

In the Matter of the Compensation of  
**TAWNYA KNIGHT, Claimant**

WCB Case No. 16-03465

**ORDER ON REVIEW**

Bailey & Yarmo LLP, Claimant Attorneys

Gilroy Law Firm, Defense Attorneys

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

Claimant requests review of Administrative Law Judge (ALJ) Riechers's order that upheld the self-insured employer's denial of claimant's injury claim for a right shoulder condition. On review, the issue is compensability. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact" and provide the following summary.

Claimant developed right shoulder pain on April 30, 2016, while demonstrating an appliance that makes ice cream from frozen fruit. (Tr. 6, 7). She told her supervisor, Ms. Payne, that her right shoulder was hurting from prying apart frozen bananas. (Tr. 11, 12). Ms. Payne reported the conversation to the employer's operations manager, Ms. Arntson. (Tr. 39).

On May 12, 2016, claimant treated with Ms. Smith, a physician's assistant (PA), for complaints of dizziness and right shoulder pain. (Ex. 2). PA Smith reported a history that the right shoulder pain worsened with overhead activity and wiping. She noted that claimant reported "doing a demonstration \* \* \* where she works and exacerbating shoulder bursitis." (Ex. 2-9). Ms. Smith examined claimant's right shoulder and diagnosed bursitis. (Ex. 2-8).

Accompanying PA Smith's chart note was an "overview addendum" from Dr. Ellingsen, which concerned treatment of claimant on April 13, 2015. At that time, Dr. Ellingsen had diagnosed "subacromial bursitis," which she described as "[c]hronic, has not seen a shoulder specialist, started during teenage years. Constantly throbbing. Exacerbated by lifting overhead, right is much worse." (Ex. 2-3).

On May 23, 2016, claimant told Ms. Cartwright, PA, that she could hardly use her right shoulder. (Ex. 3A-4). PA Cartwright administered an injection into the subacromial space of claimant's right shoulder. (Ex. 3A-5).

On June 4, 2016, claimant was seen at the emergency room, at which time an 827 Form was prepared, indicating that she had injured her right shoulder on April 30, 2016, at work. She reported that she had to stab frozen bananas that were in gallon freezer bags, break them apart and forcefully shove them through a machine to complete her demonstration. (Exs. 4, 5). That same date, claimant also completed an initial report of a work-related injury with her employer that essentially reported the same history.<sup>1</sup> (Ex. 6A).

On June 10, 2016, claimant was seen by Dr. Ryan, an orthopedist. Dr. Ryan understood that claimant injured her right shoulder at work lifting a heavy bag of frozen bananas. (Ex. 10-1). He indicated that, since that time, claimant had experienced pain with overhead activity. In an area of the chart note for past medical history, Dr. Ryan noted, “Noncontributory.” (Ex. 10-1). He diagnosed impingement syndrome, rotator cuff disease, and possible multidirectional instability. (Ex. 10-2, -3).

A June 22, 2016, right shoulder MRI showed tendinosis and fraying of the supraspinatus and infraspinatus tendons. (Ex. 13-2).

On June 27, 2016, after reviewing the MRI, Dr. Ryan opined that claimant “had a shoulder strain and may have early impingement syndrome.” (Ex. 14).

On July 20, 2016, the employer issued a denial, asserting that there was insufficient evidence of a compensable injury or occupational disease. (Ex. 21). Claimant requested a hearing.

On October 5, 2016, Dr. Ryan signed a concurrence letter prepared by claimant’s counsel. (Ex. 37). The letter provided a history to Dr. Ryan that claimant developed right shoulder pain on April 30, 2016, after spending two to three hours prying and pulling apart frozen bananas with a pair of shears. (Ex. 37-2). Dr. Ryan agreed that this mechanism of injury, along with claimant’s objective findings, such as reduced range of motion, and her gradual improvement to full range of motion, were consistent with a right shoulder strain, and that the work injury was the major contributing cause of the strain. (Ex. 37-2-3). Dr. Ryan agreed that the June 2016 right shoulder MRI only showed signs of “beginning” bursitis, rather than a chronic condition; however, even if she had chronic bursitis,

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<sup>1</sup> Claimant’s testimony and recorded statement regarding the mechanism of injury were also consistent with this history. (Ex. 12; Tr. 7-9).

the shoulder strain was a new problem involving the deltoid and trapezius muscles, separate from any preexisting inflammation of the bursa beneath the acromion bone. (Ex. 37-2).

