Smith, Michael

OCCUPATIONAL DISEASE (RCW 51.08.140)

Apportionment

The allocation of responsibility permitted by WAC 296-17-870 may be addressed in an employer's appeal by establishing that the worker was engaged in employments not considered by the Department and that these employments contained the hazard or exposure that contributed to the disease. **….*In re Michael Smith,* BIIA Dec., 00 12127 (2002)**

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: MICHAEL T. SMITH	**)**	**DOCKET NO. 00 12127**
	)	
CLAIM NO. X-309707	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Michael T. Smith, Pro Se

Employer, Nuprecon, Inc., by
Law Office of Deborah A. Knapp, per
Deborah A. Knapp

Department of Labor & Industries, by
The Office of the Attorney General, per
Brian L. Dew, Assistant

The employer, Nuprecon, Inc., filed an appeal with the Board of Industrial Insurance Appeals on February 29, 2000, from an order of the Department of Labor and Industries dated December 22, 1999. That order affirmed three prior Department orders that, in the aggregate, allowed the claim for the occupational disease of bilateral carpal tunnel syndrome, with a date of manifestation of August 20, 1999; paid time loss compensation from September 17, 1999 through October 15, 1999; and charged the claim to 4 Seasons General Contractors at 16 percent and to Nuprecon, Inc., at 10 percent. **REVERSED AND REMANDED.**

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 employer to a Proposed Decision and Order issued on April 30, 2002, which dismissed the employer's appeal to the December 22, 1999 Department order. We have granted review to affirm previously ordered sanctions and impose additional ones upon the Department due to its violations of the Superior Court Civil Rules (CR) during the discovery process; to find that the employer's appeal was timely; to direct that Nuprecon not be charged any share of the costs of this claim because its liability percentage calculated per WAC 296-17-870(b) is below the 10 percent threshold; and to direct the Department to recalculate the percentage share attributed to other employers who exposed the claimant to the hazard causing his occupational disease within the experience period for this claim.

PRELIMINARY PROCEDURAL AND EVIDENTIARY CONSIDERATIONS

Discovery Violations and Sanctions

The employer made attempts at informal discovery during the fall and winter of 2000-2001. On April 2, 2001, the Department filed a CR 26(c) motion for a protective order. This motion did not

contain any statement indicating that the required CR 26(i) conference of counsel had occurred. The Department's motion was heard on April 5, 2001, at which time our industrial appeals judge ruled on the record that the material in question was subject to discovery by the employer; in essence denying in whole the Department's CR 26(c) motion. No ruling regarding CR 37(a)(4) sanctions against the Department was entertained at that time.

On May 7, 2001, the employer took the discovery deposition of Richard Bredeson, a risk classification specialist, otherwise referred to as a policy manager, with the Department. The employer's counsel, in her July 25, 2001 declaration, characterized Mr. Bredeson's deposition as unhelpful; however, Mr. Bredeson did testify that claims managers as well as policy managers handle aspects of the allocation decisions. He named several other Department employees who had some contact with the claim at the time the allocation decision was being addressed. Those employees were Julia Ehr, another policy manager; Christine Smith and Del Jensen, claims managers; and Bill Harmon, who may only have routed the files back and forth. Mr. Bredeson also identified Eddie Cheung, who supervised Ms. Ehr and him, but it was unclear if Mr. Cheung had anything to do with this matter. The employer did not have the deposition transcribed until some time after July 25, 2001.

On May 9, 2001, the employer's counsel requested a conference to resolve discovery issues. Our industrial appeals judge scheduled a discovery conference, which was held on May 11, 2001, and was not reported. On May 14, 2001, the industrial appeals judge issued an order that we interpret as a CR 26(f) order directing the Department to provide the entire file and to identify the Department employee who made the allocation decision. Immediate deadlines were set in the hope of preserving the hearing time, which had already been continued to the end of the month. The CR 26(f) order did not contain any CR 37(b)(2) sanctions, although it warned the Department that failure to comply with the order would result in such sanctions.

