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In the Matter of the Compensation of  
**LEWIS D. VANOVER, Claimant**  
WCB Case No. 08-07424  
ORDER ON REVIEW  
George J Wall, Claimant Attorneys  
Sather Byerly & Holloway, Defense Attorneys

Reviewing Panel: Members Weddell and Langer.

The self-insured employer requests review of that portion of Administrative Law Judge (ALJ) Mills's order that set aside its denial of claimant's occupational disease claim for left-sided hearing loss. On review, the issues are compensability and responsibility. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," as modified herein.<sup>1</sup> We summarize the pertinent facts.

Claimant worked as a mechanic for the employer from 1980 to 1993. (Tr. 5). Before that, he worked as a journeyman machinist from 1964 through 1977 and as a machine shop manager from 1977 through 1980, both for different employers. (Tr. 7-9).

In 1993, claimant was laid off by the employer. (Tr. 13; Ex. 16-2). Thereafter, he did not work for another employer. Instead, he worked for himself, managing and performing "upkeep" on three rental properties, which he continued to do as of the date of hearing. (Tr. 13-17; Exs. 16-2; 28-2). He performed most of the maintenance work on those properties, including reflooring, plumbing, "a little bit of electrical," and carpentry. (*Id.*) His maintenance work involved the use of power tools, including a "Skil saw," a "table saw," and "pneumatic nailers." (Tr. 15). He "normally" wore hearing protection when operating the saws, but not with the nailers. (*Id.*)

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<sup>1</sup> We do not adopt the last two paragraphs on page 2 of the ALJ's order or the second full paragraph on page 4 of that order. We also do not adopt the ALJ's findings that claimant "retired" in 1993 or that he is "currently retired."

Additionally, we note that Exhibit 22 was not admitted. (Tr. 18). Accordingly, we do not adopt any reference or any reliance on that exhibit.

In 1980, claimant underwent a pre-employment hearing test, which measured hearing loss in the left ear at 155 dB, with a “noise-induced type curve.” (Ex. 18-1). In March 1993, the left-sided hearing loss was measured at 185 dB. (*Id.*) In September 2008, that hearing loss was measured at 260 dB. (*Id.*)

Claimant has a history of hunting, beginning in childhood. (Tr. 9). Between approximately 1965 and 1993, he fired a rifle approximately 30 times without hearing protection and another 30 times with hearing protection. (Tr. 10-11; Ex. 37). Subsequent to 1993, he only “sighted” the rifle with hearing protection. (Tr. 11).

In May 2008, claimant treated with Dr. Ierokomos for his hearing loss. (Ex. 12). He was subsequently referred to Dr. Kim, who concluded that occupational noise exposure, rather than recreational gun use, was the major contributing cause of claimant’s left-sided hearing loss. (Exs. 28, 36, 37).

In September 2008, Dr. Hodgson examined claimant at the employer’s request. (Exs. 16-18). After reviewing hearing tests from 1980 to 1993, Dr. Hodgson concluded that recreational gun use was the major contributing cause of claimant’s left-sided hearing loss. (Ex. 18-1).

The employer denied that claimant’s left-sided hearing loss was compensable, or that it was the responsible employer. Claimant requested a hearing.

### CONCLUSIONS OF LAW AND OPINION

Applying the last injurious exposure rule (LIER) and relying on the opinion of Dr. Kim, the ALJ found that claimant had established the compensability of his left-sided hearing loss as an occupational disease.<sup>2</sup> Turning to the responsibility issue, the ALJ acknowledged case precedent holding that “self-employment” may be considered potentially causal employment under the LIER. Nevertheless, the ALJ found that the employer, and not claimant’s “self-employment,” was responsible for the occupational disease claim. The ALJ reasoned that it was “not appropriate” to apply the aforementioned case precedent here because: (1) claimant was not “self-employed” after being laid off from the employer

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<sup>2</sup> The ALJ primarily confined the compensability analysis to the opinions of Drs. Kim and Hodgson. The ALJ, however, also noted that Dr. Ierokomos also supported compensability of the claim. In reviewing the record, we do not find that Dr. Ierokomos authored an admitted opinion that would establish compensability of the claimed left-sided hearing loss.

because “he received rental income, not wages or direct income”; and (2) there was “no medical evidence in [the] record suggesting any contribution to claimant’s ongoing hearing loss following his employment with [the employer].”

On review, the employer argues that we should rely on Dr. Hodgson’s opinion and find the claim not compensable. Alternatively, the employer argues that it is not responsible for the claim under the LIER because of claimant’s subsequent self-employment.

Although we agree (for the reasons set forth in the ALJ’s order) that Dr. Kim provided the more persuasive medical opinion concerning the major contributing cause of the claimed left-sided hearing loss, and that claimant’s condition is related to work-related noise exposure<sup>3</sup>, we disagree that the employer is responsible for his claimed condition. We reason as follows.

Under the LIER, initial or presumptive responsibility for the injury/occupational 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 (2007). The “onset of disability” is the triggering date for determining the last potentially causal employment. *Agricomp Ins. v. Tapp*, 169 Or App 208, 211, *rev den*, 331 Or 244 (2000). If the claimant receives treatment before experiencing temporary disability due to the condition, the triggering date for assignment of responsibility is the time when the worker first seeks medical treatment. *Id.* at 212.

