Johannes, Frank

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 not responsible for the costs of the claim if the exposure during the period the insurer was on the risk had no effect on the condition. ***….In re Frank Johannes*, BIIA Dec., 67,323 (1985)** [dissent]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: FRANK W. JOHANNES	**)**	**DOCKET NO. 67,323**
	)	
CLAIM NO. S-521963	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Frank W. Johannes, by
John S. Perazzo, Union Representative of Boilermakers Local # 104

Employer, Isaacson Steel, by
Graham and Dunn, per
Clemens H. Barnes

Department of Labor and Industries, by
The Attorney General, per
Beverly N. Goetz, Lawrence C. Watters, and Francois L. Fischer, Assistants

This is an appeal filed by the self-insured employer on March 26, 1984, from an order of the Department of Labor and Industries dated January 27, 1984 which adhered to the provisions of an order dated November 16, 1983, ordering the claim closed and directing the self- insured employer to pay a permanent partial disability award as compensation for a 30.3% loss of hearing in both ears. **AFFIRMED**.

PROCEDURAL MATTERS

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 on August 2, 1984, in which the order of the Department dated January 27, 1984 was affirmed. The employer's petition seeks reversal of the determinations made in the Proposed Decision and Order.

The Department's petition sought to have this Board assess interest on the unpaid award, should the self-insured employer's financial responsibility for the claim be affirmed. However, in a letter dated August 30, 1984, the Department agreed to withdraw its petition on the condition that this Board separately address the question of the claimant's entitlement to interest following entry of the Board's final order on the merits of the appeal. Since it is the Board's routine policy to address the applicability of interest under RCW 51.52.135 following entry of the final Board order on any appeal, we consider the Department's petition to be withdrawn and the argument therein to be waived.

DECISION

There is no contest in this appeal concerning the admission of evidence. The parties agreed at hearing to the admission of a written "Stipulation of Fact and Testimony" in lieu of presentation of witnesses. For the issue before the Board is not one of the claimant's entitlement to an award for occupational loss of hearing or the amount of that entitlement. Rather, the question presented by this appeal is one of which insurer, the employer in its self-insured capacity, or the Department as trustee of the State Fund, is responsible for payment of the benefits.

This issue is not directly answered by reference to any appellate court decision in this state's jurisdiction. This Board, however, has previously ruled on the question presented. The most recent case where the Board has addressed the issue at length was In re Harry S. Lawrence, Docket No. 54,394, 11/18/80. Prior to that decision, two other appeals, In re Delbert Monroe, Docket No. 49,698, 7/24/78, and In re Winfred E. Hanninen, Docket No. 50,653, 3/16/79, addressed the same issue. By coincidence the Monroe and Hanninen appeals were also ones involving occupational hearing loss. We feel our decision in the Lawrence appeal most clearly addressed this Board's analysis of financial responsibility of "successive insurers". Also, by coincidence the Lawrence appeal involved the same employer as is involved in the instant case.

In the present appeal, the employer is not asserting that apportionment should be done but is rather asserting that the Department's order has failed to follow the legal tenets pronounced by this Board in Lawrence. The employer admits in its brief of June 27, 1984, consistent with the position it took in the Lawrence appeal, that the "fairer approach" would be to apportion responsibility between successive insurers. Understandably, though, the employer seeks the Department and this Board to give an even-handed approach to the adjudication of such issue. In Lawrence, the self-insurer was the insurer when the last injurious exposure occurred; the Department and this Board held the self-insurer responsible for the full costs of the claim. The employer alleges that in Johannes, the Department (State Fund) was the insurer when the claimant was last exposed to a noisy environment; thus, the State Fund should bear full responsibility here.

To resolve the question in the appeal now before us, we must again look to the same authorities that we did in Lawrence. Professor Arthur Larson extensively discusses the subject of rights between successive insurers in his treatise, The Law of Workmen's Compensation. 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."