On May 15, 2001, the Department's counsel identified Mr. Bredeson and Ms. Smith as the employees involved with the liability allocation. The May 31, 2001 hearing on this appeal was converted to another discovery conference. At that time, the Department's counsel acknowledged his reluctance to provide the employer with the names of Department employees. He then proceeded to identify, as involved with the file, Mr. Bredeson, and Ms. Smith, but in addition to them, added Ms. Ehr and Carol Horrell, a claims consultant not previously identified. The industrial appeals judge directed the employer to file its interrogatories within one week, with the Department having 30 days [the period for response pursuant to CR 33(a)] to answer them. Another

proceeding to monitor discovery was set for July 12, 2001. On June 7, 2001, the employer served its interrogatories and requests for production on the Department. On July 9, 2001, the Department answered the interrogatories. These answers consisted almost entirely of objections; the only new ones being based on CR 26(b)(5), and the Department produced sections of its manuals, RLOG, the claim file, and Mr. Bredeson's deposition in lieu of answers pursuant to CR 33(c). However, that deposition had not been transcribed by either party and was not delivered to the employer until late in August, at the earliest. The Department's responses were followed almost immediately by a letter from the employer's counsel, complaining of its inadequacies. On July 12, 2001, the date of the discovery proceeding, the Department produced additional material in response to the employer's discovery requests.

On July 12, 2001, the industrial appeals judge ruled that the interrogatories were not fully and completely answered, and directed the employer's counsel to submit an itemized bill of costs in order that monetary sanctions could be awarded. The employer's counsel submitted a declaration the next day, in which she sought attorney's fees of $4,425 (29.5 hours at $150 per hour) plus $120 in costs. A final ruling on what monetary sanctions were to be awarded was delayed, and ultimately a ruling was not made.

The hearings on the merits of the employer's appeal were postponed further. In August and September 2001, the Board received further discovery material from the Department. Of particular note is the fact that the deposition of Mr. Bredeson was not transcribed until late in August 2001, and then by the Department. On September 4, 2001, at a further hearing in this matter, the industrial appeals judge verbally ordered sanctions against the Department for violation of discovery rules. These sanctions were published by an order dated December 6, 2001. The Department was prohibited from presenting any evidence, with the exception of the testimony of Mr. Bredesen (*sic*), which itself was limited to his testimony during the May 7, 2001 discovery deposition.

At the September 4, 2001 hearing, the hearing on the merits of the appeal was further postponed until January 28, 2002. This further postponement was directly related to the discovery delays up to that point. As a result of the delay in the hearing, the parties were provided with new witness confirmation deadlines. The witness confirmation deadlines were November 2, 2001, for the employer and November 16, 2001, for the Department. The employer did not meet its deadline. On November 16, 2001, the Department requested that its deadline be extended until two weeks after the employer confirmed witnesses or, in the alternative, the employer's time and witnesses be

stricken for failure to confirm. On December 5, 2001, the Department filed a "request to strike employer witnesses," noting that no confirmation or other action had occurred since its earlier request. By letter, the industrial appeals judge extended the employer's confirmation deadline until December 14, 2001, noting that if no confirmation was filed by that date, the employer's hearing time would be struck and no depositions would be allowed. In view of the earlier limitation placed on the Department's presentation of evidence, the industrial appeals judge relieved it of any confirmation deadline.

On December 7, 2001, the employer filed its confirmation of witnesses. The list contained three specifically named lay witnesses as well as a "Medical Expert (to be identified)." On January 3, 2002, the employer identified the medical witness as Dr. Raymond Jarris. On January 8, 2002, the Department filed a motion to strike all testimony on behalf of the employer. The Department alleged that the employer's witness confirmation letter had never been sent to it and that until January 3, 2002, the only potential medical witness involved in this case was Dr. Kirk Harmon, who it alleged was asked by the employer to place marks on the worker's occupational disease work history form (Exhibit No. 15). The employer opposed this motion and denied the allegation regarding Dr. Harmon.

