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In the Matter of the Compensation of  
**ALLEN BAKKEN, Claimant**  
WCB Case No. 16-04334  
ORDER ON REVIEW  
Bailey & Yarmo LLP, Claimant Attorneys  
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Lanning, Johnson and Wold. Member Johnson dissents.

Claimant requests review of Administrative Law Judge (ALJ) Pardington's order that upheld the SAIF Corporation's denial of his occupational disease claim for solvent toxicity. On review, the issue is compensability. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact" with the following supplementation.

Claimant worked as a custodial worker at a hospital for 27 years before filing his occupational disease claim for illness related to exposure to cleaning chemicals at work. (Ex. 30; Tr. 7). Except for two or three years when he worked as a "stock person," claimant used various cleaning chemicals to clean hospital rooms. (Tr. 7-11).

Since 2008, claimant has had headaches, sensitivity to light and smell, lightheadedness and dizziness/vertigo symptoms, and received treatment for those symptoms. (Exs. 3-2, 7, 10, 12, 13, 14, 15).

In February 2016, claimant's naturopathic physician, Dr. Asbill, interpreted an "Environmental Pollutants Panel" urine test as showing high levels of monoethyl phthalate, xylene and benzene. (Ex. 27-2). Dr. Asbill noted that those pollutants correlated with chemicals that claimant used in his cleaning duties, and that he was seeking a new position with the employer that would decrease his exposure. (*Id.*) Dr. Asbill also noted that claimant would "work to avoid solvents in his home and food." (*Id.*)

In May 2016, claimant submitted a blood sample for laboratory testing. (Ex. 29). Dr. Asbill reviewed claimant's results and concluded that certain findings correlated with "solvent toxicity." (Ex. 31-2).

On May 24, 2016, claimant filed a claim for chemical exposure allegedly resulting in headaches, vision issues, dizziness, vertigo, and nausea. (Ex. 30). Dr. Asbill restricted claimant from work for five weeks to undergo treatment for “solvent toxicity” due to frequent exposure to cleaning chemicals at work. (Ex. 32).

In August 2016, claimant was evaluated by Dr. Burton at SAIF’s request. (Ex. 41). Dr. Burton considered claimant to have non-specific symptoms without objective findings, which was not consistent with chemical exposure. (Ex. 41-8). He explained that normal use of the cleaning chemicals would not result in claimant’s symptoms, and that inhalation of a sufficiently high concentration would cause an immediate, but temporary, irritant response including cough or chest pain. (Ex. 41-9). Dr. Burton concluded that claimant’s work activities did not contribute to his symptoms. (Ex. 41-10).

In September 2016, SAIF denied the claim for an occupational disease. (Ex. 42).

On November 17, 2016, Dr. Burton opined that claimant’s vertigo, headaches, and light sensitivity were not medically probable results of exposure to cleaning chemicals. (Ex. 43).

On November 30, 2016, Dr. Asbill opined that claimant’s long-term exposure to certain cleaning chemicals resulted in elevated blood levels of benzene and xylene, causing his headaches, dizziness, and vision problems. (Ex. 44-5). Dr. Asbill considered the chemical exposure to be the major contributing cause of those symptoms. *Id.*

### CONCLUSIONS OF LAW AND OPINION

Reasoning that the existence of a condition had not been established, the ALJ upheld SAIF’s denial of claimant’s occupational disease claim. Claimant contends that his physician’s diagnoses of dizziness, headaches, and other conditions establish the existence of a condition. Based on the following reasoning, we are persuaded that a compensable occupational disease exists.

To establish the compensability of his solvent toxicity condition, claimant must prove that employment conditions were the major contributing cause of the disease. ORS 656.266(1); ORS 656.802(2)(a). 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).

Claimant need not prove a specific diagnosis in order to prove a compensable claim. *Boeing Aircraft Co. v. Roy*, 112 Or App 10, 15 (1992). However, he must prove the presence of a condition, not merely symptoms. *Jacquelyn Madarang*, 58 Van Natta 1237, 1240 (2006) (occupational disease claim must be proved with the presence of a condition, not merely with symptoms). A “condition” is defined as “the physical status of the body as a whole \* \* \* or of one of its parts.” *Young v. Hermiston Good Samaritan*, 223 Or App 99, 105 (2008); *Andrea Gartenbaum*, 67 Van Natta 1851, 1852 (2015) (*Young* definition of “condition” applied when analyzing the compensability of an occupational disease).

