
In the Matter of the Compensation of
ALLAN J. ZAREK, Claimant
WCB Case No. 00-02035, 99-01929
ORDER ON REVIEW
Martin L Alvey, Claimant Attorneys
SAIF Legal, James B Northrop, Defense Attorneys
Reinisch Mackenzie Healey Et Al, Defense Attorneys

Reviewing Panel: Members Biehl and Haynes.

AIG Claim Services, Inc., on behalf of Bechtel Construction Company (AIG/Bechtel), requests review of Administrative Law Judge (ALJ) Mills' order that: (1) set aside its denial of claimant's occupational disease claim for a binaural hearing loss condition; and (2) upheld the SAIF Corporation's denial, on behalf of Morgan Industrial, Inc. (SAIF/Morgan), for the same condition. On review, the issues are compensability and responsibility. We affirm in part and reverse in part.

FINDINGS OF FACT

We adopt the ALJ's findings of fact with the following exception, supplementation, and summary. We do not adopt the second sentence of the fifth paragraph of the ALJ's findings of fact.

Claimant, age 53 at the time of the hearing, has worked as a millwright since 1971. He received his assignments from the union and has worked for numerous employers over the years. His work as a millwright involved installing heavy machinery such as power generators, turbines, and sawmill equipment. He has regularly been exposed to loud noise during the course of his employment. He did not regularly wear hearing protection during most of this employment. He did not have significant off work exposure to noise.

From April 1995 to May 1996, claimant worked as a millwright for Bechtel installing steam and gas turbines at a power plant. These turbines were very noisy, making a jet engine-like noise. Claimant was also exposed to noise from power equipment being used in the construction process. Claimant wore some hearing protection at Bechtel, although not consistently.

In June and July of 1996, claimant worked as a millwright for Morgan Industrial. He was involved in two jobs, working a total of about 14 days. These

were installation-type jobs and claimant was exposed to noise in adjacent areas. He wore foam type earplug hearing protection, although not consistently.

In August 1996, claimant began his current job as a labor union business representative representing millwrights in Oregon and Southwest Washington. (Tr. 7, 10). This current employer (the Union) is not a party to this case because claimant did not think that his work at the Union had anything to do with his hearing loss. (Tr. 20). Claimant has limited noise exposure in his current job.

Claimant's job duties with the Union deal mainly with contract management, acting as the middle person between workers and employers, and ensuring compliance with the master labor agreements. (Tr. 7-8). Most of his time is spent in his office and on the road, during which time he has no noise exposure. (Tr. 8-9). However, he also visits job sites a small percentage of the time, consisting of about an hour a day on a job site, with maybe 15 minutes of that time in the field. (Tr. 14). Claimant always follows the check-in procedures when visiting a job site and always wears hearing protection (disposable foam type earplugs) during those job site visits. (Tr. 10). If claimant needs to observe something at a noisy construction site, he will be guided to the area, make his observation, and leave to a quiet area to discuss the matter. (Tr. 15).

Claimant had symptoms of hearing loss and ringing in his ears prior to beginning employment with Bechtel. From 1995 through 1998, as a union benefit, claimant received hearing screening tests and has had documented hearing loss at least since 1995. (Exs. 7, 8, 12, 13).

In December 1998, while working for the Union, claimant filed a claim for hearing loss with Bechtel. Subsequently, claimant filed a hearing loss claim with Morgan.

On February 15, 1999, Dr. Hodgson, otolaryngologist, examined claimant on behalf of AIG/Bechtel. Dr. Hodgson's deposition was taken. Dr. Hodgson is the only doctor who examined claimant or commented on causation.

Dr. Hodgson could not opine that it was impossible for claimant's work at the Union or Morgan to have caused some hearing loss. He also could not opine that prior employments before the Union employment were the sole cause of claimant's hearing loss.

CONCLUSIONS OF LAW AND OPINION

The ALJ set aside AIG/Bechtel's denial of claimant's occupational disease claim for a binaural hearing loss condition.

On review, AIG/Bechtel argues that claimant has not established a prima facie element of a compensable injury; *i.e.*, he has not established that his hearing loss either required medical services or resulted in disability, as required under ORS 656.005(7)(a). We need not resolve this question because, even if claimant established the compensability of his claim, responsibility for the claim would not rest with the joined employers.

