

FILED: December 7, 2011

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Compensation of Kavin R. Hunter, Claimant.

KAVIN R. HUNTER,
Petitioner,

v.

SAIF CORPORATION and DEPARTMENT OF CORRECTIONS,
Respondents.

Workers' Compensation Board
0701041

A140887

Argued and submitted on December 30, 2010.

R. Adian Martin argued the cause and filed the brief for petitioner.

Julene M. Quinn, Special Assistant Attorney General, argued the cause and filed the brief for respondents.

Before Haselton, Presiding Judge, and Armstrong, Judge, and Duncan, Judge.

DUNCAN, J.

Reversed and remanded for reconsideration.

1 DUNCAN, J.

2 Claimant filed a workers' compensation claim with employer for an
3 occupational disease, specifically, "medial compartment degeneration of the left knee."
4 Employer denied the claim. Claimant sought a hearing, and an administrative law judge
5 (ALJ) issued an order setting aside employer's denial. Employer appealed the order to
6 the Workers' Compensation Board, and the board issued an order reversing the ALJ's
7 order and reinstating employer's denial. The board's order was based on its conclusion
8 that claimant had failed to prove, as required to establish a compensable occupational
9 disease, that his "employment conditions were the major contributing cause of the
10 disease." ORS 656.802(2)(a).¹

11 Claimant seeks judicial review of the board's order, contending that the
12 order is not supported by substantial evidence. *See* ORS 656.298(7); ORS 183.482(8)(c).
13 We agree and, therefore, reverse and remand for reconsideration.

14 We begin with the relevant facts. Claimant has a history of injuries to both
15 his right and left knees. The workers' compensation claim at issue in this case relates to a
16 degenerative condition in claimant's left knee. The parties dispute whether that condition
17 was caused, in major part, by claimant's employment conditions. Specifically, they
18 dispute whether it was triggered by a work-related accident in 1977.

19 In 1977, while working for Montgomery Ward, claimant and a coworker

¹ We refer to the current version of ORS 656.802 throughout this opinion because, although the statute has been amended since the events of this case, *see* 2009 Or Laws, ch 24, § 1, the amendments do not affect our analysis.

1 were loading a 300-pound rototiller onto a truck when the coworker tripped, displacing
2 the weight of the rototiller onto claimant. Claimant's right knee buckled, and he heard "a
3 giant pop." Claimant continued working for two to three hours but eventually stopped
4 because of pain and swelling in his right knee. Claimant went to a medical clinic, and a
5 doctor determined that the patella of claimant's right knee had broken into several pieces.
6 According to claimant, the accident also caused pain in his left knee, but it was "minimal
7 pain" and "not nearly as bad" as the pain in his right knee. Following the accident,
8 claimant sought and received workers' compensation benefits for a right-knee condition.
9 He was released to work approximately two to three months later.

10 In 1992, while working for Mohawk Paper, claimant suffered a left-knee
11 injury. That injury was followed by surgery, which was performed by Dr. Walton.
12 During the surgery, Walton discovered that "[t]here were still some shreds of [claimant's]
13 anterior cruciate ligament present * * *, but [the ligament] was functionless." He also
14 discovered degenerative changes in the medial compartment of claimant's knee.

15 In 2002, 2003, and 2004, while working for employer, claimant suffered
16 additional work-related left knee injuries. The 2004 injury was followed by surgery,
17 during which the surgeon observed "significant degenerative joint disease in [the] medial
18 compartment."

19 In June 2005, claimant filed claims with employer for tears of the anterior
20 cruciate ligament, lateral meniscus, and medial meniscus in his left knee related to the
21 2004 injury. Employer denied the anterior cruciate ligament tear but accepted the lateral

1 and medial meniscus tears.

