Jones, Charles (II)

OCCUPATIONAL DISEASE (RCW 51.08.140)

Schedule of benefits applicable

A disease or disability is not manifest unless it is evident, in some fashion, to the worker. However, this knowledge need not necessarily be tied to the notice that the disease or disability is occupationally induced. The date of manifestation of disease or disability is the point in time when contemporaneous medical evidence of disability or need for treatment is coupled with knowledge, on the worker's part, that a disease or disability exists. ***….In re Kenneth Alseth*, BIIA Dec., 87 2937 (1989)** [*Editor's Note*: The Board's decision was appealed to superior court under Snohomish County Cause No. 89-203290-1.]**; *In re Charles Jones* (II), BIIA Dec., 87 2790 (1989); *In re Milton May*, BIIA Dec., 87 4016 (1989)** [*Editor's Note*: *Overruled*, in part *Boeing v. Heidy*, 147 Wn 2d 78 (2002).]

The 1988 amendment to RCW 51.32.180 did not explicitly overrule the Board's prior decisions applying the date of manifestation rule. Thus, even for claims filed before July 1, 1988, the Board continues to apply the date of manifestation rule to determine the schedule of benefits. ***….In re Kenneth Alseth*, BIIA Dec., 87 2937 (1989)** [*Editor's Note*: The Board's decision was appealed to superior court under Snohomish County Cause No. 89-2023290-1.]**; *In re Charles Jones* (II), BIIA Dec., 87 2790 (1989); *In re Milton May*, BIIA Dec., 87 4016 (1989)** [*Editor's Note*: The Board's decision was appealed to superior court under Snohomish County Cause No. 89-2-03033-9.] [Rule upheld by *Department of Labor & Indus. v. Landon*, 117 Wn.2d 122 (1991). *Overruled in part*, *Harry v. Buse*, 166 Wn.2d 1 (2009) (occupational hearing case becomes partially disabling on the date the worker was last exposed to hazardous occupational noise).]

RETROACTIVITY OF STATUTORY AMENDMENTS

Schedule of benefits applicable in occupational disease claim (RCW 51.32.180)

The 1988 amendment to RCW 51.32.180 did not explicitly overrule the Board's prior decisions applying the date of manifestation rule. Thus, even for claims filed before July 1, 1988, the Board continues to apply the date of manifestation rule to determine the schedule of benefits. ***….In re Kenneth Alseth*, BIIA Dec., 87 2937 (1989)** [*Editor's Note*: The Board's decision was appealed to superior court under Snohomish County Cause No. 89-2-03290-1.]**; *In re Charles Jones* (II), BIIA Dec., 87 2790 (1989); *In re Milton May*, BIIA Dec., 87 4016 (1989)** [*Editor's Note*: Rule upheld by *Department of Labor & Indus. v. Landon*, 117 Wn.2d 122 (1991).]

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: CHARLES JONES	)	**DOCKET NOS. 87 2790 and 87 2971**
	)	
CLAIM NO. K-262781	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Charles Jones, by
William H. Taylor

Self-Insured Employer, Weyerhaeuser Company, by
Roberts, Reinisch & Klor (withdrawn), and by
Kathryn D. Fewell

Department of Labor and Industries, by
The Attorney General, per
Ann Silvernale and John Wasberg, Assistants, and Laurel Anderson, Paralegal

The appeal assigned Docket No. 87 2790 is an appeal filed on August 12, 1987 by the claimant from an order of the Department of Labor and Industries dated August 6, 1987. The appeal assigned Docket No. 87 2971 is an appeal filed on August 24, 1987 by the self-insured employer, Weyerhaeuser Company, from the same order of the Department of Labor and Industries dated August 6, 1987. The order was entered pursuant to the Board order of January 2, 1987 and corrected and superseded orders dated March 5, 1987, March 6, 1987, and March 11, 1987. The August 6, 1987 order determined that claimant had sustained a permanent partial disability equal to 69.875% of complete loss of hearing in both ears as a result of exposure to injurious levels of noise while in the course of employment with Weyerhaeuser prior to1971 and closed the claim with a total award equal to $8,385.00, less prior reimbursement to the employer from the accident fund of $10,061.28, and with an overpayment due from the employer in the amount of $1,676.28. **REVERSED AND REMANDED**.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, these matters are 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 on September 23, 1988 in which the order of the Department dated August 6, 1987 was reversed and the claim remanded to the Department with directions to issue an order closing the claim with a permanent partial disability award equal to 69.875% of the complete loss of hearing in both ears to be paid on the basis of the benefit schedule in effect in 1976, less prior payments thereof.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed and said rulings are hereby affirmed. The parties agreed that the record should include the Proposed Decision and Order and the Decision and Order entered by the Board in Docket No. 70,660, a prior appeal involving Mr. Jones' hearing loss claim. The Proposed Decision and Order is marked Exhibit No. 2 and the Decision and Order is marked Exhibit No. 3. Both are hereby admitted to evidence.

