
In the Matter of the Compensation of
WILLIAM H. LODGE, Claimant
WCB Case No. 15-04600, 15-02155
ORDER ON REVIEW
Alvey Law Group, Claimant Attorneys
Sather Byerly & Holloway, Defense Attorneys
Law Offices of Sharon J Bitcon, Defense Attorneys

Reviewing Panel: Members Lanning and Johnson.

ESIS, on behalf of North American Energy Services (ESIS/NAES), requests review of those portions of Administrative Law Judge (ALJ) Sencer's order that: (1) set aside its denial of claimant's occupational disease claim for bilateral hearing loss; and (2) upheld Hartford's denial, on behalf of SCI 3.2, Inc. (Hartford/SCI), of the same condition. On review, the issue is responsibility.

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

Claimant worked as a boilermaker for various employers, including ESIS/NAES, from 1966 through 2013. Beginning in 2013, he worked seasonally for Hartford/SCI, fabricating parade floats. In February 2015, claimant filed occupational disease claims for bilateral hearing loss with both ESIS/NAES and Hartford/SCI.

Both ESIS/NAES and Hartford/SCI issued responsibility denials of claimant's hearing loss claim. On November 6, 2015, the Workers' Compensation Division issued an order under ORS 656.307 designating Hartford/SCI as the paying agent and referring the matter to the Hearings Division to issue an order regarding responsibility.

The ALJ applied the last injurious exposure rule (LIER) to determine responsibility. Based on the date that claimant first sought medical treatment for his hearing loss, the ALJ found that Hartford/SCI was presumptively responsible. Nevertheless, reasoning that the medical evidence established that claimant's work with Hartford/SCI did not contribute to his hearing loss, the ALJ concluded that responsibility shifted back to ESIS/NAES. Accordingly, the ALJ upheld Hartford/SCI's denial and set aside ESIS/NAES's denial.

On review, ESIS/NAES contends that Hartford/SCI has not made the showing required to shift responsibility to ESIS/NAES.

The 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 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, the medical opinions of Dr. Lipman, a consulting physician, Dr. Hodgson, who examined claimant at ESIS/NAES's request, and Dr. Wilson, who reviewed claimant at Hartford/SCI's request, are generally consistent with each other. We summarize those opinions as follows.

Dr. Lipman opined that claimant's work as a boilermaker was the sole cause of claimant's hearing loss, and that claimant's work for Hartford/SCI did not contribute to the hearing loss. (Ex. 16-1-2). He offered his opinion in terms of reasonable medical probability. (*Id.*)

Dr. Hodgson opined that claimant's occupational noise exposure as a boilermaker was the major contributing cause, and the sole occupational cause, of claimant's hearing loss. (Ex. 8-6). Noting that claimant's work for Hartford/SCI could have exposed him to injurious noise, but that claimant wore noise protection during such employment, Dr. Hodgson was unable to state whether claimant's work for Hartford/SCI contributed to the hearing loss. (Ex. 8-7). Based on certain assumptions regarding the nature of claimant's work and his use of hearing protection that were supported by claimant's testimony, Dr. Hodgson opined that it was medically probable, but not certain, that the occupational component of the hearing loss occurred before claimant began working for Hartford/SCI. (Ex. 14-10; Tr. 11-12, 14-20).

Dr. Wilson acknowledged that he had insufficient information to be certain that claimant's work for Hartford/SCI did not contribute, to any degree, to his hearing loss. (Exs. 15-1, 17-2). However, Dr. Wilson opined that any such contribution was unlikely. (Ex. 15-1-2). By contrast, he stated that claimant's prior work activity as a boilermaker "certainly contributed to [claimant's] hearing

loss and likely to a very significant degree.” (Ex. 15-2). Therefore, Dr. Wilson concluded that “it was medically probable that all of the occupational exposure occurred prior to [claimant’s] employment with [Hartford/SCI].” (Ex. 15-2).

Based on this medical evidence, we conclude that it is medically probable that claimant’s work for Hartford/SCI did not contribute to his hearing loss, and that prior periods of employment were the sole cause of the occupational disease. However, it was not impossible for claimant’s work for Hartford/SCI to have contributed to the occupational disease.

