

In the Matter of the Compensation of
KAVIN R. HUNTER, Claimant

WCB Case No. 07-01041

ORDER ON REMAND

Ransom Gilbertson Martin et al, Claimant Attorneys
Julie Masters, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Weddell, Lowell, and Herman.

This matter is before the Board on remand from the Court of Appeals. *Hunter v. SAIF*, 246 Or App 755 (2011). The court has reversed our order, *Kavin R. Hunter*, 60 Van Natta 3050, *recons*, 60 Van Natta 3315 (2008), that reversed an Administrative Law Judge's (ALJ's) order that set aside the SAIF Corporation's denial, on behalf of the Department of Corrections,¹ of claimant's occupational disease claim for medial compartment degeneration of the left knee. In reaching our conclusion, we reasoned that an examining physician's reports indicated "at most" the possibility that claimant experienced a work-related left knee injury in 1977. Consequently, we were not persuaded that claimant's work activities (including work-related injuries) were the major contributing cause of his claimed degenerative left knee condition. Concluding that our findings regarding the physician's reports and claimant's 1977 left knee injury were not supported by substantial evidence, the court has remanded for reconsideration. Having received the parties' supplemental briefs, we proceed with our reconsideration.

FINDINGS OF FACT

We adopt the ALJ's findings of fact with the following changes and supplementation. In the first paragraph on page 2, we replace the first sentence with the following: "The record indicates that a right knee condition was accepted in connection with the 1977 injury." Also on page 2, we change the references from the February "2002" incident to February "2003."

We provide the following summary of the pertinent facts.

Claimant has a history of injuries to both knees. In 1977, while working for Montgomery Ward, claimant and a coworker were loading an approximately 300-pound rototiller onto a truck when the coworker tripped, displacing the

¹ Our references to "SAIF" in this order refer to SAIF/Department of Corrections, unless otherwise noted.

weight of the rototiller onto claimant. Claimant's right knee buckled, and he heard "a giant pop." He continued working for two to three hours, but eventually stopped because of pain and swelling in his right knee. Claimant went to a medical clinic, and a doctor determined that the patella of his right knee had broken into several pieces. According to claimant, the accident also caused pain in his left knee, but it was "minimal pain" and "not nearly as bad" as the pain in his right knee. Following the accident, claimant sought and received workers' compensation benefits for a right-knee condition. He was released to work approximately two to three months later.

In 1992, while working for Mohawk Paper (SAIF/Mohawk), claimant suffered a left-knee injury. SAIF/Mohawk accepted an "acute tear of the medial meniscus and acute tear of the anterior cruciate ligament, left knee." (Ex. 15). Dr. Walton performed surgery on June 3, 1992, diagnosing a medial meniscal tear, chronic anterior cruciate deficient left knee, and "impinging osteophyte anterior compartment" of the left knee. (Ex. 10). Dr. Walton discovered degenerative changes in the medial compartment of claimant's knee. (Exs. 10, 14).

In 2002, 2003, and 2004, claimant suffered additional work-related left knee injuries. SAIF accepted a left knee strain resulting from the February 2003 injury. (Exs. 39, 61). After the December 9, 2004 work injury, SAIF accepted a left knee contusion and left medial and lateral meniscus tears. (Exs. 78A, 105A). Dr. Greenleaf performed left knee surgery on March 8, 2005, diagnosing medial and lateral meniscus tears, degenerative joint disease, and multiple loose bodies. (Ex. 85).

In July 2005, claimant was examined by Dr. James, on behalf of SAIF. (Ex. 97).

In 2006, Dr. Greenleaf reported that claimant's left knee was significantly symptomatic and he recommended a left total knee arthroplasty. (Exs. 119, 133).

In November 2006, claimant filed an occupational disease claim for medial compartment degeneration of the left knee. (Ex. 127). After SAIF denied compensability and responsibility for that condition (Exs. 137, 145), claimant requested a hearing.

