AGGRAVATION (RCW 51.32.160)

Proximate cause of worsened condition: new injury vs. aggravation

In considering the Department's requirement under WAC 296-14-420 to issue a joint order concerning whether a condition is the responsibility of a new claim or an aggravation of an existing claim, the Department cannot be made to issue a joint order if a determination rejecting the new claim has become final. ...In re Douglas Lenz, BIIA Dec., 00 21329 (2002)
IN RE: DOUGLAS A. LENZ ) DOCKET NO. 00 21329
CLAIM NO. T-785255 ) DECISION AND ORDER

APPEARANCES:

Claimant, Douglas A. Lenz, Pro Se

Self-Insured Employer, General Construction Company, (a.k.a., Fletcher, Inc.), by
Craig Jessup & Stratton, PLLC, per
Rebecca D. Craig

Department of Labor and Industries, by
The Office of the Attorney General, per
Steven T. Camilleri, Assistant

This is an appeal filed by the self-insured employer, General Construction Company, on
October 23, 2000, from an order of the Department of Labor and Industries dated October 4, 2000,
that reversed a Department order dated December 22, 1999, and reopened the claim effective
October 25, 1999. AFFIRMED.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
and decision on a timely Petition for Review filed by the employer to a Proposed Decision and
Order issued on May 14, 2002, in which the order of the Department dated October 4, 2000, was
affirmed.

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

The issue presented by this appeal and the evidence presented by the parties are
adequately set forth in the Proposed Decision and Order.

We have granted review to make corrections in Findings of Fact Nos. 5 and 11, and
Conclusion of Law No. 2, and to renumber Finding of Fact No. 5. The correct first terminal date for
aggravation purposes is August 29, 1997.

In addition, we have granted review to address the self-insured employer's contention that
the Board does not have jurisdiction in this appeal because the Department failed to issue a joint
order as required by WAC 296-14-420.

We begin with a review of the procedural history of the injury claims and aggravation
applications filed by Mr. Lenz, and reiterate the rationale of Industrial Appeals Judge Franklin as
stated in his Interlocutory Order Denying Self-Insured’s Motion to Remand the Claim for Further Action.

On May 25, 1994, Mr. Lenz filed an application for benefits, alleging an industrial injury (lumbar strain) sustained while working for Fletcher Industrial, Inc. The claim ultimately was accepted and benefits were provided. The claim was closed effective August 29, 1997 (Claim No. T-785255).

Mr. Lenz filed an aggravation application on November 1, 1999. On December 22, 1999, a Department order was issued denying Mr. Lenz's application to reopen Claim No. T-785255, and advised him to file a new claim for a new injury, which Mr. Lenz did, on December 29, 1999 (Claim No. X-333315). The new claim was denied by order dated February 15, 2000, and affirmed on August 28, 2000. As no appeal was filed from the August 28, 2000 order, it became a final order. Claim No. X-333315, was for an injury Mr. Lenz alleged to have occurred in the course of his employment with Circuits Engineering.

Mr. Lenz filed another injury claim on November 23, 1998, while working for Circuits Engineering. This claim (Claim No. X-133913), like the other two claims, involved injury to his low back. Although the procedural details regarding this claim are not entirely clear, the claim must have been accepted because Mr. Lenz filed an application to reopen the claim on March 1, 2000. On August 28, 2000, the same day the Department rejected Claim No. X-333315, it issued an order denying reopening in Claim No. X-133913. This order was not appealed and became a final order, also.

In the meantime, in response to Mr. Lenz's protest to the December 22, 1999 order denying reopening in Claim No. T-785255, the Department reconsidered its earlier order and issued the October 4, 2000 order reopening the claim.

At the time the Department issued the October 4, 2000 order, it had information about three injuries involving two employers that might be responsible for Mr. Lenz's condition. One of the claims involved a self-insured employer (Fletcher) and the other two a state fund employer (Circuits). There was a substantial question whether benefits should be paid based on reopening an old claim or allowed under a claim for a new injury. Under the circumstances, the Department was required to issue a joint order pursuant to WAC 296-14-420. Instead, it issued separate orders on each claim.

