Kutzer, Robert

TIMELINESS OF CLAIM (RCW 51.28.050; RCW 51.28.055)

Occupational disease [prior to 1984 amendment to RCW 51.28.055]

Compensable disability

No cause of action for an occupational disease accrues until the worker receives notification from a physician that he has an occupational disease resulting in a compensable disability. A worker who was able to continue working without impairment did not have a compensable disability. The statute of limitations did not begin to run until the worker's condition rendered him temporarily totally disabled, despite the fact that he was earlier advised by his doctor that he had an occupational disease. …In re Robert Kutzer, BIIA Dec., 44,305 (1976) [dissent]

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IN RE: ROBERT D. KUTZER  
DOCKET NO. 44,305  
CLAIM NO. G525281  
DECISION AND ORDER

APPEARANCES:

Claimant, Robert D. Kutzer, by
William A. Stiles, Jr.

Employer, Marine Asphalt Company, Inc., by
John Cheney

Department of Labor and Industries, by
The Attorney General, per
James D. Pack, Assistant

This is an appeal filed by the claimant on July 15, 1974, from an order of the Department of Labor and Industries dated June 7, 1974, which rejected this claim on the grounds: 1. The claimant's condition is not the result of injury alleged; 2. That the claimant's condition pre-existed the alleged injury and is not related thereto; 3. That no claim was filed within one year from the date on which the claimant was informed by a physician that an occupational disease had been contracted. **REVERSED AND REMANDED.**

**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 Department of Labor and Industries to a Proposed Decision and Order issued by a hearing examiner for this Board on July 15, 1975, in which the order of the Department dated June 7, 1974 was reversed, and the claim remanded to the Department with direction that the Department allow the claim as an occupational disease and take such other and further action as may be indicated and authorized or required by law.

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

The record establishes that on June 11, 1973, and for some period of time prior thereto, perhaps several years, the claimant had been suffering from a lung condition diagnosed as allergic bronchitis. According to the claimant's attending physician and the medical witness herein, Dr. Lawrence A. Whoolery, the cause of this condition may be various things, among which are toxic fumes from welding and hot oil and diesel fumes and smoke. The claimant had been a welder for a
number of years, the last 3½ years prior to June 11, 1973, involving a full-time work for this employer, Marine Asphalt Co., Inc., where he was constantly exposed to such substances. It was Dr. Whoolery’s firm opinion that such occupational exposure was the cause of claimant’s allergic bronchitis.

On June 11, 1973, the claimant suffered symptoms of extreme shortness of breath and nausea while working as a welder for this employer, and inhaling fumes from hot grease on a gear and flux from a welding rod. He started to leave for home in his own vehicle, but “passed out” while still on the employer’s premises, and was thereafter taken to Dr. Whoolery for treatment. At that time, he was told that he should not continue to pursue his occupation, for the reason that the welding and other fumes were exacerbating and causing a worsening of his bronchitis. He accordingly ceased the employment, and said he hasn’t worked since.

In the Proposed Decision and Order, the hearing examiner found that the claimant’s bronchitis condition was related to his occupational exposure and constituted an occupational disease, in accord with Dr. Whoolery’s medical opinion. The hearing examiner also found that claimant “filed his claim within one year from the date he was informed by a physician that he had contracted an occupational disease.” Accordingly, the Proposed Decision and Order directed allowance of the claim.

It was this latter determination, as to the timely filing of the claim, which Department’s counsel specifically challenges in his Petition for Review.

The claim was not filed with the Department until December 11, 1973, and therefore counsel argues that it is invalid and not compensable because it was not filed within one year following November 1972, during which month the claimant was advised by Dr. Whoolery, on more than one occasion, that his lung troubles were caused by his occupational exposure. Dr. Whoolery’s testimony does clearly establish that he so notified the claimant of the occupational nature and causation of his bronchial disease, in November 1972. The following quotes from the doctor’s testimony are clearly illustrative:

"A. On the physical examination on November of-- 9, 1972, according to my records here, he was advised at that time that the hot oil and diesel fumes and exhaust fumes and what not, were causing his--his trouble."

