
In the Matter of the Compensation of
ALAN J. DOFFING, Claimant
WCB Case No. 00-06170
ORDER ON REVIEW
Cary Et Al, Claimant Attorneys
Johnson Et Al, Defense Attorneys

Reviewing Panel: Members Biehl, Bock, and Phillips Polich.¹

The insurer requests review of Administrative Law Judge (ALJ) Mongrain's order that set aside its denial of claimant's injury claim for a cervical disc condition. On review, the issues are timeliness of claim filing and compensability.

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

Claimant is a heavy equipment operator. (Tr. 9). On December 23, 1999, he had the onset of left shoulder pain coincident with driving a front-end loader over a "4x4." (Tr. 14). Claimant testified that, on that day, he informed his supervisor (Ms. Siemer) that he had "pulled a muscle or something" while driving "out in the pit." (Tr. 18-19).

Over the next several days, claimant continued to work; his shoulder pain intensified. (Tr. 15 to 16). Eventually, claimant sought medical treatment from Dr. Bates on January 25, 2000. (Ex. 3). Dr. Bates referred claimant to Dr. Freudenberg, for an orthopedic evaluation. (*Id.*).

Dr. Freudenberg believed claimant's shoulder pain was the result of a cervical disc and recommended an MRI. (Ex. 4). A March 9, 2000 MRI (as interpreted by Dr. Bickel) showed "a prominent extradural defect at C6-7. (Ex. 5). Claimant was referred to Dr. Parvin. (Ex. 6).

Claimant filed an 801 form on March 30, 2000. (Ex. 9).

Dr. Parvin performed a cervical decompression (including diskectomy and partial vertebrectomy) with anterior fusion at C6-7. (Ex. 12).

¹ After consultation with the Department of Justice, this Board has chosen to exercise its right to issue orders as a panel of three pursuant to ORS 656.718(2) and (3).

On June 16, 2000, the insurer denied the claim. (Ex. 20). Claimant requested a hearing.

The ALJ found, from claimant's credible manner (demeanor), that: (1) claimant experienced pain in the left shoulder while working on December 23, 1999; and (2) he informed his supervisor (Ms. Siemer) of that fact. Finding that Ms. Siemer's lack of recall of that conversation did not contradict claimant's testimony, the ALJ concluded that the employer had "knowledge of the injury" within 90 days as provided by ORS 656.265(1), and thus reasoned that the claim was timely filed pursuant to ORS 656.265(4)(a). Relying on the opinion of Dr. Parvin, the ALJ concluded that claimant had established the compensability of his cervical disc condition.

On Board review, the insurer asserts that: (1) claimant is not credible; and (2) claimant failed to establish that the employer had knowledge of claimant's injury within the time provided by ORS 656.265.² We disagree with both assertions.

We generally defer to an ALJ's demeanor-based credibility findings, and we do so here. *See Bush v. SAIF*, 68 Or App 230, 233 (1984). Based upon claimant's demeanor at hearing, the ALJ found claimant credible. (O&O p. 6). Because the ALJ had the opportunity to observe claimant's testimony, he is in a much better position to assess credibility and his determination is entitled to considerable weight. *See Sherri L. Williams*, 51 Van Natta 75, 77 (1999).

Moreover, claimant's supervisor, Ms. Siemer, specifically stated that she did not dispute claimant's account of their conversation on December 23, 1999. (Tr. 40). Rather, she stated she did not remember. (*Id.*) Additionally, the medical history recorded by Dr. Bates (that claimant's shoulder pain began before Christmas while driving equipment at work) supports claimant's testimony. (Ex. 3). Based on such evidence, including especially the ALJ's demeanor-based credibility finding, we are persuaded that claimant's shoulder pain began on December 23, 1999, while he was driving a front-end loader at work. We are also persuaded that, on that day, claimant informed his supervisor he had "pulled a

² The parties do not dispute that written notice of the claim was provided within one year of the injury, but more than 90 days after the injury. Consequently, the timeliness of the claim will depend on whether the employer had "knowledge of the injury" within the 90 day time period provided by ORS 656.265(1). ORS 656.265(4)(a).

muscle or something” while driving “out in the pit.” We turn to whether such a statement constitutes “knowledge of an injury.”

