Dunnell, Amy

OCCUPATIONAL DISEASE (RCW 51.08.140)

Concurrent employers

Last injurious exposure

Responsibility for an occupational disease can be apportioned between insurers when the worker was employed in concurrent employment covered by different insurers and each employment was a proximate cause of the occupational disease. ***….In re Amy Dunnell,* BIIA Dec., 03 18764 (2005)** [*Editor's Note*: The Board's decision was appealed to superior court under Spokane County Cause No. 05-2-02014-2.]

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: AMY J. DUNNELL	)	**DOCKET NOS. 03 18764 & 04 15899**
	)	
CLAIM NOS. Y-524712 & W-793366	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Amy J. Dunnell, Pro Se

Employer, Maid to Perfection,
None

Self-Insured Employer, Federal Express Corporation, by
VavRosky MacColl Olson, P.C., per
Stephen L. Pfeifer

Department of Labor and Industries, by
The Office of the Attorney General, per
Molly M. Parish, Assistant

Docket No. 03 18764: The claimant, Amy J. Dunnell, filed an appeal with the Board of Industrial Insurance Appeals on August 14, 2003, from an order of the Department of Labor and Industries dated July 18, 2003 (Claim No. Y-524712). In that order, the Department affirmed its order dated May 20, 2003, in which the Department established an overpayment of time loss compensation in the amount of $1,332.66, assessed for the period February 20, 2003 through April 2, 2003, because: the claim is rejected for some reason other than those listed for automated rejection orders; the claim has been rejected; and this claim has been rejected because the employer is self-insured and the claim has been erroneously submitted on a State Fund report of accident. The Department order is **REVERSED AND REMANDED**.

Docket No. 04 15899: The self-insured employer, Federal Express Corporation, filed an appeal with the Board of Industrial Insurance Appeals on May 24, 2004, from an order of the Department of Labor and Industries dated April 7, 2004 (Claim No. W-793366). In that order, the Department corrected its order dated March 26, 2004; determined that at the time of injury the claimant had more than one paying job; determined that the claimant's gross monthly wage from all employment was $1,650.96; determined that the claimant was single with one dependent; and directed the self-insured employer to recalculate and repay time loss compensation based on this monthly wage. The Department order is **REVERSED AND REMANDED**.

PRELIMINARY MATTERS

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 Department to a Proposed Decision and Order issued on October 18, 2004, in which the industrial appeals judge reversed and remanded the Department order dated July 18, 2003 (Claim No. Y-524712), and the Department order dated April 7, 2004 (Claim No. W-793366).

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed.

We have granted review not because we disagree with the ultimate disposition of this claim as decided by our industrial appeals judge, but to present this unusual case as a Decision and Order of the Board.

These consolidated appeals were presented to our industrial appeals judge on motions for summary judgment filed by the self-insured employer, Federal Express Corporation (Fed Ex), and the Department of Labor and Industries. The claimant, Amy J. Dunnell, did not file a motion or any responsive materials. The State Fund employer, Maid to Perfection, has not appeared.

The documents filed with respect to these motions were:

(1) Fed Ex's Motion and Memorandum for Summary Judgment, to which were attached: an undated letter from Roger Scott, PA-C, and Daniel Stoop, M.D., to Elenor Boyer; a seven-page report of a June 27, 2003 medical examination conducted by George R. Monkman, M.D.; a ten-page report of an August 29, 2003 medical examination by Carl F. Brunjes, M.D.; a copy of the Supreme Court's decision in *Department of Labor and Industries v. Fankhauser*, 121 Wn.2d 304 (1993); a copy of the decision of the Oregon Court of Appeals in *Colwell v. Trotman*, 615 P.2d 1094 (1980); and a copy of the decision of the Supreme Court of Nevada in *Riverboat Hotel Casino v. Harold's Club*, 944 P.2d 819 (1997);[1] and

(2) Department's Brief and Cross-Motion in Response to Claimant's [*sic*-Fed Ex's] Motion for Summary Judgment, to which were attached: Exhibit A, a pay stub from Maid to Perfection for the pay period February 13, 2003 to February 26, 2003; and Exhibit B, a February 2003 copy of the claimant's calendar. Exhibit B, attached to the Department's filing, was also admitted as Board Exhibit No. 1.

