

Moore, Melvin

[PERMANENT PARTIAL DISABILITY \(RCW 51.32.080\)](#)

Award after pension determination

When a worker's exposure to noise at work occurred before he was declared permanently and totally disabled and he files a claim for hearing loss after he is declared permanently and totally disabled, the worker may be entitled to a permanent partial disability award for his occupational hearing loss. There is then no legal reason why the filing of an unrelated pension claim should prevent workers from recovering for their hearing loss. *Citing McIndoe v. Department of Labor & Indus.*, 100 Wn. App. 64, (2000) which reversed *In re Robert McIndoe*, BIIA Dec., 97 4146 (1998) ...***In re Melvin Moore, BIIA Dec., 99 17061 (2000)*** [*Editor's Note: The Board's decision was appealed to superior court under Lewis County Cause No. 00-2-00647-9.*]

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

1 **IN RE: MELVIN F. MOORE**) **DOCKET NO. 99 17061**
2)
3 **CLAIM NO. X-068652**) **DECISION AND ORDER**
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5 **APPEARANCES:**

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7 Claimant, Melvin F. Moore, by
8 Springer, Norman & Workman, per
9 John R. Dick

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11 Employer, Weyerhaeuser Company & Subsidiaries, by
12 Weyerhaeuser Company, per
13 Jack S. Eng

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15 Department of Labor and Industries, by
16 The Office of the Attorney General, per
17 James S. Johnson, Assistant
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20 The claimant, Melvin F. Moore, filed an appeal with the Board of Industrial Insurance
21 Appeals on June 25, 1999, from an order of the Department of Labor and Industries dated May 28,
22 1999. The order affirmed a Department order dated May 7, 1999 that allowed the claim for
23 occupational hearing loss with a date of manifestation of June 17, 1967, and the order also closed
24 the claim without an award for permanent partial disability because the claimant had been found
25 totally and permanently disabled under Claim No. F-562018. **REVERSED AND REMANDED.**
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32 **DECISION**
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34 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
35 and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order
36 issued on February 16, 2000, in which the order of the Department dated May 28, 1999, was
37 affirmed.
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42 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
43 no prejudicial error was committed and the rulings are affirmed. We have granted review due to the
44 issuance of a controlling court decision after completion of the proposed decision. On
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1 March 23, 2000, the Washington State Court of Appeals, Division III, issued an opinion that
2 essentially reversed earlier decisions of the Board on the key issue in Mr. Moore's appeal. The
3 issue is whether a worker can be awarded a permanent partial disability for an occupational
4 disease of hearing loss when the claim for the occupational disease was filed after the Department
5 declared him to be totally and permanently disabled under a different claim. In *McIndoe v.*
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11 *Department of Labor & Indus.*, No. 18250-9-III (Slip Op., March 23, 2000), the Court of Appeals
12 reviewed the appeals of three workers who developed occupationally related hearing loss before
13 the dates of different industrial injuries from which they were eventually found to be permanently
14 and totally disabled. They filed claims for hearing loss after they were declared permanently and
15 totally disabled. The court distinguished permanent partial disability from permanent total disability
16 so that awards for both types of permanent disability under different claims are not necessarily
17 inconsistent. It explained that permanent partial disability reflects only the loss of bodily function
18 and it is not measured by loss of earning power. By comparison, permanent total disability
19 concerns loss of earning power and is defined as the, "[L]oss of [body part or function] permanently
20 incapacitating the worker from performing any work at any gainful occupation.' RCW 51.08.160;
21 WAC 296-29-01002.'" *McIndoe*, at 5.
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33 The court interpreted the Supreme Court decision of *Clauson v. Department of Labor &*
34 *Indus.*, 130 Wn.2d 580 (1996). In *Clauson* at 586, the Supreme Court stated that, "Mr. Clauson
35 seeks a permanent partial disability award for an injury which was sustained before the injury
36 resulting in his permanent total disability and which was considered under a separate claim which
37 was **pending** at the time he was classified as permanently totally disabled." (Emphasis added).
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43 *McIndoe*, at 4. Both claims of Mr. Clauson's were filed and open at the Department, and the court
44 concluded that Mr. Clauson could later receive the permanent partial disability award regardless of
45 his status as permanently and totally disabled. The Court of Appeals in *McIndoe* explained that,
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1 "By the term *pending*, the *Clauson* court meant *pre-existing* and, therefore, necessarily included
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3 claims discovered and filed within the statute of limitation. There is then no legal reason why the
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5 filing of an unrelated pension claim should prevent these workers from recovering for their hearing
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7 loss." *McIndoe* at 5. We, of course, will follow this interpretation of *Clauson* and we note that our
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9 significant decision *In re Robert McIndoe*, BIIA Dec., 97 4146 (1998) has been reversed.

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11 The parties presented this appeal on stipulated facts. In 1973, Mr. Moore was declared
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13 permanently and totally disabled under claim F-562018. He last worked for the Weyerhaeuser
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15 Company on June 15, 1967. Mr. Moore filed his application for benefits due to occupational
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17 hearing loss with the Weyerhaeuser Company on July 24, 1998. The Department issued an order
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19 allowing the claim on May 7, 1999. The claimant protested that order, and it was affirmed on
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21 May 28, 1999. He filed this timely appeal thereafter. The parties agreed that Mr. Moore has
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23 binaural hearing loss impairment to some extent. They also agree that medical opinion in the claim
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25 file indicates his hearing loss was caused, at least in part, by exposure to noise while in the course
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27 of his employment. Mr. Moore operated a power saw, and he worked as a choker setter and woods
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29 worker for Weyerhaeuser from August 1959 until his back and lower extremity injuries in
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31 June 1967. Weyerhaeuser did not protest the allowance of the claim.

