

Wilson, Betty

DEPARTMENT

Authority to issue subsequent order while appeal pending

It is erroneous as a matter of law for the Department to adjudicate claim closure when adjudication regarding segregation of a condition is pending. To that extent, *In re Larry Nelson*, BIIA Dec., 89 0257 (1999) is overruled in the sense that it determined that the Department "lacks jurisdiction" to adjudicate a claim in such circumstances.***In re Betty Wilson, BIIA Dec., 02 21517 (2004)*** [*Editor's Note*: The Board overruled this decision and determined the Department may continue to adjudicate a claim when an appeal of an order segregating a condition is pending. *In re David Spitzner*, BIIA Dec., 17 24346 (2018).]

Scroll down for order.

1 orders, she is entitled to time loss compensation from "November 22, 2002" through November 25,
2 2002.¹
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4 Our industrial appeals judge determined that the affidavit of Dr. Hart was inadmissible
5 because it addressed entitlement to time loss compensation that, in part, was previously decided at
6 the Board. While the affidavit did address a period of time prior to November 23, 2002, the exhibit
7 remains relevant to the potential issue of entitlement that begins on November 23, 2002, and it is
8 clear that the claimant did not intend to relitigate the prior period of time loss compensation. The
9 judge also indicated that he would not consider Dr. Hart's October 15, 2001 letter, attached as
10 "Exhibit No. 2" to Claimant's Exhibit No. 4. We agree with his assessment that this document is not
11 relevant to the time period now at issue.
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13 In reaching our decision in these appeals, we have considered the following:
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- 15 • Claimant's Motion for Summary Judgment, filed with the Board on October 30, 2003,
16 including attached Exhibit Nos. 1-9 (with the exception of Dr. Hart's October 15, 2001 letter);
- 17 • Department's Motion and Brief for Partial Summary Judgment, filed with the Board on
18 October 31, 2003, including attached Exhibit Nos. 1-6;
- 19 • Claimant's Reply to Department's Motion, filed with the Board on November 10, 2003; and
- 20 • The Department's Reply Brief and Response Brief to Claimant's Motion for Summary
21 Judgment, filed with the Board on November 21, 2003; and
- 22 • The December 16, 2003 transcript of the hearing on the motions.
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30 The material facts are not in dispute. On July 9, 2002, the Department issued an order in
31 this claim wherein the Department denied coverage of cervical spondylosis. Ms. Wilson filed a
32 Board appeal on July 17, 2002, challenging the July 9, 2002 order. On September 9, 2003, we
33 issued a Decision and Order affirming the segregation order. An appeal in superior court to the
34 September 9, 2003 Board order was filed by the claimant on September 12, 2003.
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36 On November 25, 2002, while the appeal to the segregation order was pending at the
37 Board, the Department issued the order currently on appeal in Docket No. 02 21517. This order
38 paid time loss compensation from November 12, 2002 through November 22, 2002; stated that time
39 loss benefits ended on November 22, 2002, because vocational services ended; allowed the claim
40 to remain open for further action; and established the time loss rate for the payment period at
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47 ¹ The November 25, 2002 order on appeal ended time loss compensation benefits as paid **through** November 22,
2002; therefore, the period of potential time loss compensation in this appeal is limited to November 23, 2002 through
November 25, 2002.

