

In the Matter of the Compensation of
MARK A. RUDZIK, Claimant

WCB Case No. 14-04464

ORDER ON REVIEW

Shlesinger & deVilleneuve Eugene, Claimant Attorneys
Cummins Goodman et al, Defense Attorneys

Reviewing Panel: Members Johnson, Lanning and Somers. Member Johnson dissents.

Claimant requests review of Administrative Law Judge (ALJ) Ogawa's order that upheld the self-insured employer's denial of claimant's occupational disease claim for a bilateral hearing loss condition. On review, the issue is compensability. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact" and provide the following summary and supplementation.

Claimant was 58 years of age at the time of hearing. (Tr. 25). He has worked for his current employer since it merged with his former employer in approximately 1998 or 2000. (*Id.*) He began working for his former employer in January 1980. (Tr. 26). He was fairly conscious about wearing hearing protection. (Tr. 54).

Beginning in 1980, claimant worked in the Sponge Plant for two years. (Tr. 27, 29). He described the loudest activity was using a hand-held chipping gun inside of a retort (which is a metal tube). (Tr. 28). This could take several hours and he performed the task two to three times per week. (Tr. 29). Sometimes employees would play a prank in which they hit the retort with a sledgehammer while claimant was inside. (Tr. 46-48). He wore hearing protection while performing this work. (Tr. 27-28). He was subsequently laid off for two years, at which point he worked for seven months packing batteries for a different employer. (Tr. 30).

In 1984, he returned to the Sponge Plant for six months, and then worked in the Melting Plant. (Tr. 30-31). He did not think the noise at the Melting Plant was "terribly bad," but he used hearing protection. (Tr. 31-32). He then transferred into the Cow Barn where he was exposed to three hydrogen/steam explosions, which he described as loud. (Tr. 32-34). He wore hearing protection at this site. (Tr. 33, 35).

From 1985 through 1987, claimant worked in Mill Products, which is where he first noticed his hearing problems. (Tr. 36, 42). He wore hearing protection while performing that job. (Tr. 39, 41).

In 1987, claimant returned to the Sponge Plant for approximately seven to eight months and then became a Midwest grinder operator for five to six months where he sat inside a booth, which provided noise reduction. (Tr. 43). He wore noise protection for these positions. (*Id.*)

Claimant next worked as a sawyer in the Stander's Field Building (Saw Shop) for several years where there were three to five saws running at a time. (Tr. 44-45). He wore hearing protection for that position. (Tr. 45). He returned to the Sponge Plant in 1992. (*Id.*)

Claimant next worked in Raw Material Processing for seven to eight months, and did not work in loud areas. (*Id.*) He then returned to the Sponge Plant for seven to eight months and then transferred to Mill Products for approximately one year. (Tr. 46). He was then recalled to work as a sawyer. (*Id.*) Finally, he ended in a "helper position" where he worked as an inspector, hand grind conditioner, and sawyer. (*Id.*)

In addition to noise exposure at work, claimant had experience with firearms. (Tr. 48). He began hunting around 1980 or 1981 and stopped in 1985. (Tr. 50, 58). He did not use hearing protection while hunting. (Tr. 50). He went on five to seven hunting trips. (Tr. 58). He used a .270 caliber bolt action rifle and shot right-handed. (Tr. 49). He also went the week before hunting seasons to a gun range, which required hearing protection. (Tr. 48-49).

In April 2014, Dr. Pederson identified a Standard Threshold Shift (STS), which he did not attribute to occupational noise exposure. (Ex. 3). He clarified that, using age correct, there was no STS. (Ex. 2).

In June 2014, claimant filed an 801 Form, indicating bilateral hearing loss attributable to occupational noise exposure beginning in the 1980's. (Exs. 7, 8).

