

Lenk, Robert, Sr.

OCCUPATIONAL DISEASE (RCW 51.08.140)

Tinnitus

Tinnitus is an impairment manifested by different functional responses than hearing loss and, in appropriate circumstances, it must be evaluated in terms of a percentage of total bodily impairment separately from hearing loss. ...*In re Robert Lenk, Sr., BIIA Dec., 91 6525 (1993)* [concurrency]

PERMANENT PARTIAL DISABILITY (RCW 51.32.080)

Tinnitus

Because tinnitus is an impairment manifested by different functional responses than hearing loss and is neither a scheduled impairment nor addressed in the categories contained in WAC 296-20, it must be evaluated in terms of a percentage of total bodily impairment. It is appropriate to analogize to categories of mental health impairment in light of the similarity in the disruption of daily living caused by the worker's tinnitus and that described in the categories of mental health impairment. ...*In re Robert Lenk, Sr., BIIA Dec., 91 6525 (1993)* [concurrency]

Scroll down for order.

1 concluded that the tinnitus condition warrants a permanent partial disability award equal to 10% as
2 compared to total bodily impairment. While we agree with this ultimate determination, we feel it is
3 necessary to further explain the reasons for our decision. We also feel compelled to respond to the
4 employer's contention in his Petition for Review that his company should not be held solely
5 responsible for the claimant's hearing impairments.
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8 **DECISION**

