In the Matter of the Compensation of
TINA L. JUNG, Claimant
WCB Case No. 14-05791
ORDER ON REVIEW
Welch Bruun & Green, Claimant Attorneys
Sather Byerly & Holloway, Defense Attorneys

Reviewing Panel: Members Curey and Lanning.

The self-insured employer requests review of Administrative Law Judge (ALJ) Fulsher's order that set aside its denial of claimant's new/omitted medical condition claim for right shoulder supraspinatus and infraspinatus tears. On review, the issue is compensability.

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

Relying on the opinions of Dr. Tella, claimant's attending surgeon, and Dr. Montgomery, her prior treating chiropractor, the ALJ concluded that the April 2014 work injury was a material contributing cause of claimant's need for treatment/disability for her right shoulder conditions.

On review, the employer contends that the opinions of Drs. Tella and Montgomery are unpersuasive, and asserts that claimant did not establish compensability of her right shoulder conditions. Based on the following reasoning, we disagree with the employer's contentions.

To prevail on her new/omitted medical condition claim, claimant must prove that the condition exists, and that the work injury was a material contributing cause of her disability/need for treatment of that condition. *See* ORS 656.005(7)(a); ORS 656.266(1); *Maureen Y. Graves*, 57 Van Natta 2380, 2381 (2005).[1] If claimant establishes an "otherwise compensable injury," and a "combined condition" is present, the burden of proof rests with the employer to prove that the otherwise compensable injury was not the major contributing cause of claimant's disability or need for treatment of the combined right shoulder conditions.[2] ORS 656.266(2)(a); *SAIF v. Kollias*, 233 Or App 499, 505 (2010); *Jack G. Scoggins*, 56 Van Natta 2534, 2535(2004).

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[1] The existence of the claimed condition is not in dispute.

[2] There is no contention that a "combined condition" exists. Thus, resolution of this disputed claim rests on whether claimant has established the compensability of the claimed shoulder tears.

Considering the conflicting evidence regarding the nature and cause of claimant's right shoulder conditions, the compensability issues present complex medical questions that must be resolved by expert medical evidence. *See Uris v. State Comp. Dep't*, 247 Or 420, 426 (1967); *Barnett v. SAIF*, 122 Or App 279, 283 (1993). When presented with disagreement among experts, 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).

After conducting our review, we are persuaded by Dr. Tella's opinion that claimant's April 2014 work injury was a material contributing cause of her need for treatment/disability for her right shoulder conditions. In reaching that conclusion, we disagree with the employer's challenges to Dr. Tella's opinion.

Specifically, the employer asserts that Dr. Tella's opinion did not consider any information other than a temporal relationship concerning the onset of claimant's right shoulder pain. To the contrary, in addition to the temporal relationship, Dr. Tella also based his opinion on the mechanism of injury (which he considered consistent with causing a rotator cuff tear) and claimant's lack of symptoms while utilizing crutches prior to her April 2014 work injury (which he opined would likely have caused symptoms if the rotator cuff tears were present).[3] (Exs. 27, 32A-29). Therefore, we do not consider Dr. Tella's opinion to be based solely on a temporal relationship.

The employer further contends that Dr. Tella's opinion relied on an inaccurate history. Specifically, the employer argues that claimant had previous right shoulder treatment with Dr. Montgomery and that Dr. Tella did not address the prior treatment. We acknowledge that Dr. Montgomery treated claimant following a motor vehicle accident in 2010. (Exs. 33, 34-12). However, Dr. Montgomery explained that claimant did not have right shoulder rotator cuff symptoms during that course of treatment.[4] (Exs. 33, 34-19). Under such

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[3] We acknowledge Dr. Tella's opinion that claimant's subsequent lifting of a 5-pound box, two months after her April 2014 work injury, caused a "worsening" of the tears. (Exs. 27-2, 32A-27). However, such an event is not inconsistent with Dr. Tella's opinion that the April 2014 work incident was a material contributing cause of claimant's need for treatment/disability for the right shoulder conditions.

[4] The employer argues that Dr. Montgomery's opinion lacked objectivity and expertise to provide a persuasive opinion. Although acknowledging that he could not interpret MRIs (Ex. 34-9, -16, -34), Dr. Montgomery had the advantage of treating claimant before and after her April 2014 work injury. (Exs. 33, 34-13). *See Kienow's Food Stores v. Lyster*, 79 Or App 416, 421 (1986) (greater weight accorded to the opinion of physician who observed the claimant's condition before and after the relevant event); *Robert J. Vandenbogaard*, 66 Van Natta 1289, 1291 (2014) (same). Moreover, the record

circumstances, we do not consider claimant's "pre-April 2014" treatment to discount Dr. Tella's opinion. *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).

Finally, the employer contends that Dr. Tella's opinion, unlike those expressed by Drs. Brenneke and Morgan, did not address claimant's limited shoulder complaints during the first few months following the work injury.[5] However, during his deposition, Dr. Tella acknowledged that claimant had occasionally mentioned both of her shoulders within the first few months after her work injury with greater right shoulder complaints after that time. (Ex. 32A-37). In addition, after considering claimant's treatment history, Dr. Tella continued to opine that the April 2014 work injury caused the infraspinatus and supraspinatus rotator cuff tears.[6] (Ex. 32A-48). Consequently, we consider Dr. Tella's opinion to be based on an accurate history.

Accordingly, based on the aforementioned reasoning and that expressed in the ALJ's order, we conclude that Dr. Tella's opinion persuasively establishes the compensability of claimant's right shoulder conditions. Consequently, we affirm.

Claimant's attorney is entitled to an assessed fee for services on review. ORS 656.382(2). 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 $5,000, 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 and her counsel's uncontested fee submission), the complexity of the issue, the value of the interest involved, and the risk that counsel may go uncompensated.

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does not support the employer's challenge to Dr. Montgomery's objectivity. Finally, in any event, Dr. Montgomery ultimately deferred to Dr. Tella's opinion, which persuasively establishes the compensability of claimant's right shoulder conditions. (Ex. 34-35).

[5] The employer renews its argument concerning claimant's "atrophy" findings. Relying on the opinion of Dr. Morgan, the employer asserts that the amount of atrophy supported a conclusion that the tears preexisted the April 2014 work injury. However, we agree with the ALJ's reasoning that Dr. Tella persuasively responded to Dr. Morgan's "atrophy" rationale by explaining that the progression of atrophy varies between individuals.

[6] Claimant testified that, following the work incident, she had an immediate onset of right shoulder pain, which is consistent with the initial treatment records. (*See* Tr. 9; Exs. 2-3, 5-2, 10, 11, 15-1).

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).

ORDER

The ALJ's order dated August 17, 2015 is affirmed. For services on review, claimant's counsel is awarded an assessed attorney fee of $5,000, 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 February 2, 2016