
In the Matter of the Compensation of
BRENDA Y. ALLEN, Claimant
WCB Case No. 14-03623, 13-06015
ORDER ON REVIEW
Julene M Quinn LLC, Claimant Attorneys
Cummins Goodman et al, Defense Attorneys

Reviewing Panel: Members Lanning and Curey.

The self-insured employer requests review of those portions of Administrative Law Judge (ALJ) Riechers's order that: (1) set aside its denial of claimant's injury claim for a left elbow condition; and (2) awarded a \$20,000 employer-paid attorney fee. Claimant cross-requests review of that portion of the ALJ's order that upheld the employer's denials of claimant's occupational disease claim for a bilateral elbow condition. On review, the issues are compensability and attorney fees. We affirm.

FINDINGS OF FACT

Claimant began working for the employer in 1995. (Tr. 20; Ex. 33-14). She worked on a food packaging production line, inspecting and ensuring product quality, loading packaging materials onto machines, monitoring and adjusting machines, clearing jams, and maintaining a clean work area. (Ex. 1-1; Tr. 23, 25, 29, 37, 39). She rotated among four work stations at hourly intervals. (Ex. 1-1; Tr. 47).

In July 2013, claimant developed left elbow pain. (Tr. 53, 55; Ex. 4-4). By September 2013, she had pain in both elbows. (Ex. 6-1). Dr. Shipley, an orthopedic surgeon, diagnosed lateral epicondylitis. (Ex. 6-2). Claimant filed an occupational disease claim. (Ex. 3-2).

On October 23, 2013, Dr. Groman, an orthopedic surgeon, performed an examination at the employer's request. Dr. Groman observed that claimant was tender over the lateral epicondyles, but that she also had other findings that did not correspond with lateral epicondylitis. (Ex. 12-12). He opined that the cause of her condition was not adequately diagnosed. (Ex. 12-12, -13). He also concluded that her condition was unrelated to her work activities, which were not highly repetitive, forceful, and did not require her to use her arms in awkward positions. (Ex. 12-13).

Dr. Shipley disagreed with Dr. Groman's opinions. (Ex. 18). She maintained that claimant had lateral epicondylitis, which was due to repetitive use of her arms at work. (*Id.*)

The employer denied the claim. (Exs. 16, 19). Claimant requested a hearing.

On February 19, 2014, Dr. Dordevich, a specialist in internal medicine and rheumatology, performed an examination at the employer's request. Noting a "normal" examination, Dr. Dordevich concluded that claimant's elbow discomfort had resolved. (Ex. 22-7). He also opined that claimant's previous diagnoses were not caused by her work activities, which he did not regard as sufficiently repetitive or forceful. (Ex. 22-7, -9).

On April 24, 2014, after noting continued complaints of pain and left elbow tenderness, Dr. Shipley administered an injection to claimant's left elbow to reduce pain and swelling due to ongoing lateral epicondylitis. (Ex. 25-1).

On April 29, 2014, claimant was loading a stack of flattened cardboard cartons onto a machine when she felt a "pull" and a "pop" in her left elbow. (Ex. 27-1; Tr. 56, 72). Later that day, Dr. Shipley observed that claimant's left elbow was painful and swollen. (Ex. 27-1). Dr. Shipley suspected a possible strain or aggravation of the underlying lateral epicondylitis. (Ex. 27-2). Claimant filed a claim for a left elbow injury. (Ex. 28).

On May 7, 2014, an MRI showed moderate tendinosis/partial thickness tearing of the common extensor tendon on the left lateral epicondyle. (Ex. 29). Dr. Hasenauer, the radiologist, diagnosed moderate lateral epicondylitis. (*Id.*)

On June 23, 2014, Dr. Radecki, a physical medicine and rehabilitation physician, performed an examination at the employer's request. Noting widespread left upper extremity tenderness and non-physiologic complaints, Dr. Radecki diagnosed "diffuse left elbow region pains with much, much non-physiologic presentation." (Ex. 39-11, -12). He opined that there was "no finding suggestive of an actual objective injury" and "no mechanism of injury with this standard grasping and placing." (Ex. 39-12, -13). He suspected that the April 24, 2014 left elbow injection could have caused inflammation and "false positive" findings on the May 7, 2014 MRI. (Ex. 44-1).

On June 30, 2014, the employer denied the left elbow injury claim. (Ex. 42). Claimant requested a hearing.

Because claimant failed conservative treatment, on August 15, 2014, Dr. Shipley performed a left lateral epicondyle surgery. During the surgery, she observed fraying and partial tearing of the left lateral epicondyle tendon. (Ex. 46-1).

