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In the Matter of the Compensation of  
**GERALD W. COX, Claimant**  
WCB Case No. 14-01769  
ORDER ON REVIEW  
Guinn & Dalton, Claimant Attorneys  
MacColl Busch Sato PC, Defense Attorneys

Reviewing Panel: Members Weddell, Curey and Somers. Member Curey dissents.

Claimant requests review of Administrative Law Judge (ALJ) Lipton's order that upheld the self-insured employer's denial of claimant's new/omitted medical condition claim for a left shoulder posterior labral tear and traumatic arthritis of the posterior left humeral head. On review, the issue is compensability. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact" and provide the following summary.

In November 1997, claimant initially treated with Dr. Eraker for intermittent left shoulder pain, demonstrating mild glenohumeral tenderness and limited forward flexion. (Ex. 1-1). Dr. Eraker diagnosed rotator cuff tendinitis/bursitis. (*Id.*)

Claimant underwent x-rays and an arthrogram, which Dr. Philips interpreted as showing mild adhesive capsulitis, but no rotator cuff tearing or joint degeneration. (Exs. 6, 8).

In April 1998, Dr. Bosworth, orthopedic surgeon, performed a subacromial injection, resulting in no improvement. (Ex. 11-1). He concluded that claimant did not have a primary disorder of the shoulder. (Ex. 11-2).

Claimant filed an 801 for his left shoulder in August 1999 after pulling a "bucket of parts" overhead with a rope. (Ex. 15). The 801 noted burning and pain in the shoulder at the time of injury. (*Id.*)

On August 24, 1999, claimant treated with Dr. McDonald, who diagnosed a left shoulder sprain and recommended x-rays to primarily rule out any preexisting degenerative joint changes. (Ex. 17-1). Those x-rays were interpreted to be stable in appearance as compared with the previous February 1998 x-rays. (Ex. 19).

A September 1999 MRI was interpreted to reveal a partial supraspinatus tendon tear, and relatively significant AC joint degenerative change with some impingement on the supraspinatus tendon. (Ex. 23).

After reviewing the MRI, Dr. McDonald opined that the partial tear and impingement with degenerative changes explained claimant's "problem" in light of his past treatments. (Ex. 24-1).

In October 1999, Dr. Gripekoven, orthopedic surgeon, examined claimant at the employer's request. (Ex. 26). Dr. Gripekoven diagnosed a left shoulder sprain with partial rotator cuff tear, AC joint degenerative arthritis, and subacromial impingement with crepitus and pain in the rotator cuff. (Ex. 26-4-5). Ultimately, Dr. Gripekoven opined that the major contributing cause of claimant's "present problems" and need for treatment was the August 1999 work incident. (Ex. 26-5).

In October 1999, the employer accepted left shoulder sprain and partial rotator cuff tear. (Ex. 28).

In November 1999, Dr. Puziss, orthopedic surgeon, examined claimant. (Ex. 30). He noted a shoulder injury in early 1998, which resolved except for some popping and grinding. (Ex. 30-1). He further documented subsequent work injury. (*Id.*) On examination, Dr. Puziss noted findings of crepitus, including a positive Dawbarn's pop and pain test, among others. (Ex. 30-4). Dr. Puziss diagnosed a chronic left rotator cuff tear, tendinitis and impingement, and left AC arthralgias and probable arthritis. (Ex. 30-2). He opined that claimant likely tore his rotator cuff with his more recent injury, and that "clearly" his shoulder problems were work related. (*Id.*)

In December 1999, Dr. Puziss performed an arthroscopic decompression, distal clavicle resection, labral debridement, and bursectomy. (Ex. 35-1, -2). He diagnosed a large left "mid portion" posterior labral tear, traumatic arthritis in the "back part" of the humeral head, tendinitis, moderately severe impingement, early bursal-side partial thickness rotator cuff tears, and moderately severe AC joint degenerative arthritis. (Ex. 35-1). He opined that claimant's large posterior labral tear appeared to be related to the traumatic humeral head arthritis. (*Id.*)

In July 2000, Dr. Puziss declared claimant's condition medically stationary with impairment. (Ex. 45). He found mild crepitation and noted that claimant's partial thickness bursal side rotator cuff tears continued to be symptomatic. (*Id.*) He also diagnosed mild recurrent shoulder impingement versus arthritic pain. (*Id.*)

In October 2000, Dr. Dickinson, orthopedic surgeon, performed a medical arbiter examination. (Ex. 56). With respect to “traumatic arthritis,” he recommended that photographs or video from the surgery be reviewed by an independent surgeon. (Ex. 56-8). He stated that this “would presumably be a very mild condition” because there were no radiographic findings to support its existence. (Ex. 56-9).

