

Scales, James

TIMELINESS OF CLAIM (RCW 51.28.050; RCW 51.28.055)

Hearing loss

The two-year limitation period for filing a compensable hearing loss claim begins to run on the last day of injurious exposure, not the day after. ...***In re James Scales*, BIIA Dec., 09 10566 (2009)** [*Editor's Note*: This significant decision appears to have been overruled sub silentio by the Supreme Court in *Kovacs v. Dep't of Labor & Indus.*, 186 Wn.2d 95 (2016) (holding that the day of injury is excluded from time calculation in determining when the statute of limitations runs in industrial injury claims).]

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

1 **IN RE: JAMES W. SCALES**) **DOCKET NO. 09 10566**
2 **CLAIM NO. Y-035425**) **DECISION AND ORDER**

3 **APPEARANCES:**

4 Claimant, James W. Scales, by
5 The Walthew Law Firm, per
6 Kylee T. MacIntyre

7 Department of Labor and Industries, by
8 The Office of the Attorney General, per
9 Mary V. Wilson, Assistant

10 The claimant, James W. Scales, filed an appeal with the Board of Industrial Insurance
11 Appeals on January 20, 2009, from an order of the Department of Labor and Industries dated
12 December 8, 2008. In this order, the Department affirmed its orders dated August 18, 2008, and
13 August 25, 2008. In the August 18, 2008 order, the Department allowed the claim for occupational
14 disease for bilateral hearing loss, assigned November 30, 2005, as the date of manifestation, but
15 restricted the benefits to medical aid benefits only because, pursuant to RCW 51.28.055, the
16 claimant did not file an occupational hearing loss claim within two years of the last injurious
17 exposure while working for an employer covered under industrial insurance laws of the state of
18 Washington. In its August 25, 2008 order, the Department closed the claim effective August 25,
19 2008. The Department order of December 8, 2008, is **AFFIRMED**.

20 **DECISION**

21 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
22 and decision on a timely Petition for Review filed by the Department to a Proposed Decision and
23 Order issued on September 9, 2009, in which the industrial appeals judge reversed and remanded
24 the order of the Department dated December 8, 2008. All contested issues are addressed in this
25 order.

26 James Scales, a 53-year-old truck driver who resides in Easton, Washington, hurt his low
27 back and arm in the course of his employment on November 30, 2005. His subsequent industrial
28 insurance claim, identified by Claim No. AB-81657, was allowed and benefits provided.

29 It appears that as a result of the continuing effects of his industrial injury, Mr. Scales has not
30 worked since November 30, 2005. It follows, for purposes of the present hearing loss case, that his
31 last day of possible exposure to occupationally related noise was November 30, 2005.

1 Nearly two years after the accident, Mr. Scales saw his treating physician, Dr. John
2 Robertson, a Seattle orthopedic surgeon. Perhaps because hearing loss was a bit outside his area
3 of expertise, Dr. Robertson made the following comment in an office note of November 21, 2007:
4 "Under a separate claim, a chronic hearing loss is in need of evaluation by an ENT specialist, given
5 the multiple years of exposure to loud engines in his line of work as a garbage collector." Although
6 this statement was not written on a typical Application for Benefits, Dr. Robertson's office sent the
7 record to the Department where it was received on November 30, 2007. A week or so later, on
8 December 6, 2007, a separate, formal Application for Benefits was filed with the Department. The
9 formal application was identified by Claim No. Y-035425, and constitutes the present claim.

10 RCW 51.28.055(2)(a) states:

11 Except as provided in (b) of this subsection, to be valid and compensable,
12 claims for hearing loss due to occupational noise exposure must be filed
13 within two years of the date of the worker's last injurious exposure to
14 occupational noise in employment covered under this title or within one
year of September 10, 2003, whichever is later.

15 We observe that the Application for Benefits received by the Department on December 6, 2007,
16 was not filed within two years of Mr. Scales' last exposure to occupationally related injurious noise.

17 Although the formal application appears to have been late, the Department allowed the claim
18 for medical benefits under a separate subsection of Title 51. RCW 51.28.055(2)(b) states: " A claim
19 for hearing loss due to occupational noise exposure that is not timely filed under (a) of this
20 subsection can only be allowed for medical aid benefits under chapter 51.36 RCW."

21 Mr. Scales disagreed with the Department's conclusion that the scope of his claim was
22 limited to the receipt of medical benefits. He argued that Dr. Robertson's chart note of
23 November 21, 2007, received by the Department on November 30, 2007, constituted a valid
24 Application for Benefits. Deferring on that question for a moment, we first examine whether the
25 chart note was timely filed within the meaning of RCW 51.28.055(2)(a). To that end, we inquire as
26 to the date on which the two-year period began to run.

