

In the ORS 656.704 Retroactive Reserve Program Reimbursement
Dispute of

Steven M. Swearingen DCD, Claimant

Contested Case No: 11-086H

PROPOSED & FINAL ORDER

November 30, 2011

SAIF CORPORATION, Petitioner
WORKERS' COMPENSATION DIVISION, Respondent
Before Elizabeth Fulsher, Administrative Law Judge

Pursuant to notice, a hearing was scheduled for September 12, 2011 in Portland, Oregon before Administrative Law Judge Fulsher. Prior to the date of the hearing, the parties agreed to submit this matter for a decision without a hearing based on the documentary record and written closing arguments. SAIF Corporation is represented by Jeff Gerner, Trial Counsel. The Worker's Compensation Division (WCD) is represented by Carol Parks, Senior Assistant Attorney General. The record closed on October 31, 2011 on receipt of SAIF's written reply argument.

Exhibits A and 1 through 24 are admitted into the record.

ISSUE

Whether the deceased worker's condition is properly considered an occupational disease or an injury. SAIF has appealed from the WCD's May 18, 2011 decision that the claim should be classified as an occupational disease and that reimbursement from the Retroactive Reserve would be based on the date of first disability rather than the date of injury.

FINDINGS OF FACT

On March 7, 2006, decedent was diagnosed with malignant mesothelioma. (Ex. 2). An 801 claim form was filed on February 20, 2007 for mesothelioma. (Ex. 3). Dr. Lewis stated on March 4, 2007 that though it was possible that an exposure 15 to 20 years ago is the cause of decedent's condition, it is more likely that an exposure of 20 years of greater is the major contributing cause. (Ex. 4). Dr. Smith indicated that it was highly unlikely that any exposures after February 1986 could be considered a cause of decedent's mesothelioma. He explained that most patients have a latency period of between 30 to 60 years. (Ex. 5). Dr. Lewis concurred with Dr. Smith's report on July 30, 2007. (Ex. 6). Dr. Rudin indicated that the typical latency for mesothelioma is 30 to 40 years. Dr. Rudin explained that one exposure was sufficient to start the disease process. It did not appear to be due so much to cumulative exposures as it is short-term heavy exposure. (Ex. 7).

The decedent passed away on October 28, 2007. (Ex. 8). Dr. Rudin agreed with Dr. Smith that exposures 20 years earlier would be more likely be the contributing cause of decedent's mesothelioma. (Ex. 9). Dr. Lewis indicated that employment exposures less than 20 years before February 27, 2006 would not be a cause of the mesothelioma. (Ex. 10). On March 5,

2008, Dr. Rudin indicated that it was not impossible that decedent's work exposure in 2001 contributed to the cause of his condition, but it remained Dr. Rudin's opinion that the major cause was earlier exposures. (Ex. 11).

Dr. Rudin was deposed and testified that the latency of mesothelioma is 30 to 40 years. (Ex. 12-7). She agreed that most likely the cause of the condition was asbestos exposure before 1986 and that it was improbable that exposures after 1986 caused decedent's mesothelioma. (Ex. 12-8). Dr. Rudin indicated that it is thought that one event happens that changes to a cancerous cell and then starts the process. She indicated that it was one or two events that begins the process. (Ex. 12-16).

Dr. Pierce wrote on June 20, 2008 that malignant mesothelioma is diagnosed about 30 to 40 years after an exposure. A single exposure to an asbestos fiber can begin the neoplastic process and there is a sense that higher intensity exposures are more apt to lead to the malignant process than lower intensity exposures. However, ongoing exposure is not needed to promote disease development. It is thought that a single exposure is adequate to lead to the development of a cancer some 30 to 40 years after the initial exposure to asbestos. It is unknown why this latency period is so long or why additional exposures are not needed to promote cancer development. Dr. Pierce indicated that it is thought that with a heavier exposure, there is a higher chance that one of the asbestos fibers which the patient absorbs will ultimately lead to the development of mesothelioma. There is no shortened latency with a higher dose, just a higher chance that a given asbestos fiber will lead to the development of mesothelioma. Later exposures are not felt to affect the natural history of development of mesothelioma. Usually, an exposure 30 to 40 years before the diagnosis would most likely be the initiating event in the development of mesothelioma. Dr. Pierce thought that it was most likely that the exposure that led to claimant's mesothelioma occurred between 1966 and 1976. (Ex. 13).

