

Schatz, John

STANDING

Although the Atomic Energy Commission (AEC) was not the worker's employer, the Defense Project Insurance Rating Plan Contract between the Department and the AEC, authorized by Chapter 144, Laws of 1951, makes the AEC a party in interest in all claims arising out of work done by contractors or subcontractors at the Hanford Works. The AEC is therefore a "person affected" within the meaning of RCW 51.52.050 and has standing to appear in proceedings before the Board. ...*In re John Schatz*, BIIA Dec., 25,823 (1968) [dissent]

Scroll down for order.

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

1 **IN RE: JOHN SCHATZ**) **DOCKET NO. 25,823**
2))
3 **CLAIM NO. 7006732**) **DECISION AND ORDER**
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5 APPEARANCES:

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7 Claimant, John Schatz, by
8 Walthew, Warner & Keefe, per
9 John W. Rusden, John J. Costello, Charles F. Warner, and Robert H. Thompson

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11 Employer, U.S. Atomic Energy Commission, by
12 Clyde T. Fitz

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14 Department of Labor and Industries, by
15 The Attorney General, per
16 Robert G. Swenson, Virginia O. Binns, Thomas O'Malley,
17 Gordon L. Bovey, and Gosta E. Dagg, Assistants
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19 This is an appeal filed by the claimant on January 4, 1966, from an order of the Department
20 of Labor and Industries dated November 30, 1965, denying his application to reopen his claim for
21 aggravation of conditions attributable to his industrial injury of December 11, 1958. **SUSTAINED.**

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DECISION

25 This matter is before the Board for review and decision on timely Statements of Exceptions
26 filed by the claimant, the employer, and the Department of Labor and Industries to a Proposed
27 Decision and Order issued by a hearing examiner for this Board on September 22, 1967, in which
28 the order of the Department was reversed. In addition to a Statement of Exceptions filed on
29 November 2, 1967, the U.S. Atomic Energy Commission also filed an Answer to Portion of
30 Claimant's Exceptions on November 16, 1967.

34 The Board has reviewed the evidentiary rulings of the hearing examiner and finds that no
35 prejudicial error was committed, and said rulings are hereby affirmed.

37 The issue before the Board on this appeal is whether the claimant's condition, due to his
38 industrial injury of December 11, 1958, worsened in degree or became more disabling in the period
39 between November 27, 1961, and November 30, 1965.

41 In his exceptions to the Proposed Decision and Order, the claimant raised the issue of
42 whether the Atomic Energy Commission (AEC) had standing to appear at the hearings held in this
43 matter. It is the claimant's contention that the AEC, not being an employer, had no legal standing.
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1 For reasons hereafter expressed, we believe the claimant's contentions are not well taken, and his
2 objections and motions to prevent the AEC from participation in these hearings must be denied.
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4 The injury herein occurred on December 11, 1958, in the claimant's employment for the
5 Soule Steel Company at the Hanford Works of the AEC. Therefore, the rights and interest of the
6 AEC in this matter are governed by the provisions of Chap. 144, Laws of 1951; and by the Defense
7 Project Insurance Rating Plan Contract AT (45-1)-562 promulgated pursuant to said statutory
8 authority, and executed between the AEC and the Department on December 17, 1952. Chapter
9 144, Laws of 1951, provides in part that it shall remain in effect "during the continued existence of
10 the emergency proclaimed by the President of the United States on December 16, 1950, in
11 Proclamation 2914..." Said Proclamation is still in force and the emergency proclaimed thereby is
12 still in effect. 50 U.S.C.A. App., pg. 6; and see 50 U.S.C.A. App., 1967 Pocket Part, pg. 5.
13 Therefore, Chapter 144, Laws of 1951, is still in effect.
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19 Said law authorizes the Department of Labor and Industries, on request of the AEC, to
20 approve, promulgate and modify "defense projects insurance rating plans," providing for industrial
21 insurance with respect to defense or other projects "in the national interest," whenever it is found
22 that application of such plans "will effectively aid the national interest." Said law further authorizes
23 such plans "regardless of whether such plan conforms to the requirements specified in the
24 industrial insurance law of this state."
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28 In accord with the statutory authority, the Department promulgated and approved, and
29 executed with the AEC, the above-mentioned Defense Project Insurance Rating Plan Contract AT
30 (45-1)-562. Article 1(a) of this contract provides in part that all
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32 "operating, service, construction, and prime contractors of the
33 commission and their lower tier contractors engaged in work related to
34 the operation and support of the Hanford Works in or near Richland,
35 Washington, ... with respect to whom the Commission advises the
36 Department the coverage of the Plan hereinafter set forth is to apply,
37 shall be insured under the Plan."
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39 Article 1(b) provides:
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41 "The Industrial Insurance and Medical Aid Acts of the State of
42 Washington shall apply with full force and effect with respect to all prime
43 contractors and their lower tier contractors (hereinafter sometimes
44 collectively called 'employer' or 'employers') referred to in paragraph (a),
45 and all workmen and their families and dependents as are or may be
46 afforded coverage hereunder, except that under this Plan certain
47 obligations and requirements of the Industrial Insurance and Medical Aid

