

In the Matter of the Compensation of
LANCE E. FORD, Claimant

WCB Case No. 10-00450

ORDER ON REVIEW

Welch Bruun & Green, Claimant Attorneys
Reinisch Mackenzie PC, Defense Attorneys

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

The self-insured employer requests review of that portion of Administrative Law Judge (ALJ) Rissberger's order that set aside its denial of claimant's injury/occupational disease claim for a left wrist condition. On review, the issue is compensability. We affirm.

FINDINGS OF FACT

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

CONCLUSIONS OF LAW AND OPINION

Claimant filed a claim for left wrist sprain related to his repetitive work activities on November 20, 2009. (Exs. 1, 5, 6). The ALJ analyzed the claim as an injury. Relying on the opinion of Dr. Button, who examined claimant at the employer's request, the ALJ concluded that the November 20, 2009 work exposure was a material contributing cause of claimant's disability/need for treatment of a left wrist condition.

On review, the employer argues that the claim should be analyzed as an occupational disease. Claimant responds that his claim is properly analyzed as an injury, and contends that it is undisputed that his November 20, 2009 work exposure was at least a material contributing cause of the disability or need for treatment of his left wrist condition. Both parties rely on Dr. Button's opinion to support their respective positions.¹

To determine whether a claim involves an injury or an occupational disease, we look at the suddenness in the onset of the condition. *See Smirnoff v. SAIF*, 188 Or App 438, 443 (2003). To be considered an injury, the condition must arise

¹ Claimant acknowledges that Dr. Button's opinion does not establish compensability under an occupational disease theory.

from an identifiable event or have an onset traceable to a discrete period of time. *Active Transp. Co. v. Wylie*, 159 Or App 12, 15 (1999); *Laverne Y. Ballard*, 59 Van Natta 979, 982 (2007). The determining factor “is whether the condition itself, not its symptoms, occurred gradually, rather than suddenly.” *Smirnoff*, 188 Or App at 449. However, symptoms are not necessarily distinct from a condition and the two will frequently coincide. *Id.* at 443. In such circumstances, “the onset of symptoms [is] highly relevant to determining the onset of the condition.” *Id.* at 448.

We find that claimant’s claim is properly analyzed as an injury, and that his November 20, 2009 work activities were a material contributing cause of his disability or need for treatment of his left wrist condition, regardless of the diagnosis. ORS 656.005(7)(a); ORS 656.266(1); *Boeing Aircraft Co. v. Roy*, 112 Or App 10, 15 (1992) (for initial claims, claimant need not prove a specific diagnosis if he proves that his symptoms are attributable to his work); *Mannie Burkman*, 58 Van Natta 2406, 2407 (2006). We reason as follows.

On Friday, November 20, 2009, claimant began working for the employer as a temporary laborer. (Ex. 1). That day, he worked as a warehouse laborer unloading boxes from truck trailers. (Ex. 1; Tr. 7). The work involved repetitively lifting approximately 1,000 boxes weighing up to 50 pounds during the day. (Tr. 7-9). Claimant testified that, after about four or five hours of work, he experienced cramping and pain in his left wrist/forearm. (Tr. 9-11, 29). By the time his shift ended, claimant noticed that his wrist was swollen. (Tr. 10). He continued to experience pain and swelling over the weekend. (Tr. 11). Claimant had no prior left wrist problems before November 20, 2009. (Tr. 7, 13-16, 33). The ALJ found claimant’s testimony to be credible based on demeanor, and we find no persuasive reason to depart from our well-established practice of deferring to the ALJ’s credibility finding.² See *Erck v. Brown Oldsmobile*, 311 Or 519, 526 (1991) (on *de novo* review, it is a good practice for an agency or court to give weight to the factfinder’s credibility assessments); see also *Carlos Sanchez*, 59 Van Natta 58, 58-59 (2007) (same).

