
In the Matter of the Compensation of
ANNE ZOUCHA, Claimant
WCB Case No. 14-02134
ORDER ON REVIEW
Alvey Law Group, Claimant Attorneys
Kenneth R Searce, Defense Attorneys

Reviewing Panel: Members Curey, Weddell, and Somers.

The insurer requests review of that portion of Administrative Law Judge (ALJ) Wren’s order that set aside its denial insofar as it pertained to claimant’s injury claim for a left shoulder condition. Claimant cross-requests review of that portion of the ALJ’s order that upheld the insurer’s denial insofar as it pertained to claimant’s injury claim for a neck condition. 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,” as summarized and supplemented below.

Claimant worked as a medical receptionist. Beginning in November 2013 (and especially December), her workload increased. (Tr. 10). Toward the end of December 2013 and early January 2014, she began experiencing symptoms in her neck and left shoulder. (Tr. 10). From November 2013 through February 2014, she was working 9 to 10 hours a day without taking a lunch hour or breaks. (*Id.*) She testified that “sitting in that position without moving for so long, I think, is what can—what caused this.” (Tr. 10).

A January 16, 2014 cervical MRI scan showed “Small diffuse disc bulges at C5-6 and C6-7[.]” (Ex. 1). On January 24, 2014, Dr. Slack recorded a history of “chronic, recurrent neck pain and left upper arm pain.”¹ (Ex. 2-1). He concluded that “the C5-6 and C6-7 neural foramen on the left side are primary pain generators[.]” (Ex. 2-2). On February 20, 2014, in addition to the MRI findings, Dr. Slack diagnosed “facet arthropathy, which, in combination, results in moderate to severe left C5-6 and moderate left C6-7 foraminal stenosis.” (Ex. 3).

¹ Dr. Slack worked in the same office as claimant. (Tr. 11).

After two epidural steroid injections, Dr. Slack advised claimant to follow-up with her primary care physician, Dr. Harp. (Ex. 3-2).

Dr. Harp's February 24, 2014 hand written chart notes indicate a "work injury" and "sitting @ computer long periods, end of Dec." (Ex. 5-2). Dr. Harp reported "very good" range of motion in claimant's neck with some pain, and her left upper extremity strength was "3/5" due to pain. (Ex. 5-1). Dr. Harp diagnosed "left shoulder overuse tendinitis/bursitis" and "frozen shoulder." (*Id.*) Dr. Harp referred claimant to Dr. Cook, an orthopedic surgeon. (Ex. 5-1).

On February 26, 2014, Dr. Cook diagnosed "either a tendonitis/bursitis/impingement or perhaps an underlying adhesive capsulitis." (Ex. 6). He also opined that "[i]t is possible that the condition is work related." (*Id.*) Dr. Cook administered a left shoulder injection. (*Id.*)

On February 28, 2014, claimant signed an 827 form, which referred to left shoulder/arm conditions. (Ex. 8). She described her accident as, "Over time from sitting at computer for long periods." (*Id.*)

On March 3, 2014, Dr. Cook documented a follow-up telephone conference with claimant, noting that she "achieved no relief from the injection, which may indicate a more severe element of rotator cuff tendinopathy or impingement syndrome." (Ex. 9). Dr. Cook ordered a left shoulder MRI. (*Id.*)

On March 9, 2014, claimant signed an 801 form, which referred to "neck strain" and "neck/soft tissue." (Ex. 10). The form attributed the cause of her condition to "neck pain from working." (*Id.*)

A March 11, 2014 left shoulder MRI showed "[a]nterior labral and inferior glenohumeral tears" and "[g]lenoid deep bone bruise with a mild humeral head bruise." (Ex. 12).

On March 14, 2014, Dr. Cook "re-evaluated" claimant's left shoulder and concluded that she was dealing with an adhesive capsulitis. (Ex. 14). Under the heading of "Imaging," Dr. Cook's report noted that "[t]he principle finding is that of a labral tear." (*Id.*)

On March 24, 2014, Dr. Smith, a neurosurgeon, examined claimant at the insurer's request. (Ex. 15-1). Dr. Smith noted that claimant "reports that in early January 2014, she began to experience the insidious onset of pain down the outside

of her left arm.” (Ex. 15-1-2). Following a summary of claimant’s medical records, and his examination, Dr. Smith diagnosed: “sensory radiculitis involving the C6 and C7 nerve roots on the left secondary to degeneration and nerve root foramen stenosis at C5-6 and C6-7 on the left. Because of the pain in her left arm and degeneration in her left shoulder, she has developed adhesive capsulitis of her left shoulder.” (Ex. 15-3). He concluded that “[t]his combination of circumstances is unrelated to her work.” (*Id.*).

