Pate, Forrest

OCCUPATIONAL DISEASE (RCW 51.08.140)

Successive insurers

The insurer on the risk for an occupational disease claim (lung condition) on the date of compensable disability is responsible for the full costs of the claim if the exposure on that date was "of a kind" contributing to the condition for which the claim was made. The date of compensable disability was the date on which the worker was advised by a physician that he had an occupational disease precluding him from gainful employment. **….*In re Forrest Pate*, BIIA Dec., 58,399 (1982)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: FORREST PATE	)	**DOCKET NO. 58,399**
	)	
CLAIM NO. S 374200	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Forrest Pate, by
Aaby, Knies & Robinson, per
John Aaby

Employer, Skagit Corporation, by
Walsh, Margolis & Brousseau, per
Harry Margolis

Department of Labor and Industries, by
The Attorney General, per
William H. Taylor, Assistant

This is an appeal filed by the employer, Skagit Corporation, on December 29, 1980, from an order of the Department of Labor and Industries dated December 19, 1980, which adhered to a prior order allowing the claimant's claim for an occupational exposure and determined that the claim is the self-insured employer's responsibility. **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 August 27, 1981, in which the order of the Department dated December 19, 1980 was sustained.

Following the last hearing held in this matter the parties, through their attorneys, took the deposition of Dr. Delwin J. Nowak, and entered into a stipulation regarding the publication of that deposition and certain other evidentiary matters. By this reference, the stipulation of the parties contained in letters dated June 16, 1981 and June 18, 1981 is incorporated into the record as a part of the record and not as an exhibit. Pursuant to the terms of that stipulation, the deposition of Dr. Nowak taken on May 13, 1981 is hereby published by being appended to the record as a part of the transcript and not as an exhibit. All of the objections and the motions contained in that deposition are hereby overruled and denied.

The Board has reviewed the other evidentiary rulings in the full record and finds that no prejudicial error was committed and said rulings are hereby affirmed.

Consideration of the record and the Petition for Review convinces us that claimant contracted an occupational disease, for which he filed a timely application for benefits, as the result of being exposed to fumes and dust during the course of his employment as a welder. He was first employed by the Skagit Corporation on June 12, 1961 and continued to work for said employer until he was advised to terminate his employment by a physician on February 14, 1979. Until June 30, 1972, the employer secured its workers' compensation coverage by being insured with the state fund administered by the Department of Labor and Industries. On July 1, 1972 the employer became self- insured and has continued to be self-insured through July 30, 1979, the date on which Mr. Pate filed his application for benefits, and thereafter.

The employer in its notice of appeal and Petition for Review contends most ardently that responsibility for claimant's occupational disease should not be solely borne by it as a self-insured employer. The employer argues that claimant's occupationally-related lung condition became disabling or compensable while the employer was covered under the state fund and that responsibility for this condition should be charged to the state fund. Alternatively, the employer argues that the cost of the claim should be apportioned on a 50-50 basis between the self-insured and the state fund. The Board has dealt with this particular issue on a number of occasions (see In re Harry S. Lawrence Dec'd., Docket No. 54,394, 11-18-80; In re Delbert Monroe, Docket No. 49,698, 7-24-78; and In re Winfred Hanninen, Docket No. 50,653, 3-16-79. However, there are no decisions of appellate courts in this state dealing with the issue.

Although it is tempting to resolve this appeal by merely referring to the Board's prior decisions, we feel a more detailed and considered analysis is necessary. Accordingly, we are repeating the substance of substantial portions of the analysis contained in the Harry S. Lawrence Decision and Order, as it analyzes in detail the authorities which dictate our decision in this appeal.