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33 The stipulated facts establish that medical opinion exists that Mr. Moore has occupational
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35 hearing loss. Unlike claims for industrial injuries, claims for occupational disease can be filed years
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37 after work exposure. There has been no challenge to the timeliness of the claimant's application for
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39 occupational hearing loss.

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41 The recent Court of Appeals decision in *McIndoe* is directly on point with the facts of this
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43 appeal. Mr. Moore's exposure to noise at work occurred before he was declared permanently and
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45 totally disabled in 1973 due to an industrial injury. Under *McIndoe*, his claim for occupational
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47 hearing loss "was pending" the date that he was declared totally and permanently disabled. Thus,

1 he is entitled to a permanent partial disability award for his occupational hearing loss, if any such
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3 loss can be established as compensable under the Industrial Insurance Act. The claim must be
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5 remanded to the Department to adjudicate the extent of any compensable hearing loss attributable
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7 to his work.

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9 The May 28, 1999 order of the Department that affirmed the May 7, 1999 Department order
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11 is reversed. The claim is remanded to the Department to issue an order that allows the claim for
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13 the occupational disease of hearing loss, and that provides benefits to which the claimant may be
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15 entitled under the Industrial Insurance Act including an award of permanent partial disability for
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17 compensable, occupational hearing loss, if any exists.

18 **FINDINGS OF FACT**

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21 1. On July 24, 1998, Melvin F. Moore filed a timely application for benefits
22 with the Department of Labor and Industries for bilateral hearing loss
23 incurred during the course of his employment. On May 7, 1999, the
24 Department issued an order that allowed the claim with a date of
25 manifestation and last injurious exposure of June 17, 1967. The May 7,
26 1999 order also closed the claim without an award for permanent partial
27 disability because Mr. Moore had been awarded permanent total
28 disability under claim F-562018. On May 14, 1999, Mr. Moore protested
29 the May 7, 1999 order, and on May 28, 1999, the Department issued an
30 order affirming the May 7, 1999 Department order. On June 25, 1999,
31 Mr. Moore filed a Notice of Appeal with the Board of Industrial Insurance
32 Appeals. The Board issued an order granting the appeal on July 22,
33 1999.
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35 2. Mr. Moore was a power saw or chain saw operator, choker setter and
36 woods worker for the Weyerhaeuser Company from August 1959 until
37 he injured his back and lower extremities at work in June 1967.
38 Mr. Moore last worked on June 15, 1967.
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40 3. Mr. Moore has binaural hearing loss that was caused, at least in part, by
41 exposure to noise while in the course of his employment with the
42 Weyerhaeuser Company prior to June 15, 1967.
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44 4. In 1973, the Department of Labor and Industries awarded Mr. Moore
45 permanent and total disability status under Claim No. F-562018, due to
46 the effects of the industrial injury he incurred to his back and lower
47 extremities in June 1967. He remained in permanent and total disability
status as of May 28, 1999.

1 **CONCLUSIONS OF LAW**

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- 3 1. The Board of Industrial Insurance Appeals has jurisdiction over the
- 4 parties and subject matter of this appeal.
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- 6 2. Within the meaning of RCW 51.08.140, Mr. Moore has incurred the
- 7 occupational disease of bilateral, hearing loss due, at least in part, to his
- 8 employment with the Weyerhaeuser Company, and his application for
- 9 benefits filed on July 24, 1998 for the occupational disease should be
- 10 allowed.
- 11
- 12 3. Mr. Moore's occupational disease of bilateral, hearing loss was
- 13 pre-existing at the time he was declared to be permanently and totally
- 14 disabled in 1973 under claim F-562018 due to the effects of his
- 15 industrial injury of June 1967.
- 16
- 17 4. Mr. Moore may receive an award for permanent partial disability due to
- 18 the effects of his occupational hearing loss regardless of his status of
- 19 permanent and total disability since 1973 under a different claim, as
- 20 contemplated by *McIndoe v Department of Labor & Indus.*,
- 21 No. 18250-9-III (Slip Op., March 23, 2000).
- 22
- 23 5. The order of the Department of Labor and Industries dated May 28,
- 24 1999, is reversed. The claim is remanded to the Department of Labor
- 25 and Industries to issue an order that allows the claim for the
- 26 occupational disease of hearing loss, and that provides benefits to which
- 27 the claimant may be entitled under the Industrial Insurance Act including
- 28 an award of permanent partial disability for compensable, occupational
- 29 hearing loss, if any exists.

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31 It is so **ORDERED**.

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33 Dated this 27th day of April, 2000.

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35 BOARD OF INDUSTRIAL INSURANCE APPEALS

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39 /s/ _____

40 THOMAS E. EGAN Chairperson

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44 /s/ _____

45 FRANK E. FENNERTY, JR. Member

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