1 Acts which otherwise might be imposed upon employers are hereby
2 modified expressly or by necessary inference and certain obligations in
3 lieu thereof are hereby assumed by virtue of this Plan, employers
4 insured hereunder are exempt from such obligations and requirements
5 under the Industrial Insurance and Medical Aid Acts."
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7 Furthermore, Article 17 of the contract provides that:

8 "...Performance hereunder by the Commission shall be deemed and
9 shall constitute full compliance by all employers insured hereunder with
10 all provisions and requirements of the Industrial Insurance and Medical
11 Aid Acts of the State of Washington as may be affected expressly or by
12 necessary inference by the provisions of this Plan."
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14 The principal feature of this contract is that prime contractors and their subcontractors at the
15 Hanford Works of AEC are relieved from certain obligations and requirements of the Industrial
16 Insurance Act which are imposed upon employers generally throughout the rest of the state. In
17 particular, such contractors and subcontractors are relieved from all premium payments or other
18 financial burdens concerning industrial insurance coverage for their employees; instead, the duty is
19 placed on the AEC to make payments into industrial insurance, medical aid, and pension reserve
20 accounts to cover payment of all awards and benefits granted to employees (and their families and
21 dependents) of such contractors and subcontractors. Moreover, under the contract the AEC does
22 not pay premiums, but in fact reimburses the Department, on a dollar-for-dollar basis, for all
23 payments made by the Department in connection with claims filed by such employees (and their
24 families and dependents).
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26 There are many other provisions of this contract, such as provisions governing the special
27 bank accounts out of which the Department disburses funds and into which the AEC must make
28 deposits; provisions on the right of the U.S. Comptroller General of the General Accounting Office
29 to audit and inspect all records and transactions related to the Plan; provisions regarding payments
30 by the AEC to the Department, for deposit into the accident and medical aid funds, of sums which
31 reflect the AEC's proportionate share of Department administrative expenses, Department appeal
32 expenses, and operating expenses of this Board; requirements that all notices, reports,
33 correspondence, and other documents relating to claims covered by the contract, sent either to or
34 from the Department, shall, because of security control requirements, go through the AEC's
35 Richland offices; and provisions governing the Department's duties to safeguard restricted data and
36 other classified information, and to conform to all security regulations and requirements of the AEC.
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1 Finally, Article 8 of the contract provides:

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3 "It is understood and agreed that the United States represented by the
4 Commission and the employers insured under this Plan shall be
5 considered as persons aggrieved having the right to appeal to the Board
6 of Industrial Insurance Appeals and to the courts under the Workmen's
7 Compensation Statutes and other applicable law." (Emphasis supplied)

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9 It is clear from all the foregoing that, in some significant aspects, the system of industrial insurance
10 covering employment related to the Hanford Works of the AEC is not the same system as that
11 which pertains to covered employment in the rest of this state. Furthermore, this somewhat
12 different system was clearly authorized and intended by our Legislature, because of the overriding
13 "national interest" and national security considerations involved, by enactment of Chapter 144,
14 Laws of 1951.

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18 The claimant is of course correct in his contention that the Soule Steel Company, and not the
19 AEC, was his employer; but this fact is of no moment in view of the above-cited statute and the
20 insurance system promulgated pursuant thereto. If he contends that the contract between the
21 Department and the AEC could not change his "workman-employer" relationship, the answer is that
22 the contract does not purport to change such relationship. The contract simply makes the AEC a
23 party in interest in all claims arising out of work done by contractors or subcontractors at the
24 Hanford Works, since the AEC directly bears the entire financial burden of such claims; and again,
25 this is within the purview of the special statute. Instead of the usual three parties in interest in a
26 claim, i.e., the claimant, his employer, and the Department, the three parties in interest in a claim
27 such as this one are really the claimant, the AEC, and the Department.

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33 It is clear that the AEC is, within the contemplation of RCW 51.52.050, a "person affected" by
34 the Department's closing order in this claim, since (1) it must bear the entire cost of the award
35 provided for by said order; (2) the Defense Project Insurance Rating Plan, applicable to this case,
36 specifically provides that the AEC is a "person aggrieved" having the right to appeal to this Board;
37 and (3) said Plan, to the extent that it may be bound to be inconsistent with the normal
38 requirements or limitations of the industrial insurance law, supersedes such law pursuant to the
39 plain terms of Chapter 144, Laws of 1951.

