

In the Matter of the Compensation of
JOSEPH C. ASHWORTH, DCD, Claimant

WCB Case No. 10-02456, 09-05168, 09-05167, 09-01171, 08-04489, 08-04488

ORDER ON RECONSIDERATION

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Reviewing Panel: Members Lowell and Weddell.

On June 18, 2012, we abated our May 22, 2012 order that affirmed an Administrative Law Judge's (ALJ's) order that applied the last injurious exposure rule (LIER) to assign responsibility for his occupational disease (mesothelioma) to the decedent's period of self-employment.¹ We took this action to address claimant's request for reconsideration. Having received the parties' responses, we proceed with our reconsideration.

On reconsideration, claimant contends that causation was at issue at the hearing and that ORS 656.802(1)(a) prevents the assignment of responsibility to the decedent's period of self-employment.² As explained below, we continue to agree with the ALJ's analysis.

Under ORS 656.802(1)(a), an "occupational disease" is defined as a "disease or infection arising out of and in the course of employment caused by substances or activities to which an employee is not ordinarily subjected or exposed other than during a period of regular actual employment therein." Claimant bears the burden to prove that employment conditions were the major contributing cause of the disease. ORS 656.266(1); ORS 656.802(2)(a).

LIER allows a claimant to establish compensability of an occupational disease by proving that employment conditions in general were the major contributing cause of the disease, without having to prove the degree, if any, to

¹ Claimant, Georgia Ashworth, is the surviving spouse of Joseph C. Ashworth, the deceased worker. As such, she is the statutory beneficiary.

Beginning in 1977, decedent, with claimant, owned and operated a motel. They elected not to purchase workers' compensation coverage for themselves.

² We interpret claimant's "compensability" argument to relate to causation.

which exposure to disability-causing conditions at a particular employment actually caused the disease. *Roseburg Forest Products v. Long*, 325 Or 305, 309 (1997). Alternatively, a claimant may establish compensability by proving that employment conditions at a particular employer were the major contributing cause of the disease. *See Willamette Industries, Inc. v. Titus*, 151 Or App 76 (1997).

As a rule for the assignment of responsibility, LIER assigns full responsibility to the last employer that could have caused the worker's injury. *Long*, 325 Or at 309. The date on which presumptive responsibility is triggered is when the worker first sought treatment or experienced temporary disability. *SAIF v. Kelly*, 130 Or App 185 (1994). A presumptively responsible carrier may shift 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. *Id.*, at 313.

Where, however, a claimant has proven "actual" causation (*i.e.*, that employment conditions at a particular employer were the major contributing cause of the disease), LIER is not used to establish responsibility.³ *Titus*, 151 Or App at 82-83.

Claimant contends that because ORS 656.802(1)(a) requires that an occupational disease be caused by "substances or activities to which an employee is not ordinarily subjected or exposed other than during a period of regular actual employment," employment exposure to asbestos levels equivalent to "ordinary" non-work asbestos levels cannot be considered causal. Claimant further asserts that decedent's exposure to asbestos during his period of self-employment did not exceed "ordinary" background levels. Accordingly, claimant contends that decedent's period of self-employment cannot be considered a cause of his mesothelioma.

We first note that the record indicates that decedent experienced periods of elevated asbestos exposure during his self-employment.⁴ (Ex. 63-48-50).

³ Where a claimant proves "actual" causation, a carrier may defensively invoke LIER to shift responsibility to a later carrier by proving that the later employment independently contributed to the occupational disease. *SAIF v. Hoffman*, 193 Or App 750, 755 (2004); *see also Spurlock v. International Paper Co.*, 89 Or App 461, 464-65 (1988).

⁴ Claimant contends that because such periods of elevated exposure would have occurred within discrete periods of time, they would more properly be considered "injuries," rather than causes of an occupational disease. *See Smirnoff v. SAIF*, 188 Or App 438, 443 (2003) (an occupational disease results

Further, the requirement in ORS 656.802(1)(a) that the cause of an occupational disease be substances or activities “to which an employee is not ordinarily subjected or exposed other than during a period of regular actual employment” requires a claimant to prove that work conditions, when compared with non-work conditions, were the major contributing cause of the disease. *SAIF v. Noffsinger*, 80 Or App 640, 646 (1986). Thus, so long as decedent’s employment exposure to asbestos was exposure “to which [he] was not ordinarily subjected or exposed other than during a period of regular actual employment,” it meets the ORS 656.802(1)(a) requirement. Therefore, all of decedent’s employment exposure to asbestos is considered causal, including exposure that occurred during his period of self-employment.

Claimant next contends that the only period of employment for which elevated exposure to asbestos has been established was decedent’s employment for Pendleton Grain Growers/SAIF, where he worked from 1961 through 1978. However, claimant has not proven that employment conditions at Pendleton Grain Growers/SAIF were the major contributing cause of decedent’s mesothelioma. To the contrary, the medical evidence implicates decedent’s military service, from 1945 through 1946, as the most significant cause. (Ex. 61-11, 63-43).

Because claimant did not prove “actual” causation, compensability is established under LIER, which also governs responsibility.

As we previously explained, we agree with the ALJ’s conclusion that decedent’s self-employment is presumptively responsible because that was the last period of employment before he first sought treatment. Further, claimant concedes that she cannot identify a previous period of employment as the “sole” cause of decedent’s mesothelioma.

Finally, although claimant acknowledges that the medical evidence does not establish that it was “impossible” for decedent’s employment conditions during his period of self-employment to have contributed to his mesothelioma, she contends that evidence that such contribution was “improbable” is sufficient to shift responsibility to a prior employer. Yet, the “impossibility” standard does not allow a presumptively responsible carrier to shift responsibility to an earlier period of employment if the evidence shows that it was merely improbable, rather than

from conditions that develop gradually over time, whereas an injury is sudden, arises from an identifiable event, or has an onset traceable to a discrete period of time). However, occupational injuries are considered “employment conditions” when evaluating the cause of an occupational disease. *Kepford v. Weyerhaeuser Co.*, 11 Or App 363, *rev den*, 300 Or 722 (1986).

impossible, for employment conditions at the presumptively responsible employment to have contributed to the occupational disease. *Robert B. George*, 57 Van Natta 2925 (2005); *Allen J. Zarek*, 54 Van Natta 7 (2002).

Therefore, we adhere to our previous conclusion that the ALJ correctly applied LIER to assign responsibility for the compensable condition to decedent's period of self-employment. Accordingly, on reconsideration, as supplemented herein, we adhere to and republish our May 22, 2012 order. The parties' rights of appeal shall begin to run from the date of this order.

IT IS SO ORDERED.

Entered at Salem, Oregon on July 24, 2012