
In the Matter of the Compensation of
JEFFREY N. BALLARD, Claimant
WCB Case No. 08-06275, 08-05636, 08-05635, 07-08165
ORDER ON REVIEW
Ransom Gilbertson Martin et al, Claimant Attorneys
Sather Byerly & Holloway, Defense Attorneys
The Law Office of Gress & Clark LLC, Defense Attorneys

Reviewing Panel: Members Biehl and Lowell.

The SAIF Corporation, on behalf of Portland Mechanical Contractors, Inc. (SAIF/Portland Mechanical), requests review of those portions of Administrative Law Judge (ALJ) Wren's order that: (1) set aside its denial of claimant's occupational disease claim for a left shoulder superior anterior glenoid labral tear; and (2) upheld the denial for the same condition from SAIF, on behalf of A-Temp Heating & Cooling, Inc. (SAIF/A-Temp).¹ On review, the issue is responsibility.

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

The ALJ determined that claimant's left shoulder condition was appropriately analyzed as an occupational disease and concluded that the medical evidence established that his combined work exposure, including a July 2004 pressure washer injury at A-Temp, was the major contributing cause of his disability or need for treatment for the superior anterior glenoid labral tear. The ALJ applied the last injurious exposure rule (LIER) to determine responsibility. The ALJ assigned initial responsibility to SAIF/Portland Mechanical and determined that it could not shift responsibility back to SAIF/A-Temp because claimant's work exposure at SAIF/Portland Mechanical contributed to the labral tear. Because the record did not show that claimant's later work exposure actually contributed to a worsening of the tear, the ALJ concluded that responsibility remained with SAIF/Portland Mechanical.

On review, SAIF/Portland Mechanical argues that the medical evidence establishes that a work accident at A-Temp was the major, if not the sole, cause of claimant's labral tear and, therefore, SAIF/A-Temp is responsible for that condition. SAIF/Portland Mechanical argues that, because causation was proven, resorting to the LIER was unnecessary.

¹ SAIF/A-Temp initially cross-requested review of those portions of the ALJ's order regarding timeliness of claim filing, compensability, and attorney fees. However, SAIF/A-Temp has withdrawn its cross-request.

Claimant and SAIF/A-Temp respond that the medical evidence establishes that the labral tear was caused by the July 15, 2004 injury at A-Temp combined with subsequent work activities at Portland Mechanical, which extended or contributed to the tear. Claimant and SAIF/A-Temp argue that SAIF/Portland Mechanical is responsible for the labral tear.

For the reasons discussed by the ALJ, we agree that claimant's labral tear is most appropriately analyzed as an occupational disease because the medical evidence establishes that the disability or need for treatment for the tear was caused by the July 2004 work injury and his subsequent work exposure. *See Waste Management v. Pruitt*, 224 Or App 280 (2008) (substantial evidence supported the Board's occupational disease analysis where the medical evidence established that the claimant's lifetime work activities, including the 1976 and 1999 work injuries, contributed to his condition); *Kepford v. Weyerhaeuser*, 77 Or App 363, 367 (1986); *Patricia Jenkins*, 57 Van Natta 1835 (2005); *Ronald J. Capps*, 55 Van Natta 621 (2003).

SAIF/Portland Mechanical denied the claim based only on responsibility. SAIF/Portland Mechanical does not agree that the LIER applies, but it does not challenge the ALJ's finding that, if the LIER applies, SAIF/Portland Mechanical is initially or presumptively responsible for claimant's labral tear because it was on the risk when he initially sought treatment in May 2006. *See Agricom Ins. v. Tapp*, 169 Or App 208, 213, *rev den*, 331 Or 244 (2000) (under the LIER, liability is presumptively assigned to the most recent potentially causal employer for whom the claimant worked or was working at the time the claimant first sought or received medical treatment, whichever comes first).

As the presumptively responsible carrier, SAIF/Portland Mechanical can transfer liability to a previous carrier if it proves either that: (1) it was impossible for conditions at its workplace to have caused the disease in this particular case; or (2) the disease was caused solely by conditions at one or more previous employments. *See Roseburg Forest Products v. Long*, 325 Or 305, 313 (1997).

