Johnson, Gary

RES JUDICATA

Allowance of claim

When the Department issues an order expressly addressing the issue of allowance of the claim, and that order is protested by the employer, the Department is obligated to specifically address the allowance issue in a further order. A subsequent determinative time-loss order, which the employer failed to timely protest or appeal, does not preclude the Department from later rejecting the claim. The determinative time-loss order cannot be construed as an implied allowance of the claim since it fails to clearly apprise the employer that the claim has been allowed. **….*In re Gary Johnson*, BIIA Dec., 86 3681 (1987)** [dissent]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: GARY G. JOHNSON	)	**DOCKET NO. 86 3681**
	)	
	)	**ORDER REMANDING FOR**
CLAIM NO. J-528767	)	**FURTHER PROCEEDINGS**

APPEARANCES:

Gary G. Johnson, by
Gerald L. Casey

Employer, Snelson, Inc., by
Randy Britsch

Department of Labor and Industries, by
The Attorney General, per
William R. Strange, Assistant

This is an appeal filed by the claimant on October 13, 1986 from an order of the Department of Labor and Industries dated September 29, 1986 which rejected the claim for the reasons that there is no proof of a specific injury at a definite time and place in the course of employment, the condition is not the result of an industrial injury, the condition pre-existed the alleged injury, and the condition is not an occupational disease. **REMANDED FOR FURTHER PROCEEDINGS**.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the Department of Labor and Industries to a Proposed Decision and Order issued on February 24, 1987. That order in essence granted the claimant's Motion for Summary Judgment and determined that the Board lacked jurisdiction over the parties and subject matter of the claimant's appeal from the September 29, 1986 Department order rejecting the claim, because a prior determinative time-loss compensation order, which was neither appealed nor protested, had impliedly allowed the claim.

The record before us consists of the transcript of two conferences, Exhibit 1, claimant's Motion for Summary Judgment and attachments, and the Department's Response thereto and attachments.

The issue on appeal is whether an order paying time-loss compensation and containing the protest and appeal notification language of RCW 51.52.050, i.e., a determinative time-loss compensation order, impliedly allows a claim even though the employer has timely protested a prior determinative order specifically allowing the claim. The Department contends that, in these circumstances, a subsequent unappealed and unprotested determinative time-loss compensation

order is not res judicata on the question of the allowance of the claim, but only on the question of entitlement to the time-loss compensation awarded thereby.

The legal issue can only be fully understood in its factual context. Mr. Johnson filed an accident report on January 17, 1985 alleging an industrial injury occurring on January 4, 1985. On February 11, 1985 the Department issued an interlocutory time-loss compensation order, i.e., an order pursuant to RCW 51.32.210, without the appeal and protest notification language of RCW 51.52.050. On February 21, 1985 the employer protested the February 11, 1985 order and contested the claim. On March 8, March 20, April 16, and May 8, 1985 the Department issued determinative time-loss compensation orders. The March 20, 1985 order specifically allowed the claim.

In a protest dated May 3, 1985 the employer protested the March 20 and the April 16 orders, again contesting the validity of the claim. On May 8, 1985 the Department issued an order modifying all prior determinative orders, including the March 20, 1985 allowance order, to interlocutory orders.

On May 13, 1985 the Department issued a further determinative time-loss compensation order which the employer failed to either protest or appeal. Further determinative time-loss compensation orders were issued on August 23 and October 16, 1985 and these were protested by the employer on October 23, 1985.

On February 19, 1986 the Department issued an order rejecting the claim. The claimant timely appealed that order and the Department reassumed jurisdiction and issued a further order rejecting the claim on September 29, 1986. The claimant again timely appealed that reject order and it is that order which is the subject of this appeal.

From this recitation three critical facts are apparent: (1) the employer timely protested the allowance order of March 20, 1985; (2) the Department did not issue a further determinative order in response to that protest, until the rejection order was issued on February 19, 1986; and (3) the employer did not timely protest or appeal the determinative time-loss compensation order of May 13, 1985.

