Rasmussen, Mike

OCCUPATIONAL DISEASE (RCW 51.08.140)

Last injurious exposure

The date of claim filing is the pivotal consideration in determining the insurer on the risk for the last injurious exposure rule, not the date in which the Department adjudicates the claim. Distinguishing *In re Juan Muñoz*, BIIA Dec., 05 11698 (2007). **….*In re Mike Rasmussen*, BIIA Dec., 09 14857 (2011)**

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: MIKE J. RASMUSSEN	)	**DOCKET NO. 09 14857**
	)	
CLAIM NO. SD-04801	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Mike J. Rasmussen, Pro se

Employer, Oldcastle, Inc., by
Evans, Craven & Lackie, PS, per
Jon D. Floyd

Employer, VCGP Parsons RCI Frontier Kemp, by
Law Office of Carney, Badley, Spellman, per
Elizabeth K. Mauer

Employer, City of Tacoma, by
Law Office of Pratt, Day & Stratton, PLLC, per
Marne J. Horstman

Employer, Western Asphalt, Inc., by
Approach Management Services, per
Marie Vartanian, Lay Representative

Department of Labor and Industries, by
The Office of the Attorney General, per
Maureen Mannix, Assistant

On May 13, 2009, the employer Oldcastle, Inc., filed an appeal with the Board of Industrial Insurance Appeals from an order of the Department of Labor and Industries dated April 3, 2009. In the April 3, 2009 order, the Department affirmed an order dated July 9, 2008, in which it allowed the claim for occupational disease on September 28, 2007. The Department directed the self-insured employer, Oldcastle, Inc., to pay all medical and time loss compensation benefits as may be indicated in accordance with the industrial insurance laws. The Department order is **AFFIRMED.**

DECISION

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. There are two Petitions for Review filed in this appeal from the Proposed Decision and Order issued on October 8, 2010, in which the industrial appeals judge affirmed the Department order dated April 3, 2009. The first Petition for Review was filed by the City of Tacoma (Tacoma City Light) on October 13, 2010. The second was filed by Oldcastle, Inc., on

November 24, 2010. Both Petitions for Review are timely. Because the Board granted review in the City of Tacoma's Petition on October 27, 2010, all issues are before us, including those raised in Oldcastle, Inc.'s (Oldcastle) Petition for Review, even though no separate order granting review was issued pursuant to Oldcastle's Petition.

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

First, we restate the issues described by our industrial appeals judge:

(1) Was the claimant, Mr. Rasmussen, subject to any injurious exposure arising naturally and proximately out of the distinctive conditions of his employment with Oldcastle, Inc.?

(2) Did Mr. Rasmussen suffer an occupational exposure arising naturally and proximately out of the distinctive conditions of his employment prior to the filing of the claim in this appeal?

Given that the claim for benefits is based on occupational disease as provided in RCW 51.08.140, the issue is more completely framed as whether Mr. Rasmussen suffered an industrial exposure arising naturally and proximately out of the distinctive conditions of his employment. *Dennis v. Department of Labor & Indus.*, 109 Wn.2d. 467 (1987).

We will address the parties' petitions in the order they were received.

The basis for the City of Tacoma's petition is a stated error in the findings of fact. Finding of Fact No. 2 in the Proposed Decision and Order provides that Mr. Rasmussen was employed by the City of Tacoma from August of 2002 to June of 200**5**. The City asserts that the record establishes that Mr. Rasmussen did not work at the City of Tacoma after June of 200**4**. We agree the record reflects that Mr. Rasmussen did not work for the City of Tacoma past June of 2004 and will correct the findings of fact accordingly.

The basis of Oldcastle, Inc.'s (Oldcastle) Petition for Review is an objection to the determination that the last injurious exposure initiating Mr. Rasmussen's claim for occupational disease occurred while he was employed with Oldcastle. We start our discussion with the issue of whether Mr. Rasmussen suffered an injurious exposure contributing to his bilateral wrist condition described as bilateral carpal tunnel syndrome while employed with Oldcastle. The evidence is thoroughly and accurately summarized in the Proposed Decision and Order; thus, we will discuss only those facts that explain our decision.