1 \$1,501.45 per month. On December 2, 2002, the claimant appealed from the November 25, 2002
2 order.
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4 On January 28, 2003, the Department's Director issued a letter that denied vocational
5 services, stating: "The barrier to [Ms. Wilson's] participation in vocational services is due to a
6 condition not accepted as part of this claim." The summary of facts accompanying the Director's
7 decision indicates that the referenced unrelated condition is "the currently unaccepted condition of
8 cervical spondylosis." Exhibit No. 7, pages 1 and 2.
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10 On February 10, 2003, while both the segregation and time loss orders remained on appeal
11 to the Board, the Department issued the order in Docket No. 03 12511. The February 10, 2003
12 Department order determined that treatment was no longer necessary and closed the claim without
13 an award for permanent partial disability and with time loss compensation as paid through
14 November 22, 2002.
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16 In the present appeals, the parties stipulate that the claimant cannot relitigate acceptance of
17 the cervical spondylosis condition because that issue is currently on appeal to superior court. The
18 parties agree that the only issue is "whether the Department was lawfully able to issue the Orders
19 of November 25th, 2002, and February 10th, 2003." 12/16/03 Tr. at 10.
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21 Our industrial appeals judge decided that the Department lacked the subject matter
22 jurisdiction to issue the November 25, 2002 and February 10, 2003 orders while the segregation
23 order remained on appeal, and dismissed the claimant's appeals. Ms. Wilson's Petition for Review
24 does not challenge the judge's determination, but challenges the disposition of the appeals, which
25 she contends will effectively affirm the appealed orders. We have granted review to address this
26 issue. Further, we clarify that these facts do not present a question of subject matter jurisdiction.
27 Rather, the focus of the analysis is whether, as a matter of law, the Department could logically
28 adjudicate termination of benefits and claim closure while a prior order segregating cervical
29 spondylosis remained on appeal. In doing so, we reaffirm the reasoning and analysis of *In re*
30 *Harold Heaton*, BIIA Dec., 68,701 (1986).
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32 At issue in *Heaton* was the Department's ability to award a pension while the employer's
33 appeal to an order reopening the claim was pending in superior court. *Heaton* held that when a
34 Department order is on appeal, the Department retains limited ability to further adjudicate the claim.
35 The Department may address only those issues that are independent of issues pending on appeal.
36 In *Heaton*, the Board determined that the Department had the ability to issue the pension order,
37 distinguishing the case from *Reid v. Department of Labor & Indus.*, 1 Wn.2d 430 (1939).
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1 The oft-cited holding in *Reid* is that, until a final determination of the claimant's condition at
2 the first terminal date (T1) is made, it is premature to adjudicate an application to reopen the claim
3 for aggravation occurring subsequent to T1. To properly explain the full extent of our decision here,
4 it is important to note the general procedural history in *Reid*. Mr. Reid had appealed two orders of
5 the Department's joint board to superior court. One order closed the claim with permanent partial
6 impairment. The other order of the joint board denied the claimant's request for a rehearing on the
7 claimant's argument that his injury had become aggravated. *Reid* held that, as a matter of law, no
8 claim of aggravation could be shown where the prerequisite determination of the claimant's
9 condition at T1 has not yet been made. The appeal to the joint board's denial of a rehearing on the
10 aggravation claim was dismissed because the claimant could not possibly state a prima facie case
11 for aggravation without a final T1 order as the comparison point for subsequent worsening.

12 *Reid* did not approach the analysis as a question of jurisdiction. In fact, the word
13 "jurisdiction" does not appear anywhere in the court's discussion. The court focused solely on the
14 absence of a "condition prerequisite to the reopening of the claim." Until that final determination is
15 made, "there cannot be entertained a claim for aggravation . . .". *Reid*, at 435-436. In other words,
16 whether the Department seeks to adjudicate it, or the claimant seeks to prove it, aggravation cannot
17 be shown where no final T1 order exists, as a matter of law.

18 *Heaton* considered whether a limitation, such as the one imposed in *Reid*, should apply to
19 the Department's continued adjudication of his claim while the question of reopening the claim was
20 on appeal. The Board concluded that no limitations applied; *Reid* was distinguished on grounds
21 that no claim of aggravation was before the Board in *Heaton*, and more significantly, because "the
22 Department can logically adjudicate the issue of the extent of Mr. Heaton's permanent disability
23 independent from the issue pending in Superior Court of whether Mr. Heaton's claim should have
24 been reopened by the Department." *Heaton*, at 3.

25 In the decision *In re Greg Ackerson*, BIIA Dec., 94 1135 (1995), the Board revisited the
26 holding of *Reid* in light of *Marley v. Department of Labor & Indus.*, 125 Wn.2d 533 (1994). *Marley*
27 distinguished an "erroneous" Department decision from Department decisions entered without
28 subject matter or personal jurisdiction. An order entered without jurisdiction is void and cannot
29 become final and binding, while an order that is merely erroneous is not void, and can become final
30 and binding. The Department of Labor and Industries has broad subject matter jurisdiction over
31 determinations related to workers' compensation benefits. *Marley*, at 539-540.

