

In the Matter of the Compensation of
TYSON MASSEY, Claimant

WCB Case No. 09-02255

ORDER ON REVIEW

Ransom Gilbertson et al, Claimant Attorneys
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Reviewing Panel: Members Lowell and Weddell.

The insurer requests review of Administrative Law Judge (ALJ) Fulsher's order that set aside its denial of claimant's occupational disease claim for left ulnar nerve compression/left cubital tunnel syndrome. On review, the issue is compensability.

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

Claimant operated heavy equipment while serving in the military between 2000 and 2004. After he was honorably discharged in 2004, nerve conduction studies confirmed left ulnar neuropathy.

Claimant began working at the employer's rock crushing plant in 2006. He performed heavy work activities, first as a groundsman and later as a welder. Dr. Wheatley performed a left cubital tunnel release on March 6, 2009.

Claimant filed an occupational disease claim for his left elbow condition, which the insurer denied.

The ALJ set aside the denial, finding the claim compensable under the "last injurious exposure rule" (LIER).

The insurer argues that LIER does not apply, because claimant's receipt of a 30 percent military disability award for "left ulnar nerve entrapment at the elbow" is insufficient evidence that the military exposure contributed to his left elbow condition. However, claimant's military records indicate that claimant needed left ulnar nerve decompression surgery in 2009 and the procedure was related to "service connected disability." (Ex. 1-19). Thus, the record establishes that claimant's left ulnar nerve condition was "service connected." (*See* Ex. 10). Accordingly, we find that claimant's military exposure contributed to his left elbow condition.¹

¹ In reaching this conclusion, we further note Dr. Button's opinion that obtaining the information used to determine the military disability was not important, because claimant had a "very significant severe cubital tunnel syndrome" when he was discharged from the military. (Ex. 13-11).

In addition, because the record establishes that claimant's later work at the employer's rock crushing plant also contributed to his left ulnar nerve condition, we agree with the ALJ that the LIER rule of proof applies to this initial occupational disease claim. *E.g.*, *Timothy R. Hanscam*, 59 Van Natta 2835, 2836 (2007) (in an occupational disease claim with no accepted claim for the disputed condition, all that is required for the invocation of the LIER is evidence of a causal contribution from more than one employment); *Albert A. Ahlberg*, 57 Van Natta 2840, 2846 (2005), *on remand*, *Ahlberg v. SAIF*, 199 Or App 271 (2005) (same).

We also find the claim compensable under the LIER rule of proof, because the medical record persuades us that claimant's work exposure (*i.e.*, military service and work at the rock crushing plant) was the major contributing cause of his left elbow condition. *See* ORS 656.266(1); ORS 656.802(2)(a); *Roseburg Forest Products v. Long*, 325 Or 305, 309 (1997) (under the LIER rule of proof, an occupational disease claim is compensable if work exposure at more than one employment is the major contributing cause of the condition); *Wallowa County v. Fordice*, 181 Or App 222, 225 *rev den*, 334 Or 492 (2003) ("military service counts as employment for purposes of the workers' compensation statutes"); *Monte S. Walton*, 58 Van Natta 1543 (2006) (LIER rule proof satisfied based in part on military exposure). We reason as follows.

We acknowledge at the outset that there is no medical opinion expressed with "magic words," *i.e.*, no medical expert specifically used the statutory term "major contributing cause." Nonetheless, we find the claim compensable under the particular circumstances, as explained below. *See e.g.*, *SAIF v. Strubel*, 161 Or App 516, 521-22 (1999) (holding that an expert's opinion need not be ignored because it fails to include the magic words "major contributing cause"); *Freightliner Corp. v. Arnold*, 142 Or App 98, 105 (1996) (no incantation of statutory language or "magic words" required to establish major causation).

Dr. Wheatley, claimant's treating surgeon, and Ms. Hopkins, his nurse, attributed claimant's left elbow condition to his work. (Exs. 4A, 5). We find these opinions persuasive, noting that Ms. Hopkins's opinion in particular is based on an accurate and complete history about the nature of claimant's work at the rock crushing plant.²

² Ms. Hopkins's history is consistent with claimant's testimony, his military medical record, and the employer's job description. (*See* Exs. 1-22, 12).

The insurer relies on the opinion of Dr. Button, examining physician, contending that claimant's recent work activities for the insured did not contribute to his condition. We do not rely on Dr. Button's opinion, for several reasons.

First, Dr. Button had a limited understanding of claimant's work activities at the rock crushing plant, stating that they involved "a variety of maintenance and repair tasks." (Exs. 7-1, 8AA-8, -10). He did not discuss the possible causal contribution of claimant's heavy lifting at work.³ Thus, in our view, Dr. Button did not adequately consider the nature of claimant's work activities. Because those activities are otherwise identified as injurious, we do not find Dr. Button's opinion persuasive. See *Larae C. Monical*, 62 Van Natta 1637, 1640 (2010) (physician's causation opinion found unpersuasive, for not considering all of the claimant's activities).

