In the Matter of the Compensation of
JERRY F. DURANT, Claimant
WCB Case No. 11-05489, 11-05488, 11-03416
ORDER ON REVIEW
Guinn & Dalton, Claimant Attorneys
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Reviewing Panel: Members Lowell and Lanning.

The SAIF Corporation, on behalf of MPP Piping, Inc. (SAIF/MPP) requests review of Administrative Law Judge (ALJ) Spangler's order that: (1) set aside its responsibility denial of claimant's new/omitted medical condition claim for a right rotator cuff partial tear with impingement; and (2) upheld the responsibility denials from SAIF, on behalf of McKinstry Company (SAIF/McKinstry), and Sedgwick CMS, on behalf of Harder Mechanical (Sedgwick/Harder), for claimant's right shoulder condition. In his brief, claimant challenges that portion of the ALJ's order that awarded a $2,500 assessed fee. On review, the issues are responsibility and attorney fees. We affirm in part and modify in part.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact." We provide the following summary of the pertinent facts.

On November 16, 2006, claimant compensably injured his right shoulder while working for SAIF/MPP as a pipefitter. On March 14, 2007, Dr. Sedgewick performed right shoulder surgery, diagnosing "impingement and partial tear of the rotator cuff, supraspinatus bursal I." (Ex. 18). While Dr. Sedgewick performed an "arthroscopic subacromial decompression," no rotator cuff tendon *repair* occurred. (Exs. 18, 42-9, 50A-1). Dr. Sedgewick described the partial tear as it existed at surgery as "25% tearing of the supraspinatus on the bursal side of the rotator cuff * * *." (Ex. 29A).

SAIF/MPP accepted a right shoulder strain. (Ex. 13). That claim was closed in November 2007 without a permanent disability award. (Exs. 29, 31).

Claimant worked for SAIF/McKinstry from October 2007 to March 2008, and for Sedgwick/Harder from March 2008 to May 14, 2011. He did not seek medical treatment for his right shoulder condition between October 2007 and April 2011. However, he testified that his shoulder was never the same after the 2006 injury.

On April 18, 2011, claimant returned to Dr. Sedgewick, complaining of increased right shoulder symptoms. (Ex. 32). After reviewing a May 2011 right shoulder MRI, Dr. Sedgewick diagnosed a right shoulder rotator cuff tear and recommended surgical repair. (Ex. 35; *see* Exs. 34, 34A). During a June 2011 right shoulder surgery, Dr. Sedgewick found a full thickness tear of the rotator cuff. (Ex. 40).

In May 2011, claimant filed a new/omitted medical condition claim for "right shoulder rotator cuff partial tear with impingement" with SAIF/MPP, which issued a responsibility denial. (Exs. 36, 38).

Claimant subsequently filed occupational disease claims for a "right shoulder condition" with SAIF/McKinstry and Sedgwick/Harder. SAIF/McKinstry denied responsibility only. (Ex. 46A). Although Sedgwick/Harder initially denied compensability and responsibility, it withdrew the compensability denial at hearing. (Ex. 46B; Tr. 7).

Claimant was referred to Dr. Puziss, orthopedic surgeon, who examined him and reviewed his records. Claimant was also examined by Dr. Keizer, orthopedic surgeon, and Dr. Courogen, orthopedic surgeon, on behalf of the carriers.

CONCLUSIONS OF LAW AND OPINION

Because the carriers had conceded that claimant's right rotator cuff tear with impingement was compensable, the ALJ analyzed which carrier was responsible for the condition. The ALJ found that the persuasive medical evidence established that claimant's November 2006 injury with SAIF/MPP was the major, direct, and actual contributing cause of his partial thickness rotator cuff tear with impingement. The ALJ also determined that the partial thickness rotator cuff tear was the major contributing cause of the consequential full thickness rotator cuff tear with impingement. Reasoning that a consequential condition theory governed the causation issue, the ALJ rejected SAIF/MPP's argument that the last injurious exposure rule (LIER) could be applied defensively, reasoning that *SAIF v. Webb*, 181 Or App 205 (2002), was controlling.

