In the Matter of the Compensation of
CHARLES F. SPENCER , Claimant
04-07837, 04-07517, 04-06554, 04-06113
ORDER ON REVIEW
Martin J Mckeown, Claimant Attorneys
Alice M Bartelt SAIF Legal Salem, Defense Attorneys
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Reviewing Panel: Members Biehl and Langer.

Claimant requests review of those portions of Administrative Law Judge (ALJ) Howell's order that upheld denials of claimant's occupational disease claim for bilateral carpal tunnel syndrome (CTS) issued by the SAIF Corporation on behalf of Lodging Associates, Inn at Face Rock, and Kelly Vineyard (collectively: SAIF/Lodging).[1] On review, the issues are compensability and, potentially, responsibility.

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

In upholding SAIF's denials, the ALJ determined that the medical evidence was insufficient to establish that claimant's employment was the major contributing cause of his CTS. The ALJ further determined that even if the claim had been compensable, the employer that would be responsible, Hospitality Enterprises (Hospitality), had settled the claim with claimant pursuant to a Disputed Claim Settlement (DCS).

On review, claimant asserts that the medical evidence establishes that his CTS was caused by his many years of drywall work. Also, based on the opinion of his attending physician, Dr. Lin, claimant contends that the onset of his CTS preceded his employment with Hospitality and, therefore, his employment there could not have caused his CTS. Claimant further asserts that his work with SAIF/Lodging was his last injurious employment exposure and that SAIF/Lodging should be found responsible for his condition.

SAIF/Lodging responds that, in addition to a lack of persuasive medical evidence establishing compensability, the language in the DCS with Hospitality

[1] SAIF/Lodging initially cross-requested review of that portion of the ALJ's order that awarded interim compensation. However, SAIF/Lodging has withdrawn its cross-request.

precluded claimant from claiming that his CTS was caused by work. SAIF/Lodging further asserts that, having settled with the last employer, claimant assumed the risk of not receiving additional compensation from other employers.

The DCS states under "carrier's contentions" that "all of claimant's conditions are the result of preexisting, noncompensable factors and the result of self-employment for which the employer herein would not be responsible." We reject SAIF's argument that this provision precludes claimant from claiming an occupational disease with alternate employers. (*See* Ex. 56A-3). In the preceding section of the DCS called "claimant's contentions," claimant asserted he had an "occupational disease" as a result of his employment activities with the "subject employer herein." (*Id*.). Thus, the DCS did not operate as claimant's concession that he did not have a condition due to his work exposure; it only served to resolve his potential dispute with that particular employer.

As a rule of assignment of responsibility, the last injurious exposure rule (LIER) assigns full responsibility to the last employer that could have caused the claimant's injury. *Runft v. SAIF*, 303 Or 493, 499 (1987). The "onset 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. *Agricomp 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, claimant sought medical treatment on May 16, 2003. Thus, it is appropriate to designate that date as the "triggering" date for establishing the last potentially causal employment. Because claimant's last potentially causal employment was with Hospitality, presumptive responsibility would ordinarily be placed with Hospitality. However, because claimant has settled his claim against Hospitality, it cannot be held responsible for claimant's CTS condition. *Pamela M. Christman*, 52 Van Natta 122 (2000) (responsibility for the claimant's condition could not be assigned to a non-joined carrier); *Kristin Montgomery*, 47 Van Natta 961 (1995) (same).

Nonetheless, claimant can rely on the "assignment" rule of the LIER and can attempt to shift responsibility backward from Hospitality to a prior employer. *See Kristin Montgomery*, 47 Van Natta at 965, *Allan J. Zarek*, 54 Van Natta 7, 8

(2002). In *Roseburg Forest Products v. Long*, 325 Or 305, 313 (1997), the Court summarized, with approval, its precedent regarding shifting responsibility to a prior employment. It stated:

> "[A]n employer that otherwise would be responsible under the last injurious exposure rule may avoid responsibility if 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 the conditions at one or more previous employments." (*Id.*)

Thus, to shift responsibility from Hospitality to SAIF/Lodging, claimant must establish that: (1) it was impossible for conditions at Hospitality to have caused the CTS; or (2) the CTS was caused solely by conditions at one or more previous employments. *Bennett v. Liberty Northwest Insurance Corp.*, 128 Or App 71 (1994); s*ee also, Brent W. Collier*, 53 Van Natta 66, 72 (2001) (the claimant was entitled to no additional compensation where he did not pursue claim against presumptively responsible carrier and could not shift responsibility to an earlier carrier under the "impossibility" or "sole cause" prongs of LIER).

Turning to the medical evidence, Dr. Lin, claimant's treating physician, opined that claimant likely developed CTS prior to his employment with Hospitality. Nonetheless, Dr. Lin further explained that "each time [claimant] did repetitive and forceful activity with his hands, it contributed to the causation of his carpal tunnel syndrome * * *" and that each time contributed to an "actual and independent" worsening of the condition. (Ex. 63-2). There is no additional medical evidence regarding claimant's condition and its potential association to his work activities. Thus, to the extent that Dr. Lin's opinion attributed claimant's CTS to "pre-Hospitality" work activities, Dr. Lin did not establish that it was impossible for claimant's condition to have been caused by his work at Hospitality or that the CTS was caused solely by work at SAIF/Lodging. Accordingly, we affirm the ALJ's determination that responsibility for the claim does not rest with SAIF/Lodging.

ORDER

The ALJ's order dated June 17, 2005 is affirmed.

Entered at Salem, Oregon on December 9, 2005