

Burrill, Eugene

TIMELINESS OF CLAIM (RCW 51.28.050; RCW 51.28.055)

Occupational disease [prior to 1984 amendment to RCW 51.28.055]

Divisible claims

Although a worker's claim for hearing loss was not filed within one year of the date he was first advised by a physician that he suffered from an occupational disease, his claim for benefits for the additional hearing loss incurred after that date is not time barred. ...*In re Eugene Burrill*, BIIA Dec., 47,766 (1977) [dissent]

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**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

1 **IN RE: EUGENE E. BURRILL**) **DOCKET NO. 47,766**
2)
3 **CLAIM NO. G-730212**) **DECISION AND ORDER**
4

5 APPEARANCES:

6
7 Claimant, Eugene E. Burrill, by
8 Larry Meyers

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10 Employer, PACCAR, Inc.,
11 Wanda Mayo

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13 Department of Labor and Industries, by
14 The Attorney General, per
15 Robert L. DiJulio, Assistant
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17 This is an appeal filed by the claimant on February 25, 1976, from an order of the Department
18 of Labor and Industries dated January 14, 1976, which rejected the claim for the reason that no claim
19 was filed within one year from the date on which the claimant was informed that he had developed an
20 occupational disease. **REVERSED AND REMANDED.**

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23 **DECISION**

24 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
25 and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order
26 issued by a hearing examiner for this Board on June 3, 1977, in which the order of the Department
27 dated January 14, 1976 was reversed, and the claim remanded to the Department with direction to
28 allow the claim for an occupational hearing loss occurring between August 1, 1958, and January 14,
29 1976, and to pay the claimant with a permanent partial disability award of 13% combined loss of
30 hearing in both ears for said loss, and thereupon close the claim.
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35 The Board has reviewed the evidentiary rulings of the hearing examiner and finds that no
36 prejudicial error was committed and said rulings are hereby affirmed.
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38 The issue presented by this appeal and the evidence presented by the parties are adequately
39 set forth in our hearing examiner's Proposed Decision and Order.
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41 The hearing examiner has determined that the claimant is entitled to compensation for the loss
42 of hearing which has occurred subsequent to August 1, 1958. The provisions of RCW 51.28.055 (not
43 RCW 51.28.050 as erroneously stated in the Proposed Decision and Order) require that a claim for an
44 occupational disease must be filed within one year following the date the workman had notice from a
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1 physician of the existence of his occupational disease. In the case of Nygaard v. Department of Labor
2 and Industries, 58 Wn.2d 659 (1958), the Supreme Court quoted from Williams v. Department of
3 Labor and Industries, 45 Wn.2d 574 (1954):
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5 "No cause of action, of course, can accrue for an occupational disease
6 before it reaches a state of development for which it is compensable at
7 least in some degree.
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9 Even when such a cause of action exists, the statute delays the running of
10 the statute of limitations until the workman is given notice by a doctor that
11 his disabling disease is occupational in its nature and causation."
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13 On August 1, 1958, the claimant was informed by a physician, Dr. Archie Powell, that he had a noise-
14 induced hearing loss related to his employment; and said hearing disability at that time was equal to a
15 combined hearing loss in both ears of 69%. However, no claim was filed for that disability within one
16 year from the date he was so informed. In April of 1975, the claimant was informed by a physician that
17 further hearing loss had been sustained. Within one year of being so informed, the claimant filed a
18 claim, and we, like our hearing examiner, are of the opinion that the claimant did timely file a claim for
19 the additional hearing loss sustained since August 1, 1958, which additional loss, according to Dr.
20 Powell, amounted to 13% combined loss of hearing in both ears. He should be compensated for this
21 additional disability.
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23 After consideration of the Proposed Decision and Order and the Petition for Review filed
24 thereto, and a careful review of the entire record before us, we are persuaded that the Proposed
25 Decision and Order is supported by the preponderance of the evidence and is correct as a matter of
26 law.
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28 The hearing examiner's proposed findings, conclusions and order are hereby adopted as this
29 Board's findings, conclusions and order and are incorporated herein by this reference, with the
30 correction of the date "August 1, 1968" to "August 1, 1958" in Conclusions Nos. 2 and 6.
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32 It is so ORDERED.
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34 Dated this 13th day of December, 1977.
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36 BOARD OF INDUSTRIAL INSURANCE APPEALS
37

38 /s/ _____
39 PHILLIP T. BORK Chairman
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41 /s/ _____
42 WILLIAM C. JACOBS Member
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1 **DISSENTING OPINION**

2 By the claimant's direct testimony, it is clear to me that Dr. Powell did not advise the claimant
3 that he had an occupational disease that was disabling or compensable.
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5 The deposition of Dr. Powell taken in 1976 shows that the doctor did not remember what he
6 told the claimant in 1958 regarding his hearing loss insofar as it being disabling, compensable, or as a
7 matter of fact, if it was even occupational in its nature and causation.
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10 In my opinion, the worker must be given notice by his doctor not only that he has an
11 occupational disease, but that it is compensable, before the one-year statute of limitations begins to
12 run.
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14 In this appeal, the claimant did not receive such notice and therefore his claim should be
15 allowed and decided on its merits.
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17 Dated this 13th day of December, 1977.
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19 /s/
20 SAM KINVILLE Member
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