Spitzner, David

DEPARTMENT

Authority to issue subsequent order while appeal pending

The Department may further adjudicate a claim when an appeal of an order segregating a condition is pending. To the extent the decision in *In re Betty Wilson,* BIIA Dec., 02 21517 (2004) determined it was erroneous as a matter of law to continue to adjudicate the claim, that decision is overruled. **….*In re David Spitzner,* BIIA Dec., 17 24346 (2018)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: DAVID M. SPITZNER	)	**DOCKET NOS. 17 24346, 17 24346-A & 17 25343**
	)	
	)	**ORDER VACATING PROPOSED DECISION AND ORDER AND REMANDING THE APPEALS FOR FURTHER PROCEEDINGS**
CLAIM NO. SG-52805	)	

In 2015, David Spitzner sustained a low back injury in the course of his employment with Bradken, Inc., a self-insured employer. The Department allowed the claim. The Department segregated lumbar radiculopathy as unrelated to this claim and determined the self-insured employer was not responsible for providing lumbar decompression surgery. Mr. Spitzner filed a timely protest to the Department, which forwarded it to this Board as a direct appeal. The Department also issued an order closing the claim without an award for permanent partial disability. Mr. Spitzner filed a timely protest to the Department, which forwarded it to this Board as a direct appeal. The self-insured employer also filed a timely cross-appeal. In a third order, the Department penalized the self-insured employer for unreasonably delaying the payment of time-loss compensation benefits. The self-insured employer filed a timely protest to the Department, which forwarded it to this Board as a direct appeal.

The three appeals and the cross-appeal were consolidated and proceedings were scheduled jointly. Mr. Spitzner filed a Motion for Partial Remand, arguing that the application of our significant decision *In re Betty Wilson*[1] requires us to remand to the Department the appeal and cross-appeal from the closing order and the appeal from the penalty order to await the final adjudication of the segregation appeal under Docket No. 1720050. The self-insured employer submitted a response asking the Board to deny Mr. Spitzner's motion because *Betty Wilson* was factually and legally distinguishable from this case, and also for policy reasons.

Our industrial appeals judge treated Mr. Spitzner's motion as a motion for partial summary judgment, and concluded as a matter of law that the motion should be granted and remanded the claim to the Department to delay adjudication of issues pertaining to the claimant's entitlement to further benefits that were addressed in the penalty and closing orders until after a final order was issued determining whether the lumbar radiculopathy condition should be segregated from this claim. The self-insured employer arguments in support of its Petition for Review are essentially the same as it advanced in its responsive motion to Mr. Spitzner's motion for partial remand.

[1] BIIA Dec. 02 21517 (2004).

As to the self-insured employer's appeal from the September 7, 2017 penalty order,[2] we conclude that the dispositive issue of whether the self-insured employer had a genuine doubt from a medical or legal standpoint as to its liability for the time-loss compensation benefits can be logically adjudicated simultaneously with the adjudication of the segregation order. As to that appeal alone, *Betty Wilson* is factually distinguishable.

As to all three appeals, we conclude that to the extent that *Betty Wilson* can be applied to prohibit any further Department action on a claim once an appeal has been filed to an order, such as the segregation order in this case, and jurisdiction over that order has passed to the Board or the courts, the decision is legally incorrect and is overruled as to that application alone. The Proposed Decision and Order of June 8, 2018, is vacated and these appeals are **REMANDED FOR FURTHER PROCEEDINGS** consistent with this order.

DISCUSSION

This case raises the question of the extent to which an adjudication by the Department may prevent it from making further adjudications under the same claim. Our industrial appeals judge held that litigation over segregation of conditions by the Department prevented it from adjudicating the claimant's entitlement to additional benefits, from closing the claim, and from penalizing the employer for allegedly unreasonably delaying benefits due. Our judge based her holding on her application of our significant decision *In re Betty Wilson.* But before we discuss whether the *Wilson* case applies to the situation at hand, a few of the other cases involving similar issues need to be mentioned.

In *Reid v. Department of Labor & Indus.*, 1 Wn.2d 430 (1939) an appeal involving a Department order closing the claim was pending in superior court when the claimant filed an application to reopen the same claim. The Department denied a rehearing on the issue of aggravation of condition and the joint board affirmed. The Supreme Court determined that the Department cannot entertain a claim for aggravation under these circumstances. Notably, the Supreme Court did not treat this matter as a question of the Department's subject-matter jurisdiction to adjudicate the matter. Rather, it noted that as the standard by which to determine if aggravation occurred requires a comparison between the original award or rating at closure and the claimant's condition thereafter, the Department had no basis upon which to make the comparison until a final determination is made as to the extent of disability.[3]

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[2] Dckt. No 17 25343.
[3] *Reid*, at 437.