On January 28, 2002, the hearing on the merits took place in front of a new industrial appeals judge, who had been assigned the case in December 2001. Dr. Jarris was allowed to testify.

The discovery process in which the parties engaged prior to hearing this appeal was unusually and unnecessarily protracted. The result of the ongoing disputes was ultimately prejudicial to both the employer and the Department inasmuch as it delayed the hearings by almost nine months, with undoubted monetary costs to them as well. The scope of discovery is intended to be broad. As indicated by CR 26(b), any non-privileged relevant matter is subject to discovery. Admissibility at trial is not a prerequisite for discovery; it is only necessary that "the information sought appears reasonably calculate to lead to the discovery of admissible evidence." Clearly, the employer's attempts to determine how the Department arrived at the allocation percentages stated in the order under appeal are discoverable. More important perhaps, we believe, based on similar cases before us, that had the Department been forthcoming with the requested information early in the process, there would have been a substantial chance of a pre-hearing settlement of this appeal.

We make the following findings. (1) The Department's motion for a protective order was correctly denied and monetary sanctions pursuant to CR 26(c) and 37(a)(4) should be granted.

(2) The discovery deposition of Mr. Bredeson would have been taken in the ordinary course of discovery; the employer is not entitled to costs or attorney's fees associated with the taking of that deposition. (3) The Department violated the provisions of the May 14, 2001 interlocutory order, which was analogous to a CR 26(f) order, and pursuant to CR 37(b)(2), sanctions are in order. (4) The employer's interrogatories would have been propounded within the regular course of discovery; the employer is not entitled to costs or attorney's fees associated with their drafting. (5) Ongoing violations of discovery, especially regarding the answering of interrogatories, justify further CR 37(b)(2) sanctions. (6) The employer was not a totally innocent party in this matter. It is clear that the employer's file contained the name of some of the Department employees it sought to "discover" from the Department. The employer's characterization of Mr. Bredeson's deposition as unhelpful is not correct, if it meant by that phrase that it did not produce evidence relevant to how the Department made the decision and which employees were involved in different aspects thereof. Had the employer had the deposition transcribed within a reasonable period of time after the deposition, it should have shortened the discovery process considerably. (7) Each party neglected to comply with CR 26(i) on at least one occasion. (8) The employer failed to comply with the witness confirmation deadline. The Department was partially responsible for this failure inasmuch as prior to that deadline it had not revealed the name of the physician who had marked the Occupational Disease Work History form. (9) The Department was not prejudiced by the employer's failure to comply with the confirmation deadline. The Department was able to note a discovery deposition of the employer's chief lay witness before the hearings took place. The record does not reveal any attempt by the Department to depose or otherwise discover the subject matter of Dr. Jarris's testimony until the date of the hearing.

When considering the type and extent of sanctions to order in this matter, we note that under the Superior Court Civil Rules (which are applicable to our proceedings pursuant to RCW 51.52.100 and WAC 263-12-125) we may use as many and varied sanctions as are necessary to remove any advantage gained by the disobedient party. In doing so, we strive to balance the rights of the parties. *Mitchell v. Watson*, 58 Wn.2d 206 (1961). We specifically note that the withholding of material within the scope of discovery, which is based on a unilateral determination that it is not relevant, violates discovery orders and is sanctionable. *Taylor v. Cessna Aircraft Co.*, 39 Wn. App. 828 (1985). Incomplete answers are treated the same way as a failure to answer. CR 37(a)(3).

