

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 REVIEW

Jodie Phillips Polich, Claimant Attorneys  
Sather Byerly & Holloway, Defense Attorneys  
Radler Bohy et al, Defense Attorneys  
Gene L Platt, Defense Attorneys  
Thaddeus J Hettle & Assoc, Defense Attorneys  
Reinisch Mackenzie PC, Defense Attorneys

Reviewing Panel: Members Lowell and Weddell.

Claimant<sup>1</sup> requests review of that portion of Administrative Law Judge (ALJ) Fisher's order that upheld the SAIF Corporation's denial of claimant's occupational disease claim for a mesothelioma condition. On review, the issue is responsibility.<sup>2</sup>

We adopt and affirm the ALJ's order with the following supplementation, beginning with a summary of the background of the case.

The decedent served in the Navy in 1945 and 1946. Thereafter, he worked as a millwright until 1978. Beginning in 1977, the decedent and his wife owned and operated a motel. SAIF was the workers' compensation carrier for the motel business, but the decedent and his wife elected not to purchase workers' compensation coverage for themselves.<sup>3</sup>

The decedent stopped working in 1989. He was diagnosed with malignant mesothelioma and died of that condition in 2007. Claims for widow's benefits were filed with multiple carriers. The carriers denied responsibility, but not compensability. Claimant requested a hearing, contesting those denials.

---

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

<sup>2</sup> We acknowledge Royal and Sun Alliance's (Sun Alliance's) argument that the ALJ should have granted its motion to be dismissed as a party to the proceeding. However, because Sun Alliance concedes that it provided coverage during claimant's 1978-1979 work exposure, we agree with the ALJ's determination that dismissal was not warranted. *See Theodore F. Babuka*, 61 Van Natta 2757, 2759 (2009) (where the record indicated that the claimant might have worked for the insured during its coverage, dismissal of the insured as a party to the responsibility proceeding was not warranted).

<sup>3</sup> During a portion of the time that the decedent and his wife owned and operated the motel - from 1979 through 1982 - the decedent also worked as a mechanic for a frozen foods company.

The ALJ assigned responsibility for the compensable condition under the last injurious exposure rule (LIER) of assignment.<sup>4</sup> Reasoning that the decedent's self-employment (as co-owner of the motel) was the last work exposure that could have caused the disease, the ALJ concluded that it was not impossible for that exposure to have caused the disease. Further finding that there was no "sole cause" for the condition, the ALJ concluded that responsibility did not shift from the decedent's self-employment. *See Long*, 325 Or at 313.

However, because the decedent had elected not to purchase workers' compensation coverage during his self-employment, the ALJ upheld SAIF's denial of the occupational disease claim on behalf of the motel. *See UPS v. Likos*, 143 Or App 486 (1996).<sup>5</sup>

Claimant acknowledges that compensability is established under the LIER "rule of proof" (noting that SAIF raised a subjectivity defense regarding the self-employment). In addition, claimant concedes that the sole cause of the decedent's mesothelioma cannot be established and that it was not medically impossible for any of his jobs to have caused the disease. Nonetheless, claimant argues that the ALJ erred in assigning responsibility to the decedent's self-employment.<sup>6</sup>

---

<sup>4</sup> 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. *Agricom 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.

Once responsibility is assigned under LIER, the initially responsible 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. *Roseburg Forest Prods. v. Long*, 325 Or 305, 313 (1997); *Reynolds Metals v. Rogers*, 157 Or App 147, 153 (1998), *rev den*, 328 Or 365 (1999). Alternatively, 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.*

<sup>5</sup> In *Likos*, the claimant's disability arose during a period of self-employment not covered by workers' compensation insurance. Although the court agreed that the claimant's condition was work related and compensable under the LIER rule of proof, it held that the claimant was not entitled to receive compensation for her compensable injury because her "[self-employment], the last potentially causal employment before the claimant sought medical treatment and at which the claimant's claim accrued, was not subject to Workers' Compensation Law." 143 Or App at 490.

