

In the Matter of the Compensation of  
**CASEY A. JONES, Claimant**

WCB Case No. 08-06281

**ORDER ON REVIEW**

Ransom Gilbertson et al, Claimant Attorneys  
Julie Masters, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Weddell and Lowell.

Claimant requests review of Administrative Law Judge (ALJ) Lipton's order that upheld the SAIF Corporation's denial of a new/omitted medical condition claim for a gastrointestinal condition. On review, the issue is compensability. We affirm.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," with the following summary.

In April 2008, following discharge from the hospital for his compensable pneumocephalus and chemical meningitis, claimant was instructed to take medications, including Ibuprophen and Excedrin. He continued taking these medications until June 2008, when an ulcer was diagnosed. Claimant had not been treated for an ulcer before June 2008.

In August 2008, claimant requested that SAIF accept the ulcer condition. SAIF denied that claim, prompting claimant to request a hearing.

CONCLUSIONS OF LAW AND OPINION

The ALJ concluded that, consistent with *Robinson v. Nabisco, Inc.*, 331 Or 178 (2000) and *Barrett Bus. Servs. v. Hames*, 130 Or App 190, rev den, 302 Or 492 (1994), the major contributing cause standard of ORS 656.005(7)(a)(A) applied in determining the compensability of the claimed ulcer condition. Determining that claimant's consumption of medication was not the major contributing cause of the claimed ulcer condition, the ALJ upheld SAIF's denial.

On review, claimant asserts that the ALJ should have applied the material contributing cause standard generally applied to ORS 656.005(7)(a). See *Van Blokland v. Oregon Health Sciences Univ.*, 87 Or App 694, 698 (1987). He argues that *Robinson, McAleny v. SAIF*, 191 Or App 105 (2003), and *Getz v. Wonder Bur*,

183 Or App 494 (2002), support the principle that an injury sustained while treating for a compensable condition should have the same compensability standard (material contributing cause) as injuries sustained while attending a physical capacity evaluation (PCE), an insurer-arranged medical examination (IME), or a medical arbiter examination. Based on the following reasoning, we disagree.

For an injury to be compensable, it must “arise out of” and occur “in the course of” employment. ORS 656.005(7)(a). The “arise out of” prong of the compensability test requires a causal link between the worker’s injury and the employment. *Fred Meyer, Inc. v. Hayes*, 325 Or 592, 596 (1997). The requirement that the injury occur “in the course of” employment concerns the time, place, and circumstances of the injury. *Id.* Both prongs of the work-connection test must be satisfied to some degree; neither is dispositive. *Id.*

Further, to establish the compensability of an industrial injury, claimant’s work injury must be a material contributing cause of his disability or need for treatment for his claimed condition. ORS 656.005(7)(a); ORS 656.266; *Albany Gen. Hosp. v. Gasperino*, 113 Or App 411, 415 (1992). However, to establish the compensability of the claimed condition as a “consequential” condition, claimant’s compensable injury, or treatment for the compensable injury, must be the major contributing cause of the disputed condition. 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”); *Gasperino*, 113 Or App 411 (1992) (condition or need for treatment that is caused by a compensable condition is analyzed under major contributing cause standard as a consequential condition); *see also, Hames*, 130 Or App 190, *rev den*, 320 Or 492 (1994) (when treatment for a compensable injury is the major contributing cause of a new injury, the compensable injury itself is properly deemed the major contributing cause of the consequential condition under ORS 656.005(7)(a)(A)).<sup>1</sup>

Here, the dispute centers on whether the compensability of claimant’s ulcer, which resulted, in part, from use of medication which was taken to treat his compensable condition, should be analyzed under a “material contributing cause” or a “major contributing cause” standard. Based on the following reasoning, we find that the major contributing cause standard applies.

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<sup>1</sup> The determination of major contributing cause involves the evaluation of the relative contribution of different causes of claimant’s condition and deciding which is the primary cause. *Dietz v. Ramuda*, 130 Or App 397, 401 (1994), *rev dismissed*, 321 Or 416 (1995); *Joseph P. Lovett*, 57 Van Natta 939, 940 (2005). “Major contributing cause” means “more than 50 percent” of the cause. *Thomas K. Osborne*, 51 Van Natta 1262 (1999).