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10 The claimant, Robert K. Lenk, Sr., is a 53 year old man who has worked for over 30 years as a
11 machinist. The majority of such work was in California, but his most recent years of machinist jobs
12 were in this state after he moved here in 1982. He worked as a machinist into early 1991. Although
13 his employment exposed him to high noise levels, he did not use protective hearing devices except on
14 an intermittent basis. Over the years, the claimant experienced a gradual decrease in his hearing. In
15 early 1988, after commencing work at Western Wright Marine, Inc., Mr. Lenk also began to notice a
16 high-pitched ringing noise in his ears. In September of 1990 the claimant was examined by Shahn
17 Divorne, a licensed hearing aid specialist. Mr. Divorne tested the claimant for hearing aids and
18 referred him to Dr. Gordon G. Thomas, an otolaryngologist, to evaluate Mr. Lenk's complaints of
19 hearing loss and ringing in the ears.
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22 Dr. Thomas first saw the claimant on September 19, 1990. At that time, an audiogram was
23 performed which revealed binaural noise-induced hearing loss at the frequencies from 1,500 to 4,000
24 hertz, with recovery at the 6,000 hertz level. To measure the ringing in the claimant's ears, Dr.
25 Thomas also had the claimant undergo a masking test. This test showed an intensity or volume of the
26 ringing of 94 decibels bilaterally at the high-pitch frequency of 8,000 hertz. Based on these
27 examinations, Dr. Thomas diagnosed the claimant with neurosensory hearing loss and also bilateral
28 tinnitus, both of which he related to occupational exposure. To treat these conditions, the claimant
29 was provided hearing aids which were also fitted with masking devices. These improved his hearing,
30 but not his high-pitched tinnitus problem.
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33 In October of 1991, the claimant was examined by Dr. William Ritchie, also an otolaryngologist,
34 at the request of the Department of Labor and Industries. Dr. Ritchie performed a series of
35 audiometric studies which showed bilateral sensorineural hearing loss with normal levels of speech
36 recognition and discrimination. Dr. Ritchie rated the claimant's percentage hearing impairment based
37 on measurements at the 500, 1,000, 2,000, and 3,000 hertz levels in accordance with the American
38 Medical Association's Guide to the Evaluation of Permanent Impairment (AMA Guidelines). While Dr.
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1 Ritchie also diagnosed noise-induced binaural tinnitus, he did not provide a separate rating for this
2 condition, nor did he perform a masking test.
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4 Dr. Thomas testified on behalf of the claimant. The Department countered with the testimony
5 of Dr. Ritchie. Both doctors agreed that the claimant suffers from noise-induced tinnitus which is
6 causally related to his work as a machinist. They also believe that this condition is permanent and not
7 amenable to further treatment. Their only disagreement is whether the claimant should receive a
8 separate permanent partial disability award for his tinnitus.
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11 Dr. Thomas believes that tinnitus and hearing loss are distinct medical conditions which
12 deserve separate ratings. In his opinion, the degree of disability attributable to the claimant's tinnitus is
13 10% to 15% as compared to total bodily impairment. He bases his rating on the claimant's masking
14 test and the way in which the claimant is affected by his tinnitus. Dr. Ritchie, on the other hand, seems
15 to believe that the claimant's tinnitus is a symptom of his hearing loss which cannot be rated
16 separately because it is purely subjective. Thus, he believes that the impairment from tinnitus can only
17 be evaluated within the hearing loss impairment.
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22 We find that the claimant's tinnitus is a separate medical condition from his hearing loss. Both
23 Drs. Thomas and Ritchie testified that tinnitus and hearing loss can occur independently. They also
24 acknowledged that these conditions have very different sequelae. Although Dr. Ritchie believes that
25 tinnitus interferes with hearing ability, he also admitted that it can cause problems which are not
26 associated with hearing loss, such as impaired concentration and difficulty sleeping. This testimony is
27 consistent with the AMA Guidelines (admitted as Exhibit No. 3), which classify tinnitus as a separate
28 disturbance of the ear (Ch. 9.1). It is also in line with the Department's own regulations which
29 recognize that tinnitus can be an "accepted" condition requiring its own particular treatment modalities
30 such as masking devices. WAC 296-20-1101.
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35 The separate effects of hearing loss as compared to tinnitus, at least in part, are rather obvious.
36 Although they both affect hearing ability, they do so in different ways. By definition, tinnitus is the
37 presence of "noise", a ringing in the ears. Hearing loss, on the other hand, is the diminishment or
38 absence of "noise", i.e., sound, in the ears. Tinnitus can appear without hearing loss, and vice-versa.
39 The conditions can appear in the same person, but at different levels of frequency (pitch), which, from
40 the evidence herein, is clearly Mr. Lenk's situation.
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45 This brings us to Dr. Ritchie's concern that tinnitus is not a measurable impairment. The AMA
46 Guidelines do state that, while the criteria for evaluating hearing impairment are "relatively specific",
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1 tinnitus, on the other hand, is "not measurable". However, these same guidelines do not consider this
2 to be a bar to rating the impairment caused by tinnitus. Under Ch. 9.1 of the AMA Guidelines,
3 physicians are instructed to "assign a degree of impairment that is based on severity and importance,
4 and is consistent with established values". This obviously involves some subjective judgment on the
5 part of the physician, but there are many kinds of impairment ratings which involve some element of
6 subjectivity. Dr. Thomas' solution to reduce the degree of subjective evaluation was to have the
7 claimant undergo a masking test which, even Dr. Ritchie acknowledged is a valid diagnostic tool used
8 by many examiners in the field of otolaryngology. While, as Dr. Ritchie said, a masking test cannot by
9 itself measure the degree of impairment caused by tinnitus, it does provide the examiner with a means
10 of quantifying the condition with some objectivity, by determining the intensity (loudness) and
11 frequency level of the ringing sensation. We believe that this information can, in turn, be used as a
12 reasonable medical basis to gauge the accuracy and reliability of the patient's complaints. In making
13 this observation, we are not unmindful that the results of the masking test are dependent, in part, on
14 the subjective responses of the patient. However, as Dr. Ritchie conceded, this is really no different
