
In the Matter of the Compensation of
SHARLA L. SMITH-NILSEN, Claimant
WCB Case No. 01-05523
ORDER ON REVIEW
Heather Holt, Claimant Attorneys
Hornecker Cowling et al, Defense Attorneys

Reviewing Panel: Members Phillips Polich and Lowell. Member Phillips Polich concurs.

The self-insured employer requests review of Administrative Law Judge (ALJ) Mills' order that set aside claimant's injury claim for back, neck and left shoulder conditions. On review, the issue is compensability.¹

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

The employer argues that there are no objective findings to support claimant's March 1, 2001 injury claim. The employer contends that the only potentially objective findings are from Dr. Saviers. We disagree.

"Objective findings" are verifiable indications of injury or disease that may include, but are not limited to, range of motion, atrophy, muscle strength and palpable muscle spasm. ORS 656.005(19). "Objective findings" do not include physical findings or subjective responses to physical examinations that are not reproducible, measurable or observable. *Id.* In *SAIF v. Lewis*, 170 Or App 201, 212 (2000), *rev allowed* 331 Or 692 (2001), the court discussed the definition of "objective findings" in ORS 656.005(19), explaining that "[t]he statutory emphasis is on findings made by a medical expert on the basis of a verification process involving trained observation, examination, or testing that produces results -- either physical or subjective responses -- that are witnessed, measured, or can be reproduced."

On March 1, 2001, claimant injured her neck, back and left shoulder when she was transferring a patient back to a bed. She sought medical treatment on March 9, 2001, and Dr. Farmer said that the "cervical area to palpation notes tenderness to the left occipital to mid cervical level in a distribution of the

¹ The employer has moved for postponement of Board review until such time as a member representing the concerns of employers is available to participate in the review process. Because such a member is serving on the review panel, the employer's request has become moot.

trapezius muscle.” (Ex. 5-1). Claimant also had tenderness to the left paraspinous thoracic muscles, and tenderness along the right sacral iliac area. (*Id.*) Dr. Farmer also noted that claimant had reduced sensation in her left arm. (*Id.*) He diagnosed a low back sprain and a cervical sprain with a question of radicular left arm ulnar nerve distribution distally. (Ex. 5-2).

In early April 2001, Dr. Tall explained that claimant had continued tightness, tenderness and firmness of the “left thoracic paraspinal musculature, left rhomboid region, the left levator scap, trap, cervicis splenius,” and into the left scalene and “SCM” region. (Ex. 7B). Claimant had similar findings on three other exams in April 2001. (Exs. 7C, 7D, 7E).

Dr. Yarusso examined claimant on behalf of the employer and reported that claimant had tenderness about the occipital and paracervical region, down to T1 and T2 of the paraspinous muscles. (Ex. 9-5). He reported that claimant displayed no pain behavior and he found no functional overlay or symptom magnification. (Ex. 9-1, -8).

In December 2001, Dr. Saviers reported that claimant had mild tightness of the lower and mid-cervical paraspinal muscles and suboccipital muscles. (Ex. 15-2). She had a trigger point in the left iliocostalis thoracic and left teres minor, both of which referred down the ulnar aspect of the forearm and hand, and also a trigger point in the rhomboid and lower thoracic paraspinals that referred toward the lower back. (*Id.*) Claimant had very tight bands in the left upper trapezius and levator scapula. (*Id.*) Her left shoulder had tenderness of the left supra and infraspinatus attachment. (Ex. 15-3). Claimant had reduced strength in her left finger abductors and thumb to fifth digit opposition, as well as her left supraspinatus and infraspinatus. (*Id.*) Dr. Saviers also reported tightness of the quadratus lumborum, hip flexors and external rotators, and tenderness of the left SI joint and left piriformis muscle. (*Id.*)

Based on the findings of Drs. Farmer, Tall, Yarusso and Saviers, we conclude that claimant has established “objective findings” of her back, neck and left shoulder conditions. Specifically, we conclude that the doctors’ findings of tenderness, reduced sensation, tightness, trigger points, and reduced strength constitute objective findings under ORS 656.005(19).

The employer also contends that, if we determine that the March 2001 incident was a material cause of claimant’s back, neck and shoulder complaints, we should reinstate the employer’s denial because the work incident was not the

major contributing cause of her condition. However, we need not determine whether a material contributing cause standard or the major contributing cause standard applies to this claim because under either standard, Dr. Saviers' reports, when read as a whole, satisfy claimant's burden of proof. *See Worldmark the Club v. Travis*, 161 Or App 644, 650 (1999) (medical opinions are evaluated in the context rendered in order to determine sufficiency); *SAIF v. Strubel*, 161 Or App 516, 521-22 (1999) (same).

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 \$1,500, 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, and the value of the interest involved.

ORDER

The ALJ's order dated March 5, 2002 is affirmed. For services on review, claimant's attorney is awarded \$1,500, payable by the employer.

Entered at Salem, Oregon on September 10, 2002

Board Member Phillips Polich specially concurring.

I agree with the lead opinion that claimant has established "objective findings" of her back, neck and left shoulder conditions. I write separately, however, to clarify that I would find any one of the opinions of Drs. Farmer, Yarusso, Tall or Saviers sufficient to establish "objective findings." I also write separately to indicate my agreement with Judge Wollheim's dissent in *SAIF v. Lewis*, 170 Or App 201, 212 (2000), *rev allowed* 331 Or 692 (2001). I agree with Judge Wollheim that ORS 656.005(19) does not require that the indications of an injury or disease must be *presently* verifiable at the time of examination.