

Original articles

Legal basis to designation of audiologists as experts in the Labor Courts in Santa Catarina

Base legal para a nomeação de fonoaudiólogos para o encargo de peritos judiciais em audiologia no âmbito da Justiça do Trabalho em Santa Catarina

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ABSTRACT

Purpose: to identify the statutory basis for the appointment of audiologist to the task of experts in the Labor Courts.

Methods: the statutory basis was identified by reviewing the constitutional and infra-constitutional provisions in force until the year 2015, judicial sentences, analysis of dispatches, minutes of hearings and hearings with the Judge.

Results: the 1988 Constitution when established the principles, rights and fundamental guarantees, allowed the creation of the Law 6,965/81 which provides for the regulation of speech therapist profession, guaranteeing freedom of exercise professional. The Articles 1, 4 and 10 of this Law professed the competence of the speech therapist to act in lawsuits, this condition also was ratified by profession Ethic's Code in Art . 5. The legal provisions above, associated with the Art. 139 and 145 of the Civil Procedure Code have been adopted by the most judges to appoint audiologists to the task of experts in the labor court.

Conclusion: the legal basis for the appointment of audiologist to the task of experts in the Labor Courts, start from the constitutional provisions, with broad support in different infraconstitutional devices that provide clarity and legal certainty to appointments made by judges, with national law already pacified in the subject matter.

Keywords: Expert Testimony; Judiciary; Audiology; Hearing Disorders; Hearing Loss

RESUMO

Objetivo: identificar a base legal para a nomeação de fonoaudiólogos para o encargo de peritos na Justiça do Trabalho.

Métodos: a base legal foi identificada por meio da revisão dos dispositivos constitucionais e infraconstitucionais em vigor até o ano de 2015, da avaliação de sentenças, análise de despachos, atas de audiências e em audiências com os Juízes.

Resultados: a Constituição de 1988 ao consagrar os princípios, direitos e garantias fundamentais, deu azo à Lei 6.965/81 que dispõe sobre a regulamentação da Profissão de Fonoaudiólogo, garantindo a liberdade do exercício profissional. Os Artigos 1º, 4º e 10º desta Lei afirmam a competência do fonoaudiólogo para atuar em perícias judiciais, condição que é ratificada pelo Código de Ética da profissão em seu Art. 5º. Os dispositivos legais supra, combinados com os Art. 139 e 145 do Código de Processo Civil têm sido adotados pela maioria dos magistrados ao nomearem fonoaudiólogos como peritos judiciais.

Conclusão: a base legal para a nomeação de fonoaudiólogos como peritos judiciais parte de dispositivos constitucionais, com amplo amparo em diferentes dispositivos infraconstitucionais que conferem clareza e segurança jurídica às nomeações feitas pelos juizes, com jurisprudência nacional já pacificada a respeito do assunto.

Descritores: Prova Pericial; Poder Judiciário; Audiologia; Transtornos da Audição; Perda Auditiva

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INTRODUCTION

Despite judges' broad and recognized knowledge and their general culture, in legal proceedings that involve substances related to workers' health, often judges come across with issues that overpass their capacity, since they overpass the legal sphere and demand the domain of scientific and technical knowledge on health area to proper understanding of the facts under judgment. In these situations, judges designate a legal expert, based on section 145 of the Civil Code Procedure (CCP), who by means of the expert report elaboration will try to elucidate judge's concerns on the proceeding related to workers' health and work environment^{1,2}.

The designation of a legal expert is essential since the expert report has effect of strong technical evidence and will possibly guide judge's decision in the execution of the duty of judging. According to the authors^{3,4}, the expert evidence is the probative way for a professional with specialized knowledge in determined substance provides technical information of facts with the purpose to contribute to the formation of judge's verdict, therefore, correctly applying the law to the factual situation under investigation.

Considering that in Brazilian industrial site, environmental noise is the harmful cause with bigger prevalence in work place⁵ and that is so precariously controlled, annually several proceedings are led to Labor Courts related to indemnification actions due to noise induced hearing loss suffered by workers, result of improper occupational expositions. Such condition promotes audiologists' performance in the scope of Labor Courts.

