Monroe, Delbert

OCCUPATIONAL DISEASE (RCW 51.08.140)

Successive insurers

The insurer on the risk for an occupational disease claim (hearing loss) on the date of compensable disability is responsible for the full costs of the claim if the employment at that time continued to be "of a kind" which contributes to hearing loss, whether or not it added any specific percentage amount to the worker's hearing loss. Compensable disability exists when the worker has been notified by a physician that he has an occupational disease and when the disease is causing temporary or permanent disability. **….*In re Delbert Monroe*, BIIA Dec., 49,698 (1978)** [dissent]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: DELBERT MONROE	**)**	**DOCKET NO. 49,698**
	)	
CLAIM NO. S-169041	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Delbert Monroe,
None

Employer, St. Regis Paper Company, by
Eisenhower, Carlson, Newlands, Reha, Henriot and Quinn, per
Richard Jessup

Department of Labor and Industries, by
The Attorney General, per
Richard Roth and DonCosta E. Seawell, Assistants

This is an appeal filed by the employer, St. Regis Paper Company, on March 4, 1977, from an order of the Department of Labor and Industries dated January 5, 1977, which closed this claim with a permanent partial disability award of 25% of complete loss of hearing in both ears, and determined that this occupational disease claim is the self-insured employer's responsibility. **SUSTAINED**.

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 employer to a proposed decision and Order issued by a hearing examiner for this Board on December 16, 1977, in which the order of the Department dated January 5, 1977 was sustained.

The Board has reviewed the evidentiary rulings of the hearing examiner and finds that no prejudicial error was committed and said rulings are hereby affirmed.

This case, involving "successive insurers," is a matter of first impression in this state. The precise legal question is whether financial responsibility for the award for claimant's occupational hearing loss is properly to be borne by St. Regis Paper Company as a self- insured employer, or by the Department of Labor and Industries, i.e., the State Fund, which was the workers' compensation insurance carrier for St. Regis prior to April 1, 1974, when the company was certified as a self-insured employer.

The claimant has been employed by this employer for about 35 years, at its Klickitat, Washington, plant. Since 1957, he has been, and still is, a rip-saw operator, exposed to injurious

noise levels in excess of 90 dba for almost 7½ hours per day. The employer began to put into effect a noise reduction program in 1971 which, insofar as this man's work area is concerned, has not accomplished a reduction as evidenced by a series of noise-level measurements from 1968 through 1975 which showed a virtually identical noise-level range existing in 1975 as compared with the first measurements taken in 1968.

In July 1975, claimant filed his application for benefits for a gradual onset of hearing loss (Exhibit 5), which the Department thereafter adjudicated by its order of January 5, 1977, as the full responsibility of the self-insured employer.

The employer's contention in this appeal is that the evidence herein establishes that the extent of claimant's occupationally-caused hearing loss developed in ten to fifteen years following his becoming a rip-saw operator in 1957; had reached a maximum plateau in approximately 1971; and claimant's continued exposure since the employer became self-insured on April 1, 1974, has not increased the percentage level of his hearing loss. Such contentions have been supported to a high degree of medical probability, although not absolute certainty, by the employer's medical witness, Dr. Aram Glorig, a very renowned specialist in otolaryngology. Thus, employer argues that since the hearing impairment occurred prior to the date of commencement of self-insured status, the State Fund should bear full responsibility for the claim's cost.

On the other hand, the Department's position in defense of its order is that financial responsibility for occupational disease claims should be borne by the insurer on the risk at the time the disease results in "compensable disability" if the employment at that time was of a kind contributing to the disease; and that the time of determinable compensability here was considerably after the employer became a self-insurer on April 1, 1974.

We have carefully reviewed the extensive memoranda of authorities submitted by both parties to our hearing examiner, as well as the citations and discussion in the well-reasoned Proposed Decision and Order, and the employer's counsel's further arguments in his Petition for Review. We conclude that the hearing examiner's proposed disposition is the correct one. Further, we think that the "date of compensable disability" rule fosters on an over-all basis more definite and consistent results in the adjudication of responsibility for these kind of claims based on long-developing occupational diseases, and such rule is certainly more fair with regard to its impact on insurance premium rate-making and collection.

