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In the Matter of the Compensation of  
**ANDREW C. KAHL, Claimant**  
WCB Case No. 13-04383  
ORDER ON REVIEW  
Ronald A Fontana, Claimant Attorneys  
SAIF Legal Salem, Defense Attorneys

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

Claimant requests review of those portions of Administrative Law Judge (ALJ) Otto's order that: (1) excluded a second "post-hearing" rebuttal report from claimant's attending physician; and (2) upheld the SAIF Corporation's denials of his new/omitted medical condition claims for seizures, a seizure disorder, and T12 and L3 compression fractures. On review, the issues are the ALJ's evidentiary ruling and compensability. We affirm.

FINDINGS OF FACT

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

Claimant, whose job involved patrolling a large tract of land, was compensably injured in a motor vehicle accident (MVA) near the end of a graveyard shift the morning of September 22, 2007. Based on the path the vehicle took off the paved roadway before the accident, an investigative report raised the possibility that claimant was suffering from a seizure while his foot was either applied to or lodged into the accelerator. (Ex. 11). SAIF ultimately accepted, among other conditions, a "closed head injury," a "traumatic brain injury," and a "cerebral concussion with loss of consciousness." (Ex. 75).

On April 7, 2008, claimant suffered a seizure. (Ex. 17). He suffered another seizure on April 23, 2009. (Ex. 29). A May 4, 2009 MRI showed compression fractures at L3 and T12. (Ex. 32). He suffered additional seizures on May 23, 2010, and December 14, 2010. (Exs. 52A, 62A).

On May 15, 2013, claimant filed a new/omitted medical condition claim for a seizure disorder, for the aforementioned seizures, and T12 and L3 compression fractures. (Ex. 73). On September 5, 2013, claimant requested a hearing, alleging a *de facto* denial. On September 17, 2013, SAIF denied the new/omitted medical condition claim. (Ex. 78).

At the March 18, 2014 hearing, the ALJ granted a continuance to allow the parties to submit additional evidence. SAIF was allowed to depose Dr. Erb, claimant's attending physician, and claimant was allowed "to obtain three rebuttal reports from doctors who are currently in the exhibit list." (Tr. 2-3). Claimant subsequently submitted an April 3, 2013 report from Dr. Peterson, a worker-requested medical examiner, and a June 24, 2014 report from Dr. Erb. (Exs. 82, 83).

On July 3, 2014, the ALJ confirmed that the record was "not ready to close yet" because SAIF reserved the right to depose Dr. Erb and claimant "still intended to submit a third rebuttal report." (Hearing File). On October 20, 2014, SAIF deposed Dr. Erb. (Ex. 85). Claimant then submitted an October 24, 2014 report from Dr. Erb as Exhibit 84. SAIF objected to Exhibit 84, asserting that it conflicted with the ALJ's previous continuance ruling.

### CONCLUSIONS OF LAW AND OPINION

The ALJ excluded Exhibit 84. The ALJ reasoned that with respect to Dr. Erb, the record had been held open to allow one rebuttal report and cross examination. The ALJ concluded that the record had not been held open for either party to obtain a second rebuttal report from Dr. Erb following the deposition.

The ALJ also upheld SAIF's denials. The ALJ reasoned that claimant had suffered a seizure immediately before his MVA, and that the "pre-MVA" seizure was a symptom of a previously asymptomatic seizure disorder. Finding that the seizure disorder developed gradually until it became symptomatic, the ALJ analyzed the September 2007 seizure under the occupational disease standard. The ALJ referred to medical evidence that attributed the onset of the September 2007 seizure to sleep deprivation, but did not consider the night shift work to be the major contributing cause of the condition. Accordingly, the ALJ concluded that the September 2007 seizure was not compensable.

The ALJ also determined that the "MVA-related" head trauma was not a material contributing cause of claimant's "post-MVA" seizure disorder or his subsequent seizures. Accordingly, the ALJ concluded that those conditions were not compensable under either direct injury or consequential condition theories. The ALJ further found that the "post-MVA" seizure disorder and seizures were not "encompassed" within the accepted conditions. Finally, reasoning that the T12 and L3 compression fractures were consequences of the April 2009 seizure, the ALJ held that those conditions were also not compensable.

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## Evidence

Claimant contends that the ALJ's evidentiary ruling was an abuse of discretion because the record had been held open for him to submit another rebuttal report from a doctor whose opinion was already in the record, and Dr. Erb's October 24, 2014 report was such a report. We disagree with claimant's contention.

