

Weil, Otto

OCCUPATIONAL DISEASE (RCW 51.08.140)

Schedule of benefits applicable

Date of manifestation of disability is the date which determines the applicable schedule of benefits in an occupational disease claim. ...*In re Otto Weil, Dec'd*, BIA Dec., 86 2814 (1987) [dissent]

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

IN RE: OTTO WEIL, DEC'D)	DOCKET NO. 86 2814
)	
CLAIM NO. J-501892)	DECISION AND ORDER

APPEARANCES:

Widow-Petitioner, Alice Weil, by
Levinson, Friedman, Duggan, Bland and Horowitz, per
Ron Ward and Ted Willhite

Employer, Multiple, None

Department of Labor and Industries, by
The Attorney General, per
James Kallmer, Assistant

This is an appeal filed by the widow-petitioner on August 13, 1986 from an order of the Department of Labor and Industries dated July 17, 1986 which reaffirmed an order dated July 3, 1986, allowing the claim of the surviving spouse, but changing the date of "injury" for purposes of computation of compensation to December 31, 1969. **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 May 1, 1987 in which the order of the Department dated July 17, 1986 was reversed, and the claim remanded to the Department with direction to compute the widow-petitioner's compensation in accordance with the benefit schedule in effect as of March, 1984.

This matter was submitted on stipulations of fact and the parties' briefs. The parties stipulated that the decedent, Otto Weil, contracted an occupational disease in the course of covered employment resulting in his death on August 13, 1985; that the date of last injurious exposure to the employment conditions causing the occupational disease was on or about December 31, 1969; and that the occupational disease became disabling and was manifest in March, 1984.

The sole issue on appeal is whether compensation should be computed based on the schedule of benefits in effect on the date of last injurious exposure to the conditions of employment which caused the occupational disease, or based on the schedule of benefits in effect on the date the disease manifested itself. This issue has not been specifically addressed by statute or considered by

1 the appellate courts of this state. However, the issue has been previously addressed by this Board on
2 several occasions.
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4 In In re Eugene Dana, Dckt. No. 59,588 (February 25, 1982) and In re James M. Cooper, Dckt.
5 No. 63,307 (January 9, 1984) the majority of the Board stated: "If the employment, the accumulation
6 of exposures, is the "event" or happening on which compensability depends, then the date of last
7 injurious exposure is most comparable to the date of "injury" for the purpose of determining the level
8 and extent of the compensation." More recently, in In re Robert A. Wilcox, BIIA Dec., 69,954 (1986)
9 the majority of the Board held that the date of manifestation of an occupational disease determines the
10 applicable schedule of benefits. We reaffirm our decision in Wilcox and adopt the reasoning set forth
11 there in its entirety. In addition, we wish to expand somewhat upon our discussion of RCW 51.32.180
12 and 51.16.040.
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18 RCW 51.32.180 provides:

19 "Every worker who suffers disability from an occupational disease in the
20 course of employment under the mandatory or elective adoption
21 provisions of this title, or his or her family and dependents in case of death
22 of the worker from such disease or infection, shall receive the same
23 compensation benefits and medical, surgical and hospital care and
24 treatment as would be paid and provided for a worker injured or killed in
25 employment under this title: Provided, however, That this section and
26 RCW 51.16.040 shall not apply where the last exposure to the hazards of
27 the disease or infection occurred prior to January 1, 1937." (Emphasis
28 added)
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30 RCW 51.16.040 provides:

31 "The compensation and benefits provided for occupational diseases shall
32 be paid and in the same manner as compensation and benefits for injuries
33 under this title."
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35 RCW 51.16.040 expresses the clear legislative intent that benefits be computed in the same manner
36 in an occupational disease claim as in an industrial injury claim. RCW 51.32.180 serves two entirely
37 separate functions: First, it extends coverage to occupational diseases so long as "the last exposure to
38 the hazards of the disease or infection occurred prior to January 1, 1937"; and second, like RCW
39 51.16.040, it requires that industrial injuries and occupational diseases be treated the same with
40 respect to the computation of benefits. It is only the latter provision which applies here.
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44 The date of injury is the dispositive date for the purpose of determining what schedule of
45 benefits applies in an industrial injury claim. Ashenbrenner v. Department of Labor and Industries, 62
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1 Wn. 2d. 22 (1963). Thus, the critical question before us is what date, in an occupational disease
2 claim, is comparable to the date of injury in an industrial injury claim.
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4 An industrial injury by definition has two distinct and necessary elements. RCW 51.08.100
5 requires a "tangible happening" and "an immediate or prompt result." An on-the-job incident without
6 medical consequences does not constitute a compensable industrial injury within the meaning of RCW
7 51.08.100.
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10 Likewise, "a disease is no disease until it manifests itself." Grain Handling Company v.
11 Sweeney, 102 F. 2d 464, 466 (2d Cir) cert. denied, 308 U.S. 570 (1939). If Mr. Weil had filed a claim
12 on the date of last injurious exposure, December 31, 1969, it would have been rejected because no
13 disease had manifested itself at that time. Thus, the date when a worker was last exposed to
14 conditions of employment, which might or might not result in the subsequent manifestation of a
15 disease, is not comparable to the date of injury in an industrial injury claim, where the on-the-job
16 incident and some immediate physical consequence occur almost simultaneously.
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20 If occupational disease and industrial injury claims are to be treated the same for purposes of
21 computing compensation, then the computation of benefits must be tied to the point in time when both
22 events have occurred, i.e., the occupational event or exposure, and some resulting condition. In an
23 industrial injury claim, the incident and some resulting physical consequence coincide on the same
24 date and that date appropriately determines the applicable schedule of benefits in an occupational
25 disease claim, the worker is exposed to conditions over a period of time which eventually result in the
26 manifestation of a disease. The point in time when both prerequisites for a compensable occupational
27 disease claim have occurred, i.e., the occupational exposure and the manifestation of a resulting
28 disease is therefore the appropriate date for determining the applicable schedule of benefits. For this
29 reason, as well as the reasons set forth at length in Wilcox, we conclude that the date of manifestation
30 is the date which determines the applicable schedule of benefits in an occupational disease claim.
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34 After consideration of the Proposed Decision and Order, the Department's Petition for Review,
35 the parties' briefs, and a careful review of the entire record before us, we are persuaded that the
36 Proposed Decision and Order is supported by the preponderance of the evidence and is correct as a
37 matter of law.
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43 **FINDINGS OF FACT**