Here, Dr. Asbill stated that claimant was treated for “solvent toxicity,” and excused him from work for five weeks for treatment. (Exs. 27-2, 32). Dr. Asbill’s treatment notes include diagnoses of “[t]oxic effect of unspecified substance,” and “[c]ontact with and (suspected) exposure to other hazardous, chiefly nonmedicinal chemicals.” (Ex. 33-1). Dr. Asbill explained that testing revealed that claimant had elevated levels of xylene and benzene, which correlated with the cleaning chemicals that he regularly used at work. (Ex. 44-4). Dr. Asbill considered claimant’s symptoms to be consistent with the chemical exposure and elevated benzene and xylene levels. (*Id.*)

Dr. Burton disagreed with the “solvent toxicity” diagnosis, and he did not consider claimant’s symptoms to be objective evidence of any diagnosable entity, but he did not opine that solvent toxicity itself was not a “condition.” (Ex. 41-8). Accordingly, we consider Dr. Asbill’s description of elevated levels of benzene and xylene, which she termed “solvent toxicity,” to constitute a condition; *i.e.*, a physical status of claimant’s body. Therefore, we proceed to consider whether claimant has the condition and whether his work activities were the major contributing cause of the disease.

In light of the disagreement between experts, the causation issue presents a complex medical question that must be resolved by expert medical opinion. *See Uris v. Comp. Dep’t*, 247 Or 420, 426 (1967); *SAIF v. Barnett*, 122 Or App 279, 283 (1993). 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).

After conducting our review, we are persuaded by the opinion of claimant’s treating physician, Dr. Asbill. Relying on literature published by the Agency for Toxic Substances and Disease Registry (ATSDR), a federal health agency, Dr. Asbill observed that symptoms of benzene and xylene exposure include dizziness, headaches, and blurred vision. (Ex. 44-4, -53, -59). She explained that steady, chronic exposure to solvent chemicals was known to cause similar

symptoms as acute exposure. (Ex. 44-1). Dr. Asbill reported that claimant's urine testing showed elevated levels of benzene and xylene, both of which were contained in the cleaning chemicals that claimant regularly used. (Ex. 44-3). Dr. Asbill also noted that claimant's blood test results correlated with solvent toxicity. (Ex. 31-2). She concluded that claimant's work activities were the major contributing cause of the solvent toxicity. (Ex. 44-1, -5).

In contrast, Dr. Burton did not consider claimant to have symptoms of solvent toxicity, or any other condition related to chemical exposure. (Ex. 41-8). Dr. Burton explained that "proper use" of cleaning chemicals would not result in any illness, and that inhaling the chemicals at sufficiently high concentrations would result in an immediate and temporary "irritant response" involving the eyes, upper airways, and potential pulmonary symptoms including cough or chest pain. (Exs. 41-9, 43-1). Dr. Burton commented that claimant did not report those symptoms, and that symptoms of vertigo, headache, and light sensitivity would not be a medically probable result of using the cleaning chemicals. (Ex. 43-1). He noted that claimant had completely normal pulmonary function testing, and allergy testing only showed an unrelated sensitivity to cat dander. (*Id.*) Finally, Dr. Burton commented that claimant's urine testing results were "irrelevant" because they were not standardized, and because claimant was not exposed to any of the substances reported in the testing. (Ex. 43-2).

While Dr. Burton asserted, without further clarification or specification, that claimant was not exposed to any of the substances reported in the urine testing (*i.e.*, benzene and xylene), Dr. Asbill specifically stated that claimant, on a regular basis, used "Quat Stat" which contained benzene and xylene. (Ex. 44-2, -4; Tr. 8). We are more inclined to give weight to Dr. Asbill's more detailed explanation, than Dr. Burton's unexplained assertion that none of the cleaning chemicals used by claimant contained benzene or xylene. *See Craig C. Show*, 60 Van Natta 568, 576-77 (2008) (physician's more detailed, accurate, and better explained medical opinion was persuasive).

