Renfro, Lester

OCCUPATIONAL DISEASE (RCW 51.08.140)

Successive insurers

Although clear apportionment of disability may be medically possible in hearing loss cases as opposed to other occupational disease cases, the Board will not carve out an exception to the rule against apportionment of liability as between successive insurers. The Board adheres to its longstanding rule that the insurer on the risk for an occupational disease claim on the date of compensable disability or last injurious exposure is responsible for the full costs of the claim. **….*In re Lester Renfro*, BIIA Dec., 86 2392 (1988)** [*Editor's Note*: *Affirmed sub nom, Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128 (1991).]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: LESTER H. RENFRO	)	**DOCKET NO. 86 2392**
	)	
CLAIM NO. S-785668	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Lester H. Renfro, by
Walthew, Warner, Keefe, Arron, Costello and Thompson, per
Marilyn R. McAdoo, Paralegal, Robert H. Thompson and Celia Seglar

Self-Insured Employer, Weyerhaeuser Company, by
Roberts, Reinisch and Klor, per
Kathryn D. Fewell, Steven R. Reinisch, and Craig Staples

Department of Labor and Industries, by
The Attorney General, per
Loretta Lopez, Assistant, and Carington Phillip, Law Clerk

This is an appeal filed by the self-insured employer on July 7, 1986 from an order of the Department of Labor and Industries dated May 16, 1986 closing the claim and directing the self-insured employer to pay the claimant an award for permanent partial disability equal to 32.18% of the complete loss of hearing in both ears as a result of on-the-job noise exposure. **AFFIRMED**.

DECISION

Pursuant to RCW51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the employer to a Proposed Decision and Order issued on October 27, 1987 in which the order of the Department dated May 16, 1986 was affirmed.

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.

ISSUE

This appeal raises once again the issue of the responsibility of successive insurers for payment of benefits involving occupational diseases. The self-insured employer contends that occupational diseases, unlike industrial injuries, are in most cases long developing conditions that take years to become manifest. When the condition results in a permanent disability, that disability represents the totality of the worker's exposure to the harmful conditions rather than just the most recent, or any particular, exposure. Therefore, Weyerhaeuser argues that it should not be required to pay the entire permanent partial disability in this case, but should be required to pay only that

portion of Mr. Renfro's hearing loss which is attributable to the conditions at Weyerhaeuser while it was the insurer "on the risk".

The Proposed Decision and Order, following our previous decisions in this area, held that the employer "on the risk" on the date of compensable disability should bear the entire cost of that disability. In re Roland Lamberton, BIIA Dec., 63,264 (1984); In re Forrest Pate, BIIA Dec., 58,399 (1982); In re Harry S. Lawrence, BIIA Dec., 54,394 (1980); In re Winfred E. Hanninen, BIIA Dec., 50,653 (1979); and In re Delbert Monroe, BIIA Dec., 49,698 (1978). For the reasons set forth hereafter we adhere to those earlier decisions and affirm the Proposed Decision and Order.

FACTS

It is undisputed that the entire 32.18% hearing loss suffered by Mr. Renfro was incurred while in the employ of Weyerhaeuser Company, for which he began working in 1949. On January 1, 1972, the company changed its industrial insurance status and elected to become "self- insured". Mr. Renfro ceased working for Weyerhaeuser in 1983.

It is Weyerhaeuser's position that, even though it employed Mr. Renfro at all times relevant hereto, there were two different insurers responsible for any injury or disease that he may have suffered as a result of his employment. According to the employer, the company's withdrawal from the state fund created two distinct phases of industrial insurance coverage. Following this reasoning, Weyerhaeuser contends that the cost of benefits for any injury or disease suffered by Mr. Renfro before January 1, 1972 should be paid by the state fund. Weyerhaeuser concedes, however, that it should bear any costs relating to such conditions suffered after January 1, 1972.

It is also undisputed in this case that Mr. Renfro had already suffered 21.25% of his total hearing loss by the time Weyerhaeuser changed to self-insured status. The company is able to identify this percentage because of periodic audiometric testing conducted on Mr. Renfro at various times in his career. Weyerhaeuser argues that these tests allow an accurate apportionment of the amount of Mr. Renfro's hearing impairment during specific periods of time. Because the amount of hearing impairment was known at the time of the change in insurance status, the cost of Mr. Renfro's hearing impairment should, it is argued, be apportioned between the two insuring entities.

