

In the Matter of the Compensation of
MARK A. OKESSON, Claimant

WCB Case No. 05-00450, 05-00448, 04-05198, 04-05197, 04-05196, 04-05195,
04-05194

ORDER ON REVIEW

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Reviewing Panel: Members Lowell and Kasubhai.

Farmers Insurance requests review of Administrative Law Judge (ALJ) Mills' order that: (1) set aside its denials of claimant's occupational disease claim for bilateral Reynaud's syndrome; and (2) upheld denials of claimant's occupational disease claim issued by several other insurers. On review, the issues are compensability and, potentially, responsibility.

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

Claimant worked for many years in the auto glass industry, much of that time using a Chicago pneumatic gun (CPG). Claimant worked for: Safelite, insured by AIG, until 1995; for Safelite, insured by Wausau, until 1996; for Springfield Glass, insured by the SAIF Corporation, until 1999; for I-5 Glass, insured by SAIF, until 2000; for B&J Excavating, insured by SAIF, in May 2001; for Vollmer Excavating, insured by SAIF, in September through December 2001; and for the Glass Shop, insured by Farmers Insurance, during 2002 and 2003. During 2001, claimant also worked for Action Auto Glass, which is not a party to this proceeding, but did not use a CPG while working for that employer.

In 2001, while working for Action Auto Glass, claimant was diagnosed with bilateral vibratory-related Reynaud's syndrome. Later, while working for Farmers' insured, claimant used a CPG on four occasions to remove large windshields. In 2003, claimant's condition worsened and he filed claims against Farmers' insured and his prior employers. Farmers denied both compensability and responsibility, and the other carriers denied responsibility.

The ALJ rejected Farmers' timeliness defense because the claim was filed within one year of claimant's date of disability. The ALJ also rejected Farmers' defense of intentional infliction of injury because claimant had used the CPG to earn a living, rather than to intentionally worsen his condition. Consequently, the ALJ found the condition compensable. Applying the last injurious exposure rule (LIER), the ALJ found that Action Auto Glass was the presumptively liable employer, but that responsibility shifted forward to Farmers' insured because employment conditions with Farmers' insured actually contributed to the development of claimant's condition. Accordingly, the ALJ found Farmers responsible and set aside its denial.

On review, Farmers argues that claimant's condition is not compensable because he intentionally worsened his injury by using the CPG with the knowledge that it would worsen his condition. Farmers also argues that it is not responsible for claimant's condition because employment conditions at Farmers' insured did not independently contribute to a worsening of claimant's Reynaud's syndrome. For the following reasons, we disagree.

Compensability

The parties concede that employment conditions were the major contributing cause of claimant's Reynaud's syndrome. *See* ORS 656.802(2)(a) (claimant bears burden to prove that employment conditions were the major contributing cause of an occupational disease). However, a worker is not entitled to payment for an injury that is the result of "the deliberate intention of the worker to produce such injury[.]" ORS 656.156(1). There is a rebuttable presumption that the injury "was not occasioned by the willful intention of the injured worker to commit self-injury[.]" ORS 656.310(1)(b). After reviewing the record, we do not find that Farmers has rebutted this statutory presumption.

Claimant was aware of his diagnosis of Reynaud's syndrome, and the CPG's role in causing the condition, by the time he began working for Farmers' insured. (Tr. 14). He had also worked for an employer that prohibited the use of CPGs. (Tr. 48). However, he believed that because of the damage to his hands that had been done, the condition would not worsen with further use of the CPG. (Tr. 24).

Claimant owned his own CPG, which he used while working for Farmers' insured. (Tr. 11). He used the tool for jobs, involving large windshields, that would have taken much longer to complete without using the CPG. (Tr. 16–17).

Mr. Thompson, vice president for Farmers' insured, testified that CPGs were not generally used at Farmers' insured, and that he had not been aware of claimant's use of one during his employment. (Tr. 38). Mr. Thompson explained that he was aware of negative health effects of pneumatic tools and would have prohibited claimant from using the CPG if he had been aware of its use. (*Id.*) However, claimant had not been told not to use his CPG while he worked for Farmers' insured. (Tr. 24, 32).

Claimant worked in the auto glass industry because it was the most profitable line of work available to him. (Tr. 31). He used the CPG because it made his work easier. (*Id.*) The record does not establish that he intended, or even knew, that he would worsen his condition by using the CPG while working for Farmers' insured. Accordingly, we reject Farmers' argument under ORS 656.156(1).

