

Crookshanks, Steve

JOINDER

Single claim, multiple possible employers/insurers

In the allowance of a claim as an occupational disease, it is acceptable to remand a claim to the Department to determine the impacted state fund employers when the Department has agreed to the allowance of the claim because the state fund will be the responsible insurer. It is not acceptable to remand to the Department to determine the responsible insurer. All potential insurers must be joined to allow complete relief among the parties. Distinguishing *In re Juan Muñoz*, BIIA Dec., 05 11698 (2007). ...***In re Steve Crookshanks*, BIIA Dec., 16 10351 (2016)** [*Editor's Note*: The Board no longer holds that it is unacceptable to remand to the Department to determine the responsible insurer. If the record established distinctive conditions of work within Washington caused an occupational disease, the claim can be remanded to the Department to determine the responsible insurer. *In re Maria Gomez*, BIIA Dec., 16 23157 (2018).]

Scroll down for order.

1 Based on the Factual Stipulation we conclude that Mr. Crookshanks argues that his claim
2 should be allowed as an occupational disease. Because we have rejected Exhibit 1, we will not hold
3 Mr. Crookshanks to this theory of claim allowance on remand to the hearing process. We note,
4 however, that occupational disease claims are different than industrial injury claims. Occupational
5 diseases are typically the result of cumulative exposures to distinctive conditions of a worker's
6 occupation. Frequently, the occupational exposure is the result of employment over many years and
7 with many employers.

8 Occupational disease claims are reviewed against the backdrop of the "last injurious exposure
9 rule."² The last injurious exposure rule is, essentially, a policy decision that relieves injured workers
10 of the requirement to prove how much each employer contributed to the overall occupational
11 condition. Washington has adopted the last injurious exposure rule that assigns full financial
12 responsibility for an occupational disease claim to the employer/insurer (referred to as the insurer "on
13 the risk") where the worker experienced the last contributing or causal exposure to the condition. The
14 policy decision is based on the idea that it would be unduly burdensome on workers to prove which
15 employer contributed a specific amount of the total occupational exposure.³

16 More specifically, the last injurious exposure rule deals with finding the insurer responsible for
17 the cost of a particular claim. Our Industrial Insurance Act (Act) provides for two types of industrial
18 insurance coverage within the state of Washington. Employers who obtain industrial insurance
19 coverage from the state fund operated by the Department of Labor and Industries are under the fund
20 as the insurer while employers who self-insure under the Act operate as their own insurers. Thus,
21 the analysis must focus not just on the employer on the risk but rather the insurer on the risk as of
22 the date of the last injurious exposure.⁴ We emphasize that this rule applies only to different insurers.
23 For this reason the Department may apportion costs of an occupational disease claim among "state
24 fund" employers as falling under a single insurer, the state fund. Each self-insured employer is its
25 own individual insurer.

26 While the Department argues that its order on appeal should be affirmed, it further argues that
27 the claim should be remanded to the Department to determine whether "there was an employer and
28 whether distinctive conditions of employment arose with that employer," citing the Board's decision
29

30
31 ² *Weyerhaeuser Company v. Tri*, 117 Wn.2d 128 (1991).

32 ³ *In re Lester Renfro*, BIIA Dec., 86 2392 (1988).

⁴ *In re Daniel Pingley*, BIIA Dec., 01 16177 (2003).

1 of *In re Juan Muñoz*.⁵ In addressing occupational disease claims involving multiple employers the
2 Board stated in *Muñoz*:

3 The worker is only required to prove that the medical condition arose naturally and
4 proximately out of the aggregate occupational exposure. If the worker satisfies that
5 burden, then the insurer on the risk during the most recent exposure that bears a causal
6 relationship is solely liable for the entire claim.⁶

7 The role of the Department in such situations is to first determine whether the worker suffers
8 from an occupational disease arising naturally and proximately out of the distinctive conditions of
9 employment with all potentially responsible employers covered under the Washington Industrial
10 Insurance Act and, second, to determine the responsible employer/insurer on the risk. In the present
11 appeal, the Department rejected the claim based both on the theories of industrial injury as well as
12 occupational disease. We see no reason to remand the claim to the Department when, by specific
13 reference, it has already denied the claim as an occupational disease.

