In the Matter of the Compensation of
DAVID D. COVINGTON, Claimant
WCB Case No. 09-06074
CORRECTED ORDER ON REVIEW
Bottini Bottini & Oswald, Claimant Attorneys
Sather Byerly & Holloway, Defense Attorneys

Reviewing Panel: Members Langer, Biehl, and Herman.

On January 12, 2010, we reversed an Administrative Law Judge's (ALJ's) order that upheld the self-insured employer's denial of claimant's occupational disease claim for bilateral hearing loss. It has come to our attention that our order contains a clerical error. Specifically, a portion of the last sentence in the last paragraph on page 4 is incomplete.

To correct this oversight, we withdraw our January 12 order and replace it with the following order. The parties' 30-day rights of appeal shall begin to run from the date of this order.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact," and provide the following summary of the relevant facts.

Claimant has worked for the employer, a utility company, since 1979. He has variously worked as a maintenance helper, coal yard fuel equipment operator, truck driver, lineman, and working line foreman. Before he became an apprentice lineman in approximately 1988, claimant consistently wore ear muffs (and sometimes also ear plugs) for noise protection. (Tr. 10).

While working in the "ground man," "truck driver," and "lineman apprentice" positions,[1] he wore hearing protection approximately five percent of the time, and thereafter, especially while working in the "lead man lineman" job,

[1] Claimant worked as a "ground man" for approximately five months in 1987. He then became a truck driver for about six months, after which he started his three-year lineman apprenticeship in 1988. At these positions, claimant was either operating or around jackhammers, pole tamping air equipment, diesel motors, generators, and occasionally chainsaws. (Tr. 15).

he used hearing protection 20 percent of the time.[2] (Tr. 15, 17). Claimant was also exposed to two loud explosions, one in 1991, and one in 2009; he was not wearing hearing protection during either incident. (Tr. 19, 24).

In August 2009, Dr. Hodgson, an otolaryngologist, performed an employer-arranged examination. (Ex. 4). Based on claimant's work history and the configuration of his audiogram, he opined that work-related noise exposure caused 65 percent of claimant's hearing loss, with "presbycusis" contributing 35 percent. (*Id*.) Subsequently, after reviewing claimant's audiograms from 1980 through 2009,[3] Dr. Hodgson changed his opinion, stating that the hearing loss was due, in major part, to age-related factors ("accelerated" presbycusis). (Ex. 5-3).

Based on Dr. Hodgson's examination, the employer issued a denial of claimant's hearing loss claim. (Ex. 7). Claimant requested a hearing.

Mr. Fairchild, an audiologist, reviewed records and interviewed claimant in January 2010. In his report, he agreed with Dr. Hodgson's initial opinion that 65 percent of claimant's hearing loss was due to noise exposure at work. (Ex. 12). Mr. Fairchild subsequently observed that claimant's audiometric configuration in the right ear showed the classic "hook" configuration consistent with noise-induced hearing loss. (Ex. 14-2).

At claimant's request, Dr. Hicks, an audiologist, performed a records review in February 2010.[4] (Ex. 15). He disagreed with Dr. Hodgson's "accelerated presbycusis" theory because claimant showed only high frequency losses, while presbycusis normally causes some loss at all levels of hearing. (*Id*.) Dr. Hicks believed that, given the length of claimant's exposure to occupational noise, and the significant diminution of hearing at the high frequencies, work activities were the major cause of his hearing loss. (*Id*.)

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[2] As a "lead man lineman," starting in 1993, claimant worked mostly on the ground rather than up in the "bucket." As such, he was exposed to the noise of the truck (including traveling approximately 60 percent of the time) and traffic noise. Claimant stated that he wore hearing protection when there was the expectation of loud noise. (Tr. 17, 21).

[3] Claimant underwent yearly hearing tests, administered by the employer, commencing in 1980. (Ex. 1). Beginning in 1996, the tests showed a progressive worsening of his hearing in the high frequencies. (Ex. 14-4).

[4] Dr. Hicks has a PhD in audiology. (Ex. 15).

CONCLUSIONS OF LAW AND OPINION

The ALJ upheld the employer's denial, finding that two opinions supporting compensability (those of Dr. Hicks and Mr. Fairchild) did not persuasively establish the compensability of claimant's bilateral hearing loss. On review, claimant argues that the medical evidence establishes the compensability of his hearing loss claim. Based on the following reasoning, we agree.

To prove the compensability of his hearing loss as an occupational disease, claimant must establish that employment conditions were the major contributing cause of the disease. ORS 656.266(1); ORS 656.802(2)(a); *Lecangdam v. SAIF*, 185 Or App 276, 282 (2002). Determination of the major contributing cause is a complex medical question that must be resolved on the basis of expert medical opinion. *Jackson County v. Wehren*, 186 Or App 555, 559 (2003), *citing Uris v. Comp. Dep't*, 247 Or 420, 426 (1967). When, as here, experts disagree, more weight is given to those opinions that are both well reasoned and based on complete information. *Somers v. SAIF*, 77 Or App 259, 263 (1986).

