
In the Matter of the Compensation of
JUAN H. ZAPATA, Claimant
WCB Case No. 15-02557, 14-05575, 14-04733
ORDER ON REVIEW
Thomas Coon Newton & Frost, Claimant Attorneys
Ronald W Atwood PC, Defense Attorneys

Reviewing Panel: Members Johnson and Weddell.

The self-insured employer requests review of those portions of Administrative Law Judge (ALJ) Lipton's order that: (1) set aside its denial of claimant's new/omitted medical condition claim for a right shoulder rotator cuff tear; (2) found that claimant's right shoulder arthroscopy was causally related to his compensable injury; and (3) awarded a \$30,000 employer-paid attorney fee. On review, the issues are compensability and attorney fees. We affirm in part and modify in part.

FINDINGS OF FACT

On March 27, 2014, claimant's right shoulder "popped" and became painful when he threw a ball of dough into a hopper at work. (Ex. 40). Later that day, at an emergency room, he reported a "sudden recurrence of right shoulder pains[.]" (Ex. 41-1).

Claimant had previously injured his right shoulder when he lifted a tray of dough at work in 2004. (Ex. 6-1). A January 2005 right shoulder MRI showed an osteochondral defect of the humeral head and "equivocal tendonitis or partial tear of the supraspinatus tendon." (Ex. 14). He received a right subacromial injection for a suspected fracture and impingement. (Ex. 20).

Concerning the 2004 injury, the employer accepted a right shoulder strain and right shoulder tendinitis. (Exs. 11, 30). A September 2005 Notice of Closure awarded five percent permanent impairment for loss of right shoulder range of motion. (Ex. 31).

In 2006, claimant slipped and fell on a wet floor at work, resulting in multiple strains, including bilateral shoulder strains. (Ex. 34). In 2010, he had pain in his shoulders after falling onto his back at work. (Exs. 37, 38). On July 19, 2010, a physical therapist reported "rising pain levels in [claimant's] low back, [right] hip, [right] knee and, especially, [right] shoulder." (Ex. 39).

There is no record of claimant receiving medical services for his right shoulder in 2011, 2012, or 2013. He testified that, at times, his shoulder “hurt” when he worked long hours, but it was not the kind of pain that caused him to see a physician. (Tr. 16, 31).

Following the March 2014 work incident, on April 1, 2014, Dr. Carver, an occupational medicine specialist, diagnosed a right rotator cuff capsule sprain and right trapezius strain. (Ex. 46-2). Thereafter, the employer accepted a right rotator cuff capsule sprain and right trapezius strain. (Ex. 52).

Claimant was released to light duty work on April 7, 2014, and to regular work on April 18, 2014. (Exs. 48, 50). He reported that he was having increased right shoulder pain. (Ex. 51-1). He did not notice any improvement with physical therapy. (*Id.*)

A May 28, 2014 right shoulder MRI showed a full-thickness tear of the supraspinatus insertion, a substantial retraction of the musculotendinous unit, subluxation of the humeral head, possible infraspinatus and subscapularis ruptures, and mild acromioclavicular (AC) joint arthritis. (Ex. 53).

On July 29, 2014, Dr. Sohn performed a right shoulder rotator cuff repair, distal clavicle excision, and biceps tenodesis. (Ex. 59). He observed that the infraspinatus and subscapularis tendons were intact, but the supraspinatus tendon was torn and retracted and the biceps labral complex had a “SLAP-type 1 tear.” (Ex. 59-2).

On August 20, 2014, claimant initiated a new/omitted medical condition claim for a right shoulder rotator cuff tear. (Ex. 63).

On September 12, 2014, claimant asked the Workers’ Compensation Division (WCD) to resolve a dispute regarding the employer’s refusal to authorize the July 28, 2014 surgery. (Ex. 64A). The employer responded that the disputed surgery was for a new/omitted medical condition, which had not been accepted. (Ex. 65A-3). Pursuant to ORS 656.704(3)(b)(C), the WCD transferred the dispute to the Hearings Division to determine whether the disputed surgery was causally related to the accepted claim. (Ex. 66).