1 In *Ackerson*, the Department denied an application to reopen the claim while the T1 closing
2 order remained on appeal. The question of subject matter jurisdiction was explicitly raised in
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4 *Ackerson* because the claimant failed to timely protest or appeal the erroneous order denying
5 reopening. The claimant argued that, per *Marley*, the Department lacked the subject matter
6 jurisdiction to deny reopening under these circumstances and that, therefore, the order was void
7 (and appealable at any time).
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10 *Ackerson* concluded that the *Reid* decision was rooted in a subject matter jurisdiction
11 analysis and that "it is more than just legal error for the Department to act upon an aggravation
12 application." *Ackerson* found that "there are limits on the authority of the Department even in areas
13 that the Department might **appear** (*i.e.*, the 'type of controversy') to have authority." (Emphasis in
14 original).
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17 In a decision subsequent to *Ackerson*, *In re Orena Houle*, BIIA Dec., 00 11628 (2001), we
18 distinguished those determinations of this Board that lack subject matter jurisdiction, from those that
19 constitute errors of law (such as exceeding the scope of review). *Houle* notes that "our Supreme
20 Court's decision in *Marley* suggests that the court's use and interpretation of the two concepts is
21 evolving." In *Houle*, we explained that if the type of controversy is within the Department or the
22 Board's subject matter jurisdiction, then all other defects or errors go to something other than
23 subject matter jurisdiction.
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28 Having further considered *Ackerson* and *Reid* together with *Houle*, we now conclude that
29 the *Ackerson* decision erroneously recast the *Reid* analysis as one of subject matter jurisdiction.
30 The *Houle* decision, issued subsequent to *Ackerson*, stands for the proposition that the Department
31 rarely, if ever, lacks the subject matter jurisdiction to adjudicate a claim. If the problem is not
32 jurisdictional, it falls within the "erroneous" category. As explained above, *Reid* sets forth an
33 analysis for determining the presence of a legal adjudicatory error, rather than a lack of jurisdiction,
34 and formed the basis for *Heaton*'s well-reasoned decision. We reaffirm the *Heaton* analysis as
35 appropriate for determining the Department's ability to further adjudicate a claim where one aspect
36 of that claim remains on appeal.
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41 The significant decision *In re Larry Nelson*, BIIA Dec., 89 0257 (1990), also addressed the
42 question of the Department's ability to further adjudicate a claim. *Nelson* is inconsistent with our
43 decision here, for two reasons. First, it treats the issue as one of subject matter jurisdiction.
44 Second, rather than applying the test established in *Heaton*, it sets forth an unreasonably narrow
45 limitation: "Except where a Department order rejecting or closing a claim is appealed, jurisdiction
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1 remains with the Department to consider other elements of an open claim which are not covered by
2 the order on appeal." *Nelson*, at 4. To the extent that *Nelson* treats the issue as a jurisdictional
3 one and is inconsistent with the more generally applicable rule established in *Heaton*, our decision
4 in *Nelson* is overruled.
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7 In situations like *Heaton*, *Nelson*, and Ms. Wilson's case, we must focus on whether the
8 Department can logically adjudicate an issue in the claim, independent of the determination
9 pending on appeal. Applying this rule to the present case, the unchallenged facts before us,
10 including the Director's vocational determination of January 28, 2003, demonstrate that the
11 Department's decisions denying further benefits in Ms. Wilson's claim were inextricably tied to the
12 prior segregation of cervical spondylosis. While the segregation order remained on appeal, the
13 Department could not logically adjudicate entitlement to benefits because the determination of
14 entitlement was necessarily dependent upon the eventual acceptance or segregation of the cervical
15 condition. Resolution of the segregation issue is, therefore, a legal prerequisite to the
16 determination. Pursuant to *Reid* and *Heaton*, the Department could not adjudicate time loss
17 compensation, treatment, or claim closure in the orders presently on appeal.
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20 We now address Ms. Wilson's concern that the Proposed Decision and Order's dismissal of
21 these appeals has the effect of allowing the appealed orders to stand. There is no basis for
22 dismissal of the appeals. The Department had subject matter jurisdiction to issue the orders. The
23 orders are not void. They were timely appealed and this Board has jurisdiction over the appeals.
24 The parties each presented legal arguments. We have concluded that the orders are erroneous as
25 a matter of law because, in those orders, the Department adjudicated issues in the absence of a
26 prerequisite final determination regarding the cervical condition.
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29 The appropriate disposition of these appeals is to reverse the Department orders dated
30 November 25, 2002 and February 10, 2003, and to remand the claim to the Department. On
31 remand, the Department should take further adjudicatory action on the question of the claimant's
32 entitlement to the benefits the Department erroneously attempted to decide in the November 25,
33 2002 and February 10, 2003 orders. Such action must await the final resolution of all appeals to
34 the Department order of July 9, 2002, which will determine whether the cervical spondylosis
35 condition should be segregated in this claim.
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37 **FINDINGS OF FACT**

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1. On December 11, 1991, the Department of Labor and Industries received an application for benefits that alleged an industrial injury having occurred to the claimant, Betty J. Wilson, on November 30, 1991,