In July 2014, Dr. Hodgson, otolaryngologist, performed an examination at the employer's request. (Ex. 9). This audiogram testing revealed that claimant had greater hearing loss on the left. (Ex. 9-7). After reviewing 13 of claimant's hearing tests, Dr. Hodgson attributed his hearing loss to age/presbycusis (30 percent), occupational noise exposure (40 percent), and non-occupational noise exposure (30 percent). (Ex. 9-3-5, -8). Dr. Pederson agreed with Dr. Hodgson's opinion. (Ex. 11).

Subsequently, the employer denied claimant's bilateral hearing loss claim. (Ex. 12).

In January 2015, Dr. Johnson, audiologist, performed an audiogram. (Ex. 13). She noted that claimant had significant bilateral noise-related hearing loss by age 32. (Ex. 13-2). She indicated that the increase had been modest, but explained that once claimant's hair cells were destroyed in his twenties, the hearing loss had little opportunity to accelerate. (*Id.*) She thought it important to consider the age of onset of claimant's hearing loss and how unusual it was for a person in their twenties to have such significant findings. (*Id.*) In her experience, similar cases were only observed in instances of heavy metal rock band guitar players or front line military veterans. (*Id.*) She opined that it was not common to see such noise injuries in people who hunt sporadically because that usually only involved one or two shots per event. (*Id.*) She concluded that the vast majority of claimant's hearing loss was related to his loud occupational noise exposure. (Ex. 13-2-3). She opined that claimant's hearing loss was due to work (80 percent), recreational noise (15 percent), and unknown age factors obscured by the loss of hearing in claimant's twenties (five percent). (*Id.*)

The parties deposed Dr. Hodgson after he had an opportunity to review claimant's statement to the employer. (Ex. 14-39). Dr. Hodgson explained that shooting a gun right-handed is more damaging to the left ear, because the left ear turns toward the muzzle of the gun while the right ear is in a "shadow." (Ex. 14-17-18). Dr. Hodgson determined that claimant's hearing stayed practically the same from 1989 onward with only a little bit more loss, which was even less than one would expect from age. (Ex. 14-34-35).

The parties deposed Dr. Johnson. (Ex. 15). She discussed her qualifications in determining the causation of hearing loss conditions and that she was licensed to practice audiology. (Ex. 15-9-11). She reiterated that claimant's gun exposure would not have caused his hearing loss. (Ex. 15-39).

In June 2015, Dr. Hodgson reviewed Dr. Johnson's deposition, and opined that audiologists do not receive sufficient training on determining causes of hearing loss conditions. (Ex. 16-1-2). He explained that there were many potential causes for early onset hearing loss, including hereditary causes, disease, viral infections, and noise exposures. (Ex. 16-3). He disagreed that claimant's hearing was "destroyed" in his twenties because he continued to have hearing in the 2000 Hz and 1000 Hz levels without evidence of accelerated hearing loss in those

frequencies with ongoing occupational noise exposure. (Ex. 16-4). Moreover, he determined that Dr. Johnson did not have an accurate understanding of claimant's work environment, because she thought claimant's workplace was at least 120 decibels or higher, when such levels were not permitted by OSHA. (Ex. 16-5).

In August 2015, Dr. Johnson reviewed Dr. Hodgson's opinion and noted that he may not understand the current education and role of audiologists. (Ex. 18-1). She explained that in her experience while working with the Veteran's Administration, she was exposed to research on hearing loss related to rifle fire and noted that the military is still uncertain as to why certain people are more affected than others. (Ex. 18-2). Reasoning that claimant's hearing tests were more consistent with prolonged noise exposure rather than hereditary causes, Dr. Johnson concluded that hearing loss would not have occurred within a short period of time unless a person was "in a bomb explosion." (*Id.*) She explained that such hearing loss would take a number of years to accumulate and, thus, could not have occurred by firing a rifle a few times. (*Id.*) She disagreed that OSHA testing reflected the true noise exposure in any given environment. (Ex. 18-3).

CONCLUSIONS OF LAW AND OPINION

In upholding the employer's denial of claimant's bilateral hearing loss condition, the ALJ found Dr. Johnson's opinion insufficient to establish that the claimed condition was caused in major part by work-related noise exposure.

