In the Matter of the Compensation of
GARY JONES, Claimant
WCB Case No. 05-05294
ORDER ON REVIEW
Welch Bruun & Green, Claimant Attorneys
Andersen & Nyburg, Defense Attorneys

Reviewing Panel: Members Lowell and Biehl.

The insurer requests review of Administrative Law Judge (ALJ) Pardington's order that set aside its denial of claimant's occupational disease claim for bilateral sensorineural hearing loss. On review, the issue is responsibility. We reverse.

FINDINGS OF FACT

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

CONCLUSIONS OF LAW AND OPINION

Claimant worked for the insured employer from 1980 through 1997, using diesel equipment, and as a self-employed tow truck driver beginning in 1997. He filed a claim for bilateral hearing loss some time after leaving work with the insured employer.[1] Claimant first sought treatment for hearing loss in 2005. The insurer then issued a responsibility denial.[2]

Reasoning that the medical evidence established that employment conditions with the insured employer potentially contributed to claimant's hearing loss, and that the medical evidence attributing potential causation to self-employment was unpersuasive, the ALJ set aside the insurer's responsibility denial. On review, the insurer argues that responsibility presumptively lies with claimant's period of self-employment because his disability did not occur until 2005, after he had left employment with the insured employer and begun self-employment. It further asserts that the ALJ's assignment of responsibility was incorrect because the

[1] The "801" form is undated.

[2] Both Dr. Lindgren, claimant's attending physician, and Dr. Hodgson, an insurer-arranged medical examiner, opined that claimant suffers from hearing loss caused primarily by occupational exposure. (Exs. 5-4; 7). Thus, compensability is not at issue.

medical evidence did not establish that claimant's employment for the insured was the sole cause of his hearing loss or that it was impossible for claimant's self-employment work conditions to have caused the hearing loss. We agree with the insurer's contentions.

If the record establishes that a particular employment was the actual (*i.e.*, major contributing cause) of an occupational disease, responsibility for the condition lies with that employment. *Willamette Indus., Inc. v. Titus*, 151 Or App 76, 82–83 (1997); *Eric M. Watts*, 54 Van Natta 999, 1000 (2002). In that case, the carrier may invoke the last injurious exposure rule (LIER) defensively, to shift responsibility forward, if the record shows that subsequent employment actually contributed to the condition. *Watts*, 54 Van Natta at 1000.

If, on the other hand, the record does not establish that employment conditions with a particular employer were the major contributing cause of an occupational disease, then LIER assigns presumptive responsibility to the most recent employment that could have contributed to the disease. *Bracke v. Baza'r*, 293 Or 239, 248–49 (1982). The date on which presumptive responsibility is triggered is when the worker first seeks treatment or has time loss. *SAIF v. Kelly*, 130 Or App 185 (1994); *Timm v. Maley*, 125 Or App 396, 401 (1994), *rev den* 319 Or 81 (1994). The presumptively responsible carrier can shift liability to a previous carrier by establishing that it was impossible for its employment conditions to have caused the condition or that a prior period of employment was the sole cause of the condition. *Roseburg Forest Prods. v. Long*, 325 Or 305, 313 (1997).

Here, the record does not establish that employment conditions with the insured employer were the major contributing cause of claimant's hearing loss. Although both medical experts opined that occupational noise exposure was the major contributing cause of claimant's hearing loss, neither addressed the specific proportion of the hearing loss that was due to work with the insured employer. Therefore, responsibility is assigned according to LIER.

Claimant first sought treatment for his occupational disease in 2005. Thus, presumptive responsibility for the occupational disease lies with his employment at that time: his self-employment as a tow truck operator. *See United Parcel Service v. Likos*, 143 Or App 486, 490 (because the claimant's disability arose while the worker was self-employed, the self-employment was the presumptively responsible employment); *Craig A. McIntyre*, 51 Van Natta 34, 35 (1999) (presumptive responsibility was with the claimant's self-employment because that was the last

potentially causal employment). Therefore, claimant bears the burden under *Long* to show either that a previous employment was the sole cause of his hearing loss or that his work as a tow truck operator could not have caused his hearing loss. Because, as discussed above, the medical evidence does not show that employment conditions with the insured were the sole cause, claimant may only shift responsibility backward by proving it was impossible for his work as a tow truck operator to have caused his bilateral hearing loss.

Both Dr. Hodgson and Dr. Lindgren opined that claimant's self-employment could have contributed to hearing loss. (Exs. 9; 10-2). There is no contrary medical evidence.[3] Accordingly, the record does not show that it was impossible for work conditions during claimant's self-employment to have caused his hearing loss.[4] Therefore, claimant has not made the necessary showing to establish that the insurer is responsible for his hearing loss. Accordingly, we reverse.

ORDER

The ALJ's order dated November 30, 2005 is reversed. The insurer's denial is reinstated and upheld. The ALJ's $1,000 attorney fee award is also reversed.

Entered at Salem, Oregon on August 9, 2006

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[3] Dr. Lindgren concluded his ultimate opinion by stating that he "[did] not think that [claimant's] employment as a tow truck driver could have contributed to his hearing loss." (Ex. 10-2). However, in the same opinion, Dr. Lindgren described it as "remotely possible that claimant's work operating a tow truck contributed to his hearing loss." (*Id*.) He explained his opinion that there was "less than a one percent probability" of such a contribution. (*Id*.) However, the test is whether such a contribution was possible, rather than probable. *Robert G. McCullough*, 57 Van Natta 3259 (2005). Accordingly, Dr. Lindgren's opinion supports assigning responsibility to claimant's self-employment.

[4] Claimant and his wife testified that the tow truck was not noisy. (Tr. 7, 12). Claimant's wife testified that their personal car was actually noisier than the tow truck. (Tr. 12). However, claimant testified that he used both vehicles in the course of his self-employment. (Tr. 8).