
In the Matter of the Compensation of
JULIO VILLEDA, Claimant
WCB Case No. 15-00749, 15-00741
ORDER ON REVIEW
Hollander & Lebenbaum et al, Claimant Attorneys
Reinisch Wilson Weier, Defense Attorneys

Reviewing Panel: Members Lanning and Johnson.

The self-insured employer requests review of Administrative Law Judge (ALJ) Pardington's order that: (1) set aside its denial of claimant's occupational disease claim for a left shoulder condition; (2) awarded penalties and attorney fees for an allegedly unreasonable denial; and (3) reversed a Workers' Compensation Division's (WCD's) order suspending claimant's compensation under an accepted left knee claim. On review, the issues are claim processing, compensability, penalties, and attorney fees.

We adopt and affirm the ALJ's order with the following supplementation.¹

Compensability

In setting aside the employer's denial, the ALJ found the opinion of Dr. Rask, an orthopedic surgeon and claimant's treating physician, more persuasive than the opinion of Dr. Swanson, an orthopedic surgeon who performed an examination at the employer's request.

On review, the employer contends that Dr. Rask's opinion is unpersuasive, because it relied on an inaccurate history of claimant's work activities. For the following reasons, we disagree.

Claimant must prove that his employment conditions were the major contributing cause of his occupational disease. ORS 656.266(1); ORS 656.802(2)(a). It is claimant's burden to prove both legal and medical causation by a preponderance of the evidence. *Harris v. Farmer's Co-op Creamery*, 53 Or App 618 (1981). Legal causation is established by showing that claimant engaged in potentially causative work activities; whether those work activities caused claimant's condition is a question of medical causation. *Darla Litten*, 55 Van Natta 925, 926 (2003). The determination of the major contributing cause requires

¹ We adopt and affirm that portion of the ALJ's order concerning the WCD's suspension order.

evaluation of the relative contribution of the different causes and a decision as to which cause contributed more than all other causes combined. *Dietz v. Ramuda*, 130 Or App 397, 401 (1994); *Linda E. Patton*, 60 Van Natta 579, 581 (2008).

Considering the disagreement among medical experts regarding the relative contribution of employment activities to the left shoulder condition, the causation issue presents a complex medical question that must be resolved by expert medical opinion. *Uris v. Comp. Dep't*, 247 Or 420 (1967); *Barnett v. SAIF*, 122 Or App 279, 282 (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).

The employer argues that Dr. Rask's opinion was based on an inaccurate and incomplete history. In doing so, the employer asserts that claimant is not a credible witness because his testimony had inconsistencies concerning the onset of his 2014 left shoulder symptoms and the nature of his work activities.² For the following reasons, we find claimant's testimony to be credible and Dr. Rask's opinion to be based on a sufficiently accurate history. *See Jackson County v. Wehren*, 186 Or App 555, 561 (2003) (a history need only contain relevant information and is thus complete if it includes sufficient information on which to base the opinion and does not exclude information that would make the opinion less credible); *Claire L. Saeger*, 60 Van Natta 829, 831-32 (2008) (same).

First, we address claimant's onset of left shoulder symptoms. Claimant testified that he first noticed left shoulder symptoms in March 2014. (Tr. I: 15-16). He described the symptoms as, "Just pain. It felt like something was maybe

² The employer also contends that claimant provided inconsistent statements concerning previous left shoulder symptoms. However, we do not consider this determinative, because it was not a focus of the physicians' causation opinions. Moreover, claimant explained that his previous symptoms were located "all over" and then specified that it was in the shoulder blade rather than the shoulder itself. (Tr. I: 58-59; Tr. II: 7-8, 17). We find these statements consistent with claimant's testimony that he did not previously have left shoulder pain. (Tr. I: 21).

In addition, the employer argues that claimant's testimony that he reported his onset of left shoulder symptoms in 2014 to coworkers, but failed to produce those coworkers at hearing, should be construed against him. (Tr. I: 17); *see Ragie D. Duncan*, 52 Van Natta 1 (2000) (unexplained failure to call witnesses the claimant identified as corroborative of his injury construed against the claimant). However, the employer has not produced countervailing evidence. Under such circumstances, we do not construe claimant's nonproduction of these coworkers against him. *See Robert Davis*, 58 Van Natta 1766 (2006) (the claimant's testimony was credible, despite the lack of corroborating testimony, where there was no contradictory testimony); *Terry K. Pierce*, 56 Van Natta 987 (2004) (the claimant's testimony was materially reliable, despite the lack of corroborating testimony, in the absence of countervailing evidence).

broken or something moving around in there.” (Tr. I: 16). He explained that he had not discussed the left shoulder symptoms with his physicians until November 2014 because he was primarily focused on his knee condition which, at that time, was more bothersome than the shoulder. (Tr. I: 17-18; Ex. 71). He testified that the left shoulder pain persisted, but that it was better while he was off work for his knee condition after April 2014. (Tr. I: 18, 57-58). He testified at another point that his shoulder pain remained about the same after he was off work in April 2014 for his knee condition. (Tr. I: 56).