[1] The medical records submitted by Fed Ex in support of its motion were not supported by affidavit or declaration of the physicians who had prepared the records. However, it was agreed by the Department that if called to testify, the doctors would state that the information in the records was correct. Additionally, the parties agreed that Ms. Dunnell's date of first treatment for the condition for which she filed her claim was February 15, 2003, notwithstanding a suggestion in the report of Dr. Monkman that it was February 19, 2003.

The parties had previously agreed that in lieu of presenting an affidavit or declaration of Ms. Dunnell, her testimony would be presented at hearing with the understanding that if her testimony deviated from what the parties anticipated, the parties would be allowed an opportunity to submit supplemental materials. Ms. Dunnell's testimony, presented at hearing on July 19, 2004, raised no issues requiring further filings by the parties.

A preliminary issue presented at hearing was whether Fed Ex should have been precluded from arguing that the State Fund should also share responsibility for some of the cost of the claim. Our industrial appeals judge determined that the self-insured employer was not so precluded, and we agree. There is no dispute presented on that issue, and we do not address it further.

DECISION

In these consolidated appeals, the central issue before us is whether the last injurious exposure rule should apply or whether a "concurrent employment" exception should apply given the medical evidence and the unusual circumstances of this case. We conclude that when an occupational disease claim is attributed to a period of employment during which the claimant was engaged in dual employments involving different insurers, and there is no medical evidence to establish that one of the employments was not a proximate cause of the condition for which the claim was filed, a "concurrent employment" exception applies. This means that the last injurious exposure rule does not apply, and responsibility for the claim is apportioned between the insurers of the dual employers.

The claimant, Amy J. Dunnell, was born on July 3, 1973, and graduated from high school in 1991. After high school, she worked as a part-time dishwasher and as a seamstress. However, from 1993 to August 2002, the focus of her labor was raising her children and being a homemaker.

Toward the end of August 2002, Ms. Dunnell returned to employment with two employers. She worked for Maid to Perfection, performing maid services, primarily cleaning homes and apartments, but also some businesses. In this capacity she worked an average of three to four hours per day, four to five days per week. She also went to work for Fed Ex as a "handler," unloading packages from a conveyer belt and placing them in containers to be routed to other sites. At Fed Ex, she worked two to three hours per day, six days per week. Ms. Dunnell earned different pay rates with Maid to Perfection and Fed Ex.

Toward the end of January 2003, Ms. Dunnell started feeling tired and worn out, and had developed pain in her shoulder joints. Her symptoms were brought on by the constant and repetitive use of her arms. She first sought treatment for her condition on

Saturday, February 15, 2003, a day she did not work, though she had worked the previous day, Friday, February 14, 2003, for both Fed Ex and Maid to Perfection. She first received treatment from physician's assistant Roger Scott, PA-C. He advised her to use ice and gave her a prescription for anti-inflammatory medication. She worked the next day, Sunday, February 16, 2003, at Fed Ex. She did not work at Maid to Perfection on February 16, 2003 or February 17, 2003, because work was slow, but did work 4.5 hours for Maid to Perfection on February 18, 2003. She thinks that she also worked at Fed Ex on February 17, 2003 and February 18, 2003. The last day she worked for Maid to Perfection was February 18, 2003.

Ms. Dunnell returned to her doctor's office on the morning of February 19, 2003, for another appointment and saw Mr. Scott. No treatment was provided at that time. On that date, both Ms. Dunnell and her doctor, Daniel Stoop, M.D., completed the application for benefits in the State Fund claim (Claim No. Y-524712). The Department received this application for benefits on February 24, 2003.

On February 19, 2003, Ms. Dunnell also spoke to her employer, Maid to Perfection, about light duty. It did not have any to offer, but Fed Ex was able to accommodate the restriction; so on the night of February 19, 2003, Ms. Dunnell worked scanning, but not lifting, packages. She testified that by that time, however, her shoulder condition was so painful that even this light duty work was too much for her, and after approximately two hours, she gave up and left. That was the last time Ms. Dunnell worked for Fed Ex.

The parties agreed that Ms. Dunnell did not file another claim after completing the State Fund claim on February 19, 2003, but that the Department initiated the self-insured claim once it became aware that Ms. Dunnell had also worked for a self-insured employer.

