

In the Matter of the Compensation of
JEFFERY W. COATNEY, Claimant

WCB Case No. 02-04670

ORDER ON REVIEW

Ransom Gilbertson et al, Claimant Attorneys

Gilroy Law Firm, Defense Attorneys

Reviewing Panel: Members Lowell and Kasubhai.

The self-insured employer requests review of those portions of Administrative Law Judge (ALJ) Peterson's order that set aside its compensability and responsibility denial of claimant's occupational disease claim for bilateral hearing loss. On review, the issues are compensability and responsibility.

We adopt and affirm the ALJ's order with the following changes and supplementation. We change the first full sentence on page 2 to read: "Since claimant began working in Oregon, the employer has built three large storage tanks next to claimant's office, which also exposed him to loud noise." We replace the first full paragraph on page 2 with the following:

"Claimant had noticed hearing loss gradually over the past 10 years. (Ex. 5). In April 2002, he paid for an audiogram at Kaiser Permanente and was informed that his hearing loss was consistent with industrial hearing loss patterns. (Ex. 3; Tr. 19-20). Although there is an "801" claim form in the record, it was not signed by claimant. (Ex. 2). The employer indicated it first knew of the claim on March 26, 2002. (*Id.*)"

In the first full paragraph on page 3, we replace the sixth and seventh sentences with the following:

"Here, the evidence is insufficient to establish that it was impossible for the Oregon employment to have caused claimant's bilateral hearing loss or that a prior period of employment was the sole cause of his hearing loss."

Claimant has worked for the employer since 1987. For the first 11 years of his employment, he worked on an off-shore oil platform in California where he was exposed to continuous loud noise from compressors, fog horns and loud gas leaks. Claimant was then transferred to Colorado for 18 months where he was also

exposed to loud noise. In November 1999, claimant was transferred to Oregon. He was exposed to loud noise from oil barges and ships while at the loading dock, and was also exposed to loud noise during the employer's construction of three large storage tanks.

At hearing, claimant relied on the last injurious exposure rule (LIER) to establish compensability. The ALJ found that the onset of claimant's disability was on April 3, 2002, when he first sought medical treatment and was advised that he had a hearing loss due to his exposure to loud noises at work. At that time, claimant was working for the employer in Oregon and the ALJ assigned initial responsibility to the Oregon employer. The ALJ was not persuaded that it was impossible for claimant's Oregon employment with the employer to (1) have caused the hearing loss or that (2) a prior period of employment was the sole cause of the hearing loss. Consequently, the ALJ found that the employer was responsible for claimant's hearing loss. The ALJ also rejected the employer's argument that claimant's hearing loss claim was untimely under ORS 656.807.¹

Under the 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. Baza'r*, 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 to that condition, it is appropriate to designate a triggering date based on either the seeking or receiving of medical treatment, whichever occurs first. *Agricomps Ins. v. Tapp*, 169 Or App 208, 212-13, *rev den* 331 Or 244 (2000).

Here, the employer does not challenge that portion of the ALJ's order that found the "onset of disability" was April 2002. Because claimant was working for the employer in Oregon at that time, that employer is presumptively responsible. Under the LIER, the employer is responsible for claimant's hearing loss unless it proves 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).

¹ Because the employer does not challenge the portion of the ALJ's order that rejected its argument that the claim was untimely under ORS 656.807, we do not address that issue.

The employer relies on Dr. Hodgson's opinion to prove that claimant's hearing loss did not change after 1997 and, therefore, it was impossible for claimant's Oregon employment to have contributed to his hearing loss. (Ex. 13-13).

On the other hand, claimant argues that Dr. Hodgson's deposition testimony proves that he could *not* say that it was impossible for claimant's Oregon employment to have caused additional hearing loss.

In a concurrence letter from the employer, Dr. Hodgson agreed that, based on claimant's audiograms from 1987 through 2002, claimant's hearing remained "essentially the same" since 1997. (Ex. 12-1). He also agreed that claimant's employment since 1999 "did not contribute to any hearing loss." (Ex. 12-2).

