

In the Matter of the Compensation of  
**GERALD W. JESSUP, Claimant**

WCB Case No. 07-03467

ORDER ON REVIEW

Martin L Alvey, Claimant Attorneys

The Law Office of Gress & Clark LLC, Defense Attorneys

Reviewing Panel: Members Weddell and Langer.

The self-insured employer requests review of that portion of Administrative Law Judge (ALJ) Brazeau's order that set aside its denial of claimant's occupational disease claim for bilateral hearing loss. On review, the issue is compensability.

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

The employer acknowledges that work related noise exposure during its coverage could have contributed to claimant's hearing loss. However, the employer relies on evidence suggesting that claimant had hearing loss in 1991 (when he started working for the employer), arguing that "pre-1991" hearing loss was a "preexisting condition." Therefore, according to the employer, the claim is necessarily based on a worsening of a preexisting condition and claimant must prove, among other things, that his work exposure since 1991 was the major contributing cause of a combined condition, involving the "preexisting condition." *See* ORS 656.802(2)(b). Thus, the employer essentially argues that claimant may not rely on the last injurious exposure rule (LIER) to prove compensability.<sup>1</sup> We disagree, reasoning as follows.

The LIER rule of proof allows a claimant to establish the compensability of an occupational disease without having to prove the degree, if any, to which exposure to disease-causing conditions at a particular employment actually caused the disease. Claimant need only prove that the disease was caused by employment-related exposure. *Roseburg Forest Products v. Long*, 325 Or 305, 309 (1997). The LIER rule of proof applies "in any case in which the evidence supports its application." *Gosda v. J.B. Hunt Transportation*, 155 Or App 120,

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<sup>1</sup> The LIER has two aspects, a rule of proof and a rule of assignment of responsibility. As a rule of assignment of responsibility, it assigns full responsibility to the last employer that could have caused the claimant's medical condition. *Willamette Industries v. Titus*, 151 Or App 76, 81 (1997) (citing *Roseburg Forest Products v. Long*, 325 Or 305, 309 (1997)).

126 (1998). In an occupational disease claim with no accepted claim for the disputed condition, all that is required to invoke the LIER rule of proof is evidence of a causal contribution from more than one employment. *Timothy R. Hanscam*, 59 Van Natta 2835, 2836 (2007); *Albert A. Ahlberg*, 57 Van Natta 2840, 2846 (2005), *on remand*, *Ahlberg v. SAIF*, 199 Or App 271 (2005); *Jeffery K. Mershon*, 56 Van Natta 3557, 3558-59 (2004); *James R. Lowell, Jr.*, 56 Van Natta 2491, 2493 (2004); *Roger L. Hager*, 55 Van Natta 637 (2003), *aff'd without opinion*, 193 Or App 163 (2004).

Here, claimant testified that he was exposed to noise at work before he began working for the current employer in 1991.<sup>2</sup> (Tr. 22-24). According to Dr. McMenemy, his treating physician, claimant's "lifetime" work noise was the major contributing cause of his binaural sensorineural hearing loss. (Ex. 17-2; *see* Exs. 18-12-13, -19-21). Thus, the evidence supports application of the LIER rule of proof and it is sufficient to prove legal causation under ORS 656.802(2)(a).<sup>3</sup>

In addition, because we agree with the ALJ that Dr. McMenemy's causation opinion is the most persuasive, we also conclude that claimant has established medical causation. Consequently, the claim is compensable.

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 \$2,500, payable by the 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.

Because our order issues after the effective date of *amended* ORS 656.386(2) and OAR 438-015-0019, and affirms the ALJ's compensability decision, we consider it appropriate to award reasonable expenses and costs to claimant for records, expert opinions, and witness fees. *See Nina Schmidt*, 60 Van Natta 169 (2008); *Barbara Lee*, 60 Van Natta 1, *on recons*, 60 Van Natta 139 (2008).

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<sup>2</sup> Claimant explained that he was exposed to high-level noise at work less often before 1991, but he specifically declined to agree that the prior exposure was to a lesser *level* of noise. (Tr. 22-24).

<sup>3</sup> Because the claim is not based on a worsening of a preexisting condition, ORS 656.802(2)(b) does not apply. *See e.g., SAIF v. Henwood*, 176 Or App 431, 436 (2001) ("[ORS 656.802(2)(b)] has no application where the preexisting disease and the worsening are both employment related"); *Bonnie Holmbo*, 54 Van Natta 83, 85 (2002) (ORS 656.802(2)(b) not applicable when no evidence of preexisting disease prior to onset of occupational disease).

Consequently, in accordance with the aforementioned statute and rule, claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by the employer. The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

### ORDER

The ALJ's order dated May 21, 2008 is affirmed. For services on review, claimant's counsel is awarded an assessed fee of \$2,500, to be paid by the employer. Claimant is awarded reasonable expenses and costs for records, expert opinions, and witness fees, if any, incurred in finally prevailing over the denial, to be paid by the employer.

Entered at Salem, Oregon on December 17, 2008