In January 2014, claimant requested that the employer modify its acceptance to include “left shoulder posterior labral tear” and “traumatic arthritis posterior left humeral head.” (Ex. 59).

In March 2014, Dr. Farris, orthopedic surgeon, performed an examination at the employer’s request. (Ex. 60). Claimant reported that his symptoms never resolved and gradually worsened following the 1999 surgery. (Ex. 60-7). Dr. Farris obtained x-rays and interpreted them as showing AC joint heterotopic ossification and mild glenohumeral joint degenerative changes. (Ex. 60-6). He also reviewed a March 2014 MRI, which he read as showing a partial infraspinatus tendon tear, anterior and posterior degenerative tearing of the glenoid labrum, supraspinatus tendinopathy, and heterotopic ossification of the AC interval. (*Id.*)

Dr. Farris opined that claimant’s 1999 work injury was not a material contributing cause of claimant’s “current disability or need for medical treatment” because the partial rotator cuff tear diagnosed following the incident involved the supraspinatus tendon, and a more recent MRI revealed a partial infraspinatus tendon tear. (Ex. 60-8). He further determined that claimant’s mild arthritic glenohumeral joint change involved inflammation due to “constitutional” causes, resulting in breakdown and degeneration of the joint. (Ex. 60-9). He concluded that the 1999 injury was not a contributing cause of claimant’s posterior labral tear or the left posterior humeral head traumatic arthritis. (Ex. 60-10).

Subsequently, the employer denied the left shoulder posterior tear and posterior left humeral head traumatic arthritis conditions. (Ex. 63). Claimant requested a hearing. (Ex. 64).

In June 2014, Dr. Gritzka, orthopedic surgeon, performed an examination at claimant’s request. (Ex. 64a). Dr. Gritzka interpreted the March 2014 MRI as showing a medium size posterior labral tear, supraspinatus and infraspinatus tendinosis, and a partial infraspinatus tendon tear. (Ex. 64a-12). He read the March 2014 x-rays to show post surgical AC joint heterotopic ossification, but considered the rest unremarkable. (*Id.*) He opined that claimant’s left posterior

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labral tear was related to the 1999 work injury. (Ex. 64a-13). He noted that Dr. Puziss found a superior glenoid labral tear at surgery and debrided the labrum, which left the labrum fragile. (*Id.*)

In June 2014, Dr. Farris opined that claimant's 1999 work injury was not a material contributing cause of his need for treatment/disability for the claimed conditions, and that the accepted conditions were not the major contributing cause of the claimed conditions. (Ex. 65-1). He explained that claimant's mechanism of injury was inconsistent with causing a posterior labral tear because it would instead place stress on the anterior labrum, rather than the claimed posterior labrum. (Ex. 65-2). He opined that it was medically probable that the posterior labral tear identified by Dr. Puziss during surgery likely preexisted the work injury. (*Id.*) He reasoned that Dr. Puziss identified arthritis in the same location as the tear, and that the arthritis would have taken longer to develop than the four months between claimant's injury and surgery. (*Id.*) Dr. Farris considered the arthritis identified on imaging to be consistent with aging and general wear. (*Id.*)

In June 2014, Dr. Puziss opined, based on his direct observations at surgery, that claimant's posterior labral tear and posterior head traumatic arthritis were caused, in major part, by his 1999 work injury. (Ex. 66-1). He explained that the labral tear appeared acute and, given the size of the tear, it was unlikely that claimant's shoulder would have functioned very well if the tear had preexisted the injury. (Ex. 66-1-2). Dr. Puziss noted that, although claimant had treatment prior to the work injury, he was asymptomatic leading up to the event. (Ex. 66-2). He reasoned that, after the event, claimant had popping whenever he moved his shoulder, which was likely the torn labrum rubbing the humeral head causing the arthritis. (*Id.*) He opined that previous humeral head arthritis was possible, but unlikely. (*Id.*)

