

Babbitt, Dean

CAUSAL RELATIONSHIP

Audiologist

Audiologists may testify about the causation of a condition if their opinion is admissible under ER 702 using the analysis from *Frausto v. Yakima HMA*, 188 Wn.2d 227 (2017). Overruling *In re Virgil Degolier*, BIIA Dec., 60,471 (1983). ...*In re Dean Babbitt*, BIIA Dec., 18 20492 (2020)

EXPERT TESTIMONY

Admissibility of opinions

Audiologists may testify about the causation of a condition if their opinion is admissible under ER 702 using the analysis from *Frausto v. Yakima HMA*, 188 Wn.2d 227 (2017). Overruling *In re Virgil Degolier*, BIIA Dec., 60,471 (1983). ...*In re Dean Babbitt*, BIIA Dec., 18 20492 (2020)

Scroll down for order.

**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

IN RE: DEAN L. BABBITT) **DOCKET NO. 18 20492**
)
CLAIM NO. AZ-93639) **DECISION AND ORDER**

Dean L. Babbitt filed a claim for occupational hearing loss with the Department of Labor and Industries in 2018. He contends that his hearing loss was caused by his driving for Seattle Automotive Distributors, Inc. The claim was rejected. Our industrial appeals judge dismissed Mr. Babbitt's appeal to the claim rejection order for failure to make a prima facie case for relief, relying on our significant decision, *In re Virgil Degolier*.¹ In *Degolier* we held that audiologists are not qualified to provide an opinion on the cause of hearing loss. We overrule *Degolier* under an analysis guided by ER 702. After considering the testimony we believe that Dr. Batson is qualified to give an opinion regarding the cause of Mr. Babbitt's hearing loss, but we are not persuaded that Mr. Babbitt's hearing loss is an occupational disease caused by his work. We **AFFIRM** the Department order that rejected the claim.

DISCUSSION

Dean L. Babbitt is 78 years old. His work history includes a significant amount of time as a commercial delivery driver. He has played drums professionally since the early 1960s but wears no hearing protection while performing. And he spent six years as a cook in the Army Reserves.

Mr. Babbitt began driving for Seattle Automotive Distributors (Seattle Auto) in 2015. After working for them for about five months he was assigned a vehicle in which the air conditioning did not work. This required him to drive with his window down in what he described as a noisy urban environment. He noticed hearing problems in his right ear in July 2017, when he felt like his ear was filling with fluid. Mr. Babbitt sought treatment from otolaryngologist Kevin Kennedy, M.D. Dr. Kennedy referred Mr. Babbitt to his employee, audiologist Michelle Batson, Aud. D. She has a doctorate in audiology but is not a medical doctor. Dr. Batson initially considered a diagnosis of Meniere's Syndrome (Meniere's Disease), but dismissed that diagnosis because Mr. Babbitt did not have vertigo, which she described as a necessary symptom to support the diagnosis.

Dr. Batson performed audiological testing on Mr. Babbitt on August 21, 2017, and again on September 18, 2017. Both tests showed bilateral hearing loss, greater on the right than on the left. The right side hearing loss had increased by September compared to what Dr. Batson found the previous month. Dr. Batson testified that Mr. Babbitt had a "notch" in his hearing in the vicinity of

¹ BIIA Dec. 60,471 (1983).

1 4000 hz, which she characterized as a classic pattern of noise-induced hearing loss that is associated
2 with no or few other etiologies. She also found low frequency hearing loss, which she described as
3 idiopathic, that is, having no clear cause. Dr. Batson concluded that Mr. Babbitt suffered from noise-
4 induced hearing loss that she called "trucker's ear" that was caused by the noise he experienced
5 while operating delivery vehicles with the windows open.
6
7

8
9 Mr. Babbitt was also examined by otolaryngologist Julie Gustafson, M.D. Mr. Babbitt told
10 Dr. Gustafson that he had experienced hearing loss and tinnitus for about 20 years, although his
11 hearing problems had recently worsened. Dr. Gustafson performed an audiogram, the results of
12 which were similar to those performed by Dr. Batson including the "notch" at 4000 hz. Notably,
13 Mr. Babbitt's right ear had improved since his September 18, 2017 examination by Dr. Batson.
14 Dr. Gustafson said that this variability was consistent with Meniere's Disease and she diagnosed him
15 with Cochlear Hydrops, a form of Meniere's disease not associated with vertigo. Dr. Gustafson and
16 Dr. Batson both described Mr. Babbitt's high frequency hearing loss as idiopathic. Dr. Gustafson said
17 that Mr. Babbitt's hearing loss is not work related.
18
19
20
21

