

Conrad, Lloyd

OCCUPATIONAL DISEASE (RCW 51.08.140)

Tinnitus

A claim for hearing loss should not be rejected merely because the loss is not a rateable impairment under the Industrial Insurance Act. *Citing In re Robert MacPhail*, BIIA Dec., 89 3689 (1991). A claim for tinnitus should be allowed where the evidence establishes that the tinnitus exists, that it interferes with worker's daily functioning and is related to noise exposure during the course of employment. ...*In re Lloyd Conrad*, BIIA Dec., 92 0602 (1993) [concurrence]

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

1	IN RE: LLOYD E. CONRAD)	DOCKET NO. 92 0602
2)	
3	<u>CLAIM NO. T-533841</u>)	DECISION AND ORDER
4			

5 APPEARANCES:

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7 Claimant, Lloyd E. Conrad, by
8 Welch & Condon, per
9 David B. Condon, Attorney

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11 Self-Insured Employer, The Weyerhaeuser Company, by
12 David R. Harkness, Corporate Counsel

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14 This is an appeal filed by the claimant, Lloyd E. Conrad, on January 27, 1992 from an order of
15 the Department of Labor and Industries dated December 12, 1991 which affirmed an October 10,
16 1991 order. The latter order denied Mr. Conrad's claim on the grounds that he did not have
17 compensable hearing loss as defined by the Washington State Industrial Insurance Act. **REVERSED**
18 **AND REMANDED.**

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 October 30, 1992 in which the order of the Department dated December 12,
26 1991 was reversed and the claim remanded with direction to allow the claimant's tinnitus condition,
27 and to close the claim with a permanent partial disability award of 10% as compared to total bodily
28 impairment for claimant's occupationally-induced tinnitus.

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30 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no
31 prejudicial error was committed and said rulings are hereby affirmed.

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33 We agree with the Proposed Decision and Order's reversal of the Department order and
34 acceptance of the claim for the condition of tinnitus. However, rather than directing the Department to
35 close the claim with a permanent partial disability award, we will remand the claim to the Department
36 for its appropriate adjudication of this newly accepted condition. Also, the claim for hearing loss
37 should have been allowed even though the work-related portion of claimant's hearing loss is not
38 compensable under permanent partial disability standards. We will recite the relevant facts
39 concerning the claim.
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1 For eleven years prior to his retirement in 1978, Mr. Conrad operated chainsaws in the woods
2 as an employee of the Weyerhaeuser Company. Mr. Conrad did not wear hearing protection during
3 his employment at Weyerhaeuser. He testified that prior to his retirement in 1978 he had ringing in his
4 ears and hearing loss. The ringing in his ears woke him up at night. In 1975 and 1977, Mr. Conrad
5 was given audiometric tests by Weyerhaeuser. In 1990, twelve years after his retirement, Mr. Conrad
6 underwent a hearing test and was referred to Gordon Thomas, M.D., an otolaryngologist. Dr. Thomas
7 ordered an audiogram in January 1991 which revealed neurosensorial hearing loss. The doctor rated
8 Mr. Conrad's hearing at 23.4% binaural loss and stated that it had been caused by the claimant's work
9 at Weyerhaeuser. Dr. Thomas saw Mr. Conrad on several more occasions in 1991 and early 1992.

10 After Mr. Conrad filed this industrial insurance claim, Weyerhaeuser had him evaluated in
11 August 1991 by William Ritchie, M.D., also an otolaryngologist. Dr. Ritchie found the same
12 percentage of binaural hearing loss as did Dr. Thomas, but he did not relate it to the claimant's work at
13 Weyerhaeuser. Instead, Dr. Ritchie testified that most of the hearing loss was due to aging. Yet, Dr.
14 Ritchie acknowledged that Mr. Conrad had some hearing loss in 1977, although it was not sufficient
15 enough to constitute a rateable hearing impairment. Ritchie Dep. at 18-19.

16 Dr. Thomas also found that Mr. Conrad had tinnitus or ringing in the ears. He based this finding
17 on results of a masking test developed at the University of Oregon to diagnose and evaluate tinnitus.
18 The doctor rated Mr. Conrad's disability due to tinnitus at 10% as compared to total bodily impairment.
19 While Dr. Ritchie did not make a specific diagnosis of tinnitus, he did acknowledge that tinnitus can be
20 caused by noise. Dr. Ritchie also stated that tinnitus can affect hearing ability. Also, that any
21 impairment due to tinnitus is included in hearing loss impairment ratings, provided that the tinnitus is
22 present in the 500 through 3,000 hertz frequency levels, which are the frequencies at which hearing
23 loss is measured and calculated. Dr. Ritchie reviewed the audiometric tests done in 1975 and 1977
24 and concluded that, while Mr. Conrad had some hearing loss as of 1977, most of the loss found in
25 1991 was due to aging. Ritchie Dep. at 21. Dr. Thomas did not rate any hearing loss existing in 1977,
26 although he said that there was some loss present. Thomas Dep. at 31.