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43 We might note that we do not see how the fact that the AEC is a proper party and appellant
44 herein mitigates against claimant's legal rights. He has the right to claim all benefits provided to
45 injured workmen under the Act, and who actually pays for those benefits is, legally, none of his
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1 concern. His concern here is probably over the fact that the AEC is apparently choosing to
2 "contest" the case more strenuously than the actual employer, Soule Steel, might have. While this
3 is an obvious practical consideration, it has no support as a legal matter.
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6 In support of his contention that his condition due to his industrial injury of December 11,
7 1958, worsened between November 27, 1961, and November 30, 1965, the claimant presented the
8 testimony of Dr. Peter Fisher, an internist of Seattle. Dr. Fisher performed two extensive
9 examinations, reports of which he testified from at the hearings held in this matter. The first of
10 these examinations was performed on December 11, 1961, and the other was performed four years
11 later on December 16, 1965. A careful analysis of this testimony reveals that the doctor made no
12 significant findings of worsening of the claimant's condition relative to his industrial injury.
13 Comparable areas of the two examinations reveal that in 1961 the claimant was found to have a
14 "considerable" bowlegged deformity, but in 1965, he had a "modest" bowlegged appearance. On
15 neither examination, did the claimant manifest atrophy. In 1961, Dr. Fisher found shoulder and
16 neck motions slightly restricted with low back pain. In 1965, Dr. Fisher found a full range of neck
17 and shoulder motion with no mention of low back pain. In 1961, Dr. Fisher found that the claimant
18 could hardly flex his back at all, and when he did, it caused immediate back discomfort. In 1965,
19 however, he found that the claimant could perform back flexion so that his fingers reached to his
20 knee, with little low back motion, and no mention of any back discomfort. In 1961, the claimant's
21 condition was so disabling that Dr. Fisher could not test straight leg raising or hip flexion because
22 the patient's back discomfort and resistance to these tests made it impossible for him adequately to
23 test these motions. However, in 1965, Dr. Fisher found that the claimant could straight leg raise on
24 the right 70 degrees actively and 90 degrees passively, and straight leg raise on the left 40 degrees
25 actively and 60 degrees passively. He also found in 1965 that left hip flexion was "markedly
26 limited" and right hip flexion was full. In 1961, Dr. Fisher found the claimant had "marked"
27 straightening of the low back with bilateral muscle spasm but, on his 1965 examination, he found
28 straightening of the low back, but made no mention in his notes that it was either marked or that
29 there was muscle spasm. On cross-examination, Dr. Fisher stated that there must have been
30 muscle spasm in 1965, but that he did not put it down on his report because it was a minor finding.
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33 Dr. Fisher's testimony concerning x-rays is inconsistent. When first examined concerning x-
34 rays taken in October of 1965, Dr. Fisher noted no scoliosis, no significant deformities in the low
35 back, no definite loss of integrity in the intervertebral spaces of the low back except that at the
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1 lumbar joints there was a suggestion of some narrowing. He also found on direct examination
2 that there were "very minimal degenerative changes" and if there was narrowing at the lumbar
3 space, "it is very little." After cross-examination, however, on re-direct examination, Dr. Fisher took
4 another look. At this time, he discovered that there was slight scoliosis, a narrowing of the L4-L5
5 interspace "of a definite nature and considerable" and also a "definite narrowing of the interspace
6 between the 4th and 5th lumbar." This second look at the x-rays also revealed to the doctor
7 arthritic spurs which were "very large and extensive."
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11 After a thorough study of this medical witness's testimony, we are unable to find any specific
12 example of an objective medical finding which suggests that the claimant's condition due to his
13 industrial injury worsened in any degree during the relevant period. It is clear to us, however, that
14 the claimant suffered from pre-existing and unrelated disabilities including what have been
15 characterized as a small umbilical hernia, a rather large epigastric incisional hernia, and a
16 "massive" inguinal hernia (about grapefruit size) which was reducible. On its face, Dr. Fisher's
17 testimony suggests more strongly that the claimant's disabling conditions in 1965, different from
18 those in November of 1961, are not attributable to the industrial injury. Conditions attributable to
19 the industrial injury, on the other hand, seem to have improve.
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22 Taking the record as a whole, we are convinced that between November 27, 1961, and
23 November 30, 1965, the claimant's condition due to his industrial injury did not worsen or become
24 more disabling in any degree.
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27 **FINDINGS OF FACT**

