McIndoe, Robert

PERMANENT PARTIAL DISABILITY (RCW 51.32.080)

Award after pension determination

The Department is not required to pay an award of permanent partial disability benefits for a claim that was not pending at the time of the award of benefits for permanent total disability. *Explaining Clauson v. Department of Labor & Indus.*, 130 Wn.2d 580 (1996). ***….In re Robert McIndoe*, BIIA Dec., 97 4146 (1998)** [dissent] [*Editor's Note*: *Reversed, McIndoe v. Department of Labor & Indus*., 144 Wn.2d 252 (2001).]

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: ROBERT I. MCINDOE	)	**DOCKET NO. 97 4146**
	)	
CLAIM NO. P-429857	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Robert I. McIndoe, by
Tom G. Cordell, per
Tom G. Cordell

Employer, Cantex Engineering & Construction,
None

Department of Labor and Industries, by
The Office of the Attorney General, per
Stephen K. Meyer, Assistant

The claimant, Robert I. McIndoe, filed an appeal with the Board of Industrial Insurance Appeals on May 21, 1997, from an order of the Department of Labor and Industries dated May 1, 1997. The order affirmed the provisions of an order issued on September 27, 1996, that allowed the claim for benefits, determined that Cantex Engineering & Construction was the claimant's employer of record for the claim, and closed the claim. The Department's Motion for Summary Judgment is **GRANTED.** The claimant's Motion for Summary Judgment is **DENIED** and the Department order of May 1, 1997, is **AFFIRMED.**

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 to a Proposed Decision and Order issued on December 31, 1997, in which the order of the Department dated May 1, 1997, was reversed and remanded to the Department with directions to provide the claimant with such monetary and other benefits, including compensation for permanent occupationally-related hearing loss, as is in accordance with the law and the facts.

Both the claimant and the Department filed motions for Summary Judgment. In ruling on those motions, the Board has considered the following documents and evidence submitted by the parties:

1. Claimant's Motion for Summary Judgement with attachments 1-4, filed on December 5, 1997.

2. December 2, 1997 Declaration of Robert I McIndoe, filed on December 5, 1997.

3. Department's Motion for Summary Judgement with exhibits A-G, filed on December 22, 1997.

4. Department's Memorandum in Support of Summary Judgment, filed on December 22, 1997.

We grant review in this matter because we do not agree with the result the hearing judge arrived at in reconciling the leading decision of *In re Roy Sulgrove*, BIIA Dec., 88 0869 (1989) with the Supreme Court's decision in *Clauson v. Department of Labor & Indus.*, 130 Wn.2d 580 (1996). In our opinion, Summary Judgment should have been entered in favor of the Department.

The parties agree on the chronology of Mr. McIndoe's injury and the procedural history of the claims before the Department. The only issue is whether the Department applied the proper law to the administration of those claims. A brief factual review is necessary to demonstrate why we believe the Department made the proper determination.

After nine years as a heavy equipment operator, during which he was exposed to damaging levels of noise, Mr. McIndoe suffered an industrial injury on February 9, 1994. As a result of that injury, he was determined to be a permanently totally disabled worker in a Department order issued on June 24, 1996, and was awarded benefits effective August 20, 1995.

On June 10, 1996, Mr. McIndoe consulted Dr. Timothy Patton about hearing loss. Dr. Patton diagnosed 19.56 percent binaural hearing loss, more probably than not related to Mr. McIndoe's noise exposure at work. On July 5, 1996, Mr. McIndoe filed an application for benefits

for the hearing loss claim. The Department allowed the claim, but closed it with no award for permanent partial disability. In its Petition for Review, the Department argues that there is no proof Mr. McIndoe's hearing loss was medically stable as of the date the claimant was awarded permanent total disability benefits. However, the claimant's assertion that there was no further noise exposure after February 9, 1994, is uncontroverted in the record.

Mr. McIndoe alleges that his hearing loss was incurred and became medically stable before the permanent total disability benefits were awarded. Therefore, Mr. McIndoe asserts that he is entitled to an award for his permanent partial disability under the hearing loss claim. The Department's position is that the *Clauson* court specifically limited the right to receive an additional permanent partial disability award after the award of permanent total disability to those cases in which the injury/disease pre-existed the award for permanent total disability benefits **and** in which a claim was pending at the time permanent total disability benefits were awarded. Because Mr. McIndoe did not file his claim until after permanent total disability benefits were awarded, the Department did not make an award for his hearing loss.

The industrial appeals judge relied on *Sulgrove* as authority to direct the Department to pay the hearing loss disability award. The industrial appeals judge asserts that *Sulgrove* is on "all fours" with *Clauson*. In both cases, the claimant had two open claims before the Department and the Department closed the permanent total disability case first. *Sulgrove* is also similar to Mr. McIndoe's case because the permanent partial disability claim was filed for an occupational disease (asbestosis) that arose over the course of years, but was already medically stable at the time the permanent total disability case was closed. The distinction is that Mr. Sulgrove **actually filed** his asbestosis claim before his claim for permanent total disability benefits was closed.

In *Clauson*, the court clearly sets forth a two-pronged requirement--the partially disabling condition occurred before permanent total disability was awarded **and** the permanent partial

disability claim was pending when the claim resulting in permanent total disability was closed. We note the court's use of emphasis in the following quote:

> The facts in the present case differ from those in [cases where the second claim actually arose after the pension was awarded][1] in that Mr. Clauson seeks a permanent partial disability award for an injury which was sustained *before* the injury resulting in his permanent total disability award and which was considered under a separate claim, *which was pending at the time he was classified as permanently totally disabled. (*Emphasis theirs*.)*

Clauson at 585.

