In the Matter of the Compensation of
CHRISTOPHER STUMPER, Claimant
WCB Case No. 15-04807
ORDER ON REVIEW
Schoenfeld & Schoenfeld, Claimant Attorneys
Cummins Goodman et al, Defense Attorneys

Reviewing Panel: Members Curey and Ousey.

Claimant requests review of that portion of Administrative Law Judge (ALJ) Fisher's order that upheld the self-insured employer's denial of his occupational disease claim for a bilateral upper extremity condition. The employer cross-requests review of the ALJ's determination that the occupational disease claim was timely filed. On review, the issues are timeliness and compensability. We affirm in part and reverse in part.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," as summarized and supplemented below.

Beginning in 2013, claimant, a packing technician, began experiencing right shoulder and back pain that he associated with his "special cleaning" assignment at work. (Tr. 71). The "special cleaning" assignment involved the cleaning of railings, floor, and assembly line parts, using a soap solution and a combination of putty knives, small wire brushes, scrub pads, floor scrapers, and pneumatic chippers, often in awkward body positions. (Tr. 65-71).

In August 2013, claimant sought medical treatment from his primary care physician, Dr. Weinsoft, for right shoulder and back pain, which were exacerbated by the "special cleaning" duties.[1] (Ex. 8-10). Dr. Weinsoft agreed to complete "FMLA" paperwork indicating that claimant would need periodic time away from work because of the exacerbation of his right shoulder and back pain. (*Id*.)

On April 2, 2015, claimant again sought treatment from Dr. Weinsoft for shoulder and back pain. (Ex. 18-19). Dr. Weinsoft diagnosed chronic back pain and shoulder pain. (*Id*.) She referred claimant to Dr. Wooley, an orthopedic surgeon specializing in hand and upper extremities. (Ex. 23).

[1] Dr. Weinsoft's 2013 chart notes do not include any arm, elbow, or wrist symptoms.

On May 4, 2015, Dr. Wooley examined claimant. (Ex. 23). Dr. Wooley reported tenderness in the left lateral epicondyle and medial epicondyle. (*Id.*) Dr. Wooley diagnosed lateral epicondylitis and cubital tunnel syndrome. (*Id.*)

On August 18, 2015, claimant completed an 801 form alleging injury to his "left shoulder, left elbow, left wrist, left hand, right shoulder, right elbow, right wrist, right hand/back." (Ex. 26).

On October 5, 2015, Dr. Radecki, a physical medicine and rehabilitation physician, examined claimant at the employer's request. (Ex. 46-1). He found no objective findings or abnormal conditions and made no diagnosis relative to claimant's "multiple" complaints. (Ex. 46-9-10). Dr. Radecki opined that claimant's symptoms were "predominantly subjective and due, more likely than not, to psychosocial factors." (Ex. 46-9).

On October 9, 2015, the employer denied the claim. (Ex. 47-1). Claimant requested a hearing.

On December 29, 2015, Dr. Wicher, a clinical psychologist, evaluated claimant on behalf of the employer. (Ex. 52-1). She diagnosed a somatic symptom disorder and was going to rule out a generalized anxiety disorder. (Ex. 52-8). She opined "that psychological factors unrelated to [claimant's] work exposure are playing a significant role in his experience and expression of his pain complaints." (*Id.*)

On June 1, 2016, Dr. Wooley performed a left elbow lateral epicondyle release, debridement, and reattachment surgery. (Ex. 58). Because claimant had good post-operative results for his left elbow, on October 19, 2016, Dr. Wooley performed a similar surgery on his right elbow. (Ex. 62).

CONCLUSIONS OF LAW AND OPINION

Timeliness

The ALJ concluded that claimant's occupational disease claim was timely filed. In doing so, the ALJ reasoned that no physician had informed claimant that he suffered from an occupational disease more than one year from August 18, 2018, when he filed his claim. Accordingly, the ALJ held that the claim was filed timely.

On review, the employer contends that Dr. Weinsoft informed claimant "expressly or in substance" of his occupational disease by August 2013, when she acknowledged that claimant's work activities exacerbated his shoulder and back pain and completed his FMLA paperwork for periodic time off work. (Ex. 8-10). Based on the following reasoning, we disagree.

ORS 656.807(1) provides that an occupational disease claim is void unless filed one year from the *later* of the following dates: (1) the date the worker first discovered the occupational disease; (2) the date that, in the exercise of reasonable care, the worker should have discovered the occupational disease; (3) the date the claimant became disabled; or (4) the date the claimant was informed by a physician that the claimant was suffering from an occupational disease.[2] *Freightliner LLC v. Holman*, 195 Or App 716 (2004); *Obed Marquez*, 66 Van Natta 1558 (2014).

