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In the Matter of the Compensation of  
WCB Case No. 14-05578  
**MICHAEL FINCH**, Claimant  
ORDER ON REVIEW  
Ransom Gilbertson Martin et al, Claimant Attorneys  
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Johnson, Lanning and Somers. Member Lanning dissents.

The SAIF Corporation requests review of Administrative Law Judge (ALJ) Otto's order that set aside its denial of claimant's occupational disease claim for a right shoulder condition. On review, the issue is compensability. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," as summarized below.

Claimant was employed as a "working manager," supervising and maintaining production on a manufacturing line. (Tr. 5-11). Bottled condiments were boxed and stacked on pallets for shipment. (*Id.*)

In August 2014, claimant was evaluated by Dr. Matheson for right elbow and shoulder pain. (Ex. 1). Dr. Matheson diagnosed a right shoulder strain and tendinitis. (Ex. 1-2).

At the time claimant's symptoms arose, he described repetitively constructing and taping boxes, sometimes up to nine hours per day. (Tr. 7, 9). This represents approximately 90 percent of his shift. (Tr. 10). Employee turnover during this period required him to spend more time making boxes than normal. (Tr. 32).

According to his supervisor, on certain days, claimant would spend half the day making boxes and perhaps five to 10 percent of his time stacking boxes. (Tr. 35-36). He disagreed with claimant's testimony that employee turnover during the time in question was as high as 12 to 18 people. (Tr. 35). However, he acknowledged that they had some turnover and he was unsure of the actual number. (*Id.*)

Claimant also described repetitively stacking filled boxes on pallets for about 25 percent of his work day. (Tr. 8). The boxes weighed approximately four pounds, which he would stack four at a time. (*Id.*) The pallets were stacked

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to a maximum height of 60 inches. (Tr. 25). Claimant's height is 70 inches. (Ex. 20-16). He agreed that only about 10 percent of his "box stacking time" required him to lift at or above his shoulder height as he completed stacking the highest row. (Tr. 14, 16).

In October 2014, Dr. Bell, an orthopedist, diagnosed a right shoulder labral tear based on a recent MRI. (Ex. 10).

On October 22, 2014, SAIF denied the occupational disease claim. (Ex. 12). Claimant requested a hearing.

In November 2014, Dr. Bell performed a right shoulder arthroscopy. (Ex. 15). During the procedure, he confirmed the presence of a labral tear. (*Id.*)

In January 2015, Dr. Bell opined that most labral tears are caused by chronic repetitive activity, particularly overhead or throwing activities. (Ex. 16). Dr. Bell was unaware of a specific number of repetitions that would cause a labral tear. (*Id.*)

In a subsequent concurrence letter, Dr. Bell considered claimant's job to be sufficiently repetitious to cause a labral tear. (Ex. 17-2). Considering claimant's medical history, diagnostic studies, surgical findings, and his understanding of claimant's work activities, Dr. Bell concluded that the work activities were the major contributing cause of the labral tear. (Ex. 17-3). Dr. Bell found no significant degenerative changes that would otherwise explain the presence of the tear. (*Id.*)

However, in a later concurrence letter, Dr. Bell could not relate claimant's labral tear to any specific activity. (Ex. 19). Agreeing that claimant's condition could be due to work or idiopathic causes, Dr. Bell could not "determine the cause" of claimant's right shoulder condition. (*Id.*)

In his deposition, Dr. Bell testified that, by opining that he could not "determine the cause" of the labral tear, he could only conclude that it was "more likely than not" due to claimant's repetitive work activities. (Ex. 20-13). Although he was unable to state precisely how repetitive an activity must be to cause a labral tear, Dr. Bell considered it more likely than not that claimant's work was sufficiently repetitive. (*Id.*)

Later in the deposition, Dr. Bell stated that if claimant's work activities required him to lift to a maximum height of 60 inches, that would likely be

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shoulder height for his 70-inch height. That observation was followed by the following exchange:

“Q: So not performing most of those lifting activities above shoulder height, or actually below, are we then back to not knowing the cause of the labral tear? Because it’s not engaging in that chronic overhead activities?”

“A: If indeed he didn’t have to do any chronic overhead activity, it would be hard to relate that to his labral tear, yes.”