22 Dr. Gustafson is familiar with the condition of "trucker's ear," but she did not believe that
23 Mr. Babbitt suffered from it. She described the condition as having been a problem in the 1970s, and
24 that it was associated with drivers of large trucks operated on the highway, but not with smaller
25 delivery vehicles driven on surface streets such as those operated by Mr. Babbitt. Moreover,
26 Dr. Gustafson said that subsequent changes in legislation limited the noise to which truckers could
27 be exposed. Based on a 1998 study, Dr. Gustafson said that driving a heavy truck with the driver's
28 window open and the radio on for eight hours or longer could result in marginally harmful noise
29 exposure. But that is not the type of driving Mr. Babbitt did. According to Dr. Gustafson, none of
30 Mr. Babbitt's work exposed him to sufficiently intense noise of sufficient duration to cause
31 noise-related hearing loss.
32
33
34
35
36

37 We previously expressed "our conviction that . . . a segregation and causal relationship
38 question [concerning occupational hearing loss] can only be established by the testimony of a
39 physician, preferably an otolaryngologist. We do not doubt the professional ability of an audiologist
40 to measure the hearing loss, but causal relationship depends on an interpretation of history combined
41
42
43
44
45
46
47

1 with accurate medical diagnosis."² We followed that rule in numerous subsequent decisions.³
2
3 However, in our recent decision, *In re Adele Palmer*, we abandoned such hard and fast rules
4 governing the testimony of proffered expert witnesses. We followed our supreme court by adopting
5 an analytic framework centered on ER 702 to decide if a witness is qualified to give an opinion on the
6 matter before us.⁴ We believe that analysis is appropriate here as well.
7

8
9 The *Adele Palmer* decision determined that a physical therapist is qualified to provide an
10 expert opinion on the cause of the worker's pelvic floor dysfunction. In *Palmer* we were guided by
11 the supreme court's decision in *Frausto v. Yakima HMA, LLC*, which found Advanced Registered
12 Nurse Practitioners (ARNPs) to be qualified to provide expert testimony on the cause of injuries in an
13 action for medical malpractice.⁵ Part of the rationale in both *Palmer* and *Frausto* for permitting ARNPs
14 and physical therapists to testify regarding causation flowed from provisions in the licensing laws for
15 those professions that recognized the ability of an ARNP and a physical therapist to diagnose
16 conditions.⁶ The licensing laws governing the practice of audiology provide that licensed audiologists
17 "are independent practitioners who provide a comprehensive array of services related to the
18 identification, assessment, habilitation and rehabilitation, and prevention of auditory and vestibular
19 impairments."⁷ And "Audiology" is defined as:
20
21

22
23
24
25 The application of principals, methods, and procedures related to hearing and the
26 disorders of hearing and related to language and speech disorders, whether of organic
27 or nonorganic origin, peripheral or central, that impede the normal process of human
28 communication including, but not limited to, disorders of auditory sensitivity, acuity,
29 function, processing, or vestibular function, the application of aural habilitation,
30 rehabilitation, and appropriate devices including fitting and dispensing of hearing
31 instruments, and cerumen management to treat such disorders.⁸
32

33 The authority to diagnose is not clearly set out in the statutes and rules governing audiologists,
34 but the term "identification" is. As the terms are undefined they are to be understood using their plain
35 and ordinary meanings.⁹ Webster's II New Riverside University Dictionary (Webster's)¹⁰ defines
36
37
38

39 ² *Degolier*, at 2.

40 ³ *In re Juan Munoz*, BIIA Dec., 05 11698 (2007); *In re Karen L. Lahman*, Dckt. No. 07 03217 (March 2, 2009); *In re Harry*
41 *Berry*, Dckt. No. 96 5305 (March 12, 1998); *cf. In re William J. Brougham*, Dckt. No. 89 5013 (April 24, 1992) (the holding,
42 as applied to a certified audiologist, is even more applicable to an industrial hygienist.).

