

Worklan, Anton

SCOPE OF REVIEW

Closing order segregating condition

Where the Department closes a claim without an award for permanent disability and at the same time denies responsibility for a condition as unrelated to the industrial injury, the Board may, in addition to determining that the condition is causally related to the industrial injury, reach the question of whether the condition renders the worker permanently totally disabled. In this case the Department was fully apprised of the worker's allegation that the condition rendered him permanently totally disabled, had numerous opportunities to consider that issue, and was not prejudiced by any lack of medical evidence as to the extent of disability. ...*In re Anton Worklan, BIIA Dec., 26,538 (1967)*

Scroll down for order.

**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

1 **IN RE: ANTON E. WORKLAN**) **DOCKET NO. 26,538**
2)
3 **CLAIM NO. F-101066**) **DECISION AND ORDER**
4

5 **APPEARANCES:**

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7 Claimant, Anton E. Worklan, by
8 Walthew, Warner & Keefe, per
9 Robert H. Thompson

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11 Employer, Olympic Hotel,
12 None

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14 Department of Labor and Industries, by
15 The Attorney General, per
16 Norman W. Cohen, Gosta Dagg, and William J. VanNatter, Assistants
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18 Appeal filed by the claimant, Anton E. Worklan, on May 10, 1966, from an order of the
19 Supervisor of Industrial Insurance, dated April 28, 1966, closing this claim with no award for
20 permanent disability, and segregating and denying responsibility for a condition of the right
21 breast, a carcinoma, alleged to be unrelated to the injury for which the claim had been allowed.
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24 **REVERSED AND REMANDED.**

25 **DECISION**

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27 This claim for benefits under the Workmen's Compensation Act was allowed by the
28 Department of Labor and Industries for an injury the claimant sustained on April 30, 1963, when he
29 fell and struck his right breast on a lettuce crate. The claim was first closed in November of 1963
30 with no award for permanent disability. On January 27, 1965, the claimant filed an application to
31 reopen his claim for aggravation of condition. On February 5, 1965, the claim was reopened
32 effective December 12, 1964, for treatment only, and effective January 12, 1965, for authorized
33 treatment, including surgery, described as a radical right mastectomy, which had been performed
34 on January 13, 1965, for removal of the cancerous tissue from the claimant's right breast.
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39 On July 6, 1965, the claim was closed by an order of the Supervisor of Industrial Insurance,
40 reading in pertinent part as follows:
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42 "WHEREAS, this claim has been allowed for a contusion of the right
43 breast;

44 WHEREAS, the contusion requires no further treatment and has left no
45 residual permanent partial disability;
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1 IT IS THEREFORE ORDERED that the claim is hereby closed with time
2 loss compensation as paid to May 11, 1965 Inc. and no permanent
3 partial disability.

4 Treatment of the unrelated condition involving the right breast is not the
5 Department's responsibility."
6 (Emphasis added)
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9 Following the claimant's appeal from this order, which was received by this Board on August 23,
10 1965, the Department reassumed jurisdiction of the claim by an order of the Supervisor dated
11 September 17, 1965, holding the prior order closing the claim in abeyance. This order, reassuming
12 jurisdiction of the claim, was entered pursuant to RCW 51.52.060, which provides in part:

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14 "that the department, either within the time limited for appeal, or within
15 thirty days after receiving a notice of appeal, may modify, reverse or
16 change any order, decision, or award, or may hold any such order,
17 decision, or award in abeyance pending further investigation in light of
18 the allegations of the notice of appeal, and the board shall thereupon
19 deny the appeal, without prejudice to the appellant's right to appeal from
20 any subsequent determinative order issued by the department."
21 (Emphasis added)
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24 After further consideration of the claim by the department, it was again closed, on April 28, 1966, by
25 an order reading as follows:

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27 "WHEREAS, the Department did by Order of July 6, 1965 deny
28 responsibility for an unrelated condition of the right breast, and did by
29 same order close the above claim, and further consideration has been
30 made, and

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32 WHEREAS, the further consideration consisted of additional medical
33 opinion which discloses that the carcinoma of the right breast is not due
34 to the injury for which this claim was filed;

