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In the Matter of the Compensation of  
**CARL R. MATHIASON, Claimant**  
WCB Case No. 14-04532  
ORDER ON REVIEW  
Alvey Law Group, Claimant Attorneys  
Cummins Goodman et al, Defense Attorneys

Reviewing Panel: Members Weddell and Johnson.

The self-insured employer requests review of those portions of Administrative Law Judge (ALJ) Lipton's order that: (1) set aside its denial of claimant's injury claim for umbilical hernia and inguinal hernia conditions; and (2) awarded a \$7,000 assessed attorney fee. On review, the issues are compensability and attorney fees.

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

The ALJ analyzed claimant's June 2014 claim as an injury because the hernia conditions for which he sought treatment arose suddenly, within a discrete period, while he was lifting heavy items at work. Acknowledging claimant's inconsistencies regarding the precise dates and items that he lifted, the ALJ reasoned that the employer's records revealed that he had been involved in those lifting activities within the discrete period described by claimant, and other no reason was identified for his seeking treatment.

In determining compensability, the ALJ found the opinion of Dr. Bower to be more persuasive than the contrary opinions of Dr. Harrison and Dr. Blumberg. In doing so, the ALJ reasoned that Dr. Bower had previously treated claimant and was familiar with his thought process, his diagnoses of the umbilical and inguinal hernias were supported by objective findings from the June 20, 2014 medical records and his August 2014 examination, and he had an accurate understanding of claimant's work activities and onset of symptoms. Accordingly, the ALJ set aside the employer's denial.

On review, the employer contests the ALJ's legal and medical causation findings.<sup>1</sup> For the following reasons, we agree with the ALJ's conclusions.

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<sup>1</sup> The parties do not dispute the ALJ's determination that claimant's claim was for an "injury," rather than an "occupational disease."

Claimant must prove both legal and medical causation by a preponderance of the evidence. *Harris v. Farmer's Co-op Creamery*, 53 Or App 618, *rev den*, 291 Or 893 (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). To establish medical causation, claimant must show that his alleged work injury was at least a material cause of the disability or need for treatment. ORS 656.005(7)(a); ORS 656.266(1); *Albany Gen. Hosp. v. Gasperino*, 113 Or App 411, 415 (1992).

Whether claimant established legal causation hinges principally on his credibility/reliability. Because the ALJ did not make a demeanor-based credibility finding, and because the issue of credibility concerns the substance of claimant's testimony, we are equally qualified to make our own credibility determination. *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); *Coastal Farm Supply v. Hultberg*, 84 Or App 282, 285 (1987); *Michael A. Ames*, 60 Van Natta 1324, 1326 (2008). However, even if a claimant lacks credibility or reliability in certain respects, he can still prove compensability if the remainder of the record supports the claim. *See Westmoreland v. Iowa Beef Processors*, 70 Or App 642 (1984), *rev den*, 298 Or 597 (1985); *Tammi-Jo Fritz*, 67 Van Natta 840 (2015).

The employer asserts that the inconsistencies between claimant's identification of the dates of the work injury/events and items lifted, as well as the inconsistencies in his symptoms, and other portions of the record, diminish his reliability regarding the claimed work injury.

We acknowledge that some of claimant's descriptions of the dates of his work injury/events and symptoms were inconsistent. However, as explained below, we do not find such inconsistencies sufficient to defeat his injury claim.

For example, the employer notes that claimant first sought treatment with Dr. Harrison on June 20, 2014, for complaints of *left* lower quadrant pain for two months, and reported experiencing right lower quadrant pain after heavy lifting about three days before the examination (*i.e.*, June 17, 2014). (Exs. 2A, 21-2). Yet, on July 1, 2014, Dr. Harrison noted claimant's history of the onset of *right* abdominal pain on June 19, 2014. (Ex. 13-1). According to the employer, claimant's symptoms "changed," from left-sided to right-sided, only after he was

aware of a June 20, 2014 CT scan that revealed a right inguinal hernia. However, Dr. Harrison acknowledged that claimant complained of right-sided symptoms, and that he clinically assessed a right inguinal hernia on June 20, which was *before* claimant was aware of the CT scan results.<sup>2</sup> (Exs. 21, 25-7-10, -31-36).