CONCLUSIONS OF LAW AND OPINION

The ALJ applied an "occupational disease" standard, reasoning that the physicians concluded that the effects of claimant's work injuries and work activities had contributed to some degree to the claimed medial compartment

degeneration of the left knee. The ALJ determined that the claim was compensable, based on the opinions of Drs. Greenleaf, Walker, and James, who opined that the major contributing cause of claimant's left knee degeneration was due to some combination of work injuries and activities. SAIF requested review.

As set forth above, we reversed the ALJ's order, reasoning that Dr. James's reports indicated "at most" the possibility that claimant experienced a work-related left knee injury in 1977 and concluding that claimant's work activities (including work-related injuries, but not the 1977 injury) were not the major contributing cause of his claimed degenerative left knee condition. Claimant petitioned for judicial review. In reversing our prior order, the court held that our findings regarding the physician's reports and claimant's 1977 left knee injury were not supported by substantial evidence. Consistent with the court's mandate, we have conducted a further review of this record.

We begin with SAIF's argument that claim preclusion applies because claimant could have filed an occupational disease claim for osteoarthritis against it in a previous litigation involving a different employer. Claimant objects to SAIF's argument because it was not raised in prior proceedings. He contends that, in any event, there is no merit to SAIF's argument because the prior osteoarthritis claim was against a different employer and the facts have changed.

Because SAIF did not raise a claim preclusion argument in the prior proceedings, we decline to address that issue for the first time on remand.² See *Karen M. Godfrey*, 58 Van Natta 2892 (2006) (on remand), *aff'd*, *Fred Meyer Stores v. Godfrey*, 218 Or App 496 (2008); see also *Stevenson v. Blue Cross*, 108 Or App 247 (1991) (Board can refuse to consider issues on review that are not raised at hearing).

SAIF argues that the claim for medial compartment degeneration of the left knee is not properly characterized as an occupational disease. SAIF contends that in prior litigation, the same condition was litigated as an injury and, therefore, it is the "law of the case" that claimant's "left knee osteoarthritis" is the result of an injury.

² SAIF's initial brief on review asserted that we were *not* bound by a prior ALJ's conclusion in the previous litigation. (Appellate record at 62).

The “law of the case” doctrine is a general principle of law that when a ruling or decision has been made in a particular case by an appellate court, while it may be overruled in other cases, it is binding and conclusive both upon the inferior court in any further steps or proceedings in the same litigation and upon the appellate court itself in any subsequent appeal or other proceeding for review. *Sandra E. Rickon*, 61 Van Natta 311, 314 n 1 (2009), citing *Blanchard v. Kaiser Found. Health Plan*, 136 Or App 466, 470 (1995), *rev den*, 322 Or 362 (1995).

Here, the previous litigation involved SAIF/Mohawk’s responsibility denial for “traumatic osteoarthritis of the left knee secondary to chronic anterior cruciate ligament laxity.” (Exs. 114, 121, 125, 143A). That proceeding also involved a claim against SAIF (on behalf of the Department of Corrections) for compensability and responsibility for an anterior cruciate ligament tear (Ex. 114-14), but that hearing request was withdrawn and dismissed. (Ex. 121-1). Under such circumstances, the “law of the case” doctrine does not apply to the present claim against SAIF for medial compartment degeneration of the left knee because the prior litigation did not involve the currently claimed condition.

We turn to the merits of SAIF’s argument that claimant’s “left knee osteoarthritis condition” should be characterized as an injury, rather than an occupational disease.³ Relying on the opinion of Dr. James, SAIF contends that claimant’s condition is an injury because it arose from an identifiable event that was the major contributing cause of the resulting osteoarthritis.

In deciding whether a claim is properly analyzed as an injury or as an occupational disease, it is necessary to determine whether the condition developed gradually or suddenly. *Smirnoff v. SAIF*, 188 Or App 438, 443 (2003). In making that determination, we focus on the onset of the condition itself, rather than the onset of the condition’s symptoms. *Id.* at 449. We analyze the medical evidence regarding the onset of claimant’s medial compartment degeneration of the left knee, not merely the symptoms, to determine if the condition developed gradually or suddenly. *See id.* at 446.

