
In the Matter of the Compensation of
LAURENCE P. WOOD, Claimant
WCB Case No. 01-03604
ORDER ON REVIEW
Cary et al, Claimant Attorneys
Johnson Nyburg & Andersen, Defense Attorneys

Reviewing Panel: Members Phillips Polich, Lowell, and Bock. Member Phillips Polich dissents.

Claimant requests review of Administrative Law Judge (ALJ) Myzak's order that upheld Liberty Northwest's (Liberty's) denials of claimant's occupational disease claims for bilateral hearing loss and tinnitus conditions. On review, the issue is responsibility.

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

The ALJ concluded that claimant's "onset of disability" occurred (at the latest) in November 1983, and, therefore, initial responsibility under the last injurious exposure rule (LIER) was assigned to an earlier nonjoined "presumptively responsible insurer." Determining that claimant's subsequent employment exposure with Liberty's insured did not actually contribute to a worsening of his hearing loss condition, the ALJ held that responsibility for the claim did not shift to Liberty.¹

On review, claimant contends that he first sought medical treatment for his hearing loss condition in January 2001 (from Dr. Hiatt, an ear, nose, throat (ENT) physician) and, therefore, initial responsibility for his compensable hearing loss/tinnitus conditions rests with Liberty's insured (J.H. Kelly, Inc., the last employer he worked for prior to his 1991 retirement). Relying on *Donald J. Boies*, 48 Van Natta 1259, *on recon*, 48 Van Natta 1861 (1996), claimant contends that his audiological evaluation in 1983 did not constitute medical treatment that would act to trigger an assignment of responsibility. We disagree with claimant's interpretation of the *Boies* holding.

¹ The correct test for transferring liability from the initially responsible insurer to Liberty's insured is whether claimant's subsequent work exposure for Liberty's insured "actually contributed to a worsening of the condition" rather than whether claimant's condition "actually worsened." See *Reynolds Metals v. Rogers*, 157 Or App 147, 153 (1998); *Oregon Boiler Works v. Lott*, 115 Or App 70, 74 (1992). Based on this record, we conclude that claimant's work exposure for Liberty's insured did not "actually contribute to a worsening" of his hearing loss and/or tinnitus conditions.

In *Boies*, we cited *Norman L. Selthon*, 45 Van Natta 2358, 2359 (1993), and reiterated that audiometric tests obtained pursuant to OSHA requirements do not constitute medical treatment for purposes of determining the onset of disability. *Id.* at 1260. However, in *Boies*, relying on *Gregory A. Wilson*, 45 Van Natta 235 (1993) (date of first medical evaluation was the triggering date where the claimant missed no work and otherwise sought no medical treatment for his hearing loss), we also held that an audiological evaluation (performed by an audiologist) was the triggering event for the onset of disability. *Id.* at 1260. In other words, simply having a hearing test performed does not trigger the “onset of disability” because it does not constitute “medical treatment.” However, an evaluation by an audiologist can be the triggering event (as it was in *Boies*).

Here, claimant sought an audiological evaluation in March 1983 (from an audiologist at the Eugene Hearing and Speech Center) because he had noticed a progressive loss of hearing. (See Ex. 1-1). Based on the record, we are persuaded that the examination and testing by the audiologist was not done at the behest of the employer for purposes of OSHA compliance, but rather on claimant's own initiative to address a perceived problem with his hearing. The audiologist reported the results of the examination and her recommendations to claimant's family physician, Dr. Litchman. (Ex. 1-1). The audiologist also enclosed a copy of a “Medical Consultation Form for Hearing Aid Use” form for Dr. Litchman to complete “in order to facilitate the fitting of an aid.” (Ex. 1-2). Claimant was seen again at the Eugene Hearing and Speech Center in November 1983 for a fitting of a hearing aid, which he began wearing at that time.² (Ex. 2).

Under such circumstances, we conclude that claimant initially received medical *treatment* for his hearing loss condition in 1983. Therefore, we affirm the ALJ's order that concluded that responsibility for claimant's hearing loss claim did not rest with Liberty.

ORDER

The ALJ's order dated November 8, 2002 is affirmed.

Entered at Salem, Oregon on May 6, 2003

² The November 8, 1983 letter from the Eugene Hearing and Speech Center was addressed to Dr. Litchman and also advised him that he would be provided with a closing report. Such evidence supports a reasonable inference that claimant sought and received medical treatment for his hearing loss condition in 1983. (Ex. 2).

