Wilcox, Robert

OCCUPATIONAL DISEASE (RCW 51.08.140)

Schedule of benefits applicable

The date of manifestation of disability, not the date of the last injurious exposure, determines which schedule of benefits applies. The date of manifestation in this case was the date the worker's lung was surgically removed, not the date two years later when a physician first notified the worker that his condition was occupational in origin.
….*In re Robert Wilcox*, BIIA Dec., 69 954 (1986) [dissent]

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: ROBERT A. WILCOX	)	**DOCKET NO. 69,954**
	)	
CLAIM NO. H-452122	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Robert A. Wilcox, by
Stiles and Stiles, Inc., P.S., per
William A. Stiles, Jr.

Employer, The Austin Company, None

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

This is an appeal filed by the claimant, Robert A. Wilcox, on March 1, 1985 from an order of the Department of Labor and Industries dated January 3, 1985, which reopened this claim for occupational disease (asbestosis and squamous cell carcinoma) to pay 15.4% of the compensation rate for loss of earning power in the sum of $501.73 for a period of 120 days, based on the benefit schedule in effect on January 1, 1943, and closed the claim with no permanent partial disability award, in addition to the 30% of the maximum allowable for unspecified disabilities previously paid. **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 January 22, 1986 in which the order of the Department dated January 3, 1985 was reversed, and this claim remanded to the Department with direction to compute claimant's compensation in accordance with the schedule of benefits in effect on the date his occupational disease became manifest, November 20, 1975.

The facts were stipulated into the record. Mr. Wilcox's last injurious exposure to asbestos particles occurred on January 1, 1943, which was the last date of his employment with the Austin Company. His exposure on and prior to that date caused the development do pulmonary asbestosis which eventually resulted in squamous cell carcinoma in the left lung. This was treated surgically by removal of the lung on November 20, 1975. In March or April of 1978 Mr. Wilcox was informed by his physician that his condition had been caused by exposure to asbestos while working for the Austin

Company. His claim for workers' compensation benefits was filed on January 23, 1979 and was accepted by the Department.

The parties further stipulated that Mr. Wilcox's permanent partial disability caused by this occupational disease equaled 50% of the maximum allowed for unspecified disabilities. Based on this stipulated fact, we will find that the claimant's permanent partial disability is equal to 50% of the maximum allowed for unspecified disabilities.

The only question left for the Board to determine is which benefit schedule should be used for computing the level of compensation for Mr. Wilcox under the Industrial Insurance Act. The Department used the schedule in effect on January 1, 1943, when Mr. Wilcox was last exposed to asbestos (the last exposure rule). The Proposed Decision and Order rejected this approach and used the schedule in effect on November 20, 1975, when the occupational disease became manifest (the time of manifestation rule).

Which of these rules applies in Washington has not been addressed by the appellate courts or the legislature. The issue has been before this Board on two prior occasions: In re Eugene Dana, Claim No. H-128820, Docket No. 59,588, Decision of February 25, 1982; and In re James M. Cooper, Claim No. H-859079, Docket No. 63,307, Decision of January 9, 1984. In both cases, the Department and the majority of the Board applied the last exposure rule. In both cases the Board was reversed in Superior Court in favor of the time of manifestation rule. It should be noted that the decisions rendered in Superior Court were not appealed.

In the Dana and Cooper appeals, the Board acknowledged that by enacting RCW 51.32.180 the Legislature expressed its intent to compensate workers suffering from occupational diseases in the same fashion as workers who sustained industrial injuries. See also RCW 51.16.040. In Todd Shipyards Corporation, et al v. Gerald L. Black et al, 717 Fed 2nd 1280 (1983), the U.S. Ninth Circuit Court of Appeals determined that the goal of equal treatment for injured and occupationally diseased workers was best met by application of the time of manifestation rule. When discussing the application of the rule in that case involving the Longshoremen's and Harborworkers' Compensation Act (LHWCA), the court reasoned as follows:

> The time of manifestation approach also finds support in a realistic definition of the term "injury" as used in Section 10 of LHWCA. Asbestosis begins when asbestos fibers become imbedded in the lungs. The average person, however, would not consider himself "injured" merely because the fibers were embedded in his lung. Indeed expert testimony presented to one court showed that "over 90% of all urban city dwellers have

> asbestos-related scarring." Eagle- Picher Industries, Inc. v. Liberty Mutual Insurance Company, 682 F. 2d. 12, 19 (1st Cir. 1982).
>
> Moreover, even when the fiber has become imbedded in the lung and the scarring processes have begun, the end result, that is disabling disease or death, is by no means inevitable. id at 18. Rather than the average person would consider himself injured when the asbestos fibers finally cause asbestosis -- a process which can take much longer than twenty years. id at18. As Judge Learned Hand once wrote,
>
> > "The LHWCA is not concerned with pathology, but with industrial disability; and a disease is no disease until it manifests itself. Few adults are not diseased, if by that one means only that the seeds of future troubles are not already planted; and it is a commonplace that health is a constant warfare between the body and its enemies; an infection mastered, though latent, is no longer a disease, industrially speaking, until the individual's resistance is again so far lowered that he succumbs." Grain Handling Co. v. Sweeney, 102 F 2d 464, 466 (2d Cir) Cert. denied 308 U.S. 570 (1939).

