

In the Matter of the Compensation of
LLOYD E. GAROUTTE, Claimant

WCB Case No. 02-02789

ORDER ON REVIEW

Hooton Wold & Okrent LLP, Claimant Attorneys

J Keene, Reinisch et al, Defense Attorneys

Reviewing Panel: Members Langer, Phillips Polich and Bock. Member Philips Polich dissents.

Claimant requests review of Administrative Law Judge (ALJ) Herman's order that: (1) upheld the self-insured employer's denial of his left knee degenerative arthritis condition; and (2) declined to assess a penalty for an allegedly untimely denial. On review, the issues are compensability, penalties and (potentially) responsibility.

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

In upholding the employer's denial, the ALJ first determined that claimant's left knee condition was "work-related" because a prior 1984 injury and related surgery for which a previous, unjoined carrier was responsible was the major contributing cause of his arthritis condition. However, applying *David E. Stutzman*, 50 Van Natta 776, *on recon*, 50 Van Natta 889 (1998) (holding that, where the carrier and the claimant were the only parties to the dispute and there was no attempt to shift responsibility to a prior carrier, the issue was compensability, rather than responsibility), the ALJ nevertheless determined that the left knee condition was not compensable as to the employer. The ALJ reached this conclusion because the medical evidence did not establish that the October 2000 injury for which the employer was responsible was the major contributing cause of the degenerative arthritis condition under either ORS 656.005(7)(a)(B) or 656.005(7)(a)(A).

On review, claimant contends that the ALJ should have applied *Industrial Indemnity Co. v. Kearns*, 70 Or App 583 (1984) and set aside the employer's denial because the October 2000 injury independently contributed to claimant's left knee condition. We disagree.

In this case, the employer, who had previously accepted a left knee strain and meniscus tear resulting from an October 2000 work injury, exercised its

statutory right to deny the degenerative arthritis condition under ORS 656.262(6) and has not attempted to shift responsibility to the earlier carrier. Under such circumstances, to prove compensability, claimant was required to prove that the October 2000 work injury or the accepted strain/tear was the major contributing cause of the left knee degenerative arthritis condition. *Stutzman*, 50 Van Natta at 777. We agree with the ALJ's reasoning in determining that the medical evidence failed to satisfy the major contributing cause standard.

Moreover, even if *Stutzman* did not preclude application of the *Kearns* presumption, we would still uphold the employer's denial because the medical evidence establishes that the 1984 injury and surgery was the major contributing cause of the consequential arthritis condition. *SAIF v. Webb*, 181 Or App 205, 211 (2002) (where 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). Accordingly, we agree with the ALJ that the employer's denial should be upheld. Therefore, we affirm.

ORDER

The ALJ's order dated August 1, 2002, as reconsidered on November 6, 2002, is affirmed.

Entered at Salem, Oregon on April 25, 2003

Board Member Phillips Polich dissenting.

Upholding the self-insured employer's denial, the majority holds that claimant failed to prove a compensable claim because he failed to prove that the October 2000 injury was the major contributing cause of his left knee condition. In so ruling, the majority rejects claimant's contention that the employer's denial should be set aside under the authority of *Industrial Indemnity v. Kearns*, 70 Or App 583 (1984). Because I find claimant's argument persuasive and would set aside the denial, I dissent.

This case involves two compensable left knee injuries: one occurred in 1984 and the other in October 2000. Only the employer responsible for the October 2000 injury was joined in these proceedings. In *Kearns*, the court held that, in cases of successive injuries such as this, the carrier on the risk at the time of the last injury is held responsible for future medical treatment unless it can demonstrate that the last injury did not contribute independently to the claimant's

condition. The medical evidence in this case establishes that claimant's arthritis of the left knee was caused in major part by the combined effect of the two compensable injuries. (Exs. 50, 52 B, 57). Under these circumstances, the October 2000 injury has contributed independently to claimant's current left knee condition. Thus, claimant's current left knee condition is compensable and the 2000 employer should be responsible.

The majority, however, allows this employer to escape responsibility by requiring claimant to prove compensability as to a specific date of injury, in this case October 24, 2000. Moreover, the majority allows the employer to, in effect, litigate responsibility without having first issued a responsibility denial and providing claimant the opportunity to join the responsible parties. The medical evidence clearly indicates that claimant's left knee condition is the result of the combined effect of two compensable injuries, yet, by requiring that claimant prove that the October 2000 injury is the major contributing cause of the condition, the majority permits the employer to evade responsibility for a clearly compensable condition.

Granted, *SAIF v. Webb*, 181 Or App 205 (2002) has made inroads into the last injury rule of cases such as *Kearns* and *Boise Cascade v. Starbuck*, 296 Or 238 (1984). However, *Webb* occurred in a responsibility context, while this case also involves compensability. The question presented here is whether, to prove compensability, a claimant must prove compensability as to a specific date of injury. The majority apparently believes that a claimant must do so. However, I disagree and submit that the majority's decision virtually eliminates responsibility litigation and renders ORS 656.307 and 656.308 meaningless.

In conclusion, I would find that claimant has proved a compensable claim against the only employer joined in these proceedings. Given the employer's failure to properly raise a responsibility issue and the fact that the 2000 injury independently contributed to claimant's left knee condition means that this employer should also be held responsible for the current left knee condition. Because the majority concludes otherwise, I must part company and dissent.