The subject of rights between insurers receives an extensive discussion by Professor Arthur Larson in his treatise, The Law of Workmen's Compensation. The question of apportionment of financial liability for successive injuries or successive occupational exposure to disease producing elements is encompassed in his discussion beginning at §95.00. Professor Larson sets forth in §95.21 what is deemed to be the general rule supported by many judicial decisions relating to occupational disease insurer liability:

> "In the case of occupational disease, liability is most frequently assigned to the carrier who was on the risk when the disease resulted in disability, if the employment at the time of disability was a kind contributing to the

> disease. . . This is comparable to the 'last injurious exposure' rule . . . except that is places more stress on the moment of disability. Occupational disease cases typically show a long history of exposure without actual disability, culminating in the enforced cessation of work on a definite date. In the search for an identifiable instant in time which can perform such necessary functions as to start claim periods running, establish claimant's right to benefits, and fix the employer and insurer liable for compensation, the date of disability has been found the most satisfactory. Legally, it is the moment at which the right to benefits accrues; as to limitations, it is the moment at which in most instances the claimant ought to know he has a compensable claim; and, as to successive insurers, it has the one cardinal merit of being definite, while such other possible dates as that of actual contraction of the disease are usually not susceptible to positive demonstration.
>
> "Among the conditions to which this rule has been applied are asbestos, silicosis, pneumoconiosis, tuberculosis, dermatitis, occupational loss of hearing, and various diseases produced by inhalation of chemicals and fumes." (Emphasis added.)

As an example of this majority rule, Professor Larson cited Glenn v. Columbia Silica Sand Company, 112 S.E. 2d 711 (S.C. 1960). There an employee had been exposed to silica dust for four years, the last four and one-half months of which were covered by an insurer which was held fully liable.

Professor Larson continues to observe in his treatise at §95.21 that:

> "Since the onset of disability is the key factor in assessing liability. . ., it does not detract from the operation of this rule to show that the disease existed under a prior employer or carrier, or had become actually apparent, or had received medical treatment, or, . . . had already been the subject of a claim filed against a prior employer, so long as it had not resulted in disability."

Without question, a rule charging the costs to the insurer on risk when the occupational disease culminates in compensable disability would foster definite and consistent results in the adjudication of claims. Notably other jurisdictions have legislatively adopted this reasoning consistent with Professor Larson's analysis. See, e.g., Ill. Rev. Stat. Chap. 48, §172.36 and Ind. Ann. Stat., §40-2201.

The employer's alternative argument for apportionment of cost is supported by what has become known as the California rule expressed in Colonial Insurance Company v. Industrial Accident Commission, 172 P. 2n 844 (1946), which rejected the "last injurious exposure" rule. The court held that successive insurers of one employer providing coverage during the period of

development of an employee's occupational disease should share the liability. Following the judicial evolution of the apportionment concept in the Colonial Insurance case, the California legislature found it necessary to clarify the procedure so that claimants could secure their compensation. Cal. Labor Code, §5500.5(d). Similarly, other states have attempted a legislative solution to the apportionment problem of successive insurers or successive employers. See, e.g., Minn. Stat. Ann., §176.66(5), and N.Y. Workmen's Comp. Law §44.

We have also considered decisions of other jurisdictions which purport to support the position that apportionment is the appropriate principle to be applied. For example, in Scheier v. Garden State Forge Company, 347 A. 2d 362 (N.J. 1975), apportionment was allowed. However, an examination of that opinion reveals that court applied existing precedent of that state established in Bond v. Rose Ribbon and Carbon and Manufacturing Company, 200 A. 2d 322 (N.J. 1964). That case established that liability would attach:

> "to the extent of the disability then existing, [to] the employer or carrier during whose employment or coverage the disease was disclosed . . . by medical examination, work incapacity, or manifest loss of physical function."

In a later New Jersey case, Ansede v. National Gypsum Company, 37 At. 2d 649 (N.J. 1977), a request by an employer to modify the principle established by the Bond decision was made during oral argument. Had the employer's position been considered and adopted, apportionment would not have been allowed. However, the court refused to consider the request of the employer for the sole technical reason that the issue was not "raised below or in the briefs" before the court.

