

In the Matter of the Compensation of
CHARLES J. BAKER, Claimant
WCB Case No. 07-01646, 07-01564
ORDER ON REVIEW
Edward J Hill, Claimant Attorneys
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Reviewing Panel: Members Biehl, Langer, and Herman. Member Biehl concurs in part and dissents in part.

The SAIF Corporation requests review of those portions of Administrative Law Judge (ALJ) Kekauoha's order that: (1) found that it abandoned its defense that claimant's occupational disease claim for a left shoulder condition was untimely filed; and (2) set aside its denial. On review, the issues are scope of issues, timeliness of claim filing and, potentially, compensability. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," as supplemented and summarized as follows.

Beginning in 1997, claimant worked as a journeyman electrician for multiple employers. His job duties required heavy lifting and repetitive use of his arms, approximately 80 percent of which necessitated overhead work. (Ex. 22A-36, -38; Tr. 12).

In spring 2002, claimant began experiencing left shoulder pain. (Exs. 1; 22A-37). He treated with Dr. Sedgewick, who, after reviewing an MRI, diagnosed left shoulder posterior subluxation and glenohumeral degenerative joint disease. (Ex. 3). In January 2003, Dr. Sedgewick performed left shoulder surgery. (Ex. 5). In September 2003, Dr. Sedgewick noted that claimant's left shoulder was "pretty dog gone [*sic*] worn out * * * from his activities as an electrician." (Ex. 14). In discussing the cause of claimant's left shoulder condition, Dr. Sedgewick indicated only claimant's work as being the "cause of [his] disease." (Tr. 13-14).

Claimant acknowledged that he did not file a claim at that time because he was "afraid to say anything." (Ex. 22A-50). He further stated that, in retrospect, he "should have done it on workman's comp * * * because, you know, it was obviously a work related injury." (*Id.*)

Claimant continued working as an electrician and, in September 2005, began experiencing increasing left shoulder pain, as well as a popping or “grinding type movement” in that shoulder. (Ex. 22A-19, -20). After treating with Dr. Huebert, claimant underwent another MRI of his left shoulder, which showed a partial tear of the supraspinatus tendon, a long tear of the glenoid labrum, and moderate to severe glenohumeral degenerative joint disease. (Ex. 18-2).

In January 2007, claimant was referred to Dr. Irvine, who diagnosed post-traumatic left shoulder osteoarthritis “as the result of an occupational disease and repetitive overuse in a 47-year-old electrician.” (Ex. 20-1). Dr. Irvine believed that claimant’s work activities were the major contributing cause of his left shoulder condition. (Exs. 27A-1; 35-4). In January 2007, claimant filed an occupational disease claim.

At SAIF’s request, Dr. Bald examined claimant. He diagnosed moderately severe left shoulder degenerative osteoarthritis. (Ex. 27-8). Dr. Bald believed that claimant’s work activities were a “very definite contribution” to his left shoulder condition, but could not say that those activities were the major contributing cause of that condition because claimant had little or no osteoarthritis in his dominant right shoulder. (Ex. 27-8, -10). Dr. Sedgewick concurred with this opinion. (Exs. 29-1; 33).

Dr. Irvine disagreed with those opinions, explaining that, because claimant equally used both arms in an overhead position, it would be expected that his dominant shoulder would serve a protective function, thereby resulting in more damage to the non-dominant shoulder. (Ex. 35-4).

SAIF denied claimant’s occupational disease claim. Claimant requested a hearing.

At hearing, SAIF raised a defense that claimant’s claim was untimely filed. (Tr. 3). Claimant agreed that SAIF properly raised the issue of untimely filing, and that the issue would be litigated. (Tr. 4). In its written closing argument, SAIF identified claimant’s untimely filing as an issue to be decided, but did not make substantive arguments advancing that position.

CONCLUSIONS OF LAW AND OPINION

Reasoning that SAIF abandoned its timeliness defense, the ALJ did not rule on whether claimant timely filed his occupational disease claim. Regarding compensability, the ALJ found that Dr. Irvine’s opinion persuasively established that claimant’s work activities were the major contributing cause of his left shoulder condition.

On review, SAIF contends that it properly preserved its timeliness defense, and that claimant did not timely file his occupational disease claim. SAIF also argues that claimant has not established the compensability of the left shoulder condition because the opinions of Drs. Bald and Sedgewick were more persuasive than the opposing opinion of Dr. Irvine.

