
In the Matter of the Compensation of
LEONA L. DENNEY, Claimant
WCB Case No. 10-01960
ORDER ON REVIEW
Moore & Jensen, Claimant Attorneys
Judy L Johnson, Defense Attorneys

Reviewing Panel: Members Weddell and Langer.

The self-insured employer requests review of that portion of Administrative Law Judge (ALJ) Smith's order that set aside its denial of claimant's injury claim for a left shoulder condition.¹ On review, the issue is compensability. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact."

CONCLUSIONS OF LAW AND OPINION

Claimant worked for the employer as a housekeeper. On February 13, 2010, she performed particularly strenuous work activities. The next morning, claimant woke with acute left shoulder pain. Subsequent x-rays revealed a large area of calcific tendinosis near the greater tuberosity of claimant's left shoulder. (Exs. 13-4, 20-1).

Dr. Pomranky, claimant's attending orthopedist, diagnosed calcifying tendinitis of the left shoulder. (Ex. 13-5). She explained that "this is something that has been in her shoulder, but was exacerbated by the amount of work that she did [on February 13, 2010]." (*Id.*).

Dr. Woodward, an orthopedic surgeon, examined claimant at the employer's request. He opined that claimant's sudden onset of left shoulder pain was consistent with calcific tendinitis. (Ex. 11-5). Dr. Woodward also opined that the condition was not activity-related and the x-ray "has the appearance of chronic calcific deposits." (Ex. 20-2).

¹ Claimant's occupational disease claim for the same condition is in deferred status.

Claimant filed a claim, which the employer denied. At the outset of the hearing, claimant clarified that the compensability issue was limited to an injury theory.² (Tr. 2-3; *see n 1, supra*).

The ALJ found that claimant's "acute condition" (not merely her symptoms) arose over a discrete period of time, based on Dr. Pomranky's description of the condition as "acute" and her opinion that the underlying calcific tendinitis had been exacerbated by work activity. Therefore, the ALJ found that the claim was properly analyzed as a claim for an injury under ORS 656.005(7)(a).³

The employer argues that the record does not establish that the condition arose from an identifiable event or that it had an onset traceable to a discrete period of time. We agree, reasoning as follows.

² Following the employer's injury denial, claimant also filed an occupational disease claim for her left shoulder condition. The employer denied that claim shortly before this hearing case and claimant requested a hearing from the second denial. The employer did not oppose claimant's request that the two hearing requests not be consolidated. (Tr. 3). Under such circumstances, the ALJ did not consolidate the two hearing requests.

Typically, denied claims that are based on injury/occupational disease theories are litigated in a consolidated hearing. *See* OAR 438-006-0065(2). Occasionally, hearings may be bifurcated to allow parties to present evidence on procedural issues; *e.g.*, whether a claim was timely filed or whether a claimant established "good cause" for an untimely hearing request. *See* OAR 438-006-0065(5); *Max T. Canty*, 56 Van Natta 675 (2004).

Here, because claimant requested two hearings concerning two denials of claims against the same employer/insurer seeking compensation for her left shoulder condition, it would be the general practice to hear both denied claims in one consolidated hearing. Such a process would avoid the additional time and expense to the parties and the forum resulting from piecemeal litigation. In this way, if further development of the record was necessary regarding the litigation of the more recent denial, the consolidated hearing could be convened for the presentation of testimony and admission of any documentary evidence existing at the time subject to a continuance of the hearing for further evidence on the compensability issue attributable to the more recent denial.

In this case, notwithstanding these general principles, the employer did not object to claimant's request that the hearing requests not be consolidated because the most recent denial had issued shortly before the hearing. Under such circumstances, we find no abuse of discretion in the ALJ's bifurcation of the hearings. *See* OAR 438-006-0065(4).

³ Further finding that Dr. Pomranky's opinion persuasively established that claimant's work activities on February 13, 2010 were a material cause of her "acute aggravated condition," the ALJ found that claimant had carried her burden of proving that her work activity was a material cause of her disability or need for medical treatment for her left shoulder.

As the proponent of the “injury theory,” claimant bears the burden of producing persuasive evidence supporting her position. *See Harris v. SAIF*, 292 Or 683, 690, (1982) (“The general rule is that the burden of proof is upon the proponent of a fact or position, the party who would be unsuccessful if no evidence was introduced on either side.”)

