
In the Matter of the Compensation of
MIKE S. PARTRIDGE, Claimant
WCB Case No. 15-01439
ORDER ON REVIEW
Murphy & Buchal, Claimant Attorneys
Sather Byerly & Holloway, Defense Attorneys

Reviewing Panel: Members Lanning, Johnson, and Somers.

Claimant requests review of Administrative Law Judge (ALJ) Wren's order that upheld the self-insured employer's denials of claimant's new/omitted occupational disease claim for right carpal tunnel syndrome (CTS) and cubital tunnel syndrome conditions. On review, the issue is compensability.¹

¹ Noting that the ALJ who wrote the order had replaced the ALJ who had convened the hearing, claimant requests remand for a further hearing. Yet, claimant raised no objection after the hearing was held and the parties were notified that the current ALJ would be presiding over this proceeding. To the contrary, claimant acknowledged that credibility was not an issue and that the compensability dispute could be resolved by the current ALJ. Under such circumstances, we do not consider the record to be improperly, incompletely, or otherwise insufficiently developed. ORS 656.295(5). Therefore, remand is not warranted.

Claimant also seeks remand for the cross-examination of Dr. Buehler. Although claimant initially requested the opportunity to cross-examine Dr. Buehler, he subsequently waived that request. (Tr. 5). Thus, there is no compelling reason to remand for the presentation of additional evidence.

Further, claimant alleges that this case presents an issue of first impression. While a case presenting an issue of first impression may merit *en banc* review as a "significant case," such a designation is not a basis for remanding a case to the ALJ for further development of the record. Rather, such a designation is a matter for the reviewing panel to make based on their review of a particular record. See, e.g., *Mary C. Green-Kilburn*, 58 Van Natta 46, 46 n 1 (2006); *Earl L. Howard, Sr.*, 56 Van Natta 2421, 2421 (2004); *Brian W. Andrews*, 48 Van Natta 2532, 2532 (1996). After reviewing this record and the parties' arguments, we do not consider this case to present issues of first impression.

Finally, claimant seeks administrative notice of internet materials, concerning the rate of carpal tunnel injuries for particular occupational categories, as well as the physical demands for assembling pallets for loading onto semi-trucks. Noting that these materials were not admitted as evidence at the hearing, the insurer moves to strike them. Claimant offers no explanation concerning why such materials could not have been offered as evidence at hearing. Furthermore, such information is not the type to which we take administrative notice. See *Groshong v. Montgomery Ward Co.*, 73 Or App 403 (1985) (Board may take administrative notice of facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."); *Adalid A. Gutierrez*, 68 Van Natta 728, 728 n 1 (2016) (Board declined to take administrative notice of internet articles because such a submission was not of the type to take administrative notice). Consequently, we have not considered those portions of claimant's appellant's brief that refer to the extraneous material.

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

In upholding the employer's denials, the ALJ found that claimant had not established the existence of the claimed conditions or that his work activities were the major contributing cause of those conditions.

On review, claimant argues that the record establishes the existence and the compensability of his claimed new/omitted medical conditions. For the following reasons, we disagree with claimant's contention.

To establish compensable new/omitted medical conditions, claimant must prove that employment conditions that gave rise to the original accepted occupational disease claim were the major contributing cause of the claimed conditions. ORS 656.266(1); ORS 656.802(2)(a); *Lori M. Lawrence*, 60 Van Natta 727, 728 (2008); *Maureen Y. Graves*, 57 Van Natta 2380, 2381 (2005) (proof of existence of the condition is a fact necessary to establish the compensability of a new/omitted condition). Determination of the major contributing cause is a complex medical question that must be resolved on the basis of expert medical opinion. *Jackson County v. Wehren*, 186 Or App 555, 559 (2003) (citing *Uris v. Comp. Dep't*, 247 Or 420, 426 (1967)). In evaluating the medical evidence, we rely on those opinions that are both well reasoned and based on accurate and complete information. *Somers v. SAIF*, 77 Or App 259, 263 (1986).

