
In the Matter of the Compensation of
SCOTT HANDS, Claimant
WCB Case No. 15-01743
ORDER ON REVIEW
Hitt Hiller Monfils Williams, Claimant Attorneys
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Reviewing Panel: Members Johnson, Lanning and Somers. Member Johnson dissents.

The self-insured employer requests review of Administrative Law Judge (ALJ) Mills's order that set aside its denial of claimant's occupational disease claim for a mid/upper back condition. On review, the issue is compensability.

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

Claimant began working for the employer as a dock worker in June 2006. (Tr. 4-6). He primarily unloads/reloads trailers using a forklift, but occasionally physically lifts up to one hundred pounds. (Tr. 6-7). Driving the forklift requires him to turn and look over his right shoulder while controlling the steering wheel with his left hand. (Tr. 8-9). Before this work, he performed similar duties with a different employer for eight years. (Tr. 5).

Claimant developed mid-back pain approximately two years before seeking chiropractic care in August 2013. (Ex. A-1). In February 2014, thoracic spine x-rays showed mild to moderate levothoracic curvature and accentuated thoracic kyphosis. (Ex. B-2). Claimant subsequently had an MRI, which showed minimal to mild thoracic levoscoliosis and disc protrusions from T6 to T9. (Ex. 1A).

In March 2014, claimant began treating with Dr. Swartzman, who diagnosed left-sided mid-scapular back pain, present for 15 years, attributable to claimant's repetitive movements driving a "truck/vehicle." (Ex. 1-2, -5).

In April 2014, claimant treated with Dr. Moody, who "suspect[ed] that this [was] primarily due to repetitive motion given the strenuous nature of his daily work in combination with light native curvature of the spine." (Ex. 1-10). Dr. Moody had a history of "back pain – heavy lifting due to work/mid back area," and that claimant "performed heavy labor on a daily basis." (Ex. 1-10-11).

In December 2014, claimant consulted with Dr. Sauvain, occupational medicine physician, who diagnosed caudal neutral scoliosis and noted that the “causal streams” were “unclear.” (Ex. 1-32). She concluded that claimant had severe steering-related mid-thoracic pain. (Ex. 1-36). Dr. Sauvain ultimately opined that claimant had a chronic overuse injury to the soft tissues of the left periscapular region with muscle spasm related in major part to his repetitive work activities. (Ex. 48-2).

In January 2015, Dr. Mallet (formerly Dr. Swartzman) diagnosed a “chronic overuse injury that appear[ed] to be related to [claimant’s] work” and a suspected subscapular bursitis. (Ex. 1-40). She later clarified that claimant’s work exacerbated his symptoms, but she could not state that his work exposure was the major contributing cause of his scapular bursitis/need for treatment. (Ex. 45).

Subsequently, claimant treated with Dr. Pederson, who diagnosed a disordered scapular function, which he considered “possibly” related to work. (Ex. 1-44). Dr. Pederson later clarified that claimant had scapular winging and not a bursal condition. (Ex. 49-1). He was “unable to state whether or not [claimant’s] overall work exposure” with the employer was the major contributing cause of his scapular winging. (Ex. 49-2).

In February 2015, claimant treated with Dr. Mohabeer, occupational medicine physician, who noted that claimant had an “injury” described as a thoracic sprain, which resulted from repetitive work activities. (Ex. 2).

Claimant’s claim was denied on April 3, 2015. (Exs. 3, 6, 24, 35). He timely appealed that denial.

In June 2015, claimant began treating with Dr. Kafrouni, physical medicine and rehabilitation specialist, who noted claimant’s work activities of looking over his right shoulder while driving a forklift. (Ex. 44-1). Dr. Kafrouni later clarified that he diagnosed thoracic myofascial pain and chronic dystonic muscle firing conditions, caused by the postural demands of claimant’s work activities. (Ex. 47-2). He related claimant’s conditions in major part to his prolonged spinal rotation over the last two decades. (Ex. 47-3)

In July 2015, Dr. Toal, orthopedist, examined claimant at the employer’s request. (Ex. 46). He opined that the deformity (consistent with upper back pain) was likely idiopathic and associated with claimant’s scoliosis. (Ex. 46-10). He concluded that claimant’s work activities were not the major contributing cause of his need for treatment and he did not identify work-related pathology. (Ex. 46-12).