In an undated letter, Mr. Scott and Dr. Stoop, in response to a letter from Elenor Boyer of Sedgwick (presumably the third party administrator for Fed Ex), agreed with Ms. Dunnell's statement that her two jobs equally contributed to her shoulder problems. Mr. Scott and Dr. Stoop stated that there was equal effort and similar motion involved in the two positions of housecleaner and her job at Fed Ex as a package handler. In a report of an examination he conducted on June 27, 2003, George R. Monkman, M.D., offered his diagnosis as "[r]epetitive work injury, right and left shoulders, with symptoms of bursitis/tendinitis, with few objective findings." He stated that he "would estimate a 50/50 percent apportionment to her employers," which is Ms. Dunnell's estimate, and that he had "no reason or ability to change that."

In his report to Ms. Boyer concerning his August 29, 2003 examination of Ms. Dunnell, Carl F. Brunjes, M.D., made the following diagnosis:

> Bilateral subacromial bursitis/tendonitis ongoing symptoms, on a more-probable-than-not basis, related to her two work jobs (Maid to Perfection as a housecleaner and Federal Express with the work involving weighing and unloading and packing packages of various weights).

Dr. Brunjes further stated that he "agree[d] with Dr. Monkman that from the patient's history, it would seem that equal apportionment of responsibility for the work stresses exists in this particular patient's case."

These appeals present the issue of the application of the "last injurious exposure" rule, as described in *Weyerhaeuser Company v. Tri*, 117 Wn.2d 128 (1991), and WAC 296-14-350.[2] Our Supreme Court, in *Weyerhaeuser*, adopted the "last injurious exposure" rule to determine liability among successive insurers in occupational disease claims. Under this rule, the insurer on the risk during the most recent exposure that was a cause of the claimed disability was held to be solely responsible for the costs of the claim. In so holding, the court approved the Board's longstanding application of the "last injurious exposure rule." *See In re Delbert Monroe*, BIIA Dec., 49,698 (1978). In *Weyerhaeuser*, the court's statement was simply that responsibility would be assigned to the insurer at risk "during the last exposure which bears a causal relationship to the disease." 117 Wn.2d at 136. The Department, in its rule, has adopted a similar but slightly more detailed statement of the rule, assigning liability for an occupational disease claim to the insurer on the risk "at the time of the last injurious exposure to the injurious substance or hazard of disease during employment within the coverage of Title 51 RCW which gave rise to the claim for compensation." WAC 296-14-350(1). The rule protects workers from the risk of filing a claim against the wrong employer or having to involve multiple employers. It also is easier, administratively and otherwise, to assign such a claim to a single employer.

We note that the last injurious exposure rule was designed with **successive** employments in mind, rather than **concurrent** employments, as is the case here.

Other jurisdictions which adhere to the last injurious exposure rule have carved out certain exceptions. In *Department of Labor and Industries v. Fankhauser*, 121 Wn.2d 304 (1993), the

---

[2] At the conclusion of the hearing, it was noted that while all of the doctors agreed with a 50/50 apportionment of responsibility, apportionment really was not the issue addressed in this case, but rather which employment was the last employment giving rise to the claim for compensation.

Supreme Court, in a footnote, observed that some states have exceptions to the last injurious exposure rule, one of which applies when the employment is concurrent. *Fankhauser*, at 310, FN 2. The specific example offered was the Oregon case of *Colwell v. Trotman*, 615 P.2d 1094 (1980). In *Colwell,* the worker had been employed as a dental hygienist with two dentists, one on Tuesdays and the other on Wednesdays, Thursdays, and Fridays. She had successfully filed an occupational disease claim against, and received benefits from, her "Wednesday, Thursday, and Friday" employer. She thereafter filed a claim against, and sought benefits from, her "Tuesday" employer. The Oregon Court of Appeals concluded that the last injurious exposure rule, previously adopted in Oregon, would not apply under those circumstances, and allowed the worker to pursue her second claim as well. The court noted, but did not decide, the issue of possible duplication of benefits.

Riverboat Hotel Casino v. Harold's Club, 113 Nev. 1025; 944 P.2d 819; 1997 Nev. LEXIS 99, more to the point, also involved a "concurrent" employment exception to the last injurious exposure rule, but in the context of litigation between two insurers. The worker in that case was, concurrently, a full-time blackjack dealer with one employer, and a part-time blackjack dealer with the other. She had filed claims for tendonitis. Following Oregon's lead in *Colwell*, the court in *Riverboat Hotel Casino* also determined that the last injurious exposure rule should not apply under the circumstances. It directed that responsibility for the claim be allocated between the two insurers on the basis of each employer's responsibility for wages at the time of injury.