Ibid at p. 1289, 1290.

In the Dana appeal, this Board rejected these considerations. The Decision and Order stated:

> If the employment, the accumulation of exposures, is the "event" or happening on which compensability depends, then the date of last injurious exposure is most comparable to the date of "injury" for the purpose of determining the level and extent of compensation.

In so finding, the Board cited with favor Plese v. Department of Labor and Industries, 28 Wn. 2d 730 (1947). Therein the court avoided direct confrontation of the issue presented here. Plese acknowledged the common law fule establishing causes of action based upon last exposure. The last exposure was deemed to be the "date of injury" for purposes of establishing the effective date for the legislative extension of coverage to occupational diseases. See RCW 51.32.180. The Plese court specifically stated that the holding of Henson v. Department of Labor and Industries, 15 Wn. 2d 384 (1942), which rejected the last exposure rule in favor of the disability rule, was limited in application to questions concerning the statute of limitations for filing a claim.

Despite the dictum in Plese, our legislature and courts have consistently acknowledged the soundness of the Henson approach. See RCW 51.28.055 (a statute of limitations enactment); Williams v. Department of Labor and Industries, 45 Wn. 2d 574 (1954); and Nygaard v. Department of Labor and Industries, 51 Wn. 2d 658 (1958).

We see nothing in Plese requiring this Board to accept the Department's proposition that the date of last exposure is akin to the date of injury for the purposes of applying the proper compensation benefit schedule. We believe such an approach indirectly confines remedies for occupational diseases to common law concepts, a course specifically rejected by our legislature. RCW 51.04.010. We are persuaded by the realistic approach expressed by the Federal court in Todd Shipyards, supra. The date of exposure to asbestos often produces nothing and means nothing to the diseased worker until 20 or more years later. On the other hand, the effect of injury is immediate. From the point of view of its impact on the claimant, it is unrealistic to draw an analogy between the date of last exposure to a disease-producing element and the date of a traumatic injury. With a traumatic injury, a worker immediately suffers medical problems requiring treatment. With occupational disease, its character as a medical problem and/or disability producer only occurs with manifestation. Workers suffering injury and sustaining occupational disease are compensated equally only when benefits for occupational disease are paid in accordance with schedules in effect when illness becomes manifest.

In so concluding, we are cognizant of the common law rule that a cause of action arises on the date of last exposure. We are also mindful that this rule was acknowledged by our legislature in RCW 51.32.180 with respect to eligibility for occupational disease coverage. However, we view this provision of RCW 51.32.180 as jurisdictional and procedural. It concerns the extension of coverage for occupational diseases, and is merely a procedural mandate for prospective application of the statute. It does not express a legislative intent concerning remedies under the Act. That intent can be found in RCW 51.04.010 wherein the legislature stated the common law system governing remedies is ". . . inconsistent with modern industrial conditions. In practice, it proves to be economically unwise and unfair . . ." The legislature in RCW 51.12.010, and the court in Lightle v. Department of Labor and Industries, 68 Wn. 2d 507 (1966), embraced the notion that the Industrial Insurance Act is remedial in nature and its beneficial purposes must be liberally construed in favor of beneficiaries. The time of manifestation rule is more consistent with, and best serves the purpose of, these legislative declarations.

Moreover, we observe an economic unfairness in the common law practice and the last injurious exposure rule which computes a worker's compensation upon outdated benefit schedules. The permanent partial disability awards of RCW 51.32.080 are indirectly predicated on loss of earning power considerations. Harrington v. Department of Labor and Industries, 9 Wn. 2d 1 (1941); Franks v.

Department of Labor and Industries, 35 Wn. 2d 426 (1947).[1] Admittedly, permanent partial disability awards are determined on loss of bodily function wherein workers receive the same amount of money for the same disabilities regardless of their respective wages. However, periodic legislative adjustments to permanent partial disability schedules have been based approximately on increases in the state's average wages. More importantly, it must be remembered that the rules we are discussing are used solely to determine the monetary level of benefits, not the extent of the medical disability. In this respect, our Act, is compatible with the Federal Longshoremen's and Harborworker's Compensation Act. In Todd Shipyards, supra, the court rejected the last injurious exposure rule as contrary to the criteria established to determine compensation. The court stated:

