

In the Matter of the Compensation of
DAMON E. SMITH, Claimant
WCB Case No. 13-04692, 13-02633, 13-01313
ORDER ON REVIEW
Glen J Lasken, Claimant Attorneys
Reinisch Wilson Weier, Defense Attorneys
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Curey and Lanning.

Safeway Stores requests review of Administrative Law Judge (ALJ) Lipton's order that: (1) set aside its denial of claimant's occupational disease claim for a left shoulder condition; and (2) upheld the SAIF Corporation's denials of claimant's occupational disease and new/omitted medical condition claims for the same condition. On review, the issues are compensability and responsibility. We reverse in part and affirm in part.

FINDINGS OF FACT

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

Claimant worked as a delivery truck driver for SAIF's insured for 17 years. (Tr. 18; Ex. 6). In that job, he used a pallet jack and hand truck to deliver soft drinks to stores. (Tr. 18, 19). Sometimes he stocked a customer's shelves. (Tr. 20, 21). He frequently lifted up to 54 pounds and occasionally lifted/carried up to 75 pounds. (Ex. 6-3; Tr. 28, 45-46). About half of the lifting was at or above shoulder height. (Tr. 21).

On January 6, 2012, claimant consulted Dr. Kruse for right shoulder pain. (Ex. 1). Dr. Kruse assessed a repetitive use injury and advised claimant to modify and reduce stressful shoulder use at work. (Ex. 2-2).

On January 10, 2012, claimant stopped working for SAIF's insured because his driver's license was suspended. (Ex. 8-2; Tr. 34).

On March 1, 2012, claimant filed an occupational disease claim with SAIF's insured for his right shoulder condition. (Ex. 4).

In April 2012, claimant went to work for a Safeway store as a produce clerk. (Tr. 21, 34). In that job, he lifted containers of produce weighing up to 50 pounds. (Tr. 22). There was some lifting above shoulder level, but less than there had been when he worked for SAIF's insured. (Tr. 22, 36, 38, 46). Claimant also swept/mopped the produce department floor as needed. (Tr. 39).

On May 8, 2012, claimant told a SAIF investigator that his right shoulder had been intermittently painful for seven years and his left shoulder had been painful for a “couple” of years. (Ex. 8-3).

On May 11, 2012, Dr. Brenneke, an orthopedic surgeon who performed an examination at SAIF’s request, diagnosed right shoulder pain. (Ex. 9-7). Dr. Brenneke determined that the significant lifting claimant did while working for SAIF’s insured had contributed to his right shoulder symptoms, but not to its pathology, which was undefined. (Ex. 9-8). Dr. Brenneke also noted that claimant was working, but not nearly as vigorously as he had for SAIF’s insured. (Ex. 11-2).

On May 16, 2012, Dr. Kruse diagnosed right subscapular bursitis and tendonitis, due to claimant’s work for SAIF’s insured. (Ex. 10).

On July 18, 2012, SAIF accepted right scapular tendonitis. (Ex. 11A).

On July 31, 2012, claimant consulted Dr. Nonweiler, a surgeon, about his right shoulder condition. Claimant told Dr. Nonweiler that while working for SAIF’s insured, he had had some left shoulder pain as well. (Ex. 13-3). Dr. Nonweiler documented full left shoulder motion, without impingement pain or instability. (*Id.*)

On September 4, 2012, claimant told Dr. Nonweiler that his left shoulder pain had waxed and waned after the July 2012 examination. (Ex. 16-2). He was having some mild left shoulder discomfort while working at Safeway, but was able to complete all functions of the job. (*Id.*)

On November 1, 2012, Dr. Nonweiler assessed probable chronic left rotator cuff tendinosis. (Ex. 19-2). Claimant initiated a new/omitted condition claim for his left shoulder, as a consequence of his earlier right shoulder claim. (Ex. 20).

On November 19, 2012, SAIF issued a denial, asserting that the claim was for a symptom, body part, or mechanism of injury rather than a condition. (Ex. 23). Claimant requested a hearing.¹

On December 11, 2012, Dr. Nonweiler performed a complete bilateral shoulder examination and reported a positive impingement sign. (Ex. 24).

¹ On January 8, 2013, claimant amended his new/omitted medical condition claim to specify a left shoulder rotator cuff tendonitis condition. (Ex. 25). On March 12, 2013, SAIF denied responsibility for the claim. (Ex. 35). Claimant requested a hearing.

A February 18, 2013 left shoulder MRI showed tendinopathy, a partial tear, and hypertrophic change. (Ex. 30).

On March 1, 2013, Dr. Brenneke performed a second examination at SAIF's request. Reasoning that claimant did not have left shoulder symptoms in 2012, Dr. Brenneke concluded that claimant's left shoulder pathology was not related to his work exposure at SAIF's insured. (Ex. 33-12). After reviewing claimant's left shoulder MRI, Dr. Brenneke opined that the rotator cuff tear was inconsequential and not likely due to claimant's work activities. (Ex. 43-2). He concluded that claimant's left shoulder bursitis was possibly due to his work for Safeway. (*Id.*)

On April 23, 2013, Dr. Nonweiler opined that the major contributing cause of claimant's left shoulder condition was his overall work activities. (Ex. 37-2).