On October 9, 2014, Dr. Wicher, a psychologist, performed a psychological evaluation at the employer's request. Dr. Wicher diagnosed a somatic symptom disorder. (Ex. 53-4). She opined that psychological factors, unrelated to work exposure, were playing a significant role in the onset and maintenance of claimant's pain complaints. (Ex. 53-5).

Considering Dr. Wicher's diagnosis and analysis, Drs. Radecki, Groman, and Dordevich opined that some, if not all, of claimant's symptoms were caused or worsened by mental stress/anxiety. (Exs. 55-4, 58-2, 60-2).

Dr. Shipley also acknowledged that claimant's left elbow symptoms were not entirely attributable to lateral epicondylitis and deferred to Dr. Wicher's psychological diagnosis. (Ex. 57-1, -3). Nevertheless, based on her opportunity to observe claimant's condition over time, the left elbow MRI, and her observations during surgery, Dr. Shipley maintained that claimant had lateral epicondylitis in both elbows. (Ex. 61-4). Dr. Shipley also opined that the April 29, 2014 work event caused a symptomatic aggravation of claimant's left elbow condition and was a material contributing cause of the need for treatment. (Ex. 61-5). She concluded that the work activities, together with the April 29, 2014 work event, were the major contributing cause of claimant's lateral epicondylitis, disability, and need for treatment. (Ex. 61-7).

In her cross-examination deposition, Dr. Shipley testified that the 2014 work event caused a symptomatic aggravation of claimant's left lateral epicondyle condition. (Ex. 64-27, -28). She further opined that claimant's work activities probably caused bilateral symptoms and possibly caused the underlying pathology. (Ex. 64-31, -58, -76, -77).

CONCLUSIONS OF LAW AND OPINION

The ALJ determined that Dr. Shipley's opinions did not support a compensable occupational disease. Accordingly, the ALJ upheld the employer's denial of the occupational disease claim. Turning to the left elbow injury claim,

the ALJ relied on Dr. Shipley's opinion in concluding that the April 29, 2014 work incident was a material cause of claimant's disability and need for treatment. The ALJ further concluded that Dr. Wicher's opinion was insufficient to establish a "preexisting condition." Consequently, the ALJ set aside the employer's denial of the left elbow injury claim and awarded a \$20,000 employer-paid attorney fee.

On review, the employer argues that Dr. Shipley provided unpersuasive opinions regarding the alleged April 29, 2014 injury event. The employer also contends that claimant's left elbow condition was caused or worsened by mental stress and must be analyzed as a claim for a mental disorder under ORS 656.802(1)(b) and ORS 656.802(3). Lastly, the employer asserts that the attorney fee was excessive.

In her cross-request, claimant contends that Dr. Shipley's opinion proved the compensability of her occupational disease claim.

After considering the parties' respective positions, we affirm the ALJ's order. We reason as follows.

Occupational Disease

To prove compensability of her claim as an occupational disease, claimant must establish that her employment conditions were the major contributing cause of the disease itself, not just symptoms. ORS 656.802(2)(a); *Weller v. Union Carbide*, 288 Or 27, 35 (1979); *Dennis E. Hall, Sr.*, 56 Van Natta 2270, 2271 (2004). The major contributing cause means a cause that contributes more than all other causes combined. *McGarrah v. SAIF*, 296 Or 145, 166 (1983).

Because the medical evidence is divided, the causation issue is a complex medical question that must be resolved on the basis of expert medical opinion. *SAIF v. Barnett*, 122 Or App 279, 283 (1993). 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).

Dr. Shipley provided the only opinion in support of claimant's occupational disease claim. For the following reasons, we do not consider her opinion sufficient to satisfy claimant's requisite burden of proof.

Dr. Shipley opined that claimant's work activities were the major contributing cause of her lateral epicondylitis. (Ex. 61-7). In her cross-examination deposition, Dr. Shipley initially testified that claimant's work activity

probably caused the underlying pathology. (Ex. 64-31). When asked to provide the basis for her opinion, she explained that claimant related the worsening of her symptoms to the use of her arms at work, spent the majority of her time at work, and did not participate in repetitive recreational activity. (*Id.*) Dr. Shipley acknowledged that the symptoms of lateral epicondylitis can wax and wane without any corresponding change in the underlying pathology. (Ex. 64-32, -46). She also acknowledged that the underlying pathology, which she identified as tearing of the extensor tendons and inflammation, was only “potentially” related to upper extremity use. (Ex. 64-39, -41, -63, -64). Ultimately, she opined that the work activity probably caused claimant’s symptoms, but she was unable to state that the work activity probably caused her underlying pathology.¹ (Ex. 64-63, -64, -76, -77).

