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

Reviewing Panel: Members Lanning and Langer.

The self-insured employer requests review of that portion of Administrative Law Judge (ALJ) Jacobson's order that set aside its denial of claimant's new/omitted medical condition claim for a left shoulder rotator cuff tear. On review, the issue is compensability.

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

While working on October 11, 2010, claimant tripped and fell onto a shopping cart, striking her left forearm. She sought emergency room treatment on October 23, 2010, and was diagnosed with left forearm hematoma and left shoulder strain. The employer accepted left forearm hematoma.

Claimant was then diagnosed with a left rotator cuff tear, which she claimed as a new/omitted medical condition and the employer denied. Claimant requested a hearing.

The ALJ did not make a demeanor-based credibility finding, but, based on the record, concluded that claimant's description of her injury and her prior left shoulder symptoms was sufficiently reliable. Noting that claimant had previously sought treatment for left shoulder symptoms and been diagnosed with a left rotator cuff tear, the ALJ found that claimant suffered from a "preexisting condition." Finding the opinion of Dr. Moore, claimant's attending physician, most persuasive, the ALJ concluded that the work injury was a material contributing cause of claimant's need for treatment of her rotator cuff tear, and that the employer had not shown that the otherwise compensable injury was not the major contributing cause of claimant's disability or need for treatment of the combined condition. Accordingly, the ALJ set aside the denial of claimant's new/omitted medical condition claim.

On review, the employer contends that claimant's testimony is insufficiently credible or reliable to support compensability and that the opinion of Dr. Farris, who examined claimant on its behalf, is more persuasive than that of Dr. Moore. As explained below, we disagree with the employer's contentions.

Claimant bears the initial burden to show that the work accident was a material contributing cause of her disability or need for treatment of her rotator cuff tear.¹ See ORS 656.005(7)(a); ORS 656.266(1); *Olson v. State Indus. Accident Comm'n*, 222 Or 407, 414-15 (1960). If claimant makes that showing, but the otherwise compensable injury combined with a preexisting condition, the employer may prove that the combined condition is not compensable by showing that the otherwise compensable injury was not the major contributing cause of the disability or need for treatment of the combined condition. ORS 656.005(7)(a)(B); ORS 656.266(2)(a); *Jack G. Scoggins*, 56 Van Natta 2534, 2535 (2004).

Given the disagreement between experts regarding the relative contribution of the work accident to the rotator cuff tear, the causation issue presents a complex medical question that must be answered by expert medical evidence. *Uris v. State Comp. Dep't*, 247 Or 420, 426 (1967); *Barnett v. SAIF*, 122 Or App 279, 283 (1993). When presented with disagreement among experts, we give more weight to those opinions that are well reasoned and based on complete information. *Somers v. SAIF*, 77 Or App 259, 263 (1986). Whether a history is complete depends on whether it includes sufficient information on which to base the expert's opinion and does not exclude information that would make the opinion less credible. See *Jackson County v. Wehren*, 186 Or App 555, 561 (2003).

The employer contends that claimant's statements regarding her history have been inconsistent and that her testimony should be disregarded, regardless of whether such inconsistencies resulted from an attempt to deceive or merely an unreliable memory. See *George V. Jolley*, 56 Van Natta 2345, 2348 (2004), *aff'd without opinion*, 202 Or App 327 (2005) (factual inconsistencies in the record may raise such doubt that the Board is unable to find the testimony of a witness credible). Thus, the employer contends that because claimant's testimony is not credible/reliable, she has not proven that the work accident was a material contributing cause of her disability or need for treatment of her rotator cuff tear. See *Miller v. Granite Constr. Co.*, 28 Or App 473, 476 (1977) (the claimant did not carry his burden of proof where the medical evidence rested on his impeached credibility).

¹ The employer does not dispute the existence of the rotator cuff tear. See *Maureen Y. Graves*, 57 Van Natta 2380, 2381 (2005) (claimant bears the burden to prove the existence of the claimed new/omitted medical condition).

Because the ALJ did not make a demeanor-based finding regarding claimant's credibility as a witness, we are in an equally advantageous position to evaluate claimant's credibility based on the substance of the record. *Erck v. Brown Oldsmobile*, 311 Or 519, 526 (1991); *Coastal Farm Supply v. Hultberg*, 84 Or App 282, 285 (1987).

