

In the Matter of the Compensation of  
**BRIAN MOBLEY, Claimant**

WCB Case No. 09-04938

ORDER ON REVIEW

Ransom Gilbertson Martin et al, Claimant Attorneys

Radler Bohy et al, Defense Attorneys

Reviewing Panel: Members Weddell, Langer, and Herman. Member Langer dissents.

The self-insured employer requests review of Administrative Law Judge (ALJ) Rissberger's order that set aside its denial of claimant's occupational disease claim for bilateral hearing loss. On review, the issue is compensability.

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

To establish compensability of his bilateral hearing loss condition as an occupational disease, employment conditions must be the major contributing cause of the disease. ORS 656.802(2)(a); *William P. Zinter*, 60 Van Natta 2971, 2972 (2008); *Reanna R. Rodriguez*, 59 Van Natta 2865 (2007). The major contributing cause means a cause that contributes more than all other causes combined. See *Smothers v. Gresham Transfer, Inc.*, 332 Or 83, 133-34 (2001); *Stephanie J. Bowens*, 60 Van Natta 1573, 1574 (2008).

Determining the major contributing cause of claimant's hearing loss condition is a complex question that must be resolved by expert medical opinion. *Barnett v. SAIF*, 122 Or App 279, 282 (1993); *Bowens*, 60 Van Natta at 1574. To persuasively establish the major contributing cause of a condition, an opinion must consider the relative contribution of each cause and determine which cause, or combination of causes, contributed more than all other causes combined. *Dietz v. Ramuda*, 130 Or App 397, 401-02 (1994), *rev dismissed*, 321 Or 416 (1995). We give more weight to those opinions that are both well reasoned and based on complete and accurate information. *Somers v. SAIF*, 77 Or App 259, 263 (1986). A history is complete if it includes sufficient information on which to base the physician's opinion and does not exclude information that would make the opinion less credible. *Jackson County v. Wehren*, 186 Or App 555, 560 (2003).

For the reasons set forth in the ALJ's order, we agree that Dr. Lindgren provided the most persuasive opinion, and that the opinions of Drs. Hodgson and Moulin were unpersuasive. On review, the employer contends that, despite any

lack of persuasiveness of the opinions of Drs. Hodgson and Moulin, Dr. Lindgren's opinion is insufficient to establish a compensable claim. We disagree, reasoning as follows.

According to Dr. Lindgren, claimant's exposure to loud workplace noises was the major contributing cause of his bilateral hearing loss. (Exs. 29-2, 37-6).<sup>1</sup> In reaching that conclusion, Dr. Lindgren explained that sensorineural hearing loss could be caused by repeated exposure to noise levels in excess of 85 decibels, and that such hearing loss was often documented by a "noise notch" in the middle frequencies, although it could also occur at lower and higher frequencies. (Ex. 37-2). He distinguished sensorineural hearing loss from conductive hearing loss, explaining that the latter was characterized by middle-ear damage and most often caused by damage from ear infections, fevers, and ear drum perforations. (*Id.*) In contrast, noise exposure resulted in sensorineural hearing loss. (*Id.*) Dr. Lindgren opined that claimant sustained bilateral sensorineural hearing loss, primarily attributable to workplace noise exposure while working for the employer. (Ex. 37-3 through 6).

Dr. Lindgren based his opinion on: (1) a description of claimant's general daily work activities and noise exposure since beginning his production job for the employer in the early 1960s; (2) a history that claimant worked the majority of his workday in areas with noise levels exceeding 100 decibels and did not start wearing hearing protection at work until the early 1970s; (3) a review of employer-sponsored hearing tests dating back to 1968; (4) a review of available noise survey studies of the employer's plant where claimant worked; (5) his knowledge of production facility noises; and (6) an awareness of claimant's exposure to non-occupational noises, including recreational gun use, motorboats, motorcycles, chain saws, and trumpets. (Ex. 37-3, -4). Dr. Lindgren also explained that claimant had only sustained "a slight amount of hearing loss since 1972," which minimized the contribution of any age-related hearing loss and supported a conclusion that "pre-hearing protection" occupational noise exposure was the major contributing cause of claimant's bilateral hearing loss. (Ex. 37-4 through 6).