Although we agree with our Industrial Appeals Judge's ultimate determination, we believe it is necessary to set forth our reasoning for so concluding. By way of background, this claim was previously before us in 1985-1987. The Board at that time determined that the claimant's permanent partial disability equaled 69.875% of complete loss of hearing in both ears; that the claimant was last exposed to injurious noise at Weyerhaeuser prior to 1971; and that the state fund, rather than the self-insured employer, was financially responsible for payment of the permanent partial disability award. Thus, both the payor and the extent of Mr. Jones' disability caused by hearing loss were established by our final, unappealed order in the prior appeal under Docket No. 70,660.

The sole issue remaining in this appeal is which schedule of benefits applies to the payment of Mr. Jones' permanent partial disability award. The Department paid the award in accord with the schedule of benefits which was in effect until July 1, 1971, consistent with the date of last injurious exposure. Mr. Jones and the self- insured employer initially contended that the appropriate schedule was the one in effect from March 1979 through June of 1986. The Proposed Decision and Order found that the appropriate schedule was that which was in effect until March 23, 1979, applying the date of manifestation rule. Only the Department has petitioned from that determination.

Our prior decision in Docket No. 70,660 established that:

> 2. The claimant's application for compensation was filed within one year of the date he had notice from a physician that his hearing loss was occupationally related.
>
> 3. The claimant was employed by Weyerhaeuser as a saw mill worker between 1946 and 1985. Between 1947 and the fall of 1984 he was exposed to constant noise from mill equipment on an eight hour a day basis. He first noticed a problem with his hearing in approximately 1976 and began wearing a hearing aid in 1976. He used cotton to plug his ears between 1969 and 1971 and from 1971 onward used rubber ear plugs.
>
> 4. The claimant was exposed to injurious levels of noise between 1947 and 1970 while in the course of employment with Weyerhaeuser.

5. The claimant was not exposed to injurious levels of noise from 1971 to 1985 while in the course of his employment with Weyerhaeuser.

6. Between 1947 and 1970 the claimant suffered hearing loss in both ears as a proximate result of his exposure to injurious noise levels while in the course of employment with Weyerhaeuser.

7. The last injurious noise exposure suffered by the claimant while in the course of employment with Weyerhaeuser occurred prior to 1971.

8. On January 1, 1972 Weyerhaeuser became a self- insured employer under the Washington Industrial Insurance Act. Prior to that date, Weyerhaeuser was insured with the Department of Labor and Industries State Fund for workers' compensation coverage.

9. As of March 28, 1985 the claimant's hearing loss causally related to his occupational noise exposure was fixed.

10. As of March 28, 1985, as a proximate result of injurious levels of noise exposure while in the course of employment with Weyerhaeuser, the claimant sustained a permanent partial disability equal to 69.875% of the complete loss of hearing to both ears.

The only medical testimony presented in this appeal was that of Dr. Richard L. Voorhees. Dr. Voorhees is certified by the American Academy of Otolaryngology and Head and Neck Surgery. He specializes in otology, which concerns diseases of the ear. Dr. Voorhees characterized noise-induced hearing loss as a series of repetitive injuries rather than a traditional disease process. He explained that permanent hearing loss occurs during the exposure itself and not afterward, and that any permanent change in ability to hear should therefore be detectable at a time contemporaneous to the exposure. There is no evidence with respect to audiometric tests administered to Mr. Jones in this record.

Although not dealing with disability caused by the loss of hearing, the majority of this Board has on at least two occasions determined that the appropriate schedule of benefits applicable to an occupational disease claim is the schedule of benefits in effect at the time of manifestation of disability. In re Robert A. Wilcox, BIIA Dec., 69,954 (1986) and In re Otto Weil, Dec'd., BIIA Dec., 86 2814 (1987). In Wilcox we abandoned the rule tying the schedule of benefits to the last injurious exposure in favor of a rule which based the determination of the appropriate schedule on manifestation of disability. Our position was further delineated in Weil, where we affirmed our determination that the date of manifestation of disability would, in claims involving occupational disease, determine the appropriate schedule of benefits.

In 1988 the Legislature amended RCW 51.32.180 to read as follows:

> . . . For claims filed on or after July 1, 1988, the rate of compensation for occupational disease 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 filing the claim.

We do not believe that the 1988 legislative changes to RCW 51.32.180 reflect a legislative intent to preclude the application of the date of manifestation rule, as articulated in Wilcox and Weil, to claims filed prior to July 1, 1988. The Wilcox decision was identified as a significant decision of the Board in our original publication of Significant Decisions, which became available in June, 1987. We assume that the Legislature, which had directed us to publish our significant decisions, (See RCW 51.52.160), was fully aware that the Board had abandoned the date of last injurious exposure rule in favor of a date of manifestation rule. We agree with our Industrial Appeals Judge that the 1988 amendments evidence legislative agreement with the Board's determination of the issues presented in the Wilcox case.