> The paramount goal of the LHWCA is to compensate workers for the loss of wage-earning capacity resulting from occupational injuries and diseases. (Citation omitted) Because a worker's "disability reaches into the future, not the past(,), his loss as a result of injury must be thought of in terms of its impact on probable future earnings." 2 A. Larson, Laws of Workmen's Compensation, sec. 60.11(d). Thus, the Act necessarily focuses on future earnings capacity rather than on some past period of employment.
>
> The BRB's use of the date of last exposure approach in occupational disease cases is completely contrary to the purposes of the Act. Rather than compensating the worker for loss of future earning capacity, the last exposure theory affords compensation on the basis of the wages received when exposure occurred. This is so even when the disease ultimately caused by the exposure approach would compensate Black based on his 1944 weekly wage of $92.00 rather than on the earning capacity he was robbed of when the asbestosis struck in 1977. Such a result is incompatible with the goals of the LHWCA. The time of manifestation theory we now adopt is far more likely to insure that injured workers will be fairly compensated for their lost future earning capacities. (717 Fed 2d at 1289).

To apply the last exposure rule can result in inadequate permanent disability awards unrelated to current compensation standards and current economic reality. To pay an award today based upon what the economic picture was like some thirty years ago is essentially out of harmony with the remedial intent of the Workers' Compensation Act. We conclude Mr. Wilcox should receive benefits

[1] In Franks the court wrote "As stated in the Harrington opinion, the theory upon which this system of compensation is based is that injured workmen sustain a loss of earning power, or capacity to earn money. In the case of permanent partial disability, the legislature has taken loss of earning power into consideration by prescribing, in dollars, the compensation to be paid for certain specified disabilities."

based upon the compensation schedules in effect at the time the occupational disease became manifest, November 20, 1975, as determined in our Industrial Appeals Judge's Proposed Decision and Order.

FINDINGS OF FACT

Proposed Findings of Fact Nos. 1, 2, 3 and 4 are incorporated herein as the Board's final Findings. In addition, the Board enters Finding No. 5 as follows:

5. As of January 3, 1985 Robert A. Wilcox suffered the surgical loss of his left lung due to pulmonary asbestosis and related squamous cell carcinoma in that lung. Said loss resulted in a permanent partial disability equal to 50% of the maximum allowed for unspecified disabilities.

CONCLUSIONS OF LAW

We hereby incorporate proposed Conclusions of Law Nos. 1 and 2. The Board enters Conclusion No. 3 as follows:

3. The order of the Department of Labor and Industries dated January 3, 1985, computing claimant's compensation benefits in accordance with the schedule in effect on January 1, 1943, and providing additional time loss compensation at the rate of 15.4% for loss of earning power from July 1, 1984, through October 31, 1984, and closing the claim with no additional permanent partial disability other than previously provided equaling 30% of the maximum allowable for unspecified disabilities, is incorrect. The order should be reversed, and this claim should be remanded to the Department with direction to compute claimant's compensation in accordance with the schedule of benefits in effect on November 20, 1975, the date of manifestation of his occupational disease; to provide compensation in accordance with said schedule of benefits, including time loss compensation at the rate of 15.4% for loss of earning power from July 1, 1984 through October 31, 1984, and a permanent partial disability award equal to 50% of the maximum allowable for unspecified disabilities, less prior awards, and thereupon close the claim.

It is so ORDERED.

Dated this 30th day of May, 1986.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
GARY B. WIGGS Chairperson

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

DISSENTING OPINION

This case is a classic example of a change in the Board majority's position on a significant legal issue, occasioned by a change in make-up of the Board membership.

In the prior Eugene Dana and James M. Cooper cases, decided in 1982 and 1984, I concurred with the then Board chairman in applying the last exposure rule to determine the schedule of benefits which should be utilized in computing the amount of monetary compensation. Now, because of an opposite view on this issue by the current Board chairman, I find myself in the minority.

No useful purpose would be served by reiterating at length the then Board majority's decisions as expressed in Dana and Cooper. I simply adopt those decisions, and incorporate them as my dissent in this case.

My position on this issue also finds support from a distinguished former Chairman of this Board, Mr. J. Harris Lynch. In the original Digest of Washington Cases on Workmen's Compensation Law, researched and authored almost totally by Mr. Lynch and published by this Board in 1970, his comments on the Plese case, supra, at pages 356-357, included the observation that, for the purpose of determining the time of "injury" for computing the appropriate amount of benefits, "the date of last exposure would seem to be just as logical and a much easier test to apply . . ." These same comments are contained in our January, 1986 up-date of the Digest, at Vol. I, page 525.

Until either the Legislature or the appellate courts have definitively addressed this issue, I will continue to adhere to the last exposure rule.

Accordingly, I would affirm the Department's order of January 3, 1985.

Dated this 30th day of May, 1986.

/s/_____
PHILLIP T. BORK Member