Lawrence, Harry, Dec'd

OCCUPATIONAL DISEASE (RCW 51.08.140)

Successive insurers

The insurer on the risk for an occupational disease claim (lung condition) on the date of compensable disability is responsible for the full costs of the claim if the exposure on that date was "of a kind" contributing to the condition for which the claim was made. The date of compensable disability is the date the worker was advised by a physician that he had a disease which was occupational in origin. ***….In re Harry Lawrence, Dec'd,*** **BIIA Dec., 54,394 (1980)**

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: HARRY S. LAWRENCE, DEC'D	)	**DOCKET NO. 54,394**
	)	
CLAIM NO. S-129757	)	**DECISION AND ORDER**

APPEARANCES:

Widow-petitioner, Ethel Lawrence, by
Walthew, Warner, Keefe, Arron, Costello & Thompson, per
Jay Causey

Employer, Isaacson Steel, by
Detels, Draper & Marinkovich, per
R. A. Bergman and Paul Detels

Department of Labor and Industries, by
The Attorney General, per
Richard Roth, Linda Dunn and Carol Pidduck, Assistants

This is an appeal filed by the self-insured employer, Isaacson Steel, on May 14, 1979, from an order of the Department of Labor and Industries dated May 3, 1979, which order requested the self-insured employer to submit to the Department of Labor and Industries a sum of $70,719.57 as the amount required to pay the pension for Ethel Lawrence, widow of Harry S. Lawrence. **AFFIRMED**.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on timely Petitions for Review filed by the employer and the Department of Labor and Industries to a Proposed Decision and Order issued by a hearing examiner for this Board on July 25, 1980, in which the order of the Department dated May 3, 1979 in Claim No. S-129757 was reversed and this claim was remanded to the Department of Labor and Industries with direction to issue an order directing the self-insured employer, Isaacson Steel, to pay to the Department an amount equal to 10 percent of the pension reserve for the claimant, Harry S. Lawrence, and further determined that the Department of Labor and Industries was responsible for paying 90 percent of that amount.

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.

Isaacson Steel Corporation, as a self-insured employer under the Industrial Insurance Act, brings this appeal requesting this Board to clarify its financial obligation for the claims of Harry S. Lawrence, deceased, and that of his widow-petitioner.

In a prior appeal (Docket No. 44,022), it was determined that Mr. Lawrence had incurred an occupational disease during the course of his employment with Isaacson while working as an overhead crane operator. The proposed decision and order in that appeal, of which we take official notice, did not specify the precise nature of the disease other than as a "lung condition" (Finding No. 6) from inhaling:

> "...air polluted with particulate matter from welding and burning operations, diesel trucks, and more particularly, asbestos matter from brake linings and heat insulators" (Finding No. 4).

By declining to review the proposed decision and order in that case and declaring the same to be the "final" order in the appeal, that order became res judicata after dismissal of the employer's appeal to Superior Court entered March 15, 1976 (affirmed per curiam, 19 Wn. App. 1041 (1978); pet. rev. den., 90 Wn. 2d 1023 (1978)). However, the decision in that appeal was not intended by the parties to be dispositive of any issue governing the extent of financial obligation which either Isaacson as a self-insured employer or the Department of Labor and Industries would bear for the incurred claim costs or supporting the eventual pension reserve.

The facts are not in great dispute. Harry S. Lawrence began working for Isaacson Steel in 1956. He worked for 17 years in the same location as an overhead crane operator until November 2, 1973, when impaired breathing ability forced a cessation from his employment. During this entire period, Mr. Lawrence was exposed to smoke and dust as well as asbestos fibers from various sources. During the latter portion of his employment, Mr. Lawrence experienced shortness of breath and other symptoms associated with a lung disorder. Under his physician's orders, Mr. Lawrence terminated employment on November 2, 1973. Shortly thereafter, he filed a claim for workers' compensation benefits alleging the development of an occupational disease. An appeal was taken to this Board following the rejections of his claim. The Board's order reversed the Department's action and determined Mr. Lawrence to have developed an occupational disease. The employer, Isaacson Steel, became self-insured for purposes of industrial insurance liability on July 1, 1973. Prior to that time, the company had been paying premiums in accord with the law to the Department of Labor and Industries to support the accident and medical aid funds.

The legal issue, then, before us is whether apportionment of financial responsibility for a claim for occupational disease should be granted the self-insured employer.

In its petition for review, the Department contends:

> "...either the insurer on the risk at the time of last injurious exposure or the insurer on the risk at the time a worker develops a compensable disability should be responsible for payment of the worker's compensation."

