

In the Matter of the Compensation of
ROYCE A. NORTON, Claimant

WCB Case No. 02-00842, 02-00841, 02-00840, 01-06361, 01-02052

ORDER ON REVIEW

Welch Bruun & Green, Claimant Attorneys
Reinisch Mackenzie et al, Defense Attorneys
Charles Edelson, SAIF Legal, Defense Attorneys
Sather Byerly & Holloway, Defense Attorneys
John E Snarskis & Assocs, Defense Attorneys
Johnson Nyburg & Andersen, Defense Attorneys

Reviewing Panel: Members Lowell, Biehl, and Bock. Member Biehl chose not to sign the order.

The Hartford Insurance Group, on behalf of Bridgetown Cores (Hartford/Bridgetown), requests review of those portions of Administrative Law Judge (ALJ) Tenenbaum's order that: (1) set aside its responsibility denial of claimant's occupational disease claim of a bilateral hearing loss; (2) upheld Royal & Sun Alliance's responsibility denial, on behalf of Eagle Foundry (RSA/Eagle), of the same condition; (3) upheld the SAIF Corporation's responsibility denial, on behalf of Columbia Steel Casting (SAIF/Columbia), of the same condition; (4) upheld RSA's responsibility denial, on behalf of Columbia Steel Casting (RSA/Columbia), of the same condition; and (5) upheld Liberty Northwest Insurance Corporation's responsibility denial, on behalf of Columbia Steel Casting (Liberty/Columbia), of the same condition. On review, the issue is responsibility. We reverse.

FINDINGS OF FACT

Claimant, 68 years old at the time of hearing, worked in foundries for over 40 years. His last employment at Bridgetown Cores was not in a foundry setting.

Claimant's relevant periods of employment were as follows: (1) RSA/Eagle from September 1, 1985 to October 1, 1987; (2) SAIF/Columbia from April 25, 1988 to March 31, 1989; (3) RSA/Columbia from April 1, 1989 to March 31, 1997; (4) Liberty/Columbia from April 1, 1997 to July 24, 1998; and (5) Hartford/Bridgetown from July 1, 1999 to November 1, 1999.

Claimant's work environment at Eagle Foundry and Columbia Steel Casting was noisy. At Eagle Foundry, claimant worked as a "molder" next to an extremely

noisy “reclaimer” machine. (Tr. 10 - 11). He used various tools and equipment including hand rammers and power air rammers. (Tr. 11, 12, 15 - 17). During his work for Eagle Foundry and for Columbia Steel, claimant wore hearing protection about eighty percent of the time. (Tr. 12).

From July 1, 1999 to November 1, 1999, claimant was an on-call employee for Bridgetown Cores, working an average of two to three days per week. (Tr. 10, 20). Bridgetown Cores was a shell core operation that was not as noisy as foundry work. Claimant wore hearing protection 90 percent of the time at Bridgetown Cores. (Tr. 14, 22). Claimant occasionally operated the core blower machine which emitted exhaust blasts at the end of the 2-3 minute cycle (approximately 20-25 blasts per hour). (Tr. 40, 50 – 52). He used hearing protection whenever he used the large, noisy core blower. (Tr. 52).

On December 27, 2000, Dr. Hodgson, an otolaryngologist, examined claimant at the request of Liberty/Columbia. (Ex. 10). Dr. Hodgson concluded that “the majority of [claimant’s] hearing loss [was] a result of [claimant’s] lifelong occupation of a foundry worker.” (Ex. 10-4). Based on the hearing tests showing no increase in claimant’s hearing loss from 1997 to December, 2000, Dr. Hodgson further concluded that “[claimant’s] employment at Bridgetown [had] not contributed any to his hearing loss.” (Ex. 10-5). Additionally, Dr. Hodgson concluded that it was medically probable that the sole cause of claimant’s occupational hearing loss occurred prior to 1997. (Exs. 14-2; 18; 26-7-8, 18, 28).

On April 4, 2002, Dr. Ediger, a clinical audiologist, performed a records review on behalf of SAIF/Columbia. Dr. Ediger opined that claimant’s “work-related noise-induced hearing loss occurred prior to 1988.” Dr. Ediger further opined that claimant’s hearing decline in his right ear after 1988 was of idiopathic origin. (Ex. 19D-3-4). In his August, 2002 deposition, Dr. Ediger opined that claimant’s hearing loss was unrelated to his work exposure at Bridgetown. He further opined that claimant’s work [prior to Bridgetown] and/or “other factors” were the sole cause of claimant’s hearing loss. (Ex. 24-31-32, 47, 48-49).

