

In the Matter of the Compensation of  
**JERRY L. JOHNSON, Claimant**  
WCB Case No. 15-02615  
ORDER ON REVIEW  
Glen J Lasken, Claimant Attorneys  
Reinisch Wilson Weier, Defense Attorneys

Reviewing Panel: Members Weddell and Curey.

The self-insured employer requests review of Administrative Law Judge (ALJ) Ogawa's order that set aside its denial of claimant's occupational disease claim for a right shoulder condition. On review, the issue is compensability. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," which are summarized and supplemented below.

Since February 1997, claimant has worked for the employer. (Tr. 7). From 2003 until 2011, he was employed as a construction splicer. (*Id.*) Thereafter, he worked as a central office technician. (*Id.*)

In approximately July 2007, claimant was climbing a ladder out of a manhole when the ladder "slipped out" from under him. (Ex. 5B). He grabbed the manhole guard with his right hand, but was unable to pull himself out, and he eventually fell into the manhole. (Tr. 14-15). Although claimant reported the incident to the employer, he did not file a claim or seek medical treatment at that time. (Tr. 16)

After the 2007 manhole incident, claimant's right shoulder was more irritated when he performed aerial work as a splicer. (Tr. 17). In about 2011, he became a central office technician, which is generally lighter physical work. (Tr. 7, 21).

In late 2014, claimant first sought treatment for his right shoulder pain. (Ex. 1). On December 14, 2014, claimant reported to Ms. McMillan (a family nurse practitioner) a history of right shoulder pain, which started with the manhole incident. (Ex. 1-1). He mentioned progressive pain, attributing it to "a lot of" overhead work, repetitive use of his arms, and "a lot of" reaching. (*Id.*) He was referred to Dr. Gingold, an orthopedic surgeon. (*Id.*)

In January 2015, Dr. Gingold examined claimant. (Ex. 3). Claimant advised Dr. Gingold of his manhole event/injury. (Ex. 3-1). Referring to his current central office technician position, claimant noted that he did not have to do any “painful” work. (*Id.*) Based on the mechanism of a grasping injury above claimant’s head as a result of the manhole incident, his current symptoms, and examination findings, Dr. Gingold opined that claimant “most likely” had a SLAP tear. (Ex. 3-2).

On February 19, 2015, the employer denied the July 2007 injury claim, contending that it had been untimely filed and that the condition was not “worsened by or arose out of and in the course of your employment, either by accident or occupational disease[.]” (Ex. 5A). That denial has become final by operation of law.

On February 25, 2015, an MR arthrogram showed “[m]aceration and displacement of the superior labrum suggestive of bucket-handle tear,” “[s]hallow articular surface tears of the distal anterior supraspinatus and posterior infraspinatus,” “[g]rade 4 chondromalacia involving both the humeral head and glenoid as described,” and “[m]oderate degenerative hypertrophy of the acromioclavicular joint.” (Ex. 7-1). Dr. Gingold reviewed the arthrogram and explained that it revealed “a displaced labral tear, which involves the biceps anchor” and that “[t]here is partial tearing of his supraspinatus.” (Ex. 8).

On March 9, 2015, claimant filed an occupational disease claim for his current right shoulder condition. (Ex. 10).

On March 19, 2015, Dr. Gingold performed a right shoulder arthroscopic biceps tenodesis. (Ex. 13). In April 2015, Dr. Gingold acknowledged that “the SLAP tear likely occurred when [claimant] lost his balance in the manhole.” (Ex. 18-2). Dr. Gingold concluded that claimant’s “continued work activities, particularly the overhead pulling activity, likely continued to irritate the shoulder joint and disrupted tissues.” (*Id.*) Dr. Gingold opined that it was “at least medically probable that the major contributing cause of [claimant’s] combined condition would be his overall employment activities which include the incident in the manhole.” (Ex. 18-3).

On May 1, 2015, at the employer’s request, Dr. Coletti examined claimant. (Ex. 22-1). After reviewing the February 2015 MR arthrogram, Dr. Coletti explained that it “clearly demonstrates considerable degenerative change and attrition of the superior labrum consistent with a tear in this area.”

(Ex. 22-5). Dr. Coletti opined that claimant did not “have any occupational disease related to his work activity.” (Ex. 22-6). He further stated that “SLAP lesions and labral tearing such as has been demonstrated in this case typically are associated with injury and are not typically attritional.” (*Id.*) Although it was his opinion that claimant sustained an injury, he had “no disagreement with Dr. Gingold’s [April 2015] concurrence letter.” (Ex. 22-7).

On May 14, 2015, the employer denied the occupational disease claim. (Ex. 23).

In August 2015, Dr. Gingold confirmed that the “diagnosis which has caused [claimant’s] need for treatment and disability is that of SLAP tear.” (Ex. 29-1). Based on his surgical observations, he indicated that claimant had a “displaced SLAP tear, which is most often correlated to an acute onset.” (*Id.*) He further opined that claimant “developed the SLAP tear during an acute work event when he apparently fell into a manhole and stopped his fall by using his right arm to catch himself[.]” (*Id.*) Dr. Gingold did not believe that “the displaced SLAP tear developed gradually over time.” (*Id.*)

### CONCLUSIONS OF LAW AND OPINION

Relying on the opinions of Drs. Gingold and Coletti, the ALJ analyzed claimant’s right shoulder SLAP tear as an injury because it occurred during a discrete period from an identifiable event. The ALJ acknowledged that claimant’s injury claim for the 2007 manhole event was untimely. However, considering claimant’s time-barred injury as part of his overall employment conditions, the ALJ concluded that claimant’s right shoulder condition was compensable as an occupational disease.<sup>1</sup> *See* ORS 656.802(2)(a).

