

In the Matter of the Compensation of  
**RASHELLE A. CARPENTER, Claimant**

WCB Case No. 15-01518

ORDER ON REVIEW

Bennett Hartman Morris & Kaplan, Claimant Attorneys

Sather Byerly & Holloway, Defense Attorneys

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

The self-insured employer requests review of Administrative Law Judge (ALJ) Mills's order that set aside its denial of claimant's occupational disease claim for a bilateral carpal tunnel syndrome (CTS) condition. On review, the issue is compensability.

We adopt and affirm the ALJ's order with the following supplementation.

In finding claimant's bilateral CTS compensable, the ALJ relied on the opinion of Dr. Lupu, claimant's attending physician and neurologist, as supported by Dr. Buehler, hand surgeon, rather than the opinion of Dr. Nolan, hand surgeon, who examined claimant at the employer's request. The employer argues that the opinions of Drs. Lupu and Buehler are insufficient to meet claimant's burden of proof under ORS 656.802(2)(a). Based on the following reasoning, we disagree with this contention.

To establish a compensable occupational disease, claimant's employment conditions must be the major contributing cause of the disease. ORS 656.802(2)(a). The major contributing cause means a cause that contributes more than all other causes combined. *See Smothers v. Gresham Transfer, Inc.*, 332 Or 83, 133-34 (2001); *McGarrah v. SAIF*, 296 Or 145, 166 (1983). To persuasively establish the major contributing cause of a condition, an opinion must consider the relative contribution of each cause and determine which cause, or combination of causes, contributed more than all other causes combined. *Dietz v. Ramuda*, 130 Or App 397, 401-02 (1994), *rev dismissed*, 321 Or 416 (1995).

Determination of the major contributing cause is a complex medical question that must be resolved on the basis of expert medical opinion. *Jackson County v. Wehren*, 186 Or App 555, 559 (2003), citing *Uris v. Comp. Dep't*, 247 Or 420, 424 (1967). In evaluating the medical evidence, we rely on those opinions that are both well reasoned and based on accurate and complete

information. *Somers v. SAIF*, 77 Or App 259, 263 (1986). 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). 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).

We agree with the ALJ's conclusion that the opinions of Drs. Lupu and Buehler are more persuasive than the opinion of Dr. Nolan. We reason as follows.

Claimant testified at length about various work activities, including the repetitive and strenuous nature of her work as a cashier. Specifically, she testified that her job duties included repetitively and frequently grabbing, scanning, bagging, and lifting items in awkward positions, which weighed frequently more than 10 pounds. (Tr. 7-9). The ALJ found that claimant was a credible witness based on her demeanor while testifying and we find no reason not to defer to the ALJ's demeanor-based credibility finding. *See Erck v. Brown Oldsmobile*, 311 Or 510, 528 (1991) (Board generally defers to the ALJ's determination of credibility when it is based on the ALJ's opportunity to observe the witness).

Claimant further testified that she had described her job duties in detail to Dr. Lupu. (Tr. 15-16). Under such circumstances, we find that Dr. Lupu relied on a sufficiently accurate history. *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 opinion and does not exclude information that would make the opinion less credible). After ruling out additional risk factors, Dr. Lupu determined that environmental factors, like claimant's occupation, were more likely the cause of her condition. (Ex. 20-2). Dr. Lupu considered claimant's history that she began experiencing symptoms approximately one year after working for the employer, and that she frequently used a box cutter, straightened boxes, worked at the register, and engaged in other repetitive tasks at the time that she developed symptoms. (*Id.*) Ultimately, Dr. Lupu opined that claimant's occupation was the "main contributor" to her CTS. (*Id.*)

Dr. Lupu's opinion relied on an accurate history and his discussion included a weighing of the relative contribution of the relevant factors of claimant's condition. *See Dietz*, 130 Or App at 401-02. Therefore, we find his opinion persuasive.

In contrast to Dr. Lupu's opinion, Dr. Nolan attributed claimant's condition in major part to her obesity. (Ex. 16-6). Although aware of claimant's work activities, Dr. Nolan did not consider them sufficiently repetitive or forceful enough to cause claimant's condition. (Ex. 16-5). However, he did not specifically respond to Dr. Lupu's opinion or address claimant's work activities of using a box cutter or straightening boxes. Based on our review of Dr. Nolan's report (in contrast to Dr. Lupu's report), we are not persuaded that he adequately considered the nature of claimant's work activities in reaching his opinion. *See Douglas L. Kiser*, 57 Van Natta 2589, 2591 (2005); *Sammie A. Pakros*, 51 Van Natta 282, 283 (1999). Additionally, in contrast to Dr. Lupu's opinion, we do not consider Dr. Nolan's opinion to have adequately analyzed claimant's condition and its relationship to her work activities. Consequently, we further discount Dr. Nolan's opinion.

In conclusion, based on the foregoing reasoning, we are persuaded that claimant's work activities were the major contributing cause of her claimed condition. Accordingly, we conclude that her claimed occupational disease is compensable. Therefore, we affirm.

Claimant's attorney is entitled to an assessed fee for services on review. ORS 656.382(2). 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 on review is \$4,500, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's respondent's brief), the complexity of the issue, the value of the interest involved, and the risk that claimant's counsel may 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 denial, to be paid by the employer. *See* ORS 656.386(2); OAR 438-015-0019; *Gary Gettman*, 60 Van Natta 2862 (2008).

#### ORDER

The ALJ's order dated November 23, 2015 is affirmed. For services on review, claimant's attorney is awarded \$4,500, payable by the employer. Claimant is awarded reasonable expenses and costs 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 June 1, 2016

Member Johnson dissenting.

