
In the Matter of the Compensation of
MICHAEL BARNES, Claimant
WCB Case No. 18-04162, 18-03693
ORDER ON REVIEW
Elmer & Brunot PC Law Offices, Claimant Attorneys
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Woodford and Ousey.

The SAIF Corporation requests review of Administrative Law Judge (ALJ) Naugle's order that: (1) set aside its denial of claimant's injury claim for a right upper extremity condition; and (2) awarded penalties and a penalty-related attorney fee for unreasonable claim processing. On review, the issues are compensability, penalties, and attorney fees.

We adopt and affirm the ALJ's order with the following supplementation regarding compensability.

In setting aside SAIF's denial, the ALJ found that claimant had established legal causation based on his testimony and the relatively consistent reporting of the mechanism of injury. Moreover, the ALJ concluded that the opinion of Dr. Hook, claimant's attending physician, supported a determination that the February 2018 work injury was a material contributing cause of the need for treatment/disability for the right upper extremity condition. Finally, in awarding a penalty and related attorney fee, the ALJ determined that SAIF had not provided a reasonable explanation concerning its untimely denial.

On review, SAIF contends that the record does not establish legal or medical causation. As a result, SAIF argues that a penalty and related attorney fee are not warranted. For the following reasons, we disagree with SAIF's contentions.

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 his credibility/reliability.

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). Where, as here, 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). We evaluate the credibility of a witness based on an objective review of the substance of the testimony and other inconsistencies in the record. *Hultberg*, 84 Or App at 285.

SAIF contends that the testimony provided by claimant's coworkers (Mr. Sherman and Mr. Brophy) contradict claimant's testimony concerning the mechanism of injury, and that the record does not contain corroborating evidence of his version of events. Thus, SAIF argues that the record does not support legal causation. For the following reasons, such inconsistencies do not lead us to conclude that claimant's material testimony was unreliable. *See Warren Smith*, 71 Van Natta 279, 280 (2019) (existence of some inconsistencies in the record did not diminish the claimant's credibility where record as a whole supported his testimony).

As explained in the ALJ's order, when the alleged incident occurred (February 3, 2018), Mr. Sherman, claimant's supervisor, and Mr. Brophy, his coworker, were on the opposite end of a 14 and a half foot long dryer roller (which weighed about 7500 pounds). (Tr. 36-38, 44). They were approximately 17 feet from claimant. (*Id.*) Mr. Sherman stated that he saw the roll tip, but did not see claimant's hand get crushed underneath the roller. (Tr. 36). He explained that he was using a flashlight that "did not shine very good," which barely lit across the dryer. (Tr. 39). He further acknowledged that it was possible for claimant's hand to fit inside the dryer. (Tr. 40). He stated that claimant did not approach him about the alleged injury until they finished putting all the rollers in the dryer. (Tr. 37). After looking at claimant's right hand without "really see[ing] any swelling," he took claimant to the office, filed the incident paperwork, and called a nurse. (Tr. 38).

Mr. Brophy testified that he did not remember anybody calling out that they had sustained an injury. (Tr. 44). He explained that he was fairly new to the position at that point, and was still getting a feel for doing the duties of the

position. (*Id.*) Mr. Brophy testified that he witnessed claimant holding his right arm up against his chest after the incident. (Tr. 44-45). However, he also stated that there was no way that he could have missed claimant's hand getting caught in the machine. (Tr. 45). He acknowledged that it was possible for a body part to get pinched in between the rollers, but he also stated that he had fairly good vision and that nothing would have obstructed his view. (Tr. 47, 48).

Claimant testified that he was on the opposite side of Mr. Sherman fixing a dryer jam by putting rollers back in place when one of them fell on his wrist, smashing his hand up against the "bunny ear" mechanism that holds them in place. (Tr. 24-25). He stated that his wrist was immediately swollen and in pain, that he notified his supervisor, went up to the office, and then he went to the emergency room. (Tr. 25). He explained that he was injured at 6 a.m., and did not continue working. (Tr. 29-30). At the time of injury, he claimed that he "hollered" and that everybody stopped working. (Tr. 31).

That same day, claimant presented for treatment at approximately 8 a.m. at an emergency department for "hand pain status post crush injury." (Ex. 3). Claimant reported sustaining right hand pain after his hand was pinned between a roller and a piece of equipment at approximately 6 a.m.. (*Id.*) On examination, his right hand was tender to palpation and had limited range of motion. (*Id.*)

On February 8, 2018, claimant presented to Ms. Young, a physician's assistant, also reporting that he sustained a crush injury at work on February 3, 2018. (Ex. 6-3). Ms. Young noted that claimant had right wrist tenderness, and that an x-ray of the wrist showed minimal effusion compatible with a soft tissue injury. (*Id.*)

While there were some inconsistencies concerning whether claimant yelled out in pain or whether swelling of the hand/wrist was present, claimant's testimony and his consistent reporting of the mechanism of injury persuasively support a conclusion that he engaged in potentially causal work activities. The testimonies of Mr. Sherman and Mr. Brophy do not contest that claimant was working with the equipment as described. Moreover, Mr. Sherman indicated that the flashlight he used was not particularly illuminating. In addition, both testified that it was possible to injure a body part in the dryer, and neither was close to claimant when the incident occurred. Thus, under these particular circumstances, claimant has established legal causation. *See Westmoreland v. Iowa Beef Processors*, 70 Or App 642 (1984), *rev den*, 298 Or 597 (1985) (even if a claimant lacks credibility or reliability in certain respects, he/she can still prove compensability if the remainder of the record supports the claim); *Imelda Bradshaw*, 70 Van Natta 542, 546 (2018).

