
In the Matter of the Compensation of
DENNIS WARD, Claimant
WCB Case No. 14-01260
ORDER ON REVIEW
Hollander & Lebenbaum et al, Claimant Attorneys
SAIF Legal Salem, Defense Attorneys

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

Claimant requests review of Administrative Law Judge (ALJ) Mills's order that upheld the SAIF Corporation's denial of his occupational disease claim for bilateral lateral epicondylitis. On review, the issue is compensability.

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

Claimant has worked as an industrial and commercial electrician since 1976. (Tr. 34). He worked out of a union call board for different employers and had gaps in employment. (Tr. 5; Ex. 40A).

In a narrative letter to his attorney, claimant described his general job duties as an electrician, and four basic stages of electrical installation: "underground," which involved heavy lifting and intensive labor to run underground conduits; "rough in," which involved heavy lifting, overhead work, and use of tools, to install support systems for cables, conduits, panels, as well as transformers; "wire pulling," which involved heavy lifting, use of machinery, and pulling wires to install cable wire to electrical equipment; and "start up," which involves use of small hand tools and inspections. (Ex. 57-1-3). According to claimant, 50 percent of his time was spent on "wire pulling," 30 percent on "rough in," 18 percent on "underground," and the remainder of the time on other activities. (Ex. 57-3). Claimant also described his off-work activities. (Ex. 57-4-8).

In March 2006, claimant sought treatment for right elbow pain that he related to repetitive sawing and lifting at work. Right lateral epicondylitis was diagnosed. (Ex. 4).

Between December 6, 2013 and January 3, 2014, claimant worked for SAIF's insured for two weeks, with a schedule of working five 10-hour days and eight hours on Saturday for those two weeks. (Ex. 40A-2; Tr. 6). He ultimately worked for a total of 94 hours between December 6 and December 21, 2013. (Ex. 48).

Claimant installed conduits/piping during the first week and pulled wire during the second week. (Tr. 6). Installing conduits required lifting and carrying pipes/conduits from the ground onto his shoulder and overhead to various locations in the building, bending pipes using a hydraulic bender and cutting pipes with a “Porta-Band” powered circular cutting band, and securing those pipes/conduits to an electrical gear using hand tools. (Tr. 6-13).

Pulling wire required one person pulling wire off wire reels, and another person feeding the wire into the conduit unit to another journeyman wireman who pulled the wire through the exiting end of the conduit using a mechanical pulling device. (Tr. 17-19, 32-33, 37-43, 46-48). According to claimant, approximately 50 percent of his two weeks working for SAIF’s insured was spent pulling wire, with approximately 80 percent of his last week and 80 percent of his last day pulling wire. (Tr. 19, 34-35). That particular job required him to reach overhead and pull wire down “a few times,” some pulling wire up from the ground, and mostly pulling wire across his body as fast as he could. (Tr. 32-33). The job did not require him to reach out and pull wire towards him. (Tr. 33).

Claimant first felt pain in his elbows during the second week, when he was feeding/pulling wire to another journeyman wireman. (Tr. 17-20, 41). He informed his foreman that his elbows were hurting. (Tr. 20). He finished his shift, but did not return to work thereafter due to his elbow pain. (Tr. 20, 44).

On February 11, 2014, claimant sought treatment from Dr. Serneels complaining of chronic neck pain since 2007 and a “long” history of bilateral elbow pain for at least two years. (Ex. 13-1). On February 13, 2014, Dr. Poon noted claimant’s complaints of neck and elbow pain for “5-6 years” without any specific incident. (Ex. 12-1).

On February 13, 2014, claimant filed an occupational disease claim with SAIF for neck and bilateral elbow conditions. (Ex. 11). After SAIF denied the claim, claimant requested a hearing. (Exs. 22, 43).¹

In upholding SAIF’s denial of claimant’s occupational disease claim for bilateral lateral epicondylitis, the ALJ reasoned that the opinion of Dr. Schweitzer, claimant’s treating surgeon, did not persuasively establish that claimant’s work

¹ Claimant also filed occupational disease claims for the same conditions against other employers, which were denied. (Exs. 28 through 36, 42, 44, 45, 45A, 45B, 46, 47A). At hearing, the parties agreed that the claims against the other employers would be dismissed. (Tr. 1-2).

activities were the major contributing cause of his disease, or the major contributing cause of both a pathological worsening of the preexisting disease and a combined condition. ORS 656.802(2)(a), (b).