Additionally, Dr. Burton opined that exposure to cleaning chemicals would not result in symptoms of vertigo, headache, or light sensitivity. (Ex. 43-1). Nonetheless, ATSDR data included in the record, and relied on by Dr. Asbill (Ex. 44), reports that benzene exposure can cause numerous symptoms including headache, dizziness, stumbling and fainting. (Ex. 44-53). Because Dr. Burton did not address the ATSDR data (which conflicts with his understanding of benzene-related symptoms), we discount his opinion. *See, e.g., Beatriz Soto-Martinez*, 59 Van Natta 3090, 3093 (2007) (physician's opinion discounted when it did not analyze the claimant's chemical exposure in light of relevant MSDS information).

In addition, while Dr. Burton explained the symptoms that would result from a temporary irritant response to cleaning chemicals, he did not address Dr. Asbill's opinion, which described the effects of constant low-level exposure to the cleaning chemicals regularly used by claimant. (Ex. 43-1). In contrast to Dr. Asbill's opinion, Dr. Burton's opinion appeared to focus on acute high-volume exposures resulting in an immediate irritant response. Furthermore, claimant described constant low levels of exposure, of the kind discussed by Dr. Asbill. (Ex. 44-1). Accordingly, Dr. Asbill's opinion was based on a more accurate history that was more specific to claimant's circumstances. *Larry G. Nail*, 64 Van Natta 1460, 1461 (2012) (finding physician's opinion persuasive that gave more consideration to the claimant's particular circumstances).

Finally, we acknowledge the dissent's observation that Dr. Asbill did not have an accurate history regarding the date of onset of claimant's symptoms of headache, light sensitivity, and dizziness. However, we note that claimant had been working with cleaning chemicals for years at the time his symptoms began in 2008. Accordingly, while Dr. Asbill incorrectly thought that the symptoms began in 2013, they, nonetheless, began during a period of claimant's relevant exposure to cleaning chemicals. (Ex. 44-3; Tr. 7-11 ). Moreover, while Dr. Burton disagreed with Dr. Asbill's conclusion that claimant's symptoms were due to cleaning chemical exposure, his disagreement was not based on whether claimant's symptoms began in 2008 or 2013. *See Dorothy S. Calliham*, 59 Van Natta 137, 138 (2007) (where other medical opinions attached no significance to certain facts, a physician's failure to evaluate those facts did not undermine the persuasiveness of the physician's medical opinion).

In summary, we find Dr. Asbill's opinion to persuasively establish that claimant's work activities were the major contributing cause of his solvent toxicity condition. As detailed above, Dr. Asbill had a thorough understanding of the nature of claimant's exposure and symptoms, which she explained were consistent with such exposure. Dr. Asbill's opinion was further informed by the results of urine testing showing elevated levels of benzene and xylene, both of which were contained in the cleaning solutions regularly used by claimant.

Accordingly, based on the aforementioned reasoning, we conclude that claimant's occupational disease claim is compensable. Consequently we reverse the ALJ's order.

Claimant's counsel is entitled to an assessed fee for services at the hearing level and on review. ORS 656.386(1). 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 at the hearing level and on review is \$10,000, payable by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by the hearing record, claimant's appellate briefs, and his attorney's unopposed fee submission), the complexity of the issue, the value of the interest involved, the risk that counsel may 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; *Nina Schmidt*, 60 Van Natta 169 (2008); *Barbara Lee*, 60 Van Natta 1, *recons*, 60 Van Natta 139 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

### ORDER

The ALJ's order dated December 29, 2016 is reversed. SAIF's denial is set aside and the claim is remanded to SAIF for processing in accordance with law. For services at the hearing level and on review, claimant's attorney is awarded an assessed fee of \$10,000, to be paid 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 February 15, 2018

Member Johnson dissenting.

The majority concludes that Dr. Asbill persuasively established the compensability of a "solvent toxicity" condition, and that SAIF's denial should be set aside. Because I conclude that Dr. Asbill relied on a materially incomplete and inaccurate medical history, I would affirm the ALJ's order that upheld SAIF's denial.

