

In the Matter of the Compensation of  
**ROGER W. DENISON, Claimant**

WCB Case No. 15-03220

ORDER ON REVIEW

Bailey & Yarmo LLP, Claimant Attorneys  
SAIF Legal, Salem, Defense Attorneys

Reviewing Panel: Members Lanning, Curey, and Somers. Member Lanning dissents.

The SAIF Corporation requests review of Administrative Law Judge (ALJ) Jacobson's order that set aside its denial of claimant's occupational disease claim for a respiratory condition. On review, the issue is compensability. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact."

CONCLUSIONS OF LAW AND OPINION

Claimant worked at the employer's manufacturing plant from October 2012 through October 2014. (Tr. 10, 19). Previously, in 1988, claimant had been hospitalized for approximately a week and a half for pneumonia. (Tr. 13, 16). Additionally, in 2009, he filed a workers' compensation claim for "brewer's lung" in connection with his work for a previous employer, a brewery, for which he worked from 1994 through 2010. (Tr. 9; Ex. 18). The brewery's insurer denied his claim, and he did not appeal that denial. (Ex. 25).

In April 2015, claimant filed a claim for a respiratory condition, which SAIF denied. (Exs. 43, 44, 45, 46, 47, 60). Claimant requested a hearing.

The ALJ analyzed claimant's occupational disease claim under ORS 656.802(2)(b), as a claim involving the worsening of a preexisting asthma condition. Finding the opinion of Dr. Kelley, claimant's attending physician, most persuasive, the ALJ set aside SAIF's denial.

On review, SAIF contends that the medical evidence does not persuasively support claimant's occupational disease claim. Based on the following reasoning, we agree.

To prove the compensability of an occupational disease, claimant must prove that employment conditions were the major contributing cause of the disease. ORS 656.266(1); ORS 656.802(2)(a). If the occupational disease claim is based on the worsening of a preexisting disease or condition, claimant must prove that employment conditions were the major contributing cause of the combined condition and of the pathological worsening of the disease. ORS 656.266(1); ORS 656.802(2)(b). The “major contributing cause” is the cause, or combination of causes, that contributes more than all other causes combined. *Schleiss v. SAIF*, 354 Or 637, 644 (2013); *Sandra M. Garrett*, 68 Van Natta 892, 893 (2016). For the reasons discussed below, we find that claimant’s occupational disease claim is not compensable regardless of whether it is analyzed under ORS 656.802(2)(a) or ORS 656.802(2)(b).

Considering claimant’s history of respiratory conditions, the various potential contributing causes of the claimed respiratory condition, and medical evidence that there is insufficient information to attribute causation to employment conditions, the causation 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). 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). Although a treating physician’s opinion may be given greater weight because of a greater opportunity to observe the claimant’s condition over time, the weight given to the treating physician will depend on the record in each particular case. *Dillon v. Whirlpool Corp.*, 172 Or App 484, 489 (2001).

Dr. Kelley acknowledged claimant’s history of other respiratory conditions, but opined that claimant suffered from “obstructive asthma” as a result of exposure to fumes and particulates (specifically, polyethylene terephthalate (PET) and paper dust) while working for the employer. (Ex. 63-2). He reasoned that claimant’s current symptoms were primarily located in the throat, not the lungs, and were thus distinct from the respiratory problems from which claimant suffered while working at the brewery. (*Id.*) He also reasoned that claimant’s previous symptoms had resolved before work for the employer began and that claimant’s new symptoms arose while working for the employer and “largely subsided” after ceasing such work. (Ex. 63-3-4). He asserted that claimant’s preexisting asthma condition “would not have *caused* his current condition of ‘obstructive asthma.’” (Ex. 63-2) (emphasis original). He also acknowledged that claimant “may indeed have a

physiology that demonstrates a more extreme reaction to certain exposures or that makes him more ‘vulnerable’ to certain exposures,” but did not consider such to be a “true contributor to development of obstructive asthma.” (Ex. 63-3).

Dr. Kelley opined that employment conditions were the major contributing cause of claimant’s obstructive asthma condition. (Ex. 63-4). As explained below, we do not find his opinion persuasive.

The medical records do not support the history on which Dr. Kelley based his opinion. Claimant began working for the employer in October 2012. Although, in 2013, claimant had sought treatment for exacerbations of his asthma and was diagnosed with chronic sinusitis, he was first diagnosed with “obstructive asthma” in March 2014. (Exs. 27, 29, 32, 33, 34, 35). When Dr. Kelley treated claimant for obstructive asthma, his chart notes (and those of an examining nurse practitioner) consistently distinguished between that condition and the chronic sinus disease for which claimant was treating with another provider. (Exs. 35, 36, 37, 38, 39, 40, 41, 61). Moreover, as noted above, Dr. Kelley distinguished between the “obstructive asthma” condition, which he attributed to employment conditions, and claimant’s *preexisting* asthma condition. (Ex. 63-2). Thus, despite treatment for respiratory problems in 2013, the contemporaneous medical records do not substantiate claimant’s obstructive asthma condition until 2014, over a year after he began work for the employer.

