Auckland, Ronald

OCCUPATIONAL DISEASE (RCW 51.08.140)

Successive insurers

PERMANENT PARTIAL DISABILITY (RCW 51.32.080)

Segregation

An insurer cannot obtain apportionment of financial responsibility for an occupational disease claim (hearing loss) under the guise of segregating preexisting disability under RCW 51.32.080(3). The insurer on the risk on the date of compensable disability is responsible for the full cost of the occupational disease claim. To obtain segregation under RCW 51.32.080(3) it must be established that the worker's preexisting hearing loss was either not industrially related or that the date of compensable disability of the preexisting loss occurred when another insurer/employer was on the risk. ***….In re Ronald Auckland,* BIIA Dec., 88 4099 (1990)** [dissent] [*Editor's Note*: *Affirmed sub nom, Weyerhaeuser Co. v. Auckland*, 65 Wn. App. 1005 (1992). The referenced provisions of RCW 51.32.080 are currently found in subsection (5).]

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: RONALD AUCKLAND	**)**	**DOCKET NO. 88 4099**
	)	
CLAIM NO. S-787675	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Ronald Auckland, by
Webster, Mrak & Blumberg, per
Richard P. Blumberg

Self-Insured Employer, Weyerhaeuser Company, by
Roberts, Reinisch & Klor, per
Steven R. Reinisch

Department of Labor and Industries, by
Office of the Attorney General, per
Linda M. Gallagher and Larry Watters, Assistants

This is an appeal filed by the self-insured employer, Weyerhaeuser Company, with the Department of Labor and Industries and transmitted to this Board on September 28, 1988 from an order of the Department of Labor and Industries dated August 5, 1988 which ordered the self-insured employer to pay a permanent partial disability award to the claimant equal to 27.8% complete loss of hearing in both ears and closed the claim. **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 self-insured employer to a Proposed Decision and Order issued on June 15, 1989 in which the order of the Department dated August 5, 1988 was affirmed.

The parties stipulated to all the facts presented in this appeal which are adequately set forth in the Proposed Decision and Order. The claimant, Ronald Auckland, had been self-employed and also employed by Rodger Spurlock and Gaylen Gray Logging as a timber faller and cutter from approximately 1969 to 1971. Mr. Auckland began working at Weyerhaeuser on September 28, 1971. The day before he started at Weyerhaeuser, Mr. Auckland had a pre-employment physical examination which included a hearing test. At that time, it was discovered the claimant had hearing loss, which is now described as an 8.43% binaural hearing impairment. While in the course of his employment with Weyerhaeuser, from September 28, 1971 to August 5, 1988, Mr. Auckland was subjected to injurious noise exposure which resulted in a further hearing loss. The additional loss was

equal to 19.4% binaural hearing impairment as of August 5, 1988 when his claim was closed. Weyerhaeuser argues that Mr. Auckland had a preexisting 8.43% binaural hearing impairment which should be segregated pursuant to RCW 51.32.080 (3) and that Weyerhaeuser should only be responsible for a 19.4% binaural hearing loss award.

We have granted review because, while we agree with the result reached in the Proposed Decision and Order, we do not entirely agree with the analysis.

RCW 51.32.080(3) provides:

> Should a worker receive an injury to a member or part of his or her body already, from whatever cause, permanently partially disabled, resulting in the amputation thereof or in an aggravation or increase in such permanent partial disability but not resulting in the permanent total disability of such worker, his or her compensation for such partial disability shall be adjudged with regard to the previous disability of the injured member or part and the degree or extent of the aggravation or increase of disability thereof.

Segregation applies whether the preexisting disability is industrial or non-industrial in origin. RCW 51.32.080(3); Corak v. Dep't of Labor & Indus., 2 Wn.App. 792, 469 P.2d 957 (1970). Pursuant to RCW 51.16.040, segregation of a preexisting permanent partial disability applies to an occupational disease claim just as it would apply to an industrial injury claim. See, Dennis v. Dep't of Labor & Indus., 109 Wn.2d 467, 476, 745 P.2d 1295 (1987). It follows, then, that RCW 51.32.080(3) applies to hearing loss permanent partial disability just as it would apply to a permanent partial disability resulting from any occupational disease.