In *Wayne-Dalton Corp. v. Mulford*, 190 Or App 370, 374-75 (2003), the court determined that the word "informed" should be accorded its ordinary meaning of "importing or making the listener aware of information." Thus, the court held that, under the ordinary meaning of the word "informed," as used in ORS 656.807(1)(b), the statute of limitations does not begin to run "until a physician tells the claimant expressly or in substance that the patient is suffering from an occupational disease." *Id*. at 375; *see also Glenn E. Severns*, 63 Van Natta 991, 993 (2011).

On August 30, 2013, when claimant sought treatment from Dr. Weinsoft, he reported that his work activities exacerbated his shoulder and back pain and that he needed periodic time off from work. (Ex. 8-10). In her chart notes, Dr. Weinsoft indicated: "Will fill out FMLA paperwork for [claimant] indicating a periodic need for days off due to exacerbations of back and shoulder pain." (*Id*.) Based on those chart notes, the employer contends that Dr. Weinsoft "expressly or in substance" told claimant that he was suffering from an occupational disease.[3] Yet, lateral epicondylitis is not a shoulder or back condition and there was no mention of an arm, elbow, or wrist condition. Moreover, Dr. Weinsoft's

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[2] The parties agree that the dispositive date regarding this claim is when a physician "informed" claimant that he was suffering from an occupational disease.

[3] We acknowledge the employer's contention that claimant's testimony supports a finding that Dr. Weinsoft "informed" him of his occupational disease in 2013. (Tr. 98-100). However, claimant's testimony is consistent with our conclusion that Dr. Weinsoft agreed with claimant that his work activities exacerbated his shoulder and back pain, but does not support a finding that, in 2013, she told him that he had an occupational disease.

completion of FMLA paperwork established only that claimant required time off of work due to his shoulder and back pain, not that his work exposure was the major cause of any condition, *i.e.*, that he had an occupational disease. (*Id*.)

Based on our review, this record does not establish that Dr. Weinsoft or any other physician had "expressly or in substance" told claimant that he was suffering from an occupational disease of his bilateral upper extremities more than one year before August 18, 2015, the date on which his occupational disease claim was filed. Thus, we conclude that claimant's occupational disease claim was timely filed. ORS 656.807(1); *Mulford*, 190 Or App at 374-75; *Severns*, 63 Van Natta at 993.

Compensability

In upholding the employer's denial, the ALJ found Dr. Radecki's opinion more persuasive than Dr. Wooley's opinion. On review, claimant contends that the ALJ should have afforded greater weight to the opinion of Dr. Wooley, his treating surgeon, because it was better reasoned and based on multiple examinations and firsthand surgical observations. Based on the following reasoning, we agree.

To establish a compensable occupational disease, claimant's work activities must be the major contributing cause of his bilateral upper extremity condition. ORS 656.266(1); ORS 656.802(2)(a); *Donald C. Wright, Jr.*, 67 Van Natta 1914, 1917 (2015). The "major contributing cause" means a cause that contributes more than all other causes combined. *McGarrah v. SAIF*, 296 Or 145, 166 (1983); *Marquez*, 66 Van Natta at 1559. Whether work activities were the major contributing cause of claimant's condition presents a complex medical question that must be resolved by expert medical opinion. *See Barnett v. SAIF*, 122 Or App 279, 282 (1993).

In assessing the persuasiveness of medical opinions, we generally evaluate the opinion's source, factual basis, and logical force, *i.e.*, the depth, clarity and cogency of analysis. *See Barbara J. Brown*, 42 Van Natta 779 (1990); *Earl M. Brown*, 41 Van Natta 287, 291 (1989). We may give more, or less, weight to the opinion of the attending physician, depending on the record in each case. *Dillon v. Whirlpool Corp.*, 172 Or App 484, 489 (2001). Additionally, a physician who performs surgery on an injured body part may be in a better position to evaluate the injury or disease than other medical experts. *Argonaut Ins. Co. v. Mageske*, 93 Or App 698, 702 (1988) (special deference was provided to a treating surgeon's opinion due to the unique opportunity to view the claimant's condition firsthand). We are most persuaded by opinions that are well reasoned and based on complete and accurate information. *Somers v. SAIF*, 77 Or App 259, 263 (1986).

On May 4, 2015, Dr. Wooley examined claimant and found tenderness in the lateral epicondyles, medial epicondyles, and pain with "wrist extension in full pronation along the mobile wad and lateral epicondyle." (Ex. 23). He diagnosed bilateral lateral epicondylitis, left worse than right, related to overuse. (Ex. 48-1-2). He administered steroid injections in both elbows with improvement of at least 60 percent over time. (Ex. 52A-3). When claimant's symptoms persisted, Dr. Wooley performed bilateral elbow surgery, releasing the common extensor origin, debridement of the lateral epicondyle, and reattachment. (Exs. 58-1, 62-1). Following those procedures, claimant's bilateral upper extremity condition significantly improved. (Ex. 66).