At hearing, claimant described the injury at work consistent with the history she reported in the contemporaneous medical records; *i.e.*, she was working with frozen bananas on April 30, 2016, stabbing these bananas and prying them apart with her right hand using closed shears. (Tr. 7-9). Claimant stated that she reported the incident to Ms. Payne that day. (Tr. 12, 13). She acknowledged that she had not filed an injury report until June 4, 2016, and implied that the reason she waited was that she had applied for an upcoming promotion and that she was not sure or did not think it was a good idea to file a claim at the time. (Tr. 12-13). Claimant stated that, when she found out she had not received the promotion, she filed the claim a couple of days later. Claimant denied feeling frustrated or angry about not receiving the promotion. (Tr. 13).

In response to the question, “Have you had shoulder problems since you were a teenager?,” claimant replied, “No, I have not.” (Tr. 15). She was then asked about the findings reported by Dr. Ellingsen on April 13, 2015, described as constant throbbing pain in the shoulder exacerbated by lifting overhead, right much worse, and responded, “It sounds like she’s describing my neck issues,” which claimant described as “feel[ing] like tension and spasmosity that create pain that refers to my neck and down my arms.” (*Id.*; *see also* Tr. 20, 25).

Ms. Arntson and Ms. Payne both testified that claimant reported on April 30, 2016, that her arm and shoulder were hurting from the product demonstration. (Tr. 38, 39, 50). However, they also testified that claimant told them that she “jammed” her right shoulder on May 2, 2016, while helping her mother with a medical scooter with a flattened tire, and that her shoulder hurt because of this off-work incident. (Tr. 40, 50).

Ms. Arntson was asked when she first became aware of claimant’s right shoulder problems. In response, she stated that, in November 2015, she had contacted the employer’s risk department regarding claimant because she believed, based on comments from claimant and her mother at that time and her own feeling that claimant had been involved in previous claims/injuries that she thought were “suspicious,” that claimant would possibly be filing a claim in the future. (Tr. 37-38). The employer’s attorney again asked Ms. Arntson when she first became aware that claimant had “any issue whatsoever with the right shoulder?” (Tr. 38). Ms. Arntson responded:

“A. Apparently, the Yonanas demo was on April 30th. I believe it would have been at the beginning of May,—

“Q. Okay.

“A. —the first few days of May.

“Q. And what did you—how did you understand her right shoulder issues came about?

“A. I was always the—under the impression that it was a chronic issue that she had always had, was—chronic bursitis in all of her joints is what she had said, and that she was currently seeking shot treatments. And this was way prior to April.

“\* \* \* \* \*

“Q. —did you become aware of an off-the-job incident involving her right shoulder?

“A. Absolutely. So Saturday, April 30th, she worked. She was off—Okay. So April 30th was a Saturday, was the day she did the Yonanas demo. Sunday— [Ms. Payne] had called me on Saturday, and we contacted the risk department on that Saturday, April 30th. She worked her full shift as a supervisor on Sunday, doing the pull and the buy and all functions.

“Q. Uh-huh.

“THE ALJ: I’m sorry. She worked a full shift on Sunday?

“[A]: Yes. That would’ve been May 1st. So Yonanas was on April 30th. That was a Saturday. Sunday I’m off, and she was supervisor that day. She worked her full shift. No complaints. No problems. [Ms. Payne] had told me what she had said on the floor on Saturday. And we had called risk department that day, because they already had a file on her. Sunday, she worked her full shift. She was off on Monday. On Tuesday, I called in sick. I had a difficult time getting in touch with her. She eventually called me back, apologized for being so abrupt on the telephone. Later told me that she didn’t come to the phone because she was in an oxy coma, that she had taken some of her mom’s oxycodones. And on—that was on Tuesday. (Tr. 38-40).

Later, Ms. Arntson continued:

“And then I had contacted—immediately right after that phone call as well, after that conversation, I contacted the risk department as well. I had talked to them about her claim for—what she had said about the Yonanas, and that she did not want to file a claim at the time. She was asked by [Ms. Payne] to—if she wanted to make a report. [Claimant] was familiar with how to do reports, because [she] was promoted to a shift supervisor on January 13th. The very first day she was left alone to be a supervisor, she filed an injury report claim for her mother. And that was on February 7th. On February 9th, I filed with the risk department what I thought was a fraud. What—there’s a box on the form to check, Do you think that this...” (Tr. 42).

