NO. 331814

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

ALEKSANDR RUMYANTSEV

Appellant/Defendant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES

Respondent.

BRIEF OF APPELLANT

Drew D. Dalton, WSBA No. 39306
Of Attorneys for Appellant Aleksandr Rumyantsev

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ASSIGNMENTS OF ERROR

Assignment of Error No. 1

A. The superior court erred as a matter of law when it found Mr. Rumyantsev did not have an occupational disease related to employment, specifically findings of fact 1.5,1.6, and 1.7.

Issues pertaining to Assignment of Error No.1

1. How is occupational disease defined?
2. What is a "distinctive condition of employment" as used in the definition of occupational disease?
3. What are Mr. Rumyantsev's "distinctive conditions of employment"?
4. What is the time frame for filing an occupational disease claim?

Assignment of Error No. 2

B. Mr. Rumyantsev's application did put the Department on notice of Hearing loss both as an injury and as an occupational disease claim.

1. An application for benefits is both an application for an injury and a disease claim.
2. Distinctive conditions of employment could have caused his condition.

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INTRODUCTION

Mr. Rumyantsev worked for Huntwood Industries. On March 19, 2010, he was hit on the front of the head while at work. The injury was reported to the employer, the employer filled out an onsite incident report. (Board Exhibit 2.) Mr. Rumyantsev speaks Russian and no English. The employer provided a Russian co-worker to translate and fill out the report. Mr. Rumyantsev only signed the report upon being told what it said. Mr. Rumyantsev denied any need for treatment beyond a Band-Aid. He returned to work. The employer did not offer to take him to the hospital or provide him with any forms to send to the Department of Labor and Industries.

On May 13, 2010, Mr. Rumyantsev was hit in the back of the head while working at Huntwood. A co-worker swung a long board around and made contact. The incident was reported to the employer and Mr. Rumyantsev was again given first aid treatment and not taken to the hospital. A translator, by the name of Aleksi, was again able to help report the accident to the employer. Mr. Rumyantsev only

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signed the report. (Board Exhibit 5.) Again, Mr. Rumyantsev was not given any worker's compensation forms at the time of the accident. He said he did not need a doctor and returned to work not knowing he was required to fill out an accident form.

Mr. Rumyantsev was laid off on September 12, 2011. (See. Board Exhibit 1) Prior to the May incidents Mr. Rumyantsev did not have memory, headache, confusion or dizziness issues. Mr. Rumyantsev testified these issues started several months to a year after the injuries. Mr. Rumyantsev did not seek treatment until he was laid off. With the layoff Mr. Rumyantsev sought medical treatment for his head, hearing loss and other conditions. He testified his first treatment was with Spokane Regional Command and they helped him file for Social Security Disability in October 2011. Mr. Rumyantsev also testified he was exposed to loud noise while working at Huntwood Industries. His last day of work and exposure to noise was September 12, 2011. Mr. Rumyantsev has not worked since September 12, 2011.

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PROCEDURAL STATEMENT OF THE CASE

Mr. Rumyantsev filed a claim for benefits on May 9, 2013. This claim for benefits was denied by the Board. Mr. Rumyantsev appealed and the Board affirmed the denial. He then appealed to Superior Court and the denial was affirmed. He is now on appeal before the Court of Appeals, Division II.

STANDARD OF REVIEW

This Court reviews orders of summary judgment de novo, and engages in the same inquiry as the Trial Court:

> After the moving party submits adequate affidavits, the nonmoving party must set out specific facts sufficiently rebutting the moving party's contentions and disclosing the existence of a material issue of fact. The nonmoving party may not rely on speculation, argumentative assertions that unresolved factual issues remain, or having its affidavits accepted at face value.

Heath v. Uraga, 106 Wn. App. 506, 512-513 (2001) (internal citation omitted)

STATEMENT OF THE CASE

Mr. Rumyantsev suffers from a brain disease process as a probable result of multiple hits to the head while working at

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Huntwood/TRA Industries. It is his position that he has an occupational disease (brain) related to work exposure (hits to the head). There is no dispute that Mr. Rumyantsev has a brain disease process. There is no dispute that it was caused by incidents at work. The question is whether it is classified as an occupational disease or industrial injury.

In addition Mr. Rumyantsev suffers from hearing loss. It is his position the May 9, 2013 application put the Department on notice with regards to his hearing loss and they should not have denied his benefits at that time.

