In the Matter of the Compensation of
LARRY D. SILER, Claimant
WCB Case No. 00-08602
ORDER ON RECONSIDERATION
Aller & Morrison, Claimant Attorneys
Julie Masters, SAIF Legal, Defense Attorneys

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

On June 5, 2002, the Board abated its May 7, 2002 order that adopted and affirmed the Administrative Law Judge's (ALJ's) order setting aside the SAIF Corporation's denial of claimant's claim for multiple injuries resulting from a fall. This action was taken to consider SAIF's motion for reconsideration. Not having received a response from claimant, we proceed with our reconsideration.

As noted in the Board's previous order, SAIF argued that the "consequential condition" statute, ORS 656.005(7)(a)(A), applied to this case. The Board initially declined to address that argument, finding the issue was raised for the first time on review. SAIF now cites a portion of the transcript in which it alleges the issue was raised at hearing. (Tr. 4-5). Having reviewed that portion of the transcript, we agree with SAIF that the consequential-condition issue was sufficiently raised at hearing and now proceed to address the compensability issue with ORS 656.005(7)(a)(A) in mind.

FINDINGS OF FACT

We continue to adopt the ALJ's "Findings of Fact."

CONCLUSIONS OF LAW AND OPINION

Claimant sustained a compensable injury to his lower back in 1995 while working for a previous employer. This injury left claimant with an unpredictable tendency for his left leg to give out. In August 2000, claimant was working for SAIF's insured as a long-haul truck driver when his left leg gave out while he was

[1] Based on the reasoning expressed in *James R. Dunn*, 54 Van Natta 1490 (2002) and *Pablo Contreras*, 54 Van Natta 1623 (2002), this case has been reviewed by all five members. Although reviewed in this manner, the members agree that this case does not involve an issue of first impression that has a profound impact on the workers' compensation system.

working on top of a truckload of watermelons. Claimant lost his balance and fell backward 10-12 feet, suffering a laceration, neck pain and dizziness.

Claimant filed a claim with SAIF, which denied the claim on both compensability and responsibility grounds. Claimant filed a request for hearing from SAIF's denial, but did not join the previous carrier.

The ALJ set aside SAIF's denial, finding first that claimant proved a compensable claim under ORS 656.005(7)(a). Specifically, the ALJ determined that claimant sustained a compensable injury that arose out of and in the course of employment with SAIF's insured. The ALJ then found that the "combined condition" limitation in ORS 656.005(7)(a)(B) did not apply because there was no "combined condition." Having found that statute inapplicable, the ALJ then found SAIF responsible for claimant's multiple injuries resulting from the August 2000 fall.

On review, citing medical evidence from the only physician who addressed causation, Dr. Dietrich, who stated that leg weakness from the 1995 injury was the major contributing cause of the August 2000 fall, SAIF asserts that the prior carrier (which is responsible for the 1995 injury) should be responsible for claimant's August 2000 injury as a "consequential condition" under ORS 656.005(7)(a)(A). We agree.

At the outset, we address claimant's contention that ORS 656.005(7)(a)(A) is inapplicable because the August 7, 2000 injury did not flow "directly and inexorably" from the 1995 compensable injury under *Barrett Business Services v. Hames*, 130 Or App 190, *rev den* 320 Or 492 (1994). Claimant asserts that claimant's 10 to 12 foot fall from the truck is beyond the direct and inexorable casual link intended by the consequential injury statute and that the nature of the accident also distinguishes this case from our decision in *Clyde Willcutt*, 49 Van Natta 482 (1997), *aff'd SAIF v. Willcutt*, 160 Or App 568 (1999). We disagree.

In *Hames*, the claimant dislocated his shoulder at work. Because of that injury, the claimant's shoulder was replaced in its joint and immobilized. That, in turn, caused the claimant to develop a condition commonly called "frozen shoulder." To treat that condition, a surgeon prescribed "extremely aggressive" physical therapy to improve the range of shoulder motion. That treatment was reasonable and necessary. During the course of the physical treatment, which involved rigorous manipulation of the claimant's shoulder and arm, his right ulnar

nerve was injured. The court concluded that the ulnar injury was a compensable consequential condition under ORS 656.005(7)(a).