On review, claimant contests the ALJ's evaluation of the medical evidence. For the following reasons, we affirm.

To establish a compensable occupational disease, claimant must prove that employment conditions were the major contributing cause of the bilateral lateral epicondylitis. ORS 656.266(1); ORS 656.802(2)(a); *Lori M. Lawrence*, 60 Van Natta 727, 728 (2008). However, if the occupational disease claim is based on the worsening of a preexisting disease or condition, claimant must establish that employment conditions were both the major contributing cause of the combined condition and pathological worsening of the disease, not merely the cause of the symptoms of the disease. ORS 656.802(2)(b); *Weller v. Union Carbide*, 288 Or 27, 35 (1979) (symptomatic worsening is not sufficient under ORS 656.802(2)(b); there must be proof of a pathological worsening of the disease).

The determination of major contributing cause involves the evaluation of the relative contribution of the different causes of claimant's diseases and a decision as to which is the primary cause. *Dietz v. Ramuda*, 130 Or App 397, 401 (1994), *rev dismissed*, 321 Or 416 (1995); *Linda E. Patton*, 60 Van Natta 579, 581 (2008). Because of the possible alternate causes of claimant's conditions, expert medical opinion must be used to resolve the question of causation. *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); *Patton*, 60 Van Natta at 582.

At the outset, the ALJ found claimant's testimony to be credible in substance and based on his demeanor. Because the record contains no persuasive evidence casting doubt on claimant's testimony, we have no reason to reject the ALJ's demeanor-based credibility finding. *Erck v. Brown Oldsmobile*, 311 Or 519, 526-527 (1991); *Coghill v. Bend Millworks*, 125 Or App 57, 60 (1993); *Garth Starr*, 66 Van Natta 1282, 1283 (2014).

Claimant argues that Dr. Schweitzer persuasively described the biomechanics of activities causative of his condition, had an accurate understanding of the mechanism and duration of his work activities of pulling wire and using heavy vibrating tools, and fully considered the necessary factors in explaining how his work activities of pulling wire were the major contributing

cause of his occupational disease and the major contributing cause of both a pathological worsening of the disease and combined condition. For the following reasons, we disagree with those contentions.

In November 2014, Dr. Schweitzer reviewed claimant's narrative regarding his work activities as an electrician, as well as his off-work activities. (Ex. 47B-1). Dr. Schweitzer explained that lateral epicondylitis involved "micro-tears" of the tendons attached at the epicondyle and was more of a degenerative process from overuse in extending the wrists and fingers against resistance over time. (Ex. 47B-1-2). Dr. Schweitzer opined that claimant's work activities as an electrician, "specifically his duties of pulling wire[,] were the major contributing cause of his bilateral lateral epicondylitis. (Ex. 47B-2). Based on the work activities described in claimant's narrative, as compared to his age and off-work activities, Dr. Schweitzer considered claimant's work activities to be of sufficient force, posture, and repetitiveness to cause the condition due to stressing of the tendons where they attach to the elbow. (*Id.*)

In February 2015, Dr. LeClere examined claimant at SAIF's request. (Ex. 49). Claimant reported having difficulties with overhead work, which he did "extensively," and described that his arms are in many different positions when pulling wire, depending on the job at hand. (Ex. 49-2). Claimant demonstrated reaching overhead and pulling down with both arms, reaching out in front and pulling back towards his torso with shoulders flexed out in front and elbows flexed, and pulling up from the ground below in a similar fashion. (*Id.*) Dr. LeClere explained that the motion appeared to be primarily throughout the shoulders, not repetitive wrist extension and flexion, and involved mainly pulling with the entire upper extremities. (Ex. 49-8). Dr. LeClere opined that claimant's bilateral lateral epicondylitis was idiopathic, and that his work activities were not of the type, frequency, and duration to cause or significantly contribute to his condition. (Ex. 49-10).