On November 22, 2009, claimant was diagnosed with acute left wrist de Quervain’s tenosynovitis based on objective findings of mild swelling over the radial dorsal aspect of his left wrist, as well as a positive Finkelstein’s test.

² Specifically, the ALJ found that claimant’s testimony was “consistent, reasonably specific and delivered in a sincere manner.” (Opinion and Order at 4).

(Exs. 2, 3, 4). Thereafter, claimant's subsequent diagnoses also included a left wrist sprain with possible tendon tear and tenosynovitis/tendonitis based on examination findings. (Exs. 6, 10, 11, 12, 13).

On April 7, 2010, Dr. Button examined claimant at the employer's request and found no diagnosable left wrist condition. (Ex. 15A-4-5). He noted that the November 22 examination findings, particularly the positive Finkelstein's test, were consistent with de Quervain's tenosynovitis. (Ex. 15A-1). However, based on the contemporaneous medical records and claimant's description and location of symptoms, Dr. Button stated that the "presumption would be that he developed an acute inflammatory tendonitis/tenosynovitis process, termed intersection syndrome." (Ex. 15A-5). When asked if he could identify the source of claimant's left wrist/forearm symptoms and need for treatment, Dr. Button replied, "Only historically on the basis of the description of his symptom location and apparent correlation with one day of work." (*Id.*) In doing so, Dr. Button observed that the November 23 report regarding claimant's left wrist did not describe findings of a tendonitis process, and that claimant was diagnosed with a wrist sprain. (Ex. 15A-2, -5). He further opined that the November 30, 2009 examination findings were consistent with the left wrist MRI findings (which Dr. Button considered to be suggestive of a tendonitis process) and a diagnosis of tenosynovitis. (Ex. 15A-6). Dr. Button agreed that "the underlying pathology of [claimant's] current left wrist/forearm condition occur[red] suddenly due to a discrete traumatic event[.]" (Ex. 15A-6).

Dr. Button opined that claimant did not have any off-work factors or injuries, particularly considering his previous "cage fighting" activities, that contributed to his left wrist/forearm problems. (*Id.*) When asked if claimant's November 20, 2009 work activity was a material contributing cause of his disability/need for treatment for the left wrist/forearm condition, Dr. Button replied, "It would appear to be so on the description of the findings of examiners in that time frame." (*Id.*) When asked whether claimant's November 20, 2009 work exposure was the major contributing cause of his left wrist/forearm disability and need for treatment, Dr. Button replied:

"On the basis of the history, it would appear so. However, in my experience as an upper extremity surgeon, it is a distinct rarity that such a tendonitis process would arise during one day, especially so for intersection syndrome tendonitis. Characteristically, it takes a prolonged period of time with vigorous physical activity using wrists and hands for tenosynovitis to develop." (Ex. 15A-7).

In an April 21, 2010 concurrence letter, Dr. Button stated that claimant's "left forearm/wrist symptoms occurred fairly suddenly after one day of work unloading boxes on November 20, 2009[,]" but that the "underlying pathology responsible for those symptoms * * * developed gradually over an extended period of time." Dr. Button explained that claimant's November 20, 2009 work activities "precipitated symptoms associated with tendonitis[,]" but that the "underlying tendonitis condition * * * was caused by repetitive use over a period of several months/weeks." Noting that claimant participated in off-work mixed martial arts fighting, Dr. Button concluded that claimant's off-work activities were more causative of the tendonitis/tenosynovitis condition. (Ex. 16).

We acknowledge that Dr. Button's April 7, 2010 report appears to be inconsistent with his April 21, 2010 report. (Exs. 15A, 16). However, at deposition, Dr. Button explained that his April 7 opinion was based on the history provided by claimant, as well as the contemporaneous medical reports that there was a "cause-and-effect" relationship between claimant's diagnoses and work activities. (Ex. 17-7-10, -18-19). Dr. Button further explained that his April 21 opinion was based on his experience of having not seen a tendonitis condition caused by one day of work. (Ex. 17-8-9). Thus, Dr. Button asserted that there were no inconsistencies or changed opinions between his April 7 and April 21 reports, and stated that he adhered to his April 7 opinion that claimant's left wrist condition occurred suddenly due to a discrete traumatic event. (Ex. 17-7, -9-10).

