

In the Matter of the Compensation of  
**GEORGE E. HIATT, Claimant**

WCB Case No. 02-09094, 02-05391, 02-05141, 02-05140, 02-05139, 02-05138,  
02-05137, 02-03280

**ORDER ON REVIEW**

Cary et al, Claimant Attorneys  
Johnson Nyburg & Andersen, Defense Attorneys  
Paul Louis Roess, Defense Attorneys  
Julie Masters, SAIF Legal, Defense Attorneys  
Dennis L Ulsted, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Phillips Polich and Langer

Liberty Northwest Insurance Corporation, on behalf of Morse Brother's, Inc. (Liberty/Morse), requests review of those portions of Administrative Law Judge Poland's order that: (1) set aside its denial of claimant's occupational disease claim for bilateral hearing loss condition; and (2) upheld denials of claimant's occupational disease claims for the same condition issued by the SAIF Corporation, on behalf of Bohemia, Inc., Wakefield Logging and Pierrat Brothers (SAIF/Bohemia, SAIF/Wakefield and SAIF/Pierrat), and by Liberty, on behalf of Pieratt Brothers and Eugene Sand and Gravel (Liberty/Pieratt and Liberty/Eugene Sand). On review, the issue is responsibility. We affirm.

FINDINGS OF FACT

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

CONCLUSIONS OF LAW AND OPINION

The ALJ found the last employer, Liberty/Morse, responsible for claimant's hearing loss under the Last Injurious Exposure Rule (LIER). In doing so, the ALJ found that the "onset of disability" date occurred while claimant worked for Liberty/Morse in November of 2001 and that Liberty/Morse failed to shift responsibility to an earlier employment because the medical evidence did not establish it was impossible for employment conditions at Liberty/Morse to have caused claimant's hearing loss or that the hearing loss was solely caused by prior employment. Additionally, the ALJ held that SAIF/Bohemia did not accept claimant's bilateral hearing loss when it issued an Updated Notice of Acceptance (UNOA) listing hearing loss as the accepted condition. Finally, the ALJ held that apportionment of the claim was inappropriate because the evidence did not support a finding that claimant's exposure prior to Liberty/Morse was the sole cause of the hearing loss.

On review, Liberty/Morse argues that presumptive responsibility should be placed with SAIF/Bohemia for two reasons: (1) claimant initially sought treatment for hearing loss during SAIF's/Bohemia's period of coverage; and (2) SAIF/Bohemia issued an "unqualified" UNOA accepting claimant's bilateral hearing loss claim. In the alternative, if it is found responsible, Liberty/Morse argues that responsibility for the claim should be apportioned among the carriers. For the following reasons, we disagree with Liberty/Morse's contentions.

The LIER assigns initial responsibility to the last period of employment whose conditions might have caused the disability. *Reynolds Metals v. Rogers*, 157 Or App 147, 153 (1998), *rev den* 328 Or 365 (1999). The "onset of disability" is the triggering date for determining which employment is the last potentially causal employment. *Bracke v. Baza'r*, 293 Or 239, 248 (1982). If the injured worker receives medical treatment before experiencing time loss due to the condition, then the date of first medical treatment is determinative for assigning initial responsibility for the claim. *Timm v. Maley*, 125 Or App 396, 401 (1993), *rev den* 319 Or 81 (1994).

In support of its responsibility argument, Liberty/Morse cites *Laurence Woods*, 55 Van Natta 1539 (2003). In *Woods*, the claimant reported that he received an audiogram in 1983, that the results were given to his attending physician, and that he began wearing hearing aids at that time. In holding that the "onset of disability" was in 1983, we emphasized that it was not only the audiological testing, but the involvement with the claimant's treating physician, who filled out additional forms and fitted claimant with hearing aids, that led to our determination that the "onset of disability" was in 1983. *Laurence P. Woods, on recon*, 55 Van Natta 1817 (2003). The present claim is factually distinguishable from *Woods*.

In this case, claimant reported that he went to a doctor for his ears sometime in the 1970s. However, he was unsure of any further details. (Tr. 26). Moreover, there is no evidence, as there was in *Woods*, that claimant sought "treatment" for his condition. Liberty/Morse argues that claimant's un rebutted testimony that he went to the doctor is sufficient to establish he sought "treatment," triggering the "onset of disability" for purposes of the LIER. However, we find claimant's rather vague testimony insufficient to establish that he sought treatment during SAIF/Bohemia's coverage.