On September 30, 2014, Dr. Farris, an orthopedic surgeon, performed an examination at the employer’s request. According to Dr. Farris, claimant reported having some discomfort in the right shoulder after the 2004 injury, which persisted

until the 2014 injury, when his symptoms became acutely worse.¹ (Ex. 67-8). Dr. Farris diagnosed a right shoulder strain superimposed on a preexisting severe right rotator cuff tear, moderate right AC joint arthritis, and right biceps tendonitis. (Ex. 67-7). He opined that the work incident was never the major contributing cause of the rotator cuff tear or the need for treatment/disability of the combined condition. (Ex. 67-11). Reasoning that any worsening that might have occurred as a result of the 2014 work incident would have been minor in comparison to the significant preexisting condition, Dr. Farris concluded that the incident was not a material cause of the rotator cuff tear and surgery performed on July 28, 2014. (Ex. 67-12).

On October 16, 2014, the employer denied the rotator cuff tear, asserting that it was a preexisting condition and that the injury was not the major contributing cause of the condition. (Ex. 68). Claimant requested a hearing.

Dr. Carver disagreed with Dr. Farris's opinion. Believing that claimant had been without pain and functioning well before the 2014 injury, Dr. Carver concluded that the rotator cuff tear and biceps tendinitis were due to the injury. (Ex. 69).

Dr. Sohn also disagreed with Dr. Farris's opinion. Dr. Sohn reasoned that, even if claimant had preexisting conditions, the injury caused a significant flare-up and the need for treatment. (Ex. 70-1).

Following claimant's January 9, 2015 right shoulder MRI, Dr. Sohn determined that the rotator cuff tear had not healed and was still retracted. (Exs. 84-2, 86).

On February 19, 2015, Dr. Puziss, an orthopedic surgeon, performed an examination at claimant's request. Regarding the 2005 work injury, Dr. Puziss diagnosed a "healed" right shoulder and rotator cuff sprain. (Ex. 89-10). As to the 2014 work injury, he diagnosed an acute right supraspinatus rotator cuff tear. (*Id.*) He further opined that claimant did not have a preexisting rotator cuff tear, but even if he did, the 2014 work injury combined with that condition and was the major and material cause of the disability/need for medical treatment of the tear. (Ex. 89-12, -13).

¹ Claimant testified, over the employer's objection, that the interpreter misinterpreted his remarks to Dr. Farris. (Tr. 16, 17). Claimant also testified that his shoulder hurt only sometimes, as when he worked long (*e.g.*, 12, 13) hours. (Tr. 16, 31).

In his April 6, 2014 deposition, Dr. Sohn opined that sometime between the 2005 MRI (which showed a “tiny, little tear”) and the 2015 MRI (showing a “massive, large retracted tear”), claimant sustained a major tear of his rotator cuff. (Ex. 91-37). Dr. Sohn could not determine when the tear occurred, but he concluded that the March 2014 work injury aggravated the shoulder enough that claimant required medical treatment. (Ex. 91-18, -38).

On April 6, 2015, Dr. Swanson, an orthopedic surgeon, performed an examination at the employer’s request. Dr. Swanson diagnosed preexisting right AC joint osteoarthritis, congenital type II acromion with a developmental spur producing a type III acromion, preexisting right supraspinatus and infraspinatus rotator cuff tears, and degenerative type I SLAP lesion. (Ex. 92-21). He opined that claimant had right shoulder symptoms in 2004, 2005, 2006, and 2010, consistent with rotator cuff tendinopathy, which led to a spontaneous failure of the rotator cuff tendons, before the March 2014 work incident. (Ex. 92-30).

On June 9, 2015, Dr. Farris opined that the March 2014 work incident was not a material cause of the rotator cuff tears, which he maintained were preexisting. (Ex. 93-1, -2).

