

In the Matter of the Compensation of
JAMES BURTON, Claimant
WCB Case No. 00-09045
ORDER ON REVIEW
Welch Bruun & Green, Claimant Attorneys
Mark P Bronstein, Defense Attorneys

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

The self-insured employer requests review of Administrative Law Judge Fulsher's order that set aside its denial of claimant's injury/occupational disease claim for a pulmonary condition. On review, the issue is compensability.

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

Claimant, a carpenter, began working for the employer on October 16, 2000. (Tr. 10). The job site where claimant worked was a 7-floor building undergoing a seismic upgrade, which included, among other things, the use of jackhammers. (Tr. 48; 53 to 55). Dust masks were available at the job site for workers who wanted to use them. (Tr. 52 to 53). Claimant did not use the masks. (Tr. 30).

Claimant was exposed to concrete dust on October 19, 20, 21, 23, 24, and 25. (Tr. 10 to 14).

Claimant was laid off on October 27, 2000. (Tr. 55). Claimant was upset about the lay off and indicated he would file a workers' compensation claim. (Tr. 56).

On October 30, 2000, claimant saw Dr. Hawkins (an allergy and immunology specialist) for complaints of shortness of breath and a productive cough. (Exs. 23; 33). An initial pulmonary function test showed "some significant obstruction." (*Id.*) Dr. Hawkins diagnosed mineral dust small airways disease (MDAD) and reported that "[T]his is clearly a noxious inhalation substance." (*Id.*) The same day, claimant filed a claim for his pulmonary condition. (Ex. 22).

The employer denied the claim on November 14, 2000. (Ex. 26). Claimant requested a hearing.

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).

The ALJ determined that claimant's pulmonary condition arose over a discrete six-day time period. Relying on *Jeld-Wen, Inc. v. Molena*, 166 Or App 396, rev den 330 Or 336 (2000) and *Weyerhaeuser v. Woda*, 166 Or App 73, rev den 330 Or 36 (2000), the ALJ reasoned that claimant's pulmonary condition should be analyzed as an injury. The ALJ determined (based on demeanor) that claimant's testimony was less credible than other witnesses. Nonetheless, based on the testimony of Mr. Stipes (claimant's supervisor) and the results of silica dust testing, the ALJ determined that claimant had been exposed to silica dust on the employer's job site on October 19, 20, 21, 23, 24, and 25.² Relying on the medical opinion of Dr. Hawkins, the ALJ concluded that claimant's work exposure was a material contributing cause of his pulmonary condition. Consequently, the ALJ set aside the employer's denial.

The employer asserts that claimant's pulmonary condition should be analyzed as an occupational disease. We adopt the ALJ's reasoning that claimant's pulmonary condition should be analyzed as an injury. Consequently, we reject the employer's argument.³

To establish that his pulmonary condition is compensable, claimant must prove that work exposure to silica dust was a material contributing cause of the disability or need for treatment of the pulmonary condition. See ORS 656.005(7)(a); *Albany General Hospital v. Gasperino*, 113 Or App 411 (1992). If however, claimant had a claimant had a preexisting condition that

² The employer asserts that because claimant was not a credible witness, he cannot establish that he was exposed to concrete dust at work. We disagree. Although Mr. Sipes disagreed with claimant's description of the dust conditions as a "white-out," he did say that in his two years of working for the employer, he had not seen worse conditions. (Tr. 37; 40). Moreover, the medical evidence supports claimant's testimony that his pulmonary condition results from the dusty conditions on the employer's work site. Consequently, we find corroborating evidence supporting claimant's testimony that he was exposed to concrete dust at the employer's work site. Accordingly, we reject the employer's argument. See *Herbert Lawrence*, 47 Van Natta 1716 (1995).

³ The employer asserts that the six-day time period (over which claimant's problems developed) is too long a developmental time for claimant's condition to be considered an injury. In *Valtinson v. SAIF*, 56 Or App 184, 188 (1982), the court reasoned that "sudden in onset" did not equal "instantaneous." Consequently, the court found the claimant's condition, which developed over a short "discrete period of time," was an injury rather than an occupational disease. (*Id.*) In *Richard L. Ulmen*, 50 Van Natta 1033, 1034 (1998), we applied the "discrete time period" rationale and concluded that a worker's cervical disc protrusion, which developed over a identifiable two-week time period, constituted an injury rather than an occupational disease. Applying the reasoning of *Valtinson* and *Ulmen*, we find that claimant's six-day dust exposure period is a short, identifiable and discrete period of time. Consequently, we reject the employer's argument.

combined with his October 2000 work exposure, he is subject to the "major contributing cause" standard of proof under ORS 656.005(7)(a)(B).

The medical evidence from Dr. Hawkins and Dr. Montanaro (employer-arranged examiner) does not establish that there was preexisting condition that combined with the injury/work exposure. When asked if claimant had any preexisting conditions that contributed to his symptoms, Dr. Montanaro noted that claimant had previously been diagnosed with asthma and that it was "possible" that this might contribute to his symptoms.⁴ (Ex. 29-7). Dr. Montanaro also diagnosed chronic infectious paranasal sinusitis and indicated that this condition "may be" contributing to claimant's respiratory complaints. (*Id.*) Dr. Hawkins believed that claimant "might" have the tendency to have asthma. (Ex. 31). Because this evidence is expressed in terms of medical "possibility" rather than "probability," we find insufficient evidence that claimant had a preexisting condition that combined with the October work injury/exposure. Therefore, we conclude that ORS 656.005(7)(a)(B) is not applicable and apply a "material contributing cause" standard to this claim. We turn to the causation issue.

Because of possible alternative causes for claimant's 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 give greater weight to that of the treating physician absent persuasive reasons to the contrary. *See Weiland v. SAIF*, 64 Or App 810, 814 (1983).

Dr. Hawkins opined that claimant had MDAD as a result of his work exposure to concrete (silica) dust. Dr. Hawkins based her opinion on: (1) her examinations and treatment of claimant; (2) a review of claimant's old medical records; (3) pulmonary function tests; and (4) medical literature on occupational asthma co-authored by Dr. Montanaro. (Exs. 23; 25; 27; 28; 31; 33). Dr. Hawkins' opinion is well reasoned and based on complete information. Consequently, we find it persuasive.

In contrast to Dr. Hawkins, Dr. Montanaro opined that claimant had chronic infectious paranasal sinusitis. (Ex. 29). Dr. Montanaro's opinion, however, was

⁴ On examination Dr. Montanaro found no evidence of asthma. (Ex. 29-6).

based on his one-time examination of claimant that occurred four months after claimant's work exposure to silica dust. (*Id.*) Dr. Montonaro also indicated that claimant's symptoms were consistent with "having a transient irritant response from nuisance dusts in the workplace." (Ex. 29-7). Dr. Montonaro further stated that the effect of any such dust exposure should have long since resolved. (*Id.*) Such an opinion (contrary to the employer's assertions) supports a conclusion that claimant suffered a pulmonary condition as a result of his exposure to workplace dust.

Finding no persuasive reason to do otherwise, we give greater weight to the opinion of Dr. Hawkins. Consequently, we agree with the ALJ that claimant has established the compensability of his pulmonary condition.

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 \$1,700, to be paid by the self-insured employer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's respondent's brief, and his counsel's uncontested request), the complexity of the issue, and the value of the interest involved.

ORDER

The ALJ's order dated June 26, 2001 is affirmed. For services on review, claimant is awarded a \$1,700 attorney fee, payable by the self-insured employer.

Entered at Salem, Oregon on May 7, 2002