In the Matter of the Compensation of
JOHN E. SAMPSON, Claimant
WCB Case No. 03-00842, 01-09554, 01-01130, 01-07009
ORDER ON RECONSIDERATION
Fontana & Takaro, Claimant Attorneys
Julie Masters, SAIF Legal, Defense Attorneys
Scheminske et al, Defense Attorneys
Mark P Bronstein, Defense Attorneys
Johnson Nyburg & Andersen, Defense Attorneys

Reviewing Panel: Members Biehl, Lowell and Bock. Member Lowell concurs.

On April 20, 2004, we abated our March 22, 2004 order that, among other decisions, affirmed those portions of the Administrative Law Judge's (ALJ's) order that: (1) set aside Liberty Northwest Insurance Corporation's denial of claimant's occupational disease claim for bilateral Raynaud's syndrome, issued on behalf of Action Auto Glass; and (2) upheld the denials of claimant's occupational disease claims for the same condition issued by Wausau Insurance and the SAIF Corporation on behalf of Safelite Glass Corporation, Action Auto Glass and Glass Pro, Inc. We took this action to consider Liberty's motion for reconsideration. Having received the parties' arguments, we proceed with our reconsideration.

In our original order, we adopted the ALJ's determination that responsibility for claimant's bilateral Raynaud's syndrome should not shift from Liberty to SAIF/Glass Pro. Liberty argues that the ALJ's analysis of the medical evidence was incorrect, and that the medical opinions of Drs. Edwards and Duncan are more persuasive than that of Dr. Braun, on whose opinion the ALJ relied in determining that claimant's employment for SAIF/Glass Pro did not independently contribute to the disputed condition.

After again considering the medical evidence, we conclude that responsibility for the disputed condition should shift to SAIF/Glass Pro.[1] We reason as follows.

Claimant was employed by Liberty's insured when he first sought treatment for his Raynaud's Syndrome. The responsibility issue turns on whether claimant's

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

employment for SAIF/Glass Pro actually contributed to a worsening of the disease. *See Liberty Northwest Ins., Corp v. Tobola*, ___ Or App ___ (September 22, 2004) (carrier failed to establish that a subsequent employment actually contributed to a worsening of hearing loss condition); *Willamette Industries Inc. v. Titus*, 151 Or App 76, 81 (1997). If so, then responsibility for the disputed condition would shift to SAIF/Glass Pro.

The ALJ determined that there was no actual contribution from the SAIF/Glass Pro employment. In making that determination, the ALJ relied on the medical opinion of Dr. Braun, a urologist and surgeon, who reviewed medical records for SAIF/Glass Pro. The ALJ found the contrary opinions of Dr. Edwards, the treating vascular surgeon, and Dr. Duncan, an examining vascular surgeon, to be less persuasive.

Because of the divergence in medical opinion regarding causation, we are faced with a complex medical question to be resolved by expert medical opinion. *Barnett v. SAIF*, 122 Or App 279 (1993); *Paula G. Acheson*, 56 Van Natta 1382 (2004). Where there is a dispute between medical experts, we give more weight to those medical opinions that are both well reasoned and based on complete information. *Somers v. SAIF*, 77 Or App 259, 263 (1986).

Drs. Edwards and Duncan opined that claimant's use of a vibrating electric "FEIN" Knife at SAIF/Glass Pro contributed to a pathological worsening of claimant's Raynaud's Syndrome. (Exs. 18, 28, 36). Dr. Braun, on the other hand, concluded that these work activities did not contribute to further progression of the disease process, asserting that any causal relationship was speculative. (Ex. 34).

We consider Dr. Braun's opinion to be unpersuasive. First, Dr. Braun, a urologist, never examined claimant, but rather expressed his opinion in a two-page concurrence report based on his review of medical records. (Ex. 34). Second, Dr. Braun postulated that there was no clear medical proof of a cause and effect relationship between the use of vibratory tools and the development of Raynaud's syndrome. However, this opinion is at odds with the insurers' concession that the disputed Raynaud's condition is compensable. Third, Dr. Braun's opinion lacks any discussion of claimant's long-term exposure using another device called a "Chicago Knife" and how subsequent exposure to use of the "FEIN" knife may have affected the already existing Raynaud's syndrome.

On the other hand, Dr. Edward's opinion that continued exposure to any vibrating tool such as the FEIN knife would cause increased damage was not

speculative. (Ex. 18). While he could not cite specific literature regarding the impact of a FEIN knife (Ex. 28-58), Dr. Edward's opinion was based on claimant's history and studies regarding the effects of the use of vibratory tools at work. Moreover, Dr. Edwards, a vascular surgeon, considered claimant's prior use of the "Chicago Knife" and then considered whether the continued use of a FEIN knife contributed to a pathological worsening of claimant's Raynaud's syndrome. Dr. Edwards answered that question in the affirmative in a deposition during which his opinion was thoroughly explored. (Ex. 28). We find that his opinion to be well reasoned and explained and based on an accurate history.[2]

Accordingly, we find that claimant's employment at SAIF/Glass Pro actually contributed to a worsening of the disputed condition. Therefore, SAIF/Glass Pro is responsible for claimant's Raynaud's syndrome.

We now turn to SAIF/Glass Pro's cross-request for reconsideration regarding the penalty issue. In our original order, we assessed a 25 percent penalty based on amounts due under the Liberty claim for SAIF/Glass Pro's untimely denial of responsibility. We based that penalty on amounts due at the time of hearing. SAIF/Glass Pro requests that we modify our order so that the penalty is based on amounts then due, if any, as of the date of its denial. We agree with SAIF/Glass Pro's argument.

