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In the Matter of the Compensation of  
**BRYAN CRISP, Claimant**  
WCB Case No. 09-04699  
ORDER ON REVIEW  
George J Wall, Claimant Attorneys  
Sather Byerly & Holloway, Defense Attorneys

Reviewing Panel: Members Weddell, Lowell, and Herman. Member Lowell dissents.

The self-insured employer requests review of Administrative Law Judge (ALJ) Fulsher'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.

Claimant was 47 years old at the time of hearing. He worked for the employer for about 26 years, assembling and finishing truck cabs and chassis and maintaining equipment. Claimant and those working around him regularly operated noisy high speed air-driven tools, including drills, rivet guns, screw guns, and "impacts." His work environment also included constant loud noise from machinery, tools, and truck engines running without mufflers.

After about 5 years on the job, claimant began wearing earplugs at work. His off work activities sometimes included hunting with a Winchester ".243," beginning when he was 17. He fired this gun twice when hunting. Beginning in 2003, claimant used a .50 caliber muzzle loader instead. (*See Ex. 22A-66*). He also sometimes fired these guns at an outdoor range before hunting season. He always used hearing protection when he fired the muzzle loader, but he did not always use protection when he fired the ".243."

Claimant discharged 10-15 rounds per year at most and some years he did not fire a gun at all. (*See Ex. 22A-67-68; Tr. 11-12, 19-20*). For example, before 1989, claimant did not hunt or shoot for 14 years. (*See Tr. 20*).

Claimant began noticing hearing loss in 2002. In 2009, Dr. Lindgren recommended hearing aids. Claimant filed a claim for hearing loss, which the employer denied.

The ALJ found Dr. Lindgren's opinion relating claimant's hearing loss primarily to his work more persuasive than Dr. Hodgson's opinion relating it to primarily to presbycusis (age-related hearing loss) and avocational gun use. Consequently, the ALJ set aside the denial.

The employer urges us to uphold its denial, contending that claimant's reporting about his avocational gun use has been so inconsistent that no doctor had a reliable history on which to base an opinion. Moreover, according to the employer, Dr. Hodgson's opinion is the most persuasive. We address these arguments in turn.

To prove his claim, claimant must establish that work exposure was the major contributing cause of his hearing loss. *See* ORS 656.266(1); 656.802(2)(a). Because the medical evidence addressing causation is divided, the causation issue is a complex medical question that must be answered by persuasive medical evidence. *Barnett v. SAIF*, 122 Or App 279 (1993). We rely on medical opinions that are well-reasoned and based on accurate and complete histories. *Somers v. SAIF*, 11 Or App 259, 263 (1986).

Claimant's testimony, his recorded statement, and the histories he provided to doctors establish that his avocational gun use was limited to 10-15 shots per year *at most*, for 16 of the last 30 years. In contrast, the record also establishes that he had 26 years of work exposure to loud noise, including the first five of those years without hearing protection. We consider the medical opinions in light of these findings.

Dr. Lindgren, an ear, nose, and throat specialist, evaluated claimant's hearing loss in 2009. He initially understood that claimant fired only "1 to 2 shots per year, target practice \* \* \* \*." (Ex. 18-1). However, claimant's attorney later provided Dr. Lindgren with an October 22, 2009 concurrence report, wherein Dr. Hodgson referenced claimant's recorded statement indicating that he "discharges *up to* 15 rounds per season." (*See* Exs. 22A-68; 27-2, 30-1) (Emphasis added). Thereafter, Dr. Lindgren agreed: "While there may have been some damage to [claimant's] hearing from gunfire, given the limited exposure *as was described*, in your opinion no more [than] 5-10% of his overall hearing loss should be attributed to gun fire noise exposure[;] \* \* \* presbycusis and gun fire are minimal causes at best [;]\* \* \* [and] occupational exposure to noise is the major cause of his hearing loss." (Ex. 30-1-2) (Emphasis added).

Dr. Hodgson, an otolaryngologist who examined claimant at the employer's request, reached a different conclusion. He attributed about 40 percent of claimant's hearing loss to work exposure, 20 to 25 percent to age, and about 35 percent to recreational gun use. (See Ex. 25-3, 29-3). Dr. Hodgson's initial opinion was based on his understanding that claimant had "3-4 shots per season." Thereafter, considering claimant's recorded statement that he discharges "up to 15 rounds per season," and noting that *unprotected* use of the .50 caliber muzzle loader can cause significant damage "with one blast," Dr. Hodgson stated that this information strengthened his conclusion that claimant's work exposure contributed less than 50 percent to his hearing loss. (Ex. 27-2). (Emphasis added).