Based on the factual narrative and our conclusions stated above, we conclude that the following sanctions should be imposed. (1) Pursuant to CR 26(c) and CR 37(b)(2), we determine

that the Department shall pay reasonable attorney's fees to the employer in the amount of $2,760. This is based on 18.4 hours at $150 per hour, as stated in the Declaration of Deborah A. Knapp, filed with us on July 25, 2001. This represents reimbursement for actions taken on March 29; April 2, 3, and 5; May 9, 11, 15, and 30; and July 10, 11, 12, and 25, 2001. Other activities, and the deposition reporting fees, likely would have been incurred during this litigation, even without the occurrence of the Department's sanctionable actions. (2) We hereby affirm the limitations placed on the scope of the Department's testimony by the December 6, 2001 "Interlocutory Order Awarding Sanctions for Failure to Comply with Discovery." We note that the Department chose to rest its case-in-chief in this appeal. (3) At the January 28, 2002 hearing, the Department objected to much of the testimony and evidence proffered by the employer, on the grounds of lack of authenticity, hearsay, and relevance. We rule that the Department is estopped from raising objections based on lack of authenticity and hearsay to the evidence presented by the employer at the January 28, 2002 hearing, which was offered to show how the Department calculated the allocation of the costs of the claim to employers, the medical basis for that allocation, and the calculations of the period of time, including the number of hours, the claimant worked while at each employer. The Department's actions materially prejudiced the employer's attempts to locate individuals who could provide non-hearsay testimony about these matters and authenticate documents that needed authentication. This is particularly true of the evidence regarding the opinions of the as yet not-clearly identified physician who marked Exhibit No. 15 at the **Department's** request, and upon whom the Department relied in calculating which employers would be charged with the costs of this claim and what share they would be allocated.

Evidentiary Rulings

Exhibit Nos. 3, 4, and 5 are rejected pursuant to ER 403. Exhibit No. 9, identified as Task No. 714 from a Department manual, is rejected pursuant to ER 402. This procedure did not become effective until May 16, 2000, **after** the date of the Department order under appeal. Therefore, the Department's decision could not have been based or guided by that procedure. All other exhibits are admitted. All evidentiary rulings made during the hearing are affirmed.

ISSUES

(1) Did the appellant/employer, Nuprecon, timely file a Notice of Appeal from the Department's December 22, 1999 order?

(2) Was the Department correct to allocate or charge 10 percent of the costs of this claim to Nuprecon?

The parties stipulated that the provision of the Department order under appeal, which allowed the claim for the occupational disease of bilateral carpal tunnel syndrome, is correct and is not at issue in this appeal.

DECISION

Timeliness of Employer's Notice of Appeal

The Department issued the order in question on December 22, 1999. The parties stipulated that the employer received that order on December 27, 1999. The statutory sixtieth day fell on Friday, February 25, 2000. The employer's service company, Approach Management, assigned the employer's account to B.J. Bailey, who telecommutes from her home on Camano Island, which is in northern Snohomish County. Camano Island residents share a post office with Stanwood, a small town that technically is not on Camano Island. Ms. Bailey testified that she wrote the protest letter on Friday, February 18, 2000, but did not place it in her mailbox at home because the deliveryman had already been by that day. She affirmatively testified that she mailed the Notice of Appeal on Saturday, February 19, 2000, by placing it in the mailbox at her home. She remembered this specifically because it was her son's first birthday party and she took it out to the mailbox when her father arrived for the party. The Board received the Notice of Appeal on February 29, 2000 (Exhibit No. 2) The only evidence in the record about the location of the Notice of Appeal between those dates comes from the postal cancellation mark on the envelope (Exhibit No. 2), which is dated February 26 or 28, 2000. (The cancellation is faint and not at all clear.)

We conclude that the affirmative testimony of Ms. Bailey about the date and circumstances of mailing the Notice of Appeal outweighs the ambiguous meaning of the postal cancellation date on the envelope that contained it. *Farrow v. Department of Labor & Indus.*, 179 Wash. 453 (1934), relied upon by the Proposed Decision and Order to reach the opposite result, is not applicable under the circumstances of this appeal. *Farrow* details what facts must be proven to establish the presumption of mailing a document. That case is applicable only when a document alleged to have been mailed was not received. We received the Notice of Appeal in the U.S. mail and it bore a postal cancellation mark, therefore it was mailed. In this case, the issue is not if, but **when** the Notice of Appeal was mailed. *Farrow* also is not applicable in this situation because it applies only when the organization that mailed the document cannot produce a person who remembers mailing that specific document. Mailroom personnel who often handle hundreds of documents per day cannot be expected to specifically remember each one of those documents. But when direct

testimony is presented that establishes the exact circumstances and date of mailing, the presumption of mailing is not needed.