According to Dr. Button, tendonitis and tenosynovitis were interchangeable terms. (Ex. 17-12-13). He explained that tendonitis is an inflammation of the lining to tissues around a tendon due to stress overload. (Ex. 17-11, -24-25). The symptoms of tendonitis include discomfort, pain, and sometimes swelling and warmth over the effected area, with objective findings of swelling warmth, and sometimes a crackling sensation over the tendons. (Ex. 17-11-12). Dr. Button agreed that the symptoms of tendonitis are one and the same with the diagnosis of tendonitis, in general terms. (Ex. 17-12). He also stated that tendonitis does not occur without swelling and pain. (*Id.*) According to Dr. Button, if claimant had tendonitis before the November 20, 2009 work exposure, he would expect claimant to have symptoms of pain, discomfort, and swelling. (Ex. 17-12-13). Claimant had no such symptoms before his November 20, 2009 work exposure.

The employer argues that Dr. Button diagnosed intersection syndrome tendonitis, and explained that the condition developed gradually over an extended period with excessive force. (Exs. 15A-5-7, 17-22-23). According to Dr. Button, intersection syndrome tendonitis is a rare form of tendonitis in the distal third of

the forearm. (Ex. 15A-5, 17-10, -21). However, at deposition, he explained that the diagnosis was “just a suspicion,” and agreed that claimant did not have such a diagnosis, or any other diagnosable condition, at the time of his examination. (Ex. 17-10-11). Moreover, Dr. Button did not dispute that the medical records continued to include a sprain diagnosis. (Exs. 6, 10, 12, 13, 15A-8). Furthermore, Dr. Button agreed that the symptoms of tendonitis are one and the same with the diagnosis of tendonitis, which is an inflammation of the tendons. (Ex. 17-11-12). In any event, because this is an initial claim, claimant need not prove a specific diagnosis. *Roy*, 112 Or App at 15.

The employer also argues that Dr. Button’s opinion is further supported by Dr. Walters, who diagnosed tenosynovitis on November 30, 2009. (Exs. 10, 11). Based on the following reasoning, we find Dr. Walters’s opinion to be unpersuasive.

In a concurrence letter to the employer, Dr. Walters opined that the underlying condition responsible for claimant’s “valid subjective complaints” was de Quervain’s tenosynovitis, which developed gradually, and that the November 20, 2009 work activities were not the major contributing cause of his condition. (Ex. 15). Yet, Dr. Walters also stated that claimant’s clinical presentation was “questionable,” and that his subjective complaints did not correlate with objective findings. (*Id.*) However, Dr. Button persuasively explained that claimant’s symptoms were consistent with examination findings and the MRI. (Ex. 15A-5-6). Thus, we do not find Dr. Walters’s opinion to be well reasoned or persuasive. *See Somers v. SAIF*, 77 Or App 259, 263 (1986).

Evaluating Dr. Button’s opinion in context and based on the record as a whole, including the contemporaneous medical records on which he relied, we find that claimant’s left wrist condition arose from an identifiable event and has an onset traceable to a discrete period of time. *See SAIF v. Strubel*, 161 Or App 516, 521-22 (1999) (medical opinions are evaluated in context and based on the record as a whole to determine sufficiency); *see also Valtinson v. SAIF*, 56 Or App 184, 188 (1982) (an injury does not necessarily need to be “instantaneous,” it can occur within a discrete period of time). Therefore, we conclude that claimant’s claim is properly analyzed as an injury, and that the November 20, 2009 work exposure was a material contributing cause of the disability/need for treatment of his left wrist condition. ORS 656.005(7)(a); ORS 656.266(1); *see Donald Drake Co. v. Lundmark*, 63 Or App 261, 266 (1983), *rev den*, 296 Or 350 (1984) (finding that the claimant’s claim was properly analyzed as an injury where his back trouble coincided precisely with an injurious event and he had no prior back problems

before the event); *see also James K. Crosley*, 57 Van Natta 1226, 1227 (2005) (an “injury” analysis applied because the onset of the condition was traceable to that discrete period of several days where the claimant drove a truck without suspension).