³ At hearing, claimant’s attorney explained that the left knee condition identified in the denials as “medial compartment degeneration of the left knee” was also referred to in the medical records as “medial compartment osteoarthritis” or “osteoarthritis.” (Tr. 1). SAIF’s attorney indicated that the physicians used those terms interchangeably. (Tr. 2). On remand, the parties’ briefs refer to the terms interchangeably.

The record does not include persuasive medical evidence indicating that claimant's medial compartment degeneration of the left knee arose suddenly. Rather, the persuasive medical evidence establishes that the condition itself was gradual in onset. We reason as follows.

Dr. James opined that claimant's 1977 work injury was the major contributing cause of the chronic anterior cruciate ligament (ACL) laxity and osteoarthritis that was noted in 1992. (Ex. 113-4). He testified that an injury to a knee resulting in an ACL tear that is not repaired alters the mechanics of the knee joint to the extent that the articular surfaces of the knee cannot withstand the abnormal stresses and "through the years a degenerative process sets in secondary to the absence of an anterior cruciate functioning normally." (Ex. 116-8). Dr. James explained that the ensuing osteoarthritis "doesn't occur immediately, but over a period of years becomes very evident." (*Id.*) Thus, Dr. James's opinion establishes that claimant's medial compartment degeneration of the left knee developed gradually over time.

Likewise, Dr. Walker did not find that claimant's medial compartment degeneration of the left knee arose suddenly. Rather, he concluded that claimant's severe left knee degenerative changes resulted from his work activities and work injuries. (Ex. 147).

Dr. Greenleaf believed that claimant's December 2004 work injury and resulting March 2005 surgery accelerated the arthritic changes within the medial compartment of the left knee, although he acknowledged that claimant had arthritic changes within the left knee before the December 2004 injury. (Ex. 139). Dr. Greenleaf did not indicate that medial compartment degeneration of the left knee arose suddenly as the result of a discrete work event.

Based on the aforementioned opinions, we find that claimant's claimed left knee medial compartment degeneration condition developed gradually and, therefore, we determine compensability under an occupational disease standard.

Under the last injurious exposure rule (LIER) rule of proof, an occupational disease claim is compensable if work exposure at more than one employment is the major contributing cause of the condition. *Roseburg Forest Products v. Long*, 325 Or 305, 309 (1997). An occupational disease includes "any series of traumatic events or occurrences which requires medical services or results in physical disability or death." ORS 656.802(1)(a)(C). In weighing the contribution of "employment conditions," we include the contribution of work-related injuries.

Waste Mgmt. v. Pruitt, 223 Or App 280, 286 (2008) (occupational disease compensable where medical evidence established that the claimant's lifetime work activities, including previous work injuries, caused his condition); *Kepford v. Weyerhaeuser Co.*, 77 Or App 363, 366-67, *rev den*, 300 Or 722 (1986) (cumulative effect of the claimant's job injury and employment conditions considered in determining compensability of an occupational disease claim).

SAIF argues that the occupational disease claim is not compensable because claimant cannot establish that his exposure to work activities had an out-of-the-ordinary effect on his left knee medial compartment degenerative condition. For the following reasons, we disagree.

A compensable occupational disease must be one caused by substances or activities "to which an employee is not ordinarily subjected or exposed other than during a period of regular actual employment." ORS 656.802(1)(a); *SAIF v. Noffsinger*, 80 Or App 640, 645-46, *rev den*, 302 Or 342 (1986) ("because ORS 656.802(1)(a) requires that the disease be one 'to which an employee is not ordinarily subjected or exposed other than during a period of regular actual employment therein,' the claimant must also prove that work conditions, when compared with non-work conditions, were the major contributing cause of the disease").