In support of his bilateral lateral epicondylitis diagnosis, Dr. Wooley explained that: "[D]uring multiple office visits, provocative tests and monitored response to conservative treatment of PT and steroid injections, I encountered consistent findings" of lateral epicondylitis in both upper extremities. (Ex. 66-1). He also emphasized that his surgical observations of "degenerate nonlinear tendon structure and area of gelatinous tissue" were consistent with lateral epicondylitis. (Ex. 66-2).[4]

In contrast, Dr. Radecki, who examined claimant at the employer's request on October 5, 2015 (before his June and October 2016 surgeries), found "no orthopedic, neurologic or rheumatologic diagnosis relative to [claimant's] multiple complaints in his thoracic spine, neck, shoulders, elbows, wrists or hands." (Ex. 46-9). Although Dr. Radecki also found tenderness to palpation at the lateral epicondyles, he attributed such pain complaints to psychosocial factors. (Ex. 46-7). In doing so, he emphasized claimant's myriad of subjective pain complaints, his attitude towards his employer, and the lack of correlation between the number of weeks working the "special cleaning" assignment and the severity of his symptoms. (Ex. 46-9-10).

We find Dr. Radecki's opinion that there was "no diagnosable condition" related to claimant's upper extremities to be poorly explained and inconsistent with his examination findings, which included tenderness at the lateral epicondyles. Without further explanation and/or reasoning for his conclusion, we discount the persuasiveness of Dr. Radecki's opinion. *See Moe v. Ceiling Sys. Inc.*, 44 Or App 429, 433 (1988) (rejecting unexplained or conclusory opinion).

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[4] We acknowledge Dr. Wicher's diagnosis of a somatic symptom disorder, which would "cause [claimant] to report more subjective complaints than can be measured objectively." (Ex. 53-34). However, Dr. Wicher explained that such a disorder would not preclude claimant from also having an occupational disease. (Ex. 53-35-36).

Evaluating the source, factual basis, and logical force of the competing medical opinions, we find Dr. Wooley's diagnosis of bilateral lateral epicondylitis, which is supported by multiple visits and firsthand surgical observations, to be persuasive. *See, e.g.*, *Mageske*, 93 Or App at 702 (special deference given to treating surgeon's opinion due to unique opportunity to view condition firsthand); *see also Diana G. Hults*, 61 Van Natta 1886, 1888 (2009) (more weight accorded to diagnostic opinions of physicians who had greater opportunity to observe claimant's condition over time).

Based on his experience with numerous chronic elbow and wrist problems, Dr. Wooley opined that, more likely than not, claimant's elbow pathology, impairment and need for treatment were due to his work activities. (Ex. 66-2). Dr. Wooley's observations over time and at surgery, in addition to his qualifications and experience, as well as his comprehensive knowledge of claimant's work activities, as discussed below, render him the best source in this record from which to secure an opinion about the causal relationship between claimant's work activities and his bilateral upper extremity condition.

Dr. Wooley described both claimant's regular work activities and his "special cleaning" duties in great detail. (Ex. 55-1-2). For instance, he described the "special cleaning" duties as cleaning a variety of equipment that had years of buildup (sometimes as much as one to two inches of thick food, dust, dirt, grime and grease) using the following tools: a putty knife, overhead scrapers, steel brushes, scrub pads, floor scrapers, compressed air, chemicals, and floor chippers. (Ex. 55-2). Dr. Wooley explained that cleaning the equipment "required constant, repetitive scrubbing and chipping motions with strenuous force," "excessive reaching," "hunched over positions, on his hands and knees," and other awkward body positions, "[a]ll the while, exerting excessive force" through the use of multiple muscle groups of the hands and forearms. (Exs. 55-2, 65-85-86).

Dr. Wooley also explained claimant's condition biomechanically: "Lateral epicondylitis (a.k.a. tennis elbow) is caused by repetitive and vigorous overuse, resulting in microscopic tears that form where the tendon attaches to the lateral epicondyle," leading to inflammation and pain. (Ex. 55-6). According to Dr. Wooley, claimant's repetitive cleaning activities, as well as repetition on the line, are consistent with the types of overuse activities that lead to lateral epicondylitis. (*Id*.)

We are persuaded by the logical force of Dr. Wooley's biomechanical explanation for how claimant's work activities caused the lateral epicondylitis condition observed during surgery.[5] *Mageske*, 93 Or App at 702; *Brian P. Goodrich*, 64 Van Natta 2285, 2289 (2012) (treating surgeon's opinion given greater weight because it explained how surgical findings supported the diagnosis and cause of the claimed condition); *see also Holly S. Hall*, 62 Van Natta 2216, 2218-19 (2010) (finding physician's biomechanical explanation of how the claimant's work activities caused an occupational disease to be well reasoned and persuasive).