In reaching this conclusion, we acknowledge the apparent inconsistencies between Dr. Button’s initial opinion that the November 20, 2009 work exposure was a material contributing cause of claimant’s disability/need for treatment of a left wrist condition (which occurred suddenly due to a discrete traumatic event), and his subsequent opinion that the work exposure “precipitated symptoms” associated with tendonitis. (Exs. 15A-6, 16). However, at deposition, Dr. Button explained that his opinions were not inconsistent. (Ex. 17-7-10). Instead, Dr. Button adhered to his initial opinion that claimant’s November 20, 2009 work activities precipitated claimant’s symptoms and, based on contemporary medical reports of examining physicians, continued to opine that claimant’s work activities “precipitated the diagnosis” of tendonitis. (Ex. 17-7-10, -15, -18-19). Thus, we find that Dr. Button’s opinion persuasively supports the compensability of claimant’s injury claim.³ Consequently, 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 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 representation), 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).

³ Furthermore, Dr. Button’s opinion that claimant’s work activities were not the major contributing cause of his left wrist condition specifically addressed an occupational disease, rather than an injury. *See George D. Smirnoff*, 56 Van Natta 67, 70 (2004) (on remand) (no unexplained change of opinion where a physician’s initial opinion addressed compensability under an injury theory, and the subsequent opinion addressed compensability as an occupational disease). Similarly, Dr. Walters’s opinion also addressed an occupational disease and major contributing cause, rather than an injury claim and the material contributing cause of claimant’s disability/need for treatment. (Ex. 15).

Here, the examining physicians addressed claimant’s condition in the context of repetitive stress associated with the discrete work activities on November 20, 2009. (Exs. 2, 3, 4, 6, 10, 12, 13, 15, 15A, 17). There is no dispute that claimant’s November 20, 2009 work activities involved repetitive stress.

ORDER

The ALJ's order dated September 3, 2010 is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$3,500, 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 May 17, 2011

Member Langer dissenting.

Citing *Smirnoff v. SAIF*, 188 Or App 438, 449 (2003), the majority relies on Dr. Button's opinion in concluding that claimant's claim is subject to an injury, rather than the occupational disease, standard of proof and that the injury is compensable. I respectfully disagree. The record does not include persuasive medical evidence establishing that claimant's left wrist *condition*, rather than the symptoms, developed suddenly. Moreover, the record does not include persuasive medical opinion supporting a compensable injury.

To determine whether an injury or an occupational disease standard applies, we focus on the onset of the condition itself, rather than the onset of the condition's symptoms. *Id.* at 449. In *Smirnoff*, the claimant had right knee surgery 20 years before the work-related incident and the claimant's knee was symptom-free in the interim. Although the claimant's right knee symptoms began on a particular day at work, the medical evidence indicated that his meniscal tear developed gradually. *Id.* at 446. There was no medical evidence indicating that the condition that became symptomatic arose suddenly or as a result of a traumatic event. *Id.* The court concluded that we erred as a matter of law in equating the onset of symptoms with the onset of the condition without any analysis of the medical evidence relating to the onset of the condition itself. *Id.*

Thus, to properly analyze this case based on *Smirnoff*, we must examine the *medical evidence* regarding the onset of claimant's left wrist condition, not merely the symptoms, to determine if the condition developed gradually or suddenly. *Id.*; *Katrina Taylor*, 63 Van Natta 41, 42 (2011). Although in this initial claim, claimant need not establish a specific diagnosis for his condition causing disability and need for treatment, we must determine the nature of the condition for purposes of deciding whether the condition should be analyzed as an injury or occupational disease. Based on Dr. Button's opinion, the majority finds that claimant's

compensable condition is wrist tendonitis or tenosynovitis, an inflammatory condition affecting tendons. (Ex. 17-11-12). Dr. Button's opinion, however, does not persuasively establish either that this condition developed suddenly or that it is materially related to claimant's work activities.

