

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*, BIA Dec., 67,323 (1985) [dissent]

Scroll down for order.

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

1 **IN RE: FRANK W. JOHANNES**) **DOCKET NO. 67,323**
2)
3 **CLAIM NO. S-521963**) **DECISION AND ORDER**
4

5 APPEARANCES:

6
7 Claimant, Frank W. Johannes, by
8 John S. Perazzo, Union Representative of Boilermakers Local # 104

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

13
14 Department of Labor and Industries, by
15 The Attorney General, per
16 Beverly N. Goetz, Lawrence C. Watters, and Francois L. Fischer, Assistants
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18 This is an appeal filed by the self-insured employer on March 26, 1984, from an order of the
19 Department of Labor and Industries dated January 27, 1984 which adhered to the provisions of an
20 order dated November 16, 1983, ordering the claim closed and directing the self- insured employer to
21 pay a permanent partial disability award as compensation for a 30.3% loss of hearing in both ears.

22 **AFFIRMED.**
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24 **PROCEDURAL MATTERS**
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26 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
27 and decision on timely Petitions for Review filed by the employer and the Department of Labor and
28 Industries to a Proposed Decision and Order issued on August 2, 1984, in which the order of the
29 Department dated January 27, 1984 was affirmed. The employer's petition seeks reversal of the
30 determinations made in the Proposed Decision and Order.
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32 The Department's petition sought to have this Board assess interest on the unpaid award,
33 should the self-insured employer's financial responsibility for the claim be affirmed. However, in a
34 letter dated August 30, 1984, the Department agreed to withdraw its petition on the condition that this
35 Board separately address the question of the claimant's entitlement to interest following entry of the
36 Board's final order on the merits of the appeal. Since it is the Board's routine policy to address the
37 applicability of interest under RCW 51.52.135 following entry of the final Board order on any appeal,
38 we consider the Department's petition to be withdrawn and the argument therein to be waived.
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1 **DECISION**