A similar issue was addressed by us in our significant decision *In re Harold Heaton*[4]. The Department reopened Mr. Heaton's claim due to aggravation of condition. While that determination was under appeal in superior court, the Department issued an order finding the claimant permanently and totally disabled. This latter determination was appealed to the Board. We upheld the Department's action and distinguished *Reid* because the "Department can logically adjudicate the issue of the extent of Mr. Heaton's permanent disability independent from the issue pending in Superior Court."[5] The Board did not conclude that there was an issue of subject-matter jurisdiction. Unlike the situation in *Reid*, there was no condition precedent or non-existent prior finding that would make it logically impossible for the Department to make such a determination. We noted that the superior court appeal did not act as an automatic stay of the action in front of us and the Department acted within its "adjudicatory authority" in closing the claim with a pension.

However, this type of issue was discussed in terms of subject-matter jurisdiction in another of our significant decisions, *In re Larry Nelson*.[6] In that case, Mr. Nelson refused to attend an examination scheduled for him by his employer. The Department issued an order directing the employer to reschedule an examination with that same physician and directed the claimant to appear for the examination. This order was appealed to the Board. While it was pending, the Department issued a further order that stated that time-loss compensation benefits would not be paid while the allowance order was in abeyance awaiting the medical examination. We stated that because the subject of provisional time-loss compensation benefits was not addressed by the order under appeal, the Department retained jurisdiction to issue the second order addressing that matter. That second order had not yet been appealed to the Board, but the parties wished the Board to make a decision on the issue of entitlement to the provisional time-loss compensation benefits. We refused on the basis of our lack of appellate jurisdiction due to the absence of an appeal to us from the second order.

In 1994, the Supreme Court issued its seminal case of *Marley v. Department of Labor & Indus.*[7] regarding the scope and extent of the Department's subject-matter jurisdiction. In 1984, the Department had issued an order that denied surviving spouse benefits to Ms. Marley because she had been living separate and apart from the decedent worker and was not a beneficiary under RCW 51.08.020. Six years later a protest to that order was filed on her behalf. The Department issued an

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[4] , BIIA Dec., 68,701 (1986).
[5] *Heaton*, p. 2.
[6] BIIA Dec. 89 0257 (1990).
[7] 125 Wn.2d 533 (1994).

order denying the protest as untimely. Eventually the appeal reached the Washington State Supreme Court, which noted that the order denying the benefits was valid if the Department had both personal and subject-matter jurisdiction. Ms. Marley did not dispute that the Department had personal jurisdiction when it issued the 1984 order.

The court indicated that subject-matter jurisdiction is lacking only when an agency or tribunal attempts to decide a type of controversy over which it has no authority to adjudicate. Citing *Abraham v. Department of Labor & Indus.,* [8]the court noted the Legislature gave the Department broad authority to adjudicate all claims for workers' compensation benefits. Because the type of controversy was that of workers' compensation benefits, the Department clearly had subject-matter jurisdiction to issue the decision it did in 1984. The Supreme Court further stated that when a party believes that a Department order is in error, it must appeal that order. Failure to appeal the order, even when it contains a clear error of law, turns the Department order into a final adjudication that precludes re-argument of the same claim.

On this background of case law *Betty Wilson* was decided by the Board in 2004. In that case the Department had issued an order segregating various neck conditions. The Department order was appealed, eventually reaching superior court where it was pending when the Department issued two more orders: one addressing the payment and termination of time-loss compensation benefits among other issues and the second closing the claim with permanent partial disability benefits. A Proposed Decision and Order was issued that determined that while the segregation order was on appeal, the Department lacked subject-matter jurisdiction to issue the latter two orders. The Board noted that, as the type of controversy was that of Ms. Wilson's entitlement to workers' compensation benefits, a subject the Department had authority over. The subject-matter jurisdiction of the Department was clearly not at issue. Instead, the Board stated that the applicable test was that enunciated in *Heaton*, that the Department can logically adjudicate the issues of entitlement to benefits addressed in the latter orders independent from the issues in the first order that is under appeal in superior court.[9] As such, the Board overruled *Nelson* and applied the *Heaton* test. The Board concluded that the decisions denying further benefits to Ms. Wilson were inextricably tied to the prior segregation of the neck condition and as such the Department could not logically adjudicate entitlement to benefits until such a final determination was reached. It is here we disagree.

[8] 178 Wash. 160 (1934).
[9] *Wilson*, at 4.

