Cobian, Moises

INJURY (RCW 51.08.100)

Injury v. ccupational disease

OCCUPATIONAL DISEASE (RCW 51.08.140)

Occupational disease v. injury

SCOPE OF REVIEW

Occupational disease and industrial injury as alternative theories

When an allowed claim has not been clearly designated as an industrial injury or occupational disease, the parties and the industrial appeals judge must clearly address the question of whether the claim is for an industrial injury or occupational disease. **….*In re Moises Cobian*, BIIA Dec., 10 13290 (2011)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: MOISES COBIAN	)	**DOCKET NO. 10 13290**
	)	
CLAIM NO. SA-94346	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Moises Cobian, by
Rodriguez & Associates, P.S., per
Norma Rodriguez

Self-Insured Employer, Tyson Foods, Inc., by
Law Offices of Randall Leeland, per
Randall Leeland and Brian Sanderson

The claimant, Moises Cobian, filed an appeal with the Board of Industrial Insurance Appeals on April 2, 2010, from an order of the Department of Labor and Industries dated February 18, 2010. In this order, the Department affirmed its order dated December 16, 2009. In that order, the Department ended time-loss compensation benefits as paid through December 6, 2007, stated the self-insured employer is not responsible for the conditions diagnosed as bilateral upper arm and shoulder conditions and closed the claim. The Department order is **REVERSED AND REMANDED.**

PROCEDURAL AND EVIDENTIARY MATTERS

The industrial appeals judge issued a Proposed Decision and Order on February 9, 2011, in which he reversed the February 18, 2010 Department order. The industrial appeals judge determined that claimant Moises Cobian's bilateral upper arm and shoulder conditions should be allowed under the claim and determined that Mr. Cobian is not entitled to time-loss compensation benefits for the period December 7, 2007, through December 16, 2009. The self-insured employer Tyson Foods, Inc., and Mr. Cobian filed timely Petitions for Review of the Proposed Decision and Order. This matter is therefore before the Board for review and decision as provided by RCW 51.52.104 and RCW 51.52.106.

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

DECISION

We agree with the key determinations made by the industrial appeals judge. We have granted review to address deficiencies in the Findings of Fact and Conclusions of Law in the Proposed Decision and Order, and to emphasize the importance of promptly clarifying whether

issues adjudicated in this appeal are within the context of an allowed occupational disease claim or within the context of an industrial injury claim.

We agree with these key determinations in the Proposed Decision and Order: self-insured employer Tyson Foods, Inc., should be responsible for Mr. Cobian's bilateral upper arm and shoulder conditions under this claim; these conditions are in need of further proper and necessary medical service; and, Mr. Cobian was not precluded from reasonably continuous gainful employment due to conditions properly covered under this claim for the period December 7, 2007, through December 16, 2009.

From the whole of the testimony, we are able to infer that Moises Cobian filed his claim due to upper body pain in the cervical and thoracic spine and upper torso and arm and shoulder areas of his body. We are able to infer also that Tyson and the Department of Labor and Industries understood Mr. Cobian alleged that this upper body pain constitutes an occupational disease within the meaning of RCW 51.08.140 in that his painful condition was caused by distinctive conditions of his employment as a clod puller in Tyson's meat processing operations. This work involved repetitive, relatively heavy pulling, pushing, and cutting on heavy, suspended sides of beef.

We are convinced by the testimony of orthopedic surgeon Thomas L. Gritzka, M.D., that focused upon pathology in Mr. Cobian's shoulders. Dr. Gritzka testified that Mr. Cobian needs further diagnostic service to determine whether he has seronegative spondyloarthropathy and that he should have the opportunity to see if nonsteroidal anti-inflammatory medications or other treatment would help improve his painful condition. We were not impressed with orthopedic surgeon H. Graeme French, M.D.'s assumptions that Mr. Cobian is an immediate surgical candidate without the diagnostic and treatment measures suggested by Dr. Gritzka. And we reject orthopedic surgeon Dr. Herbert H. Gamber's narrow view of Mr. Cobian's claim as if the claim were only for a cervical strain, which Dr. Gamber characterizes as resolved. Finally, we agree with our industrial appeal judge that the medical and vocational testimony does not support a claim for time-loss compensation benefits for the period December 7, 2007, through December 16, 2009. Tyson had several jobs available within Mr. Cobian's physical restrictions. And, there are other jobs such as truck driving identified by vocational counselor Maurilio Garza, which Mr. Cobian could likely obtain.