In finding claimant's bilateral carpal tunnel syndrome (CTS) condition compensable, the majority primarily relies on the opinion of Dr. Lupu. Because I find the opinion of Dr. Nolan more persuasive, I respectfully dissent.

There are three causation opinions. Dr. Lupu, neurologist, and Dr. Buehler, hand surgeon, potentially support a causal relationship between claimant's work activities and her claimed bilateral CTS condition. In contrast, the opinion of Dr. Nolan, hand surgeon, does not support a causal relationship. For the following reasons, I would find the opinions of Drs. Lupu and Buehler insufficient to establish compensability.

Dr. Lupu opined that claimant's "occupation [was] more than likely the main contributor to the onset of her carpal tunnel syndrome." (Ex. 20-2). He explained that occupational risks such as repetitive wrist movements "may" lead to carpal tunnel within one year or sooner even at claimant's age when she began experiencing symptoms. (*Id.*) Finally, Dr. Lupu determined that environmental factors, such as claimant's occupation, were more likely the cause of her CTS because she did not have other risk factors. (*Id.*)

I find Dr. Lupu's opinion unpersuasive. Aside from claimant's occupation, Dr. Lupu did not explain which environmental factors he weighed in his causation opinion. (Ex. 20). In addition, he did not comment on the contribution from claimant's morbid obesity when determining the major contributing cause of the condition.<sup>1</sup> (*Id.*) Finally, although claimant testified that she described her job duties in detail to Dr. Lupu, his opinion did not reference this "detailed" information in rendering his causation opinion. (Tr. 15-16; *Id.*) Without further explanation or a response to Dr. Nolan's opposing "causation" theory, I find Dr. Lupu's opinion unpersuasive and insufficient to establish claimant's burden of proof. *See* ORS 656.802(2)(a); *Moe v. Ceiling Systems*, 40 Or App 429, 433 (1980) (rejecting conclusory medical opinion as unpersuasive); *Louise Richards*, 57 Van Natta 80, 81 (2005) (physician's opinion unpersuasive when it did not rebut or respond to contrary opinion).

Dr. Buehler opined that claimant's carpal tunnel release was work-related "due to the association with her work." (Ex. 14). He took a history that claimant had carpal tunnel symptoms since 2008, which were exacerbated by her work

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<sup>1</sup> Dr. Nolan opined that claimant's severe obesity was the major cause of her CTS, and that there was "strong evidence" that obesity caused CTS in medical literature. (Ex. 16-5).

activities. (*Id.*) He further noted that claimant performed grasping, stocking, and clerking activities at work, that she had carpal tunnel symptoms while performing those activities, and that her symptoms largely resolved while off work. (*Id.*) Without further explanation, Dr. Buehler's opinion attributing claimant's symptomatology to her work activities is insufficient to establish that claimant's work activities were the major contributing cause of her CTS condition. *See Dennis E. Hall, Sr.*, 56 Van Natta 2770, 2771 (2004) (work activities must be the major contributing cause of the alleged occupational disease, not just the symptoms of that disease).

Finally, even assuming that the opinions of Drs. Lupu and Buehler are legally sufficient, I find Dr. Nolan's opinion more persuasive for the following reasons.

Dr. Nolan took a thorough history from claimant with respect to her job duties. (*See Ex. 16*). He explained that claimant had a BMI of 47, which placed her in the "morbidly obese" category, and that the AMA Guidelines (essentially meta-analysis) showed there is "strong evidence" that obesity is a significant contributing cause in the development of claimant's CTS. (*Id.*) Moreover, he explained that abnormal fluid shifts that occur during periods of sleeping contribute to increased chronic pressure on the median nerve in the carpal canal, which further explained why claimant reported symptoms at night.<sup>2</sup> (*Id.*) He acknowledged that there was "some evidence" that "certain forms of work requiring significant repetitive activity performed in combination with force, may be a cause of carpal tunnel syndrome." (*Ex. 16-5*). Specifically, he noted that activities associated with the development of CTS included use of vibratory tools such as jack hammers, sanders, and grinders, or working with tools that required constant gripping in awkward positions. (*Ex. 19*). However, after reviewing claimant's work activities, Dr. Nolan determined that her part-time retail work was inconsistent with causing the condition. (*Ex. 19*). After weighing claimant's morbid obesity with her work activities (which were light and varied), he opined that claimant's obesity was the major contributing cause of her CTS condition. (*Exs. 16, 29*).

Neither Dr. Lupu nor Dr. Buehler addressed the aforementioned analysis expressed by Dr. Nolan. In the absence of a response from Drs. Lupu and Buehler,

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<sup>2</sup> Claimant testified that she had carpal tunnel symptoms at night. (*Tr. 25*).

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I find Dr. Nolan's thorough and well-reasoned opinion to be the most persuasive.<sup>3</sup> *See Ex. 16A; Somers, 77 Or App at 263; Richards, 57 Van Natta at 81.* Consequently, I would conclude that claimant has not proven the compensability of her bilateral CTS condition. Therefore, I would reverse the ALJ's order that set aside SAIF's denial. Accordingly, I respectfully dissent.

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<sup>3</sup> Citing *Douglas L. Kiser, 57 Van Natta 2589, 2591 (2005)*, and *Sammie A. Pakros, 51 Van Natta 282, 283 (1999)*, the majority concludes that Dr. Nolan did not give sufficient consideration to the nature of claimant's work activities in reaching his conclusion regarding causation. However, in those cases, the physician in question did not reference a detailed work history, which is dissimilar to the present case. Moreover, the majority's rationale is premised on claimant's lay characterization of her work activities as "repetitive." However, whether a particular activity is of the type to cause a particular condition is a complex medical question, which must be resolved by a persuasive medical opinion. Consequently, I do not discount Dr. Nolan's opinion.