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In the Matter of the Compensation of  
**LALEA BUXTON, Claimant**  
WCB Case No. 02-03798, 02-00292, 0109024  
**ORDER ON REVIEW**  
Glen J Lasken, Claimant Attorneys  
Hoffman Hart & Wagner, Defense Attorneys  
Julie Masters, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Biehl and Langer.

AIG Claim Services, Inc., on behalf of Express Personnel Services (AIG/Express), requests review of Administrative Law Judge (ALJ) Peterson's order that: (1) set aside its compensability/responsibility denial of claimant's current lumbar disc condition; and (2) upheld the SAIF Corporation's responsibility denial on behalf of Mt. Bachelor Ski Resort, Inc. (SAIF/Bachelor), for the same condition. In its brief, AIG/Express argues that the ALJ erred by allowing SAIF/Bachelor to amend its compensability denial to include responsibility. On review, the issues are the ALJ's procedural ruling, compensability, and responsibility. We affirm.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact" and "Ultimate Findings of Fact."

CONCLUSIONS OF LAW AND OPINION

On December 11, 2000, while working for SAIF/Bachelor, claimant compensably injured her low back bending over to pull out a file cabinet drawer. (Exs. 2; 3). The claim was accepted as a "low back strain." (Ex. 5).

In May 2001, claimant ceased working for SAIF/Bachelor, and began working for AIG/Express, where her duties consisted of stacking and sorting pieces of lumber. (Tr. 19). The pieces of lumber varied in length from 1 foot to approximately 10 feet 5 inches. (Tr. 20). On average, claimant would lift and stack about 15,000 board-feet per day. (Tr. 32). The work required repetitive bending and twisting. (Tr. 20).

On August 6, 2001, claimant sought treatment from physician assistant (PA) Montoya, complaining of worsening back pain for the last two weeks. (Ex. 10-1). Claimant also reported occasional shooting pain in both legs. (*Id.*)

A September 2001 MRI (interpreted by Dr. Moore) demonstrated disc herniations at L4-S1. (Ex. 14). In November 2001, Dr. Moore performed right-sided hemilaminectomy/discectomy at L5-S1 and right-sided foraminotomy at L5-S1. (Ex. 20).

Claimant filed claims for her current disc condition with both SAIF/Bachelor and AIG/Express. On January 2, 2002 SAIF/Bachelor denied the compensability of claimant's current condition.<sup>1</sup> (Ex. 22C). AIG/Express denied compensability/responsibility on May 6, 2002. (Ex. 25).

Claimant timely requested hearings on the aforementioned denials.

Taking into account claimant's history of no low back problems prior to the December 2000 work injury, the mechanism of that injury, the mechanism of the repetitive bending and lifting associated with claimant's work activities with AIG/Express, and the "mild" degeneration identified during diagnostic studies, Dr. Moore opined that the major contributing cause of claimant's current disc condition was the combination of the December 2000 work injury and her subsequent repetitive work activities with AIG/Express. (Ex. 23-2). Noting that claimant did not have significant radicular symptoms until after claimant began working for AIG/Express, Dr. Moore reasoned that a disc injury solely from the December 2000 work incident would not be clinically significant. (*Id.*)

Dr. Parsons (SAIF/Bachelor-arranged medical examiner) opined that claimant's disc condition occurred spontaneously, and was not related to her work for either SAIF/Bachelor or AIG/Express. (Exs. 15; 27; 28). Dr. Parsons' opinion rested, in part, on a belief that claimant did not experience increased symptoms while working for AIG/Express. (Ex. 27-1).

Finding that Dr. Parsons' belief regarding claimant's lack of increased symptoms while working for AIG/Express was inaccurate, the ALJ determined that Dr. Parsons' opinion was entitled to little weight. Consequently, the ALJ relied on the causation opinion of Dr. Moore and determined that the major cause of claimant's current low back condition was the cumulative effects of the December 2000 work injury (from employment with SAIF/Bachelor) and the subsequent work activities with AIG/Express.<sup>2</sup> Applying the last injurious

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<sup>1</sup> At hearing, SAIF/Bachelor amended its denial to include responsibility. (Tr. 3)

<sup>2</sup> The opinions of Drs. Moore and Parsons are the only causation opinions in the record.

