

In the Matter of the Compensation of
TIMOTHY R. HANSCAM, Claimant

WCB Case No. 09-00239

ORDER ON REVIEW

Martin L Alvey, Claimant Attorneys

Julie Masters, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Lowell, Biehl and Herman. Member Lowell dissents.

Claimant requests review of Administrative Law Judge (ALJ) Riechers's order that: (1) based the rate of his permanent partial disability (PPD) benefits for an occupational disease claim for a bilateral knee condition on a February 1988 date of injury; and (2) reversed a penalty awarded by an Order on Reconsideration under ORS 656.268(5)(e). On review, the issues are rate of PPD and penalties. We reverse.

FINDINGS OF FACT

In April 1987, claimant underwent left knee arthroscopic surgery for degenerative arthritis and multiple loose cartilaginous bodies. (Ex. 3). In February 1988, a right knee arthroscopic procedure was performed for the same reasons. (Ex. 6).

On October 3, 2005, claimant treated with Dr. Slattery for ongoing pain in both knees. (Exs. 7, 8, 9). Dr. Slattery recommended total knee replacements. (Ex. 17-1).

In June 2006, Dr. Bowman, after reviewing claimant's records and a history of his work activities, diagnosed bilateral knee "end-stage osteoarthritis." (Ex. 13-3). Dr. Bowman agreed with Dr. Slattery that a total knee replacement was necessary to treat that condition. (Ex. 13-2). According to Dr. Bowman, claimant's earlier 1987-88 treatments were for an idiopathic arthritis, while the need for treatment for his current end-stage osteoarthritis was caused, in major part, by his lifetime of work activities, including those performed for the SAIF Corporation's insured from 2000-2005. (Ex. 13-2, -3).

On December 4, 2007, we set aside SAIF's denial of claimant's occupational disease claim for his bilateral knee condition. *Timothy R. Hanscam*, 59 Van Natta 2835 (2007). In doing so, we used the last injurious exposure rule (LIER) as a rule of proof to find that claimant's lifetime of employment conditions

was the major contributing cause of his claimed bilateral knee condition under ORS 656.802(2)(a). *Id.* at 2836-37. Alternatively, considering the 1987-88 bilateral knee condition to be a “preexisting condition,” we also found the claim compensable under ORS 656.802(2)(b) because the persuasive medical evidence established that claimant’s lifetime of work activities was the major contributing cause of his claimed bilateral knee condition and that his “post-1988” work exposure” pathologically worsened his preexisting arthritic condition. *Id.* at 2837.¹ Under both analyses, we relied on Dr. Bowman’s opinion.

Thereafter, SAIF accepted bilateral knee osteoarthritis and issued an October 22, 2008 Notice of Closure using February 29, 1988 as the date of injury by which it calculated claimant’s PPD award. (Ex. 22). Claimant requested reconsideration.

A January 8, 2009 Order on Reconsideration modified the closure notice, finding that October 3, 2005 was the appropriate date of injury to be used in calculating claimant’s PPD award. (Ex. 27). Because claimant was at least 20 percent permanently disabled and received an increase of at least 25 percent in the amount of PPD awarded at claim closure, the reconsideration order also awarded a penalty under ORS 656.268(5)(e) and OAR 436-030-0175(2), (3).² (Ex. 27-4). SAIF requested a hearing.

CONCLUSIONS OF LAW AND OPINION

The ALJ reinstated the Notice of Closure, finding that, under *Reynoldson v. Multnomah County*, 189 Or App 327, *rev den*, 336 Or 192 (2003), claimant’s date of injury was February 29, 1988, because that was the date that he first sought treatment for his bilateral knee condition. Therefore, pursuant to ORS 656.202(2), the ALJ determined that the 1988 PPD rates should be used to calculate claimant’s PPD award for his occupational disease. Based on that determination, the ALJ reversed the penalty award.

¹ Accordingly, contrary to SAIF’s assertion, we considered claimant’s earlier bilateral knee condition as a “preexisting condition” in finding his claim compensable under ORS 656.802(2)(b). *See* 59 Van Natta at 2837.

² Claimant’s claim was closed on October 22, 2008. Thus, the applicable standards are found in WCD Admin. Order 08-054 (eff. July 1, 2008). OAR 436-030-0003(1).