On review, claimant contends that Dr. Johnson's opinion persuasively establishes the compensability of his hearing loss condition and is more persuasive than Dr. Hodgson's opinion. For the following reasons, we agree.

To establish the compensability of his occupational disease claim, claimant must prove that employment conditions were the major contributing cause of his hearing loss condition. ORS 656.802(2)(a). Employment conditions are the "major contributing cause" if they contributed more than all other causes combined. *Bowen v. Fred Meyer Stores*, 202 Or App 558, 563-64 (2005), *rev den*, 341 Or 140 (2006).

The compensability of claimant's hearing loss presents a complex medical question, which must be resolved with expert medical opinion. *Barnett v. SAIF*, 122 Or App 279, 282 (1992). Where the medical evidence is divided, we rely on those medical opinions that are well reasoned and based on complete and accurate information. *Somers v. SAIF*, 77 Or App 263 (1986).

Drs. Hodgson and Johnson agree that the primary cause of claimant's hearing loss is due to noise exposure. (Exs. 9, 13). However, they disagree as to the amount of contribution from claimant's work-related and non-work-related exposures. (*Id.*) Dr. Hodgson attributed 30 percent to age/presbycusis, 40 percent to occupational noise exposure, and 30 percent to non-occupational noise exposure. (Ex. 9-3-5). In contrast, Dr. Johnson attributed 80 percent to work-related noise, 15 percent to recreational noise, and five percent to unknown age factors. (Ex. 13-3).

After reviewing the record, we find that Dr. Johnson's opinion, when read as a whole, persuasively establishes that claimant's work exposure was the major contributing cause of his hearing loss condition. Dr. Johnson persuasively explained that claimant's limited exposure to gun shot fire was unlikely to cause such drastic hearing loss. (Exs. 13-2, 15-39, 18-2). She reasoned that such hearing loss would take a number of years to accumulate and, thus, could not have occurred by firing a rifle a few times. (Exs. 15-38, 18-2). She weighed this contribution against claimant's noise exposure at work, which she explained was likely above 120 decibels. (Ex. 18-3). She based her reasoning on her personal experience within a similar work environment as claimant's, and then applied that information to his level of exposure. (Exs. 15-34, 18-3). Ultimately, we find her opinion to be well-reasoned and based on a complete and accurate history.¹

In contrast, Dr. Hodgson's opinion is internally inconsistent and based on an inaccurate history. Specifically, he stated that, if claimant's hearing loss was attributable to his work-related noise exposure over time, it would be expected that his hearing loss would have continued to worsen. Although Dr. Hodgson opined that claimant's hearing stayed relatively the same, a review of the record shows that claimant's hearing loss continued to deteriorate. (Ex. 9-8). Moreover, Dr. Hodgson's reasoning that claimant's noise level exposure at work could not be more than OSHA's requirement of 120 decibels is an unsupported assumption. Specifically, the record lacks OSHA studies addressing the decibel levels at claimant's employer. Consequently, for the aforementioned reasons, we discount Dr. Hodgson's opinion. *See Miller v. Granite Construction Co.*, 28 Or App 473,

¹ We acknowledge the dissent's assertion that Dr. Johnson's opinion is unpersuasive, because she "conceded" that she did not understand the contribution of gun shots on hearing loss conditions. However, she explained that in her experience while working with the Veteran's Administration, she was exposed to research on hearing loss related to rifle fire and noted that the military is still uncertain as to why certain people are more affected than others. (Ex. 18-2). Moreover, the particular question pertained to the use of .22 caliber rifles, rather than gun exposure in general. (Ex. 15-36). Consequently, we decline to discount Dr. Johnson's opinion on this basis.

478 (1977) (medical opinion that is based on an incomplete or inaccurate history is not persuasive); *Howard L. Allen*, 60 Van Natta 1423, 1424-25 (2008) (internally inconsistent medical opinion, without explanation for the inconsistencies, was unpersuasive).

