

Seltz, Carl

RES JUDICATA

Absence of finding concerning previously litigated issue

Where a worker had claimed retroactive time-loss compensation in a prior appeal, but the proposed decision and order placing the worker on the pension rolls had not addressed the issue of retroactive time-loss, the worker could not establish entitlement to such time-loss in an appeal from the subsequent ministerial Department order placing him on the pension rolls. The absence of a finding regarding a disputed material fact must be construed as a finding adverse to the appellant, and his failure to file a petition for review of the prior proposed decision and order made it res judicata that he was not entitled to the retroactive time-loss.*In re Carl Seltz, BIA Dec., 88 1964 (1989)*

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

1 **IN RE: CARL SELTZ**) **DOCKET NOS. 88 1964 & 88 1965**
2)
3 **CLAIM NOS. F-216689& G-992415**) **DECISION AND ORDER**
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5 APPEARANCES:

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7 Claimant, Carl Seltz, by
8 Thomas A. Thompson

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10 Employer, Boeing Company, by
11 None

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13 Department of Labor and Industries, by
14 The Attorney General, per
15 Lynn D.W. Hendrickson, Assistant, and Steve LaVergne, Paralegal

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17 These are appeals filed by the claimant, Carl Seltz, on May 13, 1988 from an order of the
18 Department of Labor and Industries dated May 9, 1988, entered in Claim Nos. F-216689 and
19 G-992415, which adhered to the provisions of a Department order of April 20, 1988.¹ Pursuant to a
20 Board order dated April 7, 1988, the April 20, 1988 Department order reopened the claim effective
21 October 16, 1986, classified Mr. Seltz as permanently totally disabled, and placed him on the
22 permanent pension rolls effective that date as a result of the combined effects of these injuries. The
23 order further provided that the pension would be awarded under Claim No. G-992415, and that a
24 previously paid permanent partial disability award would be charged against the pension reserve,
25 reducing the monthly payments accordingly. **APPEALS DISMISSED.**

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30 **DECISION**

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32 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
33 and decision on a timely Petition for Review filed by the claimant, Carl Seltz, to a Proposed Decision
34 and Order issued on February 17, 1989 in which the claimant's appeals were dismissed for want of
35 subject matter jurisdiction.

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37 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no
38 prejudicial error was committed and said rulings are hereby affirmed. By agreement of the parties, the
39 certified Board record in prior appeals assigned Docket Nos. 87 1132 and 87 1105 is admitted to
40 evidence as Exhibit 9. See also Cloquet v. Dept. of Labor & Indus., 154 Wash. 363 (1929).

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46 ¹ The claimant filed a single notice of appeal from a single Department order. However, because the Department
47 order applied to two different claims, two separate docket numbers were assigned.