In reaching this conclusion, the court stated:

> "Once claimant's shoulder was dislocated, it had to be immobilized; once the shoulder was immobilized, adhesive capsulitis invariably developed; once adhesive capsulitis developed, physical therapy was necessary to restore shoulder and arm movement; and once appropriate physical therapy was employed, claimant's ulnar nerve was injured. Once claimant's shoulder was hurt, there was a certain, almost tragic, inevitability to what followed. There were no careening drivers or *falls from logging trucks*, just the direct consequences of treatment of the compensable injury." *Hames*, 130 Or App at 194 (emphasis added).

Claimant's fall from the truck in this case is similar to the logging truck example cited in *Hames* as an illustration of an intervening incident that could break the direct causal link between a compensable injury and a subsequently arising condition. However, the medical evidence in this case does not establish that the height of claimant's fall contributed to the severity of claimant's injuries. The most direct evidence on that issue is an examining physician's (Dr. Donahoo's) statement that claimant's landing after an 11 foot fall on packed gravel "could" do structural damage to the cervical spine, but Dr. Donahoo's statement does not establish this to a degree of medical probability. (Ex. 72-7). Based on this evidence, we conclude that the fall from the truck in this case did not break the direct causal link between claimant's 1995 compensable injury and his current injuries.

Because Dr. Dietrich specifically concluded that leg weakness from the prior 1995 injury was the major contributing cause of claimant's August 7, 2000 fall, we conclude that claimant's multiple injuries resulted "directly and inexorably" from the leg weakness due to the 1995 compensable injury. (Ex. 79-8). Because of this, we conclude that SAIF is not responsible for the August 7, 2000 injury, even though that injury occurred during the course and

scope of employment for SAIF's insured.[2] In reaching this conclusion, we apply ORS 656.005(7)(a)(A).

In *Conner v. B & S Logging*, 153 Or App 354 (1998), a claimant had an accepted 1985 claim with one carrier and a 1991 claim with a second carrier. We had determined that the second carrier was responsible for the current condition claim (which had not been accepted) pursuant to *Industrial Indemnity v. Kearns*, 70 Or App 583 (1984). After finding that the medical evidence showed that the second injury was the major contributing cause of a portion of the current condition, and citing ORS 656.005(7)(a)(A), the court, without relying on *Kearns*, affirmed our conclusion that the second carrier was responsible. 153 Or App at 162.[3]

We applied *Conner* in *Michael C. Reddin*, 50 Van Natta 1396 (1998), and *Albert H. Olson*, 51 Van Natta 685 (1999). In *Reddin*, we found that the medical evidence did not show that either one of the claimant's prior accepted injuries alone was the major contributing cause of the current condition. Thus, the responsibility issue was decided under the last injury rule and rebuttable presumption in *Kearns*. 50 Van Natta at 1399.

In *Olson*, we explained that we first determine whether the current condition has been previously accepted; if so, then responsibility is decided under ORS 656.308(1). If not, then responsibility is resolved under the *Kearns* presumption or ORS 656.005(7)(a)(A), depending on whether the medical evidence establishes that a prior accepted injury is the major contributing cause of

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[2] Although claimant argues that our decision in *Willcutt* is distinguishable, we disagree. In that case, the claimant fell in his driveway at home due to leg weakness resulting from leg nerve damage due to treatment for a previously accepted 1974 back injury. *Willcutt*, 160 Or App at 170. The court affirmed our determination that the claimant had sustained her burden of proving under ORS 656.005(7)(a)(A) that the cervical condition was a direct consequence of treatment the claimant received for a compensable 1974 low back injury. *Willcutt*, 160 Or App at 575. Likewise in this case, the medical evidence proves that claimant's fall from the truck was direct consequence of the weakness resulting from the prior compensable 1995 injury. Accordingly, we find that *Willcutt* supports our decision.

[3] In *SAIF v. Webb*, 181 Or App 205, 211 (2002), the court reaffirmed its reasoning in *Conner* and stated:

> "when the evidence establishes that the major contributing cause of a consequential condition is a previously accepted compensable injury, resorting to the judicially created Kearns presumption is unnecessary. Employers with an accepted claim are liable for a consequential condition if the accepted injury is the major contributing cause."

a consequential condition. 51 Van Natta at 687. In that case, because the medical evidence showed that one of the accepted claims was the major contributing cause of the consequential condition, the carrier that accepted that claim was responsible for the current condition.

