

In the Matter of the Compensation of
LEONARD G. ANICKER, Claimant
WCB Case No. 13-03378
ORDER ON REVIEW

Jodie Phillips Polich, Claimant Attorneys
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Reviewing Panel: Members Lanning, Johnson and Somers. Member Lanning dissents.

The self-insured employer requests review of Administrative Law Judge (ALJ) Wren's order that: (1) set aside its denial of claimant's occupational disease claim for a bilateral hearing loss condition; and (2) awarded a \$16,000 employer-paid attorney fee. On review, the issues are compensability and attorney fees. We reverse.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact."

CONCLUSIONS OF LAW AND OPINION

Claimant has a long history of work in occupations in which he was exposed to potentially injurious noise. (*See* Tr. 151). From 1972 to 2001, he worked in metal foundries. (Ex. 40-2). From 2001 to 2004, he worked at a lumber mill. (*Id.*) In 2005, he started his current employment in airport maintenance. (*Id.*)

Claimant's loudest work was working in the metal foundries. (Tr. 73). He wore earplugs some of the time at each foundry, as well as ear muff hearing protection at one of the employers part of the time. (Ex. 40-2). He used ear plugs at the airport when he knew he would be exposed to loud noise, though occasionally he experienced loud noise without having time to use ear plugs. (Ex. 40-1). He has been better about using hearing protection in more recent years. (Tr. 57).

Claimant has hunted with rifles since 1973. When sighting rifles, he used hearing protection, but he did not use it while actually hunting. (Tr. 36; Ex. 40-2). He also used a chainsaw and other power tools at home, but generally wore ear protection when he did so. (Ex. 40-2, -3).

Before filing the claim, claimant began having difficulty understanding people in conversation, particularly with background noise. (Ex. 38). In February 2013, he was evaluated by Dr. Lindgren, who diagnosed work-related bilateral hearing loss after obtaining an audiogram. (*Id.* at 2). Dr. Lindgren noted claimant's history of occupational noise exposure and nearly 40 years of hunting with firearms, and concluded that occupational noise exposure was the major contributing cause of the hearing loss. (*Id.*)

In May 2013, claimant was evaluated by Dr. Hodgson at the employer's request. (Ex. 40). Dr. Hodgson obtained another audiogram and noted that claimant's hearing loss was 30 percent worse in the left ear compared to the right. (*Id.* at 4). At the time of the evaluation, Dr. Hodgson did not have claimant's prior audiograms, with the exception of the recent one from Dr. Lindgren. (*Id.*) He commented that the prior audiograms would be very helpful for evaluating the progression of claimant's hearing loss over time. (*Id.*) Nonetheless, based on the asymmetry of claimant's hearing loss, Dr. Hodgson opined that firearm use and presbycusis were the major contributing cause. Dr. Hodgson explained that claimant used rifles in a right-handed posture, which exposed his left ear to more noise, resulting in greater loss on the left. (*Id.* at 4).

Thereafter, the employer denied the claim. Claimant then requested a hearing.

Before the hearing, claimant was evaluated by Dr. Kim for a "Worker Requested Medical Examination." (Ex. 44). Dr. Kim had obtained audiograms dating from 2005 to 2011. (*Id.* at 2). He also noted that claimant related that he had a hearing test in 2000 that showed hearing loss. Dr. Kim opined that claimant's occupational exposure likely led to premature degeneration of his hearing. He reasoned that claimant's hearing loss was more than would be expected due to presbycusis, and his employment history was consistent with noise-induced hearing loss. (*Id.*) Dr. Kim acknowledged some contribution from claimant's use of firearms, but felt that the employment exposure was more significant. (*Id.*)