In September 2015, Dr. Mohabeer opined that the etiology of claimant's pain was a combination of his preexisting hyperkyphosis and work activities. (Ex. 50-1). He ultimately agreed with Dr. Toal's opinion. (*Id.*)

In October 2015, Dr. Kafrouni agreed that claimant did not have scapular bursitis or winging. (Ex. 50A-1, -3). He explained that, while claimant had thoracic scoliosis and hyperkyphosis, he saw many patients that had those conditions and were without pain. (Ex. 50A-2). Consequently, Dr. Kafrouni concluded that the major contributing cause of claimant's myofascial pain with chronic dystonic muscle firing was due to the postural demands of his work. (Ex. 50A-3).

Dr. Toal disagreed that claimant's "thoracic myofascial pain syndrome" was due to posture, or that he had chronic dystonic muscle firing. (Ex. 52-1). Even if claimant had those conditions, he attributed them to claimant's underlying thoracic kyphosis. (Ex. 52-2). Dr. Toal reasoned that there were no studies documenting chronic upper back conditions among drivers due to occupational exposure. (Ex. 52-1).

CONCLUSIONS OF LAW AND OPINION

In setting aside the employer's denial, the ALJ determined that Dr. Kafrouni's opinion persuasively established that claimant's work was the major contributing cause of his condition. On review, the employer contends that the opinions of Drs. Toal and Mohabeer are more persuasive than that of Dr. Kafrouni. Based on the following reasoning, we disagree.

To establish the compensability of his occupational disease claim, claimant must show that employment conditions were the major contributing cause of the disease. ORS 656.266(1); ORS 656.802(2)(a). The major contributing cause is the cause, or combination of causes, that contributed more than all other causes combined. *Bowen v. Fred Meyer Stores*, 202 Or App 588, 563-64 (2005), *rev den*, 341 Or 140 (2006).

Because the causation inquiry presents a complex medical question, it must be resolved by expert medical evidence. *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).

As stated above, there are several opinions pertaining to the compensability of claimant's back condition.¹

We agree with the ALJ's conclusion that Dr. Kafrouni's opinion is the most persuasive. Dr. Kafrouni reviewed and persuasively rebutted the opinions of Drs. Toal and Mohabeer. (Ex. 50A). He also persuasively weighed the contributions from claimant's scoliosis, hyperkyphosis and work activity, and explained that, while his preexisting conditions may be contributing to his condition (*i.e.*, myofascial pain with chronic dystonic muscle firing), the work activity was the major contributing cause of his condition. (*Id.*) He further reasoned that many of his patients had scoliosis and hyperkyphosis, and lived ordinary lives without pain. (Ex. 50A-2).

¹ Dr. Sauvain initially diagnosed caudal neutral scoliosis and indicated that the causal streams were "unclear." (Ex. 1-32, -36). However, she subsequently diagnosed an "overuse injury to the soft tissues of the left periscapular region with muscle spasm." (Ex. 48-2). She noted that claimant had reproducible symptoms with work activity motions on examination. (*Id.*) Yet, Dr. Sauvain did not explain why she no longer diagnosed scoliosis. *Cf. Kelso v. City of Salem*, 87 Or App 630, 634 (1987) (where there was a reasonable explanation in the record for a physician's change of opinion, that opinion was persuasive). Moreover, Dr. Sauvain did not weigh claimant's documented kyphosis. *See Dietz v. Ramuda*, 130 Or App 397, 401 (1994), *rev dismissed*, 321 Or 416 (1995) (the medical evidence supporting the disputed claim must consider the relative contribution of the different causes to determine the primary cause); *Linda E. Patton*, 60 Van Natta 579, 581 (2008) (same). Consequently, we find her opinion unpersuasive.

Dr. Mallet (Swartzman), diagnosed subscapular bursitis, but could not state whether claimant's work was the major contributing cause of his underlying condition. (Ex. 45). However, Drs. Toal, Pederson, and Kafrouni persuasively established that claimant does not have that condition. (Exs. 46, 49, 50A). Dr. Mallet did not respond to the criticisms offered by Drs. Toal, Pederson, and Kafrouni. *See Janet Benedict*, 59 Van Natta 2406, 2409 (2007), *aff'd without opinion*, 227 Or App 289 (2009) (medical opinion unpersuasive when it did not address contrary opinions). Moreover, she was unable to render a conclusion as to the major contributing cause of claimant's condition. For these reasons, we find her opinion unpersuasive.