An ALJ may conduct a hearing in any manner that will achieve substantial justice, and has broad discretion regarding the admissibility of evidence. ORS 656.283(6); *Brown v. SAIF*, 51 Or App 389, 394 (1981). We review an ALJ's evidentiary ruling for abuse of discretion. *SAIF v. Kurcin*, 334 Or 399, 406 (2002). If the record is held open for a limited purpose, it is within the ALJ's discretion to exclude evidence that does not comport with that purpose. *Debra A. Meyer*, 64 Van Natta 2243, 2044 (2012); *Clifford L. Conradi*, 46 Van Natta 854, 857 (1994). However, it is an abuse of discretion to exclude evidence that falls within the scope of the express purpose for which the record is held open. *Jamie M. Holly*, 63 Van Natta 1670, 1672 (2011).

Here, the record had been held open to allow claimant to obtain "three rebuttal reports from doctors who [were] currently in the exhibit list." (Tr. 2). After claimant submitted two rebuttal reports, including a rebuttal report from Dr. Erb, the ALJ continued to hold the record open for "a third rebuttal report."

Although the ALJ did not explicitly require that claimant's rebuttal reports be authored by different doctors, the ALJ also did not explicitly permit claimant to obtain more than one rebuttal report from the same doctor. To the extent that the terms of the continuance may have been ambiguous, it was within the ALJ's discretion to clarify those terms.

Moreover, after claimant submitted Dr. Erb's first rebuttal report, SAIF did not submit medical evidence from any other expert. Thus, after Dr. Erb authored her first rebuttal report, there was no additional medical evidence for her to rebut.

Under such circumstances, we conclude that it was within the ALJ's discretion to conclude that Dr. Erb's October 24, 2014 report was not the third "rebuttal report" contemplated by the terms of the continuance. Accordingly, it was within the ALJ's discretion to exclude the disputed report (Exhibit 84) as inconsistent with the terms of the continuance. See *Meyer*, 64 Van Natta at 2044 (within the ALJ's discretion to exclude evidence that was not related to the purpose

for which the evidentiary record was held open); *cf. Jerry D. Thatcher*, 50 Van Natta 888 (1998) (within the ALJ's discretion to allow a second "post-hearing" report from the same physician).

### Compensability

Claimant contends that his September 2007 seizure was a compensable injury caused either by sleep deprivation or by the MVA itself. Further, he argues that his "post-MVA" seizure disorder and seizures are compensable as ordinary conditions caused by the MVA. Alternatively, claimant asserts that the "post-MVA" seizure disorder and seizures were symptoms of the accepted head conditions, and therefore encompassed within the accepted conditions. Finally, claimant contends that the T12 and L3 compression fractures are compensable consequences of the April 2009 seizure. As explained below, we disagree with claimant's contentions.

We begin with the September 2007 seizure. Even if we agreed that this seizure should be analyzed under the "material contributing cause" standard applicable to injuries, we would not find the condition compensable. We reason as follows.

We adopt the ALJ's conclusion that the persuasive medical evidence establishes that claimant had a hereditary disorder that predisposed him to have seizures, and that the September 2007 seizure was precipitated by sleep deprivation immediately before the MVA. Claimant contends that the seizure was caused by the "incident" of work-related sleep deprivation.

To establish compensability of the September 2007 seizure under an "injury" standard, claimant must show that the work incident was a material contributing cause of his need for treatment or disability of the seizure.<sup>1</sup> ORS 656.005(7)(a); ORS 656.266(2)(a); *Brown v. SAIF*, 262 Or App 640, 652 (2014); *Jean M. Janvier*, 66 Van Natta 1827, 1830 (2014). As discussed below, we do not conclude that work-related sleep deprivation was a material contributing cause of claimant's need for treatment or disability concerning the September 2007 seizure.

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<sup>1</sup> As noted above, we find that the existence of the September 2007 seizure has been established. See *Maureen Y. Graves*, 57 Van Natta 2380, 2381 (2005) (a claimant must prove that a claimed new/omitted condition exists).