Responsibility

Under LIER, initial or presumptive responsibility lies with the last employer that could have caused the worker's disease. *Bracke v. Baza'r*, 293 Or 239, 248–49 (1982). The date on which presumptive responsibility is triggered is when the worker first seeks treatment or has time loss. *SAIF v. Kelly*, 130 Or App 185 (1994); *Timm v. Maley*, 125 Or App 396, 401 (1994), *rev den*, 319 Or 81 (1994). Because claimant first sought treatment while working for Action Auto Glass, that employer is presumptively responsible.

Liability is shifted from the presumptively responsible employer to a subsequent employer, however, if the record shows that the later employment actually contributed to a worsening of the condition. *Reynolds Metals v. Rogers*, 157 Or App 147, 153 (1988). To show such contribution, claimant relies on the opinion of Dr. Edwards, who initially diagnosed claimant.

Dr. Edwards opined that even if claimant had used the CPG only twice, over a total of 30 minutes, it would have caused a pathological worsening of the Reynaud's syndrome. (Ex. 38). He based that opinion on the nature of Reynaud's syndrome, which is a cumulative trauma disorder. (*Id.*)

Farmers argues that the history on which Dr. Edwards' opinion was based was insufficiently precise. We do not agree. Claimant, in fact, testified that he used the CPG four times, rather than twice, while working for Farmers' insured. (Tr. 21–22). This fact would likely provide more, rather than less, support for a

worsening. Therefore, there is no evidence that Dr. Edwards lacked sufficient information on which to base his opinion. Accordingly, his opinion is persuasive. *See Jackson County v. Wehren*, 186 Or App 555, 560–61 (2003) (a history is complete if it includes sufficient information on which to base an opinion and does not exclude information that would make the opinion less credible).

Farmers also argues that Dr. Edwards based his opinion on statistical analysis instead of examination findings. *See Sherman v. Western Employers Ins.*, 87 Or App 602 (1987) (physician’s comments that were general in nature and not addressed to the worker’s particular situation were not persuasive); *Yolanda Enriquez*, 50 Van Natta 1507 (1998) (medical evidence grounded in statistical analysis was not persuasive because it was not sufficiently directed to the worker’s particular circumstances). However, Dr. Edwards was familiar with claimant’s work and condition, and specifically considered the mechanism of injury. (Ex. 38). Based on claimant’s specific circumstances, Dr. Edwards reached his conclusion to a degree of “medical probability.” (*Id.*) Thus, Dr. Edwards’ analysis was not based solely on statistical analysis, but instead addressed claimant’s particular circumstances. Accordingly, we find his opinion persuasive.

Dr. Braun, an independent medical examiner, opined that claimant had not suffered a pathological worsening of his condition. (Ex. 36-6). He explained that claimant’s “current findings are no different [from] those presented initially in 2002.”¹ (*Id.*) However, Dr. Edwards made the distinction between a clinical worsening and a pathological worsening of the condition. (Ex. 38). Because of the nature of claimant’s condition, even 30 minutes using the CPG was sufficient to cause a pathological worsening of the underlying condition. (*Id.*)

After reviewing the medical evidence, we conclude that claimant’s Reynaud’s syndrome was actually worsened by employment conditions while working for Farmers’ insured. Consequently, we find Farmers responsible, and affirm.

Claimant’s attorney is entitled to an assessed fee for services on review. ORS 656.382(2). 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

¹ Noting that Dr. Duncan, an examining physician, and Dr. Braun both characterized claimant’s condition as “class 3,” whereas Dr. Edwards had described the condition as “class 4” in 2002, Farmers argues that claimant’s condition had actually improved. (Exs. 5-2; 13-11; 36-7). However, as noted, Dr. Braun described his findings as “no different” from those recorded by Dr. Edwards. (Ex. 36-3). Further, Dr. Edwards explained why the later findings would support a “class 4” diagnosis. (Ex. 37-1).

attorney's services on review is \$2,500, payable by Farmers. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's respondent's brief and uncontested attorney fee request), the complexity of the issue, and the value of the interest involved.

ORDER

The ALJ's order dated November 30, 2005 is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$2,500, to be paid by Farmers.

Entered at Salem, Oregon on June 21, 2006