

May, Milton

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: The Board's decision was appealed to superior court under Snohomish County Cause No. 89-2-03033-9. *Overruled in part Boeing v. Heidy*, 147 Wn.2d 78 (2002).]

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RETROACTIVITY OF STATUTORY AMENDMENTS

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

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Scroll down for order.

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

1 **IN RE: MILTON L. MAY**)
2)
3 **CLAIM NO. K-368205**)
4)
 DOCKET NO. 87 4016
 DECISION AND ORDER

5 APPEARANCES:

6
7 Claimant, Milton L. May, by
8 William H. Taylor

9
10 Self-Insured Employer, Weyerhaeuser Company, by
11 Deena Pease and Richard Lewis, Claims Representatives, and by
12 Roberts, Reinisch & Klor, P.C., per
13 Steven R. Reinisch

14
15 Department of Labor and Industries, by
16 The Attorney General, per
17 Ann Silvernale and Lisa A. Vincler, Assistants, and Laurel Anderson, Paralegal

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19 This is an appeal filed by the claimant, Milton L. May, on October 9, 1987 from an order of the
20 Department of Labor and Industries dated September 1, 1987. The order adhered to the provisions of
21 an order dated July 6, 1987 which closed the claim with a permanent partial disability award equal to
22 23.13% of complete loss of hearing in both ears, **REVERSED AND REMANDED.**

23
24 **DECISION**

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26 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
27 and decision on a timely Petition for Review filed by the Department of Labor and Industries to a
28 Proposed Decision and Order issued on September 9, 1988 in which the order of the Department
29 dated September 1, 1987 was reversed and the claim was remanded with directions to pay the
30 permanent partial disability award in accordance with the schedule of benefits in effect from March 23,
31 1979 to June 30, 1986, and thereupon close the claim.

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33 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no
34 prejudicial error was committed and said rulings are hereby affirmed.

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36 The claimant, Milton May, has been employed by the Weyerhaeuser Company since 1953 and
37 has sustained an occupational hearing loss during the course of that employment. The sole issue on
38 appeal is whether the schedule of benefits in effect as of July 1, 1971 or the schedule in effect as of
39 June 1986 applies to this claim. The Weyerhaeuser Company was insured with the state fund through
40 December 31, 1971 and has been self-insured thereafter.

1 During the course of hearings and depositions the parties to this appeal have agreed that the
2 extent of Mr. May's disability caused by hearing loss was correctly assessed in the Department order
3 which is the subject of this appeal as equal to 23.13% binaural hearing loss and that compensation for
4 that disability is the responsibility of the state fund and not the self-insured employer. This leaves, as
5 the sole issue presented by this appeal, the question of which schedule of benefits shall be applicable
6 to the payment of Mr. May's permanent partial disability award. The Department paid the permanent
7 partial disability in accordance with the schedule of benefits which was in effect until March 22, 1979,
8 however, Mr. May contends that the appropriate schedule was the one in effect as of June of 1986.

9 At the outset we address the Department's contention that the unappealed Department order of
10 June 30, 1987 constitutes a res judicata determination that Mr. May's last injurious exposure to noise
11 at Weyerhaeuser occurred prior to January 1, 1972 when Weyerhaeuser became self-insured. That
12 order stated:

13 WHEREAS, this claim was filed for occupational disease of the above
14 date and assigned self-insured claim number S784406, and

15 WHEREAS, it is determined that this claim is the responsibility of the State
16 Fund and has been assigned a new claim number, K368205;

17 THEREFORE IT IS ORDERED, that all further correspondence and action
18 will be concerned with claim K368205 under the jurisdiction of the State
19 Fund.

