

In the Matter of the Compensation of
MILES E. MCCLURE, Claimant

WCB Case No. 01-09515

ORDER ON REVIEW

Welch Bruun & Green, Claimant Attorneys
Reinisch Mackenzie Healey et al, Defense Attorneys

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

The insurer requests review of Administrative Law Judge (ALJ) Davis' order that: (1) found that claimant's occupational disease claim for hearing loss was not time-barred; and (2) set aside the insurer's denial of that claim. On review, the issues are timeliness of claim filing and compensability.

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

Unable to find that claimant had been told "simply and directly" in 1990, that his occupational disease arose out of his employment, the ALJ concluded that the claim was timely when it was filed in 2001. The ALJ then set aside the insurer's denial, reasoning that Dr. Dowsett, claimant's treating physician, and Dr. Lindgren had convincingly linked the majority of claimant's hearing loss to workplace noise exposure and had effectively rebutted the opinion of Dr. Hodgson, an insurer-arranged medical examiner, who opined that the majority of claimant's hearing loss was age-related.

On review, the insurer contends that claimant was informed of the link between work and his hearing loss more than one year before he filed his claim and that work-related noise exposure was not the major contributing cause of claimant's hearing loss. The insurer's contentions notwithstanding, we agree with the ALJ's determination of the issues.

An occupational disease claim must be filed within one year of the time that claimant is informed, simply and directly, that his condition arose out of his employment. *Templeton v. Pope & Talbot, Inc.*, 7 Or App 119, 120-21 (1971); *Leonard F. Staley*, 55 Van Natta 2115, 2118 (2003). Claimant sought treatment for ear problems 1990. (Ex. A). The doctor's chart notes indicate that claimant "worked around machinery for years" and had "some hearing loss." (Id.) The assessment was "noise induced hearing loss." (Id.) A check mark next to the pre-printed words "discussion with patient" suggests, according to the insurer, that the doctor told claimant that work had caused his hearing loss.

There is no indication, however, that the physician told claimant that his hearing impairment was related to workplace noise. Although the chart notes mention work around machinery and the opinion that the hearing loss was noise-induced, they do not draw an explicit connection between claimant's work and the hearing loss. Even if the doctor had reached such a conclusion, there is no indication that the cause of claimant's hearing loss was included in the discussion. A list of subjects is included under the heading "discussion with patient;" none of the subjects is related to noise or causation. (Ex. A).

Had some connection between workplace noise and hearing loss been mentioned in the discussion, this still would not necessarily result in claimant's claim being time-barred. Informing a claimant that he has hearing loss is not enough. *See Liberty Northwest Ins. Corp. v. Meeker*, 106 Or App 411, 414-15 (1991). Even telling a claimant that he has hearing loss that is related to work does not qualify as informing him, simply and directly, that his hearing loss is the result of work-related noise exposure. *See Leonard F. Staley*, 55 Van Natta 2115, 2119 n.6 (2003) (physician informed the claimant that there was a relationship between work and hearing loss, but did not tell the claimant, simply and directly, that hearing loss arose from employment); *Curtis A. Mulford*, 54 Van Natta 986, 988 (2002) (physician told the claimant that work was contributing to his condition, but did not tell the claimant, simply and directly, that condition arose out of employment). Because the record must show that claimant was told, simply and directly, that his employment caused his hearing loss, and this record does not establish that such a communication took place, we conclude that the claim was timely filed.

We turn to compensability. Claimant must prove that his work activities were the major contributing cause of his hearing loss. ORS 656.802(2)(a). Because of the complex nature of the medical question presented, the long period during which claimant's hearing loss developed, and the conflicting expert opinions regarding the cause of the hearing loss, we consider the medical causation issue to be complex, requiring resolution by expert medical opinion. *See Barnett v. SAIF*, 122 Or App 279, 283 (1993).

Claimant relies primarily upon the opinion of Dr. Lindgren, a Board-certified otolaryngologist with over 40 years of experience. Considering the potential causes of claimant's hearing loss, including presbycusis, Dr. Lindgren concluded that claimant's exposure to loud noises in the workplace was the major contributing cause of his hearing loss. (Ex. 1-1). In reaching this conclusion, Dr. Lindgren reviewed claimant's health and noise-exposure history, examined

claimant, and relied upon an article by George Gates of the University of Washington School of Medicine (Ex. 10), which suggested that workers exposed to loud noises at work continue to suffer from accelerated hearing loss after they leave their jobs. (Ex. 8-1-2). Based upon his 40 years of experience, and considering the amount of workplace noise, the length of claimant's exposure, and the "notch" patterns of claimant's audiogram, Dr. Lindgren opined that claimant's industrial noise exposure was the major contributing cause of his hearing loss. (Ex. 8-2).