On August 28, 2015, Dr. Swanson opined that claimant’s 2004 right shoulder x-rays showed a bone cyst in the humeral head, which was probably due to rotator cuff tendinopathy caused by aging, bone spurs, and the type III acromion. (Ex. 97-6). He reasoned that these conditions had worn through the rotator cuff tendons, significantly before the March 2014 work incident to produce the findings shown on the May 28, 2014 MRI. (*Id.*)

On October 9, 2015, Dr. Gritzka, an orthopedic surgeon, performed a Worker Requested Medical Examination under ORS 656.325(1)(e). Dr. Gritzka acknowledged that claimant probably had major structural right shoulder abnormalities before the March 2014 work incident, and that the incident was probably not a material cause of the rotator cuff tear. (Ex. 98-19, -21). However, reasoning that claimant’s shoulder was totally functional before the incident and impaired after the incident, he concluded that the incident caused the preexisting condition to become symptomatic. (Ex. 98-19).

Dr. Swanson was deposed on November 11, 2015. He maintained that claimant did not tear his rotator cuff or pathologically worsen the preexisting condition when he threw the dough. (Ex. 100-14, -27). He opined that, despite the massive preexisting tear, claimant’s right shoulder remained functional, due to good secondary muscle strength, until after Dr. Sohn performed surgery. (Ex. 100-20, -30).

Dr. Farris was deposed on November 17, 2015. He did not believe that the March 2014 work incident caused the rotator cuff tear to become symptomatic, but “[i]f it did, it was just for a very brief period of time.” (Ex. 101-34). He did not know why claimant’s pain worsened after the incident. (Ex. 101-42).

On December 22, 2015, Dr. Puziss reiterated that claimant tore the supraspinatus as a result of throwing the dough on March 27, 2014, but, even if he assumed that the rotator cuff was completely torn before that incident, he opined that the right shoulder pain and loss of functionality after the injury supported the proposition that the March 2014 incident was the major cause of claimant’s need for treatment and surgery. (Ex. 103-4).

On December 22, 2015, Dr. Sohn opined that the March 2014 work incident probably caused the supraspinatus to tear completely. (Ex. 106-2). His opinion was based on claimant’s right shoulder functionality before that incident, the mechanism of injury, the sudden onset of pain that did not resolve and required treatment, the MRI that showed a complete supraspinatus tear, but suggested it was repairable, and the surgery that indicated the tear was no more than three years old. (*Id.*) He also agreed that Dr. Gritzka’s opinion (*i.e.*, that the work injury aggravated the preexisting pathology, causing a need for treatment) presented a “likely scenario” and conformed to his opinion. (Ex. 106-3).

On December 23, 2015, Dr. Gritzka opined that the exact pathology claimant had on the day before the injury was unknown, but was likely a partial or full thickness supraspinatus tear. (Ex. 104-2). He noted, however, that claimant had not been diagnosed with, or treated for, a torn rotator cuff before the work injury. (Ex. 104-3). Dr. Gritzka maintained that the March 2014 work event was a substantial cause of the need to treat the rotator cuff tear, as supported by the mechanism of injury and the temporal relationship between the injury and the ongoing symptoms, which prompted treatment and surgery. (Ex. 104-5).

In a “post-hearing” deposition, Dr. Sohn testified that the tear looked “fresh,” meaning it was probably less than three years old, but he could not tell when, during those three years, it occurred. (Ex. 112-22). Having looked at the tear, he saw nothing that would support a finding that it occurred on March 27, 2014. (Ex. 112-23).

In another “post-hearing” deposition, Dr. Gritzka testified that, based on claimant’s age, he probably had a rotator cuff tear before the March 2014 work incident, but he had a functional shoulder. (Ex. 113-6, -7). Dr. Gritzka maintained

that the incident converted the preexisting asymptomatic condition to a symptomatic condition and was a material cause of the need to treat the rotator cuff tear. (Ex. 113-38).

