In the Matter of the Compensation of
JOYCE D. SHAW, Claimant
WCB Case No. 03-06846, 03-06669
ORDER ON REVIEW
James W Moller, Claimant Attorneys
Johnson Nyburg & Andersen, Defense Attorneys
Alice M Bartelt, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Biehl and Lowell.

Claimant requests review of Administrative Law Judge (ALJ) Pardington's order that: (1) upheld the SAIF Corporation's denial of claimant's occupational disease claim for bilateral carpal tunnel syndrome (CTS); and (2) upheld Liberty Northwest Insurance Corporation's denial of claimant's occupational disease claim for the same condition. On review, the issues are compensability and responsibility. We reverse in part and affirm in part.

FINDINGS OF FACT

We adopt the ALJ's findings of fact with the following supplementation.

Dr. Van Allen, a hand surgeon and claimant's treating physician, examined claimant twice. (Ex. 18-19).

CONCLUSIONS OF LAW AND OPINION

There is no dispute that claimant suffers from bilateral CTS, worse in her right wrist. Rather, the sole contention is whether claimant's job duties were the major contributing cause of her CTS. The dispute is between Drs. Gardner and Denekas, neurologists, who opined that claimant's job duties were not causative due to the lack of force employed against her wrists, and Dr. Van Allen, who opined that claimant's work activities were the major cause of her CTS.[1]

The ALJ concluded that the opinions of the three doctors were, at best, in equipoise, and therefore claimant had not carried her burden of proof. On review, claimant argues that Dr. Van Allen's opinion is more persuasive because of his

[1] Dr. Hortsch, claimant's attending physician, also supported compensability. (Ex. 13).

expertise, as well as his greater knowledge of claimant's history. For the following reasons, we agree.

To establish the compensability of an occupational disease claim, claimant's work activities must be the major contributing cause of the disease. ORS 656.266, ORS 656.802(2)(a). To satisfy the "major contributing cause" standard, claimant's work activities must have contributed more to the claimed conditions than all other factors combined. *See, e.g., McGarrah v. SAIF*, 296 Or 145, 146 (1983). A determination of the major contributing cause involves the evaluation of the relative contribution of different causes of claimant's disease and deciding which is the primary cause. *Dietz v. Ramuda*, 130 Or App 397, 401-02 (1994); *Eric M. Maggard*, 55 Van Natta 554, 555 (2003).

Because of the possible alternative causes of claimant's condition, resolution of this matter is a complex medical question that must be resolved by expert medical opinion. *See Uris v. Compensation Dept.*, 247 Or 420, 424-36 (1967); *Barnett v. SAIF*, 122 Or App 279 (1993). More weight is given to those medical opinions that are well reasoned and based on complete information. *See Somers v. SAIF*, 77 Or App 259, 263 (1986).

The ALJ considered Dr. Van Allen's opinion "generally well reasoned and thorough." We agree. The ALJ discounted Dr. Van Allen's opinion for not considering the effect of Dr. Denekas' diagnosis of arthritis in the right thumb joint, although as we note below Dr. Denekas did not relate that diagnosis to claimant's CTS condition. In any event, we are persuaded that Dr. Van Allen addressed Dr. Denekas' arthritis diagnosis and determined that there was no evidence that any arthritic process had impinged on the carpal canal. (Ex. 18-8).

Dr. Van Allen established his credentials as a hand surgeon, who is exposed to numerous CTS patients, performs two to three CTS release surgeries every week, and has been doing so for ten years. (Ex. 18-16-17). Dr. Van Allen noted that causative factors included not only repetitive activities, but posture of the wrist – a factor that was not considered by any other doctor. (Ex. 18-10). (*See* footnotes 2, 4, *infra*). Additionally, Dr. Van Allen testified, consistent with the medical literature relied on by Dr. Gardner, that "[h]igh force isn't always required. Low force repetition can also be causative." (Ex. 18-10).

The insurers challenge what they describe as Dr. Van Allen's temporal analysis, in that he noted that claimant's symptoms subsided during the six months she did not work while between employers, and that reemergence of those

symptoms after beginning work for SAIF's insured. However, as set forth in the medical literature provided by Dr. Hortsch, this specific temporal change in CTS symptoms is a frequently noted aspect of the condition. (Exs. 15-4, 17-10).

Finally, noting that the cause of CTS is unique to each individual and after considering claimant's work activities and all other possible causative factors, Dr. Van Allen opined that those work activities were the major contributing cause of claimant's CTS. (Exs. 16, 18-14).

After noting the amount of time claimant spent at a computer while at work, Dr. Gardner, a neurologist who performed an insurer-arranged medical examination (IME), opined that it was insufficient to have caused CTS. (Ex. 7-7). That opinion was based primarily on his interpretation of statistical studies regarding CTS. (*Id.*). Dr. Gardner did not discuss what claimant did at the computer, other than to generally note that she typed and used a mouse, nor did he discuss the physical positioning of the computer in relation to claimant.[2] Neither did he discuss the physiological causes of CTS and explain why claimant's computer and/or clerical work would likely not have brought about those physiological changes.