20 The June 30, 1987 order did not explicitly advise Mr. May that the Department had determined he was
21 last exposed to injurious noise levels at Weyerhaeuser prior to January 1, 1972. Nor did that order
22 advise Mr. May that the lower July 1971 through March 1979 schedule of benefits would apply to his
23 permanent partial disability award, which was awarded pursuant to a subsequent order of July 6,
24 1987. Thus, the only issue which was finally determined by the unappealed Department order of June
25 30, 1987 was that the state fund, not the self-insured employer, was responsible for the claim. See,
26 King v. Department of Labor and Industries, 12 Wn. App. 1 (1974).

27 A majority of this Board has, on at least two occasions, determined that the appropriate
28 schedule of benefits is the schedule of benefits in effect at the time of manifestation of disability. In re
29 Robert A. Wilcox, BIIA Dec., 69,954 (1986) and In re Otto Weil, Dec'd, BIIA Dec., 86 2814 (1987). In
30 Wilcox we abandoned the rule tying the schedule of benefits to last injurious exposure in favor of a
31 rule which based the determination of the appropriate schedule on manifestation of disability. Our
32 position was further delineated in Weil where we affirmed our determination that the date of

1 manifestation of disability would determine the appropriate schedule of benefits in claims involving
2 occupational disease.
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4 In 1988, as a part of the Department of Labor and Industries' agency request legislation, the
5 Legislature amended RCW 51.32.180 as follows:
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7 Every worker who suffers disability from an occupational disease in the
8 course of employment under the mandatory or elective adoption
9 provisions of this title, or his or her family and dependents in case of death
10 of the worker from such disease or infection, shall receive the same
11 compensation benefits and medical, surgical and hospital care and
12 treatment as would be paid and provided for a worker injured or killed in
13 employment under this title(~~PROVIDED, HOWEVER, That~~) except as
14 follows: (a) This section and RCW 51.16.040 shall not apply where the last
15 exposure to the hazards of the disease or infection occurred prior to
16 January 1, 1937; and (b) for claims filed on or after July 1, 1988, the rate
17 of compensation for occupational diseases shall be established as of the
18 date the disease requires medical treatment or becomes totally or partially
19 disabling, whichever occurs first, and without regard to the date of the
20 contraction of the disease or the date of filing the claim.
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22 This amendment became effective June 8, 1988.
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24 Pursuant to this legislative amendment, the Department promulgated a new regulation, WAC
25 296-14-350, effective July 24, 1988, which reads as follows:
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27 CLAIM ALLOWANCE AND WAGE DETERMINATION IN
28 OCCUPATIONAL DISEASE CASES. (1) The liable insurer in occupational
29 disease cases is the insurer on risk at the time of the last injurious
30 exposure to the injurious substance or hazard of disease which gave rise
31 to the claim for compensation.

32 (2) The compensation schedules and wage base for claims filed prior to
33 July 1, 1988, shall be determined according to the schedule in effect and
34 the wage paid, if wage based schedules apply, at the time of the last
35 injurious exposure to the substance or hazard giving rise to the claim for
36 compensation.
37

38 (3) The compensation schedules and wage base for claims filed on or
39 after July 1, 1988, shall be determined as follows:

40 (a) If the worker was employed at the time the disease required medical
41 treatment or became totally or partially disabling, whichever occurred first,
42 compensation shall be based on the monthly wage paid on that date
43 regardless of whether the worker is employed in the industry that gave rise
44 to the disease or in an unrelated industry.

45 (b) If the worker was not employed, for causes other than voluntary
46 retirement, at the time the disease required medical treatment or became
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1 totally or partially disabling, whichever occurred first, compensation shall
2 be based upon the last monthly wage paid.

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4 (c) Benefits shall be paid in accordance with the schedules in effect at the
5 time the disease required medical treatment or became totally or partially
6 disabling, whichever occurred first, without regard to the date of the
7 contraction of the disease or the date of filing the claim.

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9 (Emphasis added).