The employer's petition also cites us to Gregory v. Peabody Coal Company, 355 S.W.2nd 156 (Ky.1962), and asserts that such case was "discussed with approval" by the Board in the Lawrence appeal. It argues the holding in that case supports the employer's position in the instant appeal. Initially, we must respond that the employer has misinterpreted this Board's reliance on that Kentucky case. In Lawrence, the Gregory case was cited to illustrate that Kentucky holds to the general rule of the last insurer on risk as being solely responsible. It was cited to rebut the employer's position in Lawrence that Kentucky followed an apportionment theory illustrated by Yocom v. Hayden, 566 S.W.2nd 776 (Ky.1978). In Lawrence, we distinguished the inapposite nature of the Yocom facts, and then cited Gregory v. Peabody, supra, as representing the true Kentucky rule. This Board did not, however, embrace in its entirety the rule announced in that case.

The holding in Lawrence to which this Board has attempted to faithfully adhere was stated in a single short paragraph:

> "In summary, we are persuaded that this state's system of underwriting workers' compensation claims costs requires that we follow the general rule espoused in Professor Larson's treatise. Simply stated, in this state

> the insurer who is on the risk for a claim for 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 is of a kind contributing to the condition for which the claim is made."

That statement is somewhat different than the rule in Gregory v. Peabody, but is consistent with the essence of the general rule discussed in Larson's treatise at Sec. 95.21.

At the outset of this decision, we noted there was no dispute over the admission of facts. There is considerable dispute, however, over the inferences to be made from certain of those facts and the application of the rule of law to those facts. The factual dispute centers upon paragraph 9 of the "Stipulation of Fact and Testimony":

> "Dr. Powell would further testify that his experience and knowledge indicates that most of the hearing loss from occupational-noise exposure usually occurs in the early stages of that exposure and tapers off towards the end of that exposure. Based upon the Northwest Speech and Hearing Center data showing essentially no loss of hearing between 1977 and 1983, he would opine that no hearing loss occurred between March 1, 1983 and April 7, 1983. He would also opine that most, if not all, of the hearing loss occurred prior to 1977 and, though no tests of Mr. Johannes' hearing prior to 1977 are known to exist, that probably most, if not all, of the hearing loss also occurred prior to July, 1973. He could not state exactly what percentage of hearing loss was sustained prior to July, 1973 or after July 1973." (Underlining added).

We have underlined those portions of the stipulation which give rise to the parties' points of contention. We are confident that the stipulation is unambigious that Mr.Johannes suffered no additional loss of hearing between March 1, 1983 when the employer resumed state fund insurance coverage and April 20, 1983 when the claimant filed his application for benefits. This, in spite of the fact revealed in Stipulation No. 2, that Mr. Johannes' working environment was neither more nor less noisy after March 1, 1983.

Applying those facts to the rule from Lawrence quoted above, we draw several conclusions. In point of fact, since the exposure to noise categorically caused no additional hearing loss after March 1, 1983, then can it be held that the exposure following that date was of a kind contributing to the condition for which the claim was made? We think not. That wording was carefully selected to illustrate that if a disease or condition is worsened, advanced, or otherwise affected by continuing exposure, albeit minor, the insurer on risk will be held fully financially responsible. On the other hand,

if, in point of fact there was no such effect by the continuing exposure, then it follows that such exposure was not of a kind contributing to the condition. In most cases proof that such exposure would have absolutely "no effect" would be difficult to elicit. But here, we read the stipulation to state that very thing.

Still, this does not end our inquiry. The employer takes the position that the stipulation supports a similar negative effect from the claimant's noise exposure for the entire period that the employer was self-insured, June 1973 through February 28, 1983. The employer claims that Mr. Johannes' entire hearing loss took place after he began work on November 29, 1956 but before the employer became self-insured. From our reading of the record, what is stipulated is that (1) "most, if not all" of Mr. Johannes' hearing loss occurred prior to 1977, at least three and one-half years after the employer became self-insured; (2) "probably most, if not all" of the hearing loss occurred prior to "July (sic) 1973"; (3) Dr. Archie Powell, otolaryngologist, the only physician whose opinions were stipulated "could not state exactly what percentage of hearing loss was sustained prior to July, 1973 or after July, 1973."

We believe the three points of stipulated fact highlighted in the preceding paragraph do not categorically establish that no effect was had on Mr. Johannes' hearing ability after the employer became self-insured. Since it was also stipulated that during the last 13 years of his employment, Mr. Johannes' work environment was "significantly noisier" than the first 14 years, we believe it is appropriate to conclude that the exposure sustained while the employer was self-insured was of a kind contributing to the condition. Only three years of this "significantly noisier" environment occurred before the employer became self-insured. At least three and one-half years of this environment occurred prior to the claimant's first hearing test conducted by the Northwest Speech and Hearing Center.