Claimant’s counsel objected to this answer as nonresponsive and not relevant, and the ALJ agreed it went “beyond the scope of the question.” (*Id.*) After a few more questions, Ms. Arntson was asked if she believed claimant’s description of how she operated the Yonanas display was consistent with her own understanding of how the demonstration operated. (Tr. 43). She responded, “Her and her mother have both been trained on the demo, had done ten, at least, previous demos with the preparation the same way, where the bananas—I come in at 8:00 o’clock in the morning. They are left out to defrost.” (*Id.*) This answer was objected to as being “rambling,” and again the ALJ instructed that the witness was going beyond the scope of the question. (*Id.*) When the question was reasked, Ms. Arntson responded by stating:

“A. Well, she—I would—I don’t know how to answer that, because what she had said, I do not believe. \* \* \*.  
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“Q. Okay. So when where the bananas taken out of the freezer?

“A. 8:00 o’clock in the morning.

“Q. Okay. And when did she start working that day?

“A. The earliest would have been 10:15. We would’ve had a meeting at—until 10:30. And like she had

mentioned, it would've been 20 minutes prep time to get the-- So probably around 11:00 o'clock would be the first time."<sup>2</sup> (Tr. 44).

Finally, Ms. Arntson testified that on June 3, 2016, about thirty minutes into claimant's shift, she let claimant know that she would not get the promotion, and claimant responded in an angry fashion, expressing that she was upset with the employer and the district manager. She further testified that claimant did not mention shoulder complaints and that she filed her workers' compensation claim the next morning. (Tr. 45-46).

Ms. Payne testified that she first became aware claimant was filing a claim on the day claimant was told that Ms. Payne had received the promotion that claimant had hoped to receive. (Tr. 51-52). Ms. Payne further testified that after claimant had told her and Ms. Arntson "on or about" May 2, 2016, that she had hurt her shoulder pushing her mother in a chair, she had worked with claimant for another nine or ten days without hearing claimant complain of her shoulder. (Tr. 50-51).

Ms. Holmes, claimant's coworker, testified that she was working with claimant on June 3, 2016. She had worked with claimant for about thirty minutes into the shift, and then claimant had been called into the meeting with Ms. Arntson where she had been informed she was not promoted. Ms. Holmes stated that claimant had come back from that meeting upset and had told her about how bad her shoulder was hurting her. Claimant had not mentioned that her right shoulder hurt her previously. (Tr. 56-57).

In rebuttal testimony, claimant admitted that she helped her mother move the scooter, but denied that she hurt her shoulder at that time. (Tr. 59). She stated that the scooter did not have flat tires. (*Id.*) Claimant also disputed that she told Ms. Payne and Ms. Arntson about the scooter incident as they had reported. (Tr. 76).

Claimant's mother testified that claimant had assisted her with her scooter at one time because the disc brake was grabbing on the back wheel, and she helped her "run interference" crossing the road to her physical therapy appointment.

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<sup>2</sup> Ms. Payne, who was at work on April 30, 2016, testified that claimant told her on that day that the demonstration bananas were clumped in a bag and that she "suggested that the next time we prepped that we put the bananas in a line in the bag," and that she also mentioned that her arm and shoulder would hurt her getting the bananas out of the bag. (Tr. 50).

(Tr. 66). Claimant's mother stated that claimant was not physically assisting her to move, but was taking a video of the back wheel. (Tr. 66-67). She explained that "you would assume that it felt like a flat tire because of the way the brake was grabbing." (Tr. 67). She testified that claimant did not hurt her shoulder while assisting her. (*Id.*)

### CONCLUSIONS OF LAW AND OPINION

In upholding the employer's denial, although finding that claimant proved legal causation, the ALJ determined that medical causation had not been established.

On review, claimant contends that Dr. Ryan's opinion persuasively establishes the compensability of her April 30, 2016, right shoulder injury. In addition, she disagrees with the employer's contention that she did not establish legal causation, asserting that the record does not contradict her testimony regarding how the injurious work event occurred. For the following reasons, we conclude that the claim is compensable.

Claimant must prove both legal and medical causation by a preponderance of the evidence. *Harris v. Farmer's Co-op Creamery*, 53 Or App 618, *rev den*, 291 Or 893 (1981); *Carolyn F. Weigel*, 53 Van Natta 1200 (2001), *aff'd without opinion*, 184 Or App 761 (2002). Legal causation is established by showing that claimant engaged in potentially causative work activities; whether those work activities caused claimant's condition is a question of medical causation. *Darla Litten*, 55 Van Natta 925, 926 (2003). Whether claimant established legal causation hinges principally on her credibility/reliability.