In disputing claimant's credibility or reliability, the employer primarily asserts that her post-injury accounts of her prior left shoulder symptoms and treatment were incomplete and inconsistent. Therefore, we begin by reviewing the "pre-injury" medical record and claimant's subsequent statements.

Claimant sought treatment from Dr. Carroll, a sports medicine specialist, for evaluation of neck, back, and left shoulder pain on December 15, 2009. (Ex. 46-1). Dr. Carroll initially concluded that claimant "likely has multijoint arthritis and possibly rotator cuff syndrome in the left shoulder." On December 30, 2009, after reviewing a left shoulder x-ray, Dr. Carroll concluded that claimant suffered from multijoint arthralgias and left shoulder pain "due to at least tendinitis." (Ex. 50-1-2). Dr. Carroll performed a left shoulder steroid injection on January 11, 2011, and noted that claimant's left shoulder felt much better on January 15, 2011. (Exs. 53-2, 53A, 55-1).

On March 30, 2010, Dr. Busby, general practitioner, stated that claimant "has a rotator cuff tear" and that she "states that she was told she may need to have surgery." (Ex. 56A). Dr. Busby indicated that shoulder treatment was discussed with claimant. (Ex. 56A).

The employer contends that claimant misrepresented this history of left shoulder symptoms and treatment in her testimony and in "post-injury" statements. We disagree.

In recorded "post-injury" statements, claimant acknowledged that she had a history of left shoulder symptoms before the work accident and a history of shoulder treatment, although she did not recall which shoulder had been treated. (Exs, 71-13, -20, 86-12, -16-17). Although she initially denied previous treatment to her "left arm," she disclosed her previous shoulder treatment when asked about other prior medical treatment. (Ex. 71-17, -20). While she did not provide a complete history in her statements, she disclosed that her shoulder was aching immediately before the work injury, that she had received treatment for shoulder pain, and that there were additional details that she could not recall.

Similarly, even if claimant did not initially provide a full history to Dr. Moore, her attending physician, or Dr. Farris, she disclosed her previous shoulder problems. (Exs. 70-1, 77-1, 83-3).

Claimant's "post-injury" statements lack certain details, but are generally consistent with the record. Given claimant's testimony, noted below, that such gaps resulted from gaps in recollection, they do not impeach her general credibility.

According to claimant's testimony, her symptoms did not resolve completely, but were dramatically improved between the January 15, 2010 injection and the October 11, 2010 work accident. (Tr. 12). She was sleeping better and could "do [her] job without the aches and pains." (*Id.*) After she fell, she felt immediate, severe left shoulder pain, as well as pain in the rest of her arm. (Tr. 15). Her "post-injury" pain was in a different location (in the front rather than the back) and of a different character (a sharp pain rather than an ache) than it had been when she saw Dr. Carroll. (Tr. 18). Her pain in the months after the work injury was more intense, at 5/10 or 6/10, than it was when she was Dr. Carroll, at 3/10. (Tr. 18-19). Her "post-injury" left shoulder pain was more constant and more related to movement than her "pre-injury" pain, which occurred more at night. (Tr. 19-20).

When cross-examined regarding Dr. Busby's March 30, 2010 chart note and various "post-injury" statements she had made regarding her "pre-injury" left shoulder symptoms and treatment, claimant expressed times that she did not remember several specific conversations, including her conversation with Dr. Busby regarding a possible rotator cuff tear, and that several statements that she had made regarding incomplete recollection were accurate. (Tr. 24-31)

The "pre-injury" chart notes noted improvement after the shoulder injection, and there was a long gap in treatment and documented shoulder symptoms before the work injury. Additionally, the record documents the existence of new, more significant shoulder symptoms, resulting in a shoulder strain diagnosis when claimant first sought emergency room treatment, after the work injury. Considering the passage of time between Dr. Carroll's December 15, 2009 chart note, the October 11, 2010 work accident, and claimant's August 2, 2012 testimony, her explanation regarding gaps in her recollection is reasonable. Likewise, the inconsistencies between her testimony and the record are minor and do not undermine her general credibility.