Dr. Smith gave an opinion that the total number of genetic and epigenetic events that has to occur before induction of a mesothelioma develops is unknown, but most likely involves several genes and probably more than a dozen genes. This process takes many years and the average mesothelioma he sees has had a latency period from first exposure to asbestos of 50 years. This means that the average tumor growth time for a mesothelioma takes greater than 15 to 20 years from the development of the first cancer cell until diagnosis; then it takes usually 15 to 30 years for several genetic and epigenetic events to occur before there is enough cell transformation for the malignancy to begin. It is very unusual for all this to occur in a period as short as 20 years. Dr. Smith indicated that it usually takes more than 40 years from first exposure to development of a clinical mesothelioma. (Ex. 14).

SAIF accepted the decedent's claim for a fatal condition on May 1, 2009. (Ex. 17). Decedent's claim was closed on May 15, 2009. (Ex. 18).

On May 18, 2011, the WCD determined that decedent's claim met the definition of an occupational disease not an injury based on the fact that mesothelioma is a disease that develops over many years, not the initial exposure. Based on this reasoning, the WCD concluded that reimbursement from the Retroactive Reserve Program would be based on the date of first disability, February 27, 2006, rather than the date of injury reported as July 1, 1986. (Ex.21).

SAIF requested a hearing regarding the May 18, 2011 decision. (Ex. 22). This matter was referred to the Board for a hearing. (Ex. 23). On September 2, 2011, Dr. Pierce indicated that mesothelioma was traceable to a single discrete event and was not caused by multiple exposures. Dr. Pierce opined that it is a situation where it takes time for the condition caused by the discrete event to manifest to the point where treatment is sought and required. (Ex. 24).

CONCLUSIONS OF LAW AND OPINION

SAIF argues that the condition did not need time and repeated exposures to develop. Rather, it argues that it is a situation where the condition caused by a discrete event took time to manifest itself to the point where treatment was sought. The WCD summarizes its argument that the May 18, 2011 order should be affirmed by asserting that the decedent's claim is an occupational disease because the exposure to asbestos does not constitute a compensable injury, there is no proof that there was a sudden onset of the mesothelioma condition and the exposure cannot be attributed to a discrete incident that occurred on a specific date, time or with a specific employer. I agree with WCD's argument.

Whether a claim involves an injury or an occupational disease turns on the suddenness in the onset of the condition. *See Smirnoff v. SAIF*, 188 Or App 438, 443 (2003). To be considered an injury, the condition must arise from an identifiable event or have an onset traceable to a discrete period of time. *Active Transp. Co. v. Wylie*, 159 Or App 12, 15 (1999). The determining factor "is whether the condition itself, not its symptoms, occurred gradually, rather than suddenly." *Smirnoff* 188 Or App at 449.

In this case, the medical evidence is consistent that a single exposure can eventually lead to the disease. However, the initial exposure is not an event that causes disability or a need for treatment. Based on the preponderance of the medical evidence, there is a long latency period of at least 20 years, but as long as 50 years, while the disease develops. The disease is not diagnosed and treatment is not sought until many years after the exposure that sets the process in motion.

Although a single exposure can cause the process to begin, there is no way to identify the specific event or date or discrete period when the event occurs that eventually leads to the development of the cancer. One of the hallmarks of an injury is that there is an identifiable event or an identifiable discrete period of time when the injury occurs. That is not present here. There is no way to determine which exposure of many caused the process to begin that developed into the disease. Development of the cancer is not immediate. It takes many, many years for the disease process to get to the point where a person seeks treatment or suffers disability. The decedent's condition did not develop immediately. It took many, many years for the disease process to result in a need for treatment and disability.

Based on the medical record, I conclude that the decedent's claim involved an occupational disease as opposed to an injury. The occupational disease statute clearly contemplates that exposures, such as occurred in this case, are included within the types of work exposures that are considered occupational diseases. ORS 656.802(1)(a)(A) provides that an occupational disease includes "Any disease or infection caused by ingestion of, absorption of,

inhalation of or contact with dust, fumes, vapors, gases, radiation or other substances." In addition, the condition does not arise suddenly following an identifiable event or discrete period of time. It is impossible to identify a discrete period or identifiable event. Rather, the condition develops into cancer gradually over a very long period of time. The physicians are not able to identify a discrete period of time when the inciting event occurred. It could have occurred any time over a period of multiple years. I believe that this claim clearly involves an occupational disease. For that reason, I find that the WCD's May 18, 2011 decision should be affirmed.

ORDER

The WCD's May 18, 2011 order is affirmed.