Claimant testified that he was hired on August 16, 2007 to work graveyard shifts Friday and Saturday nights and to fill in for other shifts as necessary. (Tr. 24). He did not recall exactly which days he worked in the period preceding the MVA, but testified that he worked nights for a “pretty long stretch,” of up to seven shifts in a row, but also had days off. (Tr. 27-28). He described his schedule as exhausting because, due to child care responsibilities, he slept less than five hours on his work days, and he tried to stay up during the day on his days off. (Tr. 28). He “couldn’t get use to it, you know, going back and forth of trying to sleep at night versus trying to sleep during the day.” (*Id.*) This testimony establishes that claimant’s sleep deprivation resulted from the demands of his personal life and his attempt to “go back and forth” between being awake at night and being awake during the day.

Dr. Erb opined that it was not reasonable to expect that claimant could “adapt” to his night shift work. (Ex. 83-7). She noted that human hormone cycles are based on sunrise, and that although some people who consistently work at night “adjust to it okay and are actually not sleep deprived,” “their hormone cycles are still not going to be at the right time.” (Ex. 85-25). Based on a history that claimant worked at least one day shift in the two weeks before the MVA and, additionally, was “trying to lead a more normal life with the rest of society” by “trying to sleep at night and be up during the day,” Dr. Erb explained that the inconsistent sleep schedule made it more difficult for claimant to sleep enough. (Ex. 89-26). She opined that claimant’s “changing and irregular work schedule” was a material contributing cause of his sleep deprivation. (Ex. 85-27).

Claimant, however, testified that he worked day shifts “[a]t first, when [he] was first hired on.” (Tr. 26). He did not testify that he continued to work day shifts into the two week period before the MVA. Thus, while Dr. Erb believed that claimant’s inconsistent sleep schedule resulted from both an inconsistent shift assignment and his attempt to “lead a more normal life with the rest of society,” the record supports a conclusion that claimant’s inconsistent sleep schedule resulted from his choice to change his sleep schedule on his days off to sleep at night and be up during the day.

Accordingly, Dr. Erb’s conclusion attributing claimant’s sleep deprivation, and the related seizure, to his work schedule is based on a work schedule that included both day and night shifts in the two week period before the MVA. Because claimant’s testimony does not support this history, we conclude that Dr. Erb’s opinion is based on inaccurate information and is unpersuasive. *Miller v. Granite Constr. Co.*, 28 Or App 473, 478 (1977).

Dr. Peterson also opined that it was not possible to adapt to changes in sleep patterns that cycle over a period, such as claimant's schedule of working nights "and then revert for two or three days to staying up during the day and trying to sleep at night." (Ex. 82-2). She opined that claimant's "work schedule--which required him to work 12 hour shifts on some nights while he then shifted back to trying to sleep nights and be up during the day," was a material contributing cause of the September 2007 seizure. (Ex. 82-5). She did not believe that claimant's personal life was a more compelling cause of claimant's sleep deprivation than the necessity to work night shifts. (Ex. 82-8).

Although Dr. Peterson opined that claimant's graveyard shift schedule was at least as significant a cause of his sleep deprivation as his personal life, she attributed the sleep deprivation to claimant's changing sleep schedule rather than the mere fact that he worked at night. As explained above, the record establishes that claimant's changing sleep schedule resulted from his attempt to "try to stay up during the day" and "try and sleep at night, which [he] couldn't get used to." (Tr. 28). Under such circumstances, we do not find Dr. Peterson's opinion, that claimant's work schedule was a material contributing cause of the September 2007 seizure, to be persuasive.

Drs. Smith and Dickerman, who examined claimant at SAIF's request, did not attribute claimant's sleep deprivation to his work environment. (Exs. 80-5, 81-4).

Accordingly, based on our review of this record, we conclude that work-related sleep deprivation was not a material contributing cause of claimant's need for treatment and disability of the September 2007 seizure. Accordingly, that condition is not compensable.

We turn to the "post-MVA" seizure disorder and the April 2008, April 2009, May 2010, and December 2010 seizures. Claimant contends that the "MVA-related" head injury involved trauma to his brain that worsened his seizure disorder such that he suffered subsequent seizures. Thus, claimant asserts that these conditions are direct injuries, subject to the "material contributing cause" standard. However, as discussed below, we do not conclude that the MVA was a material contributing cause of claimant's need for treatment or disability of the "post-MVA" seizure disorder and seizures.

Considering the disagreement among experts regarding the contribution of the MVA to the seizure disorder, this causation inquiry presents a complex medical question that 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). When presented with disagreement among experts, 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). We may give more weight to the opinion of an expert if the record establishes that the opinion is supported by a greater level of specialized experience or expertise. *Abbott v. SAIF*, 45 Or App 657, 661 (1980). As explained below, we find the opinions of Drs. Smith and Dickerman more persuasive than the opinions of Drs. Erb and Peterson.

