

Ross, Darlene

SCOPE OF REVIEW

Allowance of claim

In an appeal involving the allowance of a claim for occupational disease, it is inappropriate for the Board to allow the claim as a "temporary" aggravation of a pre-existing disease. To do so is to go beyond the scope of review and pass upon the extent of permanent disability. Nevertheless, when evidence demonstrates that the worker suffers from a pre-existing, symptomatic and disabling condition a finding in that regard is appropriate since a necessary issue in an allowance case is whether the condition complained of was caused by the occupational exposure. ...***In re Darlene Ross, BIIA Dec., 88 4379 (1990)*** [*Editor's Note: Explained In re Orena Houle, BIIA Dec., 00 11628 (2001).*]

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

1 IN RE: DARLENE K. ROSS) DOCKET NO. 88 4379
2)
3 CLAIM NO. S-770113) DECISION AND ORDER
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5 APPEARANCES:
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7 Claimant, Darlene K. Ross, by
8 Harpold, Fornabai and Fiori, P.C. per
9 David L. Harpold
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11 Self-insured Employer, ESD # 121 Workers' Compensation Trust, by
12 Rolland, O'Malley and Williams, per
13 James L. Rolland and Wayne L. Williams
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15 This is an appeal filed by the claimant, Darlene K. Ross, on October 31, 1988 from an order of
16 the Department of Labor and Industries dated October 18, 1988 which adhered to the provisions of an
17 order dated September 28, 1988 which closed the claim with time loss compensation as paid to April
18 16, 1986 and no permanent partial disability award. **REVERSED AND REMANDED.**
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21 **DECISION**
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23 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
24 and decision on a timely Petition for Review filed by the self-insured employer to a Proposed Decision
25 and Order issued on January 2, 1990 in which the order of the Department dated October 18, 1988
26 was reversed and the claim remanded with direction to award a permanent partial disability equal to
27 Category II of WAC 296-20-380 and time-loss compensation for the period between April 16, 1986
28 and June 30, 1986, and thereupon close the claim.
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31 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no
32 prejudicial error was committed and said rulings are hereby affirmed.
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35 This is the second appeal arising out of this claim. Previously, Ms. Ross appealed from a
36 Department order dated March 2, 1987 which had rejected the claim. By a Decision and Order issued
37 on August 18, 1988, we reversed the Department order and remanded the claim to the Department
38 with direction to allow the claim "on an occupational disease basis as an acute and temporary
39 exacerbation of a pre-existing pulmonary condition and impairment, and to take such other and further
40 action as may be authorized or required by law based on such acute and temporary exacerbation."
41 Exhibit No. 3 at 4. We also made a specific finding that "The claimant's diesel fume exposures had no
42 lasting or permanent affect upon her lungs or her pre-existing pulmonary conditions". Exhibit No. 3 at
43 3. The employer argues that we are now precluded as a matter of law from granting the claimant a
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1 permanent partial disability award, as the prior Decision and Order was not appealed and the claimant
2 cannot now argue that there is a permanent disability. We must agree, however, with our Industrial
3 Appeals Judge, who determined that we exceeded our authority in the prior appeal by, in effect,
4 making an advance determination regarding permanent disability. The only issue before us at that
5 time was whether the claim should have been allowed at all, and it was premature to effectively rate
6 the extent of eventual permanent partial disability, if any.
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10 It was not, however, beyond our authority to determine that Ms. Ross had a pre-existing
11 symptomatic respiratory condition prior to her occupational exposures. We specifically found that
12 "Prior to her occupational exposures to diesel fumes, the claimant had impaired pulmonary function of
13 an obstructive nature as a result of a 25 pack year history of cigarette smoking, and asthma. In
14 addition, at the time of the claimant's episode of acute respiratory distress on or about March 13, 1986,
15 and for a period of some weeks prior thereto, the claimant was suffering from an upper respiratory
16 infection of a viral or flu-like nature." Exhibit No. 3 at 3. Ms. Ross is foreclosed by those final findings
17 from arguing that any permanent respiratory impairment which she presently has is entirely related to
18 her occupationally-related exposure.
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24 The claimant presented two medical witnesses, Dr. Arthur Knodle and Dr. Jeffrey Cary. The
25 employer presented no evidence. While the testimony of Drs. Knodle and Cary is not entirely clear, it
26 is our sense that they both feel Ms. Ross's exposure to diesel fumes has made a permanent,
27 qualitative difference in claimant's underlying asthma.
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30 Dr. Knodle, a specialist in pulmonary medicine, was the claimant's attending physician. Dr.
31 Knodle testified that Ms. Ross's respiratory condition was best described by Category 2 of permanent
32 respiratory impairments (WAC 296-20-380), which, pursuant to WAC 296-20-680(8), translates to 15%
33 as compared to total bodily impairment. We accept Dr. Knodle's determination of Ms. Ross's
34 permanent impairment. However, Dr. Knodle quite rightly indicated that the categories of permanent
35 respiratory impairments do not fit well for asthmatics because their respiratory function varies so much.
36 It is precisely because of that variability that WAC 296-20-37(1)(d) provides the more appropriate
37 mechanism for rating Ms. Ross's permanent partial disability. The relevant portion of that WAC reads
38 as follows: "When the respiratory condition (asthma or reactive airway disease) is thought to be
39 permanent, but the degree of respiratory impairment varies, then the examining physician shall give an
40 estimate of percentage of total bodily impairment, as per Rule 15 or WAC 296-20-220." With this
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1 clarification, we accept Dr. Knodle's determination that Ms. Ross's overall permanent impairment is
2 equal to 15% as compared to total bodily impairment.
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4 The distinction between a category rating as opposed to a rating as a percentage of total bodily
5 impairment becomes important when the question of segregating pre-existing disability under RCW
6 51.32.080(3) is addressed. If Ms. Ross's permanent impairment were most appropriately rated under
7 the categories of WAC 296-20-380, then WAC 296-20-220(1)(h) would apply to the segregation of
8 pre-existing disability. However, since Ms. Ross's permanent impairment is most appropriately rated
9 as a percentage of total bodily impairment, the mechanism for segregating pre-existing disability is
10 somewhat different.
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12 Although Dr. Knodle was aware of the claimant's pre-existing respiratory impairment, he did not
13 determine what percent of Ms. Ross's respiratory problems was causally related to her occupational
14 exposure. In order to determine the award for permanent partial disability to which Ms. Ross might be
15 entitled, it is necessary for the record to contain evidence that the trier-of-fact can use to segregate the
16 pre-existing impairment from the impairment resulting from the occupational exposure. Enevold v.
17 Dep't of Labor & Indus., 51 Wn.2d 648 (1958). While Dr. Cary did not specifically rate Ms. Ross's
18 permanent partial disability, he did express an opinion with respect to the portion of her disability
19 attributable to the occupational exposure.
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21 Dr. Cary is a specialist in pulmonary medicine who examined Ms. Ross in November 1986 and
22 again in October 1989. Dr. Cary was of the opinion that the occupational exposure contributed no
23 more than 5% to Ms. Ross's permanent impairment. Accepting Dr. Cary's opinion that 5% of Ms.
24 Ross's impairment is attributable to her diesel fumes occupational exposure, her permanent partial
25 disability would be equal to 0.75% as compared to total bodily impairment, i.e., 5% of 15%.
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27 Proposed Finding of Fact No. 1 and Proposed Conclusion of Law No. 1 are hereby adopted as
28 this Board's final finding and conclusion. We make the following additional findings and conclusions:
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30 **FINDINGS OF FACT**
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- 32 2. During the course of her employment for the employer herein, ESD # 121,
33 over a period of approximately 1 1/2 years as a school bus driver, the
34 claimant was required to periodically fuel the school buses with diesel fuel.
35 As a result, the claimant developed a sensitivity to diesel fumes which, on
36 or about March 13, 1986, triggered an acute episode of respiratory
37 distress in the claimant while she was fueling a bus, and thereafter
38 resulted in her hospitalization for a period of approximately five days in late
39 March, 1986.
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3. Prior to her occupational exposure to diesel fumes, the claimant had impaired pulmonary function of an obstructive nature as a result of a 25 pack year history of cigarette smoking, and asthma. In addition, at the time of the claimant's episode of acute respiratory distress on or about March 13, 1986, and for a period of some weeks prior thereto, the claimant was suffering from an upper respiratory infection of a viral or flu-like nature.
 4. During the period April 16, 1986 through June 30, 1986 Darlene Ross was temporarily unable to work on a reasonably continuous basis as a result of her occupational disease, i.e., the aggravation of her impaired pulmonary function resulting from the occupational diesel fume exposures.
 5. On October 18, 1988 Darlene Ross had a permanent respiratory impairment equal to 15% as compared to total bodily impairment. Only 5% of that impairment, i.e., 0.75% as compared to total bodily impairment, is causally related to her occupational exposure to diesel fumes. Her condition related to the occupational exposure was fixed and stable as of October 18, 1988.

