Nelson, Robert

OCCUPATIONAL DISEASE (RCW 51.08.140)

Successive insurers

Where distinctive conditions of employment with each employer contributed to progression of worker's condition, the later insurer is responsible for the worsened condition or disability. ***….In re Robert Nelson,* BIIA Dec., 89 3376 (1991)** [*Editor's Note*: The Board's decision was appealed to superior court under Spokane County Cause No. 91-2-02863-4.]

PERMANENT PARTIAL DISABILITY (RCW 51.32.080)

Segregation

When the compensable disability did not arise before filing the claim regarding the current employer and there is no indication the worker received prior physician notification as required by RCW 51.28.055, segregation of any pre-existing disability is not available to the employer as a successive employer/insurer under *Auckland* rationale. ***….In re Robert Nelson,* BIIA Dec., 89 3376 (1991)** [*Editor's Note*: The Board's decision was appealed to superior court under Spokane County Cause No. 91-2-02863-4.]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: ROBERT L. NELSON	**)**	**DOCKET NO. 89 3376**
	)	
CLAIM NO. T-124235	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Robert L. Nelson, by
Solan, Doran, Milhem & Hertel, P.S., per
Robert C. Milhem, Attorney, and Wendy R. Green, Legal Assistant

Self-Insured Employer, ADM Milling Company, by
Roberts, Reinisch, Mackenzie, Healey & Wilson, P.C., per
Michael H. Weier, Steven R. Reinisch and Craig A. Staples

Self-Insured Employer (Intervenor), Nabisco, Inc., by
Law Offices of Madden & Crockett, per
Carol J. Molchior

Department of Labor and Industries, by
The Attorney General, per
Kent E. Mumma, Assistant, and Gary W. McGuire, Paralegal

This is an appeal filed by the self-insured employer, ADM Milling Company, on August 10, 1989, from an order of the Department of Labor and Industries dated June 28, 1989, which required ADM Milling Company to accept the claim for occupational disease and allowed the claim for medical treatment and other benefits as indicated or authorized by the law. **AFFIRMED**.

PROCEDURAL AND EVIDENTIARY MATTERS

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 self-insured employer, ADM Milling Company, to a Proposed Decision and Order issued on October 5, 1990 in which the order of the Department dated June 28, 1989 was affirmed.

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 with the following exception: ADM Milling's objection and motion to strike during the August 15, 1990 deposition of Stephen R. Sears, M.D., at 54, lines 12-18, are overruled and denied.

DECISION

Robert L. Nelson has worked at the same milling plant since 1952. The plant was purchased from Nabisco, Inc. (Nabisco) by ADM Milling Company (ADM) in May 1984. The appealed order allows Mr. Nelson's claim for occupational disease and directs the self-insured employer, ADM, to accept responsibility. ADM appealed and the former plant owner, Nabisco, intervened. ADM asks that it be found free of responsibility for this claim or, alternatively, that a portion of Mr. Nelson's condition preexisting ADM's ownership be segregated.

At a pre-hearing conference on March 2, 1990 and a hearing on July 2, 1990, the parties stipulated that Mr. Nelson sustained an occupational disease. The descriptive diagnosis of this disease is not at issue. Certified orthopedist Dr. Richard P. Treloar described the disease as "bilateral degenerative disease in both knees" (7/2/90 Tr. at 35), certified rehabilitation medicine specialist Dr. G. Keith Mackenzie described it as "degenerative joint disease in both knees" (7/2/90 Tr. at 73), and certified orthopedic surgeon Dr. Stephen Sears described it as "significant arthritis in his knees" (8/15/90 Sears Dep. at 29).[1]

This Board has consistently held that the employer on the risk on the date of compensable disability or last injurious exposure is responsible for the full cost of the claim so long as the exposure to which the worker is subjected is of a kind contributing to the condition for which the claim is filed. In re Lester H. Renfro, BIIA Dec., 86 2392 (1988); In re Forrest Pate, BIIA, Dec., 58,339 (1982); and, In re Delbert Monroe, BIIA Dec., 49,698 (1978). Responsibility for an occupational disease claim may be avoided by an employer if the exposure during the time it was on the risk had no effect on the worker's condition. In re Charles D. Jones, BIIA Dec., 70 660 (1987); In re Frank W. Johannes, BIIA Dec., 67,323 (1985); and, In re Roland Lamberton, BIIA Dec., 63,264 (1984).