1 while in the course of her employment. On February 7, 1992, the
2 Department issued an order wherein the Department allowed the claim
3 and began paying the claimant time loss compensation benefits.
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5 On January 25, 1995, the Department issued an order in which the
6 Department closed the claim. The claimant protested that order on
7 March 21, 1995, and the Department responded with a March 22, 1995
8 order in which it affirmed the prior order of January 25, 1995. On
9 May 18, 1995, the claimant filed a Notice of Appeal to the Department
10 order dated March 22, 1995, with the Board of Industrial Insurance
11 Appeals. On June 9, 1995, the Department reassumed jurisdiction over
12 its March 22, 1995 order and, on June 15, 1995, the Department issued
13 an order in which it set aside the prior order dated January 25, 1995,
14 and allowed the claim to remain open for treatment and action as
15 indicated.
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17 On July 9, 2002, the Department issued an order in which it denied
18 coverage of a condition described as cervical spondylosis and
19 determined that the condition was not related to the industrial injury. On
20 July 17, 2002, the claimant filed a Notice of Appeal to the Department
21 order dated July 9, 2002, with the Board. On August 1, 2002, the Board
22 granted the appeal and assigned it Docket No. 02 16420.
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24 On November 25, 2002, the Department issued an order in which it
25 ended time loss compensation benefits as paid through November 22,
26 2002, because vocational services had ended; paid time loss
27 compensation from November 12, 2002 through November 22, 2002;
28 and allowed the claim to remain open for further action. On
29 December 2, 2002, the claimant filed a Notice of Appeal to the
30 November 25, 2002 order with the Board. On January 13, 2003, the
31 Board granted the appeal and assigned it Docket No. 02 21517.
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33 On February 10, 2003, the Department issued an order in which it
34 closed the claim without provision for further treatment or for a
35 permanent partial disability award. On March 3, 2003, the claimant filed
36 a Notice of Appeal to the February 10, 2003 order with the Board. On
37 March 27, 2003, the Board granted the appeal and assigned it Docket
38 No. 03 12511.
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- 40 2. The claimant and the Department each presented evidence in Docket
41 No. 02 16420 on the issue of whether the claimant's cervical
42 spondylosis condition was related to her industrial injury. The Board
43 issued a final judgment on the merits on September 9, 2003, which
44 affirmed the July 9, 2002 Department order segregating the claimant's
45 condition diagnosed as cervical spondylosis as unrelated to the
46 industrial injury.
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- 1 3. The Department's November 25, 2002 order (Docket No. 02 21517) and
2 February 10, 2003 order (Docket No. 03 12511) were issued while the
3 claimant's appeal of the July 9, 2002 Department order under Docket
4 No. 02 16420 remained before the Board.
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6 4. The Department's November 25, 2002 order, in which the Department
7 ended time loss compensation benefits and vocational services, relied
8 on the correctness of its July 9, 2002 determination that the claimant's
9 cervical spondylosis condition was not related to the industrial injury.
10 The July 9, 2002 order remained on appeal before the Board under
11 Docket No. 02 16420 at the time the November 25, 2002 order was
12 issued.
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14 5. The Department's February 10, 2003 order, in which the Department
15 closed the claim, relied on the correctness of its July 9, 2002
16 determination that the claimant's cervical spondylosis condition was not
17 related to the industrial injury. The July 9, 2002 order remained on
18 appeal before the Board under Docket No. 02 16420 at the time the
19 February 10, 2003 order was issued.
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21 6. As of November 25, 2002 and February 10, 2003, the condition
22 diagnosed as cervical spondylosis was the basis for the claimant's
23 request for further industrial insurance benefits in Claim No. N-154706.
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CONCLUSIONS OF LAW

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27 1. The Board of Industrial Insurance Appeals has jurisdiction over the
28 parties to and the subject matter of these consolidated appeals.
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30 2. There are no material issues of fact in these appeals. The claimant is
31 entitled to judgment as a matter of law.
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33 3. The Department could not logically adjudicate the issues addressed in
34 its November 25, 2002 order because, as of that date, the prerequisite
35 determination regarding the proximate cause of the claimant's cervical
36 spondylosis remained on appeal and undecided.
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38 4. The Department could not logically adjudicate the issues addressed in
39 its February 10, 2003 order because, as of that date, the prerequisite
40 determination regarding the proximate cause of the claimant's cervical
41 spondylosis remained on appeal and undecided.
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43 5. The orders dated November 25, 2002 and February 10, 2003, are
44 reversed. This claim is remanded to the Department with directions to
45 promptly take further adjudicatory action on the question of the
46 claimant's entitlement to the benefits that were prematurely addressed in
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1 the November 25, 2002 and February 10, 2003 orders. Such action
2 must await the final resolution of appeals to the Department order of
3 July 9, 2002, which will determine whether the cervical spondylosis
4 condition should be segregated in this claim.
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6 It is so **ORDERED**.

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8 Dated this 15th day of June, 2004.
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10 BOARD OF INDUSTRIAL INSURANCE APPEALS
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13
14 /s/ _____
15 THOMAS E. EGAN Chairperson
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19 /s/ _____
20 FRANK E. FENNERTY, JR. Member
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24 /s/ _____
25 CALHOUN DICKINSON Member
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