The employer's petition for review does not challenge the hearings examiner's conclusion that it be directed to pay to the Department an amount equal to 10 percent of the pension reserve, effectively apportioning the financial impact of the claim as 90 percent the responsibility of the state fund administered by the Department of Labor and Industries and 10 percent the responsibility of Isaacson Steel as a self-insured employer. Having failed to object thereto, the employer must be deemed to have waived any such contention. RCW 51.52.104.

The parties to this appeal have aided us in surveying the existing statutory and case law of this state and concluded that the issue is truly one of first impression. There is no formula or procedure contemplated in the existing statutes permitting or proscribing apportionment in the circumstances presented before us. Neither is there any binding precedent established in the case law of this state to comfortably drape around a decision on this issue.

Although an issue of first impression under statutory and appellate case law, the issue is not one of first impression before this agency. Members of a prior Board have on two occasions, i.e., In re Delbert Monroe, Docket No. 49,698 and In re Winfred Hanninen, Docket No. 50,653, determined that the self-insured employer should bear the entire financial responsibility for occupational diseases in hearing loss claims, no apportionment being granted.

Those cases, however, did not proceed beyond the Superior Court level. It is a temptation merely to cite those decisions and the reasoning inherent in them to dispose of the instant appeal. Such action would be determinative as well as consistent with the philosophy of the prior majority. Much can be said for uniformity and consistency of decision, but the words of Ralph Waldo Emerson remind us that a "foolish consistency is the hobgoblin of little minds, adored by little statement and philosophers and divines." Consequently, we feel a fresh look at the issue is warranted by the persuasive and cogent arguments advanced by the parties.

The subject of rights between insurers receives an extensive discussion by Professor Arthur Larson in his treatise, The Law of Work-men's Compensation. The question of apportionment of

financial liability for successive injuries or successive occupational exposure to disease-producing elements is encompassed in his discussion beginning at § 95.00. Professor Larson sets forth in § 95.21 what is deemed to be the general rule supported by many judicial decisions relating to occupational disease insurer liability:

> "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... This is comparable to the 'last injurious exposure' rule... except that it places more stress on the moment of disability. 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, 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 actual contraction of the disease are usually not susceptible to positive demonstration.
>
> Among the conditions to which this rule has been applied are asbestos, silicosis, pneumoconiosis, tuberculosis, dermatitis, occupational loss of hearing, and various diseases produced by inhalation of chemicals and fumes." (Emphasis added.)

As an example of this majority rule, Professor Larson cited Glenn v. Columbia Silica Sand Company, 112 S.E.2d 711 (S.C. 1960). There an employee had been exposed to silica dust for four years, the last four and one-half months of which were covered by an insurer which was held fully liable.

Professor Larson continues to observe in his treatise at § 95.21 that:

> "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."

Without question, a rule charging the insurer on risk when the occupational disease culminates in disability would foster definite and consistent results in the adjudication or claims. Notably other

jurisdictions have legislatively adopted this reasoning consistent with Professor Larson's analysis. See, e.g., Ill. Rev. Stat. Chap. 48, § 172.36 and Ind. Ann. Stat., § 40-2201.

The employer's position herein is supported by what has become known in workers' compensation law as the California rule expressed in Colonial Insurance Company v. Industrial Accident Commission, 172 P. 2nd 884 (1946), which rejected the "last injurious exposure" rule. The court held that successive insurers of one employer providing coverage during the period of development of an employee's occupational disease should share the liability. Following the judicial evolution of the apportionment concept in the Colonial Insurance case, the California legislature took action to clarify the procedure so that claimants could secure their compensation. Cal. Labor Code, § 5500.5(d). Similarly, other states have attempted a legislative solution to the apportionment problem of successive insurers or successive employers. See, e.g., Minn. Stat. Ann., § 176.66(5), and N.Y. Workmen's Comp. Law, § 44.

The employer herein also cites us to decisions of other jurisdictions which purport to support its position that apportionment in accord with the weight of medical evidence is the appropriate principle to be applied. For example, in Scheier v. Garden State Forge Company, 347 A. 2d 362 (N.J. 1975), apportionment was allowed. However, an examination of that opinion reveals that court applied existing precedent of that state established in Bond v. Rose Ribbon and Carbon Manufacturing Company, 200 A. 2d 322 (N.J. 1964). That case established that liability would attach:

> "to the extent of the disability then existing, [to] the employer or carrier during whose employment or coverage the disease was disclosed...by medical examination, work incapacity, or manifest loss of physical function."

