
In the Matter of the Compensation of
GREGORY A. SHANAFELT, Claimant
WCB Case No. 09-03314, 09-02535, 09-01913, 08-07195
ORDER ON REVIEW
Unrepresented Claimant
SAIF Legal, Defense Attorneys
Sheridan Levine LLP, Defense Attorneys

Reviewing Panel: Members Curey and Lanning.

Claimant, *pro se*,¹ requests review of Administrative Law Judge (ALJ) Bethlahmy's order that: (1) upheld the denials of claimant's occupational disease claim for C4-5 and C5-6 disc herniations issued by the SAIF Corporation, on behalf of Advanced Technology Group and Rainbow Painting Company; and (2) upheld the denials of his occupational disease claim for a cervical condition issued by Empire Pacific (*formerly* Alliant Specialty Insurance Services). In addition, claimant objects to medical reports admitted by the ALJ at hearing. On review, the issues are evidence, compensability, and, potentially, responsibility.

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

Evidence

On review, claimant objects to the admission of medical reports from Drs. Silver, Teal, Rosenbaum, and Vessely submitted by SAIF and Empire Pacific.² It is our general practice to not consider issues raised for the first time on review. *Fister v. South Hills Care Center*, 149 Or App 214 (1997), *rev den*, 326 Or 389 (1998) (absent adequate reason, Board should not deviate from its well-established practice of considering only those issues raised by the parties at hearing).

¹ Inasmuch as claimant is unrepresented, he may wish to consult the Ombudsman for Injured Workers, whose job it is to assist injured workers in such matters. He may contact the Ombudsman, free of charge, at 1-800-927-1271, or write to:

DEPT OF CONSUMER & BUSINESS SERVICES
OMBUDSMAN FOR INJURED WORKERS
PO BOX 14480
SALEM OR 97309-0405

² Dr. Silver, Dr. Teal, and Dr. Vessely examined claimant at SAIF's request. (Exs. 37, 45, 56). Dr. Rosenbaum examined claimant at the request of Empire Pacific. (Ex. 47).

Here, at the June 2, 2013 hearing, claimant was represented by an attorney. At that time, the reports from Drs. Silver, Teal, and Rosenbaum (including Dr. Rosenbaum's deposition testimony) were admitted into the record without objection, subject to claimant's right of cross-examination. (Tr. I-17, I-20, I-29; *see* Exs. 37, 45, 47, 48, 50, 51, 53, 53A). The hearing was postponed to address other evidentiary matters. (*See* Tr. I-59-60).³ In October and December 2013, SAIF submitted Dr. Vessely's medical reports. (*See* Exs. 56, 57). On February 20, 2014, claimant's counsel submitted a Notice of Resignation indicating that he no longer represented claimant. (Hearing File). At the March 13, 2014 reconvened hearing, Dr. Vessely's reports were admitted into evidence without objection. (Tr. II-16).

Claimant did not object at hearing to the admission of the medical reports from Drs. Silver, Teal, Rosenbaum, and Vessely. Under such circumstances, we are disinclined to consider the admission of those reports for the first time on review. *Fister*, 149 Or App at 218. In any event, even if we addressed this evidentiary issue, we find no error in the ALJ's ruling. We reason as follows.

An ALJ is not bound by common law or statutory rules of evidence and may conduct a hearing in any manner that will achieve substantial justice. ORS 656.283(6). We review the ALJ's evidentiary ruling for abuse of discretion. *SAIF v. Kurcin*, 334 Or 399 (2002). Under ORS 656.310(2), the disputed medical reports "constitute prima facie evidence as to the matter contained therein * * * provided that the doctor rendering [the] reports consents to submit to cross-examination."

Here, there is no indication that Drs. Silver, Teal, Rosenbaum, or Vessely (the physicians "rendering" the reports) were asked to submit to cross-examination or refused to do so. Therefore, we find no abuse of discretion in the ALJ's

³ At the July 2, 2013 hearing, SAIF explained that it submitted various medical reports from Dr. Makker (claimant's attending physician) pursuant to OAR 438-007-0018(1), but that it was not offering those reports as exhibits. (Tr. I-15, I-53, I-56). To the extent that its submission of Dr. Makker's reports could be considered as offering them as evidence, SAIF clarified that it was withdrawing those reports. (Tr. I-15, I-43, I-46-48). Thereafter, claimant, through his attorney, offered Dr. Makker's reports for admission into the hearing record. (Tr. I-47-48). In response, SAIF and Empire Pacific requested cross-examination of Dr. Makker. (Tr. I-15, I-19, I-47-48, I-53). *See* ORS 656.310(2). In reply, claimant's counsel acknowledged that Dr. Makker would not be available for cross-examination. (Tr. I-16, I-49). After claimant's attorney withdrew as counsel, the parties, including claimant, had a conference call, during which it became evident that Dr. Makker was not available for deposition. At the March 13, 2014 reconvened hearing, claimant, *pro se*, withdrew all of Dr. Makker's reports, as Dr. Makker did not make himself available for cross-examination. (Tr. II-2-4, II-22). Thus, Dr. Makker's reports were excluded, without objection, from the record. (*Id.*)

admission of those medical reports. *See Kelly Richardson*, 66 Van Natta 562 (2014) (finding no abuse of discretion where a physician's reports were admitted without objection, subject to the claimant's right to cross-examination); *Barbara J. Lovejoy*, 66 Van Natta 399, 400 (2014) (finding no abuse of discretion where the record did not indicate that the doctors authoring the reports refused to submit to cross-examination).

