

In the Matter of the Compensation of  
**MERLE G. WINTERS, Claimant**  
WCB Case No. 04-05756, 04-01963  
ORDER ON REVIEW

George J Wall, Claimant Attorneys  
Thaddeus J Hettle & Assoc, Defense Attorneys  
Julie Masters, SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Lowell and Weddell.

Claimant request review of Administrative Law Judge (ALJ) Bethlahmy's order that: (1) upheld denials of claimant's occupational disease claim for a bilateral hearing loss condition issued by the SAIF Corporation and OIGA; and (2) did not assess penalties against SAIF for allegedly unreasonable claim processing. On review, the issues are compensability, penalties, and, potentially, responsibility. We affirm in part and reverse in part.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Facts," as summarized below.

From 1965 to 1981, claimant was employed with K-Lines, SAIF's insured, as a truck driver. In 1983, after retiring from K-Lines, claimant worked briefly for George Lawrence as a truck driver.<sup>1</sup> George Lawrence was an Oregon employer. (Ex. 23-2; Tr. 22-23). Then, claimant spent less than two years as a truck driver for D&M, which was a trucking venture operated by claimant and another individual.

In 2003, claimant sought medical treatment for hearing loss and had his first audiogram. Dr. Lindgren, claimant's treating physician, opined that claimant's truck driving as a whole was the major cause of claimant's hearing loss condition. Dr. Lindgren noted that claimant's employment with George Lawrence and D&M probably did not contribute to his hearing loss condition, but that such contribution was not "impossible." (Ex. 26).

Dr. Hodgson performed an examination at the request of SAIF. He opined that claimant's overall work exposure was the major contributing cause of his hearing loss condition and that "no one employer, or period of insurance" could be proven as the actual, sole, or major contributing cause of claimant's hearing loss condition. (Exs. 19; 25-1).

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<sup>1</sup> Both SAIF and OIGA are representing K-Lines for different periods of coverage.

Both physicians noted a lack of audiological testing directly following claimant's retirement from K-Lines, as well as a lack of measurements gauging noise exposure in claimant's various work environments. Under such circumstances, they were unable to opine that it was "impossible" for work exposure with George Lawrence and D&M to have contributed to claimant's hearing loss condition. (Exs. 19-2; 25-2; 26-1).

### CONCLUSIONS OF LAW AND OPINION

In upholding SAIF's denial, the ALJ found that D&M was presumptively responsible for claimant's hearing loss condition under the "last injurious exposure rule" (LIER). The ALJ reasoned that presumptive responsibility did not shift from D&M because the record did not establish that it was impossible for claimant's employment at D&M to have contributed to claimant's hearing loss condition. Consequently, the ALJ concluded that SAIF was not responsible for claimant's hearing loss condition.

On review, claimant cites *UPS v. Likos*, 143 Or App 486, 491 n 1 (1996), in arguing that an employer not subject to Oregon workers' compensation laws cannot be held responsible under the LIER. Claimant asserts that K-Lines is the only employer subject to Oregon law and, as such, is the responsible employer. For the following reasons, we disagree.

The "assignment" rule of the LIER attaches initial or presumptive responsibility for the claimed condition to the insurer during the last period of employment when conditions could have contributed to the claimant's disability. *AIG Claim Services v. Rios*, 215 Or App 615, 619 (2007); *Mark A. Calbria*, 60 Van Natta 704, 705 (2008). When non-covered employment is presumptively responsible under the LIER (such as self-employment) and the record does not establish that it was impossible for that employment to have caused the condition or that one or more previous employments was the sole cause of the condition, the claimant is not entitled to workers' compensation benefits for a work-related injury. See *Lisa M. Korczak*, 60 Van Natta 1778, 1780 (2008) (by foregoing coverage for her self-employed housekeeping business, the claimant risked not receiving compensation for an on-the-job injury).

Here, it is undisputed that claimant did not seek medical treatment for his hearing loss condition until after he worked with D&M, his last employer. As such, D&M is presumptively responsible for his condition under the LIER. Dr. Hodgson could not exclude claimant's work with D&M as a possible contribution to his hearing loss condition. (Ex. 25). Similarly, Dr. Lindgren could

not state that it was impossible for claimant's employment with D&M to have contributed to his hearing loss condition. (Ex. 26). Based on that medical evidence, responsibility remains with D&M and does not shift to his previous employments with either George Lawrence or K-Lines. *See New Portland Meadows v. Dieringer*, 153 Or App 383, 390 (1998); *Korczak*, 60 Van Natta at 1780.

Claimant contends that his exposure with D&M cannot be considered for purposes of the "assignment" rule for the LIER because D&M was an "out-of-state" employer. However, D&M was a joint-venture/self-employment relationship involving claimant and a second individual, which was based in the State of Oregon. D&M also ran loads for an Oregon business. (Ex. 22). Additionally, claimant's trips began and would "dead-head" in Oregon. (Tr. 39-40). Such circumstances support a conclusion that D&M was an Oregon employer.