SAIF contends that Dr. James provided the most persuasive opinion. Claimant informed Dr. James that he initially injured his left knee in 1977 while working for Montgomery Ward. He explained that he and a coworker were carrying a heavy device weighing about 250 pounds when the coworker tripped, displacing the weight of the object onto claimant. Claimant's right leg slipped over the edge of the loading dock, throwing full weight on his left leg, which collapsed beneath him. (Ex. 97-2). Dr. James was aware that claimant had an accepted right knee condition resulting from the 1977 incident, but he determined that he also injured his left knee in that work event. (Exs. 111, 113-3). Dr. James concluded that the 1977 injury was the major contributing cause of claimant's chronic anterior cruciate ligament (ACL) laxity and osteoarthritis noted at the time of the 1992 surgery. (Ex. 113-4).

After reviewing the record, we reach the following conclusions. Claimant's work activities in general required a lot of walking and standing on cement and uneven ground, as well as climbing stairs. He was required to respond to fights and assaults that arose on the unit. (Tr. 17). Claimant was injured at work in 1992 when he slipped and twisted his left knee as he was stepping off a ladder. (Ex. 3).

In February 2003, he slipped and fell on his left knee at work. (Exs. 36, 37). In November 2004, claimant was escorting a combative inmate, when his left knee struck a concrete floor. (Exs. 69, 71). On December 9, 2004, claimant injured his left knee after tackling a combative inmate. (Ex. 77). After considering these events, as well as the 1977 work incident, we conclude that claimant's work activities and injuries were sufficient to meet the requirements of an occupational disease claim. *See* ORS 656.802(1)(a).

SAIF contends that Dr. James opined that claimant's condition was not significantly influenced by any incident either in 1992, 2003, December 2006, or November 2006, and that his ongoing work activities did not contribute in a material way to the osteoarthritic condition. SAIF relies on Dr. James's opinion that claimant's knee would undergo a steady deterioration through the years, regardless of on or off work activities.

When Dr. James's reports are read as a whole, however, we find that they support the conclusion that claimant's other work injuries and work activities also contributed to his left knee medial compartment degenerative condition. *See SAIF v. Strubel*, 161 Or App 516, 521-22 (1999) (medical opinions are evaluated in context and based on the record as a whole to determine sufficiency). We reason as follows.

In July 2005, Dr. James attributed 15 percent of claimant's current left knee condition to the December 2004 work injury. (Ex. 97-17). In a January 2006 concurrence letter, Dr. James concluded that the left knee condition was "such that the type of work claimant has been doing over the years would contribute to the current condition of claimant's left knee." (Ex. 111-2). In March 2006, Dr. James adhered to that statement. (Ex. 113-4). He explained that claimant had a "very vigorous" lifestyle after his 1992 left knee surgery, despite his anterior cruciate laxity. He noted that claimant returned to full activity after 1992, being extremely active in rescue diving and training. Claimant worked as a corrections officer during that time, and also hunted and backpacked off-work. (*Id.*)

In the March 2006 report, Dr. James also explained that between April 16, 1992 and October 2005, "claimant's work activities through the years as well as off-the-job activities and the above mentioned recurrent injuries did not play as significant a role or even a material contributing role in regard to the progression of the left knee condition as we see it today." (Ex. 113-6).

In a deposition, Dr. James explained that any activity on and off the job contributed in some way to claimant's left knee osteoarthritis. (Ex. 116- 7, -8, -9, -16, -29). However, he did not believe the work activities would contribute in "as major a way" as the original left knee injury in 1977. (Ex. 116-7). Dr. James concluded that the 2004 work injury caused an acute medial meniscus injury, as well as a lateral meniscal tear. (Ex. 97-14, -16).