In a deposition, claimant's attorney asked Dr. Hodgson whether the noise level claimant was exposed to in Oregon, either in the construction of the tank or in the off-loading of the ship, was the type of noise capable of causing hearing loss. Dr. Hodgson replied that it depended on how much claimant was involved. (Ex. 13-9). He said that the construction noise was capable of causing hearing loss if claimant was in a very close area. (*Id.*) He explained that if claimant was in close proximity to the construction for a significant length of time, that would be capable of causing hearing loss, but if he was only there for an hour or two a day, that would not be enough to cause noise-induced hearing loss. (Ex. 13-10). Dr. Hodgson could not say that it was impossible for the construction noise and pumping noise to cause hearing loss because he did not know the noise levels. (*Id.*)

Dr. Hodgson testified that, based on claimant's audiograms, his left ear hearing had not changed between December 1991 and May 2002. (Ex. 13-12). The right ear had a 20-decibel increase in hearing loss during that time. (*Id.*) He acknowledged that there was some increase in hearing loss between 1987 and 1997. (Ex. 13-13). On the other hand, he said there was no change in claimant's hearing after 1997. (Ex. 13-13). He explained:

"Well, it was from the comparative audiograms that I tabulated that showed me that between 1997, in the left ear it was 235, but I'm quite certain that the 6,000 was incorrect. It was 10 decibels, and he's never been that in either ear before or since, so it's at least 20 decibels more than that, so that would

make it say 255. And the test that we did was 245, so there's no change during that time in the left ear.

“In the right ear he was 260 in 1997 and 265 in 2002, which is well within the realm of test, retest ratability.” (Ex. 13-14, -15).

Although the employer argues that it was impossible for the Oregon employment to contribute to the hearing loss, Dr. Hodgson explained that he did not have enough information about the noise levels claimant was exposed to in Oregon to say whether it was impossible for that noise exposure to have caused hearing loss. (Ex. 13-13, -14). Therefore, we are not persuaded that it was impossible for conditions at the Oregon employment to have caused claimant's hearing loss.

In addition, we find that Dr. Hodgson's opinion is not sufficient to establish that claimant's hearing loss was caused solely by conditions before his Oregon employment with the employer. Dr. Hodgson compared claimant's audiograms and made an adjustment to the 1997 audiogram because he did not believe the finding for the left ear at 6,000 decibels (“10”) was correct. (Ex. 13-14, -15; *see* Ex. 8). He increased the “10” decibel figure by 20 decibels and concluded that the total was therefore “255,” rather than “235” as shown for the 1997 audiogram. Because claimant's 2002 audiogram showed a total of “245,” Dr. Hodgson concluded that there was no change in claimant's left ear since 1997. (Ex. 13-14, -15). Dr. Hodgson's conclusion about claimant's hearing in the left ear is necessarily dependent on his conclusion that the 1997 “10 decibel” finding for the left ear at 6,000 decibels was incorrect and that it should be increased by 20 decibels.

Regarding claimant's right ear, Dr. Hodgson said that the total in 1997 was “260” and the total in 2002 was “265,” which was “well within the realm of test, retest ratability.” (Ex. 13-15).

Although Dr. Hodgson found that there was an increase in hearing loss in the right ear since 1997, he discounted that change as “well within the realm of test, retest ratability” and concluded that there was no change in claimant's hearing loss after 1997. (Ex. 13-14, -15, -17). In the absence of a thorough explanation, we do not consider Dr. Hodgson's conclusion that claimant's increased right ear hearing loss in 2002 (as compared to the 1997 audiogram) was nothing more than “test/retest variability” sufficient to establish that claimant's prior employment was the *sole* cause of the condition. *See Johnny E. Marble*, 54 Van Natta 24 (2002)

(although medical opinion showed that differences between the claimant's test results before and after his work for the insured were within "test/re-test variability," opinion was insufficient to establish that the claimant's prior employment was the sole cause of the condition), *aff'd Foster Wheeler Corp. v. Marble*, 188 Or App 579 (2003).

Moreover, although Dr. Hodgson found that there was no increase in claimant's left ear hearing loss, that is dependent on his conclusion that the 1997 "10 decibel" finding for the left ear at 6,000 decibels was incorrect and that it should be increased by 20 decibels. Thus, after adjusting the 1997 audiogram results, Dr. Hodgson found that claimant did not have a change in hearing loss in the left ear since 1997. (Ex. 13-14, -15). Even if we accept Dr. Hodgson's finding that the 1997 "10 decibel" finding for the left ear at 6,000 decibels was incorrect, he did not persuasively explain why he increased it by 20 decibels. We are not persuaded that the medical evidence establishes that claimant's hearing loss was caused solely by conditions before his Oregon employment with the employer. Under these circumstances, we conclude that responsibility remains with the Oregon employer.

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 \$1,500, payable by the self-insured employer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's respondent's brief), the complexity of the issue, and the value of the interest involved.

ORDER

The ALJ's order dated April 15, 2003 is affirmed. For services on review, claimant's attorney is awarded \$1,500, payable by the self-insured employer.

Entered at Salem, Oregon on November 14, 2003