Among the reasons for granting review is our observation that Finding of Fact No. 1 in the Proposed Decision and Order does not show that a timely claim was filed. The finding recites that Mr. Cobian filed an Application for Benefits "on November 16, 2007, alleging he sustained an

industrial injury on July 10, 2006." This finding, if accepted, would reflect an untimely claim for industrial injury because the November 16, 2007 claim filing would follow well over one year after the day upon which the injury allegedly occurred. RCW 51.28.050. We also note that Finding of Fact No. 1 further states that the claim "was allowed and benefits paid" even though we do not see any entry on the stipulated Jurisdictional History or other stipulation to the effect that the Department of Labor and Industries ever issued an order explicitly allowing Mr. Cobian's claim. Neither do we find any order explicitly allowing the claim upon examining the Department's claim file when using our authority to do so to determine matters related to our jurisdiction as outlined in *In re Mildred Holzerland*, BIIA Dec., 15,729 (1965).

We nevertheless find that Mr. Cobian's claim is a claim for occupational disease and amend Finding of Fact No. 1 accordingly to show that Mr. Cobian's claim was timely filed. Ultimately, the parties, late in the course of hearings, acquiesced in treating this claim as an allowed claim for occupational disease and neither Mr. Cobian nor Tyson Foods, Inc., has objected to our industrial appeals judge treating the claim as an allowed claim for occupational disease. We find no evidence that a physician ever informed Mr. Cobian in writing that he had an occupational disease or that he could file a claim for such. Thus, Mr. Cobian's claim filing met the timeliness filing requirements of RCW 51.28.055 for occupational disease claims – that is, that the claim is not barred for failure to file within two years following the date of written physician notice.

We observe that, consistent with the omission in the Jurisdictional History stipulation, litigation in this appeal continued far too long without explicit attention by our judges and by the representatives to the question of whether the claim was a claim for **industrial injury** or for **occupational disease**. Mr. Cobian and his wife were repeatedly questioned by the attorneys about Mr. Cobian's "injury" and his condition before and after his "injury." The testifying physicians were repeatedly asked about their view of the effects of Mr. Cobian's "industrial injury." And, it was a physician, Dr. Gritzka, who finally volunteered that the condition should likely be viewed as an occupational disease.

The Department order before us is an order closing Mr. Cobian's claim and denying self-insured responsibility for certain medical conditions under the claim. We question the wisdom of administratively adjudicating matters in any claim, let alone litigating them before this Board, without a high degree of consciousness of whether a claim is allowed for an occupational disease versus an injury occurring at a specific time. The distinction is critical in determining timeliness of claim filing; insurer responsibility; apportionment of employer account liabilities in State Fund

claims; periods for which claims are valued for experience rating and retrospective rating purposes in State Fund claims; applicable schedule of benefits; and monthly wages for calculation of time-loss compensation and pension benefits. In the case before us, as in many other cases, it is necessary to know whether the claim is for occupational disease or industrial injury in order to determine the nature and scope of the claim in order to make findings and conclusions on such matters as to what conditions should be allowed under the claim; whether the covered conditions cause inability to work; and whether the claim should remain open for further treatment of properly covered conditions.

In this appeal, we have made the inference that witnesses are testifying about the effects of, and the needs attendant to, the same occupational disease for which the claim was previously filed and adjudicated. We have inferred that the witnesses are not referring to some injury or referring to some period of exposure or referring to some distinctive conditions of employment and effects thereof, **other than** those for which this claim was filed and adjudicated. Drawing these necessary inferences was made difficult because of incomplete characterization of the issues inherent in occupational disease claims and the resulting imprecise questioning of witnesses.

The whole of our Industrial Insurance Act contemplates that claims be filed and adjudicated on a claim-by-claim basis. A valid claim for occupational disease is a claim for exposure to distinctive conditions of employment causing a disease to develop. RCW 51.08.140 and *Dennis v. Department of Labor & Indus.,* 109 Wn.2d. 467 (1987). In order to effectively and efficiently present and consider testimony concerning the effects of an occupational disease, counsel and our judges should be as clear as possible about the nature and duration of the exposure to distinctive conditions of employment; should articulate any disagreement over the considered exposure and the results of such exposure; and should be clear and precise in questioning witnesses about such matters.

We agree with the ultimate determinations intended by our industrial appeals judge. However, in order to be clearer, we add Findings of Fact and Conclusions of Law and adjust others, to make clear that we are not inadvertently considering any other occupational disease than that for which this claim was originally filed and adjudicated by Tyson Foods, Inc., and the Department under Claim No. SA-94346. We also add to the final Conclusion of Law a direction that this claim be held open for proper and necessary medical service, which direction was inadvertently omitted in the Proposed Decision and Order.