Thereafter, Dr. Schweitzer disagreed with Dr. LeClere's causation analysis, but agreed with Dr. LeClere's opinion that claimant's work activities of pulling wire involved all joints of the upper extremity. (Ex. 51-1). Dr. Schweitzer explained that movement and bending of the elbows to pull something towards one's self and use of the shoulder causes stress in the elbow joints as described in his previous report, which was causative of claimant's elbow conditions. (*Id.*) He opined that, based on reasonable medical probability, the effect of claimant's daily work activities were of sufficient frequency, force and duration to cause wear and tear on his elbow joints, causing his bilateral lateral epicondylitis. (Ex. 51-2).

Dr. Schweitzer agreed that lateral epicondylitis can be idiopathic in some cases, but disagreed with Dr. LeClere's opinion that claimant's condition was idiopathic. (Ex. 51-3). Instead, Dr. Schweitzer adhered to his opinion that claimant's work activities were the major contributing cause of his condition. (*Id.*)

Dr. LeClere disagreed with Dr. Schweitzer's assertions that bending/use of the elbow contributed to the development of lateral epicondylitis and that claimant's work activities, particularly pulling wire, were the major contributing cause of his bilateral lateral epicondylitis. (Ex. 54-1). Dr. LeClere explained:

“[L]ateral epicondylitis is degeneration of the tendon that attaches the wrist extensor muscles to the elbow. A tendon attaches a muscle to bone. In this case, the extensor carpi radialis brevis (ECRB) is the muscle, and it attaches to the lateral epicondyle. The tendon can degenerate, which can cause pain in the area. The ECRB is the muscle which causes flexion and extension of the wrist. Therefore, bending of the elbow is not implicated in the use of the ECRB muscle.” (Ex. 54-1).

Dr. LeClere reasoned that, when claimant demonstrated how he was pulling wires, he did a lot of pulling down from overhead, which would not involve flexion and extension of the wrists. (Ex. 54-1). Also, based on claimant's narrative letters, Dr. LeClere continued to opine that claimant's work activities were not of the type, frequency or duration to cause or contribute to claimant's condition. (Ex. 56).

At deposition, Dr. Schweitzer testified that medical literature supported a conclusion that specific work activities involving a combination of both high repetition and high force were statistically significant risk factors that could contribute to the development of lateral epicondylitis, although he could not quantify what would be considered “high” repetition or force. (Ex. 55-11, -19-20, -23, -25). After re-reviewing claimant's narrative, Dr. Schweitzer identified only wire pulling as the primary activity that could be causative because it would involve both repetition and force. (Ex. 55-11-12, -21-22, -25-26, -28).

However, Dr. Schweitzer was unaware of claimant's work activities for specific employers, the specific portions of work activities performed for each employer, or the frequency, duration, force, repetitiveness or technique of claimant's wire pulling activities (which he considered important factors in determining the contribution of those activities to claimant's condition) for any

specific employer. (Ex. 55-10-12, -15-20, -25). Dr. Schweitzer acknowledged that he had never seen claimant pull wires as he had described, and did not ask him details of how he performed that activity and, instead, relied on claimant's own description and narrative. (Ex. 55-11, -15, -19-21, -32).

Dr. Schweitzer explained that, when he had described claimant's wire pulling activity to be causative, he envisioned a combination of techniques such as pulling up from below waist level and flexing the elbow (which involves stabilizing the wrist and requires some extension force to maintain that position), as well as pulling across the body. (Ex. 55-15-16). However, Dr. Schweitzer testified that, if claimant's job duties of pulling wire included bending of the elbow as well as flexion and extension of the wrist repetitively and forcefully, those activities were sufficient and "could" contribute to claimant's condition, but he did not know claimant's specific technique or "that they are causative." (Ex. 55-25).