After the deposition, Dr. James reviewed additional records in connection with claimant's left knee occupational disease claim, including records regarding a November 10, 2006 left knee injury. He explained that the routine occupation of a corrections officer was not associated with an increased risk for developing osteoarthritis in the knee. (Ex. 135-3). Dr. James explained that his diagnosis of claimant's left knee was not different than the condition noted in 1992, except that there was an acute re-tear of the medial meniscus, as well as a lateral meniscal tear, resulting from the December 2004 injury. (Ex. 135-4). He noted that the meniscal tears were treated with partial meniscectomies, and that those surgeries had no "consequential or significant affect [*sic*] on the steady progression of the osteoarthritis." (Ex. 135-5). Nevertheless, Dr. James explained that claimant's work incidents from 1992 through November 2006 played a minor role in the progression of the osteoarthritic condition. (Ex. 135-6).

An occupational disease claim may be based on the cumulative effect of all of the claimant's work-related exposure and prior work injuries may be considered as part of the overall employment conditions. *Hunter*, 246 Or App at 760, citing *SAIF v. Henwood*, 176 Or App 431, 435 (2001), *rev den*, 333 Or 463 (2002), and *Kepford*, 77 Or App at 366.

We find that, when read as a whole, Dr. James's reports support the conclusion that claimant's work injuries and work exposure were the major contributing cause of his claimed occupational disease. He ultimately explained that the 1977 work injury was causally related to the medial compartment degeneration in the left knee and that the work incidents from 1992 through November 2006 played a minor role in the progression of the osteoarthritic condition. He also stated that the left knee condition was "such that the type of work claimant has been doing over the years would contribute to the current condition of claimant's left knee." (Exs. 111-2, 113-4).

Likewise, Dr. Walker concluded that claimant's work injuries and work activities over time were the major contributing cause of his left knee medial compartment degeneration. (Ex. 147-3).

Dr. Greenleaf, who performed claimant's March 2005 partial medial and lateral meniscectomies after the December 9, 2004 injury, explained that the removal of a significant portion of his medial meniscus resulted in significant degenerative changes within the medial compartment of his left knee. He acknowledged that claimant had left knee arthritic changes before the December 2004 injury, but he concluded that the removal of the greater portion of the medial meniscus accelerated the arthritic changes. (Ex. 139). Dr. Greenleaf's report supports the conclusion that the December 2004 injury causally contributed to claimant's left knee medial compartment degeneration.

Based on the opinions of Dr. James and Walker, as supported by Dr. Greenleaf, we conclude that claimant's work exposure, including his work injuries, were the major contributing cause of his medial compartment degeneration of the left knee.

We turn to the responsibility issue. At hearing, claimant argued that, regardless of whether responsibility was presumptively established with a former employer, responsibility shifted to SAIF because the medical evidence established that the later employment actually contributed to a worsening of the medial compartment degeneration of the left knee. SAIF responded that responsibility should rest with claimant's 1992 employer and should not shift forward, based on Dr. James's opinion that no significant contribution was made by further work activity or events. Based on the opinions of Drs. Greenleaf, Walker, and James, the ALJ concluded that responsibility for the claimed condition shifted forward to SAIF.

On remand, SAIF argues that claimant's subsequent employment did not actually contribute to a worsening of his degenerative condition. We disagree.

Under the LIER, initial or presumptive responsibility for the 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. *Agricomps Ins. v. Tapp*, 169 Or App 208, 211, *rev den*, 331 Or 244 (2000). If a 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. Once responsibility is assigned under LIER, the initially responsible carrier may transfer liability to a subsequent carrier by establishing that the subsequent employment actually contributed to a worsening of the condition.

Reynolds Metals v. Rogers, 157 Or App 147, 153 (1998), *rev den*, 328 Or 365 (1999). In order to shift responsibility to a later carrier, claimant must suffer a worsening of the condition; a mere increase in symptoms is not sufficient. *Id.*

Here, regardless of which carrier is initially responsible for claimant's medial compartment degeneration of the left knee, we agree with the ALJ's conclusion that responsibility for the claimed condition shifts forward to SAIF. We reason as follows.

