
In the Matter of the Compensation of
MARY L. ARNOLD, Claimant
WCB Case No. 07-07875
ORDER ON REVIEW
Scott M McNutt Jr, Claimant Attorneys
John E Snarskis & Assocs, Defense Attorneys

Reviewing Panel: Members Weddell, Langer, and Herman. Member Langer concurs in part and dissents in part.

Claimant requests review of Administrative Law Judge (ALJ) Ogawa's order that upheld the insurer's denial of claimant's occupational disease claim for bilateral carpal tunnel syndrome (CTS). In its respondent's brief, the insurer requests that we address the effect, if any, of claimant's failure to appeal the correctly dated order. We treat the insurer's request as a motion to dismiss. On review, the issues are dismissal/jurisdiction and compensability. We deny the motion to dismiss and reverse.

FINDINGS OF FACT

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

CONCLUSIONS OF LAW AND OPINION

Jurisdiction

On July 1, 2008, claimant filed a request for review of the "Opinion and Order dated *June 27, 2008* issued by [ALJ] Ogawa in this matter." (Emphasis added). The request specifically referenced claimant's name, an October 9, 2007 date of injury, claim number YMH12668, WCB Case No. 07-07875, and a hearing date of May 30, 2008.

In its brief, the insurer notes that the ALJ's order was published with a date of June 30, 2008, from which no formal request for review was filed. The insurer further observes that claimant refers to a timely filed appeal of an order bearing that date in her appellant's brief (whereas her request for review referenced an Opinion and Order dated June 27, 2008). (Respondent's Brief, p. 1; *see* Appellant's Brief, p. 1). The insurer asks us to address our authority to proceed with our appellate review. For the following reasons, we conclude that we have jurisdiction to consider this matter.

An ALJ's order is final unless, within 30 days after the date on which a copy of the order is mailed to the parties, one of the parties requests Board review under ORS 656.295. *See* ORS 656.289(3). Requests for Board review shall be mailed to the Board and copies of the request shall be mailed to all parties to the proceeding before the ALJ. ORS 656.295(2). Compliance with ORS 656.295 requires that statutory notice of the request be mailed or actual notice be received within the statutory period. *Argonaut Ins. Co. v. King*, 63 Or App 847, 852 (1983).

Under ORS 656.295(1), the request for review “of an order of an Administrative Law Judge need only state that the party requests a review of the order.” We have previously stated that our authority to review an ALJ's order “necessarily includes determining the order to which the [party's] appeal was directed[.]” *Dorothy I. Adams*, 48 Van Natta 2190, 2191 (1996). Thus, in deciding whether the party has requested review of the ALJ's order, we look to whether the request provides sufficient accurate information to properly identify the appealed Opinion and Order. That is, if the request for review allows us to identify an order that corresponds with an existing Opinion and Order, then we find the request for review sufficient. *Terri L. Walker*, 51 Van Natta 1471 (1999).

Here, claimant's request for review referenced a May 30, 2008 hearing for WCB Case No. 07-07875, claim number YMH12668, and an Opinion and Order from ALJ Ogawa dated June 27, 2008, a copy of which was attached to the request. The Board's file, however, contains an original Opinion and Order by ALJ Ogawa dated *June 30, 2008*, for WCB Case No. 07-07875, claim number YMH12668, and a May 30, 2008 date of hearing. There is no record of a June 27, 2008 order in the Board's file. Therefore, June 30, 2008 is the correct date of the ALJ's order. Accordingly, for jurisdiction to vest with this forum, we must determine whether claimant's request for review constitutes an appeal of the ALJ's June 30, 2008 order. We conclude that it does.

First, we note that the “June 27, 2008” order from ALJ Ogawa that claimant submitted with her review request appears to be identical to the ALJ's June 30, 2008 order contained in the Board's file. Although claimant's request for review contained an incorrect reference to the date of the ALJ's Opinion and Order (as compared to that on record with the Board and the Hearings Division), the request specifically referred to an order from ALJ Ogawa. The record further establishes that there is only one such order, and that order, dated June 30, 2008, contains the same WCB case number, claim number, and hearing date as that referenced by claimant in her request for review.