The heart of the dispute between the parties is whether Mr. Auckland's preexisting 8.43% hearing loss permanent partial disability can be segregated from the subsequent hearing loss sustained as a result of employment with Weyerhaeuser. The problem is how to distinguish between apportionment of financial liability among successor insurers/employers and segregation of preexisting permanent partial disability pursuant to RCW 51.32.080(3).

In a long line of cases, this Board has consistently held that the insurer/employer on the risk on the date of compensable disability bears the entire cost of an occupational disease-based disability. See, e.g., In re Lester Renfro, BIIA Dec., 86 2392 (1988). The date of compensable disability is the date on which the worker receives the requisite statutory notice from a physician of the existence of an occupationally related disease-based disability. RCW 51.28.055; See, e.g., In re Charles D. Jones, BIIA Dec., 70,660 (1987); In re Winfred E. Hanninen, BIIA Dec., 50,653 (1979). Since the

apportionment of financial responsibility is not permissible in occupational disease claims, it cannot be achieved under the guise of segregating preexisting permanent partial disability. Thus, the manner in which we allow segregation in occupational disease cases must be consistent with our many decisions prohibiting apportionment.

For non-industrially related preexisting permanent partial disability there is no potential for apportionment masquerading as segregation. Thus, if the evidence discloses a preexisting symptomatic, disabling condition, segregation is appropriate.

But for preexisting occupationally-related permanent partial disability something more is required in order to avoid apportionment. The worker must have filed a claim for the preexisting disability or the terms of RCW 51.28.055 with respect to notification by a physician of the existence of a preexisting occupational disease must have been met. That is, if the date of compensable disability with respect to a preexisting permanent partial disability occurred when another insurer/employer was on the risk, then the subsequent insurer/employer is not responsible for paying that portion of the permanent partial disability award. In this sense, the question of whether to segregate preexisting permanent partial disability is a part of the larger problem of identifying the insurer/employer which is responsible for the costs of an occupational disease claim.

With these guidelines in mind, we turn to the facts of this particular case. This is the self-insured employer's appeal. It was therefore Weyerhaeuser's burden to make a prima facie showing either that Mr. Auckland's preexisting permanent partial disability was not industrially related or that the date of compensable disability with respect to Mr. Auckland's preexisting 8.43% binaural hearing loss occurred prior to injurious noise exposure during the course of employment with Weyerhaeuser. The employer has proved neither.

The parties' stipulation is not explicit on the question of what caused Mr. Auckland's preexisting hearing loss. If anything, there is some suggestion that it was caused by his pre-Weyerhaeuser employment as a timber faller. At any rate, since the Department directed the self-insured employer to pay the entire 27.8% permanent partial disability award, presumably the Department concluded that Mr. Auckland's entire hearing loss was occupationally induced. Since the employer has not proved otherwise, we as well must conclude that all of Mr. Auckland's hearing loss is occupational, including the preexisting 8.43%.

The question then becomes whether Mr. Auckland was advised by a physician that he had an occupational hearing loss prior to his injurious exposure to noise during the course of his employment

with Weyerhaeuser. A routine pre-employment audiogram was performed on September 27, 1971 as part of an overall pre-employment physical. There is no evidence that Mr. Auckland was advised by a physician of the results of that audiogram or that he had occupationally related hearing loss. Indeed we assume that he was not so advised, since Weyerhaeuser is not contending that the claim filed on June 8, 1987 was time-barred with respect to the preexisting 8.43% hearing loss. Because the notification requirements of RCW 51.28.055 were not met, and because Mr. Auckland apparently has not filed a prior claim for his preexisting hearing loss, the benefits of segregation are not available to the self-insured employer.

To conclude otherwise would be to allow an employer to discover the existence of a hearing impairment and to use that discovery to limit its own liability while, at the same time, failing to disclose the existence of the impairment to the worker. We would also be effectively allowing the employer to apportion liability by calling it something different. And finally, we would be placing an unfair burden on workers who file occupational disease claims to identify each and every employment throughout their working lives which contributed to the occupational disability. This is precisely the result we have sought to avoid in the successive insurer/employer cases.