....

Q Back in November, 1972, is it likely that you discussed with him the situation of his lung problems and the possible or probable relation-
ship of those lung problems to this exposure that you mentioned of the hot oil and diesel fumes and exhaust fumes at work?

A Yes, I'm sure I discussed this with Mr. Kutzer in November of '72. He was seen by me on November 19, 1972, complaining of shortness of breath and I'm sure, at that time, that I discussed the probability of his condition being aggravated by hot oil and diesel fumes.

Q Is it likely, Doctor, that at that time you advised him of your opinion as to the probability of relationship of his troubles to the exposure at work?

A I feel that that is true, yes.

Q Did you also discuss with him the same subject on a visit of November 16, 1972?

A I imagine my description at that time would be along the same lines as the one earlier in November. My diagnosis in my record indicates that or states that he was allergic to diesel oil and welding fumes."

However, under our Supreme Court's interpretations of the one-year statutory limitation for filing of occupational disease claims, this physician's notification is not enough, of itself, to hold that the statute had run. RCW 51.28.055 reads as follows:

"Claims for occupational disease or infection to be valid and compensable must be filed within one year following the date the workman had notice from a physician of the existence of his occupational disease, without reference to its date of origin."

Our Court has interpreted this to mean that the running of the statute of limitations does not commence until the workman is given notice by a doctor "that his disabling disease is occupational in its nature and causation." In other words, he must be made aware of the fact, by a doctor, that he has a disease that in the doctor's opinion is related to his occupation. Williams v. Department of Labor and Industries, 45 Wn. 2d 574; Nygaard v. Department of Labor and Industries, 51 Wn. 2d 659. As above pointed out, this requirement was met in November of 1972, in this case.

There is, however, an additional event which must occur before the one-year period commences to run, which was established by the Williams and Nygaard cases, supra. This further requirement was not alluded to in the Department's Petition for Review. The Court said, in Williams:

"No cause of action, of course, can accrue for an occupational disease before it reaches a stage of development for which it is compensable at least in some degree." (Emphasis supplied)
Any doubt as to the meaning of this statement was dispelled in *Nygaard*, *supra*, when the Court explained:

"A disease, and full knowledge of it, may exist long before a compensable disability develops. This court has already adopted the rule that the period allowed for filing a claim for an occupational disease does not commence to run prior to the time some degree of disability, amounting to a compensable disability, results."  (Emphasis supplied)

In applying this principle to the facts in *Nygaard*, the Court observed that at no time prior to the date of Nygaard's collapse on the job was he required to miss work due to his alleged occupational disease, and the record did not show that "his ailment had, in any way, impaired his efficiency as a workman until his collapse..." In other words, there was no temporary, permanent partial, or permanent total disability, until the time of his "collapse," at which time of course a status of temporary total disability -- a "compensable" disability -- existed. Since the claim was filed by Nygaard well within a year after this compensable disability began, the Court concluded that it was timely filed.

Thus, it can be seen that two events must take place to start the running of the one-year claim filing period: (1) Notice to the workman by a doctor that his disease is occupational in its nature and causation; and (2) The disease must have reached the point where some sort of compensable disability results from it. Until one year has passed from the occurrence of both of these events, a claim is not invalid because of untimely filing.

Applied to the facts of the instant case, it is clear, as we have heretofore pointed out, that event (1) occurred in November 1972.

However, as to event (2), careful review of the record convinces us that the first time claimant can be said to have suffered a known compensable disability from his allergic bronchitis was on June 11, 1973, when he had the severe episode at his job and had to quit work on his doctor's advice, thus becoming temporarily totally disabled. Although he had some previous milder allergic bronchitis attacks requiring him to see the doctor, specifically in November 1972, and apparently on one occasion in 1968, there is no definite evidence that he was required to lay off work thereby, or that his welding work which he regularly performed was in any way impaired prior to the incident of June 11, 1973. He testified that the condition began to "bother" him more in about February 1973, but he still worked steadily and full-time up until the June 11, 1973 incident. The
satisfactory way in which he performed, and the fact of his regular full-time work up until that date, was corroborated to a considerable degree by the employer's witnesses.