On April 11, 2014, the insurer denied claimant’s neck claim. (Ex. 16-1). The insurer asserted that it had “been unable to obtain sufficient evidence to establish that you sustained a compensable occupational disease arising out of and in the course of employment[.]” (*Id.*) Claimant requested a hearing. (Ex. 17).

Dr. Cook did not concur with Dr. Smith’s opinion. (Ex. 18). Dr. Cook explained that “having seen [claimant] on a number of occasions, it is my opinion that her neck and shoulder issues are work related, and that her foremost problem is an adhesive capsulitis of the shoulder.” (*Id.*) He then stated: “That is a rather nebulous entity and multifactorial in onset. Sometimes, people do not have a cause effect history that emerge with an adhesive capsulitis and sometimes it is repetitive motion that initiates it, and that is certainly part of her job environment.” (*Id.*) He then concluded: “Absent any outside injuries, and the fact that her neck is frequently in a flexed position, I feel that both the neck and shoulder issues are work related[.]” (*Id.*)

On May 29, 2014, Dr. Cook performed a “Manipulation under anesthesia and injection, left shoulder.” (Ex. 19-1). Dr. Cook’s pre-operative and post-operative diagnosis was adhesive capsulitis. (*Id.*)

On June 23, 2014, at the insurer’s request, Dr. Kaesche, an orthopedist, examined claimant and reviewed her medical records. (Ex. 20-2). Based on claimant’s medical history, Dr. Kaesche reported that claimant had “for some time prior to 01/02/13 noted some sense of aching and stiffness in her neck. There was no specific episode at work or off work she can define as the cause of the symptoms. She postulates because she sat at a computer a great deal of time while at work that was the contributing factor.” (*Id.*) Dr. Kaesche stated that “[c]ommencing 01/02/13, [claimant] noted increasing discomfort in her neck and progressive restriction of motion of the left shoulder.”² (Ex. 20-3). Dr. Kaesche

² Dr. Kaesche later acknowledged an error in the section of his report entitled “History of Present Illness.” (Ex. 25-2). He explained that reference to the calendar year 2013 should be corrected to the year 2014. (*Id.*)

concluded that “there was no specific on-the-job injury and the examinee’s work activities as a surgery scheduler are not a cause of her development of neck or left shoulder symptoms on the basis of ‘overuse.’” (Ex. 20-10). Further, he noted that “[t]here is no mechanism of injury or overuse described by [claimant] consistent with producing neck or left shoulder symptoms.” (Ex. 20-11). Finally, Dr. Kaesche explained that “[t]here is no evidence of any pattern of trauma superimposed upon the degenerative pattern[,]” and “[t]hese changes are consistent with the examinee’s age.” (*Id.*)

Ultimately, Dr. Kaesche concluded that: “Repetitive motion at work such in the position as the examinee described she was functioning at the time of the onset of symptoms would not cause adhesive capsulitis of the left shoulder. It is more probable than not the development is related to the preexisting degenerative changes as noted on the MRI.” (Ex. 20-13).

In a concurrence letter, Dr. Cook disagreed with Dr. Kaesche’s opinions. (Ex. 23-9). In particular, Dr. Cook asserted that Dr. Kaesche had an inaccurate history regarding the onset of claimant’s neck and shoulder issues. (*Id.*) He also expressly disagreed with Dr. Kaesche’s opinion that working long hours with claimant’s neck in a flexed position was an insufficient mechanism of injury to cause her neck issues. (*Id.*) Dr. Cook stated “the work during the discrete and identifiable time period commencing in early January, 2014 was a material contributing cause of her disability and need for medical treatment for her diagnosed cervical and shoulder conditions.”³ (*Id.*)

At the hearing, the parties agreed that the issue was compensability of claimant’s neck and left shoulder conditions under an injury theory. (Tr. 2). Claimant conceded that she could not meet her burden of proving a compensable occupational disease. (*Id.*)

CONCLUSIONS OF LAW AND OPINION

Persuaded by Dr. Cook’s opinion, the ALJ concluded that claimant’s left shoulder condition was compensable as an injury. Concerning the neck claim, the ALJ was not persuaded that claimant’s neck condition arose suddenly. Consequently, the ALJ concluded that claimant’s neck injury claim was not compensable.