On review, both parties agree that, under *Reynoldson*, claimant's "date of injury is the date of disability from the disease or the date of the first medical treatment of it," whichever is earlier. See 189 Or App at 332. They also agree that the date of injury determines the PPD rate for his occupational disease claim for his bilateral knee condition. See ORS 656.202(2) (payment of benefits shall be in the amounts provided for by the law in force at the time the injury giving rise to the right to compensation occurred); *Reynoldson*, 189 Or App at 332-33 (proper PPD rate is determined by the rate in effect on the date of injury, *i.e.*, when the claimant first sought treatment for the disease). The parties part ways, however, regarding *Reynoldson's* application to the instant matter, with claimant asserting an October 3, 2005 date of injury (and application of the PPD rates in effect at that time) and SAIF claiming a February 29, 1988 date of injury (and use of the PPD rates then in force). For the following reasons, we find that October 3, 2005 is the date of injury.

In *Reynoldson*, the court explained that, under ORS 656.202(2), the laws governing the payment of compensation, including the rate for a PPD award, are those "in force at the time that the injury giving rise to the right to compensation occurs * * *." 189 Or App at 331 (quoting ORS 656.202(2)). "In occupational disease cases, the injury to which the statute refers is the occupational disease for which compensation is sought." *Id.*

Here, we must determine the occupational disease that forms the basis of claimant's PPD award. To do so, we turn to our prior order, which found claimant's bilateral knee "end-stage osteoarthritis" compensable based on the persuasive opinion of Dr. Bowman. *Hanscam*, 59 Van Natta at 2836-37.³ Dr. Bowman concluded that claimant's work activities throughout his life were responsible for 60 percent "of the current condition (end-stage osteoarthritis) * * *." (Ex. 13-3). Dr. Bowman attributed 15 to 20 percent of that contribution to claimant's work activities at SAIF's insured from 2000-2005. (Ex. 13-3).

³ Although our prior order looked to all of claimant's work activities as contributing to his claimed condition ("end-stage osteoarthritis"), including those before and after his 1987-88 treatments, it did not determine the date of disability or first treatment for that condition. Therefore, our prior order provides no preclusive effect regarding the date of injury.

Thus, based on Dr. Bowman's opinion, before claimant's 2000-2005 work exposure with SAIF's insured, he did not have the claimed occupational disease that our prior order found compensable. It necessarily follows that claimant could not have first treated for that disease in 1987-88.⁴

We disagree with SAIF's assertion that Dr. Bowman did not distinguish between claimant's 1987-88 arthritic condition and the claimed "end-stage osteoarthritis" condition. Dr. Bowman explained that, subsequent to the 1987-88 surgeries, claimant developed increasing pain, limited ambulation, "varus (bowlegged) deformities, bone spurs, and "other manifestations of arthritic progression" indicative of "end[-]stage osteoarthritis." (Ex. 13-2). Dr. Bowman further explained that claimant's 1987-88 treatments were for "an initial idiopathic arthritis," whereas his October 2005 (and future) treatment was for his "current condition (end-stage osteoarthritis) * * *," which was caused in major part by a lifetime of work activities, including those from 2000-2005. (Ex. 13-3).

Based on the foregoing, we conclude that claimant did not seek treatment for his occupational disease (bilateral knee end-stage osteoarthritis) until he treated for that condition on October 3, 2005. In doing so, we reiterate that Dr. Bowman's opinion, which our prior order found persuasive, distinguished between the idiopathic arthritis for which claimant was treated in 1987-88, and the occupationally-related "end-stage osteoarthritis" for which claimant sought treatment in October 2005. (Ex. 13). It was the latter condition for which claimant sought compensation, and that was the subject of our prior order. Indeed, as set forth above, the compensability of claimant's occupational disease was expressly and quantifiably dependent on his 2000-2005 work exposure at SAIF's insured.

Therefore, we find that October 3, 2005 is the proper date of injury for claimant's bilateral knee condition. *See Reynoldson*, 189 Or App at 331 (in determining the date of injury for an occupational disease, the "injury * * * is the occupational disease for which compensation is sought"). Accordingly, we reinstate the Order on Reconsideration, including the penalty awarded under ORS 656.268(5)(e) and OAR 436-030-0175(2), (3).⁵

⁴ Although Dr. Bowman stated that claimant's development of end-stage knee osteoarthritis was "not surprising" and could be "predicted," he maintained that the post-2000 work exposure contributed to the end-stage knee osteoarthritis in an amount that made claimant's work activities the major contributing cause of that condition. (Ex. 13-2, -3).

