

In the Matter of the Compensation of
ROBERT G. MCCULLOUGH, Claimant

WCB Case No. 04-08263, 04-04722

ORDER ON REVIEW

Welch Bruun & Green, Claimant Attorneys

Scheminske et al, Defense Attorneys

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Reviewing Panel: Members Langer and Biehl.

Liberty Northwest Insurance Corporation (Liberty) requests review of those portions of Administrative Law Judge (ALJ) Davis' order that: (1) set aside its denial of claimant's occupational disease claim for bilateral carpal tunnel syndrome (CTS); and (2) upheld ESIS, Inc.'s (ESIS') denial of claimant's occupational disease claim for the same condition. On review, the issue is responsibility. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact." We do not adopt the ALJ's "Findings of Ultimate Facts."

CONCLUSIONS OF LAW AND OPINION

Claimant began working for Liberty's insured (Columbia Steel) in 1984. He was laid off in October 2003. Claimant began working for Consolidated Metco (ESIS) in December 2003, and first received medical treatment for bilateral CTS in April 2004.

Liberty denied responsibility for the claim, while ESIS denied both compensability and responsibility.¹ Claimant requested a hearing from those denials.

The ALJ found Liberty responsible for claimant's bilateral CTS because the medical evidence established that claimant's employment for its insured was the actual (major contributing) cause of the condition. The ALJ cited *Daniel P. Sanborn*, 56 Van Natta 29, *on recon* 56 Van Natta 369 (2004), as support for the conclusion that it was inappropriate to apply the last injurious exposure (LIER) in determining responsibility because actual causation was established.

¹ ESIS conceded compensability before the hearing.

On review, claimant and Liberty contend that the ALJ should have applied LIER in deciding the responsibility issue. Specifically, they assert that, because claimant sought treatment while employed by the self-insured employer (ESIS), ESIS is presumptively responsible. They further assert that ESIS should be found ultimately responsible for claimant's CTS because it was not impossible for the ESIS employment to have caused the disputed condition and because the earlier employment for Liberty's insured was not the sole cause of the condition. For the following reasons, we agree with those contentions.

Under *Willamette Industries, Inc. v. Titus*, 151 Or App 76 (1997), LIER may not be used to determine responsibility where actual causation (major contributing cause) is established. *Eric M. Watts*, 54 Van Natta 999, 1000 (2002). Nevertheless, LIER may be used defensively by a targeted employer under certain circumstances. Proof that the subsequent employment independently contributed to the current disability is required before the rule of responsibility can be invoked defensively. *Titus*, 151 Or App at 82.

Here, there is no dispute that employment for Liberty's insured was the major contributing cause of the CTS condition. In *Sanborn*, we found the employment that was the actual (major contributing) cause responsible for the disputed condition. However, in *Sanborn*, unlike here, the medical evidence did not establish to medical probability that subsequent employment actually contributed to the disputed condition. 56 Van Natta at 30, 370. In this case, we find that claimant's subsequent employment for ESIS actually contributed to the bilateral CTS condition. Thus, Liberty may use LIER defensively. We reason as follows.

Two medical opinions are relevant to the issue of whether claimant's last employment (ESIS) contributed to claimant's CTS: those of Dr. Nolan, an examining physician, and Dr. Ginocchio, who performed nerve conduction studies.² Both concluded that employment for Liberty's insured was the major contributing cause of claimant's condition. Dr. Nolan, however, concluded that all of claimant's employment contributed, at least slightly, to the development of the CTS. (Ex. 16-7). Specifically, Dr. Nolan opined that "post-Liberty" employment, up to the time treatment was sought (which would include the ESIS employment),

² Another examining physician, Dr. Radecki, did not believe that claimant's condition was work related, so we agree with the ALJ that his opinion was of little value in deciding the responsibility issue. (Ex. 10). The attending physician, Dr. Peters, opined that the Liberty employment was the actual cause of the CTS, but he did not address the issue of subsequent employment contribution. (Ex. 14).

contributed to the development of the CTS. Dr. Ginocchio concurred with Dr. Nolan's report. (Ex. 78). Dr. Ginocchio also opined that claimant's most recent employment "certainly contributed" to a worsening of the CTS. (Ex. 19-2).

In his deposition, Dr. Nolan testified that claimant's last employment contributed slightly to the CTS. (Ex. 24-19). While Dr. Nolan estimated that the Liberty employment contributed roughly 60 percent to claimant's CTS, he estimated the ESIS employment contributed one percent. (Ex. 24-22). Dr. Ginocchio was also deposed. He testified that there was an ongoing contribution from both claimant's Liberty and ESIS employment. (Ex. 25-24).

Having reviewed this record, we are persuaded that claimant's ESIS employment independently contributed to his CTS-related disability. Accordingly, we conclude that responsibility should be determined under LIER.

The LIER provides that, when a worker proves that an occupational disease was caused by work conditions that existed when more than one carrier was on the risk, the last employment providing potentially causal conditions is deemed responsible for the disease. *Boise Cascade Corp. v. Starbuck*, 296 Or 238, 241 (1984). The "onset of disability" is the triggering date for determining which employment is the last potentially causal employment. *Bracke v. Baza'r*, 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, 212-13 (2000). ESIS, as the last potentially causal employment when claimant first received medical treatment in April 2004, can transfer liability to a previous insurer by establishing that it was impossible for its employment to have caused the condition or that a prior period of employment was the sole cause of the condition. *Roseburg Forest Products v. Long*, 325 Or 305, 313 (1997).

Applying that standard, we find ESIS responsible for claimant's CTS. Both Dr. Nolan and Dr. Ginocchio stated that it was not impossible for that employment to have caused the CTS, and given our determination that the ESIS employment contributed to the CTS, previous employment was not the sole cause of the disputed condition. Accordingly, we find ESIS responsible for claimant's bilateral CTS. Thus, we reverse the ALJ's responsibility determination.

ORDER

The ALJ's order dated July 13, 2005 is reversed in part and affirmed in part. Those portions that set aside Liberty's denial and upheld ESIS' denial are reversed. Liberty's denial is reinstated and upheld. ESIS' denial is set aside and the claim is remanded to ESIS for processing according to law. ESIS is responsible for the ALJ's \$1,000 attorney fee award.³ The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on December 30, 2005

³ Claimant requests a \$1,000 assessed fee for services on review under ORS 656.307(5). We decline that request. *Gary W. Higgins*, 57 Van Natta 336 (2005) (no statutory authority under ORS 656.307 to award an assessed attorney fee for the claimant's counsel's services on review).