
In the Matter of the Compensation of
FORREST WELLS, Claimant
WCB Case No. 02-02343
ORDER ON REVIEW
Greg Noble, Claimant Attorneys
Bruce A Bornholdt, SAIF Legal, Defense Attorneys

Reviewing Panel: Members Biehl, Langer, and Bock. Member Biehl dissents.

Claimant requests review of Administrative Law Judge (ALJ) Spangler's order that upheld the SAIF Corporation's denial of claimant's occupational disease claim for a bilateral hearing loss condition. On review, the issue is compensability.

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

Noting that the claim is largely resolved by the weight of the medical evidence, the ALJ evaluated the case as a complex medical causation question. Giving more weight to Dr. Hodgson, an insurer-arranged medical examiner, than to Mr. Frink, claimant's audiologist, the ALJ concluded that the occupational disease claim was not compensable. We agree with the ALJ's compensability determination.

Based on the cumulative nature of claimant's hearing loss and the conflicting opinions regarding causation, we conclude that this case should be evaluated as a complex medical question. *Barnett v. SAIF*, 122 Or App 279, 283 (1993); *Jesse L. Bachler*, 55 Van Natta 216, 217 (2003). To prove his occupational disease claim for hearing loss, claimant must show that his work exposure was the major cause of his hearing loss. *Lecangdam v. SAIF*, 185 Or App 276, 282 (2002); *Asa L. Lewis, Jr.*, 55 Van Natta 1801, 1802 (2003).

We must first address whether the last injurious exposure rule (LIER) of proof applies to the instant claim. That rule allows a claimant to establish compensability by showing that his disability or need for treatment is work-related, without requiring him to show the degree to which any particular employment contributed to the condition. *Roseburg Forest Prods. v. Long*, 325 Or 305, 310 (1995); *David S. Fields*, 55 Van Natta 562, 564 (2003). SAIF contends that claimant did not *invoke* the rule at hearing and that we, therefore, should not consider it. As a rule of proof, the LIER is applicable in any case where the evidence supports its application. *Gosda v. J.B. Hunt Transp.*, 155 Or App 120,

126 (1998); *Bonnie Holmbo*, 54 Van Natta 83, 86 (2002). Furthermore, claimant did argue that “[SAIF’s insured] being the last employer that could’ve contributed [they] would be responsible under the last injurious exposure rule.” (Tr. 4).¹ Under these circumstances, we conclude that the LIER applies.

Claimant’s hearing loss was apparent at his first known hearing examination in 1969 and has become progressively worse over the course of his life. (Ex. 19-2). By the time of the 1969 examination, at the age of 25, claimant had worked in a cereal factory, a fruit packing facility, and a sawmill, and had done farm and orchard work, all of which involved exposure to loud noise. (Tr. 16–22). His hearing was so poor by 1969 that he failed his military physical exam. (Ex. 19-6). Claimant began working for SAIF’s insured’s accounting department in 1968, where he was exposed to loud dot matrix printers from 1980 to 1996.

Two experts provided conflicting opinions as to causation of claimant’s hearing loss. Mr. Frink concluded that employment noise was the major contributing cause of claimant’s hearing loss. (Ex. 21-1). In contrast, Dr. Hodgson, an otolaryngologist, concluded that the major contributing cause of claimant’s profound hearing loss is most likely a familial tendency. The ALJ found Dr. Hodgson’s opinion well reasoned and more persuasive than that of Mr. Frink. We agree.

From the rejection of claimant’s enlistment in 1969, Dr. Hodgson concluded that claimant already had significant hearing loss at that time. (Ex. 19-6). Such poor hearing so early in life was a strong indication, Dr. Hodgson reasoned, that claimant’s hearing loss was mostly independent of any exposure to workplace noise. (*Id.*). At the time of Dr. Hodgson’s examination, claimant’s hearing loss was more severe than would be expected in a man exposed to a 100-decibel (dB)

¹ The following exchange provides further support for the proposition that SAIF understood that LIER applied:

[SAIF’s counsel]: “If this is compensable, it’s compensable as to [SAIF’s insured].”

ALJ: “Okay. That’s clean enough for me. What I heard you guys both saying is this is solely compensability and you can argue what you want. And I need to look at this and go, ‘is this work related?’ And if it’s work related, that—I mean, that’s the basis that this whole case hinges on.”