ADM makes three basic arguments in support of its appeal. First, ADM argues that exposure at ADM was not of a kind which worsened Mr. Nelson's underlying pathology, as opposed to merely

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[1] The stipulation limits ADM's appeal by excluding any challenge to Mr. Nelson's right to have his occupational disease claim allowed. We accept as given, then, that Mr. Nelson's bilateral degenerative disease in both knees arose "naturally and proximately out of employment" during plant ownership by Nabisco or under successive ownership by ADM, or both. See RCW 51.08.140. Thus Mr. Nelson's condition "came about as a matter of course as a natural consequence or incident of distinctive conditions of" work for either Nabisco or ADM, or both. Dennis v. Dep't of Labor & Indus., 109 Wn.2d 467, 481, 745 P.2d 1295 (1987); Kaiser Aluminum v. McDowell, 58 Wn.App. 283, 286, 792 P.2d 1269 (1990).

worsening his symptoms, and that ADM should therefore not be held responsible. Secondly, ADM argues that even if exposure at ADM contributed to Mr. Nelson's condition, ADM should not be responsible because any worsened knee condition was not a natural consequence of distinctive conditions at ADM (see footnote 1 supra). Third, ADM argues Mr. Nelson had a compensable disability preexisting ADM ownership and that this portion of the condition should be segregated.

ADM cites three Oregon cases in support of its first convention- -that worsening of underlying pathology, not just symptoms, is a prerequisite to successive employer/insurer responsibility: Hensel Phelps Const. v. Mirich, 81 Or.App. 290, 724 P.2d 919 (1986); Fred Meyer v. Benjamin Franklin Sav. & Loan, 73 Or.App. 795, 700 P.2d 257 (1985) and FMC Corp. v. Liberty Mutual Ins. Co., 70 Or.App. 370, 689 P.2d 1046 (1984), modified 73 Or.App. 223, 698 P.2d 551 (1985).

Of the three cases cited, only Hensel and Fred Meyer distinguished between worsening of symptoms and worsening of the underlying condition. Both of the cases are distinguishable from the present appeal. Hensel was an injury case in which a prior claim was paid. The issue was whether a second employer should be responsible for a new injury. Fred Meyer was an occupational disease case wherein a prior claim also was paid. The issue was whether a second employer should be responsible under an additional claim.[2]

Of the Oregon cases cited, only FMC Corp. is similar to the present case in that it raised the question of successive insurer responsibility for an occupational disease where no prior claim had been filed. FMC Corp. did not make any distinction between worsening of symptoms and worsening of the underlying condition. Rather, the court held that FMC,

> as the last employer where conditions existed that could have caused the disease, to shift responsibility to an earlier employer where working conditions could have caused the disease, ... must establish that the conditions at the earlier employer were the sole cause or that it was impossible for conditions at FMC's plant to have caused the disease.

FMC Corp., 689 P.2d at 1048. See also FMC Corp., 698 P.2d at 553. A similar rule is stated in Inkley v. Forest Fiber Products Co., 288 Or. 337, 605 P.2d 1175 (1979)--once the requirement of some contributing exposure is met, courts will not go on to weigh the relative amount or duration of

[2] Further research discloses that Fred Meyer is cited in Industrial Indemnity Co. v. Weaver, 81 Or. App. 493, 726 P.2d 400, 401 (1986). Similarly this case involved an occupational disease and a prior paid claim. The issue was whether later insurers should be responsible for additional benefits claimed.

exposure under various employers and carriers. This is the majority rule stated in 4 A. Larson, The Law of Workmen's Compensation, § 95.26(a) (1990).

It appears that, under the Oregon rule and the majority rule stated in the Larson treatise, ADM's burden is greater than merely showing that only Mr. Nelson's symptoms, rather than his underlying condition, worsened during its watch. However, we do not need to reach that question because the evidence shows the ADM Milling exposure proximately caused a worsening of the knee condition, on the basis of both symptoms and x-ray findings. The facts present here do not support ADM Milling's contention that only symptomatology worsened while it was the employer/insurer.