The last carrier may transfer liability to a previous carrier by establishing that it was impossible for its employer to have caused the condition, or that a prior period of employment was the sole cause of the condition. *Reynolds Metals v. Rogers*, 157 Or App 147, 153 (1998), *rev den*, 328 Or 365 (1999). Alternatively, the initially responsible carrier may transfer liability to a subsequent insurer by establishing that the subsequent employment actually contributed to a worsening of the condition. *Id.*

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<sup>3</sup> On review, the employer asserts that we should rely on Dr. Hodgson’s conclusion that recreational gun use was the major contributing cause of claimant’s left-sided hearing loss, a conclusion which was based on claimant’s “pre-1980” asymmetrical hearing loss. (*See Ex. 18-1*). We, however, are more persuaded by Dr. Kim’s detailed explanation concerning the contribution of any recreational gun use to claimant’s left-sided hearing loss. (*Ex. 37-1, -2*). In rebutting Dr. Hodgson’s opinion, Dr. Kim emphasized the decreased contribution of outdoor shooting (as opposed to indoor target shooting), the limited number of shots fired, and the disbursement of that gunfire over a large period of time. (*Id.*) We rely on that more specific and better-reasoned opinion.

We have consistently held that prior employers/carriers are not responsible under the LIER when the claimant first sought treatment during a period of noncovered self-employment, and the medical evidence did not establish that it was impossible for the “potentially responsible” self-employment to have caused the claimed condition, or that prior covered employment was the sole cause of the condition. *See Lisa M. Korczak*, 60 Van Natta 1778 (2008); *Charles A. Lutz*, 58 Van Natta 3232 (2006), *recons.*, 59 Van Natta 101 (2007); *Gary Jones*, 58 Van Natta 1882 (2006); *Craig A. McIntyre*, 51 Van Natta 34 (1999); *see also UPS v. Likos*, 143 Or App 486 (1996) (the claimant was not entitled to receive compensation for her compensable injury where her disability arose during a period of self-employment that did not have workers’ compensation coverage because her self-employment, the last potentially causal employment before claimant sought medical treatment and at which claimant’s claim accrued, was not subject to Workers’ Compensation Law). In other words, if a noncovered employment (*i.e.*, not subject to ORS Chapter 656) is presumptively responsible under the LIER, 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. *Korczak*, 60 Van Natta at 1779.

Here, the parties do not dispute that the triggering date for assignment of responsibility is May 2008, when claimant first sought medical treatment for his left-sided hearing loss. (*See Ex. 12*); *see also Tapp*, 169 Or App 208 at 212. The employer asserts that claimant was “self-employed” at that time, when he received income from three rental properties that he was managing and maintaining. We agree.

As set forth above, the record does not support a conclusion that claimant only passively received “investment” income from his rental properties. To the contrary, he identified himself as “semi-retired,” specifically identifying the “upkeep” that he performs on his three rental properties. (Tr. 13). Likewise, other records indicate that claimant also informed others that he “worked for himself with his own rental properties” (Ex. 16-2), and that, “[s]ince 1993, he has been working managing rental properties” (Ex. 28-2). The record also establishes that claimant was actively engaged in managing those properties, and that he performed the majority of necessary maintenance work. (Tr. 13-17). That maintenance work included reflooring, plumbing, “a little bit of electrical,” and carpentry. (*Id.*)

After reviewing the record, we are persuaded that claimant earned regular monthly income for renting properties that he actively managed and maintained. (Tr. 13-17). We, therefore, conclude that he was engaged in the business of renting and managing properties, and that he earned income from a commercial enterprise that he actively participated in and owned. Such services qualify as “employment”/”self-employment.” See *Jimmy D. Sabey*, 62 Van Natta 1909 (2010) (self-employment may establish workforce status, thereby constituting regular gainful employment); *Wes L. Sessums*, 52 Van Natta 823 (2000) (same); *Jeffrey P. Connor*, 49 Van Natta 2060 (1997) (same).

Thus, because this noncovered self-employment is presumptively responsible under the LIER, 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, claimant is not entitled to workers’ compensation benefits for his left-sided hearing loss. *Korczak*, 60 Van Natta at 1779.<sup>4</sup> Accordingly, we reverse.

#### ORDER

The ALJ’s order dated August 12, 2011 is reversed in part and affirmed in part. That portion of the ALJ’s order that set aside the employer’s denial of claimant’s occupational disease claim for left-sided hearing loss is reversed. The employer’s denial is reinstated and upheld. The ALJ’s \$7,500 attorney fee and cost awards are also reversed. The remainder of the ALJ’s order is affirmed.

Entered at Salem, Oregon on February 2, 2012

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<sup>4</sup> Because claimant as a self-employed property owner/manager is presumptively responsible under the LIER, he (as the presumptively responsible employer) has the *affirmative* burden of showing that responsibility should be shifted to a different carrier. *Rogers*, 157 Or App at 153. Thus, claimant’s assertion that there must be affirmative evidence showing that his self-employment contributed to his hearing loss misses the mark. In any event, Dr. Kim stated that there was some “noise exposure” from claimant’s “work[] managing rental properties.” (Ex. 28-2). Supportive of this statement, claimant’s self-employment involved the use of power tools, and he “normally” wore hearing protection when operating some, but not all, of that equipment. (Tr. 15). In addition, claimant’s 2008 audiogram also showed an increase in his left-sided hearing loss, subsequent to his period of self-employment. (Ex. 18-1).