15 from an audiogram which is the accepted test for evaluating hearing loss impairment, and which also
16 has a subjective element inherent in its hearing loss measurements.
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18 We also note that our courts have recognized that certain impairments are compensable even
19 though they cannot be fully measured by objective tests. In Price v. Dep't of Labor & Indus., 101
20 Wn.2d 520 (1984), our State Supreme Court held that workers suffering from an industrially-related
21 mental health condition are not required to present objective clinical evidence of worsening in order to
22 have their claim reopened for additional benefits. In coming to this conclusion, the Court explained
23 that psychiatric opinions are primarily based upon the patient's symptoms which are necessarily
24 subjective in nature. Price at 528. It appears that workers with the medically-acknowledged condition
25 of tinnitus face a similar situation, since such condition can affect them in much the same way as
26 would a mental health impairment, (i.e., loss of sleep, loss of concentration, interference with
27 interpersonal relations, etc.). Under these circumstances, we do not feel that it is reasonable to
28 demand that workers such as Mr. Lenk be required to demonstrate, in a completely objective manner,
29 that which medical technology may be as yet unable to precisely quantify.
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31 Having determined that tinnitus is a separate impairment from hearing loss, manifested by
32 some different functional responses, we now turn to the manner in which it should be rated. Tinnitus is
33 not listed as a specified permanent partial disability under RCW 51.32.080, nor does it fall under any
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1 of the categories of unspecified disabilities described in the Washington Administrative Code sections.
2 WAC 296-20-200 et. seq. Nonetheless, this does not mean that tinnitus cannot be rated. WAC 296-
3 20-220(1)(o) provides that bodily areas which are not included in the categories and which do not
4 involve loss of hearing, loss of central visual acuity, loss of an eye by enucleation, or loss of the
5 extremities or use thereof, "shall" be assessed for impairment "in terms of percentage of total bodily
6 impairment". As noted above, hearing loss and tinnitus are not synonymous; they have different
7 functional effects on the ears. Thus, we find that it was appropriate for Dr. Thomas to evaluate Mr.
8 Lenk's impairment due to tinnitus under the above-cited special rule for unspecified disabilities.
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13 Because there is no category which covers Mr. Lenk's tinnitus, we feel that it is proper to
14 evaluate his impairment by analogizing to those unspecified disabilities which are categorized. This is
15 certainly in line with the AMA Guide's instruction to assess the impairment "consistent with established
16 values". As noted, we believe that tinnitus is quite analogous to a mental health impairment because
17 they both involve a subjective component and can cause similar disruptions in activities of daily living.
18 Accordingly, we can use the rules for rating mental health impairments (WAC 296-20-340) as guides
19 for our evaluation of Mr. Lenk's impairment due to tinnitus.
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24 In opting for this approach, we do not suggest that the mental health categories should be
25 mechanically applied to determine impairment ratings for tinnitus. Rather, we recognize that in many
26 cases, the ultimate rating will fall between the various categories. For example, there is no
27 guaranteeing that the increments of mental impairment, either in terms of describing the loss of
28 function or in terms of the percentage of impairment, will correlate to increments of severity of tinnitus
29 problems. We emphasize that we use the mental health impairment scheme by way of analogy only.
30 Our decision in this matter does not prevent rating "between" categories as long as the rating is
31 supported by the medical evidence of record and is not inconsistent with the descriptions of the mental
32 health impairments.
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37 In applying these principles to the facts at hand, we agree with Dr. Thomas that the claimant's
38 industrially-related tinnitus is properly rated at a disability equal to 10% as compared to total bodily
39 impairment. As previously noted, the masking test performed in September of 1990 measured the
40 claimant's tinnitus at 94 decibels, which, in Dr. Thomas' opinion, is similar in intensity to a fire siren. In
41 addition, the frequency (pitch) of the claimant's tinnitus is at a considerably higher level (8,000 hertz)
42 than the frequencies of his ratable hearing loss (500 through 3,000 hertz). In other words, Mr. Lenk
43 has an effect on his hearing functions due to his tinnitus which is not reflected in his permanent partial
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1 disability award for binaural hearing loss based solely on the loss at the lower frequencies. Even Dr.
2 Ritchie stated that, while presence of tinnitus at one of the four frequencies at which binaural hearing
3 loss is rated would affect the percentage rating of such loss (i.e., would be encompassed within that
4 rating), such would not be the case if the tinnitus was at higher levels outside of those frequencies.
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7 Consistent with the results of the masking test showing an intense and high-pitched tinnitus, the
8 claimant is frequently irritable, has difficulty sleeping nearly every night, and cannot understand
9 conversations over the telephone. He also suffers severe headaches and is distracted due to
10 impaired concentration. Given these disruptions in daily activities, we are satisfied that the claimant's
11 impairment due to tinnitus most closely corresponds to the mild social and cognitive limitations
12 contemplated under Category 2 of WAC 296-20-340. Although the rather severe results of Dr.
13 Thomas' masking test (with which Dr. Ritchie stated he had no disagreement in light of his audiogram
14 findings) might imply a greater impairment, there is no evidence that the claimant has lost interest in
15 his usual daily activities or needs supervision to perform work activities, which factors are necessary
16 and contemplated under any category above Category 2.
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22 We must also note here that if the claimant's tinnitus was at frequency levels by which binaural
23 hearing loss is measured, our decision could very well be different, since in such a situation, according
24 to the evidence in this record, the tinnitus itself would affect and be encompassed within the binaural
25 hearing loss percentage rating. A rating determination under such a factual scenario must necessarily
26 await another case, with its medical evidence specifically addressed thereto.
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29 Finally, we feel constrained to address Mr. Edward Wright's contention in his Petition for