In sum, based on the aforementioned reasoning, the record persuasively establishes that claimant's occupational noise exposure was the major contributing cause of his bilateral hearing loss condition. Consequently, claimant's occupational disease claim is compensable. Accordingly, we reverse.

Claimant's attorney is entitled to an assessed fee for services at hearing and on review. ORS 656.386(1). 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 at hearing and on review is \$12,000, payable by the employer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by the record and claimant's appellate briefs), the complexity of the issue, the value of the interest involved, and the risk that counsel may go uncompensated.

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 656.382(2); OAR 438-015-0019; *Nina Schmidt*, 60 Van Natta 169 (2008); *Barbara Lee*, 60 Van Natta 1, *recons*, 60 Van Natta 139 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

ORDER

The ALJ's order dated February 10, 2016 is reversed. The employer's denial is set aside and the claim is remanded to the employer for processing according to law. For services at hearing and on review, claimant's attorney is awarded an assessed fee of \$12,000, 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 October 3, 2016

Member Johnson, dissenting.

In finding claimant's hearing loss condition compensable, the majority relies on Dr. Johnson's opinion. Because I find Dr. Hodgson's opinion more persuasive, and ultimately conclude that Dr. Johnson's opinion is unpersuasive, I respectfully dissent.

Dr. Hodgson concluded that claimant's audiograms were not consistent with his occupational exposure constituting the major contributing cause of his condition. (Ex. 9-4-5). Specifically, Dr. Hodgson explained that the asymmetry of claimant's hearing loss was consistent with his right-handed shooting. (Ex. 14-18). Moreover, Dr. Hodgson considered the lack of hearing loss progression over the years to be more consistent with gun noise exposure rather than ongoing occupational noise exposure.² (Ex. 14-34-35).

In addition, Dr. Hodgson explained that it was unlikely that the noise level at claimant's employment was "at least 120 decibels or higher" as indicated by Dr. Johnson, because such levels would exceed maximum noise levels permitted by OSHA regulations. (Ex. 16-5). In response, Dr. Johnson stated that OSHA measurements "do not necessarily reflect the true noise exposure in any given environment, including a work place." (Ex. 18-3). She further explained that her conclusion that claimant was exposed at work to at least 120 decibels of noise or higher was "speculation," based on "multiple similar cases and review of the literature in places like steel mills" and her own measuring of sound levels at a different steel mill in the past. (Ex. 15-34-35). She had no specific evidence pertaining to claimant's actual noise levels at work. (Ex. 15-33, -35). Under these circumstances, I do not consider Dr. Johnson's "assumption" that claimant's employment exposure was within the 120 to 140 decibel range to be well supported. *See Miller v. Granite Construction Co.*, 28 Or App 473, 478 (1977) (medical opinion that is based on an incomplete or inaccurate history is not persuasive); *see also Sherman v. Western Employers Ins.*, 87 Or App 602, 606 (1987) (physician's comments that were general in nature and not addressed to the claimant's particular situation were not persuasive).

² I note that Dr. Johnson did not respond to Dr. Hodgson's explanation that claimant's hearing loss was worse in his left ear due to right-handed rifle shooting. Consequently, I discount her opinion. *See Janet Benedict*, 59 Van Natta 2406, 2409 (2007), *aff'd without opinion*, 227 Or App 289 (2009) (medical opinion unpersuasive when it did not address contrary opinions).

In addition, Dr. Johnson opined that the kind of hearing loss observed in claimant's audiograms was "the kind of hearing loss you only see with continuous and prolonged noise exposure." (Ex. 18-2). Yet, she appeared to contradict herself by stating that "a person doesn't suffer early hearing loss of the magnitude suffered by [claimant] in a short period of time unless this person was, literally, in a bomb explosion." (Ex. 18-2). Without further explanation, I discount Dr. Johnson's inconsistent opinion. See *Moe v. Ceiling Sys., Inc.*, 44 Or App 429, 433 (1980) (rejecting unexplained or conclusory opinion); see also *Howard L. Allen*, 60 Van Natta 1423, 1424-25 (2008) (internally inconsistent medical opinion, without explanation for the inconsistencies, was unpersuasive).