First, we agree with the ALJ's conclusion that a preponderance of the record establishes actual causation against SAIF/MPP for claimant's partial-thickness rotator cuff tear condition. In that regard, the persuasive reports from Drs. Sedgewick, Puziss, and Keizer establish that the November 2006 work injury directly caused the partial thickness rotator cuff tear with impingement.[1] (Exs. 43, 50A, 51A). Dr. Puziss opined that the November 2006 work-related right shoulder strain caused a partial right supraspinatus tear and impingement. (Ex. 42-7). He explained that during the November 2006 accident, claimant sustained a heavy right shoulder strain in abduction with some external rotation with his full body weight, which was consistent with and sufficient to cause partial tearing (25 percent) of the rotator cuff bursal side, suprapinatus. (Ex. 42-9). Dr. Keizer also concluded that the November 2006 injury was the "actual and direct" cause of claimant's partial tear of the right supraspinatus tendon. (Ex. 50A-1). Finally, Dr. Sedgewick opined that the major cause of the partial tear with impingement was the November 2006 work injury. (Ex. 43-1).

Moreover, in written closing argument, SAIF/MPP acknowledged that the medical opinions agreed that the "claimed rotator cuff tear with impingement is directly related to the 11/16/06 industrial accident[.]" (SAIF/MPP's opening closing argument at 5).

Thus, we find that the new/omitted medical condition claim for partial thickness rotator cuff tear with impingement was compensably related to the 2006 injury with SAIF/MPP.

Furthermore, the persuasive opinions from Drs. Sedgewick, Puziss, and Keizer establish that the compensable partial thickness rotator cuff tear condition was the major contributing cause of the full thickness rotator cuff tear with impingement. *See* ORS 656.005(7)(a)(A) ("No injury or disease is compensable as a consequence of a compensable injury unless the compensable injury is the major contributing cause of the consequential condition."); *Albany Gen. Hosp. v. Gasperino*, 113 Or App 411, 415 (1992).

Dr. Sedgewick concurred with claimant's counsel's statement that claimant's right shoulder rotator cuff tear had progressed to a full thickness tear, which was caused in major part by his 2006 injury. (Ex. 43-2). Dr. Keizer concurred with Sedgwick's counsel's statement that claimant's full thickness tear

[1] Dr. Courogen was unable to determine whether the partial rotator cuff tear was due to the 2006 injury or whether it was an attritional tear due to impingement from preexisting AC joint arthritis. (Ex. 44-7). We are more persuaded by the well-reasoned opinions of Drs. Puziss, Sedgewick, and Keizer that the 2006 injury was a material and the major contributing cause of the partial thickness rotator cuff tear with impingement.

in his right rotator cuff was a direct consequence of the partial tear resulting from the 2006 injury, which was the major contributing cause of the tear. (Ex. 50A-2). Likewise, Dr. Puziss concurred with Sedgwick's counsel's statement that claimant's 2006 injury contributed to the development of his full thickness tear and, as such, was the major contributing cause of his current right shoulder condition (including the full thickness tear). (Ex. 51A-2).

Based on these opinions, we agree with the ALJ's conclusion that the right full thickness rotator cuff tear with impingement is a "consequential condition" under claimant's compensable 2006 claim. In other words, the record supports a conclusion that claimant's 2006 compensable injury (his partial right rotator cuff tear) was the major contributing cause of his current right full thickness rotator cuff tear with impingement. *See* ORS 656.005(7)(a)(A). Therefore, responsibility for claimant's consequential right full thickness rotator cuff tear condition rests with SAIF/MPP, which was the carrier on the risk in 2006. *Webb*, 181 Or App at 211; *see, e.g., Daniel W. Foster*, 55 Van Natta 1737 (2003) (disputed condition was determined to be compensably related to a 1999 claim; because the persuasive evidence established that the 1999 injury was the major contributing cause of the disputed condition, responsibility remained with the original carrier).

In *Webb*, the claimant had experienced three compensable injuries to the same knee, which had been accepted by three different carriers. The claimant then developed degenerative joint disease and it was not disputed that the condition was a compensable consequential condition. The only issue was responsibility. We found that the first injury was the major contributing cause of the degenerative condition and concluded that the "first injury" carrier was responsible for the claimant's consequential condition. *Donald L. Webb*, 52 Van Natta 1005 (2000).