Having reviewed Dr. Shipley’s opinion, we conclude that it does not establish that the symptoms of lateral epicondylitis were the disease or that claimant’s work activities were probably (as opposed to possibly) the major contributing cause of the disease (as opposed to its symptoms). Thus, Dr. Shipley’s opinion is insufficient to establish a compensable occupational disease under ORS 656.802(2)(a). *See Gormley v. SAIF*, 52 Or App 1055, 1059 (1981) (persuasive medical opinions must be based on probability rather than possibility); *Peggy Shipman*, 51 Van Natta 827 (1999), *aff’d without opinion*, 164 Or App 784 (1999) (where the medical evidence distinguished between the condition and the symptoms, work-related symptoms were insufficient to prove a compensable occupational disease).

Left Elbow Injury

To establish a compensable injury, an injured worker must prove that a work injury was a material contributing cause of disability or a need for medical treatment. *See* ORS 656.005(7)(a); ORS 656.266(1); *Albany Gen. Hosp. v. Gasperino*, 113 Or App 411, 415 (1992). Where an injury is of a complicated nature, expert medical evidence is necessary to meet the burden of proof. *Uris v. Compensation Dept.*, 247 Or 420, 426 (1967); *Barnett*, 122 Or App at 282.

For the following reasons, we conclude that Dr. Shipley’s opinion persuasively established that the April 29, 2014 work event was a material contributing cause of claimant’s need for treatment for her left elbow condition.

¹ On redirect examination, Dr. Shipley re-affirmed her belief that the lateral epicondylitis was “work related,” but she did not retract or explain her “cross-examination” statements distinguishing the cause of claimant’s symptoms from the cause of her underlying condition. (Ex. 64-82).

Dr. Shipley examined claimant's left elbow on the date of injury. Noting that the left elbow had swelling and was tender and painful at the lateral condyle, Dr. Shipley suspected a possible strain or aggravation of the underlying lateral epicondylitis. (Ex. 27-2). After touring claimant's work site, Dr. Shipley opined that the alleged mechanism of injury (lifting flattened cracker boxes into a machine) could cause or aggravate lateral epicondylitis. (Ex. 31-1). Dr. Shipley concluded that claimant had a left elbow injury when she lifted the boxes onto the machine. (Ex. 37-1).

During surgery, however, Dr. Shipley observed that the left extensor tendon "had a degenerative appearance" and that there was no "frank" tear. (Ex. 46-1). Based on these observations, as well as her examinations before and after the work event, Dr. Shipley concluded that the April 29, 2014 work event caused a symptomatic aggravation and was a material contributing cause of the need for treatment for left lateral epicondylitis. (Ex. 61-5). In her cross-examination deposition, she testified that her determination regarding the effects of the work event was based on her examination and claimant's report of increased pain at the lateral epicondyle and tendon insertion following the April 29, 2014 work event. (Ex. 64-75).

The employer argues that Dr. Shipley did not identify a change in claimant's left elbow examination following the April 29, 2014 work event. Yet, a work injury that renders a preexisting condition symptomatic may be considered a material contributing cause of a claimant's disability/need for treatment. *See Jason Griffin*, 64 Van Natta 1954, 1955 (2012) (physician's opinion that a work incident caused a symptomatic flare of the claimant's chronic back pain was sufficient to establish that the work incident was a material contributing cause of the disability/need for treatment).

The employer also argues that Dr. Shipley did not respond to the contrary analyses of Drs. Groman and Radecki. We disagree.

Dr. Shipley disagreed with Dr. Groman's opinions regarding claimant's bilateral lateral epicondylitis diagnosis and the causative role of her work activities, which were provided before the 2014 work event. (Exs. 12, 18). Dr. Groman did not reexamine claimant after the work event or specifically address whether that event was a material contributing cause of claimant's subsequent need for treatment. (Ex. 58). Under such circumstances, we discount

Dr. Groman's opinion.² *See Miller v. Granite Const. Co.*, 28 Or App 473, 476 (1977) (medical opinion that is based on an incomplete or inaccurate history is not persuasive); *Tammi-Jo Fritz*, 67 Van Natta 840, 843 (2015) (discounting physician's opinion that was based on an inaccurate and incomplete history); *see also Jackson County v. Wehren*, 186 Or App 555, 560-61 (2003) (a history is complete if it includes sufficient information on which to base the opinion and does not exclude information that would make the opinion less credible).