⁵ SAIF does not dispute the validity of the penalty if the correct date of injury is determined to be October 3, 2005.

Because SAIF requested a hearing regarding the Order on Reconsideration and we have reinstated and affirmed that order, claimant's attorney is entitled to an assessed fee for services at the hearing level, inasmuch as claimant's compensation was not ultimately reduced or disallowed as a result of SAIF's hearing request. ORS 656.382(2); *Crystal L. DeLeon*, 61 Van Natta 1777 (2009). 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 attorney's services at the hearing level is \$3,000, payable by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by the hearing record and claimant's written arguments) the complexity of the issue, the value of the interest involved, and the risk that claimant's counsel might go uncompensated.

In addition, because our order results in increased compensation, claimant's counsel is awarded an "out-of-compensation" attorney fee equal to 25 percent of the increased compensation created by this order, not to exceed \$6,000, payable by SAIF directly to claimant's counsel. ORS 656.386(3); OAR 438-015-0055(2).

ORDER

The ALJ's order dated May 8, 2009 is reversed. The Order on Reconsideration's PPD and penalty awards are reinstated and affirmed. For services at the hearing level, claimant's counsel is awarded an assessed attorney fee of \$3,000, payable by SAIF. In addition, claimant's attorney is awarded an "out-of-compensation" attorney fee equal to 25 percent of the increased compensation created by this order, not to exceed \$6,000, payable directly to claimant's counsel.

Entered at Salem, Oregon on January 29, 2010

Member Lowell dissenting.

I agree with the majority that, under *Reynoldson v. Multnomah County*, 189 Or App 327, 332-33, *rev den*, 336 Or 192 (2003), the proper PPD rate is determined by the rate in effect on the date of injury, which means the date on which claimant first sought treatment for the claimed occupational disease. I also agree that our prior order is a proper starting point in determining when claimant first sought treatment for his bilateral knee osteoarthritis. That prior order found that condition compensable using the LIER rule of proof. *Timothy R. Hanscam*, 59 Van Natta 2835, 2836-37 (2007). Our order also found that claimant's lifetime of work activity, beginning in 1967, was the major contributing cause of his

bilateral knee osteoarthritis. *Id.* Moreover, the opinion of Dr. Bowman, which our prior order found persuasive, explained that claimant had arthritis of *both* knee joints as early as 1988, and that he received surgical treatment for that *bilateral* condition in April 1987 (for the left knee) and February 1988 (for the right knee). (See Ex. 13-1); *see also Hanscam*, 59 Van Natta at 2837. Based on the foregoing, I would find that claimant first sought treatment for his bilateral knee osteoarthritis in February 1988.

I disagree with the implication by claimant and the majority that the October 3, 2005 bilateral knee treatment was for a condition distinguishable from that which he treated for in 1987-88. In doing so, I note that Dr. Bowman characterized both conditions as arthritis. (See Ex. 13-2, -3). Although Dr. Bowman explained that, by October 2005, the initial arthritis had progressed to an “end-stage osteoarthritis,” Dr. Bowman noted that such a development was “not surprising and was predicted at the time the [1987-88 arthritis] diagnosis was made.” (Ex. 13-2). Accordingly, Dr. Bowman’s opinion, on which our earlier compensability decision relied, does not support the majority’s conclusion that claimant’s October 3, 2005 treatment for his bilateral knee condition was for a condition separate from that treated in 1987-88.

Based on the foregoing, I would find that claimant first sought treatment for his occupational disease (bilateral knee osteoarthritis) on February 29, 1988. Accordingly, the standards in existence as of that date of injury must be used to rate claimant’s PPD award. *Reynoldson*, 189 Or App at 332-33.⁶ Because the majority determines otherwise, I respectfully dissent.

⁶ Because I would affirm the ALJ’s modification of the reconsideration order, it necessarily follows that I would also affirm the ALJ’s decision to reverse the reconsideration order’s penalty award.