Moreover, Dr. Harrison testified that claimant's work did not cause an inguinal hernia given his "changing symptoms." (Ex. 25-19-20). In particular, Dr. Harrison believed that claimant initially sought treatment on June 20 primarily for *left* lower quadrant pain, and that the *right*-sided pain was a minor issue, and not the reason he sought treatment that day. (Ex. 25-10, -31-32). He further noted that, on July 1, 2014, "[claimant] reported that he *never* had left-sided pain to begin with." (Ex. 25-33) (emphasis added). Nevertheless, despite his concession that claimant *did* complain of right-sided symptoms on June 20, and even after reading his July 1 chart note that claimant "reports to me that the pain has never been severe in the left lower quadrant, but that it has always been in the right lower quadrant," Dr. Harrison still felt that claimant changed his story regarding his symptoms. (Ex. 25-32-33; *see* Ex. 13-1). Yet, Dr. Harrison acknowledged that he did not ask claimant to clarify any discrepancy about the varying dates of onset of right-sided symptoms. (Ex. 21-2-3).

The employer also contends that claimant described lifting heavy mulch "about three days" before his June 20, 2014 examination with Dr. Harrison, lifting a swimming pool on June 20 after his appointment, and pushing a heavy cart of trees, lifting a swimming pool, and heavy mulch the day before he sought emergency treatment on June 26, 2014. (*See* Exs. 2A, 3, 6, 11, 13, 14, 15). However, Dr. Harrison did not ask claimant to clarify any particulars about what or where he had engaged in heavy lifting, "unless that was what [claimant] was referring to as heavy lifting on the 20th, but that was not ever specified in that detail on the 20th." (Exs. 21-3, 25-7, -12-13). Claimant also testified, when asked if he told Dr. Harrison about his lifting activities, that he told Dr. Harrison that he had been lifting, as he always lifted at work. (Tr. 12). Claimant further explained that, at the emergency room, he did not know what was wrong with him and that he described his work activities to the examiners. (Tr. 18). Finally, claimant's wife corroborated that claimant described his work duties to the emergency room providers. (Tr. 40).

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<sup>2</sup> Furthermore, Dr. Harrison's own June 20, 2014 chart note corroborated claimant's complaints of right-sided pain, and Dr. Harrison obtained an abdominal CT scan to assess claimant's right and left lower quadrant pain. (Exs. 2, 2A).

After reviewing the record, we agree with the ALJ's reasoning and conclusion that the employer's records revealed that claimant had been involved in the described work activities within the discrete period he reported, and that no reason other than these activities was identified for his seeking treatment. Moreover, despite inconsistencies about the exact dates and sequence that claimant engaged in these lifting activities, other evidence explains such inconsistencies.

For example, Dr. Bower treated claimant before his alleged June 2014 work injury events and was familiar with his thought process. (Exs. A-1, 18-1, 22-3, 26-1). According to Dr. Bower, claimant has "a slow, non-linear, thought process" and has difficulty recalling details. (Ex. 26-1). He explained that, "after allowing [claimant] sufficient time to tell you, at his pace and organization, about his symptoms, [Dr. Bower was] able to get a cogent history from him about his hernias." (*Id.*) He further reasoned that claimant's "thought process is such that he does not appreciate details that would likely be important to an insurance adjuster when reviewing a physician's history." (Ex. 26-2). After questioning and listening to claimant, Dr. Bower reported that claimant first experienced pain in his right groin when loading several bags of mulch at work. (*Id.*) Dr. Bower was also aware of claimant's history of lifting a large swimming pool and pushing carts of trees, which increased his symptoms. (*Id.*)

Dr. Bower's explanation of claimant's thought process is corroborated in the record. For example, claimant testified that he had already planned to see Dr. Harrison on June 20, 2014 for a general physical and to discontinue pain medication because it was causing confusion problems. (Tr. 12, 24). He also testified that he lifted mulch "a few days" before he sought treatment with Dr. Harrison on June 20, but sought treatment "the next day," and that the lifting event was "one day" earlier. (Tr. 10-11, 23-26). Additionally, Dr. Harrison considered claimant a "vague" historian regarding when events happen. (Ex. 25-16-17). Similarly, Dr. Blumberg found claimant's history to be confusing as to the date and location of the injury, and considered him to be a "redundant historian." (Ex. 23-1).

Based on the foregoing reasons, in addition to those expressed in the ALJ's order, we do not consider claimant's history to be inconsistent to a degree that causes us to find his historical reporting unreliable. Therefore, we are persuaded that claimant has established legal causation. *See Harris*, 53 Or App at 621; *George L. Gottbehuet*, 64 Van Natta 63, 66 (2012) (in cases where the claim is based on physical exertion, a showing of unusual exertion is not required; the usual exertion of a claimant's regular job is sufficient to establish legal causation).

We turn to the issue of medical causation. The employer contends that Dr. Bower's opinion was based on an inaccurate history because he relied on claimant's inconsistent descriptions of the dates/sequences of his lifting activities at work and onset of symptoms. For the reasons explained above, we disagree with those contentions.

