
In the Matter of the Compensation of
JOHNNY E. MARBLE, Claimant
WCB Case No. 99-08754
ORDER ON REVIEW
Martin L Alvey, Claimant Attorneys
Deryl K Nielsen PC, Defense Attorneys

Reviewing Panel: Members Biehl, Bock, and Haynes.

The insurer requests review of those portions of Administrative Law Judge (ALJ) Davis' order that: (1) set aside its denial of claimant's occupational disease claim for binaural hearing loss; (2) awarded a \$2,700 attorney fee under ORS 656.386(1) for claimant's counsel's services in obtaining a "pre-hearing" rescission of the insurer's denial of compensability; and (3) awarded a \$1,000 attorney fee under ORS 656.308(2)(d) for claimant's counsel's services at hearing regarding the insurer's responsibility denial. On review, the issues are responsibility and attorney fees.¹ We affirm.

FINDINGS OF FACT

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

CONCLUSIONS OF LAW AND OPINION

Claimant, 62 years old at time of hearing, worked for more than 30 years as a union boilermaker and iron worker for various employers. (Tr. 10). In November 1996, claimant took a hearing test and was advised by the audiologist that he had hearing loss. (Ex. 1A). In January 1999, claimant's hearing was tested again. The test again revealed bilateral sensorineural hearing loss. (Ex. 2).

On May 14, 1999, claimant started working for the insured. Claimant's work was noisy, involving the use of jack hammers and metal bars. Claimant worked for the insured until June 2, 1999, when he retired. (Tr. 10).

¹ Claimant moves to strike the insurer's "appellate exhibit," consisting of portions of closing arguments to the ALJ regarding the insurer's "apportionment defense." Because we would reach the same ultimate conclusion regardless of whether we considered the insurer's submission, we need not address the motion.

On September 29, 1999, claimant filed a claim for bilateral hearing loss, “progressive in onset.” (Ex. 6). On November 3, 1999, the insurer denied both compensability and responsibility for claimant’s hearing loss condition. (Ex. 8).

In January 2000, Dr. Hodgson examined claimant at the request of the insurer. (Ex. 9). A third audiogram was administered at that time, which again revealed bilateral hearing loss. (Ex. 9-6). Dr. Hodgson concluded that claimant’s work as an ironworker/boilermaker over the years was the major contributing cause of his bilateral sensorineural hearing loss. (Ex. 10-1). However, Dr. Hodgson stated that claimant’s work for the insured did not worsen claimant’s underlying hearing loss condition. (Ex. 9-4). Nevertheless, he agreed that claimant’s work exposure for the insured was “of the type that could have contributed to [claimant’s] hearing loss,” and that it was “not impossible” for claimant’s work exposure at the insured to have contributed to his hearing loss. (Ex. 10-1, -2).

Claimant requested a hearing from the insurer’s denial. Before hearing, the insurer rescinded the compensability portion of its denial, but continued to deny responsibility.² The ALJ awarded claimant an assessed attorney fee under ORS 656.386(1), set aside the insurer’s responsibility denial, and awarded claimant a separate assessed fee under ORS 656.308(2)(d).

The ALJ reasoned that claimant’s work for the employer was the last exposure that could have caused his condition before he sought medical treatment for his hearing loss from Dr. Hodgson in January 2000. Further reasoning that the insurer failed to prove that it was impossible for claimant’s last work exposure to have caused the condition, or that prior work was its sole cause, the ALJ concluded that responsibility remained with the insurer.

On review, the insurer contends that it is not responsible for claimant’s bilateral hearing loss condition because the medical evidence establishes that responsibility should lie with one or more of claimant’s prior employers. We disagree.

As a general rule, absent an accepted claim, the last injurious exposure rule “assigns initial responsibility for the claimant’s occupational [condition] to the last employer for whom the claimant worked before the claimant became disabled by

² Claimant did not file claims with any other employers.

or sought treatment for the [condition] whose work conditions could have caused the [condition].” *MacMillan Plumbing v. Garber*, 163 Or App 165, 170 (1999). However, a presumptively responsible insurer may avoid responsibility if it proves either: (1) that it was impossible for conditions at its workplace to have caused the disease; or (2) that the disease was caused solely by conditions at one or more previous employments. *Roseburg Forest Products v. Long*, 325 Or 305, 313 (1997).

Here, the compensability of claimant’s condition is not contested. Dr. Hodgson provides the only medical evidence addressing the responsibility issue. Dr. Hodgson concluded that it was *not* impossible for claimant’s work for the insured to have contributed to claimant’s hearing loss. (Ex. 10-2). The only remaining question is whether claimant’s prior employment was the sole cause of the condition. *See Roseburg Forest Products v. Long*, 325 Or at 313.