Pursuant to the 1988 legislative amendment, the Department promulgated a new regulation, WAC 296-14-350. The Department's WAC goes beyond the legislation by stating:

> (2) The compensation schedules and wage base for claims filed prior to July 1, 1988, shall be determined according to the schedule in effect and the wage paid, if wage based schedules apply, at the time of the last injurious exposure to the substance or hazard giving rise to the claim for compensation.

The Legislature itself in no way indicated that, for claims filed prior to July 1, 1988, a different rule should apply. Since the Legislature did not explicitly overrule the Board majority's interpretation of the statute as it read prior to 1988, we must assume that the Legislature acquiesced in such statutory construction. Thus, we conclude that the 1988 Legislature merely clarified what it meant by the date of manifestation by defining it as "the date the disease requires medical treatment or becomes totally or partially disabling, whichever occurs first. . . ." The 1988 amendments do not specifically preclude application of the date of manifestation rule, as enunciated in the prior Decisions and Orders of Wilcox and Weil, to claims filed prior to July 1, 1988.

In so concluding, we are mindful of the legislative mandate that "[t]his title shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment." RCW 51.12.010. Without an explicit

statement from the Legislature that the date of manifestation rule does not apply to claims filed prior to July 1, 1988, we cannot make such an inference from the 1988 amendments.

We agree with our Industrial Appeals Judge on the sub-issue of when Mr. Jones' disability became manifest, but we do not entirely agree with his rationale. He focused almost exclusively on "disability", rather than looking to the entire phrase "manifestation of disability". He reasoned that the existence of a functional impairment was irrelevant unless it forced a claimant to seek treatment or affected his wage earning capacity. He therefore concluded that Mr. Jones' functional hearing impairment did not become a "disability" until he first purchased and began wearing a hearing aid in 1976. While we agree with the result, we believe our Industrial Appeals Judge's conclusion is premised on a misunderstanding of the nature of permanent partial disability.

Permanent total disability and temporary total disability, by definition, connote a loss of wage earning capacity. Permanent partial disability, on the other hand, is a completely separate concept. While loss of earning power has been taken into account by the Legislature in creating the schedules for permanent partial disability awards, such awards are predicated on loss of bodily function and not on loss of earning power. Fochtman v. Department of Labor and Industries, 7 Wn. App. 286, 293-294 (1972); Page v. Department of Labor and Industries, 52 Wn.2d 706 (1958). Inability to work is not, in itself, evidence of loss of bodily function. Ellis v. Department of Labor and Industries, 88 Wn.2d 844, 853 (1977). Likewise, a worker may suffer from a functional loss and not sustain any loss of earning power. It does not appear that Mr. Jones' hearing loss has ever precluded him from engaging in employment, yet his loss is certainly a "disability" compensable under our Act. Further, the compensability of his disability does not depend on it being amenable to treatment.

Although we reach the same result as our Industrial Appeals Judge, we analyze the question of when Mr. Jones' occupational disease or disability became manifest somewhat differently. Rather than focusing solely on "disability" we broaden our scope to encompass "manifestation." The word "manifest" is defined in the Compact Edition of the Oxford English Dictionary 1715 (1971) as: "1. Clearly revealed to the eye, mind or judgement; open to view or comprehension; obvious." It is defined in Webster's Third New International Dictionary 1375 (1986) as: "1a: Capable of being readily and instantly perceived by the senses and esp. by the sight: not hidden or concealed: open to view . . . b: Capable of being easily understood or recognized at once by the mind: not obscure: OBVIOUS."

Implied in these definitions is the requirement that the disease or disability must be apparent to someone; some person must know that the disease or disability exists. We conclude that a disease or

disability is not manifest unless it is evident, in some fashion, to the worker. However, this knowledge need not necessarily be tied to notice that the hearing loss is occupationally induced. Our interpretation in this regard is in accord with our prior decision in Wilcox. There the worker was notified by a physician of the occupational nature of his condition in March or April of 1978. However, his lung had been surgically removed previously on November 20, 1975. The Board majority held that Mr. Wilcox's disease or disability manifested itself on November 20, 1975, when his lung was removed.

The question of whether Mr. Jones knew he had a permanent hearing impairment in 1970 is simply not addressed in this sparse record. Indeed, the record before us contains no indication that any audiometric tests were performed, although obviously such testing must have occurred, since it is a prerequisite to a permanent partial disability award. Based on the record before us, we cannot conclude that Mr. Jones knew, in 1970, that he had a hearing impairment.