In concluding that the May 13, 1985 determinative time-loss compensation order impliedly allowed the claim, the Proposed Decision and Order relied on the Board's prior decision in In re Herbert Olive, BIIA Dec., 70,349 (1986). Olive is distinguishable on its facts. In Olive, the employer failed to protest or appeal a determinative time-loss compensation order issued prior to the allowance order. In the instant appeal, the employer timely protested the allowance order but failed to protest or appeal a subsequent determinative time-loss compensation order. When an employer has diligently

and timely protested a specific allowance order, it cannot be required to appeal or protest a subsequent determinative time-loss compensation order to preserve its objection to the allowance of the claim. The employer has the right to rely on the Department's promise that a further appealable order will be issued in response to the protest. The May 13, 1985 time-loss compensation order was clearly not in response to the employer's protest to the allowance of the claim. The February 19, 1986 reject order was that response.

The provisions of RCW 51.32.210 do not change this analysis. That provisional time-loss compensation section provides:

> "The payment of this or any other benefits under this title, prior to the entry of an order by the Department in accordance with RCW 51.52.050 as now or hereafter amended, shall be not considered a binding determination of the obligations of the Department under this title. The acceptance of compensation by the worker or his or her beneficiaries prior to such order shall likewise not be considered a binding determination of their rights under this title."

That language does not render a time-loss compensation order headed by the language of RCW 51.52.050 binding with respect to issues which are not resolved by the order. When a prior allowance order has been timely protested and the Department has not issued a further determinative order in response to that protest, a subsequent determinative time-loss compensation order which has been neither appealed nor protested is a binding res judicata determination only with respect to the issues resolved by that order, i.e., entitlement to the time-loss compensation awarded thereby.

The case law fully supports this view. In King v. Department of Labor and Industries, 12 Wn. App. 1 (1974) the Court of Appeals was faced with the question of whether the language "the plaintiff did not suffer any permanent partial disability from a psychiatric standpoint as a proximate result of his industrial injury" clearly apprised the worker that his psychiatric condition was not causally related to the industrial injury. The court held:

> "Fundamental fairness requires that to constitute such a specific rejection of plaintiff's psychiatric condition a claimant must be clearly advised that any relationship between his psychiatric problems and his injury is finally determined. Finding of Fact No. 7 is not a model of clarity. However, in our opinion it is no more and no less than a determination that "the plaintiff did not suffer any permanent partial disability from a psychiatric standpoint as a proximate result of his industrial injury of October 15, 1962." In the absence of a clear and unmistakable final finding that a condition is neither caused by nor aggravated by an industrial injury, a workman should not be

> precluded from thereafter litigating the causal relationship between the injury and his condition." King at 4.

In this appeal, we are faced with the question of whether the employer was clearly apprised that the claim had been allowed by the following language contained in the May 13, 1985 Department order:

> "This order is issued to permit the payment of time loss, as listed below, without the necessity of further verification. Do not cash this warrant if you have returned to work, or if you are released to return to work by your doctor within the payment period. Please return the warrant to the Olympia office for correction.
>
> It is hereby ordered that 02 semi monthly time loss compensation payments be made as shown below for the compensation period beginning 04-22-85."

We conclude that this language was not a "clear and unmistakable" determination that the claim had been allowed, within the principle of King, supra.

It is not sufficient to argue circuitously that the Department has no authority to issue a determinative time-loss compensation order unless the claim has been allowed and therefore any determinative time-loss compensation order must be binding on the employer as an allowance of the claim. The parties are only bound to the extent that an order specifically resolves an issue and notifies the parties of that resolution.

Our conclusion is consistent with the Board's prior decision in In re Kerry G. Kemery, BIIA Dec., 62,634 (1983). In that case the Department had reopened a claim for aggravation of condition for the unstated reason that the industrial injury to the claimant's knee had later caused a low back condition. Relying on King, the Board concluded that the employer was bound by all determinative time-loss compensation orders which had been neither protested nor appealed, but could still litigate the question of whether the back condition was causally related to the industrial injury, since that question had never been specifically resolved in an order complying with RCW 51.52.050.

The same result obtains here. The May 13, 1985 order is only binding on the employer with respect to the payment of time-loss compensation. The payment of time-loss compensation pursuant to that order did not operate as a sub silentio allowance of the claim. The Department's first response to the employer's timely protest of the March 20, 1985 allowance order was the issuance of its February 19, 1986 order rejecting the claim. Mr. Johnson's timely notice of appeal from that order was properly responded to by reassuming jurisdiction and then issuing the further rejection order of

September 29, 1986. Mr. Johnson has timely appealed the latter order to this Board which has jurisdiction over the parties and subject matter of the appeal.

