
In the Matter of the Compensation of
JASON L. DUGAN, Claimant
WCB Case No. 09-03459, 09-00791
ORDER ON REVIEW
Martin L Alvey, Claimant Attorneys
Maher & Tolleson LLC, Defense Attorneys
James B Northrop, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Lowell and Weddell.

Eberle Vivian, Inc./Cherry City Electric requests review of those portions of Administrative Law Judge (ALJ) Wren's order that: (1) set aside its responsibility denial of claimant's injury/occupational disease claim for a right knee condition; and (2) upheld the SAIF Corporation/Stoner Electric, Inc.'s responsibility denial of that same condition. On review, the issue is responsibility. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," with exceptions noted herein.¹

CONCLUSIONS OF LAW AND OPINION

Claimant, an apprentice electrician, began working for Eberle Vivian/Cherry City on May 5, 2008. (Ex. 64). During a one-week period when he was working on "outside receptacles" that involved kneeling and repetitive squatting, he experienced pain in both knees. (Tr. 15-16). His right knee discomfort resolved, but his left knee symptoms remained, at which point he brought it to the attention of Eberle Vivian/Cherry City. (Tr. 16).

On July 15, 2008, claimant treated with Dr. Davis, at Eberle Vivian/Cherry City's behest, for evaluation of his left knee pain. (Ex. 5; Tr. 16). Dr. Davis reviewed a job analysis, released claimant to modified work, and restricted him from kneeling, squatting, or crawling. (Ex. 5-2).

Claimant returned to Eberle Vivian/Cherry City and performed "trim crew work," which was "specifically within" his work restrictions. (Tr. 16-17). Eberle Vivian/Cherry City accepted left knee patellar tendonitis. (Exs. 12, 57).

¹ We do not adopt the ALJ's "Ultimate Findings of Fact" or the finding that Dr. Seymour did not note any right knee complaints on September 29, 2008. (See Ex. 19-3).

On August 20, 2008, Dr. Davis released claimant to full-duty work. (Ex. 13). On August 29, 2008, claimant's employment with Eberle Vivian/Cherry City ended. (Ex. 64).

Claimant was employed by SAIF/Stoner City from September 5, 2008 through September 30, 2008, although he performed no physical work on September 5 or September 30. (Ex. 64, Tr. 25-26, 34-35). He worked 40 hours per week and, with the exception of two or three days, worked on a project involving installation of "bollard" electrical fixtures and "running conduit." (Tr. 17-19, 35). Installing the conduit required trenching through "hard rock river-bed-style material." (Tr. 19). Alongside another employee, claimant dug two trenches, one that was 10 inches wide and 70 feet long, and the other 18 inches wide and 15 to 20 feet long. (Tr. 21-23). For one or two days, claimant operated a "ditch witch," a heavy, tilling-type machine that bucked with force when hitting a line or rock; all other digging times were spent manually trenching. (Tr. 21, 29, 40-42). Approximately 80 percent of claimant's working time for SAIF/Stoner was spent digging or shoveling trenches. (Tr. 36).

While performing these tasks at SAIF/Stoner, claimant experienced right knee pain such that he "wouldn't necessarily want to walk." (Tr. 23). The pain was located inside his right knee, which was a different area from his previously resolved right-knee pain. (Tr. 24). He self-treated the right knee with ice and heat at night. (Tr. 25).

On September 29, 2008, claimant treated with Dr. Seymour, complaining of right knee pain that was worse when kneeling, squatting, or digging. (Ex. 19-1). Dr. Seymour recorded right knee tenderness and trace swelling. (Ex. 19-3). He placed claimant on modified duty, restricting him from squatting, kneeling, shoveling, or climbing ladders. (Ex. 19A).

Claimant returned to SAIF/Stoner the following morning (September 30, 2008) and reported to his supervisor that he had been placed on light duty. (Tr. 26). That same day, he returned to performing "trim crew" work for Eberle Vivian/Cherry City. (Tr. 26). He continued to perform that modified work until November 23, 2008. (Tr. 28; Stipulated Fact).

A January 2009 MRI showed a right knee meniscus tear, which Dr. Davis attributed to claimant's work for SAIF/Stoner in September 2008. (Exs. 51, 52A, 60). Dr. Vessely, who examined claimant at SAIF/Stoner's request, initially reached a similar conclusion. (Ex. 65-13, -14). Thereafter, Dr. Vessely changed

his opinion concerning the cause of claimant's right knee meniscal tear, opining that claimant's overall work exposure was the major cause of his right knee meniscus tear, and that his ongoing work exposure at Eberle Vivian/Cherry City after his employment with SAIF/Stoner independently contributed to a worsening of his right knee condition such that it became "independently disabling" and required treatment. (Ex. 66-6).