Dr. Bower noted that the medical records all contained similar histories of claimant experiencing right-sided abdominal/groin pain after lifting bags of mulch shortly before June 20, 2014, and increased pain after lifting a swimming pool a few days later. (Ex. 26-2-5). Based on his experience with diagnosing and treating hernias, Dr. Bower opined that lifting mulch bags, as claimant described, is the type of heavy work that can cause either type of hernia (*i.e.*, umbilical or inguinal) that claimant has. (Ex. 26-3). He further explained that, based on his experience as a general surgeon and taking "hundreds" of histories concerning hernia development, as well as generally accepted medical literature, he disagreed with Dr. Blumberg's opinion that claimant's work did not contribute to or cause the hernias. (*Id.*)

Dr. Bower further noted that Dr. Blumberg's conclusion that claimant had simple abdominal defects appeared to be based on the fact that he was unable to verify the presence of either an umbilical or inguinal hernia by clinical examination, whereas Dr. Bower confirmed findings of incarcerated umbilical and inguinal hernias at his August 4, 2014 examination that he could not reduce, which were both "hernias, not simple defects." (Ex. 26-3). Based on the history obtained from claimant, his own physical examination findings, review of the medical records and histories contained therein, and considering all other possible causes, Dr. Bower opined that claimant's lifting activity on or about June 17, 2014, was a material contributing cause of his right inguinal hernia and umbilical hernia, and the need for treatment of those conditions. (Ex. 26-5).

The employer also argues that Dr. Bower's opinion is unpersuasive because he did not rebut Dr. Blumberg's contrary medical opinion. However, for the reasons noted above, we find that Dr. Bower addressed and persuasively explained his disagreement with Dr. Blumberg's conclusions.

Furthermore, we do not consider Dr. Blumberg's opinion to be based on an accurate history. For example, he believed that claimant's initial complaints following his alleged work injury/events were on the left, rather than the right, and that his complaints migrated to the right after the discovery of the right-sided inguinal hernia on the CT scan. (Ex. 27-2). Yet, as previously noted, the medical

reports on and shortly after June 20, 2014 documented claimant's complaints of right-sided symptoms, and that he complained of right-sided symptoms before he was aware of the results of the CT scan.<sup>3</sup> (*See* Exs. 2, 2A, 7-1, 13-1, 25-7-10, -31-33). Because Dr. Blumberg's opinion is premised on an inaccurate history concerning claimant's complaints, we discount his opinion. *See Somers v. SAIF*, 77 Or App 259 (1986) (medical opinion that is based on inaccurate and incomplete information is not persuasive).

Moreover, because Dr. Blumberg's opinion was based, in part, on his conclusion that claimant was not credible/reliable regarding his descriptions and dates of his work injury/events, and because we have found that a preponderance of the evidence establishes that claimant was injured at work as described, we find Dr. Blumberg's opinion to be less persuasive than that of Dr. Bower. *Julia Rodriguez*, 63 Van Natta 1744, 1748 (2011) (medical opinion based, in large part, on the physician's conclusion that the claimant was not credible given less weight where the claimant was found to be credible).<sup>4</sup>

Based on the foregoing reasons, in addition to those expressed by the ALJ, we agree that Dr. Bower's opinion persuasively establishes the compensability of claimant's injury claim for his hernia conditions. ORS 656.005(7)(a); ORS 656.266(1); *Jackson County v. Wehren*, 186 Or App 555, 560 (2003); *Gasperino*, 113 Or App at 415; *Somers*, 77 Or App at 263. 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 issue, we find that a reasonable fee for claimant's attorney's services on review is \$3,500, 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 issues, the value of the interests involved, and the risk that claimant's counsel might go uncompensated.<sup>5</sup>

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<sup>3</sup> Dr. Harrison's June 20, 2014 chart note also indicated that the diagnosed right inguinal hernia explained claimant's discomfort with lifting and pressure in the right groin area. (Ex. 2A-3).

<sup>4</sup> For similar reasons, we do not find the opinion of Dr. Harrison, who concurred with Dr. Blumberg's January 2015 opinion, to be persuasive.

<sup>5</sup> Claimant's attorney did not provide an attorney fee submission or statement of services, an estimate of time spent, any evaluation of the factors to be considered as set forth in OAR 438-015-0010(4) as specifically applied to this case, or suggest an amount that would be a reasonable assessed attorney fee.

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 Gettman*, 60 Van Natta 2862 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

### ORDER

The ALJ's order dated December 14, 2015 is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$3,500, 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 July 25, 2016