
In the Matter of the Compensation of
LLOYD R. FLEMING, Claimant
WCB Case No. 15-04074
ORDER ON REVIEW
Julene M Quinn LLC, Claimant Attorneys
SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Lanning and Curey.

Claimant requests review of Administrative Law Judge (ALJ) Sencer's order that upheld the SAIF Corporation's denial of claimant's occupational disease claim for a right shoulder condition. On review, the issue is compensability.

We adopt and affirm the ALJ's order with the following supplementation.

Claimant worked for Simonds International Corporation (Simonds) from July 2010 to March 2013. (Tr. 7). He has an accepted July 20, 2012 injury claim for a nondisabling right shoulder strain with Simonds, insured by First Liberty Insurance Corporation (First Liberty). (Ex. 9A). From November 2013 until October 2015, claimant worked for Treske Precision Machining (Treske), insured by SAIF. (Tr. 12).

In June or July 2015, after claimant requested a hearing challenging Simonds/First Liberty's March 2015 denial of his new/omitted medical condition claim for a "near full thickness tear with a possible small area that is full thickness involving the supraspinatus tendon right shoulder," the parties entered into a DCS. (Exs. 29B, 30A, 36B).

By and through the DCS, claimant raised a claim for his "current conditions" and Simonds/First Liberty issued a denial, which provided that claimant's "current conditions, including but not limited to, all medical conditions diagnosed in the medical record to date, * * * and need for medical treatment and/or disability are not due to [claimant's] on the job injury of July 20, 2012, its sequela or [claimant's] work activities while employed with [Simonds]." (Ex. 36B-2-3).

In the DCS, Simonds/First Liberty contended that claimant's current conditions and need for treatment and disability "are not, in any way or degree of contribution, the result or consequence of claimant's on the job injury of July 20, 2012, nor materially related to his work activities with [Simonds]." (Ex. 36B-5). Additionally, Simonds/First Liberty asserted and contended that "[t]he denied

conditions noted above and the need for medical treatment are due to non-compensable, preexisting conditions, and/or due to a new injury or subsequent work activities neither caused nor worsened by” the 2012 injury.¹ (*Id.*)

Finally, the DCS provided that “the claimant stipulates and agrees that the legal effect of this settlement shall be the same as if the claimant admitted and agreed to the accuracy of the contentions of [Simonds/First Liberty] as set forth above.” (Ex. 36B-8).

The DCS was signed by claimant and his then-attorney on July 2, 2015, and was approved by the Board on July 15, 2015. (Exs. 36B, 38B).

On July 3, 2015, claimant filed a claim against Treske/SAIF for a “right shoulder rotator cuff tear and AC Joint DJD,” as diagnosed by Dr. McWeeney, his attending physician and treating surgeon. (Ex. 37). On August 28, 2015, SAIF denied claimant’s occupational disease claim for a right shoulder condition. (Ex. 41). Claimant requested a hearing.

Applying *Gilkey v. SAIF*, 113 Or App 314 (1992), the ALJ determined that claimant could not rely on employment conditions with his earlier employer, Simonds, to establish the compensability of his occupational disease claim for a right shoulder condition because he previously entered into a DCS with Simonds/First Liberty, agreeing that his right shoulder conditions were not due to his work exposure at Simonds. Accordingly, the ALJ reasoned that claimant must prove that his later work activities with Treske/SAIF were the major contributing cause of his combined right shoulder condition and pathological worsening of the disease under ORS 656.802(2)(b).² Determining that Dr. McWeeney’s opinion did not address that question, the ALJ upheld SAIF’s denial.

¹ The DCS described the “current condition” being denied as including, but not limited to:

“a near full thickness tear with a possible small area that is full thickness involving the supraspinatus tendon right shoulder, right brachial plexus nerve impingement, severe tendinopathy, PASTA lesion, preexisting and degenerative left shoulder high-grade, bursal-sided supraspinatus tendon tear, partial-thickness, high-grade, degenerative and preexisting left shoulder acromioclavicular joint arthritis with osteophyte formation and resultant impingement on the rotator cuff, left shoulder superior labrum degenerative tearing, degenerative disc disease in the cervical spine[.]” (*Id.*)

² Only work exposure with Simonds and Treske has been identified as causally related to the claimed right shoulder conditions.