The ALJ found the testimony of the Ms. Payne and Ms. Arntson credible based upon their demeanor and the manner of their testimony, but did not make express demeanor-based credibility findings regarding the testimony of claimant (or her mother). In determining the credibility of a witness's testimony, we normally defer to an ALJ's demeanor-based credibility finding. *See Erck v. Brown Oldsmobile*, 311 Or 519, 526 (1991) (on *de novo* review, it is a good practice for an agency or court to give weight to the factfinder's credibility assessments). However, where the ALJ does not make demeanor-based credibility findings, and the credibility issue concerns the substance of a witness's testimony, we are equally qualified to make our own credibility determination. *Coastal Farm Supply v. Hultberg*, 84 Or App 282, 285 (1987). Inconsistencies in the record may raise such doubt that we are unable to conclude that material testimony is reliable. *George V. Jolley*, 56 Van Natta 2345, 2348 (2004), *aff'd without opinion*, 202 Or App 327 (2005).

Because claimant reported to Ms. Payne (who reported to Ms. Arntson) on April 30, 2016, that her arm and shoulder were hurting from the at-work product demonstration, the ALJ concluded that claimant had established that she engaged in potentially causative work activities on that day. (*See* Tr. 38, 39, 50).

Based on our *de novo* review, we agree with the ALJ's conclusion that legal causation of the claimed injury has been established. Claimant's testimony regarding the alleged injury was consistent with that reported in the medical records following her claim, and was supported by the employer's witnesses. Therefore, based on claimant's uncontested and corroborated testimony, we conclude that she injured herself at work as described on April 30, 2016 (*i.e.*, while pulling/prying apart frozen bananas during a product demonstration). (Tr. 7-9, 38, 39, 50; Exs. 4, 6A, 12, 37).

Moreover, although we acknowledge the ALJ's demeanor-based credibility finding regarding the testimony of Ms. Payne and Ms. Arntson, we do not defer to that assessment because, upon closer scrutiny, we find the testimony of those two witnesses as showing preconceived notions regarding claimant's veracity in claim filing and as being comprised of overbroad and general statements that were often unresponsive to the questions posed.

For example, Ms. Arntson was critical of claimant's description of the mechanism of injury as she believed that given the time line of how the demonstration would be arranged, the bananas would not have been frozen, which suggests that they would not have required "stabbing" as described by claimant. (Tr. 43). In running through her time line to support her testimony, she indicated, "I come in at 8:00 o'clock in the morning. They are left out to defrost. \* \* \*. We would've had a meeting at—until 10:30." (Tr. 43-44). However, Ms. Arntson did not work on April 30, 2016, and could not have either taken the bananas out to defrost or had a meeting with claimant. In a similar vein, Ms. Arntson believed that claimant had told her that she had "chronic bursitis in all of her joints" and was currently seeking shot treatments. (Tr. 38). Besides the treatment for her current shoulder condition, the record discloses only that claimant required two injections in the summer of 2015 for right hip trochanteric bursitis. (Ex. 2-23; Tr. 26). Ms. Arntson never reconciled her beliefs that claimant's shoulder problems were due to her bursitis problem or the "post-work" scooter incident of May 2, 2016. (Tr. 38, 41). Ms. Arntson also testified that, after some effort, she had a conversation with claimant on Tuesday, May 3, 2016, in which claimant apologized for having been abrupt with her on the phone and shared with

Ms. Arntson that she had been in an “oxy coma.” (Tr. 40). It is unclear when claimant had been abrupt on the telephone with Ms. Arntson, given Ms. Arntson’s difficulty in getting in touch with claimant until claimant called her back on May 3.

Ms. Arntson further testified that she had contacted the “risk department” in November 2015 to report that she thought that “perhaps [claimant] would be filing a claim in the future.” (Tr. 37). Apparently, despite these misgivings, claimant was promoted to a shift supervisor in January 2016, and she retained that position despite Ms. Arntson’s concerns about her having helped her mother complete an incident report in February 2016. Also, claimant was still being considered for a promotion until June 3, 2016, despite Ms. Arntson having contacted the employer’s “risk department” with her concerns no less than three different times (upon learning of the complaint of shoulder problems made by claimant to Ms. Payne on April 30, 2016; after speaking with claimant on May 3, 2016; and again after meeting with claimant on May 5, 2016, when she purportedly advised her of the “scooter” incident).

