
In the Matter of the Compensation of
DARRELL ALCORN, Claimant
WCB Case No. 16-02391, 16-02051
ORDER ON REVIEW
Alana C DiCicco Law, Claimant Attorneys
SAIF Legal Salem, Defense Attorneys
Sather Byerly & Holloway, Defense Attorneys

Reviewing Panel: Members Lanning and Curey.

Claimant requests review, and the SAIF Corporation, on behalf of Liberty Metal Fabricators Inc. (Liberty/SAIF) cross-requests, review of Administrative Law Judge (ALJ) Sencer's order that: (1) set aside's Liberty/SAIF's denial of claimant's occupational disease claim for bilateral hearing loss; (2) upheld a denial of claimant's occupational disease claim for the same condition issued by SAIF, on behalf of Lynch Co. Inc. (Lynch/SAIF); and (3) awarded claimant's attorney a \$3,500 fee, payable by Liberty/SAIF. On review, the issues are responsibility and attorney fees. We affirm in part and modify in part.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact" with the following summary.

Claimant worked as a sheet metal fabricator for Lynch/SAIF from 1996 to 2006. (Ex. 4-2). Between 2006 and June 2014, claimant worked as a sheet metal fabricator for Liberty/SAIF. (*Id.*). Claimant returned to Lynch/SAIF and worked from June 2014 until he retired in November 2014. (*Id.*; Tr. 8).

In February 2016, claimant sought treatment for hearing loss and filed an occupational disease claim with Lynch/SAIF. (Exs. 1, 2, 3).

In April 2016, claimant was evaluated by Dr. Lipman at Lynch/SAIF's request. Dr. Lipman noted claimant's long history of work with various employers in the metal fabrication industry and concluded that his employment with Lynch/SAIF was not the major contributing cause of his hearing loss. (Ex. 6-4). Lynch/SAIF issued a denial of responsibility for claimant's occupational disease claim. (Ex. 7).

In May 2016, Liberty/SAIF also denied responsibility for claimant's occupational disease claim. (Hearing file). Claimant requested a hearing on both denials. (*Id.*)

In July 2016, Dr. Lipman opined that claimant's life long occupational exposure was the major contributing cause of his hearing loss. (Ex. 11-1). Dr. Lipman further noted that there had been no change in claimant's hearing loss between a June 2014 audiogram and an April 2016 audiogram. (Ex. 11-2). Consequently, Dr. Lipman concluded that it was impossible for claimant's last period of employment with Lynch/SAIF to have caused or contributed to his hearing loss. (*Id.*)

Dr. Lipman was deposed in August 2016. (Ex. 12). Dr. Lipman reiterated that there was no appreciable change in claimant's hearing between the June 2014 and April 2016 audiograms. (Ex. 12-16). He agreed that it was possible that claimant sustained a one decibel change in his hearing loss during his employment with Lynch/SAIF in 2014. (Ex. 12-17). However, Dr. Lipman explained that any change of less than five decibels would be disregarded because it would fall within the range of test-retest variability. (*Id.*)

On October 3, 2016, the Workers' Compensation Division issued an order designating Lynch/SAIF as the designated paying agent pursuant to ORS 656.307. (Hearing file).

CONCLUSIONS OF LAW AND OPINION

The ALJ determined that Dr. Lipman's opinion established, to a reasonable degree of medical probability, that claimant's last period of employment with Lynch/SAIF did not contribute to his hearing loss. Accordingly, the ALJ upheld Lynch/SAIF's denial and set aside Liberty/SAIF's denial. Regarding an attorney fee award under ORS 656.307, the ALJ considered the fee limitation in ORS 656.308(2)(d) in awarding an assessed attorney fee of \$3,500.

On review, claimant reiterates her request for a \$9,000 attorney fee for services at hearing and contends that the ALJ's consideration of ORS 656.308(2)(d) was improper. Liberty/SAIF contends that Lynch/SAIF, as the presumptively responsible employer, did not satisfy the requirements to shift responsibility. Based on the following reasoning, we affirm the ALJ's decision regarding the responsibility issue, and modify claimant's attorney fee award.

Responsibility

The last injurious exposure rule (LIER) assigns presumptive responsibility to the most recent potentially causal employer for whom the claimant worked or was working at the time the claimant first sought or received treatment (whichever came first). *Agricomps Ins. v. Tapp*, 169 Or App 208, 213, *rev den*, 331 Or 244 (2000). A presumptively responsible employer may shift responsibility to a prior employer by establishing that: (1) it was impossible for conditions at its workplace to have caused the disease; or (2) the disease was caused solely by conditions at one or more previous employments. *See Roseburg Forest Products v. Long*, 325 Or 305, 313 (1997). The impossibility or sole cause standard for shifting responsibility from the presumptively responsible carrier is met where the medical evidence establishes, to a reasonable medical probability, that it was impossible for its exposure to have caused claimant's hearing loss or that prior employment was the sole cause. *See Lon E. Harris*, 55 Van Natta 1283 (2003); *Jerry W. Brown*, 55 Van Natta 253 (2003); *Allan J. Zarek*, 54 Van Natta 7 (2002).

The causation issue in this case presents a complex medical question that must be resolved by expert medical evidence. *See Uris v. State Comp. Dep't*, 247 Or 420, 426 (1967); *Barnett v. SAIF*, 122 Or App 279, 283 (1993).

Here, Dr. Lipman's medical opinion is neither rebutted nor opposed by contrary medical evidence. Relying on Dr. Lipman's persuasive opinion, we agree with the ALJ's determination that, to a reasonable degree of medical probability, it was impossible for claimant's latter period of employment with Lynch to have contributed to his hearing loss disability. While Dr. Lipman agreed that it was "possible" that an immeasurable amount of hearing loss was caused by claimant's last period of employment, he also explained that hearing loss is "measurable." (Ex. 12-17, -26).