Dr. Dowsett, claimant's treating physician since 1991 and also a board-certified otolaryngologist, reviewed Dr. Lindgren's and Dr. Hodgson's reports. He concurred with Dr. Lindgren's opinion. (Ex. 9-1). In addition, he addressed concerns raised by Dr. Hodgson regarding the Gates article, which we discuss below. (Ex. 9-2).

The insurer argues that claimant's doctors failed to apply the general theorem to claimant's individual case or conduct the analysis required by *Dietz v. Ramuda*, 130 Or App 397, 401-02 (1994), *rev dismissed* 320 Or 416 (1995). The insurer also advances Dr. Hodgson's medical opinion.

In contrast to Drs. Lindgren and Dowsett, Dr. Hodgson opined that 60 percent of claimant's right ear hearing loss and 54 percent of claimant's left ear hearing loss were caused by age. (Ex. 4-4). He arrived at this conclusion by comparing claimant's hearing loss with the average hearing loss of a man his age. (Ex. 4-3-4). Dr. Hodgson reasoned that the audiogram pattern for age-related hearing loss was the very similar in configuration to claimant's audiogram, suggesting that claimant suffered from an average amount of age-related hearing loss. (Ex. 6-1).

Dr. Hodgson also criticized the Gates article used by Dr. Lindgren in his analysis of claimant's condition. (Ex. 6-2). According to Dr. Hodgson, the article had two significant weaknesses: the failure to determine whether there was continued noise exposure after the subjects retired and the failure to document the actual amount of occupational noise to which the subjects were exposed. (Id.).

On this record, we find the opinions of Dr. Lindgren and Dr. Dowsett to be the persuasive. Although Dr. Hodgson identified weaknesses in the Gates article on which Dr. Lindgren relied, we do not find those weaknesses sufficient to undermine Dr. Lindgren's opinion. The assumption that the subjects of the study were not subjected to continued loud noise after retirement is a safe one. (Ex. 9-2).

The article's failure to determine the precise amount of noise that subjects had been exposed to during their employment may be a weakness inherent in all studies where subjects are asked about their noise exposure. (Id.). However, the exposure of subjects to loud noise was determined. (Ex. 6-2). Furthermore, although Dr. Lindgren was influenced by the Gates article, he did not depend on it in making his findings.

Rather than relying solely on the Gates article to support the proposition that industrial noise exposure accelerated claimant's presbycusis, Dr. Lindgren, who has practiced as an otolaryngologist for over 40 years, evaluated claimant and concluded that, based on his experience and professional knowledge, claimant's audiogram and work history fit the pattern of accelerated post-exposure hearing loss. (Ex. 8-2). It is on this basis that Dr. Lindgren concluded that "exposure to loud noise in the workplace, when compared to other potential causes including presbycusis, is the major (over 50%) contributing cause of his hearing loss." (Ex. 1-1).

Dr. Hodgson's reliance on American National Standards Institute (ANSI) statistics to determine claimant's presbycusis is, in contrast, inadequate. Presbycusis progresses at different rates in different individuals, and the assumption that claimant's presbycusis is average is not a safe one. (Ex. 8-2). The inadequacy of general statistics to form an opinion as to a particular claimant, without taking into account the claimant's individual situation, is well established. *See Donald V. Hogg*, 54 Van Natta 2698, 2700 (2002) (sole reliance on ANSI statistics inadequate). Dr. Hodgson's statement that claimant's audiogram has a similar shape as that of a man with a median amount of presbycusis is inadequate to relate the ANSI statistics to claimant's particular condition. (Ex. 6-1).

Accordingly, we agree with the ALJ's conclusion finding Dr. Lindgren's and Dr. Dowsett's opinions more persuasive than Dr. Hodgson's. Thus, we affirm.

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 \$2,200, payable by the insurer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by claimant's respondent's brief and his counsel's uncontested statement of services), the complexity of the issue, and the value of the interest involved.

