

In the Matter of the Compensation of
JAMES A. SUMPTER, Claimant
WCB Case No. 01-08400, 01-03382, 01-01036
ORDER ON REVIEW
Bottini Bottini & Oswald, Claimant Attorneys
Sather Byerly & Holloway, Defense Attorneys
Randy Rice AAL, Defense Attorneys
Cavanagh & Zipse, Defense Attorneys

Reviewing Panel: Members Langer and Biehl.

Safeco Insurance Company, on behalf of Gladstone Machine, Inc. (Safeco/Gladstone), requests review of Administrative Law Judge (ALJ) Lipton's order that: (1) set aside its responsibility denial of claimant's occupational disease claim for a left shoulder calcific tendinitis condition; (2) upheld Safeco Insurance's responsibility denial of the same left shoulder condition, issued on behalf of Boring Machine Works; and (3) upheld Farmers Insurance Co.'s denial of the same condition, issued on behalf of Boring Machine Works. On review, the issue is responsibility.

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

The ALJ set aside Safeco/Gladstone's denial based on the opinion of Dr. Edelson that claimant's employment in the summer of 2000 (while Safeco was on the risk) was the major contributing cause of his left shoulder calcific tendinitis. Alternatively, the ALJ determined that Safeco/Gladstone was responsible under the last injurious exposure rule (LIER).

On review, Safeco/Gladstone contends that ORS 656.308(1) applies to determine responsibility, because claimant's current left shoulder condition is the same condition Farmers accepted as part of a 1996 right hand claim. We disagree.

ORS 656.308(1) applies when a "new" compensable injury includes the "same condition" previously accepted. *See, e.g., Sanford v. Balteau Standard*, 140 Or App 177, 186 (1996); *SAIF v. Yokum*, 132 Or App 18, 23 (1994). A new compensable injury "involves the same condition" if the new injury meets either of the following definitions: "6a: to have within or as part of itself: CONTAIN, INCLUDE *** c: to have an effect on: concern directly: AFFECT ***." *Multifoods Specialty Distribution v. McAtee*, 333 Or 629, 635 (2002) (quoting Webster's Third New Int'l Dictionary, 1191 (unabridged ed. 1993)).

Here, Farmers accepted a right hand “crush injury” in connection with claimant’s 1996 compensable right hand injury. (Ex. 1F). In addition, on May 12, 1998, Farmers indicated that it had accepted a “left shoulder strain” as a compensable consequence of claimant’s right hand injury. (Ex. 18; Tr. 42, 58). However, claimant’s current left shoulder condition has been diagnosed as calcific tendinitis. (See Exs. 34, 40-5). There is no medical evidence in the record that establishes that claimant’s current left shoulder calcific tendinitis “has within or as part of itself” or “contains, includes or affects,” claimant’s accepted right hand crush injury or left shoulder strain conditions.

Although Safeco/Gladstone contends that the contemporaneous medical evidence establishes that claimant’s left shoulder condition in 1997 was, in fact, tendinitis, we generally will not look behind the express language of a carrier’s written acceptance. See *Johnson v. Spectra Physics*, 303 Or 49, 56 (1987); *Jerry W. Gabbard*, 54 Van Natta 1022 (2002) (where there has been a written acceptance, the scope of acceptance encompasses only those conditions specifically or officially accepted in writing); *Quinna J. Nolan*, 53 Van Natta 226, 228 (2001).¹

Thus, we conclude that claimant’s new “calcific tendinitis” condition does not involve the previously accepted condition. Accordingly, ORS 656.308(1) does not apply. See *Refugio A. Ruiz*, 54 Van Natta 696 (2002).

In addition, even assuming that the calcific tendinitis was a “consequential condition” of the accepted right hand crush injury or left shoulder strain conditions under ORS 656.005(7)(a)(A), because the calcific tendinitis condition (the consequential condition) itself has never been accepted, ORS 656.308(1) does not apply. See *SAIF v. Webb*, 181 Or App 205, 209 n3 (2002).

Because ORS 656.308(1) does not apply to this responsibility dispute, responsibility is determined under the LIER. As a rule of assignment of responsibility, the LIER assigns full responsibility to the last employer that could have caused claimant’s injury. *Runft v. SAIF*, 303 Or 493, 499 (1987). The “onset

¹ Alternatively, even assuming, in reference to the contemporaneous medical reports, that Farmers accepted a left shoulder tendinitis condition in 1997, “tendinitis” is “inflammation of tendons and tendon-muscle attachments.” By contrast, “calcific tendinitis” is “Inflammation and calcification of the subacromial or subdeltoid bursa resulting in pain, tenderness and limitation of motion in the shoulder.” *Dorland’s Illustrated Medical Dictionary* 1667 (28th ed. 1994). Therefore, in the absence of medical evidence supporting such a conclusion, we are not persuaded that “tendinitis” is the same condition as “calcific tendinitis.”

of disability” is the triggering date for determining which employment is the last potentially causal employment. *Bracke v. Baza’r, Inc.*, 293 Or 239, 248 (1982). Where a claimant seeks or receives medical treatment for the compensable condition before experiencing time loss due to that condition, it is appropriate to designate a triggering date based on either the seeking or receiving of medical treatment, whichever occurs first. *Agricom Ins. v. Tapp*, 169 Or App 208, 213 (2000); see *Reynolds Metals v. Rogers*, 157 Or App 147, 153 (1998) (the date of the first medical treatment is the triggering date that dictates which period of employment is assigned initial responsibility for the treatment).

Here, the record reflects that claimant first sought treatment for his left shoulder calcific tendinitis symptoms while Safeco/Gladstone was on the risk. (Ex. 34). Thus, Safeco/Gladstone is initially responsible. As the initially responsible carrier, and the last carrier, Safeco/Gladstone is responsible for claimant’s left shoulder condition unless it proves either: (1) that it was impossible for conditions at its workplace to have caused the disease in this particular case; or (2) that the disease was caused solely by conditions at one or more previous employments. See *Roseburg Forest Products v. Long*, 325 Or 305, 313 (1997). Here, there is no such evidence.² Accordingly, we agree with the ALJ’s decision to assign responsibility to Safeco/Gladstone.

ORDER

The ALJ’s order dated March 29, 2002, as corrected on April 17, 2002, is affirmed.³

Entered at Salem, Oregon on February 4, 2003

² Alternatively, we agree with the ALJ’s reliance on Dr. Edelson’s opinion, establishing actual causation by claimant’s employment with Safeco/Gladstone.

³ As the only issue is responsibility, claimant’s attorney is not entitled to an additional fee on review. ORS 656.308(2)(d). Although claimant alludes to entitlement to an assessed fee under ORS 656.386(1) (claimant’s respondent’s brief at 5), at hearing, claimant agreed that the only issue was responsibility. (Tr. 5).