

In the Matter of the Compensation of
KAVIN R. HUNTER, Claimant

WCB Case No. 07-01041

ORDER ON REVIEW

Ransom Gilbertson Martin et al, Claimant Attorneys
Julie Masters, SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Weddell, Lowell, and Herman.

The SAIF Corporation, as the insurer for the Department of Corrections (SAIF/Corrections), requests review of Administrative Law Judge (ALJ) Somers' order that set aside its compensability and responsibility denials of claimant's occupational disease claim for medial compartment degeneration of the left knee. On review, the issues are compensability and responsibility. We reverse.

FINDINGS OF FACT

We adopt the ALJ's findings of fact with the following changes and supplementation. In the first paragraph on page 2, we replace the first sentence with the following: "The record indicates that a right knee condition was accepted in connection with the 1977 injury." Also on page 2, we change the references from the February "2002" incident to February "2003."

CONCLUSIONS OF LAW AND OPINION

The ALJ determined that claimant's occupational disease claim for medial compartment degeneration of the left knee was compensable, based on the opinions of Drs. Greenleaf, Walker, and James, who opined that the major contributing cause of claimant's left knee degeneration was due to some combination of work injuries and activities. The ALJ explained that prior work injuries are not "preexisting conditions," and may be considered as part of the overall employment conditions. In reaching this conclusion, the ALJ apparently reasoned that claimant sustained a work-related left knee injury before 1992.

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

Claimant relies 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.

Under the LIER rule of proof, an occupational disease claim is compensable if work exposure at more than one employment is the major contributing cause of the condition. *Roseburg Forest Products v. Long*, 325 Or 305, 309 (1997). In *Kepford v. Weyerhaeuser*, 77 Or App 363, 365-66, *rev den*, 300 Or 722 (1986), the court held that an occupational disease claim can be based on the cumulative effect of job injuries and work activities.

The ALJ relied on *Kepford*, as well as *Richard G. Pruitt*, 58 Van Natta 2635 (2006), in determining that the claim was compensable. 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.

Here, claimant seeks to establish compensability of medial compartment degeneration of the left knee. The medical evidence establishes that when claimant first sought medical treatment for a left knee condition in 1992, he already had significant preexisting degenerative changes in that knee, including preexisting medial compartment disease. For the following reasons, we find that *Pruitt* is distinguishable because the record is not sufficient to establish that claimant initially sustained a work-related injury to his left knee. We reason as follows.

In April 1992, claimant compensably injured his left knee while working for SAIF's insured, Mohawk Paperback. SAIF/Mohawk accepted an "acute tear of the medial meniscus and acute tear of the anterior cruciate ligament, left knee." (Ex. 15).

When claimant sought treatment from Dr. Walton on April 17, 1992, he told him he had a right knee injury with surgery in 1988. Dr. Walton explained that the injury that precipitated the 1988 surgery also involved "a mild stress to the left

knee, but examination at that time noted no effusion,” and claimant said that he quickly returned to previous function. (Ex. 3). Claimant told Dr. Walton his left knee had previously been the “good” knee. (Exs. 3, 5).

On June 3, 1992, Dr. Walton performed left knee surgery, and diagnosed a medial meniscal tear and chronic anterior cruciate deficient left knee, as well as “impinging osteophyte anterior compartment left knee.” (Exs. 10, 14). He explained that most of claimant’s medial meniscus had already been auto-amputated, and that there were still some shreds of the anterior cruciate ligament present, but it was “functionless.” He also found grade IV changes of the medial compartment of the left knee. (Ex. 10).

In a later report, Dr. Walton explained that the acute part of the injury was a tear of the remaining portion of the medial meniscus, as well as a tearing and displacement of the remaining fibers of his anterior cruciate ligament. Dr. Walton explained that, with regard to the preexisting degenerative components, he had surgically treated a large osteophyte. (Ex. 14). After surgery, claimant’s major complaint was in the medial compartment. (Ex. 16-2). Dr. Walton commented that claimant might be a candidate for a high tibial osteotomy within the year to prevent further collapse of the medial compartment. (Exs. 11, 13, 14, 16, 18). He also opined that claimant would eventually need a total knee replacement. (Exs. 14, 16).