In any event, even if claimant's employment with D&M was not considered, responsibility would shift to George Lawrence (his employment subsequent to K-Lines and before D&M). *See SAIF v. Henwood*, 176 Or App 431, 440 (2001), *rev den*, 333 Or 463 (2002) (if both out-of-state and Oregon working conditions contributed to an occupational disease, LIER applies and, because initial responsibility cannot be assigned to an out-of-state employer, the Oregon carrier was responsible); *see also Anthony Castro*, 59 Van Natta 2008, 2012 (2007) (same). Because the medical evidence does not establish that it was impossible for claimant's employment with George Lawrence to have contributed to his hearing loss condition, responsibility would not shift to K-Lines.<sup>2</sup> *Rios*, 215 Or App at 619.

Finally, claimant argues that SAIF's compensability denial was unreasonable and that, as such, a penalty and attorney fee award are appropriate. *See* ORS 656.262(11)(a). Based on the following reasoning, we find SAIF's conduct to be unreasonable.

Under ORS 656.262(11)(a), if an insurer or self-insured employer unreasonably delays or unreasonably refuses to pay compensation, the insurer or self-insured employer shall be liable for an additional amount up to 25 percent of the amount "then due." The standard for determining an unreasonable resistance to

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<sup>2</sup> Claimant argues that SAIF did not establish that he worked for a George Lawrence trucking company that was subject to Oregon workers' compensation law. Regardless of where the ultimate burden of proof rests, the preponderance of the record supports a conclusion that claimant was employed by a trucking company called "George Lawrence" in approximately 1983. (Tr. 10; 17; 24). Moreover, the record establishes that "George Lawrence" was an Oregon employer. (Ex. 23-2).

the payment of compensation is whether, from a legal standpoint, the carrier had a legitimate doubt as to its liability. *Int'l Paper Co. v. Huntley*, 106 Or App 107 (1991); *Michael D. Seaman*, 52 Van Natta 438, 439 (2000) (the compensability portion of a carrier's responsibility denial was found unreasonable because the carrier did not have a legitimate doubt as to the compensability of the claim). If so, the refusal to pay is not unreasonable. "Unreasonableness" and "legitimate doubt" are to be considered in the light of all the evidence available to the insurer. *Brown v. Argonaut Ins.*, 93 Or App 588, 591 (1988); *James L. Bernard*, 60 Van Natta 596, 600 (2008).

Here, when SAIF issued its compensability denial, Dr. Lindgren had opined that claimant's work exposure (including his employment with K-Lines) was the major contributing cause of his hearing loss condition. (Ex. 5). Likewise, Dr. Hodgson had opined that, "on a more probable than not basis," claimant's work exposure at K-Lines contributed to his hearing loss condition. (Ex. 9-4). Neither physician attributed the major contributing cause of claimant's condition to "off-work" factors.

SAIF argues that it was unclear whether claimant intended to pursue an "actual causation" claim against it. In that event, had it conceded compensability, SAIF asserts that its approach to defending the claim under the LIER would have been affected. See *Richard N. Hoffman*, 54 Van Natta 2093 (2002), *on recon.*, 55 Van Natta 229 (2003), *aff'd*, *SAIF v. Hoffman*, 193 Or App 750 (2004) (when a claimant relies on "actual causation" against an employer, the employer can succeed in shifting responsibility to a later employer only by adducing proof that the later employment made an "independent contribution" to the disability). Consequently, SAIF asserts that its compensability denial was justified.

In essence, SAIF relies on *Hoffman* to support its position that its compensability denial was necessary to avoid limiting its eventual responsibility defense to the claim under the LIER. Yet, had SAIF conceded compensability of claimant's hearing loss condition, such an action would not have amounted to an admission that claimant's work exposure *at SAIF's insured* was the cause of his hearing loss condition.<sup>3</sup> See *Conner v. B&S Logging*, 153 Or App 354 (1998); *see also Hoffman*, 193 Or App at 754-55.

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<sup>3</sup> Moreover, a concession of compensability would not have precluded SAIF from invoking a LIER defense at the hearing. In light of its concerns, SAIF could have clarified its intentions in its letter limiting its denial to responsibility. In this way, compensability of the claim could have been conceded (which would be consistent with the medical opinions) and SAIF could have then garnered evidence in support of its position under LIER and *Hoffman* that conditions at claimant's subsequent employments made an "independent contribution" to his hearing loss condition. See *Willamette Industries v. Titus*, 151 Or App 76, 82 (1997); *Hoffman*, 193 Or App at 754.

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Under these circumstances, we find that SAIF did not have a legitimate doubt regarding the compensability of the claim. Consequently, its compensability denial was unreasonable.

However, because of our prior determination that SAIF is not responsible for claimant's hearing loss condition, there are no "amounts due" on which to base a penalty. *See* ORS 656.262(11)(a). Nevertheless, an attorney fee award is still appropriate. *See Nancy Ochs*, 59 Van Natta 1785, 1788 (2007) (attorney fee under ORS 656.262(11)(a) for an employer's untimely acceptance or denial of a claim is not contingent on the assessment of a penalty). After considering the factors set forth in OAR 438-015-0110 and OAR 438-015-0010(4), we find that a reasonable attorney fee under ORS 656.262(11)(a) for the employer's acts of unreasonable conduct is \$1,000, payable by SAIF. In reaching this conclusion, we have given primary consideration to the benefit to claimant, the results achieved and the time devoted to the case (as represented by the record).

#### ORDER

The ALJ's order dated February 15, 2008 is affirmed in part and reversed in part. For SAIF's unreasonable compensability denial, claimant's attorney is awarded a \$1,000 attorney fee, to be paid by SAIF. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on October 27, 2008