As a result, the self-insured employer has contended that the unappealed, final orders issued in the State Fund claims should be considered "void" and the Board should remand this
matter so that the Department can issue a joint order as required by WAC 296-14-420. The employer cites to Board significant decisions supporting its argument. *In re Bennie Johnson*, BIIA Dec., 91 4040 (1992), and *In re Kenneth Keierleber*, BIIA Dec., 91 5087 (1993). However, as noted by our industrial appeals judge, Supreme Court decisions issued after these Board significant decisions dictate a different result in this appeal. Unappealed final orders issued by the Department within the scope of its jurisdiction will not be considered "void" even if they might have been legally incorrect when issued. *Marley v. Department of Labor & Indus.*, 125 Wn.2d 533 (1994), and *Kingery v. Department of Labor & Indus.*, 132 Wn.2d 162 (1997). Simply stated, we cannot require the Department to do something that is beyond its jurisdiction.

After consideration of the Proposed Decision and Order and the Petition for Review filed thereto, and a careful review of the entire record before us, we are persuaded that the Proposed Decision and Order is supported by the preponderance of the evidence and is correct as a matter of law.

**FINDINGS OF FACT**

1. On May 25, 1994, Douglas A. Lenz filed an application for benefits alleging that he injured his back in the course of his employment with Fletcher Industrial, Inc., on December 13, 1993.

On July 6, 1994, the claim was rejected.

On October 4, 1994, following a timely protest and request for reconsideration filed on behalf of the claimant, the July 6, 1994 order was canceled, and the claim was allowed.

On October 5, 1994, following a timely protest and request for reconsideration filed by the self-insured employer, the October 4, 1994 order was canceled, the Department order dated July 6, 1994 rejecting the claim was affirmed, and the claim was rejected.

On October 27, 1995, following a timely appeal filed by the claimant, the October 5, 1994 order was reversed and the claim was remanded to the Department with directions to order the self-insured employer to accept the claim and provide benefits.

On April 15, 1997, the self-insured employer was directed to pay a permanent partial disability award of Category 3 of permanent dorso-lumbar and/or lumbosacral impairments and to close the claim with time-loss compensation as paid through January 6, 1994.

On August 29, 1997, following a timely protest and request for reconsideration filed by the claimant, the April 15, 1997 order was
4. As of August 29, 1997, Douglas A. Lenz's condition, proximately caused by the industrial injury of December 13, 1993, was fixed and he was no longer in need of treatment, and his permanent disability was best described by Category 3 of permanent dorso-lumbar and lumbosacral impairments.
5. On November 23, 1998, Douglas A. Lenz was employed by Circuits Engineering, Inc., when he slipped on some liquid solder that was on the floor at work and nearly fell, injuring his upper neck and low back, and in January 1999, he filed Claim No. X-133913. On August 28, 2000, the Department issued an order denying his application to reopen, and no protest or appeal was taken from that order.

6. On January 24, 1999, Douglas A. Lenz injured his back in the course of his employment with Circuits Engineering, Inc., while moving some machinery but did not file a claim for benefits for this injury.

7. On October 25, 1999, Douglas A. Lenz, with the assistance of Dr. Diane Gulbas, completed Board Exhibit No. 4, an application to reopen Claim No. T-785255.

8. On December 29, 1999, Douglas A. Lenz filed an application for benefits in Claim No. X-333315, alleging an injury to his low back in the course of his employment with Circuits Engineering, Inc., occurring on September 20, 1999, caused by repetitive lifting and bending while welding. The claim was denied by order dated August 28, 2000, and no protest or appeal was taken from that order.

9. The symptoms of low back pain that Douglas A. Lenz was experiencing as of October 25, 1999, when he filed his application to reopen his claim, were proximately caused by his industrial injury of December 13, 1993, and not residuals from his industrial injury of November 23, 1998, or the lifting injury of January 24, 1999.

10. The repetitive bending that Douglas A. Lenz engaged in while performing welding work for Circuits Engineering, Inc., from June 1998 through October 1999, would not have caused Mr. Lenz to experience low-back symptoms but for the industrial injury of December 13, 1993.


**CONCLUSIONS OF LAW**

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

2. Between August 29, 1997 and October 4, 2000, Douglas A. Lenz's condition, proximately caused by the industrial injury of December 13, 1993, worsened and his disability increased within the meaning of RCW 51.32.160.
3. The Board and the Department lack jurisdiction over the final orders issued in Claim Nos. X-133913 and X-333315.

4. The order of the Department of Labor and Industries dated October 4, 2000, is correct and is affirmed.

It is so ORDERED.

Dated this 5th day of December, 2002.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/
THOMAS E. EGAN Chairperson

/s/
FRANK E. FENNERTY, JR. Member