10 We do not believe that the 1988 legislative changes to RCW51.32.180 reflect a legislative intent
11 that the date of manifestation rule articulated by the Board majority in Wilcox and Weil should not
12 apply to claims filed prior to July 1, 1988. The Wilcox decision was identified as a significant decision
13 of the Board in our original publication of Significant Decisions, which became available in June 1987.
14 We assume that the Legislature, which had directed us to publish our significant decisions, (See RCW
15 51.52.160), was fully aware that the Board majority had abandoned the date of last injurious exposure
16 rule in favor of a date of manifestation rule. We believe that the 1988 amendments evidence legislative
17 agreement with the Board's determination of the issues presented in the Wilcox case.

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19 The Department's WAC goes beyond the legislation by stating:

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22 (2) The compensation schedules and wage base for claims filed prior to
23 July 1, 1988, shall be determined according to the schedule in effect and
24 the wage paid, if wage based schedules apply, at the time of the last
25 injurious exposure to the substance or hazard giving rise to the claim for
26 compensation.
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30 The Legislature itself in no way indicated that, for claims filed prior to July 1, 1988, a different rule
31 should apply. Since the Legislature did not explicitly overrule the Board majority's interpretation of the
32 statute as it read prior to 1988, we must assume that the Legislature acquiesced in such statutory
33 construction. Thus, we conclude that the 1988 Legislature merely clarified what it meant by the date of
34 manifestation by defining it as "the date the disease requires medical treatment or becomes totally or
35 partially disabling, whichever occurs first...." The 1988 amendments do not specifically preclude
36 application of the date of manifestation rule, as enunciated in the prior Decisions and Orders of Wilcox
37 and Weil, to claims filed prior to July 1, 1988.

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39 In so concluding, we are mindful of the legislative mandate that "[t]his title shall be liberally
40 construed for the purpose of reducing to a minimum the suffering and economic loss arising from
41 injuries and/or death occurring in the course of employment." RCW 51.12.010. Without an explicit
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1 statement from the Legislature that the date of manifestation rule does not apply to claims filed prior to
2 July 1, 1988, we cannot make such an inference from the 1988 amendments.
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4 We now turn to the facts of this particular appeal. Mr. May saw Dr. Thomas C. Smersh, a
5 Board certified otolaryngologist, on June 9, 1986. Dr. Smersh referred Mr. May to the Northwest
6 Speech and Hearing Center for the performance of audiometric testing. As a result of that testing in
7 June of 1986, Dr. Smersh concluded that Mr. May suffered from binaural hearing loss equal to 23.17
8 (sic)%. (Since the parties concur that the correct award is 23.13% binaural hearing loss, we will not
9 address this very minor, apparent discrepancy.)
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13 Dr. Smersh was the first doctor to advise Mr. May that he had sustained an occupationally
14 related hearing loss. Additionally, Mr. May was first provided with hearing aids after he saw Dr.
15 Smersh in 1986. Although it is clear from the record that audiograms had been administered to Mr.
16 May on numerous occasions, only the percentage interpretation of the one audiogram performed in
17 June 1986 is set forth in the record. It is apparent that the June 1986 audiogram must have served as
18 the basis for the Department's determination of the extent of Mr. May's permanent disability. There is
19 absolutely no evidence in the record as to any percentage extent of binaural hearing loss which
20 existed in prior year.
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25 The record made by the litigants in this appeal is indeed puzzling. The Department has
26 conceded that the State Fund must bear responsibility for the 23.13% binaural hearing loss which was
27 manifested by the June 1986 audiogram, long after the employer became self-insured. However,
28 absent any evidence establishing an earlier date of manifestation for Mr. May's 23.13% binaural
29 hearing loss, we are obliged to find that that disability manifested itself in June 1986, as evidenced by
30 the audiometric testing performed at that time. Thus the schedule of benefits in effect in June 1986
31 applies to Mr. May's 23.13% binaural hearing loss permanent partial disability award.
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35 After careful consideration of the Proposed Decision and Order, the Department's Petition for
36 Review filed thereto, and a review of the entire record before us, we are persuaded that the Proposed
37 Decision and Order is supported by a preponderance of the evidence, and is correct as a matter of
38 law.
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41 **FINDINGS OF FACT**

- 42 1. On October 15, 1984 the Department of Labor and Industries received a
43 report of accident from the claimant, Milton L. May, alleging that he
44 sustained a hearing loss on or near November 5, 1971, as the result of
45 exposure to noise during the course of his employment with the
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1 Weyerhaeuser Company. Two claim numbers, K-368205 and S-784406,
2 were assigned to this claim.