In this case, claimant's multiple injuries resulting from the August 2000 fall are not previously accepted conditions with any employer (whether or not a party to this proceeding). Under such circumstances, neither ORS 656.308(1) nor the *Kearns* presumption under the "last injury rule" for multiple accepted claims for the same body part are applicable. Instead, consistent with the *Conner*/*Webb* rationale it is permissible to apply ORS 656.005(7)(a)(A) because the uncontroverted medical evidence from Dr. Dietrich establishes that the 1995 compensable injury with the prior carrier alone is the major contributing cause of claimant's consequential conditions.[4]

In summary, we find, based on our *de novo* review, that the medical evidence proves that the 1995 injury is the major contributing cause of claimant's current consequential conditions. Thus, we disagree with the ALJ's conclusion that SAIF is responsible for the August 2000 injury. Therefore, we reverse.

Accordingly, on reconsideration and in lieu of our May 7, 2002 order, the ALJ's order dated July 13, 2001 is reversed. SAIF's denial is reinstated and upheld. The ALJ's attorney fee award is also reversed. The parties' rights of appeal shall begin to run from the date of this order.

IT IS SO ORDERED.

Entered at Salem, Oregon on January 17, 2003

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[4] We recognize that this case differs factually from cases such as *Conner*, *Webb*, and *Olson* because those cases involved multiple prior accepted claims involving the same body part, whereas this case involves one prior accepted claim for an "unjoined' carrier. The primary purpose of our citations to *Conner*, *Webb*, and *Olson*, however, is to illustrate that ORS 656.005(7)(a)(A) is applicable when the evidence establishes that an accepted injury with another employer is the major contributing cause of claimant's consequential condition. Although in this case the carrier with the accepted claim is not a joined party, we detect nothing from the reasoning expressed in C*onner* and its progeny that would prohibit application of the "consequential condition' standard under these circumstances where the "joined" carrier contests compensability and responsibility for the claim based on a "consequential condition" theory.

Members Biehl and Phillips Polich dissenting.

Claimant sustained multiple injuries in the course and scope of employment for SAIF's insured after a 10 to 12 foot fall from the top of a truckload of watermelons. Despite the clearly compensable nature of claimant's injuries, the majority nevertheless concludes that SAIF is not responsible for this injury because, under ORS 656.005(7)(a)(A), claimant's injuries are a direct consequence of a prior injury for a previous unjoined employer. For the following reasons, we believe the majority incorrectly determines that this statute applies to this case.

Under ORS 656.005(7)(a)(A), a consequential condition must flow "directly and inexorably" from the previously accepted injury. *Barrett Business Services v. Hames*, 130 Or App 190, *rev den* 320 Or 492 (1994). In that case, the court held that the claimant's treatment for an accepted shoulder dislocation directly led to an ulnar nerve condition that it determined to be a compensable consequential condition. In emphasizing the inevitability of the consequential condition resulting from the compensable shoulder injury, the court gave a couple of examples of intervening incidents that would have broken the causal link intended by the consequential condition statute. One of those examples was a fall from a logging truck. Although the majority concludes otherwise, we would find that a 10 to 12 foot fall from the truck lies clearly within the court's example and establishes that claimant's multiple injuries in this case are not a consequential condition within the meaning of ORS 656.005(7)(a)(A).

As noted in claimant's brief, every citation SAIF adduces in support of its position save one involves a consequential condition in the same body part that was the subject of the original injury. *See Thomas L. Hinson*, 51 Van Natta 1942 (1999) (low back instability and facet arthropathy determined to be a compensable consequence of previously accepted L4-5 disc herniation); *Dennis D. Hall*, 51 Van Natta 1537 (1999) (right knee chondromalacia held to be a compensable consequence of accepted right knee sprain); *Albert H. Olson*, 51 Van Natta, 51 Van Natta 658 (1999) (failed back syndrome was a compensable consequence of previously accepted low back injury). None of the accepted consequential conditions in those cases involved, as here, a new and discrete compensable work injury such as a fall from the top of a truck.

Granted, *SAIF v. Willcutt*, 160 Or App 568 (1999) involved a subsequent injury to a body part unrelated to the originally accepted injury. In that case, a neck injury resulted from a fall in the claimant's driveway because of nerve

damage in the claimant's leg arising from treatment of a previously accepted back injury. The court determined that the neck injury was a consequential condition under ORS 656.005(7)(a)(A). However, this case is clearly distinguishable from *Willcutt*. The claimant in *Willcutt* fell while merely walking on the ground, while clamaint here fell from a height of 10 to 12 feet, a height that placed him at increased risk for injury and obviously contributed to the severity of his injuries.

In conclusion, the majority errs in allowing SAIF to use ORS 656.005(7)(a)(A) as a shield to its liability for injuries resulting from claimant's fall from his truck. As a result, we must part company and dissent.