Kemery, Kerry

APPEALABLE ORDERS

Informal letters

A letter advising the employer that the Department has accepted the worker's low back condition as causally related to the industrial injury does not constitute a formal statutory order and no res judicata effect attaches to the informal communication if it is not appealed. ***….In re Kerry Kemery*, BIIA Dec., 62,634 (1983)**

RES JUDICATA

Acceptance of condition

Unappealed Department orders reopening the claim for aggravation of condition and paying time-loss compensation on the mistaken but unstated ground that the worker's low back condition was causally related to the knee condition for which the claim was filed are res judicata. However, the employer is not foreclosed from later litigating the issue of causal relationship by timely appealing subsequent time-loss compensation orders. ***….In re Kerry Kemery*, BIIA Dec., 62,634 (1983)**

Informal letter

A Department letter advising the employer that the Department has accepted the worker's low back condition as causally related to the industrial injury is not a formal statutory order and does not become res judicata if not appealed. ***….In re Kerry Kemery*, BIIA Dec., 62,634 (1983)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: KERRY G. KEMERY	)	**DOCKET NO. 62,634**
	)	
CLAIM NO. H-596620	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Kerry G. kemery, Pro se

Employer, Glen River Industries, Inc., by
Bogle and Gates, per
Richard A. Montgomery

Department of Labor and Industries, by
The Attorney General, per
S. Frederick Feller and H. Andrew Saller, Assistants

Appeal filed by the employer on July 28, 1982 from an order of the Department of Labor and Industries dated June 1, 1982, which adhered to the provisions of prior orders which awarded time-loss compensation for specific periods of time. **REVERSED AND REMANDED**.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on timely Petitions for Review filed by the employer and the Department of Labor and Industries to a Proposed Decision and Order issued on April 20, 1983, in which the order of the Department dated June 1, 1982 was reversed, and remanded with instructions to relieve the employer of the financial responsibility for the time-loss compensation which had been determined to have been improperly paid to the claimant, and of the back surgery and all other residuals and expenses of any back condition, as well as any vocational rehabilitation and obesity programs, and take such other or further action as indicated or required by law.

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

The injury for which the original claim herein was filed and allowed consisted of a lacerated right knee occurring on April 18, 1979. By order dated January 15, 1980, the Department simultaneously allowed and closed the claim without award for permanent partial disability or time-loss compensation. Thereafter, the claimant began experiencing problems with his low back. On May 12, 1980, he filed an application to reopen his claim for aggravation of condition based upon his low back problems. By order dated July 18, 1980, the Department granted the application and

reopened the claim effective March 12, 1980, for treatment and such other action as may be indicated. Thereafter, treatment was provided for the claimant's low back condition and he was periodically awarded time-loss compensation pursuant to formal Department time-loss orders. The Department's order reopening the claim for aggravation, and all subsequent orders awarding time-loss compensation were duly communicated to the employer. The employer's appeal herein is from an order of the Department reaffirming prior time-loss orders awarding the claimant time-loss compensation for the period from November 17, 1981 to May 20, 1982. The Department's order reopening the claim for aggravation and all time-loss orders covering periods of time prior to the above-noted period were never protested nor appealed by the employer.

Turning to the appeal itself, the medical evidence clearly establishes that the claimant's low back condition, the condition for which he was awarded time-loss compensation, is wholly unrelated to his industrial injury to the right knee of April 18, 1979. The industrial appeals judge so found, and, based thereon he concluded that the "reaffirmance" time-loss order specifically under appeal herein should be reversed and the employer's cost experience credited accordingly. He further determined that additional cost credits should be given the employer, but the extent and intent of this further relief is ambiguous in its terminology.

On review before the Board, the Department argues that any question of causal relationship between the claimant's low back condition and his right knee injury is beyond the purview of challenge herein by the employer because it is res judicata that the claimant's low back condition is causally related to his right knee injury by virtue of the Department's order of July 18, 1980, which reopened the claim for aggravation -- an order which was neither protested nor appealed within the time allotted by law, and therefore became final and binding upon all interested parties.