Dr. Erb noted that in a person with a predisposition to seizures, a head trauma or traumatic brain injury can trigger a seizure. (Ex. 85-29). Thus, after claimant's head injury, Dr. Erb opined that "he now has two reasons to have a seizure disorder: He has the genetic predisposition and now has the traumatic brain injury on top of that." (Ex. 85-32). Thus, she opined that the cause of claimant's seizure disorder "presently is a combination of a genetic predisposition to seizures and a traumatic brain injury." (Ex. 85-33). Thus, Dr. Erb concluded that the head injury continued to be a material contributing cause of claimant's seizures. (*Id.*) In particular, she cited the absence of previous seizures as evidence supporting her causation opinion. (Ex. 85-34).

Dr. Peterson also opined that, considering the lack of "pre-MVA" seizures, the "MVA-related" head injury was the most likely cause of claimant's "post-MVA" seizure disorder. (Ex. 79-18). She also reasoned that in the presence of an asymptomatic and undiagnosed seizure disorder, a head injury would further lower the seizure threshold. (*Id.*) Thus, like Dr. Erb, she opined that a combination of the head injury and claimant's underlying tendency toward seizures resulted in the "post-MVA" seizure disorder and seizures. (*Id.*)

Dr. Smith, who examined claimant at SAIF's request, stated that he is a leading expert in epilepsy and its causes and in the review and interpretation of EEG studies. (Ex. 80-3). He asserted that his expertise gave him an advantage in rendering a causation opinion. (Ex. 80-4).

Dr. Smith noted that claimant had a "very specific" EEG pattern that was hereditary and indicated a lower seizure threshold, even if the condition was asymptomatic. (Ex. 60-14-16). He reasoned that if claimant's head injury had caused a brain injury that contributed to the seizures, such an injury "would show up on an EEG." (Ex. 60-24). He explained that claimant's EEG showed "activity of symmetrical dysfunction and not one specific area as would occur in a traumatic

brain injury induced seizure disorder or epilepsy condition.” (Ex. 80-4). Dr. Smith further reasoned that because of the length of time that elapsed between the September 2007 MVA and the first “post-MVA” seizure, in April 2008, the temporal relationship between the two events did not support a causal relationship. (Ex. 60-27). Ultimately, he concluded that there was no causal relationship between claimant’s head injury and the “post-MVA” seizure disorder or seizures. (Ex. 80-5).

Dr. Dickerman, like Dr. Smith, examined claimant at SAIF’s request. Dr. Dickerman also has specialized training and expertise in interpreting EEGs and treating epilepsy patients. (Ex. 81-2). He stated that his opinion was supported by his experience and qualifications. (*Id.*)

Dr. Dickerman opined that the EEG studies did not identify a focal abnormality in the brain that would be consistent with a head trauma that caused seizures. (Ex. 81-3). He explained that there was a “generalized discharge,” meaning that claimant’s “entire brain shows activity of dysfunction and not one specific area as would occur in a traumatic brain injury induced seizure or epilepsy condition.” (*Id.*) Thus, he concluded that the EEG was inconsistent with the conclusion that the head injury further lowered claimant’s seizure threshold. (Ex. 81-4).

After considering this evidence, we find the opinions of Drs. Smith and Dickerman most persuasive. They explained that a brain injury that could have contributed to claimant’s subsequent seizures would have been confirmed by EEG, and that claimant’s EEG did not show such an injury. They also explained why their specialized expertise gave them an advantage in rendering their causation opinions. Their opinions are well reasoned and more persuasive than those of Drs. Erb and Peterson, who did not persuasively address the EEG or the expertise claimed by Drs. Smith and Dickerman. *See Donald C. Wright, Jr., 67 Van Natta 1914 (2015) (medical opinion found less persuasive where it did not address facts supporting contrary opinion).*

Therefore, we conclude that the work injury was not a material contributing cause of claimant’s need for treatment or disability of the “post-MVA” seizure disorder or seizures. Likewise, because there was no causal relationship between the “post-MVA” seizure disorder and seizures and the accepted “closed head injury,” “traumatic brain injury,” or “cerebral concussion with loss of consciousness,” the seizure disorder and seizures are not “encompassed”

symptoms of the accepted conditions. Accordingly, the “post-MVA” seizure disorder and seizures are not compensable, nor are the T12 and L3 compression fractures that resulted from the April 2009 seizure.

