
In the Matter of the Compensation of
MARK E. DENNY, Claimant
WCB Case No. 02-03285, 01-09298, 01-07059
ORDER ON REVIEW
Philip H Garrow, Claimant Attorneys
Johnson Nyburg & Andersen, Defense Attorneys
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Reviewing Panel: Members Phillips Polich and Langer.

Liberty Northwest Insurance Corporation (Liberty) requests review of those portions of Administrative Law Judge (ALJ) Tenenbaum's order that: (1) set aside its denial of claimant's occupational disease claim for a bilateral shoulder condition; (2) upheld Royal and Sun Alliance's (RSA) denial of claimant's occupational disease claim for the same condition; and (3) upheld ITT Specialty Risk Service's (SRS) denial of claimant's occupational disease claim for the same condition. On review, the issue is responsibility.¹

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

The ALJ concluded that claimant's "onset of disability" occurred (at the latest) in August 1998, and, therefore, initial responsibility under the last injurious exposure rule (LIER) was assigned to RSA as the "presumptively responsible insurer." Relying on the opinion of the attending physician, Dr. Jacobson, the ALJ determined that claimant's subsequent employment exposure during SRS' coverage period, and ultimately Liberty's coverage period, actually contributed to a worsening of claimant's bilateral shoulder condition, thereby holding that responsibility for the claim shifted to Liberty. Liberty contends on review that Dr. Jacobson's opinion is insufficient to transfer responsibility forward from SRS to Liberty.² We disagree.

¹ Claimant initially filed a cross-request for review contesting the ALJ's attorney fee award. Claimant has subsequently withdrawn his cross-request.

² The ALJ found that, based on Dr. Jacobson's opinion, there was an actual contribution to a worsening of claimant's condition due to the employment activity during SRS' coverage period, thereby shifting responsibility from RSA to SRS. SRS does not dispute this determination by the ALJ. Because we agree with the ALJ's determination that the employment conditions during SRS' coverage period made an actual contribution to a worsening of claimant's condition, and no dispute was raised by SRS, we do not address this issue.

The correct test for transferring liability from the initially responsible insurer to a subsequent insurer's coverage period is whether claimant's subsequent work exposure "actually contributed to a worsening of the condition." See *Reynolds Metals v. Rogers*, 157 Or App 147, 153 (1998); *Oregon Boiler Works v. Lott*, 115 Or App 70, 74 (1992). If an actual contribution to a worsening of the condition is established, the subsequent insurer is responsible for claimant's condition.

The only opinion addressing whether there has been an actual contribution to a worsening of claimant's bilateral shoulder condition is the opinion offered by Dr. Jacobson. Dr. Jacobson's July 26, 2002 concurrence confirmed his opinion that claimant's disease process was in place by May 1, 2001, and that "it did not change in any material fashion up until his surgeries in September and October 2001." (Ex. 125-2).

In his deposition, Dr. Jacobson originally answered no when asked whether claimant's work activities in May of 2001, when Liberty had assumed coverage, made any contribution to the shoulder condition. (Ex. 126-30). However, after further questioning, Dr. Jacobson agreed that the continued lifting claimant performed as a butcher in 2000 and 2001 would have continued to cause damage to the fraying of the shoulder tendon. (Ex. 126-41). Dr. Jacobson explained that while any contribution from the employment activity during Liberty's coverage period would be "negligible," there would be some contribution, and that there would be an incremental progression of pathology based on "the injurious nature of the functions of a butcher." (Ex. 126-42-43). Dr. Jacobson agreed that the work activities do have an actual contribution to claimant's pathology, and that the difference is the degree of that contribution. (Ex. 126-46).

Absent any information regarding claimant's work activities, Dr. Jacobson could not say whether the work made any contribution. (Ex. 126-47). However, Dr. Jacobson stated that if claimant was performing his duties as a butcher, there was a contribution from the work activities performed during Liberty's coverage period. (Ex. 126-51). Dr. Jacobson's testimony as a whole establishes that if claimant performed regular job duties as a butcher during his employment under Liberty's coverage, there was an actual contribution to a worsening of his bilateral shoulder condition.

Liberty relies on *Robert L. Hagebush*, 54 Van Natta 1816 (2002), in support of its assertion that a negligible contribution does not constitute an actual worsening resulting in a transfer of responsibility. In *Hagebush*, the claimant filed

claims against two separate employers for his bilateral carpal tunnel syndrome. Based on the date of first treatment, we determined that presumptive responsibility rested with the earlier employer, and that there was insufficient evidence to establish that the later employment period made an actual contribution to a worsening of the claimant's carpal tunnel syndrome. *Id.* In *Hagebush*, the claimant's treating physician concluded that the earlier employment was the primary contributor to the claimant's condition, but could not state that there was anything more than a possible contribution from the later employment period. *Hagebush* at 1817. The earlier employer relied on a consulting physician to establish an actual contribution. That physician agreed that it was probable that the claimant's carpal tunnel syndrome was worse during the later employment period, but did not state whether the condition was worse due to the claimant's later employment. That physician also acknowledged that "there is no direct correlation between the presence of CTS symptoms and the progression of the disease." *Hagebush* at 1817-18.

Here, Dr. Jacobson specifically stated that if claimant was performing his duties as a butcher, there was a contribution from the work activities performed during Liberty's coverage period. (Ex. 126-51). He also agreed that all the work activities do have an actual contribution to claimant's pathology, and that the difference is the degree of that contribution. (Ex. 126-46). Unlike the consulting physician in *Hagebush*, Dr. Jacobson affirmatively attributed claimant's condition to his work activities, and explained the incremental progression of the disease pathology when determining whether there had been a contribution. Dr. Jacobson's testimony establishes an actual contribution to a worsening of claimant's condition if claimant was performing butcher activities during Liberty's coverage period.

Claimant's testimony reflects that he was performing butcher-type work activity during his employment under Liberty's coverage. When asked whether he performed his regular duties when he returned to work during the first week of May, 2001, claimant responded "Yes, as far as I can remember." (Tr. 44). When later asked whether he actually recalled what he did those few days he worked, claimant responded "No. Just general worked." (Tr. 77). While claimant was restricted to modified work by Dr. Jacobson for the period of March 26, 2001 through April 15, 2001, there is no evidence in the record that those restrictions remained in effect after April 15, 2001. (Ex. 62). Claimant testified that even when he was on light duty, his job duties at work did not change, and he did not get any assistance from his employer. (Tr. 41). Based on claimant's testimony,

we find that claimant performed his regular work duties as a butcher during the period of employment under Liberty's coverage.

Based on Dr. Jacobson's opinion that the employment conditions during Liberty's coverage period would have made an actual contribution to a worsening of claimant's bilateral shoulder condition if the work duties were those of a butcher, and claimant's testimony that his work activity during Liberty's coverage period constituted his regular work duties, we find that there was an actual contribution to a worsening of claimant's bilateral shoulder condition due to his work activity during Liberty's coverage period. Thus, responsibility shifts to Liberty as the responsible insurer.

ORDER

The ALJ's order dated March 10, 2003 is affirmed.

Entered at Salem, Oregon on August 13, 2003