In the case before us, it is the Department's contention that Fed Ex should be solely responsible for the costs of Ms. Dunnell's claim because her last few hours of employment were with Fed Ex on the evening of February 19, 2003, when she attempted light duty work, and she had last worked for Maid to Perfection the day before, on February 18, 2003. Fed Ex, on the other hand, argues that since it is clear Ms. Dunnell's occupational disease arose naturally and proximately from distinctive conditions of employment with both employers, and the employment with these employers was concurrent, the last injurious exposure rule should not apply. Fed Ex asks that a "concurrent employment" exception to the last injurious exposure rule be applied and that the costs of Ms. Dunnell's occupational disease claim be shared between Fed Ex and the State Fund.

The medical experts presented in this case are unable to identify a "last injurious exposure." Instead, they offer a consensus that responsibility should be apportioned equally. The parties agree that no additional medical evidence will answer the question in terms of the "last injurious

exposure." It is clear that we cannot meaningfully, or with medical support, apply the last injurious exposure rule here. Therefore, bearing in mind that the purpose of the last injurious exposure rule includes protection of the worker from entanglements inherent in multiple claims, and employers from potentially complex related problems, we adopt the "concurrent employment" exception in the circumstances of this case. This will require apportioning responsibility for Ms. Dunnell's claim between Maid to Perfection and Fed Ex.

Accordingly, Fed Ex's Motion for Summary Judgment is granted, the Department's Motion for Summary Judgment is denied, and the orders of the Department dated July 18, 2003 and April 7, 2004, are reversed, and these claims are remanded to the Department with direction to allow the claim assigned Claim No. Y-524712; determine whether that claim should be consolidated with Claim No. W-793366 for claims administration purposes or administered separately; determine a fair and reasonable allocation of the costs associated with Ms. Dunnell's claim for occupational disease, and if and to the extent indicated, provide for reimbursement between the Department and Federal Express for claim costs paid; and take such other and further action as may be indicated by the law and the facts.

FINDINGS OF FACT

1. **Docket No. 03 18764:** On February 24, 2003, the claimant, Amy J. Dunnell, filed an application for benefits with the Department of Labor and Industries, in which she alleged that she had developed an occupational disease that became manifest on February 10, 2003, while in the course of her employment. This claim, assigned Claim No. Y-524712, was filed with the Washington State Fund, and the interested employer, as determined by the Department, was Maid to Perfection. By an order dated April 3, 2003, the Department paid provisional time loss compensation to the claimant for the period February 20, 2003 through April 2, 2003. On May 20, 2003, the Department issued an order in which it established an overpayment of time loss compensation in the amount of $1,332.66, assessed for the period February 20, 2003 through April 2, 2003, because: the claim is rejected for some reason other than those listed for automated rejection orders; the claim has been rejected; and this claim has been rejected because the employer is self-insured and the claim has been erroneously submitted on a State Fund report of accident. On June 13, 2003, the claimant protested and requested reconsideration of the order dated May 20, 2003. On July 18, 2003, the Department issued an order in which it affirmed the order dated May 20, 2003.

On August 14, 2003, the Board of Industrial Insurance Appeals received a Notice of Appeal, filed by the claimant, from the Department order dated July 18, 2003. The appeal was assigned Docket No. 03 18764. On September 12, 2003, the Board issued an order in which it granted the appeal and directed that proceedings be held with respect to the issues raised by the Notice of Appeal.

Docket No. 04 15899: On May 8, 2003, an application for benefits was filed on behalf of the claimant, Amy J. Dunnell, with the Department of Labor and Industries, alleging that she had developed an occupational disease that became manifest on February 15, 2003, while in the course of her employment. This claim, assigned Claim No. W-793366, was filed with the Department's self-insurance section, and the interested self-insured employer, as determined by the Department, was Federal Express Corporation. On May 13, 2003, the Department issued an order in which it determined that the worker had sustained an injury or occupational disease while in the course of her employment with a self-insured employer; allowed the claim; and directed that the self-insured employer pay all medical and time loss benefits as may be indicated in accordance with the industrial insurance laws. On August 13, 2003, the Department issued an order in which it corrected the order dated May 13, 2003; allowed the claim for the occupational disease on February 15, 2003; and directed the self-insured employer to pay all medical and time loss benefits as may be indicated in accordance with the industrial insurance laws.