The essence of Oldcastle's objection to the allowance of the claim is that Mr. Rasmussen's job duties and short term of employment did not cause an injurious exposure to his bilateral carpal tunnel condition. There are two components to Oldcastle's argument: job duties, and duration of

employment. Oldcastle argues that Mr. Rasmussen's job duties were not of a kind that could cause or worsen carpal tunnel syndrome and did not, in fact, expose Mr. Rasmussen to conditions that would either cause or worsen carpal tunnel syndrome. *In re Charles Jones,* BIIA Dec., 70,660 (1987). Additionally, or in the alternative, Oldcastle argues that Mr. Rasmussen's employment could not have caused or worsened his carpal tunnel conditions because he had not worked long enough to sustain an injurious exposure. This alternative theory inferentially presumes that the working conditions could cause carpal tunnel over an extended period of time.

We acknowledge, but defer for the moment, that Oldcastle also asserts that Mr. Rasmussen suffered a further "last injurious exposure" following his employment with Oldcastle. Oldcastle, therefore, argues it is not the employer of risk and not responsible for the claim.

In terms of the first argument, evidence of Mr. Rasmussen's job duties was provided by James Strandy on behalf of Oldcastle, and on behalf of Mr. Rasmussen by himself and Gregory C. Whittle. As a point of clarification, we note that Oldcastle has changed corporate identity and is referred to in the record frequently as "ICON." Again, the only evidence describing Mr. Rasmussen's job duties was presented from the three witnesses referred to above.

James Strandy is a physical therapist and a certified ergonomist. Mr. Strandy was presented to establish that Mr. Rasmussen's job did not put him at risk to develop carpal tunnel syndrome. Foundational to his testimony and opinions is an accurate description of Mr. Rasmussen's actual work with Oldcastle. Mr. Strandy visited Oldcastle's Auburn, Washington worksite. While employed with Oldcastle, Mr. Rasmussen was a heavy equipment operator. Mr. Strandy analyzed the major pieces of equipment operated by Mr. Rasmussen and evaluated the controls to determine the stress placed on an operator's wrists and hands. Mr. Strandy described the machines were operated with electronic controls incorporating devices commonly referred to as "joysticks," and that these controls did not require heavy exertion or excessive movements that were likely to stress an operator's upper extremities. In Mr. Strandy's analysis, he assumed an eight-hour work shift and he made other assumptions about the frequency that equipment controls would be used during a work shift.

The Department presented the testimony of Gregory C. Whittle in addition to the testimony of Mr. Rasmussen. Mr. Whittle was a co-worker with Mr. Rasmussen and performed the same job duties, operating the same kinds of equipment as Mr. Rasmussen during Mr. Rasmussen's employment with Oldcastle. Mr. Whittle was employed by Oldcastle from 1999 through December 2007. Both he and Mr. Rasmussen describe a very different operating pattern than the

one presented by Mr. Strandy. Among the differences is a description of the experience of operating the large earth moving equipment. Both witnesses described jarring and vibration attendant with running the machinery in grading and/or moving earth. Both described the pace of the work as significantly more rapid than described by Mr. Strandy. Operation of the vehicles' controls was more intense and sustained. Mr. Whittle and Mr. Rasmussen testified that they worked twelve-hour shifts, not eight as assumed by Mr. Strandy. Mr. Rasmussen testified that he had only one fifteen minute break during his twelve-hour shift and that it was a six-day workweek, unless rained out. While Mr. Rasmussen acknowledged that some days were rained out, the actual number is inconclusive.

We find the differences in the description of the job duties between Mr. Strandy and Mr. Rasmussen to be significant. One of the key differences is the length of the workday. Mr. Rasmussen testified that he worked a twelve-hour shift. This particular assertion was completely unchallenged by Oldcastle. We understand that Mr. Rasmussen's and even Mr. Whittle's testimony may be viewed as self-serving but—in the absence of any contradiction—we must accept their description of job duties and work conditions as persuasive. Mr. Strandy's assumptions about job duties appear to be idealized representations of working conditions. His testimony does not rebut Mr. Rasmussen's testimony about what was actually required. Likewise, we must view any medical opinion regarding causation based on Mr. Strand's description of job duties as flawed. The issue is whether the distinctive conditions Mr. Rasmussen's job duties—as he presented them—naturally and proximately caused his bilateral carpal tunnel syndrome. We conclude that the distinctive conditions of Mr. Rasmussen's job duties as a heavy equipment operator caused his bilateral carpal tunnel syndrome.

