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In the Matter of the Compensation of  
**GARY L. JORDAN, Claimant**  
WCB Case No. 16-00022, 15-05490  
ORDER ON REVIEW  
Alvey Law Group, Claimant Attorneys  
Cummins Goodman et al, Defense Attorneys  
Ronald W Atwood PC, Defense Attorneys

Reviewing Panel: *En Banc*. Members Lanning, Curey, Somers, Weddell, and Johnson.

Gallagher Bassett Services, Inc. (Gallagher Bassett) requests review of Administrative Law Judge (ALJ) Riechers's order that: (1) found that claimant's occupational disease claim for a hearing loss condition against Gallagher Bassett was timely filed; (2) set aside Gallagher Bassett's denial of claimant's occupational disease claim; and (3) upheld Intermountain Claims, Inc.'s (Intermountain's) responsibility denial of an occupational disease claim for the same condition. On review, the issues are timeliness of claim filing and responsibility. We affirm in part and reverse in part.

#### FINDINGS OF FACT

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

Claimant, a carpenter, has worked for multiple employers since 1984. (Ex. 3). He worked as a carpenter for Intermountain's insured from March 2014 to November 2014. (Tr. 11). He went to work as a carpenter for Gallagher Bassett's insured in March 2015. (*Id.*) During those two employment periods, claimant was similarly exposed to noise from tools (*e.g.*, jackhammers, grinders, Skilsaws, roto-hammers, Sawzalls) and wore foam earplugs to protect his hearing. (Tr. 12, 13, 15).

On June 6, 2014, Ms. Dickie, an audiologist, performed an audiogram, advised claimant that he had occupationally-related hearing loss, and recommended that he obtain hearing aids. (Exs. 2C, 3-2. 13A-17).

On December 8, 2014, claimant filed a Washington workers' compensation claim against Intermountain's insured. (Ex. 4). On August 4, 2015, he re-filed the Intermountain claim in Oregon. (Ex. 8).

On September 21, 2015, while claimant was working for Gallagher Bassett's insured, Dr. Hodgson, an otolaryngologist, performed an examination at Intermountain's request. Dr. Hodgson provided the results of an audiogram that was administered that day, as well as the results of two audiograms that were administered before claimant began working for Gallagher Bassett's insured. (Ex. 9-10). He opined that the tests were "fairly" comparable (*i.e.*, within "test/re-test variability") and concluded that claimant's lifelong occupational noise exposure contributed more than 50 percent to his hearing loss condition. (Ex. 9-4, -5).

On October 2, 2015, Intermountain denied responsibility only for claimant's Oregon hearing loss claim, asserting that another insurer or employer might be responsible for the claim. (Ex. 10). Claimant requested a hearing.

On October 20, 2015, claimant filed a claim against Gallagher Bassett. (Ex. 12). On December 17, 2015, Gallagher Bassett issued a denial, asserting that the claim was untimely filed under ORS 656.807 and may be the responsibility of another employer or insurer. (Ex. 14). Claimant requested a hearing.

On December 21, 2015, Dr. Hertler, an otolaryngologist, performed a records review at Intermountain's request. Dr. Hertler reviewed a 2003 noise level survey, which Intermountain represented to be an accurate reflection of claimant's exposure during the time he worked for its insured. (Ex. 15-1). Dr. Hertler opined that it would be impossible for that noise level to contribute to claimant's hearing loss. (Ex. 15-2).

### CONCLUSIONS OF LAW AND OPINION

The ALJ concluded that the claim against Gallagher Bassett was timely filed. *See* ORS 656.807(1); *cf. Baker v. Liberty Northwest Ins. Corp.*, 257 Or App 205, *rev den*, 354 Or 597 (2013). Next, applying the last injurious exposure rule (LIER), the ALJ determined that Intermountain was presumptively responsible and that Dr. Hodgson's opinion was sufficient to transfer liability to Gallagher Bassett. *See Dennis Hunter*, 65 Van Natta 1158, 1161 (2013). Accordingly, the ALJ upheld Intermountain's denial and set aside Gallagher Bassett's denial.

On review, Gallagher Bassett asserts that its claim, which was filed more than one year from the date that claimant was informed that he was suffering from an occupational disease, is time-barred under ORS 656.807. Gallagher Bassett also argues that the medical evidence is insufficient to shift responsibility for the

claim from Intermountain to Gallagher Bassett. For the following reasons, we disagree with Gallagher Bassett's "untimely claim" contention, but we reverse the ALJ's responsibility decision.

### Claim Filing

ORS 656.807(1) provides that an occupational disease claim is void unless it is filed one year from the later of the following dates: (1) the date the worker first discovered the occupational disease; (2) the date that, in the exercise of reasonable care, the worker should have discovered the occupational disease; (3) the date the worker became disabled; or (4) the date the worker was informed by a physician that the worker was suffering from an occupational disease. *Freightliner LLC v. Holman*, 195 Or App 716, 721 (2004); *Obed Marquez*, 66 Van Natta 1558 (2014).