“Q: [A]re we back to your opinion as stated in Exhibit 19, to say that you can’t determine causation of his labral tear?”

“A: If he is not doing overhead lifting, that would be correct.” (Ex. 20-17).

Before the conclusion of the deposition, Dr. Bell still considered claimant’s description of the job activities as told to him to be consistent with causation of the right shoulder labral tear. (Ex. 20-18).

### CONCLUSIONS OF LAW AND OPINION

Relying on claimant’s testimony and Dr. Bell’s opinion, the ALJ concluded that claimant’s work activities were the major contributing cause of his right shoulder condition. Accordingly, the ALJ set aside SAIF’s denial.

On review, SAIF contends that Dr. Bell’s opinion only supports causation of a labral tear due to “chronic” and “repetitive” overhead activity. Reasoning that claimant’s testimony only establishes minimal, if any, overhead lifting activities, SAIF asserts that Dr. Bell’s opinion does not support the compensability of the claimed condition. Based on the following reasoning, we agree.

To establish the compensability of his occupational disease claim, claimant must show that employment conditions were the major contributing cause of the disease. ORS 656.266(1); ORS 656.802(2)(a). The major contributing cause is

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the cause, or combination of causes, that contributed more than all other causes combined. *Bowen v. Fred Meyer Stores*, 202 Or App 588, 563-64 (2005), *rev den*, 341 Or 140 (2006).

Because the causation inquiry presents a complex medical question, it must be resolved by expert medical evidence. *Uris v. State Comp. Dep't*, 247 Or 420, 426 (1967); *Barnett v. SAIF*, 122 Or App 279, 283 (1993). We properly may or may not give greater weight to the opinion of the treating physician, depending on the record in each case. *Dillon v. Whirlpool Corp.*, 172 Or App 484, 489 (2001). Even un rebutted medical opinion may be inadequate to meet a party's burden of proof. *See Moe v. Ceiling Systems, Inc.*, 44 Or App 429 (1980); *Dale F. Cecil*, 51 Van Natta 1010 (1999) (un rebutted medical opinion from the treating physician may be unpersuasive if unexplained, inconsistent, or couched in terms of medical possibility rather than probability). If a physician's opinion is premised on an incomplete description of claimant's work activities, the opinion is generally unpersuasive. *See, e.g., Miller v. Granite Constr. Co.*, 28 Or App 473, 476 (1977) (medical opinion that is based on an incomplete or inaccurate history is not persuasive); *Edwin Owen*, 67 Van Natta 2146, 2150 (2015).

Here, Dr. Bell initially endorsed an understanding that claimant's work activities were "highly repetitive both above and below shoulder height," including the taping of boxes "at times below and at times above shoulder height." (Ex. 17). Observing that "chronic repetitive activity" is generally how labral tears occur, Dr. Bell explained that such tears are very common in occupations where people are "constantly working with their arms up overhead." (Ex. 20-12).<sup>1</sup>

If claimant did not do "any chronic overhead activity," Dr. Bell clarified that it would be difficult to relate his work activities to the right shoulder labral tear. (Ex. 20-17). Finally, if claimant was "not doing overhead lifting," Dr. Bell would be unable to determine causation of the labral tear. (*Id.*) Dr. Bell was not asked whether his understanding of claimant's overhead work activity was consistent with the amount described by claimant at hearing, and our review of this record does not establish that he understood that the majority of claimant's work was below shoulder level.

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<sup>1</sup> Additionally, in attributing causation of claimant's labral tear to "chronic overhead activity," Dr. Bell referenced professional quarterbacks and baseball pitchers engaged in overhead throwing, as well as fire prevention installers working on ceiling-installed sprinkler systems. (Ex. 20-12, -13). In doing so, Dr. Bell did not explain how claimant's work activity was similar to these described examples. In the absence of such an explanation, Dr. Bell's opinion does not persuasively establish that claimant's work activities represented "chronic overhead activity" sufficient to meet the "major contributing cause" standard for an occupational disease claim. ORS 656.266(1); ORS 656.802(2)(a).

