
In the Matter of the Compensation of
DAVID DUNN, Claimant
WCB Case No. 15-01866
ORDER ON REVIEW
Dale C Johnson, Claimant Attorneys
SAIF Legal, Defense Attorneys

Reviewing Panel: Members Curey and Lanning.

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

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

In February 2015, claimant sought treatment for right foot pain. After SAIF denied his occupational disease claim for a right foot condition, claimant requested a hearing.

The ALJ noted that claimant had an unfused right fifth metatarsal apophysis, a congenital condition that preceded the onset of his right fifth metatarsal apophysitis condition. Citing *Corkum v. Bi-Mart Corp.*, 271 Or App 411 (2015), the ALJ concluded that because the unfused apophysis merely rendered claimant more susceptible to the apophysitis, it was not a "preexisting condition" or a "cause" to be weighed in determining the major contributing cause of disease. Further, finding that employment conditions were the major contributing cause of claimant's apophysitis, the ALJ set aside SAIF's denial. *See* ORS 656.802(2)(a).

On review, SAIF contends that the claim should be analyzed under ORS 656.802(2)(b) and that claimant's unfused apophysis should be weighed against employment conditions in determining the major contributing cause of his apophysitis. SAIF also asserts that the claim is not compensable because the record does not establish that employment conditions contributed more than claimant's off-work activities to his apophysitis. Based on the following reasoning, we affirm.

Claimant must establish the compensability of his occupational disease by showing that employment conditions were the major contributing cause of the disease. ORS 656.266(1); ORS 656.802(2)(a). If the occupational disease claim is based on the worsening of a preexisting disease or condition, claimant must prove

that employment conditions were the major contributing cause of the combined condition and of the pathological worsening of the disease. ORS 656.266(1); ORS 656.802(2)(b). The “major contributing cause” is the cause, or combination of causes, that contributes more than all other causes combined. *Schleiss v. SAIF*, 354 Or 637, 644 (2013); *Sandra M. Garrett*, 68 Van Natta 892, 893 (2016).

In the context of an occupational disease claim, determination of the major contributing cause requires consideration of all contributing causes, including non-employment causes that are not “preexisting conditions” as defined by ORS 656.005(24). *Bowen v. Fred Meyer Stores*, 202 Or App 558, 563-64 (2005). Nevertheless, SAIF’s contentions (*i.e.*, regarding the weighing of claimant’s unfused apophysis in the determination of major causation, as well as the applicability of ORS 656.802(2)(b)) implicate the definition of “preexisting condition” under ORS 656.005(24). That statute provides that:

“(b) ‘Preexisting condition’ means, for all occupational disease claims, any injury, disease, congenital abnormality personality, disorder or similar condition that contributes to disability or need for treatment and that precedes the onset of the claimed occupational disease, or precedes a claim for worsening in such claims pursuant to ORS 656.273 or 656.278.

“(c) For the purposes of industrial injury claims, a condition does not contribute to disability or need for treatment if the condition merely renders the worker more susceptible to the injury.”

In the context of an injury claim, the *Corkum* court concluded “the text, context, and legislative history of ORS 656.005(24)(c) show that a condition merely renders a worker more susceptible to injury if the condition increases the likelihood that the affected body part will be injured by some other action or process but does not actively contribute to damaging the body part.” 271 Or App at 422. SAIF contends that ORS 656.005(24)(c) and *Corkum* are limited to injury claims and, therefore, do not apply to an occupational disease claim under ORS 656.802. Based on the following reasoning, we disagree with SAIF’s contention.

In *Liberty Northwest Ins. Corp. v. Spurgeon*, 109 Or App 566, 569 (1991), *rev den*, 313 Or 210 (1992), which preceded the adoption of the definition of “preexisting condition” under ORS 656.005(24), the court explained that “[a]ll

causes of a disease, as opposed merely to a susceptibility or predisposition, must be considered in determining which, if any, was the major contributing cause.” (emphasis in original). Thus, pursuant to *Spurgeon*, a “susceptibility or predisposition” is not weighed in determining the major contributing cause of an occupational disease.

