

In the Matter of the Compensation of
LIONEL M. RIOS, Claimant

WCB Case No. 04-08312, 04-05311, 04-05310, 04-03816, 04-02803, 04-02256,
03-08153

ORDER ON REVIEW

John M Hoadley, Claimant Attorneys
Wallace Klor & Mann PC, Defense Attorneys
Gilroy Law Firm, Defense Attorneys
Alice M Bartelt, SAIF Legal Defense Attorneys
David L Bussman, Safeco Legal, Defense Attorneys
Jerry Keene, Reinisch et al, Defense Attorneys

Reviewing Panel: Members Lowell and Kasubhai.

AIG Claims Services (AIG), on behalf of Coe Manufacturing Company, requests review of those portions of Administrative Law Judge (ALJ) Otto'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 claim for the same condition issued by the SAIF Corporation, Safeco, Special Districts Association of Oregon, and American Protection. Claimant requests an attorney fee award for services on review regarding the compensability issue. On review, the issues are responsibility, and (potentially) attorney fees.

We adopt and affirm the ALJ's order with the following supplementation.

The ALJ found the last insurer,¹ AIG, responsible for claimant's hearing loss under the LIER. In doing so, the ALJ found that the "onset of disability" date occurred when claimant first sought treatment in September 2003 and that AIG failed to shift responsibility to an earlier insurer because the medical evidence did not establish it was impossible for employment conditions during AIG's period of coverage not to have caused claimant's hearing loss or that the hearing loss was solely caused by claimant's work while employer was covered by other insurers.

¹ Claimant worked for the same employer throughout the relevant period, but the last injurious exposure rule (LIER) applies to determine liability among insurers for a single employer just as it does to determine responsibility among multiple employers. *Roseburg Forest Products v. Long*, 325 Or 305, 314 (1997).

On review, AIG argues that: (1) claimant first sought medical treatment for his hearing loss when he had a hearing test at “Miracle Ear;”² or (2) in the alternative, even if it was presumptively responsible under LIER, it sustained its burden of proof on the “impossibility/sole cause” issue.

Under the LIER, initial or presumptive responsibility for a condition is assigned to the last period of employment where conditions could have caused claimant’s disability. *Reynolds Metals v. Rogers*, 157 Or App 147, 153 (1998), *rev den* 328 Or 365 (1999); *Bracke v. Baza’r*, 293 Or 239, 248 (1982). The “onset of disability” is the triggering date for determining which employment is the last potentially causal employment. *Charles M. Spivey*, 56 Van Natta 93, 95 (2004), *aff’d without opinion*, 205 Or App 111 (2006).

In support of its responsibility argument, AIG contends that, although there is no medical record regarding claimant’s hearing test, claimant’s un rebutted testimony that he went to “Miracle Ear” is sufficient to establish that he sought “treatment,” triggering the “onset of disability” for purposes of the LIER. However, we find claimant’s testimony insufficient to establish that he sought “treatment” from Miracle Ear.

In making this determination, we have considered the court’s definition of “treatment” with regard to the LIER. In *Foster Wheeler Corp. v. Marble*, 188 Or App 579, 583 (2003), the court explained that treatment “involves either ongoing medical care or application of some technique, drug, or other action designed either to alleviate or cure a disease or injury.” Subsequently, in *Raytheon Constructors v. Tobola*, 195 Or App 396 (2004), the court clarified that medical treatment did occur when an certified audiologist administered audiograms and also recommended hearing aids. The court explained that an audiologist or hearing aid specialist, licensed in the state, were medical providers under ORS 656.005(12)(a). *SAIF v. Johnson*, 198 Or App 504 (2005).

Here, although claimant testified that an employee from Miracle Ear administered a hearing test and recommended hearing aids, it is unknown whether that employee was an audiologist, or a licensed care provider. Thus, absent

² We acknowledge that AIG indicated that claimant visited “Miracle Ear” in 1987. Claimant’s statement indicated that it was in 1995, but he testified that he could not remember the year. Because we find that the visit to Miracle Ear was not medical treatment, the exact date is irrelevant. (Ex. 13B-17; Tr. 22-23).

information in the record regarding the individual who administered the hearing test, claimant's visit to Miracle Ear does not qualify as medical treatment. *See Charles M. Spivey*, 56 Van Natta at 96 (absent evidence that the individual who sold the claimant hearing aids was a certified audiologist, licensed to practice the healing arts, the claimant had not received medical services).

Consequently, we agree with the ALJ's determination that presumptive responsibility under the LIER rests with AIG, the last 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 AIG did not establish that responsibility should shift to a previous insurer.

AIG can transfer liability to a previous insurer by establishing that it was impossible for the work place conditions during its period of coverage to have caused the condition or that a prior period of employment was the sole cause of the condition. *Roseburg Forest Products*, 325 Or at 313.

Here, AIG provided coverage for the employer from November 1, 2001 to December 8, 2001 when claimant retired and sought medical treatment. Thus, although AIG could theoretically have carried its burden of proving sole causation by showing that claimant's hearing loss was not affected during that period of coverage for the employer, we adopt the ALJ's reasoning and conclusion that the medical opinions did not meet that burden.³

Specifically, we find that: (1) the medical history of claimant working only in the "burner area" was inaccurate since he testified that he entered the noisy part of the shop at least 12 times a day; (2) noise testing was done two years after claimant left the job and there is no evidence that the noise conditions were the same as at the time of claimant's employment; and (3) no hearing test was done preceding claimant's employment while AIG was providing coverage. Thus, based on these particular circumstances, we conclude that AIG's "sole causation/impossibility" argument is unpersuasive when compared to the contrary medical opinion. Accordingly, we agree with the ALJ that responsibility remains with AIG and does not shift to a prior insurer.

³ We do not adopt the fourth full sentence of the first paragraph on page nine of the Opinion and Order.

Attorney Fees

Finally, claimant contends that because the ALJ addressed the compensability of his condition, his attorney is entitled to an assessed attorney fee under ORS 656.382(2) for services on review. We disagree and reason as follows.

A claimant's entitlement to an attorney fee award in workers' compensation cases is governed by statute. Unless specifically authorized by statute, attorney fees cannot be awarded. *Forney v. Western States Plywood*, 297 Or 628 (1984).

ORS 656.382(2) authorizes an assessed attorney fee when a carrier initiates a hearing request or request for Board review *to obtain* a disallowance or reduction in claimant's compensation award, and the ALJ or the Board finds *on the merits* that the compensation award should not be disallowed or reduced. *Deaton v. Hunt-Elder*, 145 Or App 110, 114-115 (1996); *Strazi v. SAIF*, 109 Or App 105, 107-108 (1991).

Here, the ALJ determined that compensability was not at issue, but rather, the issue at hearing was determination of responsibility among the carriers, which arose from the issuance of a designation of a paying agent under ORS 656.307. The authority for awarding an attorney fee, therefore, is found in ORS 656.307. Although ORS 656.307(5) provides that an ALJ may award a reasonable attorney fee if claimant appears at a proceeding under ORS 656.307 and actively and meaningfully participates through an attorney, there is no statutory authority under ORS 656.307 granting authority to the Board, to award an assessed attorney fee for claimant's counsel's services on review. *See, e.g., John M. Bowhan*, 54 Van Natta 285, 288 (2002); *Lynda C. Prociw*, 46 Van Natta 1875 (1994). Therefore, because compensability of claimant's condition was not at issue at hearing or on review, we are not statutorily authorized to award an attorney fee.

ORDER

The ALJ's order dated November 22, 2005 is affirmed.

Entered at Salem, Oregon on June 14, 2006