We hold that Mr. Johannes was last subjected to noise exposure of a kind contributing to his hearing loss condition between July 1973 and February 28, 1983. Therefore, the self-insurer must be held fully responsible for the costs of his claim.

FINDINGS OF FACT

1. On April 20, 1983, the claimant, Frank W. Johannes, filed a claim with the Department of Labor and Industries alleging that he incurred an occupational disease on or about April 6, 1983, consisting of occupational hearing loss. The Department provided medical treatment. On November 16, 1983, the Department issued an order closing the claim and directing that the self-insured employer, Isaacson Steel, pay a permanent partial

disability award equal to 30.3% of the loss of hearing in both ears as a result of on the job noise exposure. On January 6, 1984, the employer filed notice of protest with the Department. On January 27, 1984, the Department issued an order adhering to its order of November 16, 1983. On March 26, 1984, employer filed notice of appeal with the Board of Industrial Insurance Appeals. On April 12, 1984, the Board issued an order granting the appeal, assigning Docket No. 67,323 to the appeal and directing that hearings be held on the issues raised by the appeal.

2. From November 29, 1956 through October 19, 1983, claimant worked as a welder in the welding shop at Isaacson Steel until the employer's plant was permanently closed. The welding shop was always a noisy place throughout his employment. The work environment was significantly noisier from 1970 through 1983. Claimant's work environment was neither more nor less noisy after March 1, 1983 than it had been prior to March 1, 1983.

3. Isaacson Steel had state fund workers' compensation coverage in the period from November 29, 1956 through June 1973. Thereafter it was a self-insured employer under the Workers' Compensation Act. On March 1, 1983, employer returned to state fund coverage under the Workers' Compensation Act.

4. On April 7, 1983, claimant was diagnosed by a physician as having sustained hearing loss caused by exposure to excessive noise levels at Isaacson Steel. The extent of his hearing loss on January 27, 1984 was equal to 30.3% in both ears as a result of his exposure to noise at Isaacson Steel.

5. Between March 1, 1983 and April 20, 1983, the claimant, although exposed to a noisy environment, suffered no additional hearing loss than that sustained from noise exposure on the job preceding that period. The noise exposure during that period did not contribute to the claimant's condition.

6. Between July 1, 1973 and February 28, 1983, while the employer underwrote his industrial insurance as a self-insurer, the claimant was exposed to a noisy environment of a kind which contributed to his hearing loss condition.

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, in its self-insured capacity, was the last insurer on risk at a time when such exposure was of a kind contributing to the claimant's condition of hearing loss.

3. The Department's order dated January 27, 1984 which adhered to the provisions of its order dated November 16, 1983 closing the claim and directing the self-insured employer to pay an award for permanent partial

disability equal to 30.3% of the loss of hearing in both ears, is correct, and should be affirmed.

It is so ORDERED.

Dated this 19th day of February, 1985.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
MICHAEL L. HALL Chairperson

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

DISSENTING OPINION

I agree with the Board majority, to the effect that the issue here -- financial responsibility of "successive insurers" for the cost of claims based on long-developing occupational diseases--is not a new issue before this Board. In addition to the Monroe, Hanninen, and Lawrence cases heretofore cited, I also refer to the case of In re Forrest Pate, Docket No. 58,399, 2/5/82, unanimously decided by the three present Board members.

In all of these cases we relied heavily on Professor Arthur Larson's treatise on Workers' Compensation Law, Sec. 95.21, setting forth a general principle, supported by many judicial decisions, relating to liability as between successive insurers for occupational disease cases. The Board majority in the present case again emphasizes the importance of Larson's test (page 3, lines 13-28); and so do I.

Furthermore, I concur fully with the majority's statement of the holding to which this Board has attempted to faithfully adhere, as taken from the Lawrence decision:

> "In summary, we are persuaded that this state's system of underwriting workers' compensation claims costs requires that we follow the general rule espoused in Professor Larson's treatise. Simply stated, in this state the insurer who is on the risk for a claim for 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 is of a kind contributing to the condition for which the claim is made."

The identical holding was also set forth in our Pate decision; and very similar language was used in deciding the first appeal on this issue, the Monroe case in 1978.

Where we part company is in the application of the rule of law to the facts in this case.