We have also considered Yocum v. Hayden, 566 S.W. 2d 776, (Ky. 1978). We, however, find that opinion inapposite to the facts before us. Mr. Yocum had been forced by a silicotic condition to cease his work after many years exposure to silica dust. He failed to file a timely application for benefits and his claim was rejected. He later returned to work for four months further exposing his lungs to the ingestion of silica particles. An appeal concerning the legality of a claim for this "second exposure" found its way to the appellate court. There existed under Kentucky law a presumption that a worker would not be considered previously disabled due to an occupational disease if he had not filed a claim and was not off work during the period of exposure. In the Yocum case, the claimant had experienced a substantial period of unemployment because of the effect of silicosis even though his claim had been rejected, subsequently he renewed his employment. Under those circumstances, the court held the presumption of non-disability for

continuous employment could not be invoked. The circumstances in Yocum are distinctly different than those pertaining to Mr. Pate's exposure.

In fact, it appears that Kentucky adheres to the general rule of holding the last insurer on risk solely responsible. The case of Gregory v. Peabody Coal Company, 355 S.W. 2d 156 (Ky. 1962) illustrates the true Kentucky rule. In that case, the claimant had worked for one employer for thirty years and the employer against whom the claim was filed for only twenty-five days. Both employments had exposed him to injurious dust. Even though it was established that his condition of pneumoconiosis had been contracted through the first thirty years of employment, the court held his last employer solely liable by reasoning:

> ". . . [I]t is not required that the employee prove he did contract silicosis in his last employment, but only that the conditions were such that they could cause the disease over some indefinite period of time." (Emphasis added)

As previously mentioned, there are no Washington decisions which allude to the "date of compensable disability" rule as regards liability of successive insurers for an occupational disease case. However, our court has used such a rule in connection with another important function which Professor Larson mentions, i.e., the commencement of the allowable claim period for an occupational disease. Williams v. Department of Labor & Industries, 45 Wn. 2d 574 (1954) and Nygaard v. Department of Labor and Industries, 51.Wn. 2d 659 (1958), dealt with this subject regarding the occupational disease statute of limitations, RCW 51.28.055. These cases set forth the rule that no claim or "cause of action" accrues for an occupational disease, even though there may be knowledge of its existence, until such time as a compensable disability results from it. Thus, under our law, one year must pass from the occurrence of two events before a claim for occupational disease may be rejected as not being timely, i.e., the occurrence of a compensable disability, and notice by a physician that the disease producing that disability is occupational in nature and causation. It is beyond question that Mr. Pate's claim filed on July 30, 1979 was timely, since he was not told by his doctor that his lung disease was caused by his work, and did not cease the work because of that advice, until February 14, 1979. That was the time it was determined that claimant had a compensable disability.

Even so, we must consider whether justice results when a self-insured employer is on the risk at the time a claim is filed for occupational disease, but when as a practical matter only part of the injurious exposure occurred during the time the employer was self-insured.

We are well aware that adherence to the general rule advanced by Professor Larson may work a hardship on the employer who contributes only partially to a claimant's eventual disability, but which is made to bear the full financial responsibility. But such is already the case for those employers who have employees whose previous work experience had been spent entirely outside the state of Washington and who learn they have occupational diseases after working only a short time in similarly hazardous work for the employer in this state. In such cases, given that the occupational exposure in Washington contributed to the development or severity of the disease condition, the Washington employer's cost experience will reflect the full financial impact of that claim, cf. Kallos v. Department of Labor and Industries, 46 Wn. 2d 26 (1955).

The Oregon Court of Appeals, we believe, sets forth a most cogent reasoning for adoption of the general rule. Noting the hardship on an employer who contributes only slightly to a claimant's occupational disease, that court stated:

> "The same could be said for minor injuries which aggravated pre-existing conditions, thus making the last employer liable for the complete disability under the accidental injury portion of the workmen's compensation act. In the latter situation, the legislature has afforded some relief through the second injury reserve . . . thus, defendant's contentions of the harshness of the general rule should be directed to the legislature."

This state, too, has a second injury fund designated to encourage the hiring of previously partially disabled workers by limiting the liability of a second employer to disabilities actually resulting from subsequent injuries. We note, however, that the concept of a second injury fund was not added to the Workers' Compensation Act until 1943, some thirty-two years after the inception of the Act. We can only suggest that to the extent that apportionment is raised as an issue herein, it must be subject to legislative attention, just as the issue of liability for second injuries was some thirty-nine years ago.