In October 1992, Dr. Walton responded to questions from SAIF/Mohawk, explaining that the 1992 work injury was not the major cause of claimant’s need for the high tibial osteotomy. Rather, he said that claimant had an underlying condition that was aggravated by the 1992 injury. Dr. Walton did not believe SAIF/Mohawk was responsible for the total knee replacement. (Ex. 17). In November 1992, SAIF/Mohawk denied compensability of “treatment for advanced degenerative condition in the medial joint requiring a high tibial osteotomy[.]” (Ex. 19). There is no evidence that denial was appealed.

In December 1992, Drs. Bald and Barth examined claimant on behalf of SAIF/Mohawk. They concluded that claimant had an acute tear of the left medial meniscus, superimposed on preexisting chronic anterior cruciate insufficiency with medial compartment disease noted at the 1992 surgery, which consisted of grade IV chondromalacia. They explained that the need for a high tibial osteotomy was related, in major part, to the preexisting anterior cruciate insufficiency and degenerative medial compartment disease. (Ex. 20-4).

In 1997, claimant began working as a correctional officer for SAIF's insured, and experienced several work-related injuries to his left knee. In February 2003, SAIF/Corrections accepted a left knee strain. (Exs. 39, 61). He injured his left knee again in November 2004 and December 2004. (Exs. 69-71, 76-77). SAIF/Corrections accepted a left knee contusion, left medial meniscus tear, and left lateral meniscus tear (and other conditions) resulting from the December 2004 injury. (Exs. 78A, 105A). Claimant treated with Dr. Walker and Dr. Greenleaf.

Dr. Greenleaf performed left knee surgery on March 8, 2005. His postoperative diagnoses included medial meniscus tear and degenerative joint disease, lateral meniscus tear, and multiple loose bodies. He found significant degenerative joint disease in the medial compartment. (Ex. 85).

On July 20, 2005, Dr. James examined claimant on behalf of SAIF/Corrections. Claimant told him he had a work-related left knee injury in 1977 with another employer (Montgomery Ward). Dr. James believed that the 1977 injury explained the significant preexisting degenerative changes found during the 1992 left knee surgery. He opined that the findings at the 1992 surgery, except for some later tearing, were due in a major way to a preexisting condition now identified as occurring in 1977. (Ex. 97-3, -4). Dr. James concluded that the left knee condition preexisting the 1992 injury included an anterior cruciate ligament injury and traumatic osteoarthritis of the medial compartment and patellofemoral joint, which were most likely secondary to the 1977 injury. (Ex. 97-14, -15). Drs. Walker and Greenleaf concurred with Dr. James' July 20, 2005 report. (Exs. 101, 104).

Later, Montgomery Ward's attorney wrote to Dr. James and explained that the 1977 claim was accepted for a *right* knee injury, and that claimant was awarded permanent disability for the right leg. On January 29, 2006, Dr. James agreed that, based on the 1977 right knee injury, claimant's current left knee problems were *not* related to the 1977 injury. (Ex. 111).

On March 20, 2006, however, Dr. James adhered to his July 2005 report. He acknowledged his January 29, 2006 concurrence letter, where he was informed that the 1977 work injury was accepted for claimant's right knee. Nevertheless, Dr. James adhered to his July 2005 report, explaining that claimant had described an injury to the left knee in 1977, as well as the right lower extremity. (Ex. 113-3, -4, -6). Dr. James explained that the left knee "may not have been documented or treated as far as the final disability rating was concerned." (Ex. 113-3).

Dr. James subsequently explained that if claimant did not have a left knee injury during the 1977 work incident, he had some type of left knee injury at that approximate time. He said that the findings at the 1992 surgery took several years to develop, and even if the left knee injury did not occur in 1977, it occurred several years before 1992. (Exs. 116-7, 136A-3). He acknowledged there was no clear documentation of when the preexisting injury occurred. (Ex. 135-6).

