

In the Matter of the Compensation of
STEPHEN F. KAMIN, Claimant
WCB Case No. 11-04217, 10-05161
ORDER ON REVIEW

Ransom Gilbertson Martin et al, Claimant Attorneys
Wallace Klor & Mann PC, Defense Attorneys

Reviewing Panel: Members Lanning and Langer.

Claimant requests review of that portion of Administrative Law Judge (ALJ) Sencer's order that upheld the self-insured employer's denial of his occupational disease claim for a right shoulder condition. On review, the issue is compensability. We reverse.

FINDINGS OF FACT

We adopt the ALJ's findings of fact.

CONCLUSIONS OF LAW AND OPINION

Claimant has worked for the employer for 25 years as a driver, including the last five years driving semi-trailer trucks. He appealed the employer's denial of his injury/occupational disease claim for a right shoulder condition. The ALJ upheld the denial of the injury claims, reasoning that they were barred because claimant failed to provide the employer with timely notice of either injury.¹ The ALJ determined that claimant sustained an occupational injury in September 2009, which was either reinjured or exacerbated in January 2010. Because claimant did not provide the employer with timely notice of either injury under ORS 656.265, the ALJ concluded that claimant could not "recast" the injury claims as an occupational disease.

On review, claimant contends that his work injuries may be considered for purposes of establishing an occupational disease and he relies on Dr. Anderson's opinion to establish compensability.

The employer responds that claimant's two shoulder injuries, sustained months apart, did not constitute an occupational disease. The employer relies on Dr. Anderson's testimony that claimant's rotator cuff tear was best characterized as an acute injury.

¹ The parties do not challenge that portion of the ALJ's order that upheld the denial of the injury claims for a right shoulder condition.

To prove compensability of an occupational disease, claimant must establish that his employment conditions were the major contributing cause of his right shoulder condition. ORS 656.802(2); ORS 656.266(1). An occupational disease claim may be based on the cumulative effect of all of a claimant's work-related exposure, and prior work injuries may be considered as part of the overall employment conditions. *Hunter v. SAIF*, 246 Or App 755 (2011); *Waste Management v. Pruitt*, 224 Or App 280 (2008); *Kepford v. Weyerhaeuser Co.*, 77 Or App 363, 366, *rev den*, 300 Or 722 (1986). Moreover, a time-barred work injury can be considered under ORS 656.802 for purposes of establishing an occupational disease. *William G. Robison*, 64 Van Natta 112, 114 (2012); *Patricia Jenkins*, 57 Van Natta 1835, 1838 (2005).

However, a condition that is due solely to a specific work injury, without contribution from general employment conditions, is not an occupational disease. *E.g.*, *Anthony Castro*, 59 Van Natta 2008, 2013 (2007) (because no physician opined that the claimant's employment conditions in general, or in combination with work-related injuries, were the major contributing cause of the cervical degenerative changes, the occupational disease claim was not compensable); *Michael G. O'Connor*, 58 Van Natta 689 (2006), *aff'd without opinion*, 215 Or App 358 (2007) (where the medical evidence attributed the claimant's condition to two distinct injuries, and did not establish that it was related to his work activities in general or in combination with the work injuries, the occupational disease claim was not compensable).

Here, even though claimant's September 2009 and January 2010 work injuries are time-barred, they may be considered for purposes of establishing an occupational disease. Furthermore, we find that Dr. Anderson's opinion establishes compensability under an occupational disease theory. We reason as follows.

Dr. Anderson began treating claimant in May 2010 and performed his right shoulder surgery in November 2011. His post-operative diagnoses were right shoulder supraspinatus rotator cuff tear and a SLAP tear. (Ex. 45C). Dr. Anderson did not believe that claimant's SLAP tear was related to his work. (Ex. 49-6, -7, -9, -12). Because there is no persuasive medical evidence establishing compensability of the SLAP tear, we focus on compensability of the right shoulder supraspinatus rotator cuff tear.