As a rule of assignment of responsibility, the last injurious exposure rule assigns full responsibility to the last employer that could have caused the claimant's injury. *Runft v. SAIF*, 303 Or 493, 499 (1987). The "onset of disability" is the triggering date for determining which employment is the last potentially causal employment. *Bracke v. Baza'r, Inc.*, 293 Or 239, 248 (1982). 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. *Agricomps Ins. v. Tapp*, 169 Or App 208, 213 (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).

Claimant did not lose time from work due to his hearing loss condition. Therefore, under the usual circumstances, the presumptive (initial) assignment of responsibility under the rule of assignment of responsibility portion of last injurious exposure rule would be determined by the date claimant sought or received medical treatment for the compensable hearing loss condition. AIG/Bechtel contends that, because claimant did not seek or receive medical treatment for the hearing loss condition, there is no basis to designate a triggering date to assign presumptive responsibility. Claimant counters that Dr. Hodgson's examination satisfies the triggering date requirement.

As noted above, the standard set by the courts to assign presumptive responsibility under the last injurious exposure rule where the worker has not sustained disability is the date the worker sought or received medical treatment, whichever first occurs. *See Agricomps Ins. v. Tapp*, 169 Or App at 213 (explaining this standard). It is not clear whether an examining physician's examination would

satisfy the “triggering date” standard of seeking or receiving medical treatment.¹ Nevertheless, under the circumstances of this case, we need not decide that issue.

The Union employed claimant at the time of Dr. Hodgson’s February 1999 examination. Thus, assuming that Dr. Hodgson’s examination is sufficient to establish the triggering date to assign presumptive responsibility, we would ordinarily assign presumptive responsibility for claimant’s hearing loss condition to the Union. However, because claimant has not chosen to pursue a claim against the Union, it cannot be held responsible for claimant’s hearing loss condition.² *Pamela M. Christman*, 52 Van Natta 122 (2000) (responsibility for the claimant’s condition could not be assigned to a non-joined carrier); *Kristin Montgomery*, 47 Van Natta 961 (1995) (same).

The question is whether claimant can shift responsibility backward from the Union to a prior (joined) employer. In *Roseburg Forest Products v. Long*, 325 Or 305, 313 (1997), the Court summarized with approval its prior precedents regarding shifting responsibility to a prior employment. Specifically, the Court stated that

“once compensability is established, an employer that otherwise would be responsible under the last injurious exposure rule may avoid responsibility if it proves either: (1) that it was impossible for conditions at its workplace to have caused the disease in this particular case or (2) that the disease was caused solely by the conditions at one or more previous employments.” *Id.*

Although citing the above law in *Long*, the ALJ relied on *John W. Blankenship*, 52 Van Natta 406 (2000), to conclude that the above recited standard could be met where the medical evidence establishes that it is “medically improbable” that there was any contribution to claimant’s hearing loss from the

¹ Here, Dr. Hodgson served as an examining physician and, as such, did not establish a doctor/patient relationship with claimant. (Exs. 16, 30-4, 30-27). When deposed, Dr. Hodgson stated that he did not undertake treatment of claimant. (Ex. 30-27). Under these circumstances, it is questionable whether claimant could be considered to have sought or received medical treatment from Dr. Hodgson.

² For purposes of our analysis, we emphasize that the Union is only presumptively responsible for claimant’s condition. Because claimant is only pursuing a claim against AIG/Bechtel and SAIF/Morgan, our review is limited to addressing whether either of those carriers is responsible for claimant’s hearing loss condition.

most recent employers and where that evidence establishes that it is “medically probable” that claimant’s employment prior to those employers was the sole cause of his work-related hearing loss. Finding that Dr. Hodgson’s opinion met that medically probable/improbable standard, the ALJ assigned responsibility to AIG/Bechtel.

We disagree with the ALJ’s conclusion. In addition, we disagree with SAIF/Morgan’s contention that the Court in *Long* changed its interpretation of “impossibility.” As noted above, the *Long* Court restated the requirements it had set forth in its prior cases under which an employer could shift responsibility backward to previous employers. In summary, the Court explained:

“In other words, under *Boise Cascade [Corp. v. Starbuck, 296 Or 238 (1984)]*, when a worker invokes the last injurious exposure rule to establish a *prima facie* case against the last employer, that employer may avoid responsibility by proving that the disability in a particular case was caused solely by conditions at one or more previous employments. Such a showing shifts responsibility to the specified employer or employers.