30 Review that his company, Western Wright Marine, Inc., should not be held solely responsible for Mr.
31 Lenk's occupationally-related hearing problems; although, as a legal matter, that issue is not before us
32 in this narrowly defined appeal.
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35 Mr. Wright points out that Mr. Lenk was exposed to high noise levels as a machinist for many
36 years before, and for a period of time after, his employment period with Western Wright Marine, Inc.
37 In fact, his work for this company was all in the year 1988. Mr. Wright states that the corporation was
38 dissolved as of the end of 1988, and that new owners commenced operating the plant in 1989, and
39 Mr. Lenk was rehired and worked for them in 1989 and 1990. These facts are corroborated by Mr.
40 Lenk's own testimony. The same type of machinery work was continued with the same equipment,
41 under the business name of Western Wright Marine, but with the word "Incorporated" being dropped
42 from the name. It is also possible that Mr. Lenk may have done some machinist work for other
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1 employers in this state, after moving here in 1982 and prior to going to work for Mr. Wright in 1988;
2 however, our testimonial record is not clear on this point. In light of this employment history, Mr.
3 Wright argues that most, if not all, of the costs of this claim should be charged to other employers.
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5 In this regard, our industrial appeals judge's Proposed Decision and Order found that Mr.
6 Lenk's last injurious exposure to high levels of occupational noise occurred during his employment at
7 Western Wright Marine, Inc. Based on the record before us, and in view of the limited issue we were
8 called upon to decide (i.e., solely whether or not Mr. Lenk's tinnitus condition warrants a permanent
9 partial disability award) such a finding should not be made, and is very possibly incorrect. While Mr.
10 Lenk's occupational exposure at Western Wright Marine, Inc., was no doubt injurious, it may not have
11 been his "last" injurious exposure. That exposure appears to have occurred during his work for the
12 successor employer, Western Wright Marine (with no "Inc.") in 1989 and 1990. If such is the case, the
13 Department of Labor and Industries may possibly charge all costs of this claim to the industrial
14 insurance account of Western Wright Marine, under the "last injurious exposure rule" which is used to
15 assign liability between successive insurers for occupational disease benefits. This rule requires that
16 the insurer "on the risk" during the most recent exposure, that has a causal relationship to the
17 occupational condition, is solely liable for the costs of the claim. Weyerhaeuser Company v. Tri, 117
18 Wn.2d 128 (1991).
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27 On the other hand, the Department has another rule regarding proration of costs resulting from
28 occupational disease claims, WAC 296-17-870(6). This rule applies to such claims involving a
29 worker's exposure to the "disease hazard" while working for two or more employers who are insured
30 under the State Fund. The rule provides that the Department shall prorate the costs of the claim to
31 each period of employment involving exposure to the hazard. If the Department applies this rule to the
32 costs of this claim, such costs would be proportionately shared with Western Wright Marine, and
33 perhaps with other employers in this state for whom Mr. Lenk may have done machinist work in the
34 1982 to 1988 period.
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39 As noted above, it is not within this Board's jurisdiction in this appeal to determine how the
40 Department should allocate the costs of this claim to potentially liable employers. That determination
41 must rest with the Department's underwriting and premium rating staffs, following our remand of this
42 claim to the Department.
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1 After consideration of the Proposed Decision and Order and the Petition for Review filed
2 thereto, and a careful review of the entire record before us, we enter the following findings and
3 conclusions:
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5 **FINDINGS OF FACT**
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- 7 1. On March 11, 1991, Robert K. Lenk, Sr., filed his application for benefits
8 with the Department of Labor and Industries alleging that he had suffered
9 hearing loss while in the employ of Western Wright Marine, Inc. On June
10 28, 1991, the Department issued an order which allowed the claim,
11 granted him an award for permanent partial disability equal to 28.43% of
12 complete hearing loss in both ears, and thereupon closed the claim. After
13 a Protest and Request for Reconsideration filed by the claimant on August
14 9, 1991, raising the issue of compensability of his tinnitus condition, the
15 Department issued an order on November 25, 1991, affirming the prior
16 order.
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18 On December 4, 1991, Mr. Lenk filed his Notice of Appeal with the Board
19 of Industrial Insurance Appeals from the November 25, 1991 Department
20 order, raising the sole issue of compensation for his tinnitus. On January
21 9, 1992, the Board issued an order which granted the appeal.
- 22 2. Mr. Lenk is a 53 year old man who has worked for over 30 years as a
23 machinist. In this capacity, the claimant was exposed to high noise levels.
24 He did not wear protective hearing devices, except on an intermittent
25 basis. In 1988, while working as a machinist for Western Wright Marine,
26 Inc., the claimant began to notice a constant, high pitched ringing noise in
27 his ears. Prior to this time, he had experienced a gradual loss of hearing
28 in both ears.
- 29 3. As a proximate and natural consequence of his many years of
30 occupational exposure to machine noise while working as a machinist,
31 including the years of 1988, 1989, and 1990 when he engaged in such
32 work for Western Wright Marine, Inc., and for its successor, Western
33 Wright Marine, the claimant developed binaural hearing loss and tinnitus.
34 Exposure to high noise levels was a distinctive condition of the claimant's
35 employment as a machinist.
- 36 4. As of November 25, 1991, the claimant had binaural hearing loss as
37 demonstrated by an audiogram, at the 1,500, 2,000, 3,000, and 4,000
38 hertz frequencies, with recovery at the 6,000 hertz level. In addition, he
39 had tinnitus, as measured by a masking test, at the intensity of 94 decibels
40 bilaterally at the frequency of 8,000 hertz.
- 41 5. As of November 25, 1991, the claimant had the following mild social and
42 cognitive limitations due to his tinnitus at the 8,000 hertz frequency:
43 frequent irritability; difficulty understanding conversations over the
44 telephone; problems reading and following directions due to impaired
45 concentration; and frequent substantial sleep disturbances. These
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1 limitations on his normal function were not related to his bilateral hearing
2 loss at the lower hertz frequencies.

