Roberson, Leonard

AGGRAVATION (RCW 51.32.160)

Proximate cause of worsened condition: new occupational disease vs. aggravation

Whether a carpal tunnel condition resulting from employment activities which give rise to a need for surgery is an aggravation of an occupational disease for which prior claims were filed, or a new occupational disease, is a question of proximate cause. A claim of aggravation of a prior condition and a claim for a new occupational disease may not be mutually exclusive. ***….In re Leonard Roberson,* BIIA Dec., 89 0106 (1990)**

OCCUPATIONAL DISEASE (RCW 51.08.140)

Successive insurers

The provisions of RCW 51.32.080(3) which require segregation of preexisting conditions cannot be used in an attempt to avoid the "successive insurer rule" prohibiting apportionment. However, employers who take responsibility for current conditions may avoid future responsibility where subsequent employment conditions may constitute a supervening cause of the worsening of the preexisting condition. ***….In re Leonard Roberson*, BIIA Dec., 89 0106 (1990)** [*Editor's Note*: The referenced provisions of RCW 51.32.080 are currently found in subsection (5).]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: LEONARD C. ROBERSON	**)**	**DOCKET NOS. 89 0106, 89 0107, & 89 0820**
	)	
CLAIM NOS. S 739776, S 739787, & K 100288	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Leonard C. Roberson, by
Harpold, Fornabai & Fiori, P.C., per
David L. Harpold

Self-Insured Employer, Iowa Beef Processors, Inc., by
Rolland, O'Malley & Williams, P.S., per
Julie Hatcher, legal secretary, and
James L. Rolland and Wayne L. Williams

State Fund Employer, Paschen Contractors, Inc., by
None

Department of Labor and Industries, by
The Attorney General, per
Larry Watters, Assistant

Docket No. 89 0106 is an appeal filed by the self-insured employer, Iowa Beef Processors, Inc., on January 12, 1989 from an order of the Department of Labor and Industries concerning Claim No. S-739776 dated November 18, 1988, which set aside and held for naught a Department order dated August 12, 1988 and reopened the claim effective June 20, 1988 for authorized treatment and action as indicated, based on aggravation of claimant's right wrist condition. **REVERSED AND REMANDED**.

Docket No. 89 0107 is an appeal filed by the self-insured employer, Iowa Beef Processors, Inc., on January 12, 1989 from an order of the Department of Labor and Industries concerning Claim No. S-739787 dated November 18, 1988 which set aside and held for naught a Department order dated August 12, 1988 and reopened the claim effective June 20, 1988 for authorized treatment and action as indicated, based on an aggravation of claimant's left wrist condition. **REVERSED AND REMANDED**.

Docket No. 89 0820 is an appeal filed by the claimant, Leonard C. Roberson, on March 16, 1989 from an order of the Department of Labor and Industries concerning Claim No. K-100288 dated March 7, 1989 which rejected the claim for benefits on the basis that the medical evidence disclosed that the condition, bilateral carpal tunnel syndrome, was a preexisting condition and the medical condition had been allowed under the self-insured claim Nos. S-739776 and S-739787. The order

also demanded reimbursement of provisional time loss compensation paid for the period January 9, 1989 through March 4, 1989 in the amount of $2,271.94. **REVERSED AND REMANDED**.

PROCEDURAL RULING

By agreement of the parties, all three of these appeals were consolidated before our industrial appeals judge for the purposes of conference, hearing, and decision. However, at the time the Proposed Decisions and Orders were issued, the appeals were deconsolidated. One Proposed Decision was issued with respect to the self-insured claims, and a separate Proposed Decision and Order was issued with respect to the state fund claim. Since the parties have agreed that the issues in all three appeals should be tried and decided together, and because the issues involved are intrinsically intertwined, we have reconsolidated the appeals for the issuance of one Decision and Order.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, these matters are before the Board for review and decision on timely Petitions for Review filed by the self-insured employer to the two Proposed Decisions and Orders issued on December 11, 1989, in which the two orders of the Department dated November 18, 1988, as well as the order dated March 7, 1989, were affirmed.