2 In July 2005, at employer's request, claimant submitted to an independent
3 medical examination by Dr. James. In a July 2005 report, James diagnosed left knee
4 medial and lateral meniscus tears, along with "[t]raumatic osteoarthritis of the left knee
5 secondary to chronic anterior cruciate ligament laxity, most likely secondary to the injury
6 described in [1977]." At the time of the report, James believed that claimant's left knee
7 was the one that was seriously injured during the 1977 accident at Montgomery Ward.

8 James later realized that claimant's right knee was the one that was
9 seriously injured in the 1977 accident, but he adhered to his opinion that the 1977
10 accident caused the degenerative condition in claimant's left knee. In a March 2006
11 report, James wrote that the 1977 accident "involved both lower extremities" and
12 claimant had "very clearly describ[ed] what happened to his left knee." James also wrote
13 that it remained his "strong opinion" that the 1977 accident caused the degenerative
14 condition in claimant's left knee. He explained:

15 "After reconsidering the history given to me by the claimant and in spite of
16 the fact that that the only medical documentation in regard to the injury of
17 1977 represents the right knee, it is still my strong opinion that the incident
18 in 1977 is the major contributing cause to the chronic anterior cruciate
19 ligament laxity noted in 1992 and the osteoarthritis noted in 1992. Any
20 other conclusion simply does not make good sense medically."

21 James concluded:

22 "[T]he injury incurred at work in 1977 as described to me by the worker did
23 involve the left knee as well as the right lower extremity, and it is the only
24 logical incident historically that could have resulted in the condition of the
25 knee noted at surgery by Dr. Walton in 1992."

1 In a July 2006 deposition, James testified that, if claimant had not been
2 injured in 1977, "then I need another date at that approximate time when the injury did
3 occur, because obviously the findings [of degeneration] at surgery in 1992 took several
4 years to develop and were not the result of the injury in April 1992."

5 In November 2006, claimant filed an occupational disease claim for medial
6 compartment degeneration of the left knee, the claim at issue in this case. ORS
7 656.802(1)(a)(C) defines "occupational disease," in relevant part, as

8 "any disease or infection arising out of and in the course of employment
9 caused by substances or activities to which an employee is not ordinarily
10 subjected or exposed other than during a period of regular employment
11 therein, and which requires medical services or results in disability or
12 death, including

13 "* * * * *

14 "(C) Any series of traumatic events or occurrences which requires
15 medical services or results in physical disability or death."

16 To establish the compensability of an occupational disease, a claimant
17 "must prove that employment conditions were the major contributing cause of the
18 disease." ORS 665.802(2)(a); ORS 656.266(1) (claimant has the burden of proving that
19 the occupational disease is compensable). Under the "last injurious exposure rule" of
20 proof,²

² "The last injurious exposure rule is both a rule of proof and a rule of assignment of responsibility." *Roseburg Forest Products v. Long*, 325 Or 305, 309, 937 P2d 517 (1997) (citing *Runft v. SAIF*, 303 Or 493, 500, 739 P2d 12 (1987)). As a rule of assignment of responsibility, "it can be used to assign liability for [a] claim as between the claimant's employers." *SAIF v. Henwood*, 176 Or App 431, 434, 31 P3d 1096 (2001), *rev den*, 333 Or 463 (2002).

1 "a claimant [may] prove the compensability of an injury without having to
2 prove the degree, if any, to which exposure to disease-causing conditions at
3 a particular employment actually caused the disease. *The claimant need*
4 *prove only that the disease was caused by employment-related exposure.*"

5 *Roseburg Forest Products v. Long*, 325 Or 305, 309, 937 P2d 517 (1997) (citations
6 omitted; emphasis added). Thus, an occupational disease claim may be based on the
7 cumulative effect of all of the claimant's work-related exposure. [SAIF v. Henwood](#), 176
8 Or App 431, 435, 31 P3d 1096 (2001), *rev den*, 333 Or 463 (2002). Prior work injuries
9 may be considered as part of the overall employment conditions. *See Kepford v.*
10 *Weyerhaeuser Co.*, 77 Or App 363, 366, 713 P2d 625, *rev den*, 300 Or 722 (1986).

