Lovell, Herbert

RETROACTIVITY OF STATUTORY AMENDMENTS

Occupational disease statute of limitations (RCW 51.28.055)

The 1984 amendment to RCW 51.28.055, extending the time for filing claims for occupational disease, was intended to operate prospectively only. Where the time for filing a claim under the former statute had started to run prior to the effective date of the amendment (June 7, 1984), the amendment cannot extend the time for filing a claim. **….*In re Herbert Lovell*, BIIA Dec., 69 823 (1986)**

TIMELINESS OF CLAIM (RCW 51.28.050; RCW 51.28.055)

Occupational disease [prior to 1984 amendment to RCW 51.28.055]

Divisible claims

The failure to file a timely claim for hearing loss does not necessarily extinguish the right to file a claim for hearing loss which develops after the date a physician notified the worker that he was suffering from an occupational disease. The burden is on the worker, however, to establish that the additional hearing loss was caused by occupational exposure occurring after the date of such notification. **….*In re Herbert Lovell*, BIIA Dec., 69 823 (1986)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: HERBERT G. LOVELL	)	**DOCKET NO. 69,823**
	)	
	)	**ORDER REMANDING APPEAL FOR FURTHER**
CLAIM NO. S-552252	)	**HEARING**

APPEARANCES:

Claimant, Herbert G. Lovell, by
William H. Taylor

Self-insured Employer, Publishers Forest Products, by
Roberts, Reinisch & Klor, per
Steven R. Reinisch and Craig Staples

Department of Labor and Industries, by
The Attorney General, per
G. Bruce Clement, Assistant

This is an appeal filed by the self-insured employer on February 11, 1985 from an order of the Department of Labor and Industries dated January 15, 1985, which adhered to the provisions of a December 10, 1984 order closing the claim and ordering the self-insured employer to pay claimant a permanent partial disability award equal to 35.6% loss of hearing in both ears. **REMANDED TO THE HEARING PROCESS**.

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 Petitionfor Review filed by the claimant to a Proposed Decision and Order issued on April 30, 1986. The Department joined in the claimant's Petition for Review. The Proposed Decision and Order reversed the order of the Department dated January 15, 1985 and remanded the claim to the Department with directions to enter an order rejecting the claim on the ground that no claim was filed within one year following the date the worker had notice from a physician of the existence of his occupational disease.

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. We are also in agreement with the Industrial Appeals Judge to this extent: We believe the claim for occupational disease is, at least in part, untimely. We conclude, however, that because of the peculiar nature of noise-induced hearing loss, the claim for occupational disease may not be completely extinguished. Pursuant to WAC 263-12-145(3), we are remanding this appeal to the hearing process for the

purpose of taking additional evidence pursuant to this order, and issuing a further reviewable Proposed Decision and Order.

The original issue in this appeal was whether the Department of Labor and Industries in its State Fund capacity was responsible for a portion of the occupational hearing loss award made to the claimant. The claimant had been employed by Publishers Forest Products from 1958 through 1981. Publishers Forest Products became a self-insured employer on January 1, 1980. It was the employer's position that as a self-insured employer it should not be responsible for hearing loss incurred prior to the date it became self-insured.

In the course of the proceedings it became apparent that there was a genuine issue concerning the timeliness of the claim for occupational disease. Additional evidence was presented which focused on the issue of whether the claim was filed within the time prescribed by RCW 51.28.055. For our purposes, the evidence presented on this issue is adequately set forth in the Proposed Decision and Order.

In his Petition for Review, the claimant contends that the Industrial Appeals Judge was incorrect in finding that on June 26, 1975 the claimant was advised by a physician that he had an occupational hearing loss. We agree with the Industrial Appeals Judge's resolution of this factual issue. The claimant may have been mistaken as to the name of the doctor who advised him that he had a work-related hearing loss, but both the claimant's testimony and that of Dr.Whipple make it quite apparent that the claimant was advised on June 26, 1975 that he had a noise-induced hearing loss which was caused by his exposure to noise at Publishers Forest Products' mill.

At a hearing on July 22, 1985 the parties had stipulated that the claimant was entitled to the award which had been ordered by the Department. The claimant, who was then appearing pro se, was assured that his award was not at risk and that the only issue was whether the Department, rather than the self-insured employer, should be responsible for some or all of the award. In his Petition for Review the claimant maintains that the employer is estopped from raising a timeliness defense which effectively eliminates the claimant's right to receive the award. It is indeed unfortunate that the jurisdictional bar of RCW 51.28.055 was raised at such a late date. However, we cannot find that the employer is estopped from raising this defense.

The limitations contained in RCW 51.28.055 are jurisdictional and may be raised at any time. Gilbertson v. Department of Labor and Industries, 22 Wn. App. 813 (1979). A claimant may safely assume, when a statute of limitations defense is not raised, that he need not offer proof that a claim

was timely filed. "He is never free, however, from the risk that the evidence may show that the statute has run." Williams v. Department of Labor and Industries, 45 Wn. 2d 574, 576 (1954). The timeliness of a claim is a limitation on the right to receive compensation and neither the employer nor the Department have the power to waive a time limitation where it is shown that the right had already been extinguished by the failure to file a timely claim. Wheaton v. Department of Labor and Industries, 40 Wn. 2d 56 (1952). A claim not timely filed is void ab initio. The case of Seavey Hop Corp. v. Pollock, 20 Wn. 2d 337, 347-48 (1944), cited in the Petition for Review for the proposition that a party can waive a jurisdictional defense by stipulation,is simply not applicable to cases arising under the Industrial Insurance Act.