Under these circumstances, we conclude that claimant's intentions in requesting review were obvious. That is, the information contained in claimant's review request, as outlined above, allows us to properly identify the order sought to be appealed. We find that claimant's request for review necessarily pertained to ALJ Ogawa's June 30, 2008 Opinion and Order in WCB Case No. 07-07875, which is the only order on file related to that case number at the time of the request. Accordingly, in this particular case, the incorrect date of the ALJ's published order in claimant's request for review is not fatal to her appeal. *See Adams*, 48 Van Natta at 2191 (request for review valid even though contained inaccurate WCB number because "the ALJ's order issued on May 7, 1996 was clearly the subject of the employer's request for review" and, thus, inaccurate WCB number was "not fatal to its appeal"); *Maree Elliott*, 45 Van Natta 408, 409 (1993) (although the carrier requested review of the ALJ's January 11, 1993 "Denial of Motion to Reopen and Reconsider," it was clear from the information in the request that the carrier intended to request review of the ALJ's December 18, 1992 "Opinion and Order"); *cf. Walker*, 51 Van Natta at 1472 (insurer's request for review of the ALJ's order unsuccessful where its request provided the claimant's name and WCB numbers, but failed to name the correct ALJ and date of the order).

Inasmuch as claimant's request was mailed within 30 days of the issuance of the ALJ's June 30, 2008 order and because copies of that request were timely provided to the other parties, we conclude that we have jurisdiction to consider this matter. *See* ORS 656.289(3).

Alternatively, because the ALJ's June 30, 2008 order issued after the June 27 order, we conclude that the June 30 order implicitly modified or amended the June 27 order. As such, claimant's appeal of the June 27 order extended to the June 30 order. *Larry Vigal*, 41 Van Natta 1266, 1267 (1989) (where the carrier's request for review reflected its desire to appeal a specific ALJ's order, and that order had been withdrawn, republished, and supplemented prior to the filing of the request for review, the request was considered as one for review of the ALJ's subsequent decision); *Robert D. Billick*, 40 Van Natta 1041 (1988).

Compensability

Finding the medical evidence in "equipoise," the ALJ concluded that claimant did not meet her burden of establishing a compensable occupational disease.

On review, claimant argues that the medical opinion of Dr. Van Allen, who opined that her work activities were the major cause of her CTS, was better reasoned than that of Dr. Button, who found to the contrary. Accordingly, based on Dr. Van Allen's opinion, claimant contends that she has established compensability of the disputed bilateral CTS condition. For the following reasons, we agree.

Claimant's occupational disease claim is compensable if her employment conditions were the major contributing cause of the disease. ORS 656.802(2)(a). Relative contribution of all contributing causes must be considered. *Bowen v. Fred Meyer Stores*, 202 Or App 558, 563 (2005). To satisfy the "major contributing cause" standard, claimant's work activities must have contributed more to the claimed condition than all other factors combined. *Dietz v. Ramuda*, 130 Or App 397, 401 (1994), *rev dismissed*, 320 Or 416 (1995); *Sherry C. Quigley*, 57 Van Natta 678, 679 (2005).

Because of the possible alternative causes of claimant's condition, resolution of this matter is a complex medical question that must be resolved by expert medical opinion. *See Barnett v. SAIF*, 122 Or App 279 (1993). We give more weight to those medical opinions that are well-reasoned and based on complete information. *See Somers v. SAIF*, 77 Or App 259, 263 (1986); *Jane T. Brodie*, 55 Van Natta 2669 (2003). In addition, we generally give greater weight to the opinion of a worker's treating physician, absent persuasive reasons to do otherwise. *Weiland v. SAIF*, 64 Or App 810 (1983); *Darwin B. Lederer*, 53 Van Natta 974 n 2 (2001). However, we properly may or may not give greater weight to the opinion of the treating physician, depending on the record in each case. *Dillon v. Whirlpool Corp.*, 172 Or App 484, 489 (2001).