Dr. Voorhees testified that noise-induced hearing loss occurs at the 3000 and 4000 frequencies and sometimes at 6000. He later elaborated that, with noise-induced hearing loss, "the low and mid-frequencies are usually within the normal range of hearing depending upon the duration of noise exposure and the intensity and the greatest losses occur in the area of 2000 to 6000 cycles per second. . . ." Tr. 6/17/88 at 10-11. There is no testimony in this record as to whether hearing loss at the higher frequencies is within the conversational range, which would presumably be more noticeable to a worker.

In addition, Dr. Voorhees noted that noise-induced hearing loss can also be temporary in nature.

> [D]uring the time of exposure a temporary loss may often occur and an individual employee can go through this what is called a temporary threshold shift exposure after exposure with recovery between until somewhere down the line the inner ear no longer recovers and then hearing loss is permanent.

Tr 6/17/88 at 13. Although apparently Mr. Jones' hearing loss was permanent in 1970, there is nothing in this record to suggest that he was aware he had sustained a permanent hearing loss as of that time. If he was aware that he had sustained any hearing loss at all, he may well have viewed the impairment as temporary, and hence non-compensable, in nature.

Furthermore, while not strictly applicable here, the 1988 legislation offers some guidance. It speaks of manifestation in terms of the date the condition "requires treatment or becomes totally or

partially disabling.' There is no evidence that Mr. Jones' hearing loss has ever been totally disabling or productive of any loss of earning power. Mr. Jones first noticed a problem with his hearing in 1976 and began wearing a hearing aid at that time. The question of when his hearing loss became permanently partially disabling is more difficult.

We are hampered by the limited nature of the record before us on this issue. Without having any audiograms before us, we cannot say that Mr. Jones would have received a permanent partial disability award if he had filed his claim in 1970. The Department currently rates permanent partial disability for hearing loss by considering the frequencies of 500 Hz 1000 Hz, 2000 Hz, and 3000 Hz. Workers' Compensation Manual, at B-31. However, in the 1970's and early 1980's it was the Department's policy to exclude the 3000 level from the computation. In re Matt L. Minerich, Dckt. No. 48,253 (May 12, 1978); In re Earl Cameron, Dckt. No. 48,766 (March 7, 1978).

In addition, WAC 296-62-09011 as it read as of 1980 provided, in part: "The medical profession has defined hearing impairment as an average hearing threshold level in excess of 25 decibels (ANSI S3.6- 1969) at 500, 1000, and 2000 Hz, ..." By 1981-1982, that WAC had been amended to read: "The medical profession has defined hearing impairment as an average hearing threshold level in excess of 25 decibels (ANSI S3.6-1969 (R1973)) at 500, 1000, 2000, and 3000 Hz, ..." (Emphasis added)

In light of these shifting standards for evaluation of hearing loss permanent partial disability, the record does not establish whether Mr. Jones in fact had a compensable permanent partial disability back in 1970. Certainly there is nothing in the record to suggest that a physician had rated his permanent partial disability at that time.

Given all these circumstances, we will not permit the Department to effectively "back date" Mr. Jones' permanent partial disability award by six years. As the self-insured employer noted in its notice of appeal:

> The Order appears to be both prejudicial to the worker and the employer alike. The question before the Board appears to be whether the Department or any Adjudicative body should be allowed to designate a date of injury prior to the date of filing of a claim.
>
> We question the wisdom of condoning this practice and we see many instances where this situation could be abused to by both the State Fund and Employer to change dates of injuries to accommodate a lower permanent partial disability schedule.

The best indicator of when Mr. Jones knew he had a hearing problem is the date when he began wearing a hearing aid. In fact, in the prior appeal under Docket No. 70,660 we explicitly found that Mr. Jones "first noticed a problem with his hearing in approximately 1976 and began wearing a hearing aid in 1976." The date of manifestation of disease or disability is the point in time when medical evidence of disability or need for treatment (satisfied here by the provision of a hearing aid in 1976) is coupled with knowledge on the worker's part. Generally speaking, when the worker actively seeks out medical advice or treatment, knowledge can be inferred. In the present case, the year when both of these elements coincided was 1976. Thus the schedule of benefits in effect at that time applies to Mr. Jones' permanent partial disability award.

After careful consideration of the Proposed Decision and Order, the Department's Petition for Review filed thereto, and a review of the entire record before us, we are persuaded that the Proposed Decision and Order is supported by the preponderance of the evidence and is correct as a matter of law. The Findings of Fact, Conclusions of Law and Order contained in the Proposed Decision are hereby adopted as this Board's final Findings, Conclusions and Order.

It is so ORDERED.

Dated this 4th day of May, 1989.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
SARA T. HARMON Chairperson

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

/s/_____
PHILLIP T. BORK Member