In arguing that Dr. Lindgren's opinion is unpersuasive, the employer contends that Dr. Lindgren did not properly weigh non-occupational contributing factors. *See Dietz*, 130 Or App at 401-02. We disagree. As set forth above, Dr. Lindgren's opinion included an assessment of the contribution of claimant's

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<sup>1</sup> Dr. Hodgson acknowledged that claimant's workplace exposure caused "at least 45 percent" of his hearing loss. (Ex. 38-7, -8).

exposure to non-occupational noises, including recreational gun use, motorboats, motorcycles, chain saws, and trumpets. (Ex. 37-3, -4). Dr. Lindgren also considered the contribution of age-related hearing loss. (Ex. 37-4). Moreover, he explained why he did not consider other potential medical issues, including ear infections, fevers, and ear drum perforations, pertinent to claimant's sensorineural hearing loss. (Ex. 37-2, -3).

We disagree with the employer's interpretation of Dr. Lindgren's opinion that it did not weigh the *cumulative* contributing total of non-occupational factors against employment contribution. Although Dr. Lindgren's opinion separately explained why the aforementioned work factors were not individually the major contributing cause of claimant's hearing loss, the opinion also unequivocally concluded that, after considering all of the potentially contributing causes, the major contributing cause of claimant's bilateral hearing loss was occupational noise exposure. (Ex. 37-2 through 6).

We also disagree with the employer's assertion that Dr. Lindgren's opinion was based on a materially inaccurate history. In advancing that assertion, the employer suggests that Dr. Lindgren did not have an accurate history concerning: (1) claimant's previous ear injuries/infections; (2) claimant's military service; and (3) the extent of claimant's non-occupational noise exposure to recreational gun use.<sup>2</sup>

With respect to claimant's history of ear injuries and infections, the record establishes that Dr. Lindgren reviewed claimant's hearing tests, which included a history of those injuries/infections. (*See, e.g.*, Exs. 6, 7, 10-17, 19, 37-3). In any event, Dr. Lindgren persuasively explained that such a history was not relevant to claimant's type of hearing loss. (Ex. 37-2, -3).

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<sup>2</sup> The employer also suggests that Dr. Lindgren had an insufficient history because he only reviewed noise survey studies of its plant from years after claimant sustained his hearing loss. (*See* Exs. 8, 20, 37-4). Dr. Lindgren's opinion, however, was not based on the noise survey studies alone, but also on claimant's description of his work activities and noise exposure, as well as Dr. Lindgren's knowledge of noise in production facilities. (Ex. 37-3, -4). Moreover, claimant testified, without rebuttal, that the workplace noise *lessened* during the latter part of his employment, after which he had sustained his hearing loss. (Tr. 25-26). Finally, the record does not establish that Drs. Hodgson and Moulin reviewed additional noise survey studies that were not reviewed by Dr. Lindgren. Therefore, we do not disregard Dr. Lindgren's opinion on this basis.

As to claimant's previous military service, the other medical experts did not persuasively assign a contributory significance to that service with respect to his bilateral hearing loss.<sup>3</sup> (See Exs. 28-2, -3, 25-2, 30-3, 31-32, 32-18, 38-15, -16).<sup>4</sup> Therefore, we do not disregard Dr. Lindgren's opinion because it did not expressly document a history of that service.

With respect to the extent of claimant's recreational firearm use, claimant provided Dr. Lindgren with a history of avocational hunting for six years, firing one to two right-handed shots per year, and target shooting. (Ex. 29-1). That history is not substantially different from that provided to Dr. Hodgson, who recorded a history that claimant: (1) shot right handed; (2) started hunting as a youth; (3) engaged in "very little" target shooting; (4) and stopped hunting in approximately 2001. (Ex. 27-2). Dr. Hodgson's opinion did not indicate the number of years or frequency of claimant's hunting, or the frequency with which he fired shots while hunting. (*Id.*) Likewise, Dr. Moulin's audiology reports and opinion contained even less specificity concerning the amount and frequency of claimant's recreational gun use. (See, e.g., Exs. 4, 5, 7, 10). Moreover, Dr. Hodgson concluded that claimant's recreational gun use contributed less than 10 percent to claimant's bilateral hearing loss. The employer acknowledges that Dr. Lindgren's opinion addressed claimant's recreational gun use. Under these circumstances, we do not conclude that Dr. Lindgren's opinion lacked sufficient information on which to base his opinion or that it excluded information that would make his opinion less credible. See *Wehren*, 186 Or App at 560.

