

Callender, Joe, Sr.

SCOPE OF REVIEW

Occupational disease and industrial injury as alternative theories

In an employer appeal of a Department order allowing a claim as an industrial injury, the Board's scope of review extends to whether the claim should have been allowed as an occupational disease. ...*In re Joe Callender, Sr., BIA Dec., 89 0823 (1990)* [dissent on other grounds] [*Editor's Note: The Board's decision was appealed to superior court under Snohomish County Cause No. 90-2-06962-0.*]

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

IN RE: JOE CALLENDER, SR.)
)
CLAIM NO. T-103395)
)
DOCKET NO. 89 0823
DECISION AND ORDER

APPEARANCES:

Claimant, Joe Callender, Sr.,
by Stiles, Stiles & Stiles,
per Brock D. Stiles

Self-Insured Employer, Summit Timber Company,
by Hall and Keehn, per
Thomas G. Hall

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

This is an appeal filed by the self-insured employer, Summit Timber Company, on March 17, 1989 from an order of the Department of Labor and Industries dated February 13, 1989 which allowed the claim as an industrial injury sustained on February 18, 1988. **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 employer to a Proposed Decision and Order issued on March 30, 1990 in which the order of the Department dated February 13, 1989 was reversed and this matter remanded to the Department with instructions to issue an order allowing the claim as an occupational disease.

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.

The issues presented by this appeal and the evidence presented by the parties are very adequately set forth in the Proposed Decision and Order.

We are in agreement with our Industrial Appeals Judge that there is no evidence in the record to sustain a finding that the claimant suffered a traumatic injury to his shoulders in the course of his employment on February 18, 1988. The only medical witness to testify, Dr. Kenneth Lang, who treated the claimant for a bilateral shoulder condition, could not relate that condition to any particular trauma. Instead, Dr. Lang was of the opinion that the bilateral shoulder condition, which he described

1 as bilateral acromioclavicular joint traumatic arthritis, was the result of repetitive movements of the
2 shoulder.
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4 We concur with our Industrial Appeals Judge that the central issue in this appeal is whether the
5 claimant's bilateral shoulder condition constitutes an occupational disease as defined under our
6 Industrial Insurance Act.
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8 Our Industrial Appeals Judge was convinced that the claimant's bilateral shoulder condition was
9 the result of distinctive conditions of Mr. Callender's employment with Summit Timber, arose naturally
10 and proximately out of that employment, and thus constitutes an occupational disease. We agree.
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12 Although this claim was allowed originally by the Department as a traumatic injury, the proper
13 scope of our review includes consideration of the claim as an occupational disease. In re Cathy
14 Lively, BIIA Dec., 62,097 (1983) and In re Judith Burr, BIIA Dec., 52,023 (1979).
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16 In Dennis v. Dep't of Labor & Indus., 109 Wn.2d 467, 481 (1987), the Supreme Court held that
17 an occupational disease or disability arises "naturally" out of employment if (1) the particular work
18 conditions more probably than not caused the disease or disease-based disability than conditions in
19 everyday life or all employments in general; (2) the disease or disease-based disability is a natural
20 incident of distinctive conditions of the worker's particular employment; and (3) if the conditions
21 causing the disease or disease-based disability are conditions of employment, not conditions
22 coincidentally occurring in the workplace. In its Petition for Review, the employer argues that the
23 conditions of claimant's employment with Summit Timber were not "distinctive" as required by Dennis.
24 We disagree. The employer incorrectly focuses on Mr. Callender's most recent years of employment
25 rather than the 27 years that Mr. Callender has worked for Summit Timber. The conditions of his
26 employment throughout those years are well described by the claimant, his son, and Mr. Terry
27 Mullane, the personnel manager for Summit Timber.
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36 On August 7, 1961, the claimant began to work for Summit Timber Company. He has worked
37 as a puller on the green chain, an offbearer on an 8 foot saw, sawyer on an 8 foot saw, barker and,
38 since 1972, as a handyperson. The duties of the handyperson included running any machine or
39 operation when its operator was on break or leave, and assisting on any machine or operation
40 necessary to ease or prevent production bottlenecks. As a handyperson, claimant usually ran each
41 machine or operation for a period of time during each working day. As of February 1988, the claimant
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2 had worked almost 27 years on jobs which required the repetitive use of both shoulders in lifting,
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4 pushing, pulling or working overhead with heavy lumber products during some or all of the day.