Claimant asserts that the major contributing cause does not apply to injuries that are the “direct and natural” result of the work incident. In support of his “material contributing cause” standard argument, claimant cites the following language from *Hames*:

“Before 1990, we and our Supreme Court had routinely held that new injuries incurred during medical treatment of compensable injuries were themselves compensable. *See, e.g., Williams v. Gates, McDonald & Co.*, 300 Or 278, 709 P2d 712 (1985);<sup>2]</sup> *McDonough v. National Hosp. Ass’n*, 134 Or 451, 461, 294 P 351 (1930). *Accord Wood v. SAIF, supra* n 5, 30 Or App at 1108-09 (in *dicta*, reviewing medical treatment cases from other jurisdictions).<sup>3]</sup> It might reasonably be expected that if the legislature intended to nullify that well-established authority, the legislative history would include some discussion akin to its disapproval of *Fenton v. SAIF*, [87 Or App 78, *rev den* 304 Or 311 (1987),] *supra*. But there is none.” *Id.* at 196.

To be compensable, ORS 656.005(7)(a)(A)<sup>4</sup> requires that “the compensable injury” be the major contributing cause of the consequential condition. The *Hames* court stated that, where necessary and reasonable treatment of a compensable injury is the major contributing cause of a new injury, a distinction between the compensable injury and its treatment is artificial. Consequently, for purposes of

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<sup>2</sup> The *Williams* court did not enunciate what standard by which it determined compensability of the claimed mental condition, but cited to *McDonough*. In *McDonough*, the plaintiff/worker sued a hospital/physician for malpractice. The court affirmed a motion for summary judgment, finding that “an aggravation of the primary injury resulting from the mistake, negligence for malpractice of a physician in treating the original injury is compensable under the [workers compensation] act, and that the act intends that there shall be but one satisfaction for the added injury in cases where the injured workman has received full compensation for the combined injury.” The *McDonough* court did not address the standard to be applied to consequential condition claims.

<sup>3</sup> In *Wood*, the court held the claim was compensable where the claimant was injured during vocational rehabilitation. The court determined that the injury was a “direct and natural consequence” of the primary compensable injury. *Id.* at 1109.

<sup>4</sup> ORS 656.005(7)(a)(A) states:

“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.” (Emphasis supplied).

analyzing the compensability of a consequential condition under ORS 656.005(7)(a)(A), such a condition will be compensable where the *treatment* of a compensable injury is the major contributing cause of the new/consequential condition. *See also, David M. Poe*, 60 Van Natta 3085, 3086 (2008) (citing to *Amelia A. Westling*, 60 Van Natta 2740, 2742-43 (2008), which rejected the claimant's argument that the requirement that a consequential condition be a "direct result of reasonable and necessary treatment of a compensable injury" should be interpreted to mean "material contributing cause" under *Hames*).

*Robinson, Getz, and McAleny* do not require a different result. In *Robinson*, the court held that an injury that occurred during a "compelled medical examination" (CME) was compensable as an *initial injury* that independently "arose out of" and occurred "in the course of" employment.<sup>5</sup> In making that determination, the court reasoned that, because the claimant's participation in the CME was required by statute (and not voluntary) and because the carrier paid for and retained significant control over the time, place and circumstances of the CME, the injury "arose out of" and "in the course of" employment. Once that determination was made, the court concluded that the CME injury was a compensable injury under ORS 656.005(7)(a), and was not a "consequential condition" subject to the limitation in ORS 656.005(7)(a)(A). *See Robinson*, 331 Or at 190.

In *Getz*, the court likened a PCE to a CME, finding that the injury the claimant sustained attending the PCE both "arose out of" and "in the course of" employment. *Id.* at 501 (the claimant was "within the period of employment [that is, at a time when claimant was on employer's payroll], at a place where a worker reasonably may be expected to be [that is, at a medical facility where he had been directed to go by his physician, as part of the claim evaluation process], while \* \* \* reasonably \* \* \* fulfilling the duties of the employment or \* \* \* doing something reasonably incidental to it."). Therefore, the *Getz* court also determined that the claimant's PCE injury was not a "consequential condition" under ORS 656.005(7)(a)(A).