In addition, Ms. Payne testified that in the nine or ten days that she worked with the injured worker “on or after” May 2, 2016, she did not recall claimant mentioning her right shoulder. The record reflects, however, that claimant was seen by medical providers on two occasions for right shoulder complaints after May 2, 2016, and had x-rays taken of her shoulder, medications prescribed, and an injection performed. (Ex. 2).

Finally, the description of the off-work incident in which claimant was assisting her mother was described by Ms. Arntson as involving a scooter on which claimant’s mother rested a knee, but was described by Ms. Payne as involving a chair. (Tr. 40, 50). Both Ms. Payne and Ms. Arntson described claimant as having advised them the device had a flat tire and that she jammed or hurt her shoulder pushing her mother’s device. (Tr. 40, 50). According to Ms. Arntson, claimant reported that she was helping her mother toward a medical transport van. (Tr. 40). In rebuttal, claimant and her mother, who owned the scooter, testified that the scooter never had a flat tire, but that it did have a disc brake issue. (Tr. 59, 66, 67). Moreover, claimant’s mother explained that she used the scooter to go across the street to a physical therapy appointment. She did not mention a medical transport van. (Tr. 67). Claimant’s mother also indicated that claimant was not pushing her in the scooter, but was instead walking behind her filming the disc brake issue. (Tr. 66-67). Claimant acknowledged that she recalled assisting her mother with attending a medical appointment on or about May 2, 2016, but disagreed that she had injured her shoulder doing so as described by Ms. Payne and Ms. Arntson. (Tr. 59, 76).

We find the testimony of Ms. Arntson and Ms. Payne to be rife with hyperbole and an apparent willingness to disagree with claimant's testimony and the rest of the record on issues both central and collateral to the outcome of this claim to an extent that renders their material testimony unreliable. *Jolley*, 56 Van Natta at 2348. Accordingly, we conclude that the testimony of Ms. Arntson and Ms. Payne does not impeach or reduce the overall credibility or reliability of claimant's testimony that she injured her shoulder in the work incident on April 30, 2016, and did not injure her shoulder helping her mother with her "scooter."

Because we are persuaded that claimant was engaged in potentially causative work activities on April 30, 2016, we turn to the medical causation issue. Claimant has the burden of proving, by a preponderance of the evidence, that her April 30, 2016, work injury was a material contributing cause of her disability or need for treatment for her claimed shoulder condition. ORS 656.005(7)(a); ORS 656.266(1); *Albany Gen. Hosp. v. Gasperino*, 113 Or App 411 (1992).

Due to the complicated nature and potential alternative causes of claimant's condition, resolution of this matter is a complex medical question that must be resolved by expert medical opinion. *See Barnett v. SAIF*, 122 Or App 279, 283 (1993). In evaluating the medical evidence, we rely on those opinions that are well reasoned and based on accurate and complete information. *See Somers v. SAIF*, 77 Or App 259, 263 (1986).

Here, the sole medical opinion to address the causation issue was that of Dr. Ryan. (Ex. 37). In concluding that claimant's work activities on April 30, 2016, were at least a material contributing cause of her right shoulder strain, Dr. Ryan ultimately understood that claimant began to experience right shoulder pain after spending several hours at work prying and pulling apart frozen bananas with a pair of shears. (Ex. 37-2). He considered the mechanism of injury to be consistent with the right shoulder strain that he ultimately diagnosed. (*Id.*)

Contrary to the ALJ's conclusion that Dr. Ryan's opinion was premised on an inaccurate history as it failed to consider "chronic" shoulder problems described by Dr. Ellingsen as "bursitis" in 2015, or the "scooter" incident of May 2, 2016, described by Ms. Payne and Ms. Arntson, we conclude that Dr. Ryan's opinion was premised on a materially accurate history. *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 reliable). Our conclusion is based on the following reasoning.

First, we do not discount Dr. Ryan’s opinion for not considering claimant’s purported “chronic” prior shoulder bursitis condition. Dr. Ryan persuasively explained that claimant’s work injury was a strain of the deltoid and trapezius muscles, completely separate from any preexisting inflammation of the bursa beneath the acromion bone. (Ex. 37-2). There is no contrary medical opinion. Therefore, although Dr. Ryan may not have been aware of Dr. Ellingsen’s preinjury diagnosis of “bursitis,” we do not discount the persuasiveness of his uncontroverted opinion on that basis.