In the alternative, Weyerhaeuser contends that even if it is required to pay the entire cost of a disability award as the insurer on the risk at the date of compensable disability, that the Department should nevertheless be required to reimburse the self-insured employer. The company argues that it has already paid the premiums for coverage of the risk of injuries or diseases

occurring to its workers before it became self-insured. Therefore, the cost of Mr. Renfro's 21.25% hearing loss disability incurred before January 1, 1972, should be paid from the state fund based on Weyerhaeuser's previous payments to that fund.

DECISION

In bringing this appeal, Weyerhaeuser has asked the Board to change its long held position in "successive insurer" cases. While the Board has reviewed this issue several times since our first decision in Monroe, supra, there does not appear to be any dispositive reported appellate court decision dealing with this subject.[1] Further there has been no legislative pronouncement on this issue, in spite of our several suggestions that the legislature is the appropriate forum for addressing this question. Lamberton at 8, Pate at 10, Lawrence at 9.[2] Therefore, in resolving this appeal, we are left with the arguments raised by the parties in this case and our own previous decisions.

At least two of those previous decisions, Monroe and Lamberton, bear a striking resemblance to the facts in the present case. Both cases involved an occupational hearing loss, a single employer, and the change in status of that employer from state fund to self insurance. Weyerhaeuser has not presented any differentiating fact or legal argument to warrant a different result here. We therefore adopt our analysis in Monroe and Lamberton in toto here. However, rather than resolve this appeal by simply citing our earlier decisions or reiterating them, we will take this opportunity for further comment on this issue.

As set forth above, the general nature of this problem arises out of the complexities of occupational disease cases. The assignment of financial responsibility in an industrial injury case is

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[1] We would note that in a recent decision, Division II of the Court of Appeals dealt with the apportionment argument in a different context. In that case, the employer argued that the cost of vocational services should be apportioned between the state fund and the employer's self-insurance because the worker had sustained two injuries, one while the employer was insured with the state fund and one while the employer was self-insured. The court rejected this argument and cited 4 A. Larson, The Law of Workmen's Compensation,] 95.21 (1987) approvingly. Champion International, Inc. v. Department of Labor and Industries, 50 Wn. App 91 (1987).

[2] Although there has been no legislative pronouncement on the apportionment question, the Department has recently adopted an administrative regulation (WAC 296-14-350) on June 24, 1988 stating:

> "The liable insurer in occupational disease cases is the insurer on risk at the time of the last injurious exposure to the injurious substance or hazard of disease which gave rise to the claim for compensation."

While perhaps not strictly applicable in this case, WAC 296-14-350 certainly lends support to our position with regard to the apportionment question.

relatively easy. By its very definition, an injury is a discrete and isolated event occurring at a specific moment in time. RCW 51.08.100. The insurer at the time of the injury may be properly assigned the financial responsibility for the resulting costs of benefits paid. By contrast, an occupational disease may occur over a prolonged period of time during which a worker may receive multiple exposures while in the course of employment with multiple employers. If each successive employment exposes the worker to the conditions giving rise to the occupational disease, then that disease has arisen naturally and proximately out of each of those employments. RCW 51.08.140. The problem is that it is difficult, if not impossible, to go back in time and determine the degree or extent to which each and every exposure affected the ultimate disability.

In the last several decades medical science and art have advanced our understanding of the relationship between our environment and resulting risks to health. The association between some conditions in the environment and certain diseases is becoming clearer all the time. Nevertheless, for the majority of diseases incurred in the work place there remain many unanswered questions in terms of both the cause and progression of the disease process. It would be a difficult, and in many cases, an impossible burden to require a worker, disabled by means of an occupational disease, to prove the extent to which each employment contributed to the ultimate disability. As the self-insured employer notes in its Petition for Review, the rule requiring the employer on the risk on the date of compensable disability or last injurious exposure to bear the entire costs of the claim is a judicial solution to solve a myriad of legal problems occasioned by occupational disease cases. See also 4 A. Larson, The Law of Workmen's Compensation, § 95.24, at 17-148 (1987).[3]

The argument against using the date of compensable disability, or last injurious exposure, for assigning financial responsibility among successive insurers is the apparent financial hardship on the last insurer in bearing the total cost of the disability. Citing an Oregon case, the employer notes that over the long run the cost of such a rule is spread proportionately among all employers or insurers. Rumft v. SAIF, 303 Oregon 493, 739 P. 2d. 12 (1987). Again, citing the same Oregon case, the self-insured employer argues that when the reasons for charging the insurer "on the risk" as of the date of compensable disability or last injurious exposure are "mitigated" by the facts of a particular case, the rule should not be applied.