“By the same logic, the later employer may prove that its working conditions could not possibly have caused the *particular* claimant’s occupational disease. By making that latter kind of showing, the employer may avoid responsibility without proving *which* previous employer actually caused the injury. Such a showing shifts responsibility to the next most recent employer.” *Long, 325 Or at 313* [emphasis in original].

In addition, the Court of Appeals applied *Long* without indicating any change in the interpretation of “impossibility.” See *Liberty Northwest Insurance Corp. v. Kaleta, 173 Or App 82 (2001)*. In doing so, the court found that, based on the medical evidence, the Board properly and consistently with *Long* determined that the claimant’s prior employments with two earlier employers were the sole cause of his bilateral carpal tunnel syndrome. Thus, the court found that it necessarily followed that the claimant’s one day of work at his most recent employer (the employer assigned initial responsibility based on the claimant’s seeking treatment at the time of that employment) did not cause the claimant’s condition, because his previous employments were the sole cause of his condition.

The court also held that the Board correctly determined that the employer assigned responsibility under the last injurious exposure rule (the next to the last employer) failed to shift responsibility back to the earlier employer. In making this holding, the court quoted the Board's reasoning regarding that determination:

“[b]ecause we find no evidence that this [earlier employment] exposure was the sole cause of claimant's carpal tunnel syndrome condition or that it was impossible for claimant's employment with [the next to the last employer] to have contributed to that condition, responsibility remains with [the next to the last employer].” 173 Or App at 88.

The court held that this language showed that the Board knew what the standard under *Long* was for shifting responsibility backwards under the last injurious exposure rule. Thus, the court found that the Board did not err in its application of the last injurious exposure rule.

Based on the above reasoning, the *Long* Court did not change the requirements to shift responsibility backward under the last injurious exposure rule. As stated above, *Long* held that

“an employer that otherwise would be responsible under the last injurious exposure rule may avoid responsibility if it proves either: (1) that it was impossible for conditions at its workplace to have caused the disease in this particular case or (2) that the disease was caused solely by the conditions at one or more previous employments.” 325 Or 305, 313.

We proceed to apply this standard to the present case. Dr. Hodgson repeatedly found that, based on the evidence available to him, he could not state that it was impossible for conditions at the Union to have caused claimant's hearing loss, given that claimant's work included visiting noisy work sites, even considering the fact that claimant always wore hearing protection during those work site visits.³ (Exs. 20-2, 27-2, 30-10, -11-12, -18, -21, -22-23, -26).

³ Beginning in 1995 and continuing through 1998, claimant underwent various annual health screening tests, including hearing tests, as a service provided by his union. (Exs. 7-5, 8-4, 12-4, 13-4). These hearing tests indicated that claimant had sustained a hearing loss. Dr. Hodgson noted that these

Dr. Hodgson also was unable to state that claimant's hearing loss was caused solely by the conditions at his previous employments. (Ex. 30-12). There is no medical evidence to the contrary.

On this record, responsibility for claimant's hearing loss condition does not shift from the Union to claimant's previous employments. However, because the Union was not joined in this action, it cannot be assigned responsibility for claimant's hearing loss.

Accordingly, we reverse those portions of the ALJ's order that set aside AIG/Bechtel's denial and awarded an attorney fee.

ORDER

The ALJ's order dated October 19, 2000 is affirmed in part and reversed in part. That portion of the ALJ's order that set aside AIG/Bechtel's denial of responsibility for claimant's binaural hearing loss condition is reversed. AIF/Bechtel's denial is reinstated and upheld. The ALJ's assessed attorney fee award is reversed. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on January 10, 2002

were screening tests that only provided a range of hearing measurements. As such, he could not compare them with the February 15, 1999 audiogram and was unable to determine whether claimant's hearing loss had changed from the time of these screening tests to the time of the 1999 audiogram. (Exs. 30-6-7, 30-16-17). This presents a different factual record from that presented in cases where the medical evidence included audiograms persuasively establishing that no hearing loss occurred during specific employments. See *RLC Industries v. Sun Studs, Inc.*, 172 Or App 233 (2001); *SAIF v. Paxton*, 154 Or App 259 (1998).