Additionally, Dr. Gardner noted that claimant worked a 36-hour work week, less than half of which was devoted to the computer keyboard, and of the time devoted to the computer, 20 percent was spent using the computer mouse. (Ex. 7-4, 7-7). That history, however, only considers claimant's employment at SAIF's insured, after she initially reported the onset of CTS symptoms.

Dr. Gardner did not consider claimant's employment with Liberty's insured. At that employment, claimant worked a 40-hour work week, with a 30 minute lunch break each day and, when time permitted, two 15-minute breaks during the day. (Tr. 10). Claimant reported that work as high volume. (Tr. 11-12). During that time, she also worked at a computer and spent 70 percent of the time using the mouse with her right hand, and the remaining 30 percent typing at the computer keyboard. (Tr. 13, 15). Dr. Van Allen opined that the work activities at Liberty's insured were a causative factor in claimant's condition. (Ex. 16-1-2).

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[2] A study cited by Dr. Van Allen found these factors significant, noting that "[a] number of positional and dynamic factors influence carpal canal pressure both in asymptomatic individuals and in patients who have carpal tunnel syndrome. Canal pressure increases with changes in wrist position including flexion, extension, and radial or ulnar deviation and is further affected by changed in finger posture and tendon load." (Ex. 17-11-12). As previously noted, Dr. Van Allen considered these factors. (Ex. 18-10).

Dr. Gardner did not adequately consider all of the possible causes of claimant's CTS condition and relied on an incomplete history. Under such circumstances, his opinion is unpersuasive.

Dr. Denekas, a neurologist who performed an IME, briefly noted claimant's work activities with both employers,[3] and dismissed her work duties as potentially causative, saying they were "not the type of activities that lead to the development of [CTS]." (Ex. 12-6). Dr. Denekas asserted that CTS, "if it is related to occupation, requires use of the hand against high resistance with wrists in a non-neutral position, either hyperflexed or hyperextended." (*Id*.). Dr. Denekas concluded that claimant suffered from CTS, but considered it degenerative and/or idiopathic in nature. (Ex. 12-7). He also diagnosed possible arthritis in claimant's thumb joint as a cause of discomfort, but did not relate that diagnosis to the CTS condition.

Dr. Denekas reviewed and agreed with the articles relied on by Dr. Gardner. (*Id*.). Dr. Denekas further concluded that "factors other than work are the major contributing cause" of claimant's CTS. (Ex. 12-9). However, he made no reference to what those factors might be or how they were more likely causative than claimant's work activities.

Because Dr. Denekas did not have a complete history of claimant's work activities and did not consider the affect of claimant's work activities in relation to any other activities, his opinion is conclusory. Like Dr. Gardner's, Dr. Denekas' opinion is unpersuasive.

On this record, we consider Dr. Van Allen's opinion to have the most complete history and thorough reasoning. Therefore, it is the most persuasive. We conclude that claimant's work activities are the major contributing cause of her CTS condition. Consequently, claimant's CTS condition is compensable.

Because claimant does not have an accepted claim for her bilateral CTS condition, responsibility for her condition is determined pursuant to the last injurious exposure rule (LIER). *See SAIF v. Webb*, 181 Or App 205, 209 n3 (2002); *SAIF v. Yokum*, 132 Or App 18, 23 (1994); *Cathy E. Cherry*, 56 Van Natta 642, 648 (2004). Under the LIER, initial or presumptive responsibility for a condition is assigned to the last period of employment where conditions could

[3] The history of work activities obtained by Dr. Denekas is that claimant was a "unit secretary" and "data entry, primarily." (Ex. 12-1-2, *compare* Ex. 16-2).

have caused claimant's disability. *Bracke v. Baza'r*, 293 Or 239, 248-49 (1982); *Cherry*, 56 Van Natta at 648. The "onset of disability" is the triggering date for determining which employment is the last potentially causal employment. *Bracke*, at 248. 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); *Cherry*, 56 Van Natta at 648.

Here, claimant first sought treatment for her CTS condition on March 16, 2001, while employed by Liberty's insured. (Ex. A; Tr. 9, 16). Therefore, Liberty is assigned presumptive responsibility for claimant's condition. Responsibility for claimant's condition can shift forward to SAIF if claimant's subsequent employment at SAIF's insured actually contributed to a worsening of the condition. *Reynolds Metals v. Rogers*, 157 Or App 147, 153 (1998); *Cherry*, 56 Van Natta at 649.

Dr. Van Allen, whose opinion we have found persuasive, testified that claimant's condition pathologically worsened while working for SAIF's insured. (Ex. 18-12-13, 18-17). Accordingly, we conclude that SAIF is the responsible insurer.

Claimant's attorney is entitled to an assessed attorney fee for services at hearing and on review. ORS 656.386(1), ORS 656.308(2)(d). 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 $8,000, payable by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by the hearing record, claimant's appellate briefs, and her counsel's uncontested fee request), the complexity of the issues, the value of the interest involved, and the risk that counsel may go uncompensated.

ORDER

The ALJ's order dated May 20, 2004 is reversed in part and affirmed in part. SAIF's denial of claimant's CTS condition is set aside and the claim is remanded to SAIF for processing in accordance with law. For services at hearing and on review, claimant's attorney is awarded an assessed fee of $8,000, payable by SAIF. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on January 28, 2005