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

The issue presented is whether Mr. Roberson's bilateral carpal tunnel syndrome, which required surgery in March 1989, was the result of an aggravation of his preexisting condition, which arose during the course of his employment with Iowa Beef Processors, Inc. (IBP), or if it developed as a natural and proximate result of his employment with Paschen Contractors, Inc. (Paschen). IBP contends that Mr. Roberson's carpal tunnel syndrome as it existed in 1988 resulted from the working conditions at Paschen, and Mr. Roberson's new claim for industrial insurance benefits should be allowed, and the aggravation applications filed on the self-insured claims should be denied.

Mr. Roberson began working at IBP in 1984, approximately seven months before he began having problems with his hands. He worked cutting and trimming beef shanks, an activity which required him to lift meat off a conveyor belt and trim it. In March, 1985, Mr. Roberson filed two claims with his self-insured employer. Claim No. S-739776 was for a right wrist condition and Claim No. S-739787 was for a left wrist condition.

On May 19, 1985, Mr. Roberson first consulted David Fischer, M.D., an orthopedic surgeon, regarding his problems with his hands. Mr. Roberson presented with complaints of numbness and abnormal sensation in the middle fingers of his right hand. Dr. Fischer obtained EMG tests which indicated that Mr. Roberson had developed early carpal tunnel syndrome on the right. In addition, the Phalen's Test indicated that Mr. Roberson had carpal tunnel syndrome bilaterally.

In May of 1985, Mr. Roberson left the employment of IBP. Two weeks later, he began working for Transco Pacific Railroad as a "gandy dancer" operating a jackhammer and sledge hammer in helping build a railroad. This employment continued until late summer, 1985.

By August, 1985, Mr. Roberson was complaining of pain in both of his hands interfering with his ability to sleep at night. Dr. Fischer continued treating Mr. Roberson until January 22, 1986. His treatment included injections to attempt to relieve inflammation and the use of a wrist splint. Throughout the time that Dr. Fischer provided treatment, Mr. Roberson's complaints were predominantly in the right wrist. In fact, Dr. Fischer said he thought the claims involved only the right wrist. As of January, 1986, Mr. Roberson had been off of work for a couple of months and his symptoms and complaints had subsided. Dr. Fischer noted on his last visit that Mr. Roberson still had occasional twinges and discomfort and the Phalen's Test remained positive on both sides. At that time, Dr. Fischer recommended that the claims be closed with no permanent partial disability. On April 16, 1986, the self- insured employer issued orders closing the claims with payment of medical benefits only.

The record indicates that Mr. Roberson left his employment with Transco in late summer of 1985, and as of January, 1986, had not returned to work. In the fall of 1987 he began work with Paschen. His work history between late 1985 and the fall of 1987 is somewhat sketchy. Mr. Roberson testified that he was unemployed for several months. He also stated he worked briefly as an insulation installer, worked for a month as a dishwasher, worked a few days digging holes, and worked helping people in and out of radiation suits.

In September or October, 1987, Mr. Roberson started working construction jobs out of the Laborers' Local No. 440. He worked with Paschen Contractors, Inc. on a highway construction project. His responsibilities included general labor, carpentry, and operation of a chipping gun.

On June 20, 1988 Mr. Roberson consulted Wilbur G. Sandbulte, M.D., an orthopedic surgeon, concerning problems he was again experiencing with his hands and wrists. Mr. Roberson gave a history which included his bilateral carpal tunnel syndrome which developed while working for IBP. He

also complained of increasing symptoms for approximately six months prior to the examination. Mr. Roberson stated he had been unable to sleep for more than two or three hours per night, due to pain, numbness and tingling in both hands and that he experienced numbness when he did heavy lifting. Dr. Sandbulte's examination revealed positive responses to both Tinel's and Phalen's tests, which were indicative of carpal tunnel syndrome bilaterally.

Based on Dr. Sandbulte's recommendation, Mr. Roberson ceased his employment with Paschen in June, 1988. He filed his application to reopen his self-insured claims on June 29, 1988. Mr. Roberson also filed an accident report for a claim based on his employment with Paschen on January 9, 1989.

