Meisner, Cindy

OCCUPATIONAL DISEASE (RCW 51.08.140)

Successive insurers

The State Fund is an insurer for purposes of determining the responsible insurer for an occupational disease claim. The last injurious exposure rule is used to determine the responsible insurer and does not allow apportionment between successive insurers. This rule does not prevent the Department from apportioning claim costs between various state fund employers. ***….In re Cindy Meisner*, BIIA Dec., 95 6101 (1997)** [*Editor's Note:* The Board's decision was appealed to superior court under King County Cause No. 97-2-16495-8 SEA.]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: CINDY A. MEISNER	)	**DOCKET NO. 95 6101**
	)	
CLAIM NO. N-933779	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Cindy A. Meisner, by
George M. Riecan & Associates, Inc., P.S., per
Robert R. Hall

Employer, Spears Manufacturing Co, by
Thomas G. Hall & Associates, per
Janet Smith

Department of Labor and Industries, by
The Office of the Attorney General, per
Peter Helmberger, Assistant

The employer, Spears Manufacturing Co, filed an appeal with the Board of Industrial Insurance Appeals on November 27, 1995, from an order of the Department of Labor and Industries dated September 28, 1995. The order affirmed an order dated March 10, 1995, allowing the claim for occupational disease and naming Spears Manufacturing as the employer. **AFFIRMED.**

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 employer to a Proposed Decision and Order issued on October 25, 1996, in which the order of the Department dated September 28, 1995, was affirmed.

This matter was presented to the Board by way of stipulated facts. Review has been granted to discuss the application of WAC 296-17-870(6), that apportions costs of occupational disease claims, and the last injurious exposure rule codified in WAC 296-14-350(1). The Department of Labor and Industries maintains that these rules apply to different determinations and are not in conflict. The employer contends that the last injurious exposure rule, upheld by the

Washington State Supreme Court in *Fankhauser v. Department of Labor & Indus.,* 121 Wn.2d 304 (1993), and *Weyerhaeuser Company v. Tri,* 117 Wn.2d 128 (1991), ostensibly overrules WAC 296-17-870(6). We disagree with the employer and conclude that the provisions can, and should be applied in the manner proposed by the Department of Labor and Industries.

The stipulated facts indicate that Ms. Meisner has worked for three different employers since 1986. In each job, she worked 40 hours per week and was required to repetitively use her right upper extremity doing 10-key data entry and computer work. She worked for Evergreen Temporary Services from February 1986 and February 1987, Spears Manufacturing from February 1987 through October 7, 1994, and Mr. Ed's Bingo Casino from October 10, 1994 through September 1995.

While employed at Spears, Ms. Meisner began experiencing occasional right hand, right elbow and/or right arm pain with numbing in the top of the hand leading into the elbow. She continued to have pain in her right hand, right elbow and/or right arm with activity after becoming employed at Mr. Ed's Bingo Casino. She claims that she did not have right hand, elbow, and/or arm pain while employed at Evergreen Temporary Services, although a work history form she completed for the Department lists work activity with all three employers as causing her pain complaints. Ms. Meisner first obtained a diagnosis and treatment for her right hand/elbow and/or arm condition on October 14, 1994, when she saw Dr. Leonard Allott. Another physician, Dr. H. Richard Johnson, is of the opinion that Ms. Meisner's right hand, elbow, and/or arm condition was proximately caused by repetitive use of the right upper extremity due to work activities of 10-key data entry and computer work. Ms. Meisner filed an application for benefits with the Department on October 18, 1994, at which time she was working for Mr. Ed's Bingo Casino. She, nevertheless, identified Spears as her employer on her application for benefits. The Department order dated

March 10, 1995 allowing the claim listed Spears Manufacturing as the employer. Ms. Meisner received time loss compensation beginning September 12, 1995.

Spears Manufacturing contends that they are not the responsible employer for Ms. Meisner's claim, and that in accordance with WAC 296-14-350(1) and the fact that Ms. Meisner's last exposure to the harmful activity was during her employment with Mr. Ed's Bingo Casino, that Mr. Ed's Bingo Casino should be the employer responsible for the costs of the claim. The Department maintains that the allowance order lists Spears Manufacturing because she was working for Spears when she first developed symptoms and had only limited exposure to the hazard at Mr. Ed's Bingo Casino at the time the condition was first diagnosed. The Department also maintains (more importantly) that since the employers potentially involved with this occupational disease claim all insure their industrial insurance obligations through the state fund, as defined by RCW 51.08.175, the claim costs will be prorated pursuant to WAC 296-17-870(6). Before prorating costs, pursuant to this rule, the Department must first determine the extent to which each of Ms. Meisner's employments contributed to her condition.