Next, Oldcastle argues that Mr. Rasmussen did not work long enough to sustain an injurious exposure to his wrists. Mr. Rasmussen was employed by Oldcastle from August 1, 2007, through September 29, 2007—a period of approximately two months. Oldcastle asserts that duration of employment would not have caused or worsened Mr. Rasmussen's carpal tunnel condition.

In order to determine whether the duties and/or duration of Mr. Rasmussen's employment with Oldcastle caused or worsened his bilateral carpal tunnel condition, we turn to the medical expert testimony. Four medical experts testified in this appeal. Oldcastle presented the testimony of Paul Reiss, M.D., and Louis Kretschmer, M.D. The Department presented the testimony of Traci Barthel, M.D., and Michael Tepper, M.D. All these medical experts agree that Mr. Rasmussen has

bilateral carpal tunnel syndrome. The medical history supports that Mr. Rasmussen was experiencing clinical signs of carpal tunnel syndrome in his left wrist as early as 2004.

Both Drs. Reiss and Kretschmer believed that, irrespective of the job duties, Mr. Rasmussen had not worked long enough at Oldcastle to sustain carpal tunnel syndrome or a worsening to that condition. It is interesting to note that neither witness relied, to any extent, on Mr. Strandy's ergonomic findings. Nevertheless, on cross-examination Dr. Reiss allowed that griping requirements described in Mr. Strandy's findings were the kind that could lead to carpal tunnel syndrome. Dr. Reiss stated that he did not feel that Mr. Rasmussen had worked at Oldcastle long enough to sustain a harmful result. On cross-examination, Dr. Kretschmer acknowledged that an electro-diagnostic study done on October 1, 2007 (within two days of Mr. Rasmussen's last day of employment with Oldcastle) showed bilateral carpal tunnel syndrome, moderate to severe. Dr. Kretschmer generally denied that **any** of Mr. Rasmussen's employments either caused or put him at risk for carpal tunnel syndrome.

Dr. Tepper began treating Mr. Rasmussen for other medical conditions in October of 2005, but examined him specifically for complaints of carpal tunnel syndrome on August 29, 2007. This was the mid-point of Mr. Rasmussen's employment with Oldcastle. Dr. Tepper believed the complaints were severe enough at that time to consider a surgical referral. Although Dr. Tepper had seen Mr. Rasmussen for other conditions and had noted paresthesia of the upper extremities before, he testified that Mr. Rasmussen's condition on August 29 represented a significant exacerbation of findings that he formally diagnosed as bilateral carpal tunnel syndrome. Dr. Tepper was unequivocal that Mr. Rasmussen's long hours (twelve-hour shifts) operating heavy equipment using his wrists and hands at Oldcastle was a cause of his bilateral carpal condition. Mr. Rasmussen was in need of surgical intervention as of October 2007.

Dr. Barthel first examined Mr. Rasmussen on May 21, 2009. Dr. Barthel diagnosed bilateral carpal tunnel syndrome, noting it was very advanced. She testified that once the condition develops beyond the mild stage, continued occupational exposure would cause a progression of the condition. Dr. Barthel testified that Mr. Rasmussen was in need of surgery for bilateral carpal tunnel syndrome as of October 2007, and she believed the conditions of his employment with Oldcastle were a cause of his condition and need for treatment. On cross-examination, Dr. Barthel explained that once carpal tunnel syndrome is in advanced stages, brief periods away from work will not be sufficient to cause an improvement in symptoms. Dr. Barthel acknowledged that Mr. Rasmussen had left-sided carpal tunnel syndrome as of December of 2004 but that his

condition, bilaterally, was much worse by October 2007. Eventually, Dr. Barthel performed carpal tunnel release surgery on the right wrist on September 3, 2009, and on the left wrist on December 3, 2009.

We agree with our industrial appeals judge that Mr. Rasmussen incurred an occupational disease described as bilateral carpal tunnel syndrome arising naturally and proximately out of the distinctive conditions of his employment as a heavy equipment operator with Oldcastle between August 1, 2007, and September 29, 2007.

We next address the question of which insurer is responsible for this claim for occupational disease.

Oldcastle's alternate argument focuses on responsibility for the costs of the claim under WAC 296-14-350(1). The weight of medical evidence establishes that Mr. Rasmussen was in need of medical treatment for his carpal tunnel syndrome during his employment with Oldcastle. However, Oldcastle argues that WAC 296-14-350(1) relieves it of responsibility for the claim because it was not the, "insurer on the risk at the time of the last injurious exposure."