Mr. Nelson became a maintenance man between 1981 and 1983. 7/2/90 Tr. at 13. Plant ownership changed from Nabisco to ADM Milling in 1984. Mr. Nelson testified that walking and the other work activities of his maintenance job occurred on hard floors and made his knees worse:

> Q. Thinking back to 1987 when you filed the accident report, your knee pain in that year when you filed the accident report was worse than it was in 1986, was it not?
>
> A. Yes.
>
> Q. Over the years, over the last several years in fact your knees have gotten progressively worse with each year, is that right?
>
> A. Yes.

7/2/90 Tr. at 22.

Dr. Stephen Sears, a certified orthopedic surgeon, evaluated claimant on July 10, 1990, and reviewed the originals of knee x-ray films taken in 1982, 1987 and 1990. The two other physicians to testify, Drs. Richard L. Treloar and G. Keith Mackenzie, had not evaluated the 1982 films, but felt the degeneration probably did not change in degree between 1982 and 1987. Dr. Sears stated the x-rays showed increased "pathology" occurring during claimant's ADM employment:

> Q. Before I ask you the next question, Doctor, can you just describe for us as best you can in lay-person's terms how you interpreted the February 1982 x-rays?
>
> A. Yes, I interpreted those as showing mild narrowing of the medial joint space, and that would be an early arthritic condition involving the knees.
>
> Q. Okay. Is mild changes, is that the equivalent or not of minimum degenerative changes?
>
> A. It is the equivalent.
>
> Q. All right. And how would you describe, in, again, in layperson's terms as much as possible, the nature of the x-rays that you reviewed from 1987?

A. Well, in 1987 I would describe in lay terms that arthritis as being advanced; severe I guess would be a better word.

Sears Dep. at 21.

Q. If you remember my question, Doctor, do you have an opinion?

A. Yes, my opinion would be that the patient did have arthritis prior to 1984 in his knees, but that it advanced significantly from 1984 through 1987 based upon the patient's testimony and the fact that the x-rays in 1982, which occurred after he switched jobs, show only minimal arthritis and not in stage or terminal arthritis of his knees.

Q. Okay. And Doctor, more specifically, assuming that working full time on hard surfaces did aggravate his knee condition, do you have an opinion whether his employment from '84 to the present contributed to that progression?

A. Yes, and my opinion would be in the affirmative.

Q. All right. Doctor, I'd like you to assume that Mr. Reinisch's second expert in this matter, Dr. Keith Mackenzie, has testified that it is medically probable in his opinion that the work Mr. Nelson did as a packer, and particularly lifting and moving heavy bags of feed, was what contributed to claimant's knee degeneration, but that his walking on hard surfaces all day did not in any way contribute because after the packing work, claimant's knee degeneration became so severe that it was like a broken dinner plate, and according to Dr. Mackenzie, quote, "Once a plate is broken, you can drop it some more after it's broken, but the damage is already done," end quote.

Assuming that to have been his testimony, Doctor, do you agree or disagree with Dr. Mackenzie that walking on hard surfaces has not contributed in any way but that only lifting and moving heavy bags of feed contributed to claimant's knee degeneration?

A. I would disagree.

Q. Why?

A. Because, there again, we go back to the x- rays of February the 25th, 1982. Those x- rays show only mild arthritic changes in the knee. Those x-rays were taken a year or approximately a year after the patient ceased doing the job that involved carrying and lifting the hundred pounds, so something had to have occurred after February the 25th, 1982, that caused this arthritis to advance from minimal to severe. By what you've told me, the only thing that occurred during that time was walking on the concrete; that would appear to be a more likely causative agent. The lifting of the heavy bags stopped, by my understanding, in 1981, and yet the arthritis had advanced significantly at a much higher pace. I guess, to put it in simple words, I do not equate the x-rays of February 1982 with a

broken dinner plate. I don't consider this in stage or terminal or beyond the point of no return.

Sears Dep. at 26-28.

