Crookshanks, Steve

JOINDER

Single claim, multiple possible employers/insurers

In the allowance of a claim as an occupational disease, it is acceptable to remand a claim to the Department to determine the impacted state fund employers when the Department has agreed to the allowance of the claim because the state fund will be the responsible insurer. It is not acceptable to remand to the Department to determine the responsible insurer. All potential insurers must be joined to allow complete relief among the parties. Distinguishing *In re Juan Muñoz*, BIIA Dec., 05 11698 (2007). **….*In re Steve Crookshanks*, BIIA Dec., 16 10351 (2016)**

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: STEVE B. CROOKSHANKS	)	**DOCKET NO. 16 10351**
	)	
	)	**ORDER VACATING PROPOSED DECISION**
	)	**AND ORDER AND REMANDING THE APPEAL**
CLAIM NO. SZ-34537	)	**FOR FURTHER PROCEEDINGS**

Mr. Crookshanks filed a claim in which he alleged he suffered an occupational disease due to the distinctive conditions of his employment. The Department of Labor and Industries (Department) rejected the claim. The industrial appeals judge directed allowance of the claim for the occupational disease but determined that the self-insured employer, J H Kelly, LLC, (Kelly) was not the employer on the risk for the occupational disease claim. He reached this determination based on stipulated facts by Kelly and Mr. Crookshanks. The Department asks the Board to deny the claim because when Kelly stipulated itself out of claim liability the claimant did not establish an employer-employee relationship that led to the occupational disease and did not move to join other putative "employers." We agree with the Department that the decision of the industrial appeals judge is in error because other potential responsible employers and insurers identified in the parties' Factual Stipulation should have been joined as provided by CR 19. We remand this matter to the hearing process to join those parties identified in the Factual Stipulation and other potentially liable insurers and employers identified in further proceedings. We reject the Factual Stipulation as Exhibit 1 because of the joinder error. Following joinder, if necessary, the industrial appeals judge must issue a Proposed Decision and Order determining whether Mr. Crookshanks sustained an occupational disease and if so, to further determine the insurer on the risk as of the date of the last injurious exposure.[1] The Proposed Decision and Order of July 14, 2016, is vacated and this appeal is **REMANDED FOR FURTHER PROCEEDINGS**.

DISCUSSION

Mr. Crookshanks appealed an order of the Department dated November 24, 2015, in which the Department rejected his claim as neither an occupational disease nor an industrial injury. Kelly was the employer identified under the claim. The appeal was decided based on a stipulation of fact submitted by Mr. Crookshanks and Kelly. The Department did not actively participate in the matter at hearing, although its legal representative, the Office of the Attorney General, was sent notice of all proceedings.

[1] WAC 296-14-350

Based on the Factual Stipulation we conclude that Mr. Crookshanks argues that his claim should be allowed as an occupational disease. Because we have rejected Exhibit 1, we will not hold Mr. Crookshanks to this theory of claim allowance on remand to the hearing process. We note, however, that occupational disease claims are different than industrial injury claims. Occupational diseases are typically the result of cumulative exposures to distinctive conditions of a worker's occupation. Frequently, the occupational exposure is the result of employment over many years and with many employers.

Occupational disease claims are reviewed against the backdrop of the "last injurious exposure rule."[2] The last injurious exposure rule is, essentially, a policy decision that relieves injured workers of the requirement to prove how much each employer contributed to the overall occupational condition. Washington has adopted the last injurious exposure rule that assigns full financial responsibility for an occupational disease claim to the employer/insurer (referred to as the insurer "on the risk") where the worker experienced the last contributing or causal exposure to the condition. The policy decision is based on the idea that it would be unduly burdensome on workers to prove which employer contributed a specific amount of the total occupational exposure.[3]

More specifically, the last injurious exposure rule deals with finding the insurer responsible for the cost of a particular claim. Our Industrial Insurance Act (Act) provides for two types of industrial insurance coverage within the state of Washington. Employers who obtain industrial insurance coverage from the state fund operated by the Department of Labor and Industries are under the fund as the insurer while employers who self-insure under the Act operate as their own insurers. Thus, the analysis must focus not just on the employer on the risk but rather the insurer on the risk as of the date of the last injurious exposure.[4] We emphasize that this rule applies only to different insurers. For this reason the Department may apportion costs of an occupational disease claim among "state fund" employers as falling under a single insurer, the state fund. Each self-insured employer is its own individual insurer.