ARGUMENT

Mr. Rumyantsev suffers from two disease processes. These are traumatic brain injury and hearing loss. Both of these conditions arose out of work activities as stated by the doctor and Mr. Rumyantsev in his testimony. The Superior Court was wrong in its interpretation of the definition of occupational disease and what qualifies as distinctive conditions of employment.

What is an Occupational Disease?

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Occupational disease is defined by RCW 51.08.140: ""Occupational disease" means such disease or infection as arises naturally and proximately out of employment under the mandatory or elective adoption provisions of this title."

Restated it is a disease process or infection that was caused as a result of work activities. This is most prominent in In re: Sharon Baxter, Dec. 92 5897 (1994); cited by Magee v. Rite Aid, 167 Wn. App 60, 65 (2012). Ms. Baxter was a nurse. In the case she was stuck by needles on occasion at work. The Board found that she suffered both an occupational disease claim and an injury claim. The injury claim arose every time she was stuck by a needle at work and it was subject to the one year statute of limitations. The disease claim arose from the hepatitis she contracted. Because the hepatitis was a disease and was not immediately discoverable it was subject to the two year statute of limitations and the discovery provisions of a disease.

A work claim can be for both an injury and/or an occupational disease. For it to be a disease related to work it must only be shown that it was related to work or in other

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words arose out of employment.

What are "distinctive conditions of employment"?

In Dennis v. Dep't of Labor, 109 Wn.2d 467, 481 (1987) The Court Stated:

> Only in the context of an occupational disease does our Act expressly require that the disabling condition "arise out of employment." RCW 51.08.140. Therefore, in construing the term "naturally in its ordinary sense, the meaning of the term must be tied to the "arising out employment" language. We hold that a worker must establish that his or her occupational disease came about as a matter of course as a natural consequence or incident of distinctive conditions of his or her employment. The conditions need not be peculiar to, nor unique to, the worker's particular employment. Moreover, the focus is upon conditions giving rise to the occupational disease, or the disease-based disability resulting from work-related aggravation of a nonwork related disease, and not upon whether the disease itself is common to that particular employment. The worker, in attempting to satisfy the "naturally" requirement, must show that his or her particular work conditions more probably caused his or her disease or disease-based disability than conditions in everyday life or all employments in general.

"The worker is to be taken as he or she is, with all his or her preexisting frailties and bodily infirmities." Dennis, 109 Wash.2d at 471,(citing *Wendt v. Department of Labor & Indust.,* 18 Wash.App. 674, 682-83,(1977)). Dennis also held that the conditions need not be peculiar to, or unique to, the worker's employment. 109 Wash.2d at 481.

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Conditions that occur at work at distinctive conditions of employment. They need not be peculiar. The Claimant need only show that the conditions of his employment lead to his disease. In this case the Department said there are no distinctive conditions of employment and the superior court agreed but they both failed to address the testimony directly on point as to the brain trauma and the hearing loss conditions.

Mr. Rumyantsev's "distinctive conditions of employment."

The Court can allow this clam if it finds Mr. Rumyantsev had an occupational disease supported by medical evidence relating the condition to work. See *Simpson Timber Co. v. Wentworth*, 96 Wn. App. 731 (1999)(If medical testimony establishes a worker's job duties accelerated his need for treatment or aggravated his underlying condition, his claim can be allowed.) Here Mr. Rumyantsev's job duties led to the blows on the head. They caused a disease process testified to by Dr. Cox and led to his myriad of conditions. We ask the Court to reverse the superior court order as the only medical evidence shows Mr. Rumyantsev has occupationally related hearing loss and a brain occupational disease.

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Injuries as Occupational Disease Claims/Brain Trauma

The brain is different than most parts of the body. In most cases we have an injury for which immediate damage can be seen. In the brain we often do not see damage until later as the result of a deterioration of the brain, this is a specific disease process caused by the trauma. See Cox tr. 2/10/14 p. 10 ln. 17-25. This was testified to by Dr. Cox and no contrary opinion was supplied. This is why the legislature has established occupational disease and injury theory claims. Occupational disease claims have the specific requirements of notification by a doctor to cover those disease processes that cannot be seen or immediately known after an initial exposure. RCW 51.28.055 provides that notice in writing must be provided by a physician for the statue of limitations to start tolling in an occupational disease claim.