Dr. Walker opined that claimant developed a pathological worsening of the left knee medial compartment degeneration after the December 2004 work injury and subsequent surgery. (Ex. 147-3).

Dr. James concluded that claimant's left knee condition was "such that the type of work claimant has been doing over the years would contribute to the current condition of claimant's left knee." (Exs. 111-2, 113-4). Dr. James explained that claimant's December 2004 injury resulted in an acute re-tear of the medial meniscus, as well as a lateral meniscal tear. (Ex. 135-4). Those meniscal tears were treated with partial meniscectomies in 2005. Although Dr. James did not believe that the 2005 surgery had a "significant" effect on claimant's osteoarthritis, he concluded that claimant's work incidents from 1992 through November 2006 played a minor role in the progression of the osteoarthritic condition. (Ex. 135-5, -6).

As discussed earlier, Dr. Greenleaf opined that claimant's December 2004 injury with SAIF causally contributed to the medial compartment degeneration of the left knee. He explained that after the 2004 left knee injury, which required the removal of the greater portion of the medial meniscus, the arthritic changes within claimant's knee were accelerated. (Ex. 139-2). He noted that the change in knee alignment was not documented until August 2006, when the examination and x-rays of the left knee showed significant varus gonarthrosis.⁴ (*Id.*) Dr. Greenleaf concluded that the December 2004 injury resulted in further damage to the medial meniscus and that the subsequent medial meniscectomy contributed to the increased varus alignment of the left knee. (*Id.*)

⁴ On January 26, 2006, Dr. Greenleaf had opined that claimant's December 2004 injury "has not significantly contributed to or worsened his underlying osteoarthritic condition." (Ex. 110). However, the record indicates that Dr. Greenleaf revised his opinion after the August 2006 examination and left knee x-rays, which showed the change in claimant's knee alignment. (Ex. 139).

Based on the aforementioned medical reports, we conclude that claimant's subsequent work with SAIF's insured actually contributed to a worsening of his medial compartment degeneration of the left knee. Consequently, we conclude that SAIF is responsible for claimant's left knee medial compartment degeneration condition. Therefore, on remand, we affirm the ALJ's decision.

When a claimant finally prevails after remand from the Court of Appeals, the Board shall approve or allow a reasonable attorney fee for services before every prior forum. ORS 656.388(2). Because claimant has prevailed on his denied claim after remand, he is now entitled to attorney fees for his counsel's services at hearing, at the Board level in the first instance, before the court, and on remand. ORS 656.386(1); ORS 656.382(2); ORS 656.388(1).

The court's appellate judgment included an attorney fee award of \$3,300 related to claimant's attorney's services before the court.

The ALJ awarded an \$8,000 assessed attorney fee for claimant's attorney's services at hearing, which was neither contested by SAIF during our initial review nor on remand. Moreover, after considering the factors set forth in OAR 438-015-0010(4), and applying them to this case, we reinstate the ALJ's reasonable attorney fee award.

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 Board level in the first instance and on remand is \$4,000, payable by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the case at those levels (as represented by claimant's counsel's fee submission and SAIF's objections), the complexity of the issues, the nature of the proceedings, the skill of the attorneys, the value of the interest involved, and the risk that counsel might go uncompensated. This award is in addition to the ALJ's and the court's attorney fee awards.

Finally, claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by SAIF.⁵ See ORS 656.386(2); OAR 438-015-0019; *Nina Schmidt*, 60 Van Natta 169 (2008); *Barbara Lee*, 60 Van Natta 1, *recons*, 60 Van Natta 139 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

⁵ The court's appellate judgment awarded claimant \$209 in costs.

Accordingly, on remand, the ALJ's order dated April 2, 2008 is affirmed. For services on Board review and on remand, claimant's counsel is awarded a fee of \$4,000, to be paid by SAIF. This fee is in addition to the attorney fee awards granted by the ALJ's order and the court's appellate judgment. Claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by SAIF.

IT IS SO ORDERED.

Entered at Salem, Oregon on July 17, 2012