

Sarbacher, Robert, Dec'd

BOARD

Motion to vacate order denying petition for review

Where the Board used the date of manifestation for calculating benefits in occupational disease claim, but the worker's beneficiary determined benefits payable would be greater if the date of last injurious exposure were used, the failure to determine the financial consequences of different benefit rates before issuance of proposed decision and order does not constitute a mistake or excusable neglect which would justify vacating order under CR 60.*In re Robert Sarbacher, Dec'd, BIIA Dec., 88 3107 (1991)*

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

IN RE: ROBERT A. SARBACHER, DEC'D CLAIM NO. K-604283))))	DOCKET NO. 88 3107 DECISION AND ORDER
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APPEARANCES:

Robert A. Sarbacher, Dec'd. and
 Marlys Sarbacher, Widow Petitioner, by
 Levinson, Friedman, Vhugen, Duggan, Bland & Horowitz, per
 William D. Hochberg

Employer, Various, by
 None

Department of Labor and Industries
 The Attorney General, per
 Lisa Vincler and Nancy Thygesen Day, Assistants, and
 Laurel Anderson, Paralegal

This is an appeal filed by the claimant, Robert A. Sarbacher, deceased, on October 17, 1988, from an order of the Department of Labor and Industries dated October 11, 1988. The order adhered to the provisions of an order dated August 31, 1988, which allowed the claim for malignant mesothelioma resulting from occupational exposure to asbestos fibers, provided that the date of last injurious exposure and date of injury for compensation purposes was determined to be June 30, 1974, with the average monthly wage paid at the time equal to \$850.85, denied responsibility for claimant's condition diagnosed as bullous emphysema as unrelated to the exposure for which the claim was filed, and provided that the claim would remain open for authorized treatment and action as indicated. Motion to vacate Order Denying Petition for Review and cross motion for sanctions and reprimand

DENIED.

PROCEDURAL HISTORY.

This matter is before the Board on a motion by the widow petitioner, Marlys Sarbacher, to vacate our October 30, 1989 Order Denying Petition for Review.

The sole issue raised by this appeal was whether the compensation benefits paid in this claim should be paid based on the wages earned by the worker on the "date of last injurious exposure" or the date his disability from such exposure became "manifest".