The Board has found that some conditions are both injury and disease. Meaning the initial exposure may cause an injury that can worsen but it can also cause a disease that will not manifest until a later date in time. The most relevant case to this analysis is *In re: Sharon Baxter*, Dec. 92 5897 (1994). In *Baxter* the Board

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was required to determine if the claimant could file a claim for occupational disease when the likely exposure (injury) took place in 1984, twelve years prior to filing. In that case Ms. Baxter worked as a dental assistant and was stuck multiple times by needles in 1984. However, at the time of the incidents there was no manifest condition.

The Board found that the "needle stick" incidents by themselves satisfy the definition of an injury claim consistent with RCW 51.08.100. Each one of the sticks could have been the basis for a separate claim. However, Ms. Baxter did not file a claim for any of these events within the required year. The Board stated: "During the period within which Ms. Baxter could have filed an injury claim the disease had not developed to the extent that it was diagnosable." In *Baxter* the condition did not become disabling until well after the one year statute of limitations had run.

The *Baxter* Board found:

> Both the manner in which the condition developed and the definition of an occupational disease convinces us that this is a condition or ailment which should be evaluated under the provisions of RCW 51.08.140. Consideration of the decisions in *Nygaard v. Department of Labor & Indus.*, 51 Wn. 2d 659 (1958) and *Williams v. Department of Labor & Indus.*, 45 Wn.2d 574 (1954), supports our conclusion that this is precisely the type of condition which should be covered as an occupational disease. In light of the lengthy

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> period that elapsed before the disease developed, was diagnosed, or required treatment, it would be unreasonable to require that a claim be filed within the period provided for a claim arising out of a "...sudden and tangible happening, of a traumatic nature, producing and immediate or prompt result...". RCW 51.08.100 (emphasis added).

Specifically this means that a Claimant cannot be expected to report a condition that they did not know they have.

Baxter is similar to Mr. Rumyantsev's case. At the time of the reported head injuries Mr. Rumyantsev had nothing more than cut on his head. This could have been filed as a specific injury but it was not. (Same as Ms. Baxter's case.) If a claim was filed it might have been reopened later for a disease process "worsening" but when there is an occupational disease process you can also file an occupational disease claim despite the corresponding injury. See *Baxter*.

Mr. Rumyantsev did not have any concussion diagnoses, memory problems, dizziness or headaches at the time of injury. He was able to work and there was no disability. This was, on its face, your standard first aid case. No need to file a claim. The disability did not occur until October 2011 when he was found not able to work because of these problems. There was no diagnosis by a physician within a year of either injury that connected the conditions

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to his injuries at work. At that time the injury theory was not open to Mr. Rumyantsev except under and equity argument at Superior Court. The only question was whether there was a disease claim.

A doctor testified Mr. Rumyantsev's current condition is a disease process, there is no evidence to the contrary the claim must be allowed and the superior court order reversed. The distinctive conditions of employment were the injuries at work just like the needle sticks in Baxter. Dr. Cox said as much. No immediate disease problem or diagnosis of one until years later.

Mr. Rumyantsev testified that as to the specific conditions of employment that led to both head injuries. He testified that he was cleaning in an area and clamps fell off and hit him in the head the first time. P.10 ln 1-3. The second time he was working with gluing wood and moving it around. He states he had to continually duck to avoid being hit and then, one time he was hit. See. Pg. 13 ln 9-26 pg. 14 ln 1- 11. "But for" his employment he would not have been hit in the head or exposed to multiple head traumas at work.

An occupational disease must arise naturally and proximately out of distinctive conditions of employment. RCW 51.08.140. Dennis [v. Dep't of Labor & Indus., 109 Wash.2d 467, (1987). Sometimes, a claim could be filed for each of a series

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of events or as an occupational disease. Magee v. Rite Aid, 167 Wn. App. At 65. Here Mr. Rumyantsev is filling the claim because of a series of head injuries that caused his occupational disease and for the disease itself that has only been tied to work exposure.

Only Dr. Cox testified. She testified she treated patients with brain trauma and was trained for it. She stated that she was aware that he hit his head multiple times while working at the cabinet shop. Cox 2/10/14 p. 8 ln 1-13; also supported by the exhibits in the Certified Appellate Board Record. Dr. Cox further testified that with a traumatic brain injury that she personally had seen the symptoms manifest as much as five years after the initial injury. Cox 2/10/14 p.10 ln 17-23. She also testified that a brain injury can be both a disease and an injury. Id. at p. 12-ln 3-5, 18-20. This makes this case very similar to the *Baxter* needle stick case mentioned above.

