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In the Matter of the Compensation of  
**JESUS R. MARTINEZ-ROSAS, Claimant**  
WCB Case No. 17-01395  
ORDER ON REVIEW  
David B Wagner, Claimant Attorneys  
Liberty Mutual Ins, Defense Attorneys

Reviewing Panel: Members Ousey and Johnson.

Claimant requests review of Administrative Law Judge (ALJ) Martha Brown's order that upheld the insurer's denial of his new/omitted medical condition claim for a left lateral epicondylitis condition. On review, the issue is compensability. We affirm.

FINDINGS OF FACT

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

For the last five years, claimant has worked as a "quality controller" for a packaged concrete manufacturing company. (Tr. 4). As part of his work activities, he lifted bags of concrete, which weighed from 50-90 pounds, removed a sample, and then moved the bag about three meters and emptied it. (Tr. 8). Claimant lifted approximately two bags per hour. (*Id.*)

In September 2015, the insurer accepted claimant's right lateral epicondylitis condition. (Ex. 4).

Because conservative treatment was unsuccessful, in July 2016, claimant had right elbow surgery. (Ex. 26). About two weeks after surgery, claimant returned to modified work with a 10-pound lifting restriction. (Tr. 8; Ex. 27-1). As a result of his right elbow condition, he primarily used his left arm at work and limited his right arm to simple tasks. (Tr. 9).

In December 2016, shortly after returning to his regular work activities, claimant reported increasing right arm symptoms and similar left arm symptoms. (Exs. 32-1, 33-1). Dr. Knight noted that claimant's left arm symptoms "may be related to his return to work and increased activity." (Ex. 33-3).

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On January 25, 2017, Dr. Knight diagnosed a left lateral epicondylitis condition and treated it with a joint injection. (Ex. 37-3).

On February 10, 2017, at the insurer's request, Dr. Dawson, an orthopedic surgeon, examined claimant. (Ex. 39-1). He diagnosed left lateral epicondylitis, "presently asymptomatic and unrelated to occupational exposure."<sup>1</sup> (Ex. 39-14). Dr. Dawson noted that claimant did not discuss his left elbow symptoms until asked about them, and that he had marked his pain on the pain diagram as "0/10." Although acknowledging that "good studies" linked lateral epicondylitis to activities similar to claimant's work exposure, Dr. Dawson opined that his "work injury" had ceased to be the major cause of his continued symptoms. (Ex. 39-16).

Ms. Marik, a family nurse practitioner who treated claimant for his accepted right elbow condition, concurred with Dr. Dawson's report. (Ex. 42).

On February 24, 2017, the insurer denied claimant's new/omitted medical condition claim for a left elbow condition. (Ex. 40). Claimant requested a hearing.

### CONCLUSIONS OF LAW AND OPINION

In upholding the insurer's denial, the ALJ was not persuaded that claimant's accepted right elbow condition was the major contributing cause of his left elbow condition. *See* ORS 656.005(7)(a)(A). On review, claimant contends that his left elbow condition is compensable as a consequential condition of his accepted right elbow condition. For the following reasons, we affirm.

ORS 656.005(7)(a)(A) provides that no injury or disease is "compensable as a consequence of a compensable injury" unless the compensable injury is the major contributing cause of the consequential condition. The "compensable injury" at issue in this case concerns claimant's accepted right lateral epicondylitis condition. Thus, to establish the compensability of his left elbow condition as a consequential condition, claimant must prove that the major contributing cause of the condition was either the accepted right elbow condition or treatment for that condition. *See* ORS 656.266(1); ORS 656.005(7)(a)(A); *SAIF v. Allen*, 279 Or App 135, 138 (2016); *Albany Gen. Hosp. v. Gasperino*, 113 Or App 411 (1992) (condition or need for treatment that is caused by a compensable condition is analyzed under the major contributing cause standard as a consequential condition).

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<sup>1</sup> Dr. Dawson did not mention claimant's recent left elbow joint injection. (Ex. 39-16).

The “[d]etermination of the major contributing cause is a complex medical question that must be resolved on the basis of expert opinion.” *Jackson County v. Wehren*, 186 Or App 555, 559 (2003) (citing *Uris v. Comp. Dep’t*, 247 Or 420, 424 (1967)).

Here, claimant relies on the opinion of Dr. Knight, his treating orthopedic surgeon, to support the compensability of his left elbow condition as a “consequential condition.” For the following reasons, we find Dr. Knight’s opinion insufficient to satisfy the requisite statutory standard for compensability of the claimed left elbow condition.

In a December 2016 examination, Dr. Knight observed that claimant was “developing some symptoms on the left *may be* related to his return to work and increased activities.” (Ex. 33-3) (Emphasis added). Ultimately, Dr. Knight opined that claimant “really did overuse the left arm significantly while he was treating the right arm and that his work activities contributed to this development” of the left elbow condition. (Ex. 50-3).

We acknowledge that “magic words” are not required to establish the compensability of a claimed condition. *Liberty Northwest Ins. Co. v. Cross*, 109 Or App 109 (1991); *McClendon v. Nabisco Brands, Inc.*, 77 Or App 412 (1986) (“magic words” are not required); *Norma Gutierrez*, 70 Van Natta 36, 39 (2018). Nonetheless, after conducting our review of this record, we find Dr. Knight’s conclusory and unexplained opinion insufficient to persuasively establish the compensability of the claimed left elbow condition under a “consequential condition” theory. *See Moe v. Ceiling Sys., Inc.*, 44 Or App 429, 433 (1980) (rejecting unexplained or conclusory opinion); *Jesus Meza*, 69 Van Natta 1747, 1750 (2017).

In addition, because Dr. Knight’s “causation” opinion is couched in terms of “may be” related and “contributed to,” it is discounted. *Gormley v. SAIF*, 52 Or App 1055, 1060-61 (1981) (persuasive medical opinions must be based on medical probability, rather than possibility); *Kyle G. Anderson*, 61 Van Natta 2117, 2117-18 (2009) (the words “can be” and “may be” indicate only possibility, not medical probability).

Moreover, Dr. Knight’s opinion did not adequately respond to Dr. Dawson’s opinion (with which Ms. Marik concurred) that claimant’s left elbow condition was unrelated to his “occupational exposure.” In the absence of such a response, we further discount the persuasiveness of Dr. Knight’s opinion. *See Janet Benedict*, 59 Van Natta 2406, 2409 (2007), *aff’d without opinion*, 227 Or App 289 (2010) (medical opinion unpersuasive when it did not address contrary opinion).

Because we find Dr. Knight's opinion unpersuasive, it is unnecessary to address claimant's challenges to the contrary medical opinions. *See Cesar Penaloza*, 69 Van Natta 661, 666 n 4 (2017) (because the physicians' opinions supporting compensability were insufficient to meet the claimant's burden of proof, it was unnecessary to address the persuasiveness of countervailing physicians' opinions); *Lorraine W. Dahl*, 52 Van Natta 1576 (2000) (same).

In sum, the record does not persuasively establish the compensability of the claimed left arm condition under a "consequential condition" theory. Accordingly, we affirm the ALJ's order that upheld the insurer's denial.

### ORDER

The ALJ's order dated October 10, 2017 is affirmed.

Entered at Salem, Oregon on May 31, 2018