We likewise find Dr. Pederson's opinion unpersuasive because, he too, was unable to state whether claimant's work activities were the major contributing cause of his condition. (Ex. 49).

Finally, although Dr. Moody "suspected" that claimant's "back pain" was primarily due to heavy lifting, his opinion is not phrased in terms of medical probability and it focused on claimant's symptoms rather than the cause of his condition. (Ex. 1-10, -11). Consequently, we consider his opinion insufficient to establish compensability of claimant's back condition. *See Gormley v. SAIF*, 52 Or App 1055, 1060

(1981) (persuasive medical opinions must be based on medical probability, rather than possibility); *see also Tammy L. Foster*, 52 Van Natta 178 (2000) (to establish a compensable occupational disease claim, work activities must be the major contributing cause of the disease itself, not just disability or need for treatment).

In contrast, Dr. Toal concluded that claimant did not have chronic dystonic muscle firing because, on physical exam, the muscles in the upper back were supple and showed no spasm, increased tone or pathological “firing.” (Ex. 52). However, many physicians documented claimant’s muscle spasm on examination. (Exs. 7, 29, 48). Moreover, although he disagreed with Dr. Kafrouni’s opinion that claimant’s “myofascial pain” was due to the postural demands of his employment, Dr. Toal relied on medical literature without sufficiently applying that information directly to claimant’s particular circumstances. *See Sherman v. Western Employer’s Ins.*, 87 Or App 602 (1987) (physician’s comments that were general in nature and not addressed to the claimant’s situation in particular were not persuasive); *Sara Mason*, 58 Van Natta 1018, 1019 (2006) (medical evidence grounded in statistical analysis was not persuasive because it was not sufficiently directed to the claimant’s particular circumstances). Under such circumstances, we consider Dr. Toal’s opinion unpersuasive.

Dr. Mohabeer initially concluded that claimant had a thoracic sprain from repetitive work activities. (Ex. 2). However, without providing an explanation, he subsequently changed his opinion and determined that claimant’s hyperkyphosis was probably the major contributing cause and concurred with Dr. Toal. (Ex. 50). We consider Dr. Mohabeer’s unexplained change of opinion unpersuasive. *Cf. Kelso*, 87 Or App at 634.

In sum, after reviewing claimant’s testimony and the medical record, we conclude that Dr. Kafrouni’s well-reasoned and thorough opinion supporting the compensability of claimant’s condition is most persuasive.² *See Somers*, 77 Or App at 263. Accordingly, based on the aforementioned reasoning, and that expressed in the ALJ’s order, the record persuasively establishes that claimant’s work activities were the major contributing cause of his claimed back condition. Therefore, we affirm.

² We acknowledge the dissent’s contention that Dr. Kafrouni’s opinion referred to claimant’s need for treatment/disability rather than the cause of his condition. However, when asked about claimant’s work-caused condition, Dr. Kafrouni responded that he had “thoracic myofascial pain due to posture” and “chronic dystonic muscle firing due to postural demands.” (Ex. 47-2). Moreover, Dr. Kafrouni explained that those medical conditions were caused in major part by claimant’s two decades of forklift work. (Ex. 47-3). Consequently, we consider Dr. Kafrouni’s opinion to have considered the cause of claimant’s condition.

In addition, we acknowledge the dissent’s assertion that Dr. Kafrouni did not respond to Dr. Toal’s criticisms. However, as previously stated, Dr. Toal’s opinion was unpersuasive because it was based on medical literature without sufficiently applying that information directly to claimant’s particular circumstances. Under such circumstances, a rebuttal opinion is unnecessary. *See Steven L. Blanchard*, 60 Van Natta 453, 454 (2008) (despite lack of rebuttal to a contrary opinion, physician’s opinion was considered persuasive because the contrary medical opinion was internally inconsistent).

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 \$4,000, 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), the complexity of the issue, the value of the interest involved, and the risk that counsel may go uncompensated.