Carpal Tunnel Syndrome

Claimant contends that the record establishes the existence and compensability of his right CTS condition. However, even assuming that he has proven the existence of his CTS condition, we are not persuaded that claimant's work activities were the major contributing cause of his CTS condition.

Dr. Vu took a history from claimant that he "does everything in the warehouse, operating a whole bunch of different type of [equipment], heavy labor type as well as a lot [of] repetitive use of his upper extremities[.]" (Ex. 11-1). Initially, she concluded that, based on claimant's presentation and occupational exposure of working in a warehouse for the last 17-18 years, he probably had work-related CTS. (Ex. 11-2). However, on review of subsequent nerve conduction studies, she determined that the CTS electrodiagnostics had been "ruled out," but that claimant "may" still have CTS symptoms. (Ex. 16).

Dr. Vu did not offer another causation opinion after reviewing the electrodiagnostic studies and determined that it was only "possible" that claimant had CTS symptoms. See *Gormley v. SAIF*, 52 Or App 1055 (1981) (persuasive

medical opinions must be based on medical probability, rather than possibility). Moreover, she did not review any additional work up, including claimant's second electrodiagnostic study, or other medical opinions. *See Somers*, 77 Or App 263. Finally, she did not explain her opinion that claimant's work activities were the major contributing cause of his condition. *See Moe v. Ceiling Systems, Inc.*, 44 Or App 429, 433 (1980) (rejecting unexplained or conclusory medical opinions). Under such circumstances, we consider her opinion to be unpersuasive.

Dr. Buehler reported that claimant is a right-hand dominant warehouseman who performs "a lot of lifting of freight" at work. (Ex. 22). Dr. Buehler opined that claimant probably had CTS, and that his "work injury/activities" were the "major cause" of that condition. (Ex. 39A-1). However, he then recommended repeat electrodiagnostic studies, which he interpreted to be negative. (Ex. 41). Thereafter, he was "at [a] loss" to explain claimant's discomfort, and agreed with the employer's plan for further examination. (Ex. 43). Subsequently, Dr. Buehler reviewed and concurred with Dr. Bell's opinion, which concluded that claimant did not have CTS and, even if he did, it was unrelated to his work activities. (Exs. 47, 52).

Notwithstanding these comments, Dr. Buehler subsequently performed right carpal tunnel and cubital tunnel releases, which resulted in claimant's symptoms largely resolving. (Exs. 54, 57). Finally, based solely on a summary of Dr. Vu's September 2014 opinion that claimant's occupational exposure was the probable cause of his CTS condition, Dr. Buehler opined that claimant's work was the primary cause of his CTS. (Exs. 60, 61).

We consider Dr. Buehler's subsequent conclusory opinion to represent an unexplained change of opinion (where he had agreed with Dr. Bell's opinion that neither supported a CTS diagnosis nor its relationship to claimant's work activities). Specifically, Dr. Buehler did not provide any reasoning as to what was contained within Dr. Vu's "initial" opinion to reasonably explain his apparent change of opinion. In the absence of further explanation, we consider Dr. Buehler's mention of Dr. Vu's "initial" opinion to be an insufficient ground to substantiate Dr. Buehler's change of opinion. *See Moe*, 44 Or App at 433; *Francisco R. Mejia*, 61 Van Natta 1265, 1268, *recons*, 61 Van Natta 2005 (2009) (no reasonable explanation for changed opinion where a physician did not explain the change, and the record did not establish that the physician received "new information" that otherwise might explain the changed opinions). Consequently, Dr. Buehler's opinion does not persuasively establish the compensability of the CTS condition.

Claimant contends that we should give deference to Dr. Buehler's opinion as his treating surgeon. Yet, Dr. Buehler did not rely on those surgical findings in rendering his causation opinion. (Exs. 39A-1, 60, 61). Under such circumstances, his opinion is not entitled to special deference as the attending surgeon. *See Argonaut Ins. Co. v. Mageske*, 93 Or App 698, 702 (1988) (special deference given to treating surgeon's opinion relying on surgical observations); *Brent Nowland*, 67 Van Natta 2016, 2020 (2015) (no special deference accorded to a treating surgeon's opinion that is not based on surgical findings).