Because we are persuaded that claimant was engaged in potentially causative work activities on February 3, 2018, we turn to the medical causation issue. On review, SAIF asserts that Dr. Hook's opinion is unpersuasive. For the following reasons, we disagree.

To establish a compensable injury, claimant must prove that a work event was a material contributing cause of his disability/need for treatment. *See* ORS 656.005(7)(a); ORS 656.266(1); *Albany Gen. Hosp. v. Gasperino*, 113 Or App 411, 415 (1992); *Dalton R. Vega*, 71 Van Natta 853, 856 (2019); *see also Boeing Aircraft Co. v. Roy*, 112 Or App 10, 15 (1992) (for initial claims, the claimant need not prove a specific diagnosis to prove a compensable injury); *Margarret Y. Interiano*, 71 Van Natta 111, 113 n 2 (2019).

This case involves conflicting medical opinions and, therefore, presents a complex medical question that must be resolved by expert opinion. *Barnett v. SAIF*, 122 Or App 279, 282 (1993); *Randy M. Manning*, 59 Van Natta 694, 695 (2007). We give more weight to those medical opinions that are well reasoned and based on complete information.¹ *Somers v. SAIF*, 77 Or App 259, 263 (1986).

At deposition, Dr. Hook agreed that, if a person had an injury consistent with the February 3, 2018, mechanism of injury, and thereafter sought treatment that showed "tenderness to palpation, decreased range of motion, and swelling," the injury was a material contributing cause of the person seeking treatment.² (Ex. 22-18, -19). Dr. Hook also agreed that if a person sustained the described mechanism of injury and subsequently sought treatment, that event would be a material cause of seeking the treatment. (*Id.*)

SAIF contends that, because claimant's hand/wrist was not swollen at the initial examination, and Dr. Button indicated that the effusion noted on x-ray was not "swelling," the history provided to Dr. Hook was inaccurate/insufficient. Yet, Dr. Hook did not limit his response to whether "swelling" was present. Rather, as stated above, he further indicated that, if someone had the described injury and

¹ We adopt the ALJ's reasoning that discounted the opinions expressed by Drs. Button and Vets.

² Dr. Hook had agreed earlier in the deposition that claimant's presentation of tenderness to palpation, decreased range of motion, and joint effusion, were consistent with a crush injury. (Ex. 22-13, 14). The radiologist interpreted the x-ray (taken on the date of injury) to show minimal joint effusion. (Ex. 5).

subsequently sought treatment, the incident would be a material contributing cause of seeking treatment. Moreover, Dr. Hook included the findings of tenderness and decreased range of motion, which were indisputably present. (Ex. 3).

In addition, Dr. Hook had previously indicated that, while the initial examination did not include a determination as to whether or not swelling was present, the x-ray of that same date showed “mild swelling.” (Ex. 21-2). Under such circumstances, Dr. Hook’s ultimate opinion persuasively establishes that the February 2018 work injury was a material contributing cause of claimant’s need for treatment.³ *See Angelo Ioannou*, 70 Van Natta 117, 122 (2018) (a physician’s opinion that the work injury was a precipitating cause of the claimant’s need for medical treatment was sufficient to meet a “material cause” standard).

In sum, for the reasons expressed above, as well as those in the ALJ’s order, the record persuasively establishes that claimant’s February 2018 work injury was a material contributing cause of his need for treatment/disability for his right upper extremity condition. Consequently, claimant’s injury claim is compensable. Accordingly, we affirm.

Claimant’s attorney is entitled to an assessed attorney fee for services on review. ORS 656.382(2), (3). 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 on review is \$4,000, payable by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant’s respondent’s brief and his counsel’s uncontested fee submission), the complexity of the issues, the benefit secured/value of the interest involved, the risk that claimant’s counsel might 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; *Gary E. Gettman*, 60 Van Natta 2862 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

³ Dr. Hook had previously indicated that claimant’s injury was consistent with a right hand crush injury and right hand numbness. (Ex. 20-1, -2). He subsequently stated that, if he set all credibility issues aside, that he could possibly support that the February 2018 event led to a need for treatment of a contusion. (Ex. 21-3). Finally, Dr. Hook’s deposition testimony further explained that, without the credibility concerns, he would attribute the need for treatment to the work injury, and that the diagnoses were consistent with the mechanism of injury. (Ex. 22-10). As explained above, we find claimant’s testimony to be credible. Under such circumstances, Dr. Hook’s opinion persuasively supports the compensability of the claim.

ORDER

The ALJ's order dated April 8, 2019 is affirmed. For services on review, claimant's attorney is awarded an assessed attorney fee of \$4,000, 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 September 27, 2019