CONCLUSIONS OF LAW AND OPINION

In setting aside the employer's denial, the ALJ relied primarily on Dr. Gritzka's opinion to conclude that the March 27, 2014 work injury was a material contributing cause of claimant's need for treatment of his right rotator cuff tear, including the surgery performed by Dr. Sohn. The ALJ awarded claimant's counsel an assessed attorney fee of \$30,000.²

On review, the employer contends that claimant did not prove that his rotator cuff tear was caused, worsened, or rendered symptomatic by the work injury. The employer also argues that the attorney fee award was excessive.

To prevail on his new/omitted medical condition claim, claimant must prove that the March 2014 injury was a material contributing cause of his disability or need for treatment of the claimed condition.³ ORS 656.005(7)(a); ORS 656.266(1); *Betty J. King*, 58 Van Natta 977 (2006). If claimant meets that burden and the medical evidence establishes that the "otherwise compensable injury" combined with a "preexisting condition" to cause or prolong disability or a need for treatment, the employer has the burden to prove that the otherwise compensable injury (*i.e.*, the work-related injury incident) was not the major contributing cause of the disability or need for treatment of the combined condition. ORS 656.005(7)(a)(B); ORS 656.266(2)(a); *Brown v. SAIF*, 262 Or App 640, 652 (2014); *SAIF v. Kollias*, 233 Or App 499, 505 (2010); *Jean M. Janvier*, 66 Van Natta 1827, 1832 (2014), *aff'd without opinion*, 278 Or App 447 (2016).

Because of the disagreement between medical experts regarding the cause of the disability/need for treatment, the claim presents complex medical questions that must be resolved by expert medical opinion. *See Barnett v. SAIF*, 122 Or App 279,

² The ALJ did not apportion the attorney fee award between claimant's counsel's services regarding the compensability issue and those services regarding the surgery issue. *See Nicholas J. Watts*, 69 Van Natta 355 (2017) (where the claimant prevailed over the carrier's denial of a new/omitted medical condition claim as well as its medical services denial, his attorney was entitled to an assessed fee for services on review concerning the compensability dispute and an additional assessed fee for services on review regarding the medical services dispute, contingent on the claimant finally prevailing on all aspects of the denial).

³ The parties do not dispute, and the record establishes, the existence of the claimed right rotator cuff tear condition. *See Maureen Y. Graves*, 57 Van Natta 2380, 2381 (2005).

282 (1993). More weight is given to those medical opinions that are well reasoned and based on complete information. *See Somers v. SAIF*, 77 Or App 259, 263 (1986).

For the following reasons, we conclude that Dr. Gritzka's opinion persuasively established that the March 27, 2014 work event was a material contributing cause of claimant's need for treatment for his right rotator cuff tear.

Dr. Gritzka opined that claimant's exact pathology before the March 27, 2014 work-related injury incident was unknown, but was probably an asymptomatic rotator cuff tear. (Exs. 98-20, 104-2). He acknowledged that the 2005 MRI showed a small partial tear, but he believed that, at most, this indicated that claimant was at risk to develop further pathology. (Ex. 104-3). He asserted that claimant was neither diagnosed with, nor treated for, a torn rotator cuff before the injury, noting that the prior medical records documented shoulder pain, but did not suggest that claimant had a torn rotator cuff. (*Id.*) He concluded that the work incident caused the rotator cuff tear to become symptomatic and require treatment. (Exs. 98-19, -20, 104-5). He reasoned that, by history, claimant's right shoulder was functional before the incident. (Ex. 98-20). He considered the possibility that claimant's "post-injury" symptoms were due to the accepted sprain, but noted that sprains and strains generally heal on their own within six to eight weeks and when the problem persists, it is no longer just a sprain or strain. (Ex. 113-17, -20, -21). He concluded that the rotator cuff tear was the source of claimant's pain. (Ex. 113-25, -26). In sum, he opined that claimant's symptoms on the day of the March 2014 injury supported a conclusion that the work injury was a material contributing cause of the disability/need for treatment of the rotator cuff tear.