1 The issue before the Board is whether the Department is required to consider a claimant's
2 eligibility for back time loss compensation, when he has been placed on a pension pursuant to a Board
3 order which is silent on the time loss question. The Department maintains that, when the Board has
4 entered an order placing a worker on a pension without designating an effective date, the Department
5 may consider the worker's eligibility for time loss compensation for unpaid periods prior to the date of
6 the closing order which had been appealed. However, the Department also maintains that it will not
7 consider the worker's right to time loss compensation for such periods when the Board directs that the
8 pension should begin on a date earlier than the date of the Department's closing order.
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10 To better elucidate the issue -- these appeals are from a Department order of May 9, 1988
11 affirming a prior order of April 20, 1988, which placed Mr. Seltz on a pension effective October 16,
12 1986. The Department orders of May 9, 1988 and April 20, 1988 were based on a Proposed Decision
13 and Order adopted by the Board as its final order on April 7, 1988, involving two appeals from two
14 orders entered in April 1987, closing the two claims (F-216689 and G-992415) with permanent partial
15 disability awards. The Proposed Decision and Order, as adopted by the Board, held that Mr. Seltz
16 was permanently and totally disabled as of October 16, 1986, a date earlier than the April 1987 closing
17 orders. However, the Proposed Decision and Order was silent as to Mr. Seltz's eligibility for unpaid
18 time loss compensation for a period prior to October 16, 1986.
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20 Mr. Seltz's time loss compensation had been terminated effective May 16, 1986 by a
21 Department order dated May 15, 1986, which Mr. Seltz had timely protested. When the Board found
22 Mr. Seltz to be permanently and totally disabled as of October 16, 1986, the Department then issued a
23 ministerial order complying with the Board order. The ministerial order was also silent as to Mr. Seltz's
24 eligibility for time loss compensation from May 17, 1986 through October 15, 1986. When Mr. Seltz
25 then sought time loss compensation for this interim period, the Department refused to consider his
26 request, maintaining that the April 1987 Department orders which had been appealed to the Board
27 contained language closing the claims "with time loss compensation as paid" and therefore the time
28 loss issue now attempted to be raised was res judicata and could no longer be litigated. The claimant,
29 on the other hand, maintains that the Board was without jurisdiction to place Mr. Seltz on the pension
30 rolls on a date preceding the date of the Department's orders closing the claims.
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32 When the Department closed the two claims in April 1987 with permanent partial disability
33 awards and with time loss compensation as paid, the claimant appealed to the Board, maintaining that
34 Mr. Seltz was entitled to a pension. At the first conference held on June 2, 1987, a statement of the
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1 issues made by the Mediation Judge included "back time loss compensation from approximately May
2 1986 forward." At a further conference held on June 30, 1987, a restatement of the issues on appeal
3 made no mention of time loss compensation, but claimant's attorney raised the issue of whether Mr.
4 Seltz was permanently and totally disabled prior to July 1, 1986. At the first hearing held on October
5 19, 1987 claimant's counsel stated that Mr. Seltz was seeking a pension "as of the closing date" which
6 he indicated would be the first week of April, 1987.
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10 The medical testimony developed through claimant's attorney's questioning did not focus
11 exclusively on Mr. Seltz's condition as of April, 1987. Dr. Early, who examined Mr. Seltz on March 4,
12 1987, offered opinions with regard to extent of disability, presumably at the time he psychiatrically
13 examined Mr. Seltz. Dr. Burrell, who examined Mr. Seltz on December 19, 1986, offered opinions with
14 regard to permanent total disability, but without regard to April 1987 specifically. The opinions of Mr.
15 Wren, who vocationally evaluated Mr. Seltz on December 30, 1986, were tied to April, 1987.
16 However, no evidence was specifically elicited concerning the claimant's temporary total disability
17 status and right to time loss compensation prior to April, 1987.
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22 The Proposed Decision and Order, dated February 12, 1988, dealt only with the pension issue
23 and directed the Department to place the claimant on a pension as of October 16, 1986. It made no
24 findings of fact or legal conclusions with respect to the claimant's eligibility for time loss compensation
25 between May 17, 1986 and October 15, 1986. Neither the Department of Labor and Industries nor the
26 claimant filed a Petition for Review of the February 12, 1988 Proposed Decision and Order, and it was
27 therefore adopted by the Board as its final order on April 7, 1988.
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31 The claimant submits that the Board was without jurisdiction to decide the date that the
32 claimant achieved the status of permanent total disability, if that date was prior to the date the
33 Department closed the claims with permanent partial disability awards. This contention is incorrect.
34 Implicit in the Department's orders closing the claims with permanent partial disability awards and with
35 time loss compensation as paid is the determination that the claimant was not entitled to a permanent
36 total disability award. Therefore, the orders previously under appeal presented questions concerning
37 the claimant's eligibility for time loss compensation through the date of the claim closure and whether
38 or not the claimant was eligible for a permanent total disability pension at any time through the date of
39 the claim closure. The Board had jurisdiction to determine those questions. See Lenk v. Dept. of
