In the Matter of the Compensation of
JEFFERY L. MILLER, Claimant
WCB Case No. 14-01791, 13-04207
ORDER ON REVIEW
Moore Jensen, Claimant Attorneys
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Lanning, Curey and Somers.

The SAIF Corporation requests review of Administrative Law Judge (ALJ) Donnelly's order that set aside its denials of claimant's injury/occupational disease claims for a right shoulder condition. On review, the issues are compensability, claim processing and attorney fees. We affirm in part and reverse in part.

FINDINGS OF FACT

In June 2013, claimant, an apartment maintenance worker involved in remodeling duties, developed pain and heard a pop in his right shoulder as he was locking an apartment door. (Ex. 1; Tr. 6-8). His arm was extended behind him when the key stuck in the lock. (*Id.*)

Claimant sought treatment the same day, was diagnosed with an arm strain, and instructed to follow-up with occupational medicine. (Ex. 2). He reported that he had experienced some right shoulder soreness for about two weeks before the injury, but otherwise did not have any shoulder issues. (*Id*.)

An MRI showed rotator cuff pathology, prompting a referral to Dr. Fedorov, an orthopedist. (Exs. 5, 6). In July 2013, Dr. Fedorov interpreted the MRI as showing full thickness tears of the supraspinatus and subscapularis and subluxation of the biceps tendon. (Ex. 7).

In August 2013, claimant was examined by Dr. Toal at SAIF's request. Diagnosing acromioclavicular (AC) joint arthritis and preexisting rotator cuff disease, Dr. Toal did not consider the mechanism of injury sufficiently forceful to injure claimant's shoulder. (Ex. 10-5). He attributed claimant's need for treatment to preexisting rotator cuff disease. (Ex. 10).

Even assuming that claimant's work injury was a material cause of the shoulder condition, Dr. Toal opined that it combined with his preexisting shoulder condition and that the preexisting condition would be the major contributing cause of the condition and the need for treatment. (Ex. 15).

Dr. Fedorov believed that claimant's work injury was a material contributing cause of the need for treatment for the right shoulder condition. (Exs. 16, 17). Dr. Fedorov also considered the AC joint to be distinct from the shoulder joint, or glenohumeral joint, and that claimant's rotator cuff pathology was not an "arthritic process." (Ex. 17D).

Claimant was evaluated by Dr. Brenneke, at SAIF's request. (Ex. 22). Dr. Brenneke considered claimant's work activities for his current and prior employers to be consistent with a significant contribution to his right shoulder condition. (*Id.* at 10). However, he concluded that claimant's work activities (including heavy lifting and overhead work) were not the major contributing cause of the right shoulder condition. (*Id.*)

Dr. Puziss performed an examination at claimant's request. (Ex. 25). Dr. Puziss agreed that the rotator cuff tears preexisted the work injury. However, he considered claimant's work activities to be consistent with overuse of the rotator cuff, leading to its degeneration. (*Id*. at 8). Considering the work injury incident to be consistent with causing worsening of the rotator cuff tears, Dr. Puziss opined that the injury incident was at least a material contributing cause of the need for treatment. Dr. Puziss disagreed with Dr. Toal's opinion that claimant's rotator cuff pathology constituted an "arthritic condition." (*Id.* at 9-10).

SAIF denied claimant's injury/occupational disease claims, and claimant submitted hearing requests, which were consolidated for hearing. (Exs. 11, 23).

CONCLUSIONS OF LAW AND OPINION

Separately analyzing claimant's injury and occupational disease claims, the ALJ found that Dr. Puziss provided the most persuasive opinion on both claims/theories. Accordingly, the ALJ set aside both denials.

On review, SAIF disputes the ALJ's analysis of the medical opinions. Alternatively, SAIF asserts that it should be responsible for only one claim for the same condition. Based on the following, we find the claim compensable as an occupational disease.