On review, claimant argues that *Gilkey* does not apply because it involved one employer and two insurers, whereas this case involves two employers and the last injurious exposure rule (LIER) as a rule of proof to establish compensability.³ Relying on *Reynolds v. USF Reddaway, Inc.*, 283 Or App 21 (2016), and *Ahlberg v. SAIF*, 199 Or App 271 (2005), he contends that all of his employment exposures can be considered to establish the compensability of his occupational disease claim for his worsened right shoulder condition under ORS 656.802(2)(b). Finally, claimant asserts that, as a result of the DCS, he agreed to allow Simonds/First Liberty's denial to go final, but did not agree to the employer's contentions therein. For the following reasons, we disagree with claimant's arguments.

First, the court's conclusion in *Gilkey* that the previous compensable injury could not be regarded as having contributed to the claimant's current condition was based on the fact that the parties had agreed in a previous DCS that there was no compensable relationship between the previous compensable injury and the claimant's currently claimed and denied degenerative hip condition. 113 Or App at 317. Thus, *Gilkey* turned on the express language of the DCS.⁴

Here, similarly, based on the specific DCS provisions, we find that claimant *expressly stipulated and agreed* that his then-current right shoulder conditions (which included the current claimed conditions) were not related or attributable to his employment exposure (including his work injury and work activities) with Simonds, and were due, instead, to nonwork-related causes or subsequent injuries or work activities. (Ex. 36B-4-6). Therefore, claimant's employment exposure with Simonds that was subject to the DCS cannot be considered for the purposes of establishing his current occupational disease claim for his worsened right shoulder condition under the LIER rule of proof. *See Gilkey*, 113 Or App at 317.

Moreover, because neither *Reynolds* nor *Ahlberg* involved a previous DCS in which the claimant stipulated that the employment exposure with the employer subject to those agreements neither caused nor contributed to the conditions settled in the DCS, those decision are not controlling and do not require the consideration of work exposure that has been the subject of a DCS. *See, e.g., Sheila L. Minor*, 67 Van Natta 1556 (2015); *Mark D. Nerheim*, 64 Van Natta 1005 (2012).

³ As a rule of proof, the LIER allows a claimant to prove compensability of an occupational disease without having to prove the degree, if any, to which exposure to disease-causing conditions at a particular employment actually caused the disease. *See Albert A. Ahlberg*, 57 Van Natta 1840, 2845 (2005) (on remand).

⁴ Because the court's decision was based on the express language in the agreement, the fact that the DCS here involves a previous employer, as opposed to only one employer with two insurers as in *Gilkey*, does not affect the application of the *Gilkey* rationale to this case.

We turn to medical causation. The parties agree that claimant's occupational disease claim is based on the worsening of a preexisting disease or condition. Therefore, to establish compensability of his occupational disease, claimant must prove that his "post-DCS" employment exposure with Treske/SAIF was the major contributing cause of the combined condition and pathological worsening of the disease. ORS 656.266(1); ORS 656.802(2)(b). The causation issue presents a complex medical question that must be resolved by expert medical evidence. *Uris v. State Comp. Dep't*, 247 Or 420, 426 (1967); *Barnett v. SAIF*, 122 Or App 279, 283 (1993). When presented with disagreement among experts, we give more weight to those opinions that are well reasoned and based on complete information. *Somers v. SAIF*, 77 Or App 259, 263 (1986).

Dr. McWeeney opined that, while claimant's work activities and exposures with both Simonds and Treske contributed to his current condition, his previous employment with Simonds was the major contributing cause of that condition. (Exs. 48A, 51, 52-18, -19). At one point in his deposition, Dr. McWeeney also agreed that claimant's overall work activity with both employers was the major contributing cause of his current condition and need for treatment. (Ex. 52-11). However, neither Dr. McWeeney nor any other medical opinion addressed whether claimant's work exposure at Treske/SAIF *alone* was the major contributing cause of his condition, which, as discussed above, is necessary given the effect of the previous DCS with Simonds/First Liberty.

Accordingly, under the particular circumstances of this case, claimant has not met his burden of proving that his "post-DCS" employment exposure (*i.e.*, his employment exposure that was *not* subject to the DCS) was the major contributing cause of his combined right shoulder condition and the pathological worsening of the disease. ORS 656.266(1); ORS 656.802(2)(b); *see James M. Steele*, 51 Van Natta 1031 (1999) (physician's opinion that related the claimant's current condition to overall work activities, including work exposures that the parties agreed in previous DCSs were not related, found insufficient to establish a compensable occupational disease under ORS 656.802(2)(b)). Consequently, we affirm.

ORDER

The ALJ's order dated December 5, 2016 is affirmed.

Entered at Salem, Oregon on August 11, 2017