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36 IT IS THEREFORE ORDERED that the Department does hereby
37 adhere to the aforesaid order, and the claim shall remain closed
38 pursuant thereto."
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40 The claimant again filed a notice of appeal with this Board in which he alleged that the development
41 of his cancerous condition, and the surgery necessarily required therefor, was causally related to
42 his injury and, further, that he had become permanently and totally disabled as a result of disability
43 attributable to this condition. At the hearings that were held to permit the parties to present their
44 evidence on the issues raised by the notice of appeal from the Supervisor's order, the claimant,
45 without objection from the Department, produced evidence in support of both contentions. The
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1 Department's evidence, presented through the testimony of a medical expert who had examined
2 the claimant in October of 1965, after the Department had reassumed jurisdiction of the claim,
3 following his first appeal, was directed only to the first issue raised by the claimant's notice of
4 appeal; that is, whether or not his cancerous condition had any causal connection with his injury.
5 On November 29, 1966, a hearing examiner for the Board issued a Proposed Decision and Order in
6 connection with the appeal, reversing the Supervisor's order and remanding the claim to the
7 Department with direction to place the claimant on its pension rolls as a permanently and totally
8 disabled workman. This proposed disposition of the appeal was based upon the finding that the
9 claimant's cancerous condition in his right breast was causally related to his industrial injury, and
10 upon the further finding that he had been thereby rendered permanently and totally disabled. The
11 matter is now before the Board for review on the basis of the Statement of Exceptions the
12 Department of Labor and Industries has filed to the Proposed Decision and Order.

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14 The principal issue raised by the Department's exceptions presents a legal question
15 respecting the Board's jurisdiction. The Department contends that in a case such as this, where it
16 has closed a claim with no award for permanent disability and has, in the same order, segregated
17 and denied responsibility for a pathological condition conceded to be present but asserted to be
18 unrelated to the injury for which the claim was allowed, the Board's jurisdiction is limited to
19 determining whether or not the condition in question is causally related to the industrial injury. It
20 contends that if the Board in this case should find that the claimant's injury is causally related to his
21 cancerous condition, either by way of initiating cause or by way of aggravation with consequent
22 acceleration of the development of the carcinoma, its further jurisdiction would be limited to
23 remanding the claim to the Department with direction to assume responsibility for the condition.

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25 In support of its contention, that "the Board has no original jurisdiction to rate the disability for
26 a condition which had been determined by the Department to be unrelated to the industrial injury for
27 which the claim was allowed," the Department relies principally upon the case of Shufeldt v.
28 Department of Labor and Industries, 57 Wn. 2d 758. It may be noted in this connection that the
29 Department, in its Statement of Exceptions, has erroneously asserted that:

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"In the Shufeldt case, the Court said that the Board is an appellant body only and has no original jurisdiction. It was further stated there that the Board can only decide matters which had been previously decided by the administrative tribunal." (Emphasis added)

