Alseth, Kenneth

OCCUPATIONAL DISEASE (RCW 51.08.140)

Schedule of benefits applicable

A disease or disability is not manifest unless it is evident, in some fashion, to the worker. However, this knowledge need not necessarily be tied to the notice that the disease or disability is occupationally induced. The date of manifestation of disease or disability is the point in time when contemporaneous medical evidence of disability or need for treatment is coupled with knowledge, on the worker's part, that a disease or disability exists. **….*In re Kenneth Alseth*, BIIA Dec., 87 2937 (1989)** [*Editor's Note*: The Board's decision was appealed to superior court under Snohomish County Cause No. 89-203290-1.]**; *In re Charles Jones* (II), BIIA Dec., 87 2790 (1989); *In re Milton May*, BIIA Dec., 87 4016 (1989)** [*Editor's Note*: *Overruled*, in part *Boeing v. Heidy*, 147 Wn 2d 78 (2002).]

The 1988 amendment to RCW 51.32.180 did not explicitly overrule the Board's prior decisions applying the date of manifestation rule. Thus, even for claims filed before July 1, 1988, the Board continues to apply the date of manifestation rule to determine the schedule of benefits. **….*In re Kenneth Alseth*, BIIA Dec., 87 2937 (1989)** [*Editor's Note*: The Board's decision was appealed to superior court under Snohomish County Cause No. 89-2023290-1.]**; *In re Charles Jones* (II), BIIA Dec., 87 2790 (1989); *In re Milton May*, BIIA Dec., 87 4016 (1989)** [*Editor's Note*: The Board's decision was appealed to superior court under Snohomish County Cause No. 89-2-03033-9.] [Rule upheld by *Department of Labor & Indus. v. Landon*, 117 Wn.2d 122 (1991). *Overruled in part, Harry v. Buse*, 166 Wn.2d 1 (2009) (occupational hearing case becomes partially disabling on the date the worker was last exposed to hazardous occupational noise).]

RETROACTIVITY OF STATUTORY AMENDMENTS

Schedule of benefits applicable in occupational disease claim (RCW 51.32.180)

The 1988 amendment to RCW 51.32.180 did not explicitly overrule the Board's prior decisions applying the date of manifestation rule. Thus, even for claims filed before July 1, 1988, the Board continues to apply the date of manifestation rule to determine the schedule of benefits. **….*In re Kenneth Alseth*, BIIA Dec., 87 2937 (1989)** [*Editor's Note*: The Board's decision was appealed to superior court under Snohomish County Cause No. 89-2-03290-1.]**; *In re Charles Jones* (II), BIIA Dec., 87 2790 (1989); *In re Milton May*, BIIA Dec., 87 4016 (1989)** [*Editor's Note*: Rule upheld by *Department of Labor & Indus. v. Landon*, 117 Wn.2d 122 (1991).]

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: KENNETH R. ALSETH	**)**	**DOCKET NO. 87 2937**
	)	
CLAIM NO. K-511035	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Kenneth R. Alseth, by
William H. Taylor and Richard R. Roth

Self-Insured Employer, Weyerhaeuser Company, by
Roberts, Reinisch & Klor (withdrawn), and by Kathryn D. Fewell

Department of Labor and Industries, by
The Attorney General, per
Ann Silvernale, Assistant, and Laurel Anderson, Paralegal

This is an appeal filed by the claimant, Kenneth R. Alseth, on August 17, 1987 from an order of the Department of Labor and Industries dated May 28, 1987 which modified an April 27, 1987 order from final to interlocutory, determined that Claim S-784315 is the responsibility of the state fund, noted that the claim had been assigned a new claim number, K-511035, and closed the claim with a permanent partial disability award equal to 21.88% of complete loss of hearing in both ears as awarded under the April 27, 1987 order. **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 September 23, 1988 in which the order of the Department dated May 28, 1987 was reversed and the claim remanded to the Department to issue an order assigning Claim No. S-784315 a new claim number, that of K-511035, and closing the claim with a permanent partial disability award equal to 21.88% of complete loss of hearing in both ears with that permanent partial disability award to be paid based on the benefit schedule in existence during October 1984.