27 In a series of decisions culminating with *Nelson v. Department of Labor & Indus.*, 9 Wn.2d
28 621 (1941), our Supreme Court adopted the interpretation that the statute of limitation begins to run
29 on the day of injury. "This court has established the rule that the one year period in which the claim
30 must be filed commences to run on the day of the accident." *Nelson* at 632. This rule was stated
31 and accepted by the Supreme Court in *Read v. Department of Labor & Indus.*, 163 Wash. 251
32 (1931); *Ferguson v. Department of Labor & Indus.*, 168 Wash. 677 (1932); *Sandahl v. Department*
of Labor & Indus., 170 Wash. 380 (1932); *Crabb v. Department of Labor & Indus.*, 186 Wash. 505

1 (1936). By extension, application of this rule to the present case means that the two-year limitation
2 period for filing a compensable hearing loss claim begins to run on the last day of injurious
3 exposure, not the day after. As noted above, the date of Mr. Scales' last injurious exposure was
4 November 30, 2005.

5 This Board expressed in an earlier decision: "Consider the following self-evident statement:
6 Each calendar year begins on January 1 and ends on December 31, not at the end of the
7 succeeding January 1." *In re Gwen R. Carey*, BIIA Dec. 03 13790 (2005). When applied to the
8 facts of this case, it is apparent that Mr. Scales' two-year application period within which to file a
9 compensable hearing loss claim began on November 30, 2005, and ended November 29, 2007.
10 We are thus required to conclude that Dr. Robertson's chart note received by the Department on
11 November 30, 2007, was not timely filed with respect to RCW 51.28.055(2)(a).

12 In summary, the Department of Labor and Industries was correct to allow Mr. Scales' hearing
13 loss claim for medical treatment. Similarly, it was correct to find that the claim was not
14 compensable under the provisions of RCW 51.28.055(2)(a). Finally, the question of whether
15 Dr. Robertson's November 21, 2007 chart note constituted a valid application for benefits is not
16 reached.

17 **FINDINGS OF FACT**

- 18 1. On December 6, 2007, the claimant, James W. Scales, filed an
19 Application for Benefits with the Department of Labor and Industries in
20 which he alleged that he suffered an occupational disease in the form of
21 hearing loss, with a last injurious exposure of November 30, 2005. On
22 his application the claimant did not identify a chargeable employer. On
23 August 18, 2008, the Department issued an order in which it allowed the
24 claim for hearing loss in both ears with a November 30, 2005, date of
25 manifestation. In its order, the Department also noted that, pursuant to
26 RCW 51.28.055, the claimant was entitled to medical benefits only
27 because he did not file his claim for occupational hearing loss within two
28 years of the last injurious exposure while working for an employer
29 covered under the industrial insurance laws of the state of Washington.

30 On August 25, 2008, the Department issued an order in which it closed
31 the claim effective that date. On October 17, 2008, the claimant filed a
32 Protest and Request for Reconsideration of the Department orders
dated August 18, 2008, and August 25, 2008. On December 8, 2008,
the Department issued an order in which it affirmed the orders dated
August 18, 2008, and August 25, 2008. On January 20, 2009, the
claimant filed a Notice of Appeal with the Board of Industrial Insurance
Appeals. On January 27, 2009, the Board issued an order in which it
granted the appeal under Docket No. 09 10566, and agreed to hear the
appeal.

- 1 2. On November 30, 2005, James W. Scales sustained an industrial injury
2 to his low back and left arm, which was allowed and assigned Claim No.
3 AB-81657. There is no evidence that Mr. Scales was exposed to
4 injurious occupational noise after November 30, 2005 injury.
5
6 3. On November 21, 2007, during the course of treating the claimant under
7 Claim No. AB-81657, Dr. Robertson noted that Mr. Scales had
8 experienced job related hearing loss, which was in need of further
9 evaluation by a specialist.
10
11 4. In the chart note of November 21, 2007, Dr. Robertson wrote that under
12 a separate claim, a chronic hearing loss was in need of evaluation by an
13 ENT specialist, given the multiple years of exposure to loud engines in
14 Mr. Scales' line of work as a garbage collector.
15
16 5. The Department received Dr. Robertson's November 21, 2007 chart
17 note on November 30, 2007.
18
19 6. The factual materials submitted by the parties demonstrate that there is
20 no genuine issue as to any material fact.

21 **CONCLUSIONS OF LAW**

- 22 1. The Board of Industrial Insurance Appeals has jurisdiction over the
23 parties to and the subject matter of this appeal.
24
25 2. Mr. Scales' hearing loss claim was properly allowed for medical benefits
26 under RCW 51.28.055(2)(b).
27
28 3. Dr. Robertson's chart note received by the Department on
29 November 30, 2007, did not constitute a timely application for a
30 compensable hearing loss claim within the meaning of RCW 51.28.020
31 and RCW 51.28.055(2)(a).
32
33 4. The Department of Labor and Industries is entitled to a decision as a
34 matter of law as contemplated by CR 56.
35
36 5. The order of the Department dated December 8, 2008, is correct and is affirmed.

37 Dated: December 1, 2009.

38 BOARD OF INDUSTRIAL INSURANCE APPEALS

39 /s/ _____
40 THOMAS E. EGAN Chairperson

41 /s/ _____
42 LARRY DITTMAN Member