1 The remarks of the Court in the Shufeldt case, erroneously paraphrased by the Department in its
2 argument, in fact had reference, not to the jurisdiction of the Board of Industrial Insurance Appeals,
3 which it referred to in its opinion as one of the "administrative tribunals," but to the jurisdiction of the
4 Superior Court "on review of a decision of the Board of Industrial Insurance Appeals." This is
5 apparent from what the Court actually said (57 Wn. 2d 758, 760):
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9 "The jurisdiction of the superior court on review of a decision of the
10 Board of Industrial Insurance Appeals is appellate only. It has no
11 original jurisdiction. It can decide only matters decided by the
12 administrative tribunals. The only issue before the superior court upon
13 the appeal in this case was the correctness of the department's decision
14 holding that there was no relationship of cause and effect between the
15 injury and any disability attributable to a heart condition. The
16 department did not, nor did the Board of Industrial Insurance Appeals,
17 consider the question of the extent of any disability attributable to the
18 heart condition. Under such circumstances, the only issue in the
19 superior court was the one decided by the Board of Industrial Insurance
20 Appeals." (Emphasis added)
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22 The only issue contested before the Board in the Shufeldt case was the question of causal
23 relationship between the workman's injury and his heart condition. It is apparent that he had not
24 had any stage of the proceedings before the Board alleged, or attempted to prove, the extent of his
25 disability resulting from his heart condition; nor had the Department offered any proof as to the
26 extent of his heart disability. Under these circumstances, the court's holding that the jurisdiction of
27 the Superior Court in a workman's compensation case is defined by the scope of the issues
28 contested before the Board of Industrial Insurance Appeals obviously does not support the
29 Department's position in the present case that the Board, itself, upon finding the claimant's
30 cancerous condition to be causally related to his injury, would have no jurisdiction to award him
31 compensation for the disability that he has alleged in his notice of appeal was caused by his injury
32 and that he has proved by competent evidence in proceedings before the Board.
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38 The Board is an appellate body in the sense that it acquires jurisdiction of a case only upon
39 appeal from an order or decision of the Department of Labor and Industries. It is also, however, the
40 trial tribunal before which the evidentiary record in a case is made. Its role thus differs from that of
41 the Department, which has original jurisdiction of the workman's claim, and from that of the
42 Superior Court, which may decide his case only upon the record established before the Board. The
43 scope of the Board's review of an order of the Supervisor of Industrial Insurance closing a
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1 workman's claim is defined by the notice of appeal and includes all issues properly raised therein.
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3 Brakus v. Department of Labor and Industries, 48 Wn. 2d 218; RCW 51.52.070; RCW 51.52.102.
4 The issue before the Department in July of 1965, when it closed this claim with no award for
5 permanent disability, after having re-opened the claim for aggravation of condition, and in April of
6 1966, when it adhered to its prior closing order, after having held it in abeyance pending further
7 investigation of the claim following the claimant's notice of appeal from the July, 1965 order, was
8 whether or not there had occurred any permanent aggravation of the claimant's disability
9 attributable to his industrial injury. In deciding that the workman's condition attributable to his injury
10 had not become aggravated and that he had no disability attributable to said injury, the Department
11 fully exercised its original jurisdiction on the issue before it, and this issue was therefore properly
12 placed before the Board by the claimant in his notice of appeal. See Noll v. Department of Labor
13 and Industries, 179 Wash. 213.
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19 It should be noted that the cases the Department has cited, apart from the Shufeldt case, in
20 support of its position on this issue, are for the most part cases involving an appeal from an order
21 rejecting a claim rather than an appeal from an order segregating and denying responsibility for a
22 portion of the disability the workman alleges to have been caused by an injury for which a claim has
23 already been allowed. The two situations are not legally analogous. When the Department rejects
24 a claim on the ground that no accident or injury has occurred, or on any other ground, for example,
25 that the claim was not timely filed or that the claimant was not engaged in covered employment, or
26 that he was not in the course of his employment, the Department has never exercised its original
27 jurisdiction to determine the claim on its merits in the sense as to the nature and extent of the relief,
28 including medical treatment, time-loss compensation, or permanent disability award, to which the
29 claimant may have been entitled if the Department had not determined that it was legally barred
30 from doing so. There is, therefore, a clear distinction between "reject" cases and cases such as
31 that here under consideration where the Department has exercised original jurisdiction allowing the
32 claim and in determining the extent of relief to which the claimant is entitled.
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40 It should be further noted that we are not here confronted with any element of surprise or
41 lack of notice to the Department, such as, for example, was present in the case of Stansbury v.
42 Department of Labor and Industries, 36 Wn. 2d 330, in which the Court stated:
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45 "... Unless the department has been advised of the theory on which a
46 claimant is proceeding and the character of the relief desired, it has no
47 opportunity to make the proper investigation and to grant the relief

1 requested, if it determines that the circumstances warrant it, or to obtain
2 evidence to meet the issues raised by that theory if it is convinced that
3 the relief requested is not warranted, or to raise questions of law which
4 might be a bar to its consideration."
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6 The claimant's notice of appeal from the Supervisor's order of July 6, 1965, is not now before us. In
7 any event, as noted above, the Department deemed it advisable after considering the allegations
8 contained therein, to resume jurisdiction of the claim to make a further investigation thereof,
9 including a medical examination of the claimant directed toward his cancerous condition. When,
10 after its further investigation, the Department again closed the claim in April of 1966, it is clear that it
11 had in fact considered this condition and made a judgment with respect thereto. Furthermore, in his
12 notice of appeal from the Supervisor's order of April 28, 1966, the contents of which are before us,
13 the claimant has requested that he be granted a permanent total disability award for his disability
14 resulting from the condition for which the Department has denied responsibility. At this point, if the
15 Department felt itself unprepared to meet the issue as to the extent of the claimant's disability
16 resulting from this condition, it could again, pursuant to the provisions of RCW 51.52.060, have held
17 its closing order in abeyance "pending further investigation in the light of the allegations in the
18 notice of appeal." See Brakus v. Department of Labor and Industries, *supra*.
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26 It is evident that the Department was fully apprised that the claimant was contending that his
27 injury of April 30, 1963, encompassed his carcinoma and that he had permanent disability resulting
28 therefrom, which he alleged to be total in nature. The Department had full opportunity to consider
29 the issue thus raised. Furthermore, the Department raised no objection to the testimony of the
30 claimant's medical witness as to his evaluation of the claimant's disability resulting from his
31 carcinoma, and when, at the first hearing held in connection with this appeal, claimant's counsel
32 asserted that the issue to be litigated embraced the extent of the claimant's disability resulting from
33 the condition for which the Department had denied responsibility, counsel for the Department
34 neither objected nor offered an alternative to this statement of the issue. It is apparent that the
35 Department was in no way prejudiced by the litigation of such issue on this appeal as its medical
36 witness had thoroughly examined the claimant and was obviously in a position to express an
37 opinion as to the extent of disability attributable thereto, apart from the question of causal
38 relationship, had he been asked. It may be noted finally, in this connection, that the case of
39 Knowles v. Department of Labor and Industries, 28 Wn. 2d 970, is in accord with the result we have
40 reached herein although the issue of jurisdiction was not discussed in that case.
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1 We have considered the other exceptions raised by the Department to the Proposed
2 Decision and Order, but deem them to be without sufficient merit to warrant discussion. The order
3 of the Supervisor of Industrial Insurance dated April 28, 1966, will be reversed and this claim will be
4 remanded to the Department of Labor and Industries with direction to place the claimant on its
5 pension rolls as a permanently and totally disabled workman.
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8 In the course of our review of the record in this appeal, we have considered the evidentiary
9 rulings made by the hearing examiner and, finding no prejudicial error therein, hereby affirm said
10 rulings.
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13 **FINDINGS OF FACT**