Because of the severity of Mr. Roberson's symptoms, Dr. Sandbulte performed carpal tunnel release surgery on the right wrist on March 15, 1989 and on the left wrist on March 24, 1989. The record does not indicate whether Mr. Roberson was employed from June, 1988 until he had his surgery in March, 1989. However, Dr. Sandbulte did indicate that Mr. Roberson returned to work as a flagger on April 11, 1989.

Both medical witnesses agree that Mr. Roberson suffered from carpal tunnel syndrome as a result of his employment with IBP. They both agree that the use of vibrating tools would likely aggravate the symptoms of carpal tunnel syndrome. Dr. Sandbulte concluded that the condition he treated was related to Mr. Roberson's employment at IBP, based on Mr. Roberson's statements that he was never pain-free after the condition initially developed in 1985. On the other hand, Dr. Fischer found Mr. Roberson's condition to be fixed and stable, virtually symptom-free, and resulting in no permanent disability, in early 1986.

Our industrial appeals judge relied on the rules set forth in McDougle v. Dep't of Labor & Indus., 64 Wn.2d 640, 645, 393 P.2d 631 (1964) to conclude that the aggravation of Mr. Roberson's carpal tunnel syndrome should be the responsibility of IBP. We disagree. The facts of this case lead us to the conclusion that the aggravation of Mr. Roberson's bilateral carpal tunnel syndrome arose as a natural consequence of repeated trauma through use of a jackhammer, sledge hammer, chipping gun and similar vibrating equipment during the course of his employment subsequent to IBP.

At the time Mr. Roberson's self-insured claims were closed in early 1986, his treating doctor noted Mr. Roberson had only occasional discomfort and no permanent disability. Only after his return to work in the construction field with Paschen in late 1987 and the first six months of 1988 did Mr.

Roberson's carpal tunnel syndrome flare up, resulting in the need for bilateral carpal tunnel release surgery.

As we stated in In re Alfred Swindell, BIIA Dec., 53 792 and 54 864 (1980), McDougle does not hold that a new accident identifiable in time and place adversely affecting an area of the body previously injured in an industrial injury, must be considered an aggravation of that previous injury. But, as we pointed out in In re Robert D. Tracy, Dckt. No. 88 1695 (February 2, 1990) at 6: "A new injury and an aggravation of a preexisting condition are not necessarily mutually exclusive." See, also, In re Mary L. Wardlaw, Dckt. No. 88 2105 (May 25, 1990). McDougle, Swindell, Tracy, and Wardlaw all involved industrial injury claims. These appeals concern occupational disease claims. However, a similar analysis applies.

In previous decisions, we have quoted the strong dicta in Dennis v. Dep't of Labor & Indus., 109 Wn.2d 467, 745 P.2d 1295 (1987), in support of our position that a work-caused aggravation of a preexisting symptomatic condition can, in certain cases, constitute a new occupational disease under the Industrial Insurance Act. So what is the difference between a new occupational disease and an aggravation of a preexisting symptomatic condition which had been the basis of a prior claim? Under certain circumstances, the answer may be "none".

As in all requests for benefits, we must first look at the issue of proximate cause. In Simpson Logging Co. v. Dep't of Labor & Indus., 32 Wn.2d 472, 202 P.2d 448 (1949), the Court stated that a cause must be proximate in the sense that there is no intervening cause, and but for the exposure in the employment, the disease would not have been contracted. In other words, the question here is: Did Mr. Roberson's subsequent employment activity constitute a supervening cause that resulted in the need for surgery, independent of his work activity at IBP which gave rise to the original diagnosis of carpal tunnel syndrome?

Dr. Sandbulte found this question difficult to answer because Mr. Roberson's symptoms improved after he left IBP and did not significantly worsen until after he went to work for Paschen in the fall of 1987. Dr. Sandbulte acknowledged that Mr. Roberson's use of vibrating tools after his employment at IBP contributed to his carpal tunnel syndrome. Yet Dr. Sandbulte also believed Mr. Roberson would have required surgery at some point if he pursued any type of occupation which required use of his hands. Dr. Fischer stated that once a person is susceptible to carpal tunnel syndrome, he or she is probably susceptible to it indefinitely, depending upon activity level. He noted that Mr. Roberson's use of vibrating tools would likely cause an aggravation of his symptoms. The

medical testimony provides support for both the aggravation and new occupational disease theory. However, both doctors seem to agree that, in carpal tunnel syndrome cases, employment which requires repetitive use of the hands leads to the need for surgery.