27 We agree with the industrial appeals judge that the claimant did not prove that he had any
28 rateable hearing loss due to work exposure which constitutes a permanent impairment under the
29 Industrial Insurance Act. However, since he had some hearing loss due to his employment, the claim
30 probably should not have been rejected in total. Rather, the Department should have allowed the
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1 claim and ordered payment of any medical bills for reasonable treatment, testing and diagnosis of that
2 condition. In re Robert E. MacPhail, BIIA Dec., 89 3689 (1991).

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4 The Board is aware that the Department of Labor and Industries has apparently been reluctant
5 to recognize tinnitus as a condition for which a worker can be rated for possible permanent partial
6 disability. This reluctance apparently is due to a perceived inability to objectively measure the extent
7 of impairment caused by such condition. Based on the record here, we must find that the claimant has
8 established that he has tinnitus caused by his Weyerhaeuser employment, and that the condition has
9 some effect on his daily functioning.

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11 We note that the self-insured employer did not object to testimony based on the University of
12 Oregon tinnitus test on grounds that the test is unreliable, or that it is not accepted in the medical
13 community. In fact, Dr. Ritchie, the self-insured employer's expert witness, readily admitted that he
14 himself has directed audiologists to administer tinnitus tests to patients in the past. For some reason,
15 he did not do so in Mr. Conrad's case. Further, Dr. Ritchie explained that tinnitus can be both an
16 objective and subjective experience, and that it can be objectively substantiated when, "the frequency
17 and intensity of the tinnitus can be measured by asking the person to respond to tones that are of the
18 same frequency and intensity as the ringing that they hear in the ear. That is both a subjective and
19 objective test." Ritchie Dep. at 14-15. Dr. Ritchie acknowledged that the University of Oregon tinnitus
20 test measures the intensity and frequency of ringing in the ear, but he said that it does not measure
21 "how much disability or impairment or how much the ringing bothers the person." Ritchie Dep. at 15.
22 Dr. Ritchie explained that since tinnitus affects the ability to hear, he does not think it should be
23 independently rated separately from impairment due to hearing loss. Yet, he also admitted that to the
24 extent that tinnitus occurs at a different frequency level than the frequencies used in the audiometric
25 test for hearing loss rating, an audiometric test would not measure or rate tinnitus.

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27 Based on the medical evidence within this record, we must conclude that tinnitus can be
28 verified and measured, at least partly in an objective manner. The two medical experts really only
29 disagree as to the method of determining impairment. Dr. Thomas used the measurements of the
30 University of Oregon test, along with some subjective evaluation of effect of the tinnitus on Mr.
31 Conrad's daily functioning, and rated his impairment at 10% as compared to total bodily impairment.
32 Dr. Ritchie stated that the impairment Mr. Conrad may have had due to tinnitus was part of the
33 bilateral hearing loss rating.