Dr. Hicks concluded that claimant's occupational noise exposure was the major contributing cause of his bilateral hearing loss. (Ex. 15-2). In offering his opinion, Dr. Hicks relied on:

> "* * * 29 years of serial, annual hearing tests performed by [claimant's] employer * * *. The serial audiograms * * * document that his low frequency hearing thresholds (500 and 100 Hz) have remained normal (virtually unchanged) while his high frequency hearing sensitivity has gradually gotten progressively worse over the nearly 30 years of his employment * * *." (Ex. 15-1).[5]

[5] The employer argues that claimant's hearing loss was not "gradual," as Dr. Hicks described. According to the tables in the record, claimant's "higher frequency" hearing loss fluctuated for several years. Nonetheless, when viewed from the perspective of claimant's 30-year work history, the table supports a conclusion that it might be worse one year, improve for a year, and then worsen. (Ex. 14-4). As such, claimant's high frequency hearing loss worsened during that period. Thus, the reference to "gradual," when analyzed in this context, does not prompt us to discount Dr. Hicks's opinion.

According to Dr. Hicks, "Noise-induced hearing losses are typically confined to the higher frequencies while the low frequencies are very resistant to damage from occupational noise exposure."[6] (*Id*.) Dr. Hicks concluded that claimant's hearing loss was consistent with both of those noise-induced hearing loss "conventions."

Dr. Hicks further explained that the pure tone configuration of claimant's hearing loss indicated that it was either caused by, or exacerbated by, prolonged exposure to hazardous levels of noise. As such, the basis for Dr. Hicks's opinion is primarily based on the progressive hearing loss detailed in claimant's yearly audiograms, and claimant's many years of working in a noisy environment.[7]

Having reviewed Dr. Hicks's opinion, we find it well reasoned and persuasive.[8] Moreover, Mr. Fairchild's opinion is consistent with it. Mr. Fairchild opined that noise exposure was the major contributing cause of claimant's hearing loss. (Ex. 12-4). He disagreed with Dr. Hodgson's "revised" opinion that claimant's hearing loss was not primarily work related because it did not appear until more than 10 years in his work history. He explained that there are multiple reasons why hearing loss due to noise exposure might not appear until

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[6] Claimant's hearing loss began to increase at the noise-sensitive levels of 3,000Hz and 4,000Hz beginning in 1996. (Ex. 14-4). The record does not contain evidence that claimant was subjected to significant non-occupational noise. (Ex. 5-3).

[7] The employer contends that Dr. Hicks "focused" on claimant's exposure to a 1991 explosion. To the contrary, in response to Dr. Hodgson's opinion that this work explosion did not affect claimant's hearing, Dr. Hicks acknowledged that, while there was no significant change in claimant's pure tone audiometry, such a finding did not mean that his inner ear was not damaged, making it more vulnerable to future noise exposure. (Ex. 15-1-2). Thus, the discussion regarding the effects of the 1991 explosion is consistent with Dr. Hicks's ultimate opinion that claimant's overall work exposure to noise was the major contributing cause of his hearing loss.

[8] Although finding Dr. Hick's explanation of why claimant did not have "accelerated presbycusis" persuasive, the ALJ discounted his opinion because he referenced Dr. Hodgson's history, which the ALJ determined was inaccurate. However, we do not discount Dr. Hicks's opinion for having been based on an inaccurate history. Dr. Hicks's reference to Dr. Hodgson's (as well as Mr. Fairchild's) history was part of his justification for not recounting a work history in his report, which was to avoid duplication. (Ex. 15-1). Having reviewed Dr. Hicks's report, it is apparent that his opinion was primarily based on an analysis of the audiograms and a rebuttal of Dr. Hodgson's "accelerated presbycusis" reasoning, rather than on the specific details of claimant's history of noise exposure. Under these circumstances, we decline to discount Dr. Hicks's opinion for an alleged lack of an accurate history.

later and that noise-induced hearing loss may occur at any time. (Ex. 12-3). After reviewing claimant's audiograms from 1980 to 2009, he opined that claimant's right ear had the classic "hook" audiometric configuration of noise induced hearing loss. (Ex. 14-2).

The employer contends that Mr. Fairchild's opinion was unduly influenced by his own personal experiences, and his admiration for linemen (whom he referred to as "heroes"). (Ex. 14-2). Viewing Mr. Fairchild's opinion in its entirety, however, we conclude that his reference to linemen as "heroes" constituted a minor element of a lengthy, detailed report that objectively evaluated the causation issue. We decline to discount the opinion due to alleged bias.

