Lamberton, Roland

OCCUPATIONAL DISEASE (RCW 51.08.140)

Successive insurers

The insurer on the risk for an occupational disease claim (hearing loss) on the date of compensable disability is responsible for the full costs of the claim if the exposure to which the worker was subjected during the period the insurer was on the risk was "of a kind" contributing to the condition for which the claim was made. ***….In re Roland Lamberton*, BIIA Dec., 63,264 (1984)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: ROLAND LAMBERTON	**)**	**DOCKET NO. 63,264**
	)	
CLAIM NO. S-432358	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Roland Lamberton, by
Aaby, Knies & Robinson, per
Joseph Albo

Employer, PACCAR, Inc., by
Perkins, Coie, Stone, Olsen & Williams, per
Debra F. Cheatum

Department of Labor and Industries, by
The Attorney General, per
James S. Kallmer, Assistant

This is an appeal filed on October 26, 1982 by PACCAR, Inc., a self-insured employer, from an order of the Department of Labor Industries dated August 31, 1982. The order adhered to the provisions of a prior Department order closing the claim with a permanent partial disability award of 19.3% of complete loss of hearing in both ears, and determined that this occupational disease claim is the self-insured employer's responsibility. The Department order is **AFFIRMED**.

PROCEDURAL STATUS AND EVIDENTIARY RULINGS

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 Department to a proposed Decision and Order issued on August 24, 1983, in which the order of the Department dated August 31, 1982 was reversed, and the claim remanded to the Department with direction to assess only 13.23% of the claimant's 19.3% binaural hearing loss to PACCAR, Inc. as a self-insurer, rather than the entire 19.3%, and thereupon close the claim.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. Said rulings are hereby affirmed.

ISSUE

It is undisputed before this Board on review that (1) Roland Lamberton's hearing loss was in fact caused by excessive occupational noise exposure during the course of his employment with PACCAR; and (2) the permanent partial disability rating of 19.3% binaural hearing impairment was a reasonable and correct award for the claimant's occupationally-caused hearing loss. The sole

issue presented for the Board's resolution is whether financial responsibility for this occupational disease claim should be borne entirely be PACCAR as a self-insured employer, or borne in all or in part by the Department (i.e., the State Fund), which carried PACCAR's industrial insurance coverage prior to January 1, 1978.

DECISION

The evidence presented by the parties is adequately set forth in the Proposed Decision and Order, and will not be extensively reiterated herein. We agree with the determination in the Proposed Decision and Order that some, but not all, of the claimant's occupationally-caused 19.3% binaural hearing loss occurred during the course of his employment with PACCAR prior to PACCAR's election to become self-insured. We note in passing that the employer's Reply to the Department's Petition for Review abandons its earlier position that occupational noise exposure after January 1, 1978 was not "injurious" and that claimant Lamberton had sustained all of the 19.3% binaural hearing loss while PACCAR was insured by the state fund.

The employer's contention is that because the evidence establishes that the claimant had a binaural hearing loss of 6.07% from noise exposure at PACCAR up to January, 1978, "equity" requires that the state fund be assessed for that portion of the claimant's hearing loss as it existed before PACCAR became self-insured.

In defense of its order, the Department counters that (1) financial responsibility for occupational disease claims should be borne by the insurer on risk at the time the disease results in "compensable disability", if the employment at that time was of a kind contributing to the disease; and (2) the time of determinable compensability in this case was considerably after PACCAR became a self-insurer on January 1, 1978.

In bringing this appeal, the employer urges this Board to retreat from our holdings in earlier cases that the "date of compensable disability" ought to be observed for purposes of determining financial responsibility for an occupational disease claim. We respectfully decline to do so. On further analysis, we feel such a holding fosters more definite and consistent results in the adjudication of responsibility for claims (like this one) which are based on long-developing occupational diseases, and is ultimately more fair to all employers in its impact on insurance premium rate-making and collection.

