
In the Matter of the Compensation of
JOHN A. KNAPP, Claimant
WCB Case No. 08-03292, 08-03291
ORDER ON REVIEW
Martin L Alvey, Claimant Attorneys
Julie Masters, SAIF Legal, Defense Attorneys
Cummins Goodman et al, Defense Attorneys

Reviewing Panel: Members Langer and Biehl.

Public Risk Consultants (PRC), on behalf of Portland Community College (PCC), requests review of Administrative Law Judge (ALJ) Rissberger's order that: (1) set aside its denial of claimant's occupational disease claim for hearing loss; (2) upheld the SAIF Corporation's denial of claimant's occupational disease claim for the same condition; (3) awarded assessed attorney fees totaling \$8,300 under ORS 656.386(1) and ORS 656.308(2)(d), to be paid by PRC; and (4) awarded a penalty and an \$800 employer-paid attorney fee for a discovery violation, payable by PRC. On review, the issues are responsibility, attorney fees, and penalties.

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

In 1991, claimant received a permanent partial disability (PPD) award from an out-of-state claim for bilateral hearing loss. (Exs. 20, 26). From January 29, 2002 to September 21, 2005, he worked as an auto painter for SAIF's insured; he described his work environment as "loud." (Exs. 84-47 through 52, 87-1).¹

On September 12, 2005, claimant treated with Dr. Coale, who performed an audiometric evaluation and ordered an electrocochleography (ECOG). (Exs. 43, 44, 47).

From late September 2005 through April 2007, claimant worked for PCC as a tool room clerk. He worked an average of 24 hours per week without hearing protection beneath a noisy overhead exhaust fan that he considered "very loud." (Tr. 22-26).

¹ During that time, he was also involved in an industrial motor vehicle accident (MVA), after which he complained of vertigo, "tinnitus," ringing in the ears, and worsened hearing. (Exs. 29, 36-2, 39, 43-2, 57).

In December 2006, Dr. Hicks, who had treated claimant since 1990, performed an audiogram. (Exs. 60, 99-7). After reviewing prior audiograms (from 1990, 1991, and September 2005), Dr. Hicks noted progressively worsening hearing loss. (Exs. 64, 77-2).

Dr. Hodgson examined claimant at SAIF's request. (Ex. 88-2). He attributed 40 percent of claimant's hearing loss to his lifetime work exposure, 40 percent to presbycusis, and 20 percent to "[o]ther non-work causes." (Ex. 88-6). He stated that a March 2008 noise report showed that the noise levels at SAIF's insured were below "the threshold for noise induced hearing loss." (*Id.*)

Dr. Wilson examined claimant at PRC's request. (Ex. 92). He opined that claimant's out-of-state employment was the major contributing cause of his hearing loss. (Ex. 92-3, -4). Dr. Wilson asserted that noise studies conducted at SAIF's insured and PCC indicated that his employment with those entities did not contribute to his hearing loss. (Ex. 92-4).

Dr. Coale opined that claimant's lifetime exposure to occupational noise was the major contributing cause of his hearing loss. (Ex. 93-1). He opined that conclusions concerning claimant's exposure to noise toxicity could not be drawn from the noise surveys relied on by Drs. Hodgson and Wilson, and that claimant's hearing loss over the years was more than could be accounted for by presbycusis. (Ex. 93-2). Dr. Hicks agreed with Dr. Coale's opinion. (Ex. 99-27, -28).

Both SAIF and PRC denied compensability and responsibility concerning claimant's occupational disease claim for hearing loss. Claimant requested a hearing.

Relying on the opinions of Drs. Coale and Hicks, the ALJ found the claim compensable and assigned responsibility to PRC under the last injurious employment rule (LIER). On review, PRC contends that Drs. Hodgson and Wilson provided the more persuasive medical opinion, and that its noise survey established that the noise level in the tool room at PCC was below that at which hearing loss could occur. We disagree with PRC's contention, reasoning as follows.

Under the LIER, initial or presumptive responsibility for the disease is assigned to the carrier during the last period of employment when conditions could have contributed to the claimant's disability. *AIG Claim Servs. v. Rios*, 215 Or App 615, 619-20 (2007). The "onset of disability" is the triggering date for determining the last potentially causal employment. *Agricomps Ins. v. Tapp*,

169 Or App 208, 211-12, *rev den*, 331 Or 244 (2000). If the claimant receives treatment before experiencing time loss due to the condition, the triggering date for assignment of responsibility is the time when the worker first seeks medical treatment for symptoms, even if not correctly diagnosed until later. *Oregon Boiler Workers v. Lott*, 115 Or App 70, 74 (1998), *rev den*, 328 Or 365 (1999); *SAIF v. Kelly*, 130 Or App 185, 188 (1994); *Derek T. McCulloch*, 59 Van Natta 1049, 1053 (2007).

