Williams, Louis

COVERAGE AND EXCLUSIONS

Self-employment

OCCUPATIONAL DISEASE (RCW 51.08.140)

Longshore and Harbor Workers' Compensation Act

A claim should not be rejected on the basis the condition developed while the worker was self-employed and not covered by the industrial insurance laws as the last injurious exposure rule was not intended to apply as a basis to deny a claim. The Department is required to determine the nature and extent of the worker's covered employment to determine whether any of such employment impacted the worker's condition. *Citing In re John Robinson*, BIIA Dec., 91 0741 (1992) (federal) and *In re Gary Peck*, Dckt No. 91 6243 (January 19, 1993) (another state). **….*In re Louis Williams*, BIIA Dec., 92 4110 (1993)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: LOUIS J. WILLIAMS	**)**	**DOCKET NO. 92 4110**
	)	
CLAIM NO. N-383989	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Louis J. Williams, by
Rumbaugh & Rideout, per
Teri L. Rideout

Employer, Oyster Bay Inn, by
None

Department of Labor and Industries, by
The Office of the Attorney General, per
Michael Davis-Hall, Assistant and Sherry Silver, Paralegal

This is an appeal filed by the claimant, Louis J. Williams, on June 10, 1992 from an order of the Department of Labor and Industries dated May 6, 1992 which rejected the claim on the grounds that the claimant was a federal employee at the time of his industrial injury. **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 Department of Labor and Industries to a Proposed Decision and Order issued on March 1, 1993 in which the order of the Department dated May 6, 1992 was reversed, and the claim was remanded with directions to accept the claim and, if possible, determine the amount of hearing loss suffered by Mr. Williams while he was self-employed at the Silverdale Laundromat, and grant him an award for hearing loss equal to the remaining hearing loss, or, if such deduction is not possible, to grant Mr. Williams an award for the entire amount of hearing loss, including his employment at the Silverdale Laundromat, and to thereupon close the claim.

The issue presented by this appeal and the facts stipulated into the record by the parties are adequately set forth in the Proposed Decision and Order.

The Department admits that the basis for claim rejection set forth in its May 6, 1992 order is incorrect. See, Memorandum in Support of Department's Order. In addition, the stipulated facts reflect that the claimant was not a federal employee but was self-employed as a sole proprietor at the time of the last injurious exposure. Finally, the parties argued this case based on the claimant's status as a sole proprietor. The scope of review thus extends to this alternative basis of claim rejection. See, In re Cathy E. Lively, BIIA Dec., 62,097 (1983).

The Department wishes to apply the last injurious exposure rule, WAC 296-14-350(1), as a basis to reject a hearing loss occupational disease claim where the last injurious exposure occurred while the claimant was a sole proprietor who had not elected to obtain coverage under the Act.

RCW 51.12.020(5) excludes the claimant's status as a sole proprietor from mandatory coverage, and the claimant had not elected to obtain coverage under the Act pursuant to RCW 51.32.030. He was, as a sole proprietor, simply not covered under industrial insurance. The Department asserts the last injurious exposure rule may be applied because a sole proprietor is, "in effect", a self-insurer under the Act as the latter term is defined by RCW 51.08.173 and qualified by Chapter 14, Title 51. The plain wording of those statutory requirements simply belie such an argument.

As we explained in In re John L. Robinson, Dckt. No. 91 0741 (September 29, 1992), "The 'last injurious exposure rule is not to be used as a basis to deny benefits when exposure has occurred under different compensation systems . . ."It is to be applied only "to the last employer over which (a) particular compensation program has jurisdiction." In re Richard C. Corkum, Dckt. No. 90 0280 (March 28, 1991). Mr. Williams was not self-insured as defined by RCW 51.08.173 and therefore not within the jurisdiction of our state's industrial insurance system at the time of his last injurious exposure to noise. Under such circumstances, the last injurious exposure rule cannot be used to deny coverage for injurious exposures which have occurred to Mr. Williams while under our Act. It is true that Mr. Williams may bear an individual risk for additional exposures in his uncovered status, but this does not allow the Department to avoid responsibility for injurious exposures to Mr. Williams while working at covered employments within this state.

We find no reason to distinguish the underlying principle to be applied to this case from that applied in previous Board decisions denying the use of the last injurious exposure rule where the last injurious exposure occurred under another insurance system, such as another state, In re Gary Peck, Dckt. No. 91 6243 (January 19, 1993) or Federal system. Robinson, supra.

We agree with the Proposed Decision and Order which correctly reversed the Department order which had rejected the claim in toto on the basis of the last injurious exposure rule. To the extent that Mr. Williams sustained occupational noise-induced hearing loss in his employment as a covered worker under our industrial insurance system (specifically from 1948 to 1958, from 1958 to 1966, and in 1968 and 1969), he is entitled to such benefits and compensation as may be supported factually.