Dr. Anderson had an accurate understanding that claimant experienced right shoulder pain after pulling a kingpin release on a trailer on September 1, 2009. (Exs. 1, 32, 49-11). He was aware that claimant's pain at that time was not

significant enough to seek medical treatment, but his shoulder continued to worsen with job activities associated with rigging and setting trailers. (Exs. 32, 49-11). He understood that claimant experienced additional pain from the same activity in January 2010. (*Id.*)

Dr. Anderson's understanding is consistent with claimant's testimony. Claimant testified that he experienced right shoulder pain in September 2009, after aggressively pulling a "sticky" kingpin release. (Tr. 15). His right shoulder was painful, but the pain subsided over time. (Tr. 15-16). He continued to use his right shoulder at work, but avoided using it when the pain increased and then increased usage when the pain decreased. (Tr. 16). In January 2010, he again experienced right shoulder pain when he released a kingpin handle from a trailer and gave it an aggressive pull. (Tr. 17). After that incident, he quit using his right shoulder. When his shoulder seemed to improve, he started using it again. (Tr. 17-18). However, when he started using that shoulder more, he realized it was not getting better and he had difficulty sleeping at night because of the pain. (Tr. 18-19). He sought treatment from Dr. Anderson. Claimant's testimony supports Dr. Anderson's conclusion that claimant experienced continued right shoulder problems from his work activities after the September 2009 incident.

Dr. Anderson concluded that the movement of the dolly and the cranking/hooks up the kingpin over time was the major contributing cause of claimant's right shoulder supraspinatus tear. (Ex. 32-2). He opined that claimant's repetitive activity at work was the major contributing cause of that condition. (*Id.*) Dr. Anderson also explained that his surgical findings were consistent with a repetitive use injury, which began in September 2009, and continued as claimant reinjured his shoulder while moving the dolly/kingpin on the semi-trailer. He concluded that claimant's work activities were the major contributing cause of his rotator cuff tear. (Ex. 46-2).

The employer contends that Dr. Anderson opined that claimant's rotator cuff tear was best characterized as the result of an acute injury. We disagree with the employer's interpretation of Dr. Anderson's opinion for the following reasons.

In a deposition, the employer's attorney asked Dr. Anderson if claimant's rotator cuff tear was an injury he sustained in February or March 2010, rather than a "repetitive use deal." (Ex. 49-9). Dr. Anderson replied: "That's my opinion, yes." (*Id.*) Later in the deposition, however, Dr. Anderson was reminded of claimant's history in the March 29, 2011 concurrence letter (Ex. 32), and agreed that if that history was accurate, it was consistent with his opinion. (Ex. 49-10,

-11). The history in that concurrence letter referred to claimant's September 2009 and January 2010 work injuries, as well as continuing worsening from his work activities involved with rigging and setting trailers. (Ex. 32). Dr. Anderson concluded that all of claimant's activities, including the September 2009 work incident, his continuing work activities, and the second work incident, combined to cause his rotator cuff tear. (Ex. 49-11).

Dr. Anderson's chart notes also relied on claimant's continued work activities in assessing causation. (Exs. 34, 43A). He explained that he did "not have much question whatsoever that this injury was caused by repetitive use and even an acute event of reaching underneath the trailer and pulling the pin." He had observed that motion and explained that it can tear the shoulder where claimant's pathology was located. (Ex. 34). He also noted that claimant had increased pain doing his work, but continued to work despite the pain. (Ex. 43A).

Thus, when Dr. Anderson's reports and deposition testimony are read as a whole, his opinion establishes that claimant's work activities, including his work injuries, were the major contributing cause of his right rotator cuff tear. *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). We are most persuaded by Dr. Anderson's opinion because he had an opportunity to observe claimant over an extended period and was in a better position to evaluate his condition. *See Dillon v. Whirlpool Corp.*, 172 Or App 484, 489 (2001) (we may give greater weight to the opinion of the treating physician, depending on the record in each case); *Weiland v. SAIF*, 64 Or App 810, 814 (1983) (a treating physician's opinion may be entitled to greater weight because of a better opportunity to observe and evaluate a claimant's condition over an extended period).

In contrast, we are not persuaded by the opinions of examining physicians Drs. Woodward and Thompson. Drs. Woodward and Thompson examined claimant before his surgery. (Exs. 10, 20). Dr. Woodward opined that if claimant had a supraspinatus tear, it was related to "age-dependent degeneration of the rotator cuff[,] rather than a work event." (Ex. 10-6). Dr. Thompson explained that claimant's degenerative changes could have been aggravated symptomatically by the September 2009 work incident, but he did not believe it would cause a rotator cuff tear. (Ex. 20-6). He explained that it was common to find attritional changes in the rotator cuff secondary to aging. (Ex. 20-5).