Dr. Hodgson was apparently unaware that claimant always used hearing protection when he fired the muzzle loader. This lack of information diminishes the persuasiveness of Dr. Hodgson's opinion, which stressed the potential damage from unprotected discharge of a muzzle loader.

Nonetheless, except for this apparent discrepancy, the two doctors relied on essentially the same history of gun usage and the record establishes that this history is materially accurate, even if it may be overstated.<sup>1</sup> Under these circumstances, we find that both doctors' opinions were based on sufficient information about claimant's off-work noise exposure.<sup>2</sup> See *Jackson County v. Wehren*, 186 Or App 555, 560-61 (2003) (a history is complete if it includes sufficient information on which to base an opinion and does not exclude information that would make the opinion less credible).

In reaching this conclusion, we specifically note that, even if claimant fired as many as 15 shots each year, both physicians concluded that gunfire noise exposure contributed less than employment noise exposure. That said, we next evaluate the persuasiveness of the medical opinions, based on their reasoning.

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<sup>1</sup> Neither Dr. Lindgren nor Dr. Hodgson specifically addressed claimant's history that he did not fire a gun at all during 14 years of his "hunting history." (See Tr. 20). In our view, that apparent oversight weakens Dr. Hodgson's opinion (which is based on the extent of claimant's gun use), and it strengthens Dr. Lindgren's opinion (which is based on significant work exposure compared with much less significant gun use).

<sup>2</sup> We do not speculate about possible causes for claimant's hearing loss not identified by medical experts as potential factors. See *Jackson County v. Wehren*, 186 Or App at 560 (medical expert not required to weigh hypothetical causes if no suggested by another expert as contributing to the claimant's condition); *Kathleen White*, 62 Van Natta 1199 (2010) (where no medical opinion indicated that other conditions/activities contributed to the claimant's condition, there were no other causes for doctor to weigh).

Dr. Hodgson related claimant's hearing loss to his gun use in part because claimant shoots "right-handed." According to Dr. Hodgson, claimant's left-greater-than right hearing loss is consistent with right-handed shooting position, which he believes naturally shields the right ear. (Ex. 27-2).

Dr. Lindgren disagreed, based in part on medical study results indicating that a shooter's left ear is more sensitive to noise damage than the right, regardless of whether the shooter is right or left handed. (*See* Ex. 30). Dr. Lindgren also explained that the study results were consistent with his over 40 years of clinical experience. (*Id.*) Like the ALJ, we find that Dr. Lindgren persuasively rebutted Dr. Hodgson's opinion in this regard.

We also find Dr. Lindgren's opinion persuasive regarding the contribution from presbycusis. Dr. Lindgren opined that presbycusis accounted for only 5-10 percent of claimant's hearing loss because of claimant's relatively young age. (*See* Exs. 25-3-4; 27, 29, 30-2-5). Dr. Kim, a specialist in otology and neurotology, performed a worker-arranged medical examination and agreed that presbycusis contributed minimally in claimant's case, for the same reason. (Ex. 28-2). Ultimately, Dr. Hodgson opined that claimant's relative youth accounted for "no more than 20 %" of his hearing loss. (Ex. 29-3). Under these circumstances, we find that age contributed minimally to claimant's hearing loss.

Moreover, once Dr. Hodgson's causal attribution to presbycusis (20-25 percent) is eliminated (or reduced to 5-10 percent pursuant to Dr. Lindgren's opinion) from his "causation equation," that leaves only 45 percent of claimant's hearing loss (at most) attributable to nonwork related causes. When considered in this manner, Dr. Hodgson's opinion supports a conclusion that claimant's work exposure *was* the major contributing cause of his hearing loss.

Dr. Hodgson also relied on a "trajectory" that he obtained by tabulating claimant's hearing test results and graphing them. (*See* Ex. 25-9). Based on the graph, Dr. Hodgson stated that claimant's hearing loss did not change significantly between 1983 and 1998, then it increased significantly -- with a spike between the January 1998 and October 1998 tests -- followed by a gradual increase, and another spike in April 2009. (*Id.* at 4, -9).