In its petition, IBP points out that in occupational disease claims where "injurious exposure" has occurred through multiple employment, the"successive employers rule" applies. This Board in a long line of cases has held that the insurer "on the risk" on the date of compensable disability or last injurious exposure is responsible for the full costs of the claim. There is no apportionment among successive insurers for the consequences of occupational disease. See In re Lester Renfro, BIIA Dec., 86 2392 (1988); In re Forrest Pate, BIIA Dec., 58 399 (1982); In re Delbert Monroe, BIIA Dec., 49 698 (1978).

However, those cases do not involve the issue of the aggravation of a preexisting condition which had been an accepted occupational disease claim. Does this matter? The Industrial Insurance Act requires that a preexisting disability be segregated from a subsequent permanent partial disability award affecting the same part of the body. See RCW 51.32.080(3) and RCW 51.32.100. We have previously stated that the segregation section of the statute cannot be used in an attempt to avoid the "successive insurer rule" prohibiting apportionment. In re Ronald Auckland, Dckt. No. 88 4099 (January 10, 1990). In fact, our prior decisions have encouraged employers, as a policy matter, to take responsibility for current conditions to avoid future responsibility. In re Herbert G. Lovell, BIIA Dec., 69 823 (1986). IBP did just that.

Mr. Roberson's carpal tunnel syndrome, which initially occurred during his employment with IBP, resulted in no permanent disability as of April, 1986, when his self-insured claims were closed. It is possible that as a natural consequence the condition thereafter worsened over time. However, it is much more probable that Mr. Roberson's subsequent employment which involved the use of various vibrating equipment constituted a supervening cause, resulting in the need for the March 1989 surgeries. The medical testimony supports this conclusion, as does the case law and our previous decisions.

After consideration of the Proposed Decisions and Orders and the Petitions for Review filed thereto, and a careful review of the entire record before us, we are persuaded that Mr. Roberson's claim should be allowed as a new occupational disease.

FINDINGS OF FACT

1. On March 4, 1985, the self-insured employer, Iowa Beef Processors, Inc., received an accident report alleging that the claimant, Leonard C. Roberson, sustained a compensable injury or condition to his right wrist on February 25, 1985, while in the course of his employment with Iowa Beef Processors, Inc. The claim was assigned No. S-739776. On April 16, 1986, the self-insured employer issued an order closing the claim with payment for medical benefits only.

   On March 7, 1985, the self-insured employer received an accident report alleging that the claimant, Leonard C. Roberson, suffered a compensable injury or condition to his left hand on March 4, 1985, while in the course of his employment with Iowa Beef Processors, Inc. The claim was assigned No. S-739787. On April 16, 1986, the self-insured employer issued an order closing the claim with payment for medical benefits only.

   On June 29, 1988, the claimant filed an application to reopen both claims for aggravation of the conditions caused by the occupational disease. On August 12, 1988, the Department denied the aggravation applications and determined that Claim Nos. S-739776 and S-739787 should remain closed pursuant to the provisions of the self-insured orders of April 16, 1986, and noted the possibility that a new injury had been sustained.

   After a September 2, 1988 protest and request for reconsideration under each claim, the Department held the August 12, 1988 orders in abeyance in its orders of September 21, 1988. On November 18, 1988, the Department set aside and held for naught its August 12, 1988 orders and reopened Claim Nos. S-739776 and S-739787 effective June 20, 1988 for authorized treatment and action as indicated.

   On January 12, 1989, the employer filed a notice of appeal from the Department order of November 18, 1988 in Claim No. S-739776. On January 20, 1989, the Board issued an order granting the appeal, assigning it Docket No. 89 0106, and directed that proceedings be held on the issues raised therein.

   On January 12, 1989, the employer filed a notice of appeal from the Department order of November 18, 1988 in Claim No. S-739787. On January 20, 1989, the Board issued an order granting the appeal, assigning it Docket No. 80 0107, and directed that proceedings be held on the issues raised therein.