We find the testimony of Ms. Bailey to be credible. That testimony and other evidence in the record support the following factual scenario. On Saturday, February 19. 2000, Ms. Bailey placed the Notice of Appeal in the mailbox next to her house. We take official notice that the post office was closed on Sunday, February 20, 2000, and also on Monday, February 21, 2000, the Presidents' Day holiday. The Notice of Appeal would have been sorted at the local (Stanwood) post office no earlier than Tuesday February 22, 2000. Since the Notice of Appeal was not to be delivered to a local address, it was not postmarked, but instead was placed with other non-local delivery mail to be sent to the large regional mail processing center in Everett, for cancellation and sorting. It is likely that the Notice of Appeal did not reach this Everett postal facility any earlier than Thursday, February 24, 2000. The Everett processing station receives mail from all over Snohomish County, and thus processes far more mail daily than the Department does. Under the circumstances, it is not unreasonable to conclude that the Notice of Appeal was not postmarked until February 26, 2000. In any event, the Notice of Appeal was in the possession of the U.S. Postal Service well before the end of the 60-day appeal deadline, and therefore was timely. *In re Harold Francis*, BIIA Dec., 68,154 (1985); and *see Continental Sports Corp. v. Department of Labor & Indus.*, 128 Wn.2d 594 (1996), which discussed the similar 30-day appeal deadline of RCW 51.48.131.

Allocation of Liability in this State-Fund Occupational Disease Claim

The evidence in the record, taken as a whole, reveals that the Department used the following procedure in assessing the liability of the employer for the costs of this claim: Upon receipt of the claimant's application for benefits, the Department determined that it should be categorized as an occupational disease claim, for which multiple state-fund employers likely would be responsible. The Department sent a form, Exhibit No. 15, to the claimant, which asked him to list his entire work history, including names of employers, dates employed by each, and job title/duties. In the meantime, the Department obtained medical and other information that showed the condition or disability had been diagnosed as bilateral carpal tunnel syndrome, with a date of manifestation [date of injury pursuant to WAC 296-17-870(6)] of August 20, 1999. Based on this date, the Department determined the "experience period" of this claim. WAC 296-17-850(2) and 296-17-870. Upon obtaining the completed work history form from the claimant, the Department sent it to a physician (most likely the doctor then listed by the Department as the claimant's attending

physician), and asked the physician to affix a mark (a “star” or asterisk) next to each employer (and period of employment) that the physician concluded was partially responsible for exposing the claimant to the hazards that ultimately were natural and proximate causes of the claimant's bilateral carpal tunnel syndrome. When the physician returned the completed form, the Department estimated: (1) the number of months (to the nearest hundredth) the claimant was exposed to the hazard(s) of employment that caused his occupational disease; and (2) the number of months (to the nearest hundredth) the claimant was employed with each employer to whom responsibility for the occupational disease was attributed by the physician. The Department then divided the period of exposure attributed to the three responsible employers that employed the claimant during the "experience period," by the total exposure the claimant sustained, to the hazard of employment that caused his occupational disease. Nuprecon’s share was 9.64 percent, which was rounded up to 10 percent. The share of Northwest Abatement Services was 9.17 percent, which was rounded down to 9 percent, which was not assessed against it because it fell below the 10 percent threshold of WAC 296-17-870(6). Four Seasons General Contractor’s share was 15.67 percent, which was rounded up to 16 percent. The fact that the assessed percentages taken together equaled less than 100 percent is typical of these assessments since otherwise responsible employers are not assessed any percentage of the costs of the claim if the claimant’s employment with them, and therefore his exposure, falls outside the experience period.