Claimant's theory of compensability for this claim relies in part on Dr. James' belief that he had a work-related injury in 1977, which caused the severe degenerative changes, including preexisting medial compartment disease, which were found during the 1992 surgery. However, there are no contemporaneous medical records indicating that claimant injured his left knee in 1977 or received any treatment for a left knee condition as a result of that incident. Claimant testified that the 1977 injury caused left knee pain, but nothing compared to what was in the right leg. (Tr. 10). At a prior hearing, claimant said that there was "minimal pain" in the left knee after the 1977 incident. (Exs. 114-19, 121-2).

In the *Pruitt* case relied on by claimant, the 1976 left knee injury, which contributed to the claimed left knee condition, was clearly work-related. Here, however, we agree with SAIF/Corrections that the preponderance of evidence does *not* establish that claimant's initial left knee injury, some time before 1992, was work-related. Claimant's testimony indicates that he had only minimal left knee pain after the 1977 incident, and there is no evidence he sought any medical treatment for his left knee in connection with that incident. At most, Dr. James' reports indicate the possibility that claimant experienced a work-related injury to his left knee in 1977. *See Gormley v. SAIF*, 52 Or App 1055, 1060 (1981) (persuasive medical opinions must be based on medical probability, rather than possibility).

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).

To establish a compensable occupational disease, claimant must prove that employment conditions were the major contributing cause of his disease. ORS 656.802(2)(a). If the occupational disease claim is based on the worsening of a preexisting disease or condition, claimant must prove that employment activities were the major contributing cause of the combined condition and pathological worsening of the disease. ORS 656.802(2)(b).

On this record, claimant has not established that he experienced a work-related injury to his left knee at some time before 1992. It follows that any medical opinions relying on the fact that claimant sustained a work-related injury before 1992 are not persuasive.

As noted above, claimant relies on Dr. James' opinion that the work event in 1977 caused a left knee ACL tear that contributed to the gradual development of the medial compartment degeneration of the left knee. But Dr. James' reports only support compensability of this newly claimed condition if the record establishes that claimant initially injured his left knee before 1992 in a *work-related* incident. Dr. James consistently focused on the pre-1992 incident as the major contributing cause of claimant's left knee osteoarthritis condition. (Exs. 97-14, -16, 106, 113-4, 116-6, -7, 135-4, 136A-6). Moreover, Dr. James concluded that the progression of claimant's left knee osteoarthritis was *not* significantly influenced by the work related incidents in 1992, 2003, 2004 or 2006, or his ongoing work activities. (Exs. 97-17, 113-4, -5, -6, 116-28, -29, -31, 135-2, -3, -5, -6, 136A).

In 2005, Dr. James explained that claimant's eventual need for a total knee replacement would be based on the significant osteoarthritis that preexisted the 1992 injury. (Ex. 97-17). He said that the "die was essentially cast with the original injury" before 1992. (Ex. 113-4). Dr. James explained that claimant's activities on and off work plus subsequent injuries after 1992 did not contribute in as significant a way to the current left knee condition as the preexisting osteoarthritis and chronic anterior cruciate ligament laxity identified in 1992. (Exs. 113-6, 116-28, -29, 135-2, -3). He could not state that any later injuries hastened the natural progression of the osteoarthritic condition. (Ex. 116-31).

In January 2007, Dr. James explained that claimant did not have an occupational disease condition. Rather, the "overwhelming" condition regarding claimant's left knee was the severe preexisting osteoarthritis diagnosed at the 1992 surgery. (Ex. 135-4). Dr. James explained that claimant's job as a corrections officer was not associated with an increased risk for developing osteoarthritis in the knee. (Ex. 135-3). Moreover, he said that claimant's cumulative work for SAIF/Corrections' insured was not the major contributing cause of the claimed

condition. He explained that incidents between 1992 and 2006 played only a “minor role” in the progression of the osteoarthritis. (Ex. 135-6). We conclude that Dr. James’ opinion does not support compensability of claimant’s occupational disease claim for medial compartment degeneration of the left knee.

Similarly, Dr. Greenleaf’s reports do not support compensability of claimant’s left knee condition based on an occupational disease theory. He did not provide an opinion indicating that claimant’s work activities were the major contributing cause of the claimed left knee condition. In February 2007,¹ he explained that the preexisting arthritic changes in the left knee were accelerated after the December 2004 injury and the March 2005 surgery. (Ex. 139).