At surgery, Dr. Anderson found some minimal degenerative changes, but concluded that they were not the cause of claimant's need for surgery. (Ex. 46-1). We are more persuaded by Dr. Anderson, who had an advantageous position as claimant's treating surgeon and provided a well-reasoned opinion (which was based in part on surgical findings). See *Argonaut Ins. v. Mageske*, 93 Or App 698, 702 (1988) (treating surgeon's opinion persuasive given his first-hand exposure to and knowledge of the claimant's condition).

Drs. Woodward and Thompson did not believe that claimant's work incidents could cause a rotator cuff tear. (Exs. 20-6, 24). However, Dr. Farris explained that pulling on a dolly release handle that was stuck "would not be an unreasonable mechanism for sustaining a rotator cuff tear[.]" (Exs. 33-6, 50). Moreover, Dr. Anderson was personally familiar with the motion involved in claimant's work activities and persuasively explained why his work injuries and activities were sufficient to cause a rotator cuff tear. (Exs. 32, 32A, 34, 46, 49). In light of Dr. Anderson's opinion, as supported in part by Dr. Farris, we are not persuaded by the conclusory opinions of Drs. Woodward and Thompson.

Dr. Farris examined claimant before his surgery and concluded that he sustained a right shoulder strain, by history, and a possible partial thickness supraspinatus tear, possibly related to the strain injury. (Ex. 33-5). He later reviewed Dr. Anderson's operative report. (Ex. 48). In a concurrence letter from the employer's attorney, Dr. Farris concluded that claimant probably sustained a rotator cuff tear on September 1, 2009, which was exacerbated in January 2010, when claimant was performing the same activity. (Ex. 50-2). He agreed with the employer that this would be indicative of an injury and not the result of an occupational disease process. (*Id.*)

In reaching that conclusion, however, Dr. Farris did not respond to Dr. Anderson's opinion that claimant's work activities in general, in addition to the specific incidents, contributed to the right shoulder rotator cuff tear. See *Janet Benedict*, 59 Van Natta 2406, 2409 (2007), *aff'd without opinion*, 227 Or App 289 (2009) (medical opinion unpersuasive when it did not address contrary opinions). We are more persuaded by the opinion of Dr. Anderson because it is well-reasoned and based on complete information. Dr. Anderson concluded that, although claimant's symptoms began with the September 2009 incident and were exacerbated in January 2010, his repetitive work activities, including those incidents, were the major contributing cause of his right rotator cuff tear. Therefore, this claim is properly analyzed as an occupational disease. See *Kepford*, 77 Or App at 366.

Based on the persuasive opinion of Dr. Anderson, we conclude that claimant's work activities were the major contributing cause of his right shoulder rotator cuff tear. Therefore, we reverse that portion of the ALJ's order that upheld the employer's denial of claimant's right shoulder rotator cuff tear.

Claimant's attorney is entitled to an assessed fee for services at hearing and on review regarding the occupational disease claim for the right shoulder rotator cuff tear. ORS 656.386(1). 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 at hearing and on review regarding the right shoulder rotator cuff tear is \$10,000, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the issue (as represented by the record and claimant's appellant's brief), the complexity of the issue, the value of the interest involved, and the risk that claimant's counsel may go uncompensated.

Finally, claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the right shoulder rotator cuff tear denial, to be paid by the employer. *See* ORS 656.386(2); OAR 438-015-0019; *Nina Schmidt*, 60 Van Natta 169 (2008); *Barbara Lee*, 60 Van Natta 1, *recons*, 60 Van Natta 139 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

ORDER

The ALJ's order dated May 24, 2012 is reversed in part and affirmed in part. The self-insured employer's denial is set aside insofar as it denied an occupational disease claim for a right shoulder rotator cuff tear and the claim is remanded to it for processing according to law. For services at hearing and on review regarding the right shoulder rotator cuff tear, claimant's attorney is awarded an assessed fee of \$10,000, 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 right shoulder rotator cuff tear denial, to be paid by the employer. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on December 6, 2012