Finally, we disagree that Dr. Lindgren's opinion did not persuasively address the contrary opinions of Drs. Hodgson and Moulin. The employer advances that argument on the basis that Dr. Lindgren's opinion did not specifically mention the reports of Drs. Hodgson and Moulin. Although Dr. Lindgren's opinion may not have expressly mentioned those reports, his opinion did address and persuasively rebut the conclusions and reasoning contained in those reports.

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<sup>3</sup> Claimant also had not noticed any hearing problems as of the time that he completed his military service. (Tr. 8-9).

<sup>4</sup> Although Dr. Moulin referenced claimant's "service record" as one of many "important considerations" regarding the causes of claimant's hearing loss, she did not adequately explain the basis of that conclusion. (See Ex. 32-52). She also did not reconcile that conclusion with the fact that claimant sustained the majority of his hearing loss between 1968-1972, which was long after claimant's military service ended in 1961. Moreover, unlike the other medical experts, Dr. Moulin did not recognize *any* employment contribution to claimant's hearing loss condition. (See Ex. 32-53, -54). As set forth above and in the ALJ's order, such a conclusion is not supported by the record, and we give no weight to Dr. Moulin's opinion.

Specifically, Dr. Lindgren rebutted the proposition advanced by Drs. Hodgson and Moulin that claimant's previous fevers and ear injuries/infections contributed to his bilateral hearing loss. (Exs. 25-2, 28-2, -3, 37-2, -3). He also persuasively rebutted the conclusions of Drs. Hodgson and Moulin that age-related presbycusis was a significant contributor to claimant's hearing loss. In particular, Dr. Lindgren explained that the majority of claimant's hearing loss was sustained by 1972 when claimant was in his early 30s and when age-related hearing loss would not be expected to be a significant contributor. (Ex. 37-4).<sup>5</sup> Drs. Hodgson and Moulin did not dispute that claimant's hearing loss remained substantially the same after 1972, or persuasively explain why they nevertheless attributed so much of claimant's hearing loss to age-related presbycusis. (See Exs. 25-2, 31-14 through 17, -23, -24, 32-53).

Therefore, we conclude that Dr. Lindgren's opinion adequately addressed the opposing opinions of Drs. Hodgson and Moulin. Moreover, for the reasons set forth above and in the ALJ's order, we find Dr. Lindgren's opinion better explained and more persuasive.<sup>6</sup>

Claimant's attorney is entitled to an assessed fee for services on review. ORS 656.382(2). 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 is \$3,000, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's respondent's brief and his counsel's uncontested fee submission), the complexity of the issue, and the value of the interest involved.

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<sup>5</sup> As set forth above, all of the medical experts agreed that claimant's hearing loss was not substantially different after 1972. Nevertheless, and contrary to the employer's argument, Dr. Lindgren's opinion addressed the major contributing cause of claimant's hearing loss as of 2009 (when the claim was filed), and not just as of 1972. (Exs. 29-2, 37-6).

<sup>6</sup> Although Dr. Hodgson may not have expressly stated that the statistical tables on expected age-related hearing loss that he used did "not apply to claimant," his explanation and application of those tables in this case are not convincing. Dr. Hodgson asserted that claimant would not have had any significant age-related hearing loss in 1972, when he was 33 years old. (Ex. 31-14). Dr. Hodgson also acknowledged that claimant's hearing loss was the same in 1972 as it was in 2009, when he was 70 years old. (*Id.*) Based on statistical tables on expected age-related hearing loss, Dr. Hodgson attributed 45 percent of claimant's hearing loss to age-related hearing loss *both* in 1972, when was 33 years old, and in 2009, when he was 70 years old. (Ex. 31-14, -15). Dr. Hodgson reasoned that, by 1972, claimant had already lost "cells that *would* degenerate from age later on." (Ex. 31-15) (emphasis added). He added that because "the nerve endings were already gone [that] *age couldn't affect them.*" (*Id.*) (emphasis added). We do not find that this reasoning logically explains Dr. Hodgson's conclusion concerning the contribution of age-related presbycusis to claimant's bilateral hearing loss as of 1972 and 2009, or his use of statistical tables on generally-expected age-related hearing loss as applied to claimant.

Finally, claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by the employer. 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 December 9, 2010 is affirmed. For services on review, claimant's attorney is awarded an assessed fee of \$3,000, to be paid by the employer. Claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by the employer.

Entered at Salem, Oregon on July 11, 2011

Member Langer dissenting.

