Sarbacher, Robert, Dec'd

BOARD

Motion to vacate order denying petition for review

Where the Board used the date of manifestation for calculating benefits in occupational disease claim, but the worker's beneficiary determined benefits payable would be greater if the date of last injurious exposure were used, the failure to determine the financial consequences of different benefit rates before issuance of proposed decision and order does not constitute a mistake or excusable neglect which would justify vacating order under CR 60. ***….In re Robert Sarbacher, Dec'd*, BIIA Dec., 88 3107 (1991)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: ROBERT A. SARBACHER, DEC'D	**)**	**DOCKET NO. 88 3107**
CLAIM NO. K-604283	**)**	**DECISION AND ORDER**

APPEARANCES:

Robert A. Sarbacher, Dec'd. and
Marlys Sarbacher, Widow Petitioner, by
Levinson, Friedman, Vhugen, Duggan, Bland & Horowitz, per
William D. Hochberg

Employer, Various, by
None

Department of Labor and Industries
The Attorney General, per
Lisa Vincler and Nancy Thygesen Day, Assistants, and
Laurel Anderson, Paralegal

This is an appeal filed by the claimant, Robert A. Sarbacher, deceased, on October 17, 1988, from an order of the Department of Labor and Industries dated October 11, 1988. The order adhered to the provisions of an order dated August 31, 1988, which allowed the claim for malignant mesothelioma resulting from occupational exposure to asbestos fibers, provided that the date of last injurious exposure and date of injury for compensation purposes was determined to be June 30, 1974, with the average monthly wage paid at the time equal to $850.85, denied responsibility for claimant's condition diagnosed as bullous emphysema as unrelated to the exposure for which the claim was filed, and provided that the claim would remain open for authorized treatment and action as indicated. Motion to vacate Order Denying Petition for Review and cross motion for sanctions and reprimand **DENIED**.

PROCEDURAL HISTORY.

This matter is before the Board on a motion by the widow petitioner, Marlys Sarbacher, to vacate our October 30, 1989 Order Denying Petition for Review.

The sole issue raised by this appeal was whether the compensation benefits paid in this claim should be paid based on the wages earned by the worker on the "date of last injurious exposure" or the date his disability from such exposure became "manifest".

A Proposed Decision and Order was entered on September 11, 1989 based on stipulated facts. The stipulation reflects that Mr. Sarbacher filed this claim on July 6, 1987. His last injurious exposure to asbestos was on June 30, 1974. He was diagnosed with malignant mesothelioma on October 30, 1987. Stipulation of Facts.

Our Industrial Appeals Judge reversed the decision of the Department, finding that the date of manifestation of disability should be used to determine the amount of benefits paid in this claim for occupational disease. In doing so, she followed the Board's most recent pronouncements on the issue. In re Kenneth Alseth, BIIA Dec., 87 2937 (1989); In re Otto Weil, BIIA Dec., 86 2814 (1987); In re Robert Wilcox, BIIA Dec., 69,594 (1986).

Thereafter, at the request of the Department, the Board extended to October 24, 1989 the time for filing Petitions for Review. We subsequently received the Department's Petition for Review on October 9, 1989. On October 30, 1989 we entered our Order Denying Petition for Review, thus making the Proposed Decision and Order the final order of this Board. Thereafter, on February 27, 1990, the widow petitioner filed a motion to vacate our Order Denying Petition for Review. The motion was brought under CR 60(b)(1) and (11) "based upon a mistake and inadvertence of the parties". Claimant's Motion for Vacation of Order.

In his affidavit in support of the motion, the attorney for the widow petitioner, William D. Hochberg, states that he reviewed his files in order to determine that the date of manifestation would actually result in a higher compensation rate for his clients. This review was presumably done after the Proposed Decision and Order was entered, as he states:

> This process was in part necessary because of the fact one would litigate the use of date of injury, as opposed to the date of manifestation, without really knowing what the actual effect would be in terms of compensation rates.

Affidavit of William D. Hochberg, p. 2.

The attorney states that he called Linda L. Hart, an employee of the Department, on October 24, 1989 to confirm that the date of manifestation would produce a higher rate of compensation. She told him that it would and confirmed this in a letter dated October 25, 1989. Specifically, she stated:

> If we had been able to use the date the condition required treatment, 8-15-86, Mr. Sarbacher's monthly compensation rate would have been $1096.52 [as opposed to $574.75], based on his 1979 earnings of $18,414.71.[1]

Hart letter dated October 25, 1989.

The "mistake" upon which the widow petitioner seeks to vacate our final order was set forth in the attorney's affidavit as follows:

> The mistake is obvious in that the Department and I failed to account for the social security offset involved in this claim. Unfortunately, I relied on the October 25, 1989 letter as a basis to insure that Mrs. Sarbacher would receive the most benefits possible based upon her husband's wages. This was an unfortunate mistake of fact. Obviously, if either the Department or I realized that the Sarbachers would be receiving the maximum compensation rate, but for the social security offset, I would not have appealed the Department order. If there was not an appeal of the original Department order, Mrs. Sarbacher would now be receiving the maximum compensation rate possible in her claim.

Affidavit of William D. Hochberg, pp. 2-3.

The widow petitioner asks "that the Board Order by vacated and that the original Department order be affirmed and that the appeal be dismissed."

In response to the widow petitioner's motion, the Department, on April 23, 1990, objected and filed a cross motion for sanctions and reprimand. The Department objected to the motion on its merits for the reason that the mistake, if any, was due to Mr. Hochberg's inexcusable neglect in not determining, in a timely manner, the effect his appeal would have on his clients. The Department has moved for sanctions only in the event the Board grants the motion to vacate. Attorney's fees are sought both for defending the department's order and defending against the motion to vacate. Reprimand of Mr. Hochberg is sought, pursuant to WAC 263-12-020(5)(a), for the reason that Mr. Hochberg had ex parte contact with the Department's employee, Ms. Hart, in violation of Rule 4.2 of the Rules of Professional Conduct.