ORDER

The ALJ's order dated March 17, 2003 is affirmed. For services on review, claimant's attorney is awarded a \$2,200 fee, payable by the insurer.

Entered at Salem, Oregon on October 14, 2003

Board Member Langer, dissenting in part.

I concur with the majority's conclusion that claimant filed a timely claim for hearing loss. I disagree on the issue of compensability. For the following reasons, I would uphold the insurer's denial of claimant's hearing loss claim.

The majority discounts the opinion of Dr. Hodgson as inadequate, because he relied on ANSI standards to determine the portion of claimant's hearing loss attributable to presbycusis. According to the majority, these standards represent general statistics that do not reflect individual circumstances of this worker and, therefore, are inadequate to determine the compensable portion of his hearing loss.

Unlike the majority, I find Dr. Hodgson's opinion persuasive. Noting that claimant's audiogram pattern displayed a configuration very similar to the median man his age, Dr. Hodgson concluded that the major contributing cause of claimant's hearing loss (60 percent) was his age. (Ex. 4-3, 4). Although Dr. Hodgson relied on the ANSI standards, he also relied on claimant's audiogram. Thus, he took into consideration claimant's individual circumstances. Because Dr. Hodgson included in his opinion claimant's hearing loss test as well as statistical data, I would not discount Dr. Hodgson's opinion. *See, e.g., Seeley v. Sisters of Providence*, 179 Or App 723, 730 (2002) (although statistical evidence alone is insufficient to prove a claim, it may permit an inference to a causal link with work); *James L. Bonnicksen*, 55 Van Natta 1632 (2003) (because Dr. Hodgson relied on individualized hearing loss tests as well as ANSI standards, the Board did not discount his causation opinion); *Donald V. Ball*, 52 Van Natta 1819 (2000) (physician's opinion based in part on statistical studies was not discounted because it also considered particular facts of the injury).

Moreover, if Dr. Hodgson's reliance on statistical evidence makes his opinion unpersuasive, the opinions of Dr. Lindgren and Dr. Dowsett suffer from the same weakness. Relying on the Gates study's proposition that noise-induced hearing loss can continue after exposure to the noise ends, the doctors concluded that that was what happened in claimant's case. Dr. Lindgren further reported that the conclusion of the Gates study is consistent with his practice. But both the

study and Dr. Lindgren's practice represent statistical evidence that is not based on claimant's examination.

Dr. Hodgson criticized the Gates study for a failure to determine whether the subjects of the study continued to be exposed to loud noise after retirement and a failure to determine the precise amount of noise to which the subjects had been exposed during their employment. Dr. Lindgren in turn criticized the ANSI standards as inadequate, because presbycusis progresses at different rates in different individuals. Both points may be well taken. The majority's attempt to cure the weaknesses of the Gates study, however, is based on assumptions and not persuasive to me. I am not persuaded from this record that the type of the statistical evidence on which Dr. Lindgren relied is more reliable and persuasive than the statistical evidence on which Dr. Hodgson relied.

Both Dr. Hodgson and Dr. Lindgren relied on claimant's hearing tests to reach their opinions. The majority finds Dr. Hodgson's statement that claimant's audiogram has a similar shape as that of a man with a median amount of presbycusis inadequate to relate the ANSI statistics to claimant's particular condition. Instead, the majority concludes that Dr. Lindgren's reference to the "notch" patterns of claimant's audiograms makes his opinion adequately individualized. I disagree.

According to Dr. Lindgren, the notch patterns indicate noise-induced hearing loss. (Ex. 8-2). Dr. Hodgson, agreed, however, that claimant suffers from a great deal of noise-induced hearing loss. (Ex 4). I find nothing in Dr. Lindgren's opinion that would explain how the notch patterns relate to the assumed acceleration of the noise-induced hearing loss after claimant's retirement and the conclusion that claimant's age-related hearing loss does not amount to a cause greater than the noise-induced hearing loss. Accordingly, I find his causation opinion unexplained and would not rely on it.

In summary, I would conclude that the medical evidence in support of compensability is not better-reasoned and more persuasive than Dr. Hodgson's opinion. Therefore, I would conclude that claimant did not establish a compensable claim.

For all of the foregoing reasons, I respectfully dissent on the compensability issue.