The "first injury" carrier sought judicial review, attempting to shift responsibility for the claimant's condition to a subsequent employer, under either the LIER or the rebuttable presumption of *Industrial Indemnity Co. v. Kearns*, 70 Or App 583 (1984), where the court held that when a claimant has had multiple accepted injuries to the same body part, a rebuttable presumption arises under which the last insurer is responsible for the compensable injury. In *Webb*, the two subsequent carriers argued that we had properly refrained from applying the LIER and that under ORS 656.005(7)(a)(A), the "first injury" carrier was responsible for the degenerative condition. The court agreed that the "first injury" carrier was responsible for the consequential condition claim, explaining that under ORS 656.005(7)(a)(A), liability for a consequential condition falls on the employer with an accepted injury that is the major contributing cause of the consequential condition. 181 Or App at 211.

Here, SAIF/MPP argues that *Webb* is not controlling and that it was not precluded from asserting the LIER defensively. Instead, it contends that the full thickness rotator cuff tear is an occupational disease that resulted from a combination of the 2006 injury and subsequent work activities. While SAIF/MPP concedes that it is presumptively responsible for the full thickness rotator cuff tear under the LIER, it argues that because evidence establishes that claimant's later work activities with Sedgwick/Harder and SAIF/McKinstry contributed to a worsening of the underlying rotator cuff tear condition, responsibility should shift forward to one of those employers. *See SAIF v. Hoffman*, 193 Or App 750, 753 (2004) ("If a claimant chooses not to rely on LIER's rule of proof and instead to prove that conditions at a particular employer actually caused the disease, that employer can still defensively invoke LIER to shift responsibility to a subsequent employer."); *Willamette Inds., Inc. v. Titus*, 151 Or App 76, 81 (1997) (carriers "may assert the rule of responsibility as a defense even when a claimant has chosen to prove actual causation.").

In contrast, claimant and Sedgwick/Harder argue that *Webb* applies to the responsibility analysis and that SAIF/MPP is responsible for the right full thickness rotator cuff tear. SAIF/McKinstry contends that, regardless of the legal standard we apply, it is not responsible for claimant's right shoulder condition.

SAIF/MPP also argues that *Webb* is distinguishable because it involved three accepted injury claims, whereas this case involves only one accepted claim. In prior cases, however, we have determined that the pivotal fact in *Webb* was that a single accepted injury remained the major cause of the consequential condition--not that more than one injury had been accepted. We have reasoned that it is permissible to apply the *Webb* analysis in responsibility cases where, as here, there is at least one accepted injury and the claimant's disputed condition is a compensable consequence of that accepted injury. *E.g., Jesus R. Cobian*, 56 Van Natta 677, 683 (2004); *Thomas E. Taggart*, 55 Van Natta 2965, 2970, *recons*, 55 Van Natta 3295 (2003).

SAIF/MPP further contends that *Webb* is distinguishable because claimant asserted a consequential condition theory *and* an occupational disease against it. *See, e.g., Waste Mgmt. v. Pruitt*, 224 Or App 280 (2008), *rev den*, 346 Or 66 (2009) (distinguishing *Webb* on the basis that the claimant had asserted an occupational disease theory). For the following reasons, we do not consider *Webb* to be distinguishable on such a basis.

In *Pruitt*, the claimant had filed an occupational disease claim. The carrier argued that, despite the claimant's chosen theory of compensability, the medical evidence showed that his condition was, in fact, a consequential condition. 224 Or App at 285. The court disagreed, finding substantial evidence to support our conclusion that the record established that the disputed condition was properly considered as an occupational disease, and not as a consequential condition. *Id.* at 286 (citing *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)). The court explained that if the claimant had sought to establish the compensability of his claim as a consequential condition "*or if the board had determined that the claim was most appropriately characterized as a consequential condition claim*," then "the claim would be subject to the provisions of ORS 656.005(7)(a)(A), and the compensability of the condition would depend on proof that one of claimant's previous compensable injuries was its major contributing cause. *Webb* would provide guidance in determining which employer should bear responsibility for the claim." *Id.* at 286 (emphasis added).

Thus, despite a claimant's chosen theory of compensability, it is our obligation as a fact finder to apply the appropriate legal standard to determine the compensability of a worker's claim. We review the medical evidence and the record to determine the appropriate standard of review. *Dibrito*, 319 Or at 248; *Tamara L. Folkman*, 61 Van Natta 637, 640 (2009); *Daniel Suing*, 56 Van Natta 2600, 2601 (2004).