[SAIF’s counsel]: “Yes.” (Tr. 7).

environment for 40 years. (Ex. 19-4). Given the difference between claimant's hearing loss and the hearing loss expected from age and noise, Dr. Hodgson reasoned that genetic factors were the major cause of claimant's hearing loss. (Ex. 19-5).

Claimant argues that Dr. Hodgson's opinion is unpersuasive because he did not have a complete history of claimant's work exposure. Claimant is correct that Dr. Hodgson did not determine claimant's work exposure to noise before 1968 and assumed that such exposure was minimal. (Ex. 19-5). Nevertheless, Dr. Hodgson persuasively explained that claimant's hearing loss was greater than hearing loss that would be expected from exposure to a 100-dB environment (which would be significantly louder than the printers that claimant was exposed to) for 40 years (a much longer time than claimant was exposed to loud industrial noise). (Ex. 19-4-5). In addition, Dr. Hodgson explained that claimant's hearing loss has progressed consistently from 1971 to the present time and involves the lower frequencies. (Ex. 19-4). According to Dr. Hodgson, such progressive hearing loss involving those frequencies is indicative of a familial tendency. That claimant was not aware of any familial tendency to hearing loss is not determinative. Dr. Hodgson explained that familial hearing loss often skips generations and is caused by the complex interplay of 60 defective genes. (Ex. 19-5).

Mr. Frink conceded that claimant's hearing loss was greater than would be expected from noise and age alone. (Ex. 21-2). He also acknowledged that genes are a factor in claimant's hearing loss. (*Id.*). Nevertheless, he concluded that "the one real factor" in claimant's hearing loss was industrial exposure. (Ex. 21-3).

We conclude that Mr. Frink did not persuasively rebut Dr. Hodgson's attribution of claimant's hearing loss primarily to genetic factors, as demonstrated by continued progressive hearing loss in the low frequencies. (Ex. 19-6). Dr. Hodgson is an otolaryngologist, a medical doctor specializing in treatment in diseases of the ear, nose, and throat, whereas Mr. Frink is an audiologist. The record reveals that Mr. Frink is qualified to measure hearing loss and make recommendations regarding hearing aid amplification. The record does not establish Mr. Frink's qualifications and expertise in evaluating genetic causes of hearing loss. Accordingly, we defer to Dr. Hodgson as the expert with specialized knowledge of diseases of the ear. *See e.g. Henry F. Downs*, 48 Van Natta 2094, *on recon*, 48 Van Natta 2200 (1996) (otolaryngologist's opinion carries greater weight than audiologist's causation opinion).

In conclusion, having considered Dr. Hodgson's and Mr. Frink's reports, we find Mr. Frink's opinion inadequate to establish that claimant's work-related noise exposure was the major contributing cause of his hearing loss condition. Consequently, we conclude that his occupational disease claim is not compensable.

ORDER

The ALJ's order dated April 21, 2003 is affirmed.

Entered at Salem, Oregon on October 13, 2003

Board Member Biehl dissenting.

The majority gives undue weight to Dr. Hodgson's status as an otolaryngologist over Mr. Frink's status as an audiologist and fails to sufficiently consider the import of claimant's history of occupational exposure to 100+ dB environments prior to his 1969 examination. I find that Mr. Frink has offered the most persuasive analysis of claimant's hearing loss and, therefore, respectfully dissent.

When faced with a dispute between experts, we give more weight to those opinions which are both well-reasoned and based on complete information. *Somers v. SAIF*, 77 Or App 259, 263 (1986). Citing *Henry F. Downs*, 48 Van Natta 2094, *on recon*, 48 Van Natta 2200 (1996), the majority defers to Dr. Hodgson as an otolaryngologist; that deference is misplaced. *Downs* stands for the unremarkable proposition that specialized expertise is one factor to be considered in weighing expert opinion. *See Abbott v. SAIF*, 45 Or App 657, 661 (1980) (more weight given to physician who had treated multiple sclerosis for 30 years, published 20 or 30 articles on multiple sclerosis, and chaired the Neurology Department at the University of Oregon medical school). We noted in *Downs* that the otolaryngologist had presented a well-reasoned opinion based on a complete history of claimant's noise-related exposure. *Downs* does not stand for the proposition that a specialist in the evaluation and rehabilitation of those whose communication disorders center in whole or in part in the hearing function is not qualified to offer an opinion as to the cause of a hearing disease. Instead, the standard for evaluating the persuasiveness of expert medical opinion is whether that opinion is well-reasoned and based on complete information.