There is no formula or procedure contemplated in the existing statutes permitting or proscribing apportionment in the circumstances presented before us. Neither is there any binding

precedent established in the case law of this state to comfortably drape around a decision on this issue.

Although an issue of first impression under statutory and appellate case law in this state, the issue is not one of first impression before this agency (as the parties in this case have readily acknowledged). On two prior occasions, i.e., In re Delbert Monroe, Docket No. 49,698, July 24, 1978, and In re Winfred Hanninen, Docket No. 50,653, March 16, 1979, this Board (comprised of partially different membership) determined that the self-insured employer should bear the entire financial responsibility for occupational diseases in hearing loss claims, no apportionment being granted. Similar results have been reached by this Board in cases of long-developing occupational diseases resulting in pulmonary disability. See In re Harry S. Lawrence, Docket No. 54,394, November 18, 1980, and In re Forrest Pate, Docket No. 58,399, February 5, 1982.

It is a temptation merely to cite those decisions and the reasoning inherent in them to dispose of the instant appeal. Such action would be consistent with the philosophy of the prior Board determinations. Although much can be said for uniformity and consistency of decision, we feel another look at the issue is warranted by the arguments advanced by the parties.

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 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 of a kind contributing to the disease. . . . This is comparable to the 'last injurious exposure' rule . . . except that it 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 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 position herein is supported by what has become known in workers' compensation law as the California rule expressed in Colonial Insurance Company v. Industrial Accident Commission, 172 P. 2nd 884 (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 took action 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.

Although PACCAR also cites us to decisions of other jurisdictions which purport to support its position that apportionment in accord with the weight of medical evidence is the appropriate

principal to be applied, one notes that in most if not all of the cited jurisdictions, their respective legislatures have specifically acted to reject the "last injurious exposure" rule. On the other hand, in a substantial number of those states whose legislative branches have not addressed the apportionment question, the general rule of holding the last insurer on risk solely responsible survives.

A pertinent example is Gregory vs. Peabody Coal Company, 355 S.W. 2nd 156(Kentucky 1962). In Gregory, the claimant has worked for one employer for thirty years and for 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:

> "...It 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 we have previously noted, it is undisputed here that Mr. Lamberton has shown that the conditions at PACCAR after January 1, 1978 were such that they could and did cause occupational hearing loss.

Like the parties appearing before us, we find no Washington appellate 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 and 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 claimant's disease is occupational in nature and causation. There is no contention in Mr. Lamberton's case that his claim was untimely. Thus, from the fact that the claim was filed on November 16, 1981, it must be presumed that he did not have a

legally compensable disability until after PACCAR became self-insured on January 1, 1978. In fact, the record supports this conclusion, because there was no determination of a compensable disability in the form of a measurable percentage of permanent partial hearing impairment until 1981, which was long after PACCAR had become self-insured.

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 some 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 after electing to become self-insured, but who is made to bear the full financial responsibility therefor. 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 only after working in similar extraordinarily hazardous work for an employer in this state. In such cases, given that the extraordinary exposure in Washington produced the development of disability from the disease condition, the Washington employer's cost experience would necessarily 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 partially to a claimant's disability, 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. "Mathis v. St. Acc. Ins. Fund, 499 P. 2d 1331 (Oregon 1972).

This state, too, has a second injury fund designed 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 Workers' Compensation Act. We suggest that the apportionment issue raised by this appeal may be the

subject of an appropriate legislative solution, just as the issue of second injuries was some forty-one 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'sCompensation 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 to be apportioned among carriers.

Furthermore, we must note that to the extent the employer in its self-insured status is partially free from financial responsibility 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 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. The employer's "equitable" argument that its premiums paid to the state fund for the many years prior to its becoming self-insured justifies apportionment may appear superficially plausible. But, such an argument assumes that premiums had been collected by the state fund for "unknown" claims such as this one. Our analysis leads to the conclusion that such is not the case.

