In the Matter of the Compensation of
DAVID A. JOHNSON, Claimant
WCB Case No. 02-01105, 02-01104, 02-00468, 02-00467, 02-00466, 02-00358, 01-09283, 01-09282
ORDER ON REMAND
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Reviewing Panel: Members Biehl and Lowell.

This matter is before the Board on remand from the Court of Appeals. *SAIF v. Johnson*, 198 Or App 504 (2005). The court has reversed our prior order, *David A. Johnson*, 55 Van Natta 3298 (2003), which affirmed an Administrative Law Judge's (ALJ's) order that set aside the SAIF Corporation's denial, on behalf of Gilkison & Dad (SAIF/Gilkison), of claimant's occupational disease claim for bilateral hearing loss. In reaching our conclusion, we had determined that claimant did not first seek or receive "medical treatment" when he was administered an audiogram as a promotional offer and was fitted for a hearing aid by either a licensed hearing aid specialist or audiologist. Holding that we erred in making that determination, the court has remanded for reconsideration.

FINDINGS OF FACT

We adopt the ALJ's findings of fact and provide the following summary.

Claimant worked at several jobs for different employers in the logging industry between 1960 and his retirement in 1997 at the age of 60. Each of his jobs exposed him to loud noise, and he began to notice hearing loss in the 1980s.

The ALJ provided the following summary of the coverage periods for claimant's employers. Crown Zellerbach, insured by SAIF (SAIF/Crown), employed claimant from 1960 through 1966; Bridge Creek, insured by Liberty Northwest Insurance Corporation (Liberty/Bridge Creek), employed him in 1992; Gross & Son, insured by Liberty (Liberty/Gross), employed him from August 1991 through November 1992; Carol's Enterprises, insured by SAIF (SAIF/Carol's), employed him from April 1993 through June 1993; Robert Kelley, insured by Liberty (Liberty/Robert Kelley), employed him from June 1993 through June

1994; Barrett Business Services/Pinnacle, employed him from July 29, 1996 through November 29, 1996; Atchley Brothers, insured by SAIF (SAIF/Atchley), employed him from March 18 through April 29, 1997; and SAIF/Gilkison employed him from May 22, 1997 through October 31, 1997.

In September 1993, claimant's wife entered a contest sponsored by a commercial hearing aid vendor, Beltone, at a fair, and she won a free hearing exam and (if necessary) free hearing aid. She gave her prize to claimant, and he then took a diagnostic test from a Beltone employee who was either an audiologist or licensed hearing aid specialist. The Beltone employee determined that claimant suffered bilateral hearing loss and fitted him for the free hearing aid. She also offered to sell claimant a hearing aid for his other ear, but he declined the offer. When the single hearing aid subsequently broke, he did not have it repaired or replaced; he testified that if he had had enough money to replace it, he would have.

Claimant next sought a hearing test in June 2001, when he underwent another audiogram and received follow-up treatment from an otolaryngologist, Dr. Urben. At that time, he had been retired for four years and his most recent employer was Gilkison.

In September 2001, another otolaryngologist, Dr. Hodgson, performed an insurer-arranged medical examination. In November 2001, claimant gave notice of his claim for workers' compensation benefits to each of his employers for his bilateral hearing loss. All denied responsibility.

On March 6, 2002, the Department of Consumer and Business Services issued a ".307" order designating SAIF/Crown as the responsible paying agent. (Ex. 33).

CONCLUSIONS OF LAW AND OPINION

The ALJ applied the last injurious exposure rule (LIER) to determine responsibility. The ALJ determined that claimant's visit to Dr. Urben, rather than his visit to the Beltone employee, marked the first time claimant sought or received medical treatment. Because SAIF/Gilkison was the most recent employer that could have contributed to claimant's hearing loss when claimant visited Urben, the ALJ assigned presumptive responsibility to that company. SAIF/Gilkison did not rebut the presumption and was held responsible.

On review, we agreed with the ALJ that the care that claimant received at Beltone did not amount to "medical treatment" and we affirmed the ALJ's order. *David A. Johnson*, 55 Van Natta at 3298. SAIF/Gilkison sought judicial review.

The court explained that the dispositive question was whether claimant received "medical treatment" from the Beltone employee. Citing *Foster Wheeler Corp. v. Marble*, 188 Or App 579, 583, *rev den*, 336 Or 60 (2003), the court said that to have received "medical treatment," claimant would had to have obtained "'either ongoing medical care or application of some techniques, drug, or other action designed either to alleviate or cure a disease or injury.'" *Johnson*, 198 Or App at 510 (quoting *Foster Wheeler Corp.*, 188 Or App at 583). The court explained that, in the absence of further curative steps, audiograms alone did not constitute medical treatment for hearing loss. In contrast, relying on *Raytheon Constructors v. Tobola*, 195 Or App 396, 402 (2004), the court observed that medical treatment *did* occur when an audiologist administered audiograms and also recommended hearing aids because the audiologist took an "action designed to alleviate * * * a disease."