The filing of this claim on December 11, 1973, was obviously within one year from the date of first apparent development of compensable disability on June 11, 1973. The claim was therefore timely.

FINDINGS OF FACT

After a careful review of the record, and in view of the foregoing discussion, the Board finds as follows:

1. On December 11, 1973, the claimant filed a report of accident with the Department of Labor and Industries alleging an injury or occupational disease occurring to the claimant on June 11, 1973, while in the course of his employment with Marine Asphalt Co., Inc., as a welder. On June 7, 1974, the Department entered an order rejecting the claim on the grounds: (1) That claimant's condition is not the result of injury alleged; (2) That the claimant's condition pre-existed the alleged injury and is not related thereto; (3) That no claim was filed within one year from the date on which claimant was informed by a physician that an occupational disease had been contracted. Claimant appealed to this Board on July 15, 1974, and on July 26, 1974, the Board granted the appeal and ordered hearing proceedings thereon.

2. For several years prior to June 11, 1973, the claimant had been employed steadily and full-time as a welder by the Marine Asphalt Co., Inc., and in connection with his duties he was exposed to inhalation of toxic welding fumes and hot oil and diesel fumes and smoke.

3. For some period of time, perhaps several years, prior to June 11, 1973, the claimant had been suffering from a lung condition described as allergic bronchitis.

4. On or about November 9, 1972, the claimant was informed by his doctor that his allergic bronchitis condition was related to the inhalation of welding fumes and other irritating smoke and fumes at work. He was not advised by the doctor at that time to cease his employment as a welder or to limit his work activity in any way. On November 9, 1972, and thereafter, the claimant's efficiency and ability to perform his work was not noticeably affected by his bronchitis condition, and he continued to work regularly and full-time for this employer until June 11, 1973.

5. On June 11, 1973, the claimant developed a further exacerbation and worsening of his allergic bronchitis, as the result of inhaling smoke and fumes from welding and from hot grease on gears on which he was working in the course of his employment. Medical treatment was necessary, and he had to quit his employment on his doctor's advice on June 11, 1973, because of the bronchitis condition.
6. The claimant's allergic bronchitis was caused by his occupational exposure to welding fumes and other irritating smoke and fumes in his employment.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Board makes the following conclusions of law:

1. This Board has jurisdiction of the parties and subject matter of this appeal.

2. This claim filed on December 11, 1973, was a timely claim for an occupational disease, within the one-year limitation imposed by RCW 51.28.055 and the judicial interpretations of said statute.

3. The claimant sustained an occupational disease, within the meaning of the Workmen's Compensation Act, naturally and proximately resulting from his employment with Marine Asphalt Co., Inc.

4. The Department's order of June 7, 1974, rejecting this claim, is incorrect and should be reversed, and this matter should be remanded to the Department with direction to allow the claim as an occupational disease and to take such further action as may be indicated and authorized or required by law.

It is so ORDERED.

Dated this 27th day of February, 1976.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/
PHILLIP T. BORK Chairman

/s/
SAM KINVILLE Member

DISSENTING OPINION

The claim filed by Mr. Kutzer on December 11, 1973, was some 13 months and 2 days from November 9, 1972, when Dr. Whoolery advised the claimant that fumes at work were causing his lung trouble to worsen.

I believe there is no jurisdiction to reach the merits of this case, since an essential jurisdictional requirement, i.e., filing of the claim within the one-year period provided in RCW 51.28.055, has not been met. I therefore dissent from the Board's majority decision, and would uphold the Department's rejection of the claim.

Dated this 27th day of February, 1976.

/s/
R. M. GILMORE Member