Despite a claimant's chosen theory of compensability, it is our obligation as fact finder to review the medical evidence and the record to determine the appropriate legal standard to evaluate the compensability of a claim. *Dibrito v. SAIF*, 319 Or 244, 248 (1994); *Jeffrey F. Durant,* 65 Van Natta 1182 (2013); *Tamara L. Folkman*, 61 Van Natta 637, 640 (2009); *Daniel Suing*, 56 Van Natta 2600, 2601 (2004).

An occupational disease includes "any series of traumatic events or occurrences which requires medical services or results in physical disability or death." ORS 656.802(1)(a)(C); *Filiberto B. Rosas*, 63 Van Natta 1881 (2011). Work injuries may be considered among "employment conditions" when evaluating the major contributing cause of an occupational disease. *See Hunter v. SAIF*, 246 Or App 755, 760 (2011); *Kepford v. Weyerhaeuser Co*., 77 Or App 363, 366, *rev den*, 300 Or 722 (1986); *William W. Hoffnagle*, 66 Van Natta 1471, 1479-80 (2014). 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).

Here, Dr. Puziss opined that claimant had an acute injury superimposed on an occupational disease consisting of rotator cuff tears due to overuse. (Ex. 25-11). Such an opinion (if found persuasive) is consistent with "a series of traumatic events or occurrences" requiring medical services such that an occupational disease analysis is applicable. *See* ORS 656.802(1)(a)(C); *Rosas*, 63 Van Natta at 1881-82. Because this opinion is the one that advances the compensability of claimant's claimed condition, we analyze the disputed claim under an "occupational disease" standard.

To establish the compensability of an occupational disease, claimant's employment conditions must be the major contributing cause of his right shoulder disease. ORS 656.802(2)(a). The determination of the major contributing cause involves the evaluation of the relative contribution of different causes of claimant's disease and deciding which is the primary cause. *See Dietz v. Ramuda*, 130 Or App 397 (1994), *rev dismissed*, 320 Or 416 (1995). Because of the possible alternative causes of claimant's condition, resolution of this matter is a complex medical question that must be resolved by expert medical opinion. *Barnett v. SAIF*, 122 Or App 279, 283 (1993). More weight is given to those medical opinions that are well reasoned and based on complete information. *Somers v. SAIF*, 77 Or App 259, 263 (1986).

SAIF contends that the opinions of Dr. Toal and Dr. Brenneke persuasively establish that claimant's right shoulder condition is not the result of an occupational disease. We disagree with that contention.

Dr. Toal opined that claimant's preexisting AC joint arthritis was the primary cause of claimant's supraspinatus tendon tear and disability/need for treatment. (Ex. 19-2). He explained that the AC joint arthritis resulted in spurs, which caused impingement and gradual tearing of the supraspinatus tendon. (*Id.* at 3).

Dr. Puziss responded, stating that the location of the bone spur was apart from the actual supraspinatus tear and that it was unlikely that the spur was causing significant impingement. (Ex. 25-9). He also considered it unlikely that the supraspinatus tear was caused by claimant's preexisting AC joint arthritis, and that, in any case, it was not possible for the AC joint arthritis and bone spur to cause claimant's subscapularis tendon tear. (*Id.*) Dr. Puziss opined that claimant's rotator cuff tears (both supraspinatus and subscapularis) were caused by his work activities over time, in combination with the June 2013 injury incident. (*Id.* at 8).

