

In the Matter of the Compensation of  
**THOMAS L. MCDONELL, Claimant**  
WCB Case No. 02-07808, 02-06078, 02-05553

**ORDER ON REVIEW**

Cary et al, Claimant Attorneys  
Johnson Nyburg & Andersen, Defense Attorneys  
Julie Masters, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Kasubhai, Langer, and Bock. Member Langer dissents.

The SAIF Corporation requests review of that portion of Administrative Law Judge (ALJ) Tenenbaum's order that: (1) set aside SAIF's denial of claimant's occupational disease claim for bilateral hearing loss; and (2) upheld Liberty Northwest Insurance Corporation's denial of claimant's occupational disease claim for the same condition. On review, the issues are compensability and responsibility. We affirm.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," including the ALJ's "Ultimate Findings of Fact."

CONCLUSIONS OF LAW AND OPINION

Claimant was the part-owner and, later, the sole proprietor of a drive-through car wash from 1965 until his retirement in July 2000. SAIF provided coverage for the car wash from December 1980 through August 1987, and from October 1998 through October 2000. Liberty Northwest Insurance Corporation (Liberty) provided coverage from July 1987 through November 1998.

Based on a review of the medical evidence, the ALJ concluded that claimant's bilateral hearing loss condition was compensably related to his work activity, and assigned responsibility to SAIF for its period of coverage from 1998 to 2000. On review, SAIF contends that the medical evidence does not persuasively establish the compensability of claimant's bilateral hearing loss condition. In addition, SAIF argues that even if claimant's bilateral hearing loss condition is compensable, the ALJ applied the wrong test when assigning responsibility.

We adopt the ALJ's reasoning with regard to the compensability of claimant's bilateral hearing loss condition. Further, in response to SAIF's contention that Dr. Lindgren never stated that claimant's work activity was the major contributing cause of his condition, we note that "magic words" are not required to establish compensability where the record as a whole satisfies claimant's burden of proof. *Liberty Northwest Ins. Corp. v. Cross*, 109 Or App 109, 112 (1991), *rev den* 312 Or 676 (1992) (the use of "magic words" or statutory language is not required where the record as a whole satisfies the burden of proof); *see also Richard S. Herd*, 56 Van Natta 514 (2004). Here, we conclude that the record as a whole establishes that claimant's work activity was the probable major cause of his bilateral hearing loss condition.

With regard to responsibility, the parties agree that the last injurious exposure rule (LIER) applies. The parties also agree that, under the LIER, initial responsibility for claimant's bilateral hearing loss condition rests with SAIF for its first period of coverage. However, SAIF may shift responsibility for the condition to a subsequent insurer by establishing that the employment while the subsequent insurer was on the risk actually contributed to the cause or a worsening of the condition. *See Reynolds Metals v. Rogers*, 157 Or App 147, 153 (1998), *rev den* 328 Or 365 (1999); *Willamette Industries, Inc. v. Titus*, 151 Or App 76, 81 (1997).

The medical evidence establishes that both periods of subsequent employment, under Liberty and SAIF's coverage, respectively, contributed to claimant's bilateral hearing loss condition. We reason as follows.

Claimant testified that he never went a day without going into the car wash tunnel, where the noisy equipment was located, until the business was closed in 2000. (Tr. 41). Based on claimant's attitude, demeanor and responsiveness, the ALJ found claimant to be credible and reliable. Although not statutorily required, we generally defer to an ALJ's credibility determination when it is based on the ALJ's opportunity to observe the witness. *See Erck v. Brown Oldsmobile*, 311 Or 519, 526 (1991). However, we do not do so where inconsistencies in the record raise such doubt that we are unable to conclude that material testimony is unreliable. *See Gail A. Albro*, 48 Van Natta 41, 42 (1996) (inconsistencies in the record may be a sufficient basis to disagree with the ALJ's credibility finding if the inconsistencies raise sufficient doubt that material testimony is credible).

Here, the inconsistencies in the record do not lead us to conclude that the material testimony is not credible. Accordingly, we defer to the ALJ's demeanor-based credibility findings.

Liberty's coverage extended from July 1987 through November 7, 1998. Dr. Lindgren, who examined claimant on one occasion, opined that there had been a worsening between 1987 and 1997, under Liberty's coverage. (Ex. 12A-18-22). He based his opinion on claimant's continued noise exposure, which is consistent with claimant's testimony that he was exposed to the noisy equipment in the car wash tunnel at least once every day.