This Board, in both the Lawrence and Pate cases, had cited and discussed the case of Gregory v. Peabody Coal Company, 355 S.W.2d 156 (Ky.1978), a significant Kentucky case which held the last insurer on risk solely responsible for a long-developing silicosis claim, even though the exposure to injurious dust under the last employer was only 25 days. In doing so, the Court said:

> " ... [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."

The Board majority now says that they did not rely on, or embrace in its entirety, the Gregory v. Peabody rule. Be that as it may, this Board member, in signing the Pate decision, certainly did "embrace" the Gregory principle, and I do so now, becuase I think it is in accord with our previous holdings on the "successive insurers" issue.

It is clear and undisputed in this case, based on the stipulated facts, that the time of determining claimant's compensable disability did not occur until April 1983, when he was diagnosed to have permanent binaural hearing loss due to excessive occupational-noise exposure, was advised of the extent thereof, and filed his claim therefor. At that time, and since March 1, 1983, the Department, in its State Fund insurer capacity, was the insurer on the risk. At that time, was the employment exposure of a kind contributing to hearing loss? The majority says No, because there was no additional hearing loss incurred after March 1, even though the occupational environment continued to be excessively noisy after that date. In other words, the majority says there must be some additional percentage impairment or actual deleterious effect by the last exposure before the insurer on risk at that time is held liable.

I disagree. The liability principle does not speak to some actual additional deleterious effect by the exposure covered by the last insurer on the risk. It simply requires that the exposure at the time of compensable disability be "of a kind" contributing to the condition. What is the condition? Hearing loss. What is the "kind" of exposure contributing to hearing loss? Excessive occupational noise. Was there excessive occupational noise exposure under the State Fund coverage from and after March 1, 1983? Yes, per the stipulated facts, there was -- to the same extent as had existed for a number of years prior thereto.

Of more than passing interest is the fact that in the earlier Monroe and Hanninen cases, the evidence was that those claimants' occupational hearing losses had reached their maximum plateau prior to the changes in insurance coverage and had not increased in percentage levels following such

changes--this fact was to a high degree of probability in Monroe, and virtually certain in Hanninen. Yet in both of those cases, we assessed the insurer on the risk at the time of determination of compensable disability as fully responsible for the claim. Is the Board majority now retreating from what, up to now, appears to have been a settled legal posture?

As further support for my view, I cite judicial decisions from our neighboring state of Oregon. Mathis v. State Accident Insurance Fund, 10 Or.App. 139, 499 P.2d 1331 (1972); Davidson Baking Co. v. Industrial Indemnity Co., 20 Or.App. 508, 532 P.2d 810 (1975); Inkley v. Forest Fiber Products Co., 288 Or. 337, 605 P.2d 1175 (1980). See also, Murgalo v. N.Y. Daily News, 57 A.D.2d 978, 394 N.Y.S.2d 106 (1977).

As a final observation, our four previous cases on this issue have involved the State Fund as the original insurer, and then a change by the employer to self-insurer status, which was the insurance on the risk at the time the occupational disease reached compensable disability. This is the first case to reach us with the reverse situation for successive insurance coverage. However, in my view this has no bearing on how the insurer liability principle should be applied.

On the facts here, this is an April 1983 claim, based on compensable disability and last injurious exposure in that month. If, as I feel should be the case, the State Fund were to bear the claim cost herein, it would promptly charge Isaacson's account with such cost and thereby affect the employer's experience record. Thus, this current claim would then affect, as it should under recognized workers' compensation insurance principles (RCW 51.16.035), the employer's present actual premium rate as determined by its experience modification under the "experience rating" procedures. WAC 296-17-310(3), and WAC 296-17-850 through -890. The end result, in my view, is that fixing financial responsibility on the insurer on risk at the time of compensable disability fosters more definite and consistent results for these kinds of present claims based on long-developing occupational diseases, and the rule also achieves compatibility with rating system principles governing premium calculation and collection.

Based on all the foregoing, I dissent from the Board majority's decision. I would reverse the Department's order of January 27, 1984, and direct the Department, in its State Fund capacity, to pay the claimant's award of 30.3% loss of hearing in both ears.

Dated this 19th day of February, 1985.

BOARD OF INDUSTRIAL INSURANCE APPEALS
/S/
PHILLIP T. BORK Member