While Dr. Toal provided diagrams and an MRI image showing the proximity of claimant's AC joint arthritis to the supraspinatus tendon, Dr. Toal did not respond to Dr. Puziss's attribution of the degeneration of the tendons to claimant's work activities, nor did he rebut Dr. Puziss's opinion that it was impossible for claimant's AC joint arthritis to cause the subscapularis tendon tear. (*See* Exs. 27, 28). Given Dr. Toal's emphasis on the contribution of the AC joint arthritis to degeneration of the supraspinatus tendon, the absence of a response to Dr. Puziss's opinion regarding causation of the subscapularis tendon tear diminishes the persuasiveness of Dr. Toal's opinion. Additionally, Dr. Toal did not offer an opinion on whether the degeneration of claimant's rotator cuff was caused, in part, by his work activities over time. *See Janet Benedict*, 59 Van Natta 2406, 2409 (2007), *aff'd without opinion*, 227 Or App 289 (2009) (medical opinion less persuasive when it did not address contrary opinions). Under these circumstances, we do not find Dr. Toal's opinion to be persuasive.[1]

Regarding Dr. Brenneke's opinion, we agree with the ALJ's reasoning that it is internally inconsistent and inadequately explained. Therefore, we consider the opinion unpersuasive. *See Howard L. Allen*, 60 Van Natta 1423, 1424-25 (2008) (internally inconsistent medical opinion, without explanation for the inconsistencies, was unpersuasive).

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[1] SAIF contends that Dr. Puziss's opinion should be discounted because he did not rebut Dr. Toal's diagram illustrating the proximity of the bone spur and the supraspinatus tear. (*See* Ex. 27). However, Dr. Puziss's opinion was premised on the unlikelihood of a significant impingement attributable to the bone spur, not on the complete absence of such a contribution. Additionally, Dr. Puziss explained that it was impossible for the spur to cause a subscapularis tear. (Ex. 25-9). As explained above, Dr. Toal did not address Dr. Puziss's explanation. Therefore, we do not consider Dr. Puziss's lack of a specific response to the diagram to be determinative.

Accordingly, Dr. Puziss's opinion persuasively establishes that claimant's right shoulder condition is compensable as an occupational disease.

SAIF argues that it should be responsible for only one claim for the same condition. We agree. Because we have determined that the medical evidence supports an occupational disease analysis, rather than an injury theory, we uphold SAIF's denial of claimant's right shoulder injury claim. *See, e.g., Randy W. Collins* 55 Van Natta 641, 645 n 3 (2003) (upholding an aggravation denial when the medical evidence established a compensable occupational disease); *Troy A. Edmonds*, 50 Van Natta 1093, 1094 (1998) (upholding injury denial when evidence established compensable occupational disease).

Because SAIF's injury denial is being upheld, we modify the ALJ's attorney fee award.

After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable attorney fee for claimant's counsel's services at the hearing level concerning the occupational disease issue is $9,000, to be paid by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the issue (as represented by the record and claimant's counsel's submission), the complexity of the issue, the value of the interest involved, and the risk that claimant's counsel might go uncompensated.

Claimant's attorney is also entitled to an assessed fee for services on review regarding the occupational disease issue. ORS 656.382(2). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this issue, we find that a reasonable attorney fee award concerning this issue is $4,500, to be paid by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the issue (as represented by claimant's respondent's brief and his counsel's fee submission), the complexity of the issue, the value of the interest involved, and the risk that claimant's counsel might go uncompensated.[2]

Finally, claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the occupational disease denial, to be paid by SAIF. *See* ORS 656.386(2); OAR 438-015-0019; *Gary Gettman*, 60 Van Natta 2862 (2008). The procedure for recovering this award, if any, is described in OAR 438-015-0019(3).

[2] Claimant's counsel is not entitled to a fee for services on review regarding the injury denial.

ORDER

The ALJ's order dated November 13, 2014 is affirmed in part and reversed in part. SAIF's denial of claimant's injury claim is reinstated and upheld. In lieu of the ALJ's $10,000 attorney fee award, claimant's counsel is awarded $9,000, for services at the hearing level concerning the occupational disease denial, to be paid by SAIF. For services on review regarding the occupational disease issue, claimant's attorney is awarded an assessed fee of $4,500, payable by SAIF. Claimant is awarded reasonable expenses for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the occupational disease denial, to be paid by SAIF. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on August 14, 2015