40 Labor & Indus., 3 Wn.App. 977, 982 (1970).
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1 Mr. Seltz obviously recognized the Board's jurisdiction to pass on the issue of whether he was
2 permanently and totally disabled prior to April 1987. A restatement of the issues at the June 30, 1987
3 conference indicates that he was seeking to be accorded permanent total disability status prior to July
4 1, 1986. Moreover, Mr. Seltz did not challenge the Proposed Decision and Order of February 12,
5 1988, which explicitly found that as of October 16, 1986 the residuals of the two industrial injuries had
6 rendered him permanently unemployable. See Finding No. 12, Proposed Decision and Order, Dckt.
7 Nos. 87 1132 and 87 1105 (February 12, 1988). The Board had jurisdiction to place Mr. Seltz on a
8 permanent total disability pension prior to the date of the Department's orders closing the claims, and
9 the determination that Mr. Seltz was permanently and totally disabled effective October 16, 1986 is
10 final, since neither the Department nor the claimant sought further review of that finding.
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12 The Board also had jurisdiction in the prior appeals to address Mr. Seltz's eligibility for time loss
13 compensation for any periods after time loss compensation was terminated on May 16, 1986. The
14 absence of a finding as to a material fact is deemed to be a finding against the party having the burden
15 of proving that fact. Lang v. Lang, 40 Wn.App. 758 (1985). Therefore, the silence of the prior
16 February 12, 1988 Proposed Decision and Order on the issue of back time loss compensation, which
17 was a disputed issue before the Board at that time, must be construed as a finding adverse to the
18 claimant. Stafford v. Dept. of Labor & Indus., 33 Wn.App. 231, 237 (1982). Furthermore, since the
19 claimant failed to petition for review of that Proposed Decision and Order, it is res judicata that Mr.
20 Seltz is not entitled to time loss compensation for the period of May 17, 1986 through October 15,
21 1986.
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23 We are aware that, where the Board order directing that a claimant be placed on a pension is
24 silent with respect to back time loss compensation, the Department routinely considers whether any
25 time loss compensation for periods prior to the date of the closing order should be paid. Indeed,
26 Michael G. Watson, a Department employee of 21 years, testified that he would have followed this
27 procedure if the Board had not fixed the date of the pension to begin on October 16, 1986. If the
28 Department feels itself able to consider eligibility for back time loss compensation when the Board
29 doesn't specifically fix the date of the pension commencement, why shouldn't the Department make
30 the same assessment when the Board specifically fixes the pension commencement as of a date prior
31 to the date of the closing order but after the date of previous time loss termination? No logical
32 explanation has been set forth by the Department to explain its position.
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1 At the same time, however, we cannot require the Department to consider Mr. Seltz's eligibility
2 for back time loss compensation. That issue has already been finally determined against him by our
3 order of April 7, 1988 adopting the Proposed Decision and Order of February 12, 1988 in Docket Nos.
4 87 1132 and 87 1105.
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7 The Department's practice of considering a claimant's eligibility for back time loss
8 compensation when the Board has directed that the claimant be placed on a pension is apparently a
9 longstanding policy. As a practical matter, the Department is not precluded from taking this approach,
10 so long as none of the parties files a subsequent appeal with this Board. However, once the issue is
11 before us in an appeal from a ministerial order, only one conclusion is possible. The Department's
12 practice is not legally enforceable, and for good reason.
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16 If we were now to direct the Department to consider Mr. Seltz's eligibility for back time loss
17 compensation, we would potentially be allowing three separate appeals, where one should have
18 sufficed -- that is, the appeal from the original closing order, the appeal from the Department's
19 ministerial order, and a third appeal if the claimant is dissatisfied with the Department's determination
20 regarding back time loss compensation. The simple fact is that it has already been decided that Mr.
21 Seltz is not entitled to time loss compensation for the period of May 17, 1986 through October 15,
22 1986. It is one thing if the Department voluntarily chooses to pay back time loss compensation,
23 despite our final determination to the contrary. It is quite another for the claimant to try to relitigate the
24 very same issue before this Board which has already been determined against him in a prior appeal
25 before us. We cannot permit the latter course of action.
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31 Obviously the present situation could have been avoided had the claimant presented evidence
32 to the Board with regard to the back time loss compensation issue at the time of the prior hearings in
33 this matter. Obviously, however, he abandoned that issue. Alternatively, the parties could have
34 agreed that the issue of unpaid time loss compensation was not in dispute in the prior appeals and
35 should be reserved for the Department's further consideration in the event the Board found the
36 claimant to be permanently and totally disabled. The Board might have accommodated such an
37 agreement, although that approach too encourages some piecemeal litigation.
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41 However, since neither of these options was utilized in the prior appeals, we have no choice but
42 to dismiss claimant's appeals from the ministerial Department order of May 9, 1988.
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45 The Board hereby makes the following findings and conclusions:
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3 **FINDINGS OF FACT**