Dr. Gritzka's opinion supports the compensability of claimant's right shoulder rotator cuff tear as a new/omitted medical condition. *See Jason C. Griffin*, 64 Van Natta 1954, 1955 (2012) (physician's opinion that a work incident caused a symptomatic flare of the claimant's chronic back pain was sufficient to establish that the work incident was a material contributing cause of the disability/need for treatment).

In contrast, Dr. Farris did not believe that the March 2014 work event caused the tear to become symptomatic, but "[if] it did, it was just for a very brief period of time." (Ex. 101-34). Dr. Farris's opinion was not adequately explained. *See Moe v. Ceiling Sys., Inc.*, 44 Or App 429, 433 (1980) (rejecting unexplained or conclusory opinion). Moreover, the period of time has no bearing on whether the March 2014 work event was a material contributing cause of the disability/need for

treatment of the tear. *See Braden v. SAIF*, 187 Or App 494, 500 (2003) (the Board was not authorized to find a claim compensable for a discrete period at the initial stage, because it may not bypass statutory claim processing requirements). Under these circumstances, we are more persuaded by Dr. Gritzka's reasoning.

More importantly, Drs. Farris and Swanson opined that the incident was not a material contributing cause of the rotator cuff tear itself or its pathological worsening. (Exs. 93-1, -2, 100-27). In doing so, they did not acknowledge that the rotator cuff tear was not diagnosed or treated before the March 2014 injury; *i.e.*, that the rotator cuff tear was not a legally cognizable "preexisting condition." *See* ORS 656.005(24) (for injury claims, except for arthritis or an arthritic condition, "preexisting condition" means the worker was diagnosed with the condition or obtained medical services for the symptoms of the condition before the injury); *Schleiss v. SAIF*, 354 Or 637, 652-53 (2013) (a "mild degenerative condition" was not a legally cognizable "preexisting condition" because it was not diagnosed or treated before the work injury and was not "arthritis" or an "arthritic condition"); *Mujo Brcaninovic*, 66 Van Natta 1890, 1895 (2014) (the claimant's L3-4 disc bulging was not a "preexisting condition" where the record did not establish that he was diagnosed with or obtained medical services for the condition before the work injury, or that it was "arthritis" or an "arthritic condition"). In fact, Dr. Swanson testified that the cause for claimant's 2010 right shoulder pain "could have been anything[.]" (Ex. 100-43).

Moreover, Drs. Farris and Swanson did not persuasively address the cause of claimant's disability/need for treatment of the rotator cuff tear. In other words, even if claimant's rotator cuff was completely torn before the work event, it would not necessarily follow that the work event, which resulted in increased symptoms and loss of shoulder function, did not materially contribute to disability/need for treatment for the rotator cuff tear. In the absence of such an analysis, we discount their opinions. *See Lowell P. Hubbell*, 62 Van Natta 2446, 2449-50 (2010) (opinion unpersuasive where it did not address the requisite question concerning the cause of any disability/need for treatment of the claimed condition, as opposed to the cause of the condition itself).

In addition, after considering the opinions of Drs. Farris and Swanson, Dr. Sohn confirmed his opinion that claimant either tore his rotator cuff or aggravated a previous tear in the work incident and this incident was the main reason he required shoulder surgery. (Ex. 106-3). He also stated that his opinion conformed to that of Dr. Gritzka. (*Id.*)

In conclusion, based on the foregoing reasons, we find that the opinion of Dr. Gritzka (as supported by that of Dr. Sohn) persuasively established that the work injury was a material contributing cause of the disability/need for treatment of claimant's right rotator cuff tear. Accordingly, claimant has established an "otherwise compensable injury." ORS 656.005(7)(a)(B).

Therefore, if the medical evidence establishes that the "otherwise compensable injury" combined with a "preexisting condition" to cause or prolong disability or need for treatment, the burden shifts to the employer to prove that the otherwise compensable injury (*i.e.*, the work-related injury incident) was not the major contributing cause of the disability/need for treatment of the combined condition. ORS 656.005(7)(a)(B); ORS 656.266(2)(a); *Kollias*, 233 Or App at 505; *Janvier*, 66 Van Natta at 1832.