5 The employer contends that these conditions of claimant's employment are like conditions
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7 occurring in all employments generally. Summit Timber relies on Dr. Lang's testimony in support of
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9 this argument. Dr. Lang was asked by employer's counsel: "And that's activity [lifting, overhead work,
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11 pushing, and pulling] done in physical work generally?" 1/8/90 Tr. at 73 (Emphasis added). He
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13 responded in the affirmative.

14 However, there are obviously countless jobs which do not require the type of repetitive physical
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16 activity which claimant was required to perform for Summit Timber. Indeed, when Dr. Lang was
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18 asked:

19 Q. Doctor, one question. From what you know of Mr. Callender's job duties
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21 would you be able to state condition or conditions you diagnosed would be
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23 more likely to occur to a person who was engaged in those job activities
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25 for the length of time Mr. Callender was than another person in other
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27 employments in general or nonemployment life?

28 He responded:

29 A. Yes, Your Honor. It's my opinion that the kind of work he described to me
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31 was consistent with the appearance of this type of degenerative change.

32 1/8/90 Tr. at 71.

33 Dr. Lang's testimony, coupled with that of the lay witnesses, establishes the requisite distinctive
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35 conditions of employment to satisfy the "naturally" prong of the Dennis occupational disease test.

36 Furthermore, this is an employer's appeal and the employer therefore had the burden of
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38 making a prima facie showing that claimant does not have an occupational disease. Only then does
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40 the burden shift to the claimant to prove entitlement to benefits by a preponderance of the evidence.
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42 Olympia Brewing Co. v. Dep't of Labor & Indus., 34 Wn.2d 498 (1949). The employer presented no
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44 medical testimony. It is questionable whether the employer has presented a prima facie case,
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46 although Summit Timber has apparently relied on challenging the "distinctive" aspect of the conditions
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of claimant's employment. In any event, there is no question that the claimant has proved by a
preponderance of the evidence that his bilateral acromioclavicular joint traumatic arthritis arose both
naturally and proximately out of his employment with Summit Timber.

1 The well-reasoned Proposed Decision and Order is correct in its entirety. We adopt its
2 reasoning, findings, and conclusions as our own.
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4 It is so ORDERED.

5 Dated this 9th day of November, 1990.
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7 BOARD OF INDUSTRIAL INSURANCE APPEALS

8 /S/ _____
9 SARA T. HARMON Chairperson

10 /S/ _____
11 FRANK E. FENNERTY, JR. Member
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13 **DISSENT**

14 I disagree with the Board majority's decision that this claimant's bilateral arthritic shoulder
15 condition is an occupational disease.
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17 Since 1972 Mr. Callender was employed in the Summit Timber mill as a handyperson. The
18 physical activity associated with the handyperson position involved a wide variety of activities. Mr.
19 Callender's job required that he fill in for all of the different work stations at the mill when the regular
20 employees were either on vacation, ill, or taking breaks. While Mr. Callender performed virtually all of
21 the different mill jobs, he did so on a very sporadic and short term basis. The record also indicates
22 that many of the jobs in the mill since 1972 have been automated, and that Mr. Callender's work
23 involved the operation of machinery which did not subject his upper extremities to strenuous repetitive
24 tasks. Dr. Lang attributes the bilateral shoulder condition to strenuous and repetitive use of the arms
25 and believes the condition is a result of the activities involved in Mr. Callender's work. However, he
26 readily admits that he has no knowledge of the claimant's specific job requirements.
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29 Dr. Lang's opinion, in order to have probative value, must be supported by an appropriate and
30 correct factual basis regarding Mr. Callender's actual job requirements. The record before us indicates
31 that Mr. Callender's specific job requirements, the particular and distinctive conditions of his
32 employment, for the last sixteen years did not require strenuous repetitive movements of the arms or
33 shoulders. Since the factual record does not support the assumptions Dr. Lang used in reaching his
34 opinion regarding the cause of Mr. Callender's bilateral shoulder condition, I am unable to accept his
35 opinion that that condition is an occupational disease as described under our Act.
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39 I would order the rejection of this claim.
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41 Dated this 9th day of November, 1990.
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43 /S/ _____
44 PHILLIP T. BORK Member
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