- 44 1. On November 8, 1984 the worker, Otto Weil, filed a claim for benefits with
45 the Department of Labor and Industries alleging an occupational disease
46 occurring as a result of exposure while working as a boilermaker in
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1 shipbuilding and construction work. On August 13, 1985 the worker died
2 as a result of the occupational disease. On November 26, 1985, the
3 decedent's surviving spouse, Alice Weil, filed a claim for widow's benefits.
4 On May 22, 1986, the Department issued an order allowing the claim filed
5 by the surviving spouse. On July 3, 1986 the Department issued an order
6 correcting and superseding the order of May 22, 1986, approving the
7 claim for benefits filed by the surviving spouse, and changing the date of
8 injury for compensation purposes to December 31, 1969. The widow filed
9 a request for reconsideration on July 11, 1986. On July 17, 1986 the
10 Department issued an order reaffirming the order of July 3, 1986. On
11 August 13, 1986 the widow filed a notice of appeal with the Board of
12 Industrial Insurance Appeals. On August 22, 1986 the Board issued an
13 Order Granting the Appeal and assigned it Docket No. 86 2814.

- 14 2. The decedent, Otto Weil, contracted an occupational disease in the
15 course of covered employment with multiple employers, resulting in his
16 death on August 13, 1985.
- 17 3. The decedent's last injurious exposure to employment conditions resulting
18 in the occupational disease was on or about December 31, 1969.
- 19 4. The covered occupational disease incurred by the decedent became
20 disabling and manifest in March, 1984.

21 **CONCLUSIONS OF LAW**

- 22 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties
23 and subject matter of this appeal.
- 24 2. The computation of compensation payable to the widow-petitioner should
25 be based on the benefit schedule existing in March, 1984, when the
26 decedent's occupational disease became manifest.
- 27 3. The order of the Department of Labor and Industries dated July 17, 1986,
28 which affirmed an order dated July 3, 1986, allowing the claim of the
29 surviving spouse but changing the date of injury for compensation
30 purposes to December 31, 1969, is incorrect and should be reversed and
31 the claim remanded to the Department with direction to allow the claim of
32 the surviving spouse, but to compute compensation in accordance with
33 the benefit schedule in effect as of March, 1984, the date of manifestation
34 of the deceased worker's occupational disease.

35 It is so ORDERED.

36 Dated this 30th day of November, 1987.

37 BOARD OF INDUSTRIAL INSURANCE APPEALS

38 /s/

39 SARA T. HARMON

Chairperson

40 /s/

41 FRANK E. FENNERTY, JR.

Member

1 **DISSENTING OPINION**

2 In the prior Eugene Dana and James M. Cooper cases, decided in 1982 and 1984, I concurred
3 with the then Board chairman in applying the last injurious exposure rule to determine the schedule of
4 benefits which should be utilized in computing the amount of monetary compensation. But, because
5 of an opposite view on this issue by the Board Chairperson in 1986, I found myself in the minority in
6 the 1986 Robert A. Wilcox case. Similarly, because of an opposite view on this issue by the current
7 Board Chairperson, I again find myself in the minority.
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11 No useful purpose would be served by reiterating at length the then Board majority's decisions
12 as expressed in Dana and Cooper. I simply adopt those decisions, and incorporate them as my
13 dissent in this case.
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16 My position on this issue also finds support from a distinguished former Chairman of the Board,
17 Mr. J. Harris Lynch. In the original Digest of Washington Cases on Workmen's Compensation Law,
18 researched and authored almost totally by Mr. Lynch and published by this Board in 1970, his
19 comments on the case of Plese v. Department of Labor and Industries, 28 Wn. 2d 730 (1947), at
20 pages 356-357, included the observation that, for the purpose of determining the time of "injury" for
21 computing the appropriate amount of benefits, "the date of last exposure would seem to be just as
22 logical and a much easier test to apply . . ." These same comments are contained in our January,
23 1986 update of the Digest, at Vol. I, page 525.
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26 Until either the Legislature or the appellate courts have definitively addressed this issue, I will
27 continue to be consistent by adhering to the last injurious exposure rule.
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30 Accordingly, I would affirm the Department's order of July 17, 1986.
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33 Dated this 30th day of November, 1987.
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36 /s/
37 PHILLIP T. BORK Member
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