Notwithstanding claimant’s inconsistent statements that his shoulder pain either improved or remained constant while he was off work for his knee condition, we find claimant’s testimony regarding the *onset* of his left shoulder condition to be consistent. We next address claimant’s described work activities.

With respect to claimant’s reported work activities, we acknowledge that his description of pushing and pulling bins was inconsistent with Dr. Rask’s understanding. Specifically, claimant testified that he pushed and pulled bins that weighed 250 to 300 pounds when full. (Tr. 39). However, Dr. Rask understood claimant’s job to involve pushing and pulling bins that weighed 400 to 500 pounds. (Exs. 108A, 111-2, 114A-7, 114B, 119).

Yet, claimant provided a consistent history concerning his job duty of pulling apart magnets and the “jerking” motion required to pull apart plastic.³ (Tr. I: 26, 29-30, 62; Tr. II: 43). That history is sufficiently consistent with Dr. Rask’s “excessive jerking” history, which he considered sufficient to be the major contributing cause of claimant’s condition. (Exs. 111-2, 114B, 115, 119). We do not consider claimant’s “embellishment” on other activities sufficient to discount Dr. Rask’s opinion with respect to the “magnets” and “jerking” motions. Under such circumstances, we conclude that Dr. Rask’s opinion was based on an accurate history.

We adopt the ALJ’s reasoning concerning medical causation. Consequently, for the reasons expressed above, and those set forth in the ALJ’s order, we conclude that claimant’s employment conditions were the major contributing cause of his left shoulder condition.

³ Ms. Kocker disagreed with claimant’s description of the amount of force required for these activities. (Tr. II: 25). However, we agree with the ALJ’s assessment that her opinion is less probative because she did not spend much time working with him directly.

Penalty

In awarding a penalty for an allegedly unreasonable denial under ORS 656.262(11)(a), the ALJ concluded that there was no contrary medical evidence when the employer issued the denial to support a legitimate doubt. On review, the employer contends that it had legitimate doubt. For the following reasons, we affirm.

Under ORS 656.262(11)(a), if a carrier unreasonably delays or unreasonably refuses to pay compensation, the carrier shall be liable for an additional amount up to 25 percent of the amounts “then due.” Whether a denial was an unreasonable resistance to the payment of compensation depends on whether, from a legal standpoint, the carrier had a legitimate doubt about its liability. *Int’l Paper Co. v. Huntley*, 106 Or App 107 (1991). “Unreasonableness” and “legitimate doubt” are to be considered in light of all the evidence available at the time of the denial. *Brown v. Argonaut Ins. Co.*, 93 Or App 588, 591 (1988).

The employer contends that it had a legitimate doubt as to its liability, because claimant did not mention left shoulder complaints until November 2014, and the employer believed, based on Ms. Kocker’s opinion, that he was embellishing his work activities to Dr. Rask. However, on this record, there is no evidence that claimant embellished his work activities as of the time the employer issued the denial.

For the reasons expressed above, and as contained in the ALJ’s order, we conclude that the employer did not have a legitimate doubt concerning its liability at the time it issued the denial of claimant’s left shoulder condition.

Attorney Fee

Claimant’s attorney is entitled to an assessed fee for services on review concerning the successful defense of the ALJ’s decision. 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 on review is \$4,750, 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, his counsel’s fee “request,” and the employer’s objection), the complexity of the issues, the value of the interests involved, and the risk of going uncompensated.⁴

⁴ Claimant’s attorney references Oregon State Bar (OSB) attorney fee survey results, attaching that information to her fee request. Because such information is not part of the record, it is not subject to our review. See *Stephanie Thomas*, 62 Van Natta 2825 (2010) (OSB Economic Survey not subject

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 E. Gettman*, 60 Van Natta 2862 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

ORDER

The ALJ's order dated January 25, 2016 is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$4,750, 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 November 1, 2016

to administrative notice); *Inettie N. Trent*, 56 Van Natta 2678 (2004) (same); *Rene F. Juarez*, 56 Van Natta 1441, 1445 (2004), citing *Jamie J. Boldway*, 52 Van Natta 755, 756 (2000) (the Director's "official records," such as statistics regarding overturned denials, do not represent agency decisions or orders and, as such, are not subject to administrative notice); *Marc Grossetete*, 50 Van Natta 2235 n 2 (1998) (same). Therefore, we do not consider this information in determining a reasonable attorney fee.