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exposure rule (LIER) as a rule of proof, the ALJ concluded that claimant's current condition was compensable. Finding that the date claimant first sought medical treatment for the disputed condition was the appropriate triggering date for the assignment of initial responsibility under the LIER, the ALJ assigned initial responsibility for the condition to SAIF/Bachelor. Further finding from Dr. Moore's opinion that claimant's work activities with AIG/Express had worsened the disputed condition, the ALJ concluded that ultimate responsibility for claimant's current low back condition rested with AIG/Express.

On review, AIG/Express asserts that the ALJ erred in: (1) allowing SAIF/Bachelor to amend its denial at hearing; (2) finding claimant's current condition compensable; and (3) assigning it ultimate responsibility for the disputed condition. We begin with the ALJ's procedural ruling.

The Board's rules provide that amendments to the issues raised and relief requested at hearing "shall be freely allowed." OAR 438-006-0031, OAR 438-006-0036; *see SAIF v. Ledin*, 149 Or App 94 (1997) (a carrier may amend its denial at hearing). Where such an amendment is permitted, to afford due process, the responding party must be given an opportunity to respond to the new issues raised. *See* OAR 436-006-0091(3); *Sandra L. Shumaker*, 51 Van Natta 1981 (1999), *on recon* 52 Van Natta 33 (2000). In other words, a party's remedy for surprise and prejudice created by a late-raised issue is a motion of continuance. *See* OAR 438-006-0031, OAR 438-006-0036.

Here, SAIF/Bachelor denied claimant's occupational disease claim for her current low back condition on the basis that it did not arise out of and in the course and scope of her employment. (Ex. 22C). At the commencement of the hearing, SAIF/Bachelor sought to amend its denial to include responsibility. (Tr. 3). AIG/Express objected to the SAIF/Bachelor's request. The ALJ allowed SAIF/Bachelor to amend its denial. Thereafter, AIG/Express did not seek a continuance.

Under similar circumstances, we previously held that it was not error to allow a carrier to amend its compensability denial to include responsibility. *See Brooke E. Lindgren*, 54 Van Natta 1340, 1341 (2002)(ALJ did not err in allowing carrier to amend a denial to include responsibility; the claimant's remedy was to request a continuance). Consistent with our reasoning in *Lindgren*, we are not

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persuaded that the ALJ erred by allowing SAIF/Bachelor to amend its denial to include responsibility. We turn to compensability.

Claimant seeks to establish the compensability of her current disc condition as an occupational disease. For purposes of establishing that an occupational disease is work related, a worker may rely on all employments. *See Joyce E. Young*, 54 Van Natta 1061 (2001). In order to establish the compensability of her current disc condition as an occupational disease, claimant must prove that her cumulative work activities are the major contributing cause of the disease itself, not just the major contributing cause of the disability or treatment associated with it. ORS 656.802(2)(a).

A determination of the major contributing cause involves the evaluation of the relative contribution of different causes of claimant's disease and deciding which is the primary cause. *See Dietz v. Ramuda*, 130 Or App 397 (1994), *rev dismissed* 320 Or 416 (1995). Because claimant asserts that the cumulative effect of her employments with SAIF/Bachelor and AIG/Express, including the December 2000 work injury, have resulted in her "current" condition, the key is whether the medical evidence supports the conclusion that the major contributing cause of her "current" condition is the cumulative work activity, including the effect of the December 2000 work injury. *Kepford v. Weyerhaeuser Co.*, 77 Or App 363, 366 *rev den* 300 Or 722 (1986).

Because of possible alternative causes for her current condition, resolution of this matter is a complex medical question that must be resolved by expert medical opinion. *See Uris v. Compensation Department*, 247 Or 420 (1967). When there is a dispute between medical experts, more weight is given to those medical opinions which are well reasoned and based on complete information. *See Somers v. SAIF*, 77 Or App 259, 263 (1986).