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3 There is no contest in this appeal concerning the admission of evidence. The parties agreed at
4 hearing to the admission of a written "Stipulation of Fact and Testimony" in lieu of presentation of
5 witnesses. For the issue before the Board is not one of the claimant's entitlement to an award for
6 occupational loss of hearing or the amount of that entitlement. Rather, the question presented by this
7 appeal is one of which insurer, the employer in its self-insured capacity, or the Department as trustee
8 of the State Fund, is responsible for payment of the benefits.
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11 This issue is not directly answered by reference to any appellate court decision in this state's
12 jurisdiction. This Board, however, has previously ruled on the question presented. The most recent
13 case where the Board has addressed the issue at length was In re Harry S. Lawrence, Docket No.
14 54,394, 11/18/80. Prior to that decision, two other appeals, In re Delbert Monroe, Docket No. 49,698,
15 7/24/78, and In re Winfred E. Hanninen, Docket No. 50,653, 3/16/79, addressed the same issue. By
16 coincidence the Monroe and Hanninen appeals were also ones involving occupational hearing loss.
17 We feel our decision in the Lawrence appeal most clearly addressed this Board's analysis of financial
18 responsibility of "successive insurers". Also, by coincidence the Lawrence appeal involved the same
19 employer as is involved in the instant case.
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22 In the present appeal, the employer is not asserting that apportionment should be done but is
23 rather asserting that the Department's order has failed to follow the legal tenets pronounced by this
24 Board in Lawrence. The employer admits in its brief of June 27, 1984, consistent with the position it
25 took in the Lawrence appeal, that the "fairer approach" would be to apportion responsibility between
26 successive insurers. Understandably, though, the employer seeks the Department and this Board to
27 give an even-handed approach to the adjudication of such issue. In Lawrence, the self-insurer was
28 the insurer when the last injurious exposure occurred; the Department and this Board held the
29 self-insurer responsible for the full costs of the claim. The employer alleges that in Johannes, the
30 Department (State Fund) was the insurer when the claimant was last exposed to a noisy environment;
31 thus, the State Fund should bear full responsibility here.
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1 To resolve the question in the appeal now before us, we must again look to the same
2 authorities that we did in Lawrence. Professor Arthur Larson extensively discusses the subject of
3 rights between successive insurers in his treatise, The Law of Workmen's Compensation. Professor
4 Larson sets forth in] 95.21 what is deemed to be the general rule supported by many judicial
5 decisions relating to occupational disease insurer liability:
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8 "In the case of occupational disease, liability is most frequently assigned to
9 the carrier who was on the risk when the disease resulted in disability, if
10 the employment at the time of disability was of a kind contributing to the
11 disease... This is comparable to the "last injurious exposure" rule...except
12 that it places more stress on the moment of disability. Occupational
13 disease cases typically show a long history of exposure without actual
14 disability, culminating in the enforced cessation of work on a definite date.
15 In the search for an identifiable instant in time which can perform such
16 necessary functions as to start claim periods running, establish claimant's
17 right to benefits, and fix the employer and insurer liable for compensation,
18 the date of disability has been found the most satisfactory. Legally, it is
19 the moment at which the right to benefits accrues; as to limitations, it is the
20 moment at which in most instances the claimant ought to know he has a
21 compensable claim; and, as to successive insurers, it has the one cardinal
22 merit of being definite, while such other possible dates as that of actual
23 contraction of the disease are usually not susceptible to positive
24 demonstration."
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26 The employer's petition also cites us to Gregory v. Peabody Coal Company, 355 S.W.2nd 156
27 (Ky.1962), and asserts that such case was "discussed with approval" by the Board in the Lawrence
28 appeal. It argues the holding in that case supports the employer's position in the instant appeal.
29 Initially, we must respond that the employer has misinterpreted this Board's reliance on that Kentucky
30 case. In Lawrence, the Gregory case was cited to illustrate that Kentucky holds to the general rule of
31 the last insurer on risk as being solely responsible. It was cited to rebut the employer's position in
32 Lawrence that Kentucky followed an apportionment theory illustrated by Yocom v. Hayden, 566
33 S.W.2nd 776 (Ky.1978). In Lawrence, we distinguished the inapposite nature of the Yocom facts, and
34 then cited Gregory v. Peabody, supra, as representing the true Kentucky rule. This Board did not,
35 however, embrace in its entirety the rule announced in that case.
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41 The holding in Lawrence to which this Board has attempted to faithfully adhere was stated in a
42 single short paragraph:
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44 "In summary, we are persuaded that this state's system of underwriting
45 workers' compensation claims costs requires that we follow the general
46 rule espoused in Professor Larson's treatise. Simply stated, in this state