It is hereby ORDERED that claimant's Motion for Summary Judgment be denied and the matter be remanded to the industrial appeals judge for further proceedings on the merits of the claimant's appeal.

It is so ORDERED.

Dated this 13th day of July, 1987.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/S/
SARA T. HARMON, Chairperson

/S/
PHILLIP T. BORK Member

DISSENTING OPINION

I must dissent from the majority opinion in regards to the disposition of this appeal.

The issue is whether a final, determinative order paying time-loss compensation results in the allowance of a claim if no prior determinative order allowing the claim has been entered. The Department contends that an order of this type is not res judicata on the question of the allowance of the claim in which it was entered.

The Department issued a series of determinative time-loss compensation orders as well as a determinative order allowing the claim. The employer timely protested all of these orders. The Department modified the allowance order, changing it from a determinative order to an interlocutory order. Thereafter, additional determinative time-loss compensation orders were issued, all of which were timely protested by the employer except for an order dated May 13, 1985. Subsequently, the Department issued its September 29, 1986 rejection order, which the claimant appealed.

The Department of Labor and Industries, being a creature of statute, has only the power specifically given to it by the Legislature and must act within the prescribed boundaries thereof. Wheaton v. Department of Labor and Industries, 40 Wn.2d 56 (1952). In general, the Department has no authority to pay benefits unless it has already determined a valid claim exists. An exception to this

principle is found within RCW 51.32.210 which provides for the payment of provisional temporary disability compensation (including time-loss compensation) in an expedited manner, "prior to the entry of an order by the Department in accordance with RCW 51.52.050..." (see also, RCW 51.04.030 and WAC 296-20)

The May 13, 1985 Department order contains appealable language and is an order in accordance with RCW 51.52.050. RCW 51.32.210, when read in conjunction with RCW 51.52.050, indicates that the issuance of a time-loss compensation order with appealable language constitutes a binding determination of the parties' rights under the Washington State Industrial Insurance Act. If there is no appeal of such an order within 60 days of its communication to the parties, that order is final and the issues and rights determined therein are res judicata. As stated above, the Department does not have the authority to issue a determinative order providing benefits for an unaccepted claim. To state that the May 13, 1985 order did not accept the claim would require the belief that the Department issued an order with the knowledge and intent to act beyond its legal authority. The more logical interpretation of the Department's action in issuing this order is that the claim was to be allowed thereby. While the Department contends that such a result is unfair to the employer, any harm caused to the employer is because of its neglect of its appeals rights.

Since the May 13, 1985 order was not timely appealed (no party, including the employer, contended that communication of this order was delayed or did not occur such that a protest or appeal was timely filed) and since the Department did not hold this order for naught, place it in abeyance or otherwise modify it, the order is final and res judicata as to all the matters determined therein, expressly or by implication.

It follows that if the May 13, 1985 Department order allowing the claim is res judicata as to that issue, the Department was without authority to issue the September 29, 1986 order rejecting the claim.

I would thereby incorporate the IAJ's proposed Finding of Fact No. 1 as the Board's final finding found in the Proposed Decision and Order issued on February 24, 1987. Also proposed Finding of Fact No. 2 is adopted as my final finding except that the date of the order referred to in the body of the finding is corrected to May 13, 1985. Additionally, I would enter Finding of Fact No. 3 as follows:

FINDINGS OF FACT

3. The order of May 13, 1985 was not protested or appealed within 60 days of its communication to the parties, nor did the Department of Labor and Industries hold the order for naught, place it in abeyance or otherwise modify it within that time period.

CONCLUSIONS OF LAW

I would also propose the following Conclusions of Law:

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

2. The order of May 13, 1985, which paid time-loss compensation was an order issued in accordance with RCW 51.52.050.

3. The order of May 13, 1985 accepted the claim and is final and res judicata as to that issue.

4. The order of the Department of Labor and Industries dated September 29, 1986 which rejected the claim for the reasons that there is no proof of a specific injury at a definite time and place in the course of employment, the condition is not the result of an industrial injury, the condition pre-existed the alleged injury and the condition is not an occupational disease, is correct and should be reversed and this claim remanded to the Department with instruction to treat the claim as allowed by its order dated May 13, 1985 and to provide further relief consistent therewith.

Dated this 13th day of July, 1987.

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