Dr. Moore has had the opportunity to evaluate claimant both before and after the AIG/Express work exposure.<sup>3</sup> Consequently, we find that Dr. Moore is in an advantageous position to render a causation opinion. *See Kienow's Food Stores v. Lyster*, 79 Or App 416 (1986). Based on her well reasoned opinion, which we find persuasive, we conclude that the major contributing cause of claimant's current disc condition is the combination of her December 2000 work injury (while

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<sup>3</sup> Dr. Moore was the attending physician for the December 2000 work injury.

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employed with SAIF/Bachelor) and her subsequent work activity with AIG/Express.

Claimant invoked the LIER to establish the compensability of her current disc condition.

“The last injurious exposure rule is both a rule of proof and a rule of assignment of responsibility. As a rule of proof, the last injurious exposure rule allows a claimant to prove the compensability of an injury without having to prove the degree, if any, to which exposure to disease-causing conditions at a particular employment actually caused the disease. The claimant need prove only that the disease was caused by employment-related exposure.” *Roseburg Forest Products v. Long*, 325 Or 305, 310 (1997).

Having determined from Dr. Moore’s opinion that claimant’s current disc condition results, in major part, from her employments with both SAIF/Bachelor and AIG/Express, we apply the LIER and conclude that the disputed disc condition is compensable.

If invoked by a claimant to establish compensability, the LIER assigns full responsibility to the last employer that could have caused the claimant's injury. *Runft v. SAIF*, 303 Ore. 493, 500 (1987); *Bracke v. Baza'r*, 293 Or 239, 248-49 (1982). The "onset of disability" is the triggering date for determining which employment is the last potentially causal employment. *Id.* at 248. Where a claimant seeks or receives medical treatment for the compensable condition before experiencing time loss due to that condition, it is appropriate to designate a triggering date based on either the seeking or receiving of medical treatment, whichever occurs first. *Agricom Ins. v. Tapp*, 169 Or App 208, 212-13 (2000); see *Reynolds Metals v. Rogers*, 157 Or App 147, 153 (1998) (the date of the first medical treatment is the triggering date that dictates which period of employment is assigned initial responsibility for the treatment).

Here, the onset of disability of claimant’s current disc condition was August 6, 2001, when AIG/Express was on the risk. (Ex. 10-2). Based on Dr. Moore’s opinion that the disc injury solely from the December 2000 work incident would not be clinically significant, we conclude that claimant did not seek

or receive medical treatment for her current disc condition before August 6, 2001. (Ex. 23-3). Therefore, initial responsibility rests with AIG/Express. *Bracke*, 293 Or at 248; *Tapp*, 169 Or App at 212; *Rogers*, 157 Or App at 153.

As the presumptively responsible carrier, AIG/Express may avoid responsibility only if it proves either: (1) that it was impossible for the conditions at its workplace to have caused claimant's current condition; or (2) that claimant's current condition was caused solely by the conditions at SAIF/Bachelor. See *Roseburg Forest Products v. Long*, 325 Or 305, 313; *Allen J. Zarek*, 54 Van Natta 7 (2002); *Betty L. Martinez*, 50 Van Natta 1535 (1998). The medical record here does not support such conclusions. Accordingly, ultimate responsibility for claimant's current disc condition rests with AIG/Express.<sup>4</sup>

Claimant's attorney is entitled to an assessed fee for services on review. ORS 656.382(2). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable fee for claimant's attorney's services on review is \$1,500, to be paid by AIG/Express. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's respondent's brief ), the complexity of the issues, and the value of the interest involved.

#### ORDER

The ALJ's order dated September 11, 2002 is affirmed. For services on review, claimant is awarded a \$1,500 attorney fee, payable by AIG/Express.

Entered at Salem, Oregon on March 10, 2003

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<sup>4</sup> Even if we assume that initial responsibility for the disc condition (because medical treatment for that condition predated claimant's work with AIG/Express), the medical record supports the conclusion that claimant's subsequent work (for AIG/Express) contributed to and worsened claimant's condition. Therefore, ultimately responsibility would shift to AIG/Express.