
In the Matter of the Compensation of
ELLIS L. WHITNEY, Claimant
WCB Case No. 01-03593
ORDER ON REVIEW
Myrick Seagraves, Claimant Attorneys
Julie Masters, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Biehl and Lowell.

The SAIF Corporation requests review of Administrative Law Judge (ALJ) Stephen Brown's order that set aside its denial of claimant's occupational disease claim for bilateral hearing loss. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact." However, we summarize and supplement those findings as follows.

In February 2001, claimant filed a claim for bilateral hearing loss that allegedly occurred during his employment in the 1950's and early 1960's.¹ During this time, claimant first worked as a "blacksmith" in a sawmill that exposed him to noise from heavy equipment and cranes. Claimant described the noise as "enough to make your ears ring for several hours after you got home." (Tr. 15). Claimant did not wear any hearing protection.

From 1957 to 1963, claimant worked for the employer against which he filed his occupational disease claim. There, he installed "blow pipe systems" in sawmills. Claimant was exposed to noise levels similar to those to which he was exposed as a "blacksmith." (Tr. 15).

After 1963, claimant performed automobile repairs, operated a private printing shop and sold industrial chemicals until the late 1970's, when he began to sell hearing aids. (Ex. 7-2; Tr. 16). This "post-1963" employment did not involve significant noise exposure.

Claimant began wearing hearing aids around 1980 and also began self-administering hearing tests once every two or three years from 1980 to 1998.

¹ No timeliness defense was asserted.

(Tr. 18). Although claimant did not retain the record of the results of those tests, he recalled that his hearing loss “just stayed about the level, about the way it was to start with.” (Tr. 20).

Dr. Ediger, a clinical audiologist, evaluated claimant’s hearing loss on behalf of SAIF in April 2001. After deducting expected hearing loss for a 77-year old due to presbycusis (age-related hearing loss), Dr. Ediger opined that the major contributing cause of claimant’s hearing loss was presbycusis, not work exposure 37 years earlier. (Ex. 7-6). Noting claimant’s history that his hearing had remained stable for the past twenty years, Dr. Harris, an otolaryngologist, disagreed with Dr. Ediger’s opinion and attributed claimant’s hearing loss in major part to noise exposure. (Exs. 10, 11).

CONCLUSIONS OF LAW AND OPINION

The ALJ set aside SAIF’s denial of claimant’s hearing loss claim. In so doing, the ALJ applied the presbycusis value (100) for a male 60 years or older contained in the Director’s permanent disability standard, OAR 436-035-0250(4)(b). Then applying the ratio of presbycusis to the total of right and left ear hearing loss, the ALJ concluded that, “mathematically,” noise induced hearing loss was the major contributing cause of claimant’s hearing loss.

SAIF requested reconsideration, citing *Marvin H. Benz*, 53 Van Natta 266, 267 (2001) (on remand), in which we stated that the 100 decibel deduction for presbycusis was applicable only after a claim had been determined compensable. The ALJ declined to change his opinion regarding the major cause of claimant’s hearing loss, reasoning that the relevant language in *Benz* was “dicta” and was also in conflict with the court’s opinion in *RLC Industries v. Sun Studs, Inc.*, 172 Or App 233 (2001) (applying OAR 436-035-0250(2) in a responsibility context).

On review, SAIF contends that the ALJ incorrectly applied a disability rule in determining the compensability of a hearing loss claim and that the only medical opinion supporting compensability (Dr. Harris’s) is not well reasoned and is, hence, unpersuasive.

Unlike the ALJ, we question whether *Sun Studs* applies in a compensability context. See *Johnny E. Marble*, 54 Van Natta 24 (2002) (discussing *Sun Studs* and holding that, under particular circumstances, OAR 436-035-00250(2) can be utilized in analyzing *responsibility* for a claim). Nevertheless, we need not decide

the applicability of *Sun Studs* because we find the medical evidence supporting compensability unpersuasive.

In order to establish this claim as an occupational disease, claimant must prove that his work exposure was the major contributing cause of his bilateral hearing loss condition. ORS 656.802(2)(a). Because of claimant's multiple work exposures and the number of potential causes of the hearing loss, the causation issue presents a complex medical question requiring competent medical evidence for its resolution. *Uris v. Compensation Department*, 247 Or 420 (1967); *Barnett v. SAIF*, 122 Or App 279, 282 (1993). Where the medical evidence is divided, such as in this case, we rely on those opinions that are well reasoned and based on complete and accurate information. *Somers v. SAIF*, 77 Or App 259, 263 (1986).

As previously noted, Dr. Harris provided the only medical evidence supporting the claim. In opining that noise exposure was the major contributing cause of claimant's hearing loss, Dr. Harris noted that there was "enough noise exposure to cause hearing loss," that claimant had been required to use hearing aids for twenty years, and that claimant's hearing loss had remained stable for over the last twenty years. (Ex. 10). Claimant testified that he was exposed to loud noise during his employment from the 1950's to 1963. Moreover, claimant testified that his hearing loss remained stable from 1980 to the present. Even assuming that claimant's testimony is accurate, Dr. Harris' opinion does not address the significance of the roughly 17-year period from claimant's last exposure to loud noise in 1963 to 1980.

For most, if not all, of this period, no hearing loss tests were conducted. In addition, claimant did not testify specifically regarding the nature or progression of hearing loss, if any, during this period.² For his part, Dr. Harris did not state, for instance, that it was likely that the majority of claimant's hearing loss was already in place in 1963, nor did he address the stability (or progression) of claimant's hearing loss from that point to 1980. Because Dr. Harris did not address the period

² When asked at hearing when he first came to believe that he had hearing damage, claimant did not specify a particular time, but noted that he first tested his hearing around 1979. (Tr. 16). In a statement given to SAIF, claimant stated that he first noticed his hearing problems "somewhere around 1979, 80's, 76 somewhere in that neighborhood." (Ex. 5A-1). If claimant's hearing loss first became evident roughly 15 years or more after the last exposure to loud noise in 1963, we are unable to find that claimant's noise exposure prior to 1963 was the major cause of any hearing loss in the absence of persuasive medical evidence addressing the delayed onset of hearing loss. See *SAIF v. Calder*, 157 Or App 224, 228 (1998).

of 1963 to 1980 in forming his opinion on the causation issue, we cannot state that Dr. Harris' opinion was well-reasoned, even if we assume that noise exposure in the relevant period was sufficient to cause hearing loss and that claimant's hearing loss remained stable during the period from 1980 to the present.

As previously noted, the remaining evidence addressing the causation issue is from Dr. Ediger, whose opinion does not support compensability. Even if, as claimant contends and the ALJ found, Dr. Ediger's opinion is not well reasoned, we find that, on this record, the medical evidence does not establish that claimant's noise exposure in the 1950's and early 1960's was the major contributing cause of his bilateral hearing loss first diagnosed in 2001. Thus, we reverse.

ORDER

The ALJ's order dated November 2, 2001, as reconsidered on November 20, 2001, is reversed. SAIF's denial is reinstated and upheld. The ALJ's attorney fee is also reversed.

Entered at Salem, Oregon on June 28, 2002