

In the Matter of the Compensation of
DANIEL P. SANBORN, Claimant

01-02841, 01-02500, 01-02498, 01-02494, 01-01420, 01-01419, 00-09707, 00-07614,
00-07294, 00-05076

ORDER ON REVIEW

Welch Bruun & Green, Claimant Attorneys
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Reviewing Panel: Members Lowell and Kasubhai.

The SAIF Corporation, on behalf of Walsh & Sons (SAIF/Walsh & Sons), requests review of Administrative Law Judge (ALJ) Mills' order that: (1) set aside its responsibility denial of claimant's occupational disease claim for bilateral hearing loss; and (2) upheld the responsibility denials of the same condition issued by Oregon Wire Products/SAIF (SAIF/Oregon Wire), Custom Wire Products/Liberty Northwest (Liberty/Custom Wire), Custom Wire/SAIF (SAIF/Custom Wire), Wood Exchange/Liberty Northwest (Liberty/Wood Exchange), Wood Exchange/Gallagher Bassett (Gallagher/Wood Exchange), Technical Fabricators/Farmers (Farmers/Technical Fabricators), Technical Fabricators/Cunningham Lindsey (Cunningham/Technical Fabricators), and Advanced Metal Products/Safeco (Safeco/Advanced Metal). On review, the issue is responsibility. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," with the following additional findings.

Dr. Bakos, an examining physician, concluded that claimant's employment at Oregon Wire from 1978 to 1990 was the major contributing cause of claimant's hearing loss. (Ex. 24). Dr. Bakos later testified that most of claimant's hearing loss was caused by work activity at Oregon Wire. (Ex. 46: 13-14).

CONCLUSIONS OF LAW AND OPINION

The ALJ set aside SAIF/Walsh & Son's responsibility denial, finding that it was responsible for claimant's hearing loss under the last injurious exposure rule (LIER). In doing so, the ALJ first determined that actual causation could not be established against any particular employer and therefore the basic principles of the LIER must be used to assigning initial responsibility and any subsequent transfer of responsibility. Applying those principles, the ALJ first assigned initial responsibility to SAIF/Walsh & Sons as the last potentially causal employment prior to claimant first having sought medical treatment in 2000. The ALJ then found that this employer failed to satisfy its burden of transferring responsibility to another employer/carrier.

On review, SAIF/Walsh & Sons contends primarily that the ALJ incorrectly found that actual causation had not been established. It asserts that the medical evidence from Dr. Bakos establishes that claimant's employment at SAIF/Oregon Wire from 1978 to December 1990 actually caused claimant's hearing loss and that, because the medical evidence did not prove that subsequent employment actually contributed to claimant's hearing loss, SAIF/Oregon Wire remained responsible for claimant's hearing loss condition. For the following reasons, we find SAIF/Walsh & Sons arguments persuasive.

Under *Willamette Industries, Inc. v. Titus*, 151 Or App 76 (1997), LIER may not be used to determine responsibility where actual causation (major contributing cause) is established. *Eric M. Watts*, 54 Van Natta 999, 1000 (2002). Nevertheless, LIER may be used defensively by a targeted employer under certain circumstances. Proof that the subsequent employment independently contributed to the current disability is required before the rule of responsibility can be invoked defensively. *Titus*, 151 Or App at 82.

In this case, we find that the medical evidence establishes that claimant's employment at SAIF/Oregon Wire was the major contributing cause of his hearing loss and that, because subsequent employment did not actually contribute to disputed condition, responsibility should have been assigned to SAIF/Oregon Wire. We reason as follows.

There are two relevant medical opinions with respect to the responsibility issue: those of Dr. Bakos and another examining physician, Dr. Hodgson. Dr. Bakos initially opined that claimant's employment at SAIF/Oregon Wire was the major contributing cause of his hearing loss. (Ex. 24-2). Dr. Bakos was subsequently deposed, at which time his testimony further reiterated that

claimant's employment at Oregon Wire was the major contributing cause of claimant's hearing loss. Dr. Bakos testified that it was reasonable to assume that claimant's hearing loss was due to noise exposure on the job, specifically the first job he held at SAIF/Oregon Wire. (Ex. 46-13). Dr. Bakos further testified that most of claimant's hearing loss was caused by that employment due to the length of time he spent at that job. (Ex. 46-14).

Dr. Hodgson was also deposed but was unable to arrive at a percentage contribution to claimant's hearing loss attributable to each employment exposure because of the absence of hearing tests prior to 2000. (Ex. 45: 9-10, 30-31). Therefore, Dr. Bakos provided the only direct evidence on actual causation and his opinion establishes that claimant's SAIF/Oregon Wire employment was the actual (major contributing) cause of the hearing loss condition.

SAIF/Oregon Wire does not dispute this conclusion, but instead points to statements from Drs. Bakos and Hodgson which it alleges establishes that subsequent employment actually contributed to claimant's hearing loss. It argues that responsibility should shift forward to either Liberty/Custom Wire or Safeco/Advanced Metal. We disagree with SAIF/Oregon Wire's arguments.

Dr. Hodgson stated that "it is a medical probability that [claimant] did suffer binaural hearing loss in 1994." (Ex. 34-3). Liberty was on the risk for Custom Wire from 1990 to December 2, 1994 and, according to SAIF/Oregon Wire, would, therefore, be responsible for the disputed condition. Nevertheless, Dr. Hodgson did not state that claimant's employment in 1994 contributed to the hearing loss condition. Instead, we find that Dr. Hodgson's statement merely reflected an agreement that, by 1994, claimant had binaural hearing loss. In support of this conclusion, we observe that Dr. Hodgson elsewhere stated that claimant's post-1990 employment only "could contribute" to claimant's hearing loss. (Ex. 30-6). Considering Dr. Hodgson's opinion as a whole, we find that this comment does not establish actual contribution from claimant's "post-Oregon Wire" employment.

At one point, Dr. Bakos testified that claimant's work exposure at Safeco/Advanced Metal did contribute to claimant's hearing loss. (Ex. 46-19). However, Dr. Bakos later clarified that most of claimant's hearing loss came from claimant's longest employment (Oregon Wire), but that some other jobs where claimant spent a month "could contribute," but in a very minimal way. (Ex. 46-22). Claimant's employment at Advanced Metal was for approximately a month in 1999. In light of Dr. Bakos' testimony that such employment only

“could contribute,” we are persuaded that, viewed in its entirety, Dr. Bakos’ opinion does not establish independent contribution to the hearing loss condition after claimant’s Oregon Wire employment ceased in 1990.

Accordingly, we conclude that SAIF/Oregon Wire is the responsible carrier. Because the ALJ concluded otherwise, we reverse the ALJ’s responsibility determination.

Claimant’s attorney is entitled to an assessed fee for services on review. After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable fee for claimant’s attorney’s services on review is \$1,000, payable by Oregon Wire/SAIF. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant’s respondent’s brief), the complexity of the issue, and the value of the interest involved.¹

ORDER

The ALJ’s order dated June 6, 2003 is reversed in part and affirmed in part. SAIF/Oregon Wire’s denial is set aside and the claim is remanded to it for processing in accordance with law. SAIF/Walsh & Sons denial is reinstated and upheld. Oregon Wire/SAIF is responsible for the ALJ’s attorney fee award. For services on Board review, claimant’s attorney is awarded \$1,000, payable by Oregon Wire/SAIF. The remainder of the ALJ’s order is affirmed.

Entered at Salem, Oregon on January 13, 2004

¹ In making this award, we observe that claimant’s position on review (that we should affirm the ALJ’s order) has not prevailed.