Further, as discussed above, we do not find the testimony of Ms. Payne and Ms. Arntson that claimant “jammed” her right shoulder in a “scooter” incident to be reliable. Accordingly, we find that Dr. Ryan’s opinion was based on a sufficiently accurate history. *See Wehren*, 186 Or App at 561.

Alternatively, even if we accept the employer witnesses’ testimony regarding claimant having “jammed” her shoulder in the May 2, 2016, “scooter” incident, the record does not contain any *medical* evidence regarding the nature of that injury or its potential for causing a shoulder strain or any other injury to the shoulder. By comparison, Dr. Ryan opined that the April 30, 2016, mechanism of injury (which, based on our credibility determination, we have determined to be accurate) was consistent with the right shoulder strain he eventually diagnosed as the work injury. (Ex. 37-2).

In the absence of expert medical evidence regarding the medical relevance of the “scooter” incident, even assuming the reliability of that history, we are not inclined to discount Dr. Ryan’s opinion on the basis that claimant told the employer’s witnesses that she “jammed” her right shoulder on May 2, 2016. *See Wehren*, 186 Or App at 563 (medical expert not required to weigh hypothetical causes if not suggested by another expert as contributing to the claimant’s condition); *SAIF v. Calder*, 157 Or App 224, 227-28 (1998) (the Board is not an agency with specialized medical expertise and must base its findings on medical evidence in the record); *see also Gregory S. Jorde*, 68 Van Natta 1358, (2016) (a physician’s failure to evaluate the claimant’s “pre-work injury” complaints did not undermine the persuasiveness of the physician’s medical opinion where no medical expert questioned the physician’s opinion on that basis); *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).

Accordingly, based on the aforementioned reasoning, we conclude that claimant established both legal and medical causation of her injury claim. Consequently, we reverse the ALJ's decision to uphold the employer's denial.

Claimant's counsel is entitled to an assessed attorney 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 this case, we find that a reasonable fee for claimant's attorney's services at the hearing level and on review is \$12,500, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by the hearing record and claimant's appellate briefs), 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 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 February 13, 2017 is reversed. 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 review, claimant's attorney is awarded an assessed fee of \$12,500, to be paid by the employer. 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.

Entered at Salem, Oregon on May 31, 2018

Member Johnson dissenting.

The majority opinion concludes that claimant has established both legal and medical causation of her denied injury claim. Because I disagree that claimant has established legal causation, I respectfully dissent.

Although I find that claimant's reporting of the injurious work event on April 30, 2016, was consistent and not directly contradicted by the record (including the testimony by Ms. Payne and Ms. Arntson), other evidence in the record casts doubt on her accuracy as a historian. Therefore, I find her description of the alleged work incident to be unreliable. I reason as follows.

Claimant must prove both legal and medical causation by a preponderance of the evidence. *Harris v. Farmer's Co-op Creamery*, 53 Or App 618, *rev den*, 291 Or 893 (1981); *Carolyn F. Weigel*, 53 Van Natta 1200 (2001), *aff'd without opinion*, 184 Or App 761 (2002). Legal causation is established by showing that claimant engaged in potentially causative work activities; whether those work activities caused claimant's condition is a question of medical causation. *Darla Litten*, 55 Van Natta 925, 926 (2003). Whether claimant established legal causation hinges principally on her credibility/reliability.

The ALJ found the testimony of Ms. Payne and Ms. Arntson (claimant's supervisor and operations manager, respectively) credible based upon their demeanor and the manner of their testimony, but did not make express demeanor-based credibility findings regarding the testimony of claimant (or her mother). In determining the credibility of a witness's testimony, the Board normally defers to an ALJ's demeanor-based credibility finding. *See Erck v. Brown Oldsmobile*, 311 Or 519, 526 (1991) (on *de novo* review, it is a good practice for an agency or court to give weight to the factfinder's credibility assessments). However, where the ALJ does not make demeanor-based credibility findings, and the credibility issue concerns the substance of a witness's testimony, the Board is equally qualified to make its own credibility determination. *Coastal Farm Supply v. Hultberg*, 84 Or App 282, 285 (1987). Inconsistencies in the record may raise such doubt that the Board is unable to conclude that material testimony is reliable. *George V. Jolley*, 56 Van Natta 2345, 2348 (2004), *aff'd without opinion*, 202 Or App 327 (2005).

