
In the Matter of the Compensation of
BROOKE E. LINDGREN, Claimant
WCB Case No. 01-01798
ORDER ON REVIEW
Schneider Et Al, Claimant Attorneys
Cavanagh & Zipse, Defense Attorneys

Reviewing Panel: Members Langer and Biehl.

Claimant requests review of Administrative Law Judge (ALJ) Kekauoha's order that upheld the insurer's denial of her occupational disease claim for right carpal tunnel syndrome. In her brief, claimant argues that the ALJ erred by allowing the insurer to amend its denial to include responsibility and by continuing the hearing for the insurer's medical report. On review, the issues are the ALJ's procedural ruling, continuance and responsibility. We reverse.

FINDINGS OF FACT

We adopt the ALJ's findings of fact.

CONCLUSIONS OF LAW AND OPINION

Amendment of Denial

Claimant contends that the ALJ erred by allowing the insurer to amend its denial at hearing to include responsibility. She relies on OAR 438-005-0053, arguing that the insurer's responsibility denial is invalid because it did not include information advising her to file separate claims against other potentially responsible carriers in order to protect her right to obtain benefits.

The Board's rules provide that amendments to the issues raised and relief requested at hearing "shall be freely allowed." OAR 438-006-0031, OAR 438-006-0036; *see SAIF v. Ledin*, 149 Or App 94 (1997) (a carrier may amend its denial at hearing). Where such an amendment is permitted, to afford due process, the responding party must be given an opportunity to respond to the new issues raised. *See* OAR 436-006-0091(3); *Sandra L. Shumaker*, 51 Van Natta 1981 (1999), *on recon* 52 Van Natta 33 (2000). In other words, a party's remedy for surprise and prejudice created by a late-raised issue is a motion of continuance. *See* OAR 438-006-0031, OAR 438-006-0036.

Here, the insurer denied claimant's occupational disease claim for right carpal tunnel syndrome (CTS) on the basis that it did not arise out of and in the course and scope of her employment. (Ex. 6). At the June 4, 2001 hearing, the insurer's attorney sought to amend the denial to include responsibility. (Tr. I-1). Claimant objected to the insurer's request, arguing that the denial had to be amended in writing. (Tr. I-2-3, -6). The insurer's attorney responded that claimant's remedy was to ask for a postponement. (Tr. I-4). The ALJ allowed the insurer to amend its denial to include responsibility, noting that the insurer's filing of an amended written response was sufficient. (Tr. I-8). The ALJ asked claimant if she wanted a postponement or continuance in light of the new issue, but claimant declined. (*Id.*)

We acknowledge that OAR 438-0005-0053(2)(c) provides that responsibility denials shall "[a]dvice the claimant to file separate, timely claims against other potentially responsible insurers or self-insured employers * * * in order to protect the claimant's rights to obtain benefits on the claim." The only other potentially responsible employer in this case is Framed Art Studios (Framed Art), which is partly owned by claimant. The insurer points out, however, that claimant was aware of her right to file a claim against a later employer, Framed Art, but she expressly refused to file such a claim. (Tr. II-10). Claimant chose not to file a claim against any other carriers and she declined the ALJ's offer to postpone or continue the case. Under these circumstances, we are not persuaded that the ALJ erred by allowing the insurer to amend its denial to include responsibility.

Continuance

Claimant argues that the ALJ abused his discretion by continuing the hearing for admission of Dr. Weller's report. She contends that the insurer had no valid excuse for not having its evidence available at the time of hearing.

ORS 656.283(7) provides that the ALJ is not bound by common law or statutory rules of evidence and may conduct a hearing in any manner that will achieve substantial justice. The statute has been interpreted to give ALJ's broad discretion in admitting or excluding evidence. *See Brown v. SAIF*, 51 Or App 389, 394 (1981). We review the ALJ's ruling on a motion for continuance for abuse of discretion. *SAIF v. Kurcin*, 334 Or 399 (2002).

Here, claimant asserts that the only possible basis for a continuance was for a reason that would justify a postponement, OAR 438-006-0091(4), and the only reason that would justify a postponement was incomplete case preparation.

OAR 438-006-0081(4) allows for a postponement if there is a finding of “extraordinary circumstances” beyond the control of the party requesting the postponement. Subsection (4) of OAR 438-006-0081 provides that “extraordinary circumstances” shall not include “[i]ncomplete case preparation, unless the [ALJ] finds that completion of the record could not be accomplished with due diligence.” Claimant argues that the ALJ could not possibly have found “due diligence” based on the facts in this case. We disagree.