On review, asserting that claimant’s SLAP tear arose suddenly during a discrete period from an identifiable event (*i.e.*, his “manhole” incident), the employer contends that the record does not establish that the SLAP tear was gradual in onset. As such, the employer argues that claimant’s occupational disease claim is not compensable. Based on the following reasoning, we agree.

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<sup>1</sup> Because claimant’s “injury” claim is time barred, his right shoulder condition is compensable only if the persuasive medical evidence establishes that claimant’s work-related injury and subsequent work activities were the major contributing cause of his condition. *See Justin B. Espinoza*, 61 Van Natta 2673, 2674-75 (2009); *Robert D. Papke*, 60 Van Natta 1204, 1206-07 (2008).

To resolve this dispute, we must determine whether claimant's condition should be analyzed as an "injury" or as an "occupational disease." What sets an "occupational disease" apart from an accidental "injury" is that the occupational disease is gradual, rather than sudden, in onset. *Mathel v. Josephine County*, 319 Or 235, 240 (1994); *see also Smirnoff v. SAIF*, 188 Or App 438, 443 (2003) (an occupational disease results from conditions that develop gradually overtime, whereas an injury is sudden, arises from an identifiable event, or has an onset traceable to a discrete period).<sup>2</sup>

For the following reasons, we conclude that the physicians' opinions support an analysis of claimant's right shoulder SLAP tear as an injury, rather than as an occupational disease.

Dr. Gingold concluded that "the SLAP tear likely occurred when [claimant] lost his balance in the manhole." (Ex. 18-2). He explained that, during that event, "[t]here was likely considerable force in the shoulder joint resulting from the substantial upward jerking motion." (*Id.*) Moreover, based on his surgical observations, Dr. Gingold opined that claimant's SLAP tear was "a displaced SLAP tear, which is most often correlated to an acute onset." (Ex. 29-1). Dr. Gingold attributed claimant's development of the SLAP tear to "an acute work event when he apparently fell into a manhole and stopped his fall by using his right arm to catch himself[.]" (*Id.*) He also explained that he did "not think that the displaced SLAP tear developed gradually over time." (*Id.*)

We acknowledge that Dr. Gingold also indicated that claimant's "continued work activities, particularly the overhead pulling activity, likely continued to irritate the shoulder joint and disrupted tissues [which] led to the recent worsening of his condition," (Ex. 18-2), and that "it was at least medically probable that the major contributing cause of [claimant's] combined condition would be his overall employment activities which include the incident in the manhole." (Ex. 18-3). However, in light of Dr. Gingold's prior comments, we consider his opinion to be more reflective of a conclusion that claimant's SLAP tear likely occurred as a result of his acute 2007 "manhole" injury, rather than from a gradual development of the tear over time.

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<sup>2</sup> An occupational disease also 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). A time-barred work injury can be considered under ORS 656.802 as "one of a series of traumatic events" for purposes of establishing an occupational disease. *See Espinoza*, 61 Van Natta at 2674-75; *Papke*, 60 Van Natta at 1206-07. In addition, the work activities must be the major contributing cause of the disease itself, not just of the disability or need for treatment. *See Matthew Martin*, 60 Van Natta 2459 (2008); *Tammy L. Foster*, 52 Van Natta 178 (2000).

Under such circumstances, Dr. Gingold's opinion does not persuasively attribute claimant's SLAP tear to his 2007 work injury, in conjunction with his general work activities and, as such, is not supportive of an occupational disease theory. *E.g., Anthony Castro*, 59 Van Natta 2008, 2013 (2007) (because medical evidence did not establish that the claimant's employment conditions in general, or in combination with work-related injuries, were the major contributing cause of the cervical degenerative changes, occupational disease claim was not compensable). Instead, when analyzed in its entirety, Dr. Gingold's opinion is more supportive of a sudden onset of claimant's SLAP condition as a direct result of the acute 2007 "manhole" incident, which is more consistent with an "injury" analysis.

Finally, Dr. Coletti opined that claimant's SLAP tear was specifically attributable to the 2007 manhole incident and not to general work activities. (Exs. 22, 25). Consequently, Dr. Coletti's opinion does not support a compensable occupational disease.

Accordingly, based on the aforementioned reasoning, we conclude that the compensability of claimant's right shoulder SLAP tear claim is subject to an "injury" analysis. *See Michael G. O'Connor*, 58 Van Natta 689 (2006), *aff'd without opinion*, 215 Or App 358 (2007) (where the medical evidence did not establish that the claimed condition was related to the claimant's work activities in general or in combination with the work injuries, an occupational disease claim was not compensable). Because claimant's injury claim for such a condition is time barred, and the requirements for an occupational disease claim have not been established, it follows that the claimed condition is not compensable. Consequently, we reverse the ALJ's order.

### ORDER

The ALJ's order dated October 5, 2015 is reversed. The employer's denial is reinstated and upheld. The ALJ's \$7,000 attorney fee and cost awards are reversed.

Entered at Salem, Oregon on April 19, 2016