Pingley, Daniel

JOINDER

Single claim, multiple possible employers/insurers

Although all potential insurers on a claim must be given the opportunity to participate in an appeal involving claim allowance, if all the potential employers are insured through the state fund and the Department is participating in the appeal, it is unnecessary to join all state fund employers.In re Daniel Pingley, BIIA Dec., 01 16177 (2003) [Editor's Note: The Board's decision was appealed to superior court under Cowlitz County Cause No. 03-2-00215-2.]

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS STATE OF WASHINGTON

)

IN RE: DANIEL G. PINGLEY

DOCKET NO. 01 16177

CLAIM NOS. W-532148 & P-798533

DECISION AND ORDER

APPEARANCES:

Claimant, Daniel G. Pingley, by Springer Norman & Workman, per John R. Dick

Self-Insured Employer, Gram Lumber Company (RSG Forest Products, Inc.), by Reinisch Mackenzie Healey Wilson & Clark, P.C., per Steven R. Reinisch

Department of Labor and Industries, by The Office of the Attorney General, per Edward D. Callow, Assistant

The self-insured employer, Gram Lumber Company (RSG Forest Products, Inc.), filed an appeal with the Board of Industrial Insurance Appeals on June 7, 2001, from a joint order of the Department of Labor and Industries dated May 21, 2001. The joint order declared that the claim against RSG (Claim No. W-532148) would remain open, and the claim against ENB Logging (Claim No. P-798533) was rejected, based on the last injurious exposure rule. **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 self-insured employer to a Proposed Decision and Order issued on June 5, 2002, in which the order of the Department dated May 21, 2001, was affirmed.

The issues raised by appellant Gram Lumber Company, are: 1) Whether the P-798533 occupational disease claim against ENB Logging should be allowed; and 2) Whether Gram Lumber Company, under the W-532148 claim, is responsible for treatment of Mr. Pingley's bilateral carpal tunnel syndrome and other benefits. Following a careful review of the record, we agree with the result reached by our industrial appeals judge in the Proposed Decision and Order.

Gram Lumber contends that it should be liable only for benefits related to Mr. Pingley's exposure during his employment with the self-insured employer, which, it contends, resulted in temporary exacerbation of his occupational disease. This would result, we believe, in a type of hybrid apportionment of benefits and/or disability between Gram Lumber and the State Fund. Such

apportionment would be antithetical to the purpose of the last injurious exposure rule. Apportioning responsibility in occupational disease claims and appeals is difficult, at best:

An occupational disease may occur over a prolonged period of time during which a worker may receive multiple exposures while in the course of employment with multiple employers. If each successive employment exposes the worker to the conditions giving rise to the occupational disease, then that disease has arisen naturally and proximately out of each of those employments . . . The problem is that it is difficult, if not impossible, to go back in time and determine the degree or extent to which each and every exposure affected the ultimate disability.

In re Lester Renfro, BIIA Dec., 86 2392 (1988), at 6.

As noted by our Supreme Court in Weyerhaeuser v. Tri, courts have adopted the last injurious exposure rule,

[I]t is more economical arbitrarily to assign full responsibility to the last employer than to attempt to apportion accurately responsibility according to causation. In addition, by assigning responsibility to an employer who can be identified without a determination of causation, the claimant is better protected from the risk of filing claims against the wrong employer

Weyerhaeuser v. Tri, 117 Wn.2d 128, 137 (1991), (citing Runft, 303 Or. at 500).

Approving adoption of the rule for our state, our Supreme Court concluded:

The Court of Appeals, the Board, and the Department have all adopted the last injurious exposure rule. We, too, conclude that implementation of the rule furthers the Act's overall goals. Implementation of the last injurious exposure rule may create a tension between the Act's goals of providing swift and certain relief to the worker on the one hand, and of limiting employer liability on the other. However, given our commitment to liberally construing the Act in favor of injured workers, *Sacred Heart Med. Ctr. v. Carrado*, 92 Wn.2d 631, 635, 600 P.2d 1015 (1979);

Weyerhaeuser, at 189.

We granted review in order to consider the facts of this case in conjunction with the facts in *In re Richard L. Eades*, Dckt. No. 01 17639 (December 20, 2002), and *In re Sidney T. Jones, Jr.*, Dckt. No. 00 15875 (January 29, 2002).