The problem with the application of *Heaton* is that it is too expansive. *Reid* concluded that it was erroneous for the Department to adjudicate in the manner and timing that it did because it was logically impossible for the question before it to be answered. This is an extremely specific standard. Similarly, any attempt by the Department to re-adjudicate an order that became final after the appeal period had passed would be stricken down as an error of law by the *Reid* test as a logical impossibility: A thing cannot be "A" and "not-A" simultaneously.[10] The test of logic as stated by *Heaton* and applied by *Wilson*, should not permit the Board to substitute its own opinion about the order in which the Department adjudicates issues of benefit entitlement and claims management before it based on an ill-defined and general standard of "logic" that is not predictable and can be applied on a mere whim.

Policy reasons support not applying the test of logical adjudication as broadly as it was in *Heaton* and *Wilson*. A primary policy of the Industrial Insurance Act is to provide "sure and certain relief for workers, injured in their work, and their families and dependents."[11] In Mr. Spitzner's case, the delay to claims administration, and potentially to his receipt of benefits, including delays in treatment, could be extensive. It is impossible to predict just how long it will take for the litigation over the segregation of the back conditions to be completed. And when it is finished, a new round of litigation over the specific benefits due and owing to him likely would begin. Such a piecemealing of the litigation is a recipe for delay and does not promote judicial economy.

The simultaneous adjudication of all three orders in Mr. Spitzner's claim is not logically impossible. In fact, it is consistent with our decision in *Heaton*. As noted in that case, the Department had the ability to administratively implement its decision to reopen the claim even though that decision was on appeal in superior court because that court had not stayed the implementation of it. Thus, Mr. Heaton could be determined by the Department to be entitled to pension benefits, which would not be delayed by the ongoing litigation over the reopening of the claim. In Mr. Spitzner's case this is even more compelling because all three orders are under the appellate jurisdiction of the Board, thus enabling simultaneous hearing of them.

Although not specifically stated, *Heaton* is clear that for the purpose of litigation of the order finding the claimant to be permanently and totally disabled, the disposition of the earlier Department order that reopened the claim constituted the "Law of the Case," which cannot be challenged in the

[10] In this context this is the logical equivalent of the legal doctrine of *res judicata*.
[11] RCW 51.04.010.

litigation of the latter Department order. Only a final determination made by the superior court or a higher court could change the law of the case.

Such a conclusion is consistent with another of our significant decisions: *In re Steven Carrell*, [12]a post-*Marley* decision. In *Carrell*, the Department closed the claim with an award for permanent partial disability, which the Board reversed, finding instead that the claim should have been closed, but without a permanent partial disability award. One part of the Board's order directed the Department to issue what amounted to a ministerial order closing the claim without the permanent partial disability award. The Board's decision was appealed to superior court, where it was pending when the Department issued the order as directed by the Board. That Department order contained language describing the parties' protest and appeal right, which if not exercised in a timely fashion would result in this order becoming final. The Board stated that the Department had exercised its original jurisdiction over the subject matter. The superior court now had appellate jurisdiction over the subject-matter of the Department order that had been appealed to it. The Department could not re-vest itself with the authority to reconsider the substance of the order under appeal. But the Department retained authority to issue the ministerial order in compliance with the Board's direction in its final order.

The principle to be applied is that once subject-matter jurisdiction over the final Department order has passed to either the Board or the courts, the Department is free to continue to adjudicate other claim-related matters so long as in doing so it does not attempt to change an action it took that is now under appeal or to make a determination that is logically impossible for it to make. Whenever a Department order is on appeal to the Board and the Department wishes to adjudicate other issues under the claim, the determinations of its order under appeal at the Board must be considered to be the "Law of the Case" and the Department cannot reconsider those determinations unless changed by the Board in a final order.

Once a final Board order is appealed to superior court, the parties may apply to the court for a stay of further administrative action. An appeal to superior court is not an automatic stay to further action by the Department.[13] As we stated in *Heaton* and *Carrell*, the Department is acting within its adjudicatory authority to continue to administer the claim, even to the extent of issuing further

[12] BIIA Dec., 99 11430 (1999).
[13] RCW 51.52.110; *Lee v. Jacobs*, 81 Wn.2d 937 (1973).

determinative orders so long as those actions are consistent with the final order under appeal in superior court.

In Mr. Spitzner's case, the segregation order is still pending before us. No final Board order has been appealed to superior court. RCW 51.52.060 does not create an automatic stay on further Department action pending resolution of the appeal and a final Board order. Subsection (6) of that statute specifically indicates that the Department's adjudicative process regarding the entitlement and payment of awards of benefits is not changed, altered, or modified by an appeal to the Board. This is tantamount to stating that there is no automatic stay. This, however, does not prevent the Board from staying further adjudication when there is an appeal before it and when a stay is appropriate.