Spears Manufacturing argues that the last injurious exposure rule upheld by the Washington State Supreme Court in both *Tri* and *Fankhauser, supra* and codified by WAC 296-14-350(1) supersedes the apportionment of occupational disease cases set out in WAC 296-17-870(6). They also argue that the Department, as trustee of the medical aid and accident funds, is not an "insurer", citing as authority *Stamp v. Department of Labor & Indus.,* 122 Wn.2d 536 (1993). We disagree with both arguments.

In adopting the last injurious exposure rule in *Tri* the Supreme Court explicitly sought to remedy the assignment of liability between successive *insurers.* The court recognized the burden that would be placed on injured workers to prove a precise percentage of liability in order to receive compensation from more than one insurer and rejected apportionment between insurers as

inconsistent with the Industrial Insurance Act's goal of sure and certain relief. In *Fankhauser,* the Supreme Court emphasized that the last injurious exposure rule applies between insurers operating under the provisions of the Industrial Insurance Act. *Fankhauser*, at 311 and 312.[1]

We turn now to Spears Manufacturing's alternate theory, that the Department is not an "insurer." In *Stamp*, the Court interpreted the Oregon Insurance Guaranty Association's (OIGA) enabling statute that prohibited OIGA funds from being recovered by any "insurer." The Court held that neither the self-insured employer nor the Department were "insurers" for the purpose of the insurance guaranty statute. This interpretation, however, was in the context of the insurance guaranty statute, not the Industrial Insurance Act or the Department's regulations promulgated pursuant to the Act. The Court found that the goal of both Washington and Oregon's insurance guaranty statute is to ensure that no insurer be able to recover from its insurance guaranty fund. Both self-insured employers and the Department were held not to be "insurers" for the purposes of either the Oregon guaranty act, or its Washington counterpart. We conclude that *Stamp* is limited to the context of the guaranty act.

WAC 296-14-350(1), in codifying the court's adoption of the last injurious exposure rule, consistently refers to "liable insurer," rather than using the term "liable employer." WAC 296-14-350(1) states, in part, the "liable insurer in occupational disease cases is the insurer on risk at the time of the last injurious exposure to the injurious substance or hazard of disease during employment within coverage of Title 51 RCW that gave rise to the claim for compensation." The last injurious exposure rule must be applied when successive insurers under our state's Industrial Insurance Act are involved. In the State of Washington, only the state fund and self-insured

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[1] In *Fankhauser* the Supreme Court found that a self-employed worker was not within the coverage of the Act. The court rejected the idea that self-employment equated with self-insurance. Therefore, the last injurious exposure rule could not apply because Fankhauser was not an insurer under the Act. The last injurious exposure rule is not a rule of broad application. We have noted in several earlier decisions that the rule does not operate to deny coverage as between insurance "systems," i.e., between Washington's Industrial Insurance Act and another state or federal system

employers are considered insurers for the purpose of industrial insurance. The concept of last injurious exposure identifies the liable insurer, between the state fund and a self-insured employer, or between two self-insured employers. The concept of last injurious exposure is not intended to be applied to the Department's process of determining responsibility within the insurance functions of the state fund.

The Industrial Insurance Act clearly establishes the Department's responsibilities to operate the industrial insurance state fund in accordance with recognized principles of insurance, including the underwriting of insurance and assessment of monetary obligations to insured employers. WAC 296-17-870 sets forth the methods for evaluating actual losses and determining how employers insured with the state fund shall be assessed for losses. Section 6 reads as follows:

> **Occupational disease claims.** When a claim results from an employee's exposure to an occupational disease hazard, the 'date of injury,' for the purposes of experience rating, shall be the date on which the disability was diagnosed, giving rise to the filing of a claim for benefits. The **cost of any occupational disease claim, paid from the accident fund and the medical aid fund and arising from exposure to the disease hazard under two or more employers, shall be prorated to each period of employment involving exposure to the hazard.** Each insured employer who had employed the claimant during the experience period, and for at least ten percent of the claimant's exposure to the hazard, shall be charged for his share of the claim based upon the prorated costs.

(Emphasis added.)

Under this rule, the Department's ability to prorate the cost of a claim to more than one employer is limited to four conditions. First, the claim must be filed for an occupational disease. Second, the claim costs must have been paid from the accident fund and medical aid fund. Third, the condition for which the claim is filed must result from exposure to a hazard while working for more than one employer. Fourth, the proration applies to employers insured with the state fund,

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of industrial insurance. *In re John Robinson*, BIIA Dec., 91 0741 (1992); *See*, also, *In re Gary Peck*, Dckt. No. 91 6243 (January 14, 1993).

who employed the worker during the experience period, in which at least ten percent of the workers exposure to the hazard occurred. The identification in the WAC of claims **paid from the accident fund and the medical aid fund** clearly references claims that have been paid by the Department for state fund insured employers. Self-insured claims are paid by the self-insured employer and are not paid from the accident fund and medical aid fund. We find the Department's authority to prorate claims costs under this rule to be consistent with the state fund's role as an insurer.

