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In the Matter of the Compensation of

**DAVID G. NOLAN Claimant**

WCB Case No. 08-07485

ORDER ON REVIEW

Ransom Gilbertson Martin et al, Claimant Attorneys

Sather Byerly & Holloway, Defense Attorneys

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

Claimant requests review of that portion of Administrative Law Judge (ALJ) Pardington's order that upheld the self-insured employer's denial of his injury claim for a left shoulder condition.<sup>1</sup> On review, the issue is compensability. We affirm.

#### FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," summarized as follows.

On October 6, 2008, claimant drove a forklift into a hole while working. (Tr. 24-26). He experienced pain in his back and left shoulder and had difficulty raising his left arm. (Tr. 26-29). He reported the incident to the employer that day. (Tr. 32; Exs. 25, 26). He treated with a physician assistant (PA), Denison, who placed him on modified work. (Ex. 28).

PA Denison suspected a rotator cuff tear and ordered an MRI. (Exs. 37, 38). A November 2008 MRI did not show evidence of a rotator cuff tear, but was interpreted by a radiologist as showing a "suspect[ed]" small nondisplaced fracture of the posterior inferior glenoid lip. (Ex. 40).

Before the October 2008 work incident, claimant had been involved in motor vehicle accidents (MVAs) in 1992, 1993, and 1996. (Exs. 2, 3, 4, 8). He sustained cervical strains in each incident. (*Id.*)

PA Denison opined that the glenoid fracture shown on the November 2008 MRI appeared to be "acute." (Ex. 44-2). He also stated that the mechanism of injury was "consistent with" sustaining a glenoid fracture. (*Id.*) He then checked "No" in response to the following statements:

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<sup>1</sup> The employer's denial also denied alleged injuries to the cervical and thoracic spine. Claimant does not contend on review that he sustained cervical or thoracic spine injuries.

“You are aware of [claimant’s] prior motorcycle accidents. The bottom line is if you believe [claimant’s] history, the mechanics of his injury is consistent and [claimant’s] pain and presentation is consistent, you believe the major contributing cause of his disability and need for treatment was his on-the-job injury as reported.” (Ex. 44-3).

PA Denison then handwrote the following in an “Explain” section:

“I was not aware of a prior accident. However, I do not believe this history contributed in any way to the acute glenoid fracture. [Claimant’s] described mechanism is consistent with the fracture.” (*Id.*)

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

#### CONCLUSIONS OF LAW AND OPINION

The ALJ upheld the employer’s denial, finding that PA Denison’s opinion did not establish that claimant’s work injury was a material contributing cause of his disability/need for treatment for the left shoulder condition. In doing so, the ALJ reasoned that, at most, the opinion stated that the work incident was “consistent with” the diagnosed left shoulder condition. The ALJ further reasoned that the opinion was inadequately explained and based on an incomplete understanding of claimant’s medical history.

On review, claimant contends that PA Denison sufficiently attributed the left shoulder condition to the October 2008 work incident, and that the injuries sustained in the MVAs are irrelevant to the currently claimed condition. We affirm the ALJ’s decision, reasoning as follows.

To prove the compensability of an injury, claimant must show that the work incident was a material contributing cause of his disability or need for treatment. ORS 656.005(7)(a); ORS 656.266(1); *Albany Gen. Hosp. v. Gasperino*, 113 Or App 411, 415 (1992). He must prove both legal and medical causation by a preponderance of the evidence. *Harris v. Farmer’s Co-op Creamery*, 53 Or App 618 (1981); *Carolyn F. Weigel*, 53 Van Natta 1200 (2001), *aff’d without opinion*, 184 Or App 761 (2002). Legal causation is established by showing that claimant engaged in potentially causative work activities; whether those work activities caused claimant’s condition is a question of medical causation. *Darla Litten*, 55 Van Natta 925, 926 (2003).