With respect to assessment and collection of premiums, the Department of Labor and Industries is directed 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 acturial solvency in accordance with recognized insurance principles." RCW 51.16.035

It also is apparent that the legislature intended the accident fund supported by premium payments to be ultimately "neither more nor less than self supporting", RCW 51.16.100, and directed the Department to make adjustments by transferring funds between classes to foster that intent.

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 for long-developing occupational diseases is not possible due to an ever-growing fund of information concerning the

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 Diseases", June 1980). Consequently, the calculation of expected state fund costs has not been able to 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. This demonstrates, to our mind, the efficacy and practical necessity, from a fair and responsive insurance funding standpoint, of 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 and 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 overruled, and 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 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. Lamberton'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. Lamberton, that point was not reached until it was determined that he had a compensable disability. In chronology, such did not occur until considerably after PACCAR became self-insured.

In summary, we are persuaded that this state's system of underwriting workers' compensation claim costs requires that we follow the general rule espoused in Professor Larson's treatise. Simply stated, in this state the insurer or employer who was on the risk for a claim of occupational disease on the date of determination 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 was subjected while under that risk coverage was of a kind contributing to the condition for which the claim is made. Mr. Lamberton's work environment after January 1, 1978 was of a kind contributing to his occupational hearing impairment, and for that reason we conclude that PACCAR in its self-insured capacity must be held fully responsible for the costs of this claim.

After consideration of the Proposed Decision and Order, the Department's Petition for Review filed thereto, the Employer's Reply to the Department's Petition for Review, and a careful review of the entire record before us, we hereby enter the following:

FINDINGS OF FACT

1. On November 16, 1981, Roland Lamberton filed an application for benefits with the Department of Labor and Industries, alleging the onset of occupational hearing loss due to exposure to noise during the course of his employment with PACCAR, Inc., a self-insured employer under the Industrial Insurance Act. The claim was subsequently allowed, and on July 19, 1982, the Department issued an order closing the claim with a permanent partial disability award of 19.3% complete loss of hearing in both ears. A protest and request for reconsideration of the Department's closing order was filed on behalf of the employer on August 19, 1982, and on August 31, 1982 the Department issued an order adhering to the provisions of its July 19, 1982 closing order. A notice of appeal was filed on behalf of the employer on October 26, 1982, and on November 10, 1982 the Board of Industrial Insurance Appeals issued an order granting the appeal, and directed that hearings be held on the issues therein raised.

2. The employer, PACCAR, Inc., became self-insured on January 1, 1978, and remained so through November 16, 1981, when Mr. Lamberton filed the instant application for benefits, and has continued in such self-insured capacity.

3. The employer, PACCAR, Inc., on its self-insured capacity, was the insurer on risk for occupational disease claims that reached the point of compensable disability on or after January 1, 1978.

4. Although Roland Lamberton's occupational disease of hearing loss was somewhat noticeable prior to January 1, 1978, it was not determined to be compensably disabling until after said date, to wit, in 1981.

5. As of the date the hearing loss became compensable, Mr. Lamberton was still encountering injurious exposure to noise during the course of his employment with PACCAR, Inc., which contributed to the development of this occupational disease.

6. As of August 31, 1982, as a result of exposure to excessive noise during the course of his employment with PACCAR, Inc., claimant Lamberton sustained a fixed and permanent binaural hearing loss equal to 19.3% complete loss of hearing in both ears.

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 subject matter of this appeal.

2. As of August 31, 1982, the claimant, Roland Lamberton, suffered a permanent partial disability for a compensable hearing loss equal to 19.3% of complete loss of hearing in both ears.

3. The employer, PACCAR, Inc., in its self-insured capacity, is financially responsible for the entire occupational hearing loss claim of Roland Lamberton.

4. The order of the Department of Labor and Industries dated August 31, 1982, requiring the self-insured employer to pay the claimant a permanent partial disability equal to 19.3% complete loss of hearing in both ears, is correct and should be affirmed.

It is so ORDERED.

Dated this 22nd day of February, 1984.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/
MICHAEL L. HALL Chairman

/s/
FRANK E. FENNERTY, JR. Member

/s/
PHILLIP T. BORK Member