We will enter findings and conclusions which require the Department to further investigate and consider this claim on its merits, and to determine the extent of benefits and compensable disability he may be entitled to, based on the periods of employment exposure during which he was a worker covered by the provisions of the Industrial Insurance Act. These matters have not yet been addressed by the Department. They must be so addressed now.

Finally, we note that the issue in this case is the same as in the cases of In re Curtis Rudolph, Dckt. No. 90 4312 (June 17, 1991) and In re Marvin Fankhauser, Dckt. No. 89 4870 (July 2, 1990), both of which were appealed to the courts and are currently pending decision by the Supreme Court of Washington, in Cause No. 59170-9. Our disposition of this case is the same as was made in those two cases.

FINDINGS OF FACT

1. On December 3, 1991, immediately after being notified by Dr. Gordon Thomas of industrially related hearing loss, Louis J. Williams, filed his application for benefits with the Department of Labor and Industries, alleging that he suffered occupational exposure to noise which caused hearing loss in both ears while in the employ of the Oyster Bay Inn. On May 6, 1992, the Department issued an order rejecting the claim for benefits on the ground that the claimant was a federal employee at the time of injury and was not subject to the provisions of the industrial insurance laws of the State of Washington.

   On June 10, 1992, the claimant filed his notice of appeal with the Board of Industrial Insurance Appeals from the Department order of May 6, 1992. On July 9, 1992, the Board issued an order granting the appeal.

2. As of May 6, 1992, Louis J. Williams had noise-induced hearing loss which was caused by noise exposure during the following employment periods: two years during the 1940's while Mr. Williams was enlisted in the Navy at Adak, Alaska; 1948-1958, while Mr. Williams was an employee of Liquified Natural Gas, in Seattle, Washington; 1958-1966, while Mr. Williams was an employee of Suburban Propane Gas Company, in Tacoma and Bremerton, Washington; 1966-1967, while Mr. Williams was an employee of Puget Sound Naval Shipyards, in Bremerton, Washington;

1968-1969, while Mr. Williams was an employee of Hill, Ingman and Chase, in Seattle, Washington; and, 1965-1972, while Mr. Williams was self-employed at the Silverdale Laundromat, in Silverdale, Washington.

3. While self-employed at the Silverdale Laundromat, Mr. Williams' status was a self-employed sole proprietor. This employment was not subject to mandatory industrial insurance coverage.

4. From 1965 through 1972, Mr. Williams did not elect to obtain industrial insurance coverage under the Act, for himself as the sole proprietor of the Silverdale Laundromat.

5. Mr. Williams' last injurious exposure to noise occurred during his self-employment at the Silverdale Laundromat from 1965 through 1972. There was no insurer providing industrial insurance under the Act for this self-employment.

6. Mr. Williams was an employee covered by the Industrial Insurance Act while working for Hill, Ingman and Chase in 1968 and 1969. Mr. Williams suffered hearing loss caused by exposure during that employment, which was the last injurious exposure for which there was an insurer providing coverage for the claimant under the Industrial Insurance Act.

7. On December 3, 1991, immediately after having been informed by Gordon Thomas, M.D., that he had an occupationally related hearing loss, Mr. Williams filed his application for benefits with the Department.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to this appeal. The Board also has jurisdiction over the subject matter, i.e., whether this claim was properly rejected because claimant's last injurious exposure was in self-employment as a sole proprietor for which he had not elected voluntary coverage.

2. RCW 51.12.020(5) excludes from mandatory coverage of RCW Title 51 the claimant's self-employment as a sole proprietor from 1965 through 1972, and he had not elected to obtain such coverage for himself pursuant to RCW 51.32.030.

3. The last injurious exposure rule, as stated in WAC 296-14-350(1), applies only to insurers providing industrial insurance coverage under the provisions of the Washington Industrial Insurance Act. A self-employed sole proprietor is not an insurer, within the meaning of the regulation.

4. The order of the Department of Labor and Industries dated May 6, 1992, which rejected the claim for benefits on the ground that Mr. Williams was a federal employee at the time of his injury and was not subject to the provisions of the industrial insurance laws of the State of Washington, is incorrect and is reversed. The claim is remanded to the Department with directions to further investigate and consider the claim on its merits, and to determine the extent of benefits and disability compensation, if any, to

which Mr. Williams may be entitled based on the periods of employment during which he was a worker covered by the Industrial Insurance Act, and to take further adjudicative action as may be indicated by the facts and the law.

It is so ORDERED.

Dated this 17th day of May, 1993.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
S. FREDERICK FELLER Chairperson

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

/s/_____
PHILLIP T. BORK Member