

In the Matter of the Compensation  
**JAMES R. LOWELL, JR., Claimant**  
WCB Case No. 03-05515  
ORDER ON REVIEW  
Black Chapman et al, Claimant Attorneys  
Johnson Nyburg & Andersen, Defense Attorneys

Reviewing Panel: Members Langer, Kasubhai and Bock. Member Langer dissents.

Claimant requests review of Administrative Law Judge (ALJ) Howell's order that upheld the insurer's denial of his occupational disease claim for a left knee condition. On review, the issue is compensability. We reverse.

FINDINGS OF FACT

We adopt the ALJ's findings of fact, as summarized and supplemented.

Claimant is a 62 year old male. At about age 15, claimant hit the side of a car while on his bicycle. He fractured his left fibula below the knee.

Claimant began working as an apprentice tile setter in the early 1960's. Initially, he worked mixing and carrying mortar and carrying tiles. Later, he began to lay tiles and he spent a good deal of time on his knees.

Beginning in 1969, claimant worked as a service technician repairing appliances such as refrigerators, freezers, washers, dryers and heating and air conditioning units. In 1986, he began performing the same job for the employer.

As a service technician, claimant worked long hours. He went to customers' homes to repair appliances. He spent about 80 percent of his work time kneeling or squatting. He initially knelt more on his left knee than his right, but he often knelt on both knees. He was frequently up and down from kneeling and squatting positions.

In the 1980's or 1990's, claimant began to experience left knee pain. Over the years, that pain increased. By 2003, claimant's left knee pain had become severe, and he had begun to experience less significant right knee pain.

On about April 29, 2003, while working, claimant rose from kneeling and experienced a sudden increase in left knee pain. He saw Dr. Newton for his left knee pain. Dr. Newton diagnosed a Baker's cyst and probable osteoarthritis. (Ex. 1). Claimant was referred to Dr. Webb, an orthopedist.

Claimant filed a claim for his left knee condition. He completed a form advising the insurer that he experienced arthritis and that he had a family history of arthritis. (Exs. 3 & 5).

Dr. Webb examined claimant on May 29, 2003. Claimant informed Dr. Webb of his left fibula fracture, his several years of left knee symptoms and his work activities. X-rays of claimant's left knee revealed a complete loss of lateral cartilage space with bony erosion of the tibial plateau. Claimant's childhood fibula fracture was evident. Dr. Webb diagnosed traumatic arthritis. He believed that claimant's condition resulted from injury at the time of his early fibula fracture. He also believed work activities had accelerated the traumatic osteoarthritis in claimant's left knee. Dr. Webb diagnosed early osteoarthritis in the right knee. Total left knee replacement surgery was recommended. (Ex. 4).

In a later concurrence letter, Dr. Webb agreed that, without records demonstrating an injury to a joint space as a result of claimant's injury as a teenager, it was speculative to conclude that the severe arthritis in the lateral compartment of the left knee was traumatically induced by that incident. (Ex. 8). He agreed that claimant "may or may not have prior injury to the left knee joint." (*Id.*) Dr. Webb concluded that claimant's work activities were the major contributing cause of his knee osteoarthritis.

On July 3, 2003, Dr. James examined claimant on behalf of the insurer. He diagnosed severe lateral compartment osteoarthritis of the left knee and early arthritis of the right knee. Dr. James concluded that claimant's early injury, when he fractured his fibula, caused post-traumatic arthritis. Dr. James also said that claimant's work activities contributed to his left knee arthritis. (Ex. 6).

On July 15, 2003, the insurer denied claimant's claim. (Ex. 7). Claimant requested a hearing.

### CONCLUSIONS OF LAW AND OPINION

The ALJ found that claimant's occupational disease claim was based upon the worsening of preexisting left knee arthritis and, therefore, he must prove that

the work conditions were the major contributing cause of the combined condition and pathological worsening of the preexisting condition. ORS 656.802(2)(b). Applying this reasoning, the ALJ concluded that the occupational disease claim was not compensable.

Claimant contends that the evidence does not support the ALJ's conclusion that he had a preexisting condition of arthritis in his left knee that preceded the onset of his occupational disease.<sup>1</sup> Therefore, claimant asserts that the ALJ should not have applied ORS 656.802(2)(b).

For the following reasons, we agree with claimant that ORS 656.802(2)(b) does not apply to this case. Claimant's occupational disease claim is based on his almost 40-year history of work activities and he relies on the opinion of Dr. Webb to establish compensability. In *Gosda v. J. B. Hunt Transportation*, 155 Or App 120, 126 (1998), the court explained that the last injurious exposure rule (LIER) of proof applies whenever the evidence supports its application.

As a rule of proof, the LIER allows a claimant to prove compensability of an occupational disease without having to prove the degree, if any, to which exposure to disease-causing conditions at a particular employment actually caused the disease. The claimant need prove only that the disease was caused by employment-related exposure. *Roseburg Forest Products v. Long*, 325 Or 305, 309 (1997).

