Swendt, David

OCCUPATIONAL DISEASE (RCW 51.08.140)

Successive insurers

Where the evidence established that the hearing loss incurred by the worker after the employer became self-insured was not proximately caused by the work exposure, the employer is not responsible in its self-insured capacity for the hearing loss, since employment conditions during the period of self-insurance were not "of a kind" contributing to the worker's disease. **….*In re David Swendt*, BIIA Dec., 61,790 (1983)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: DAVID G. SWENDT	**)**	**DOCKET NO. 61,790**
	)	
CLAIM NO. S-367081	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, David G. Swendt, Pro Se

Self-insured Employer, Georgia-Pacific Corporation, by
Schwabe, Williamson, Wyatt, Moore & Roberts, per
Gary D. Keehn

Department of Labor and Industries, by
The Attorney General, per
Meredith L. Lehr, Assistant

This is an appeal filed on March 24, 1982 by the Georgia-Pacific Corporation, a self-insured employer under the Act, from an order of the Department of Labor and Industries dated March 10, 1982 which adhered to provisions of a prior order allowing claimant's claim of occupationally induced hearing loss, granting a permanent partial disability award of 18% bilateral loss of hearing and directing the Georgia-Pacific Corporation to pay the claimant the sum of $5,184.00 for that disability. **REVERSED AND REMANDED**.

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 Department of Labor and Industries to a Proposed Decision and Order issued on November 17, 1982 in which the order of the Department dated March 10, 1982 was reversed, and the claim remanded to the Department with direction to accept the claimant's present hearing loss as an obligation of the Department of Labor and Industries under the State Fund and for such other action as may be required.

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

The issue presented by this appeal and the evidence presented by the parties are adequately set forth in the Proposed Decision and Order; we are in basic agreement.

The evidence is overwhelming, and the parties virtually agree, that the cause of Mr. Swendt's pre-1972 bilateral hearing loss handicap, then approximately 11%, was his occupational exposure

at work with Georgia-Pacific Corporation, whose workers' compensation coverage at that time was with the State Fund administered by the Department.

We have carefully studied the evidence contained in the transcript pertaining to the causation of the progression in Mr. Swendt's bilateral hearing loss handicap since 1972. It is clear that all of that increase, from approximately 11% in 1972 to 18% in March of 1982, occurred after the employer became self-insured in January of 1972.

The testimony of the claimant and Mr. Jenkins, employer's safety supervisor, stands un-rebutted and un-impeached. In combination with exhibits 1, 2 and 4, their testimony establishes the following facts:

Mr. Swendt's duties as a "barker-chipper" for the employer has not materially changed since 1965; in January of 1972, Mr. Swendt's ears were fitted with ear plugs which he thereafter wore each 8-hour shift of each working day, removing them only during his lunch period; Mr. Swendt performed his work as a "barker-chipper" from a control booth, the acoustical qualities of which have not changed since 1972; the level of noise to which Mr. Swendt was exposed within the control booth of his "barker-chipper" station since 1970 has ranged from a minimum of 76 to a maximum of 85 decibels; and the results of an audiometric test made of Mr. Swendt's hearing on June 13, 1972 by Mr. Crape for the employer appear on exhibit 4.

From the testimony of the three medical witnesses, all experts in otolarygology, we are persuaded that the following facts are supported by the preponderance of the evidence: that "canal" type ear plugs, represented by exhibit 1, provide between 10 and 20 decibels of hearing protection; that applying the formula endorsed by the American Medical Association, the progression of Mr. Swendt's bilateral hearing loss handicap between mid-1972 and mid-1980 approximates 7%; that Mr. Swendt's noise exposure at work since 1972 did not exceed 76 to 85 decibels, and was further reduced by 10 to 20 decibels by his conscientious use of the fitted canal type ear plugs; that the foregoing level of exposure to noise is not injurious to the ears of a worker, nor was it to those of Mr. Swendt.

The weight of the evidence requires us to conclude that the post-1972 progression of Mr. Swendt's bilateral hearing loss handicap was not the result of his post-1972 exposure to noise at his employer's plant. From the evidence we feel compelled to reach this conclusion, despite the fact that none of the suggested alternative causes (aging, hereditary predisposition, and the 5% plus-or-minus margin of audiometric testing), standing alone, appear particularly convincing.

This Board has previously followed the general rule set forth in Larson's Workmen's Compensation, section 95.21, which is quoted in the Proposed Decision and Order. However, it is inapplicable here, since the exposure to noise in the employer's plant has not been the proximate cause of the progression of the claimant's bilateral hearing loss handicap since 1972, when Georgia-Pacific Corporation became, from the standpoint of imposition of the risk, a new and different employer. In other words, his post-1972 employment was not "of a kind contributing to the disease."

The Department's order of March 10, 1982 adhered to the provisions of a previous order dated June 19, 1981 which granted to the claimant a permanent partial disability award equal to 18% loss of hearing in both ears as a result of his occupational exposure. However, only 11% of that award for hearing loss has been shown to be caused by his occupational exposure. Must Mr. Swendt now lose 7% of his 18% award?