11 Employer denied claimant's claim, and claimant requested a hearing before
12 an ALJ. At the hearing, claimant testified that, during the 1977 incident at Montgomery
13 Ward, his right knee was badly injured, and he also felt pain in his left knee, albeit
14 "nothing compared to what was [in] the right leg."

15 Claimant had also testified about the 1977 incident at a prior hearing, a
16 transcript of which the ALJ received into evidence. At the prior hearing, claimant
17 testified, on cross-examination by employer's counsel, that the left knee injury that he
18 suffered in the 1977 accident was the only left knee injury he suffered before 1992:

19 "[EMPLOYER'S COUNSEL:] [O]ther than the Montgomery
20 Ward's 1977 claim for injury to your knee, of some extent, can you think of
21 any other prior left-knee injuries that you've had?"

22 "[CLAIMANT:] Well, absolutely not. I received no medical
23 attention, nothing, regarding my left knee, other than all the ones that are
24 reported. And --

25 "[EMPLOYER'S COUNSEL:] So it would just be the 1977 claim?"

1 "[CLAIMANT:] Would be the only possible -- if there was a
2 possible tie, that would be the only one."

3 The ALJ set aside employer's denial. Employer appealed to the board, and
4 the board reversed, holding that claimant had failed to establish that the degenerative
5 condition in his left knee was caused by a work-related injury. In its initial "Order on
6 Review," the board explained its reasoning as follows:

7 "Claimant's theory of compensability for this claim relies in part on
8 Dr. James's belief that he had a work-related injury in 1977, which caused
9 the severe degenerative changes, including preexisting medial compartment
10 disease, which were found during the 1992 surgery. However, there are no
11 contemporaneous medical records indicating that claimant injured his left
12 knee in 1977 or received any treatment for a left knee condition as a result
13 of that incident. Claimant testified that the 1977 injury caused left knee
14 pain, but nothing compared to what was in the right leg. At a prior hearing,
15 claimant said that there was 'minimal pain' in the left knee after the 1977
16 incident.

17 "In [*Richard G. Pruitt*, 58 Van Natta 2635 (2006)³,] relied on by
18 claimant, the 1976 left knee injury, which contributed to the left knee
19 condition, was clearly work-related. Here, however, we agree with
20 [employer] that the preponderance of evidence does *not* establish that
21 claimant's initial left knee injury, some time before 1992, was work-related.
22 Claimant's testimony indicates that he had only minimal left knee pain after
23 the 1977 incident, and there is no evidence he sought any medical treatment

³ The board described *Pruitt* as follows:

"In *Pruitt*, one of the claims was for bilateral degenerative knee conditions. The claimant had a work-related injury and medial meniscectomy on the left knee in 1976. In 1999, the carrier accepted bilateral knee contusions, and the claimant subsequently filed an occupational disease claim for bilateral knee conditions. In *Pruitt*, we relied on the [last injurious exposure rule], and found that the medical evidence showed that the 1976 injury and subsequent surgery, as well as claimant's other work activities, contributed to the left knee condition. We concluded that the claimant's work activities, including the 1976 work injury, were the major contributing cause of his left knee condition."

1 for his left knee in connection with that incident. At most, Dr. James's
2 reports indicate the possibility that claimant experienced a work-related
3 injury to his left knee in 1977. *See Gormley v. SAIF*, 52 Or App 1055,
4 1060[, 630 P2d 407] (1981) (persuasive medical opinions must be based on
5 medical probability, rather than possibility).

6 "In a deposition, Dr. James testified that, regardless of whether
7 claimant's left knee was seriously injured in 1977 or not, there had to be an
8 injury to that knee to cause the condition seen in 1992. We note that the
9 1992 reports from Dr. Walton indicated that claimant had an injury in 1988,
10 which involved 'a mild stress to the left knee[.]' There is no evidence that
11 the 1988 incident was work-related.