[3]The date of compensable disability is the date on which two events coincide -- the worker has been notified by a physician that his condition is occupational in nature (i.e., the applicable notification requirements under the occupational disease statute of limitations have been met) and the disease has manifested itself to the extent that it is compensable. In cases such as the instant appeal, where the worker is no longer employed on the date of compensable disability, there is an additional inquiry -- the insurer on the risk on the date of last injurious exposure must be identified.

In the present case, as in both Monroe and Lamberton, the employer had occasion to administer periodic audiometric testing. These tests provided a quantifiable measure as to the progressive loss of hearing. Weyerhaeuser argues that the existence of these tests "mitigates" the problems of proof and lack of certainty normally associated with an occupational disease claim. To hold the last insurer on the risk liable for the entire cost of the disabling condition in circumstances where the disability can be accurately apportioned among employers or insurers, would be "grossly unfair."

The problems associated with the apportionment remedy, even in quantifiable conditions such as hearing loss, are not adequately addressed by the employer. First of all, we are concerned that the very nature of hearing loss is inherently different from other kinds of occupational diseases, such as asbestosis, or arthritic conditions stemming from repetitive trauma. The fact that Weyerhaeuser is able to assign a specific degree of impairment in a hearing loss case at specific points in time obscures the uncertain nature of similar issues with respect to other occupational conditions. Apportionment as a possible "mitigating" remedy for successive insurers in occupational disease cases would invite litigation over attempted apportionment in claims involving conditions not capable of the same degree of precision.

In its Petition for Review the employer quotes from our recent order in In re Herbert Lovell, BIIA Dec., 68,823 (1986) where we stated:

> ". . . [W]here a worker who has sustained a hearing loss as a result of occupational exposure continues to be exposed to injurious occupational noise, the likelihood, the necessity, of multiple claims becomes evident. . . ." Lovell at 6.

Apparently, the employer finds support for its apportionment argument in this language. We disagree with that interpretation of our decision in Lovell.

The facts in Lovell were similar, though not identical, to the facts in the instant appeal. Mr. Lovell filed an occupational disease claim for hearing loss. The employer had changed to self-insured status during the period of Mr. Lovell's employment and was seeking to apportion the disability award between itself and the state fund. The evidence as to Mr. Lovell's earlier disability also showed that he had been first advised of the relationship of his hearing loss to his employment by a physician in 1975. His subsequent filing of a claim after he quit working for the employer sometime after 1981 was, therefore, untimely with respect to the hearing loss which existed in 1975. Williams v. Department of Labor and Industries, 45 Wn. 2d 574 (1954). Nygaard v.

Department of Labor and Industries, 51 Wn. 2d 659 (1958). However, we concluded that Mr. Lovell might have a compensable claim for hearing loss due to further injurious exposure sustained after 1975. The language relied on by the employer in the present appeal referred to the possibility of an occupational disease claim for this subsequently incurred hearing loss.

Unlike Weyerhaeuser, we do not read Lovell to sanction apportionment. To the contrary, Lovell is in harmony with our rejection of apportionment. Lovell looks to the future, not the past. A worker can file a claim for each successive increment in hearing loss if he experiences future continued injurious exposure to harmful conditions of employment. Lovell does not stand for the proposition that once a worker has filed a claim, the insurer on the risk can look back over all prior exposures with all prior employers and insurers and seek to apportion financial responsibility amongst them after the fact.

Indeed, Lovell demonstrates some of the problems with the proposed apportionment remedy. Evidence to apportion an earlier amount of disability may shield the insurer on the risk from some financial costs, but that same evidence could be used by the previous insurer or employer as a sword to reject a claim or at least a portion of a claim. For example, the previous insurer or employer could raise the timeliness issue as a defense to apportionment even when not raised by the insurer on the risk.