Based on these concessions, we discount the persuasiveness of Dr. Schweitzer's "causation" opinion that claimant's work activities of pulling wire were of sufficient force, posture, and repetitiveness to stress the tendons attached at the epicondyle from the wrist to contribute to the development of the condition. (Exs. 47B-1-2, 51-1-2).² See *Miller v. Granite Constr. Co.*, 28 Or App 473, 476 (1977) (medical opinions are only as reliable as the history provided by the claimant); *Latonya M. Bias*, 60 Van Natta 905, 905 (2008) (persuasiveness of medical evidence depends on accuracy of history).

Moreover, Dr. Schweitzer testified that he envisioned claimant "pulling [wire] out to the side for most of his workday *every week*," meaning "the majority of an 8-hour shift[.]" (Ex. 55-29) (emphasis added). We acknowledge that claimant credibly testified that approximately 50 percent of his two weeks working for SAIF's insured were spent pulling wire, with approximately 80 percent of his last week and 80 percent of his last day pulling wire, and most of his wire pulling was across his body. (Tr. 19, 33-35). Yet, based on an understanding that claimant would work for an employer for four weeks in stages, and to the extent that claimant's wire pulling work was "an all day 8-hour day activity for several days" and then he would move on to a different activity for that employer,

² We note that, with the exception of pulling wire across his body, claimant demonstrated his general wire pulling activities to Dr. LeClere. (Ex. 49-2).

Dr. Schweitzer opined that such wire pulling activity “could increase his symptoms,” but that he was unsure if those activities actually caused the condition. (Ex. 55-29-30).³

Under these particular circumstances, we find that Dr. Schweitzer’s opinion is based on possibility, rather than probability, and, in any event, does not persuasively establish that claimant’s wire pulling activities were the major contributing cause of his bilateral lateral epicondylitis condition. *Gormley v. SAIF*, 52 Or App 1055, 1060 (1981) (use of the words “could” militated against a finding of medical causation in terms of probability); *Kyle G. Anderson*, 61 Van Natta 2117, 2117-18 (2009) (the words “can be” and “may be” indicate only possibility, not medical probability).⁴

Finally, we disagree with claimant’s contention that the opinion of Dr. Schweitzer persuasively establishes that his work activities were the major contributing cause of both a pathological worsening of the preexisting disease and a combined condition. We reason as follows.

³ We also note that, based on claimant’s narrative and a job description from an employer in October 2013 (which claimant testified was when he last had elbow symptoms, and that those work activities described therein were consistent with his work activities at SAIF’s insured), and considering the cumulative effect of work as an electrician since 2006 (when he initially reported having right elbow symptoms), Dr. Schweitzer could not say with confidence that claimant’s work activities were the major contributing cause of his condition. (Exs. A, 55-30; Tr. 35). Further, based on an understanding that claimant worked as an electrician with different employers at various times with breaks between employment since before 2006, Dr. Schweitzer could not say that his work activities caused his condition. (Ex. 55-30).

⁴ Noting that his work activities also included the use of vibrating power tools (*i.e.*, “Porta-Band” power cutter, hydraulic “knockout” pump, and drill) with outstretched arms, claimant argues that Dr. Schweitzer’s testimony supports a conclusion that those were the types of activities statistically significant for causing bilateral lateral epicondylitis. However, Dr. Schweitzer focused on claimant’s wire pulling activities and he testified that, if claimant was using vibrating power tools repetitively with outstretched arms, those activities “could” contribute, depending on the position of the wrist and elbow. (Ex. 55-17, -24). Additionally, claimant testified that his elbows were flexed at about 90 degrees when operating the “Porta-Band,” that he only used the “knockout” and drill to cut 10 holes on the first day on the job, that his hands were at chest height and his elbows “fairly closed” when operating the “knockout” (which did *not* vibrate), and that his elbows would be bent while using the drill. (Tr. 11-12, 15-16). Therefore, we are not persuaded that Dr. Schweitzer identified such activities as causative to claimant’s condition, based on reasonable medical probability. *Gormley*, 52 Or App at 1060; *Anderson*, 61 Van Natta at 2117-18.

If medical evidence supports a conclusion that symptoms are brought on by claimant's work activity and the symptoms are, in fact, the occupational disease for which he seeks treatment, substantial evidence could support a finding that employment conditions were the major contributing cause of the disease. *SAIF v. Chipman*, 166 Or App 443, 449 (2000); *Mary A. Ralston*, 60 Van Natta 2372, 2373 (2008).