In December 2014, Dr. Puziss opined that claimant's mechanism of injury was consistent with a posterior labral tear. (Ex. 67-1). Moreover, he explained that had claimant's tear preexisted the injury, he would have experienced clicking and/or popping with shoulder movement. (*Id.*) While he agreed that it is common for traumatic arthritis to take time to develop, he clarified that, if arthritis develops adjacent to the tear, the likely cause would be the labral tear. (*Id.*) He further reasoned that repetitive movement with a labral tear would accelerate the arthritis given the proximity of the conditions. (*Id.*)

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## CONCLUSIONS OF LAW AND OPINION

In upholding the employer's denial, the ALJ determined that Dr. Puziss did not adequately explain inconsistencies or rely on an accurate history. The ALJ, therefore, concluded that Dr. Puziss's opinion was insufficient to establish that claimant's work injury was either the major contributing cause, or a material cause, of the disability/need for treatment of the denied conditions.

On review, claimant argues that his August 1999 work injury was a material contributing cause of the need for treatment/disability for his claimed left shoulder posterior labral tear, and that his work-related injury-incident was the major contributing cause of his traumatic arthritis of the posterior left humeral head. In support of this position, claimant contends that Dr. Puziss's opinion persuasively establishes the compensability of his claimed left shoulder conditions. Based on the following reasoning, we agree.

The parties do not dispute, and the medical evidence establishes, the existence of the claimed conditions. *See Maureen Y. Graves*, 57 Van Natta 2380, 2381 (2005). For conditions arising directly from the work injury, claimant must prove that the work injury was a material contributing cause of his disability/treatment of the condition.<sup>1</sup> ORS 656.005(7)(a); ORS 656.266(1); *Albany Gen. Hosp. v. Gasperino*, 113 Or App 411, 415 (1992). If the condition arose as a consequence of a compensable injury, claimant must prove that the compensable injury was the major contributing cause of the consequential condition. ORS 656.005(7)(a)(A); ORS 656.266(1); *Gasperino*, 113 Or App at 415.

Considering the disagreement between experts regarding the compensability of the claimed new/omitted medical conditions, this claim presents complex medical questions that must be resolved by expert medical opinion. *Barnett v. SAIF*, 122 Or App 279, 283 (1993). We give more weight to those opinions that are both well reasoned and based on complete and accurate information. *Somers v. SAIF*, 77 Or App 259, 263 (1986).

Claimant testified that, before his August 1999 work injury, he treated for left shoulder joint soreness/stiffness. (Tr. 7). He remembered receiving shoulder injections before his 1999 work injury, but they were unhelpful. (Tr. 9, 10). He recalled that the work injury caused stabbing and increased pain in the back side

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<sup>1</sup> The parties do not contend that a combined condition is present.

of the shoulder, which was not previously present. (Tr. 8). However, due to the passage of time, he could not recall whether his shoulder pain had resolved before the August 1999 work injury. (Tr. 9, 10).

Dr. Puziss initially took a history that claimant's shoulder problems preceding the 1999 work incident resolved except for some ongoing popping and grinding. (Ex. 30-1). However, Dr. Puziss subsequently clarified that claimant did not have "clicking and/or popping" with shoulder movement before the August 1999 injury. (Ex. 67-1). Moreover, Dr. Puziss explained that, had claimant's labral tear preexisted that injury, his shoulder would not have functioned very well. (Ex. 66-2).

After considering claimant's testimony and the medical record, we conclude that Dr. Puziss had a sufficiently accurate medical history on which to base his opinion. *See Jackson County v. Wehren*, 186 Or App 555, 561 (2003) (a history is complete if it includes sufficient information on which to base the physician's opinion and does not exclude information that would make the opinion less credible). The important factor in Dr. Puziss's analysis was that claimant had a functioning shoulder and was symptom free without clicking/popping before his work injury. (Exs. 66-2, 67-1). This history is supported by the record. Specifically, there are no findings of crepitus, clicking or popping before claimant's work injury, and he did not seek medical treatment between April 1998 and August 1999. While he testified that the 1998 injections did not improve his shoulder, he did not recall any additional factors supporting a symptomatic, clicking/popping or nonfunctioning shoulder after his 1998 treatment until his 1999 work injury. (Tr. 9, 10). Moreover, during that period of time, claimant continued to work as a millwright, which required the use of his shoulder.