Based on the aforementioned reasoning, we affirm.

### ORDER

The ALJ’s order dated April 16, 2015 is affirmed.

Entered at Salem, Oregon on January 29, 2016

Member Weddell dissenting in part.

I agree with the majority’s conclusions regarding the ALJ’s evidentiary ruling and the compensability of claimant’s “post-MVA” seizure disorder and seizures. However, I conclude that claimant’s September 2007 seizure is compensable as an injury. Accordingly, I respectfully dissent in part.

To begin, I agree with the majority’s conclusion that claimant had a hereditary disorder that predisposed him to have seizures, and that the September 2007 seizure was precipitated by sleep deprivation immediately before the MVA. Further, whereas the ALJ concluded that the September 2007 seizure was properly analyzed under the occupational disease standard, I analyze it as an injury.

What sets an “occupational disease” apart from an accidental “injury” is that the occupational disease is gradual, rather than sudden, in onset. *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). The ALJ reasoned that claimant’s sleep deprivation arose gradually. However, the disputed condition is the September 2007 seizure, not the sleep deprivation that preceded it.

I interpret the opinions of Dr. Erb, claimant’s attending physician, Dr. Peterson, a worker-requested medical examiner, and Drs. Smith and Dickerman, who examined claimant at SAIF’s request, to support the conclusion that although claimant had a longstanding condition that rendered him more

susceptible to seizures, the September 2007 seizure itself arose suddenly.<sup>2</sup> (Exs. 60-50-52, 77-43, 79-17-18, 85-28-31). There is no medical evidence persuasively suggesting that the seizure itself arose gradually. Therefore, I analyze the seizure as an injury.

Claimant bears the burden to show that the “work-related injury incident” was a material contributing cause of his need for treatment or disability of the seizure.<sup>3</sup> ORS 656.005(7)(a); ORS 656.266(1); *Brown v. SAIF*, 262 Or App 640, 652 (2014); *Jean M. Janvier*, 66 Van Natta 1827, 1830 (2014). As the majority notes, the evidence persuasively establishes that the seizure was precipitated by sleep deprivation. Thus, the “work-related injury incident” in this case was claimant’s sleep-deprived state at the time of the seizure.

The majority concludes that claimant’s sleep-deprived state was not work related because his sleep deprivation resulted from the demands of his personal life and his attempt to “go back and forth” between being awake at night and being awake during the day. I disagree with this conclusion.

Although Dr. Erb did not opine that night shift work causes sleep deprivation in all workers, she explained that human hormone cycles are based on sunrise, and that even those workers who have consistent schedules and “adjust to” working at night will experience disrupted hormone cycles. (Ex. 85-25). In discussing the causes of claimant’s sleep deprivation on the date of the injury, she explained:

“His sleep was inadequate at that time. He was working 12-hour shifts often, ten p.m. to ten a.m., and he was also--he worked numbers of hours. He didn’t have a regular--did not appear to me that he had a regular schedule. And he was taking care of his young daughter, who was on a more normal day/night cycle than he was on.” (Ex. 85-24).

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<sup>2</sup> Dr. Peterson opined that it was slightly more likely that MVA-related head trauma precipitated the September 2007 seizure than that the seizure preceded the MVA. (Ex. 79-19). In either event, Dr. Peterson’s opinion supports the conclusion that the seizure arose suddenly. (*Id.*) Further, she offered a causation opinion addressing what the probable causes of the September 2007 would have been if the seizure had preceded the MVA. (Ex. 82).

<sup>3</sup> The record does not establish that claimant’s hereditary condition, which rendered him more susceptible to seizures, was diagnosed or treated prior to the work injury. Thus, it does not constitute a cognizable “preexisting condition,” and the “major contributing cause” analysis applicable to combined conditions is not applicable. See ORS 656.005(7)(a)(B), (24)(a), (c).

Dr. Erb's description of claimant's shift schedule and off-work personal responsibilities is consistent with his testimony. (Tr. 24, 27-28). She opined that claimant's work schedule was a material contributing cause of his sleep deprivation, and of the MVA (by causing the sleep deprivation that caused the seizure that caused the MVA). (Ex. 85-27-28). I interpret her opinion to support the conclusion that claimant suffered from work-related sleep deprivation, and that the work-related sleep deprivation was a material contributing cause of claimant's need for treatment and disability of the September 2007 seizure.