2. On January 9, 1989, the Department of Labor and Industries received an accident report alleging that the claimant, Leonard C. Roberson, developed bilateral carpal tunnel syndrome as a result of an industrial injury or occupational disease on June 20, 1988, while in the course of his employment with Paschen Contractors, Inc. The claim was assigned No. K-100288. Provisional time loss compensation benefits were paid.

On March 7, 1989, the Department issued an order rejecting the claim on the basis that the medical condition had been allowed under self-insured claim Nos. S-739776 and S-739787, determined that provisional time loss compensation had been paid for the period January 9, 1989 through March 4, 1989 in the amount of $2,271.94 and demanded reimbursement in that amount.

On March 16, 1989, the claimant filed a notice of appeal from the Department order of March 7, 1989. On April 5, 1989, the Board issued an order granting the appeal, assigning it Docket No. 89 0820 and directed that proceedings be held on the issues raised.

3. During the course of his employment with IBP in 1984-1985, Mr. Roberson developed carpal tunnel syndrome on the left and right as the result of his work as a beef trimmer.

4. As of April 16, 1986, Mr. Roberson's bilateral carpal tunnel condition causally related to his employment with IBP, and allowed under Claim Nos. S-739776 and S-739787, was fixed and stable, requiring no further treatment, and resulting in no permanent partial disability.

5. Between April 16, 1986 and November 18, 1988, the worsening of Mr. Roberson's bilateral carpal tunnel syndrome was not causally related to his employment with IBP in 1984-85.

6. In 1987 and 1988, Mr. Roberson's work with Paschen Contractors, Inc., as a laborer, required him to operate various vibrating equipment, including drills and chipping guns.

7. As a result of operating vibrating equipment, which was a distinctive condition of his employment with Paschen Contractors, Inc., Mr. Roberson aggravated his preexisting bilateral carpal tunnel syndrome and this aggravation arose naturally and proximately out of his employment with Paschen Contractors, Inc.

8. As a result of the aggravation of Mr. Roberson's preexisting bilateral carpal tunnel syndrome resulting from his employment with Paschen Contractors, Inc., he required active treatment, including bilateral carpal tunnel release surgeries in March 1989.

CONCLUSIONS OF LAW

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

2. Between April 16, 1986 and November 18, 1988, the worsening of Mr. Roberson's bilateral carpal tunnel syndrome was not causally related to his 1984-85 employment with IBP, and therefore Claim Nos. S-739776 and S-739787 should not be reopened pursuant to RCW 51.32.160.

3. The aggravation of Mr. Roberson's preexisting bilateral carpal tunnel syndrome by the distinctive conditions of his employment with Paschen

Contractors, Inc., constitutes an occupational disease as defined by RCW 51.08.140.

4. The Department order regarding Claim No. S-739776 dated November 18, 1988 which set aside and held for naught the Department order of August 12, 1988 and reopened this claim effective June 20, 1988 for authorized treatment and action as indicated, is incorrect and should be reversed.

5. The Department order regarding Claim No. S-739787 dated November 18, 1988 which set aside and held for naught the Department order of August 12, 1988 and reopened the claim effective June 20, 1988 for authorized treatment and action as indicated, is incorrect and should be reversed.

6. The Department order of May 7, 1989 in Claim No. K-100288 which rejected the claim against Paschen Contractors, Inc., on the basis that the medical condition had been allowed under self-insured claim Nos. S-739776 and S-739787, determined that provisional time loss compensation had been paid for the period January 9, 1989 through March 4, 1989 in the amount of $2,271.94, and demanded reimbursement in that amount, is incorrect and should be reversed.

7. All three claims are remanded to the Department with directions to enter orders allowing the aggravation of the claimant's preexisting bilateral carpal tunnel syndrome as an occupational disease under Claim No. K-100288, denying the applications to reopen for aggravation of condition in Claim Nos. S-739776 and S-739787, and to take such further action as may be appropriate under the law and the facts.

It is so ORDERED.

Dated this 5th day of July, 1990.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/
SARA T. HARMON Chairperson

/s/
FRANK E. FENNERTY, JR. Member

/s/
PHILLIP T. BORK Member