CONCLUSIONS OF LAW

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2. During the period April 16, 1986 through June 30, 1986, inclusive, Darlene Ross was temporarily totally disabled as a proximate result of her occupational exposure to diesel fumes, within the meaning of RCW 51.32.090.
 3. On October 18, 1988 Darlene Ross had a permanent respiratory impairment best described as 15% as compared to total bodily impairment. See WAC 296-20-370(1)(d). Five percent of that permanent respiratory impairment was causally related to her occupational exposure to diesel fumes, i.e., 0.75% as compared to total bodily impairment.
 4. The order of the Department of Labor and Industries dated October 18, 1988 which adhered to the provisions of an order dated September 28, 1988 which closed the claim with time loss compensation as paid to April 16, 1986 and without award for permanent partial disability, is incorrect and is reversed and the claim is remanded to the Department to direct the self- insured employer to pay a permanent partial disability award equal to 0.75% as compared to total bodily impairment, and time loss compensation for the period from April 16, 1986 through June 30, 1986 and thereupon close the claim.

40 It is so ORDERED.

41 Dated this 23rd day of July, 1990.

42 BOARD OF INDUSTRIAL INSURANCE APPEALS

43 /s/ _____
44 SARA T. HARMON Chairperson

45 /s/ _____
46 PHILLIP T. BORK Member
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