Here, Dr. Schweitzer ultimately opined that claimant had idiopathic bilateral lateral epicondylitis, that his December 2013 work activities of pulling wire caused an increase in symptoms of that condition (which represented a pathological worsening of the underlying condition), and those work activities combined with the underlying condition. (Ex. 55-32-35). However, Dr. Schweitzer did not state or clarify whether claimant's work activities were the *major* contributing cause of the pathological worsening, or the *major* contributing cause of the combined condition itself. (Ex. 55-33-35).

Under these circumstances, Dr. Schweitzer's opinion does not persuasively establish the compensability of claimant's occupational disease claim for bilateral lateral epicondylitis under ORS 656.802(2)(b). *See Nathaniel G. Jones*, 59 Van Natta 1137, 1139 (2007) (claim not compensable under ORS 656.802(2)(b) where physician opined that the claimant's work activities caused a pathological worsening of his CTS, but did not clarify whether the work activities were the major contributing cause of the pathological worsening); *see also Sally J. Van Meter*, 57 Van Natta 2641 (2005) (claim not compensable under ORS 656.802(2)(b) where medical evidence did not address the major contributing cause of the combined condition).

In sum, based on the foregoing reasons, in addition to those expressed in the ALJ's order, the record does not persuasively establish the compensability of claimant's bilateral lateral epicondylitis claim. ORS 656.266(1); ORS 656.802(2)(a), (b). Consequently, we affirm.

ORDER

The ALJ's order dated January 25, 2016 is affirmed.

Entered at Salem, Oregon on August 12, 2016

Member Lanning dissenting.

The majority finds that the opinion of Dr. Schweitzer was insufficient to establish the compensability of claimant's occupational disease claim for bilateral lateral epicondylitis under ORS 656.802(2)(a) or (b). Because I disagree with their conclusion, I respectfully dissent.

Here, Dr. Schweitzer initially opined that claimant's work activities as an electrician, particularly pulling wire, were the major contributing cause of his bilateral lateral epicondylitis condition. (Exs. 47B, 51). His opinion was based on claimant's narrative describing his work activities as an electrician, claimant's description to him (as well as claimant's description to Dr. LeClere) regarding his wire pulling activities, the onset and progression of his of symptoms, as well as the consideration of claimant's age, weight, and off-work activities. (*Id.*) According to Dr. Schweitzer, claimant's work activities of pulling wire were of sufficient force, posture, and repetitiveness to stress the tendons attached at the epicondyle from the wrist to contribute to the development of the condition. (Exs. 47B-1-2, 51-1-2).

At deposition, Dr. Schweitzer testified that the mechanism for the development of lateral epicondylitis is extension of the wrist against resistance, or extension to maintain and stabilize the position of the wrist if the elbow is flexed. (Ex. 55-14-16, -24-25). Further, working with the arms outstretched was a position of higher risk, and lifting using the shoulders in flexed position and the elbows in relative extension would also be causative and contributory to the development of the condition. (Ex. 55-24-25, -27). According to Dr. Schweitzer, the position of the wrists (*i.e.*, extension of the wrist against resistance or to maintain position), and not just the elbow/arm, was of particular importance because the ECRB muscle crosses the elbow and is a secondary stabilizer of the elbow. (Ex. 55-24-25).

Dr. Schweitzer explained that, based on claimant's narrative, wire pulling was the primary work activity that could be causative of his bilateral lateral epicondylitis because it involved a combination of both high force and high repetition. (Ex. 55-11-12). Dr. Schweitzer testified that if claimant's job duties of pulling wire included bending of the elbow as well as flexion and extension of the wrist repetitively and forcefully, those activities could contribute to claimant's condition, but that he did not know claimant's specific technique. (Ex. 55-25). Additionally, if claimant was performing wire pulling activities in different positions as he demonstrated and described to Dr. LeClere, Dr. Schweitzer could

not state, with a reasonable degree of certainty, that those work activities caused claimant's condition if he performed those activities only 50 percent of the time or less for each employer. (Ex. 55-26).