In accord with the decision in Mathis is the Oregon court's later pronouncement in Davidson Baking Company v. Industrial Indemnity Company, 532 P. 2d 810 (Or. 1975) which upheld the Workmen's Compensation Board's assessment of liability solely against the last of successive insurance carriers when it was determined that the carrier was on the risk at the time of the claimant's last injurious exposure. In Davidson the court refused to depart from the rule that liability is not be apportioned among carriers.

Moreover, we must note that should this employer in its self-insured status be fully free from financial responsibility, or have that responsibility substantially reduced because of apportionment, this would cause the state fund to bear significant financial impact. The remaining employers in the class vacated by the self-insurer and potentially all other employers under the state fund would have to bear the burden for previously unknown or unanticipated occupational diseases developing at a time when premiums paid would not have included the potential costs for diseases which were developing, but had not become legally compensable.

With respect to assessment and collection of premiums, the Department of Labor and Industries is directed by RCW 51.16.035 to classify all occupations or industries:

> "In accordance with their degree of hazard and fix therefor basic rates and premiums which shall be the lowest necessary to maintain actuarial solvency in accordance with recognized insurance principles."

It also is apparent that the legislature intended the accident funds supported by premium assessments to be ultimately "neither more nor less than self-supporting", RCW 51.16.100.

In determining premium rates, past and prospective costs are to be considered. See WAC 296-17-310. Such determinations are, of course, reflected from actual claims experienced plus actuarial projections. A truly accurate assessment of prospective costs had not been possible for long-developing occupational diseases, due to an ever-growing fund of information concerning causal connection between exposure to hazardous materials in the work environment and the burgeoning discoveries of abnormal physical conditions. (See the U. S. Department of Labor's "Interim Report to Congress on Occupational Disease", June 1980.) Consequently, the calculation of expected state fund costs could not anticipate costs generated by long-delayed occupational disease claims originating from exposure with employers who have vacated their previous classifications under the state fund to become self-insured. To expect the remainder of employers still insured under the state fund to accept financial responsibility for such unknown claims when they finally become known, would be excessive and unfairly discriminatory to those employers.

This type of claim is an unexpected example of a loss which is, in insurance parlance, a loss "incurred but not reported". If claims of this nature are now to be said to have been "incurred" in premium years which are now only history, there would be substantial state fund liability for costs paid out now which were never contemplated when the earlier premium rates were charged and paid. As a result, in order to maintain actuarial solvency, as required by the law, future rates to

employers now insured with the state fund would have to be raised, to "make up" for the avoidance of those costs, by employers in whose employ the occupational condition may have first developed and who have since become self-insured, or by such employers who have since gone out of business and are not longer paying any premiums. This demonstrates, to our mind, the efficacy and practical necessity, from a fair and responsive insurance funding standpoint, on the "date of determination of compensable disability" rule in deciding monetary responsibility for these long-developing occupational disease claims.

Without the benefit of definitive case law on point in this state we must look for parallel reasoning in existing decisions from which to glean some guidance. Our Supreme Court drew a distinction between accidents "occurring in" a class and accidents "caused by" a class of hazardous industry in Boeing Aircraft Company v. Department of Labor & Industries, 22 Wn. 2d 423 (1945). There, a Boeing aircraft crashed during a trial flight into a meat packing plant killing the airplane crew and many employees of the meat packing plant. The Boeing Company, the sole contributor to Class 34-3 under the merit rating system of industrial insurance, was charged for deaths not only to its employees, but for the deaths and injuries to the meat packing company's employees' which paid its premiums under Class 43-1. The Supreme Court determined that the cost experience of the meat packing company's employees' injuries should be borne by that company. This was so even though the meat packing company in no way contributed to the cause of its employees' deaths or injuries. The court noted:

> "It is clear from a reading of the workmen's compensation act and our opinions interpreting the same that every hazardous industry within the purview of the workmen's compensation act should bear the burden arising out of injuries to its employees regardless of the cause of injury, and that it was never contemplated that each class should be liable for the accidents caused by such class, but that each class the statute provides shall meet and be liable for accidents occurring in such class." (Emphasis added.)