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4 On September 19, 1986, the Department issued an order under Claim No.
5 S-784406 closing the claim with a permanent partial disability award equal
6 to 23.125% of the complete loss of hearing in both ears sustained while in
7 the employ of the Weyerhaeuser Company, a self-insured employer. On
8 September 26, 1986, the Weyerhaeuser Company, filed a protest and
9 request for reconsideration from the Department order dated September
10 19, 1986. On February 11, 1987 the Department issued an order holding
11 its order dated September 19, 1986 in abeyance.

12 On June 30, 1987 the Department issued an order in Claim No. K-368205
13 determining that the claim had been filed under Claim No. S-784406 but is
14 the responsibility of the state fund and that all further correspondence and
15 action will be under Claim No. K-368205 and under the jurisdiction of the
16 state fund. On July 6, 1987 the Department issued an order closing the
17 claim with a permanent partial disability award equal to 23.13% of
18 complete loss of hearing in both ears. On August 25, 1987, the claimant
19 filed a protest with the Department from the Department order dated July
20 6, 1987. On September 1, 1987 the Department issued an order adhering
21 to the provisions of its order dated July 6, 1987.

22 On October 9, 1987, the claimant filed a notice of appeal with the Board of
23 Industrial Insurance Appeals from the Department order dated September
24 1, 1987. On November 9, 1987 the Board issued an order granting the
25 appeal, assigning Docket No. 87 4016 and directing that hearings be held
26 on the issues raised by the appeal.

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28 2. The claimant, Milton L. May, has been employed with the Weyerhaeuser
29 Company since 1953. Until December 31, 1971, the Weyerhaeuser
30 Company was insured with the state fund. Since January 1, 1972, the
31 Weyerhaeuser Company has been self-insured.
- 32 3. The claimant suffered a hearing loss as a result of exposure to loud noise
33 during the course of his employment with the Weyerhaeuser Company.
- 34 4. As a result of audiometric testing interpreted by a physician, it was
35 determined in June, 1986, that Milton L. May, the claimant, had
36 experienced an occupationally related permanent partial disability
37 consisting of hearing loss equal to 23.13% of the complete loss of hearing
38 in both ears.
- 39 5. The claimant's noise-induced occupationally related binaural hearing loss
40 of 23.13% was first determined in June, 1986, and became manifest at
41 that time.

42 **CONCLUSIONS OF LAW**

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45 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties
46 and subject matter to this appeal.
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2. The computation of benefits payable to the claimant, Milton L. May, should be based on the benefit schedule existing in June 1986, when the 23.13% binaural hearing loss attributable to the noise-induced occupational hearing loss became manifest.
 3. The order of the Department of Labor and Industries dated September 1, 1987, which adhered to the provisions of an order dated July 6, 1987, closing the claim with a permanent partial disability award equal to 23.13% of the complete loss of hearing in both ears, paid at the schedule of benefits in effect from July 1971 through March 1979, should be reversed and the claim remanded to the Department with directions to pay a permanent partial disability award equal to 23.13% of the complete loss of hearing in both ears according to the schedule of benefits in effect in June 1986, less prior awards, and thereupon to close the claim.

15 It is so ORDERED.

16 Dated this 13th day of April, 1989.

17
18 BOARD OF INDUSTRIAL INSURANCE APPEALS

19
20
21 /s/
22 SARA T. HARMON Chairperson

23
24 /s/
25 FRANK E. FENNERTY, JR. Member

26
27 /s/
28 PHILLIP T. BORK Member