All three of these cases involve occupational disease claims and application of the last injurious exposure rule. The *Jones* and *Eades* appeals were remanded by this Board for further hearings because we determined that joinder of the Department and/or other employers was critical

to a complete adjudication of the claim in order to avoid piece-meal litigation and the potential for inconsistent results.

Mr. Jones had filed a claim for occupational hearing loss while working for a self-insured employer. The Department issued an order rejecting the claim. The order stated:

This claim is denied because: The worker's condition is not the result of the exposure alleged.

That the evidence reveals that the last injurious exposure which gave rise to the disease for which this claim was filed did not occur during employment subject to coverage under the industrial insurance laws of the State of Washington.

Mr. Jones appealed this order to the Board. The order was affirmed by the Proposed Decision and Order, and Mr. Jones filed a Petition for Review. We indicated that the mere fact that it had been determined that the self-insured employer was not responsible for Mr. Jones' hearing loss did not dispose of his appeal. A claim is not subject to rejection simply because a worker failed to identify correctly the liable insurer on the risk. We noted that the record was inadequate to make a determination of which employer would be on the risk should the claim be allowed. We remanded for further proceedings to take further evidence regarding Mr. Jones' work history and to join parties necessary to make a full determination.

Richard L. Eades filed an appeal from a Department order rejecting his occupational hearing loss claim on the basis that the claimant's condition was not the result of the exposure alleged. Like Mr. Jones, Mr. Eades had filed his claim for occupational hearing loss with a self-insured employer. In neither of the Jones or Eades appeals did the Department appear or participate at Board hearings. Although we agreed with the Proposed Decision and Order that Mr. Eades did not establish that he was exposed to injurious noise while working for the self-insured employer, we disagreed that the claim should be rejected based on the record, which showed that Mr. Eades did have occupationally related hearing loss.

As stated in *Eades*, one of the advantages of the last injurious exposure rule is that it protects the worker from the risk of filing claims against the wrong employer. *Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128 (1991). Although identification of the correct employer is necessary in order to identify correctly the correct insurer, it is not critical to claim **allowance**. However, we recognized for the first time in *Eades* that joinder in these cases need not be as expansive as we had required in *Jones* and prior such appeals:

To fully decide the issue of claim allowance, however, any potentially responsible insurer must be allowed to participate in the appeal. We intentionally refer to "responsible insurer" rather than "employer" because under the industrial insurance scheme in this state, there are two potential types of responsible insurers: the State Fund or a self-insured employer. The costs of workers' compensation benefits are borne either by the State or by self-insurers. See Weyerhaeuser v. Tri, 117 Wn.2d 128 (1991). In Mr. Eades' appeal, the State Fund is potentially at risk for the costs associated with Mr. Eades' occupational hearing loss. At a minimum, the Department must be joined under these circumstances, but it is unnecessary to join all potential State Fund employers. Based on this record, it is unclear whether Mr. Eades had injurious noise exposure with other self-insured employers. If there is a potential that other self-insured employers may be responsible for Mr. Eades' occupational hearing loss, they must be joined also. Other State Fund employers may be allowed to participate, but their joinder is not necessary to fully adjudicate claim allowance.

Eades, at 2.

Although the evidence in Mr. Pingley's case potentially implicates prior State Fund employers for liability under the last injurious exposure rule, in essence, it is the State Fund, the Department of Labor and Industries, that would be the **insurer** on the risk if our decision in this case were to be reversed on further appeal. Because the Department was a party to this appeal, joinder of State Fund employers is not necessary to fully adjudicate claim allowance.

Having carefully considered the record, the Proposed Decision and Order, and the Self-Insured Employer's Petition for Review, we make the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. On December 8, 2000, the claimant, Daniel G. Pingley, filed an application for benefits alleging that he injured his hands during the course of his employment with the Gram Lumber Company on October 5, 2000. The claim was assigned Claim No. W-532148.

On January 4, 2001, the Department of Labor and Industries issued an order allowing the claim, based on aggravation of a pre-existing condition diagnosed as bilateral carpal tunnel syndrome.

On January 12, 2001, the self-insured employer, Gram Lumber Company, protested the Department order of January 4, 2001.

On January 23, 2001, after granting certain time loss compensation, the Department issued an order closing the claim.

On February 15, 2001, the claimant filed his protest of the Department order of January 23, 2001.