In this context, it becomes evident and almost unquestionable, the fact that the audiologists is one of the professionals who can significantly contribute to Brazilian judiciary system when designated as expert to assist Justice in situations where damages related to workers' hearing are discussed. However, since judges, as their custom, generically nominate the expert reports carried out in health area as "medical report" - using the term "medical" as synonym of "health"- it is common the aggrieved party of the investigation object to get confused and raise against the audiologist professional, under the allegation that they could not act as an legal expert for not being a doctor. Discussions of this nature are very common and present in the scope of Justice and the community in general, mainly in times of attempts of reserves in professional market.

Also, even in the audiologists' field there are incongruences between professionals defending the performance as experts and suspecting the legitimacy of the performance in this charge. Therefore, the necessity of researching the complex Brazilian legal system is justified aiming to clarify what is the legal basis to designate audiologists for the expert charge in the scope of the Labor Courts.

METHODS

The legal basis used by the Labor judges to designate audiologist legal expert was searched and hierarchized in this study from the constitutional and infra-constitutional provisions, applying a logical order in the direction of vertical legal commands (from higher to minor).

The researches consisted in direct consultations in different Jurisdictions of Labor in the state of Santa Catarina through qualitative evaluations of a few dozens of proceedings, of trial court judgments and final decisions, orders and minutes of hearings in proceedings that involved the audiologists' designation in the jurisdictional scope of the Regional Labor Court of Santa Catarina represented by the acronym "TRT-12" (Tribunal Regional do Trabalho), whereas the number 12 (twelve) represents the state of Santa Catarina. The Information and data collected for the research development were also extracted from the public data of working proceedings available in the site of the Regional Labor Court of Santa Catarina (TRT-12), through the address www.trt12.jus.br as well as jurisprudences applied by the Superior Labor Court (Tribunal Superior do Trabalho - TST) through address www.trt.jus.br.

According to the Committee of Ethics in Research (CER) of the University of the West Santa Catarina, the protocol for this research is dismissed from CER evaluation since it does not directly involve human beings in the evaluations and is dealing with data of public domain, following the terms in CER system of Brazilian National Committee for Ethics in Research (CONEP).

RESULTS

The different legal provisions that founded the legal basis to audiologists' designation for the legal expert charge in audiology scope of the Labor Court are synthetically presented in Figure 1.

Legal provision	Short description
Art. 3º, clause IV, of the Federal Constitution of 1988	It is forbidden any kind of discrimination, inclusively among different professionals of health area
Art. 5º II and the XIII, of the Federal Constitution of 1988	It determines the practice of any work, trade or profession is free, observing the professional qualifications which the law shall establish
Law 6.965 of December 9th of 1981, the Presidency of the Republic	It establish the regulation of the speech language pathologist and audiologist profession recognizing their practice in the domestic territory
Art. 4º of Law 6.965	It authorizes the speech language pathologist and audiologist to evaluate, to diagnose, to give opinion and to assist public and private agencies in the area of the oral and writing communication, voice and hearing
Art. 10 of Law 6.965	It authorizes the Federal Council of Speech Language Pathology and Audiology sciences to apply normative function, to establish necessary documents to interpretation and execution of the law determination.
Code of Professional Ethics of the Speech Language Pathologist and Audiologist	Based on the previous Law of the Federal Council of the Speech Language Pathologist and Audiologist, it prescribes through the Code of Ethics the right of the subscribed professionals to conduct necessary investigation and other procedures needed to the full practice of the activity; amongst others.
Art. 145 of the Civil Code Procedure (CCP) combined with the Art. 421 paragraphs 1º, 2º and 3º	It authorizes the Judge to be assisted by experts and makes possible the performance of all the professionals with university level, properly subscribed in the agency of competent classroom, since they prove their specialty in the substance on which they will opine.
Attached I of NR 7 of the Ministry of Labor	It affirms that is exclusive skill of doctors and audiologists the conduction of audiometric tests, having the tacit agreement of since the audiologist is capable to carry through tests, they also can interpret them for investigations purposes that discuss hearing disorders and losses
Art. 1º of Resolution 96 of the Superior Labor Council	By means of the guidelines and statements proposals about Legal Investigation of Work-related Accidents and Occupational Illnesses “strictly” suggesting in Article 1º also the participation of speech language therapists and audiologists such investigations.
Jurisprudence – Process AIRR – 54900 – 18.2011.5.17.0011, from April 08, 2015, from Minister Maurício Godinho Delgado’s report, from the Third Panel, published on DEJT April 10, 2015	It establishes the agreement of the Superior Court that reports developed by audiologists do not constitute restraining of access defense, therefore, they are effective for judicial purposes of investigations in the scope of the Labor Justice in Brazil