Board Member Phillips Polich dissenting.

The majority adopts and affirms the ALJ's order upholding Liberty's denials of responsibility for claimant's occupational disease claims for bilateral hearing loss and tinnitus conditions. Because I find that claimant first sought medical treatment for these conditions in January 2001, placing initial responsibility with Liberty's insured, I respectfully dissent.

The ALJ concluded that claimant's "onset of disability" occurred (at the latest) in November 1983, and, therefore, initial responsibility under the last injurious exposure rule (LIER) was assigned to an earlier nonjoined "presumptively responsible insurer."³ Determining that claimant's subsequent employment exposure with Liberty's insured did not actually contribute to a worsening of his hearing loss condition, the ALJ held that responsibility for the claim did not shift to Liberty.

On review, claimant contends that he first sought medical treatment for his hearing loss condition in January 2001 (from Dr. Hiatt, an ear, nose, throat (ENT) physician) and, therefore, initial responsibility for his compensable hearing loss/tinnitus conditions rests with Liberty's insured (J.H. Kelly, Inc., the last employer he worked for prior to his 1991 retirement). Relying on *Donald J. Boies*, 48 Van Natta 1259, *on recon*, 48 Van Natta 1861 (1996), claimant contends that his audiological evaluation in 1983 did not constitute medical treatment that would act to trigger an assignment of responsibility. I agree with claimant's contentions.

Under LIER, initial or presumptive responsibility for a condition is assigned to the last period of employment where conditions could have caused claimant's disability. *Bracke v. Baz'r, Inc.*, 293 Or 239, 248-49 (1982). The "onset of disability" is the triggering date for determining which employment is the last potentially causal employment. *Id.* at 248. Where a claimant seeks or receives medical treatment for the compensable condition before experiencing time loss due that condition, it is appropriate to designate a triggering date based on either the seeking or receiving of medical treatment, whichever occurs first. *Agricom Ins. v. Tapp*, 169 Or App 208, 213 (2000); *see Reynolds Metals v. Rogers*, 157 Or App 147, 153 (1998) (the date of the first medical treatment is the triggering date

³ Because there is no previously accepted claim for claimant's hearing loss condition, ORS 656.308(1) does not apply to determine responsibility. *SAIF v. Yokum*, 132 Or App 18, 23 (1994). Therefore, responsibility is determined under LIER.

that dictates which period of employment is assigned initial responsibility for the treatment).

In *Boies*, we cited *Norman L. Selthon*, 45 Van Natta 2358, 2359 (1993), and reiterated that audiometric tests obtained pursuant to OSHA requirements do not constitute medical treatment for purposes of determining the onset of disability. *Id.* at 1260.

Here, claimant sought an audiological evaluation in March 1983 (from an audiologist at the Eugene Hearing and Speech Center) because he had noticed a progressive loss of hearing. (*See Ex. 1-1*). Claimant was seen again at the Eugene Hearing and Speech Center in November 1983 for a fitting of a hearing aid, which he began wearing at that time. (*Ex. 2*).⁴ However, an audiometric test and the purchase of a hearing aid does not constitute medical *treatment* which is sufficient to establish the “onset of disability.” *See Boies* at 1260. Under such circumstances, I conclude that claimant initially received medical *treatment* for his hearing loss/tinnitus conditions in January 2001, when he sought treatment from Dr. Hiatt.

The last potentially responsible employer was Liberty’s insured. Consequently, I would assign initial responsibility for the hearing loss/tinnitus conditions to Liberty. Under the LIER, Liberty is responsible for claimant’s hearing loss/tinnitus conditions, unless it can shift responsibility backwards under the LIER to a previous employer. To shift responsibility backwards, Liberty must prove either: (1) that it was impossible for conditions at its workplace to have caused the disease in this particular case; or (2) that the disease was caused solely by conditions at one or more previous employments. *Roseburg Forest Products v. Long*, 325 Or 305, 313 (1997). I find no such evidence in this case. Accordingly, on this record, I would find that Liberty is responsible for claimant’s bilateral hearing loss/tinnitus conditions under the LIER. Therefore, I respectfully dissent.

⁴ I find the majority’s “inference” that medical treatment was sought and received because his treating physician was copied with the June 8, 1983 letter unsupported by medical evidence in this case. Nothing indicates that this was anything more than a professional courtesy. I think physicians (and insurers) will be surprised to learn that by being copied on a letter from another medical practitioner that “treatment” has been provided.