Mr. Rumyantsev like Baxter had an immediately identifiable injury that could have been reported as an industrial injury and in fact was to the employer, it just was not sent in to the Department. There were multiple contusions to the head, injury claims. However, the underlying disease process was not immediately discoverable. As Dr. Cox testified it can takes years to know if

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there will be a brain disease process. Like the Hepatitis C case it was not known which injury caused the condition, when the condition would manifest or if it would manifest. Even if there was only one hit to the head the disease process would not also be immediately discoverable. There is no dispute the injuries happened at work and that they happened in the course of his job. As such they arose naturally out of employment and they caused the disease process and thus they fulfill the distinctive conditions test of Dennis. Mr. Rumyantsev's brain disease claim should be allowed for this condition as an occupational disease.

Occupational Hearing Loss

Mr. Rumyantsev stated he was exposed to loud noise in his medical records and testimony. Rumyantsev tr. P. 18 ln 6 -19. The report of accident form noted hearing loss was a complaint. Dr. Cox testified Mr. Rumyantsev had noise exposure consistent with occupationally related hearing loss. Cox tr. P. 13 ln 21-25p.14 ln 1-7. This by itself should have allowed the claim as an occupational disease as there was testimony from the worker and the doctor that loud noise caused his problems and it was at work. There was no testimony to the contrary. This also fulfills the Dennis distinctive

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condition of employment test and the hearing loss condition should be allowed.

What is the time frame for filing an Occupational Disease claim

In Williams v. Department of Labor & Industries, 45 Wash.2d 574, 575, 576, (1954) the Washington Supreme Court said: "No cause of action, of course, can accrue for an occupational disease before it reaches a stage of development for which it is compensable at at (sic) least in some degree." The court went on to state the statute of limitations does not begin to run when the disease requires treatment or is disabling, but when a doctor gives him notice that it is work related. When Mr. Rumyantsev was hit on the head he immediately had an injury claim but also had an occupational disease claim that he did not know about. Same as *Baxter*. Mr. Rumyantsev did not have knowledge the occupational disease condition was work related until at least October 2011. Technically he has never been given written notice by a physician that his disease process is work related.

In accordance with Williams no course of action was available to Mr. Rumyantsev until the condition was diagnosed.

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Based on the medical evidence the earliest date was October 2011. He filed in May 2013. As the medical evidence supports a finding of an occupational disease, he filed within the statute of limitations for and occupational disease. Mr. Rumyantsev's application for benefits should be found timely and benefits allowed. Board case law specifically states that all accident claim forms are reviewed for both injury and disease issues. In re: Judith Burr, Dckt No. 52 023 (1979). Burr found an accident report must be viewed by the Department as a claim for compensation for either an industrial injury or an occupational disease and the Department must adjudicate the claim under both theories. The superior court decision finding the Department was not on notice of an occupational disease claim is expressly contrary to this case law.

As it is the Department's duty to adjudicate both issues they cannot claim surprise or prejudice when the issue is raised before the Board. *See* also: In re: James McCollum, Dckt 62 296 (1983); In re: Joe Callender, *Sr.* Dckt 89 0823 (1990) (both discussing the Boards scope of review regarding injury and occupational disease theories.) Therefore, when an order clearly denies the occupational disease claim (as in this case) and gives no reason as to why, allowance of the occupational disease claim is properly before the

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Board.

CONCLUSION

Mr. Rumyantsev testified that his work exposure caused his traumatic brain injury. The events are work related as supported by employer accident forms admitted as evidence. Dr. Cox testified that Mr. Rumyantsev had a disease process in the brain, which would not have been known at the time of injury and it was caused by his work incidents. Like Baxter this claim should be allowed for the brain disease process and the hearing loss. We ask the court to overturn the superior court order and award attorneys fee and cost as appropriate under the law.

DATED: **August 25, 2015.**

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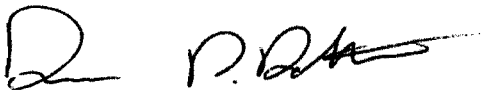

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that I mailed this day an original and true copies of the document referenced below to the following; postage prepaid, first class mail in Spokane Valley, WA to:

Docket No. : 320111
Claimant : Aleksandr Rumyantsev

Document : **BRIEF OF APPELLANT**

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DATED: 25 August 2015

Keileen R. Selby

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AMENDED CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that I mailed this day a true copy of the document referenced below to Steve Vinyard - Office of the Attorney General, postage prepaid, first class mail in Spokane Valley, WA to:

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