While the Department argues that its order on appeal should be affirmed, it further argues that the claim should be remanded to the Department to determine whether "there was an employer and whether distinctive conditions of employment arose with that employer," citing the Board's decision

---

[2] *Weyerhaeuser Company v. Tri*, 117 Wn.2d 128 (1991).
[3] *In re Lester Renfro,* BIIA Dec., 86 2392 (1988).
[4] *In re Daniel Pingley,* BIIA Dec., 01 16177 (2003).

of *In re Juan Muñoz.*[5] In addressing occupational disease claims involving multiple employers the Board stated in *Muñoz*:

> The worker is only required to prove that the medical condition arose naturally and proximately out of the aggregate occupational exposure. If the worker satisfies that burden, then the insurer on the risk during the most recent exposure that bears a causal relationship is solely liable for the entire claim.[6]

The role of the Department in such situations is to first determine whether the worker suffers from an occupational disease arising naturally and proximately out of the distinctive conditions of employment with all potentially responsible employers covered under the Washington Industrial Insurance Act and, second, to determine the responsible employer/insurer on the risk. In the present appeal, the Department rejected the claim based both on the theories of industrial injury as well as occupational disease. We see no reason to remand the claim to the Department when, by specific reference, it has already denied the claim as an occupational disease.

We acknowledge that remanding to the hearing process is a different result than the decision in *Muñoz.* In *Muñoz* we remanded the adjudication of the claim to the Department to determine whether his occupational condition arose naturally and proximately of the distinctive conditions of his multiple employments as a carpenter with employers covered by the Washington Industrial Insurance Act during the course of his employment as a carpenter; coincidentally, a similar employment to Mr. Crookshanks. In the present appeal we have rejected Exhibit 1 as a factual basis on which to proceed. We believe it more appropriate to remand under these circumstances, with no evidentiary record at all, to the hearing process in order to provide the parties an opportunity to join those employers identified in the stipulation and to provide them an opportunity to participate. We reiterate the Board's statement in *Muñoz:*

> With respect to the joinder question, CR 19(a)(1) provides for the "joinder of persons needed for just adjudication" as follows: "A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties." We have consistently held that, in occupational disease cases involving multiple employers, the issue of claim allowance cannot be fully decided unless all potentially responsible insurers participate.[7]

---

[5] BIIA Dec., 05 11698 (2007)
[6] *Muñoz,* at 13.
[7] *Muñoz*, at 15.

On remand the industrial appeals judge should attempt to identify all insurers on the risk during the period of the claimed occupational exposure. At the minimum this should include the Department of Labor and Industries as the adjudicatory body for state fund claims and any other self-insured employers in addition to Kelly.

ORDER

The Proposed Decision and Order issued on July 14, 2016, is vacated and this matter is remanded to the hearing process to join such other insurers on the risk as provided by CR 19 and to conduct further proceedings as indicated by this order. The industrial appeals judge is directed to issue a further Proposed Decision and Order determining whether the claimant, Mr. Crookshanks, sustained an occupational disease arising naturally and proximately from the distinctive conditions of his employment and, if he sustained an occupational disease, to further determine the insurer on the risk as of the date of the last injurious exposure. The new order will contain findings and conclusions as to each contested issue of fact and law. Any party aggrieved by the new Proposed Decision and Order may petition the Board for review, as provided by RCW 51.52.104. This order vacating is not a final Decision and Order of the Board within the meaning of RCW 51.52.110.

Dated: October 3, 2016.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
DAVID E. THREEDY Chairperson

/s/_____
JACK S. ENG Member

Addendum to Decision and Order
In re Steve B. Crookshanks
Docket No. 16 10351
Claim No. SZ-34537

Appearances

Claimant, Steven B. Crookshanks, by Busick Hamrick Palmer, PLLC, per Douglas M. Palmer

Self-Insured Employer, Kelly Group, LLC, by Ronald W Atwood PC, per Ronald W. Atwood

Department of Labor and Industries, by The Office of the Attorney General, per Anastasia R. Sandstrom

Department Order(s) Under Appeal

In Docket No. 16 10351, the claimant, Steven B. Crookshanks, filed an appeal with the Board of Industrial Insurance Appeals on January 11, 2016, from an order of the Department of Labor and Industries dated November 24, 2015. In this order, the Department rejected the claim.

Petition for Review

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The Department filed a timely Petition for Review of a Proposed Decision and Order issued on July 14, 2016, in which the industrial appeals judge reversed and remanded the Department order dated November 24, 2015. The claimant and the employer filed responses to the Department's Petition for Review.

Evidentiary Rulings

Exhibit 1 is rejected.