Based on the following reasoning, we find Dr. Van Allen's opinion most persuasive and sufficient to establish, by a preponderance of the evidence, compensability of claimant's bilateral CTS as an occupational disease.

Dr. Button, who performed an insurer-arranged medical examination on February 21, 2008, did not believe that claimant's CTS was work-related. Rather, in Dr. Button's opinion, a combination of factors--body habitus, idiopathic factors (gender, age), and diabetes--were the major cause of claimant's CTS. (Ex. 9). He also explained that claimant's obesity caused abnormal fluid shifts that can lead to swelling in the synovial tissue surrounding the median nerve, which, over a period of years, may cause the type of chronic median nerve compression that results in CTS.

In reaching his opinion, Dr. Button relied on a history that claimant spent an estimated seven hours of her workday on the computer dealing with transmissions involving e-mails, answering questions, and addressing various requests. (Ex. 9-1). He understood that claimant took numerous steps on the computer to access and process information, and that she operated the mouse with her right hand, did “togglng” activity with the left hand (using the thumb and little fingers, as demonstrated by claimant during the examination), and performed standard key entry with both hands. (*Id.*) Based on this description, Dr. Button determined that claimant’s job duties were “light” in nature. (Ex. 11-6).

Dr. Button noted that the medical literature (mainly Harvard and Mayo Clinic studies) established that keyboarding might be a risk factor but was not a causative factor of CTS. (Exs. 9-4, 11-23). He explained that claimant’s “togglng” motion would not be causative of CTS due to the biomechanics or structure of the wrist and muscles involved with that motion. (Ex. 11-12, -13). He further explained that with light tapping “fingertip” motions on a keyboard during data entry, the extrinsic flexor tendons would not be sufficiently activated to enhance circulation and decrease the hydrostatic pressure gradient within the carpal tunnel. He noted that many of the fine motor skills involved with typing (tapping and side-to-side motions) are performed with the intrinsic muscle-tendon units of the hand, which originate beyond the carpal tunnel. (Ex. 11-11). Thus, according to Dr. Button, any inflammatory process from such activities would be distant from the carpal tunnel.

In contrast, Dr. Van Allen opined that claimant’s work activities appeared to be manually labor-intensive enough to cause CTS. (Ex. 10-6). According to Dr. Van Allen, whether such activities were causative of CTS was a cumulative process that depended on frequency, duration, finger motion, and wrist posture. (Ex. 10-6, -9, -10). He described the physiology of the development of CTS as an increase in pressure within the carpal canal, and explained that extreme flexion and extension of the wrist was not necessary to increase this pressure. (Ex. 10-13-18). Rather, deviation from neutral in the wrist “in any position for an extended period of time” causes incremental pressure increases in the carpal tunnel, and it can take awhile to see the “sums” of this increased pressure cause problems. (Ex. 10-18, -23). Dr. Van Allen explained that, with keyboarding, the extrinsic flexor tendons were moving within the confines of the carpal canal, next to the median nerve, which was the softest part within the confines of the canal. Thus, logically to him, keyboarding affects the pressure within the carpal canal. (Ex. 10-20-21).

Dr. Van Allen also remarked that Dr. Button's conclusion that keyboarding was a risk factor but not causative was problematic because the positioning of the wrist and activities have been shown to increase the pressure in the carpal tunnel and this is the physiologic mechanism by which the condition occurs. (Ex. 10-16-17). Dr. Van Allen acknowledged that there was medical literature both arguing for and against the association of CTS to keyboarding activity. (Ex. 10-15-16). However, he felt the medical literature on both sides was flawed. (Ex. 10-19, -23). According to Dr. Van Allen, the Mayo Clinic study, as relied on by Dr. Button, was flawed in that the factors potentially playing a role in the condition (*i.e.*, off-work activities or other diseases) were not controlled for. (Ex. 10-23-24). He also noted that the Harvard study (also cited by Dr. Button) admitted that it was not a well-controlled randomized study. (Ex. 10-24).