1 With regard to the cause of Mr. Conrad's tinnitus, Dr. Thomas related it to noise exposure at
2 Weyerhaeuser. Dr. Ritchie was not directly asked whether he believed Mr. Conrad had tinnitus
3 caused by his work at Weyerhaeuser. It can be inferred that since he did not rate any hearing loss
4 related to Mr. Conrad's past work, he also would not relate any tinnitus to the claimant's work.
5 Nevertheless, Dr. Ritchie agreed that tinnitus can be caused by exposure to noise. Ritchie Dep. at 28.
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7 The most the expert testimony establishes is that Mr. Conrad incurred both some hearing loss and
8 some tinnitus during his eleven years running chainsaws for Weyerhaeuser. The claimant did not
9 prove that the hearing loss caused by that work exposure was compensable. It is also premature to
10 rate impairment for the newly addressed condition of tinnitus.
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14 The record shows that tinnitus can be noise-induced. Mr. Conrad was exposed to noise at
15 Weyerhaeuser which caused some hearing loss. He also described ringing in his ears which existed
16 while he worked at Weyerhaeuser. While Dr. Ritchie inferentially would dispute a causal relationship
17 between Mr. Conrad's work at Weyerhaeuser and his tinnitus he, Dr. Ritchie, provided no basis to
18 refute Dr. Thomas's conclusions that there was a causal relationship. In addition, there were no earlier
19 tinnitus test results to be used for comparison with the tinnitus test given to Mr. Conrad in 1991. Thus,
20 we must view the weight of the evidence as showing that the tinnitus is related at least partly to Mr.
21 Conrad's work at Weyerhaeuser.
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24 We have held that even if a worker's hearing loss caused by work exposure is not
25 compensable under permanent partial disability rating standards, the Department should not reject a
26 claim. In re Robert E. MacPhail, supra. Rather, the Department should allow the claim and order
27 benefits such as treatment and/or payment for diagnostic tests. See WAC 296-20-1101. Similarly, if
28 the weight of the evidence supports the conclusion that a claimant has tinnitus caused by exposure to
29 noise at work, then a claim for tinnitus should be accepted under the Industrial Insurance Act. A
30 worker who is, in fact, affected by noise-induced tinnitus should not have his claim rejected merely
31 because physicians may dispute a proper method for evaluating the extent of permanent impairment it
32 causes. A worker with work-related tinnitus may benefit from medical treatment such as noise
33 masking. We note that WAC 296-20-1101 specifically provides that masking devices may be provided
34 in cases of accepted tinnitus, when recommended by a physician.
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37 It is also specifically provided in the regulations implementing the Act that a physician is to rate
38 impairment not covered by the category rules or the statutory listing of specified disabilities, by
39 evaluating the worker's functional impairment "in terms of percentage of total bodily impairment."
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1 WAC 296-20-220(1)(o). As discussed in Dr. Ritchie's deposition, the American Medical Association's
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3 Guides to the Evaluation of Permanent Impairment (which are utilized in our state for hearing-related
4 problems) recognize that a physician should rate impairment from tinnitus "based on severity and
5 importance, and consistent with established values." Based on this record, Mr. Conrad's claim for
6 tinnitus must be allowed, and benefits as appropriate under the Act provided.
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9 In reaching our conclusions we have emphasized our reliance on the "record" developed in this
10 appeal. We do this purposefully because we are not indicating an unreserved acceptance of either
11 expert's testimony. As to the pivotal questions of the causation and effects of tinnitus, the two experts
12 essentially corroborate each other. That is, that tinnitus can be noise-induced and it can affect a
13 person's ability to function. Having accepted these two points, Dr. Thomas's opinions appear the more
14 persuasive ones when considering all of the other facts and data.
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18 In his proposed decision, the industrial appeals judge applied the rating for tinnitus of 10% as
19 compared to total bodily impairment, as testified to by Dr. Thomas. However, the Department's order
20 on appeal had rejected this claim. We are reversing this rejection and ordering benefits as may be
21 indicated for hearing loss other than a permanent disability award. We also order acceptance of
22 tinnitus, a condition not specifically nor even inferentially previously addressed in this claim by the
23 Department, so far as our record discloses. It is well established that the Department has original
24 jurisdiction over industrial insurance claims, including the issue of amount of compensation and
25 benefits to be awarded to a claimant once a judgment is issued that reverses original rejection of a
26 claim. Cole v. Dep't of Labor & Indus., 137 Wash. 538, 543 (1926). The Department must be given
27 the opportunity to adjudicate this newly accepted claim for tinnitus and determine if treatment for it was
28 or is necessary or if the condition is fixed and stable. If the condition is fixed and stable, then the
29 Department must determine whether Mr. Conrad has any permanent disability from tinnitus.
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33 In conclusion, Mr. Conrad has proven that he developed the condition of tinnitus as a proximate
34 result of noise exposure in his employment at Weyerhaeuser. The order denying his claim must be
35 reversed and his claim accepted for tinnitus. Mr. Conrad failed to establish that he has hearing loss
36 which can be compensated under the Industrial Insurance Act. Since the Department has not had the
37 opportunity to adjudicate the appropriate benefits to be allowed under the claim for the accepted
38 condition of tinnitus, the claim must be remanded to the Department for such a purpose. In this
39 respect, the posture of this claim is different from that presented in our recent decision in In re Robert
40 K. Lenk, Sr., Dckt. No. 91 6525 (May 12, 1993), wherein the issue of extent of permanent disability
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1 due to claimant's work-related hearing problems (both hearing loss and tinnitus) was squarely before
2 us, since both conditions had been considered by the Department, the claim had been allowed, and
3 the Department had the opportunity to administratively adjudicate the question of permanent disability
4 from both conditions.
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7 From the Proposed Decision and Order, the Board adopts Findings of Fact Nos. 1, 2, and 3,
8 and Conclusions of Law Nos. 1 and 2. We hereby enter the following additional finding and
9 conclusion:
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11 **FINDINGS OF FACT**

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13 4. As a proximate result of his work as a cutter for Weyerhaeuser from 1967
14 to 1978, and exposure during that period to occupational noise, the
15 claimant developed tinnitus, i.e., ringing in the ears.
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17 **CONCLUSIONS OF LAW**