On April 15, 2002, claimant was examined by audiologist Dr. Hicks. Dr. Hicks opined that “[claimant’s] forty years of occupational noise exposure as a foundry worker [was] the major contributing factor to his present hearing loss.” (Ex. 21-2). Dr. Hicks further opined that claimant’s hearing loss had worsened during his 10 years of employment with Columbia Steel. (Ex. 21-2). In his deposition, Dr. Hicks testified that it was “possible” that claimant’s noise exposure

at Bridgetown could have contributed “some small amount” to the progression of claimant’s hearing loss. (Ex. 25-18). However, Dr. Hicks would not state that it was a “probability.” (Ex. 25-20). Finally, Dr. Hicks agreed that “[claimant’s] work prior to Bridgetown could possibly be the sole cause of [claimant’s] current hearing loss.” (Ex. 25-25).

CONCLUSIONS OF LAW AND OPINION

The sole issue at hearing was responsibility for claimant’s occupational disease claim for bilateral hearing loss. The parties agreed that the case was subject to the last injurious exposure rule (LIER) for assigning responsibility and that presumptive responsibility was assigned to Hartford/Bridgetown as claimant’s last potentially injurious employer. The ALJ concluded that responsibility remained with Hartford/Bridgetown, after determining that Hartford/Bridgetown had failed to establish either that it was impossible for claimant’s employment at Bridgetown to have contributed to his hearing loss, or that claimant’s employment prior to Bridgetown was the sole cause of his hearing loss.

On review, Hartford/Bridgetown contends that the persuasive medical evidence (*i.e.*, the opinions of Drs. Hodgson and Ediger) establishes that the sole cause of claimant’s occupational hearing loss occurred prior to its coverage.¹ We agree with Hartford/Bridgetown’s contentions based on the following reasoning.

As a rule of assignment of responsibility, the LIER assigns full responsibility to the last employer that could have caused the claimant’s injury. *Runft v. SAIF*, 303 Or 493, 499 (1987). However, an employer otherwise responsible under the LIER may avoid responsibility by establishing either that: (1) it was impossible for conditions at its workplace to have caused the disease; or (2) the disease was caused solely by the conditions at one or more previous employments. *Roseburg Forest Products v. Long*, 325 Or 305, 313 (1997).

The ALJ concluded that the evidence failed to establish that claimant’s employments prior to Bridgetown were the sole cause of claimant’s bilateral hearing loss. In reaching this conclusion, the ALJ particularly noted that, although Dr. Hodgson thought that claimant’s work prior to the 1997 audiogram was “probably the sole cause of claimant’s hearing loss,” Dr. Hodgson had also

¹ Hartford/Bridgetown does not contend that it was “impossible” for claimant’s employment at Bridgetown to cause the hearing loss condition. (App. Brief p.4).

acknowledged that the work environment at Bridgetown could have been noisy enough to cause some hearing loss. (O & O p.6). Furthermore, the ALJ noted that Dr. Hodgson “could not say that there were no hair cells injured due to claimant’s noise exposure at Bridgetown.” (O & O p.6).

The ALJ did not discuss Dr. Ediger’s opinion regarding whether the sole cause of claimant’s hearing loss was employment prior to Bridgetown. Additionally, although the ALJ relied on Dr. Hicks’ opinion, the statement by Dr. Hicks that the ALJ cited did not address whether the work exposure prior to Bridgetown was the “sole cause.” The ALJ stated:

“[a]lthough Dr. Hicks acknowledged that the difference between the 1997 and 2000 audiograms could be accounted for by the margin of error in testing, he concluded that claimant’s employment at *Columbia* probably did contribute to an increase in [claimant’s] hearing loss, and that that was possible even if claimant had worn hearing protection one hundred percent of the time there, which he did not.” (O & O p.6) (Emphasis added).