Because it was not impossible for claimant’s work at Hartford/SCI to have contributed to his hearing loss, responsibility does not shift to ESIS/NAES on that basis. *See Gerald T. Fisher*, 58 Van Natta 2592 (2006). Nevertheless, responsibility may also be shifted if the occupational disease was caused solely by conditions at one or more previous employments. *Long*, 325 Or at 313; *David S. Fields*, 55 Van Natta 562, 564 (2003).

Citing *Foster Wheeler Corp. v. Marble*, 188 Or App 579 (2003), *Jeffrey Coatney*, 55 Van Natta 3887 (2003), and *Allan J. Zarek*, 54 Van Natta 7 (2002), ESIS/NAES contends that the *possibility* of contribution by claimant’s work at Hartford/SCI, although such contribution was not medically probable, prevents Hartford/SCI from shifting responsibility back to ESIS/NAES. As explained below, we disagree with this interpretation of the case law.

ESIS/NAES’s interpretation of the “sole cause” test would require a presumptively responsible employer to establish that it was not possible for its employment conditions to have contributed to a claimant’s occupational disease. Such an interpretation would equate the “sole cause” test with the “impossibility” test. However, as the *Long* court explained, responsibility may be shifted to a prior employer by satisfying either the “sole cause” test *or* the “impossibility” test. *Long*, 325 Or at 313.

Consistent with the *Long* rationale, we have explained that medical opinions expressed in terms of medical probability may support the shifting of responsibility to a prior employer. *Lon E. Harris*, 55 Van Natta 1283, 1283 (2003); *Jerry W. Brown*, 55 Van Natta 253, 255 (2003). Thus, a presumptively responsible employer may shift responsibility back to a prior employer if it was medically probable that prior periods of employment were the “sole cause” of an occupational disease. *E.g.*, *Brown*, 55 Van Natta at 255; *John W. Blankenship*,

52 Van Natta 406 (2000) (responsibility shifted under “sole cause” where it was unlikely, but possible, that work for the presumptively responsible employer contributed to the occupational disease).

The cases cited by ESIS/NAES (*Marble*, *Zarek*, and *Coatney*) are consistent with this framework. In *Marble*, we had reasoned that the “sole cause” test was not satisfied by the “mere possibility” that employment conditions of the presumptively responsible employer did not contribute to the occupational disease. *Johnny E. Marble*, 54 Van Natta 24, 26 (2002). On appeal, the *Marble* court found our conclusion to be supported by substantial evidence. 188 Or App at 584. Similarly, in *Zarek*, we found that the “sole cause” test was not satisfied when a medical expert “was unable to state that [the] claimant’s [occupational disease] was caused solely by the conditions at his previous employments.” 54 Van Natta at 13. Finally, in *Coatney*, we found that the medical opinion that supported the presumptively responsible employer’s “sole cause” contention was unpersuasive because it did not explain changing criteria for interpreting test results. 55 Van Natta at 3891.

Thus, *Marble*, *Zarek*, and *Coatney* did not address circumstances in which it was medically probable that prior periods of employment were the sole cause of the occupational diseases. As such, those decisions are distinguishable from the present case.

Therefore, we find that this record, which establishes a medical probability that claimant’s work prior to his Hartford/SCI employment was the sole cause of his occupational disease, supports the shifting of responsibility to ESIS/NAES. Accordingly, we affirm.¹

ORDER

The ALJ’s order dated November 14, 2016 is affirmed.

Entered at Salem, Oregon on May 15, 2017

¹ As noted above, the Director issued an Order Designating Paying Agent on November 6, 2015, pursuant to ORS 656.307 (“307” order). The “307” order further referred the matter to the Hearings Division pursuant to ORS 656.307(2) to issue an order regarding responsibility. 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 *Frank Jung*, 64 Van Natta 1998, 2004 n 8 (2012) (there is no statutory authority under ORS 656.307 to award an assessed attorney fee for the claimant’s counsel’s services on review); *Gary W. Higgins*, 57 Van Natta 336 (2005) (same).