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 also agree with our Industrial Appeals Judge's determination that this appeal was timely filed and that we have jurisdiction to decide the merits of the issue raised by the notice of appeal.

The issue in this appeal concerns the schedule of benefits applicable to Mr. Alseth's award for noise-induced hearing loss. Our Industrial Appeals Judge concluded that the schedule in effect at the time Mr. Alseth's disability became "manifest" should control. He determined that Mr. Alseth's disability first manifested itself when he sought treatment for his hearing loss in October 1984. We hold that in an occupational disease claim for a noise-induced hearing loss any award for permanent partial disability should be paid according to the schedule in effect at the time the worker's disability became manifest. We agree with our Industrial Appeals Judge's determination that Mr. Alseth's disability resulting from occupational noise exposure became manifest in October 1984, when he first sought treatment for his hearing loss.

The claimant, Kenneth R. Alseth, has worked for Weyerhaeuser Company as a puller for 23 years. During that time he was exposed to a high level of noise. In October 1984 Mr. Alseth was examined by Dr. Lynch and was told that he suffered a permanent hearing loss due to noise exposure at work. At that time he filed a claim with Weyerhaeuser and the Department.

The parties stipulated that Weyerhaeuser Company became a self- insured employer on January 1, 1972. The parties further stipulated that Mr. Alseth underwent an audiometric evaluation on October 14, 1971 and that since that time, based on comparison to an exam given on September 16, 1985, there has been a 1.5% increase in the handicapped score in the right ear and a .4% decrease in the handicapped score in the left ear, resulting in a 1.1% binaural increase in the handicapped score.

The only medical testimony presented in this appeal was that of Dr. Richard L. Voorhees. Dr. Voorhees is certified by the American Academy of Otolaryngology and Head and Neck Surgery. He specializes in otology, which concerns diseases of the ear. Dr. Voorhees compared the results of the audiometric tests given in 1971 and 1985. Because of an intervening change in rating standards and because some of the changes noted were within a category of "test-retest variability" he did not believe the 1.1% binaural increase was statistically significant. Dr. Voorhees characterized noise-induced hearing loss as a series of repetitive injuries rather than a traditional disease process. He explained that permanent hearing loss occurs during the exposure itself and not afterward, and that any permanent change in ability to hear should therefore be detectable at a time contemporaneous to the exposure. In his opinion the entirety of Mr. Alseth's hearing loss due to noise exposure at work occurred prior to October 1971.

No testimony was presented concerning the extent of Mr. Alseth's noise-induced hearing loss. The parties apparently concede, and the Board will therefore conclude, that the extent of Mr. Alseth's loss is 21.88% of complete loss of hearing in both ears, the percentage upon which the Department based its award in the order under appeal.

Based upon the testimony of Dr. Voorhees that all of Mr. Alseth's hearing loss occurred prior to the October 14, 1971 audiogram, it is uncontroverted that Mr. Alseth's "last injurious exposure" would have been no later than 1971. In its Petition for Review the Department maintains that Mr. Alseth's disability award should be based upon the benefit schedule in effect on the date of last injurious exposure. Its argument is premised on 1988 legislative changes to RCW 51.32.180. As amended by Laws of 1988, ch. 161, § 5, that statute now reads in part:

> . . . For claims filed on or after July 1, 1988, the rate of compensation for occupational diseases shall be established as of the date the disease requires medical treatment or becomes totally or partially disabling, whichever occurs first, and without regard to the date of filing the claim.

The Department argues that the legislative adoption of what is essentially a "date of manifestation" rule cannot be applied to this claim since the Legislature expressly provided that the amendment would only apply to "claims filed on or after July 1, 1988." According to the Department, the last injurious exposure rule should apply to this claim, which was filed in 1984. We disagree.

