
In the Matter of the Compensation of
THEODORE E. HORNBERGER, Claimant
WCB Case No. 01-00702
ORDER ON REVIEW
Black Chapman Et Al, Claimant Attorneys
Michael G Bostwick LLC, Defense Attorneys

Reviewing Panel: Members Langer, Lowell, Bock, Biehl, and Phillips Polich.¹ Members Biehl and Phillips Polich dissent.

Claimant requests review of Administrative Law Judge (ALJ) Stephen Brown's order that upheld the self-insured employer's partial denial of claimant's injury claim for an L3-4 disc condition. On review, the issue is compensability/responsibility.

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

In 1986, claimant suffered a low back injury while working in Alaska. (Tr. 7). That injury, which resulted in a spinal fusion from L4 to S1, was compensable under Alaska's workers' compensation laws. (Ex. 6; Tr. 8).

On July 20, 1999, claimant received injuries to a variety of body parts, including his low back, as the result of a "rollover" motor vehicle accident (MVA) while working for the Oregon employer (Exs. 9; 17). With regard to claimant's low back claim, the employer accepted a low back strain. (Ex. 47).

In October 2000, claimant requested that the employer accept an "L3-4 disc injury." (Ex. 40). In December 2000, the employer declined to accept that condition. (Ex. 42). Claimant requested a hearing.

At hearing, claimant asserted that the July 1999 MVA contributed to his L3-4 disc condition and that compensability/responsibility for that condition should be determined by the "last injury rule." Finding the "last injury rule" not applicable, the ALJ relied on the opinion of Dr. Marble (employer-arranged medical examiner) and concluded that claimant had failed to establish that the

¹ On June 7, 2002, pursuant to a notice of public meeting, the Board decided to sit together as a panel of five to review a designated group of cases. This case was one of that limited group. Although reviewed by all of the members, this case does not involve an issue of first impression that has a profound impact on the workers' compensation system.

major contributing cause of his L3-4 disc injury was the July 1999 vehicle accident. Consequently, the ALJ upheld the employer's denial of that condition.

On review, claimant continues to assert that the "last injury rule" places compensability/responsibility for his L3-4 disc condition with the Oregon employer. The employer responds that the "last injury rule" is not applicable. As explained below, we find that the "last injury rule" as encompassed within the "*Kearns* presumption" is not applicable to this claim.²

In *SAIF v. Webb*, 181 Or App 205 (2002), the court held that, in successive injury claims, it is unnecessary to resort to the judicially created "*Kearns* presumption" to assign responsibility for a "consequential condition" where the medical evidence establishes the major contributing cause of the "consequential condition" is a previously accepted compensable injury. "[A] 'consequential condition' is a separate condition that arises from the compensable injury, for example, when a worker suffers a compensable foot injury that results in an altered gait that, in turn results in back pain." *Fred Meyer, Inc., v. Evans*, 171 Or App 569, 573 (2000) (citing *Fred Meyer, Inc., v. Crompton*, 150 Or App 531, 536 (1997)).

Here, the medical evidence does not establish that claimant's L3-4 disc was injured in the 1986 work event. (Exs. 1 through 8). Rather, the medical evidence establishes that claimant's L4 to S1 fusion from the 1986 work event resulted in degeneration of the L3-4 disc. (Exs. 25-2; 26-7; 35-2; 41-14). Accordingly, we find that claimant's L3-4 disc condition is a "consequential condition" of his 1986 work injury. Based on that conclusion, it is unnecessary to apply the "last injury rule" or "*Kearns* presumption." See *Webb*, 181 Or App at 205.

Having reached this conclusion regarding claimant's L3-4 disc condition, we examine the medical record to determine whether the 1986 accepted condition is the major contributing cause of the disputed disc condition. If so, then it is not necessary to resort to the *Kearns* presumption to assign responsibility.

² *Kearns* created a rebuttable presumption that, in the context of successive accepted injuries involving the same body part, the last carrier with an accepted claim remains responsible for subsequent conditions involving the same body part. *Industrial Indemnity Co. v. Kearns*, 70 Or App 583, 585-87, (1984). Encompassed in the "*Kearns* presumption" is the "last injury rule," which fixes responsibility based on the last injury to have independently contributed to the claimant's current condition. *Id.* at 587. The carrier with the last accepted injury can rebut the *Kearns* presumption by establishing that there is no causal connection between the claimant's current condition and the last accepted injury. *Id.* at 588.