Moreover, the chart notes following the October 2014 end of claimant’s employment do not corroborate the subsequent improvement that Dr. Kelley described in his ultimate causation opinion. To the contrary, in March 2015, Dr. Kelley described claimant’s obstructive asthma as “previously controlled overall though symptoms have been getting a little worse of late.”<sup>1</sup> (Ex. 41-1). In May 2015, he described an “acute exacerbation” of the obstructive asthma condition, which was “significantly debilitating to [claimant] with its progression over the last two years.” (Ex. 52-1). An improvement in claimant’s obstructive asthma was reported in July 2015. (Ex. 61-1).

Thus, Dr. Kelley’s premise, that claimant’s obstructive asthma began with working for the employer and substantially improved after the end of such work, is inconsistent with treatment records that indicated that the condition did not

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<sup>1</sup> In March 2015, Dr. Kelley suggested that the obstructive asthma could be related to claimant’s previous brewery work. (Ex. 41-1). As noted above, the brewery work had ended in 2010, and Dr. Kelley subsequently opined that claimant’s obstructive asthma was distinct from the respiratory condition from which claimant had suffered while working at the brewery.

develop until over a year after he began work for the employer, and actually worsened after he left work for the employer. Consequently, notwithstanding his status as claimant's treating physician, Dr. Kelley's opinion was based on inaccurate information regarding claimant's history of respiratory conditions. Accordingly, we find it unpersuasive. *See Miller v. Granite Constr. Co.*, 28 Or App 473, 478 (1977) (medical opinion based on inaccurate information was insufficient to carry the claimant's burden of proof).

Further, Dr. Kelley's explanation indicates that in reaching his opinion regarding major causation, he did not fully consider all contributing causes. Despite his acknowledgment that claimant may have a physiology that "demonstrates a more extreme reaction to certain exposures or that makes him more 'vulnerable' to certain exposures," he reasoned that this was not "a true contributor to development of obstructive asthma." (Ex. 63-3).

A mere susceptibility is not weighed as a contributing cause when determining the major contributing cause of a claimed occupational disease. *Murdoch v. SAIF*, 223 Or App 144, 146 (2008), *rev den*, 346 Or 361 (2009). Dr. Kelley indicated, however, that claimant's physiology may *either* have merely made claimant more "vulnerable" *or* actively contributed to his respiratory condition by "demonstrat[ing] a more extreme reaction" to environmental exposure. While the former possibility suggests a mere susceptibility, the latter possibility suggests that claimant's preexisting physiology was an active contributing cause of his claimed respiratory condition. *See Corkum v. Bi-Mart Corp.*, 271 Or App 411, 422 (2015) (a susceptibility "increases the likelihood that the affected body part will be injured by some other action or process but does not actively contribute to damaging the body part"); *Murdoch*, 223 Or App at 149 ("susceptible" includes "having little resistance to a specific infectious disease," citing *Webster's Third New Int'l Dictionary* 2303 (unabridged ed 2002)).

Thus, Dr. Kelley's opinion raised the possibility that claimant's physiology merely rendered him more vulnerable to certain exposures. Nevertheless, Dr. Kelley did not explain why he considered claimant's physiology to be a mere susceptibility rather than an active contributor. Further, he did not weigh claimant's preexisting physiology against employment exposures in reaching his opinion regarding major causation. Therefore, we are not persuaded that Dr. Kelley considered all contributing causes in reaching his opinion, which would be necessary to address the major contributing cause of the claimed condition. *See Dietz v. Ramuda*, 130 Or App 397, 401 (1994), *rev dismissed*, 321 Or 416

(1995) (determining the major contributing cause of an injury or disease requires evaluation of the relative contribution of the different causes); *Moe v. Ceiling Sys., Inc.*, 44 Or App 429, 433 (1980) (conclusory medical opinion found unpersuasive).

Finally, Dr. Bardana did not distinguish between claimant's preexisting asthma condition and his "obstructive asthma" condition while reviewing claimant's medical records or while diagnosing claimant's respiratory conditions. (Ex. 59-9-12, -25). He opined that claimant's 1988 infection could have caused permanent damage, which might have gone unnoticed (Ex. 62-2), and that claimant experienced frequent infections and flares of asthma from 2007 onward. (Exs. 59-30, 62-2). He explained that there had been no "cross shift" or work provocation pulmonary function studies to verify a relationship between claimant's conditions and employment, and there were few medical records to compare test results. (Exs. 59-27-29, 62-2). Under such circumstances, he opined that there was insufficient evidence to conclude that work for the employer had affected claimant's health, and that any such conclusion would be speculative. (Exs. 59-30, 62-2).

