
In the Matter of the Compensation of
DONALD L. ALLEN, Claimant
WCB Case No. 12-04909
ORDER ON REVIEW
Jodie Phillips Polich, Claimant Attorneys
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Weddell and Curey.

Claimant requests review of Administrative Law Judge (ALJ) Sencer's order that upheld the SAIF Corporation's denial of his new/omitted medical condition claim for a "partial thickness tear, left supraspinatus." On review, the issue is compensability.

We adopt and affirm the ALJ's order with the following changes and supplementation. In the second paragraph on page 4, we replace the third sentence with the following: "Dr. Butters included the following handwritten comment: 'probably same injury[,] AC separation often have related rotator cuff injury or disease.' (Ex. 56; *see* Ex. 57-1)." On page 6, we replace the last paragraph with the following discussion.

SAIF accepted a "non-displaced fracture left scapula, AC separation left shoulder and right scalp contusion" resulting from claimant's April 6, 2000 work injury. (Ex. 6).

On January 9, 2001, Dr. Butters, orthopedic surgeon, performed left shoulder surgery. (Ex. 17). On April 18, 2001, he performed surgery to remove a Rockwood screw, washer, and Merilene tape. (Ex. 27).

In February 2012, claimant sought treatment from Dr. Butters for left shoulder pain. (Ex. 40). Dr. Butters diagnosed a partial thickness tear of the left supraspinatus and recommended surgery. (Exs. 40, 43). On May 11, 2012, he performed a left shoulder arthroscopy, arthroscopic subacromial decompression, deep surface cuff debridement, and rotator interval debridement. (Ex. 46).

Claimant filed a new/omitted medical condition claim for a partial thickness tear, left supraspinatus. (Ex. 44). After SAIF denied the claim (Ex. 55), claimant requested a hearing.

At hearing, claimant argued that the partial thickness tear of the left supraspinatus was directly caused by the work injury and, therefore, a material contributing cause standard applied. The ALJ disagreed, finding that the medical evidence established that the left supraspinatus tear occurred after the April 2000 injury and applying a major contributing cause standard for a consequential condition. Because the medical evidence did not meet that burden of proof, the ALJ upheld SAIF's denial.

On review, claimant contends that Dr. Butters's opinion establishes that the work injury directly contributed to the partial thickness tear of the left supraspinatus. He argues that the work injury was a material contributing cause of his disability/need for treatment for the left supraspinatus tear. For the following reasons, we disagree with claimant's argument regarding the standard of proof.

The parties do not dispute, and the medical evidence establishes, the existence of the partial thickness tear of the left supraspinatus. *See Maureen Y. Graves*, 57 Van Natta 2380, 2381 (2005). For conditions arising directly from the work injury, claimant must prove that the work injury was a material contributing cause of his disability/treatment of the condition. ORS 656.005(7)(a); ORS 656.266(1); *Albany Gen. Hosp. v. Gasperino*, 113 Or App 411, 415 (1992). If the condition arose as a consequence of a compensable injury, claimant must prove that the compensable injury was the major contributing cause of the consequential condition. ORS 656.005(7)(a)(A); ORS 656.266(1); *Gasperino*, 113 Or App at 415.

The distinction between a direct injury (subject to the "material contributing cause" standard) and a consequential condition (subject to the "major contributing cause" standard) is that the former is directly caused by the industrial accident, whereas the latter is a separate condition that arises from a compensable injury. *Fred Meyer, Inc. v. Crompton*, 150 Or App 531, 536 (1997) (a consequential condition is "a separate condition that arises from the compensable injury, for example, when a worker suffers a compensable foot injury that results in an altered gait that, in turn, results in back strain"); *Gasperino*, 113 Or App at 415 (because the evidence established that the claimant's condition arose directly, although belatedly, from the work injury, the standard was material contributing cause).

Here, Dr. Butters reviewed claimant's June 2000 MRI and medical records and explained that it was more likely than not that the partial thickness tear of the left supraspinatus came into existence some time after the April 2000 work injury and likely after his treatment in 2001. (Ex. 57-1). Dr. Butters adhered to that opinion in a deposition. (Ex. 60-5, -6, -23).

Dr. Butters concluded that the left supraspinatus tear was *not* directly caused by the work injury. SAIF's attorney asked Dr. Butters: "[y]ou're not saying here today that there was some direct cause since we have sort of the absence of the tear on MRI after injury? By direct cause meaning that it was actually torn with the injury more likely than not?" (Ex. 60-23). Dr. Butters responded: "No, I don't think it was." (*Id.*) It was Dr. Butters's opinion that the work injury was a material contributing cause of the disability/need for treatment of the partial thickness tear of the left supraspinatus, but was not the "major contributing cause" of that condition. (Exs. 57, 60-14, -15, -17, -21).

There are no other medical opinions indicating that claimant's partial thickness tear of the left supraspinatus arose directly from the work injury. Dr. Weeks, who examined claimant on SAIF's behalf, concluded that the supraspinatus tear came into existence after the work incident and was due to a degenerative process. (Ex. 58-11). Because the medical evidence does not support the conclusion that claimant's partial thickness tear of the left supraspinatus arose directly from the work injury, a "material contributing cause" standard does not apply. *See Daniel L. Demarco, 65 Van Natta 1837, 1838-39 (2013)* (medical evidence did not establish that the new/omitted medical conditions arose directly from the work accident).

Instead, Dr. Butters indicated that the left supraspinatus tear arose as a consequence of the compensable injury, which implicates a "consequential condition" theory of compensability. *See* ORS 656.005(7)(a)(A) ("[n]o 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"). Because the medical evidence is insufficient to meet the requisite "major contributing cause" standard of proof, we affirm the ALJ's order upholding SAIF's denial of claimant's new/omitted condition claim for a partial thickness tear of the left supraspinatus.

ORDER

The ALJ's order dated April 24, 2014 is affirmed.

Entered at Salem, Oregon on January 27, 2015