Where a claim is based on an industrial injury the law is well settled that the applicable schedule of benefits is determined by the law in effect on the date of injury. Ashenbrenner v. Department of Labor and Industries, 62 Wn.2d 22 (1963). Unfortunately, there are no reported Washington appellate court decisions which specifically resolve the issue of the applicable schedule of benefits in a claim for occupational disease. Prior to the 1988 amendments, the Legislature had also been silent as to the schedule to be applied in such cases. The only statutory guidance on the issue was contained in RCW 51.16.040 and RCW 51.32.180.

RCW 51.16.040 provides:

> The compensation and benefits provided for occupational diseases shall be paid and in the same manner as compensation and benefits for injuries under this title.
>
> RCW 51.32.180 (as last amended by Laws of 1977, 1st ex. sess., ch. 350, § 53) provided:
>
> Every worker who suffers disability from an occupational disease in the course of employment under the mandatory or elective adoption provisions of this title, or his or her family and dependents in case of death

> of the worker from such disease or infection, shall receive the same compensation benefits and medical, surgical and hospital care and treatment as would be paid and provided for a worker injured or killed in employment under this title: Provided, however, that this section and RCW 51.16.040 shall not apply where the last exposure to the hazards of the disease or infection occurred prior to January 1, 1937.

These two statutory provisions express a clear legislative intent that benefits in occupational disease claims be computed in the same manner as in claims for industrial injuries. The difficulty, of course, is that an injury and an occupational disease are completely different in kind. An injury is a result of a single traumatic event, while an occupational disease is a result of a series of events or a continued exposure over a prolonged period of time. The question, then, is what constitutes the date of "injury" in a claim for occupational disease?

In the case of In re Eugene Dana, Dckt. No. 59,588 (February 25, 1982), the Board was presented with the issue of the schedule to be applied in calculating the time-loss compensation of a worker suffering from asbestosis. The worker had last been employed in an environment where he was exposed to asbestos fibers in 1968. In October 1976 he had developed significant symptoms and findings involving his lungs and a diagnosis of asbestosis was made. He filed a claim for benefits in 1977, and benefits were originally paid based on schedules in effect in 1977. Thereafter, the Department issued an order finding that benefits should have been paid according to the 1968 schedule and assessed an overpayment. The issue presented to the Board was whether time-loss compensation should have been paid at the rates in effect on the date of last exposure (1968) or the date the condition became disabling (fiscal year 1977).

In Dana, the Board majority noted that RCW 51.32.180 excluded coverage of occupational disease claims where the last exposure occurred prior to January 1, 1937. According to the majority, this language evidenced a legislative intent to make the date of last exposure the date of "injury" for the purpose of determining the extent of allowable benefits. The majority also noted that, under the common law, a cause of action against an employer based on contraction of a disease accrued on the date of last exposure. Calhoun v. Washington Veneer Company, 170 Wash. 152 (1932); Grant v. Fisher Flouring Mills Company, 181 Wash. 576 (1935).

Two court decisions were discussed in Dana. In Henson v. Department of Labor and Industries, 15 Wn.2d 384 (1942) the worker had not filed his claim for benefits within one year following the date of last exposure. The issue was whether a worker claiming an occupational disease

was subject to the one year statute of limitations applicable to claims for industrial injuries. The court specifically refused to follow the common law rule that a claim for disease accrued on the date of last exposure and held that there was no statute of limitations governing the time within which a claim for occupational disease must be filed. (Henson was decided prior to the enactment of RCW 51.28.055, which established time limitations for the filing of claims for occupational disease). Dicta in Henson suggested that the date of disability constituted the date of injury in an occupational disease claim.

In Plese v. Department of Labor and Industries, 28 Wn.2d 730 (1947) the worker had developed silicosis as a result of working in a coal mine. His last exposure was on November 7, 1941. Legislation had been passed which increased the compensation levels effective December 3, 1942. The worker maintained that he first became disabled from his disease some time after December 3, 1942, and was therefore entitled to benefits at the higher rate. The court specifically avoided the issue of whether the date of disability was the date of injury by holding that the worker had become disabled before the new schedule came into effect. The Plese court also specifically limited the holding in Henson to the procedural question of whether the one year statute of limitations for injury claims was applicable to claims for occupational disease. The court noted that Henson "very carefully avoided saying that the date of disability was the date of injury, ..." Plese, at 731-738.