In this appeal, Nuprecon, the employer/appellant, must prove by a preponderance of evidence that the Department’s allocation of 10 percent of the costs of this occupational disease claim was incorrect. The allocation of liability between State Fund employers in occupational disease claims is not "discretionary" in the sense that proof of an abuse of discretion by the Department is necessary to overturn such an allocation decision. Decisions by the Department regarding the allocation of costs of an occupational disease claim are part of the risk classification function of the Department, and not the claims administration function. RCW 51.16.035; *In re Harry Reese, M.D.*, BIIA Dec., 00 P0044 (2001).

WAC 296-17-870(6) is the regulation that directs how costs of an occupational disease claim shall be prorated or allocated to each period of employment in which the injured worker was exposed to the occupational hazard(s) that caused his or her disability. That regulations states in part:

> The cost of any occupational disease claim, paid from the accident fund and the medical aid fund and arising from exposure to the disease hazard under two or more employers, shall be prorated to each period of

> employment involving exposure to the hazard. Each insured employer who had employed the claimant during the experience period, and for at least ten percent of the claimant's exposure to the hazard, shall be charged for his share of the claim based upon the prorated costs.

As the regulation reveals, the costs of an occupational disease claim need only be prorated or allocated between periods of employment only when the claim is deemed to be a "State Fund" claim, in which the exposures to the disease hazards arise out of employment with multiple employers. *In re Cindy Meisner*, BIIA Dec., 95 6101 (1997). Exhibit No. 15, as supplemented and adopted by the testimony of Dr. Jarris, reveals that the claimant was exposed to the employment hazards in question during his work for several employers. Ms. Bailey testified that Nuprecon is a State Fund employer. We infer from Exhibit No. 10 and the record as a whole, that the other employers mentioned were also State Fund employers. Clearly, WAC 296-170870(6) applies in regard to this claim.

The mere requirement that the Department prorate or allocate costs of the claim between the employers of this State Fund occupational disease claim does not mean that each employer listed in the occupational disease work history form filled out by the claimant will be assessed or charged for a percentage of the costs of the claim. In order for Nuprecon or any employer to be charged a portion of the costs of this claim, it must have employed the claimant during the experience period **and** be responsible for at least 10 percent of the claimant's total exposures to the hazard that naturally and proximately caused the occupational disease. Nuprecon employed the claimant from April 30, 1999 through August 20, 1999, some or all of which time falls within the experience period as defined by WAC 296-17-850. Based primarily on Exhibit Nos. 10 and 15, and the testimony of Dr. Jarris, we conclude that Nuprecon should not be charged or allocated any percentage share in the costs of this claim because less than 10 percent of the claimant's exposure to the disease causing employment hazards occurred during the time that Nuprecon employed him.

Exhibit No. 10 best reveals the Department's calculations used to arrive at the 10 percent allocation or charge of claim costs to Nuprecon. The exhibit shows that the Department calculated that the claimant was exposed to the employment hazards that caused his occupational disease for the equivalent of 38.14 months. According to the Department's calculations, 3.68 months of that exposure took place through the claimant's work at Nuprecon between April 30, 1999 and August 20, 1999. Arithmetically, then, the percentage of the claimant's exposure attributable to his employment at Nuprecon was 10 percent (9.64 percent rounded to the nearest whole number),

which would require the Department to allocate that percentage of claim costs against the employer.

We conclude that the figure arrived at by the Department for Mr. Smith's total exposure to the employment hazards that caused his carpal tunnel syndrome, understates the length of those exposures. The Department did not include in its calculation of the claimant's total exposure to occupational hazards, the time periods he worked for the employers listed in Exhibit No. 15 (the occupational disease work history form he filled out) that were not marked by a physician as being partly responsible for the claimant's occupational disease. Like Dr. Jarris, we perceive that the work duties/conditions to which the claimant was exposed while working at Labor Works, Inc., and Eagle Hardware and Garden, and were not included in the calculation, were also likely causes of his bilateral carpal tunnel syndrome. We agree with Dr. Jarris that at the very least, the exposures the claimant received while working for those two employers must be included in the total exposure figure used by the Department to calculate the percentage of exposure, and therefore the allocations of costs, attributable to Nuprecon and the other employers.