In *Multnomah County v. Obie*, 207 Or App 482 (2006), the court considered the effect to occupational disease claims of post-*Spurgeon* amendments to ORS 656.005(24) pertaining to the consideration of predispositions or susceptibilities.¹ Based on the legislative history of the 2001 statutory amendment to ORS 656.005(24), the court concluded that the legislature intended to exclude “predispositions” from the definition of a preexisting condition in the context of both injury and occupational disease claims. *Obie*, 207 Or App at 488; see also Or Laws 2001, ch 865, § 1 (deleting “or predisposes a worker” from ORS 656.005(24)). Therefore, the court rejected the contention that the legislature intended that, in the context of an occupational disease claim, a condition that renders the worker more susceptible to injury constitutes a contributing cause or a preexisting condition. *Obie*, 207 Or App at 488-89.

Subsequently, citing *Spurgeon* and *Obie*, the court expressly applied ORS 656.005(24)(c) to an occupational disease claim in *Murdoch v. SAIF*, 223 Or App 144, 146 (2008), *rev den*, 346 Or 361 (2009). Evaluating an occupational disease claim for a toe amputation that had resulted from an infection, the *Murdoch* court concluded that conditions (diabetes and diabetic neuropathy) that merely rendered the claimant more susceptible to the infection could not, in accordance with ORS 656.005(24)(c), be considered a “cause” for the purpose of determining the “major contributing cause” of the claimed occupational disease. 223 Or App at 149.

Based on the aforementioned case precedent, we have applied ORS 656.005(24)(c) to occupational disease claims, reasoning that “[f]or occupational disease cases, predispositions and susceptibilities do not constitute ‘causes’ contributing to the disease, condition, or need for treatment/disability.” *Natalia Gonzalez-Perez*, 67 Van Natta 1981, 1984 (2015). Further, relying on the *Corkum* rationale, we determined whether an asserted “cause” of a claimed occupational disease was, instead, a mere susceptibility. *Id.* at 1984.

¹ Under ORS 656.802(2)(e), which was adopted in 1995, “Preexisting conditions shall be deemed causes in determining major contributing cause under this section.”

Here, SAIF asserts that *Spurgeon* was decided under a prior statutory scheme, and contends that *Obie* is distinguishable because that case involved a psychological condition that arose suddenly (and consequently was not similar to ordinary occupational disease claims). Nevertheless, the *Obie* court specifically addressed the question of whether a predisposition may be considered a preexisting condition in the context of an occupational disease claim under the current statutory scheme. 207 Or App at 488.

SAIF also argues that the *Obie* court's discussion of predispositions was unnecessary to the disposition of the case and, thus, was *dicta*. However, regardless of whether the *Obie* court's discussion of the issue was necessary, the *Murdoch* court's application of *Obie* and ORS 656.005(24)(c) was necessary to its holding that the disputed occupational disease claim was compensable. *Murdoch*, 223 Or App at 150. Likewise, our application of *Corkum* and *Murdoch* was essential to our decision in *Gonzalez-Perez*. 67 Van Natta at 1986. For these reasons, we decline SAIF's invitation to depart from those authorities.²

Turning to the case at hand, we evaluate the nature of the contribution of the unfused apophysis to claimant's apophysitis, as well as major causation under the applicable legal standard. These are complex medical questions, which must be resolved by expert medical opinion. *See Barnett v. SAIF*, 122 Or App 279, 282 (1993). As explained below, we find the opinion of Dr. Loveland, claimant's attending podiatrist, most persuasive and conclude that claimant's apophysitis is compensable.

Dr. Loveland noted that an unfused apophysis is not a degenerative condition, and could remain unknown or asymptomatic over a person's lifetime. (Ex. 14-4). He explained that the condition at issue, apophysitis, is an inflammatory condition that results when the peroneus brevis tendon repetitively pulls on the fibrous tissue of the apophysis.³ (Ex. 14-3-4). He also reasoned that

² We recognize SAIF's arguments that contest the *Obie* and *Murdoch* rationales regarding the interpretation of ORS 656.005(24). Nevertheless, the court's holdings and statutory analysis are controlling precedent.