The holding in *Wilson* and its application in this case creates an automatic stay of Department action by the Board where none exists either statutorily or by case law. Such a result is contrary to RCW 51.52.060(6) as well as an unwarranted extension to the authority given us by the Legislature. As such, to the extent that *Wilson* determined that further adjudication of a claim by the Department was erroneous as a matter of law when an appeal is taken to a Department order segregating a condition, *Wilson* is legally incorrect and is overruled.

This does not mean that the Board cannot grant a stay from further Department action during the pendency of an appeal should there be good cause for one. While the stay of an appeal is not specifically mentioned, the Board's powers and process as outlined in RCW 51.52.095, and what follows, permit granting a stay upon application of a party or parties for good cause when such a stay would advance judicial economy, prevent piecemealing of litigation and not create a hardship to the other parties.

In Mr. Spitzner's case as in others where multiple appeals are before the Board, bifurcating the hearing process in order to try one or more appeals separately and before others is permissible, on application of the parties or by our industrial appeals judges on their own motion. Additionally, when faced with a similarly perceived problem, the parties during mediation or thereafter may negotiate and enter into an agreement on how to proceed in the litigation of these appeals, resolve one or more of them, or otherwise remand them all to the Department for joint action there.

We do note that even were we to uphold *Wilson* and apply it to these appeals, the appeal from the penalty order[14] should be returned to the hearing process rather than remanded to the Department. At issue in that appeal is whether the self-insured employer unduly delayed the payment

[14] Docket No. 17 25343 pertaining to the employer's appeal from the September 7, 2017 Department order.

of time-loss compensation benefits for a period of time in 2015, over a year before the segregation order was issued. The issue in this type of appeal is limited: whether the employer had a genuine doubt from a medical or legal standpoint as to its liability for benefits.[15] Resolution of this issue does not require an answer to the question of whether or not the condition at issue in the segregation order should be accepted under this claim.

ORDER

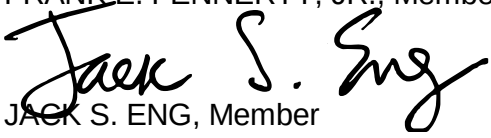
These appeals are remanded to the hearings process, as provided by WAC 263-12-145(5), for further proceedings as indicated by this order. Unless the matter is settled or dismissed, the industrial appeals judge will issue a new Proposed Decision and Order. The new order will contain findings and conclusions as to each contested issue of fact and law. Any party aggrieved by the new Proposed Decision and Order may petition the Board for review, as provided by RCW 51.52.104. This order vacating is not a final Decision and Order of the Board within the meaning of RCW 51.52.110.

Dated: October 29, 2018.

BOARD OF INDUSTRIAL INSURANCE APPEALS

LINDA L. WILLIAMS, Chairperson

FRANK E. FENNERTY, JR., Member



JACK S. ENG, Member

[15] *Taylor v. Nalley's Fine Foods,* 119 Wn. App. 919 (2004); *In re Frank Madrid,* BIIA Dec., 86 0224-A (1987).

Addendum to Order
In re David M. Spitzner
Docket Nos. 17 24346, 17 24346-A & 17 25343
Claim No. SG-52805

Appearances

Claimant, David M. Spitzner, by David B. Vail, Jennifer M. Cross-Euteneier & Associates, per Ryan A. Johnson

Self-Insured Employer, Bradken, Inc., by Wallace Klor Mann Capener & Bishop P.c., per Christopher A. Bishop

Department of Labor and Industries, by Office of the Attorney General, per Kay A. Germiat

Department Order(s) Under Appeal

1. In Docket No. 17 24346, the claimant, David M. Spitzner, filed a protest with the Department of Labor and Industries on September 28, 2017. The Department forwarded it to the Board of Industrial Insurance Appeals as an appeal. The claimant appeals a Department order dated August 2, 2017. In this order, the Department affirmed an earlier order that closed the claim without an award for permanent partial disability.

2. In Docket No. 17 24346-A, the employer, Bradken, Inc., filed an appeal with the Board of Industrial Insurance Appeals on November 16, 2017, from an order of the Department of Labor and Industries dated August 2, 2017. In this order, the Department affirmed an earlier order that closed the claim without an award for permanent partial disability.

3. In Docket No. 17 25343, the employer, Bradken, Inc., filed an appeal with the Board of Industrial Insurance Appeals on November 16, 2017, from an order of the Department of Labor and Industries dated September 7, 2017. In this order, the Department affirmed an earlier order that penalized the self-insured employer for unreasonably delaying the payment of time-loss compensation to Mr. Spitzner for August 20, 2015, through November 30, 2015.

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 employer filed a timely Petition for Review of Proposed Decision and Order issued on June 8, 2018.