Dr. Hodgson's opinion was influenced, in large part, by the severity of claimant's hearing loss as documented in 1969. (Ex. 19-6). Dr. Hodgson was unaware that claimant had been exposed to work environments in excess of

100 dB since 1959. This failure to consider claimant's prior occupational noise exposure renders his opinion less persuasive. Mr. Frink, by contrast, did consider claimant's work history in forming his opinion. (Ex. 21-1).

Dr. Hodgson's opinion that claimant's hearing loss is hereditary appears to be based, primarily, on the discrepancy between the hearing loss that would be expected from age and noise exposure and the severity of claimant's loss. (Ex. 19-4-5).² Even Mr. Frink conceded that claimant's hearing loss was greater than would be expected from age and noise alone. (Ex. 21-2). Recitation of general statistics, without consideration for a claimant's particular circumstances, however, is not persuasive. See *Sherman v. Western Employers Ins.*, 87 Or App 602, 605 (1987); *Daniel A. Holte*, 52 Van Natta 1661 (2000).

The majority cites Dr. Hodgson's statement that the average man, exposed to a 100 dB environment for 40 years, would not be expected to suffer claimant's level of hearing loss. It does so to support its conclusion that claimant's history of noise exposure (which Dr. Hodgson did not consider) did not cause his hearing loss. There is no medical evidence relating that statistic to claimant, who had been exposed to work environments exceeding 100 dB. (Ex. 21-1). We are not an agency with specialized medical expertise entitled to take official notice of technical facts; our findings must be supported by medical evidence in the record. *SAIF v. Calder*, 157 Or App 224 (1998); *Pamela M. Christman*, 54 Van Natta 1992, 1996 (2002). Without such evidence, we should not be persuaded by statistics describing how noise exposure would be "expected" to affect the average man.

Mr. Frink's critique of Dr. Hodgson's "familial tendency" conclusion is persuasive. The only member of claimant's family with any known hearing loss is an uncle who worked a lifetime around loud noise. (Ex. 21-2). Without any family history of non-noise-related hearing loss, the proposition that claimant's

² When prompted to describe claimant's preexisting conditions, Dr. Hodgson stated that claimant's hearing loss "has the typical characteristics of a progressive familial-type loss that has begun many years ago * * * we note that he had a severe hearing loss on the [1971 hearing test]. It has continued to progress to the present time and involves the lower frequencies." (Ex. 19-4). He later stated that the amount of hearing loss and involvement of lower frequencies did not suggest noise or age as a factor in the hearing loss. (*Id.*). The majority interprets this to mean that progressive hearing loss in the lower frequencies is indicative of hereditary hearing loss. I find, rather, that Dr. Hodgson was merely describing claimant's early hearing loss, the severity of which influenced his finding of a familial cause.

condition is genetic is speculative.³ Furthermore, Mr. Frink explained that, although claimant may be more sensitive to loud noise than the average worker, it is still the noise, rather than genetics or age, that causes the hearing loss. (Ex. 21-3). Such sensitivity should be distinguished from genetic defects like Waardenburg's syndrome, Usher's syndrome, and Pendred's syndrome. (*Id.*).

Considering the possibility of hereditary hearing loss and weighing the probable effect of age, Mr. Frink concluded that the major contributing cause of claimant's hearing loss was his exposure to industrial noise. (Ex. 21-3). Mr. Frink had the most complete history, and his opinion was the most well-reasoned. I find his opinion to be the most persuasive, and I accordingly find that claimant has established the compensability of his hearing loss condition.

Accordingly, I would reverse the ALJ's order, set aside SAIF's denial, and remand the claim to SAIF for processing. Therefore, I dissent.

³ Dr. Hodgson argued that "[f]amilial hearing loss often skips generations. There are approximately 60 defective genes that could be inherited by a person. It usually takes a combination of these to create a hearing loss in any one given person and may often skip generations." (Ex. 19-6). Notwithstanding this general proposition, the record does not establish that any such "hearing loss genes" are present anywhere in claimant's family, much less in claimant's own genome. The possibility that familial hearing loss may skip generations is not evidence that it skipped all known generations to only affect claimant.