Furthermore, when asked how many times an individual would need to fire a ".22 caliber rifle" outside without hearing protection before it caused significant permanent hearing loss, Dr. Johnson responded that she was "not necessarily an expert in that area," and conceded that she had no idea how many times one would have to fire such a rifle to incur such hearing loss. (Ex. 15-36-37). She later stated that she was "not an expert on the impact of rifle shooting."³ (Ex. 18-2). Regardless of this concession, Dr. Johnson opined that firing a rifle 300 times would be more likely to damage "the auditory system than if you do it three times." (Ex. 15-38). Without further explanation, it is unclear how Dr. Johnson was able to come to this conclusion in light of her admission that she was not an expert on rifle noise exposure on hearing loss. See *Moe*, 44 Or App at 433; see also *Allen*, 60 Van Natta at 1424-25.

Rather, Dr. Johnson affirmatively indicated that she "[was] an expert in identifying and diagnosing noise-induced hearing loss." (Ex. 18-2). Because the physicians agreed that the primary contributor to claimant's hearing loss was noise-related, the issue was not whether his hearing loss was "noise-induced," but whether the primary noise contributor was work-related or non-work-related. (Exs. 9-4-5, 13-3). Consequently, for the reasons expressed above, Dr. Johnson's opinion is unpersuasive. See *Dietz v. Ramuda*, 130 Or App 397, 401 (1994), *rev dismissed*, 321 Or 416 (1995) (the determination of major contributing cause involves the evaluation of the relative contribution of the different causes of claimant's condition and a decision as to which is the primary cause).

³ Contrary to the majority's interpretation that Dr. Johnson limited her response to whether she was an expert on the impact of ".22 caliber rifles" on hearing loss conditions, her latter statement makes it clear that she was referring to rifle noise exposure in general when stating that she was not an expert "in that area." I would discount Dr. Johnson's opinion on that basis. *E.g.*, *Mark D. Nerheim*, 64 Van Natta 1005, 1007 (2012).

In contrast, Dr. Hodgson understood and had experience working with younger individuals who suffered hearing loss from limited rifle use. (Ex. 16-5). Thus, Dr. Hodgson's understanding of claimant's noise exposure, both work-related and non-work-related, is more accurate and provides further reasoning for finding his opinion to be more persuasive than Dr. Johnson's. *See Miller*, 28 Or App at 478; *Obed Marquez*, 16 Van Natta 1558, 1560 (2014); *William Karrasch*, 64 Van Natta 2157, 2161 (2012) (where physician's opinion relying on an accurate understanding of the claimant's work exposures was persuasive).

Finally, although Dr. Johnson opined that work-related noise exposure constituted the major cause of claimant's hearing loss condition, she also stated that "there could be 100 men working in a metal factory and a certain small number of them will respond to the same level of noise differently even when using ear protection." (Ex. 13-3). She stated that claimant's hearing loss was determined at an early age, and "probably due to unavoidable bio-genetic factors which we now realize are present in the human auditory system." (Ex. 13-2-3). Without further explanation, it is unclear exactly how Dr. Johnson concluded that claimant's work exposure was the major contributing cause of his hearing loss. *See Moe*, 44 Or App at 433; *see also Allen*, 60 Van Natta at 1424-25.

Ultimately, claimant bears the burden of proof to establish the compensability of his occupational disease on the basis of persuasive medical opinion. ORS 656.266(1). For the reasons expressed above, as well as those contained in the ALJ's order, I do not consider Dr. Johnson's opinion to be persuasive. In the alternative, as I have previously explained, I would find Dr. Hodgson's opinion more persuasive than Dr. Johnson's opinion. Consequently, I would not find the claimed hearing loss condition compensable. Because the majority concludes otherwise, I respectfully dissent.