In Dana, the Board majority agreed with the court in Plese that Henson did not support the proposition that the date of disability in an occupational disease case is the date of injury for the purpose of determining the appropriate schedule of benefits. Citing J. H. Lynch, Digest of Leading Washington Cases on Workmen's Compensation Law, 357 (1979), the Board majority then held that the compensation schedule in effect on the date of last injurious exposure should be applied.[1] In Dana the Board majority concluded that:

> . . . 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 date of "injury" for the purpose of determining the level and extent of the compensation.

Dana, at 5.

[1] The former chairman of this Board, J. Harris Lynch, had commented on the Plese case in the original publication of the Digest, at 356- 357. He observed 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 the January 1986 update of the Digest of Washington Cases on Workers' Compensation Law, Volume 1, p. 525.

The Board again addressed the schedule of benefits issue in occupational disease claims in In re James M. Cooper, Dckt. No. 63,307 (January 9, 1984). In Cooper the Board was presented with the issue of whether a worker's permanent partial disability award for hearing loss should be paid according to a schedule of awards which had been increased between the date of last exposure (1978) and the date the worker had been administered an audiogram and been diagnosed as suffering from noise-induced hearing loss (1981). Adhering to the decision in Dana, the Board majority concluded "that the monetary level of compensation in effect at the `date of last injurious exposure' should be applied as the "date of injury", and not the "date of manifestation". Cooper, at 5.

The Board continued to adhere to the last injurious exposure rule as pronounced in Dana and Cooper until 1986. In that year, the Board decided the case of In re Robert A. Wilcox, BIIA Dec., 69,594 (1986). In Wilcox the Board majority noted that both Dana and Cooper had been reversed in superior court in favor of a date of manifestation rule and that neither superior court decision had been appealed. Relying on the reasoning in Todd Shipyards Corporation, et al v. Gerald L. Black, et al, 717 F.2d 1280 (9th Cir. 1983), the Board majority agreed that the goal of equal treatment for injured and occupationally diseased workers was best met by applying a date of manifestation rule under which benefits were paid according to the schedule in effect when the disease became disabling. Persuaded by the "realistic approach" expressed by Todd Shipyards, the Board majority determined that the worker's disabling condition, pulmonary asbestosis resulting in squamous cell carcinoma of the left lung, became manifest on the date the claimant was treated surgically by removal of the lung.

This issue was most recently addressed by this Board, as currently composed, in the case of In re Otto Weil, Dec'd., BIIA Dec., 86 2814 (1987). There the Board majority again held that the date of manifestation is the appropriate date for determining the schedule of benefits to be applied in an occupational disease claim. For, as the majority noted in Weil, "a disease is no disease until it manifests itself." Grain Handling Company v. Sweeney, 102 F.2d 464, 466 (2d Cir.), cert. denied, 308 U.S. 570 (1939).

We do not believe that the 1988 legislative changes to RCW 51.32.180 reflect a legislative intent to preclude the application of the date of manifestation rule, as articulated in Wilcox and Weil, to claims filed prior to July 1, 1988. The Wilcox decision was identified as a significant decision of the Board in our original publication of Significant Decisions, which became available in June, 1987. We assume that the Legislature, which had directed us to publish our significant decisions, (See RCW 51.52.160), was fully aware that the Board had abandoned the date of last injurious exposure rule in

favor of a date of manifestation rule. We agree with our Industrial Appeals Judge that the 1988 amendments evidence legislative agreement with the Board's determination of the issues presented in the Wilcox case.

Pursuant to the 1988 legislative amendment, the Department promulgated a new regulation, WAC 296-14-350. The Department's WAC goes beyond the legislation by stating:

> (2) The compensation schedules and wage base for claims filed prior to July 1, 1988, shall be determined according to the schedule in effect and the wage paid, if wage based schedules apply, at the time of the last injurious exposure to the substance or hazard giving rise to the claim for compensation.