Eberle Vivian/Cherry City and SAIF/Stoner both denied responsibility of claimant's injury/occupational disease claim for his right knee meniscus tear; both conceded that the condition was compensable. (Tr. 74-76, 87; Ex. 60C).² In setting aside Eberle Vivian/Cherry City's responsibility denial and upholding SAIF's responsibility denial, the ALJ found that claimant's right knee condition should not be analyzed as an injury, but as an occupational disease resulting from his work activity at both Eberle Vivian/Cherry City and SAIF/Stoner. Relying on Dr. Vessely's changed opinion, the ALJ found that claimant's post-September 2008 work activity at Eberle Vivian/Cherry City independently contributed to the claimed right knee meniscus tear.

On review, the parties agree that the last injurious exposure rule (LIER) provides the method by which to assign presumptive responsibility. *See SAIF v. Yokum*, 132 Or App 18, 23-24 (1994); *Debra A. Gillman*, 58 Van Natta 2041, 2044 (2006). Under the LIER, initial or presumptive responsibility for the injury/occupational disease is assigned to the carrier during the last period of employment when conditions could have contributed to the claimant's disability. *AIG Claim Servs. v. Rios*, 215 Or App 615, 619 (2007). The "onset of disability" is the triggering date for determining the last potentially causal employment. *Agricomp Ins. v. Tapp*, 169 Or App 208, 211, *rev den*, 331 Or 244 (2000). If the claimant receives treatment before experiencing temporary disability due to the condition, the triggering date for assignment of responsibility is the time when the worker first seeks medical treatment. *Id.* at 212.

The last carrier may transfer liability to a previous carrier by establishing that it was impossible for its employer to have caused the condition, or that a prior period of employment was the sole cause of the condition. *Reynolds Metals v. Rogers*, 157 Or App 147, 153 (1998), *rev den*, 328 Or 365 (1999). Alternatively,

² We disagree with Eberle Vivian/Cherry City's alternative contention that it only agreed to litigate its denial of the new/omitted medical condition claim related to the previously accepted left knee condition. At hearing, Eberle Vivian/Cherry City agreed that it amended its position to deny responsibility (but not compensability) of the right knee condition. (Tr. 75; *see also* Tr. 87).

the initially responsible carrier may transfer liability to a subsequent insurer by establishing that the subsequent employment actually contributed to a worsening of the condition. *Id.*

Here, claimant first sought medical treatment for his claimed right knee condition on September 29, 2008 (when he was also placed on modified duty). (Exs. 19, 64). At that time, he was still employed by SAIF/Stoner. Therefore, SAIF/Stoner is presumptively responsible. To transfer liability to Eberle Vivian/Cherry City, SAIF/Stoner must establish that claimant's subsequent employment with Eberle Vivian/Cherry City actually contributed to a worsening of his meniscus tear. *Rogers*, 157 Or App at 153. Based on the following reasoning, the record does not support such a conclusion.

Eberle Vivian/Cherry City contends that Dr. Vessely's changed opinion, which is the only expert medical opinion supportive of SAIF/Stoner's position, was not persuasive because it was based on an inaccurate history. SAIF/Stoner disagrees with that contention and requests that we rely on Dr. Vessely's changed opinion.

Resolution of this matter presents a complex medical question that must be resolved by expert medical opinion. *Barnett v. SAIF*, 122 Or App 279, 282 (1993). In evaluating the medical evidence, we rely on those opinions that are both well reasoned and based on accurate and complete information. *See Somers v. SAIF*, 77 Or App 259, 263 (1986); *Linda Patton*, 60 Van Natta 579, 582 (2008).

We conclude that Dr. Vessely's changed opinion is unpersuasive, and that, based on Dr. Davis's opinion, responsibility for claimant's right knee condition rests with SAIF/Stoner. We reason as follows.

