

In the Matter of the Compensation of
GREGORY T. BELKNAP, Claimant

WCB Case No. 09-03790

ORDER ON REVIEW

Malagon Moore & Jensen, Claimant Attorneys

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

The self-insured employer requests review of Administrative Law Judge (ALJ) Mundorff's order that set aside its denial of claimant's injury claim for a myocardial infarction. On review, the issue is compensability. We affirm.

FINDINGS OF FACT

Claimant worked at a recycling center. (Tr. 4; Ex. 3-2). At approximately 2 p.m. on May 27, 2009, he arrived at work, but was unable to park his car because a refrigerator had been left in his designated parking space. (Tr. 4-6; Exs. A, B, 3-1). He physically moved the refrigerator, which weighed approximately 300 pounds, across two feet of gravel surface. (Tr. 5-8, 12). He needed to exert "quite a bit of force to move" the refrigerator. (Tr. 9). He felt an immediate burning in his chest, which worsened over the next five minutes, followed by shortness of breath. (Tr. 8-9). He was then transported by ambulance to a hospital, where he was treated for a myocardial infarction. (Exs. 1-1, 2, 3-1, -5).

Before arriving at work on the day of the myocardial infarction, claimant mowed his lawn in the morning. (Tr. 9; Ex. 3-2). At around 12:30 p.m., he engaged in some weightlifting exercises, including bench pressing approximately 100 pounds. (*Id.*) He did not experience any chest discomfort or other symptoms before lifting the refrigerator at work. (Tr. 9).

Claimant was treated by Dr. Gory, a cardiologist, who performed an acute angioplasty. (Exs. 1, 2, 3-2). Claimant was subsequently informed that he would need a quadruple coronary bypass, which was performed two days later by Dr. Tobin. (Exs. 2, 3-2).

Dr. Gory noted that claimant had an underlying coronary disease, but that even with that disease, extreme exertion could be a material cause of a myocardial infarction. (Exs. 1, 2). He concluded that claimant's moving of the refrigerator was likely a material contributing cause of the acute myocardial infarction. (Exs. 1, 2).

In August 2009, Dr. Semler examined claimant at the employer's request. Unlike Dr. Gory, he concluded that moving the refrigerator was not a material contributing cause of the myocardial infarction and its resulting need for treatment, but was merely "coincidental." (Ex. 3-5, -6). He asserted that moving the refrigerator was "not strenuous or anything unusual or extraordinary that [claimant] was not already accustomed to. Had [claimant] done something more extraordinary, more stressful physically, or unusual[,] then it might have been more of a contributing factor * * *." (Ex. 3-6). Therefore, Dr. Semler concluded that it was more medically probable that atherosclerosis, diabetes mellitus, elevated cholesterol/lipids, age, and gender were "the major causal factors in bringing on a heart attack on May 27, 2009." (*Id.*) Dr. Tobin concurred with Dr. Semler's opinion. (Ex. 4).

The employer denied claimant's injury claim. Claimant requested a hearing.

CONCLUSIONS OF LAW AND OPINION

The ALJ set aside the employer's denial, relying on the opinion of Dr. Gory. On review, the employer contends that Dr. Gory's opinion is unpersuasive because he did not have a complete history of other potential causes of claimant's myocardial infarction and did not weigh those other potentially contributing causes. We disagree with the employer, reasoning as follows.

Claimant has the burden to prove that his work injury was a material contributing cause of the disability/need for treatment for his myocardial infarction. ORS 656.266; ORS 656.005(7)(a); *Albany General Hospital v. Gasperino*, 113 Or App 411 (1992). A "material contributing cause" is a substantial cause, but not necessarily the sole cause or even the most significant cause. *See Van Blokland v. Oregon Health Sciences Univ.*, 87 Or App 694, 698 (1987); *Summit v. Weyerhaeuser Co.*, 25 Or App 851, 856 (1976) ("material contributing cause" means something more than a minimal cause; it need not be the sole or primary cause, but only the precipitating factor).

Because of the possible alternative causes of claimant's disability/need for treatment, resolution of this matter is a complex medical question that must be resolved by expert medical opinion. *Barnett v. SAIF*, 122 Or App 279, 282 (1993). More weight is given to those medical opinions that are well reasoned and based on complete and accurate information. *Somers v. SAIF*, 77 Or App 259, 263 (1986). A physician's history is complete if it includes sufficient information on which to base the opinion and does not exclude information that would make the opinion less credible. *Jackson County v. Wehren*, 186 Or App 555, 561 (2003).

Here, Dr. Gory opined that the May 27, 2009 work incident was a material contributing cause of claimant's disability/need for treatment for the myocardial infarction. (Exs. 1, 2). In reaching that decision, Dr. Gory relied on an accurate history concerning the incident. (*Id.*) Moreover, Dr. Gory also considered claimant's "underlying coronary disease." (Ex. 2). Despite the presence of that disease, Dr. Gory still deemed it probable that moving the refrigerator was a material contributing cause of the myocardial infarction and subsequent need for treatment. (Exs. 1, 2). We find this opinion to be well reasoned and persuasive.

We disagree with the employer that we should discount Dr. Gory's opinion because his opinion did not mention claimant's "pre-work" weightlifting activities. Although Dr. Semler received such a history, he did not relate those activities in any part to the myocardial infarction. (*See* Ex. 3-5, -6). Therefore, we do not find that Dr. Gory lacked sufficient information on which to base his opinion or information that rendered his opinion less credible. *See Wehren*, 186 Or App at 561.