In *Baker*, the claimant had not filed a claim within one year after being informed by a physician that he had an occupational disease. Instead, he postponed filing a claim until after he had gone to work for a different employer. He then filed an occupational disease claim against both the first carrier and the second carrier. Both carriers denied compensability and responsibility. The second carrier also raised an untimely filing defense.

We found the claim untimely filed under ORS 656.807(1). *Charles J. Baker*, 60 Van Natta 3026 (2008). In reaching our conclusion, we acknowledged the claimant's assertion that the reasoning expressed in *Ahlberg v. SAIF*, 199 Or App 271 (2005) and *Kepford v. Weyerhaeuser Co.*, 77 Or App 363 (1986) permitted him to file a new occupational disease claim, unencumbered by the statute of limitations, for his ongoing work exposure that resulted in a worsened condition. *Id.* at 3029. We disagreed with that assertion, stating that those cases did not hold that a claimant may indefinitely postpone the filing of an initial occupational disease claim after being informed by a physician that the claimant is suffering from an occupational disease. *Id.* We further stated that ORS 656.807 contains no such exception. *Id.* Lastly, we found that the claimant's reasoning contradicted the express language of ORS 656.807, "which requires that all occupational disease claims be filed 'one year from the date the claimant \* \* \* is informed by a physician that the claimant is suffering from an occupational disease.'" *Id.* The claimant petitioned for judicial review of our decision.

On appeal, the court affirmed. In doing so, the court rejected the claimant's contention that a new one-year limitation period under ORS 656.807(1) began with each subsequent period of employment, noting that ORS 656.807(1) "provides that *all* occupational disease claims 'shall be void' if not filed within that one-year time period." (Emphasis in original). *Baker*, 257 Or App at 214.

Here, at hearing, Gallagher Bassett relied on *Baker* in support of its contention that its claim was *not* timely filed under ORS 656.807(1). Noting that the facts in *Baker* were distinctly different from those presented here (in that claimant filed the Intermountain claim within one year of being informed that he had an occupationally-related hearing loss condition, whereas the claimant in *Baker* had not filed a timely claim against the first carrier), the ALJ declined to apply *Baker* to the subsequent Gallagher Bassett claim for the same condition. The ALJ reasoned that application of the *Baker* rationale would interfere with the “risk-spreading” function of the LIER. *See Bracke v. Baza’r*, 293 Or 239, 249-50 (1982).

On review, Gallagher Bassett argues that, under ORS 656.807(1) and *Baker*, claimant’s claim filing against its insured was untimely because claimant did not file that claim within one year after he was notified that he had an occupational disease. Based on the following reasoning, we consider the *Baker* holding distinguishable.

Here, as in *Baker*, a second carrier is challenging the timeliness of an occupational disease claim, asserting that the claim against the second carrier was filed more than one year after claimant received notice that he was suffering from an occupational disease. However, in contrast to *Baker*, in this case, claimant filed a claim against the first employer (Intermountain’s insured) within the one-year period under ORS 656.807(1). We agree with the ALJ that this fact provides an important distinction from the situation involved in *Baker* in that claimant did not postpone filing the initial claim after being informed by a physician that he was suffering from an occupational disease. Under such circumstances, we decline to extend the *Baker* holding (where no claim against any potentially responsible employer was filed within one year of the claimant’s notification that he was suffering from an occupational disease) to a situation where claimant has timely filed his occupational disease claim against the first potentially responsible employer, but, as a result of his continuing exposure with a subsequent employer, and the first carrier’s responsibility denial, claimant’s later claim against the second employer is filed more than one year after his notice of an occupational disease.

Therefore, we agree with the ALJ’s decision to reject Gallagher Bassett’s “untimely claim” defense. Further, because Gallagher Bassett was the only carrier to place claimant’s entitlement to compensation at risk (*i.e.*, by asserting that the claim was untimely filed) Gallagher Bassett remains responsible for the ALJ’s attorney fee and cost awards under ORS 656.386.

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## Responsibility

There is no dispute that Intermountain was presumptively responsible. Therefore, the resolution of the responsibility issue turns on whether the medical evidence was sufficient to transfer liability from Intermountain (the presumptively responsible carrier) to Gallagher Bassett. We conclude that the medical evidence was not sufficient to transfer liability. We reason as follows.

To transfer liability for an initial occupational disease claim to a later carrier, the presumptively responsible carrier must prove that subsequent employment actually contributed to a worsening of the underlying disease. *Reynolds Metals v. Rogers*, 157 Or App 147, 153 (1998), *rev den*, 328 Or 365 (1999); *John A. Knapp*, 62 Van Natta 3055, 3057 (2010). Even a slight contribution to the underlying condition is sufficient. *J.H. Kelly, LLC v. Smith*, 244 Or App 123, 128 (2011); *Emory M. Schaffer*, 66 Van Natta 441, 443 (2014). However, in order to shift responsibility to a later carrier, there must be a worsening of the underlying disease. *SAIF v. Hoffman*, 193 Or App 750, 753 (2004); *Rogers*, 157 Or App at 153; *Ramona M. Johnson*, 62 Van Natta 2163, 2173 (2010).