The employer also contends that claimant's reliability is impeached by the delay in seeking treatment, as well as the fact that claimant's chief complaint was her forearm rather than her shoulder. However, when claimant first sought emergency room treatment, she noted her shoulder pain and was diagnosed with a shoulder strain. (Ex. 64-1). Further, the employer does not dispute the occurrence of the work accident, which caused a compensable forearm hematoma and was related to the initial shoulder strain diagnosis. (Ex. 64-2). These circumstances are consistent with claimant's testimony.

Consequently, we conclude that claimant's history is sufficiently reliable. Further, based on claimant's account of new symptoms arising from the work injury, Dr. Farris opined that the work injury exacerbated, and combined with, a preexisting condition. (Ex. 88-3). His opinion supports a conclusion that the work injury was a material contributing cause of claimant's disability or need for treatment. Additionally, Dr. Moore opined that the work injury was the major contributing cause of claimant's rotator cuff tear. (Exs. 85-3, 89-3). In the absence of disagreement among experts regarding material causation, we conclude that claimant has carried her initial burden under the "material contributing cause" standard.

There is no dispute that claimant suffered from a preexisting left shoulder condition. Accordingly, we turn to the question of whether the employer has proven that the otherwise compensable injury was not the major contributing cause of the disability or need for treatment of claimant's combined left shoulder condition. *See* ORS 656.266(2)(a). Because the employer has the burden of proof on this issue, the medical evidence supporting its position must be persuasive. *Jason J. Skirving*, 58 Van Natta 323, 324 (2006), *aff'd without opinion*, 210 Or App 467 (2007); *Jason Griffin*, 64 Van Natta 1954, 1956 (2012).

Dr. Farris reported claimant's history of preexisting left shoulder problems and stated that claimant did not notice left shoulder pain immediately after the work accident. (Ex. 83-7). He reasoned that if claimant had suffered a rotator cuff tear, her immediate shoulder symptoms would have been worse. (Ex. 88-3). He explained that people generally experience severe pain when an acute rotator cuff tear occurs, but he believed that claimant had no shoulder symptoms for a few days after the work injury. (Ex. 90-24). He noted the presumed lack of such symptoms, in particular, "bothered" him. (*Id.*) He also opined that the mechanism of injury would not have caused a rotator cuff tear. (Ex. 88-3). We do not find his opinion persuasive.

As explained above, claimant testified that she experienced severe left shoulder symptoms immediately after her work accident, and we accept that account. (Tr. 15). Dr. Farris's opinion regarding the magnitude of the otherwise compensable injury was largely based on the absence of such symptoms. Accordingly, we conclude that Dr. Farris's opinion was based on inaccurate information.

Further, although Dr. Farris reported claimant's history of preexisting left shoulder problems, he did not discuss the symptomatic improvement that claimant experienced during the nine months between her January 2010 injection and her October 2010 work accident. Therefore, it is unclear whether Dr. Farris had an accurate understanding of claimant's preexisting condition.

Additionally, Dr. Farris later acknowledged that, considering the hematoma caused by claimant's fall, the work injury involved sufficient force to cause the rotator cuff tear. (Ex. 90-20). He explained that whether an impact could cause a rotator cuff tear would depend on both the force and the angle of the impact. (Ex. 90-19-20). He also conceded that he did not know the angle of the impact. (Ex. 90-20). Given his explanation that the force of the fall was sufficient to cause the rotator cuff tear, and that he did not know whether the angle of the fall was compatible with causing such an injury, his conclusion that the mechanism of injury would not have caused the rotator cuff tear is not well-reasoned.

Under such circumstances, we do not find Dr. Farris's opinion regarding the relative contribution of the otherwise compensable injury to claimant's disability or need for treatment of her combined condition persuasive. Therefore, the employer has not carried its burden of proof. Accordingly, we affirm.²

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), the complexity of the issue, the value of the interest involved, and the risk that claimant's counsel may go uncompensated.

² The employer contends that Dr. Moore's opinion is unpersuasive, primarily because it is based on inaccurate information. Even assuming that Dr. Moore's opinion is not persuasive, we would still find the new/omitted medical condition claim compensable. Because the burden of proof regarding the major contributing cause of claimant's disability or need for treatment of the combined condition rests with the employer, and because the medical evidence supporting the employer's position is unpersuasive, we agree with the ALJ's decision to set aside the employer's denial.

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; *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 September 17, 2012 is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$3,500, payable 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 April 25, 2013