28 After a complete review of the record, the Board finds:
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- 30 1. On December 11, 1958, while in the course of his employment for the
31 Soule Steel Company (operating on a contract with the Atomic Energy
32 Commission), the claimant herein suffered an industrial injury. A timely
33 report of accident was filed, the claim allowed, and treatment provided.
34 On August 5, 1960, the claim was closed and hernia conditions suffered
35 by the claimant were disallowed by the Department as un-related to the
36 industrial injury. On appeal to this Board, this order was sustained on
37 July 31, 1961.
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- 39 2. On October 13, 1961, an application to reopen the claim for aggravation
40 of condition was filed by the claimant with the Department, and on
41 November 27, 1961, that application was denied. After appeal, the
42 claimant was awarded 50% of the maximum allowable for unspecified
43 disabilities for residuals of his industrial injury.
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3. On August 16, 1965, the claimant filed an application to reopen his claim for aggravation of his condition. On November 30, 1965, the application was denied. A notice of appeal was filed with this Board on January 4, 1966, and on January 14, 1966, this appeal was granted.
 4. Proceedings were conducted in connection with this appeal, and, on September 22, 1967, a hearing examiner for this Board entered a Proposed Decision and Order in connection therewith. Thereafter, within the period of time provided by law, exceptions were filed and the case referred to the Board for review as provided by RCW 51.52.106.
 5. On November 30, 1965, the claimant herein suffered from disabling conditions including degenerative arthritis of his lumbar spine and three hernias as follows: a small umbilical hernia, an epigastric incisional hernia, rather large, and a massive inguinal hernia, but these conditions were not caused by or related to his industrial injury.
 6. Between November 27, 1961, and November 30, 1965, the claimant's condition changed in that in 1961 the claimant manifested a "considerable" bowlegged deformity, whereas in 1965, he had a "modest" bowlegged appearance; in 1961, his shoulder and neck motions were restricted with low back pain, however, in 1965, he had a full range of neck and shoulder motion and no low back pain; in 1961, he was barely able to flex his back at all and flexion of his back caused immediate back discomfort, however, in 1965, he could perform back flexion so that his fingers reached to his knees without back discomfort; in 1961, his back condition was so disabling that straight leg raising tests and hip flexion tests could not be adequately performed because of discomfort and resistance, however, in 1965, the claimant could perform these straight leg raising tests and raise his right leg 70 degrees and his left leg 40 degrees actively and also was able to flex his left hip (with "marked" limitation) and flex his right hip fully; in 1961, the claimant manifested "markedly" diminished sensation to pin prick below the left knee and absent vibratory sensation at the ankles and diminished at both knees, however, in 1965, the claimant's perception of pin prick was definitely improved on the left lateral thigh and in most of the leg and foot, and his perception of vibratory sensation was less abnormal in 1965 than in 1961.
 7. Between November 27, 1961, and November 30, 1965, the claimant's disabling conditions due to his industrial injury of December 11, 1958, did not worsen in any degree nor did they become more disabling; but his condition resulting from his industrial injury did in fact improve as stated in Finding No. 6.

CONCLUSIONS OF LAW

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Based on the foregoing findings of fact, the Board concludes:

- 1 1. This Board has jurisdiction of the parties and subject matter of this
2 appeal.
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4 2. The Atomic Energy Commission is a proper party to this appeal before
5 the Board.
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7 3. The order of the Department of Labor and Industries issued herein on
8 November 30, 1965, is correct in law and fact, and must be sustained.

9 It is so ORDERED.

10 Dated this 10th day of September, 1968.

11 BOARD OF INDUSTRIAL INSURANCE APPEALS

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14 /s/
15 ROBERT C. WETHERHOLT Chairman

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17 /s/
18 R.M. GILMORE Member

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20 **DISSENTING OPINION**

21 This Board, by its order of November 13, 1964 (which order was later sustained by the
22 Superior Court in Benton County), determined that the claimant's back condition, resulting in the
23 disability present in 1961, was causally related to the industrial injury. Despite the opinion of both
24 Dr. Richard A. Pettee and Dr. A. M. Gregson in this record that such condition is not related to the
25 industrial injury, it is now res judicata it is.

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28 The claimant, prior to the industrial injury of 1958, was steadily employed at hard labor and
29 since that injury has not worked. The entire back disability as it existed in November 1961, was
30 due to the industrial injury, and it is the consensus of the medical testimony in this record that the
31 claimant was permanently and totally disabled due to his back disability on November 30, 1965. I
32 am persuaded that the claimant was unemployable in November 1965, due to back disability
33 previously found to be caused by the industrial injury and I would reverse the order of the
34 Department of Labor and Industries and direct that this injured workman be classified as a
35 permanently and totally disabled workman under the Act.
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40 Dated this 10th day of September, 1968.

41 BOARD OF INDUSTRIAL INSURANCE APPEALS

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44 /s/
45 R.H. POWELL Member
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