In *McAleny*, the claimant was injured during a medical arbiter examination. Applying *Robinson* and *Getz*, the *McAleny* court reasoned that the medical arbiter examination occurred while the claimant was on employer's payroll, at a location where the worker could reasonably be expected to be (the facility to which he had been sent by the director), while doing something incidental to the duties of his

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<sup>5</sup> The court reversed our order, which had analyzed the injury as a consequential condition.

employment. In reaching its conclusion, the *McAleny* court noted that the legislature's assignment of costs of the medical arbiter examination to the carrier indicated "a recognition" that a medical arbiter examination, like a CME or a PCE, did not serve a claimant's personal interest unconnected to work, but was instead "an integral part of the claim verification process." As in *Robinson* and *Getz*, the *McAleny* court likewise held that the claimant's injury was not subject to ORS 656.005(7)(a)(A).

Here, unlike *Robinson*, *Getz*, and *McAleny*, claimant's ulcer did not result from attending or participating in a statutorily authorized or required activity, nor does claimant allege that taking the medication for the pneumocephalus and chemical meningitis "arose out of" or "in the course of" employment. Instead, he asserts his condition arose out of the treatment for conditions (pneumocephalus and chemical meningitis) that resulted from the compensable condition (L5-S1 disc herniation) that resulted from the industrial accident.

This case is factually similar to *Hames*. There, the claimant suffered a compensable shoulder dislocation. As a result, the shoulder had to be immobilized; once immobilized, adhesive capsulitis developed which prompted physical therapy to restore shoulder and arm movement. During the physical therapy, the claimant's ulnar nerve was injured. The *Hames* court stated:

"We conclude that where necessary and reasonable treatment of a compensable injury is the major contributing cause of a new injury, a distinction between the compensable injury and its treatment is artificial. In such instances, the compensable injury itself is properly deemed the 'major contributing cause of the consequential condition.' ORS 656.005(7)(a)(A)." *Id.* at 196-97.

Thus, the court determined that the ulnar nerve condition was most appropriately analyzed as a consequential condition under ORS 656.005(7)(a)(A), requiring application of the major contributing cause standard. *Id.* at 197.

Such an analysis is consistent with the rationale expressed by the *Gasperino* court:

"The distinction is between a condition or need for treatment that is caused by the *industrial accident*, for which the material contributing cause standard still

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applies, and a condition or need for treatment that is caused in turn by the *compensable injury*. It is the latter that must meet the major contributing cause test.”

Here, claimant’s ulcer falls squarely into the second category described in *Gasperino*. The ulcer is not a condition caused by claimant’s January 2006 lifting injury at work. Instead, the ulcer was caused (in part) by medical treatment (*i.e.*, medication) for pneumocephalus and chemical meningitis, which was caused by the epidural treatment for claimant’s left L5-S1 disc condition, which was attributable to the January 2006 lifting incident. (Exs. 7, 10, 25, 26, 28, 29). Consequently, consistent with *Hames*, ORS 656.005(7)(a)(A) applies.

We turn to the medical evidence. Dr. Gifford, claimant’s treating physician, opined that the medication use was a material contributing cause of the ulcer condition. (Ex. 67). Additionally, Dr. Gerhard, who examined claimant at SAIF’s request, opined that the major contributing cause of the ulcer condition was an idiopathic bacteria called “H. Pylori” and that the medication use only contributed to an “irritation” of the ulcer. (Exs. 65-2, 66-6).

In light of the foregoing, the medical evidence does not establish that the compensable injury or its treatment was the major contributing cause of the ulcer condition. Under such circumstances, claimant has not established the compensability of his consequential condition. *See* ORS 656.005(7)(a)(A). Accordingly, we affirm.

#### ORDER

The ALJ’s order dated July 16, 2009 is affirmed.

Entered at Salem, Oregon on January 21, 2010