In the Matter of the Compensation of
DAVID A. JOHNSON, Claimant
WCB Case No. 02-01105, 02-01104, 02-00468, 02-00467, 02-00466, 02-00358, 01-09283, 01-09282
ORDER ON REVIEW
Cary et al,Claimant Attorneys
Reinisch Mackenzie et al, Defense Attorneys
Julie Masters, SAIF Legal, Defense Attorneys
Scheminske et al, Defense Attorneys
Johnson Nyburg & Andersen, Defense Attorneys
Thaddeus J Hettle & Assoc, Defense Attorneys

Reviewing Panel: Members Biehl and Lowell.

The SAIF Corporation, on behalf of Gilkison & Dad (SAIF/Gilkison), requests review of Administrative Law Judge (ALJ) Poland's order that: (1) set aside its denial of claimant's occupational disease claim for a bilateral hearing loss condition; and (2) upheld denials of claimant's occupational disease claims for the same condition issued by SAIF, as insurer for Crown Zellerbach (SAIF/Crown), SAIF, as insurer for Carol's Enterprises (SAIF/Carol's), Liberty Northwest Insurance Corporation, as insurer for Bridge Creek (Liberty/Bridge Creek), Liberty, as insurer of Gross & Son (Liberty/Gross), Liberty, as insurer for Robert Kelley (Liberty/Robert Kelley), Pinnacle-SIMS, Inc., as administrator for self-insured employer Barrett Business Services (Pinnacle/Barrett), and SAIF, as insurer for Atchley Brothers (SAIF/Atchley). On review, the issue is responsibility.

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

In September 1993, claimant's wife won a free hearing aid from a hearing aid vendor at a county fair. An individual associated with that vendor administered an audiogram to claimant that documented bilateral hearing loss, and then fitted him for a hearing aid for his right ear. Claimant did not purchase a second aid for his left ear, and went without further testing or evaluation until June 2001. In June of 2001, claimant underwent another audiogram, and received follow-up treatment from Dr. Urben, an otolaryngologist, on July 31, 2001.

The ALJ applied the last injurious exposure rule (LIER) to determine responsibility. The ALJ found that the audiometric testing in September 1993 did not constitute medical treatment sufficient to trigger presumptive liability under

LIER. As a result, the ALJ concluded that LIER was triggered when claimant received medical treatment in 2001, thereby assigning presumptive responsibility to claimant's most recent employer, SAIF/Gilkison. The ALJ then determined that SAIF/Gilkison failed to establish that it was impossible for the exposure with SAIF/Gilkison to have contributed to claimant's hearing loss, or that a prior work exposure was the sole cause of that loss. Accordingly, the ALJ concluded that SAIF/Gilkison was the responsible employer.

On review, SAIF/Gilkison contends that the September 1993 audiogram and hearing aid fitting constituted medical treatment sufficient to trigger presumptive responsibility under LIER. SAIF/Gilkison argues that presumptive liability rests with Liberty/Robert Kelley (the carrier providing coverage prior to the September 1993 audiogram), and that the medical evidence does not establish that claimant's employment with SAIF/Gilkison made an actual contribution to a worsening of claimant's condition. For the following reasons, we disagree.

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. Baza'r*, 293 Or 239, 248-48 (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. *Agricomp Ins. v. Tapp*, 169 Or App 208, 212-13 (2000).

SAIF/Gilkison relies on our decision in *Laurence P. Wood*, 55 Van Natta 1539, *on recon* 55 Van Natta 1817 (2002), in support of its assertion that a hearing loss test and the fitting of a hearing aid by an audiologist constituted treatment for purposes of LIER. We find the facts in *Wood* distinguishable. In *Wood*, the claimant sought out a test and examination by an audiologist. The results of the test and examination were forwarded to the claimant's treating physician by that audiologist, and the treating physician was given a form to complete. The claimant then had a return visit with the audiologist for the fitting of a hearing aid.