In contrast, Dr. Radecki's understanding of claimant's work activities and "special cleaning" duties was limited. He described, "[r]elative to the cleaning, [claimant] shows me how he gets down on his hands and knees and uses cleaning tools to clean equipment," and then describes some of those tools. (Ex. 46-1). His opinion does not otherwise address claimant's work activities. Dr. Radecki also has not persuasively rebutted Dr. Wooley's biomechanical explanation for how claimant's work activities were the major contributing cause of his bilateral lateral epicondylitis condition.[6] Thus, we further discount his opinion. *Wright, Jr.*, 67 Van Natta at 1920 (finding physician's opinion less persuasive for not rebutting another physician's biomechanical explanation regarding how the duration and type of the claimant's work activities caused the claimed conditions observed at surgery).

Moreover, Dr. Wooley expressly disagreed with Dr. Radecki's opinion that claimant's work activities were not the major cause of his condition because it did not get better or resolve after the "special cleaning" duties ceased. Dr. Wooley explained that rest and/or a cessation of work activities would not necessarily resolve claimant's condition because "lateral epicondylitis does not always get better without surgical intervention, regardless of whether the individual is off

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[5] We acknowledge the employer's contention that Dr. Wooley's "surgical report" did not describe any pathology found during surgery. However, Dr. Wooley explained that he remembered in detail what he observed during claimant's surgeries, which included degenerate nonlinear tendon structure and an area of gelatinous tissue during debridement and tendon reattachment on both elbows. (Exs. 65-53, -57, 66-2).

[6] We acknowledge that Dr. Radecki has opined that claimant's use of a scraper to clean machinery does not involve the type of wrist or elbow motion/position to cause lateral epicondylitis. (Ex. 67-29-31). Yet, as shown above, we have concluded that Dr. Radecki's knowledge of claimant's work activities was not as comprehensive as that of Dr. Wooley. We also find Dr. Wooley's biomechanical explanation of how claimant's work activities caused his condition to be persuasive because of its logical force.

work." (Ex. 55-6). "Some individuals get better through conservative treatment, while others require surgical decompression and reattachment of the common extensor origin before their condition subsides." (*Id.*)

In conclusion, we find that Dr. Wooley's well-reasoned opinion is supported by multiple examinations, surgical observations, treatment responses, and a comprehensive knowledge of the biomechanics of claimant's work activities. Under such circumstances, we find persuasive Dr. Wooley's opinion that claimant has a bilateral lateral epicondylitis condition that was caused in major part by his work activities. Accordingly, we reverse that portion of the ALJ's order that upheld the denial of claimant's occupational disease claim and set aside the employer's denial.

Claimant's attorney is entitled to an assessed fee for services at the hearing level and on review. ORS 656.386(1). We determine the amount of claimant's counsel's attorney fee for services at the hearing level and on review by applying the factors set forth in OAR 438-015-0010(4) to the circumstances of this case. Those factors are: (1) the time devoted to the case; (2) the complexity of the issues involved; (3) the value of the interest involved; (4) the skill of the attorneys; (5) the nature of the proceedings; (6) the benefit secured for the represented party; (7) the risk that counsel may go uncompensated and the contingent nature of the practice of workers' compensation law; and (8) the assertion of frivolous issues or defenses.

On review, the record reveals the following information. The issues in dispute were the timeliness and compensability of claimant's occupational disease claim for a bilateral upper extremity condition. Based on claims generally litigated before this forum, those issues present factual and medical questions of average complexity. The record contains 68 exhibits, including three depositions. Claimant's counsel generated important medical evidence, including two concurrence letters. The hearing lasted approximately five and one-half hours, with four witnesses for claimant and one witness for the employer, generating a transcript of 142 pages. Five months later, closing arguments via telephone were recorded, with a 38 page transcript. Claimant's counsel spent 40 hours at the hearing level and 30 hours on Board review.

The claim's value and the benefits secured involved medical services, including two surgeries, temporary disability, and possible permanent disability benefits. Both parties were represented by attorneys with significant experience, who presented their positions in a thorough, well-reasoned, and skillful manner. No frivolous issues or defenses were raised. Considering the conflicting evidence

and the employer's vigorous defense, there was a risk that claimant's counsel might go uncompensated. Finally, we have considered the contingent nature of the practice of workers' compensation law.

Based on the application of each of the previously enumerated factors, and considering the parties' arguments, we find that a reasonable assessed attorney fee for claimant's counsel's services at the hearing level and on review is $17,000.

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; *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 August 22, 2017 is affirmed in part and reversed in part. The employer's denial is set aside and the claim is remanded to the employer for processing in accordance with law. For services at the hearing level and on Board review, claimant's counsel is awarded an assessed attorney fee of $17,000, payable by the employer. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on June 28, 2018