I disagree with the majority's conclusion that Dr. Lindgren's opinion is sufficient to establish claimant's occupational noise exposure as the major contributing cause of his hearing loss condition. Therefore, I dissent, reasoning as follows.

Claimant has the burden of establishing that his occupational noise exposure is the major contributing cause of his claimed hearing loss. ORS 656.802(2)(a). Although Drs. Hodgson and Lindgren agreed that claimant incurred *some* hearing loss as a result of his employment, only Dr. Lindgren concluded that such employment was the *major contributing cause* of the claimed hearing loss. Thus, for claimant to prevail, that opinion must be persuasive and must consider the relative contribution of each cause and determine which cause, or combination of causes, contributed more than all other causes combined. *Dietz v. Ramuda*, 130 Or App 397, 401-02 (1994), *rev dismissed*, 321 Or 416 (1995).

I would not find that Dr. Lindgren's opinion satisfies this standard. The record establishes that claimant "had a considerable amount of hearing loss" before he started working for the employer. (Ex. 38-9). Dr. Hodgson explained that, although assigning exact percentages to various contributing factors was difficult and although he attributed 45 percent to claimant's work, he could not agree that the industrial exposure caused the majority of claimant's hearing loss. (Exs. 31-17, 18, 29, 38-8, -9). It is unclear, however, whether Dr. Lindgren

sufficiently understood or weighed the contributory significance of claimant's pre-employment hearing loss. (*See* Ex. 37). Therefore, I would not rely on his opinion. *See Miller v. Granite Construction Co.*, 28 Or App 473, 476 (1977) (medical opinions based on an incomplete or inaccurate history are entitled to little weight).

Claimant had some hearing loss by 1968. His hearing loss dramatically increased from 1968 to 1972. According to Dr. Hodgson, this increase could not primarily be attributed to claimant's work exposure, because claimant continued to perform the same job for the employer that he had performed since 1962, and he wore hearing protection for part of the 1968-1972 period. (Ex. 28-2). Moreover, the 1972 audiogram showed that claimant had a lot of hearing loss in the low frequencies that are "not affected at all by industrial type noise." (Ex. 31-18, -25). Thus, Dr. Hodgson concluded that a number of medical and other factors influenced claimant's hearing. (Exs. 28-2, 31-15, 38-9, -13).

The record shows that claimant had a documented medical history of ear infections, fevers, and a possible perforated ear drum. Dr. Lindgren dismissed the contributory significance of this history on the ground that such medical conditions caused "conductive hearing loss," whereas claimant had "sensorineural hearing loss," which Dr. Lindgren associated with noise exposure. (*See* Ex. 37-2, -3). Dr. Hodgson explained, however, that claimant's aforementioned medical conditions could also cause claimant's type of hearing loss, and that it was medically probable that there was such a causal relationship. (Ex. 38-13 through 15). Dr. Lindgren did not adequately explain why he minimized the causative contribution of claimant's past medical history. Consequently, I would find Dr. Lindgren's conclusory dismissal of claimant's medical history to be unpersuasive. *See Moe v. Ceiling Sys., Inc.*, 44 Or App 429, 433 (1980) (rejecting unexplained or conclusory opinion); *Janet Benedict*, 59 Van Natta 2406, 2409 (2007), *aff'd without opinion*, 227 Or App 289 (2009) (medical opinion unpersuasive when it did not sufficiently address contrary opinions).

Based on the fact that claimant had no additional hearing loss from 1972, when he was 33 years old, to 2009, when he was 70 years old, the majority finds unpersuasive and illogical Dr. Hodgson's opinion attributing 45 percent of claimant's hearing loss to age-related presbycusis. Yet, I understand Dr. Hodgson's opinion to be that, as an average man of 70, claimant is expected to have about 45 percent of hearing loss caused by aging. At age 33, however, claimant already had hearing loss in the frequencies that are affected by presbycusis. The cells and nerve endings that could be affected by age-related

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degeneration were already “gone” when claimant was young and they could not have been further damaged. (Ex. 31-15, -17). Probably due to medical factors, claimant’s hearing was, in effect, 70 years old when he was 33. Similarly, claimant’s hearing loss in the frequencies affected by noise could not have been further damaged by his continued work exposure. (Ex. 31-44). Thus, I would find that Dr. Hodgson adequately explained his opinion.

In sum, I would find that the opinion of Dr. Lindgren did not persuasively establish claimant’s workplace noise exposure as the major contributing cause of his claimed hearing loss condition. Therefore, I respectfully dissent.