12 "Thus, the record indicates that the 1977 work incident caused
13 'minimal pain' to the left knee, and the 1988 non-work-related incident
14 involved a 'mild stress to the left knee.' We are not persuaded that the
15 preponderance of evidence demonstrates that the initial injury to claimant's
16 left knee, which occurred some time before 1992, was work-related."

17 (Emphasis and some brackets in original; record citations omitted.)

18 Claimant sought reconsideration, challenging the board's finding that he
19 sustained a left knee injury in 1988. After reviewing the evidence, the board agreed that
20 claimant "did not have a left knee injury in 1988." Accordingly, in its "Order on
21 Reconsideration," the board modified its initial order to delete any references to a 1988
22 left knee injury. But, the board otherwise adhered to its initial order, explaining:

23 "We adhere to our previous conclusion that claimant has *not* established
24 that he experienced a work-related injury to his left knee at some time
25 before 1992, and that any medical opinions relying on the fact that he
26 sustained a work-related injury before 1992 are not persuasive. For the
27 reasons discussed in our prior order, we continue to find that the medical
28 evidence is not sufficient to establish that claimant's employment
29 conditions were the major contributing cause of the medial compartment
30 degeneration of the left knee."

31 (Emphasis in original.) This judicial review followed.

32 On review, claimant contends that the board's order is not supported by

1 substantial evidence. *See* ORS 656.298(7); ORS 183.482(8)(c). "Substantial evidence
2 exists to support a finding of fact when the record, viewed as a whole, would permit a
3 reasonable person to make that finding." ORS 183.482(8)(c). For the reasons that
4 follow, we conclude that the board's order is not supported by substantial evidence.

5 Claimant's claim was premised on four factual assertions: (1) the
6 degenerative condition in his left knee was caused by an injury that occurred before 1992;
7 (2) he suffered an injury to his left knee during the 1977 accident at Montgomery Ward;
8 (3) that injury was sufficient to cause his degenerative condition; and (4) that injury was
9 the only injury he suffered before 1992. The board accepted claimant's first assertion; it
10 found that the degenerative condition in claimant's left knee was caused by an injury that
11 occurred before 1992. But, the board apparently rejected the second assertion--that he
12 suffered a left knee injury during the 1977 accident--and, as a result, the third and fourth
13 assertions that were predicated on it--that the 1977 work-related left-knee injury was
14 sufficient to cause his degenerative condition, and that it was only the left-knee injury he
15 suffered before 1992. We conclude that the board's finding that the claimant did not
16 suffer an injury to his left knee during the 1977 accident at Montgomery Ward is not
17 supported by substantial evidence.

18 The board found that "at most, Dr. James's reports indicated the possibility
19 that claimant experienced a work-related injury to his left knee in 1977." The record
20 does not support that finding. James's unwavering position was that the degenerative
21 condition in claimant's left knee was the result of an injury, and James concluded that the

1 1977 accident caused the degenerative condition; in other words, James concluded that
2 the accident caused an injury and that the injury caused the condition. To review, in his
3 March 2006 report--which was written with an understanding that the 1977 accident
4 resulted in greater injury to claimant's right knee than his left--James reiterated his
5 "strong opinion that the incident in 1977 is the major contributing cause to the chronic
6 anterior cruciate ligament laxity noted in 1992 and the osteoarthritis noted in 1992. Any
7 other conclusion simply does not make good sense medically." And he concluded that
8 "the *injury* incurred at work in 1977 as described to me by the worker did
9 involve the left knee as well as the right lower extremity, and it is the only
10 logical incident historically that could have resulted in the condition of the
11 knee noted at surgery by Dr Walton in 1992."

12 (Emphasis added.)