Dr. Davis, claimant's treating physician since July 2008, attributed claimant's right knee meniscus tear to the physically demanding work he performed for SAIF/Stoner during a three-week period in September 2008. (Exs. 52A, 60). Dr. Davis noted that, before performing such work for SAIF/Stoner, claimant was on restricted duty at Eberle Vivian/Cherry City as a result of a July 2008 left-knee injury. (Ex. 60-2). After that condition became medically stationary, claimant returned to "regular work" for SAIF/Stoner for a three-week period of "much heavier labor," which included digging ditches and frequent squatting. (*Id.*) After that three-week period, claimant experienced posterior and anterior right knee pain, with an MRI showing a right-knee meniscus tear. (*Id.*) Noting that claimant experienced his meniscus-related right knee pain

while working for SAIF/Stoner, and not Eberle Vivian/Cherry City, Dr. Davis concluded that the meniscus tear occurred during the three-week period of working for SAIF/Stoner, and was not related to work performed at Eberle Vivian/Cherry City. (*Id.*)

SAIF/Stoner acknowledges that Dr. Davis's opinion is consistent with the history provided by claimant at hearing. SAIF/Stoner also does not dispute that Dr. Davis's opinion attributed claimant's right knee meniscus tear to the three-week period where he worked for SAIF/Stoner, with no contribution from claimant's subsequent employment at Eberle Vivian/Cherry City.

SAIF/Stoner, however, requests that we disregard Dr. Davis's opinion because it purportedly relied on an inaccurate history. Specifically, SAIF/Stoner asserts that contemporaneous medical records, as opposed to claimant's testimony, do not support the onset of meniscus-related right knee pain until *after* claimant returned to modified work for Eberle Vivian/Cherry City on September 30, 2008. SAIF/Stoner argues that Dr. Vessely's changed January 2010 opinion, which was based on that allegedly more accurate history, is more persuasive. As such, SAIF/Stoner contends that Eberle Vivian/Cherry City is responsible for the claimed right knee meniscus tear.

We disagree that Dr. Vessely's changed opinion is more persuasive than the opinion of Dr. Davis. Dr. Vessely originally agreed with Dr. Davis that claimant's meniscus tear was attributable to the three-week period at SAIF/Stoner, during which claimant performed heavy ditch digging. (*See, e.g.*, Exs. 52A, 60, 65-13, -14). Dr. Vessely subsequently changed his opinion based on a series of "assumptions" provided to him in a conversation with SAIF/Stoner's counsel. (Ex. 66). Thus, the persuasiveness of Dr. Vessely's changed opinion is contingent on the accuracy of those assumptions. *See Miller v. Granite Constr. Co.*, 28 Or App 473, 478 (1977) (medical opinions based on an incomplete or inaccurate history are entitled to little weight); *Michele M. McCoy*, 57 Van Natta 2272, 2273 (2005) (medical opinion based on inaccurate history unpersuasive).

We find several of Dr. Vessely's assumptions unsupported by the record. Specifically, Dr. Vessely assumed that the trenches dug by claimant while working for SAIF/Stoner were only about eight inches wide, and that claimant did not stand in those trenches. (Ex. 66-3). The record establishes, however, that claimant dug two trenches, a narrower trench (not more than 10 inches wide) and a wider trench (not more than 18 inches wide). (Tr. 22-23). Moreover, even with respect to the narrower trench, claimant testified that he stepped into the trench while performing

his work activities. (Tr. 22). Claimant also never recanted that his manual ditch digging required him to get down into the trenches to perform his work. (*See* Ex. 65-2).

Dr. Vessely's changed opinion also assumed that: (1) "*some* kneeling and squatting" was required; and (2) "*some* trenching" had to be done with a manual, as opposed to a mechanical, trench shovel. (Ex. 66-3) (emphases added). When compared with Dr. Vessely's original opinion, which *emphasized* the extent of the aforementioned activities, we interpret Dr. Vessely's changed opinion as *minimizing* the degree of those activities. That minimization, however, is not consistent with the record, which shows that claimant's trenching activities were overwhelmingly performed manually (with only one, possibly two days of using a mechanical "ditch witch"). (*See* Tr. 21-23, 29-30). Additionally, claimant's kneeling and squatting were regularly occurring and a significant part of his work activity for SAIF/Stoner. (Exs. 60-2, 65-2). Thus, we find the "assumed" history that Dr. Vessely relied on in his changed opinion to be inaccurate.

Dr. Vessely's changed opinion also relied on an understanding that claimant's right knee symptoms were not significant and did not require investigation and treatment until he returned to Eberle Vivian/Cherry City and performed "stair climbing, squatting, and kneeling" work activities. (Ex. 66-5). We also find this understanding to be incorrect.