On March 26, 2004, the Department issued an order in which it determined that at the time of injury the claimant had more than one paying job; determined that the claimant's gross monthly wage from all employment was $1,650.96; determined that the claimant was single with **no** dependents; and directed the self-insured employer to recalculate and repay time loss compensation based on this monthly wage. On April 2, 2004, the claimant protested and requested reconsideration of the order dated March 26, 2004.

On April 5, 2004, the Board of Industrial Insurance Appeals received a Notice of Appeal, filed on behalf of the self-insured employer, from the Department order dated March 26, 2004. The appeal was assigned Docket No. 04 13896. On April 21, 2004, the Board issued an order in which it granted the appeal and directed that proceedings be held with respect to the issues raised by the Notice of Appeal. However, on April 7, 2004, the Department issued a further order in which it corrected the order dated March 26, 2004; determined that at the time of injury the claimant had more than one paying job; determined that the claimant's gross monthly wage from all employment was $1,650.96; determined that the claimant was single with **one** dependent; and directed the

self-insured employer to recalculate and repay time loss compensation based on this monthly wage.

On May 24, 2004, the Board of Industrial Insurance Appeals received a further Notice of Appeal, filed on behalf of the self-insured employer, from the Department order dated April 7, 2004. The appeal was assigned Docket No. 04 15899. On June 2, 2004, the Board issued an order in which it granted the appeal and directed that proceedings be held with respect to the issues raised by the Notice of Appeal. On June 15, 2004, the Board issued an order in which it dismissed the appeal assigned Docket No. 04 13896, for the reason that the order dated March 26, 2004, was not a final order of the Department, but without prejudice to the right of the self-insured employer to pursue its appeal of the later order dated April 7, 2004 (assigned Docket No. 04 15899).

2. In January 2003, the claimant, Amy J. Dunnell, developed a condition later diagnosed as bursitis/tendonitis involving both shoulders. This condition arose naturally and proximately as a result of the distinctive conditions of her concurrent employment as a housecleaner with Maid to Perfection and as a package handler with Federal Express from August 2002 to February 19, 2003. During that period, Ms. Dunnell had worked for Maid to Perfection an average of three to four hours per day, four to five days per week. During that period, Ms. Dunnell had also worked for Federal Express two to three hours per day, six days per week.

3. Ms. Dunnell's occupational disease became symptomatic in late January 2003. She first sought treatment for the disease on February 15, 2003. She and her doctor completed an application for industrial insurance benefits for this disease on the morning of February 19, 2003. Ms. Dunnell last worked for Maid to Perfection on February 18, 2003. She did not work for Maid to Perfection on February 19, 2003, because Maid to Perfection could not accommodate a light duty work restriction placed upon her by her doctor on February 19, 2003. Federal Express did attempt to accommodate the light duty restriction, and Ms. Dunnell did perform light duty work for Federal Express for a short time on the evening of February 19, 2003. Ms. Dunnell has not worked since February 19, 2003.

4. There are no genuine issues as to any fact material to the issues raised by these appeals.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of these appeals, which were filed within the time allowed by RCW 51.52.060, which raise no material issue of fact, and which can be decided as a matter of law.

2. The claimant, Amy J. Dunnell, developed an occupational disease, within the meaning of RCW 51.08.140, that arose naturally and proximately from her employment with both Maid to Perfection and Federal Express.

3. The last injurious exposure rule, by which liability for the costs of an occupational disease claim is assigned to the insurer at risk during the last exposure which bears a causal relationship to the disease, does not apply where the occupational exposure claimed occurs with each of two employers with whom the worker is concurrently employed, involving two different insurers, and there is no medical evidence to establish that one of the two employments was not a proximate cause of the condition giving rise to the claim.

4. The orders of the Department dated July 18, 2003 (Claim No. Y-524712) and April 7, 2004 (Claim No. W-793366) are incorrect and are reversed. These claims are remanded to the Department with direction to allow the claim assigned Claim No. Y-524712; determine whether that claim should be consolidated with Claim No. W-793366 for claims administration purposes or administered separately; determine a fair and reasonable allocation of the costs associated with Ms. Dunnell's claim for occupational disease, and if and to the extent indicated, provide for reimbursement between the Department and Federal Express for claim costs paid; and take such other and further action as may be indicated by the law and the facts.

It is so **ORDERED.**

Dated this 12th day of April, 2005.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

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

/s/_____
CALHOUN DICKINSON Member