We find Dr. Van Allen's explanations more persuasive than Dr. Button, who more generally opined that slight deviation of the wrist off of neutral was insufficient movement in the carpal tunnel to be injurious because the "wrist * * * is designed to go through a wide arc of motion in all planes." (Ex. 11-13, -14, -15).

Although Dr. Van Allen did not know the specific duration claimant engaged in keyboarding at any given time, based on his review of claimant's job description, he understood that a "majority" of her day was spent keyboarding. (Ex. 10-7, -9, -11). Based on this information, Dr. Van Allen concluded that claimant's keyboarding activities provided the necessary "duration of exposure on a daily basis" for the development of CTS. (Ex. 10-19).

Regarding the role of obesity, Dr. Van Allen stated that the studies associating obesity with CTS did not show a physiologic underlying cause or that obesity independently caused CTS. (Ex. 10-17). Rather, the association made between heavy people and the development of the condition appeared to be based mostly on statistical criteria. (*Id.*) In Dr. Van Allen's opinion, if there was a cause and effect relationship between obesity and CTS, he would expect to see improvement with weight loss, which, in his clinical experience, did not occur. (Ex. 10-20). Dr. Van Allen also did not feel that claimant's diabetes was playing much of a role. (Ex. 10-19).

In sum, Dr. Van Allen persuasively explained that claimant's work activities were a cumulative process that was consistent with increased pressure to the carpal tunnel that led to the development of her CTS. He had an accurate history of claimant's work activities and took into consideration other potentially causative

factors (such as diabetes and obesity) when rendering his opinion that claimant's CTS was related to her work activities involving computer use/keyboarding. Furthermore, Dr. Van Allen persuasively rebutted Dr. Button's opinion. We conclude that Dr. Van Allen provided a thorough, complete and well-reasoned opinion concerning the causation of claimant's bilateral CTS. In contrast, Dr. Button did not adequately address why claimant's work activities were not a significant cause of her CTS condition, especially in light of Dr. Van Allen's detailed and well-reasoned physiological explanation as to why claimant's work activities were the major contributing cause of her bilateral CTS.

Under these circumstances, finding no persuasive reasons to the contrary, we conclude that Dr. Van Allen's opinion persuasively establishes that claimant's work activities were the major contributing cause of her bilateral CTS condition. Accordingly, we reverse the ALJ's order and set aside the insurer's denial.

Claimant's attorney is entitled to an assessed fee for services at hearing and on review. ORS 656.386(1). 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 at hearing and on review is \$10,000, payable by the insurer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by the record, claimant's appellate briefs, and her counsel's fee request), the complexity of the issue, the value of the interest involved, and the risk that claimant's counsel may go uncompensated.¹

Finally, because our order issues after the effective date of *amended* ORS 656.386(2) and OAR 438-015-0019, and because claimant has finally prevailed over a denied claim, we consider it appropriate to award reasonable expenses and costs to claimant for records, expert opinions, and witness fees. *See Nina Schmidt*, 60 Van Natta 169 (2008); *Barbara Lee*, 60 Van Natta 1, *on recons*, 60 Van Natta 139 (2008).

Consequently, in accordance with the aforementioned statute and rule, 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 insurer. The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

¹ In awarding an attorney fee, we reach our determination of a reasonable award, irrespective of a specific objection to an attorney fee request. *Leroy H. Crago*, 58 Van Natta 1143 n 1 (2006); *Daniel M. McCartney*, 56 Van Natta 460 (2004).

ORDER

The ALJ's order dated June 30, 2008 is reversed. The insurer's denial is set aside and the claim is remanded to the insurer for processing according to law. For services at hearing and on review, claimant's attorney is awarded an assessed fee of \$10,000, payable by the insurer. 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 insurer.

Entered at Salem, Oregon on March 9, 2009

Member Langer concurring in part and dissenting in part.

I agree with the majority that we have jurisdiction to review this case. However, because I disagree with the majority that claimant has established compensability of her bilateral carpal tunnel syndrome (CTS) by a preponderance of the medical evidence, I respectfully dissent.