In *Hunter*, a physician opined that the claimant's lifelong exposure to work-related noise was the major contributing cause of a hearing loss condition. 65 Van Natta at 1161. The physician also stated that "all of [the] claimant's work exposure contributed to the progress of his hearing loss." *Id.* Based on that evidence, we reasoned that the "presumptively responsible" carrier was allowed to shift responsibility for the claimed condition to a subsequent period of employment. *Id.* at 1161.

Here, Dr. Hodgson opined that claimant's "lifelong occupational noise exposure" contributed more than 50 percent to his hearing loss. (Ex. 9-5). However, Dr. Hodgson reviewed the results of an audiogram that was administered after claimant began working for Gallagher Bassett's insured, as well as the results of two audiograms that were administered before claimant began working for that employer. (Ex. 9-10). Dr. Hodgson observed that claimant showed better thresholds of hearing in the "pre-Gallagher Bassett" June 6, 2014 test. (Ex. 9-4). He also opined that the tests were "fairly" comparable (*i.e.*, within "test/re-test variability"). (*Id.*) Therefore, in contrast to *Hunter*, Dr. Hodgson's opinion does not support that claimant's exposure while working for Gallagher Bassett's insured contributed to the progress (or a worsening) of his hearing loss. In the absence of such an opinion, we are unable to conclude that claimant's hearing loss worsened as a result of his subsequent employment exposure with Gallagher Bassett. *See*

*Benz v. SAIF*, 170 Or App 22, 25 (2000) (although the Board may draw reasonable inferences from the medical evidence, it is not free to reach its own medical conclusions); *see also SAIF v. Calder*, 157 Or App 224, 228 (1998) (Board is not an agency with specialized medical expertise and must base its findings on medical evidence in the record).

Dr. Hertler's opinion did not address whether claimant's subsequent employment with Gallagher Bassett contributed to a worsening of his hearing loss condition.

Under these circumstances, the medical evidence does not allow Intermountain to transfer liability for claimant's hearing loss condition to Gallagher Bassett. Therefore, we reverse that portion of the ALJ's order that found Gallagher Bassett responsible for claimant's hearing loss claim. For the reasons expressed above, responsibility for the claim rests with Intermountain.

Claimant is entitled to an assessed attorney fee for his counsel's "appearance and active and meaningful participation" in finally prevailing against a responsibility denial, payable by Intermountain. ORS 656.308(2)(d). Absent a showing of "extraordinary circumstances," such a fee award may not exceed \$2,500, as adjusted by the percentage increases made to the average weekly wage. *Id.* For assessed fees awarded from July 1, 2016 through July 1, 2017, the maximum fee award under ORS 656.308(2)(d) is \$3,047.

Here, claimant's counsel "actively" and "meaningfully" participated in the responsibility proceeding by taking a position and advocating claimant's interest in deciding the responsible carrier. *See Darrell W. Vinson*, 47 Van Natta 356, 359 (1995) (*en banc*) (finding a claimant's counsel's participation to be "meaningful" even though the position taken concerning the responsible carrier did not "ultimately prevail"). After considering the factors in OAR 438-015-0010(4) and applying them to this case, in particular the time devoted to the responsibility proceeding (as represented by the hearing record and claimant's respondent's brief), the complexity of the issue, and the value of the interest involved, we find that a reasonable attorney fee for claimant's counsel's services at the hearing level and on Board review regarding the responsibility issue is \$3,047, payable by Intermountain.<sup>1</sup> This award is in lieu of the ALJ's "308(2)(d)" attorney fee award of \$2,885 payable by Gallagher Bassett.

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<sup>1</sup> There is no contention that there were "extraordinary circumstances," nor does the record support such a conclusion. *See Samuel A. Brown*, 65 Van Natta 1370, 1373 n 2 (2013) (declining to award attorney fee in excess of statutory maximum under ORS 656.308(2)(d) where the claimant neither asserted "extraordinary circumstances" nor were such circumstances found).

Because Gallagher Bassett requested review of the ALJ's order and continued to challenge the timeliness of the claim filing, claimant's compensation was at risk on review, justifying an attorney fee award under ORS 656.382(2) for claimant's counsel's services on review. *See Cigna Ins. Cos. v. Crawford & Co.*, 104 Or App 329 (1990); *Damon E. Smith*, 67 Van Natta 1910, 1913 (2015). After considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that a reasonable attorney fee award for claimant's counsel's services on review concerning the claim timeliness issue is \$4,000, payable by Gallagher Bassett. 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 may go uncompensated.

### ORDER

The ALJ's order dated March 21, 2016 is affirmed in part and reversed in part. Gallagher Bassett's responsibility denial is reinstated and upheld. Intermountain's responsibility denial is set aside and the claim is remanded to Intermountain for processing according to law. In lieu of the ALJ's \$2,885 attorney fee payable by Gallagher Bassett, claimant's counsel is awarded a \$3,047 attorney fee, payable by Intermountain. For services on review pertaining to the timeliness issue, claimant's attorney is awarded an assessed attorney fee of \$4,000, payable by Gallagher Bassett. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on October 12, 2016