The Legislature itself in no way indicated that, for claims filed prior to July 1, 1988, a different rule should apply. Since the Legislature did not explicitly overrule the Board majority's interpretation of the statute as it read prior to 1988, we must assume that the legislature acquiesced in such statutory construction. Thus, we conclude that the 1988 Legislature merely clarified what it meant by the date of manifestation by defining it as "the date the disease requires medical treatment or becomes totally or partially disabling, whichever occurs first. . . ." The 1988 amendments do not specifically preclude application of the date of manifestation rule, as enunciated in the prior Decisions and Orders of Wilcox and Weil, to claims filed prior to July 1, 1988.

In so concluding, we are mindful of the legislative mandate that "[t]his title shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment." RCW 51.12.010. Without an explicit statement from the Legislature that the date of manifestation rule does not apply to claims filed prior to July 1, 1988, we cannot make such an inference from the 1988 amendments.

We agree with our Industrial Appeals Judge on the sub-issue of when Mr. Alseth's disability became manifest, but we do not entirely agree with his rationale. He reasoned that the existence of a functional impairment was irrelevant unless it forced a claimant to seek treatment or affected his wage earning capacity. He therefore concluded that Mr. Alseth's functional hearing impairment did not become a "disability" until he first sought treatment for the condition in 1984. We believe our Industrial Appeals Judge's conclusion is premised on a misunderstanding of the nature of permanent partial disability.

Permanent total disability and temporary total disability, by definition, connote a loss of wage earning capacity. Permanent partial disability, on the other hand, is a completely separate concept.

While loss of earning power has been taken into account by the Legislature in creating the schedules for permanent partial disability awards, such awards are predicated on loss of bodily function and not on loss of earning power. Fochtman v. Department of Labor and Industries, 7 Wn. App. 286, 293-294 (1972); Page v. Department of Labor and Industries, 52 Wn.2d 706 (1958). Inability to work is not, in itself, evidence of loss of bodily function. Ellis v. Department of Labor and Industries, 88 Wn.2d 844, 853 (1977). Likewise, a worker may suffer from a functional loss and not sustain any loss of earning power. It does not appear that Mr. Alseth's hearing loss has ever precluded him from engaging in employment, yet his loss is certainly a "disability" compensable under our Act. Further, the compensability of his disability does not depend on it being amenable to treatment.

Although we reach the same result as our Industrial Appeals Judge, we analyze the question of when Mr. Alseth's occupational disease or disability became manifest somewhat differently. The word "manifest" is defined in the Compact Edition of the Oxford English Dictionary 1715 (1971) as: "1. Clearly revealed to the eye, mind or judgment; open to view or comprehension; obvious." It is defined in Webster's Third New International Dictionary 1375 (1986) as: "1a: Cpable of being readily and instantly perceived by the senses and esp. by the sight: not hidden or concealed: open to view . . . b: Capable of being easily understood or recognized at once by the mind: not obscure: OBVIOUS."

Implied in these definitions is the requirement that the disease or disability must be apparent to someone; some person must know that the disease or disability exists. The question which confronts us is whether knowledge on the part of the person administering the audiometric test in October 1971 suffices. Or, does manifestation require some knowledge on the part of the worker? And if so, what does the worker have to know before one can say that his disease or disability has manifested itself?

We conclude that a disease or disability is not manifest unless it is evident, in some fashion, to the worker. However, this knowledge need not necessarily be tied to notice that the hearing loss is occupationally induced. Our interpretation in this regard is in accord with our prior decision in Wilcox. There the worker was notified by a physician of the occupational nature of his condition in March or April of 1978. However, his lung had been surgically removed previously on November 20, 1975. The Board majority held that Mr. Wilcox's disease or disability manifested itself on November 20, 1975, when his lung was removed.

The question of whether Mr. Alseth knew he had a permanent hearing impairment in October 1971 is simply not addressed in this sparse record. We will not assume that if an audiogram reveals

hearing impairment, the worker knows that he has a hearing impairment. We will not impute such knowledge to Mr. Alseth, for several reasons.