Here, however, we do not agree with SAIF/Portland Mechanical that claimant's labral tear was caused "solely" by the work injury at A-Temp. In a concurrence letter from SAIF/A-Temp, Dr. Bald, examining orthopedic surgeon, agreed that if claimant had episodes of shoulder popping when he performed his work, especially if the popping episodes increased in frequency or intensity, that would indicate a pathological worsening of the labral tear and he would attribute the worsened condition to the work activity. Dr. Bald indicated that claimant's labral tear was a consequence of the July 15, 2004 work injury at A-Temp and, to a lesser extent, some of the additional work activity. (Ex. 59-2).

Claimant experienced left shoulder pain and popping on July 15, 2004, while working at A-Temp and moving a pressure washer from a roof. (Tr. 11-13). His left shoulder remained sore after that incident. (Tr. 13-14). In May 2005, claimant began working for Portland Mechanical, which involved moving and lifting heavy items weighing 200 to 300 pounds, and working with his arms above shoulder level. (Tr. 15, 24). He experienced left shoulder symptoms when lifting overhead or using his arm in certain positions. (Tr. 16-17). The left shoulder pain and popping increased and became more noticeable while working for Portland Mechanical, and he modified his work activities. (Tr. 24, 25, 26). Claimant's left shoulder popped at work on a weekly basis. (Tr. 19-20, 24). Claimant sought medical treatment when he could no longer tolerate the pain. (Tr. 17).

In a deposition, Dr. Bald indicated that claimant had initially sustained a full thickness tear, but he explained that the tear can get caught or pinched between the bones and can result in an extension of the tear. (Ex. 63-12, -33, -34, -42). He testified that when the tear gets caught between bones or stuck, it typically causes pain and a mechanical sensation, such as popping. (Ex. 63-8, -11). Dr. Bald agreed that it was probable that claimant's later work activity contributed to the tear. (Ex. 63-33, -34). Later in the deposition, Dr. Bald was asked about claimant's additional work activities that included shoulder popping and he testified that the probability was that that type of activity could result in some extension of the tear or a worsening of the tear. (Ex. 63-41). Dr. Bald agreed that claimant's need for treatment in February 2008 was related to a combination of trauma and work activity. (Ex. 63-34).

We do not agree with SAIF/Mechanical that Dr. Bald's testimony was equivocal and indicated only that the later work activities "might have" contributed to a worsening of the labral tear. Rather, when Dr. Bald was informed about claimant's subsequent shoulder popping incidents while performing his work duties, he agreed that the later work activity probably contributed to an extension or worsening of the labral tear. Consequently, the medical evidence does not establish that it was impossible for claimant's employment with SAIF/Portland Mechanical to have caused his labral tear or that a prior employment exposure was the sole cause of his condition. Therefore, we agree with the ALJ that SAIF/Portland Mechanical remains responsible for claimant's labral tear.

In any event, even if we assume that claimant's injury at A-Temp was the major contributing cause of the labral tear and that SAIF/A-Temp is initially responsible for the labral tear, SAIF/A-Temp may use the LIER defensively to shift responsibility to a later employer by showing that the later employment

actually contributed to a worsening of the disease. *Willamette Industries, Inc. v. Titus*, 151 Or App 76, 81 (1997). Here, even if we apply that “major causation” analysis, Dr. Bald’s opinion establishes that claimant’s work exposure at SAIF/Portland Mechanical actually contributed to a worsening of the labral tear. Therefore, responsibility under this analysis would also shift forward to SAIF/Portland Mechanical.²

Claimant’s counsel is entitled to an attorney fee award for services on review. After considering the factors set forth in OAR 438-015-0010(4), and applying them to this case, we find that \$500 is a reasonable attorney fee for claimant’s attorney’s services on review, payable by SAIF/Portland Mechanical. In reaching this conclusion, we have particularly considered the time devoted to the denial issue (as represented by claimant’s respondent’s brief), the complexity of the denial issue, the value of the interest involved, and the risk that claimant’s counsel might go uncompensated.

ORDER

The ALJ’s order dated July 9, 2009 is affirmed. For services on review, claimant’s counsel is awarded an assessed fee of \$500, payable by SAIF/Portland Mechanical.

Entered at Salem, Oregon on February 5, 2010

² The parties do not dispute the ALJ’s conclusion that the medical evidence does not establish that claimant’s later employment after SAIF/Mechanical contributed to a worsening of the labral tear.