1 A Proposed Decision and Order was entered on September 11, 1989 based on stipulated facts.
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3 The stipulation reflects that Mr. Sarbacher filed this claim on July 6, 1987. His last injurious exposure
4 to asbestos was on June 30, 1974. He was diagnosed with malignant mesothelioma on October 30,
5 1987. Stipulation of Facts.
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7 Our Industrial Appeals Judge reversed the decision of the Department, finding that the date of
8 manifestation of disability should be used to determine the amount of benefits paid in this claim for
9 occupational disease. In doing so, she followed the Board's most recent pronouncements on the
10 issue. In re Kenneth Alseth, BIIA Dec., 87 2937 (1989); In re Otto Weil, BIIA Dec., 86 2814 (1987); In
11 re Robert Wilcox, BIIA Dec., 69,594 (1986).
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15 Thereafter, at the request of the Department, the Board extended to October 24, 1989 the time for
16 filing Petitions for Review. We subsequently received the Department's Petition for Review on
17 October 9, 1989. On October 30, 1989 we entered our Order Denying Petition for Review, thus
18 making the Proposed Decision and Order the final order of this Board. Thereafter, on February 27,
19 1990, the widow petitioner filed a motion to vacate our Order Denying Petition for Review. The motion
20 was brought under CR 60(b)(1) and (11) "based upon a mistake and inadvertence of the parties".
21 Claimant's Motion for Vacation of Order.
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24 In his affidavit in support of the motion, the attorney for the widow petitioner, William D.
25 Hochberg, states that he reviewed his files in order to determine that the date of manifestation would
26 actually result in a higher compensation rate for his clients. This review was presumably done after
27 the Proposed Decision and Order was entered, as he states:
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34 This process was in part necessary because of the fact one would litigate
35 the use of date of injury, as opposed to the date of manifestation, without
36 really knowing what the actual effect would be in terms of compensation
37 rates.
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39 Affidavit of William D. Hochberg, p. 2.
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41 The attorney states that he called Linda L. Hart, an employee of the Department, on October
42 24, 1989 to confirm that the date of manifestation would produce a higher rate of compensation. She
43 told him that it would and confirmed this in a letter dated October 25, 1989. Specifically, she stated:
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1 If we had been able to use the date the condition required treatment, 8-15-
2 86, Mr. Sarbacher's monthly compensation rate would have been
3 \$1096.52 [as opposed to \$574.75], based on his 1979 earnings of
4 \$18,414.71.¹
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6 Hart letter dated October 25, 1989.
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8 The "mistake" upon which the widow petitioner seeks to vacate our final order was set forth in
9 the attorney's affidavit as follows:
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11 The mistake is obvious in that the Department and I failed to account for
12 the social security offset involved in this claim. Unfortunately, I relied on
13 the October 25, 1989 letter as a basis to insure that Mrs. Sarbacher would
14 receive the most benefits possible based upon her husband's wages. This
15 was an unfortunate mistake of fact. Obviously, if either the Department or
16 I realized that the Sarbachers would be receiving the maximum
17 compensation rate, but for the social security offset, I would not have
18 appealed the Department order. If there was not an appeal of the original
19 Department order, Mrs. Sarbacher would now be receiving the maximum
20 compensation rate possible in her claim.
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22 Affidavit of William D. Hochberg, pp. 2-3.
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24 The widow petitioner asks "that the Board Order be vacated and that the original Department
25 order be affirmed and that the appeal be dismissed."
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27 In response to the widow petitioner's motion, the Department, on April 23, 1990, objected and
28 filed a cross motion for sanctions and reprimand. The Department objected to the motion on its merits
29 for the reason that the mistake, if any, was due to Mr. Hochberg's inexcusable neglect in not
30 determining, in a timely manner, the effect his appeal would have on his clients. The Department has
31 moved for sanctions only in the event the Board grants the motion to vacate. Attorney's fees are
32 sought both for defending the department's order and defending against the motion to vacate.
33 Reprimand of Mr. Hochberg is sought, pursuant to WAC 263-12-020(5)(a), for the reason that Mr.
34 Hochberg had ex parte contact with the Department's employee, Ms. Hart, in violation of Rule 4.2 of
35 the Rules of Professional Conduct.
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43 ¹ If is unclear what, if any, relevance the 1986 and 1979 dates would have in determining the level of
44 benefits under either a date of manifestation or date of last injurious exposure theory. The parties had
45 stipulated that the date of last injurious exposure was 1974 and the date of manifestation was 1987.
46 Even under Department rules applicable to post-1988 claims, the last wage paid is only relevant where
47 the worker ceased employment for reasons other than voluntary retirement. WAC 296-14-350(3)(b).

1 The widow petitioner has filed a motion for substitution as the proper party to this appeal, the
2 worker having died on October 10, 1989. The motion to substitute is granted. The attorney for the
3 widow petitioner also denies the allegation that he had engaged in ex parte contact with a Department
4 employee without the consent of the Office of the Attorney General. He explained that he was given
5 permission to do so by the Assistant Attorney General then representing the Department, and further,
6 that the subject matter of the conversation did not relate to this pending litigation.
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10 A hearing was held on the motions on April 30, 1990. At the hearing the attorney for the widow
11 petitioner explained that it was the practice of the Department to apply the date of last injurious
12 exposure for determining benefit rates. The Board, on the other hand, applied the date of
13 manifestation. This would allow workers "to play both sides of the isle", by choosing to appeal to the
14 Board only when it would be financially advantageous to do so. 4/30/90 Tr. at 13.
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18 Initially, the widow petitioner's attorney alleged that the date of manifestation resulted in a lower
19 benefit amount because of the social security offset. He has since explained that the lesser rate is
20 due to variations in cost-of-living adjustment multipliers since 1974. Hochberg letter dated May 10,
21 1990. The actual differences in the compensation rates are not clear from this record, nor are the
22 mechanics of how each would be computed. It is still not clear, for example, what impact, if any, the
23 social security offset would have on the compensation rate under the "date of manifestation" rule.
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27 The Department, however, after implementing our prior decision of October 30, 1989, has
28 established an overpayment of compensation in the amount of \$5,316.01. Department Order dated
29 December 21, 1989. This decision is still pending at the Department and we specifically do not, and
30 cannot, pass on whether the amount of alleged overpayment is correct or incorrect. The issue of the
31 actual dollar amount of monthly benefits payable is not before us. Suffice to say that application of the
32 "date of manifestation" rule in this case may not have been financially advantageous to either the
33 deceased worker or his surviving spouse.
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35 **DECISION**