In *Johnson*, the court concluded that, because claimant not only took an audiogram, but was fitted for a hearing aid, he obtained the "'application of some technique, drug, or other action designed either to alleviate or cure a disease or injury.'" *Johnson*, 198 Or App at 510 (quoting *Foster Wheeler Corp.*, 188 Or App at 583). The court concluded that we erred in determining that claimant did not seek or receive medical treatment for the purposes of the LIER when he underwent the September 1993 audiogram and hearing aid fitting. The court remanded for reconsideration.

Under the LIER, liability is presumptively assigned to the most recent potentially causal employer for whom claimant worked or was working at the time claimant first sought or received medical treatment, whichever comes first. *Bracke v. Baza'r*, 293 Or 239, 248 (1982); *Agricomp Ins. v. Tapp*, 169 Or App 208, 212-13, *rev den*, 331 Or 244 (2000).

Here, the court has determined that, for purposes of assigning presumptive responsibility under the LIER, claimant first sought and received medical treatment for his hearing loss in September 1993. At that time, Liberty was providing coverage on behalf of Robert Kelley and, therefore Liberty/Robert Kelley is presumptively responsible.

Liberty/Robert Kelley can transfer liability to a previous insurer by establishing that it was impossible for its employer to have caused the condition or that a prior period of employment was the sole cause of the condition. *Roseburg Forest Products v. Long*, 325 Or 305, 313 (1997). Alternatively, Liberty/Robert Kelley can transfer liability to a subsequent insurer by establishing that the subsequent employment actually contributed to a worsening of the condition. *Reynolds Metals v. Rogers*, 157 Or App 147, 153 (1998), *rev den*, 328 Or 365 (1999).

The only relevant medical opinion regarding responsibility is from Dr. Hodgson, who examined claimant in September 2001 on behalf of SAIF. Dr. Hodgson also provided additional medical opinions on behalf of other carriers. In a December 27, 2001 letter, Dr. Hodgson explained that he could not say that it was medically impossible for claimant's employment with Robert Kelley to have contributed to his current hearing loss. (Ex. 23-2, -3). In a January 2002 letter, Dr. Hodgson could not say that the sole cause of claimant's noise-induced hearing loss occurred in the first 10 to 15 years of his employment. (Ex. 27).

In a deposition, Dr. Hodgson was asked to assume that claimant's work at Gilkison was noisier than that at Robert Kelley, Bridge Creek or Gross & Son, and that claimant worked at Gilkison with the window down because it was hot. (Ex. 34-19). Based on the premise that the machines at those three prior employments were quieter than at Gilkison, Dr. Hodgson agreed that it was medically impossible for those three employment periods to have contributed to claimant's hearing loss. (Ex. 34-19, -20).

Later in his deposition, however, Dr. Hodgson agreed that without specific noise surveys for those three prior employers, he was speculating whether claimant's work exposure there had contributed or not. (Ex. 34-21). Dr. Hodgson agreed that it was reasonable, in medical probability, to assume that all work exposure before September 1993 contributed to claimant's hearing loss, which included claimant's employment at Robert Kelley. (Ex. 34-21, -22).

When read as a whole, we find that Dr. Hodgson's opinion does not establish that it was impossible for claimant's exposure at Robert Kelley to have caused his hearing loss. *See Gormley v. SAIF*, 52 Or App 1055 (1981) (medical opinion must be stated in terms of reasonable medical probability, not mere possibility). Furthermore, the medical evidence does not establish that a prior period of employment before Robert Kelley was the sole cause of his hearing loss. Consequently, Liberty/Robert Kelley cannot transfer liability to a previous carrier.

We turn to the question whether Liberty/Robert Kelley can transfer liability to a subsequent carrier by establishing that the subsequent employment actually contributed to a worsening of the condition. In order to shift responsibility to a subsequent insurer, the injured worker must suffer a worsening of the condition; a mere increase in symptoms is not sufficient. *Reynolds Metals v. Rogers*, 157 Or App at 153.

Claimant was employed at three locations after he worked at Robert Kelley: Barrett Business Services/Pinnacle employed him from July 29, 1996 through November 29, 1996; SAIF/Atchley employed him from March 18 through April 29, 1997; and SAIF/Gilkison employed him from May 22, 1997 through October 31, 1997.