Based on claimant’s history and a 1999 audiogram, Dr. Hodgson attributed claimant’s hearing loss condition to a “combination of noise-induced hearing loss from gun use and his long occupation in the iron worker and boilermaker’s union, and also age-related hearing loss.” (Ex. 9-4). Claimant’s work in the iron worker and boilermaker’s union, referenced by Dr. Hodgson, necessarily includes the two-week span of employment exposure while working with the insured. It follows from Dr. Hodgson’s opinion that claimant’s exposure with prior employers was not the *sole* cause of his hearing loss condition. Responsibility for claimant’s condition therefore lies with the insured. *Roseburg Forest Products v. Long*, 325 Or at 313.

In reaching this conclusion, we acknowledge that, although audiograms in 1996, 1999, and 2000 showed progressive hearing loss, Dr. Hodgson opined that the differences between the 1999 and 2000 test results (before and after claimant’s work for the insured) were “within test/re-test variability.” (Exs. 9-4, 11). Dr. Hodgson’s comparison of audiograms logically supports a *possibility* that claimant’s increased hearing loss in 2000 (as compared to 1999) was nothing more than “test/retest variability.” However, we do not consider that mere possibility to be sufficient to establish that claimant’s prior employment was the *sole* cause of the condition. Accordingly, on this record, we agree with the ALJ that the insurer is responsible for claimant’s hearing loss condition.

The insurer next contends, in the alternative, that claimant’s hearing loss condition should be “apportioned” among claimant’s former employers, citing *James River Corp. v. Green*, 164 Or App 649 (1999). We disagree. Initially, we

note that *Green* did not involve a responsibility dispute. Rather, the issue was the extent of the claimant's scheduled permanent disability related to his accepted hearing loss condition. 164 Or App at 651. The court held that in certain circumstances, OAR 436-035-0250³ allows a claimant's hearing loss to be "apportioned" between the employers at closure, when a claimant's extent of permanent disability is determined. 164 Or App at 653. *Green* is therefore distinguishable.

In *RLC Industries v. Sun Studs, Inc.*, 172 Or App 233 (2001), the court reasoned that OAR 436-035-00250(2), coupled with the appropriate medical evidence and audiograms, could establish that a claimant's work for a certain employer could *not* have caused his or her hearing loss condition. 172 Or App at 235-237. Thus, under particular circumstances, the rule can be utilized in analyzing responsibility for a claim. However, here, in contrast to *Sun Studs*, a medical expert (Dr. Hodgson) has specifically concluded that claimant's work for the employer *could* have caused his hearing loss condition. (Ex. 10-1). Accordingly, *Sun Studs* is also distinguishable. "Apportionment" is not appropriate.

Finally, we adopt the ALJ's opinion and conclusions regarding attorney fees, with the following supplementation.

The insurer argues that the ALJ's \$2,700 attorney fee under ORS 656.386(1) for services related to obtaining rescission of its denial of compensability should be reduced. In this regard, the insurer contends that claimant prevented issuance of an order under ORS 656.307 by not filing claims against other potentially responsible carriers.

We are not persuaded by the insurer's argument. To avoid liability for an attorney fee under ORS 656.386(1), the insurer needed to deny responsibility only for claimant's condition. In other words, the insurer's compensability denial (not claimant's failure to file additional claims) is the basis for the fee. Moreover,

³ OAR 436-035-0250 provides, in pertinent part:

"Compensation may be given only for loss of normal hearing which results from an on-the-job injury or exposure, if adequately documented by a baseline audiogram obtained within 180 days of assignment to a high noise environment."

we adopt the ALJ's findings and conclusions regarding the factors set forth in OAR 438-015-0010(4) in determining claimant's attorney fee award.⁴

ORDER

The ALJ's order dated November 15, 2000 is affirmed.⁵

Entered at Salem, Oregon on January 10, 2002

⁴ We also agree that claimant is entitled to an attorney fee under ORS 656.308(2)(d) (as awarded by the ALJ), based on his attorney's active and meaningful participation in prevailing against the insurer's responsibility denial. However, claimant is not entitled to a fee in addition to the ALJ's \$1,000 fee award under this statute, because there is no showing of extraordinary circumstances in this case. *Foster-Wheeler Construction, Inc. v. Smith*, 151 Or App 155, 158 (1997).

⁵ Because the only issues on review were responsibility and attorney fees, claimant is not entitled to an attorney fee pursuant to ORS 656.382(2). *Dotson v. Bohemia*, 80 Or App 23, *rev den* 302 Or 35 (1986); *Frank A. Greek, Sr.*, 53 Van Natta 996 (2001).