Eades, Richard

JOINDER

Single claim, multiple possible employers/insurers

A claim cannot be rejected because the responsible employer or insurer is not a party to the appeal. To fully decide the issue of claim allowance, any potentially responsible insurer must be allowed to participate. If the state fund is implicated, the Department must be joined. It is unnecessary to join all state fund employers, although they may be allowed to participate. **….*In re Richard Eades,* BIIA Dec., 01 17639 (2002)**

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: RICHARD L. EADES	**DOCKET NO. 01 17639**
CLAIM NO. W-438613	**ORDER VACATING PROPOSED DECISION AND ORDER AND REMANDING APPEAL FOR FURTHER PROCEEDINGS**

APPEARANCES:

Claimant, Richard L. Eades, by
Springer Norman & Workman, per
Leonard F. Workman

Self-Insured Employer, Ocean Beach School District #101, by
Law Office of Craig A. Staples, per
Craig A. Staples

The claimant, Richard L. Eades, filed an appeal with the Board of Industrial Insurance Appeals on July 17, 2001, from an order of the Department of Labor and Industries dated June 15, 2001. The order of June 15, 2001, reversed a Department order dated February 28, 2001, and denied the claim on the basis that the claimant's condition is not the result of the exposure alleged. **REMANDED FOR FURTHER PROCEEDINGS.**

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order issued on May 30, 2002. The Proposed Decision and Order affirmed the Department order of June 15, 2001. We remand this matter to the hearings process to join the necessary parties for a full adjudication of the issues raised by this appeal.

We agree with our industrial appeals judge that Mr. Eades did not establish that he suffered any injurious noise exposure while working for Ocean Beach School District. We do not agree, however, that the claim should be rejected based on this record, which shows that Mr. Eades does have occupationally related hearing loss. To determine the insurer on the risk, it was incumbent upon our industrial appeals judge to join each and every insurer who may be responsible for Mr. Eades' condition. By affirming the Department order without joining these parties, Mr. Eades is placed in the unenviable position of having to file a further claim, hoping this time to fortuitously name the party responsible for his hearing loss. Not only is that unfair to Mr. Eades, but this piecemeal approach to the adjudication of his claim could lead to inconsistent results. In light of these concerns, we hold that a claim cannot be rejected simply because the worker failed to identify

the correct employer on the application for benefits. There is no provision in the Industrial Insurance Act that requires rejection of a claim merely because the worker incorrectly identified the employer. One of the advantages of the "last injurious exposure rule" noted by our Supreme Court is that the rule protects the worker from the risk of filing claims against the wrong employer. *Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128 (1991). The Proposed Decision and Order runs afoul of the protection afforded the worker in instances where the correct employer was not identified when the claim was filed. Identification of the correct employer is necessary in order to correctly identify the responsible insurer, it is not critical to claim allowance.

To **fully** decide the issue of claim allowance, however, any potentially responsible insurer must be allowed to participate in the appeal. We intentionally refer to "responsible insurer" rather than "employer" because under the industrial insurance scheme in this state, there are two potential types of responsible insurers: the State Fund or a self-insured employer. The costs of workers compensation benefits are borne either by the State or by self-insurers. *See Weyerhaeuser v. Tri*, 117 Wn.2d 128 (1991). In Mr. Eades' appeal, the State Fund is potentially at risk for the costs associated with Mr. Eades' occupational hearing loss. At a minimum, the Department must be joined under these circumstances, but it is unnecessary to join all potential State Fund employers. Based on this record, it is unclear whether Mr. Eades had injurious noise exposure with other self-insured employers. If there is a potential that other self-insured employers may be responsible for Mr. Eades' occupational hearing loss, they must be joined also. Other State Fund employers may be allowed to participate, but their joinder is not necessary to fully adjudicate claim allowance.

We are mindful that our jurisdiction is appellate only and that "[i]f a question is not passed upon by the department, it cannot be reviewed by either the board or superior court." *Hanquet v. Department of Labor & Indus.*, 75 Wn. App. 657, 662 (1994), quoting *Lenk v. Department of Labor & Indus.*, 3 Wn. App. 977 (1970). Some may argue that we do not have jurisdiction to join other employers because the Department order lists only Ocean Beach School District. We disagree. Mr. Eades seeks allowance of his occupational disease claim. To evaluate the merits of that claim the Department had to pass upon the issue of whether Mr. Eades' hearing loss was caused, in any part, by employment covered under the Industrial Insurance Act. By rejecting the claim on the basis that the "condition is not the result of the exposure alleged," the Department determined, at least by implication, that there was no responsible Washington employer. Accordingly, we have jurisdiction in this appeal to determine whether any of Mr. Eades' employers should bear responsibility for his hearing loss under *Lenk*.

On remand, our industrial appeals judge must conduct further hearings to determine Mr. Eades' work history in detail and, pursuant to CR 19 and WAC 263-12-045(h), join the parties necessary to make a full determination in this matter. If Mr. Eades' last injurious exposure was with a self-insured employer other than Ocean Beach School District #101, the industrial appeals judge should so find. If Mr. Eades' last injurious exposure was with a State Fund employer, our industrial appeals judge should remand to the Department to either accept this claim and establish it as a State Fund claim, or in the alternative, reject this claim and establish and accept a new State Fund claim, and to determine, administratively, the ratio of responsibility of each State Fund employer for Mr. Eades' hearing loss.

The Proposed Decision and Order dated May 30, 2002, is vacated. This matter is remanded to the hearings process, pursuant to WAC 263-12-145(4), for further proceedings as indicated by this order. The parties are advised that this order is not a final Decision and Order of the Board within the meaning of RCW 51.52.110. At the conclusion of further proceedings, the industrial appeals judge shall, unless the matter is dismissed or resolved by an Order on Agreement of Parties, enter a Proposed Decision and Order containing findings and conclusions as to each contested issue of fact and law, based on the entire record, and consistent with this order. Any party aggrieved by such Proposed Decision and Order may petition the Board for review of such further Proposed Decision and Order, pursuant to RCW 51.52.104.

It is so ORDERED.

Dated this 20th day of December, 2002.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

/s/_____
FRANK E. FENNERTY, JR. Member

/s/_____
JUDITH E. SCHURKE Member