Dr. Hodgson concluded that claimant's short employment at Atchley did not contribute to a worsening of his hearing loss. (Ex. 27, 31, 34-10).

Dr. Hodgson initially determined that claimant's employment at Gilkison did not contribute to his hearing loss. (Exs. 10, 32). In reaching that conclusion, he had relied heavily on an industrial hygiene survey at Gilkison. (Ex. 34-7). In a deposition, however, Dr. Hodgson changed his opinion based on claimant's testimony that he had worked on a different yarder than the one tested, which was noisier. (Ex. 34-6, -7). Dr. Hodgson said that he could no longer say that it was impossible for claimant's employment at Gilkison to have contributed to the hearing loss. (Ex. 34-8).

Dr. Hodgson also changed his opinion about whether claimant's employment after 1993 had contributed to a worsening of the hearing loss. In a February 14, 2002 concurrence letter, after reviewing claimant's September 1993 audiogram, Dr. Hodgson agreed that, based on his comparison of the 1993 and 2001 audiograms, claimant had experienced a progression in his bilateral hearing loss beyond what would be expected by simple aging from 1993 to 2001. In reaching that conclusion, Dr. Hodgson had compared the hearing loss measurements at each frequency. He agreed that claimant's work exposure after 1993 had independently contributed to a worsening of the hearing loss. (Ex. 30A).

In a deposition, however, Dr. Hodgson indicated that claimant's employment after 1993 did *not* actually contribute to a worsening of his hearing loss. He said that claimant's left ear hearing loss went from 475 decibels in 1993 to 490 decibels in 2001. Dr. Hodgson explained that the difference in the left ear was "quite slight" and was probably in the realm of "test retest variability," and it could have been less hearing loss than expected from age during that time. (Ex. 34-9).

Later in the deposition, Dr. Hodgson was asked about a graph he had prepared showing that "pure tone average" between September 1993 and September 2001 increased two and a half decimal points for the left ear. Dr. Hodgson said that he could not render an opinion as to whether the "majority cause" of that increase was due to work versus presbycusis. (Ex. 34-12). He explained that the increase of 15 decibels in the left ear during that period was less than would be expected from the change due to age. (Ex. 34-12, -14). He could not say that work was the "major cause" of the worsening in the left ear between 1993 and 2001. (Ex. 34-12, -13). Dr. Hodgson explained that "there's no way of knowing if that change is due to noise or age." (Ex. 34-13).

Claimant's right ear hearing loss went from 450 decibels in 1993 to 495 decibels in 2001, a difference of 45 decibels. (Ex. 34-9, -15). Dr. Hodgson said that the change due to age expected for an average person was 41 decibels, so the change in claimant's right ear was slightly more than that. (Ex. 34-13). He was unable to say that the major cause of that increase was work-related. (*Id*.) Dr. Hodgson also noted that there was "test retest variability" in those figures. (Ex. 34-15). He also agreed that it was "more probable than not" that the change in claimant's hearing between 1993 and 2001 was due to aging, rather than noise. (Ex. 34-16). Dr. Hodgson also agreed that it was "more probable than not" that the sole cause of claimant's hearing loss was his exposure before September 1993. (Ex. 34-16, -17).

We are unable to reconcile Dr. Hodgson's February 14, 2002 concurrence letter in which he agreed that claimant's work exposure after 1993 had independently contributed to a worsening of the hearing loss (Ex. 30A), with his deposition testimony indicating that it was more probable than not that the work exposure after 1993 did *not* contribute to a worsening of the hearing loss. We find no reasonable explanation for Dr. Hodgson's change of opinion. *Compare Kelso v. City of Salem*, 87 Or App 630, 633 (1987) (where there was a reasonable explanation for a physician's change of opinion, that opinion was persuasive). In any event, we find that Dr. Hodgson's opinion regarding the contribution of claimant's employment after 1993 to his hearing loss is not well-reasoned or persuasive. We conclude that the medical evidence is not sufficient to establish that claimant's employment after Liberty/Robert Kelley actually contributed to a worsening of the condition. Consequently, responsibility for claimant's hearing loss condition remains with Liberty/Robert Kelley.

Accordingly, on reconsideration, the ALJ's order dated April 16, 2003 is reversed. Liberty/Robert Kelley's denial is set aside and the claim is remanded to Liberty/Robert Kelley for processing in accordance with law. SAIF/Gilkison's denial is reinstated and upheld. The ALJ's $3,000 attorney fee award under ORS 656.307(5) shall be paid by Liberty/Robert Kelley.

IT IS SO ORDERED.

Entered at Salem, Oregon on August 5, 2005