In a later New Jersey case, Ansede v. National Gypsum Company, 375 At. 2d 649 (N.J. 1977), a request by an employer to modify the principle established by the Bond decision was made during oral argument. Had the employer's position been considered and adopted, apportionment would not have been allowed. However, the court refused to consider the request of the employer for the sole technical reason that the issue was not "raised below or in the briefs" before the court.

The employer also cites us to Yocom v. Hayden, 566 S.W. 2d 776, (Ky. 1978) to support its position. We, however, find that opinion inapposite to the facts before us. Mr. Yocom had been forced by a silicotic condition to cease his work after many years exposure to to silica dust. He failed to file a timely application for benefits and his claim was rejected. He later returned to work

for four months further exposing his lungs to the ingestion of silica particles. An appeal concerning the legality of a claim for this "second exposure" found its way to the appellate court. There existed under Kentucky law a presumption that a worker would not be considered previously disabled due to an occupational disease if he had not filed a claim and was not off work during the period of exposure. In the Yocom case, the claimant had experienced a substantial period of unemployment because of the effect of silicosis even though his claim had been rejected, subsequently he renewed his employment. Under those circumstances, the court held the presumption of non-disability for continuous employment could not be invoked. The legal circumstances in Yocom are distinctly different than those pertaining to Mr. Lawrence's exposure.

In face, it would appear that Kentucky adheres to the general rule of holding the last insurer on risk solely responsible. The case of Gregory v. Peabody Coal Company, 355 S.W. 2d 156 (Ky. 1962) illustrates the true Kentucky rule. In that case, the claimant had worked for one employer for thirty years and the employer against whom the claim was filed for only twenty-five days. Both employments had exposed him to injurious dust. Even though it was established that his condition of pneumoconiosis had been contracted through the first thirty years of employment, the court held his last employer solely liable by reasoning:

> "...[I]t is not required that the employee prove he did contract silicosis in his last employment, but only that the conditions were such that they could cause the disease over some indefinite period of time." (Emphasis added.)

Like the parties appearing before us, we find no Washington decisions which allude to the "date of compensable disability" rule as regards liability of successive insurers for an occupational disease case. However, our court has used such a rule in connection with another important function which Professor Larson mentions, i.e., the commencement 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 the occupational disease statute of limitations, 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 for occupational disease may be rejected as not being timely, i.e., the occurrence of a compensable disability, and notice by a physician that the claimant's disease is occupational in nature and

causation. In the prior appeal of Mr. Lawrence's claim, there was no contention, nor is there one now, that his claim was untimely. Thus, it must be presumed that he did not have a legally compensable disability until after Isaacson became self-insured on July 1, 1973.

Even so, we must consider whether justice results when a self-insured employer is on the risk at the time a claim is filed for occupational disease, but when as a practical matter little injurious exposure occurred during the time the employer was self-insured.

We are well aware that adherence to the general rule advanced by Professor Larson may work a hardship on the employer who contributes only a slight amount to a claimant's disability, but which is made to bear the full financial responsibility. But such is already the case for those employers who have employees whose previous work experience had been spent entirely outside the state of Washington and who learn they have occupational diseases after working only a short time in similarly hazardous work for the employer in this state. In such cases, given that the exposure in Washington contributed to the development or severity of the disease condition, the Washington employer's cost experience will reflect the full financial impact of that claim, cf. Kallos v. Department of Labor and Industries, 46 Wn. 2d 26 (1955).

The Oregon Court of Appeals, we believe, sets forth a most cogent reasoning for adoption of the general rule. Noting the hardship on an employer who contributes only slightly to a claimant's disability, that court stated:

> "The same could be said for minor injuries which aggravated pre-existing conditions, thus making the last employer liable for the complete disability under the accidental injury portion of the workmen's compensation act. In the latter situation, the legislature has afforded some relief through the second injury reserve...thus, defendant's contentions of the harshness of the general rule should be directed to the legislature."

This state, too, has a second injury fund designed to encourage the hiring of previously partially disabled workers by limiting the liability of a second employer to disabilities actually resulting from subsequent injuries. We note, however, that the concept of a second injury fund was not added to the Workers' Compensation Act until 1943, some thirty-two years after the inception of the Workers' Compensation Act. We can only suggest that the apportionment issue raised by this appeal may find an appropriate legislative solution, just as the issue of second injuries did some thirty-seven years ago.