Dr. Hodgson was ultimately able to obtain and review claimant's audiogram studies from 1979 to 2013. (Ex. 46). He also reviewed noise level surveys obtained by the employer. After reviewing this additional information, Dr. Hodgson explained that it confirmed his original conclusion. He noted that the audiograms showed that claimant had asymmetric hearing loss greater on the left as early as 1979. (*Id.* at 2). Dr. Hodgson also noted that claimant's hearing

loss progressed at a significantly greater rate since 2010 when he was 57 years old, which is an expected consequence of aging rather than noise-induced hearing loss. (*Id.*) Dr. Hodgson also discussed the progression of claimant's hearing loss over time, noting that he had normal right ear hearing as late as 1993, when he had been working in metal foundries for 21 years. (Tr. 132). Dr. Hodgson did not believe that claimant had been exposed to injurious noise in his current employment based on his review of the relevant noise level surveys, which showed a time-weighted average of exposure below injurious thresholds. (Tr. 128). He attributed 20 percent of claimant's hearing loss to his occupational noise exposure, 30 percent to firearm use, and 50 percent to presbycusis. (Tr. 148).

Dr. Lindgren specifically disagreed with Dr. Hodgson's opinion regarding the cause of claimant's hearing loss asymmetry. In doing so, Dr. Lindgren referred to a journal article, which posited support for the proposition that occupational noise results in asymmetrical hearing loss, rather than symmetrical loss, as was once presumed.¹

Dr. Kim was not able to directly explain the late onset of hearing loss in claimant's right ear, but he noted that the correlation between the time of noise exposure and the resulting hearing loss is a subject of ongoing debate in the otology field. (Ex. 48-5). He referenced the work of a well known researcher, Dr. Gates, noting that such work supports the proposition that hearing loss can manifest well after a person is removed from an injuriously noisy environment. He did not think it was possible to attribute precise percentages to causes of claimant's hearing loss, but did find that there was a sufficient basis to attribute occupational exposure as the dominant cause. (Ex. 49-33, -34).

The ALJ determined that claimant's employment exposed him to potentially injurious noise. The ALJ also found that the opinions from Drs. Lindgren and Kim persuasively established that claimant's occupational exposure over the course of his working life was the major contributing cause of his hearing loss. In doing so, the ALJ considered the opinion of Dr. Hodgson unpersuasive because, among other reasons, it was unclear whether he relied on a complete history of claimant's occupational noise exposure.

¹ The article hypothesizes that differences in anatomy of the right side may create a superior noise attenuating reflex as compared to the left side, resulting in asymmetrical loss. (Ex. 13-3; "Asymmetry in noise-induced hearing loss: relevance of acoustic reflex and left or right handedness." *Otology & Neurotology*, June 2007, Volume 28, Issue 4, pgs. 434-37).

On review, the employer contests the ALJ's interpretation of Dr. Hodgson's opinion, as well as the determination that the opinions of Drs. Lindgren and Kim were more persuasive. Based on the following reasoning, we reverse.

To establish that his hearing loss is a compensable occupational disease, claimant must prove that employment conditions were the major contributing cause of his bilateral hearing loss. ORS 656.266(1); ORS 656.802(2)(a). The major contributing cause is the cause, or combination of causes, that contributed more than all other causes combined. *Smothers v. Gresham Transfer, Inc.*, 332 Or 83, 133-34 (2001).

The causation issue presents a complex medical question, to be resolved by expert medical evidence. *Uris v. State Comp. Dep't*, 247 Or 420, 426 (1967); *Barnett v. SAIF*, 122 Or App 279, 283 (1993). Where, as here, the medical evidence is divided, we give more weight to those opinions that are well reasoned and based on complete information. *Somers v. SAIF*, 77 Or App 259, 263 (1983). A medical opinion that rests on inaccurate information is not persuasive. *Miller v. Granite Constr. Co.*, 28 Or App 473, 478 (1977). The history that a medical opinion relies on is complete if it includes sufficient information on which to base the opinion and does not exclude information that would make the opinion less credible. *Jackson County v. Wehren*, 186 Or App 555, 560-61 (2003).