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[1] If is unclear what, if any, relevance the 1986 and 1979 dates would have in determining the level of benefits under either a date of manifestation or date of last injurious exposure theory. The parties had stipulated that the date of last injurious exposure was 1974 and the date of manifestation was 1987. Even under Department rules applicable to post-1988 claims, the last wage paid is only relevant where the worker ceased employment for reasons other than voluntary retirement. WAC 296-14-350(3)(b).

The widow petitioner has filed a motion for substitution as the proper party to this appeal, the worker having died on October 10, 1989. The motion to substitute is granted. The attorney for the widow petitioner also denies the allegation that he had engaged in ex parte contact with a Department employee without the consent of the Office of the Attorney General. He explained that he was given permission to do so by the Assistant Attorney General then representing the Department, and further, that the subject matter of the conversation did not relate to this pending litigation.

A hearing was held on the motions on April 30, 1990. At the hearing the attorney for the widow petitioner explained that it was the practice of the Department to apply the date of last injurious exposure for determining benefit rates. The Board, on the other hand, applied the date of manifestation. This would allow workers "to play both sides of the isle", by choosing to appeal to the Board only when it would be financially advantageous to do so. 4/30/90 Tr. at 13.

Initially, the widow petitioner's attorney alleged that the date of manifestation resulted in a lower benefit amount because of the social security offset. He has since explained that the lesser rate is due to variations in cost-of-living adjustment multipliers since 1974. Hochberg letter dated May 10, 1990. The actual differences in the compensation rates are not clear from this record, nor are the mechanics of how each would be computed. It is still not clear, for example, what impact, if any, the social security offset would have on the compensation rate under the "date of manifestation" rule.

The Department, however, after implementing our prior decision of October 30, 1989, has established an overpayment of compensation in the amount of $5,316.01. Department Order dated December 21, 1989. This decision is still pending at the Department and we specifically do not, and cannot, pass on whether the amount of alleged overpayment is correct or incorrect. The issue of the actual dollar amount of monthly benefits payable is not before us. Suffice to say that application of the "date of manifestation" rule in this case may not have been financially advantageous to either the deceased worker or his surviving spouse.

DECISION

The widow petitioner does not seek to set aside our decision for the reason that it is wrong. There is no question but that the "date of manifestation" is the proper date to use in calculating benefits in this occupational disease claim. Dep't of Labor & Indus. v. Landon, 117 Wn.2d 122 (June 27, 1991). Further, that is the date which must be used for calculating the widow petitioner's benefits as well as the worker's. In re William Kilpatrick, Dec'd., Dckt. No. 89 5200 (April 3, 1991). Rather, she wants to take advantage of the date of last injurious exposure which the Department continued to

apply prior to Landon, contrary to our pronouncements in Wilcox, Weil, and Alseth, supra. In effect, she wants the opportunity to dismiss her appeal and thereby obtain the financial benefits of the Department's incorrect application of the law. Having previously decided that the "date of manifestation" should determine the calculation of benefits in this claim, and that decision having been determined to be correct by the Supreme Court's Landon decision, we are not inclined to vacate our order of October 30, 1989 for the reasons alleged in the motion to vacate. The motion to vacate that order is denied.

We need not decide at this juncture whether or to what extent pre- Landon Department decisions applying the "date of last injurious exposure" rule are subject to later modification. We will assume that had the claimant dismissed this appeal before we had entered our final order, the Department would have continued to pay benefits according to "date of last injurious exposure" calculations.

The attorney for the widow petitioner would have us believe that, but for the representations by Ms. Hart, he would not have pursued this appeal. Yet those representations, which we assume to be at least partially erroneous, were made almost a year after the attorney filed the appeal! Further, we note that the telephone conversation between Mr. Hochberg and Ms. Hart occurred on the very last day for filing Petitions for Review. Her letter was not sent until after the time for filing a Petition for Review had passed. It is therefore difficult to imagine that Mr. Hochberg actually relied upon this mistaken information to his clients' detriment. The "mistake", if any, was on Mr. Hochberg's part in failing to timely and diligently determine whether his pursuit of the appeal he filed was likely to be of financial benefit to his client.

Clearly, Mr. Hochberg understood that benefits based on the "date of last injurious exposure" may in some cases exceed those calculated according to the "date of manifestation". Yet there is nothing in the record to suggest that at any time prior to the entry of the Proposed Decision and Order he had conducted an investigation of facts necessary to determine if that was the situation in the case here. He had ample opportunity to inquire or conduct discovery or obtain stipulations necessary to ascertain the applicable benefit rates under either the "date of manifestation" or "date of last injurious exposure" rules. The failure to determine the financial consequences of the different benefit rates in a timely fashion does not constitute a "mistake" or "excusable neglect" which would justify vacating our final order under CR 60.

Since we are denying the widow petitioner's motion to vacate, the Department's motion for sanctions is also denied. We agree with the Department that ex parte contact with a Department employee concerning the calculation of benefits would be a matter which is the "subject of the representation" in this matter and a violation of RPC 4.2. However, the evidence as to whether Mr. Hochberg had the consent of the Office of the Attorney General to make such contact is conflicting. Therefore, the Department's motion for reprimand is also denied.

It is so **ORDERED**.

Dated this 6th day of December, 1991.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
S. FREDERICK FELLER Chairperson

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

/s/_____
PHILLIP T. BORK Member