In the Boeing case, the court determined that each class would bear its own liability regardless of injury or death to employees insured within a particular class. Each class then regardless of the cause or source of injury or death must be solvent to fund its own liability.

We draw an analytical parallel between a "class" under the merit rating system for premium determinations to carry its own liability and a "self-insurer" statutorily defined to carry its own liability to its employees. RCW 51.08.173. The obvious distinction, of course, between the cited case and

Mr. Pate's circumstances is that in Boeing the date of onset of disability from injuries was precisely determined. Still, the logic requiring each self-insurer to carry its own liability holds equally firm when considering financial responsibility for cost experience for claims actually incurred when the claim reaches the point of determinable compensability, or as expressed in the Nygaard case, supra, the point of compensable disability. With respect to Mr. Pate, that point was not reached until he was advised by a physician that his disease was occupational in causation. In chronology, such did not occur until long after Skagit Corporation become self-insured.

In summary, we are persuaded that this state's system of underwriting workers' compensation claims costs requires that we follow the general rule espoused in Professor Larsen's treatise. Simply stated, in this state the insurer or employer who is on the risk for a claim of occupational disease on the date of compensable disability should be charged with and expected to bear financial responsibility for the full costs of such claim as long as the exposure to which the worker-claimant is subjected on the date of compensable disability is of a kind contributing to the condition for which the claim is made.

The record before us establishes that Mr. Pate's occupational disease was determined to be compensable after July 1, 1972, the date on which the employer became self-insured. Accordingly, full responsibility for the occupational disease should be borne by the self-insured employer. The Department's order of December 19, 1980, allowing the claim for an occupational disease and determining that it was the responsibility of the self-insured employer, is correct and must be affirmed.

FINDINGS OF FACT

Based on a careful review of the entire record, this Board finds as follows:

1. On July 30, 1979 claimant, Forrest Pate, filed an application for benefits with the Department of Labor and Industries alleging that he had contracted an occupational disease as the result of being exposed to dust and fumes during the course of his employment for the Skagit Corporation. On October 13, 1980 the Department of Labor and Industries issued an order allowing the claim as an occupational exposure. The employer filed a timely protest and request for reconsideration, and on December 19, 1980 the Department issued an order adhering to the provisions of its order of October 13, 1980, and determining that the claim was the employer's responsibility in its self-insured capacity. On December 29, 1980 the self-insured employer filed a notice of appeal from the Department's order of December 19, 1980.

On January 23, 1981 the Board issued an order granting the appeal and proceedings were held thereafter.

2. As a direct result of exposure to welding fumes, smoke and dust during the course of his employment with Skagit Corporation from June 12, 1961 through February 14, 1979, claimant, Forrest Pate, developed the disease of pulmnary emphysema and bronchitis.

3. Skagit Corporation, at the time Mr. Pate was hired on June 12, 1961, was insured with the state fund for worker's compensation coverage and remained so until June 30, 1972. On July 1, 1972 Skagit Corporation became self-insured and remained self-insured through July 30, 1979, when Mr. Pate filed his application for benefits with the Department, and has continued in such self-insured capacity.

4. Claimant, Forrest Pate, was not advised until February 14, 1979 by his physician that his lung condition was caused by and related to his exposure to welding fumes, smoke and dust during the course of his employment at the Skagit Corporation and that he should immediately cease work in that environment. Claimant did cease work at that time.

5. Although claimant's condition had affected him since 1968, causing him at times to miss work for brief periods, it was not determined as a compensably disabling occupational disease until February 14, 1979.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, this Board concludes as follows:

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

2. The self-insured employer, Skagit Corporation, is fully financially responsible for the costs of the occupational disease claim filed by Forrest Pate.

3. The order of the Department of Labor and Industries dated December 19, 1980, allowing this claim as the self-insured employer's responsibility, is correct and should be affirmed.

It is so ORDERED.

Dated this 5th day of February, 1982.

BOARD OF INDUSTRIAL INSURANCE APPEALS
/s/_____
MICHAEL. L HALL Chairman

/s/_____
FRANK E. FENNERTY, JR Member

/s/_____
PHILLIP T. BORK Member