³ Dr. Cook also opined that claimant’s work during this discrete and identifiable period was the major contributing cause of her disability and need for treatment for those conditions. (Ex. 23-9).

On review, the insurer contends that both the left shoulder and neck conditions are more properly analyzed under the occupational disease standard. The insurer also asserts that claimant's work activities were not a material contributing cause of her disability or need for treatment for the claimed conditions. In response, claimant argues that the opinion of her treating surgeon, Dr. Cook, persuasively supports the compensability of her neck and left shoulder injury claims. Based on the following reasoning, we are not persuaded that claimant's neck and left shoulder conditions are compensable.

When determining whether a condition is appropriately analyzed as an injury or an occupational disease, we must examine whether the condition itself, and not its symptoms, occurred suddenly or gradually. See *Luton v. Willamette Valley Rehabilitation Center*, 272 Or App 487, 153 (2015); *Smirnoff v. SAIF*, 188 Or App 438, 449 (2003). To be considered an injury, the condition must arise from an identifiable event or have an onset traceable to a discrete period. *Active Transp. Co. v. Wylie*, 159 Or App 12, 15 (1999); *LP Co. v. Disdero Structural*, 118 Or App 36 (1993) (injury need not be instantaneous; thoracolumbar sprain caused by three days of work analyzed as injury); *Valtinson v. SAIF*, 56 Or App 184, 188 (1982) (injury need not be instantaneous, but may occur during a discrete period); *Donald Drake Co. v. Lundmark*, 63 Or App 261 (1983), *rev den*, 296 Or 350 (1984) (injury occurred suddenly, although the symptoms grew progressively worse over six subsequent weeks of employment); *Debra A. Deluca*, 64 Van Natta 1112 (2012) (injury occurred within discrete week-long period of heavy lifting).

Occupational diseases, on the other hand, are conditions that are gradual rather than sudden in onset. *Fuls v. SAIF*, 321 Or 151 (1995); *James v. SAIF*, 290 Or 343, 348 (1981); *Weyerhauser v. Woda*, 166 Or App 73, 79-80 (2000). Thus, we analyze the medical evidence regarding the onset of the claimed neck and shoulder *conditions*, not merely the symptoms, to determine if the conditions developed gradually or suddenly. *Smirnoff*, 188 Or App 446; *Katrina Taylor*, 63 Van Natta 41 (2011).

Where, as here, medical experts disagree about the cause of a claimant's disability/need for treatment, the compensability issue presents a complex medical question that must be resolved by expert medical opinion. *Uris v. State Comp. Dep't*, 247 Or 420, 426 (1967); *Barnett v. SAIF*, 122 Or App 279, 283 (1993). We give more weight to those expert opinions that are well reasoned and based on complete information. *Somers v. SAIF*, 77 Or App 259, 263 (1986). Although we

may give greater weight to the attending physician's opinion, whether we do so will depend on the record in each case. *Dillon v. Whirlpool Corp.*, 172 Or App 484, 489 (2001).

After conducting our review, we are not persuaded that claimant's neck and left shoulder conditions arose as a result of a traceable event or discrete period of time. Claimant testified that her work was very busy from November 2013 through February 2014. (Tr. 10). She reported a history of working 9 to 10 hours a day during those busy winter months, without taking a lunch break or any other breaks, leading to her neck and left shoulder symptoms. (Tr. 9-10). Toward the end of December 2013, she "was having problems." (Tr. 11). She described problems getting dressed and said she was "somebody to just blow things off and ignore it, so I did[.]" but "[i]t got worse and worse." (*Id.*)

Claimant did not quantify the amount of time she ignored her "problems." This history is consistent with Dr. Kaesche's report that claimant had neck and shoulder symptoms for some time before "January 2, 2014." (Exs. 20-2, 25-2).⁴ An MRI was performed on January 16, 2014, which suggests that treatment began sometime before that date. (Exs. 1, 2).