Having determined that Dr. Puziss's opinion was based on a sufficiently accurate history, we next address whether Dr. Puziss's causation opinion persuasively establishes the compensability of the claimed conditions. For the following reasons, we conclude that it is.

Dr. Puziss performed claimant's December 1999 surgery, including a labral debridement, and opined that the tear appeared acute. (Ex. 66-1). He further explained that, given the size of the tear he observed at surgery, claimant would likely not have functioned well before his August 1999 work injury had the tear preexisted that event. (Ex. 66-2). With respect to the humeral head arthritis, Dr. Puziss explained that the popping claimant experienced post-injury was likely his torn labrum rubbing the humeral head causing the arthritis. (*Id.*) Although

acknowledging that arthritis generally takes longer to develop than four months, Dr. Puziss opined that, given the proximity between the two, the labral tear accelerated the arthritic development. (Ex. 67-1). He concluded that the work injury was the major contributing cause of the tear, which, in turn, was the major contributing cause of the arthritis. (Ex. 66-2).

In contrast, Dr. Farris opined that the tear likely preexisted claimant's work injury. (Ex. 65-2). He noted that the location of claimant's humeral head arthritis was adjacent to the labral tear. (*Id.*) He explained that the degree of arthritis Dr. Puziss identified during claimant's surgery would take longer than the four months between the injury and the surgery to develop and, as a result, he opined that the arthritis and tear were likely preexisting. (*Id.*) Moreover, he reasoned that claimant's treatment before the work injury was consistent with a preexisting arthritic condition. (*Id.*) In addition, he noted that the imaging was consistent with aging and general wear. (*Id.*) Consequently, Dr. Farris concluded that the August 1999 work injury was not a material contributing cause of claimant's disability/need for treatment of the claimed conditions, and that the accepted conditions were not the major contributing cause of either claimed condition. (*Id.*)

With respect to the labral tear condition, we find Dr. Puziss's opinion to be most persuasive. He based his opinion, in part, on direct surgical observation, which placed him in an advantageous position to observe that condition. *See Argonaut Ins. Co. v. Mageske*, 93 Or App 698, 702 (1988) (more weight given to opinion of treating surgeon because of opportunity to observe the condition during surgery). Moreover, Dr. Farris did not respond to Dr. Puziss's opinion that the labral tear appeared acute, or that claimant would likely not have functioned well before the injury had the tear preexisted that event. In the absence of such a response, Dr. Farris's opinion is unpersuasive. *See Nancy C. Prater*, 60 Van Natta 1552, 1556 (2008) (failure to rebut contrary opinion rendered physician's opinion unpersuasive); *Louise Richards*, 57 Van Natta 80, 81 (2005) (doctor's opinion unpersuasive when he did not rebut or respond to contrary opinion in the record).

With respect to the arthritic condition, we again find Dr. Puziss's explanation most persuasive. Although Dr. Farris opined that arthritis generally takes longer than four months to develop, he based this conclusion on generalities rather than claimant's specific factors. Without further explanation, we discount Dr. Farris's opinion. *See Sherman v. Western Employers Ins.*, 87 Or App 602, 606 (1987) (little weight given to comments that were general in nature and not

addressed to the claimant's particular situation). Moreover, Dr. Farris did not respond to Dr. Puziss's thorough opinion that the proximity of claimant's labral tear to the arthritis caused acceleration and development of the traumatic arthritis. Without such a response, we further discount Dr. Farris's opinion. *See Prater*, 60 Van Natta at 1556; *Richards*, 57 Van Natta at 81.

In conclusion, considering claimant's particular circumstances and utilizing his observations at surgery, Dr. Puziss determined that claimant's work injury was the major contributing cause of claimant's traumatic arthritis. Based on the aforementioned reasoning, we find Dr. Puziss's well explained opinion persuasive. *Somers*, 77 Or App at 263.

Therefore, we conclude that claimant's new/omitted condition claims for left shoulder posterior labral tear and traumatic arthritis of the posterior left humeral head are compensable. Specifically, we find that claimant's work-related injury-incident was a material contributing cause of his need for treatment/disability of his posterior labral tear condition, and that his work-related injury-incident was the major contributing cause of his traumatic arthritis condition. Thus, we reverse.