In *Smirnoff v. SAIF*, 188 Or App 438 (2003), the claimant’s right knee symptoms began on a particular day at work. However, there was no medical evidence indicating that the condition that became symptomatic (the meniscus tear) arose suddenly or as the result of a traumatic event. *Id.* at 449. Because the condition developed over time, the court concluded that the claim for a torn meniscus condition should be analyzed as an “occupational disease.” *Id.*; *see Mathel v. Josephine County*, 319 Or 235, 240 (1994) (compensable injuries under ORS 656.005(7) are “events,” whereas occupational diseases under ORS 656.802 are “ongoing states of the body or mind”).

Here, as in *Smirnoff*, the record establishes that claimant’s symptoms arose suddenly on a particular day. Also, as in *Smirnoff*, the record establishes that the onset of the condition preexisted the symptoms. *See Smirnoff*, 188 Or App at 443 (the onset of symptoms may or may not coincide with the onset of a condition, depending on the medical evidence). *Id.* at 443. In this regard, Drs. Pomranky and Woodward opined that claimant’s calcific tendinitis preexisted her February 13, 2010 work activities, whereas her symptoms began the next morning. (*See* Exs. 13-5, 20-2). Moreover, as in *Smirnoff*, there is no medical evidence indicating that the condition that became symptomatic (calcific tendinitis) arose suddenly or as the result of a traumatic event.

According to Dr. Woodward, calcific tendinitis “usually develops over several weeks.” (Ex. 20-2). He also said that the x-ray taken about 2 months after the onset of symptoms had “the appearance of chronic calcific deposits.” (*Id.*). Dr. Pomranky did not rebut these opinions and she did otherwise comment on the development of the condition. Under these circumstances, we find the record insufficient to establish that the *condition* arose suddenly.⁴

⁴ Claimant argues that we should discount Dr. Woodward’s opinion, because it only addressed the “mere base condition,” (calcific tendinitis), as opposed to the condition for which claimant contends that she sought treatment (acute calcific tendinitis). We disagree, reasoning as follows.

Although Dr. Pomranky stated that claimant needed treatment for acute calcific tendinitis, she also acknowledged that the calcific tendinitis “had been there” previously. In our view, Dr. Pomranky’s opinion supports a conclusion that the difference between the preexisting underlying calcific tendinitis

Consequently, the claim should not be analyzed as an “injury.” *See* 188 Or App at 449 (the determining factor in deciding if a claim should be analyzed as an injury or a disease “is whether the condition itself, not its symptoms, occurred gradually, rather than suddenly”); *Joshua N. Beachboard*, 61 Van Natta 2999 (2009) (although onset of the claimant’s symptoms may have been acute, claim was analyzed as an occupational disease because the persuasive medical evidence established that the claimed condition occurred over an extended period); *compare Donald Drake Co. v. Lundmark*, 63 Or App 261, 266, *rev den* 296 Or 350 (1984) (when the onset of the condition coincides with a specific injurious event, the fact that pain grows worse over a period of time does not make a condition gradual in onset).

Accordingly, we reverse the ALJ’s order and uphold the employer’s denial of claimant’s injury claim.

ORDER

The ALJ’s order dated July 20, 2010 is reversed in part and affirmed in part. That portion of the order that set aside the self-insured employer’s denial of claimant’s left shoulder injury claim is reversed. The denial is reinstated and upheld. The ALJ’s \$7,500 assessed attorney fee award is reversed. The remainder of the ALJ’s order is affirmed.

Entered at Salem, Oregon on March 9, 2011

condition and the “acute condition” is that the underlying condition became acute when it became symptomatic. In other words, we find that Dr. Pomranky’s use of the word “acute” refers to claimant’s symptoms, not a condition other than the underlying calcific tendinitis. *See SAIF v. Strubel*, 161 Or App 516, 521 (1999) (medical opinions are evaluated in context and based on record as a whole to determine sufficiency). Accordingly, because the onset of the *condition* (not the symptoms) is dispositive here, we do not discount Dr. Woodward’s opinion for not separately evaluating the onset of claimant’s symptoms.