Mr. Rasmussen stopped working for Oldcastle at the end of September 2007. He filed his claim for benefits on October 24, 2007, less than a month after leaving Oldcastle. Mr. Rasmussen resumed employment in early December of 2007 with VCGP Parsons RCI Frontier Kemp (VPFK), and worked with this state fund employer until March 14, 2008. Mr. Rasmussen then worked for another state fund employer, Western Asphalt, Inc., (Western) from March 2008 to May 8, 2008. After this employment, Mr. Rasmussen went back to work for VPFK in June of 2008, and worked for VPFK through January 26, 2009. After a delay in the claims administration process, Mr. Rasmussen's claim was allowed by the order under appeal on April 3, 2009. We agree with Oldcastle that the medical evidence indicates that these later employments may also have caused an injurious exposure to Mr. Rasmussen's wrists. Oldcastle contends, therefore, that it was not the "insurer on the risk" as of the date the claim was finally allowed in April 2009.

Regarding the "last injurious exposure rule," we stated in an earlier decision involving a similar occupational disease condition:

> The claimant is correct that the schedule of benefits should be determined from when her carpal tunnel condition first became manifest, when she was working for Chevron and had the surgery on her left wrist. See *In re Robert Wilcox,* BIIA Dec., 69,954 (1986). However, the issue of responsibility or which employer is on risk is not determined by when the condition became manifest. Liability issues in occupational disease cases where there are successive insurers, are determined by an analysis of which insurer was on risk on the date of compensable disability or last injurious exposure, and that employer is then responsible for the full costs of the

> claim. *Weyerhaeuser Co. v. Tri,* 117 Wn.2d 128 (1991). The last injurious exposure rule was designed to lessen the burden on claimants who have had successive employers and might not be able to go back and establish that each of these employers proximately caused or contributed to the development of the occupational disease condition. The insurer/employer on the risk on the date of compensable disability bears the entire cost of an occupational disease-based disability, no matter how slight the exposure to the hazard or how long ago the exposure occurred. The date of compensable disability is the date on which the worker receives the requisite statutory notice from a physician of the existence of an occupationally related disease-based disability. RCW 51.28.055. *See, e.g., In re Charles Jones,* BIIA Dec., 70,660 (1987).

In re Gloria v. Cartagena-Go, Dckt. No. 95 1747 (January 10, 1997*),* at 4-5.

The last injurious exposure rule is intended to mitigate the burden on the worker in proving which employers were responsible for causing the occupational condition. We note the past tense nature of this inquiry; in other words, the issue is to determine the employer or, more properly, insurer on the risk up to the filing of the claim for benefits. When Mr. Rasmussen filed the claim, Oldcastle was the employer of last injurious exposure.

Asserting that Mr. Rasmussen's last injurious exposure occurred with other employers by the time the claim was allowed in April of 2009, Oldcastle filed a motion to join parties on October 21, 2009, citing CR 19 and our decision of *In re: Richard Eades,* BIIA Dec., 01 17639 (2002). Also, citing another of our decisions, *In re Juan Muñoz*, BIIA Dec., 05 11698 (2007), Oldcastle requested that the later state fund employers, VPFK and Western, be joined. Later VPFK moved to be dismissed from the litigation of the appeal, arguing that WAC 296-14-350(1) limits the consideration of the insurer on the risk during the employment, "which gave rise to the claim for compensation." VPFK asserted that WAC 296-14-350(1) acts as a time limit in terms of fixing the end of the employment period giving rise to the claim. The industrial appeals judge, relying on *Muñoz,* concluded that the critical date for "allocating employer responsibility is not the date of filing, but the date that the Department entered its order." Interlocutory Order Denying Employer, VPFK's Motion to Dismiss, p 2, ll 16 to 18, April 22, 2010.

We have designated *Muñoz* as a significant decision for reasons that do not address the issues in this case. In *Muñoz,* we held that it was not within the scope of a physical therapist's practice to render an opinion as to the causation of medical conditions. We do not address this issue here.

