
In the Matter of the Compensation of
HAROLD D. COX, Claimant
WCB Case No. 17-01924
ORDER ON RECONSIDERATION
Miller Law, Claimant Attorneys
Sather Byerly & Holloway, Defense Attorneys

Reviewing Panel: Members Curey and Ousey.

On July 9, 2018, we affirmed an Administrative Law Judge's (ALJ's) order that upheld the self-insured employer's denial of claimant's injury/occupational disease claim for a right shoulder condition. Challenging our adoption of the ALJ's analysis concerning the opinion of Dr. Brooks, claimant seeks abatement and reconsideration of our decision. Having received the employer's response and claimant's reply, we have proceeded with our reconsideration. Based on the following reasoning, we adhere to our prior decision.

Claimant contends that we adopted the ALJ's erroneous finding that his treating physician, Dr. Brooks, was unaware of his history of right shoulder pain following a pole vaulting injury. On reconsideration, we acknowledge that Dr. Brooks was made aware of claimant's pole vaulting injury some nine months after she began treating claimant's right shoulder. Nonetheless, for the following reasons, we consider Dr. Brooks's opinion to be unpersuasive.¹

To prevail on his occupational disease claim, claimant must establish that employment conditions, including work injuries, were the major contributing cause of the disease. *See* ORS 656.266(1); ORS 656.802(2)(a); *Hunter v. SAIF*, 246 Or App 755, 760 (2011); *Kepford v. Weyerhaeuser Co.*, 77 Or App 363, 366, *rev den*, 300 Or 722 (1986). Determination of major causation requires evaluation of the relative contribution of all causes and identification of the cause, or combination of causes, contributed more than all other causes combined. *Bowen v. Fred Meyer Stores*, 202 Or App 558, 563-64 (2005).

Here, Dr. Brooks began treating claimant in September 2016. (Ex. 62-6). On July 19, 2017, Dr. Brooks indicated that counsel for the employer had just made her aware of claimant's earlier right shoulder injury and medical treatment.

¹ On reconsideration, we do not adopt that portion of the ALJ's reasoning that Dr. Brooks was not aware of claimant's pole vaulting injury and history of right shoulder treatment. Otherwise, as supplemented above, we continue to adopt the ALJ's determination that Dr. Brooks's opinion was unpersuasive.

(Ex. 60-2). Dr. Brooks had not reviewed claimant's MRI imaging, did not feel comfortable doing so, and deferred to the opinions of other physicians who had reviewed the diagnostic imaging regarding its significance as to the cause of claimant's right shoulder condition. (*Id.*)

Claimant contends that, in a subsequent concurrence letter, Dr. Brooks stated that she weighed "all potential causes," which would necessarily include weighing claimant's history of right shoulder pain following a pole vaulting injury. However, without a more detailed analysis regarding the pole vaulting injury, we are not persuaded that Dr. Brooks' statement that she weighed "all potential causes" adequately explains a determination that claimant's work activities and injuries were the major contributing cause of his right shoulder condition. (Ex. 60A-4). Furthermore, while Dr. Brooks discussed claimant's alleged work injuries and work activities and their impact on his right shoulder in detail, such an analysis did not discuss claimant's history of right shoulder treatment and the occurrence of the pole vaulting injury. (*Id.*) Under such circumstances, we are not persuaded that Dr. Brooks adequately weighed the contribution of all the potentially contributing causes regarding claimant's right shoulder condition. *Dietz v. Ramuda*, 130 Or App 397, 401-02 (1994), *rev dismissed*, 320 Or 416 (1995) (in determining the major contributing cause of a condition, a medical expert must weigh the relative contribution of each cause); *Sherrill J. Vaughn*, 70 Van Natta 327, 331 (2018).

Additionally, Dr. Brooks's opinion is internally inconsistent. In a concurrence letter, she "defer[red] to the opinions of those providers who have personally reviewed the imaging to determine the significance of its findings related to etiology and causation." (Ex. 60-2). However, in her subsequent deposition, she declined to defer to the opinion of Dr. Black, claimant's orthopedic surgeon, stating that Dr. Black's review of claimant's MRI imaging and observations during surgery offered no advantage regarding a determination of the etiology of claimant's right shoulder condition. (Ex. 62-35). In the absence of a reasonable explanation for this apparent change of opinion, this inconsistency causes us to further discount Dr. Brooks's opinion. *See, e.g., Howard L. Allen*, 60 Van Natta 1423, 1424-25 (2008) (internally inconsistent medical opinion, without explanation for the inconsistencies, was unpersuasive).

Further, the record supports a conclusion that Dr. Brooks has less expertise than claimant's treating surgeon, Dr. Black. Dr. Brooks acknowledged that she relies on radiologists reports, rather than the actual imaging. (Ex. 62-8). Dr. Brooks further stated that a physician with expertise in interpreting MRI

imaging would have an advantage in making a diagnosis, but she disputed that such expertise conferred an advantage in determining the cause of the diagnosis. (Ex. 62-37). However, because Dr. Brooks did not provide a persuasive explanation for such a distinction, we discount her causation opinion.

Finally, as did the ALJ, we find no persuasive reason not to defer to the opinion of claimant's orthopedic surgeon, Dr. Black, who performed his right shoulder surgery. See *Dillon v. Whirlpool Corp.*, 172 Or App 484, 489 (2001); *Argonaut Ins. Co. v. Mageske*, 93 Or App 698, 702 (1988) (a treating surgeon's opinion is entitled to deference because of the unique opportunity to evaluate what is seen at the time of the surgery); Cf. *Emma I. Sims*, 63 Van Natta 1198, 1202 (2011) (declining to defer to treating surgeon's opinion in light of well reasoned opinions to the contrary). We base this conclusion on the following reasoning.

After performing surgery, Dr. Black opined that claimant's right shoulder condition was consistent with age-related degenerative changes, rather than his work activities or alleged work injuries. (Ex. 61-3). Claimant contends that Dr. Black's opinion should be disregarded because his concurrence report discussed surgical findings that were not specifically recorded in his operative report. Yet, in the absence of a persuasive countervailing opinion, we decline to discount Dr. Black's surgical observations on this basis.

In conclusion, based on the abovementioned reasoning, as well as the analysis expressed in those adopted portions of the ALJ's order, we conclude that the record does not persuasively establish that claimant's work activities were the major contributing cause of his claimed right shoulder condition. Therefore, we continue to affirm the ALJ's order that upheld the employer's denial.

Accordingly, we withdraw our July 9, 2018 order. On reconsideration, as supplemented herein, we republish our July 9, 2018 order. The parties' 30-day statutory rights of appeal shall begin to run from the date of this order.

IT IS SO ORDERED.

Entered at Salem, Oregon on July 26, 2018