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).

ORDER

The ALJ's order dated November 24, 2015 is affirmed. For services on review, claimant's attorney is awarded \$4,000, 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 the employer.

Entered at Salem, Oregon on July 8, 2016

Member Johnson dissenting.

In finding claimant's mid/upper back condition compensable, the majority relies on the opinion of Dr. Kafrouni. Because I find the opinions of Drs. Toal and Mohabeer more persuasive, I respectfully dissent.

There are several opinions pertaining to the compensability of claimant's back condition.³

Dr. Kafrouni weighed the contributions from claimant's scoliosis and hyperkyphosis to determine that the postural demands of his work activities were the major contributing cause of his disability and need for treatment of myofascial pain with chronic dystonic muscle firing. (Ex. 50A). He based his opinion on the fact that many of his patients had scoliosis and hyperkyphosis, and lived ordinary lives without pain. (Ex. 50A-2).

³ I agree with the reasons expressed by the majority that the opinions of Drs. Mallet (Swartzman), Pederson, Moody, and Sauvain are unpersuasive.

Dr. Toal responded to Dr. Kafrouni's opinion. (Ex. 52). He concluded that claimant did not have chronic dystonic muscle firing because, on physical exam, the muscles in the upper back were supple and showed no spasm, increased tone or pathological "firing." (Ex. 52-1). Moreover, he disagreed with Dr. Kafrouni's opinion that claimant's "myofascial pain" was due to the postural demands of his employment. (*Id.*) Rather, even if claimant had either of those conditions, Dr. Toal considered them related to claimant's underlying thoracic kyphosis, which he explained produced a positive sagittal imbalance, with his head and neck well forward of the midline of his body, leading to tension and pain in the upper back and neck muscles. (Ex. 52-2).

In reaching his conclusion, Dr. Toal compared claimant's particular work activities and situation with medical literature, explaining that there was no support for relating upper back conditions to occupational driving. (Ex. 52-1). However, he explained there was abundant literature documenting the effects of chronic thoracic kyphotic deformity causing muscular back pain and spinal degeneration, as in claimant's case. (*Id.*) Finally, he noted (consistent with claimant's testimony) that claimant continued to have back symptoms regardless of his prolonged absence from work, which he reasoned was inconsistent with the conclusion that claimant's postural work demands were the major contributing cause of his condition. (Ex. 52-2, -3).

I consider Dr. Toal's well-reasoned and thorough opinion, as supported by Dr. Mohabeer, to be the most persuasive.⁴ *See Somers v. SAIF*, 77 Or App 259, 263 (1986). Moreover, because Dr. Kafrouni did not respond to Dr. Toal's criticisms, I consider his opinion to be unpersuasive. *See Janet Benedict*, 59 Van Natta 2406, 2409 (2007), *aff'd without opinion*, 227 Or App 289 (2009). Finally, Dr. Kafrouni's opinion is based on the major contributing cause of the "need for treatment/disability" rather than his back "condition," which is insufficient to establish claimant's burden of proof. (Ex. 50A); *see* ORS 656.266(1); ORS 656.802(2)(a).

⁴ Dr. Mohabeer initially noted that claimant had a thoracic sprain from repetitive work activities. (Ex. 2). However, after considering claimant's lack of improvement and Dr. Toal's opinion, he subsequently concluded that claimant's hyperkyphosis was probably the major contributing cause of claimant's condition and need for treatment and concurred with Dr. Toal. (Ex. 50). I interpret Dr. Mohabeer's statements as an evolving impression that reflected his ongoing consideration of alternative causes, rather than as a definitive determination of causation. Thus, rather than expressing irreconcilable positions or inconsistent conclusions suggesting a "change in opinion," I interpret Dr. Mohabeer's opinion as his ultimate resolution of the issue following further consideration and review of additional information. *See Richard A. Adams*, 54 Van Natta 2358, 2361 (2002). Therefore, Dr. Mohabeer's eventual opinion bolsters the persuasiveness of Dr. Toal's opinion.

Consequently, for these reasons, I would conclude that claimant has not proven the compensability of his mid/upper back condition. Therefore, I would reverse the ALJ's order that set aside the employer's denial. Accordingly, I respectfully dissent.