Compensability

Claimant has performed painting and drywall work for over thirty years. On May 22, 2007, he sought treatment for a 10-year history of neck and bilateral shoulder pain. (*See Exs. 5, 7*).

A cervical MRI was performed in September 2007. (Ex. 6). On December 28, 2007, Dr. Makker performed a C5-6 discectomy and fusion. (Ex. 11).

In April and June 2008, additional cervical imaging studies were performed. (Exs. 14, 15, 20). On August 15, 2008, Dr. Makker performed a C4-5 discectomy, C5-6 hardware removal, and C4-C6 fusion. (Ex. 21).

Thereafter, SAIF denied the compensability of, and responsibility for, claimant's occupational disease claims for C4-5 and C5-6 disc herniations. (Exs. 28, 42, 44). In addition, Empire Pacific denied the compensability of, and responsibility for, claimant's occupational disease claim for a cervical condition. (Exs. 46, 47A). Claimant requested a hearing challenging those denials.

In upholding the denials of claimant's occupational disease claims, the ALJ found that the medical evidence did not establish that his work activities were the major contributing cause of his cervical conditions. For the following reasons, we agree with the ALJ's decision.

To establish a compensable occupational disease, claimant has the burden of proving that employment conditions were the major contributing cause of his claimed cervical conditions. ORS 656.266(1); ORS 656.802(2)(a); *Lori M. Lawrence*, 60 Van Natta 727, 728 (2008). The major contributing cause means a cause that contributes more than all other causes combined. *See Smothers v. Gresham Transfer, Inc.*, 332 Or 83, 133-34 (2001); *McGarrah v. SAIF*, 296 Or 145, 166 (1983). The determination of major contributing cause involves the evaluation of the relative contribution of the different causes of claimant's

disease and a decision as to which is the primary cause. *Dietz v. Ramuda*, 130 Or App 397, 401 (1994), *rev dismissed*, 321 Or 416 (1995); *Linda E. Patton*, 60 Van Natta 579, 581 (2008).

Because of the possible alternate causes of claimant's condition, expert medical opinion must be used to resolve the question of causation. *Uris v. Comp. Dep't*, 247 Or 420 (1967); *Barnett v. SAIF*, 122 Or App 279 (1993). In evaluating the medical evidence, we rely on those opinions that are both well reasoned and based on accurate and complete information. *Somers v. SAIF*, 77 Or App 259, 263 (1986); *Patton*, 60 Van Natta at 582.

Here, Drs. Silver, Teal, Rosenbaum, and Vessely were the only physicians who offered causation opinions regarding claimant's cervical conditions. In addition to the C4-5 and C5-6 disc conditions, these physicians diagnosed cervical spondylosis with degenerative disc disease.⁴ (*See Exs. 37, 45, 47, 48, 50, 51, 53, 56, 57*).

According to Dr. Silver and Dr. Teal, claimant's lifelong work activities may have contributed "slightly" or "mildly" to his cervical conditions. (*Exs. 37-6, 45-13, 53A-4*). Dr. Rosenbaum and Dr. Vessely opined that claimant's work activities, at most, contributed to his subjective symptoms of cervical spondylosis. (*Exs. 47-9, 56-14*). Nevertheless, all of these physicians ultimately concluded that claimant's work activities were not the major contributing cause of his cervical conditions or any pathological worsening thereof. (*See Exs. 37, 45, 47, 48, 50, 51, 53, 53A, 56, 57*). In doing so, they persuasively explained that the biomechanics of claimant's work activities were not of the type to cause his cervical pathology. (*Id.*)

In conclusion, the persuasive medical evidence does not establish that claimant's work activities were the major contributing cause of his cervical conditions. Accordingly, claimant's occupational disease claims are not compensable. ORS 656.266(1); ORS 656.802(2)(a); *Barnett*, 122 Or App at 283. Consequently, we affirm.⁵

⁴ Claimant objects to the term "degenerative disc disease," arguing that the record does not support the existence of such a condition. However, as summarized above, the uncontroverted medical opinions support a diagnosis of degenerative disc disease. We recognize that a specific diagnosis need not be established. Nonetheless, the presence of the claimed condition must be proven. *See Boeing Aircraft Co. v. Roy*, 112 Or App 10, 15 (1992); *Daymen C. Kessler*, 60 Van Natta 2285 (2008). In any event, the medical opinions do not establish that claimant's work activities were the major contributing cause of his claimed occupational disease. *Lawrence*, 60 Van Natta at 728.

⁵ Because claimant has not established the compensability of his occupational disease claims, we need not address the responsibility issue.

ORDER

The ALJ's order dated April 11, 2014 is affirmed.

Entered at Salem, Oregon on September 16, 2014