<sup>6</sup> Claimant argues that this application of LIER improperly assigns him a burden of proof. However, as we explained in *Lewis D. Vanover*, 64 Van Natta 206, 210 n 4 (2012), because claimant, as a self-employed property owner/manager, is presumptively responsible under the LIER, he (*as the*

Claimant relies on evidence that the decedent was not exposed to greater than ambient levels of asbestos (the substance that caused his disease), during his self-employment. According to claimant, responsibility should not be assigned to the decedent's self-employment, because his disease did not arise out of an exposure *at that employment* "to which [he was] not ordinarily subjected or exposed other than during a period of regular actual employment," as required under ORS 656.802(1)(a).<sup>7</sup> Thus, claimant essentially argues that responsibility should not be assigned to the decedent's self-employment under LIER, because his exposure during that employment did not actually cause his disease.

However, as the ALJ explained, ORS 656.802(1)(a) pertains to compensability, not responsibility.<sup>8</sup> Thus, we agree with the ALJ's conclusion that ORS 656.802(1)(a) does not prevent assigning responsibility to the decedent's self-employment. *See Dibrito v. SAIF*, 319 Or 244, 248 (1994) ("the Board's first task is to determine which provisions of the Workers' Compensation Law are applicable").

In addition, we agree with the ALJ's reasoning that responsibility for the compensable condition is presumptively assigned to the decedent's self-employment under LIER, because it is the last employment that "could have"

---

*presumptively responsible employer*) has the affirmative burden of showing that responsibility should be shifted to a different carrier (either by showing that it was impossible for claimant's self-employment to have caused his disease or that a previous employment exposure was the sole cause of his condition). *See id.* at 210.

<sup>7</sup> ORS 656.802(1)(a) provides, in part:

"As used in this chapter, 'occupational disease' means any 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, and which requires medical services or results in disability or death \* \* \* [.]"

<sup>8</sup> *E.g.*, *SAIF v. Noffsinger*, 80 Or App 640, 645-46, *rev den*, 302 Or 342 (1986) ("Of course, 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"); *Gary L. Evans, Dcd.*, 60 Van Natta 3327, 3332-33 (2008) (before the legislature enacted ORS 656.802(2)(b), the courts applied the "major contributing cause" standard of proof in occupational disease cases under ORS 656.802(1)(a)) (discussing *Noffsinger*).

contributed to the condition. *See Troy J. Pachano*, 62 Van Natta 514, 517 (2010) (responsibility presumptively assigned under LIER to last employment that could have caused the condition.)<sup>9</sup>

Accordingly, because the record does not establish that other employment was the sole cause of the condition, or that it was impossible for exposure during the decedent's self-employment to cause the condition, responsibility does not shift from the self-employment.

As we explained in *Lisa M. Korczak*, 60 Van Natta 1778, 1779 (2008), a carrier is not responsible under LIER, when responsibility is initially assigned at "a period of noncovered self-employment, and the medical evidence [does] not establish that it was impossible for the 'potentially responsible' self-employment to have caused the claimed condition, or that prior covered employment was the sole cause of the condition." (*citing Likos*, 143 Or App at 490; *Charles A. Lutz*, 58 Van Natta 3232 (2006), *recons*, 59 Van Natta 101 (2007); *Gary Jones*, 58 Van Natta 1882 (2006); *Craig A. McIntyre*, 51 Van Natta 34 (1999)).

Thus, the aforementioned case precedent establishes that, if a noncovered employment (*i.e.*, not subject to ORS Chapter 656) is presumptively responsible under the LIER, and the record does not establish that it was impossible for that employment to have caused the condition or that previous employment was the sole cause of the condition, the claimant is not entitled to workers' compensation benefits for a work-related injury. By not having workers' compensation insurance coverage for his business, the decedent took the risk of not receiving compensation for an on-the-job injury. *See The New Portland Meadows v. Dieringer*, 157 Or App 619, 622 (1998) (noting that the nonsubject employer in *Likos* was an employer "under the jurisdiction of Oregon, who simply chose to take the risk of not being compensated for an on-the-job injury by not placing herself within Oregon's statutory scheme"); *Korczak*, 60 Van Natta at 1780. Because this is such a case, we affirm the ALJ's responsibility decision.

### ORDER

The ALJ's order dated October 17, 2011 is affirmed.

Entered at Salem, Oregon on May 22, 2012

---

<sup>9</sup> ORS 656.308(1) does not apply to the responsibility determination because there is no accepted claim for mesothelioma. *See SAIF v. Yokum*, 132 Or App 18, 23 (1994) ("For ORS 656.308(1) to be triggered, there must be an accepted claim for the condition, for which some employer is responsible.")