Claimant returned to Eberle Vivian/Cherry City on modified duty that prohibited "squatting, kneeling, shoveling, [and] climbing ladders." (Ex. 19A; *see also* Ex. 28A). To accommodate those restrictions, claimant was provided with a rolling cart/stool so that he "didn't have to squat or kneel." (Tr. 26-27). He did not recall any squatting activities, noting that Eberle Vivian/Cherry City was "very hyper-aware to make sure that" he did not exceed his work restrictions. (Tr. 30). His foreman also testified that he "ma[d]e sure that [claimant] followed his restrictions" of "no squatting, kneeling, [or] ladders." (Tr. 46). Although claimant had to occasionally "bend down" to "transition from one position to another" (Tr. 39), the record does not support Dr. Vessely's understanding that claimant exceeded his work restrictions concerning squatting and kneeling. Moreover, Dr. Vessely's changed opinion does not reflect an awareness of the accommodations provided by Eberle Vivian/Cherry City to meet claimant's work restrictions. (*See* Ex. 66).

Claimant also testified that he experienced significant right knee symptoms while working at SAIF/Stoner, and that he initially self-treated those symptoms. (Tr. 23-25). Subsequently, he sought medical treatment for his right knee complaints while still employed at SAIF/Stoner. (Tr. 25; Ex. 19). As set forth in

Dr. Davis's opinion, claimant's symptoms were ultimately attributed to a meniscus tear sustained as a result of his work activities at SAIF/Stoner. (Exs. 52A, 60). Thus, we find Dr. Vessely's contrary understanding as to the onset of claimant's right-knee symptoms, as set forth in his changed opinion, to be inaccurate. (See Ex. 66-5).

We also disagree with SAIF/Stoner's assertion that the contemporaneous medical records are necessarily inconsistent with claimant's testimony. The contemporaneous medical records support that claimant sought treatment for his right knee with Dr. Seymour, who practiced in the same office as Dr. Davis, on September 29, 2009, his last day of employment with SAIF/Stoner. (Ex. 19-1). Dr. Seymour noted that, during the month of September, claimant had "been doing a lot of digging and crawling on regular duty." (Ex. 19-2). Dr. Seymour also recorded trace swelling and tenderness in the right knee. (Ex. 19-3). Claimant was then placed on restricted duty and reported as much to his supervisor the following morning. (Tr. 25-26; Ex. 19A). When claimant followed up with Dr. Davis the following month, Dr. Davis also saw swelling in the right knee. (Exs. 28, 52A).

Consequently, we are not persuaded that the absence of recorded right-knee symptoms in three October 2008 physical therapy notes, made in the context of prescribed therapy for claimant's left knee condition, warrants a finding that claimant did not experience right knee symptoms while working for SAIF/Stoner in September 2008. (See, e.g., Exs. 21-23). This is particularly so given that claimant also acknowledged that he initially did not "do anything" related to right-knee treatment because he had been "released back to full status" and was trying to complete the job that he was hired to perform. (See Tr. 24-25).

In sum, we find that Dr. Vessely's changed opinion, on which SAIF/Stoner relies, to be based on an inaccurate history, and therefore, unpersuasive. Rather, we are persuaded by Dr. Davis's opinion, which attributed claimant's right knee condition to his work for SAIF/Stoner, and not to his subsequent employment at Eberle Vivian/Cherry City. Consequently, the record does not persuasively establish that claimant's subsequent work with Eberle Vivian/Cherry City actually contributed to a worsening of his claimed right knee meniscus tear.³ Accordingly, we conclude that responsibility for the claim rests with SAIF/Stoner and, as such, we reverse.

³ Alternatively, even if claimant's disability date presumptively rested with Eberle Vivian/Cherry City, we would still find SAIF/Stoner responsible for the claim. In doing so, based on the aforementioned reasoning, we would find that the sole cause of claimant's claimed condition was his work activities with SAIF/Stoner.

ORDER

The ALJ's order dated July 6, 2010 is reversed in part and affirmed in part. SAIF/Stoner's responsibility denial is set aside and the claim is remanded to SAIF/Stoner for processing according to law. Eberle Vivian/Cherry City's responsibility denial is reinstated and upheld. SAIF/Stoner is responsible for payment of the ALJ's attorney fee award under ORS 656.308(2)(d). The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on April 7, 2011