Although Dr. Bardana did not reach a firm conclusion regarding whether there had been *any* contribution to any of claimant's respiratory conditions by employment conditions, he explained why causation could not be attributed to claimant's work for the employer to a degree of medical probability. We find his opinion well-reasoned, based on complete information, and persuasive.

In light of Dr. Bardana's explanation of the difficulties in attributing any degree of causation to employment exposure, as well as Dr. Kelley's reliance on inaccurate information and failure to persuasively weigh all contributing causes, we conclude that claimant has not carried his burden of proof, regardless of whether his claim is based on the worsening of a preexisting disease or condition. In other words, claimant has not established that employment conditions were the major contributing cause of a respiratory condition. *See* ORS 656.802(2)(a). Claimant also has also not established that employment conditions were the major contributing cause of a worsening of a preexisting condition and the major contributing cause of the combined condition. *See* ORS 656.802(2)(b).

Therefore, claimant's occupational disease claim is not compensable. Accordingly, we reverse.

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ORDER

The ALJ's order dated February 22, 2016 is reversed. SAIF's denial is reinstated and upheld. The ALJ's \$8,000 attorney fee and cost awards are reversed.

Entered at Salem, Oregon on September 21, 2016

Member Lanning dissenting.

The majority concludes that claimant has not established the compensability of his occupational disease claim for a respiratory condition regardless of whether his claim is analyzed under ORS 656.802(2)(a) or ORS 656.802(2)(b). Because I conclude that employment conditions were the major contributing cause of his respiratory condition, I respectfully dissent.

I find most persuasive the opinion of Dr. Kelley, claimant's attending physician. Dr. Kelley explained that claimant's work for the employer exposed him to fumes and particulates, specifically paper dust and polyethylene terephthalate (PET). (Ex. 63-1). He explained that claimant's work involved the type and duration of exposure that could cause obstructive asthma. (*Id.*) He also reasoned that the timing of the onset and development of claimant's obstructive asthma condition (*i.e.*, while working for the employer), as well as the timing of the reduction in symptoms (*i.e.*, after the end of claimant's work for the employer), indicated that the condition arose from claimant's work for the employer. (Ex. 63-3).

Dr. Kelley discussed claimant's history of respiratory conditions. He noted that claimant had developed a respiratory condition while working at a previous employer, a brewery. (*Id.*) He further noted, however, that the condition that claimant had developed at the brewery resolved after claimant stopped working in that environment. (*Id.*) He also explained that claimant's symptoms while working at the brewery were located in the lungs and bronchial passages, but the symptoms that claimant developed while working for the employer were located in his throat. Considering the resolution of claimant's prior condition and the difference in symptoms, Dr. Kelley concluded that claimant's obstructive asthma was a distinct condition that arose while working for the employer. (*Id.*)

Dr. Kelley addressed the theory, raised by Dr. Bardana, that claimant's respiratory condition was related to a low immunoglobulin level. (*Id.*) He noted that although claimant's "immunoglobulin level was technically low, it was not significantly low enough to be considered a cause for his pulmonary problems." (*Id.*)

Dr. Kelley acknowledged that claimant "may indeed have a physiology that demonstrates a more extreme reaction to certain exposures or that makes him more 'vulnerable' to certain exposures." (*Id.*) However, he explained that this physiology was not a "true contributor to the development of obstructive asthma." (*Id.*)

As claimant's attending physician throughout the relevant period, Dr. Kelley was most familiar with the development of claimant's obstructive asthma, as well as with the development and resolution of claimant's previous respiratory condition. Because both Dr. Kelley and Dr. Bardana based their opinions, in large part, on the timing of claimant's symptoms and the similarity, or difference, between those symptoms and his previous symptoms, Dr. Kelley's position as claimant's attending physician put him in a superior position to render an opinion. *See Weiland v. SAIF*, 64 Or App 810, 814 (1983) (greater weight given to opinion of attending physician, who had a better opportunity to evaluate the claimant's condition). Further, Dr. Kelley cogently explained the causal relationship between claimant's work environment and his obstructive asthma condition, weighed the potential contribution of other causes, and refuted Dr. Bardana's theory that claimant's respiratory condition was related to a low immunoglobulin level.<sup>2</sup> I conclude that his opinion is most persuasive.

Based on Dr. Kelley's persuasive opinion, I conclude that claimant's employment conditions were the major contributing cause of his obstructive asthma condition. Further, I conclude that his occupational disease claim for obstructive asthma was not based on the worsening of a preexisting condition. Therefore, I conclude that claimant has established the compensability of his occupational disease claim under ORS 656.802(2)(a).

Accordingly, I respectfully dissent.

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<sup>2</sup> Dr. Bardana also based his opinion on claimant's 1988 hospitalization and the respiratory condition that claimant developed while working at the brewery. (Ex. 59-31). However, he acknowledged that he lacked the information necessary to assess the importance of those events. (Ex. 59-31-32). I consider his overall opinion speculative and unpersuasive.