In accord with the decision in Mathis is the Oregon court's later pronouncement in Davidson baking Company v. Industrial Indemnity Company, 532 P. 2d 810 (Or. 1975) which upheld the Workmen's Compensation Board's assessment of liability solely against the last of successive insurance carriers when it was determined that the carrier was on the risk at the time of the claimant's last injurious exposure. In Davidson the court refused to depart from the rule that liability is not to be apportioned among carriers.

Moreover, we must note that should the employer in its self-insured status be free from financial responsibility or substantially free because of apportionment, this would cause the state fund to bear the full financial impact. The remaining employers in the class vacated by the self-insurer and potentially all other employers under the state fund would bear the burden for previously unknown or unanticipated occupational diseases developing at a time when premiums paid would not have included the potential costs for disease which were developing, but had not become legally compensable. The employer's argument that its premiums paid to the state fund for the many years prior to its becoming self-insured justifies apportionment may appear superficially plausible. But, such an argument assumes that premiums had been collected for the state fund for "unknown" claims such as this one. Our analysis leads to the conclusion that such is not the case.

With respect to assessment and collection of premiums, the Department of Labor and Industries is directed by RCW 51.16.035 to classify all occupations or industries:

> "In accordance with their degree of hazard and fix therefor basic rates and premiums which shall be the lowest necessary to maintain actuarial solvency in accordance with recognized insurance principles."

It also is apparent that the legislature intended the accident funds supported by premium assessments to be ultimately "neither more nor less than self supporting", RCW 51.16.100, and provided the Department to make adjustments by transferring funds between classes to foster that intent.

In determining premium rates, past and prospective costs are to be considered. See WAC 296-17-310. Such determinations are, of course, reflected from actual claims experienced and actuarial projections. A truly accurate assessment of prospective costs is not possible due to an ever-growing fund of information concerning the causal connection between exposure to hazardous materials in the work environment and the burgeoning discoveries of abnormal physical conditions. (See the U. S. Department of Labor's "Interim Report to Congress on Occupational Diseases", June

1980). Consequently, the calculation of current expected state fund costs cannot anticipate costs generated by occupational disease claims originating from self-insured employers who have vacated their previous classifications under the state fund. To expect the remainder of employers still insured under the state fund to accept financial responsibility for such unknown future claims would be excessive and unfairly discriminatory to them.

The gravamen of the employer's argument is that the claimant's disease is one which insurance parlance might recognize as a loss which was "incurred but not reported". If claims of this nature are now to be said to have been "incurred" in premium years which are now only history, 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.

Without the benefit of definitive case law on point in this state we must look for parallel reasoning in existing decisions from which to glean some guidance. Our Supreme Court drew a distinction between accidents occurring "in" a class and accidents "caused" by a class of hazardous industry in Boeing Aircraft Company v. Department of Labor and Industries, 22 Wn. 2d 423 (1945). There, a Boeing aircraft crashed during a trial flight into a meat packing plant killing the airplane crew and many employees of the meat packing plant. The Boeing Company, the sole contributor to Class 34-3 under the merit rating system of industrial insurance, was charged for deaths not only to its employees but for the deaths and injuries to the meat packing company's employees which paid its premiums under Class 43-1. The Supreme Court determined that the cost experience of the meat packing company's employees' injuries should be borne by that company. This was so even though the meat packing company in no way contributed to the cause of its employees' deaths or injuries. The court noted:

> "It is clear from a reading of the workmen's compensation act and our opinions interpreting the same that every hazardous industry within the purview of the workmen's compensation act should bear the burden

> arising out of injuries to its employees regardless of the cause of injury, and that it was never contemplated that each class should be liable for the accidents caused by such class, but that each class the statute provides shall meet and be liable for accidents occurring in such class." (Emphasis added.)

In the Boeing case, the court determined that each class would bear its own liability regardless of injury or death to employees insured within a particular class. Each class then regardless of the cause or source of injury or death must be solvent to fund its own liability.

We draw an analytical parallel between a "class" under the merit rating system for premium determinations to carry its own liability and a "self-insurer" statutorily defined to carry its own liability to its employees. RCW 51.08.173. The obvious distinction, of course, between the cited case and Mr. Lawrence's circumstances is that in Boeing the date of onset of disability from injuries was precisely determined. Still, the logic in requiring each self-insurer to carry its own liability holds equally firm when considering financial responsibility for cost experience for claims actually incurred when the claim reaches the point of compensability, or as expressed in the Nygaard case, supra, the point of compensable disability. With respect to Mr. Lawrence, that point was not reached until he was advised by a physician of his disease and that it was occupational in nature. In chronology, such advice did not occur until after Isaacson became self-insured.