The facts in *Muñoz* bear some similarity to the present case in terms of the filing of a claim for occupational disease and the insurer on the risk. Mr. Muñoz had been a carpenter for many years. He began experiencing serious left knee osteoarthritis in January of 2002. Mr. Muñoz

commenced his employment with the self-insured employer, Hoffman Structures, Inc. (Hoffman) in March of 2002, and worked until January 30, 2004. In October of 2003, medical providers recommended that Mr. Muñoz have surgery on his left knee. Mr. Muñoz filed a claim for benefits on a state fund form on January 30, 2004. Eventually the claim was refiled on a self-insured form received by Hoffman on February 26, 2004, and by the Department on April 12, 2004. Mr. Muñoz went to work for two other self-insured employers after Hoffman. He worked for Atkinson Construction (Atkinson) from February 13, 2004, through March 26, 2004, and for PCL Construction Services (PCL) from April 5, 2004, to June 30, 2004. Mr. Muñoz underwent a total left knee replacement surgery on July 1, 2004. As in the present appeal, Mr. Muñoz worked for other employers after the filing of his claim.

At hearing in the *Muñoz* case, both Atkinson and PCL were joined as parties. Atkinson argued that the claim allowance determination should be based on the injurious occupational exposures up to the date of claim filing only. Atkinson cited a number of cases as authority including, *Department of Labor & Indus. v. Landon*, 117 Wn.2d 122 (1991); *Ashenbrenner v. Department of Labor & Indus.*, 62 Wn.2d 22 (1963); and *Lynch v. Department of Labor & Indus.*, 19 Wn.2d 802 (1944). We determined, limitedly, that these cases did not address the question of the time limiting aspect of filing a claim for benefits. We believe that these cases, while not directly addressing the issue in *Muñoz* and in this case, are consistent with our holding in the present appeal.

Our chief concern in *Muñoz* was not his employment after the filing of the claim but rather his employment before the filing of the claim. The Department, in its order in that appeal, denied the claim as to Hoffman. We remanded the claim for the Department to consider the larger issue of whether Mr. Muñoz's left knee condition arose naturally and proximately out of the distinctive conditions of his multiple employments as a carpenter with employers subject to the Washington Industrial Insurance Act. This included consideration about employments **before** Hoffman including, potentially, those employments subject to coverage by the state fund. We stated that:

> (A) worker is not required to determine the correct employer/insurer. The sole requirement is to file the claim. It is then incumbent on the Department to determine whether the worker has an occupational disease arising out of all relevant employments and, if so, which employer/insurer is responsible. … Unfortunately, the Department does not appear to have addressed any question other than the narrow issue of whether Mr. Muñoz's left knee osteoarthritis arose out of his employment with Hoffman from March 25, 2002 through January 30, 2004.

Muñoz, at 15.

Based on the medical evidence in *Muñoz* it appeared that his knee condition had become disabling and required medical treatment, as evidenced by the left knee MRI performed on January 11, 2002, before the employment with Hoffman. Thus, the last injurious exposure could have been with an earlier employer covered by the state fund. Neither the Department nor any prior "insurer" were parties to the appeal and, therefore, could not defend the issue of a last injurious exposure occurring prior to Mr. Muñoz's employment with Hoffman.

Our result in *Muñoz* is consistent with our previous decision of *In re Daniel Pingley*, BIIA Dec., 01 16177 (2003). In *Pingley* we explained that:

> [T]he mere fact that it had been determined that the self-insured employer was not responsible for Mr. Jones' hearing loss did not dispose of his appeal. A claim is not subject to rejection simply because a worker failed to identify correctly the liable insurer on the risk. We noted that the record was inadequate to make a determination of which employer would be on the risk should the claim be allowed. We remanded for further proceedings to take further evidence regarding Mr. Jones' work history and to join parties necessary to make a full determination.

Pingley, at 3.

Thus, the filing of a claim for an occupational disease requires consideration of the existence of a medical condition arising naturally and proximately out of the conditions of a worker's employment in addition to a determination of the insurer on the risk as of the last injurious exposure giving rise to the claim.

Eades and *Pingley* also addressed the question of joinder of potentially responsible 'insurers' in an appeal addressing claim allowance under CR 19. The present appeal presents a substantially different circumstance to these earlier cases and to *Muñoz* in terms of the parties actually participating in the appeal. Other potential "insurers" are represented in this appeal, including the Department of Labor and Industries, on behalf of previous state fund employers and one additional prior self-insured employer, The City of Tacoma. VPFK and Western, who employed Mr. Rasmussen after the claim in this appeal was filed, were also joined for the purpose of trial. There is no similar need to remand the claim here, as the Department and other potential "insurers" participated in the litigation at the Board.