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1 the insurer who is on the risk for a claim for occupational disease on the
2 date of compensable disability should be charged with and expected to
3 bear financial responsibility for the full costs of such claim as long as the
4 exposure to which the worker-claimant is subjected on the date of
5 compensable disability is of a kind contributing to the condition for which
6 the claim is made."
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8 That statement is somewhat different than the rule in Gregory v. Peabody, but is consistent with the
9 essence of the general rule discussed in Larson's treatise at Sec. 95.21.
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11 At the outset of this decision, we noted there was no dispute over the admission of facts. There
12 is considerable dispute, however, over the inferences to be made from certain of those facts and the
13 application of the rule of law to those facts. The factual dispute centers upon paragraph 9 of the
14 "Stipulation of Fact and Testimony":
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16 "Dr. Powell would further testify that his experience and knowledge
17 indicates that most of the hearing loss from occupational-noise exposure
18 usually occurs in the early stages of that exposure and tapers off towards
19 the end of that exposure. Based upon the Northwest Speech and Hearing
20 Center data showing essentially no loss of hearing between 1977 and
21 1983, he would opine that no hearing loss occurred between March 1,
22 1983 and April 7, 1983. He would also opine that most, if not all, of the
23 hearing loss occurred prior to 1977 and, though no tests of Mr. Johannes'
24 hearing prior to 1977 are known to exist, that probably most, if not all, of
25 the hearing loss also occurred prior to July, 1973. He could not state
26 exactly what percentage of hearing loss was sustained prior to July, 1973
27 or after July 1973." (Underlining added).
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30 We have underlined those portions of the stipulation which give rise to the parties' points of contention.
31 We are confident that the stipulation is unambiguous that Mr. Johannes suffered no additional loss of
32 hearing between March 1, 1983 when the employer resumed state fund insurance coverage and April
33 20, 1983 when the claimant filed his application for benefits. This, in spite of the fact revealed in
34 Stipulation No. 2, that Mr. Johannes' working environment was neither more nor less noisy after March
35 1, 1983.
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38 Applying those facts to the rule from Lawrence quoted above, we draw several conclusions. In
39 point of fact, since the exposure to noise categorically caused no additional hearing loss after March 1,
40 1983, then can it be held that the exposure following that date was of a kind contributing to the
41 condition for which the claim was made? We think not. That wording was carefully selected to
42 illustrate that if a disease or condition is worsened, advanced, or otherwise affected by continuing
43 exposure, albeit minor, the insurer on risk will be held fully financially responsible. On the other hand,
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1 if, in point of fact there was no such effect by the continuing exposure, then it follows that such
2 exposure was not of a kind contributing to the condition. In most cases proof that such exposure would
3 have absolutely "no effect" would be difficult to elicit. But here, we read the stipulation to state that
4 very thing.
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7 Still, this does not end our inquiry. The employer takes the position that the stipulation supports
8 a similar negative effect from the claimant's noise exposure for the entire period that the employer was
9 self-insured, June 1973 through February 28, 1983. The employer claims that Mr. Johannes' entire
10 hearing loss took place after he began work on November 29, 1956 but before the employer became
11 self-insured. From our reading of the record, what is stipulated is that (1) "most, if not all" of Mr.
12 Johannes' hearing loss occurred prior to 1977, at least three and one-half years after the employer
13 became self-insured; (2) "probably most, if not all" of the hearing loss occurred prior to "July (sic)
14 1973"; (3) Dr. Archie Powell, otolaryngologist, the only physician whose opinions were stipulated
15 "could not state exactly what percentage of hearing loss was sustained prior to July, 1973 or after July,
16 1973."
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22 We believe the three points of stipulated fact highlighted in the preceding paragraph do not
23 categorically establish that no effect was had on Mr. Johannes' hearing ability after the employer
24 became self-insured. Since it was also stipulated that during the last 13 years of his employment, Mr.
25 Johannes' work environment was "significantly noisier" than the first 14 years, we believe it is
26 appropriate to conclude that the exposure sustained while the employer was self-insured was of a kind
27 contributing to the condition. Only three years of this "significantly noisier" environment occurred
28 before the employer became self-insured. At least three and one-half years of this environment
29 occurred prior to the claimant's first hearing test conducted by the Northwest Speech and Hearing
30 Center.
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35 We hold that Mr. Johannes was last subjected to noise exposure of a kind contributing to his
36 hearing loss condition between July 1973 and February 28, 1983. Therefore, the self-insurer must be
37 held fully responsible for the costs of his claim.
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40 **FINDINGS OF FACT**