A. I think I misunderstood your question, at least from what you've just said. I would believe on a more probable than not basis that there was not a significant increase in the arthritis from 1982 through '84, based upon what the patient says. Understanding, and I did want to say this, that the patient's arthritis goes back 18 or 20 years. It has been progressing to a certain degree during that time period, so I'm not trying to say that there was no progression at all from '82 to '84, that would not be reasonable, but my understanding, based upon facts presented to me, would be that there was a probable more significant increase in that arthritis from 1984 through 1987, and that from '82 to '84, although consistent with the progression over the last 20 years, was not particularly outstanding, especially compared with the three years from '84 to '87.

Q. Okay. I just want to make sure we're absolutely clear on this point, so I'm going to ask the short form of the question.

Is it medically probable that his knee degenerative changes went from minimum degenerative changes in 1982 to severe by 1984?

A. No.

Sears Dep. at 30-31.

Dr. Sears' testimony is firmly based on x-ray film comparisons, as opposed to the suppositions of Drs. Treloar and Mackenzie. We are therefore persuaded that actual underlying degeneration, and not just symptoms, changed from mild or moderate to severe while Mr. Nelson worked for ADM Milling.

Further, the attending physician, Dr. Treloar, testified that the primary cause of the degenerative knee problems was walking on the hard surfaces of concrete and hardwood floors that claimant had done in his work both in the past and present:

Q. You indicated the work that he was doing standing and walking on cement floors prior to 1984 contributed to the degeneration of his joint disease.

A. Yes.

Q. Assuming that to be true, the walking on cement floors that he did subsequent to 1984 was also contributing to his degenerative joint disease.

A. Probably.

7/2/90 Tr. at 52.

> Q. If I understand you correctly, you also feel the walking that he does on cement floors, which is full time, actually aggravates the knees more and aggravates the degenerative joint disease more than if he were not doing that?
>
> A. Yes.

7/2/90 Tr. at 56.

We conclude that Mr. Nelson's exposure while at ADM Milling was of a kind which contributed to his disability.

We next consider ADM's second argument, that any causative conditions during ADM's ownership were not distinctive. As noted above, the parties have stipulated that Mr. Nelson has sustained an occupational disease. In order to find that causative conditions at ADM were not distinctive, we would need to be convinced, as a threshold matter, that employment conditions during ADM's ownership were different from those during Nabisco's ownership in some manner which is medically significant in Mr. Nelson's case. We cannot find such a significant difference.

For instance, Dr. Richard Treloar was asked whether claimant would have the same knee condition he experiences today, if his many years of Nabisco employment were removed. He replied:

> I said, "It's difficult for me to be certain of that because it would depend on what he had done instead of that for 31 years, but I suspect he probably would not have had, if we could stipulate he did not walk on cement floors for 31 years, it wouldn't matter who he was employed with, but in all likelihood if he had a different type of employment that did not require cement floors, he probably wouldn't have had as severe arthritis as he does."

7/2/90 Tr. at 60-61.

Walking on cement floors appears to have been a distinctive condition of Mr. Nelson's employment for Nabisco until 1984 and for ADM Milling from 1984 through the present. According to Dr. Treloar, the arthritis would not have become as severe as it did, absent this condition found in work with <u>each</u> of the employers.

Furthermore, lifting and climbing were also distinctive conditions of work with each of the employers. Dr. Treloar felt those requirements of Mr. Nelson's employment also had contributed to the disease:

> Q. In previous questioning I asked you whether or not walking and standing on cement floors was the most important factor or aggravating factor on

Mr. Nelson's knees among his job duties, and I think you indicated it was also the lifting that he did.

A. Yes.

Q. Assuming that as a maintenance man lifting is required on an average of between ten and 40 pounds, between four and 20 times per shift, sometimes 50 and 60 pounds, and once or twice a month 100 pounds, and that lifting is typically done between floor and waist level and return, would you agree that he continues to have some stress on his knees due to lifting since he's become a maintenance man?