At the June 4, 2001 hearing, the insurer’s attorney sought to hold the record open for Dr. Weller’s report. (Tr. I-2). At that time, Dr. Weller had already performed an examination of claimant on behalf of the insurer, but the insurer had not yet received his report. (Tr. I-1). Claimant objected to the admission of Dr. Weller’s report, arguing that the insurer had waited until the last minute to obtain a report. (Tr. I-2, -3). The insurer explained that it had requested Dr. Weller’s examination after receiving Dr. Peters’ May 10, 2001 report, which was the only report on causation at that time. (Tr. 1-4; Ex. 11). That report was submitted as an exhibit on May 14, 2001. At hearing, the insurer’s attorney asserted that after receiving the report, he acted diligently to schedule a medical examination on behalf of the insurer. (*Id.*) The insurer sent a letter to Dr. Weller on May 24, 2001, and Weller examined claimant on May 31, 2001. (Exs. 11A, 14). The record indicates the insurer received Dr. Weller’s report on June 5, 2001, the day after the first hearing. (Ex. 14). Under these circumstances, we find that the insurer established “due diligence” and the ALJ did not abuse his discretion in allowing a continuance.

Responsibility

Claimant filed a claim against the insured, but not against her later employer, Framed Art. The ALJ allowed the insurer to invoke the last injurious exposure rule (LIER) defensively. The ALJ found that, because claimant first sought treatment for her CTS condition when she was working for Framed Art, that employment was assigned initial responsibility. The ALJ reasoned that the medical evidence was insufficient to show that claimant’s previous employment was the sole cause of her condition or that it was impossible for her work at Framed Art to have contributed to her condition. The ALJ concluded that responsibility for claimant’s right CTS did not shift to the insurer.

Claimant contends that the medical opinions show that her later work did not independently contribute to the development of her right CTS and the ALJ erred by allowing the insurer to invoke the LIER defensively.

The LIER is both a rule of proof and a rule of assignment of responsibility. It is well established that a carrier may assert the rule of responsibility as a defense even when a claimant has chosen to prove actual causation. *Willamette Industries, Inc. v. Titus*, 151 Or App 76, 79 (1997); *Brent W. Collier*, 53 Van Natta 66 (2001). The LIER imposes responsibility only on the last employer that *contributed* to the worker's disease. *Roseburg Forest Products v. Long*, 325 Or 305, 310 (1997). Thus, a necessary factual predicate for the defensive use of the rule of responsibility is proof that the "subsequent employment actually contributed to the worsening of an underlying disease." *Titus*, 151 Or App at 81 (internal quotations omitted); *see also Safeco Ins. Co. v. Victoria*, 154 Or App 574, 577, *rev den* 327 Or 621 (1998).¹

For the following reasons, we find that the medical evidence in this case is insufficient to establish that claimant's later employment at Framed Art actually contributed to the worsening of her right CTS.

Claimant worked for the insured from 1994 to August 2000. Her job duties included cutting mats for picture frames. In about 1999, she became a production manager and her mat cutting activity increased to six hours or more per day. In January 2000, she noticed the onset of tingling in her right hand. Her symptoms progressively worsened to include numbness.

In August 2000, claimant terminated her employment and started Framed Art with a partner. Claimant attempted to cut mats, but had a recurrence of right hand numbness and tingling. Thereafter, claimant's business partner performed all of the mat cutting. In November 2000, claimant sought treatment for her right hand symptoms from Dr. Peters. (Ex. 1).

¹ As previously noted, the ALJ applied the "sole cause" or "impossibility" defensive prong of the LIER in determining that responsibility would have been presumptively assigned to the non-joined subsequent employer, Framed Art. However, as explained in *Titus*, the requirement that the employer prove that another employer "solely" caused the injury is necessary only *after* a worker invokes the LIER to prove compensability. *Titus*, 151 Or App at 83, n4.

Here, the insurer conceded that claimant's occupational disease claim was compensable. In light of such circumstances, claimant did not rely on the "rule of proof" prong of the LIER to establish the compensability of her claim. Thus, in accordance with the *Titus* rationale, it is not necessary to resort to the "sole cause" or "impossibility" defensive prong of the LIER. Rather, as explained above, before the defensive prong of the LIER can be used, the record must establish that the "subsequent employment actually contributed to the worsening of an underlying disease."

In May 2001, Dr. Weller examined claimant on behalf of the insurer. He reported that the factors contributing to the development of her CTS included her employment with the insured and “potential secondary issues such as persistence of some reduced hand activities at her current employment.” (Ex. 14-4). He expected that her symptoms would have resolved completely by now if her work for the insured were the only significant factor. (*Id.*) Dr. Weller explained:

“Thus there appears to be some degree of causality involved in her work at Framed Art Studios. I suspect this is of lesser importance, perhaps indeed confirmed by what appears to be a resolving condition at this time, since her features on nerve conductions are quite mild.” (Ex. 14-4, -5).