- 41 1. On April 20, 1983, the claimant, Frank W. Johannes, filed a claim with the
42 Department of Labor and Industries alleging that he incurred an
43 occupational disease on or about April 6, 1983, consisting of occupational
44 hearing loss. The Department provided medical treatment. On November
45 16, 1983, the Department issued an order closing the claim and directing
46 that the self-insured employer, Isaacson Steel, pay a permanent partial
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1 disability award equal to 30.3% of the loss of hearing in both ears as a
2 result of on the job noise exposure. On January 6, 1984, the employer
3 filed notice of protest with the Department. On January 27, 1984, the
4 Department issued an order adhering to its order of November 16, 1983.
5 On March 26, 1984, employer filed notice of appeal with the Board of
6 Industrial Insurance Appeals. On April 12, 1984, the Board issued an
7 order granting the appeal, assigning Docket No. 67,323 to the appeal and
8 directing that hearings be held on the issues raised by the appeal.
9

- 10 2. From November 29, 1956 through October 19, 1983, claimant worked as
11 a welder in the welding shop at Isaacson Steel until the employer's plant
12 was permanently closed. The welding shop was always a noisy place
13 throughout his employment. The work environment was significantly
14 noisier from 1970 through 1983. Claimant's work environment was neither
15 more nor less noisy after March 1, 1983 than it had been prior to March 1,
16 1983.
- 17 3. Isaacson Steel had state fund workers' compensation coverage in the
18 period from November 29, 1956 through June 1973. Thereafter it was a
19 self-insured employer under the Workers' Compensation Act. On March
20 1, 1983, employer returned to state fund coverage under the Workers'
21 Compensation Act.
- 22 4. On April 7, 1983, claimant was diagnosed by a physician as having
23 sustained hearing loss caused by exposure to excessive noise levels at
24 Isaacson Steel. The extent of his hearing loss on January 27, 1984 was
25 equal to 30.3% in both ears as a result of his exposure to noise at
26 Isaacson Steel.
- 27 5. Between March 1, 1983 and April 20, 1983, the claimant, although
28 exposed to a noisy environment, suffered no additional hearing loss than
29 that sustained from noise exposure on the job preceding that period. The
30 noise exposure during that period did not contribute to the claimant's
31 condition.
- 32 6. Between July 1, 1973 and February 28, 1983, while the employer
33 underwrote his industrial insurance as a self-insurer, the claimant was
34 exposed to a noisy environment of a kind which contributed to his hearing
35 loss condition.

36 **CONCLUSIONS OF LAW**

- 37 1. The Board of Industrial Insurance Appeals has jurisdiction of the parties
38 and subject matter of this appeal.
- 39 2. The employer, Isaacson Steel, in its self-insured capacity, was the last
40 insurer on risk at a time when such exposure was of a kind contributing to
41 the claimant's condition of hearing loss.
- 42 3. The Department's order dated January 27, 1984 which adhered to the
43 provisions of its order dated November 16, 1983 closing the claim and
44 directing the self-insured employer to pay an award for permanent partial
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1 disability equal to 30.3% of the loss of hearing in both ears, is correct, and
2 should be affirmed.

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4 It is so ORDERED.

5 Dated this 19th day of February, 1985.

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7 BOARD OF INDUSTRIAL INSURANCE APPEALS

8
9 /s/ _____
10 MICHAEL L. HALL Chairperson

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

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15 **DISSENTING OPINION**

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

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

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

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31 "In summary, we are persuaded that this state's system of underwriting
32 workers' compensation claims costs requires that we follow the general
33 rule espoused in Professor Larson's treatise. Simply stated, in this state
34 the insurer who is on the risk for a claim for occupational disease on the
35 date of compensable disability should be charged with and expected to
36 bear financial responsibility for the full costs of such claim as long as the
37 exposure to which the worker-claimant is subjected on the date of
38 compensable disability is of a kind contributing to the condition for which
39 the claim is made."
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41 The identical holding was also set forth in our Pate decision; and very similar language was used in
42 deciding the first appeal on this issue, the Monroe case in 1978.