Claimant testified that approximately 25 percent of his work day was stacking boxes and 10 percent of that time would be stacking boxes at or above shoulder level. (Tr. 15, 16). This description would amount to about 2.5 percent of claimant's work day. As detailed above, Dr. Bell consistently referenced repetitive overhead activity as being an important factor in relating claimant's labral tear to his work. However, Dr. Bell's multiple references to "constant" and "chronic" overhead activity lead us to conclude that he was unaware of the relatively limited duration of claimant's overhead lifting activities. Consequently, we consider his opinion to be based on an inaccurate history of claimant's work activities, and thus, unpersuasive. *Cf. 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); *Annette M. Ingle*, 58 Van Natta 1088, 1091 (2006).

Accordingly, based on the aforementioned reasoning, the record does not persuasively establish that claimant's work activities were the major contributing cause of his claimed right shoulder condition. Therefore, we reverse.

#### ORDER

The ALJ's order dated July 28, 2015 is reversed. SAIF's denial is reinstated and upheld. The ALJ's \$6,000 attorney fee and cost awards are also reversed.

Entered at Salem, Oregon on February 17, 2016

Member Lanning dissenting.

The majority concludes that Dr. Bell's opinion is based on inadequate information regarding claimant's work activities, and is therefore unpersuasive. Because I disagree with the majority's analysis, I respectfully dissent.

Dr. Bell received information regarding claimant's work activities directly from claimant, from his counsel, and a description from an insurer-requested medical examination from Dr. Weeks.<sup>2</sup> (Ex. 17-2). He considered claimant's work activities, his age (28 years old), surgical findings, lack of relevant

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<sup>2</sup> Prior to the ALJ's decision, SAIF withdrew Dr. Weeks's insurer-arranged medical examination report. However, the remaining exhibits establish that Dr. Bell reviewed the report and disagreed with Dr. Weeks's opinion that claimant's work activities were not sufficient to cause a labral tear. (Ex. 20-11).

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preexisting medical history, and lack of other plausible explanations for the work injury and concluded that claimant's labral tear was more likely than not, work-related. (Exs. 17-3; 20-11,-12).

While the majority concludes that Dr. Bell had an inadequate understanding of the amount of overhead lifting that claimant's job required, Dr. Bell was not aware of any threshold for the amount of repetition that would be required to cause a labral tear. (Ex. 20-13). I acknowledge that claimant's lifting activities at and above shoulder level were a relatively small portion of his work activities overall. However, I do not find a basis to conclude that the cumulative effect of such lifting over the course of claimant's 11 months of employment was not the major contributing cause of a gradual development of claimant's right shoulder condition. *See Mathel v. Josephine County*, 319 Or 235, 240 (1994); *see also Smirnoff v. SAIF*, 188 Or App 438, 443 (2003) (an occupational disease results from conditions that develop gradually over time, whereas an injury is sudden, arises from an identifiable event, or has an onset traceable to a discrete period of time).

Moreover, Dr. Bell was both claimant's attending physician and treating surgeon. In addition to relying on his understanding of claimant's work activities, Dr. Bell relied, in part, on his surgical findings. (Ex. 17-3). Based on my review of the record, I find no material inconsistency or deficiency on which to question Dr. Bell's medical opinion.<sup>3</sup> *See Jackson County v. Wehren*, 186 Or App 555, 560-61 (2003). Dr. Bell admitted that if claimant was not doing any overhead lifting activities, he would be unable to "determine causation" of the labral tear. (Ex. 20-17). However, the record establishes that claimant was engaged in overhead lifting as a regular part of his work activities. (Tr. 15-16). Because Dr. Bell's opinion is based on a materially accurate history, and is unchallenged and unrebutted by contrary medical opinion, I would find that claimant's shoulder claim is compensable and affirm the ALJ's order. Because the majority concludes otherwise, I respectfully dissent.

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<sup>3</sup> While it could be argued that Dr. Bell changed his opinion in response to SAIF's concurrence letter, he later clarified that his response merely meant that he could not determine the cause of claimant's labral tear with complete certainty, as opposed to medical probability. It is well settled that medical certainty is not the applicable standard. *See Robinson v. SAIF*, 147 Or App 157, 160 (1997) (medical certainty not required; a preponderance of evidence may be shown by medical probability).