On January 3, 2001, the claimant filed an application for benefits alleging that he injured his hands during the course of his employment with ENB Logging on January 13, 1999. The claim was assigned Claim No. P-798533.

On January 5, 2001, the employer, ENB Logging, protested the validity of the Application for Benefits of January 3, 2001.

On January 12, 2001, the Department issued an order rejecting the claim, concluding that the claimant's condition was not the result of an industrial injury or an occupational disease.

On February 15, 2001, the claimant protested the Department order of January 12, 2001.

On March 8, 2001, the Department issued an order affirming its order of January 12, 2001.

On April 3, 2001, the claimant protested the Department order of March 8, 2001.

On April 4, 2001, the Department issued an order that it was reconsidering its order of March 8, 2001.

On May 21, 2001, the Department issued a joint order in both Claim Nos. W-532148 (Gram) and P-798533 (ENB). The order set aside the Department order of January 23, 2001, on the Gram claim, and declared that the claim remained open for medical treatment and benefits. The order also stated that it corrected the Department order of January 12, 2001, on the ENB claim, and declared that that claim is rejected because the last injurious exposure was with Gram, which must cover treatment and benefits.

On June 7, 2001, the Gram Lumber Company filed its appeal with the Board of Industrial Insurance Appeals from the Department's joint order of May 21, 2001.

On July 9, 2001, the Board issued its order granting the appeal under Docket No. 01 16177.

2. The claimant worked in the woods as a choker setter, first in 1998 for Zumstein Logging, and then in 1999 for ENB Logging. As a choker setter, the claimant clipped up the cable around logs, allowing them to be mechanically transferred from the place where they fell to a landing. There, he would "chase" the log to unclip the cable. The claimant would

often use a chain saw to limb the logs or to buck them into lengths. In 2000, the claimant left the woods to work on the green chain at the Gram Lumber Company sawmill in Kalama. This was an entry-level job on the "chain" (conveyor) of green lumber emanating from a saw that produces one-by-four inch cedar fence boards. The saw placed these cedar boards perpendicular to the direction of chain movement. It was the claimant's job to "pull" the boards by stacking four boards together, then pulling the stack to a cart located behind him. A four-board stack weighs from 5-10 pounds. In the course of his 8-hour workday, the claimant would pull enough boards to fill six to eight carts per day. A cart, when filled, holds 754 boards, or 188 stacks of four boards. A minimum weight of 5 pounds per stack, 188 stacks per cart, and a minimum of six carts per day, equates to more than 2 tons of wood per day. A maximum weight of 10 pounds per stack, 188 stacks per cart, and a maximum of eight carts per day, equates to more than 7 tons of wood per day. The claimant moved between 2 and 7 tons of wood per day while working at the Gram Lumber Company. During his work setting chokers, using a chain saw, and pulling fence boards from the green chain, the claimant made repetitive and continuous use of his These repetitive and continuous hand and wrist hands and wrists. constitute distinctive conditions movements of the claimant's employment with Zumstein Logging, ENB Logging, and the Gram Lumber Company.

- 3. As of May 21, 2001, the claimant suffered from a hand and wrist condition, carpal tunnel syndrome, which arose naturally and proximately from the distinctive conditions of his employment with Zumstein Logging, ENB Logging, and the Gram Lumber Company.
- 4. The claimant's carpal tunnel syndrome, which arose naturally and proximately from the conditions of his employment with Zumstein Logging, ENB Logging, and the Gram Lumber Company, was not fixed and had not reached maximum medical improvement as of May 21, 2001.

CONCLUSIONS OF LAW

- 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of this appeal.
- 2. On or about May 21, 2001, the claimant had an occupational disease that arose naturally and proximately out of the distinctive conditions of his employment within the meaning of RCW 51.08.140.
- 3. As of May 21, 2001, the claimant's condition, which arose naturally and proximately from the distinctive conditions of his employment, was in need of further necessary and proper medical treatment as contemplated by RCW 51.36.010.

- 4. Under the last injurious exposure rule, the Gram Lumber Company was the insurer at risk during the last occupational exposure, which bore a causal relationship to the occupational disease, and is the insurer responsible for treatment and benefits.
- 5. The joint order of the Department of Labor and Industries, issued under Claim Nos. W-532148 and P-798533, is correct and is affirmed.

Dated this 24th day of January, 2003.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____ THOMAS E. EGAN Chairperson

/s/__

FRANK E. FENNERTY, JR.

Member