In *Roger L. Hager*, 55 Van Natta 637 (2003), *aff'd mem Grants Pass S.D. No. 7 v. SAIF*, 193 Or App 163 (2004), we said that, under the LIER, the occupational disease claim was compensable if work exposure at more than one employment was the major cause of the condition. We explained:

“The evidence need not establish that claimant's later work exposure caused a worsening of claimant's condition, under the ‘last injurious exposure’ rule of proof. Instead, in an occupational disease claim with no accepted claim for the disputed condition, all that is required for ‘invocation’ of the rule is evidence of a causal contribution from more than one employment. *See Gosda v. J. B. Hunt Transportation*, 155 Or App 120 (1998) (the last injurious exposure rule applies ‘in any case in which the evidence

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<sup>1</sup> Although claimant's initial report said that his condition arose on April 29, 2003, when he was kneeling and working on a dishwasher (Ex. 3), the claim was litigated as an occupational disease.

supports its application.’). We agree with the ALJ that the rule applies here, because there is persuasive evidence that claimant’s injury and his subsequent employment both contributed to his current C5 nerve root injury/irritation (even though the *injury* did not worsen).” 55 Van Natta at 639 n6 (emphasis in original).

Therefore, in *Hager*, we applied ORS 656.802(2)(a) and concluded that the claim was compensable under the “rule of proof.” *See also SAIF v. Henwood*, 176 Or App 431, 436 (2001) (“[ORS 656.802(2)(b)] has no application where the preexisting disease and the worsening are both employment related”); *Sandra P. Larson*, 55 Van Natta 2502, 2504-05 (2003) (rejecting the carrier’s argument that ORS 656.802(2)(b) applied; the LIER as a rule of proof was applied to establish compensability of an occupational disease claim for a right shoulder condition).

For the following reasons, we conclude that, under the LIER, claimant’s employment exposure over the past 40 years is the major contributing cause of his osteoarthritis of the left knee.

Claimant relies on the opinion of Dr. Webb to establish compensability. The insurer argues that Dr. Webb’s opinion does not sufficiently outweigh that of Dr. James to preponderate the record in claimant’s favor. We disagree.

We find that Dr. Webb’s opinion, as clarified by his concurrence letter, is well-reasoned and based on complete relevant information. Dr. Webb understood that claimant had an approximate 40-year work history of intensive work involving squatting and kneeling on his knees a large portion of each work day. Claimant’s daily work activities for the employer involved moving and repairing refrigerators, washers, dryers and other heavy appliances, and each call required being on his knees or in a crouched position.

Dr. Webb considered the factors that claimant had arthritis in both knees, more severe on the left, a leg injury as a teenager, the medical literature discussing the relationship between physical activity and knee osteoarthritis, as well as other potential risk factors including heredity, obesity, physical loading and age. Dr. Webb explained that claimant was fit and not obese, there was little information about heredity factors, and he may or may not have had a prior injury to the left knee joint. He found that claimant had no arthritis in other joints and no incidence of rheumatological etiologies. Dr. Webb acknowledged that claimant’s age was a factor. He said it was unclear why the knee osteoarthritis was not equal bilaterally, but he explained it could have been from work activities that stressed

the left knee more than the right, or from prior trauma to the left knee joint. After considering the potential causal factors, Dr. Webb concluded that claimant's 40-year work history was the major cause of his left knee osteoarthritis (Ex. 8).

Although the insurer relies on the opinion of Dr. James, we are not persuaded by his opinion for the following reasons. Dr. James found that claimant's work activities for the employer were a material cause of the left knee osteoarthritis, but not the major contributing cause of that condition. (Ex. 6). He concluded that claimant had preexisting traumatic arthritis that was secondary to the "injury in his knee" when he fractured his fibula as a teenager. (Ex. 6-7). He diagnosed an acute exacerbation of preexisting arthritis secondary to the April 29, 2003 work incident.

We are not persuaded by Dr. James' opinion that claimant injured his knee during the accident as a teenager. Although Dr. James acknowledged that claimant did not believe his knee was involved in that accident, Dr. James found that "this apparently was a significant blow to the lateral side of the knee." (Ex. 6-2, -6).

He concluded that there "probably was a traumatic arthritis preexisting and quite likely secondary to the *injury in his knee* when he fractured his fibula." (Ex. 6-7; emphasis supplied). There is no evidence to support Dr. James' conclusion that claimant had a *knee* injury when he fractured his fibula. *Compare Jackson County v. Wehren*, 186 Or App 555, 561 (2003) (a physician's history is complete if it includes sufficient information on which to base the opinion and does not exclude information that would make the opinion less credible).