According to Exhibit No. 15, Mr. Smith's exposures at Labor Works, Inc., occurred over a 13-month period (March 1998 to April 1999), during which time he worked from 8 to 25 hours per week. (These hours fall during the "experience period" for this claim.) Accepting arguendo, the 8-hour per week figure as accurate, that exposure would represent 1/5 of a regular 40-hour week or 1/5 full-time. Multiplying that fraction by the 13-month employment period, we arrive at a product of 2.6 months exposure to be added to the Department's calculation of the total exposure to the employment hazards.

According to Exhibit No. 15, Mr. Smith's exposures at Eagle Hardware and Garden occurred over a 6-month period (March 1997 to August 1997), during which time he worked full-time, 40 hours per week. (These hours fall during the "experience period" for this claim.) We conclude that an additional 4.0 months should be added to the Department's calculation of the total exposure period. We calculate this based on one full month each for April, May, June, and July 1997. We do not include any additional exposure for March or August 1997, because those months may have been included in the calculations for exposures with other employers. We note that Mr. Smith reported in Exhibit No. 15 that he was also working at Labor Ready up to 40 hours per week, ending in March 1997, and he began working for 4 Seasons General Contractors at 40 hours per week beginning in August 1997.

Thus, when adding the hours of total exposure calculated by the Department (38.17) to the additional hours we accept for Labor Works, Inc., (2.60) and Eagle Hardware and Garden (4.00), we conclude that the claimant's total exposure to the occupational hazards that naturally and proximately caused his carpal tunnel syndrome, is more accurately stated at 44.77 months. Accepting, arguendo, the Department's calculation of the period of the claimant's exposure to the employment hazards at Nuprecon, (3.68 months), the total percentage of exposure attributable to Nuprecon is only 8.54 percent, rounded to 9 percent. This figure is below the mandatory 10 percent threshold dictated by WAC 296-17-870(6). Therefore, the Department was in error to charge or assess any costs of this claim to Nuprecon.

In reaching this decision, based on purported hours of exposure, we recognize that the record does not clearly support any one method of calculating periods of exposure. WAC 296-17-870(6) does not mandate any of the possible methods that were discussed during the proceedings. We have selected the figures we used above because they are most favorable to the Department's position. In doing so, we note that even by using those figures, the Department allocation decision has been mathematically proven to be incorrect. We remand this matter to the Department for a redetermination of which employer or employers are responsible for a portion of the costs of this claim, along with the percentage to be charged for each employer consistent with this opinion. Once that redetermination is concluded, a further order shall be issued which, consistent with this opinion, will **not** charge Nuprecon with any portion of the costs of this claim.

FINDINGS OF FACT

1. On August 27, 1999, the claimant, Michael T. Smith, filed an application for benefits with the Department of Labor and Industries, alleging an injury to his wrists (bilateral carpal tunnel syndrome) on June 6, 1999, during the course of his employment with Nuprecon, Inc. On October 5, 1999, the Department issued an order paying provisional time loss compensation from September 17, 1999 through October 1, 1999. On October 13, 1999, the Department issued an order allowing the claim for the occupational disease of bilateral carpal tunnel syndrome, with a date of manifestation of August 20, 1999, and charging the claim to 4 Seasons General Contractors at 16 percent and Nuprecon, Inc. at 10 percent.

   On October 19, 1999, the Department issued an order paying time loss compensation from October 2, 1999 through October 15, 1999. On October 25, 1999, the employer filed protests and requests for reconsideration from the Department's October 5, 1999, October 13, 1999, and October 19, 1999 orders. On December 22, 1999, the

Department issued an order affirming its October 5, 1999, October 13, 1999, and October 19, 1999 orders. On February 19, 2000, the employer filed a Notice of Appeal with the Board of Industrial Insurance Appeals of the Department's December 22, 1999 order. On March 20, 2000, the Board granted the employer's appeal, subject to proof of timeliness, assigning Docket No. 00 12127, and ordering that further proceedings be held in this matter.