43 ⁴ *In re Adele Palmer*, BIIA Dec., 16 16600 & 17 11074 (2017).

44 ⁵ *Frausto v. Yakima HMA, LLC*, 188 Wn.2d 227 (2017).

45 ⁶ RCW 18.79.040 (ARNP); RCW 18.74.180 (Physical Therapist).

46 ⁷ WAC 246-828-095 (Emphasis supplied).

47 ⁸ RCW 18.35.010(2) (Emphasis supplied).

⁹ *Ravenscroft v. Wash. Water Power Co.*, 136 Wn.2d 911, 920-21 (1998).

¹⁰ Houghton Mifflin Co., © 1994.

1 "diagnosis" as the act or process of identifying or determining the nature of a disease by examination.
2 Audiologists therefore as practitioners who identify auditory and vestibular impairments and diagnose
3 those impairments. Similarly, Webster's defines "rehabilitate" as "to restore . . . to customary activity
4 through education and therapy." And Dorland's Illustrated Medical Dictionary (Dorland's)¹¹ defines
5 "rehabilitation" as the "restoration of normal form and function after injury or illness." Rehabilitation,
6 therefore, means treatment. Taken together we conclude that an audiologist such as Dr. Batson is
7 authorized by law both to diagnose and to treat auditory and vestibular impairments and hearing
8 disorders.
9

10 ER 702 also permits an expert to testify when her expertise derives from knowledge, skill,
11 experience, training, or education. Dr. Batson has graduate and undergraduate degrees, including
12 her doctorate, in audiology and hearing and speech science. She has worked in the field for years
13 diagnosing and treating patients suffering from hearing loss, often in close association with medical
14 doctors. When that education, training, and experience are considered together with the laws
15 governing the practice of audiology, we conclude that Dr. Batson is qualified under ER 702 to give
16 an expert opinion regarding the diagnosis and cause of Mr. Babbitt's hearing loss. We overrule our
17 decision in *Degolier* to the extent that it constituted a blanket rule prohibiting audiologists to testify
18 concerning the causes of hearing loss. We hold that an audiologist may testify on that issue on the
19 establishment of an appropriate evidentiary basis of the witnesses' qualifications as provided for by
20 ER 702.
21

22 There is no evidence that Mr. Babbitt suffered from an industrial injury affecting his hearing,
23 such as from a sudden traumatic event that produced a prompt effect on his hearing. And we are
24 not persuaded that Mr. Babbitt's bilateral hearing loss arose naturally and proximately from the
25 distinctive conditions of his work as a delivery and shuttle driver. We find the opinion of Dr. Gustafson
26 to be more persuasive on that issue, even though Dr. Batson was Mr. Babbitt's attending provider.¹²
27 Dr. Gustafson's experience and training in the causes and treatment of hearing problems appears to
28 us to be more comprehensive than that of Dr. Batson.
29

30 Both Dr. Batson and Dr. Gustafson testified that Mr. Babbitt's bilateral high frequency hearing
31 loss was idiopathic, they could ascribe no cause for it. Although Dr. Batson dismissed the diagnosis
32 of Meniere's Syndrome because Mr. Babbitt did not endorse vertigo, Dr. Gustafson diagnosed him
33
34
35
36
37
38
39

40
41
42
43
44
45
46
47

¹¹ W.B. Saunder's Co., © 2000.

¹² *Spalding v. Dep't of Labor & Indus.*, 29 Wn.2d 115 (1947); *Groff v. Dep't of Labor & Indus.*, 65 Wn.2d 35 (1964).

1 with Cochlear Hydrops, a Meniere's like condition in which vertigo is absent. Her diagnosis is also
2 supported by Mr. Babbitt's fluctuating audiological test results and by his prior diagnoses of Meniere's
3 Disease. Furthermore, Dr. Batson relied heavily on the "noise notch" at 4000 hz to support her
4 opinion that Mr. Babbitt's hearing loss was noise induced. But Dr. Gustafson testified that a notch
5 can develop without noise exposure; and that one study found that 1/3 of participants with a "noise
6 notch" had no harmful noise exposure. Dr. Gustafson also testified that none of Mr. Babbitt's jobs
7 exposed him to damaging levels of noise for sufficient time to cause hearing loss. And finally, we are
8 persuaded by Dr. Gustafson that Mr. Babbitt does not have "trucker's ear" because of the type of
9 equipment he operates and the changes in permissible noise levels since the condition became an
10 issue in the 1970s. Moreover, if driving with an open window caused Mr. Babbitt's hearing loss we
11 would expect that his left ear hearing loss would be worse than in his right ear because his left ear
12 would be exposed more directly to road noise through the open driver's side window. But the
13 audiology tests consistently showed the contrary.