Figure 1. Synthesis of the legal provisions that found the audiologist designation as expert on the Labor Justice

As synthetically demonstrated in the previous picture, we observed that in Title I of the Federal Constitution/88 that states the “Fundamental Principles”, in its section 3º clause IV is enclosed as fundamental goals of the Federative Republic of Brazil, amongst others, the promotion of well-being of all, without prejudiced as to origin, race, sex, colour, age and any other forms of discrimination. Also, it is presented in Title II which states the “Fundamental Rights and Guarantees”, specifically in Article 5º “All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property”. Additionally, clause II and XIII declare, respectively, “no one shall be obliged to do or refrain from doing something except by virtue of law”;

and the practice of any work, trade or profession is free, observing the professional qualifications which the law shall establish⁶.

Based on the prerogatives granted by Federal Constitution /88 which is the supreme law, the Presidency of the Federative Republic of Brazil published Law 6.965⁷ from December 9th of 1981 enclosing the audiologists’ profession regulation, recognizing in all the domestic territory their exercise. This Law defined the speech language pathologist and audiologist as being the professional with full graduation in speech language pathology and audiology sciences, that acts in research, prevention, evaluation and therapy in the fields of oral communication and writing, voice and hearing, as well as in the improvement of speech and voice patterns. In Article 4º the Law argues on the

skills of audiologists and qualified professionals in the form of the specific legislation, emphasizing, among others, the prerogatives: a) to participate on diagnosis teams, carry through evaluation of oral and writing communication, voice and hearing; b) to assist in the audiology field public agencies and governmental organizations, private or mixed; c) to give audiologist opinion in the area of oral or writing communication, voice and hearing; e d) to carry through other activities inherent to their graduation according to curriculum.

Moreover, in the Article 10^o this Law says that it is the Federal Council of Speech Language and Hearing sciences duty to apply normative function, to set legal actions necessary to the interpretation and the execution of the Law and to examine the professional exercise, adopting essential measures to the accomplishment of institutional goals, and to adjust to the participation of all the Regional Councils, About the Code of Ethics in Profession.

Based on this last prerogative guaranteed in Law, the Federal Council of Speech Language and Hearing sciences supported in the Code of Ethics in Profession in Chapter III, which establish general rights, the exercise of the activity with wide autonomy and freedom of conviction. It also reserved the right for professionals to perform the evaluation, request, elaboration and to conduct exams, diagnosis, treatment and research, the emission of opinions, findings and/or report, teaching, technical responsibility, advising, consulting, coordination, administration, orientation, investigation conduction and any other procedures needed to the full exercise of the activity; amongst others.

The Civil Code Procedure (CCP)², in accordance to the Federal Constitution/88 and the Law 6.965/81, in Tittle IV that describes judiciary agencies and the Assistants of Justice, specifically in Chapter V Article 139, affirms as assistant of the judgment, amongst others, whose attributions are determined by the rules of judiciary organization, the clerk of court, the bailiff, the expert, the receiver, the administrative officer and the interpreter. Complementarily, Article 145 of the CCP establishes that whenever the proof of the fact depends on scientific or technical knowledge the judge will be assisted by an expert in accordance with Article 421 paragraphs 1^o, 2^o and 3^o, the experts must be chosen among professionals on graduation level, properly subscribed in the agency of such profession and must prove their expertise through professional certificate in the substance on which they will have to judge. In regions where there are no qualified professionals that

fulfill the previous requirements, the indication of an expert will be on judge's free choice. We emphasize at this point that the Law clearly admits the exercise of judge's assistant as expert any professional with graduation formation, and moreover, admitting that, in the lack of these, any another professional could be indicated by the Judge, not having reasons to be discriminate among different health professions who can or cannot be expert.