- 18 3. The order of the Department of Labor and Industries dated December 12,
19 1991 which denied this claim, is reversed and the claim is remanded to the
20 Department to issue an order accepting the claim for occupational tinnitus
21 and for noncompensable occupational hearing loss, and instructing the
22 self-insured employer to provide benefits to which the claimant may be
23 entitled under the Industrial Insurance Act including the payment of any
24 medical bills incurred by the claimant for reasonable treatment, testing,
25 and diagnosis of hearing loss and tinnitus, including payment for hearing
26 aids or masking devices if found necessary and proper and recommended
27 by a physician, and to take such further action on the claim as indicated by
28 the facts and authorized by law.
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30 It is so ORDERED.

31 Dated this 3rd day of June, 1993.

32 BOARD OF INDUSTRIAL INSURANCE APPEALS

33
34 /s/ _____
35 S. FREDERICK FELLER Chairperson

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

38 /s/ _____
39 PHILLIP T. BORK Member
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42 **SPECIAL ADDITIONAL STATEMENT**

43 I have joined my colleagues in the foregoing decision, because the very clear preponderance
44 of the evidence in this record is that Mr. Conrad does have an occupational noise-induced tinnitus
45 condition, even though he does not have hearing loss sufficient to constitute a ratable hearing loss
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1 impairment, related to his occupational noise exposure. Furthermore, it is clear from this record, as it
2 was in our recently decided case of In re Robert K. Lenk, Sr., Dckt. No. 91 6525 (May 12, 1993), that
3 the effects on a person's functions due to tinnitus are, at least in part, separate from the effects of
4 hearing loss. In short, tinnitus is a different condition subject to somewhat different methods of
5 medical evaluation, as compared to straight hearing loss evaluations. This difference is clear from the
6 evidence herein, as well as the Department's own rules concerning tinnitus as an acceptable
7 condition, and the AMA guidelines recognizing it as being a separate ear condition for impairment
8 evaluation purposes.

9 However, certain other things disclosed by this record disturb me, similar to the disclosures
10 made in the record in Lenk, supra.

11 (1) Dr. Thomas has been the subject of two proceedings before the Medical Disciplinary
12 Board based on unethical and improper actions connected with his medical practice, for which he has
13 been and is now under probationary periods imposed by that Board. He is, however, entitled to
14 continue to practice during the probation, subject to compliance with the terms thereof. Suffice to say
15 that the ethical violations involved raise substantial doubts about Dr. Thomas' honesty,
16 trustworthiness, and morality.

17 However, I accept Dr. Thomas' views on the existence of Mr. Conrad's tinnitus, the effects
18 such a condition can have on a person's normal functions, and the efficacy of the tinnitus masking test
19 in giving some objectivity to evaluation of tinnitus regarding its intensity and frequency level. This
20 acceptance is not based on any great credibility attached to Dr. Thomas, but because, on these salient
21 medical points, his views were either not rebutted, or were actually corroborated, by the opinions of Dr.
22 Ritchie!

23 (2) This appeal is but one of a quite substantial number of cases which have been filed with
24 this Board, concerning the issue of tinnitus as an occupationally-caused condition, and the related
25 issue of whether, and to what extent, permanent partial disability awards should be granted for this
26 condition. Interestingly, based on our experience to date, Dr. Thomas appears to be the singular
27 physician promoting these claims, and appearing as the expert otolaryngologist at the hearings in the
28 cases before this Board.

29 In this regard, the record here shows, as it did in the Lenk case, that there are Tinnitus Clinics
30 at both the University of Washington and University of Oregon Medical Schools, and the tinnitus
31 masking test was apparently developed at the Oregon School. With availability of these resources, it
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1 certainly appears that the otolaryngology community ought to be able to come up with a greater
2 degree of standardization in evaluation of tinnitus, its causal relation to noise exposure, and
3 determination of relative severities of the condition, so there can be more consistency and fairness in
4 administrative adjudication of all claims of occupational noise-induced tinnitus.
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7 Certainly, an endless succession of adversarial cases before this Board and/or the courts --
8 with the suspect Dr. Thomas on claimant's side, and various otolaryngologists/forensic examiners
9 called as witnesses by the defense -- is not a sensible or efficient or cost-effective way to go. While
10 certainly lucrative to the medical expert witnesses, and to the attorneys representing the combatants,
11 such a litigious "system" does little to advance the interests of certainty and consistency desired by the
12 only two truly interested parties in the workers' compensation arena, namely, workers and employers.
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15 Dated this 3rd day of June, 1993.
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18 /s/
19 PHILLIP T. BORK Member
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