13 Thus, the board's finding that James's reports indicated, "at most," "the
14 possibility that claimant experienced a work-related injury to his left knee in 1977" is not
15 supported by substantial evidence. James's reports reflect his expert medical opinion that
16 claimant's left knee was injured in 1977 and that the injury caused the degenerative
17 condition in claimant's left knee. In his 2006 deposition, James did say that, if claimant
18 had not been injured in 1977, "then I need another date at that approximate time when the
19 injury did occur, because obviously the findings [of degeneration] at surgery in 1992 took
20 several years to develop and were not the result of the injury in April 1992." But, that
21 statement--which assumes a fact contrary to what claimant had told James and to what
22 claimant testified--does not contradict James's opinion that the 1977 accident caused the
23 degenerative condition in claimant's left knee. The board does not explain why, and we

1 do not perceive why, James's opinion that the 1977 accident caused the degenerative
2 condition is insufficient simply because it is contingent on a historical fact to which
3 claimant himself had testified. Thus, to the extent that the board found that James's
4 reports established only a medical possibility, that finding is not supported by the record.

5 *Gormley*, 52 Or App 1055, cited by the board, is inapposite. In *Gormley*,
6 the claimant sought workers' compensation benefits for a condition that had two possible
7 causes, one work related and one non-work related. On *de novo* review, we held that the
8 claimant had failed to prove that the condition was work related. *Id.* at 1061. As relevant
9 here, we noted that the doctor, on whose opinion the claimant relied, had stated that "it
10 [was] reasonable to assume" that claimant's work-related injury caused her condition, but
11 that he "[would] never be able to prove or disprove this," and we concluded that those
12 statements "militate[d] against a finding of medical causation in terms of probability."
13 *Id.* at 1060. Unlike in *Gormley*, in this case, James's medical opinion was not phrased as
14 a reasonable assumption; it was phrased as a strong opinion. To the extent that the board
15 found that any effect the 1977 accident had on claimant's left knee was not severe enough
16 to cause the degenerative condition in that knee, the board also erred. What caused
17 claimant's degenerative condition is, as the board noted, a complex medical question and,
18 as such, requires expert medical opinion evidence. *See Uris v. Compensation*
19 *Department*, 247 Or 420, 424, 427 P2d 753 (1967) ("where injuries complained of are of
20 such character as to require skilled and professional persons to determine the cause and
21 extent thereof, the question is one of science and must necessarily be determined by

1 testimony of skilled, professional persons" (internal quotation marks omitted)). The
2 board can reject an expert's medical opinion as unpersuasive, but it must explain its
3 reasons for doing so. It can, for example, reject an expert's medical opinion on the
4 ground that the opinion is inconsistent with that of another expert, is based on an
5 inaccurate medical history, or is conclusory. But the board cannot disregard an expert's
6 medical opinion simply because it disagrees with the opinion as a matter of medical
7 science. "The [b]oard is not an agency with specialized medical expertise entitled to take
8 official notice of technical facts within its specialized knowledge." [SAIF v. Calder](#), 157
9 Or App 224, 228, 969 P2d 1050 (1998). It "is not free to reach its own medical
10 conclusions about causation[.]" [Benz v. SAIF](#), 170 Or App 22, 27, 11 P3d 698 (2000)
11 (board could not substitute its own medical opinion about the harmfulness of the
12 claimant's previous exposure to noise for the medical opinion of the only expert who
13 addressed the question); *see also* [SAIF v. Brown](#), 177 Or App 113, 121, 33 P3d 336
14 (2001) (board erred in finding, without the support of expert medical opinion evidence,
15 that claimant's "off-work stressors" had resolved and would not have any residual effect
16 on her).

17 In this case, claimant presented expert medical opinion evidence
18 (specifically, James's reports) that the 1977 accident, as described by claimant, resulted in
19 a left knee injury that caused the degenerative condition in his left knee. If, as it appears
20 and as employer argues, the board found that claimant's 1977 left knee injury was not
21 severe enough to cause the degenerative condition in that knee, the board erred. That

1 finding is not supported by any medical evidence in the record.

2 Reversed and remanded for reconsideration.