Using the date of compensable disability to answer both the segregation and the responsible insurer questions is consistent with our prior decision in In re Herbert G. Lovell, BIIA Dec., 69,823 (1986) and with the Dennis decision, the Supreme Court's most recent pronouncement on occupational disease. We discussed Lovell at length in the Renfro decision and will not repeat that discussion here. If anything, the Dennis decision expanded occupational disease coverage. In so doing, the Supreme Court could not have intended to require a worker to file a separate occupational disease claim for each exposure to working conditions with a different employer, when it is the cumulative effect of all such exposures throughout his working life which has caused an occupational disease.

The Department order of August 5, 1988 directing the self-insured employer to pay the entire permanent partial disability award of 27.8% binaural hearing loss is correct and should be affirmed.

FINDINGS OF FACT

1. On June 8, 1987, the Department of Labor and Industries received a report of an accident alleging that the claimant, Ronald Auckland, developed a gradual hearing loss in both ears, which had been reported to the employer on January 28, 1985. On July 10, 1987, the Department issued an order closing the claim with a permanent partial disability award of 9.625% complete hearing loss in both ears. After an August 31, 1987

protest and request for reconsideration filed by the claimant, the Department issued an order on July 5, 1988 modifying the July 10, 1987 order from final to interlocutory and directing the self-insured employer to pay a permanent partial disability award of 19.4% loss of hearing in both ears and thereupon close the claim. After a July 26, 1988 protest and request for reconsideration filed by the claimant, the Department issued an order on August 5, 1988, which modified the July 5, 1988 order from final to interlocutory and directed the self-insured employer to pay a permanent partial disability award of 27.8% complete loss of hearing in both ears and closed the claim.

On September 28, 1988, the employer filed its notice of appeal with the Board of Industrial Insurance Appeals. On September 30, 1988, the Board issued an order granting the appeal, assigning it Docket No. 88 4099 and directing that proceedings be held on the issues raised by the notice of appeal.

2. Mr. Auckland was self-employed and also worked for Rodger Spurlock and Gaylen Gray Logging as a timber faller and cutter for approximately 2 1/2 years prior to September 28, 1971. On September 27, 1971, the day before his employment for Weyerhaeuser Company commenced, the claimant exhibited occupational binaural hearing loss impairment equal to 8.43% of complete loss of hearing in both ears. This hearing loss was revealed by an audiogram taken as part of a routine, pre-employment physical. It is not known whether Mr. Auckland was advised at that time by a physician of the results of the September 27, 1971 audiogram or that he had an occupational hearing loss.

3. On September 28, 1971, claimant began his employment with Weyerhaeuser. The claimant's work for Weyerhaeuser Company from September 28, 1971 to August 5, 1988 resulted in injurious exposure to noise, which caused an additional binaural hearing loss equal to 19.4% of complete loss of hearing.

4. As of August 5, 1988 claimant had sustained an overall permanent partial disability equal to 27.8% complete loss of hearing in both ears as a result of occupational noise exposure.

CONCLUSIONS OF LAW

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

2. Prior to Mr. Auckland's exposure to injurious noise during the course of employment with Weyerhaeuser, the notification requirements of RCW 51.28.055 were not met with respect to his preexisting 8.43% binaural occupational hearing loss. The date of compensable disability for Mr. Auckland's occupational hearing loss occurred sometime during the period when he was employed with Weyerhaeuser. Therefore, Weyerhaeuser must bear the full cost of the claim and pay claimant a permanent partial

disability award of 27.8% complete loss of hearing in both ears. Segregation of preexisting permanent partial disability pursuant to RCW 51.32.080(3), while applicable generally to occupational disease cases, is inapplicable to the particular facts of this case.

3. The Department order of August 5, 1988, which modified its July 5, 1988 order from final to interlocutory, directed the self-insured employer to pay a permanent partial disability award equal to 27.8% complete loss of hearing in both ears, and thereupon closed the claim, is correct and is affirmed.

It is so ORDERED.