In addition, Dr. Hodgson observed that claimant had "a lot of noise exposure" during his early years working for the employer and he did not wear hearing protection "for at least part of" that time. (*Id.* at 4). Reasoning that "[t]he increased amount of *noise-induced* hearing loss occurs in the first 10-15 years[.]"

Dr. Hodgson concluded that claimant has “a lesser amount of work-related hearing loss than we have expected \* \* \* \*.” (*Id.*) Thus, Dr. Hodgson’s opinion discounting claimant’s work-related noise exposure is based in part on a premise that noise-induced hearing loss occurs within 10 to 15 years of exposure.

However, claimant’s most prolonged exposure to loud noise occurred at work from 1983 at least until 1988 (*i.e.*, before he started using hearing protection on the job). Because the first spike in Dr. Hodgson’s graph, in 1998, occurred within 15 years of claimant’s initial work exposure and no more than 10 years after he started using hearing protection at work, the first substantial hearing loss was documented *within* the time period that Dr. Hodgson identified as indicative of noise-related hearing loss. Moreover, no other physician discounted claimant’s first 5 years of working with near-constant exposure to loud noise, based on his hearing test results. For all these reasons, we find Dr. Hodgson’s opinion unpersuasive.

Instead, we find Dr. Lindgren’s opinion persuasive because it is based on materially accurate information and it is well-reasoned and consistent with claimant’s history (whereas the opposing opinion is not, as explained above). Accordingly, based on Dr. Lindgren’s opinion, we affirm the ALJ’s decision finding the claim 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 \$3,000, 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.

Finally, 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. *See* ORS 656.386(2); OAR 438-015-0019; *Gary Gettman*, 60 Van Natta 2862 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

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ORDER

The ALJ's order dated June 17, 2010 is affirmed. For services on review, claimant's counsel is awarded an attorney fee of \$ 3,000 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 February 15, 2011

Member Lowell, dissenting.

The majority finds that claimant discharged a rifle 10-15 times per year during 16 of the last 30 years – at most -- and that claimant used hearing protection whenever he fired his .50 caliber muzzle loader. Based on this history of off-work noise exposure, compared to claimant's work exposure, the majority concludes that claimant's hearing loss claim is compensable.

The employer argues that claimant's reporting was so inconsistent that no physician had a reliable history. I agree that claimant's reporting about his gun has been confusing at best.

For example, in his recorded statement, claimant said that he hunted once a year, during deer season when he was a teenager. (Ex. 22A-6). However, claimant testified that he hunted once when he was 17, then not again until 1989, when he was approximately 26. (Tr. 19). In addition, although claimant testified at hearing that he used earmuffs when he was learning to shoot, in his recorded statement, he said that he probably started wearing hearing protection when shooting in 2001. (Tr. 10, 22A-66).

Claimant also testified that he last hunted in 2003. (Tr. 11). However, in his 2009 recorded statement he said that he still hunts, "[o]nce a year." (Ex. 22A-66). On the other hand, he also said that he had not hunted in two years. (*Id.* at 67).

Moreover, in 2003, 2004, and 2008, claimant identified noisy recreational activities, including target practice, auto racing, loud concerts or music, power tools, and motorcycling, as well as hunting, and the record does not establish that he reported all of these activities to physicians. (Exs. 13-16).

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Considering claimant's varying accounts of his avocational gun use, and his incomplete reporting, I would not find that he provided physicians with reliable or complete information. Accordingly, because a medical opinion is only as good as the history it relies on, I would find the medical evidence insufficient to carry claimant's burden of proving that work exposure was the major contributing cause of his hearing loss. *See Miller v. Granite Construction Co.*, 28 Or App 473, 476 (1977) (medical opinions are only as reliable as the history provided by the claimant); *Latonya M. Bias*, 60 Van Natta 905, 905 (2008) (persuasiveness of medical evidence depends on accuracy of history). Therefore, I respectfully dissent from the majority's contrary decision.<sup>3</sup>

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<sup>3</sup> The increase in claimant's hearing loss after he began wearing hearing protection at work supports Dr. Hodgson's reasoning that the off-work factors, such as hunting, explain this trajectory.