14 We acknowledge that remanding to the hearing process is a different result than the decision
15 in *Muñoz*. In *Muñoz* we remanded the adjudication of the claim to the Department to determine
16 whether his occupational condition arose naturally and proximately of the distinctive conditions of his
17 multiple employments as a carpenter with employers covered by the Washington Industrial Insurance
18 Act during the course of his employment as a carpenter; coincidentally, a similar employment to
19 Mr. Crookshanks. In the present appeal we have rejected Exhibit 1 as a factual basis on which to
20 proceed. We believe it more appropriate to remand under these circumstances, with no evidentiary
21 record at all, to the hearing process in order to provide the parties an opportunity to join those
22 employers identified in the stipulation and to provide them an opportunity to participate. We reiterate
23 the Board's statement in *Muñoz*:

24 With respect to the joinder question, CR 19(a)(1) provides for the "joinder of persons
25 needed for just adjudication" as follows: "A person who is subject to service of process
26 and whose joinder will not deprive the court of jurisdiction over the subject matter of the
27 action shall be joined as a party in the action if (1) in his absence complete relief cannot
28 be accorded among those already parties." We have consistently held that, in
29 occupational disease cases involving multiple employers, the issue of claim allowance
30 cannot be fully decided unless all potentially responsible insurers participate.⁷

30 ⁵ BIIA Dec., 05 11698 (2007)

31 ⁶ *Muñoz*, at 13.

32 ⁷ *Muñoz*, at 15.

1 On remand the industrial appeals judge should attempt to identify all insurers on the risk during
2 the period of the claimed occupational exposure. At the minimum this should include the Department
3 of Labor and Industries as the adjudicatory body for state fund claims and any other self-insured
4 employers in addition to Kelly.

5 **ORDER**

6 The Proposed Decision and Order issued on July 14, 2016, is vacated and this matter is
7 remanded to the hearing process to join such other insurers on the risk as provided by CR 19 and to
8 conduct further proceedings as indicated by this order. The industrial appeals judge is directed to
9 issue a further Proposed Decision and Order determining whether the claimant, Mr. Crookshanks,
10 sustained an occupational disease arising naturally and proximately from the distinctive conditions of
11 his employment and, if he sustained an occupational disease, to further determine the insurer on the
12 risk as of the date of the last injurious exposure. The new order will contain findings and conclusions
13 as to each contested issue of fact and law. Any party aggrieved by the new Proposed Decision and
14 Order may petition the Board for review, as provided by RCW 51.52.104. This order vacating is not
15 a final Decision and Order of the Board within the meaning of RCW 51.52.110.

16 Dated: October 3, 2016.

17
18 **BOARD OF INDUSTRIAL INSURANCE APPEALS**

19
20
21 /s/ _____
22 DAVID E. THREEDY Chairperson

23
24 /s/ _____
25 JACK S. ENG Member

1 **Addendum to Decision and Order**
2 **In re Steve B. Crookshanks**
3 **Docket No. 16 10351**
4 **Claim No. SZ-34537**

5 **Appearances**

6 Claimant, Steven B. Crookshanks, by Busick Hamrick Palmer, PLLC, per Douglas M. Palmer
7 Self-Insured Employer, Kelly Group, LLC, by Ronald W Atwood PC, per Ronald W. Atwood
8 Department of Labor and Industries, by The Office of the Attorney General, per Anastasia R.
9 Sandstrom

10 **Department Order(s) Under Appeal**

11 In Docket No. 16 10351, the claimant, Steven B. Crookshanks, filed an appeal with the Board of
12 Industrial Insurance Appeals on January 11, 2016, from an order of the Department of Labor and
13 Industries dated November 24, 2015. In this order, the Department rejected the claim.

14 **Petition for Review**

15 As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
16 and decision. The Department filed a timely Petition for Review of a Proposed Decision and Order
17 issued on July 14, 2016, in which the industrial appeals judge reversed and remanded the
18 Department order dated November 24, 2015. The claimant and the employer filed responses to the
19 Department's Petition for Review.

20 **Evidentiary Rulings**

21 Exhibit 1 is rejected.
22
23
24
25
26
27
28
29
30
31
32