The employer contends that claimant was not forthcoming about his previous medical treatment/injuries, and therefore has not established legal causation. Regardless of any inconsistencies concerning the earlier MVAs, claimant has consistently described the October 2008 work incident. Moreover, he reported the incident to the employer on the incident date and immediately sought medical treatment. We find this sufficient to conclude that claimant engaged in the activities potentially causative of the claimed left shoulder condition. *See Fidel Pantoja-Gonzalez*, 62 Van Natta 1665, 1666-67 (2010) (the claimant's account of a workplace incident found credible where it was consistent and corroborated by promptly reporting the injury and seeking medical treatment); *Cynthia R. Gebhardt*, 61 Van Natta 2416, 2418 (2009) (same). Accordingly, we find that legal causation has been established.

We do not, however, reach the same conclusion with respect to medical causation. As set forth above, PA Denison acknowledged being unaware of claimant's previous medical history with respect to three MVAs resulting in cervical injuries. (*See Ex. 44-3*). Moreover, he checked "No" in response to a query that included a question as to whether the October 2008 work incident was the major cause of claimant's disability/need for treatment for his left shoulder condition. (*Id.*) Although we may draw reasonable inferences from the medical evidence, we are not free to reach our own medical conclusions about causation in the absence of such evidence. *Benz v. SAIF*, 170 Or App 22, 26 (2000); *Loleatha Montague*, 59 Van Natta 1725, 1727 (2007); *see also SAIF v. Calder*, 157 Or App 224, 227-28 (1998) (the Board is not an agency with specialized medical expertise; its findings must be based on medical evidence in the record). Given PA Denison's "No" response, we do not find that a reasonable inference can be made that he meant "Yes" with respect to whether the work incident was a material contributing cause of claimant's disability/need for treatment. Therefore, his opinion is insufficient to establish a compensable injury claim.

Moreover, we also find that the opinion lacks logical force. Despite acknowledging being unaware of claimant's previous MVAs, PA Denison concluded that those incidents did not contribute to claimant's claimed condition. (*Id.*) Because PA Denison could not assess the contributory role of incidents of which he was unaware, we find his opinion poorly reasoned and unpersuasive. *Gregory T. Belknap*, 62 Van Natta 1948, 1951 (2010) (poorly reasoned opinion unpersuasive); *Karl J. Wild*, 58 Van Natta 1729, 1734 (2006) (poorly reasoned medical opinion entitled to little weight).

Therefore, in the absence of any persuasive medical opinion establishing that the October 2008 work incident was a material contributing cause of claimant's disability/need for treatment for his left shoulder condition, we affirm. *See David B. Schwartz*, 57 Van Natta 1013, 1015 (2005) (“[w]e may find even the uncontradicted opinion of a medical expert unpersuasive”); *William K. Young*, 47 Van Natta 740, 744 (1995) (uncontradicted medical opinion found unpersuasive).

### ORDER

The ALJ's order dated March 24, 2010 is affirmed.

Entered at Salem, Oregon on October 12, 2010

Member Weddell dissenting.

I disagree with the majority's determination that the uncontradicted opinion of physician assistant (PA) Denison is insufficient to establish a compensable left shoulder injury. PA Denison characterized the glenoid fracture (as evidenced on the MRI) as “acute” and consistent with the mechanism of injury as reported by claimant. (Ex. 44-2, -3). Although PA Denison marked a “No” box in response to a paragraph containing multiple assertions, he explained his “No” response by stating that he was unaware of any “prior accident.” (Ex. 44-3). He then explained that the fracture was “acute,” “consistent with the mechanism” of injury, and therefore unrelated to any prior incident. (*Id.*) Although he did not conclude that paragraph by expressly stating that the October 2008 work incident was a material contributing cause of claimant's disability/need for treatment of the fracture, I find such an inference reasonable. *See Benz v. SAIF*, 170 Or App 22, 25 (2000) (the Board is entitled to make reasonable inferences from the medical evidence). Likewise, the absence of “magic words” is not controlling if the opinion otherwise meets the appropriate legal standard. *See, e.g. SAIF v. Strubel*, 161 Or App 516, 521-22 (1999) (expert's opinion need not be ignored for not including “magic words” of “major contributing cause”). Here, because PA Denison's opinion was un rebutted, I would find that claimant has established a compensable injury. Therefore, I respectfully dissent.