

## **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., BIIA 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.]

Scroll down for order.



1 as bilateral acromioclavicular joint traumatic arthritis, was the result of repetitive movements of the  
2 shoulder.  
3

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.  
7

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.  
11

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).  
15

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.  
28  
29  
30  
31  
32  
33  
34  
35

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  
42  
43  
44  
45  
46  
47

1  
2 had worked almost 27 years on jobs which required the repetitive use of both shoulders in lifting,  
3  
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  
6  
7 occurring in all employments generally. Summit Timber relies on Dr. Lang's testimony in support of  
8  
9 this argument. Dr. Lang was asked by employer's counsel: "And that's activity [lifting, overhead work,  
10  
11 pushing, and pulling] done in physical work generally?" 1/8/90 Tr. at 73 (Emphasis added). He  
12  
13 responded in the affirmative.

14 However, there are obviously countless jobs which do not require the type of repetitive physical  
15  
16 activity which claimant was required to perform for Summit Timber. Indeed, when Dr. Lang was  
17  
18 asked:

19 Q. Doctor, one question. From what you know of Mr. Callender's job duties  
20  
21 would you be able to state condition or conditions you diagnosed would be  
22  
23 more likely to occur to a person who was engaged in those job activities  
24  
25 for the length of time Mr. Callender was than another person in other  
26  
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  
30  
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  
34  
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  
37  
38 making a prima facie showing that claimant does not have an occupational disease. Only then does  
39  
40 the burden shift to the claimant to prove entitlement to benefits by a preponderance of the evidence.  
41  
42 Olympia Brewing Co. v. Dep't of Labor & Indus., 34 Wn.2d 498 (1949). The employer presented no  
43  
44 medical testimony. It is questionable whether the employer has presented a prima facie case,  
45  
46 although Summit Timber has apparently relied on challenging the "distinctive" aspect of the conditions  
47  
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.  
3

4 It is so ORDERED.

5 Dated this 9th day of November, 1990.  
6

7 BOARD OF INDUSTRIAL INSURANCE APPEALS

8 /S/ \_\_\_\_\_  
9 SARA T. HARMON Chairperson

10 /S/ \_\_\_\_\_  
11 FRANK E. FENNERTY, JR. Member  
12

13 **DISSENT**

14 I disagree with the Board majority's decision that this claimant's bilateral arthritic shoulder  
15 condition is an occupational disease.  
16

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.  
27  
28

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.  
36  
37  
38

39 I would order the rejection of this claim.  
40

41 Dated this 9th day of November, 1990.  
42

43 /S/ \_\_\_\_\_  
44 PHILLIP T. BORK Member  
45  
46  
47