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4 6. As of November 25, 1991, the claimant's hearing loss causally related to
5 his occupational exposure was fixed and stable and resulted in permanent
6 partial disability equal
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8 7. As of November 25, 1991, the claimant's tinnitus causally related to his
9 occupational exposure was fixed and stable and resulted in permanent
10 partial disability equal to 10% as compared to total bodily impairment.

11 **CONCLUSIONS OF LAW**

- 12 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties
13 and the subject matter to this appeal.
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15 2. The claimant's hearing loss and tinnitus are compensable as occupational
16 diseases within the meaning of RCW 51.08.140.
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18 3. As of November 25, 1991, the claimant had a permanent partial disability
19 due to hearing loss equal to 28.43% of complete hearing loss in both ears,
20 within the meaning of RCW 51.32.080.
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22 4. As of November 25, 1991, the claimant had a permanent partial disability
23 due to tinnitus equal to 10% as compared to total bodily impairment within
24 the meaning of RCW 51.32.080 and WAC 296-20-220(1)(o).
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26 5. The order of the Department of Labor and Industries dated November 25,
27 1991, which affirmed an order of the Department dated June 28, 1991,
28 which order granted Mr. Lenk an award for permanent partial disability
29 equal to 28.43% of complete hearing loss in both ears and closed the
30 claim, is incorrect in part and is reversed, and the claim is remanded to the
31 Department with directions to grant Mr. Lenk said award for permanent
32 partial disability for hearing loss equal to 28.43% of complete hearing loss
33 in both ears, to accept the tinnitus condition, to grant Mr. Lenk an award
34 for permanent partial disability for tinnitus equal to 10% as compared to
35 total bodily impairment, and thereupon to close the claim.