Dr. Voorhees testified that noise-induced hearing loss occurs at the 3000 and 4000 frequencies and sometimes at 6000. He later elaborated that, with noise-induced hearing loss, "the low and mid-frequencies are usually within the normal range of hearing depending upon the duration of noise exposure and the intensity and the greatest losses occur in the area of 2000 to 6000 cycles per second. . . ." Tr 6/17/88 at 10-11. There is no testimony in this record as to whether hearing loss at the higher frequencies is within the conversational range, which would presumably be more noticeable to a worker.

In addition, Dr. Voorhees noted that noise-induced hearing loss can also be temporary in nature.

> [D]uring the time of exposure a temporary loss may often occur and an individual employee can go through this what is called a temporary threshold shift exposure after exposure with recovery between until somewhere down the line the inner ear no longer recovers and then hearing loss is permanent.

Tr 6/17/88 at 13.

Although in hindsight it is apparent that Mr. Alseth's hearing loss was permanent in October 1971, there is nothing in this record to suggest that he was aware he had sustained a permanent hearing loss as of that date. If he was aware that he had sustained any hearing loss at all, he may well have viewed the impairment as temporary, and hence non-compensable, in nature.

Furthermore, while not strictly applicable here, the 1988 legislation offers some guidance. It speaks of manifestation in terms of the date the condition "requires treatment or becomes totally or partially disabling." There is no evidence that Mr. Alseth's hearing loss has ever been totally disabling or productive of any loss of earning power. Mr. Alseth first sought medical treatment in October 1984. The question of when his hearing loss became permanently partially disabling is more difficult.

We are hampered by the limited nature of the record before us on this issue. Without having the 1971 and 1984 audiograms before us, we cannot say that Mr. Alseth would have received a permanent partial disability award if he had filed his claim in 1971. The Department currently rates permanent partial disability for hearing loss by considering the frequencies of 500 Hz, 1000 Hz, 2000 Hz, and 3000 Hz. Workers' Compensation Manual, at B-31. However, in the 1970's and early 1980's

it was the Department's policy to exclude the 3000 level from the computation. In re Matt L. Minerich, Dckt. No. 48,253 (May 12, 1978); In re Earl Cameron, Dckt. No. 48,766 (March 7, 1978).

In addition, WAC 296-62-09011 as it read as of 1980 provided, in part: "The medical profession has defined hearing impairment as an average hearing threshold level in excess of 25 decibels (ANSI S3.6- 1969) at 500, 1000, and 2000 Hz, ..." By 1981-1982, that WAC had been amended to read: "The medical profession has defined hearing impairment as an average hearing threshold level in excess of 25 decibels (ANSI S3.6-1969 (R1973)) at 500, 1000, 2000, and 3000 Hz, ..." (Emphasis added)

In light of these shifting standards for evaluation of hearing loss permanent partial disability, the record does not establish whether Mr. Alseth in fact had a compensable permanent partial disability back in October 1971. Certainly there is nothing in the record to suggest that a physician had rated his permanent partial disability at that time.

Given all these circumstances, we will not permit the Department to effectively "back date" Mr. Alseth's permanent partial disability award 13 years. The mere existence of audiometric evidence of hearing loss, without some showing of concurrent knowledge on the worker's part, is not enough to establish manifestation of disease or disability.

The best indicator of when Mr. Alseth knew he had a hearing problem, coupled with medical evidence of the existence of a disability, is the date on which Mr. Alseth first sought treatment. Since that date was October 1984, the schedule of benefits in effect at that time applies to his permanent partial disability award.

After consideration of the Proposed Decision and Order, the Department's Petition for Review filed thereto, and a careful review of the entire record before us, we are persuaded that the order of the Department of Labor and Industries dated May 28, 1987 is incorrect insofar as it pays claimant's permanent partial disability award under the October 1971 schedule as opposed to the October 1984 schedule. We hereby enter the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. On October 9, 1984, the claimant, Kenneth R. Alseth, filed an accident report with the Department of Labor and Industries alleging the occurrence of occupational hearing loss while in the course of his employment with the Weyerhaeuser Company. This claim was assigned No. S-784315.

