Morton, Clara

AGGRAVATION (RCW 51.32.160)

Extension of time to act on application to reopen claim

RES JUDICATA

Extension of time to act on application to reopen claim

An order extending the time for acting on an application to reopen the claim which is not timely appealed is final and binding and has res judicata effect. Worker cannot collaterally attack the unappealed extension decision in a later appeal of an order denying reopening of the claim. **….*In re Clara Morton*, BIIA Dec., 89 5897 (1990)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: CLARA MORTON	)	**DOCKET NO. 89 5897**
	)	
	)	
	)	**ORDER VACATING PROPOSED DECISION**
	)	**AND ORDER AND REMANDING APPEAL TO**
CLAIM NO. K-138300	)	**HEARING PROCESS**

APPEARANCES:

Claimant, Clara Morton, by
Casey and Casey, per
Gerald L. Casey and Carol L. Casey

Employer, West Coast Lutheran School, by
Maxson Young Risk Management Services, Inc., per
Judy Van Eyck, Senior Claims Administrator and Terry Peterson, Attorney

Department of Labor and Industries, by
The Attorney General, per
Ann Marie Neugebauer, Assistant, and Whitney Petersen, Paralegal

This is an appeal filed by the claimant, Clara Morton, on December 22, 1989 from an order of the Department of Labor and Industries dated December 7, 1989 which stated that on September 6, 1989 the Department received an application to reopen the claim, that medical information shows the condition caused by the injury has not worsened since final claim closure and which denied the application to reopen and ordered the claim remain closed. **REMANDED TO THE HEARING PROCESS**.

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 Department of Labor and Industries and the employer to a Proposed Decision and Order issued on September 11, 1990 in which the order of the Department dated December 7, 1989 was reversed and the claim remanded to the Department with directions to reopen the claim.

The Proposed Decision and Order granted summary judgment upon claimant Clara Morton's motion. Ms. Morton contends her application to reopen her claim should be deemed granted under RCW 51.32.160 because the Department allegedly did not have good cause for extending beyond 90 days the time for making a final determination on her application; alternatively, she argues that, if good cause indeed existed, an order of the Department entered within the original 90-day period which

purported to extend that period an additional 60 days was ineffective to extend the period because the order was in violation of the Department's own rule concerning such orders, WAC 296-14-400. The Department argues its order was effective to extend the period in that good cause did exist and had been properly stated in the order.

We hold, in the circumstances of this particular case, the order of the Department extending the period in which it must make a final determination regarding Ms. Morton's application to reopen her claim is final and binding with res judicata effect. The extension order may not be collaterally attacked in the present appeal, which is taken from a subsequent order denying Ms. Morton's application to reopen her claim on its merits. Since the Board lacks subject matter jurisdiction over the prior extension order, which has res judicata effect, the Proposed Decision and Order which would grant relief to the claimant on grounds inconsistent with that order must be vacated and the appeal remanded to the hearings process for a determination based upon the merits of Ms. Morton's application to reopen her claim.

The relevant facts are straightforward. The Department received Ms. Morton's application to reopen her claim on September 6, 1989. The Department issued an order dated November 2, 1989 which stated more information was required before a decision could be made on the application because "the Department of Labor and Industries is unable to schedule a medical examination within 90 days". The order therefore extended the decision period until February 5, 1990. Our review of the microfiche of the Department's claim file, under the authority stated in In re Mildred Holzerland, BIIA Dec., 15,729 (1965), fails to disclose the filing of any protest or appeal by any party of the order dated November 2, 1989. The Department thereafter issued an order dated December 7, 1989 which denied Ms. Morton's application to reopen her claim. Ms. Morton filed her notice of appeal of the order dated December 7, 1989 on December 22, 1989, which was well within 60 days following the issuance by the Department of its order dated November 2, 1989. However, a careful examination of that notice of appeal does not disclose any reference whatsoever to the order dated November 2, 1989, or the subject matter of the extension order.

