

In the Matter of the Compensation of  
**KIMBERLEY K. ACKLEY, Claimant**

WCB Case No. 00-04605, 00-01274

ORDER ON REVIEW

Hollander & Lebenbaum, Claimant Attorneys  
Alice M Bartelt, SAIF Legal, Defense Attorneys  
Thaddeus J Hettle & Assoc, Defense Attorneys

Reviewing Panel: Members Lowell and Phillips Polich.

Claimant requests review of that portion of Administrative Law Judge (ALJ) Johnson's order that set aside Tri-Met, Inc.'s compensability and responsibility denials of her 1999 low back injury claim.<sup>1</sup> The SAIF Corporation cross-requests review of those portions of the ALJ's order that: (1) found claimant's low back condition was not compensable as to Tri-Met; and (2) found that SAIF was responsible for claimant's low back condition. In its brief, Tri-Met argues that the ALJ erred in denying its motion to dismiss for claimant's failure to appear at an October 9, 2000 hearing. On review, the issues are motion to dismiss, compensability and responsibility.

We adopt and affirm the ALJ's order with the following changes and supplementation. In the last paragraph on page 3, we change the citation after the first sentence to "(Ex. 54A)." In the first full paragraph on page 4, we change the citation to "(Ex. 65E)." In the second full paragraph on page 4, we change the citation after the first sentence to "(Ex. 65I)." In the second paragraph on page 10, we change the first sentence to read: "On April 24, 2001, claimant was treated by Dr. Gambee for low back pain."

On page 12, we replace the third and fourth full paragraphs with the following:

"When the medical evidence is divided, we give more weight to those medical opinions that are well reasoned and based on complete information. *See Somers v. SAIF*, 77 Or

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<sup>1</sup> We note that, although claimant requested review, she did not file any briefs. We assume that she is requesting review of that portion of the ALJ's order that set aside Tri-Met's compensability and responsibility denials of her 1999 low back injury claim.

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App 259, 263, (1986). We may give greater weight to the opinion of the treating physician, depending on the record in each case. *Dillon v. Whirlpool Corp.*, 172 Or App 484, 489 (2001). Here, however, we find that the causation dispute involves expert analysis rather than expert external observations. Under those circumstances, Dr. Martinson's status of treating physician confers no special deference. See *Allie v. SAIF*, 79 Or App 284 (1986); *Hammons v. Perini Corp.*, 43 Or App 299 (1979).”

On pages 15 and 16, we delete the section pertaining to “consideration of claimant’s burden of proof.” On page 17, we delete the first full paragraph.

### Motion to Dismiss

OAR 438-006-0071(2) provides that an ALJ shall dismiss a request for hearing if a claimant and his or her attorney fails to attend a scheduled hearing, unless "extraordinary circumstances" justify postponement or continuance of the hearing. Tri-Met contends that the ALJ erred by finding that extraordinary circumstances justified claimant’s failure to appear at the hearing scheduled on October 9, 2000.

Based on the reasons discussed in the ALJ’s Interim Order Denying Motions To Dismiss, we agree with the ALJ that extraordinary circumstances existed to justify the postponement and rescheduling of the hearing.

### Responsibility

At hearing, SAIF conceded compensability and proceeded only on the issue of responsibility. (Tr. 10). Because the ALJ found that claimant’s December 1999 incident did not result in a compensable injury against Tri-Met, he concluded that SAIF was responsible for claimant’s low back condition.

On review, SAIF argues that the ALJ should have determined responsibility under the “last injury rule.” SAIF relies on *Morgan S. Cagle*, 53 Van Natta 188 (2001).

In *Cagle*, the claimant had two compensable low back injuries. We found that the 1997 and 1999 injuries were "successive injuries" involving the same body part (*i.e.*, low back) and responsibility should be determined under the "last injury

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rule." We concluded that the claimant's 1999 injury contributed independently to his low back condition and, therefore, responsibility for the condition rested with the 1999 carrier. In *SAIF v. Webb*, 181 Or App 205, 208 n.1 (2002), the court explained that, under the last injury rule, it is not sufficient to prove that the last injury *could* have caused the claimant's condition. Rather, the last injury must, in fact, contribute independently to the claimant's compensable condition.

Here, unlike *Cagle*, there is only one accepted claim and the "last injury rule" does not apply. Moreover, even assuming that the December 1999 injury is compensable as to Tri-Met, the medical evidence is insufficient to establish that the 1999 incident contributed independently to claimant's low back condition. As Tri-Met points out, Dr. Puziss found that the 1999 incident was separate from claimant's prior low back conditions, and he believed that she "simply had increased symptoms as had occurred many times over the years." (Ex. 237-7, -8). Similarly, Dr. Martinson said that the December 1999 injury did not worsen claimant's preexisting condition, and she found that the 1999 injury had resolved without any permanent impairment. (Ex. 223). Under these circumstances, we agree with the ALJ that SAIF is responsible for claimant's low back condition.

#### ORDER

The ALJ's order dated October 19, 2001 is affirmed.

Entered at Salem, Oregon on August 7, 2002