Claimant's attorney is entitled to an assessed fee for services at hearing and on review for finally prevailing over the employer's denial. 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 attorney fee award is \$13,000, to be paid by the employer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by the hearing record, claimant's appellate briefs, and his counsel's uncontested attorney fee submission), the complexity of the issues, the values of the interest involved, and the risk that claimant's counsel might 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 injury denial, to be paid the employer. *See* ORS 656.386(2); OAR 438-015-00129; *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).

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ORDER

The ALJ's order dated March 9, 2015 is reversed. The employer's denial is set aside and the claim is remanded to the employer for processing according to law. For services at hearing and on review, claimant's attorney is awarded an assessed fee of \$13,000, payable by the employer. Claimant is awarded reasonable expenses 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 October 30, 2015

Member Curey dissenting.

In finding claimant's left shoulder posterior labral tear and traumatic arthritis of the posterior left humeral head conditions compensable, the majority relies on Dr. Puziss's opinion. Because I disagree with that assessment, I respectfully dissent.

Dr. Puziss is the only physician to support the compensability of the claimed conditions as related to the 1999 injury claim.<sup>2</sup> However, I am not persuaded that Dr. Puziss rendered his "causation" opinion based on a complete and accurate history.

Claimant initially treated with Dr. Puziss in November 1999. (Ex. 30). Dr. Puziss documented a history that claimant continued to have popping and grinding from a 1998 injury. (Ex. 30-1). However, in June 2014, Dr. Puziss documented a different history. (Ex. 66-2). Specifically, Dr. Puziss indicated that claimant was "symptom free" prior to the August 1999 work exposure, but that, subsequent to that injury, claimant had "popping." (*Id.*)

Claimant testified that he did not recall whether the pain he experienced prior to that injury actually subsided, but thought that he did have ongoing pain. (Tr. 9). He recalled that the injections and physical therapy did not "seem to help" his left shoulder. (*Id.*) Because Dr. Puziss opined that claimant's lack of symptoms was significant in determining causation, and claimant continued to

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<sup>2</sup> For the reasons expressed in the ALJ's order, I do not find the medical opinions of Drs. Gripekoven or Gritzka probative to resolving this dispute.

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have symptoms, his opinion is based on an inaccurate history. Under such circumstances, Dr. Puziss's opinion is unpersuasive. *Somers v. SAIF*, 77 Or App 259, 263 (1986).

Dr. Puziss also rendered inconsistent opinions. In November 1999, during his initial consultation, Dr. Puziss opined that claimant's left rotator cuff tear was most likely from the August 11, 1999 work injury. (Ex. 30-2). However, during claimant's December 1999 surgery, Dr. Puziss changed his opinion, reasoning that the tear "appeared" related to traumatic arthritis on the back of the humeral head. (Ex. 35-1). He did not identify to which "trauma" the arthritis was related.

In June 2014, Dr. Puziss indicated that his surgical observations were more accurate than his previous diagnoses because they were directly observed. (Ex. 66-1). Although he opined that the tear appeared acute during surgery, he did not reconcile this with his previous opinion that the tear "appeared" related to the arthritis. (*Id.*) Further, he considered the tear to be acute because claimant was symptom free prior to the August 1999 work injury, and his shoulder would not have functioned well prior to the work injury had the tear been preexisting. (Ex. 66-2).

Regarding the humeral head arthritis, Dr. Puziss opined that there may have been some arthritis before the work injury given the symptoms, but he thought it unlikely. (*Id.*) He added that the torn labrum caused the traumatic arthritis. (*Id.*) Finally, Dr. Puziss opined that the likely cause of the arthritis was the labral tear because they are adjacent to one another, and the tear would "accelerate" the arthritis development. (Ex. 67-1). Although he opined that the tear likely caused the arthritis, he did not reconcile this with his previous observation during surgery that the arthritis was "traumatic." Moreover, he did not explain how "acceleration" of the arthritis allegedly caused by the tear meant that the condition was caused in major part by the work-related injury-incident.

Given the number of inconsistencies without explanation in Dr. Puziss's opinion, I find his opinion unpersuasive. See *Moe v. Ceiling Sys., Inc.*, 44 Or App 429, 433 (1980) (rejecting unexplained or conclusory opinion); *Howard L. Allen*, 60 Van Natta 1423, 1424-25 (2008) (inconsistent medical opinion, without explanation for the inconsistencies, was unpersuasive).

Consequently, I agree with the ALJ's conclusion that the record does not persuasively establish the compensability of the claimed conditions. Because the majority concludes otherwise, I respectfully dissent.