We acknowledge Dr. Cook's statement that "during the discrete and identifiable time period commencing in early January, 2014, [claimant] began to experience symptoms of her conditions." (Ex. 23-3-4). However, whether a claim should be analyzed as an injury or occupational disease claim is a legal question, the resolution of which includes analysis of medical and lay evidence. Thus, Dr. Cook's conclusory opinion that claimant's symptoms developed during a "discrete and identifiable time period" is not dispositive. *See, e.g., Maria J. Oliva-Luna*, 67 Van Natta 1875, 1876 (2015) (whether findings constitute "objective findings" is a legal issue, so a physician's opinion that no objective findings are present is not controlling if medical findings satisfying the statutory definition are nevertheless present). It is well-settled that we do not evaluate medical opinions based on "magic words." *SAIF v. Strubel*, 161 Or App 516, 521-22 (1999); *Liberty Northwest Ins. Corp. v. Cross*, 109 Or App 109, 112 (1991), *rev den*, 312 Or 676 (1992). Rather, we evaluate medical opinions in context and based on the record as a whole to determine their sufficiency. *Strubel*, 161 Or App at 521-22.

⁴ Although Dr. Kaesche initially referred to January 2, 2013, he subsequently acknowledged that the correct date was January 2, 2014. (Ex. 25).

Our review of the medical evidence and claimant's testimony leads us to conclude that her neck and shoulder conditions were gradual in onset. She became very busy at work beginning in November 2013 (especially in December 2013), "was having problems" toward the end of December 2013, and sought treatment in mid-January 2014. (See Tr. 10-11; Ex. 1). Such circumstances persuasively establish that claimant engaged in work activities for several weeks before any symptoms prompted her to seek treatment. We consider such a period to be more consistent with a gradual onset of claimant's conditions, as opposed to a discrete and identifiable period of time. See *Donald E. Forum*, 67 Van Natta 819, 824 (2015) (claim analyzed as an occupational disease when condition developed over several weeks); see also *Jan Privatsky*, 67 Van Natta 147 (2015) (shoulder condition that became symptomatic when the claimant's workload doubled was analyzed under occupational disease, rather than injury, standard because the condition developed gradually over several weeks); *Janice R. Morin*, 64 Van Natta 50 (2012) (because the persuasive medical evidence established that the right CTS condition was gradual in onset (4 to 6 weeks) following an increase in the claimant's workload, the claim was analyzed as an occupational disease).

We recognize that, in *Lundmark*, the court found that a claim should be analyzed as an injury where the claimant had noticed neck and back pain at the same time that he used a faulty loader, although his symptoms progressively worsened for the next six weeks. 63 Or App at 264. However, in reaching its conclusion, the court explained that the claimant's back trouble "*coincided precisely*" with the traumatic jolting of the faulty loader and, thus, was traceable to an identifiable event that caused his disability. *Lundmark*, 63 Or App at 266. Under such circumstances, the court reasoned that the fact that the claimant's pain grew progressively worse over the next six-weeks did not make it "gradual in onset." *Id.*

We consider *Lundmark* distinguishable. Claimant's symptoms appeared after her work activities increased in November 2013 (especially in December 2013) during the "busy" season. In contrast to *Lundmark* (where the onset of the claimant's symptoms coincided with the particular work activity), claimant's symptoms were not noticeable (or she chose to ignore them) until some 4 to 6 weeks after she began the increased work activities in question.

Further, we consider this case similar to *Sherry Nouvixay*, 67 Van Natta 624 (2015), where the claimant contended that her attending physician's opinion persuasively attributed her claimed condition to a discrete period. Notwithstanding the claimant's argument, we analyzed the claim as an

occupational disease, reasoning that no specific work event/injury had been identified and that the physician's opinion supported "the gradual onset of claimant's condition as a result of employment conditions." *Id.* at 626.

Here, claimant considered her work activities to have become busier during the winter months; *i.e.*, sitting for long periods without breaks (Tr. 10; Exs. 5-2, 6, 8, 20-2). Nonetheless, as in *Nouvixay*, claimant did not attribute her complaints to a specific work task/event/injury. Therefore, consistent with the *Nouvixay* rationale, this record establishes that claimant's conditions were gradual in onset.

Accordingly, based on the aforementioned reasoning, we conclude that the disputed conditions should be analyzed as occupational diseases, rather than as injuries. Because it is uncontested that the conditions are not compensable under an "occupational disease" analysis, the insurer's denials are upheld.

ORDER

The ALJ's order dated February 18, 2015 is affirmed in part and reversed in part. The insurer's denial of claimant's injury claim for a left shoulder condition is reinstated and upheld. The ALJ's costs and \$7,000 attorney fee awards are reversed. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on February 5, 2016