As the majority notes, Dr. Erb was told, in her deposition, that claimant also worked during the day in the two-week period preceding the work injury, and she opined that a work schedule that required both day work and night work "can be a significant issue where people are not getting adequate sleep." (Ex. 85-26-27). Nevertheless, her explanation offered before receiving that information supports the conclusion that claimant's night shift work alone significantly contributed to his sleep deprivation. Further, even considering claimant's personal daytime responsibilities, Dr. Erb's opinion supports the requisite causal relationship between claimant's work-related sleep deprivation and his disability and need for treatment of the September 2007 seizure.

I conclude that Dr. Erb's opinion is based on a materially accurate history. *See Jackson County v. Wehren*, 186 Or App 555, 560-61 (2003). Further, her explanation is well reasoned and persuasive. Consequently, I give her opinion great weight.

Dr. Peterson also opined that claimant's work schedule was a material contributing cause of the September 2007 seizure. (Ex. 82-5). She responded to the opinions of Drs. Smith and Dickerman, who opined that work did not expose claimant to sleep deprivation because "working a swing shift is normal for him and the body adjusts." (Ex. 82-3). She explained that an 8 hour swing shift can be adapted to much more easily than a 12-hour night shift. (*Id.*) Thus, she opined that claimant's work schedule was the major cause of his lack of sleep. (Ex. 82-3). She also attributed the seizure, in major part, to claimant's lack of sleep. (Ex. 82-6).

Dr. Peterson understood that on his days off, claimant reverted to sleeping at night and being awake during the day to take care of his daughter. (Ex. 82-2). Nevertheless, she concluded that claimant's necessity to work night shifts was at least as compelling a reason as his personal life for his sleep deprivation. (Ex. 82-8).

In rendering her causation opinion, Dr. Peterson understood the impact that claimant's personal life had on his sleep schedule, as well as the impact of his work schedule. Considering these factors, she attributed claimant's sleep deprivation, in major part, to his work schedule. Her opinion is well reasoned, based on accurate information, and persuasive.

The contrary opinions of Drs. Smith and Dickerman are less persuasive. They both opined:

“In this case, it does not appear the work exposed [claimant] to the sleep deprivation as working a swing shift is a normal shift for him and the body adjusts. Rather, according to his testimony, his 4 year old daughter was keeping him up and causing him to sleep less than normal. As a result \* \* \* it appears [claimant's] personal life (i.e. daughter keeping him up and/or stress with his significant other resulting in loss of sleep) seemed to be the cause of his sleep deprivation and therefore, the sleep deprivation that lowered the threshold for the seizure to occur was not due to his work environment[.]” (Exs. 80-5, 81-4).

Although Drs. Smith and Dickerman phrased their opinions in terms of whether claimant's work schedule was a cause of his sleep deprivation and resulting seizure at all, their reasoning suggests merely that claimant's personal life was a more significant cause of his sleep deprivation than his work schedule. Thus, their opinions do not persuasively address the correct analysis under the “material contributing cause” standard.<sup>4</sup>

Further, as claimant testified, he did not work a “normal” “swing shift,” as Drs. Smith and Dickerman assumed. Instead, he worked a 12-hour night shift, beginning at 10:00 p.m., and did not have a regular schedule in terms of days working and days off. As Drs. Erb and Peterson explained, the difference between the regular 8-hour swing shift assumed by Drs. Smith and Dickerman and the

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<sup>4</sup> In addition to his “check-the-box” concurrence with the above opinion, Dr. Smith noted that the seizure threshold may have been lowered also by the consumption of stimulating beverages. (Ex. 81-4). The “stimulating beverages” to which he referred were “energy drinks” that claimant drank during his night shift to stay awake during work. (Tr. 38-39). Thus, Dr. Smith raised the possibility of another work-related cause of claimant's September 2007 seizure, without persuasively explaining why the “material contributing cause” standard would not be satisfied if that cause were considered.

inconsistent 12-hour night shift that claimant actually worked was significant to the causal relationship between claimant's work schedule and his sleep deprivation. Thus, Drs. Smith and Dickerman based their opinions on materially inaccurate information. *See Miller v. Granite Constr. Co.*, 319 Or 235, 240 (1994) (medical opinion based on inaccurate information found unpersuasive).

On this record, I conclude that claimant has shown that his September 2007 seizure was a compensable injury. Therefore, I would set aside SAIF's denial of that condition.