14
15
16
17
18
19
20
21 The preponderance of the medical and audiological evidence does not support Mr. Babbitt's
22 bilateral hearing loss as arising naturally and proximately from the distinctive conditions of his
23 employment. The Department order rejecting the claim is correct and should be affirmed.

24 **DECISION**

25
26
27 In Docket No. 18 20492, the claimant, Dean L. Babbitt, filed an appeal with the Board of
28 Industrial Insurance Appeals on August 13, 2018, from an order of the Department of Labor and
29 Industries dated July 24, 2018. In this order, the Department affirmed the provisions of an order
30 dated February 9, 2018, that rejected the claim as an industrial injury or an occupational disease.
31 This order is correct and is affirmed.

32 **FINDINGS OF FACT**

- 33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
1. On October 9, 2018, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History in the Board record solely for jurisdictional purposes.
 2. Dean Babbitt is a 78 year old single man. His work history beginning in about 1959 includes commercial fishing in Alaska and car repair. He has worked intermittently as a shuttle and delivery driver since 1965, during which he operated passenger vans and automobiles. He served as a cook in the Army Reserve for six years beginning in 1964. And since the 1960s Mr. Babbitt has played drums professionally for a dance band. He used no hearing protection while performing. Beginning in 2015 Mr. Babbitt worked as a delivery driver for Seattle Automotive Distributors, Inc. After driving in an air conditioned vehicle for about five

1 months, he was assigned to a different vehicle in which the air conditioner
2 did not work. Mr. Babbitt drove this vehicle with the windows open during
3 the summer of 2017 because of adverse weather conditions.

- 4
5 3. Mr. Babbitt has complained of hearing loss and tinnitus for about 20 years,
6 and was diagnosed and treated for Menier's Syndrome in 2017 by
7 Dr. Shrewsberry.
- 8 4. Dean L. Babbitt suffers from bilateral idiopathic sensorineural hearing
9 loss, and from cochlear hydrops. Neither of these conditions were caused
10 by a sudden and tangible happening of a traumatic nature and producing
11 an immediate or prompt result, or arose naturally and proximately from
12 the distinctive conditions of his employment.

13
14 **CONCLUSIONS OF LAW**


- 15
16 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties
17 and subject matter in this appeal.
- 18 2. The order of the Department of Labor and Industries dated July 24, 2018,
19 is correct and is affirmed.

20
21
22 Dated: January 17, 2020.

23 BOARD OF INDUSTRIAL INSURANCE APPEALS

24 
25 LINDA L. WILLIAMS, Chairperson

26 
27 ISABEL A. M. COLE, Member

28 
29 JACK S. ENG, Member

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47

**Addendum to Decision and Order
In re Dean L. Babbitt
Docket No. 18 20492
Claim No. AZ-93639**

Appearances

Claimant, Dean L. Babbitt, Self-Represented

Employer, Seattle Automotive Dist, Inc., by Archbright, per Michelle Crevling

Retrospective Rating Group, Association of WA Business- Retail, Wholesale, Services #10128
(did not appear)

Department of Labor and Industries, by Office of the Attorney General, per Lucretia F. Greer

Petition for Review

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The claimant filed a timely Petition for Review of a Proposed Decision and Order issued on November 1, 2019, in which the industrial appeals judge dismissed the appeal. On December 23, 2019, the Department filed a Response to the Claimant's Petition for Review.

Evidentiary Rulings

The Board has reviewed the evidentiary rulings in the record of proceedings and reverses the exclusion of Dr. Batson's testimony as explained above. The Board finds that no other prejudicial error was committed and the remaining rulings are affirmed.

Other Procedural Rulings

All prehearing scheduling orders and orders on motions are affirmed.

Other

The decision dismissing this appeal for failure of the claimant to make a prima facie case is incorrect and is reversed.