Dated this 10th day of January, 1990.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
SARA T. HARMON Chairperson

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

DISSENT

I disagree with the Board majority's decision to affirm the Department's order of August 5, 1988 providing that the self-insured employer must pay a permanent partial disability award for claimant's entire hearing impairment, i.e., 27.8% complete loss of hearing in both ears, and I disagree with the majority's refusal to apply the provisions of RCW 51.32.080(3) to segregate the claimant's pre-existing permanent hearing impairment of 8.43% complete loss of hearing in both ears. I believe this statute applies to this claim, and that claimant's 8.43% binaural hearing impairment, which all parties stipulated pre-existed the commencement of his employment with Weyerhaeuser, must be segregated. Thus, his proper disability award should be 19.4% complete loss of hearing in both ears, as directed by the Department's prior order of July 5, 1988.

The majority readily and correctly observes that the segregation statute applies to an occupational disease claim just as it does to an industrial injury claim, and that it applies to hearing loss permanent partial disability just as it does to permanent partial disability resulting from any occupational disease.

However, in my view, the majority then gets off the track by its discussion of the "problem" of distinguishing between apportionment of financial responsibility among successive insurers/employers and segregation of pre-existing permanent partial disability, and its expressed concern over

apportionment of financial responsibility being "achieved under the guise of" segregating pre-existing disability, and the potential for apportionment "masquerading as" segregation. In light of the stipulated facts in this case, I believe these concerns are misplaced.

Furthermore, in view of the facts as stipulated to by all parties, I disagree with the discussion at page 5, 11. 7-16, of the majority's decision, whereby they "must conclude" that Mr. Auckland's pre-existing 8.43% hearing impairment was also occupationally caused.

I do not so conclude. There is nothing in the parties' stipulation to suggest to me that the pre-existing impairment was caused by his brief pre-Weyerhaeuser periods of employment as a timber faller for either Rodger Spurlock or Gaylen Gray Logging, or by his self- employment at some unspecified occupation. It is noted that, while one of the three doctors who have evaluated claimant's hearing loss would (apparently) say that the 8.43% pre-existing impairment was related to "noise exposure," there is no indication that any doctor would say that such pre-existing impairment was from occupational noise exposure, although the doctors took histories as to past medical treatment, work histories as to prior employment, recreational activities, and past noise exposure on and off the job. Nor will I "presume" that, because the Department's order of August 5, 1988 directed payment of a 27.8% permanent partial disability award, the Department thereby concluded that claimant's entire hearing loss was occupationally induced. A more valid "presumption," in my view, is that the Department's order of August 5, 1988 was a slightly considered knee-jerk reaction (prompted by claimant's counsel's protest of July 26, 1988) to this Board's Renfro decision issued on July 5, 1988.

Also, I am not much persuaded that this appeal should have its final decision turn, at least in part, on the happenstance of which party is appealing and thereby has the "burden" to make a prima facie case, inasmuch as no testimony was presented, and the case was submitted solely on stipulated facts and memoranda on the legal issues involved. Had this case been put before us by an appeal by the claimant from the Department's prior order of July 5, 1988, it would have been the claimant's burden to prove a prima facie case, and with the assumed scenario of the same stipulated facts and legal memoranda, the claimant would not then have met his "burden" since there is no evidence in the record of an occupational noise-induced hearing loss in excess of 19.4% binaural hearing impairment. To partly determine this case, which involves basically a question of law, on such evidentiary "burdens" controlled by who happens to be the appealing party, is not very helpful in the context of the over-all adjudicatory system, and can produce undesirable "tactical" litigation.

In conclusion, it is my view that this case is not governed by our series of hearing loss cases refusing to approve apportionment of liability between successive insurers/employers. This case is simply a case of segregation of pre-existing disability, governed by RCW 51.32.080(3). From whatever cause, the claimant already had a hearing loss permanent partial disability of 8.43% complete loss of hearing in both ears, prior to commencing employment with Weyerhaeuser on September 28, 1971. As a result of injurious occupational noise exposure in such employment from that date up to the 1988 closure of this claim, he sustained an increase in such hearing loss permanent partial disability of 19.4% complete loss of hearing in both ears. That percentage increase is the extent of hearing loss disability for which the self-insurer should be responsible in this claim.

I would reverse the Department's order of August 5, 1988, and reinstate its order of July 5, 1988 as the closing order herein.

Dated this 10th day of January, 1990.

/s/_____
PHILLIP T. BORK Member