We have considered the Proposed Decision and Order, the employer's and claimant's Petitions for Review and the Responses filed by the claimant and the employer. Based on a thorough review of the entire record before us, we make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The claimant, Moises Cobian, filed an Application for Benefits with the Department of Labor and Industries on November 16, 2007. The claim was considered and adjudicated, and benefits provided, with the understanding that the claim was a claim for occupational disease alleging exposure to distinctive conditions of employment as a clod puller and other jobs since August 1997, in meat processing at Tyson Foods, Inc., resulting in pain in the upper body. The claim has been treated as an allowed claim for occupational disease although no explicit order addressed allowance as such. No physician ever informed Mr. Cobian in writing that he had an occupational disease and that he could file a claim for benefits.

   The Department issued an order on December 16, 2009, in which it determined the employer was not responsible for bilateral upper arm and shoulder conditions, and closed the claim with time-loss compensation benefits as paid through December 6, 2007, with no award for permanent partial disability. The claimant protested this order on February 3, 2010, and the Department affirmed the order on February 18, 2010. The claimant filed a Notice of Appeal from this order on April 2, 2010, with the Board of Industrial Insurance Appeals. The Board issued an Order Granting Appeal on April 26, 2010, under Docket No. 10 13290, and agreed to hear the appeal.

2. In August 1997, the claimant, Moises Cobian, began work for Tyson Foods, Inc. Over the years, Mr. Cobian worked a number of different jobs for the employer, all of which involved a degree of physical exertion and use of the arms at varying heights and through a variety of motions. On July 10, 2006, Mr. Cobian was working the job of pull clod when he experienced significant pain in his arms and shoulders. This job involved the wearing of approximately 17 pounds of gear, including a metal apron, metal vest, metal glove, hardhat, and knife sheath. As part of the duties of the job, in a chilled room, Mr. Cobian would hook a side of suspended beef, weighing up to 1,200 pounds that was passing by him on a conveyer. While walking with the beef half, and holding the beef with the hook, Mr. Cobian would make a variety of cuts into the meat, some of which were at or above shoulder height. The cuts would be left hanging on the carcass as he would push it away from him and on down the conveyer line. When finished with the carcass, Mr. Cobian would walk back up the line, and begin the process over with another side of beef. The hanging meat came steadily on the conveyer, and the process was continuous. The repetitive carrying, pulling, slicing, ripping, and pushing of heavy sides of beef continuously throughout a workday, continually

using the arms and shoulders out-stretched in positions above and below shoulder height constitute distinctive conditions of employment with Tyson Foods, Inc.

3. As of December 16, 2009, the claimant suffered from bilateral upper arm and shoulder conditions that arose naturally and proximately from the distinctive conditions of his employment with Tyson Foods, Inc. These medical conditions and distinctive employment conditions were part of, and coincident with, the same medical conditions and alleged causative exposure to distinctive conditions of employment for which Claim No. SA-94346 was originally filed and adjudicated by Tyson Foods, Inc., and the Department of Labor and Industries.

4. As of December 16, 2009, the claimant's bilateral upper arm and shoulder conditions were not medically fixed and stable, and were in need of further diagnostic evaluation and treatment.

5. During the period from December 7, 2007, through December 16, 2009, inclusive, the claimant's bilateral upper arm and shoulder conditions, proximately caused by the distinctive conditions of his employment with Tyson Foods, Inc., did not preclude him from performing reasonably continuous, gainful employment when considered in conjunction with the physical restrictions placed on him by medical providers.

CONCLUSIONS OF LAW

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

2. Claim No. SA-94346 is a claim for occupational disease within the meaning of RCW 51.08.140, and has been constructively allowed and previously adjudicated as such.

3. The claimant's bilateral upper arm and shoulder conditions, proximately caused by the distinctive conditions of his employment with Tyson Foods, Inc., is an occupational disease within the meaning of RCW 51.08.140, and part of, and properly covered under, Claim No. SA-94346.

4. During the period from December 7, 2007, through December 16, 2009, inclusive, the claimant was not a temporarily, totally disabled worker within the meaning of RCW 51.32.090, and, therefore, not entitled to time-loss compensation benefits for this period.

5. The order of the Department of Labor and Industries, dated February 18, 2010 is incorrect, and is reversed. This claim is remanded to the Department with instructions to issue an order allowing the claimant's bilateral upper arm and shoulder conditions under the claim, denying time-loss compensation benefits during the period December 7, 2007, through February 18, 2010, and holding the claim open for further proper and necessary diagnostic service and medical treatment and further action as may be indicated by the law and the facts.

DATED: June 28, 2011.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
DAVID E. THREEDY Chairperson

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

/s/_____
LARRY DITTMAN Member