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In the Matter of the Compensation of  
**JOAN L. DAVIS, Claimant**  
WCB Case No. 11-01452  
**ORDER ON RECONSIDERATION**  
Glen J Lasken, Claimant Attorneys  
Thaddeus J Hettle & Assoc, Defense Attorneys  
James W Moller, Defense Attorneys

Reviewing Panel: Members Lanning and Langer.

On May 23, 2013, we abated our April 25, 2013 order that affirmed an Administrative Law Judge's (ALJ's) order that set aside the self-insured employer's denial of claimant's new/omitted medical condition claim for a left shoulder rotator cuff tear. We took this action to address the employer's motion for reconsideration. Having received claimant's response, we proceed with our reconsideration. For the following reasons, we adhere to our previous conclusion that this claim is compensable.

In affirming the ALJ's order, we determined that claimant's testimony was sufficiently credible and reliable. We reasoned that although claimant had suffered from a preexisting left shoulder condition, she established that her work accident was a material contributing cause of the disability or need for treatment of her combined rotator cuff tear condition. We further reasoned that the employer had not carried its burden to prove that the otherwise compensable injury was not the major contributing cause of the disability or need for treatment of the combined condition. *See* ORS 656.007(a); ORS 656.266(1), (2)(b); *Jack G. Scoggins*, 56 Van Natta 2534, 2535 (2004). In concluding that the employer had not carried its burden of proof, we reasoned that the opinion of Dr. Farris, an employer-arranged medical examiner, was not persuasive.

On reconsideration, the employer contends that Dr. Farris's opinion is persuasive. We disagree with the employer's contention.

Dr. Farris based his opinion, in large part, on his understanding that claimant's severe shoulder symptoms did not arise until days after the work accident. (Exs. 83-7, 88-3, 90-24). We found, based on claimant's testimony, that such symptoms arose immediately. Therefore, we reasoned that Dr. Farris's opinion was based on an inaccurate history. *See Miller v. Granite Constr. Co.*, 28 Or App 473, 478 (1977) (medical evidence that was based on inaccurate information was not persuasive).

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The employer contends that claimant testified that her immediate intense symptoms were limited to her forearm. (Tr. 15). We disagree with the employer's interpretation.

Claimant testified that her immediate symptoms included "intense pain" that was not limited to the area of impact on her forearm, but that "was going all the way up" so that her "whole arm was hurting." (*Id.*) When asked whether she meant "up into the shoulder," claimant responded, "Yeah, the whole--everything was hurting." (*Id.*)

Claimant's testimony confirms the presence of "intense" shoulder pain arising simultaneously with her forearm symptoms,<sup>1</sup> immediately after her work accident.

The employer also contends that other evidence, including a recorded statement and contemporaneous medical records, indicates that claimant's shoulder symptoms did not arise immediately. In her recorded statement, claimant said:

"It hurt into my shoulder and everything too. I mean that my whole arm thing hurt. And I didn't notice that it hurt my shoulder when I fell necessarily, my shoulder had been aching prior, and when I fell it just like it knocked the whole...the arm and the shoulder and everything out of whack." (Ex. 71-12).

Claimant's statement indicates that she was initially unsure of whether she had injured her shoulder because she was already experiencing shoulder symptoms before the work accident. Nevertheless, she said that the work accident "knocked \* \* \* the arm and the shoulder and everything out of whack."<sup>2</sup> Thus, her pre-hearing statement, like her testimony, indicates that she experienced immediate shoulder symptoms, which were different and more severe than her earlier shoulder symptoms, along with her forearm symptoms.

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<sup>1</sup> The employer contends that any immediate shoulder symptoms were merely aches that were related to her compensable forearm hematoma, and not to her rotator cuff tear. However, Dr. Farris did not offer that interpretation of claimant's immediate shoulder symptoms, but instead simply stated that claimant's new shoulder symptoms did not arise immediately. (Exs. 83-2, 90-24).

<sup>2</sup> In a subsequent pre-hearing statement, claimant explained, "[M]y whole arm hurt really bad, and my shoulder of course, but I just thought it was just jarred you know, I just thought it was strained from the fall." (Ex. 86-21).

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Further, the contemporaneous medical records do not support the employer's contention that claimant's shoulder symptoms did not arise immediately. Although the contemporaneous medical records, as well as claimant's initial claim, focused on her compensable forearm condition immediately after the work accident, she was also diagnosed with a shoulder strain when she initially sought treatment for her work injury. (Ex. 64-1). Thus, the contemporaneous medical records corroborate the presence of shoulder symptoms.<sup>3</sup>

Finally, the employer cites Dr. Farris's statement that claimant's shoulder pain only arose several days after the work injury. (Ex. 83-2). Claimant testified that she was open and honest with Dr. Farris regarding how her shoulder complaints arose. (Tr. 32). In the context of the overall record, including her previous recorded statement that shoulder symptoms arose immediately after the work accident, Dr. Farris's statement does not undermine claimant's testimony.

Accordingly, we continue to find that claimant's shoulder symptoms arose immediately after her work accident, and Dr. Farris relied on a materially inaccurate understanding of the onset of claimant's shoulder symptoms in rendering his opinion.

Additionally, we adhere to our conclusion that Dr. Farris did not adequately consider the symptomatic improvement in claimant's preexisting condition that she experienced during the nine months before the work injury. Finally, we again determine that Dr. Farris did not persuasively explain why the mechanism of injury would not have been the major contributing cause of the disability or need for treatment of a rotator cuff tear.

Therefore, we continue to hold that Dr. Farris's opinion does not carry the employer's burden to show that the otherwise compensable injury was not the major contributing cause of claimant's disability or need for treatment of the combined condition. Consequently, we adhere to our decision that the disputed claim is compensable.

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<sup>3</sup> The employer disputes the clinical significance of the shoulder symptoms recorded by the contemporaneous medical records, particularly considering claimant's preexisting shoulder condition. However, we do not rely on these records to draw conclusions regarding the medical significance of the symptoms. Rather, we simply note that claimant's testimony regarding the presence of such symptoms is not refuted by the contemporaneous medical records.

Claimant's attorney is entitled to an assessed fee for services on reconsideration. 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 reconsideration is \$2,000, payable by the employer.<sup>4</sup> In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's response to the employer's reconsideration request), the complexity of the issue, the value of the interest involved, and the risk that claimant's counsel may go uncompensated.

Accordingly, on reconsideration, as supplemented herein, we adhere to and republish our April 25, 2013 order. The parties' 30-day statutory appeal rights shall begin to run from the date of this order.

**IT IS SO ORDERED.**

Entered at Salem, Oregon on June 25, 2013

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<sup>4</sup> This fee is in addition to the attorney fee granted in our previous order.