On the other hand, the employer takes the position that a determination in this appeal that the claimant's low back condition is unrelated to his right knee injury renders void, ab initio, all prior departmental orders, including the order of July 18, 1980, reopening the claim for aggravation, inasmuch as all such orders were necessarily predicated on the erroneous determination that the claimant's low back condition was related to his original right knee injury. Thus, argues the employer, it should be relieved of all claim costs, medical and compensation, incurred from the time the claim was reopened.

The Department's order of July 18, 1980, reopening this claim for aggravation of condition constituted a determination by the Department that there had been a change for the worse in the

claimant's condition since the time of original closure of the claim, and that such worsening was causally related to the claimant's industrial injury of April 18, 1979. Although the Department's reopening order did not specify that it was allowing a low back condition as an "aggravation" of a right knee injury, we would merely note, parenthetically, that it is not unknown for a claim of aggravation to be predicated upon a condition affecting a different area of the body than that involved in the original injury. E.g., see Knowles v. Department of Labor and Industries, 28 Wn. 2d 970 (1947). Be that as it may, once the claim had been reopened by the Department, all time-loss orders issued thereafter constituted a determination of the Department that the claimant was "temporarily and totally disabled" for specified periods of time as a result of his "aggravated" condition. As previously noted, there is no question but what all were "communicated" to the employer as required by law. Moreover, there is no question but what the employer never protested nor appealed these orders. Accordingly, in the eyes of the law, the employer, under the doctrine of res judicata, is deemed to have acquiesced in all these orders (except, of course, the order specifically under appeal herein) and is bound thereby. As stated in Prince v. Saginaw Logging Company, 197 Wash. 4 (1938):

> "Having acquiesced in the departmental decision by failure to appeal, the...[employer] cannot be heard to question the correctness of that decision in another tribunal."

Nor does the fact that these departmental orders were based upon a mistake of fact to the effect that the claimant's back condition was causally related to his original injury alter the situation. We take no quarrel with the proposition, as urged by the employer, that a "Judgment", so to speak, of the Department which is predicated upon a decision wherein the Department has exceeded its statutory authority is void, ab initio. That, however, is not the case at hand. By statute, the Department is the original and sole tribunal with power to initially determine the law and the facts in any given claim. Abraham v. Department of Labor and Industries, 178 Wash. 160 (1934). Thus, the Department's factual determination that the low back condition was related to the accepted claim, albeit mistaken, was made pursuant to and fully within its statutory authority. Thus all time-loss orders based thereon carried operative legal effect unless timely appealed to this Board.

There remains the question as to whether, by reason of the employer's failure to appeal the Department's reopening order of July 18, 1980, and its further failure to appeal a series of subsequent time-loss compensation orders, it is res judicata that the claimant's low back condition

is causally related to his original injury of April 18, 1979, thereby precluding the employer from litigating herein any question as to the causal relationship of said condition. In this regard, it is to be noted that neither the Department's order of July 18, 1980, reopening this claim for aggravation, nor any of its time-loss orders issued subsequent thereto, contained a specific finding or determination that the claimant's low back condition was causally related to his industrial injury of April 18, 1979. In the absence thereof, we hold, under the doctrine of King v. Department of Labor and Industries, 12 Wn. App. 1 (1974), that the employer has an unfettered right to litigate the question of causal relationship between the claimant's low back condition and his industrial injury of April 18, 1979, in the instant appeal. In other words, we deem the rationale of King, supra, to be controlling herein, and we therefore hold that the departmental orders issued in this matter do not, as a matter of res judicata, establish that the claimant's low back condition is causally related to his industrial injury of April 18, 1979.

The Department, however, points out that the employer did have actual notice that the claimant's low back condition had been accepted by the Department under this claim by reason of the employer having received on April 14, 1981, a copy of a departmental letter dated April 10, 1981. This letter was directed to one of the claimant's treating physicians advising the doctor of this very fact. Thus, the Department argues, the employer, by failing to appeal this letter, must be deemed to have acquiesced in the Department's acceptance of the claimant's low back condition under this claim. It argues that the employer is now barred, under the doctrine of res judicata, from litigating herein any question as to the causal relationship between the claimant's low back condition and his industrial injury of April 18, 1979.