A. Yes.

Q. If you also assume since he's become a maintenance man he's been required to climb ladders approximately ten times a month, during one day of climbing it may range between one and 20 trips up and down, the maximum height being about eight feet, in order to do activities such as changing light bulbs, etcetera, would you agree that that is also an activity which would be a stress on his knees that could contribute to the degeneration of the knees?

A. Yes.

7/2/90 Tr. at 63-64.

We are not persuaded that any medically significant difference exists between work conditions under Nabisco ownership and that of ADM. More affirmatively we are convinced that walking on cement floors, lifting and climbing are distinctive conditions of Mr. Nelson's employment with ADM as compared to conditions in everyday life or all employments in general. Together, these activities at ADM at least contributed to the progression of Mr. Nelson's knee condition.[3]

Finally, we reject ADM's request that we segregate a pre-existing permanent partial disability from the condition for which it is responsible, pursuant to RCW 51.32.080(3). In addressing a similar request, we stated:

> In a long line of cases, this Board has consistently held that the insurer/employer on the risk on the date of compensable disability bears the entire cost of an occupational disease-based disability. See, e.g., In re Lester Renfro, BIIA Dec., 86 2392 (1988). The date of compensable disability is the date on which the worker receives the requisite statutory notice from a physician of the existence of an occupationally related

[3] Unlike ADM, we believe such a conclusion is compatible with, and likely required by, Kaiser Aluminum v. McDowell, supra which held that walking and climbing on hard surfaces in combination with heat qualify as distinctive conditions of employment. 58 Wn.App. at 287.

> disease-based disability. RCW 51.28.055; See, e.g., In re Charles D. Jones, BIIA Dec., 70,660 (1987); In re Winfred E. Hanninen, BIIA Dec., 50,653 (1979). Since the apportionment of financial responsibility is not permissible in occupational disease claims, it cannot be achieved under the guise of segregating preexisting permanent partial disability. Thus, the manner in which we allow segregation in occupational disease cases must be consistent with our many decisions prohibiting apportionment.
>
> For non-industrially related preexisting permanent partial disability there is no potential for apportionment masquerading as segregation. Thus, if the evidence discloses a preexisting symptomatic, disabling condition, segregation is appropriate.
>
> But for preexisting occupationally-related permanent partial disability something more is required in order to avoid apportionment. The worker must have filed a claim for the preexisting disability or the terms of RCW 51.28.055 with respect to notification by a physician of the existence of a preexisting occupational disease must have been met.
>
> That is, if the date of compensable disability with respect to a preexisting permanent partial disability occurred when another insurer/employer was on the risk, then the subsequent insurer/employer is not responsible for paying that portion of the permanent partial disability award. In this sense, the question of whether to segregate preexisting permanent partial disability is a part of the larger problem of identifying the insurer/employer which is responsible for the costs of an occupational disease claim.

In re Ronald Auckland, Dckt. No. 88 4099 (January 10, 1990) at 3-4.

The date of compensable disability did not arise prior to the time the claim was filed in 1987, when ADM Milling was Mr. Nelson's employer. No prior claim was filed and no evidence has been provided which suggests Mr. Nelson received prior physician notification as required by RCW 51.28.055. Segregation of any preexisting disability pursuant to RCW 51.32.080(3) is unavailable to ADM as successive employer/insurer. ADM Milling Company must accept the full responsibility for this occupational disease claim and provide benefits in accordance with the Department's order dated June 28, 1989.

Having reviewed the record of proceedings, the Proposed Decision and Order, ADM Milling Company's Petition for Review, and the Department's and Nabisco's replies thereto, we concur with the Industrial Appeals Judge's proposed Findings of Fact and Conclusions of Law and hereby adopt them in their entirety as our final findings and conclusions, with the following changes: at page 13, line 26, we add to Finding of Fact No. 2 the sentence, "The claimant did not receive notice from his physician of his occupational disease and that a claim for disability may be filed prior to ADM plant

ownership."; and, at page 13, line 33, we add to Finding of Fact No. 3 the sentence, "The contributing conditions at ADM were distinctive conditions of employment not found in everyday life or all employments in general."

It is so ORDERED.

Dated this 21st day of May, 1991.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
SARA T. HARMON Chairperson

/s/_____
FRANK E. FENNERTY, JR. Member