The jurisdiction of this Board is appellate only and is limited to issues raised by the notice of appeal and the Department order under appeal. Lenk v. Department of Labor and Industries, 3 Wn. App. 977, 982 (1970). In this case the Department's order under appeal, and the employer's notice of appeal as modified by its amended notice of appeal, place in issue only the causation of Mr. Swendt's hearing loss, not the extent thereof. The foregoing interpretation is concretely reinforced by the following exchange at the outset of the first hearing, held July 14, 1982.

> "Judge Keron: At the initial conference the parties agreed on the stipulation of jurisdictional facts. And, as I understand it there is no question about the hearing loss. And, the sole issue is whether or not it should be the responsibility of the Department, the self-insured employer, or pro-rated.
>
> Mr. Keehn: Correct.
>
> Judge Keron: Does that state the issue?
>
> Ms. Lehr: There's no issue about the fact of hearing loss.
>
> Mr. Keehn: Correct.
>
> Judge Keron: Okay. Any other preliminary matters?
>
> Mr. Keehn: No.
>
> Judge Keron: You may proceed.
>
> Mr. Keehn: We'd call Mr. Swendt."

It follows that this Board lacks the authority to deprive Mr. Swendt of 7% of his award. Brakus v. Department of Labor and Industries, 48 Wn. 2d 218, 219 (1956).

We note that the claimant appeared pro se. For that reason the following cases are mentioned. An award by the Department in determining whether a compensable injury has occurred is a mixed question of law and fact. Absent fraud, or something of like nature, which equity recognizes as sufficient to vacate a judgment, an award made by the Department is final and conclusive upon the Department. Abraham v. Department of Labor and Industries, 178 Wn. 160, 162 (1934); State ex rel Dunbar v. Olson, 172 Wash 424, 426 (1933); Luton v. Department of Labor and Industries, 183 Wash 105, 109 (1935); Lassiter v. Department of Labor and Industries, 2 Wn. 2d 182, 185 (1940).

The proposed findings, conclusions and order are hereby stricken and replaced by those of this Board

FINDINGS OF FACT

1. On June 23, 1980, the claimant, David G. Swendt, filed an accident report with the Department of Labor and Industries alleging that he had sustained a bilateral hearing loss as a result of exposure to excessive noise while in the course of his employment with Georgia-Pacific Corporation, a self-insured employer under the Act. On June 19, 1981, the Department of Labor and Industries issued its order allowing the claim, determining that the claimant had sustained a permanent partial disability of 18% loss of hearing in both ears as a result of his occupational exposure, and directing the employer to pay to claimant the sum of $5,184.00 for that loss. On July 23, 1981, the employer filed with the Department a notice of protest. On March 10, 1982, the Department issued an order adhering to the provisions of its previous order dated June 19, 1981. On March 24, 1982, the employer filed with the Board of Industrial Insurance Appeals its notice of appeal. Two days later, on March 26, 1982, the employer filed with this Board its amended notice of appeal. On April 20, 1982, this Board issued its order granting the employer's appeal and directed that proceedings be held on the issue raised therein.

2. Between 1947 and 1972, David G. Swendt was subjected to an occupational exposure to injurious levels of noise during each day of his employment with Georgia-Pacific Corporation. In mid-1972, Mr. Swendt's bilateral hearing loss handicap equaled 11%.

3. Between mid-1972 and March of 1982, the levels of noise to which David G. Swendt was exposed each working day at Georgia-Pacific Corporation lacked the volume or loudness necessary to cause any further progression of his hearing loss.

4. On March 10, 1982, David G. Swendt had a bilateral hearing loss handicap equal to 18% of complete loss of hearing in both ears.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the subject matter and the parties of this appeal.

2. Between mid-1972 and March of 1982, the claimant's occupational exposure to noise in the course of his employment with Georgia-Pacific Corporation caused none of the progression in the claimant's bilateral hearing loss handicap.

3. The order of the Department of Labor and Industries issued March 10, 1982, adhering to the provisions of a previous order dated June 19, 1981, which allowed the claim as a hearing loss caused by occupational exposure to noise while the claimant was in the employ of Georgia-Pacific Corporation, granted to the claimant a permanent partial disability award equal to 18% loss of hearing in both ears as a result of that occupational exposure, and closed the claim with an order requiring the employer to pay to the claimant an award in the sum of $5,184.00 for that disability, is incorrect and should be reversed and the claim remanded to the Department with direction to issue its order allowing the claimant's 18% bilateral hearing loss handicap, as it existed on March 10, 1982, as an obligation of the Department under the state accident fund, and thereupon to close the claim.

It is so ORDERED.

Dated this 9th day of February, 1983.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/
MICHAEL L. HALL Chairman

/s/
FRANK E. FENNERTY, JR. Member

/s/
PHILLIP T. BORK Member