We do not agree. A departmental letter (much less a copy thereof) does not rise to the dignity of a formal statutory Department order. An interested party to a claim is not required to appeal, under pain of res judicata for failure to do so, such informal communications. Stated differently, the doctrine of res judicata has no application to departmental letters. Lee v. Jacobs, 81 Wn. 2d 934 (1973).

Based upon our disposition of the issues presented herein, we conclude that the employer is entitled to cost relief in regard to the period of time covered by the order specifically under appeal herein, but not with regard to any period of time prior thereto, all as more specifically detailed in our formal conclusions hereto.

FINDINGS OF FACT

1. On November 2, 1979, the claimant, Kerry G. Kemery, filed a report of accident with the Department of Labor and Industries alleging that he had sustained an industrial injury to his right knee in the course of his employment for Glen River Industries, Inc. By order dated January 15, 1980, the Department simultaneously allowed and closed the claim without award for time-loss compensation or for permanent partial disability.

2. On May 12, 1980, the claimant filed an application to reopen his claim for aggravation of condition. On July 18, 1980, the Department issued an order reopening the claim effective March 12, 1980, for treatment and such other action as may be indicated. Treatment and time-loss compensation were thereafter provided. By orders dated November 17, 1981, December 20, 1981, February 22, 1982, and April 1, 1982, the Department awarded the claimant time-loss compensation for the entire period from November 17, 1981 to May 20, 1982. The employer, Glen River Industries, Inc., filed a timely protest with the Department to these orders. By order dated June 1, 1982, the Department reaffirmed and adhered to its time-loss compensation orders of November 17, 1981, December 20, 1981, February 22, 1982, and April 1, 1982. The employer filed a notice of appeal to this Board on July 28, 1982, from the Department's reaffirmance order of June 1, 1982, and on August 5, 1982, the Board issued an order granting the appeal.

3. On April 18, 1979, the claimant sustained an industrial injury in the form of a lacerated right knee in the course of his employment for Glen River Industries, Inc. This laceration injury completely healed prior to January 15, 1980, and has caused no further problems to the claimant.

4. Neither the Department's order of July 18, 1980, reopening this claim for aggravation, nor any of its subsequent time-loss compensation orders contained any notice or language to the effect that the condition for which aggravation was being allowed consisted of a low back condition.

5. On April 14, 1981, the employer received from the Department a copy of a letter dated April 10, 1981, from the Department to one of the claimant's treating doctors wherein the Department advised the doctor that it has accepted responsibility for the claimant's low back condition under this claim.

6. The claimant's industrial injury to his right knee of April 18, 1979, neither caused nor aggravated any low back condition in the claimant.

7. The low back condition for which the claimant was awarded time-loss compensation for the period from November 17, 1981 to May 20, 1982, was not causally related to his industrial right knee injury of April 18, 1979.

8. The Department's order of July 18, 1980, reopening this claim for aggravation, and all subsequent orders awarding time-loss compensation, were based upon a mistake of fact by the Department to the effect that the claimant's low back condition was causally related to his industrial injury of April 18, 1979.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has juris- diction of the parties and subject matter of this appeal.

2. The Department's mistake of fact in this matter to the effect that the claimant's low back condition is causally related to his industrial injury of April 18, 1979, does not render void any of its orders based thereon.

3. The employer is not legally precluded by res judicata principles from establishing in this appeal that the claimant's low back condition is causally unrelated to his industrial injury of April 18, 1979.

4. The employer is legally precluded by res judicata principles from receiving cost relief in regard to workers' compensation benefits provided the claimant prior to November 17, 1981.

5. The order of the Department of Labor and Industries dated June 1, 1982, adhering to the provisions of prior orders dated November 17, 1981, December 20 1981, February 22, 1982, and April 1, 1982, awarding time-loss compensation from November 17, 1981 to May 20, 1982, is incorrect, should be reversed, and this claim remanded to the Department with instructions to grant the employer cost relief in regard to all workers' compensation benefits which have been provided the claimant for all periods subsequent to November 16, 1981, inasmuch as all such benefits have no relationship to claimant's right knee injury under this claim.

It is so ORDERED.

Dated this 11th day of August, 1983.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/______________________________
MICHAEL L. HALL Chairman

/s/______________________________
FRANK E. FENNERTY, JR. Member

/s/______________________________
PHILLIP T. BORK Member