Ms. Morton's motion for summary judgment was apparently prompted by one or several of the following additional facts, although we do not view these as necessary to determining either our jurisdiction or the effect of the November 2, 1989 order. The Department, on October 2, 1989, had requested one of its service locations to arrange a medical examination of Ms. Morton. Even though the Department issued its order of November 2, 1989 indicating that it could not schedule the

examination within the 90-day period, the medical examination was actually conducted on November 21, 1989 and he Department received a report of that examination on December 4, 1989, which was the day before the initial 90-day period would have expired.

Ms. Morton argues the Department's scheduling o f the examination within the 90-day period is conclusive evidence the Department did not have the good cause (inability to schedule medical examination within 90 days) which the Department stated in its November 2, 1989 order. Ms. Morton acknowledges the report of examination was received only one day prior to expiration of the 90-day period. In this regard, she argues that if good cause still existed for not making a determination within 90 days but the nature of the good cause had changed, the Department's own rule, WAC 296-14-400, required the Department issue a new extension order stating the correct good cause.[1] She contends that because the reason listed at WAC 296-14-400(1) was no longer applicable, the Department was required to issue a new extension order stating the cause listed under WAC 296-14-400(4). Otherwise, she argues, the Department should not be allowed to take advantage of the extension beyond the initial 90 days.

As required by WAC 296-14-400, the order dated November 2, 1989 contained language which conformed to RCW 51.52.050 by stating the order would become final within 60 days, absent a protest or appeal. In order to be recognized as an effective appeal, a written document filed with this Board

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[1]Ms. Morton relies upon the following language within the Department's regulation:

> The department may, for good cause, extend the period in which the department must act for an additional sixty days. "Good cause" for such an extension may include, but not be limited to the following:
>
> (1) Inability to schedule a necessary medical examination within the ninety-day time period;
>
> (2) Failure of the worker to appear for a medical examination;
>
> (3) Lack of clear or convincing evidence to support reopening or denial of the claim without an independent medical examination;
>
> (4) Examination scheduled timely but cannot be conducted and a report received in sufficient time to render a decision prior to the end of the ninety-day time period.
>
> The department shall make a determination regarding "good cause" in a final order as provided in RCW 51.52.050.

WAC 296-14-400.

must, at least, indicate an intent to appeal and what decision or order of the Department is being challenged by the appeal. These minimum requirements are implicit in the language of RCW 51.52.060 and .070. In re Lynnette A. Murray, BIIA Dec., 41,887 (1974). We have already indicated the notice of appeal filed by Ms. Morton does not identify the extension order of the Department dated November 2, 1989, nor does its language mention any matter having to do with the Department's taking an extension of time to make a determination on Ms. Morton's application to reopen her claim. There being no other indicia within the Department claim file of a protest or appeal, it can thus readily be determined that the 60 day time limitation for a protest or appeal from the November 2, 1989 Department order to be filed has long since elapsed.

Even though the statute of limitations has run on the order dated November 2, 1989, the claimant might, under certain circumstances, be able to challenge the validity of the November 2, 1989 order. The circumstances in which an order of the Department, absent appeal, might be determined non-conclusive and without res judicata effect are most broadly described in Abraham v. Dep't of Labor & Indus., 178 Wash. 160 (1934). The court determined that the Department, in issuing an order allowing a claim, had determined a mixed question of law and fact. The Department could not reverse that order after the limitations period had run, even though the Department later came to the belief that the worker was not injured while in the employ of an employer coming under workers' compensation. In so holding, the court stated:

> Under the express terms of statutory law and in accord with its beneficial purposes, the department has original and exclusive jurisdiction, in all cases where claims are presented, to determine the mixed question of law and fact as to whether a compensable injury has occurred. . . .
>
> Since the department is the original and sole tribunal with power to so determine the facts, and its findings are reviewable only on appeal, it must follow that a judgment by it resting upon a finding of fact that the workman was so employed at the time of injury as to be within the act, is final and conclusive upon the department and upon the claimant, unless set aside on an appeal authorized by statute, or unless fraud, or something of like nature, which equity recognizes as sufficient to vacate a judgment, has intervened. (Emphasis supplied)