In making this determination, we have considered the court's recent definition of "treatment" with regard to the LIER. *Foster Wheeler Corp. v.*

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*Marble*, 188 Or App 579, 583 (2003).<sup>1</sup> There, in addressing the question of what constitutes “treatment” for the purposes of the LIER, the court reasoned as follows:

“[T]o ‘treat’ a patient is ‘to care for \*\*\* medically or surgically : deal with by medical or surgical means : give a medical treatment to[.]’ ‘Medical treatment,’ then, involves either ongoing medical care of application of some technique, drug, or other action designed either to alleviate or cure a disease or injury.”

Here, claimant agreed that he went to a doctor in the 1970s who had “something to do with the ears.” Nevertheless, the record does not establish that he received any treatment or took any action designed either to alleviate or cure his “disease or injury.” (*Id.*) Claimant cannot recall, and there is no documentation, such as audiograms, indicating the nature or extent of his hearing loss at that time. Nor do we know what condition, if any, was diagnosed. *Cf. Robert R. Tobola*, 55 Van Natta 2399 (2003) (it was considered “medical treatment” where audiologist performed audiogram, diagnosed hearing loss and recommended hearing aids). Furthermore, aside from routine audiograms (starting in 1994), there is no indication that claimant sought treatment, or took any action to address his hearing loss between 1970 and 2001. *Foster Wheeler v. Marble*, 188 Or App at 583 (audiograms considered “self-help” measures that did not involve seeking or receiving any medical treatment).

The objective in designating a triggering date is to identify the point when a condition generally becomes a disability. *Agricomp Ins. v. Tapp*, 169 Or App 208, 212, *rev den* 331 Or 244 (2000). Based on this record, and in the absence of additional information, claimant’s medical visit, sometime in the 1970s to some unknown medical provider, does not have a sufficient objective relationship to the date of disability to make it the appropriate triggering date for the assignment of initial responsibility under the LIER. Consequently, we agree with the ALJ’s determination that presumptive responsibility under the LIER rests with Liberty/Morse, the insurer providing coverage when claimant first sought medical treatment for his hearing loss condition. We further agree with and adopt the ALJ’s conclusion that Liberty/Morse did not establish that responsibility should shift to a previous employer.

Alternatively, Liberty/Morse argues that SAIF/Bohemia should be found responsible because SAIF/Bohemia issued an “unqualified” UNOA on

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<sup>1</sup> This case was issued subsequent to the ALJ’s order.

December 13, 2002. (*See* Ex. 41-1). Liberty/Morse contends that a letter issued by SAIF/Bohemia on January 14, 2003, informing claimant that the December 13, 2002 UNOA should have included language explaining that the claim was being processed pursuant to an order designating a paying agent under ORS 656.307, is the equivalent of a “back-up” denial under ORS 656.262(6).

In response, SAIF/Bohemia argues that the December 13, 2002 UNOA was not “unconditional” or “unqualified.” SAIF/Bohemia notes that accompanying the UNOA was the Notice of Closure worksheet, which contained a notation stating: “SAIF Corporation has been found responsible for this claim per .307 order dated September 19, 2002. This claim is currently under appeal and not final.” (Ex. 41-2). SAIF/Bohemia argues that, because these two documents were sent simultaneously, they should be considered together. We agree.

Having been designated the paying agent, SAIF/Bohemia was responsible for processing the claim. ORS 656.307. In compliance with the “.307” order, SAIF/Bohemia closed the claim after receiving sufficient information to do so. However, we do not find that the language in the UNOA acted as an unqualified acceptance of claimant’s bilateral hearing loss on the part of SAIF/Bohemia.

In making this determination, we distinguish this situation from other cases where a carrier issued an unqualified Notice of Acceptance, following an order requiring them do to so, rendering moot the controversy between the parties regarding the compensability of or responsibility for the claim. *See SAIF v. Mize*, 129 Or App 636 (1994). In *Mize*, the court dismissed the carrier’s petition for review after it had accepted the claim that was the basis for its appeal. In rejecting the carrier’s argument that its acceptance had been contingent on its right to seek judicial appeal, the court found that, as a factual matter, the carrier’s acceptance was “clear and unqualified” rendering the controversy over compensability moot. *Id.* at 639.

Following *Mize*, we have dismissed requests for Board review when we have found that a carrier unequivocally accepted a claim without making it contingent on the result of an appeal. *E.g.*, *Gloria J. Bryant*, 51 Van Natta 1702 (1999); *Sharon L. Erickson*, 51 Van Natta 761 (1999). Conversely, but consistent with *Mize*, we have also held that, when directed by a litigation order to accept a claim, a carrier may issue a “qualified” acceptance of the claim and continue to appeal the litigation order. *E.g.*, *Valerie Barbeau*, 49 Van Natta 1189 (1997); *Donna J. Calhoun*, 47 Van Natta 454 (1996).