On May 22, 2013, SAIF issued a denial, asserting that claimant's left shoulder condition was the responsibility of another employer.² (Ex. 40).

On July 17, 2013, claimant submitted an occupational disease claim for his left shoulder to Safeway. (Ex. 42).

On September 5, 2013, Dr. Farris, an orthopedic surgeon who performed an examination at Safeway's request, opined that claimant's left shoulder condition was in existence before he went to work for Safeway. (Ex. 47-10). Considering the difference between the lifting that claimant performed for SAIF's insured and for Safeway, Dr. Farris concluded that the work for Safeway may have caused the condition to become intermittently symptomatic, but did not cause any material worsening. (*Id.*) Dr. Farris ultimately opined that claimant's work for SAIF's insured was the major contributing cause and the sole cause of his bilateral shoulder pathology. (Exs. 47-11, 53, 56-2).

On September 20, 2013, Safeway denied compensability and responsibility for claimant's left shoulder condition. (Ex. 48). Claimant requested a hearing.

Dr. Nonweiler concurred with Dr. Farris's opinion. (Ex. 54-2). Dr. Nonweiler also opined that it was medically impossible for the work at Safeway to have contributed to claimant's left shoulder condition. (Ex. 54A).

Dr. Brenneke opined that it was not possible to determine whether claimant's left shoulder MRI findings predated his employment at Safeway. (Ex. 55-1). Rather, based on claimant's description of his work for Safeway

² At the hearing, SAIF amended its denial to include a compensability defense. (Tr. 5).

and the difference in his examinations before and after that work, Dr. Brenneke concluded that that work possibly contributed to the left shoulder pathology. (Ex. 55-1, -2).

Claimant testified that his work for SAIF's insured was more physically demanding than his work for Safeway. (Tr. 22). He also testified that his symptoms after he went to work for Safeway were "[p]retty close to the same" as they had been before he went to work there. (Tr. 27, 47).

At a "post-hearing" deposition, Dr. Brenneke acknowledged that claimant's testimony suggested that there was no contribution from his work for Safeway. (Ex. 57-16, -17). Dr. Brenneke also agreed that the work for SAIF's insured was harder than the work for Safeway and probably the major cause of claimant's left shoulder condition. (Ex. 57-38). He maintained, however, that there was possibly some contribution from the work for Safeway, regardless of whether claimant had worsened symptoms. (*Id.*)

CONCLUSIONS OF LAW AND OPINION

Finding that claimant's left shoulder condition was caused by work conditions that existed at more than one employer, the ALJ applied the last injurious exposure rule (LIER). In doing so, the ALJ determined that Safeway was presumptively responsible. Further, finding the evidence insufficient to shift responsibility back to SAIF, the ALJ concluded that Safeway was responsible for claimant's left shoulder condition.

On review, Safeway contests the compensability of claimant's left shoulder condition. Safeway also argues that the LIER should not be applied in assigning responsibility because employment conditions at SAIF's insured were the major contributing cause of claimant's left shoulder condition and subsequent work activities did not independently contribute to the condition. Alternatively, Safeway asserts that SAIF is responsible for claimant's left shoulder condition based on his compensable right shoulder claim.

In response, claimant contends that his work activities for SAIF's insured were the major cause of his left shoulder condition and that his Safeway employment did not contribute to his condition.

SAIF asserts that Safeway did not establish that it was impossible for claimant's work while employed by Safeway to have independently contributed to claimant's left shoulder condition or that claimant's work for SAIF's insured was the sole cause of the condition. Accordingly, SAIF contends that Safeway is responsible for claimant's condition.

For the following reasons, we conclude that the medical evidence establishes that claimant's work activities for SAIF's insured were the major contributing cause of his left shoulder condition.

Claimant bears the burden to establish the compensability of his occupational disease claim by showing that his work activities were the major contributing cause of his condition. *See* ORS 656.266(1); ORS 656.802(2)(a). The LIER allows a claimant to establish compensability by proving that employment conditions in general were the major contributing cause of the disease, without having to prove the degree to 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, 82 (1997).

Here, all three medical experts identified claimant's work activities at SAIF's insured as the major contributing cause of his left shoulder condition. Specifically, Dr. Farris opined that claimant's work at SAIF's insured was the major contributing cause of the pathology in both shoulders. (Ex. 47-11). Dr. Nonweiler also concluded that claimant's work at SAIF's insured was the major contributing cause of his bilateral shoulder conditions. (Ex. 54-2). Finally, Dr. Brenneke ultimately agreed that claimant's work for SAIF's insured was harder than the work at Safeway and probably the major cause of claimant's left shoulder bursitis. (Ex. 57-38). Accordingly, we conclude that claimant established compensability by proving actual causation (*i.e.*, that his work activities for SAIF's insured were the major contributing cause of the left shoulder condition).³

We turn to the responsibility issue. Under ORS 656.308(1), SAIF may shift responsibility to Safeway if claimant sustained a "new compensable injury involving the same condition."⁴ The term "new compensable injury" includes compensable occupational disease claims. ORS 656.308(1); ORS 656.804.