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38 The widow petitioner does not seek to set aside our decision for the reason that it is wrong.
39 There is no question but that the "date of manifestation" is the proper date to use in calculating
40 benefits in this occupational disease claim. Dep't of Labor & Indus. v. Landon, 117 Wn.2d 122 (June
41 27, 1991). Further, that is the date which must be used for calculating the widow petitioner's benefits
42 as well as the worker's. In re William Kilpatrick, Dec'd., Dckt. No. 89 5200 (April 3, 1991). Rather, she
43 wants to take advantage of the date of last injurious exposure which the Department continued to
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1 apply prior to Landon, contrary to our pronouncements in Wilcox, Weil, and Alseth, supra. In effect,
2 she wants the opportunity to dismiss her appeal and thereby obtain the financial benefits of the
3 Department's incorrect application of the law. Having previously decided that the "date of
4 manifestation" should determine the calculation of benefits in this claim, and that decision having been
5 determined to be correct by the Supreme Court's Landon decision, we are not inclined to vacate our
6 order of October 30, 1989 for the reasons alleged in the motion to vacate. The motion to vacate that
7 order is denied.
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11 We need not decide at this juncture whether or to what extent pre- Landon Department
12 decisions applying the "date of last injurious exposure" rule are subject to later modification. We will
13 assume that had the claimant dismissed this appeal before we had entered our final order, the
14 Department would have continued to pay benefits according to "date of last injurious exposure"
15 calculations.
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19 The attorney for the widow petitioner would have us believe that, but for the representations by
20 Ms. Hart, he would not have pursued this appeal. Yet those representations, which we assume to be
21 at least partially erroneous, were made almost a year after the attorney filed the appeal! Further, we
22 note that the telephone conversation between Mr. Hochberg and Ms. Hart occurred on the very last
23 day for filing Petitions for Review. Her letter was not sent until after the time for filing a Petition for
24 Review had passed. It is therefore difficult to imagine that Mr. Hochberg actually relied upon this
25 mistaken information to his clients' detriment. The "mistake", if any, was on Mr. Hochberg's part in
26 failing to timely and diligently determine whether his pursuit of the appeal he filed was likely to be of
27 financial benefit to his client.
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31 Clearly, Mr. Hochberg understood that benefits based on the "date of last injurious exposure"
32 may in some cases exceed those calculated according to the "date of manifestation". Yet there is
33 nothing in the record to suggest that at any time prior to the entry of the Proposed Decision and Order
34 he had conducted an investigation of facts necessary to determine if that was the situation in the case
35 here. He had ample opportunity to inquire or conduct discovery or obtain stipulations necessary to
36 ascertain the applicable benefit rates under either the "date of manifestation" or "date of last injurious
37 exposure" rules. The failure to determine the financial consequences of the different benefit rates in a
38 timely fashion does not constitute a "mistake" or "excusable neglect" which would justify vacating our
39 final order under CR 60.
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1 Since we are denying the widow petitioner's motion to vacate, the Department's motion for
2 sanctions is also denied. We agree with the Department that ex parte contact with a Department
3 employee concerning the calculation of benefits would be a matter which is the "subject of the
4 representation" in this matter and a violation of RPC 4.2. However, the evidence as to whether Mr.
5 Hochberg had the consent of the Office of the Attorney General to make such contact is conflicting.
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7 Therefore, the Department's motion for reprimand is also denied.
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10 It is so **ORDERED**.

11 Dated this 6th day of December, 1991.

12 BOARD OF INDUSTRIAL INSURANCE APPEALS

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17 /s/
18 S. FREDERICK FELLER Chairperson

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

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24
25 /s/
26 PHILLIP T. BORK Member