Although claimant’s lay testimony is probative, the assignment of responsibility for claimant’s hearing loss presents a complex medical question and resolution of this issue depends on the medical evidence. *Uris v. Compensation Department*, 247 Or 420, 426 (1967); *Barnett v. SAIF*, 122 Or App 279, 283 (1993).

Here, there are three medical opinions discussing claimant’s hearing loss. Both Dr. Hodgson and Dr. Ediger have expressed the opinion that claimant’s work exposure prior to his employment at Bridgetown, was the sole cause of his noise-induced hearing loss. (See Exs. 10-5; 14-2;18; 19D-3-4; 24-31-32, -47-49; 26-7-8, -18, -28). Dr. Hicks, at most, concluded that it was “possible” that claimant’s work prior to Bridgetown could be the sole cause of claimant’s current hearing loss. (Ex. 25-25).

Based on our *de novo* review of the medical record, we conclude that the preponderance of the persuasive medical evidence establishes that claimant’s work exposure prior to Bridgetown was the sole cause of his occupational hearing loss. We rely primarily on Dr. Hodgson’s opinion as it is the most complete and well-reasoned. Dr. Hodgson, an otolaryngologist, examined claimant (unlike

Dr. Ediger), performed his own audiogram, considered the entire medical record as it developed (including all of claimant's previous audiograms), and reviewed claimant's testimony at hearing, in reaching his final conclusion that claimant's work exposure prior to Bridgetown was the sole cause of claimant's noise-induced hearing loss. Based on these medical opinions, we conclude that the sole cause of claimant's hearing loss was the work exposure prior to Bridgetown. Accordingly, we find that Hartford/Bridgetown is not responsible for claimant's bilateral hearing loss condition.

Because Liberty/Columbia was claimant's employer prior to Bridgetown, Liberty/Columbia is now presumptively responsible unless it can shift responsibility "backwards" by establishing either that it was impossible for conditions at its workplace to have caused the disease, or that the disease was caused solely by the conditions at one or more previous employments. We conclude that Liberty/Columbia is responsible for the following reasons.

Claimant's employment at Liberty/Columbia was from April 1, 1997 to July 24, 1998. There is no contention by the parties that it was "impossible" for this period of employment exposure to have caused the hearing loss condition. Therefore, responsibility for the condition can only shift from Liberty/Columbia if claimant's work exposure prior to April 1, 1997 was the sole cause of claimant's hearing loss.

First, we note that Dr. Hodgson's opinion that the work exposure prior to 1997 was the sole cause of claimant's noise-induced hearing loss, was based on the audiograms taken between 1988 and May 12, 1997, which showed a worsening of the occupational hearing loss. (*See* Ex. 26-18, -22-25, -28, -31). Additionally, although Dr. Hodgson seemed to agree that claimant's hearing loss was "maxed out" by 1995 (as evidenced by claimant's 1995 audiogram), Dr. Hodgson did not opine that employment prior to 1995 was the "sole cause" of claimant's hearing loss.² (*See* Ex. 26-30). Therefore, we conclude that Liberty/Columbia has not met its burden of establishing that the "sole cause" of claimant's hearing loss was claimant's work prior to its period of employment beginning in April 1997. Accordingly, we find that Liberty/Columbia is responsible for claimant's bilateral

² We do not find persuasive Dr. Ediger's conclusion that the cause of claimant's hearing loss was prior to his employment at Columbia Steel Casting in 1988. Dr. Ediger's opinion was based in part on his conclusion that because the hearing loss after 1988 was not equal bilaterally, it could not be industrially related and was therefore "idiopathic." (*See* Exs. 19D-3; 24-16). We find more persuasive Dr. Hick's explanation that the progression of hearing loss varies in individuals. (*See* Exs. 22-1; 25-14-17).

hearing loss condition.

Because we have found Liberty/Columbia, rather than Hartford/Bridgetown, to be the responsible party, it follows that Liberty is responsible for claimant's attorney fee for services at hearing on the responsibility issue.

ORDER

The ALJ's order dated February 18, 2003 is reversed in part and affirmed in part. Liberty/Columbia's denial of claimant's hearing loss condition is set aside and the claim is remanded to Liberty for processing according to law. Hartford/Bridgetown's denial of claimant's hearing loss condition is reinstated and upheld. Liberty/Columbia is responsible for the ALJ's attorney fee award, to be paid to claimant's counsel. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on October 24, 2003