Prior to hearing, VPFK moved to be dismissed as a party, arguing the WAC 296-14-350(1) limited consideration of the insurer on the risk as of the date of claim filing. WAC 296-14-350(1) provides: "The liable insurer in occupational disease cases is the insurer on the risk at the time of the last injurious exposure . . . which gave rise to the claim for compensation." VPFK contended that the language in the regulation, " which gave rise to the claim for compensation," means the last

injurious exposure refers to the specific claim for benefits and not an open-ended consideration of whether there were any other possible later "injurious exposures." VPFK also argues that setting any other time frame for determining the date of last injurious exposure, other than the date of claim filing, would create too much uncertainty. We agree.

We clarify and distinguish our decision in *Muñoz* where it purports to extend the inquiry as to the insurer on the risk past the date of claim filing. We acknowledge that *Muñoz* has been construed to require joinder of insurers who may have employed a worker after the date of the filing of a claim for occupational disease. This view runs counter to the purposes of the Industrial Insurance Act, which requires a liberal construction of the Act on behalf of injured workers as we explain below. *Muñoz* should not be construed to require joinder of "insurers" after the date of the filing of a claim for benefits based on occupational disease.

The date of the last injurious exposure must be limited to the date the claim is filed. Otherwise workers and subsequent employers would be subject to the uncertainty of who is responsible to pay benefits. For example, the insurer on the risk—as of the date the claim is filed—could avoid responsibility for the claim simply as a result of claims administration process. A delay, intentional or inadvertent, or a dispute regarding claim allowance could shift the insurer on the risk if a date other than the date of claim filing is utilized. Such an approach could place a hardship on both workers and subsequent employers where there is an unadjudicated occupational disease claim extant. An incomplete or disputed adjudication could have a chilling effect on the employability of workers with occupational disease claims in progress.

This analysis can be further tested by considering the result if the appeal in *Muñoz* had been dismissed prior to litigation resulting in the denial of the claim only with regard to Hoffman. Mr. Muñoz could have filed a claim for subsequent injurious exposure against either Atkinson or PCL. The denial of the claim with Hoffman would not have prevented the Department from considering whether Mr. Muñoz had sustained an additional injurious exposure after he left the employ of Hoffman. The date of the claim filing is the pivotal consideration and not the date on which the Department adjudicates the claim, at least in terms of claim allowance or denial.

We stated in *Muñoz* that the Department must adjudicate a claim for occupational disease fully through the date of its order. This remains true and is consistent with our earlier decisions. In such an order the Department should determine the broader issue of an entitlement to benefits for an occupational disease claim irrespective of the specific employer named in the claim. *Pingley.*

However, the adjudication should consider only those employments and insurers through the date of claim filing.

With respect to the present appeal, in light of our analysis here, we do not reach the issue of whether Mr. Rasmussen sustained a further injurious exposure with either VPFK or Western. We find that the medical evidence supports that Mr. Rasmussen sustained an injurious exposure to his bilateral carpal tunnel syndrome, naturally and proximately caused by the distinctive conditions of his employment with Oldcastle. As we stated in *Cartagena-Go,* the length of exposure does not relieve an "insurer" for responsibility of a claim under the last injurious exposure rule as long as the worker established the condition complained of required medical treatment or became totally or partially disabling, whichever occurs first, during the period of employment with the insurer on the risk. *Harry v. Buse Timber Sales, Inc.,* 134 Wn. App. 739 (2006).

We affirm the Proposed Decision and Order and the Department order dated April 3, 2009, allowing the claim for the reasons stated herein. The findings of fact and conclusions of law are modified in response to the Petitions for Review filed by City of Tacoma and by Oldcastle.

FINDINGS OF FACT

1. On October 24, 2007, the Department issued an order in which it noted that an Accident Report under that Claim No. Y-697019 had been reported to the Department on October 22, 2007 for injuries/occupational disease while in the employ of Oldcastle, Inc. The report noted that because the employer is self-insured, the Accident Report was being referred to the self-insured section to be forwarded to the employer.

   On November 21, 2007, the claimant, Mike J. Rasmussen, filed an Application for Benefits under Claim No. SD-04801. In his Application for Benefits, Mr. Rasmussen recited that the date of injury "an occupational disease, worked over 25 years construction" (OD September 28, 2007) hands and arms-CPM Development (Oldcastle Inc.) On January 9, 2008, the Department issued an order in which it stated that the employer reported the filing of a claim for benefits, but requested more time to gather information before claim allowance. A further order allowing a recheck of the claim would be issued at a later time.