We find the opinion of Dr. Hodgson to be the most persuasive. He explained that claimant's successive audiograms are not consistent with noise-induced hearing loss constituting the major contributing cause because of the asymmetry of the loss and the late onset of right-sided hearing loss. In rebuttal, Drs. Lindgren and Kim offered a journal article and a general reference to studies and research that questioned some of the underlying assumptions on which Dr. Hodgson's opinion relied. However, in doing so, neither Dr. Lindgren nor Dr. Kim sufficiently explained how the studies specifically addressed claimant's situation. For example, neither doctor explained the findings of the study and then applied these findings to claimant's specific situation in order to explain how and when his hearing loss occurred. *See Sherman v. Western Employers Ins.*, 87 Or App 602, 606 (1987) (physician's comments that were general in nature and not addressed to the claimant's particular situation were not persuasive). In contrast, Dr. Hodgson acknowledged that occupational exposure contributed, but he specifically explained that the late onset of right sided hearing loss, followed by significant acceleration bilaterally at age 57 (when claimant would be expected to have loss due to presbycusis), weighed toward nonoccupational factors being the major contributing cause.

Additionally, Dr. Hodgson's opinion was based on a more accurate understanding of the noise exposure at claimant's current place of employment. Dr. Hodgson and Dr. Kim both agreed that the time-weighted averages based on the noise sample survey reports showed a noninjurious level of exposure. Dr. Kim noted "spikes" or "peaks" in the noise level recorded by the dosimeter, which could have reached a level that Dr. Kim considered to be acoustic trauma. However, Dr. Kim conceded that he did not know the circumstances of the "spikes" and whether they would represent true recordings of the actual noise level, or if they were incidental, *i.e.* something brushing or blowing directly onto the microphone during the course of the dosimetry recording. (Ex. 49-14).

Claimant's testimony discussed several environments/activities where he experienced loud noise, though he identified military jets as the source of the loudest and regularly recurring noise. (Tr. 8). The employer's industrial hygienist testified that he had taken readings with a sound-level meter from the terminal, which registered up to 105 decibels during jet launches. (Tr. 102). The industrial hygienist also testified that noise level surveys performed in 2006, 2010 and 2013 showed that airport maintenance personnel such as claimant were not subject to injurious noise levels based on OSHA regulations. (Tr. 89).²

Under these circumstances, we do not consider Dr. Kim's assumption of acoustic trauma in the 140 decibel range to be well supported. In contrast to Dr. Kim's assumption, Dr. Hodgson's opinion was based on dosimeter sound level studies, which did not demonstrate exposure to acoustic trauma. Thus, Dr. Hodgson's understanding of claimant's noise exposure since 2005 is more accurate and provides a further reason for finding his opinion to be more persuasive than Dr. Kim's. *See Miller*, 28 Or App at 478; *Obed Marquez*, 16 Van Natta 1558, 1560 (2014).

While we acknowledge that there are shortcomings in Dr. Hodgson's opinion, as noted by the dissent, claimant bears the burden of proof to establish the compensability of his occupational disease on the basis of persuasive medical opinion. ORS 656.266(1). For the reasons expressed above, we do not consider the opinions of Drs. Lindgren and Kim to be persuasive. Additionally, despite the acknowledged shortcomings of Dr. Hodgson's opinion, we still find it more persuasive than those of the other examiners.

² The industrial hygienist further testified that a person could be exposed to this level of noise for one hour before it would be considered injurious according to OSHA, at which point hearing protection would be required. (Tr. 119). Claimant's testimony showed that the duration and frequency of the jet launches would not approach this 1-hour threshold. (Tr. 8-9).

In conclusion, based on the foregoing reasoning, we are not persuaded that claimant's occupational noise exposure was the major contributing cause of his claimed hearing loss condition. Consequently, his occupational disease claim is not compensable. Accordingly, we reverse the ALJ's order.³

ORDER

The ALJ's order dated December 2, 2014 is reversed. The employer's denial is reinstated and upheld. The ALJ's \$16,000 attorney fee and cost awards are also reversed.

