

In the Matter of the Compensation of
ERIC S. SOFICH, Claimant

WCB Case No. 08-03739

ORDER ON REVIEW

Bennett Hartman Morris & Kaplan, Claimant Attorneys
Garrett Hemann et al, Defense Attorneys

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

The self-insured employer requests review of those portions of Administrative Law Judge (ALJ) Kekauoha's order that: (1) set aside its denial of claimant's "new occupational disease" claim for left shoulder labral detachment; (2) set aside its *de facto* denial of claimant's "new injury" claim for left elbow biceps tendinitis and medial epicondylitis; and (3) awarded a \$10,000 employer-paid attorney fee. On review, the issues are compensability and attorney fees.

We adopt and affirm the ALJ's order.

Claimant's attorney is entitled to an assessed fee for services on review. ORS 656.382(2). 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 on review is \$3,500, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's respondent's brief), the complexity of the issue, and the value of the interest involved. Claimant's counsel is not entitled to an attorney fee for services on review devoted to the attorney fee issue. *Dotson v. Bohemia, Inc.*, 80 Or App 233 (1986).

Finally, claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denials, to be paid by the employer. See ORS 656.386(2); OAR 438-015-0019; *Garry Gettman*, 60 Van Natta 2862 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

ORDER

The ALJ's order dated August 19, 2009 is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$3,500, payable by the self-insured employer. Claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denials, to be paid by the employer.

Entered at Salem, Oregon on June 10, 2010

Member Lowell dissenting.

The majority adopts the ALJ's conclusion that claimant satisfied the requirements of ORS 656.802(2)(b) for establishing the compensability of his occupational disease claim. Based on the following reasoning, I respectfully disagree with that decision.

Claimant sustained a prior compensable left shoulder injury, which has resulted in surgery. Several years later, while working for the same employer, further left shoulder surgery was performed. When his employer accepted an aggravation claim, claimant objected, contending that he had a new occupational disease/injury claim for his current left shoulder condition.

Based on claimant's description of his occupational disease claim for his left shoulder condition, the ALJ found that the claim was based on claimant's work activities during a specific two-year period; *i.e.*, 2006-07. Persuaded by claimant's attending physician's (Dr. Colorito's) opinion, the ALJ concluded that claimant's work activities during the aforementioned period were the major contributing cause of his combined condition and pathological worsening of his disease. Consequently, the ALJ determined that claimant had established a new compensable occupational disease and that responsibility for the claim shifted from the employer under the previously accepted injury claim to the employer under a new occupational disease claim. *See* ORS 656.802(2)(b); ORS 656.308(1).

My review of Dr. Colorito's opinion leads me to a different conclusion. Dr. Colorito unquestionably supports a finding that claimant's work activities between his first surgery (2003) and later surgery (2007) had "something to do with" the significant worsening of his left shoulder condition. (Exs. 39-38, 41-37). Dr. Colorito also referred to claimant's work activities between 2006 and 2007 as causing the difference in his left shoulder pathology and "the worsening of the pathology." (Ex. 41-22-24, -29).

Yet, Dr. Colorito does not opine that claimant's work activities during 2006 and 2007 were "the major contributing cause of the combined condition or pathological worsening of the disease." ORS 656.802(2)(b). Because such a determination is the statutory predicate for finding an occupational disease claim compensable under ORS 656.802(2)(b), I must conclude that claimant has not met his requisite burden of proof.

Furthermore, finding Dr. Colorito's opinion sufficient to satisfy the compensability standard under ORS 656.802(2)(b) in effect lowers the threshold for shifting responsibility for a claim under ORS 656.308(1). Yet, as explained

in *SAIF v. Drews*, 318 Or 1, 10 (1993), the legislative history concerning ORS 656.308(1) documents an intention to make it more difficult to shift responsibility for the same condition to a subsequent employer. Considering that Supreme Court precedent, as well as the legislative history behind ORS 656.308(1), I would not “shift” responsibility for claimant’s condition from his previously accepted claim with the employer to a new occupational disease claim with the employer, particularly when the medical evidence does not expressly address or satisfy the statutory requirements that authorize the transfer of responsibility for a claim.

In reaching this conclusion, I acknowledge that, under similar circumstances, the court has not applied ORS 656.308(1). *Pilgrim v. Delta Airlines, Inc.*, 234 Or 80 (2010). Relying on *SAIF v. Henwood*, 176 Or App 431, 435 (2001), *rev den*, 333 Or 463 (2002), the *Pilgrim* court explained that because both the preexisting condition and its worsening were work related, the claimant’s “employment conditions” were the major contributing cause of his combined hearing loss condition and, as such, the statutory requirements for a compensable occupational disease claim had been satisfied. *See Ahlberg v. SAIF*, 199 Or App 271, 276 (2005).

Based on its application of the *Henwood* rationale, the *Pilgrim* court did not address ORS 656.308(1). Yet, the *Henwood* court had found ORS 656.308(1) inapplicable because the claimant’s occupational disease claim had been based on work activities that included an out-of-state employer. Reasoning that the out-of-state employer was not subject to Oregon workers’ compensation law, the *Henwood* court further expressed concern that applying ORS 656.308(1) to the particular claim (which involved an out-of-state employer) created the possibility that the claimant would receive no recovery at all for a work-related injury. 176 Or App at 439. Noting the statutory policy to make certain that Oregon workers are compensated for their injuries, the court declined to apply ORS 656.308(1) in such a manner.

Although citing *Henwood*, as well as *Ahlberg* (an occupational disease claim for hearing loss that involved a prior unappealed denial for a hearing loss claim), the *Pilgrim* court did not address what appears to be a significant distinction between those claims and *Pilgrim*. Specifically, there was no risk that the claimant in *Pilgrim* would go uncompensated for his condition (because his employer was processing his condition under the previously accepted claim). Likewise, the *Pilgrim* court did not discuss the Supreme Court’s analysis of ORS 656.308(1) and the legislative history, which supports an intention to establish a more difficult threshold for shifting responsibility to a subsequent employer.

Instead, the *Pilgrim* court framed the dispositive question as “whether the claim fits within a category of occupational disease that would allow the claimant to be compensated for his additional employment-caused disability.” 234 Or App at 85. Such a description suggests that the court recognized that, because the claimant’s 5-year aggravation rights had expired under his prior accepted claim, and in the absence of a new occupational disease claim, the claimant would not receive further permanent disability for his hearing loss condition.

Without question, the amount and type of benefits payable pursuant to a previously accepted claim and those under a new claim may be significantly different. Nevertheless, such differences reflect the legislature’s intentions in designing the statutory benefit scheme. In any event, any disparity between the amount of benefits available under an older accepted claim versus a new claim is fundamentally different than going “uncompensated,” which was the underlying concern expressed in *Henwood* and *Ahlberg*.

In this case, as in *Pilgrim*, the issue was framed and litigated as a question of “compensability.” However, in both cases, the employer was willing to pay benefits under the prior accepted claim, while claimant sought a “new” occupational disease claim.

Drilled down to its essence, then, the real underlying issue here is “responsibility” between two dates of injury, or perhaps more precisely, a dispute over which “date of injury” the employer should use to pay benefits. As such, it is really not a “compensability” issue, – the employer does not dispute the proposition that claimant is entitled to workers’ compensation benefits for his shoulder condition. Thus, applying the “responsibility” principles of ORS 656.308(1), or alternatively, the requirements of proving a worsening of a preexisting condition under ORS 656.802(2)(b), I would find that claimant has not met the requisite burden of proof. Therefore, I respectfully dissent.