We agree with SAIF that it did not abandon its timeliness defense merely because it did not fully brief that issue in its closing arguments. The defense was properly raised at hearing and SAIF thereafter did not disclaim its timeliness defense. (Tr. 3). Moreover, in its closing argument to the ALJ, SAIF identified timeliness as an issue to be decided. Under these circumstances, we conclude that SAIF did not abandon its timeliness defense. Accordingly, we proceed with determining whether claimant's occupational disease claim was timely filed under ORS 656.807(1).

ORS 656.807(1) provides that an occupational disease claim is void unless filed one year from the later of the following dates: (1) the date the worker first discovered the occupational disease; (2) the date that, in the exercise of reasonable care, the worker should have discovered the occupational disease; (3) the date the claimant became disabled; or (4) the date the claimant was informed by a physician that the claimant was suffering from an occupational disease. *Freightliner LLC v. Holman*, 195 Or App 716 (2004); *Vida Eghani*, 58 Van Natta 979, 981 (2006).

In *Wayne-Dalton Corp. v. Mulford*, 190 Or App 370, 374-75 (2003), the court determined that the word "informed" should be accorded its ordinary meaning of "importing information or making the listener aware of information." Thus, the court held that under the ordinary meaning of the word "informed," as used in ORS 656.807(1)(b), the statute of limitations does not begin to run "until a physician tells the claimant expressly or in substance that the patient is suffering from an occupational disease." *Id.* at 375.

SAIF argues that claimant was informed by Dr. Sedgewick in September 2003 that he was suffering from an occupational disease, but did not file his occupational disease claim until 2007, well over the maximum one-year period set forth in ORS 656.807(1). We agree, reasoning as follows.

In 2003, claimant spoke with Dr. Sedgewick regarding the cause of his left shoulder condition. Dr. Sedgewick identified claimant's work as the cause of his disease. (Tr. 13-14). Dr. Sedgewick's September 2003 chart note reported the following: "Essentially pretty dog gone [*sic*] worn out left shoulder from his

activities as an electrician.” (Ex. 14). Claimant acknowledged that he understood at that time that his claimed left shoulder condition was “obviously” work related, but opted not to file a claim at that time because he was “afraid to say anything.” (Ex. 22A-50).

Under these circumstances, we find that, in 2003, Dr. Sedgewick informed claimant “expressly or in substance” that he was suffering from an occupational disease. *See also Leonard F. Staley*, 57 Van Natta 552 (2005) (where a physician implicated work activities as causing the claimant’s hearing loss and the claimant understood that work noise contributed to the hearing loss, the physician informed the claimant that he was suffering from an occupational disease). Because claimant did not file his occupational disease until 2007, well beyond the one-year period set forth in ORS 656.807(1), we find the claim untimely filed.

Claimant does not dispute that he was informed by Dr. Sedgewick in 2003 that he was suffering from an occupational disease. Rather, he asserts that the reasoning expressed in *Ahlberg v. SAIF*, 199 Or App 271 (2005) and *Kepford v. Weyerhaeuser Co.*, 77 Or App 363 (1986) permit him to file a new occupational disease claim, unencumbered by the statute of limitations, for his ongoing work exposure that resulted in a worsened left shoulder condition. We disagree that *Ahlberg* and *Kepford*, which only addressed the doctrine of claim preclusion, permit claimant to avoid the statute of limitations requirements under ORS 656.807.

Ahlberg and *Kepford* held that, in certain circumstances where a claimant’s claimed condition worsened with ongoing work activities, the doctrine of claim preclusion did not bar the claimant from bringing a subsequent compensability claim for a new and worsened condition. Those cases did not hold that a claimant may indefinitely postpone the filing of an initial occupational disease claim after being informed by a physician that the claimant is suffering from an occupational disease. To so hold would permit a claimant to ignore the statute of limitation requirements under ORS 656.807 until such time that the claimant decided to file a claim, even where a claimant was repeatedly informed by a physician that the claimant was suffering from an occupational disease. ORS 656.807, however, contains no such exception. Moreover, such reasoning directly contradicts the express language of ORS 656.807, which requires that all occupational disease claims be filed “[o]ne year from the date the claimant * * * is informed by a physician that the claimant is suffering from an occupational disease.” We see no indication that *Ahlberg* or *Kepford* intended to eliminate this statutory requirement for timely claim filing. Accordingly, we find *Ahlberg* and *Kepford* inapposite.

Moreover, the record does not establish that claimant's 2007 claim was for a condition different from that diagnosed by Dr. Sedgewick in 2003. Although there is evidence that the claimant's condition may have worsened in the intervening years, claimant does not assert, and we do not find, that the 2007 claim is for a different condition.