The employer relies on the opinion of Dr. Hodgson, an otolaryngologist who is the only medical doctor to offer a causation opinion concerning claimant's hearing loss. Considering Dr. Hodgson's status as a specialist in ear and throat disorders, his opinion generally would be entitled to greater probative weight. *Abbott v. SAIF*, 45 Or App 657, 661 (1980) (where medical opinions are divided, we generally rely on physicians who are specialists in the field in question); *Lynda J. Zeller*, 47 Van Natta 1581, 1583 (1995) (deferring to physician's specialized expertise). Here, however, Dr. Hodgson recited a history that claimant consistently wore ear protection during his entire work history with the employer. (Exs. 4-2, 8-4).

Although claimant stated that he routinely wore hearing protection during the first nine or so years, after he became an apprentice lineman in approximately 1988, he wore earplugs only five percent of the time. (Tr. 15). Beginning in 1993, when claimant started working as a "lead" lineman, he wore hearing protection only 20 percent of the time.[9] (Tr. 17).

Where a causation opinion is based on an inaccurate history, it may be given less weight. *Somers v. SAIF*, 77 Or App 259 (1986) (medical opinion that is based on inaccurate and incomplete information is not persuasive); *Latonya M. Bias*, 60 Van Natta 905, 905 (2008) (persuasiveness of medical evidence depends on accuracy of history). However, even assuming that Dr. Hodgson had a sufficiently accurate history, we would still find his opinion unpersuasive.

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[9] Moreover, as a lead man lineman, claimant was on the ground more, and had to communicate with other workers up in the "bucket," which would preclude the frequent use of hearing protection. Claimant also explained that as a lead lineman, he spent about 60 percent of his time riding as a passenger in a truck with the right window rolled down (claimant has greater hearing loss in his right ear than in his left ear). (Tr. 26).

Dr. Hodgson initially opined that, based on claimant's history and the configuration of his then-current hearing test, occupational noise exposure was the major contributing cause of claimant's hearing loss. (Ex. 4-4). Dr. Hodgson noted, however, that it would be "helpful" to have hearing tests covering his entire employment in order to determine the development of his hearing loss. When provided with those tests, Dr. Hodgson changed his opinion to state that claimant's hearing loss was primarily due to presbycusis, which he described as "accelerated" because claimant, who was 50, would not be expected to have such a degree of age-related hearing loss. Dr. Hodgson reasoned that the configuration of his current hearing test and the "trajectory" of his hearing loss since 1980 were more typical of presbycusis. (Ex. 5-3).

However, Dr. Hodgson did not explain why the "configuration" of the current audiogram supported his initial conclusion that claimant's hearing loss was primarily work related, but subsequently supported a conclusion that claimant's hearing loss was primarily due to presbycusis. Moreover, Dr. Hicks opined that, with presbycusis, the high frequencies generally exhibit more loss due to aging than low frequencies. Nevertheless, Dr. Hicks explained that low frequencies are also affected.[10] (Ex. 15-2). Dr. Hicks noted that claimant's 30 years of hearing tests did not record any change in his low frequency hearing thresholds. (*Id*.) For this reason, Dr. Hicks did not agree with Dr. Hodgson that claimant's hearing loss was due to presbycusis. We find that Dr. Hicks persuasively rebutted Dr. Hodgson's opinion that "accelerated" presbycusis was the major contributing cause of claimant's hearing loss.

Accordingly, based on the aforementioned reasoning, we do not find Dr. Hodgson's opinion to be persuasive. Instead, we rely on the opinion of Dr. Hicks, as supported by Mr. Fairchild, in concluding that claimant has sustained his burden of proving a compensable occupational disease claim. Therefore, we reverse.

Claimant's attorney is entitled to an assessed fee for services at hearing and on review. ORS 656.386(1). 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 at hearing and on review is $9,000, payable by the

[10] Dr. Hicks observed that all of the presbycusis tables that he was aware of (including those used by Dr. Hodgson) reported a progressive worsening of the low frequencies as well as the high frequencies. (Ex. 15-2).

employer. In reaching this conclusion, we have particularly considered the time devoted to the case (as represented by the record, claimant's appellate briefs, and his counsel's uncontested fee request), the complexity of the issue, the value of the interest involved, and the risk that her counsel may go uncompensated.

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; *Nina Schmidt*, 60 Van Natta 169 (2008); *Barbara Lee*, 60 Van Natta 1, *recons*, 60 Van Natta 139 (2008). The procedure for recovering this award, if any, is prescribed in OAR 438-015-0019(3).

ORDER

The ALJ's order dated May 25, 2010 is reversed. The employer's denial is set aside and the claim is remanded to the employer for processing in accordance with the law. For services at hearing and on review, claimant's attorney is awarded an assessed fee of $9,000, payable 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 January 18, 2011