJ's assessment that the record preponderates that claimant sustained a work-related injury. Under such circumstances, the opinions expressed by Drs. Kopp and Anderson are consistent with such a history.

Moreover, claimant's described mechanism of injury was consistent with objective findings, including visible swelling of the knee and tenderness along the medial joint line, indicating a probable medial meniscus tear or plica injury. (Exs. 22-4-5, 23-1). Both Drs. Anderson's and Kopp's opinions support that claimant's work-related injury was a material contributing cause of her disability/need for treatment of her left knee condition. (Exs. 22-5, 23-1).

The employer asserts that Dr. Anderson's opinion is unpersuasive because he was unaware of claimant's 2005 left knee strain. Yet, the medical evidence does not attribute significance to claimant's prior left knee strain. *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 the opinion less credible); *Lori J. Jones*, 66 Van Natta 1400, 1405-06 (2014) (same). Moreover, Dr. Kopp noted claimant's 2005 left knee strain as part of her medical history, but still concluded that claimant's 2014 work-related incident was a material contributing cause of her current left knee condition. (Ex. 22-1-2, -5, -7).

Under such circumstances, the medical record persuasively establishes that claimant's 2014 work incident was a material contributing cause of her disability or need for treatment of her left knee condition.<sup>2</sup> Therefore, based on the ALJ's analysis, as supplemented herein, we are persuaded that claimant has established the compensability of her disputed left knee injury claim.

Claimant's attorney is entitled to an assessed fee for services on review. ORS 656.382. After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable fee for claimant's attorney's services on review is \$4,000, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's respondent's brief), the complexity of the issue, the value of the interest involved, and the risk of going uncompensated.

Finally, claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by the employer. *See* ORS 656.386(2); OAR 438-015-0019; *Gary E. Gettman*, 60 Van Natta 2862 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

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<sup>2</sup> The employer does not dispute application of the material contributing cause standard, and has not provided medical evidence indicating a combined condition or application of a major contributing cause standard.

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ORDER

The ALJ's order dated September 22, 2015 is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$4,000, payable by the employer. Claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by the employer.

Entered at Salem, Oregon on April 13, 2016

Member Curey dissenting.

Relying on the "corroborative" testimony of the only alleged "disinterested" witness, the ALJ concluded that claimant proved legal causation. The majority agreed. However, because of overwhelming inconsistencies and multiple contradictions in the medical record, claim processing records, claimant's recorded interview, her testimony, and her co-workers' testimony, I would find that claimant's version of her work-related incident is not reliable. Thus, I respectfully dissent.

In determining the reliability of a witness's testimony, we normally defer to an ALJ's demeanor-based credibility findings. *See Erck v. Brown Oldsmobile*, 311 Or 519, 526 (1991) (it is good practice to give weight to a fact finder's credibility assessments). However, where the issue of credibility concerns the substance of claimant's testimony, we are equally qualified to make our own substantive credibility determination. *Coastal Farm Supply v. Hultberg*, 84 Or App 282 (2987). Inconsistencies in the record may raise such doubt that we are unable to conclude that material testimony is reliable. *George V. Jolley*, 56 Van Natta 2345, 2348 (2004), *aff'd without opinion*, 202 Or App 327 (2005). For the following reasons, I am unable to conclude that claimant's testimony was reliable.

First, I am not convinced that Mr. Stolfa presented as a disinterested witness. Specifically, not only was he Facebook "friends" with claimant, he admitted that he was friends with her son Robert. (Tr. 31). However, even assuming he was "disinterested," I would still not find his testimony sufficient to corroborate claimant's history of a work-related injury.

Mr. Stolfa testified that "about a week or two" after his son's birthday, which was July 8, 2014, he heard Ms. Newlun ask claimant, "Hey, what happened?," and claimant said, "I hurt myself." (Tr. 29-30). Although Mr. Stolfa

heard claimant say that she hurt herself, such a statement on its own and without more specific details, does not establish or corroborate that she hurt herself *at work*, especially when other testimony suggests that she had fallen and hurt her knee at her birthday party, two days earlier. (Tr. 44).

In addition, claimant's version of events contains material inconsistencies. She reported varying times of injury. For instance, she testified that she injured herself between 5:00 a.m. and 5:30 a.m. (Tr. 13). In claim forms she signed, however, she said that her injury occurred at 9:30 a.m. (Exs. 3, 5).

Claimant testified that "Tina" was working as the cashier on the date of injury, and that "Tina" heard her "call out" when she fell, and asked her "what happened[?]" (Tr. 14). She also testified that "Tina" saw her limping. (Tr. 14-15). However, while Tina acknowledged that she opened the store with claimant on July 14, 2014, Tina testified that she did not see claimant get injured. (Tr. 58). Further, she did not hear her "cry out," and she never asked claimant if she was okay, or saw her limping. (Tr. 58, 59). Moreover, Tina testified that claimant never told her that she had been injured. (Tr. 59).

In direct contrast to the aforementioned testimony, in her recorded statement to the insurer (which was provided seven weeks after the alleged injury and closer in time to the injury), claimant said multiple times that she was working with "Michelle," not "Tina," when she slipped on a piece of ice. (Ex. 11A-4). Claimant said that: "Michelle spun around and asked me if I was OK, and I said, 'Yeah, I think so.'" (Ex. 11A-6). Michelle did not testify at hearing.

Therefore, the record establishes that it was Tina, not Michelle, that was working on the date of the injury. Furthermore, Tina did not corroborate any of claimant's statements regarding the alleged injury.

In addition, the location of the injury is unclear. According to the testimony of two co-workers, Tina and Ashley, claimant told each of them that she had injured herself when she slipped in the cooler. (Tr. 63, 68). Yet, as previously noted, claimant testified and recounted to the insurer that her injury occurred between the freezer and the ice machine. (Tr. 13).

Finally, claimant testified that she was honest with all the doctors of record. (Tr. 12). Claimant denied any previous injuries to her left knee. (Ex. 11A-13). Dr. Anderson, who treated claimant's knee condition, reported that claimant "denie[d] ever having problems with this knee in the past." (Ex. 6-1). Yet, the

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medical record establishes that, in 2005, claimant reported and sought treatment for a very similar work-related injury to her left knee when “she slipped on ice from ice machine [and] twisted knee.” (Ex. A). Claimant has offered no explanation for these various inconsistencies.

In sum, the failure to disclose a prior injury to the same body part, the varying time of injury, the differently identified location of injury, and the late change in the name of the only alleged witness, all lead me to conclude that claimant is not credible. Further, all that Mr. Stolfa corroborates is that claimant told her employer she hurt herself, not how, or when, or where she hurt herself. Under these circumstances, I am not persuaded that claimant sustained a work-related injury, as she claims, and I do not consider the physicians’ opinions based on her unreliable history to be persuasive. *See Miller v. Granite Constr. Co.*, 28 Or App 473, 476 (1997) (medical evidence based on the claimant’s impeached credibility found unpersuasive); *Sarah R. Schwanz*, 61 Van Natta 1788, 1789-90 (2009) (same). Consequently, this record does not establish that claimant’s injury claim is compensable. Because the majority has reached a different conclusion, I respectfully dissent.