36 It is so ORDERED.

37 Dated this 12th day of May, 1993.

38 BOARD OF INDUSTRIAL INSURANCE APPEALS

39 /s/
40 S. FREDERICK FELLER Chairperson

41 /s/
42 FRANK E. FENNERTY, JR. Member

43 /s/
44 PHILLIP T. BORK Member

1 **SPECIAL ADDITIONAL STATEMENT**

2 I have joined my colleagues in the foregoing decision, because the evidence in the record is
3 very clear that Mr. Lenk does have a substantial tinnitus condition in addition to his bilateral
4 sensorineural hearing loss; that such tinnitus condition is at a high level of frequency (pitch) not
5 encompassed by his ratable hearing loss at the lower frequency levels; and that the effects on his
6 normal functions by reason of the tinnitus are in addition and unrelated to the effect of his hearing loss.
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8 However, two things disclosed by this record disturb me.
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10 (1) Dr. Thomas has been the subject of at least two proceedings before the Medical
11 Disciplinary Board based on serious unethical and improper actions connected with his medical
12 practice, for which he is now under a probationary period imposed by that Board, involving close
13 monitoring of details of his practice and several other sanctions imposed on him. He is, however,
14 entitled to continue to practice during the probation, subject to compliance with all terms thereof.
15 Suffice it to say that the ethical violations involved raise substantial doubts about Dr. Thomas' honesty,
16 trustworthiness, and morality.
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18 However, I accept Dr. Thomas' opinions on the existence of Mr. Lenk's tinnitus, its intensity and
19 frequency level, the deleterious effects it has on his normal functioning, and the justification for
20 assigning it an impairment rating separate from the bilateral hearing loss rating in this case. This
21 acceptance is not because of any great credibility attached to Dr. Thomas, but because, on all these
22 salient medical points, his opinions are effectively corroborated by those of Dr. Ritchie! Dr. Ritchie's
23 only departure appears to be that since effects of tinnitus are not "measurable", that is not sufficiently
24 objective to allow an impairment rating to be determined. We have exhaustively set forth in our
25 decision the reasons why this is not so.
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27 (2) The record strongly suggests that Dr. Thomas is absolutely the only otolaryngologist in this
28 state who will rate impairment from tinnitus. This is puzzling, if true, in view of the Department rule
29 recognizing tinnitus as an acceptable condition; the AMA guidelines recognizing it as a condition which
30 is subject to an impairment rating; the apparent general acceptance of those guidelines in evaluating
31 hearing-related problems; and the rule in WAC 296-20-220(1)(o) setting forth that bodily disabilities not
32 specified in RCW 51.32.080 and not included in the categories of unspecified disabilities shall be
33 assessed for impairment in terms of "percentage of total bodily impairment".
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35 The record reflects that there are Tinnitus Clinics at both the University of Washington and
36 University of Oregon Medical Schools, and the masking test and its proper application for determining
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1 intensity and frequency level of tinnitus was developed at the Oregon School. With availability of
2 these expert technical resources, it certainly appears that the entire otolaryngology community ought
3 to come up with a greater degree of standardization in evaluation of relative severities of tinnitus, to
4 arrive at greater consistency and fairness in administrative adjudication of all cases of occupational
5 noise-induced tinnitus. I sincerely hope this will be an achievable goal in our state's system.
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9 Certainly, an endless succession of adversarial cases before this Board and/or the courts --
10 with the suspect Dr. Thomas as the expert witness on claimant's side, and various
11 otolaryngologists/forensic examiners called as witnesses on the defense side -- is not a sensible or
12 efficient or cost-effective way to go. While certainly lucrative to the medical experts, and also to the
13 attorneys representing claimants and employers, such a litigious "system" does little to advance the
14 interests of the only two truly interested parties in the workers' compensation arena, namely, workers
15 and employers.
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19 Dated this 12th day of May, 1993.
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22 /s/
23 PHILLIP T. BORK Member
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