Brooks, Paul

OCCUPATIONAL DISEASE (RCW 51.08.140)

Schedule of benefits applicable

In successive claims involving hearing loss, the second claim involves the same type of disease but a different disease process, arising wholly independent of the first disease. A date of manifestation different from the date used in the first claim can be established. Reversing *In re Scott Pollard*, Dckt. No. 99 20741 (August 1, 2001). ***….In re Paul Brooks*, BIIA Dec., 02 17331 (2003)** [*Editor's Note*: *Accord, Pollard v. Weyerhaeuser Co.*, 123 Wn. App. 506 (2004).]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: PAUL J. BROOKS	)	**DOCKET NO. 02 17331**
	)	
CLAIM NO. W-595596	)	**ORDER DENYING MOTION FOR SUMMARY JUDGMENT AND REMANDING APPEAL FOR FURTHER PROCEEDINGS**

APPEARANCES:

Claimant, Paul J. Brooks, by
Springer, Norman & Workman, per
Robert R. Hall

Self-Insured Employer, Weyerhaeuser Company & Subsidiaries, by
Law Office of Craig A. Staples, per
Craig A. Staples

Department of Labor and Industries, by
The Office of the Attorney General, per
Steve Vinyard, Assistant

The self-insured employer, Weyerhaeuser Company & Subsidiaries, filed an appeal with the Board of Industrial Insurance Appeals on July 16, 2002, from an order of the Department of Labor and Industries dated July 1, 2002. In this order, the Department corrected its order of May 23, 2002; determined that the date the claimant's occupational disease became manifest was July 6, 2001; directed the self-insured employer, Weyerhaeuser Company & Subsidiaries, to pay the claimant a permanent partial disability award of 28.44 percent, less a pre-existing disability of 5.16 percent, for complete loss of hearing in both ears; directed the self-insured employer to purchase and maintain hearing aids for the claimant; and closed the claim. The appeal is **REMANDED FOR FURTHER PROCEEDINGS.**

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on timely Petitions for Review filed by the Department and the claimant to a Proposed Decision and Order issued on April 11, 2003, in which the industrial appeals judge reversed the Department order dated July 1, 2002, and remanded the matter to the Department with direction to issue an order closing Claim No. W-595596 with a permanent partial disability award equal to 28.44 percent complete loss of hearing in both ears, less a pre-existing 5.16 percent complete loss of hearing in both ears, and to calculate the monetary award using the rate of compensation in effect in 1979.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed.

We must begin with the acknowledgment that our industrial appeals judge has decided this case in a manner entirely consonant with our previous decision, *In re Scott Pollard*, Dckt. No. 99 20741 (August 1, 2001). We have granted review, however, to overrule our decision in the *Pollard* matter, and we, therefore, deny summary judgment and remand this matter to the hearing process for a determination as to the correct schedule of benefits.

As noted, this matter is before us by way of motion for summary judgment. In reviewing this matter, we have considered the following: the Memorandum in Support of Motion for Summary Judgment, the notarized affidavit of Craig A. Staples (the self-insured employer's attorney in this matter), and the notarized affidavit of Dr. William T. Ritchie as attachments; the claimant's Memorandum in Support of Denial of Motion for Summary Judgment with Exhibit A (December 31, 2002 Memorandum Opinion Re: Cross Summary Judgment Motions from the Pacific County Superior Court in the matter of *Pollard v. Weyerhaeuser Company*) and Exhibit B (hearing tests summary from February 8, 1962 to April 22, 2002) as attachments to the memorandum, and the affidavit of Paul Brooks; the Department's response, dated March 13, 2003, and entitled Department's Memorandum Opposing Employer's Motion for Summary Judgment and Supporting Department's Cross Motion for Summary Judgment, containing attachments designated as follows: Exhibit A, the Declaration of Dr. Charles Souliere; Exhibit A has attachments identified as Exhibit 1, an audiogram test result of the claimant dated April 22, 2002; Exhibit 2, a hearing tests summary (the same summary as Exhibit B attached to the claimant's memorandum); and a hearing loss questionnaire dated January 18, 2002; and Exhibit B, a Department policy statement dated July 15, 1998. As did our industrial appeals judge, we acknowledge the error within the affidavit of Paul Brooks. We agree that this is best treated as a clerical error. Finally, we considered the self-insured employer's Reply Memorandum Re: Motion for Summary Judgment and the supporting declaration of Richard Hodgson, M.D.

