

In the Matter of the Compensation of
KAVIN R. HUNTER, Claimant
WCB Case No. 07-01041
ORDER ON RECONSIDERATION
Ransom Gilbertson Martin et al,
Julie Masters, SAIF Legal Salem

Reviewing Panel: Members Weddell, Lowell, and Herman.

Claimant requests reconsideration of our November 21, 2008 Order on Review that reversed an Administrative Law Judge's (ALJ's) order, which set aside the SAIF Corporation's compensability and responsibility denials, on behalf of the Department of Corrections (SAIF/Corrections), of claimant's occupational disease claim for medial compartment degeneration of the left knee. Contending that we erroneously found that claimant sustained a left knee injury in 1988, he seeks reconsideration of our decision.

After considering claimant's argument, we continue to adhere to our prior order with the following modification and supplementation.

On review, SAIF/Corrections argued that the occupational disease claim was not compensable because the preponderance of evidence established that the major contributing cause of claimant's left knee condition was a preexisting, non-work-related degenerative condition, which preceded the first claimed left knee injury in 1992.

On the other hand, claimant relied on the last injurious exposure rule (LIER), and on Dr. James' opinion that a work event in 1977 caused a left knee ACL tear which, although largely asymptomatic, contributed to the gradual development of the claimed occupational disease. Claimant relied on *Richard G. Pruitt*, 58 Van Natta 2635 (2006), *aff'd*, *Waste Management v. Pruitt*, ___ Or App ___ (December 3, 2008).

In *Pruitt*, one of the claims was for bilateral degenerative knee conditions. The claimant had a work-related injury and medial meniscectomy on the left knee in 1976. In 1999, the carrier accepted bilateral knee contusions, and the claimant subsequently filed an occupational disease claim for bilateral knee conditions. In *Pruitt*, we relied on the LIER, and found that the medical evidence showed that the 1976 injury and subsequent surgery, as well as the claimant's other work activities, contributed to the left knee condition. We concluded that the claimant's work

activities, including the 1976 work injury, were the major contributing cause of his left knee condition. The court found that our determination that the claimant's left knee condition resulted from his prior work injury and his subsequent employment conditions was supported by substantial evidence, and it concluded that we had properly applied the LIER to decide compensability and responsibility.

In our prior order, we explained that in *Pruitt*, the 1976 left knee injury, which contributed to the claimed left knee condition, was clearly work-related. In contrast, we agreed with SAIF/Corrections that the preponderance of evidence did *not* establish that claimant's initial left knee injury, some time before 1992, was work-related.

In reaching our conclusion, we explained that claimant's testimony indicated that he had only minimal left knee pain after the 1977 work incident, and that there was no evidence he sought any medical treatment for his left knee in connection with that incident. We determined that, at most, Dr. James' reports indicated the possibility that claimant experienced a work-related injury to his left knee in 1977. We explained:

“In a deposition, Dr. James testified that, regardless of whether claimant's left knee was seriously injured in 1977 or not, there had to be an injury to that knee to cause the condition seen in 1992. (Ex. 116-7). We note that the 1992 reports from Dr. Walton indicated that claimant had an injury in 1988, which involved ‘a mild stress to the left knee[.]’ (Ex. 3). There is no evidence that the 1988 incident was work-related.

“Thus, the record indicates that the 1977 work incident caused ‘minimal pain’ to the left knee, and the 1988 non-work-related incident involved ‘a mild stress to the left knee.’ We are not persuaded that the preponderance of evidence demonstrates that the initial injury to claimant's left knee, which occurred some time before 1992, was work-related. *See* ORS 656.266(1) (claimant has the burden of proving that the occupational disease is compensable).”

On reconsideration, claimant argues that he did *not* have a left knee injury in 1988. Claimant contends that, although Dr. Walton's April 17, 1992 chart note lacks detail, it evidently referred to the 1977 injury, which was the injury that precipitated the 1988 right knee arthroscopy.

Dr. Walton's April 17, 1992 chart note provided, in part:

"Of note is that he had an injury to the right knee in high school and in 1988 Dr. Lundsgaard performed an arthroscopic evaluation with partial medial and lateral meniscectomies in the right knee with a noted absent anterior cruciate at that time. The injury that precipitated that surgery also involved, evidently, a mild stress to the left knee, but examination at that time noted no effusion and [claimant] states he quickly returned to previous function." (Ex. 3).

Based on that chart note, it is not clear why the 1988 surgery was performed or what injury caused the "mild stress to the left knee." Claimant refers to his testimony indicating that he did not have any left knee injuries between 1977 and 1992. (Tr. 10-11). A December 1, 1992 report from Drs. Bald and Barth, who examined claimant on behalf of SAIF, explained, in part:

"[Claimant] describes that he has had no previous injuries of any kind relative to his left knee. He did apparently have several injuries in high school while playing football and then a work-related injury to the right knee following graduation. This injury resulted in arthroscopic surgery but [claimant] states that the right knee has been very stable and asymptomatic since the time of his surgery in 1986-87." (Ex. 20-2).¹

The report from Drs. Bald and Barth supports claimant's assertion that the right knee arthroscopic surgery in the 1980s was related to a work-related right knee injury after he graduated from high school. When that report is read together with claimant's testimony and Dr. Walton's chart note, the record supports claimant's argument that he did not have a left knee injury in 1988. We therefore modify our previous order to delete any references to a 1988 left knee injury.

That modification, however, does not change the result. We adhere to our previous conclusion that claimant has *not* established that he experienced a work-related injury to his left knee at some time before 1992, and that any medical

¹ At a previous hearing, claimant testified that he did not play sports in high school. (Ex. 114-59).

opinions relying on the fact that he sustained a work-related injury before 1992 are not persuasive. For the reasons discussed in our prior order, we continue to find that the medical evidence is not sufficient to establish that claimant's employment conditions were the major contributing cause of the medial compartment degeneration of the left knee.

Accordingly, our November 21, 2008 order is withdrawn. On reconsideration, as supplemented herein, we adhere to and republish our November 21, 2008 order. The parties' rights of appeal shall begin to run from the date of this order.

IT IS SO ORDERED.

Entered at Salem, Oregon on December 17, 2008