At the December 2016 hearing, claimant testified that his symptoms of headaches, light sensitivity, dizziness, and vertigo began about two years prior. (Tr. 9, 10). However, during cross-examination, claimant was asked if he had received treatment for vertigo and headaches in late 2008, and he initially replied that he did not recall. (Tr. 15). When questioned further whether he had received treatment from Dr. Phillips in 2008 for dizziness, lightheadedness, and vertigo,

claimant replied “probably” and affirmed that he saw Dr. Phillips regarding those symptoms. (*Id.*) Indeed, the medical record includes numerous references to claimant’s symptoms of dizziness, lightheadedness, and headaches beginning in 2008. (Exs. 3, 8, 10, 13).

In 2008, claimant described lightheadedness brought on by standing quickly, which Dr. Wood suspected of being due to postural hypotension. (Ex. 7-2). Additionally, in a May 2014 visit with Dr. Schloesser, a neurologist, claimant described having headaches as often as two to three times a week since he was a child. (Ex. 13). Further, between 2008 and 2014, claimant was evaluated by multiple doctors for his ongoing complaints without a clear diagnosis, or consensus, regarding their etiology. (Exs. 3, 7, 8, 10, 12-18, 18A, 19, 20, 22).

To establish the compensability of an occupational disease, claimant must prove that his employment conditions were the major contributing cause of the claimed disease. ORS 656.266(1); ORS 656.802(2)(a). Determination of major causation requires evaluation of the relative contribution of all causes and identification of the cause, or combination of causes, that contributed more than all other causes combined. *Bowen v. Fred Meyer Stores*, 202 Or App 558, 563-64 (2005).

In light of the disagreement between experts, the causation issue presents a complex medical question that must be resolved by expert medical opinion. *See Uris v. Comp. Dep’t*, 247 Or 420, 426 (1967); *SAIF v. Barnett*, 122 Or App 279, 283 (1993). 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).

Dr. Asbill considered claimant’s light sensitivity, dizziness, and headaches to begin in 2013. (Ex. 44-3). However, the medical record documents that claimant had headaches since childhood, and additionally, symptoms of dizziness and light headedness since May of 2008. (Exs. 3, 8, 10, 13). Because Dr. Asbill relied on an inaccurate history of those symptoms beginning in 2013, she did not comment on, or address, the contribution or relationship of claimant’s medical history of similar complaints. (Ex. 44-3). Because Dr. Asbill did not acknowledge claimant’s medical history of similar complaints, her opinion was based on an incomplete and inaccurate medical history. Therefore, her opinion is unpersuasive. *See Miller v. Granite Construction Co.*, 28 Or App 473, 476 (1977) (medical evidence that was based on inaccurate information was not persuasive); *Beverly A. DeCoite*, 67 Van Natta 240, 244 (2015) (medical evidence based on inaccurate and incomplete information was unpersuasive).

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Other medical records preceding claimant's occupational disease claim discussed other potential causes of his headaches and other symptoms. For example, in December 2008, Dr. Wood was "suspicious" that claimant's dizziness was caused by postural hypotension. (Ex. 7-2). In January 2016, Dr. Hill suspected that claimant's dizziness was caused by some degree of chronic motion intolerance. (Ex. 22-2). After reviewing claimant's earlier medical records, Dr. Burton, a toxicologist, obtained additional lab work and pulmonary function testing that he interpreted as normal. (Ex. 41-8). He found no objective basis to relate claimant's complaints to his work exposure. (*Id.*; Ex. 43-2).

Because Dr. Asbill's understanding regarding the onset of claimant's symptoms was materially inaccurate, and because she did not address other potential causes of claimant's symptoms that are discussed in the medical record, Dr. Asbill's opinion is not persuasive. *Richard L. Hubbard*, 63 Van Natta 939, 940 (2011) (a physician's statement that work activities "caused" an occupational disease condition did not establish that the physician weighed other potential contributing causes that had been identified).

Because no other physician attributes claimant's symptoms to his chemical exposure at work, I conclude that claimant is unable to meet his burden of proof, and SAIF's denial should be upheld. ORS 656.266(1). Because the majority concludes otherwise, I respectfully dissent.