Here, claimant did not seek out treatment. Instead, he received the hearing test and hearing aid as a prize at a county fair. The test was conducted by either an audiologist or a hearing aid specialist. The test administrator did not confer or correspond with claimant's treating physician. Claimant was given a free hearing

aid for his right ear, but received no follow-up evaluation or treatment. Because the facts in *Wood* differ significantly from the case before us, we do not find *Wood* controlling.

SAIF/Gilkison also cites *Foster Wheeler Corp. v. Marble*, 188 Or App 579, 583 (2003). In *Marble*, the court reviewed the definitions of "treatment" and "treat" in *Stedman's Medical Dictionary* 1866 (27th ed 2000) and *Webster's Third New Int'l Dictionary* 2435 (unabridged ed 1993), and determined that "medical treatment" involves either ongoing medical care or application of some technique, drug or other action designed either to alleviate or cure a disease or injury.

Turning to the facts of *Marble*, the court concluded that the claimant's 1996 and 1999 audiograms were simply self-help measures, and that no "medical treatment" occurred at either audiogram (one of which was union-provided as part of a general health screening and the other was in preparation for retirement). Observing that the claimant neither received any care for his condition nor had anyone performed any action designed to cure or alleviate the condition, the court held that the Board had not erred in finding that there was no treatment associated with the first two audiograms and that the onset of claimant's disability for purposes of LIER did not occur until after he worked for the last employer.

Here, claimant participated in a free hearing test because his wife won a free hearing aid at a county fair. Claimant did not seek out medical treatment, nor did he receive ongoing medical care. He only redeemed his wife's prize at the county fair. His actions were the equivalent of the self-help measures taken by the claimant in *Marble*, with the only exception being that claimant was given a free hearing aid as part of his prize.

Additionally, SAIF/Gilkison's argument that the commercial vendor representative who conducted the audiogram constituted a person duly licensed to practice one or more of the healing arts under OAR 436-010-0005(27) is not persuasive. "A 'healing art' would be commonly understood as the skill to treat disease or disability and, where the nature of the problem permits, to restore health." *Cook v. Workers' Compensation Department*, 306 Or 134, 143 (1988).

Here, the audiogram was signed by someone indicated as either an "audiologist or hearing aid specialist."[1] (Ex. 1). Pursuant to ORS 694.015(4)

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[1] While it may be arguable that an audiologist is a practitioner of the healing arts, it is not self-evident from the record that the person who administered the hearing test to claimant in 1993 was an

(2001), dealing in hearing aids means the sale, lease or rental or attempted sale, lease or rental of hearing aids in conjunction with the evaluation or measurement of the powers or range of human hearing and the recommendation, selection or adaptation of hearing aids. While it appears that a hearing aid specialist must be licensed to sell hearing aids under ORS 694.025 (2001), we find insufficient evidence that a hearing aid specialist qualifies as duly licensed to practice one or more of the healing arts. Based on the record, we cannot conclude that a hearing aid specialist provided medical treatment to claimant for his bilateral hearing loss.

Because we find that claimant did not receive medical treatment for his bilateral hearing loss condition until 2001, presumptive responsibility lies with SAIF/Gilkison under the LIER. In order to transfer liability to a previous employer, SAIF/Gilkison must prove that it was either: (1) impossible for claimant's employment at SAIF/Gilkison to have caused his bilateral hearing loss; or (2) that claimant's bilateral hearing loss condition was caused solely by conditions at one or more previous employments. *See Reynolds Metals v. Rogers*, 157 Or App 147, 153 (1998), *rev den* 328 Or 365 (1999).

The ALJ relied primarily on the opinion of Dr. Hodgson, concluding that his opinion did not establish, by a preponderance of evidence, that it was impossible for the exposure with SAIF/Gilkison to have contributed to claimant's hearing loss, or that a prior work exposure was the sole cause of that loss. We adopt the ALJ's reasoning, and conclude that SAIF/Gilkison remains responsible for claimant's bilateral hearing loss.

ORDER

The ALJ's order dated April 16, 2003 is affirmed.

Entered at Salem, Oregon on October 3, 2003

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audiologist. Therefore, without additional evidence, we cannot conclude that the test administrator was an audiologist.