We are also in agreement with the Industrial Appeals Judge's analysis concerning the applicability of the 1984 amendments to RCW 51.28.055. 184 Laws, c. 159. Those amendments, effective June 7, 1984, imposed new obligations and duties upon both physicians and the Department. To us, the creation of such duties adds further support to the presumption that the amendments were to operate prospectively only. Therefore, to the extent the limitations period under RCW 51.28.055 had begun running prior to June 7, 1984, the new amendments would neither delay the running of the statute of limitations nor extend the period for filing a claim.

In failing to file a claim for occupational disease, the claimant has lost the right to receive workers' compensation benefits for any noise-induced hearing loss or disability caused by occupational exposure occurring on or prior to June 26, 1975. As of that date, the claimant did suffer from a hearing loss which was compensable and had been advised by a physician that this loss was occupational in its nature and causation. See Williams v. Department of Labor and Industries, 45 Wn. 2d 574, 575-576 (1954). It appears to us, however, that the failure of the claimant to file a claim at that point should not necessarily extinguish his right to file a claim for such occupational hearing loss as subsequently incurred.

The evidence in the record, while not completely clear, suggests that any increase in noise-induced hearing loss after June 26, 1975 would have been the result of additional occupational exposure which occurred subsequent to that date. The testimony of Dr. Voorhees implies a non-progressive character to noise-induced hearing loss. In response to a question concerning the stability of hearing loss over a period of time, he states:

> ". . . One can certainly say this about any change, that if a change did occur, it would not be on the basis of a noise- induced hearing loss because noise causes its damage at the time and that damage does not

> continue after the exposure stops." (Voorhees, deposition, page 14, lines 15 to 19). (Emphasis added)

If further evidence reveals that any increase in hearing loss which the claimant incurred subsequent to June 26, 1975 was the result only of occupational exposure occurring subsequent to that date, we believe the claim for benefits is valid, but only to the extent of such increase in hearing loss.

We are not suggesting that any increase in disability found subsequent to June 26, 1975 should necessarily be compensable. To the extent such disability was in fact the result of pre-1975 exposure, it would not be compensable. If, on the other hand, the claimant is found to have some hearing loss as a result of exposure which had yet to occur as of June 26, 1975, we find it difficult to find that his claim for such disability is time-barred. We do not think the limitations of RCW 51.28.055 were designed to forever bar any future claim for noise-induced hearing loss caused exclusively by occupational exposure which had not even taken place as of the date the worker was initially advised by a physician that he suffered from some occupational hearing loss.

We recognize that the procedure we have outlined effectively creates two claims for what may technically be considered but one disease. Yet, where a worker who has sustained a hearing loss as a result of occupational exposure continues to be exposed to injurious occupational noise, the likelihood, indeed the necessity, of multiple claims becomes evident. For example, had the claimant worked for one employer up to 1975 and timely filed a claim for the hearing loss resulting from such exposure, he would have most likely received a disability award and his claim would have been closed. If he continued working in an environment which subjected him to further injurious noise, it would be likely that he would incur additional hearing loss or disability. If, however, the post-1975 employment was with a second employer, we doubt whether the claimant, upon learning of his increased hearing loss, would be able to successfully pursue a reopening application for aggravation of condition with the first employer. To be successful on such a claim, it would be necessary for the claimant to prove that his increased disability was caused by the original exposure with the first employer. If the nature of noise- induced hearing loss is as suggested by the record before us, we believe such a claimant would be unsuccessful in the application to reopen the claim. The subsequent impairment would most likely be due to this subsequent exposure and the worker's proper remedy would be to file a second claim for occupational disease, for such subsequent impairment.

In remanding this appeal for further hearing, we stress that the burden will be upon the claimant to establish his entitlement to benefits. By failing to timely file a claim for occupational disease in 1975, the claimant has lost substantial rights. It is not our intention to allow the claimant to recover benefits which he is already barred from recovering. To prevail, we believe the claimant must establish by a preponderance of the evidence that he has incurred a hearing loss which was caused solely by occupational exposure occurring subsequent to June 26, 1975. He is precluded from claiming benefits for disability caused by exposure which occurred prior to that date. His claim will therefore depend on the extent to which the medical evidence clearly segregates the disability resulting solely from post- 1975 occupational noise exposure.

After consideration of the Proposed Decision and Order and the Petition for Review filed thereto, and a careful review of the entire record before us, we believe, in accordance with our foregoing discussion, that further evidence is necessary to resolve the issues in this appeal. We therefore remand this appeal to the hearing process for the taking of such evidence. On remand, such evidence should include any additional evidence as may be necessary to resolve the other issues raised in the self-insured employer's appeal, and a further Proposed Decision and Order should be issued at the conclusion of such further proceedings in accordance with this Order and consistent with the evidence. The parties will have the right, pursuant to RCW 51.52.104, to petition for review of such further Proposed Decision and Order to be hereafter issued.

It is so ORDERED.

Dated this 25th day of November, 1986.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/
GARY B. WIGGS Chairperson

/s/
FRANK E. FENNERTY, JR. Member

/s/
PHILLIP T. BORK Member