³ The medical evidence does not establish the compensability of claimant's new/omitted medical condition claim with SAIF under a "consequential condition" theory. *See* ORS 656.005(7)(a)(A). Although Dr. Nonweiler opined that there was some contribution from the accepted right shoulder claim, he ultimately concluded that claimant's work for SAIF's insured was the major contributing cause of the left shoulder condition. (Exs. 37-4, 54-2). Consequently, we affirm that portion of the ALJ's order that upheld SAIF's denial of claimant's new/omitted medical condition claim.

⁴ ORS 656.308(1) provides:

To establish a new occupational disease, claimant's work activities at Safeway must be the major contributing cause of his combined condition and pathological worsening of his disease. ORS 656.802(2)(b). Because of the possible alternative causes of claimant's left shoulder condition, expert medical evidence must be used to resolve the question of causation. *Barnett v. SAIF*, 122 Or App 279 (1993).

Here, there is no expert medical evidence that claimant's work activities at Safeway were the major contributing cause of a pathological worsening of his left shoulder condition. Consequently, because the record does not establish that claimant sustained a new compensable occupational disease, SAIF is responsible for claimant's left shoulder condition under ORS 656.308(1).

Alternatively, SAIF may defensively invoke the LIER to shift responsibility to Safeway. To do so, SAIF must prove that the Safeway employment independently contributed to the underlying condition. *See SAIF v. Hoffman*, 193 Or App 750, 753 (2004). A mere occurrence of symptoms that does not signify a worsening of the underlying disease does not allow a reassignment of responsibility. *Spurlock v. International Paper Co.*, 89 Or App 461, 465 (1988).

As previously discussed, the medical evidence establishes that claimant's work activities for SAIF's insured were the major contributing cause of his left shoulder condition. However, that evidence does not establish that claimant's subsequent work for Safeway actually contributed to the worsening of his left shoulder condition. Dr. Farris concluded that, while the work for Safeway may have caused some intermittent symptoms, it did not cause any material worsening of claimant's left shoulder condition. (Ex. 47-10). Dr. Nonweiler opined that it was medically impossible for the work at Safeway to have contributed to claimant's left shoulder condition. (Ex. 54A). Finally, Dr. Brenneke opined only that the work at Safeway possibly contributed to claimant's left shoulder pathology. (Exs. 55, 57-38). Because Dr. Brenneke's opinion is framed in terms

“When a worker sustains a compensable injury, the responsible employer shall remain responsible for future compensable medical services and disability relating to the compensable condition unless the worker sustains a new compensable injury involving the same condition. If a new compensable injury occurs, all future compensable medical services and disability involving the same condition shall be processed as a new injury claim by the subsequent employer. The standards for determining the compensability of a combined condition under ORS 656.005(7) shall also be used to determine the occurrence of a new compensable injury or disease under this section.”

of “possibility,” it is insufficient to satisfy SAIF’s requisite burden of proof. *See Gormley v. SAIF*, 52 Or App 1055, 1060 (1981) (persuasive medical opinion must be stated in terms of reasonable medical probability, not mere possibility).

Under such circumstances, responsibility for claimant’s left shoulder condition remains with SAIF. Accordingly, we reverse that portion of the ALJ’s order that upheld SAIF’s occupational disease denial.

Because SAIF is responsible for the occupational disease claim, it is responsible for the ALJ’s \$8,000 attorney fee award for services regarding its denial at the hearing level.

Claimant’s attorney is entitled to an assessed fee for services on review regarding the overturning of SAIF’s occupational disease denial. 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 on review is \$3,500, payable by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant’s respondent’s brief), the complexity of the issues, the value of the interest involved, and the risk that claimant’s counsel might go uncompensated.

Finally, claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial of his left shoulder condition, to be paid by SAIF. *See* ORS 656.386(2); OAR 438-015-0019; *Gary Gettman*, 60 Van Natta 2862 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

ORDER

The ALJ’s order dated February 26, 2015 is reversed in part and affirmed in part. SAIF’s occupational disease denial is set aside and the claim is remanded to it for processing in accordance with law. Safeway’s denial is reinstated and upheld. SAIF is responsible for the ALJ’s \$8,000 attorney fee and cost awards. For services on review regarding the occupational disease denial, claimant’s attorney is awarded \$3,500, payable by SAIF. Claimant is also 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. The remainder of the ALJ’s order is affirmed.

Entered at Salem, Oregon on September 30, 2015