Johnson, Dennis

DEPARTMENT

Authority to segregate undiagnosed condition

The Department's segregation of a condition without evidence that the worker has been diagnosed with the condition is improper. **….*In re Juan Delaney Rodriguez,* BIIA Dec., 17 14084 (2018); …. *In re Dennis Johnson,* BIIA Dec., 17 18840 (2018)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: DENNIS D. JOHNSON	**)**	**DOCKET NO. 17 18840**
	)	
CLAIM NO. AT-92554	**)**	**DECISION AND ORDER**

Mr. Johnson injured his low back when he was hit by a car while he was driving a Bobcat for Northern Asphalt. The Department segregated the condition diagnosed as spondylolisthesis at the L4-5 level on the basis that this specific condition was not caused or aggravated by the industrial injury. Mr. Johnson appealed the Department's segregation order. Our industrial appeals judge affirmed the Department's order, finding that Mr. Johnson's L4-5 lumbar spondylolisthesis was not proximately caused or aggravated by his industrial injury. In his Petition for Review, Mr. Johnson asserts that the Department does not have subject matter jurisdiction to issue an order segregating a non-existent condition. He argues that by doing so, he is forced to either prove a causal relationship between this non-existent condition and his industrial injury or let the order stand and risk the ramifications of res judicata should the condition arise at a later date. We agree with Mr. Johnson that it is improper for the Department to segregate a non-existent undiagnosed condition. The Department order dated July 7, 2017, is **REVERSED AND REMANDED** to the Department with direction to find that as of July 7, 2017, Mr. Johnson did not have spondylolisthesis at the L4-5 level.

DISCUSSION

As a preliminary matter, Mr. Johnson asks us to void and/or vacate the Department's July 7, 2017 order on the basis that not only does the Department lack subject matter jurisdiction over a condition that does not exist, but it also cannot issue an order segregating a non-existent condition. While we agree with Mr. Johnson that it is impossible for an injured worker to prove a causal link to a condition that has yet to develop, the July 7, 2017 order is not voidable because the Department has both personal and subject matter jurisdiction to adjudicate his claim. The fact that we find error with the order does not mean that the Department did not have jurisdiction to issue it.[1]

Based on Dr. Sahibjit Gill's testimony, it is undisputed that as of July 7, 2017, there was no evidence of spondylolisthesis at the L4-5 level of Mr. Johnson's lumbar spine. Unfortunately, the Department's language in the July 7, 2017 order goes beyond this fact by stating that this specific condition was diagnosed and determined to be neither caused nor aggravated by the industrial injury. This is not correct because there is no evidence in this record that Mr. Johnson was ever diagnosed as having spondylolisthesis at the L4-5 level nor that any doctor determined that it was unrelated to

[1] *Marley v. Department of Labor & Indus.*, 125 Wn.2d 533 (1994).

the industrial injury. Mr. Johnson's argument that the Department should not issue a blanket order segregating a non-existent condition is well taken and we find that the language contained in the July 7, 2017 order to be incorrect on its face.

DECISION

In Docket No. 17 18840, the claimant, Dennis D. Johnson, filed an appeal with the Board of Industrial Insurance Appeals on July 20, 2017, from an order of the Department of Labor and Industries dated July 7, 2017. In this order, the Department segregated as unrelated the condition diagnosed as spondylolisthesis at the L4-5 level. This order is incorrect and is reversed. The matter is remanded to the Department with direction to issue an order finding that as of July 7, 2017, Mr. Johnson did not have spondylolisthesis at the L4-5 level.

FINDINGS OF FACT

1. On September 21, 2017, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History in the Board record solely for jurisdictional purposes.

2. Dennis D. Johnson sustained an industrial injury on April 1, 2014, when a car collided with the Bobcat vehicle he was operating as part of a road construction project. As a proximate result of this accident, he injured his low back and left leg.

3. As of July 7, 2017, Mr. Johnson did not have spondylolisthesis at the L4-5 level.

CONCLUSIONS OF LAW

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

2. The Department order dated July 7, 2017, is incorrect and is reversed. The matter is remanded to the Department with direction to issue an order finding that as of July 7, 2017, Mr. Johnson did not have spondylolisthesis at the L4-5 level.

Dated: July 2, 2018.

BOARD OF INDUSTRIAL INSURANCE APPEALS

LINDA L. WILLIAMS, Chairperson

FRANK E. FENNERTY, JR., Member

JACK S. ENG, Member

Addendum to Decision and Order
In re Dennis D. Johnson
Docket No. 17 18840
Claim No. AT-92554

Appearances

Claimant, Dennis D. Johnson, by Casey & Casey, P.S., per Gerald L. Casey

Employer, Northern Asphalt, None

Department of Labor and Industries, by Office of the Attorney General, per Pat L. DeMarco

Petition for Review

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The claimant filed a timely Petition for Review of a Proposed Decision and Order issued on April 24, 2018, in which the industrial appeals judge affirmed the Department order dated July 7, 2017.