With regard to SAIF's second period of coverage from 1998 to 2000, we find that Dr. Lindgren's opinion persuasively establishes that it is medically probably that claimant's employment between 1998 and 2000 actually contributed to his bilateral hearing loss condition. Dr. Lindgren stated that had claimant been exposed to similar occupational noise after 1998 as prior to 1998, it was medically probable that his work exposure contributed to cause claimant's bilateral hearing loss condition. (Ex. 12A-34). Claimant testified that while he took a two to three month vacation in the last two to three years of his business, he was around the same noisy equipment for the same amount of time in the remaining months of that time period. (Tr. 59-60). We find claimant's testimony consistent with Dr. Lindgren's assumptions regarding his occupational noise exposure. As such, we conclude that it is medically probable that claimant's occupational noise exposure under SAIF's 1998-2000 coverage period actually contributed to the cause of claimant's bilateral hearing loss condition.<sup>1</sup>

Accordingly, we find that SAIF is responsible for claimant's compensable bilateral hearing loss condition.

Claimant's attorney is entitled to an assessed fee for services on review. ORS 656.382(2). 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 regarding his bilateral hearing loss condition is \$2,500, payable by SAIF. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's respondent's brief and his counsel's undisputed statement of services), the complexity of the issues, and the value of the interest involved.

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<sup>1</sup> Because we find that claimant's condition is compensable, and because the remaining medical opinions do not support the overall compensability of his condition, we need not address those opinions with regard to the responsibility issue.

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ORDER

The ALJ's order dated September 26, 2003 is affirmed. For services on review, claimant's attorney is awarded a \$2,500 attorney fee, payable by SAIF.

Entered at Salem, Oregon on May 13, 2004

Board Member Langer dissenting.

Finding Dr. Lindgren's opinion most persuasive, the ALJ found compensable claimant's claim for bilateral hearing loss. Relying on "the record as a whole," the majority concludes that claimant established a compensable claim. Because I disagree with that conclusion, I respectfully dissent.

The record identifies at least two definite contributors to claimant's entire hearing loss – presbycusis (age-related hearing loss) and industrial noise exposure. Dr. Lindgren reported that claimant's industrial noise exposure constituted the major contributing cause of claimant's hearing loss in 1987. (Exs. 8A; 11-1). At the same time, he acknowledged that presbycusis undoubtedly contributed to claimant's present hearing loss (Ex. 12A-8), but reported that its contribution could be neither accurately measured nor estimated. (Ex. 11-1). On that basis alone, I find Dr. Lindgren's opinion unexplained and unpersuasive. Because he did not know how much one factor (presbycusis) contributed to claimant's total hearing loss, I am not persuaded that he could measure the contribution of the other factor (noise-exposure).

In addition, I find unpersuasive Dr. Lindgren's general theory that noise exposure accelerates age-related hearing loss and that, therefore, part of age-related hearing loss should be considered noise-related. (Ex. 12A-26). That theory originated in the so-called Gates study published by the University of Washington in 2000. The study was based on research conducted in the nineteen fifties. (Ex. 12A-37). According to Dr. Lindgren, the Gates study establishes that "noise-injured ear ages more rapidly than non-noise injured ear contrary to the dogma that once the noise has stopped there is no additional damage." (Ex. 11-1).

Another expert, Dr. Richard Hodgson, reported that the Gates study has weaknesses, including insufficient data of the duration of harmful noise exposure, for which other authors reject it. Dr. Hodgson concluded that Dr. Lindgren was "over-interpreting" the information in the study and that the study does not support a conclusion that a person continues to have significant hearing loss due to

previous industrial noise exposure after the person quits working. (Ex. 13-1, 5). The third expert, Dr. Sterling Hodgson, agreed with Dr. Richard Hodgson's criticism of the Gates study. (Ex. 15-5). Because two experts rebutted persuasively the theoretical basis of Dr. Lindgren's causation opinion, I would not rely on it.

Further, I find Dr. Lindgren's opinion rather equivocal. Although he attributed the major part of claimant's hearing loss to noise exposure, he also stated that claimant's hearing loss was "consistent with but not diagnostic of noise-induced hearing loss." (Ex. 11-1). Moreover, in his deposition, he acknowledged that "the major loss is the lower frequencies." (Ex. 12A-18). He added: "[H]owever, you can't be absolutely certain of that. A noise injured ear ages more rapidly than a non-injured ear[.]" (*Id.*). I interpret that part of Dr. Lindgren's testimony to mean that, although he could not be absolutely certain, he believed claimant's major hearing loss was more probably than not age-related. That part of Dr. Lindgren's opinion, however, is inconsistent with his report that the major contributing cause of claimant's hearing loss is the noise exposure.

Finally, I disagree with the majority's adoption of the ALJ's reasoning that Dr. Lindgren obtained the most accurate history of claimant's work exposure. For example, Dr. Lindgren admitted not having any information about decibel levels that existed at claimant's place of employment. (Ex. 12A-14). In my view, Dr. Lindgren's information about claimant's noise exposure was not superior to that of other doctors.

Only Dr. Lindgren's opinion supports compensability of claimant's claim. Because I find it unpersuasive, I would conclude that claimant failed to carry his burden to establish a compensable occupational disease.