ORS 656.262(11)(a) provides for a penalty of "up to 25 percent of the amounts then due" if a carrier unreasonably delays or unreasonably refuses to pay compensation. A penalty for an employer's unreasonably late denial should be based on the amount due at the time of the denial, rather than the amount due at the time of hearing. *See Wacker Siltronic Corp. v. Satcher*, 91 Or App 654, 657-58 (1988); *Deborah J. Roeters*, 55 Van Natta 1487, 1489 (2003) (penalty for untimely denial based on amounts then due at the time of the denial).

Based on the aforementioned cases, we modify the ALJ's order to assess a 25 percent penalty on "amounts then due" at the time of SAIF/Glass Pro's March 6, 2003 denial. As a result of our responsibility determination, those "amounts then due" are the benefits now payable under SAIF/Glass Pro's claim.

[2] Dr. Duncan, a vascular surgeon, also opined that claimant's employment at SAIF/Glass Pro actually contributed to a worsening of the Raynaud's syndrome. (Ex. 36).

Accordingly, on reconsideration, in lieu of our prior order, we reverse that portion of the ALJ's order that set aside Liberty/Action Auto Glass' denial. That denial is reinstated and upheld. SAIF/Glass Pro's denial is set aside and claim is remanded to SAIF for processing in accordance with law. As a result of this responsibility determination, the ALJ's $1,000 attorney fee award under ORS 656.308(2)(d) shall now be paid by SAIF/Glass Pro. The ALJ's 25 percent penalty award is modified to assess that penalty on "amounts then due" under the SAIF/Glass Pro claim at the time of SAIF/Glass Pro's denial. The remainder of our prior order, as modified and supplemented herein, is republished. The parties' rights of appeal shall begin to run from the date of this order.

IT IS SO ORDERED.

Entered at Salem, Oregon on September 30, 2004

Board Member Lowell concurring

I agree with the lead opinion's resolution of the merits of responsibility issue. However, I write separately because this case raises concerns about how the litigation process, not the medical evidence, can change the outcome when applying the last injurious exposure rule (LIER).

Here, claimant sought treatment for Raynaud's syndrome in November, 2000 while working for Action/Liberty. Action/Liberty denied the claim in February, 2001, stating "this diagnosed condition may be related to either a period of work exposure prior to this claim date or to an accepted, compensable injury you have suffered."

By the time of Action/Liberty's denial, the condition had been diagnosed and treated, although the claim had not been accepted. In the 26 months it took to get this claim litigated at the hearing level and the record closed, the claimant went on to work for a new employer (Glass Pro/SAIF).

Action/Liberty argues that Dr. Edward's opinion establishes an independent contribution/pathological worsening while working at Glass Pro/SAIF. I agree. Dr. Edwards did not say, however, that the work at Glass Pro/SAIF represented the major cause of the condition. Therefore, if Action/Liberty had accepted the claim in 2001, and denied responsibility in 2003, the evidence would likely not support a shift forward in responsibility to Glass Pro/SAIF under ORS 656.308 (1).

Nevertheless, because of the 2-½ years it took to complete the litigation record, initial responsibility for the condition was not decided until 2003. By that time, there is evidence of independent contribution under Glass Pro/SAIF's employment period, and thus application of LIER would shift responsibility to Glass Pro/SAIF.

I believe a more appropriate time period to determine compensability/responsibility is at the time of the first treatment and disability, which is November, 2000, or at least at the time of Action/Liberty's denial in February, 2001. If litigation had been concluded sometime within 16 months from Action/Liberty's denial (*i.e.* prior to claimant changing employers), Liberty would be responsible under LIER (as the insurer at the time of treatment/disability and there being no subsequent employer). Any future attempt at shifting responsibility forward to a new employer would require Action/Liberty to prove that the subsequent work was a "new compensable injury" under 656.308(1). In other words, a "new major cause" would be required. Dr. Edwards' report would not support a responsibility shift under that standard.

But this case did not proceed to hearing until April, 2003, by which time claimant had gone to work at Glass Pro/SAIF. Because a responsible employer had not yet been established, Action/Liberty was only the "presumptively responsible" employer and had a less stringent burden to "shift" responsibility for the claim forward (independent contribution/pathological worsening).

While I recognize that LIER can be a somewhat arbitrary method of assigning responsibility, this result effectively amends Liberty's 2001 denial to say "we deny responsibility for your condition because we believe future employment a year from now will independently contribute to your condition." Whether or not Glass Pro/SAIF independently contributed to claimant's condition in 2002-2003, the condition was diagnosed and treated during Action/Liberty's coverage in November, 2000. A more logical application of the law would fix responsibility at that time. Action/Liberty would pay the benefits (that in fact had accrued prior to claimant beginning work at Glass Pro/SAIF). If Action/Liberty believed it was no longer responsible at a future date, it could issue a separate responsibility denial pursuant to 656.308 (1), and prove the new employment is the major cause of the condition.

Because the LIER is judicially-created, it is subject to alteration or elimination by statutory amendment. The legislature has previously taken such action in its adoption of ORS 656.308(1), which has changed the manner in which

responsibility disputes concerning the same previously accepted condition have analyzed. The legislature may wish to explore a similar statutory approach in resolving responsibility disputes regarding occupational disease claims, such as the one presented today. The addition of such a standard by statute could contribute to a more defined, less arbitrary, more equitable, less costly and more expeditious system for determining these types of responsibility issues.