14 Based upon the record, the Board finds:

- 15 1. On April 30, 1963, the claimant, Anton E. Worklan, sustained an injury in
16 the course of his employment with the Olympic Hotel, when he slipped
17 and fell, striking his right breast against a lettuce crate. On June 19,
18 1963, a report of accident was filed with the Department of Labor and
19 Industries. On November 18, 1963, the Supervisor of Industrial
20 Insurance entered an order allowing the claim for medical treatment
21 only, and closing it with no time-loss compensation or permanent partial
22 disability award.
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- 24 2. On January 27, 1965, the claimant filed an application to reopen his
25 claim for aggravation of condition. On February 5, 1965, the Supervisor
26 entered an order reopening the claim effective December 12, 1964, for
27 treatment only, and effective January 12, 1965, for authorized treatment
28 and action as indicated. On July 6, 1965, the Supervisor entered an
29 order closing the claim with no award for permanent disability, and
30 segregating and denying responsibility for a condition described as an
31 unrelated condition of the right breast. On August 23, 1965, the
32 claimant filed a notice of appeal with this Board from the Supervisor's
33 order of July 6, 1965. Thereafter, on September 17, 1965, the
34 Supervisor entered an order holding in abeyance his order of July 6,
35 1965, pending further investigation, whereupon the Board denied the
36 claimant's appeal. On April 28, 1966, the Supervisor entered an order
37 adhering to the provisions of the order of July 6, 1965. On May 10,
38 1966, the claimant filed a notice of appeal therefrom with this Board,
39 which was granted by an order of this Board dated May 20, 1966.
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- 41 3. On November 29, 1966, a hearing examiner for this Board entered a
42 Proposed Decision and Order in connection with this appeal.
43 Thereafter, within the period of time provided by law, the Department of
44 Labor and Industries filed a Statement of Exceptions to said Proposed
45 Decision and Order.
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4. As a proximate result of the injury he sustained to his right breast on April 30, 1963, the claimant, Anton E. Worklan, developed or aggravated and accelerated a pre-existing carcinoma condition of the right breast, which was surgically removed on January 13, 1965.
 5. On or about April 28, 1966, claimant's condition, including his carcinoma condition proximately resulting from his industrial injury of April 30 1963, was fixed, and his permanent disability by reason thereof was such that he no longer had any reasonable degree of wage earning capacity.

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CONCLUSIONS OF LAW

12 Based upon the foregoing findings of fact, the Board concludes:

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1. This Board has jurisdiction of the parties and subject matter of this appeal.
 2. On or about April 28, 1966, the claimant, Anton E. Worklan, was permanently and totally disabled within the meaning of the Workmen's Compensation Act, as a proximate result of his industrial injury of April 30, 1963.
 3. The order of the Supervisor of Industrial Insurance dated April 28, 1966, should be reversed and this claim should be remanded to the Department of Labor and Industries with direction to accept responsibility for the claimant's carcinoma condition, and to place him on the pension rolls of the Department as a permanently and totally disabled workman.

26 It is so ORDERED.

27 Dated this 29th day of November, 1967.

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BOARD OF INDUSTRIAL INSURANCE APPEALS

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/s/ _____
J. HARRIS LYNCH Chairman

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/s/ _____
R. H. POWELL Member

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/s/ _____
R. M. GILMORE Member