The employer relies principally on a series of cases setting up the so-called "California rule," first established in Colonial Insurance Co. v. Industrial Accident Commission, 29 Cal. 2d 79, 172 P. 2d 884 (1946), to the effect that successive insurers for one employer providing coverage during the period of development of an employee's occupational disease should share the liability. Of course, the employer here is not seeking any share or apportionment of liability, but rather avoidance of liability altogether. In any event, legal soundness of the Colonial Insurance case is questioned in 4 Larson on Workmen's Compensation Law, Sec. 95.25.

Further, Professor Larson sets forth, in Sec. 95.21, what is deemed to be the proper principle supported by many judicial decisions relating to occupational disease insurer liability, as follows:

> "In the case of occupational disease, liability is most frequently assigned to the carrier who was on the risk when the disease resulted in disability, if the employment at the time of disability was of a kind contributing to the disease... Occupational disease cases typically show a long history of exposure without actual disability, culminating in the enforced cessation of work on a definite date. In the search for an identifiable instant in time which can perform such necessary functions as to start claim periods running, establish claimant's right to benefits, determine which year's statute applies, and fix the employer and insurer liable for compensation, the date of disability has been found the most satisfactory. Legally, it is the moment at which the right to benefits accrues; as to limitations, it is the moment at which in most instances the claimant ought to know he has a compensable claim; and, as to successive insurers, it has the one cardinal merit of being definite, while such other possible dates as that of the actual contraction of the disease are usually not susceptible to positive demonstration.
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> Among the conditions to which this rule has been applied are ... occupational loss of hearing...
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> ....
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> Since the onset of disability is the key factor in assessing liability..., it does not detract from the operation of this rule to show that the disease existed under a prior employer or carrier, or had become actually apparent, or had received medical treatment, or,...had already been the subject of a claim filed against a prior employer, so long as it had not resulted in disability." (Emphasis supplied)

We note here that, while no Washington decisions allude to the "date of compensable disability" rule as regards liability of successive insurers for an occupational disease case (this precise issue having not previously been litigated), our Court has utilized such rule in connection with another important function which Professor Larson mentions, i.e., starting the running of the allowable claim

period for an occupational disease. Williams v. Department of Labor and Industries, 45 Wn. 2d 574 (1954) and Nygaard v. Department of Labor and Industries, 51 Wn. 2d 659 (1958), dealt with this subject regarding our occupational disease statute of limitations, now RCW 51.28.055. These cases set forth the rule that no claim or "cause of action" accrues for an occupational disease, even though there may be knowledge of its existence, until such time as a compensable disability results from it. Thus, under our law one year must pass from the occurrence of two events before a claim is untimely i.e., the occurrence of compensable disability, and notice by a doctor that the claimant's disease is occupational in nature and causation.

There is no contention here that Mr. Monroe's claim, filed on July 29, 1975, was untimely. Thus, as observed by our hearing examiner, it must be presumed that he did not have a legally "compensable" disability until after St. Regis became self-insured on April 1, 1974. Indeed, the record supports this conclusion.

This claimant has not, even yet, had any temporary disability because of his hearing loss. When, then, did a permanent disability from his occupationally-related hearing loss, in the form of a determinable permanent partial disability, occur? In our view, not until some time after November 14, 1974 at the earliest. Although claimant had had one audiogram under the employer's auspices in 1971, which revealed a hearing loss, there is no evidence that it was then determined to be permanent, or even occupationally related for certain; the recommendation was made to the employer that a later re-check of claimant's hearing be done. On November 14, 1974, another pure tone audiogram was done by an audiologist, as well as other tests on claimant to determine more accurately the type and cause of his hearing loss. Dr. Glorig thereafter visited the employer's plant, reviewed the results of both audiograms, and the other tests, and had a discussion with claimant as to the results and told him of his conclusion that "some" of the hearing loss as then found was probably due to his job. That was the earliest time, it seems to us, that any determinable occupationally-caused permanent hearing loss could be said to have been ascertained. (Of Course, Dr. Glorig did not arrive at his eventual specific percentage evaluation, of 25% binaural hearing impairment from noise, until well into 1976, after considerable further testing had been done by audiograms and other more sophisticated procedures; and then, with the "hindsight" from all this accumulated information, he "related it back" to 1971.)

In light of all the foregoing, we conclude that the time of determining claimant's "compensable disability" was after November 14, 1974, which of course was well after

commencement of the employer's self-insured status. Further, the employment at that time continued to be of a kind which contributes to hearing loss -- whether or not it added any specific percentage amount to this claimant's loss. In accord with the previously-cited legal principles from Larson, the self-insurer should be held responsible for the cost of this claim.