We contrast Dr. Greenleaf’s February 2007 opinion, with his January 26, 2006 letter, which explained that, at that time, the December 2004 injury “has not significantly contributed to or worsened his underlying osteoarthritic condition.” (Ex. 110). Dr. Greenleaf noted that it was clear that “over time, removal and debridement of meniscal tears can contribute to and/or worsen osteoarthritic conditions within the knee[,]” but it was too early to tell if that would be the case for claimant. (Ex. 110).

In August 2005, Dr. Greenleaf had concurred with Dr. James’ July 2005 report that concluded that claimant already had a significant preexisting osteoarthritic condition at the time of the 1992 surgery, which included osteoarthritis of the medial compartment. (Exs. 97-14, 104). Dr. James acknowledged that the December 2004 work incident caused left medial and lateral meniscal tears, but he concluded that all of the degenerative conditions were preexisting and unrelated to that work injury. (Ex. 97-16). Dr. James concluded that only 15 percent of claimant’s then-current left knee condition was related to the December 2004 incident. (Ex. 97-17). Dr. James explained that claimant’s future treatment for a total knee replacement would be based on the osteoarthritis that preexisted the 1992 injury. (*Id.*)

Dr. Greenleaf did not indicate that he no longer agreed with Dr. James’ December 2005 report. In a later opinion, Dr. James explained that, based on the degree of osteoarthritis noted in 1992, claimant’s medial meniscus was already essentially non-functional. He did not believe that the 2004 injury and surgery had a significant effect on the progression of the osteoarthritis. (Exs. 135-4, -5, 136A-6).

¹ Dr. Greenleaf’s letter is dated “February 6, 2006,” but a date stamp on the letter indicates it was received on February 21, 2007, and the exhibit list also refers to a “2007” date. (Ex. 139).

In light of Dr. Greenleaf's January 2006 opinion and his concurrence with Dr. James' 2005 report, we conclude that his opinion is insufficient to establish that claimant's December 2004 work injury or that his work activities in general were the major contributing cause of the medial compartment degeneration of the left knee.

The remaining causation opinion is from Dr. Walker. In a June 2007 concurrence letter from claimant's attorney, Dr. Walker agreed with Dr. Greenleaf's opinion that the December 2004 injury and surgery had pathologically worsened his left knee medial compartment degeneration. (Ex. 147-3, -4). Dr. Walker concluded that claimant's work injuries and work activities over time were the major contributing cause of his left knee medial compartment degeneration/arthritis, and of his need for treatment for the left knee condition. (Ex. 147-3).

Dr. Walker's causation opinion is not persuasive because he did not explain the nature of claimant's "work injuries and work activities" or discuss how they contributed to the degenerative condition. In any event, his opinion was apparently based on his understanding from Dr. James' 2005 report that claimant sustained a work-related injury before 1992, which caused the preexisting osteoarthritis of the medial compartment found in 1992. (Ex. 97-14). Dr. Walker concurred with Dr. James' 2005 report. (Ex. 101). There is no indication that Dr. Walker changed his opinion in that regard. Because Dr. Walker apparently relied on an unsupported understanding that claimant's left knee condition before 1992 was work-related, his opinion is not sufficient to establish that claimant's work activities, including work injuries, were the major contributing cause of medial compartment degeneration of the left knee. In light of the complex nature of claimant's claimed left knee condition, Dr. Walker's conclusory opinion is not persuasive. *See Moe v. Ceiling Systems, Inc.*, 44 Or App 429, 433 (1980) (conclusory opinions given little weight).

In summary, we conclude 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.² We therefore reverse the ALJ's order.

² In light of our conclusion, it is not necessary to address responsibility or SAIF's argument that ORS 656.802(2)(b) applies.

ORDER

The ALJ's order dated April 2, 2008 is reversed. SAIF/Corrections' denials are reinstated and upheld. The ALJ's \$8,000 assessed attorney fee award is also reversed.

Entered at Salem, Oregon on November 21, 2008