First, I find no persuasive reason not to defer to the ALJ's demeanor-based credibility finding regarding the testimony of Ms. Payne and Ms. Arntson, which establishes that claimant hurt her right shoulder in the scooter incident on May 2, 2016. Because claimant denied hurting her shoulder in that incident, I do not find her testimony regarding that event/injury to be reliable or credible.<sup>3</sup>

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<sup>3</sup> The majority concludes that the testimony of Ms. Payne and Ms. Arntson is unreliable due to "preconceived notions." In effect, the majority is discounting their testimony based on a perceived bias. I find such a conclusion speculative and unsubstantiated by the record. Moreover, such a finding is contrary to the ALJ's demeanor-based credibility finding, and this record provides no reason to deviate

Next, at the hearing, claimant denied having had chronic shoulder problems before the injury, and stated that the history of symptoms reported by Dr. Ellingsen was for her “neck issues.” However, Dr. Ellingsen’s “overview addendum” for an April 13, 2015, examination does not mention any neck problems and unambiguously refers to the shoulder, diagnosing “subacromial bursitis,” and discussing a shoulder specialist and right-sided symptoms with overhead lifting. (Ex. 2-3). Furthermore, when claimant first treated with Dr. Ryan, she did not disclose any prior shoulder diagnoses or treatment; the “past medical history” portion of Dr. Ryan’s chart note says “noncontributory.”<sup>4</sup> (Ex. 10). Given these circumstances, the record casts significant doubt on the accuracy and reliability of claimant’s reporting of her history and complaints.

In light of the inconsistencies described above, I do not consider claimant’s version/description of the alleged April 30, 2016, work incident to be credible/reliable. *See Jolley*, 56 Van Natta at 2348. Consequently, her testimony is insufficient for me to conclude that she sustained a work injury as she claims. Moreover, because I find that claimant’s testimony is not reliable, Dr. Ryan’s opinion supporting the causal relationship between her shoulder condition and her work, which was based on her description of the alleged work injury, is unpersuasive. *See Miller v. Granite Const. Co.*, 28 Or App 473, 476 (1977) (“[The physician’s] conclusions are valid as to the matter of causation only to the extent that the underlying basis of those opinions, the reports of claimant as to the

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from our longstanding practice of deferring to that finding. *See Erck*, 311 Or at 526; *Steve Littrell*, 57 Van Natta 918, 919 (2005). I also find questionable the majority’s conclusion that their testimony is unreliable because it is full of “hyperbole” and a “willingness to disagree” on central issues. Therefore, I find no reasonable basis on this record to reject the testimony of two witnesses, who were found credible based on demeanor, that claimant injured her right shoulder in a “scooter” incident. *L.C. Durette*, 52 Van Natta 410 (2000) (the claimant’s testimony was irreconcilable with that of two supervisors and no reason was offered for rejection of supervisors’ testimony); *Charmaine A. Frazier*, 39 Van Natta 148 (1987) (the claimant did not meet her burden of proof where her testimony could not be reconciled with the testimony of her supervisor). I further note that those same witnesses supported claimant’s history of an alleged work event on April 30, 2016. It seems to me that if they had a bias against claimant, they would not have corroborated her history in any manner.

Finally, even if I did not consider the testimony of Ms. Payne and Ms. Arntson regarding the “scooter” incident, as discussed above, I would still find claimant not credible based on her failure to acknowledge her prior treatment to the right shoulder. *See Ron E. Weathers*, 51 Van Natta 403 (1999) (inconsistencies between the claimant’s testimony and contemporary chart notes supported finding that the claimant was not credible).

<sup>4</sup> Although Dr. Ryan was later asked to comment on the right shoulder subacromial bursitis diagnosed in April 2015 in determining causation, the reliability of claimant’s initial reporting is still called into question by her failure to disclose that history to Dr. Ryan during treatment.

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circumstances of the accident and the extent of the resulting injury, are accurate and truthful."); *Everett L. Davis*, 68 Van Natta 1972 (2016) (persuasiveness of medical evidence depends on reliability of history); *James D. Shirk*, 41 Van Natta 90, 93 (1989) (a physician's opinion based on a patient's history is only as reliable as the history is accurate).

Accordingly, under these circumstances, I would conclude that claimant has not established legal causation. Because the majority concludes otherwise, I respectfully dissent.