Here, as discussed above, the evidence does not establish the existence of a legally cognizable preexisting condition. ORS 656.005(24)(a); *Schleiss*, 354 Or at 652-53; *Brcaninovic*, 66 Van Natta at 1895. Therefore, the employer has not met its requisite burden of proving a "combined condition" defense under ORS 656.266(2)(a).

We turn to the causation issue concerning claimant's medical services claim. For the reasons set forth above regarding the compensability of the new/omitted medical condition claim, a preponderance of the medical evidence supports a conclusion that the need for claimant's disputed surgery was caused in material part by his compensable injury. ORS 656.245(1)(a); *Mize v. Comcast Corp.-AT&T Broadband*, 208 Or App 563, 569-71 (2006); *Leobardo Gomez*, 65 Van Natta 2459, 2467 (2013) (where a right biceps tendinitis/tendinosis condition was determined to be compensable, it followed that the medical services for that condition was also compensable).

Finally, we affirm the ALJ's total attorney fee award for services at the hearing level concerning the compensability and surgery issues. *See* ORS 656.386(1); OAR 438-015-0010(4); *Cory L. Krauss*, 68 Van Natta 190, 191-92 n 3 (2016) (suggesting that the claimant's counsel's submission of an affidavit or a request specifically addressing the "rule-based factors" of OAR 438-015-0010(4) could assist in the determination of a reasonable attorney fee); *Robert L. Lininger*, 67 Van Natta 1712, 1718 (2015) (although time devoted to the case is a "rule-based" factor, an hourly rate is not; application of the "rule-based" factors does not involve a strict mathematical calculation). However, we modify the ALJ's award to apportion claimant's attorney fee between services regarding the compensability

issue and a “contingent” award for services devoted to the surgery issue. *See Antonio L. Martinez*, 58 Van Natta 1814, 1822, *aff’d*, *SAIF v. Martinez*, 219 Or App 182 (2008). After considering the “rule-based” factors, we award \$25,000 for claimant’s attorney’s services related to the compensability issue and \$5,000 for those services related to the surgery issue, contingent on claimant finally prevailing over all aspects of the medical services dispute.

Claimant’s attorney is entitled to an assessed fee for services on review regarding the compensability dispute. 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 regarding the compensability issue is \$6,000, 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 submission, and the employer’s position), the complexity of the issues, the value of the interest involved, the risk that counsel may go uncompensated, and the contingent nature of the practice of workers’ compensation law. In addition, for services on review regarding the medical services dispute, claimant’s attorney is awarded an assessed fee of \$3,000, payable by the employer, contingent on claimant prevailing over all aspects of the medical services dispute described in this order.

Finally, claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the compensability denial, to be paid by the employer. *See* ORS 656.386(2); OAR 438-015-0019; *Gary E. Gettman*, 60 Van Natta 2862 (2008). Claimant is also awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the medical services denial, to be paid by the employer, contingent on claimant finally prevailing over all aspects of the medical services dispute. *Id.* The procedure for recovering these awards, if any, is prescribed in OAR 438-015-0019(3).

ORDER

The ALJ’s order dated July 25, 2016 is affirmed in part and modified in part. In lieu of the ALJ’s \$30,000 attorney fee award, claimant counsel is awarded \$25,000 for services at the hearing level regarding the compensability denial issue, payable by the employer, and \$5,000 for services at the hearing level regarding the causation/surgery issue, payable by the employer, contingent on claimant prevailing over all aspects of the medical services denial. Claimant’s attorney is awarded an assessed fee of \$6,000 for services on review regarding the

compensability issue, payable by the employer, and an assessed fee of \$3,000 regarding the causation/surgery issue, payable by the employer if claimant prevails over all aspects of the medical services dispute. Claimant is also awarded expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the compensability denial, to be paid by the employer, as well as expenses and costs for records, expert opinions, and witness fees, if any to be paid by the employer if claimant finally prevails over all aspects of the medical services denial.

Entered at Salem, Oregon on March 28, 2017