

In the Matter of the Compensation of
CRISTINA A. HERNANDEZ, Claimant

WCB Case Nos. 09-02736, 09-02007

ORDER ON REVIEW

Hollander & Lebenbaum, Claimant Attorneys
Sheridan Levine LLP, Defense Attorneys

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

Sedgwick Claim Management Service (Sedgwick) and the noncomplying employer request review of Administrative Law Judge (ALJ) Lipton's order that set aside Sedgwick's denial of claimant's injury claim for a low back condition. On review, the issue is compensability.

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

In setting aside the denial, the ALJ determined that claimant carried her burden of proving that she sustained a compensable injury on February 12, 2009, while working in the kitchen of the noncomplying employer's restaurant. On review, the employer makes a number of arguments attacking claimant's credibility/reliability as a witness. For the following reasons, we agree with the ALJ's disposition of this matter.

To prove the compensability of an injury, claimant must show that the alleged work injury was a material contributing cause of her disability or need for treatment. ORS 656.005(7)(a); ORS 656.266; *Albany Gen. Hosp. v. Gasperino*, 113 Or App 411, 415 (1992). Claimant 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).

Whether claimant established legal causation hinges principally on her credibility and reliability. In determining the credibility of a witness's testimony, we normally defer to an ALJ's demeanor-based credibility findings. See *Erck v. Brown Oldsmobile*, 311 Or 519, 526 (1991) (on *de novo* review, it is good practice to give weight to the fact finder's credibility assessments). Here, the ALJ did not make an express demeanor-based credibility finding. Because the issue of credibility concerns

the substance of claimant's testimony, we are equally qualified to make our own credibility determination. *Coastal Farm Supply v. Hultberg*, 85 Or App 282 (1987); *Michael A. Ames*, 60 Van Natta 1324, 1326 (2008).

We acknowledge that, when claimant first sought medical treatment at an emergency room on February 13, 2009, the day after she allegedly injured her low back, the chart notes reflecting that visit do not contain a history of the injury that claimant testified occurred while she was cleaning a fryer at work. Moreover, the chart notes indicate a two-week onset of claimant's low back pain and state that she denied "trauma." (Ex. 4-1). In addition, the employer produced witnesses that testified that claimant reported prior low back discomfort.

Nevertheless, there is no medical record of a prior low back injury or treatment for low back symptoms. Witnesses also testified on claimant's behalf that she had not previously demonstrated low back problems. (Trs. 33, 39, 53). Claimant reported the alleged injury during her next visit to a physician on February 16, 2009. (Ex. 7). Claimant did acknowledge previous occurrences of back pain when she became "tired." (Tr. 13). However, she testified that this occurred in the upper back. (Tr. 14). She also reported prior use of a back brace, but testified that she used it as a preventative measure. (Tr. 14). A witness (Mechor) testified that she accompanied claimant to the emergency room and that claimant reported her work injury to medical personnel. (Tr. 46). Although claimant finished her shift without reporting her injury to her supervisor (Arriola), she testified that she reported her injury to the supervisor the next day before she sought treatment. (Tr. 11). Arriola's testimony did not contradict claimant's account of her reporting of the injury.

After considering the circumstances of this claim, as well as the testimony of various witnesses, we are persuaded that the incident of injury occurred as claimant alleges. In reaching this conclusion, we further acknowledge that conflicting testimony was presented regarding the possibility that claimant may have injured her low back while moving in or out of a residence. (Trs. 16, 20, 29, 33, 39, 54, 65, 78). Having reviewed that testimony, we find insufficient evidence that such an off-the-job injury occurred.

In sum, the compensability issue is a close one. Nevertheless, we are persuaded that, on this record, claimant proved medical and legal causation. Thus, 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 \$3,500, payable by Sedgwick on behalf of the noncomplying employer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's respondent's brief, his counsel's affidavit, and the employer's objections), 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 Sedgwick on behalf of the noncomplying employer. *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 November 10, 2010 is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$3,500, payable by Sedgwick, on behalf of the noncomplying 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 Sedgwick, on behalf of the noncomplying employer.

Entered at Salem, Oregon on August 15, 2011

Member Langer dissenting.

The majority affirms the ALJ's determination that claimant sustained a compensable low back injury. Although conceding that the compensability issue is close, the majority finds that claimant proved medical and legal causation. Because I reach a different conclusion, I must respectfully dissent.

Having reviewed this record, I find enough inconsistencies that I must seriously question claimant's credibility as a witness. The most troubling aspect of the record concerns the discrepancy between claimant's testimony that she injured her low back while cleaning a fryer at work and the emergency room chart notes documenting her medical treatment the day after the alleged injury.

Those chart notes recount a history of bilateral lower back pain for two weeks. They do not mention any work-related injury. In fact, the history specifically states that claimant could not recall any injury. (Ex. 4-1). Even taking into account problems in translation, I simply cannot accept that the emergency room personnel, including the

physician, could have so inaccurately recounted claimant's history that they failed to record the injury that claimant allegedly reported to them. This is especially true where the records accurately documented other detailed aspects of claimant's history, such as the presence of thyroid disease, the fact that claimant does not smoke or use alcoholic beverages, but drinks three to four cups of coffee, and the past occurrence of a "c-section." (Ex. 4-2).

It would have been helpful had claimant called as a witness the woman who interpreted at the emergency room, Ms. Cortez, but she did not. Instead she relied on the testimony of Mechor, who testified that claimant reported her injury to a physician. However, Mechor speaks no English. The emergency room chart notes, in combination with the consistent testimony of four employer witnesses (Garcia, Godwin, Curiel and Arriola), who testified that claimant had experienced prior back problems, compel me to conclude that claimant's testimony is not credible, or at the very least, is unreliable. It is notable that one of the employer witnesses, Arriola, no longer works for the employer, so there is no reason to believe that she has any interest in the outcome of the claim. She was claimant's supervisor at the time of the alleged injury. She testified that claimant had prior back problems in connection with an off-the-job move. (Tr. 78).

Claimant admitted that she had previously worn a back brace and had experienced back pain. She testified, however, that she wore a back brace as a preventative measure and that her prior back symptoms were the result of being "tired." I have difficulty in accepting that testimony in light of the entire record, which casts doubt on claimant's reliability as a witness. It is also worth noting that the ALJ made no demeanor-based credibility finding in claimant's favor. Therefore, I have no reason to accept claimant's testimony at face value.

In conclusion, while this case is close, there is simply too much for me to overlook to find this claim compensable. Given this, I must part company with the majority and dissent.