

## **Jones, Charles (I)**

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### **OCCUPATIONAL DISEASE (RCW 51.08.140)**

#### **Successive insurers**

To avoid financial responsibility for an occupational disease claim (hearing loss), the insurer on the risk on the date of compensable disability must prove that the exposure during the period it was on the risk had no effect on the condition. ...*In re Charles Jones (I)*, BIIA Dec., 70 660 (1987)

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

1     **IN RE: CHARLES D. JONES**                     )     **DOCKET NO. 70,660**  
2   )  
3     **CLAIM NO. S-595523**                     )     **DECISION AND ORDER**  
4

5 **APPEARANCES:**

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7         Claimant, Charles D. Jones, by  
8         William H. Taylor

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10        Employer, Weyerhaeuser Company, by  
11        Eisenhower, Carlson, Newlands, Reha, Henriot & Quinn, per  
12        Richard A. Jessup

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14        Department of Labor and Industries, by  
15        The Attorney General, per  
16        David W. Swan and Byron Brown, Assistants  
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18        This is an appeal filed by the self-insured employer on May 31, 1985 from an order of the  
19        Department of Labor and Industries dated March 28, 1985 which adhered to the provisions of a prior  
20        order dated February 22, 1985, ordering the claim closed and directing the employer in its self-insured  
21        capacity to pay a permanent partial disability award equal to 79.38% of complete loss of hearing in  
22        both ears as a result of on the job noise exposure. **REVERSED AND REMANDED.**  
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25   **DECISION**

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27        Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review  
28        and decision on a timely Petition for Review filed by the Department of Labor and Industries to a  
29        Proposed Decision and Order issued on June 6, 1986 in which the order of the Department dated  
30        March 28, 1985 was reversed, and the claim remanded to the Department with instruction to award  
31        the claimant a permanent partial disability award equal to 69.875% of complete loss of hearing in both  
32        ears and further to accept responsibility for payment of that award as a State Fund obligation.  
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36        The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no  
37        prejudicial error was committed and said rulings are hereby affirmed.  
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39        Four issues are raised by this appeal: 1) Whether the claimant filed a timely claim for an  
40        occupational disease pursuant to RCW 51.28.055; 2) whether the claimant's hearing loss is causally  
41        related to occupational noise exposure at Weyerhaeuser; 3) if the claimant sustained an  
42        occupationally related hearing loss, when was the last injurious noise exposure to the claimant while  
43        he was working at Weyerhaeuser?; 4) if the claimant sustained an occupationally related hearing loss,  
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1 which of the successive insurers, the employer in its self-insured capacity, or the Department of Labor  
2 and Industries as trustee of the State Fund, is responsible for payment of benefits.  
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4 We concur in the Industrial Appeals Judge's proposed decision with respect to each of the  
5 issues raised. The evidence presented by the parties is adequately set forth in the Proposed Decision  
6 and Order.  
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8 We note that there may be some confusion generated by the line of Board decisions addressing  
9 the issue of the financial responsibility of successive insurers for the cost of claims based on  
10 long-developing occupational diseases. The Board has always adhered to the general principle  
11 proposed by Professor Larson in his treatise, see 4, Larson, the Law of Workmen's Compensation,  
12 Sec. 95.21 (1977). In In re Harry S. Lawrence, Docket No. 54,394 (11-18-80), the Board stated the  
13 rule:  
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17 "In this state the employer who is on the risk for a claim of occupational  
18 disease on the date of compensable disability should be charged with and  
19 expected to bear financial responsibility for the full costs of such claim as  
20 long as the exposure to which the worker-claimant is subjected on the  
21 date of compensable disability is of a kind contributing to the condition for  
22 which the claim is made."  
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24 In the application of this general rule, the Board has consistently rejected schemes attempting to  
25 "apportion" the financial responsibility between successive insurers. The insurer on the date of  
26 compensable disability has been held entirely responsible for the cost of a claim, if the exposure as of  
27 that time is of a kind contributing to the condition for which the claim is made. The determination of  
28 which insurer is responsible thus involves a two-step process. The first step is to identify the insurer  
29 on the date of compensable disability. The "date of compensable disability" is the moment at which  
30 the right to benefits accrues. As the Board stated in In re Winfred E. Hanninen, Docket No. 50,653  
31 (3-16-79):  
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36 "The point at which the claim culminates in disability would coincide in  
37 hearing loss claims at the moment when the claimant ought to know he  
38 has a compensable claim. In Washington this would be when he has  
39 notice from a physician of the existence of his occupational disease. RCW  
40 51.28.055."  
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42 Thus, the first step is readily accomplished by ascertaining the insurer on a definite date. The question  
43 of which insurer is responsible, however, is not resolved without looking at the claimant's occupational  
44 exposure and its effects, if any, at the time of compensable disability. This second step in the process  
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1 of determining the responsible insurer requires a working definition of occupational exposure "of a kind  
2 contributing to the condition for which the claim is made." The controversy has been whether such  
3 exposure must actually cause or worsen the occupational disease in some measurable degree, or  
4 whether the requirement is satisfied merely by occupational exposure that could cause or worsen the  
5 disease over some indefinite period of time. The Board's working definition, previously unstated, has  
6 been clarified in In re Frank W. Johannes, Docket No. 67,323 (2-19-85). In that case, the Board  
7 stated:  
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11 "That wording was carefully selected to illustrate that if a disease or  
12 condition is worsened, advanced, or otherwise affected by continuing  
13 exposure, albeit minor, the insurer on risk will be held fully financially  
14 responsible. On the other hand, if, in point of fact, there was no such  
15 effect by the continuing exposure, then it follows that such exposure was  
16 not of a kind contributing to the condition."  
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19 The second step then requires looking at the nature of the occupational exposure at the time of  
20 compensable disability. If such occupational exposure is the kind that could cause or worsen the  
21 condition or disease in question, then the burden is on the insurer then on the risk to establish by a  
22 preponderance of the evidence that such exposure had no effect on a condition previously contracted  
23 if such insurer is to be relieved of financial responsibility.  
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26 In this case, the insurer on the risk (employer in its self- insured capacity) clearly established  
27 such fact, namely, that from 1971 onward, due to protective hearing devices, the claimant was not  
28 exposed to injurious, i.e., excessive, noise levels. His exposure to excessive noise levels occurred  
29 entirely prior to 1971, under State Fund coverage.  
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32 After consideration of the Proposed Decision and Order, and the Department's Petition for  
33 Review filed thereto, and a careful review of the entire record before us, we are persuaded that the  
34 Proposed Decision and Order is supported by the preponderance of the evidence and is correct as a  
35 matter of law. The proposed Findings, Conclusions and Order are hereby adopted as this Board's  
36 final Findings, Conclusions and Order and are incorporated herein by this reference.  
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39 It is so ORDERED.

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41 Dated this 2nd day of January, 1987.

42  
43 BOARD OF INDUSTRIAL INSURANCE APPEALS

44 /s/  
45 GARY B. WIGGS Chairperson

46 /s/  
47 PHILLIP T. BORK Member