4 1. On August 20, 1964 the claimant filed an accident report with the
5 Department, alleging an industrial injury to have occurred to his right knee
6 on August 3, 1964 while in the course of employment with the Boeing
7 Company. Thereafter the claim was allowed, assigned Claim No.
8 F-216689, and time loss compensation was paid. On August 13, 1965 the
9 Department closed the claim with a permanent partial disability award
10 equal to 15% amputation value of the left leg at the knee. On March 17,
11 1966 an aggravation application was filed and on March 29, 1966 the
12 claim was reopened for further treatment. On April 24, 1969 the
13 Department closed the claim with a permanent partial disability award
14 equal to 25% amputation value of the left leg at the knee or lower half of
15 the thigh, less previous award. On May 26, 1970 an aggravation
16 application was filed, and on June 2, 1970 the claim was reopened
17 effective May 1, 1970 for further treatment. On February 1, 1972 the
18 Department entered an order closing the claim with no additional
19 permanent partial disability award.

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21 On November 23, 1973 the claimant filed an aggravation application and
22 on January 7, 1974 the Department entered an order reopening the claim
23 effective November 9, 1973 for further treatment. On April 8, 1987 the
24 Department entered an order closing the claim with no additional
25 permanent partial disability award and on April 14, 1987 the claimant filed
26 a notice of appeal with the Board. On May 6, 1987 the Board granted the
27 appeal and assigned it Docket No. 87 1132.

28 On January 3, 1977 the claimant filed an accident report for an industrial
29 injury occurring on December 28, 1976 while in the employ of American
30 Strevall Inc. On March 28, 1977 the Department entered an order
31 allowing the claim, assigning Claim No. G-992415 and closing the claim
32 for medical treatment only. This order was protested on March 31, 1977
33 and on May 18, 1977 the Department entered an order setting aside the
34 March 28, 1977 order, directing that the claim remain open. On
35 November 15, 1982 the Department entered an order denying
36 responsibility for the left hip condition as unrelated and closing the claim
37 with a permanent partial disability award equal to 50% of the amputation
38 value of the left leg at or above the knee joint with a functional stump.
39 Claimant protested on November 29, 1982 and thereafter, on December
40 16, 1982, the Department entered an order modifying the order of
41 November 15, 1982 ordering the claim to remain open for treatment. On
42 May 15, 1986 the Department entered an order terminating time loss
43 compensation with payment made through May 16, 1986. On June 17,
44 1986 the claimant protested the determination of May 15, 1986. On June
45 9, 1986 the Department entered an order finding the claimant not eligible
46 for vocational rehabilitation services due to his employability. After a
47 protest, the director entered an order on July 31, 1986 finding that the