In contrast, Dr. Bell concluded that claimant's work activities were not the major contributing cause of claimant's CTS condition, if present. (Ex. 47). Specifically, she determined that the occupational duties were varied, including use of the scanning gun, power jacks, and manual lifting. (Ex. 47-11). She explained that claimant did not describe activities requiring exposure to vibration, high force gripping on a repetitive basis, or sustained hyperextension or flexion of the wrist, which would be consistent with a greater risk to develop CTS. (*Id.*) In addition, Dr. Bell indicated that claimant was obese, which contributed to this CTS condition. (*Id.*)

Neither Dr. Vu nor Dr. Buehler responded to Dr. Bell's opinion that claimant's work activities were inconsistent with the types of activities causative of CTS, and that claimant's obesity was a contributing cause. In the absence of a persuasive response to Dr. Bell's explanation, we further discount their opinions. *See Nancy C. Prater*, 60 Van Natta 1552, 1556 (2008).

Furthermore, we conclude that Dr. Bell's well-reasoned opinion provided the most thorough analysis (in contrast with the conclusory opinions of Drs. Vu and Buehler), and was based on a complete and accurate work and medical treatment history. Under such circumstances, we conclude that her opinion is most persuasive. *Somers*, 77 Or App at 263.

Consequently, based on the aforementioned reasoning, the record does not persuasively support the compensability of the claimed right CTS condition. Accordingly, we affirm the ALJ's decision upholding the employer's denial.

Cubital Tunnel Syndrome

Claimant contends that the record establishes the existence and compensability of his right cubital tunnel syndrome condition. However, even assuming that he has proven the existence of his cubital tunnel syndrome condition, we are not persuaded that claimant's work activities were the major contributing cause of his cubital tunnel syndrome condition.

Dr. Bell concluded that claimant did not have the condition and that, even if he did, it was unrelated to his work. (Ex. 47). After taking a detailed history, Dr. Bell explained that cubital tunnel syndrome was almost always due to idiopathic factors unless there was some specific aspect of a work activity that caused repeat direct pressure or blows to the medial elbow. (Ex. 47-11, -12). Dr. Bell concluded that claimant's work activities were inconsistent with causing his claimed cubital tunnel syndrome condition. (*Id.*) For the reasons we have previously expressed, we consider Dr. Bell's opinion to be persuasive.

Dr. Buehler initially opined that claimant's work activities were the "major cause" of the cubital tunnel syndrome condition. (Ex. 39A-1).

Dr. Buehler then changed his opinion and concurred with Dr. Bell's opinion. (Ex. 52). However, he subsequently reviewed claimant's summary of Dr. Vu's September 2014 opinion that attributed claimant's CTS condition to his warehouse activities. (Exs. 60, 61). Based on this "new information from Dr. Vu," he agreed that claimant's work was the primary cause of his right cubital tunnel syndrome. (*Id.*)

Neither Dr. Vu's September 2014 opinion, nor claimant's summary, appears to address the cause of claimant's cubital tunnel syndrome. Although claimant's letter to Dr. Buehler also referenced a copy of his "warehouse worker" job description, Dr. Buehler did not discuss this description in offering his subsequent opinion. Thus, the record does not persuasively establish that Dr. Buehler's apparent change of opinion was based on any "new" information related to the cubital tunnel syndrome condition. In the absence of a reasonable explanation for such a change, we do not consider Dr. Buehler's opinion to be persuasive. *See Ruslan V. Golubchik*, 56 Van Natta 2642, 2644 (2004) (change of opinion not based on any "new" information found unpersuasive).

Consequently, the record does not persuasively establish the compensability of the claimed cubital tunnel syndrome. Accordingly, we also affirm the ALJ's decision to uphold the employer's denial of this claimed condition.

ORDER

The ALJ's order dated October 6, 2015 is affirmed.

Entered at Salem, Oregon on July 21, 2016