We wish to address one other contention made in the employer's Petition for Review, namely, that the result here reached is an un-fair and unlawful taking of St. Regis' property, specifically its premium payments made to the State Fund for industrial insurance prior to April 1, 1974, because the State Fund failed to provide coverage for this claimant's disability incurred while subject to such coverage which St. Regis had paid for.

While this argument appears plausible superficially, we do not believe it has merit. It assumes that premiums had been collected by the State Fund in prior years for "unknown" cases such as this one. But such is not the fact.

This claim, were it to be held, per the employer's contention, to have been a loss incurred in 1971, would be, in insurance parlance, an unknown and unexpected example of a loss "incurred but not reported." Of course, in the industrial insurance premium rate-making system which is based on losses incurred, in accord with recognized insurance principles (see RCW 51.16.035), there is some actuarially-determined factor built into basic premium rates for a given premium period, in recognition that in any such period there will always be some losses "incurred" during said period which are not reported and claimed until the subsequent premium period. Such factor, though, is necessarily based on the insurance entity's (in this case, the State Fund) experience in prior years as to the frequency and nature of such "incurred but not reported" claims.

This occupational hearing loss claim, however, is obviously not the type of claim which had previously been considered in the "incurred but not reported" base premium calculation. It is a matter of common every-day knowledge that the number of occupational hearing loss claims have recently been increasing at an accelerating pace, here and in many other workers' compensation jurisdictions. Indeed, there are a considerable number of such claims and appeals pending, which have arisen solely out of the employer's single plant involved in this case, the resolutions of which are awaiting the final determination of the legal issue on appeal here. These types of cases were not included in the "incurred but not reported" premium factor in years past, because the Fund's experience over the years was that such long-delayed claims were only infrequently filed.

If these claims were now to be said to have been "incurred" in premium years several years past or more, there would be substantial State Fund liability for costs paid out now which were never contemplated when the earlier premium rates were charged and paid. As a result, in order to maintain actuarial solvency, as required by the law, future rates to employers now insured with the State Fund would have to be raised, to "make up" for the avoidance of those costs, by employers in whose employ the occupational condition first developed and who have since become self-insured, or by such employers who have since gone out of business and are no longer paying any premiums. This demonstrates, of course, the efficacy and practical necessity, from a fair and responsive insurance-funding standpoint, of the "date of compensable disability" rule in deciding monetary responsibility for these long-developing occupational disease claims.

FINDINGS OF FACT

The hearing examiner's proposed Findings Nos. 1 through 5, Conclusions Nos. 1 through 3, and Order, are hereby adopted as this Board's findings, conclusions and order, and are incorporated hereinby this reference.

It is so ORDERED.

Dated this 24th day of July, 1978.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
PHILLIP T. BORK Chairman

/s/_____
SAM KINVILLE Member

DISSENTING OPINION

The only medical witness to testify in this matter was Dr. Aram Glorig, otolaryngologist, on behalf of the employer. His testimony establishes that the claimant's occupational disease was sustained prior to April 1, 1974, the date the employer herein became self-insured, i.e., the claimant's hearing loss, in its entirety, resulted from noise exposure at work for the employer herein while said employer was insured, for workmen's compensation purposes, by the Department of Labor and Industries. In other words, under the doctor's testimony, no noise exposure to which the claimant was subjected beginning April1, 1974, and thereafter, in any way contributed to the claimant's 25% loss of hearing in both ears -- the permanent partial disability that was awarded him herein. Given these circumstances, the Department must bear the full financial consequences of

the 25% loss of hearing in both ears awarded herein inasmuch as the entire job-induced noise-exposure which gave rise to said hearing loss occurred during the period of time that the Department was the "insurer' of the employer's workman for workmen's compensation purposes.

As evidenced by the lack of unanimity on the part of this Board, there is no easy answer. It is to be hoped that a system of apportionment of claims between insurers be adopted. This type of disability will become increasingly prevalent and it is necessary to achieve equity and fairness amongst employers and carriers. Apportionment is difficult in a state such as Washington which does not allow private insurance carriers to underwrite workers' compensation coverage. Nonetheless, some system needs to be developed which will allow successive employers and insurers to demonstrate by medical and other evidence the date the occupational disease developed and reached the level for which an award is made.

In this particular case, however, the issue of apportionment is not a question and for the reasons previously recited, I dissent from the majority decision.

Dated this 24th day of July, 1978.

/s/
WILLIAM C. JACOBS Member