Here, for the reasons previously discussed, the medical opinions persuasively support a conclusion that claimant's 2006 compensable injury (*i.e.*, his right partial thickness rotator cuff tear) was the major contributing cause of his right full thickness tear with impingement. Under such circumstances, we conclude that this claim is most appropriately characterized as a consequential condition claim concerning the 2006 injury. Thus, the fact that the claimant in *Webb* only asserted one theory of compensability is immaterial. Rather, as the court noted in *Pruitt*, the point of *Webb* is that it provides guidance in determining which employer is responsible for claimant's claim.

SAIF/MPP next argues that, unlike *Webb*, the medical evidence supports a finding that claimant's employment after SAIF/MPP contributed to a worsening of the underlying rotator cuff tear. However, because we have determined that the disputed condition is a "consequential condition," the LIER does not apply

and cannot be invoked to transfer liability to a subsequent carrier.[2] Rather, the rule of *Webb* applies to determine responsibility of claimant's consequential condition. *See* 181 Or App at 211; *Folkman*, 61 Van Natta at 643 (because the medical evidence established that the claimant's condition was a consequential condition related to the 2000 work injury, the carrier on the risk in 2000 was responsible for that condition).

Finally, claimant argues that if SAIF/MPP is responsible, the attorney fee award should be increased to reflect the required annual adjustment, as well as an "extraordinary" fee under ORS 656.308(2)(d). Based on the following reasoning, we modify the ALJ's award.

The ALJ found that claimant's attorney actively and meaningfully participated in finally prevailing against SAIF/MPP's responsibility denial and awarded a $2,500 assessed fee, payable by SAIF/MPP. In doing so, the ALJ noted that $2,500 was the "maximum" level for an attorney fee award under ORS 656.308(2)(d).

For finally prevailing over SAIF/MPP's responsibility denial, claimant's counsel is entitled to an attorney fee award. ORS 656.308(2)(d) provides that, absent a showing of extraordinary circumstances, a fee awarded for an attorney's appearance and active and meaningful participation in finally prevailing against a responsibility denial shall not exceed $2,500, as adjusted by the same percentage increases as made to the average weekly wage. *See Liberty Northwest Ins. Corp. v. Gordineer*, 150 Or App 136, 141-42 (1997) (maximum award under former ORS 656.308(2)(d) for prevailing over a responsibility denial was $1,000 for all levels of review, absent a showing of extraordinary circumstances). Pursuant to the Workers' Compensation Board's Bulletin 1-2012, for the period from July 1, 2012 through June 30, 2013, an attorney fee awarded under ORS 656.308(2)(d) shall not exceed $2,630.91, absent a showing of extraordinary circumstances. OAR 438-015-0038; OAR 438-015-0055(5). The maximum attorney fee allowed under ORS 656.308(2)(d) (absent extraordinary circumstances) is cumulative; *i.e.*, it encompasses all levels of litigation, including the hearing and Board review. *See Tammy Locke*, 48 Van Natta 250 (1996) (when a claimant finally prevails against a responsibility denial, ORS 656.308(2)(d) authorizes a maximum cumulative attorney fee for services at all levels of litigation, except in cases involving extraordinary circumstances).

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[2] *See Reynolds Metals v. Rogers*, 157 Or App 147, 153 (1998), *rev den*, 328 Or 365 (1999).

Claimant requests an extraordinary fee for his attorney's "extraordinary" participation in a complex case. Yet, he did not request an extraordinary attorney fee in written closing argument to the ALJ. Moreover, he has not sufficiently explained the circumstances justifying an extraordinary fee. Finally, after reviewing the record, we do not find that extraordinary circumstances exist to warrant an attorney fee award in excess of the statutory limit.

In conclusion, after considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we agree with the ALJ's determination that claimant's attorney is entitled to the "maximum" fee allowed under ORS 656.308(2)(d) (absent extraordinary circumstances). However, consistent with Bulletin 1-2012, we modify the attorney fee award to $2,630.91, to be paid by SAIF/MPP. In reaching this conclusion, we have particularly considered the time devoted to the responsibility issue (as represented by the hearing record), the complexity of the issue, and the value of the interest involved. The ALJ's attorney fee award is modified accordingly.

ORDER

The ALJ's order dated October 10, 2012 is affirmed in part and modified in part. In lieu of the ALJ's $2,500 attorney fee award, claimant's counsel is awarded an attorney fee of $2,630.91, payable by SAIF/MPP. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on June 26, 2013