Dr. Weller found that claimant’s hand and wrist flexion involved with cutting mats was reasonably expected to cause CTS symptoms. (Ex. 14-4, -5). He concluded that claimant’s work for the insured was the major contributing cause of the worsening of the underlying pathology. (Ex. 14-5). When Dr. Weller was asked about the contribution from claimant’s later employment (Ex. 11A-3), he responded:

“It is possible that the employment since leaving [the insured] has contributed to the development of the condition we have diagnosed, but give[n] that the current condition is quite mild, I suspect the condition is in fact somewhat resolved since its inception and that therefore, work at Framed Art Studios or activities elsewhere have a relatively minimal influence.” (Ex. 14-5).

We find that Dr. Weller’s opinion that it was “possible” that claimant’s work at Framed Art contributed to the development of her condition is insufficient to establish that her later employment actually contributed to the worsening of her right CTS, particularly since he believed that work had a “relatively minimal influence.”

Similarly, we conclude that Dr. Peters’ opinion does not establish that claimant’s later employment at Framed Art actually contributed to the worsening of her right CTS. Dr. Peters, claimant’s attending physician, believed that claimant’s work for the insured was the major contributing cause of her right CTS. (Ex. 11). In a deposition, the parties asked Dr. Peters about Dr. Weller’s report.

When Dr. Peters was asked if he agreed it was possible that claimant's employment after the insured had contributed to the development of her CTS, he responded:

“Technically, yes. Any activity she does with her hands may prolong recovery from what occurred at the work. However, in my last phone call with her she had stated that almost all of her symptoms were resolving despite continuing to do framing. It just wasn't the heavy repetitive action that she was doing before.” (Ex. 15-13).

Dr. Peters agreed that any activity could potentially slow claimant's healing, but would not necessarily contribute to the cause. (*Id.*) He said that Dr. Weller's opinion that there appeared to be some degree of causality in claimant's work at Framed Art was “conjecture.” (Ex. 15-15). He said her new job “possibly” delayed her healing. (Ex. 15-16). Later in the deposition, Dr. Peters explained:

“I think that it is possible that anything that she does with her hands after the work situation at [the insured] may contribute towards some [CTS] inflammation that could either prolong the healing or continue it, if she continued doing a lot of repetitive action of the hands.” (Ex. 15-18).

Dr. Peters did not agree that claimant's work after she left the insured contributed to the development of her CTS, but he acknowledged it could have contributed to her symptoms. (Ex. 15-20).

In summary, we find that the medical evidence in this case is insufficient to establish that claimant's later employment at Framed Art actually contributed to the worsening of her right CTS. Because the necessary factual predicate for the defensive use of the LIER has not been established, the insurer cannot invoke the LIER as a defense. *See Titus*, 151 Or App at 81-83; *Katie J. Elmer*, 53 Van Natta 734 (2001) (the LIER could not be invoked defensively where there was no proof that subsequent employment independently contributed to the current disability). Instead, based on the opinions of Drs. Peters and Weller, we find that actual causation has been established with respect to the insurer and, therefore, the insurer is responsible for claimant's right CTS.

Claimant's attorney is entitled to an assessed fee for services in obtaining the rescission of the insurer's compensability denial prior to a decision by the ALJ. ORS 656.386(1). 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 regarding compensability is \$3,000, payable by the insurer. In reaching this conclusion, we have particularly considered the time devoted to the issue (as represented by the hearing record, including the hearing request filed by claimant's attorney), the complexity of the compensability issue, the value of the interest involved, and the risk that claimant's counsel might go uncompensated.

Furthermore, claimant's attorney is entitled to a fee under ORS 656.308(2)(d) for prevailing against the insurer's responsibility denial. Claimant does not assert there are "extraordinary circumstances" warranting an attorney fee in excess of the statutory maximum \$1,000 attorney fee. Therefore, after considering the factors set forth in OAR 438-015-0010(4), claimant's counsel is awarded a \$1,000 attorney fee for services relating to responsibility, payable by the insurer. *See Foster-Wheeler Constructors, Inc. v. Smith*, 151 Or App 155 (1997).

ORDER

The ALJ's order dated November 2, 2001 is reversed. The insurer's denial of claimant's right CTS is set aside and the claim is remanded for processing according to law. For services regarding compensability and responsibility, claimant's attorney is awarded \$4,000, payable by the insurer.

Entered at Salem, Oregon on August 16, 2002