The facts are simple and not in dispute. The claimant has a singular work history, in that he worked for Weyerhaeuser from 1971 through July 2001, when he retired. He filed his first claim for occupational hearing loss in September 1984. This claim, S-784517 (hereafter, the "S-claim"), was allowed, and after appeal to the Board, was closed effective October 28, 1986, with a permanent partial disability award equal to 5.15 percent of binaural hearing loss. The order directed that the award be paid according to the schedule of benefits in effect in 1979.

After closure of the S-claim, Mr. Brook continued to be exposed to loud levels of noise up through his retirement. In December 2001, shortly after retirement, Mr. Brooks filed this claim, W-595596 (hereafter, the "W-claim"), alleging additional occupational noise-related hearing loss. On July 1, 2001, the Department issued the order under appeal, which determined that Mr. Brooks has 18.44 percent binaural hearing loss, less a pre-existing 5.16 percent hearing loss from the S-claim. The order further set the date of manifestation as that of July 6, 2001, and paid the permanent partial disability award according to the schedule of benefits in effect as of July 6, 2001. The self-insured employer appealed the order, contending that the correct schedule of benefits in the W-claim is that used in the S-claim, pursuant to RCW 51.32.180 and our decision in *Pollard*.

As we noted above, the facts in this matter are not in dispute, nor is the applicable law. RCW 51.32.180, the controlling statute, provides in pertinent part:

> (b) for claims filed on or after July 1, 1988, the rate of compensation for occupational diseases shall be established as of the date the disease requires medical treatment or becomes totally or partially disabling, whichever occurs first, and without regard to the date of the contraction of the disease or the date of filing of the claim.

Our decision in this matter turns entirely on the construction of this section of the statute.

In *Pollard*, we held that the statutory language directing that the date of manifestation be determined without regard to the date of contraction of the disease or the date of filing of the claim required the use of a date of manifestation that had been established in a prior different claim involving the same type of disease. In reconsidering this decision, we are mindful of the fact that, at least for claims involving hearing loss, the second application for benefits involves the same type of disease, but is a different disease process, arising wholly independently of the first disease.

It is well established that exposure to sufficient levels of noise over a period of time will cause the death of the hair cells connected to sensory nerves. Once the hair cells are dead, they are replaced with scar tissue. The hearing lost through this process is permanent. However, once a person is removed from the noise causing the death of the hair cells, there will be no further hair cell death or hearing loss, at least not from the prior exposure to injurious levels of noise. Dr. Souliere's declaration states clearly that:

> In my opinion, on a more probable than not basis, Mr. Brooks suffered additional injurious exposure to noise in the course of his employment with Weyerhaeuser at various times from March 9, 1988 through 2001, and the injurious exposure to noise at those times was a proximate cause of an increase in Mr. Brooks' permanent binaural hearing loss from a 5.16% disability to a 28.44% disability. If Mr. Brooks

> had not been exposed to injurious levels of noise between March 9, 1988 and 2001, then his condition would not have been the same: his hearing probably would have been better on July 1, 2002 than it actually was.

In other words, but for the noise exposure occurring from 1988 through 2001, Mr. Brooks would not have had further occupational hearing loss. Thus, while the hearing loss occurring from 1988 through 2001 represents the same disease, it stems from different exposure.

The self-insured employer contends that the language in RCW 51.32.180 requires that for successive occupational disease claims involving the same disease, the date of manifestation must be that which was used for the earlier claim. It appears to argue that the verbiage "without regard to the date of the contraction of the disease or the date of filing the claim" in RCW 51.32.180 mandates that even if the subsequent claim arises independently and out of wholly different circumstances, the earlier date of manifestation must be used when there are two claims involving the same disease. It argues further that this construction is required by use of the words "the disease."