Dr. Wenner, the attending orthopedic physician, believed that the 1999 MVA directly injured claimant's L3-4 disc. (Exs. 22; 45). Dr. Wenner reasoned that because of the previous fusion at L4-5 and L5-S1 (from the 1986 injury) most of the force from the 1999 accident would have been concentrated at L3-4. (Ex. 22).

Dr. Greenburg, a consulting neurologist, believed that claimant's L3-4 disc pain was a combination of "a long standing degenerative process" related to the prior fusion from the 1986 injury and "acute exacerbation" from the July 1999 MVA. (Ex. 25-2). However, Dr. Greenburg was unable to state that the July 1999 MVA was the "major cause" of claimant's L3-4 disc condition. (Ex. 46-1).

Dr. Marble (employer-arranged medical examiner) believed that claimant's low back problems were the result of a combination of the preexisting segmental fusion (from the 1986 accident), that fusion's resulting degeneration at L3-4, and the 1999 MVA. (Ex. 26-7; 35-2). Dr. Marble described the 1999 accident as a "significant traumatic episode." (*Id.*) Weighing the various causes of claimant's low back condition, Dr. Marble opined that while there was no doubt that the 1999 injury did result in claimant becoming more symptomatic, it was not the major cause of claimant's L3-4 disc condition. (Ex. 35-2).

Dr. Fuller (employer-arranged medical examiner) believed that claimant had discogenic pain at L3-4. (Ex. 41-2). Explaining that the L3-4 disc was the transitional level above the preexisting fusion, and reasoning that 1999 MVA was not severe enough to cause a discogenic event or major trauma to claimant's back, Dr. Fuller opined that the 1999 MVA did not contribute to claimant's low back condition. (Ex. 41-13; 41-7; 41-17; 49-4).

Based on our review of the medical evidence (as set forth above), we conclude, as did the ALJ, that the major cause of claimant's disputed disc condition is degeneration of the disc which was a consequence of the prior fusion from the 1986 accepted claim. Consequently, the Oregon employer is not responsible for claimant's L3-4 disc condition. *Webb*, 181 Or App at 211.

ORDER

The ALJ's order dated August 3, 2001 is affirmed.

Entered at Salem, Oregon on August 22, 2002

Members Biehl and Phillips Polich dissenting.

We agree with the majority that claimant's current L3-4 disc condition is the result of two compensable events, the 1986 Alaska work injury and the 1999 Oregon work injury. We also agree that the medical evidence supports the conclusion that the Alaska injury contributed more to the disputed disc condition than the Oregon injury. However, as explained below, we conclude that initial responsibility for the disputed disc condition should be assigned to SAIF. Accordingly, we respectfully dissent.

We acknowledge that, if the rationale of *SAIF v. Webb*, 181 Or App 205 (2002) is applied, initial responsibility for claimant's current L3-4 disc condition appears to rest with the 1986 employer. However, *Webb* involved the initial assignment of responsibility between two Oregon employers. Here the 1986 employer is an out-of-state (Alaska) employer. In analyzing the circumstances presented in *Webb*, the court did not consider whether initial responsibility could be assigned to an out-of-state employer. Nor are we aware of the court addressing that issue in the context of successive injury claims. The court, however, has addressed that issue in the context of occupational disease claims. Thus, we look to those cases for guidance.

In occupational disease claims, the court has held that initial responsibility cannot be assigned to an out-of-state employer. See *The New Portland Meadows v. Dieringer*, 153 Or App 383, *on recon* 157 Or App 619, 622, *rev den* 328 Or 365 (1999). The policy behind the court's holding was that initial responsibility could not be assigned to an out-of-state employer over which the state of Oregon had no jurisdiction. *SAIF v. Henwood*, 176 Or App 431, 440 (2001); *Dieringer*, 157 Or App at 622. Thus, the court has held (in an occupational disease context) that initial responsibility for a claimant's carpal tunnel syndrome condition rested with an Oregon employer where: (1) the out-of-state contribution was the major contributing cause of the that condition; and (2) the Oregon employer's contribution was slight. *Henwood*, 176 Or App at 435.

Because the policy underlying the court's holding in *Dieringer* was grounded in Oregon's lack of jurisdiction over out-of-state employers, we find no persuasive reason not to apply that policy to successive injury claims, as well as to occupational disease claims. Consequently, we conclude that we cannot assign initial responsibility for claimant's current L3-4 disc condition to the Alaska employer. Because we find that the 1999 MVA did contribute to claimant's current L3-4 disc condition, we find the circumstances here analogous to

Henwood. Consequently, we would assign initial responsibility for claimant's current L3-4 disc condition to the Oregon insurer; *i.e.*, SAIF. Because the majority concludes otherwise, we respectfully dissent.