We agree with the ALJ's determination that claimant first sought treatment for his hearing loss on September 12, 2005, when he treated with Dr. Coale, who conducted an audiogram. Accordingly, under the LIER, SAIF is initially responsible for the claim.² *Rios*, 215 Or App at 619-20; *Tapp*, 169 Or App at 211-12.

We also agree with the ALJ that responsibility of the claim shifted to PRC because a preponderance of the evidence established that claimant's subsequent employment with PCC actually contributed to a worsening of his hearing loss condition. *Reynolds Metals v. Rogers*, 157 Or App 147, 153 (1998), *rev den*, 328 Or 365 (1999).

As set forth above, Drs. Coale and Hicks opined that claimant's hearing loss worsened after he began working at PCC. (Exs. 97-49 through 51, 99-27, -28). Specifically, Dr. Coale noted that the audiograms conducted by Drs. Hodgson and Wilson showed such a worsening. (Ex. 97-49, -50). According to Dr. Coale, the most reasonable source of that hearing loss was exposure to noise at PCC. (Ex. 97-51).

In arguing that Dr. Coale's opinion is unpersuasive, PRC contends that its April 2008 noise survey showed that claimant could not have sustained any hearing loss while employed at its tool shop. Dr. Coale, however, specifically addressed and rejected such an argument. (Ex. 97-38, -39, 40, -44 through 51). He explained that "OSHA norms" did not set bars beneath which hearing loss could not occur; rather, those "norms" were based on injurious noise exposure for "an average individual." (*Id.*) He added that claimant's complaints were indicative of hearing loss from noise while working at PCC, and that claimant had no other significant noise exposure that would account for his hearing loss. (*Id.*)

² On review, neither carrier challenges the compensability of claimant's occupational disease claim. Moreover, PRC agrees with the ALJ's assessment that SAIF is presumptively responsible for the claim under the LIER and SAIF "assum[es] without conceding" this point.

Likewise, he persuasively explained that claimant's hearing loss while employed at PCC was greater than what would be caused by presbycusis. (Exs. 93-2, 97-54, -55).

Additionally, both Drs. Coale and Hicks stated that the noise survey was of limited utility because it only captured the noise on the particular day that it was conducted (Exs. 95-11, 93-2); specifically, the sample was taken approximately one year after claimant's employment at PCC ended. Therefore, according to Drs. Coale and Hicks, the noise survey did not reliably capture claimant's noise exposure on a day-to-day basis during his two-year employment period.

In sum, we find the opinions of Drs. Coale and Hicks to be well reasoned and persuasive. As set forth above, their opinions persuasively countered any contrary conclusions in the opinions of Drs. Hodgson and Wilson. Accordingly, we affirm.

Because PRC requested review of the ALJ's order (which concerns compensability of the claim), claimant's compensation was potentially at risk on review, thereby justifying an attorney fee award under ORS 656.382(2) for claimant's counsel's services on review. *Dennis Uniform Mfg. v. Teresi*, 115 Or App 252-53 (1992), *mod* 119 Or App 447 (1993). Nonetheless, in assessing the amount of the attorney fee, we take into consideration that the compensability issue was not expressly contested on review. Furthermore, claimant's counsel is not entitled to an attorney fee award for his counsel's services on review concerning the penalty and attorney fee issues. *See Saxton v. SAIF*, 80 Or App 631, *rev den*, 302 Or 159 (1986); *Dotson v. Bohemia, Inc.*, 80 Or App 233, *rev den*, 302 Or 35 (1986).

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 concerning the compensability issue is \$500, payable by PRC/PCC. In reaching this conclusion, we have particularly considered the time devoted to the issue (as represented by claimant's respondent's brief), the complexity of the issue, the value of the interest involved, and the risk that claimant's counsel might go uncompensated.

Finally, claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over PRC's compensability denial, to be paid by PRC. *See* ORS 656.386(2); OAR 438-015-0019; *Gary E. Gettman*, 60 Van Natta 2862 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

ORDER

The ALJ's order dated May 3, 2010 is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$500, to be paid by PRC. Claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over PRC's compensability denial, to be paid by PRC.

Entered at Salem, Oregon on December 23, 2010