On the basis of the rules of law previous elucidated, is the attached I of NR 7 of the Ministry of Labor⁸, that also has been a document considered by magistrates as legal basis to designate audiologists for expert charge, in which is declared that is doctors' and audiologists' exclusive ability to perform audiometric tests. It is implied the agreement that since the audiologist can carry through tests, they also can read them for investigation purpose investigating illness or hearing loss they select auditory illnesses and injuries, having no reason that could induce the opposite thought.

In addition to all these legal provisions that together guarantee the legitimacy of the audiologist designation as expert, there is also the orientation of the Superior Court of the Labor Justice. Thus, by means of the Resolution 96^o, established in the scope of the Brazilian Labor Justice the Program Safe Work, whose the National Managing Committee as a result of the 1^o Virtual Forum of the program, published in February 25th of 2014 the guidelines and statements proposals about Legal Investigation of Work-related Accidents and Occupational Illnesses, "strictly" suggesting in Article 1^o also the participation of speech language therapists and audiologists in such investigations.

As statement proposal for judicial investigation in work-related accidents, the National Managing Committee recommended to all labor magistrates in statement 3 the following essay to emend:

"OCCUPATIONAL PATHOLOGY. INVESTIGATION. QUALIFIED PROFESSIONAL. CAUSAL NEXUS AND DIAGNOSTIC BY PROFESSIONALS OF THE HEALTH AREA. POSSIBILITY. I - The investigation must be carried through by professional who holds scientific or technical knowledge demandable to the factual case (art. 145, of the CCP). II - The different professionals of the health area have skills to carry through distinct diagnosis, each one in their domain, as well as establishing the causal nexus."¹⁰

In continuous direction, the national jurisprudence has already pacified this agreement as can be observed

through Process AIRR - 54900-18.2011.5.17.0011 of April 08th of 2015 reported by Ministry Mauricio Godinho Delgado - 3^a Class - published in DEJT April 10th of 2015, with the following emend:

“BILL OF REVIEW. APPEAL OF SEARCH. 1. CURTAILMENT OF THE DEFENSE RIGHT. NULLITY OF THE INVESTIGATION CONDUCTED. NO CONFIGURATION. REPORT ELABORATED BY AUDIOLOGIST. POSSIBILITY. 2. ...

... DENIAL DECISION. MAINTENANCE. It is not possible to assure the processing of the appeal of search when the document of petition is not incongruent to the terms of the denial decision that subsist for its reasons itself. Destitute bill of review.”¹¹

In sum, it is possible to synthesize the legal outline in which Judges of the Regional Court of Labor of Santa Catarina (TRT-12) based the audiologists' designation for the expert charge in Figure 2.

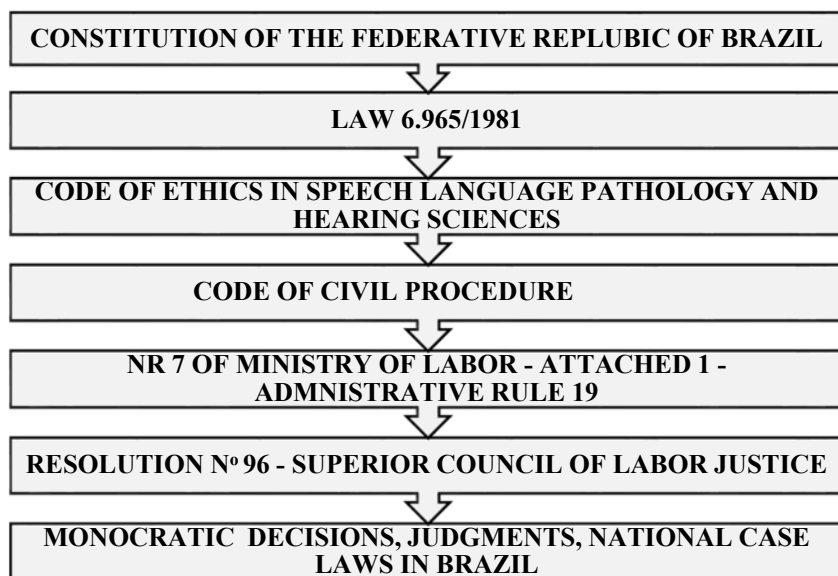


Figure 2. Legal Outline that supports the audiologist designation for the experts charge

We did not mention many other elements of the Brazilian rules of law from the jurisdictional scope of TRT 12 cited by judges and observed in the review of trial court judgments and judgment in error, orders and minutes of hearings in processes involving the audiologists designation and have been used by the magistrates to support their decisions of designation of these professionals for the expert charge, because they compose in the same sensible the clearly and legitimate legal support that already discussed, avoiding repetitions.