Under such circumstances, we conclude that Dr. Lipman's opinion was sufficient to support Lynch/SAIF's burden of proof to establish that, to a reasonable degree of medical probability, it was impossible for its 2014 period of employment to have contributed to claimant's hearing loss. *See Brown*, 55 Van Natta at 255. In reaching this conclusion, we acknowledge that the employment conditions at Lynch were similar to claimant's previous workplace exposures. Nevertheless, based on Dr. Lipman's opinion, the medical evidence has established that, in this particular case, it was not possible that claimant's last period of employment with Lynch caused or contributed to the hearing loss. *See Roseburg Forest Prods. v. Long*, 325 Or 305, 313 (1997).

Liberty/SAIF cites *Foster Wheeler Corp. v. Marble*, 188 Or App 579, 584 (2003), for the proposition that a quantifiable change in the condition during the presumptively responsible employer's period of employment is not required. However, the *Marble* court's reasoning was based on persuasive medical opinion that was specific to that case. *See Marble*, 188 Or App at 584. In particular, the court noted that the medical expert did not consider it impossible for a later period of employment to have contributed to the claimant's hearing loss, even though no hearing loss was demonstrated by successive audiograms. *Id.* Based on that evidence, the court determined that it was reasonable to conclude that it was not impossible that the presumptively responsible employer's exposure contributed to the claimant's hearing loss. *Id.*

Here, our determination is based on Dr. Lipman's opinion, which was based on successive audiogram testing, and concluded that claimant's last period of employment did not contribute to the hearing loss. (Ex. 11-2). Based on that evidence, and the lack of any contrary medical evidence, we are persuaded that Lynch/SAIF has shifted responsibility to Liberty/SAIF.

Accordingly, we affirm the ALJ's decision to set aside Liberty/SAIF's responsibility denial, and uphold Lynch/SAIF's denial.¹

Attorney Fee

At the hearing, claimant's attorney requested an assessed fee of \$9,000. (Hearing File). Both carriers responded that a fee of \$7,000 would be appropriate. (Tr. 33, 37). In awarding an attorney fee of \$3,500 under ORS 656.307(5), the ALJ considered the factors contained in OAR 438-015-0010(4) as well as the fee limitation of ORS 656.308(2)(d). In doing so, the ALJ reasoned that the circumstances of a responsibility case under ORS 656.307(5) were similar to those circumstances that exist in cases subject to ORS 656.308(2)(d).

However, the fee limitation contained in ORS 656.308(2)(d) does not apply to proceedings before an ALJ under ORS 656.307(5). *See Dean Warren Plumbing v. Brenner*, 150 Or App 422, 428 (1997). Accordingly, we proceed to

¹ Because the hearing before the ALJ was a proceeding under ORS 656.307, the ALJ's attorney fee award was granted under ORS 656.307. Furthermore, under ORS 656.307(5), claimant's counsel is not entitled to an attorney fee for services on review. *See William H. Lodge*, 69 Van Natta 924, 926 n1 (2017) (there is no statutory authority under ORS 656.307 to award an assessed attorney fee for the claimant's counsel's services on review); *Frank Jung*, 64 Van Natta 1998, 2004 n 8 (2012) (same).

determine the amount of a reasonable attorney fee for claimant's counsel's services at hearing without consideration of ORS 656.308(2)(d).² Based on the following reasoning, we modify the ALJ's attorney fee award.

In determining a reasonable attorney fee award under OAR 438-015-0010(4), the following factors are considered: (1) the time devoted to the case; (2) the complexity of the issue(s) involved; (3) the value of the interest involved; (4) the skill of the attorneys; (5) the nature of the proceedings; (6) the benefit secured for the represented party; (7) the risk in a particular case that an attorney's efforts may go uncompensated; (8) the contingent nature of the practice; and (9) the assertion of frivolous issues or defenses.

Here, the hearing, including closing arguments, lasted nearly one hour. The hearing transcript consists of 42 pages. There were 25 admitted exhibits submitted by the carriers. There was one deposition lasting 38 minutes, and consisting of 26 pages of transcript.

The value of the interest involved and the benefit secured for claimant includes the establishment of a responsible employer for claimant's occupational disease claim. The case concerned the determination of the responsible carrier, not claimant's entitlement to benefits. *See* ORS 656.307(1)(a)(D) (in a responsibility dispute, the Director shall designate a paying agent if the employers admit that the claim is otherwise compensable); *Steven M. Swearingen*, 62 Van Natta 2470, 2474 (2010).

Considering the range of disputes generally submitted for resolution to this forum, the responsibility issue presented legal and medical issues of average complexity compared to those generally litigated before the Hearings Division.

Counsel for each of the parties are experienced and presented their respective positions in a skillful and professional manner. There were no frivolous issues or defenses.

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 the hearing level is \$7,000, payable by Liberty/SAIF. In reaching

² Claimant's attorney is entitled to an assessed fee for her active and meaningful participation in the hearing. ORS 656.307(5).

this conclusion, we have particularly considered the time devoted to the case (as represented by the hearing record, claimant's counsel's fee request, and the insurers' objections), the complexity of the issue, the nature of the proceedings, and the contingent nature of the practice of workers' compensation law.³ The ALJ's attorney fee award is modified accordingly.

ORDER

The ALJ's order dated December 15, 2016 is affirmed in part and modified in part. In lieu of the ALJ's \$3,500 attorney fee award, claimant's counsel is awarded \$7,000, payable by Liberty/SAIF. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on June 16, 2017

³ We note that this award is consistent with Liberty/SAIF's position in response to claimant's counsel's attorney fee request at the hearing level.