Dr. Button was aware that claimant's left wrist symptoms developed suddenly during his work activities on November 20, 2009. (Ex. 15A-1). In his initial report, he opined that, based on claimant's description and location of symptoms, claimant may have developed "an acute inflammatory tendonitis/tenosynovitis process, termed intersection syndrome." (Ex. 15A-5). In response to a question whether claimant's "underlying pathology" occurred suddenly due to a discrete traumatic event, he stated, "Yes." (Ex. 15A-6). In a subsequent concurrence letter, however, he opined that, while the symptoms appeared fairly suddenly after one day of work, the underlying pathology responsible for those symptoms developed gradually over an extended period of time. (Ex. 16). In a deposition, Dr. Button testified that he had never seen a tendonitis condition come on after one day of work, particularly in a heavily muscled, well-conditioned individual like claimant. (Ex. 17-8-10). He further concluded that it was more likely claimant's condition arose from extended use of crutches following an unrelated ankle injury. (Ex. 17-20).

The majority acknowledges that Dr. Button's reports appear inconsistent, but notes Dr. Button's assertion that there were no inconsistencies or changed opinions. To the extent Dr. Button's opinion is internally inconsistent, it cannot be relied upon. To the extent Dr. Button reconciled in the deposition his seemingly varied reports, his clarification does not support the majority's ultimate conclusion. Dr. Button explained that his response indicating that the "underlying pathology" occurred suddenly due to a discrete traumatic event, (Ex. 15A-6), was based on claimant's description and location of symptoms, that is, on "his history." (Ex. 17-8-9). However, "medically speaking," Dr. Button did not believe that claimant would have developed an acute inflammatory tendonitis after one day of work. (Ex. 17-9).

Dr. Walters, one of claimant's treating physicians, explained that the underlying condition responsible for his left wrist complaints was probably de Quervain's tenosynovitis, which develops gradually over an extended period. (Ex. 15).

Thus, the opinion of Dr. Walters, as supported by Dr. Button's clarified opinion, establishes that, notwithstanding claimant's sudden left wrist symptoms, the underlying condition responsible for those symptoms arose gradually over time. The record does not include persuasive medical evidence establishing that claimant's left wrist *condition*, rather than the symptoms, developed suddenly. Because the medical evidence establishes that claimant's left wrist condition developed gradually, it should be analyzed as an occupational disease. *See Smirnoff*, 188 Or App at 443; *Joshua N. Beachboard*, 61 Van Natta 2999 (2009) (although onset of the claimant's symptoms may have been acute, claim was analyzed as an occupational disease because the persuasive medical evidence established that the claimed condition occurred over an extended period).

Claimant acknowledges that the medical evidence does not establish compensability under an occupational disease theory. Therefore, the ALJ's order should be reversed.

In any event, even if the claim is analyzed as an injury, Dr. Button's opinion is not sufficient to establish compensability for the following reasons.

Assuming that Dr. Button successfully reconciled his reports, the substance of his opinion is that historically, claimant reported a relationship between one day of work and his symptoms, but ultimately, that it is not medically probable that this work exposure caused his condition. (Ex. 17). Instead, Dr. Button explained that claimant's wrist swelling on November 20, 2009 was likely caused by "a preexisting condition, perhaps related to crutch walking after playing softball after injuring his ankle[.]" (Ex. 17-18).

In summary, because the medical evidence does not establish compensability under an injury or occupational disease theory, the ALJ's order should be reversed. Because the majority finds otherwise, I respectfully dissent.