2. The Department order dated December 22, 1999, was communicated to the employer on December 27, 1999. On February 19, 2000, the employer mailed its Notice of Appeal from that order to this Board, which received it on February 29, 2000.

3. The claimant sustained bilateral carpal tunnel syndrome, arising naturally and proximately out of employment with several employers, including Nuprecon, whose industrial insurance claims are insured through the State Fund. August 20, 1999, was the date of manifestation and/or date of injury for this claim.

4. Between April 30, 1999 and August 20, 1999, the claimant was exposed by his work at Nuprecon to the occupational hazards that caused his bilateral carpal tunnel syndrome.

5. The claimant's total exposure to all employment-based disease hazards that naturally and proximately caused his bilateral carpal tunnel, occurred for at least 44.77 months, with a maximum of 3.68 month's exposures attributable to his employment by Nuprecon. Nuprecon is responsible for less than 10 percent of the claimant's total exposures to employment-related hazards that caused his bilateral carpal tunnel syndrome.

6. The Department's motion for a protective order pursuant to CR 26(c) was denied. The discovery deposition of Mr. Bredeson would have been taken in the ordinary course of discovery. The Department violated the provisions of the May 14, 2001 interlocutory order, which was analogous to a CR 26(f) order. The employer's interrogatories would have been propounded within the regular course of discovery. The Department did not completely answer interrogatories propounded to it. Each party neglected to comply with CR 26(i) on at least one occasion. The employer failed to comply with the witness confirmation deadline. The Department was partially responsible for this failure inasmuch as prior to that deadline it had not revealed the name of the physician who had marked the Occupational Disease Work History form.

CONCLUSIONS OF LAW

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

2. The employer's Notice of Appeal from the December 22, 1999 Department order was timely filed with this Board, as required by RCW 51.52.050 and RCW 51.52.060.

3. The Department's violation of discovery rules substantially prejudiced Nuprecon's ability to prepare and try its case-in-chief. Sanctions authorized by CR 37 for this behavior are reasonable and necessary. The nature and extent of CR 37 sanctions most fair to the parties and designed to cure the prejudice to the employer caused by those actions are: (1) the Department shall pay reasonable attorney's fees to the employer in the amount of $2,760; (2) the limitations placed on the scope of the Department's testimony by the December 6, 2001 Interlocutory Order Awarding Sanctions for Failure to Comply with Discovery are affirmed; and (3) the Department is estopped from raising objections based on lack of authenticity and hearsay to the evidence presented by the employer at the January 28, 2002 hearing that was offered to show how the Department calculated the allocation of the costs of the claim to employers, the medical basis for that allocation and the calculations of the period of time, including the number of hours, the claimant worked while at each employer.

4. The Department was not prejudiced by the employer's failure to comply with the confirmation deadline.

5. The claimant's condition of bilateral carpal tunnel syndrome is an occupational disease within the meaning of RCW 51.08.140.

6. Nuprecon is not a chargeable employer for any portion of the costs of this claim pursuant to WAC 296-17-870(6).

7. The order of the Department of Labor and Industries dated December 22, 1999, is incorrect and is reversed. This matter is remanded to the Department to recalculate, consistent with the findings and conclusions of this decision, the percentage liability of each employer who employed the claimant during the experience period for this occupational disease claim, and thereupon issue an order allowing the claim for the occupational disease of bilateral carpal tunnel syndrome, with a date of manifestation of August 20, 1999, and stating

the employers to be charged with the costs of this claim, if any, along with their percentage of liability for the costs of this claim.

It is so ORDERED.

Dated this 29th day of October, 2002.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

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

/s/_____
JUDITH E. SCHURKE Member