In summary, we are persuaded that this state's system of under-writing workers' compensation claims costs requires that we follow the general rule espoused in Professor Larson's treatise. Simply stated, in this state the employer who is on the risk for a claim of occupational disease on the date of compensable disability should be charged with and expected to bear financial responsibility for the full costs of such claim as long as the exposure to which the worker-claimant is subjected on the date of compensable disability if of a kind contributing to the condition for which the claim is made.

In examining the evidence before us, it is clear that Mr. Lawrence's exposure during the last few months of his employment was essentially the same as it had been for the entire 17 years of his employment at Isaacson Steel. Parenthetically, we must note that the hearings examiner and apparently the parties before us too assumed that the claimant's occupational disease was one of asbestosis. We must remind, however, that the prior appeal of Mr. Lawrence did not establish the precise nature of the occupational disease suffered by Mr. Lawrence. That prior order referred to a lung condition which fairly can be inferred to mean an obstructive pulmonary disease. However,

the prior order did not set forth that the claimant was suffering from asbestosis. Consequently, the proof advanced by the employer to establish the lack of asbestos in the claimant's work environment is not dispositive of any issue before us. We feel confident that the record well supports that Mr. Lawrence's work environment was of a kind contributing to his disease condition and for that reason conclude that Isaacson Steel in its self-insured capacity must be held fully responsible for the costs of the claim.

After consideration of the proposed decision and order, the petitions for review filed thereto and a careful review of the record before us, including the briefs filed by the parties, the Board makes the following findings and conclusions:

FINDINGS OF FACT

1. On December 19, 1973, the Department of Labor and Industries received an application for benefits from the claimant, Harry S. Lawrence, alleging exposure to injurious fumes while in the course of his employment with Isaacson Steel Company. On April 15, 1974, the Department issued an order denying the claim for benefits, having assigned it Claim No. S-129757. Following a timely appeal to the Board of Industrial Insurance Appeals, the Board entered an order allowing the claim for occupational disease. A subsequent appeal to Superior Court by the employer resulted in a dismissal of the appeal, later affirmed by the Court of Appeals and the Supreme Court of the State of Washington.

2. On March 22, 1979, the Department received a claim for widow's benefits on behalf of the widow, Ethel Lawrence. On May 8, 1979, the Department issued an order correcting and superseding an order of May 3, 1979, allowing the claim for occupational asbestosis and further ordered that the claim filed by the widow-petitioner by allowed effective the date of the claimant's death, March 10, 1979. On May 3, 1979, the Department issued an order requiring the self-insured employer, Isaacson Steel, to pay to the Department the sum of $70,719.57, which amount was the "reserve" required to pay the pension to the widow-petitioner. On May 14, 1979, a notice of appeal was received from the self-insured employer by the Board of Industrial Insurance Appeals. On May 30, 1979, the Board issued an order granting the appeal and directed that proceedings be held on he issues raised by the appeal.

3. The employer, Isaacson Steel Corporation, became self-insured on July 1, 197

4. The employer, Isaacson Steel Corporation, in its self-insured capacity, was the insurer on the risk for occupational disease claims that reached the point of compensable disability on or after July 1, 1973.

5. The claim of Harry S. Lawrence, now deceased, for an occupational disease consisting of obstructive pulmonary disorders, including asbestosis, became compensable after July 1, 1973.

6. As of the date of compensable disability, Mr. Lawrence was still exposed to injurious materials in the air environment which were of a kind contributing to the development and severity of his occupational disease.

CONCLUSIONS OF LAW

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

2. The employer, Isaacson Steel Corporation, in its self-insured capacity, is fully and solely financially responsible for the occupational disease claim filed by Mr. Harry S. Lawrence, deceased, and for the full funding of the necessary reserve to pay pension payments to his widow, Ethel Lawrence.

3. The order of the Department of Labor and Industries dated May 3, 1979, requiring the self-insured employer to pay to the Department a requisite sum to fund the pension reserve for Ethel Lawrence is correct and should be affirmed.

4. The order of the Department of Labor and Industries dated May 8, 1979, correcting and superseding an order of May 3, 1979, placing the widow, Ethel Lawrence, and her son, on the pension rolls effective May 10, 1979, is correct and should be affirmed.

It is so ORDERED.

Dated this 18th day of November, 1980.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/ _____
MICHAEL L. HALL Chairperson

/s/ _____
SAM KINVILLE Member