Dr. Radecki opined that there was "no finding suggestive of an actual objective injury" on June 23, 2014, the date of his examination. (Ex. 39-12). He described Dr. Shipley's examination as "appropriate," but "smaller or more focused." (Ex. 39-15). He asserted that "by adding additional areas to the exam, one can see more of a picture of non-physiologic presentation rather than an earlier picture of possible injury at the elbow itself." (*Id.*)

Dr. Shipley disagreed with Dr. Radecki's assertions that claimant did not have lateral epicondylitis and did not suffer an injury at work on April 29, 2014. (Ex. 61-7). She acknowledged that claimant had other areas of pain, but opined that this did not invalidate claimant's tenderness at the insertion of the extensor muscles, which showed lateral epicondylitis, or other information that supported the diagnosis. (Ex. 61-6).

For the aforementioned reasons, as well as those provided in the ALJ's order, we conclude that Dr. Shipley's opinion was persuasive and satisfied claimant's burden to prove that the April 29, 2014 work event was a material contributing cause of her disability/need for treatment for her left elbow condition. *See* ORS 656.005(7)(a); ORS 656.266(1).

We turn to the employer's contention that the mental disorder/occupational disease standard applies to claimant's "injury" claim. *See* ORS 656.802(1)(b), (3). Under ORS 656.802(1)(b), a "'mental disorder' includes any physical disorder caused or worsened by mental stress." In *Estacada Rural Fire Dist. 69 v. Hull*,

² On December 18, 2014, Dr. Groman opined that claimant had a history of reporting left upper extremity symptoms without corresponding objective findings and that did not have an "organic" explanation. (Ex. 58-1, -2). Based on Dr. Wicher's diagnosis and analysis, Dr. Groman concluded that the subjective symptoms claimant reported to him and other providers reflected perceptions of physical symptoms caused or worsened by mental stress/anxiety. (Ex. 58-2). In doing so, Dr. Groman did not address the 2014 left elbow MRI or Dr. Shipley's operative findings showing the existence of a left lateral epicondylitis.

256 Or App 729, 734, *rev den*, 354 Or 61 (2013), the court explained that “stress-caused physical disorders are not compensable unless the heightened compensability requirements of ORS 656.802(3) are satisfied.” In that case, based on medical evidence that the claimant’s physical disorder (a heart attack) was caused, at least in part, by mental stress, the court applied the requirements set forth in ORS 656.802(3).

Here, based on Dr. Wicher’s psychological evaluation, Drs. Groman, Dordevich, and Radecki asserted that claimant’s *symptoms* “reflect perceptions of physical symptoms caused or worsened by mental stress/anxiety.” (Exs. 55-4, 58-2, 60-2). In contrast to *Hull*, they did not assert that claimant’s physical disorder (the existence of which they disputed) was caused or worsened by mental stress. Moreover, in addressing claimant’s perception regarding her symptoms, they did not account for the evidence showing the existence of her physical disorder (*i.e.*, the 2014 left elbow MRI and Dr. Shipley’s operative findings showing left lateral epicondylitis). Under these circumstances, we decline to apply the compensability requirements of ORS 656.802(3). *Cf. Bennanico Rosales, III*, 68 Van Natta 1827, *recons*, 68 Van Natta 1911 (2016) (where the claimant sought to establish the independent compensability of a new/omitted medical condition claim for a post traumatic stress disorder condition as directly related to a work event, the ORS 656.802(3) factors for a mental disorder applied); *Karen A. Vermeulen*, 66 Van Natta 1456, 1460 (2014) (because the claimant’s heart condition was allegedly caused or worsened by mental stress, the requirements in ORS 656.802(3) applied).

Attorney Fees/Costs

We adopt and affirm the ALJ’s attorney fee award.

Claimant’s counsel is entitled to an attorney fee for services on review regarding the injury claim and the ALJ’s attorney fee award.³ ORS 656.382(2), (3). 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 concerning these issues on review is \$5,000, to be paid by the employer. In reaching this conclusion, we have particularly considered the time devoted to these issues (as represented by claimant’s respondent’s brief and his counsel’s

³ Claimant’s counsel is not entitled to an attorney fee for services on review regarding the occupational disease issue.

uncontroverted fee submission), the complexity of the issues, the values of the interests involved, the risks that claimant's counsel might go uncompensated, and the contingent nature of the practice of workers' compensation law.

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 by the employer. *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).

ORDER

The ALJ's order dated October 28, 2015 is affirmed. For services on review, claimant's attorney is awarded an assessed attorney fee of \$5,000, payable by the employer. Claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, to be paid by the employer.

Entered at Salem, Oregon on December 13, 2016