178 Wash. at 163.

In Booth v. Dept of Labor & Indus., 189 Wash. 201 (1937), an order making a lump sum pension conversion was determined void after the period of limitations had run because the conversion was made without having the value of the annuity then remaining fixed by the Insurance

Commissioner, as clearly required by statute. Also, this Board has previously determined that prior orders of the Department calculating time loss compensation rates were void and without res judicata effect. See, e.g., In re Rod E. Carew, BIIA Dec., 87 3313 (1989) and In re Dennis G. Roberts, BIIA Dec., 88 0073 (1989). In both Carew and Roberts the Department had determined the time loss compensation rate based upon a monthly average wage calculation method which, at the time, contravened a statutory provision which specifically directed a different method for calculation of time loss compensation and which did not authorize the method utilized by the Department.

In In re Laverne H. Schmidt, Dckt. Nos. 88 0158 & 88 0440 (November 20, 1989) we held an order declaring a statutory lien against the claimant's third party recovery was void in part, even though not appealed within the period of limitations, because the Department's determination of the amount of third party recovery in the particular case exceeded the Department's legal authority. A prior superior court ruling had the legal effect of limiting the third party recovery to an amount approximately $72,000.00 less than the recovery amount upon which the Department asserted its lien. In Schmidt, we reviewed two additional cases in which our courts have held orders were void even though not appealed within the period of limitations. See, e.g., Wheaton v. Dep't of Labor & Indus., 40 Wn.2d 56 (1952) and Fairley v. Dep't of Labor & Indus., 29 Wn. App. 477 (1981), rev. denied 95 Wn.2d 1032.

In each instance wherein our appellate courts or this Board have held an order void even though not appealed within the limitations period, it was determined that the Department, by way of the void order, had attempted to adjudicate something which was not within the Department's legal power to adjudicate. This distinguishes these case and directed a different outcome than that in Abraham, supra. Rhodes v. Dep't of Labor & Indus., 103 Wn.2d 895, 899 (1985).

In the present case, the Department clearly acted within its legal authority when it issued its extension order of November 2, 1989; Ms. Morton does not contend otherwise. This entailed addressing a mixed question of fact and law. When the Department issued its order dated November 2, 1989, the Department adjudicated that it could not schedule a medical examination within the original 90-day period allotted under RCW 51.32.160 and, consistent with WAC 296-14-400, determined that this constituted "good cause" for a 60 day extension of time. The fact that the Department's determination of the time necessary to schedule an examination later proved to be incorrect is not material to the issue of whether the Department had legal authority to issue its extension order dated November 2, 1989. The later-learned incorrectness of the Department's factual

determination might conceivably have prompted, or provided some evidentiary basis for, a protest or an appeal. However, absent such an appeal, the order dated November 2, 1989 became final and binding with res judicata effect. The 60-day extension obtained by that order cannot now be collaterally attacked.

Further, we find no reason or authority, in WAC 296-14-400 or otherwise, requiring the Department to issue a further extension order simply because the particular reasons changed. An extension was already obtained; a further order would have been a needless exercise.

Finally, Ms. Morton has not alleged, nor can we conceive of, any other of the reasons contemplated in Abraham, supra, for voiding the non-appealed order as being applicable to this case.

The Proposed Decision and Order granting Ms. Morton summary judgment must, therefore, be vacated and the matter remanded to the hearings process for a determination on the merits of Ms. Morton's application to reopen her claim on grounds of aggravation. The parties are advised that this order is not a final decision and order of the Board within the meaning of RCW 51.52.110. At the conclusion of the proceedings the Industrial Appeals Judge shall, unless the matter is dismissed or resolved by an Order on Agreement of parties, enter a Proposed Decision and Order containing findings and conclusions as to each contested issue of fact and law, based upon the entire record, and consistent with this order. Any party aggrieved by such Proposed Decision and Order may petition the Board for review of such further Proposed Decision and Order, pursuant to RCW 51.52.104.

It is so ORDERED.

Dated this 31st day of October, 1990.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
SARA T. HARMON Chairperson

/s/_____
PHILLIP T. BORK Member