DISCUSSION

There are no doubts that in the 21st century the idea of health summed up basically to the medical performance, is already outdated since would be a view sufficiently limited and narrow of what is comprehensible by the called “extended concept of health”.

To support this narrowing view of health would be equivalent to affirm that to guarantee justice, the performance only of lawyers would be enough, being dispensable the performance of Judges, of Prosecuting Attorneys, of Associate Justices, of Experts, of Process Servers, of legal assistants and the judiciary policy. We do not intend to demerit medicine, because it is an important part of the health system, but as example of other professions is only part of a bigger set. Also, we discussed about this issue so the reader understands the reason that, sometimes, the parts that litigate in judgment tend not to accept the audiologist performing in the judicial field, despite such condition of insurgencies of the parts is not very frequent and when they occurred have been radically rejected by Judges, with ratification of these decisions in the scope of the TST.

Towards this context of understanding transition of the health area as field of “monocratic” performance (with dominance of one profession) and to a

“democratic” one with necessarily joint and convergent action of the different professions that compose the area, it is evident also the fact it would be proper the magistrates to start using the nomenclature “health report” over the common practice of assigning “medical report” in their orders in legal documents of processes. Besides, it is only a matter of magistrates’ habit, since the guidelines on expert evidence in work-related accidents and occupational illnesses¹⁰ already overcame this issue. Thus, the Article 1^o that wisely determines that in the investigations of work-related accidents and occupational illnesses substance shall be designated experts who attend the rules and ethical-professionals rules to analyze the object of proof, such as doctors, psychologists, physiotherapists, audiologists, occupational therapists, engineers, among others, without damage the designation of more than a professional, even if it does not deal with complex investigation, in the patterns of art. 431-B of the Code of Civil Procedure.

The Article 145 of the CCP² also it is very clear and agrees with this direction, by expressing that the investigation must be carried through by professionals who hold scientific or technical knowledge demandable to the factual case. To diverge of this agreement, would at least excite a great problem of legal order. The experts, despite their professional area (audiologists or doctors), before being experts are workers and would be an incoherence, in the scope of the Labor Justice, some workers be neglected in detriment of others, without legal motivation. To accept that a doctor can be considered better than an audiologist to act as expert in demands that involve arguing relative to hearing losses, is a unquestionable action against the Art. 5^o of the CFRB as already alluded. To be exact, that all are equal before the law, without distinction of any nature, being free the exercise of any work, trade or profession, observing the professional qualifications that the law to establish, submitting the judgment of the situation to the laws of creation of the respective professions and its advice of class in the regulation of this exercise⁶. Nevertheless, we observed that for the Labor Judges the designation of audiologists to the experts charge is legit since it deals with professionals absolutely competent and legal capable to assist it the judgment of substances that involve hearing losses.

CONCLUSION

The legal basis to audiologists designation for the experts charge in the scope of the Labor Justice has support in the Constitution of the Federative Republic of Brazil of 1988, in Law 9.965/81, in the Code of Ethics of the Speech Therapist and Audiologist Professional, in the Civil Code Procedure, in the Normative Rule n^o 7 of the Ministry of the Labor (attached I – administrative rule 19), in the Resolution 96 of the Superior Council of the Labor Justice, as well as in the jurisprudence placed by the Superior Court of Labor itself.

Therefore we may conclude, that the legal basis to designate audiologists as legal experts is founded by constitutional provisions, with wide support in different infra-constitutional provisions that ensure legal clarity and security to the designations made by the judges, with national case law already adjusted by the Superior Court of Labor in this subject, not having reasons to any doubts or hesitations to the legitimacy and legal performance of audiologists in this manner.

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