Dr. Button noted that most of claimant's time, about seven hours a day, was spent on the computer dealing with transmissions involving e-mails, answering questions, and addressing various requests. (Ex. 9-1). He understood that claimant took numerous steps on the computer to access and process information, and that she operated the mouse with her right hand, did "togglng" activity with the left hand (using the thumb and little fingers), and performed standard key entry with both hands. (*Id.*) Although Dr. Button relied on literature for the proposition that "keyboarding" does not cause CTS, he also considered claimant's specific work activities in reaching his opinion, as well as her other contributing factors such as obesity, age, gender, and diabetes. He explained that claimant's obesity causes abnormal fluid shifts that can lead to swelling in the synovial tissue surrounding the median nerve, which, over a period of years, may cause the type of chronic median nerve compression that results in CTS.

Of importance to Dr. Button was his understanding that, while claimant was on the computer most of the day, she was not continuously or repetitively keyboarding that entire time. (Ex. 11-9). He explained that the "togglng" motion (one of claimant's principal activities of the left hand) would not be causative of CTS due to the biomechanics/structure of the wrist and muscles involved with that motion (as per claimant's demonstration to him during his examination). (Ex. 11-12, -13). He further explained that with light tapping "fingertip" motions on a keyboard during data entry, the extrinsic flexor tendons would not be

sufficiently activated to enhance circulation and decrease the hydrostatic pressure gradient within the carpal tunnel. He noted that many of the fine motor skills involved with typing (tapping and side-to-side motions) are performed with the intrinsic muscle-tendon units of the hand, which originate beyond the carpal tunnel. (Ex. 11-11). Dr. Button's explanation regarding the motor skills involved with normal keyboarding is well explained. Furthermore, compared to Dr. Van Allen, Dr. Button provided a more detailed analysis in support of his conclusion that claimant's job duties were "light" in nature. (See Ex. 11-6, -9, -11).

Although Dr. Van Allen considered claimant's job duties and was aware of Dr. Button's history of "7 hours" of computer use per day, he did not adequately address why claimant's work activities were the major cause of her CTS, especially in light of Dr. Button's detailed and well reasoned physiological explanation as to why the work activities were not causative. Dr. Van Allen stated that frequency, duration and positioning of the wrist all needed to be considered. (Ex. 10-9, -10). However, Dr. Van Allen did not sufficiently consider the frequency of *claimant's* actual duties.

During his deposition, Dr. Van Allen stated that his understanding, based on his review and interpretation of claimant's job description, was that she performed keyboarding on a "frequent" basis throughout the day, but he was unaware of the exact number of hours claimant was involved in keyboarding activities, or the duration of those activities at a given time. (Ex. 10-9, -11). Claimant testified that she spent 60-70 percent of her day "keyboarding" (toggling, data entry, using computer for research). (Tr. 37, 39). Her manager then testified that any data entry/key use was done in short bursts, or a few clicks of the mouse. (Tr. 25, 30, 31). Dr. Van Allen did not consider this information in reaching his opinion regarding frequency and/or duration. Therefore, while Dr. Van Allen stated that duration and time were very important, his opinion is conclusory when it came to discussing claimant's specific circumstances (*i.e.*, the frequency and duration that claimant engaged in keyboarding).

Dr. Van Allen also emphasized the positioning of the wrists in relation to CTS causation. A necessary component to his opinion was consideration of extended periods of "wrist deviation" from neutral. However, I do not find anywhere in the record where it was shown, or described, how this claimant placed her wrists while keyboarding. Furthermore, Dr. Button persuasively rebutted Dr. Van Allen's opinion that slight deviation in the wrist can result in increased pressure necessary to cause CTS. (Ex. 11-13, -14, -15).

Given Dr. Button's detailed and well-explained discussions, I conclude that Dr. Van Allen should have provided more reasoning in support of his opinion. Therefore, I disagree with the majority that Dr. Van Allen's opinion preponderates over that of Dr. Button. Therefore, I would affirm the ALJ's order that determined the claim was not compensable. Accordingly, I dissent.