The self-insured employer buttresses this argument by asserting that the claimant should have filed an application to reopen his claim pursuant to RCW 51.32.160, and that Mr. Brooks did not do so because the 7-year aggravation period had expired. In fact, given the medical evidence, the W-claim is not an aggravation of the S-claim. As we stated in *In re Robert Tracy*, BIIA Dec., 88 1695 (1990):

> Frequently a dichotomy is established between a new injury and an aggravation for purposes of providing a framework for analyzing cases like Mr. McDougle's and like the appeal before us. But this is merely a shorthand way of determining the real questions -- but for the original industrial injury, would the worker have sustained the subsequent condition? Or, in the alternative, did some subsequent event or events constitute a supervening cause, independent of his industrial injury? In this case, the evidence supports the latter conclusion.

Tracy, at 6. The same analysis applies in occupational disease claims. *See In re Leonard Roberson*, BIIA Dec., 89 0106 (1990). In this matter, the hearing loss sustained between 1988 and 2001, the subject of the subsequent W-claim, was independent of the hearing loss sustained by the earlier S-claim. While the W-claim represents a worsening of Mr. Brooks' hearing loss, there is no causal relationship between the S-claim and the W-claim, and the claimant appropriately filed a new occupational disease claim.

Given, then, that the subsequent W-claim does not represent a worsening of the S-claim within the meaning of RCW 51.32.160, the question remains whether RCW 51.32.180 requires the use of the date of manifestation established in an earlier claim for a later claim bearing no causal relationship to the earlier claim. As noted above, the self-insured employer argues that the earlier date must be used because the two claims involve the same disease. We disagree.

First and foremost, we are mindful of the statutory mandate to liberally construe the Industrial Insurance Act to ensure the fair compensation of disabled workers, with all doubts resolved in favor of the employee. *Department of Labor and Industries v. Landon*, 117 Wn.2d 122 (1991). We do not believe it is consonant with the goals of the Industrial Insurance Act to compensate a person at a rate in effect long before either the exposure or the damage occurred. Indeed, this is exactly what the court sought to avoid in *Kilpatrick v. Department of Labor & Indus.*, 125 Wn.2d 222 (1994). *Kilpatrick* involved several claimants who had been exposed to asbestos many years prior to development of the disease that actually killed them. The court stated:

> Just as multiple dates of injury will give rise to multiple industrial injury claims, so also will the worker who establishes separate and distinct diseases from asbestos exposure be able to claim separate dates of manifestation.

Kilpatrick, at 231. Simply because this is the same type of disease process does not mean that the new claim should be assigned the schedule of benefits used in a prior unrelated claim. But for the additional exposure to noise, Mr. Brooks would not have had additional hearing loss. This is a different disease, unrelated to the first, and should be treated as such.

If we use the analysis urged by the self-insured employer, a person suffering an occupational disease such as carpal tunnel syndrome in the right wrist, who then, 5 years later, manifests carpal tunnel in the left wrist, would be required to use the date of manifestation in the earlier claim. Certainly, it is the same disease and is generally occasioned by the same movement. We note, too, that neither the statute nor *Kilpatrick* would distinguish the two diseases because they were in two different areas of the body.

For the foregoing reasons, we have reconsidered and overrule our decision in *Pollard*. Accordingly, we hereby deny the self-insured employer's motion for summary judgment. We note that there is a cross-motion for summary judgment filed by the Department. However, there is a genuine issue of fact relative to the appropriate schedule of benefits, given the declarations of Dr. Hodgson and Dr. Souliere. Thus, we deny the Department's cross-motion for summary judgment and remand this matter to the hearing process for the taking of evidence relative to the appropriate date of manifestation, consonant with this decision.

The Proposed Decision and Order dated April 11, 2003, is vacated. This matter is remanded to the hearings process, pursuant to WAC 263-12-145(4), for further proceedings as indicated by this order. The parties are advised that this order is not a final Decision and Order of the Board within the meaning of RCW 51.52.110. At the conclusion of further proceedings, the industrial appeals judge shall, unless the matter is dismissed or resolved by an Order on Agreement of Parties, enter a Proposed Decision and Order containing findings and conclusions as to each contested issue of fact and law, based on the entire record, and consistent with this order. Any party aggrieved by the Proposed Decision and Order may petition the Board for review, pursuant to RCW 51.52.104.

It is so ORDERED.

Dated this 1st day of August, 2003.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

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