   On February 3, 1986, the Department issued an order closing the claim with a permanent partial disability award equal to 19.68% complete loss of hearing in both ears. On February 19, 1986, the employer filed a protest

and request for reconsideration with the Department. On April 10, 1987, the Department issued an order correcting and superseding the February 3, 1986 order with the claim (S-784315) to be closed with a permanent partial disability award equal to 34.68% complete loss of hearing in both ears.

On April 17, 1987, the Department issued an order placing the April 10, 1987 order in abeyance. On April 27, 1987, the Department issued an order closing the claim (K-511035) with a permanent partial disability award equal to 21.88% complete loss of hearing in both ears and paying the claimant a total award for permanent partial disability in the amount of $3,150.72.

On May 28, 1987, the Department issued an order modifying the April 27, 1987 order, determining that Claim S-784315 is the responsibility of the state fund, noting that that claim had been assigned a new claim number, K-511035, and closing that claim with a permanent partial disability award equal to 21.88% complete loss of hearing in both ears as awarded under the April 27, 1987 Department order.

On June 17, 1987, the claimant mailed a protest and request for reconsideration to the Department of Labor and Industries which received it in the normal course of the mails. On August 17, 1987, the claimant filed a notice of appeal with the Board of Industrial Insurance Appeals. On September 15, 1987, this Board issued an order granting the claimant's appeal subject to proof of timeliness, assigning it Docket No. 87 2937 and directing that further proceedings be held.

2. The claimant, Kenneth R. Alseth, has worked for Weyerhaeuser Company as a puller for 23 years. During that time he was exposed to a high level of noise. In October 1984 Mr. Alseth was examined by Dr. Lynch and was told that he suffered a permanent hearing loss due to noise exposure at work. At that time he filed a claim with Weyerhaeuser and the Department.

3. Weyerhaeuser Company became a self-insurer employer on January 1, 1972.

4. Mr. Alseth underwent an audiometric evaluation on October 14, 1971 and on September 15, 1985.

5. The claimant's work as a puller at Weyerhaeuser through 1971 resulted in injurious exposure to noise which caused a 21.88% permanent binaural hearing loss. The entirety of this loss existed on October 14, 1971. Subsequent occupational exposure to noise was not injurious or further disabling.

6. Claimant first sought treatment for his hearing loss in 1984. He was first informed of the occupational nature of his hearing loss by Dr. Lynch at that time.

7. The claimant's hearing loss became manifest in October 1984 when he became aware of his impairment and first sought medical treatment.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the subject matter and parties to this proceeding.

2. Due to the timely filing of the June 17, 1987 protest letter with the Department of Labor and Industries, the May 28, 1987 Department order had not become final by August 17, 1987 and in that respect, the claimant's notice of appeal was timely filed with the Board of Industrial Insurance Appeals on August 17, 1987.

3. The benefit schedule in effect on the date of the manifestation of disability is the schedule which is to be used to determine the amount of the award paid to a claimant as compensation for a permanent partial disability caused by an occupational disease.

4. The date of manifestation of claimant's hearing loss, causally related to his exposure to noise during the course of employment with Weyerhaeuser Company, was October, 1984.

5. The order of the Department of Labor and Industries dated May 28, 1987 which modified an April 27, 1987 Department order, determined that Claim No. S-784315 is the responsibility of the state fund, noted that a new claim number of K-511035 had been assigned and closed the claim with a permanent partial disability award equal to 21.88% complete loss of hearing in both ears as awarded under the April 27, 1987 Department order, is incorrect insofar as it pays the award under the October 1971 schedule of benefits. The Department order is reversed and the claim is remanded to the Department to issue an order stating that the state fund accepts responsibility for the claim and paying a permanent partial disability award of 21.8,% of complete loss of hearing in both ears under the October 1984 schedule of benefits, less prior awards.

It is so ORDERED.

Dated this 2nd day of May, 1989.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
SARA T. HARMON Chairperson

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

/s/_____
PHILLIP T. BORK Member