"Knowledge of an injury" should include enough facts (both of an injury as well as its relationship to work) as to lead a reasonable employer to conclude that workers' compensation liability is a possibility and that further investigation is appropriate. *See Keller v. SAIF*, 175 Or App 75, 82 (2001); *Argonaut Ins. Co. v. Mock*, 95 Or App 1, 5 (1989); *Patricia A. Epperson*, 49 Van Natta 690 (1997). Here, based on claimant's credible testimony, we find that, on December 23, 1999, he informed Ms. Seimer that he had “pulled a muscle or something” while driving “out in the pit.” Claimant's statement provided not only information of an injury, but also information of how the injury occurred in relation to work. Consequently, we conclude that claimant gave his supervisor enough facts to lead a reasonable employer to conclude that workers' compensation liability was a possibility and that further investigation was appropriate. *Keller*, 175 Or App at 82-83. Accordingly, we find that the claim is not time-barred. ORS 656.265(4)(a). We turn to compensability.

Neither party disputes that claimant's cervical condition is subject to ORS 656.005(7)(a)(B). Therefore, in order to establish the compensability of his cervical condition, claimant's compensable injury must be the major contributing cause of the disability or need for treatment of the combined condition. ORS 656.005(7)(a)(B); *SAIF v. Nehl*, 148 Or App 101 (1997), *on recon* 149 Or App 309 (1997), *rev den* 326 Or 389 (1998).

To satisfy the "major contributing cause" standard, claimant must establish that his work incident of November 1999 contributed more to the disability or need for treatment of the claimed condition than all other factors combined. *See, e.g., McGarrah v. SAIF*, 296 Or 145, 146 (1983). A determination of the major contributing cause involves the evaluation of the relative contribution of different causes of claimant's disability or need for treatment of the combined condition and deciding which is the primary cause. *Dietz v. Ramuda*, 130 Or App 397 (1994), *rev dismissed* 320 Or 416 (1995).

Because of the possible alternative causes for his cervical condition, resolution of this matter is a complex medical question that must be resolved by expert medical opinion. *See Uris v. Compensation Department*, 247 Or 420 (1967). When there is a dispute between medical experts, more weight is given to those medical opinions which are well reasoned and based on complete information. *See Somers v. SAIF*, 77 Or App 259, 263, (1986). In evaluating medical opinions we generally defer to the treating physician absent persuasive

reasons to the contrary. *See Weiland v. SAIF*, 64 Or App 810 (1983). Additionally, if the opinion of the treating physician is based upon his actual surgical findings, the opinion is generally entitled to great weight. *Argonaut Ins. Co. v. Mageske*, 93 Or App 698, 702 (1988); *Charles D. Cochran*, 53 Van Natta 1514, 1515 (2001).

During surgery, Dr. Parvin found that claimant had a “significant disk herniation” at C6-7 with extruded disk material sitting within the spinal canal. (Ex. 30-1). According to Dr. Parvin, claimant experienced forceful loading and unloading of his cervical disks as the result of being bounced while driving the front-end loader. (Ex. 30-2). Dr. Parvin indicated that this force was sufficient to cause a piece of the disc “to explode through the posterior portion of the disk and into the spinal canal, causing compression on the spinal cord and nerve roots. (*Id.*) Dr. Parvin acknowledged that claimant did have some preexisting degenerative changes in his C6-7 disc. (Ex. 27-3). Nonetheless, taking that into account, Dr. Parvin opined that the major contributing cause of claimant’s overall condition and his need for surgery was the work injury. (Ex. 27-4). We find Dr. Parvin’s opinion well reasoned and persuasive. Consequently, we conclude that claimant has established the compensability of his cervical disk condition.

The insurer asserts that Dr. Young’s opinion (insurer-arranged medical reviewer) is more persuasive than Dr. Parvin’s. We disagree. Dr. Young’s opinion is based on his review of an MRI from which he describes claimant’s C6-7 disc condition as a “bulging/protruding” disc. (Ex. 25-1). He does not seem to be aware of Dr. Parvin’s surgical observations of a “significant disk herniation” with extruded disk material sitting within the spinal canal. (Ex. 30-1). Consequently, Dr. Young’s opinion appears to be based on incomplete information, and as such, is not persuasive. *See Miller v. Granite Construction Co.*, 28 Or App 473, 476 (1977); *William R. Ferdig*, 50 Van Natta 442, 443 (1998).

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 \$2,200, to be paid by the insurer. 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, and the value of the interest involved.

ORDER

The ALJ's order dated September 27, 2001, as amended September 28, 2001, is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$2,200, to be paid by the insurer.

Entered at Salem, Oregon on April 24, 2002