While the current situation does not pertain to an ALJ's order following litigation, it does pertain to action taken as a result of a ".307" Order which designated SAIF/Bohemia as a paying agent. Under such circumstances, we apply the rationale of *Mize* and its progeny to this case. In doing so, we find several decisions instructive.

In *Janice M. Hunt*, 46 Van Natta 1145 (1994), the carrier issued a "Notice of Acceptance" accepting the claimant's claim as disabling while the ALJ's order directing that reclassification was on review. Simultaneously, in a "1502" form, the carrier notified the claimant of its intent to challenge the classification issue. We noted that, because the carrier simultaneously notified the claimant of its intent to challenge the classification issue, its acceptance was not inconsistent with its assertion that claimant's claim was nondisabling. *Id.* at 1146.

Similarly, in *Valerie Barbeau*, 49 Van Natta 1189 (1997), the carrier issued an acceptance at the same time it issued a "1502" form. The "1502" form indicated that the claim was accepted through a litigation order, and the "pre-acceptance" Notice of Closure referenced the appeal and stated that temporary disability compensation had been stayed. In this circumstance, we found that the Notice of Acceptance was qualified by references to the carrier's appeal in the 1502 and the Notice of Closure, and that the controversy between the parties remained viable. *Id.* at 1189.

In contrast to *Hunt* and *Barbeau*, in *Mary C. Hammond*, 52 Van Natta 467 (2000), following an ALJ's October 1999 order, a carrier issued an unqualified claim acceptance. A few days later, the carrier requested Board review. Several weeks later, the carrier attempted to rescind its Notice of Acceptance. In that circumstance, we dismissed the carrier's appeal, reasoning that the carrier's actions after the Notice of Acceptance was issued did not affect the determination that the compensability issue had become moot.

We find the circumstances of this case similar to those in *Barbeau* and *Hunt*. SAIF/Bohemia simultaneously issued the Notice of Closure with the UNOA. The Notice of Closure's worksheet indicated that the claim was being processed pursuant to a ".307 order," that it was not final and that it was being appealed. Therefore, SAIF/Bohemia's acceptance of the bilateral hearing loss was not "clear" and "unqualified." Thus, the January 14, 2003 Modified UNOA is not a "back-up" denial and the provisions of ORS 656.262(6)(a) do not apply.

Finally, Liberty/Morse argues that the LIER should not be applied because causation can be easily apportioned among the employers. Applying the LIER, the

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ALJ found that Liberty/Morse was the employer with the last injurious exposure and that apportionment was not appropriate. We adopt that portion of the ALJ's analysis and supplement as follows.

In *Marble*, the court also addressed when apportionment is appropriate in hearing loss claims:

“Apportionment could be appropriate if the board had concluded that none of claimant’s hearing loss could have been caused by working for employer. *Cf. RLC Industries v. Sun Studs, Inc.*, 172 Or App 233, 16 P3d 1208 (2001) (apportionment appropriate where work for otherwise responsible employer *could not* have contributed to compensable condition). It could also be appropriate if ‘the loss attributable to successive employments can be determined by audiograms[,]’ *James River Corp. v. Green*, 164 Or App 649, 653, 993 P.2d 157 (1999), or if the ‘injuries are so distinct that it is possible to segregate them in terms of causation,’ *Nomeland v. City of Portland*, 106 Or App 77, 81, 806 P.2d 175 (1991).” (Emphasis added.)

*FosterWheeler Corp. v. Marble*, 188 Or App at 584-585.

Here, two doctors have provided causation opinions regarding this claim: Dr. Hodgson and Dr. Ediger. Dr. Ediger reported that claimant’s hearing “declined even more between 1995 and 2002.” (Ex. 33-7). Liberty/Morse provided coverage from May 18, 2000 through “present.” (Tr. 4). Additionally, Dr. Hodgson noted that there was “enough variation” in the audiograms that he could not be certain that there was no change in claimant’s hearing while working with Liberty/Morse. (Ex. 34-2).

Such evidence does not establish that claimant’s work exposure when Liberty/Morse was providing coverage could not have contributed to his hearing loss. Furthermore, the audiograms in this record are inadequate to determine claimant’s hearing loss between his successive employments. Accordingly, apportionment of responsibility for this hearing loss claim is not appropriate.

#### ORDER

The ALJ’s order dated April 5, 2003 is affirmed.

Entered at Salem, Oregon on September 9, 2003