1 claimant was employable and physically capable of performing the job of
2 order clerk on a full-time basis. On December 4, 1986 the Department
3 entered an order closing the claim with a permanent partial disability
4 award equal to 57% of the amputation value of the right leg above the
5 knee joint with a short thigh stump. On January 22, 1987 the claimant
6 protested the Department order of December 4, 1986. On February 25,
7 1987 the Department entered an order holding the December 4, 1986
8 order in abeyance. On April 1, 1987 the Department entered an order
9 correcting and superseding the order of December 4, 1986 and ordering
10 the claim closed with time loss compensation as paid to date and an
11 award for permanent partial disability equal to 35% disability at or above
12 the knee joint with functional stump, over and above the 25% disability
13 award at or above the knee joint with functional stump to the left knee
14 issued in Claim No. F-216689, an award equal to 5% of the left leg above
15 the knee joint with a short thigh stump over and above the pre-existing
16 disability to the knee, less permanent partial disability awards previously
17 paid, and ordering reimbursement of an overpayment in the amount of
18 \$714.88. On April 8, 1987 the claimant appealed to the Board from the
19 Department order of April 1, 1987. On May 6, 1987 the Board entered an
20 order granting the appeal, assigning Docket No. 87 1105.

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22 On February 12, 1988 a Proposed Decision and Order was entered in the
23 appeals assigned Docket Nos. 87 1105 and 87 1132, Claim Nos.
24 G-992415 and F-216689, concluding that between February 1, 1972 and
25 April 8, 1987 the claimant's condition had become aggravated and that
26 effective October 16, 1986 the claimant was totally permanently disabled
27 from the combined effects of the disabilities under Claim No. F-216689
28 and G-992415. The Proposed Decision and Order contained no findings
29 or conclusions with respect to claimant's eligibility for time loss
30 compensation during the period of May 17, 1986 through October 15,
31 1986. On April 7, 1988 the Board entered an order adopting the Proposed
32 Decision and Order as the final order of the Board, no Petition for Review
33 having been filed by any party. On April 20, 1988 the Department entered
34 an order in Claim Nos. F-216689 and G-992415 reopening the claim
35 effective October 16, 1986 and classifying Mr. Seltz as permanently totally
36 disabled effective that date, the pension to be awarded under Claim No.
37 G-992415, less the prior paid awards. On May 4, 1988 the claimant
38 protested and on May 9, 1988 the Department entered an order adhering
39 to the provisions of the Department order of April 20, 1988. On May 13,
40 1988 the claimant filed a notice of appeal with the Board which was
41 assigned Docket No. 88 1964 for Claim No. F-216689 and Docket No. 88
42 1965 for Claim No. G-992415.

- 43 2. After the Board issued its order of April 7, 1988 (in Docket Nos. 87 1132
44 and 87 1105) adopting the February 12, 1988 Proposed Decision and
45 Order which placed Mr. Seltz on the pension rolls effective October 16,
46 1986, but was silent with regard to Mr. Seltz's eligibility for time loss
47 compensation from May 17, 1986 through October 15, 1986, the

1 Department refused to consider Mr. Seltz's eligibility for time loss
2 compensation benefits for that period.

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4 **CONCLUSIONS OF LAW**

- 5 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties
6 to these appeals. The issue of eligibility for unpaid time loss
7 compensation from May 17, 1986 through October 15, 1986 was an issue
8 in dispute in the prior appeals in Docket Nos. 87 1105 and 87 1132. The
9 absence of findings and conclusions on this disputed issue in the February
10 12, 1988 Proposed Decision and Order, which was adopted as final by the
11 Board on April 7, 1988, constitutes a finding adverse to the claimant. It is
12 therefore res judicata that claimant is not entitled to time loss
13 compensation for the period of May 17, 1986 through October 15, 1986,
14 and that issue cannot be relitigated in this appeal.
- 15 2. The Department order of May 9, 1988 was a purely ministerial act by the
16 Department, complying with the Board final order of April 7, 1988. No
17 appeal lies from the Department order of May 9, 1988, and this appeal
18 (Docket Nos. 88 1964 and 88 1965) must be dismissed.

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20 It is so ORDERED.

21 Dated this 12th day of September, 1989.

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23 BOARD OF INDUSTRIAL INSURANCE APPEALS

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26 /s/ _____
27 SARA T. HARMON Chairperson

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30 /s/ _____
31 PHILLIP T. BORK Member