Employers who obtain industrial insurance coverage through the state fund share the risk and cost of their industrial insurance claims with other employers. The last injurious exposure rule adopted by the Supreme Court in *Tri* was intended to apply to the insuring entity responsible for payment of the claim, rather than individual employers being insured by that entity. In addition, the Department's allocation of costs among employers insured by the state fund by utilizing the last injurious exposure rule would, in effect, compromise the Department's ability to reduce uncertainty and spread the financial burden of losses for employers.

In conclusion, we cite with approval the industrial appeals judge's statement: "The last injurious exposure rule was only intended to apply when there are different **insurers** involved. Of course, the Department must apportion costs under this claim as indicated by its rule, and perhaps Spears would be well advised to work with the Department to ensure it is only assessed its proper share." Proposed Decision and Order, at 3. (Emphasis in original.) The Department order is affirmed.

FINDINGS OF FACT

1. On October 18, 1994, Cindy A. Meisner, the claimant, filed an application for industrial insurance benefits alleging an industrial injury/occupational disease on or about June 1, 1994, during the course of her employment with Spears Manufacturing Company. On March 10, 1995, the Department issued an order allowing the claim for an occupational disease and listing Spears Manufacturing as the interested employer. On May 5, 1995, Spears Manufacturing protested the March 10, 1995 order. On September 28, 1995, the Department issued an order affirming the March 10, 1995 order. On November 27, 1995, Spears Manufacturing appealed the September 28, 1995 order, and on January 3, 1996, the Board of Industrial Insurance Appeals granted the appeal and assigned it Docket 95 6101.

2. Cindy Meisner was employed by Evergreen Temp from February 1986 through February 1987,working 40 hours a week, doing 10-key data entry and computer work. She worked for Spears Manufacturing from February, 1987 until October 7, 1994, working forty hours a week, doing 10-key data entry and computer work. She began employment for Mr. Ed's Bingo Casino on October 10, 1994 through September 1995, working 40 hours a week doing 10-key data entry and computer work.

3. Cindy Meisner, while employed at Spears Manufacturing, began having occasional right hand, elbow and/or arm pain, with numbing over the top of the hand leading into the elbow. She continued to experience right hand, elbow and/or arm pain with activity while employed at Mr. Ed's Bingo Casino. Both of these employers insure their industrial insurance obligations through the state fund as defined by RCW 51.08.175.

4. Ms. Meisner first obtained a diagnosis and/or treatment for the right hand/elbow and/or arm condition on October 14, 1994, when she saw Dr. Leonard Allott. Cindy Meisner's right hand, elbow and/or arm condition was proximately caused by the repetitive use of the right upper extremity in accomplishing work activities of 10-key data entry and computer work. She filed an application for industrial insurance benefits on October 18, 1994, and was first paid time loss compensation for the period beginning September 12, 1995.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and the subject matter of this appeal.

2. Ms. Meisner developed an occupational disease that arose naturally and proximately from work activities associated with 10-key data entry and computer work. At the time she filed her claim for benefits, and had

the occupational disease diagnosed, she was working for a state fund employer, Mr. Ed's Bingo Casino. Pursuant to WAC 296-14-350 (1), the insurer on risk for Ms. Meisner's occupational disease claim is the Department of Labor and Industries "state fund."

3. Pursuant to WAC 296-17-870 (6), the date of injury in claim N-933779, is October 18, 1994, at which time Ms. Meisner worked for Mr. Ed's Bingo Casino. In prorating the costs of this occupational disease claim pursuant to WAC 296-17-870 (6), the Department shall prorate to each period of employment involving exposure to the hazard for the purposes of determining each state fund employer's experience rating. The last injurious exposure rule, WAC 296-14-350(1) does not preclude the Department from listing Spears Manufacturing as the employer in this claim, since the last insurer was the Department.

4. The order of the Department of Labor and Industries dated September 28, 1995, that affirmed a prior order allowing Ms. Meisner's claim for an occupational disease and listing Spears Manufacturing as the employer, is correct and is affirmed.

It is so **ORDERED.**

Dated this 29th day of May , 1997.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/____
S. FREDERICK FELLER Chairperson

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

/s/____
JUDITH E. SCHURKE Member