We are not here suggesting that a worker should receive benefits that he or she is not entitled to. Nor do we intend to limit a genuine inquiry as to the propriety of benefits payable. We are stating that apportionment as a remedy between successive insurers tends to expand the parties and issues involved in an occupational disease case, thereby creating uncertainty and delay in the relief sought by a disabled worker, contrary to RCW 51.04.010.

While at first blush, Weyerhaeuser's argument for apportionment might seem to have an equitable basis from a policy standpoint, a more in-depth inquiry suggests a slightly different view. Weyerhaeuser itself administered hearing tests on Mr. Renfro on June 4, 1969, January 14, 1972, May 5, 1980, May 21, 1982, and August 17, 1983. According to the unrebutted testimony of Dr. Thomas Smersh and the parties' stipulation with respect to Dr. J. P. Lynch's opinions, the entire 21.25% binaural hearing loss measured on January 14, 1972 was attributable to Mr. Renfro's noise exposure during employment with Weyerhaeuser prior to January 1, 1972, when Weyerhaeuser became self- insured.

While Weyerhaeuser initially challenged the timeliness of Mr. Renfro's claim, it presented no evidence on that issue. According to Dr. Smersh, the records he reviewed contained no indication that claimant had been notified regarding the occupational nature of his hearing loss. Based on the record before us, we must therefore conclude that Mr. Renfro was not notified of the occupational nature of his hearing loss in January of 1972, and indeed, that he was likely not so notified until sometime after he concluded his employment with Weyerhaeuser in 1983.

Our purpose in raising this point is to suggest that the evidence for apportionment generally goes hand in hand with the ability to notify the worker of the occupational nature of his condition. To some extent, then, the employer may have had some control over the date of compensable disability. Arguably, Weyerhaeuser's medical practitioners could have set the date of compensable disability in January, 1972, by then assuring that Mr. Renfro was notified by a physician of the occupational nature of his hearing loss. Then Weyerhaeuser might have avoided financial responsibility in its self-insured capacity for the hearing loss which existed at that time, by proving that all of Mr. Renfro's hearing loss incurred as of that time resulted from injurious noise exposure during the period when the employer was insured with the state fund. See In re Charles D. Jones, BIIA Dec., 70,660 (1987).

Instead, Weyerhaeuser declined to actively intervene back in January of 1972, despite its own medical evidence. Yet, the employer is now attempting to avoid financial responsibility for 21.25% of Mr. Renfro's clearly work-related hearing loss. In light of these facts, we are simply not persuaded, from a public policy standpoint--an inquiry, by the way, which is more appropriate to the Legislature than to this Board -- that the equities fall clearly on either side of the apportionment question.

We do not believe that the relief sought by Weyerhaeuser satisfactorily addresses all the issues involved in this or similar cases. To allow apportionment between insurers could raise important additional questions regarding both the applicable schedule of benefits and the statute of limitations. Further, although hearing loss cases are not representative of occupational disease cases in general, we are not inclined to carve out exceptions for specific kinds of diseases.

In its alternative argument, Weyerhaeuser asserts that it had paid for comprehensive workers' compensation coverage up to the time it ceased participating in the state fund. It argues that, as a result of its participation in the state fund, any and all claims attributable to that status

should be payable by that fund. Our discussion in Lamberton at pages 9-10 addresses precisely this argument and we incorporate our analysis here.

While apportioning the costs of an occupational disease among successive insurers within the parameters of the present case would be in the best interests of Weyerhaeuser, we are not at all persuaded that apportionment as a general rule would be in the best interests of workers disabled by occupational diseases, the state fund, or even other employers. We are disinclined to vary from our previous decisions on this issue. We reiterate, as we have done on numerous occasions, that the question of apportionment between successive insurers is one for the legislature. Since the self-insured employer is dissatisfied with the longstanding position taken historically by both the Department and this Board, we note that a remedy may be sought elsewhere, in the appropriate forum -- the Legislature.

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 are persuaded that the Proposed Decision and Order is supported by the preponderance of the evidence and is correct as a matter of law. The Proposed Findings, Conclusions and Order are hereby adopted as this Board's final Findings, Conclusions and Order and are incorporated herein by this reference.

It is so ORDERED.

Dated this 5th day of July, 1988.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/
SARA T. HARMON, Chairperson

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

/s/
PHILLIP T. BORK, Member