Entered at Salem, Oregon on July 2, 2015

Member Lanning dissenting.

The majority concludes that the medical opinion of Dr. Hodgson is more persuasive than those of Drs. Lindgren and Kim. Because I disagree with that conclusion, I respectfully dissent.

Before discussing the medical opinions, some context is in order. First, over the course of his over 40-year career, claimant has always worked in industry, which obliged him to have hearing protection close at hand. He began his career working in steel mills, then a lumber mill, and finally working for an airport since 2005.

While the noise level varied in his different positions, he has always had to use hearing protection throughout the course of a working day. The risks of such noise exposure over the course of a worker's career are well known and evidenced by the fact that every one of claimant's employers required him to obtain regular hearing tests. In the context of claimant's career, it is also well known that industrial employers, historically, did not always appreciate the full risk and extent of harm from industrial noise. Claimant stated that he is much better about using his hearing protection now than he was in the past, which is a very likely result of the greater emphasis on hearing protection today, as opposed to when claimant began working in steel mills as a young man.

³ It is unnecessary to address the attorney fee issue in light of our compensability decision.

Finally, while Dr. Hodgson and the employer's industrial hygienist were of the opinion that claimant's maintenance work at the airport did not expose him to injurious noise, I would find that common sense weighs against such an all-or-nothing proposition. There are good reasons that the airport regularly conducts hearing tests, noise sample surveys, and implements noise remediation measures. Such robust measures are simply not taken in the absence of potentially injurious exposures.

I consider the context of claimant's work history and his current noise exposure to be the most salient factors in assessing the cause of his hearing loss. It was the most important factor for Drs. Kim and Lindgren. Dr. Kim explained that otology is an inexact science, and that many of its foundational assumptions are up for debate. (Ex. 48). In response to Dr. Hodgson's assessment of the audiograms, Drs. Kim and Lindgren cited studies that called Dr. Hodgson's underlying assumptions into question, and they continued to rely on claimant's history of significant exposure to industrial noise. (Exs. 42, 48-4). While their objections to Dr. Hodgson's conclusion were somewhat general in nature, we should not confuse Dr. Hodgson's (or any expert's) higher level of portrayed certainty in his opinion, with its accuracy and reliability.

Based on my review of the record, certain statements by Dr. Hodgson tend to cast him in the role of advocate, rather than an impartial medical expert. For example, in the course of explaining how he apportioned the relative percentages of the contributors to claimant's hearing loss he stated that "I always avoid 50 percent because that means that... you can go either way on it, so * * *." (Tr. 148). Rather than providing an objective unbiased analysis, such a statement suggests that the expert may be advancing a particular result in the rendering of his medical opinion.

Additionally, Dr. Hodgson inaccurately criticized the study relied on by Drs. Lindgren and Kim to suggest that noise-induced hearing loss tends to be greater on the left than the right. On multiple occasions, Dr. Hodgson criticized the study in a way that suggested that the study was an outlier and that it stood alone without support from other medical researchers. (See Tr. 143, "I have not been able to find another paper * * * that would support the opinion of that paper;" Ex. 46-3, "this is a single study"). However, the article itself begins by stating that multiple studies have found that industrial or continuous noise exposures tend to affect the left ear more than the right. (Ex. 42-3). Moreover, in support of this proposition regarding asymmetrical hearing loss, the article cites three additional studies that had similar findings. (*Id.*) Such a mischaracterization further undermines the persuasiveness of Dr. Hodgson's opinion.

In contrast, I find no deficiencies of this kind in the opinions of Drs. Kim and Lindgren. I would find their opinions to be persuasive and consistent with claimant's career-long exposure to injurious noise, and therefore, sufficient to establish the compensability of his hearing loss claim. Because the majority finds otherwise, I respectfully dissent.