   On February 11, 2008, the Department issued an order in which it denied the claim on the grounds the worker's condition was not an occupational disease as contemplated by RCW 51.08.104. On February 18, 2008, the claimant filed a Protest and Request for Reconsideration. On April 18, 2008, the Department issued an order in which it held its February 11, 2008 order in abeyance. On July 9, 2008, the Department issued an order in which it canceled its February 11, 2008 order and allowed the claim for occupational disease on

September 28, 2007. In the order the Department directed the self-insured employer to pay all medical and time loss compensation benefits indicated by law.

On September 8, 2008, the employer filed a Notice of Appeal with the Board of Industrial Insurance Appeals. On October 7, 2008, the Department issued an order in which it held its July 9, 2008 order in abeyance. On October 13, 2008, the Board issued an order under Docket No. 08 18652, in which it returned the case to the Department for further action. On April 3, 2009, the Department issued an order in which it affirmed its July 9, 2008 order. On May 13, 2009, the employer filed a Notice of Appeal with the Board of Industrial Insurance Appeals. On June 18, 2009, the Board issued an Order Granting Appeal, under Docket No. 09 14857, and agreed to hear the appeal.

2. Mr. Rasmussen worked at Tacoma City Light from August of 2002 to June of 2004. The work Mr. Rasmussen performed at the City of Tacoma was the type of employment that could cause or aggravate carpal tunnel syndrome. Mr. Rasmussen was first diagnosed with carpal tunnel syndrome in 2004 when he was employed by the City of Tacoma. At the time he was first diagnosed, his carpal tunnel syndrome was only on the left. His carpal tunnel symptoms were worse when he left the City of Tacoma than they were when he was first diagnosed with carpal tunnel syndrome. Mr. Rasmussen's left-sided carpal tunnel syndrome did not require medical treatment and was not partially or totally disabling as of the time he ended his employment with the City of Tacoma in June of 2004.

3. The claimant worked as a heavy equipment operator for Oldcastle for about two months, from August 1, 2007, to September 29, 2007. During this period, he was employed six days per week, 12 hours per day, except for an occasional rain delay. He had one fifteen minute lunch break during the workday. The claimant operated a number of large heavy equipment vehicles, including a compacting roller, a D 9L-dozer, a 988 road grader, and a Caterpillar road grader. These machines required gripping of automatic controls such as "joysticks" and other control devices. Operation of these machines required the claimant to flex his wrists and/or rotate his hands and wrists in several directions for sustained periods of time throughout his work shift. The job involved the moving and grading of earth and similar materials, which caused the heavy equipment to bounce and vibrate in a jarring fashion. The vibrations and jarring of the equipment were transmitted through the machine controls and grab bars to the claimant's hands and wrists.

4. Prior to starting work for Oldcastle, Mr. Rasmussen's wrists were sore. While working for Oldcastle, the claimant suffered constant arm pain with little relief over the weekend. After a day's work, his arms felt paralyzed and he had difficulty raising his left arm while driving. On occasions, while operating a machine, his hands would become completely numb and his fingers would feel swollen. His carpal tunnel

syndrome was advanced to the point where brief periods away from work would not improve or reduce his symptoms.

5. Mr. Rasmussen sustained bilateral carpal tunnel syndrome, moderate to severe, that arose naturally and proximately out of the distinctive conditions of his employment with Oldcastle between the dates of August 1, 2007, to September 29, 2007.

6. Oldcastle Inc., is a self-insured employer in the State of Washington.

7. Mr. Rasmussen was last employed by Oldcastle Inc., as of the date of the filing of his claim on October 24, 2007.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of these appeals.

2. Claimant's condition, diagnosed as moderately severe to severe bilateral carpal tunnel syndrome, is compensable as an occupational disease within the meaning of RCW 51.08.140.

3. The City of Tacoma is not the employer on the risk at the time of Mr. Rasmussen's last injurious exposure within the meaning of WAC 296-14-350(1) and is not the responsible insurer for this claim.

4. Oldcastle, Inc., is the employer on the risk at the time of Mr. Rasmussen's last injurious exposure and is the responsible insurer for this claim within the meaning of WAC 296-14-350(1).

5. The Department order dated April 3, 2009, is correct and is affirmed.

Dated: February 3, 2011.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
DAVID E. THREEDY Chairperson

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

/s/_____
LARRY DITTMAN Member