³ SAIF contends that Dr. Loveland changed his initial opinion that claimant had a "fracture" without a persuasive explanation. *See Scott Hands*, 68 Van Natta 1035, 1039 (2016) (change of opinion without persuasive explanation found unpersuasive). Dr. Loveland, however, explained that he changed his opinion after considering Dr. Fellers's opinion. (Ex. 14-14-2). Further, Dr. Loveland's ultimate opinion that claimant suffers from apophysitis is consistent with that of Dr. Fellers, and there is no persuasive medical evidence to the contrary. Under such circumstances, we find Dr. Loveland's change of opinion to be reasonably and persuasively explained. *See Kelso v. Salem*, 87 Van Natta 630, 633 (1987) (opinion found persuasive when there was a reasonable explanation for a change of opinion); *Emily C. Rogers*, 67 Van Natta 2204, 2210 (2015).

this mechanism occurs when a person lifts the foot and moves it outward while ambulating. (Ex. 14-4). He opined that the apophysis was “merely a passive contributor” that “merely made [claimant] susceptible to apophysitis.” (*Id.*)

Dr. Loveland concluded that work activities, particularly walking, were the major contributing cause of claimant’s apophysitis. (Ex. 14-5). In support of that conclusion, he reasoned that most of claimant’s walking was done at work. (Ex. 14-3). In doing so, he noted that claimant bicycled, but explained that bicycling does not involve the type of movement that causes apophysitis. (Ex. 14-4).

SAIF relies on the opinion of Dr. Fellers, who examined claimant at its request. Dr. Fellers described the mechanism of injury as “abnormal micromotion that often occurs between the unfused pieces of bone due to the peroneus brevis tendon tugging on the * * * fibrocartilaginous attachment between the unfused pieces of bone.” (Ex. 13-1). However, Dr. Fellers’s opinion did not persuasively address whether the unfused apophysis actively contributed to claimant’s apophysitis, or merely made him susceptible to an apophysitis caused by walking, as Dr. Loveland opined.

Under such circumstances, we find that Dr. Loveland’s opinion more persuasively addressed whether the unfused apophysis was an active contributing cause of claimant’s apophysitis. Accordingly, we conclude that the unfused apophysis was a “mere susceptibility,” and not an active cause of the disease. Therefore, it was not a legally cognizable preexisting condition, and ORS 656.802(2)(b) does not apply. *Corkum*, 271 Or App at 422-23; *Gonzalez-Perez*, 67 Van Natta at 1986. Further, as a mere susceptibility, the unfused apophysis is not weighed in our determination of the major contributing cause of claimant’s apophysitis. *Murdoch*, 223 Or App at 150; *Gonzalez-Perez*, 67 Van Natta at 1987.

We turn to the question of major causation under ORS 656.802(2)(a). As noted above, Dr. Loveland explained his opinion that employment conditions were the major contributing cause of claimant’s apophysitis. (Ex. 14-5). Further, Dr. Fellers did not persuasively opine to the contrary.

Citing claimant’s testimony regarding the extent of his off-work activities, SAIF contends that Dr. Loveland did not base his opinion on sufficient information. *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 physician’s opinion and does not exclude information that would make the opinion

less credible); *Miller v. Granite Constr. Co.*, 28 Or App 473, 476 (1997) (medical opinion that is based on incomplete or inaccurate history is not persuasive). In particular, SAIF notes claimant's testimony that he did "light hiking" approximately once every two weeks, "light bike riding" approximately weekly, and walking approximately ten miles twice a week. (Tr. 7-8).

Claimant also testified he measured his walking with a pedometer and walked approximately 10 miles per day while working. (Tr. 8). He explained that he worked four or five days per week and was on his feet almost all of his working hours. (Tr. 4-5, 8). He estimated that work constituted 70 percent of his time while walking and moving his feet. (Tr. 10).

Claimant's testimony supports Dr. Loveland's history that the majority of claimant's walking activity was done at work. (Ex. 14-3). Further, Dr. Loveland explained why walking, but not bicycling, was the causal activity to be evaluated in determining causation. (Ex. 14-4).

Under these circumstances, we find Dr. Loveland's opinion well reasoned, based on complete information, and persuasive. *See Somers v. SAIF*, 77 Or App 259, 263 (1986) (more weight given to those opinions that are well reasoned and based on complete information). Therefore, we conclude that employment conditions were the major contributing cause of claimant's apophysitis condition. *See* ORS 656.802(2)(a). Accordingly, 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 \$3,500, payable by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's respondent's brief and his counsel's uncontested representation), the complexity of the issue, the value of the interest involved, the risk 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 denial, to be paid by SAIF. *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 February 5, 2016 is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$3,500, payable by SAIF. 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 SAIF.

Entered at Salem, Oregon on January 3, 2017