We also find Dr. Button's opinion unpersuasive because it was largely based on speculation about potential nonwork related risk factors. In this regard, Dr. Button initially opined that claimant had no such risk factors. (Exs. 7-6, 8AA-8-9). Later, however, Dr. Button suspected an anatomical abnormality, a likely "predisposing causative factor that would relate to the anatomic configuration of the cubital tunnel within which passes the ulnar nerve[,]" noting that abnormal fascial bands are "frequently identified at the time of surgery." (Ex. 11-2). However, when deposed, Dr. Button acknowledged that no such abnormalities had been identified in claimant's case.⁴ (See Ex. 13-8).

During a second deposition, Dr. Button clarified his opinion about a "likely" predisposing factor stating that, in his surgical experience, claimant *may* have some type of anatomical variation that "*may* have led" to his ulnar nerve condition. (Ex. 13-7). Thus, in our view, Dr. Button's ultimate causation opinion is speculative and unpersuasive. See *Lyle R. King*, 58 Van Natta 840, 844 (2006) (doctor's speculation insufficient to establish causation based on medical probability) (citing *Gormley v. SAIF*, 52 Or App 1055, 1060 (medical opinions expressed as mere possibility insufficient to prove claim)).

³ Moreover, although Dr. Button initially opined that using a sledgehammer was *not* a factor contributing to claimant's need for surgery, he later opined that it "might" have contributed to the condition. (Compare Exs. 7-6, 8AA-10). Specifically, Dr. Button conceded that "in a person having ulnar nerve entrapment [like claimant] using a sledgehammer "with a grip that would activate one of the wrist flexor tendons [] might contribute to the condition." (Ex. 8AA-10).

⁴ Insofar as Dr. Button's opinion in this regard is based on the fact that claimant is right handed and his condition is left-sided, we find it insufficiently explained. In addition, we note that claimant reported early right-sided symptoms in 2009. (Ex. 1-7).

Finally, to the extent that Dr. Button opined that claimant's ulnar nerve condition worsened spontaneously after his military exposure, we find that opinion unpersuasive in light of the persuasive opinions establishing that claimant's subsequent work at the rock crushing plant contributed to his condition.⁵ (*See* Ex. 7-6-7). *See David J. Tikunoff*, 62 Van Natta 2359 (2010) (in light of persuasive medical opinions explaining why the claimant's work activities contributed to his condition, examining physicians did not adequately explain how the purported "spontaneous" condition involved no workplace contribution).

In sum, based on the aforementioned reasoning, we are persuaded that claimant's military service and his subsequent work activities were the major contributing cause of his left ulnar nerve condition. *See Jackson County v. Wehren*, 186 Or App 555, 563 (2003) ("When the alternative to an expert's opinion on major contributing cause is another expert's opinion that no such cause is known or knowable, [*Dietz v. Ramuda*, 130 Or App 397 (1994)] does not require the first expert to propose and then reject some set of hypothetical causes."); *Freightliner Corp. v. Arnold*, 142 Or App 98, 105 (1996) (no incantation of statutory language or "magic words" required to establish major causation). Therefore, claimant has established a compensable occupational disease under ORS 656.802(2)(a) and LIER.

Next, we address the insurer's contention that it is not responsible for the claim (even if it is compensable), based on Dr. Button's opinion that claimant's work at the rock crushing plant did not contribute to his condition.

Generally, a carrier can escape liability for an occupational disease by establishing that prior employment was the sole cause of the condition or that it was impossible for employment under its coverage to have caused the condition. *See Reynolds Metals v. Rogers*, 157 Or App 147, 153 (1998), *rev den*, 328 Or 365 (1999).

Here, however, the insurer cannot escape liability for the compensable condition, because the prior employment exposure (military service) was outside the Oregon Workers' Compensation system. Under these circumstances, responsibility for the compensable claim rests with the Oregon insurer. *See SAIF v. Henwood*, 176 Or App 431, 440 (2001), *rev den*, 333 Or 463 (2002) (where both out-of-state and Oregon working conditions contributed to an occupational disease, Oregon carrier was responsible because responsibility could not be assigned to out-of-state employer).

⁵ Dr. Button subsequently opined that it was "not impossible" that the latter work contributed to the condition. (Exs. 8AA-9, 13-8).

Moreover, the persuasive medical evidence discussed above establishes that claimant's work for the insured contributed to his compensable condition. Therefore, the insurer has not established that it was impossible for employment under its coverage to contribute or that the prior military exposure was the sole cause of the condition. *See e.g., Reynolds Metals v. Rogers*, 157 Or App at 153. Consequently, we affirm the ALJ's decision setting aside the insurer's denial.

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 \$3,000, payable 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 issue, and the value of the interest involved.

Finally, 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. *See* ORS 656.386(2); OAR 438-015-0019; *Gary Gettman*, 60 Van Natta 2862 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

ORDER

The ALJ's order dated June 9, 2010 is affirmed. For services on review, claimant's counsel is awarded an attorney fee of \$3,000 to be paid 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 December 17, 2010