I acknowledge Dr. Schweitzer's statements that he did not know about claimant's work activities for specific employers, or the frequency, duration, force, repetitiveness or technique of claimant's wire pulling activities (which he considered important factors in determining the contribution of those activities to claimant's condition) for any specific employer. I further recognize that Dr. Schweitzer's testimony used terms indicative of possibility, rather than medical probability. Nevertheless, as explained below, I find that his deposition testimony persuasively supports the compensability of claimant's occupational disease claim.

Claimant demonstrated to Dr. LeClere some positions of how he pulled wire from overhead, from in front, and from floor level, but did *not* demonstrate how he pulled wire across his body specifically for his SAIF-insured job. (Tr. 31-32). Claimant testified that, specifically at his SAIF-insured job, most of the wire pulling was done across his body as fast as he could. (Tr. 32). He also did some reaching overhead and pulling down, some pulling wire up from ground, but no reaching out and pulling wire towards him. (Tr. 33). According to claimant, approximately 50 percent of his two weeks working for SAIF's insured was spent pulling wire, with approximately 80 percent of his last week and 80 percent of his last day pulling wire. (Tr. 19, 34-35).

At deposition, when asked what he envisioned in identifying wire pulling as being a probable causative activity, Dr. Schweitzer described a combination of techniques such as pulling wire from the ground and up and flexing the elbow, which still requires stabilization of the wrist and some extension force to maintain that position, as well as pulling out to the side of his body. (Ex. 55-15-16). Additionally, when asked what activity he was envisioning when he opined that claimant's wire pulling activity was the major contributing cause of his condition, Dr. Schweitzer testified that he envisioned claimant pulling wire out to the side for most of his workday every week, "like the majority of an 8-hour shift[.]" (Ex. 55-29).

Like the majority and ALJ, I agree that claimant's testimony regarding his work activities as an electrician and description of his wire pulling activities with SAIF's insured is credible. Because Dr. Schweitzer's testimony and explanation at deposition is consistent with claimant's credible testimony, I find that his opinion is based on an accurate understanding of claimant's work activities, and based on

reasonable medical probability. *See Robinson v. SAIF*, 147 Or App 157, 160 (1997) (medical certainty not required; a preponderance of evidence may be shown by medical probability).

Dr. Schweitzer ultimately opined that claimant had idiopathic bilateral lateral epicondylitis, that his December 2013 work activities of pulling wire caused an increase in symptoms of that condition (which represented a pathological worsening of the underlying condition), and those work activities combined with the underlying condition. (Ex. 55-13, -32-35). Based on Dr. Schweitzer's testimony, which evolved during the course of the deposition as he was provided with more specific information, I find that claimant has established the compensability of his occupational disease claim for bilateral lateral epicondylitis under both ORS 656.802(2)(a) and (b).

Specifically, I am persuaded that Dr. Schweitzer's opinion establishes that claimant had idiopathic bilateral lateral epicondylitis, that his December 2013 work activities caused a pathological worsening of the underlying condition, and that those work activities that worsened the underlying condition combined with the underlying condition, which is the bilateral lateral epicondylitis disease itself for which he sought treatment in February 2014. (Ex. 55-13, -32-35). Furthermore, Dr. Schweitzer persuasively opined that claimant's work activities, particularly his December 2013 wire pulling activities, were the major contributing cause of the condition. (Exs. 47B, 51). *See Howard D. Weathers*, 55 Van Natta 2839, 2840-41 (2003) (physician's opinion that the claimant's symptoms of CTS were the disease, that the worsening of the symptoms was a worsening of the disease, and that work activities were the major contributing cause of the claimant's current symptoms established compensable claim under ORS 656.802(2)(b)).

Based on the foregoing reasons, I would find that claimant has established that his employment conditions were the major contributing cause of his bilateral lateral epicondylitis, as well as both the major contributing cause of the pathological worsening of the disease and the combined condition. ORS 656.266(1); ORS 656.802(2)(a), (b). Because the majority concludes otherwise, I respectfully dissent.