The first *Clauson* factor, the occurrence of the partial disability before the totally disabling injury, seems to be satisfied in Mr. McIndoe's case because the hearing loss accrued in the years leading up to the date of the totally disabling injury on February 9, 1994. However, Mr. McIndoe failed to file the claim for the partial disability until after he received his permanent total disability award. Thus, Mr. McIndoe does not fulfill the requirement that the partial disability claim must have been pending at the time the benefits for permanent total disability were awarded. One could argue that the *Clauson* court emphasized that language because it was peculiar to the facts of the *Clauson* case and, therefore, distinguished it from the cases in which the injury occurred after the date of award for permanent total disability. However, the court could have achieved that result merely by emphasizing the sequence of the injuries. If the emphasized language dealing with the pending nature of the claim is to have **any** effect, then it must have the effect of requiring that a partial disability claim be **actually pending** in order to permit payment after the award of permanent total disability.

Viewing the facts in the light most favorable to the claimant, there is no material disputed fact. The applicable law dictated the action taken by the Department in its order of May 1, 1997. The order should be affirmed.

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[1] *Harrington v. Department of Labor & Indus*., 9 Wn.2d 1 (1941); *Sorenson v. Department of Labor & Indus.,* 19 Wn.2d 571 (1943); and *Peterson v. Department of Labor & Indus*., 22 Wn.2d 647 (1945).

FINDINGS OF FACT

1. On July 5, 1996, the Department of Labor and Industries received an application for benefits on behalf of Robert I. McIndoe, alleging that he had sustained loss of hearing during the course of his employment with Cantex Engineering & Construction. On September 26, 1996, the Department issued an order that allowed the claim for benefits but indicated that the only benefits that would be provided were hearing aids because the claimant had already been declared to be permanently totally disabled under another industrial insurance claim. On September 27, 1996, the Department issued an order that indicated that Cantex Engineering & Construction was the chargeable employer of record, and closed the claim on the ground that medical treatment was concluded. A protest and request for reconsideration of the September 27, 1996 order was filed with the Department on behalf of Mr. McIndoe on October 7, 1996. A protest of the September 26, 1996 order was filed on behalf of the claimant on November 25, 1996. The Department affirmed the provisions of the September 27, 1996 order on May 1, 1997. On May 21, 1997, the claimant filed an appeal with the Board of Industrial Insurance Appeals from the May 1, 1997 Department order. On June 18, 1997, this Board granted the appeal, assigned it Docket No. 97 4146, and directed that further proceedings be held.

2. On February 9, 1994, Robert I. McIndoe was injured during the course of his employment with Summit Stone, Inc. He filed a claim for benefits for the injury with the Department of Labor and Industries, that was assigned Claim No. N-306556. Under that claim, the Department determined that Mr. McIndoe was permanently totally disabled as a proximate result of the February 9, 1994 injury by order dated June 24, 1996. The date the claimant was awarded permanent total disability benefits was August 20, 1995.

3. Mr. McIndoe's primary occupation was as a construction worker. While doing such work, the claimant was exposed to noise caused by the machines he and other workers operated. He infrequently wore hearing protection while doing such work.

4. The claimant's last harmful exposure to noise during the course of his employment occurred while Cantex Engineering & Construction employed him.

5. The claimant last worked in the competitive labor market on February 9, 1994.

6. As of February 9, 1994, Mr. McIndoe's binaural loss of hearing was medically fixed and stable and he had sustained permanent loss of hearing equal to 19.56 percent in both ears.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter of this appeal.

2. The issue presented by this appeal is properly adjudicated by an Order on Motions for Summary Judgment in accordance with CR 56.

3. The order of the Department of Labor and Industries dated May 1, 1997, is correct and is affirmed.

It is so ORDERED.

Dated this 14th day of April, 1998.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
S. FREDERICK FELLER Chairperson

/s/_____
JUDITH E. SCHURKE Member

DISSENT

I strongly disagree with the majority's interpretation of how the *Clauson* decision applies to circumstances such as Mr. McIndoe finds himself in. The majority's interpretation of *Clauson* has the unintended (or ill considered) consequence of abridging the statute of limitations for filing an industrial insurance claim. The filing time for an occupational disease does not begin to run until after the worker has been informed in writing by his/her doctor that the medical condition arose from a workplace exposure. Mr. McIndoe may have suspected his hearing loss was work related, but the medical report of June 10, 1996, was the first occasion on which a doctor confirmed that relationship in writing. The condition arose before the totally disabling injury, but the statute did not even begin to run until 29 months later!

Similarly, a worker who suffers a workplace injury has one year to file from the date of injury. If a totally disabling injury occurred within that year and was closed with an award for permanent total disability benefits in a record short period of time, the worker could lose the right to a partial disability award before the time for filing the partial disability claim had even expired.

The interpretation of *Clauson* most consistent with the purpose of the Industrial Insurance Act is that the *Clauson* court emphasized the pending claim language to distinguish the facts peculiar to the *Clauson* case from the cases in which the injury occurred after the date of an award for permanent total disability. In cases where the partial disability is fixed and stable before the award for permanent total disability is granted, and the period for filing the partial disability claim has not yet expired, the Department should be required to consider and pay the permanent partial disability award. This outcome is also the most congruent with this Board's decision in *Sulgrove.* In this specific case, I would direct the Department to pay Mr. McIndoe a permanent partial disability award for his occupationally-induced hearing loss.

It is so ORDERED.

Dated this 14th day of April, 1998.

BOARD OF INDUSTRIAL INSURANCE APPEALS

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