We also disagree that we should disregard Dr. Gory's opinion because he did not weigh the relative contribution of other potentially contributing causes suggested by Dr. Semler. Because this case involves a material contributing cause standard, it is not necessary for a medical opinion to weigh the relative contribution of each potentially contributing cause. *Richey v. Barrett Business Services*, 173 Or App 29 (2001). In any event, as previously noted, Dr. Gory considered claimant's underlying coronary disease in reaching his opinion. (Ex. 2).

Moreover, we are not persuaded by Dr. Semler's opinion. Although Dr. Semler opined that the work incident and the myocardial infarction were "coincidental," he based this opinion on his understanding that "there was no real exertion associated with" moving the refrigerator. (Ex. 3-6). Claimant, however, testified that he had "to exert quite a bit of force to move [the refrigerator]." (Tr. 9). Therefore, we find that Dr. Semler lacked accurate information concerning the work incident that makes his opinion less persuasive. Accordingly, we do not rely on his opinion. *See Brian T. Berry*, 59 Van Natta 2427, 2431 (2007) (opinions based on materially inaccurate information not persuasive).

Additionally, in justifying his conclusion that the work incident was not a *material* contributing cause of the myocardial infarction, Dr. Semler identified an amalgamation of other factors that he deemed "the *major* causal factors in bringing on [the infarction]." (Ex. 3-6) (emphasis added). It does not necessarily follow, however, that the work incident was precluded from being a *material* contributing

cause of claimant's disability/need for treatment for the myocardial infarction merely because other factors were collectively *the major* cause of the infarction. Therefore, we are not persuaded by Dr. Semler's reasoning. *See Karl J. Wild*, 58 Van Natta 1729, 1734 (2006) (poorly reasoned medical opinion entitled to little weight). Accordingly, we affirm.

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 \$4,000, 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 and his counsel's uncontested fee request), 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 employer. *See* ORS 656.386(2); OAR 438-015-0019; *Gary E. 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 October 28, 2009, as reconsidered on November 18, 2009, is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$4,000, to be paid by the employer. 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 employer.

Entered at Salem, Oregon on July 30, 2010

Member Langer dissenting.

I disagree with the majority's conclusion that Dr. Gory's opinion persuasively establishes a compensable injury claim. His opinion was premised on the theory that "quite extreme" exertion could be a material contributing cause of a myocardial infarction. (Ex. 2). The record establishes that, approximately 90 minutes before arriving at work and suffering the myocardial infarction, claimant engaged in weightlifting, which included "two to three sets" of bench-pressing 100 pounds. (Ex. 3-2). There is no evidence, however, that Dr. Gory was aware of this activity, which would qualify as "quite extreme" exertion.¹ As such,

¹ Dr. Semler reported that moving a refrigerator two feet on a level surface was "nothing compared to" claimant's weightlifting. (Ex. 7-6).

I would find that Dr. Gory's opinion lacked "sufficient information on which to base [his] opinion" and "exclude[d] information that would make [his] opinion less credible." See *Jackson County v. Wehren*, 186 Or App 555, 561 (2003). Therefore, I would not rely on his opinion.

Moreover, in concluding that the workplace "refrigerator" incident was not a material contributing cause of claimant's need for treatment for the myocardial infarction, Dr. Semler opined that the infarction "was a result of multiple risk factors[,] including diabetes mellitus, hyperlipidemia, long-standing multi-vessel coronary atherosclerotic heart disease, [claimant's] age and male sex." Dr. Gory did not respond to this opinion; indeed it does not appear that Dr. Gory was even aware of claimant's diabetes or hyperlipidemia. Under these circumstances, I do not find Dr. Gory's opinion persuasive. See *Janet Benedict*, 59 Van Natta 2406, 2409 (2007) (medical opinion unpersuasive when it did not address contrary opinions).

In finding Dr. Gory's opinion persuasive, the majority reasons that, where a material contributing standard applies, it is not necessary for a medical opinion to weigh the relative contribution of each potentially contributing cause. See *Richey v. Barrett Business Services*, 173 Or App 29 (2001). Although that principle may be true in a general sense, it has no application here where Dr. Semler identified other potential causes of the infarction; once a medical expert made that assertion, it was incumbent on Dr. Gory to persuasively rebut that opinion. See *Benedict*, 59 Van Natta at 2409. As set forth above, Dr. Gory did not do so.

Finally, I question whether Dr. Gory expressed his opinion in terms of medical probability. See *Gormley v. SAIF*, 52 Or App 1055, 1060 (1981) (persuasive medical opinions must be based on medical probability, rather than possibility). Dr. Gory observed that "quite extreme" exertion "can be a material cause in a myocardial infarction," and that the workplace incident "likely did contribute" to the infarction. When read as a whole, this equivocating opinion suggests terms of possibility, rather than medical probability. See *Gormley*, 52 Or App at 1060 (use of the words "could," "can," "it is reasonable to assume" and "we would like to assume" militated against a finding of medical causation in terms of probability); *Kyle G. Anderson*, 61 Van Natta 2117, 2117-18 (2009) (the words "can be" and "may be" indicate only possibility, not medical probability).

In sum, I would find Dr. Gory's opinion insufficient to meet claimant's burden of proof. Because the majority determines otherwise, I respectfully dissent.