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

1 This Board, in both the Lawrence and Pate cases, had cited and discussed the case of Gregory
2 v. Peabody Coal Company, 355 S.W.2d 156 (Ky.1978), a significant Kentucky case which held the
3 last insurer on risk solely responsible for a long-developing silicosis claim, even though the exposure
4 to injurious dust under the last employer was only 25 days. In doing so, the Court said:
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6 " ... [I]t is not required that the employee prove he did contract silicosis in
7 his last employment, but only that the conditions were such that they could
8 cause the disease over some indefinite period of time."
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11 The Board majority now says that they did not rely on, or embrace in its entirety, the Gregory v.
12 Peabody rule. Be that as it may, this Board member, in signing the Pate decision, certainly did
13 "embrace" the Gregory principle, and I do so now, because I think it is in accord with our previous
14 holdings on the "successive insurers" issue.
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17 It is clear and undisputed in this case, based on the stipulated facts, that the time of
18 determining claimant's compensable disability did not occur until April 1983, when he was diagnosed
19 to have permanent binaural hearing loss due to excessive occupational-noise exposure, was advised
20 of the extent thereof, and filed his claim therefor. At that time, and since March 1, 1983, the
21 Department, in its State Fund insurer capacity, was the insurer on the risk. At that time, was the
22 employment exposure of a kind contributing to hearing loss? The majority says No, because there
23 was no additional hearing loss incurred after March 1, even though the occupational environment
24 continued to be excessively noisy after that date. In other words, the majority says there must be
25 some additional percentage impairment or actual deleterious effect by the last exposure before the
26 insurer on risk at that time is held liable.
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29 I disagree. The liability principle does not speak to some actual additional deleterious effect by
30 the exposure covered by the last insurer on the risk. It simply requires that the exposure at the time of
31 compensable disability be "of a kind" contributing to the condition. What is the condition? Hearing
32 loss. What is the "kind" of exposure contributing to hearing loss? Excessive occupational noise. Was
33 there excessive occupational noise exposure under the State Fund coverage from and after March 1,
34 1983? Yes, per the stipulated facts, there was -- to the same extent as had existed for a number of
35 years prior thereto.
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38 Of more than passing interest is the fact that in the earlier Monroe and Hanninen cases, the
39 evidence was that those claimants' occupational hearing losses had reached their maximum plateau
40 prior to the changes in insurance coverage and had not increased in percentage levels following such
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1 changes--this fact was to a high degree of probability in Monroe, and virtually certain in Hanninen. Yet
2 in both of those cases, we assessed the insurer on the risk at the time of determination of
3 compensable disability as fully responsible for the claim. Is the Board majority now retreating from
4 what, up to now, appears to have been a settled legal posture?
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7 As further support for my view, I cite judicial decisions from our neighboring state of Oregon.
8 Mathis v. State Accident Insurance Fund, 10 Or.App. 139, 499 P.2d 1331 (1972); Davidson Baking
9 Co. v. Industrial Indemnity Co., 20 Or.App. 508, 532 P.2d 810 (1975); Inkley v. Forest Fiber Products
10 Co., 288 Or. 337, 605 P.2d 1175 (1980). See also, Murgalo v. N.Y. Daily News, 57 A.D.2d 978, 394
11 N.Y.S.2d 106 (1977).
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14 As a final observation, our four previous cases on this issue have involved the State Fund as
15 the original insurer, and then a change by the employer to self-insurer status, which was the insurance
16 on the risk at the time the occupational disease reached compensable disability. This is the first case
17 to reach us with the reverse situation for successive insurance coverage. However, in my view this
18 has no bearing on how the insurer liability principle should be applied.
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22 On the facts here, this is an April 1983 claim, based on compensable disability and last
23 injurious exposure in that month. If, as I feel should be the case, the State Fund were to bear the
24 claim cost herein, it would promptly charge Isaacson's account with such cost and thereby affect the
25 employer's experience record. Thus, this current claim would then affect, as it should under
26 recognized workers' compensation insurance principles (RCW 51.16.035), the employer's present
27 actual premium rate as determined by its experience modification under the "experience rating"
28 procedures. WAC 296-17-310(3), and WAC 296-17-850 through -890. The end result, in my view, is
29 that fixing financial responsibility on the insurer on risk at the time of compensable disability fosters
30 more definite and consistent results for these kinds of present claims based on long-developing
31 occupational diseases, and the rule also achieves compatibility with rating system principles governing
32 premium calculation and collection.
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39 Based on all the foregoing, I dissent from the Board majority's decision. I would reverse the
40 Department's order of January 27, 1984, and direct the Department, in its State Fund capacity, to pay
41 the claimant's award of 30.3% loss of hearing in both ears.
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43 Dated this 19th day of February, 1985.
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45 BOARD OF INDUSTRIAL INSURANCE APPEALS
46 /S/ _____
47 PHILLIP T. BORK Member