Accordingly, for the foregoing reasons, we reverse.¹

ORDER

The ALJ's order dated November 26, 2007 is reversed in part and affirmed in part. SAIF's denial is reinstated and upheld. The ALJ's \$6,000 assessed attorney fee is also reversed. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on November 19, 2008

Board Member Biehl, concurring in part and dissenting in part.

I agree, for the reasons expressed by the majority, that SAIF did not abandon its timeliness defense. However, because I disagree with the majority's conclusion that claimant did not timely file his occupational disease claim, I dissent from that portion of the majority's opinion.

I acknowledge that, in 2003, Dr. Sedgewick informed claimant that his work activities caused his left shoulder condition and that claimant understood as much. That, however, does not end the inquiry. Subsequent to that conversation, claimant continued engaging in the same causative work activities such that his left shoulder condition worsened. This subsequent period of work exposure was necessarily not part of claimant's Dr. Sedgewick's 2003 diagnosis or claimant's left shoulder condition in 2003. I would find that this new period of exposure warrants the starting of a new occupational disease claim that was not present in 2003.

Specifically, the evidence establishes that, after 2003, claimant's continued work activities caused his left shoulder condition to worsen. By October 2005, claimant developed left shoulder pain associated with his repetitive work activities. (Ex. 20-1). Dr. Irvine noted that claimant's glenohumeral arthritis was now "end-stage and grade III" and caused by repetitive use as an electrician. (*Id.*) Because claimant's ongoing work activities caused his shoulder condition to worsen, he

¹ Because we conclude that claimant's claim was not timely filed, we do not address the compensability issue.

was not precluded from filing an occupational disease claim for that worsened condition. Unlike the majority, I find *Kepford v. Weyerhaeuser Co.*, 77 Or App 363 (1986) and *Ahlberg v. SAIF*, 199 Or App 271 (2005) to be instructive.

In *Kepford*, the Board issued a final order awarding no permanent disability because the claimant's back condition was not the result of an earlier compensable injury. Subsequent to that order, the claimant's back condition continued to deteriorate and he sought compensation for surgery, claiming that the procedure was necessitated by degenerative disc disease, which had been worsened by work activities. After the employer denied the claim, the Board affirmed that its earlier order, which held that the disc disease had not been worsened by the earlier compensable injury, required upholding the employer's denial of the surgery claim.

The court disagreed, reasoning that the claimant's subsequent work activities, along with all of the job conditions to which the claimant had been subjected, could be the major cause of a worsening of the disc disease by the time of the surgery. *Kepford*, 77 Or App at 365. In other words, the court held that the "present claim" for an occupational disease constituted a new issue that was not part of the earlier final order. *Id.* at 365-66. Accordingly, because the claimant's employment caused the disease to worsen, the court concluded that he was entitled to compensation. *Id.* at 367.

In *Ahlberg*, the claimant did not appeal the carrier's denial of his occupational disease claim for hearing loss. The court recognized that, although general rules of claim preclusion would bar the claimant from relitigating the compensability of that hearing loss claim, claim preclusion was not a bar where the claimant's condition had changed and the new claim was supported by new facts that could not have been presented earlier. *Ahlberg*, 199 Or App at 275. Because the claimant's continued work exposure caused the hearing loss to worsen, the court held that the claimant was not barred from litigating the compensability of that worsened condition. In doing so, the court held that the claimant could use the pre-denial work exposure, along with subsequent work exposure, to establish that the cumulative work activities were the major contributing cause of his later occupational disease claim for hearing loss. *Id.* at 276-77.

I find the instant matter analogous. Here, Dr. Bald agreed that "all [of] claimant's work activities, including his most recent employment" contributed to his left shoulder condition, and that the condition had "progressed with time." (Ex. 27-12). Dr. Bald further noted that, subsequent to claimant's treatment with Dr. Sedgewick in 2002 and 2003, the left shoulder condition had significantly

deteriorated in the intervening four years. (Ex. 31-2). Accordingly, Dr. Bald concluded that “claimant’s *ongoing work activities*” and “prior work activities” contributed “to the development of his current left shoulder condition.” (Ex. 31-2) (emphasis added).

Like *Kepford* and *Ahlberg*, I find no bar to claimant filing an occupational disease claim for his worsened left shoulder condition based on subsequent causal work activities. Dr. Sedgewick’s 2003 diagnosis and conversation with claimant regarding his then-existing left shoulder condition could not have considered claimant’s subsequent work activities and the cumulative work contribution to his later worsened left shoulder condition. Accordingly, consistent with *Kepford* and *Ahlberg*, I would find that the statute of limitations does not bar claimant’s later occupational disease claim based on a period of work exposure not considered by Dr. Sedgewick in 2003. Because the majority concludes otherwise, I respectfully dissent.