In addition, we are not persuaded by Dr. James' causation opinion because he appeared to rely primarily on medical literature in finding that claimant's work activity was not the major cause of his osteoarthritis. (Ex. 6-7). *See, e.g., Yolanda Enriquez*, 50 Van Natta 1507 (1998) (medical evidence grounded in statistical analysis was not persuasive because it was not sufficiently directed to the claimant's particular circumstances).

We conclude that Dr. Webb's opinion is persuasive because he had a complete history and he considered other potential contributing factors in assessing causation. *See SAIF v. Strubel*, 161 Or App 516, 521 (1999) (the medical expert must take into account all contributing factors in order to determine their relative weight); *Dietz v. Ramuda*, 130 Or App 397, 401 (1994), *rev dismissed* 320 Or 416 (1995). Based on the opinion of Dr. Webb, we conclude that claimant's left knee condition is compensable.

As a rule of assignment of responsibility, the LIER assigns full responsibility to the last employer that “could have” caused claimant’s condition. *Roseburg Forest Products v. Long*, 325 Or at 309. There is no evidence that it was impossible for conditions at the employer’s workplace to have caused claimant’s condition or that his condition was caused solely by conditions at one or more previous employments. *Id.* at 313. Consequently, we conclude that the employer is responsible for claimant’s left knee condition.

Claimant’s attorney is entitled to an assessed fee for services at hearing and on review. ORS 656.386(1). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable fee for claimant’s attorney’s services at hearing and on review is \$5,500, payable by the insurer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by the record and claimant’s appellate briefs), the complexity of the issue, the value of the interest involved, and the risk that counsel may go uncompensated.

#### ORDER

The ALJ’s order dated November 12, 2003 is reversed. The insurer’s denial is set aside and the claim is remanded to the insurer for processing according to law. For services at hearing and on review, claimant’s attorney is awarded \$5,500, payable by the insurer.

Entered at Salem, Oregon on July 29, 2004

Board Member Langer dissenting.

I agree with the majority’s conclusion that claimant may rely, under the LIER of proof, on his employment exposure over the past 40 years to establish an occupational disease claim. Nevertheless, I agree with the ALJ’s application of ORS 656.802(2)(b) and conclusion that the medical evidence does not establish persuasively a compensable occupational disease claim. Accordingly, I dissent.

Dr. Webb initially reported that claimant’s motorcycle accident when he was 18 years old likely caused ligamentous and capsular injury along with the proximal fibular fracture. As a consequence, arthritis developed. Claimant’s work activity exacerbated and accelerated the preexisting arthritis. (Ex. 4-2). Later, Dr. Webb concurred with a statement that claimant’s left knee arthritis “might have been

traumatically induced” by his teenage injury, but that this was somewhat speculative as there were no records demonstrating an injury to a joint space. (Ex. 8-2). He further agreed that claimant “may or may not have prior injury to the left knee joint.” (*Id.*).

The majority apparently infers from Dr. Webb’s later concurrence that claimant’s teenage injury did not cause any left knee osteoarthritis and, therefore, the work activities were the sole cause of that condition. I find Dr. Webb’s opinion on this issue inconsistent and unpersuasive.<sup>2</sup> While Dr. Webb initially and for purposes of treatment evaluated claimant’s condition as a combination of a preexisting (*i.e.*, preexisting the entire work exposure) arthritic condition and consequence of heavy physical work that likely accelerated the preexisting condition, he later departed from that opinion by characterizing the existence of a preexisting condition as speculative. He did not provide any explanation for the change in his opinion, however. Yet, when addressing the fact that claimant’s arthritis was not equal bilaterally, Dr. Webb conceded that “this could be from prior trauma to the left knee joint.” (Ex. 8-3). Because of these various statements, I would not rely on Dr. Webb’s opinion.

In contrast to Dr. Webb’s equivocal opinion, Dr. James clearly reported that claimant’s lateral compartment osteoarthritis of the left knee was initiated by a traumatic event. (Ex. 6-7). Therefore, I would conclude that claimant’s current left knee condition is a combined condition that consists of the preexisting traumatic arthritis exacerbated by the work exposure. Accordingly, ORS 656.802(2)(b) applies.

To prevail under that statute, claimant must establish that the employment conditions are the major contributing cause of both the combined condition and pathological worsening of the disease. I would adopt the ALJ’s reasoning and conclusion that claimant failed to prove compensability by the greater weight of evidence.

For the foregoing reasons, I respectfully dissent.

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<sup>2</sup> The ALJ rejected the insurer’s argument that Dr. Webb changed his opinion. The ALJ reasoned that, because Dr. Webb initially did not quantify the potential contribution of the preexisting, non-work related, arthritis and employment activities in either report, the doctor later did not change his opinion when he reported that the work activity was the major cause of the claimed disease. The ALJ was correct on that point. On the issue of the existence of a preexisting condition, however, I find Dr. Webb’s reports inconsistent.