Propst, Mary

BOARD

Stay of proceedings

The Board need not suspend proceedings in the worker's appeal where the employer served the Board a bankruptcy court's stay in an industrial insurance appeal where the employer is not self-insured but participates in the state fund since the presence or absence of the employer from the proceeding has no impact on the adequacy of the statutory relief available. *Citing Matter of Johns-Manville Corp*., 99 Wn.2d 193 (1983). ***….In re Mary Propst,* BIIA Dec., 92 2186 (1993)** [*Editor's Note*: The Board's decision was appealed to superior court under Snohomish County Cause No. 93-2-06468-1.]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: MARY J. PROPST	)	**DOCKET NO. 92 2186**
	)	
CLAIM NO. M-591390	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Mary J. Propst, by
Edward D. Campbell, Attorney

Employer, Nutri/System, Inc., by
Mundt, MacGregor, Happel, Falconer Zulauf & Hall, per
Kathleen C. Van Olst and Scott Zanzig, Attorneys (Withdrawn)
Schnader, Harrison, Segal & Lewis, by
Margaret S. Woodruff, Attorney

The Department of Labor and Industries, by
The Office of the Attorney General, per
Gordon C. Klug, Assistant

This is an appeal filed by the claimant, Mary J. Propst, on April 28, 1992 from an order of the Department of Labor and Industries dated April 20, 1992 which affirmed an order dated June 25, 1992 which rejected the claim for benefits. **DISMISSED**.

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 claimant to a Proposed Decision and Order issued on July 8, 1993 in which the order of the Department dated April 28, 1992 was affirmed.

The Board has reviewed the record and finds that the hearing judge erred in failing to grant the Department of Labor and Industries motion to dismiss the appeal pursuant to CR 12(b)(6) for failure to state a claim on which relief can be granted. Because we now dismiss the appeal, it is not necessary to address the issues raised by the claimant in her Petition for Review, including any erroneous evidentiary rulings and any possible prejudice arising from rescheduling of the original hearing date. The Board must, however, initially address the impact of the stay of proceedings issued in favor of the employer, Nutri/System, Inc., in bankruptcy proceeding, Cause No. 93 12725, before the U.S. Bankruptcy Court for the Eastern District of Pennsylvania.

Title 11 U.S.C. Section 362 provides that:

> a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302 or 303 of this title operates as a stay, applicable to all entities, of –

> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
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> (6) any act to collect, assess or recover a claim against the debtor that arose before the commencement of the case under this title;

Nutri/System, Inc. became the debtor in an involuntary bankruptcy proceeding on May 13, 1992. The attorneys for the employer filed a Notice of Stay pursuant to the automatic stay provisions of Chapter 11 U.S.C. Section 303 on May 11, 1993. Any interested party could have moved the bankruptcy court for relief from that stay for the purpose of the employer's participation in the current appeal. As far as our record reflects, no one did so. For the purpose of this proceeding, the stay is valid on its face and enforceable as to the employer.

The Board's past practice with respect to employers involved in bankruptcy proceedings has been to honor the automatic stay and hold the affected appeal inactive pending the debtor's discharge in bankruptcy. This practice has been, and remains, appropriate when the employer is the only party directly affected by the proceeding. For example, an appeal from a Notice and Order of Assessment involves the Department's attempt to assess and collect funds directly from the employer. In a worker's compensation appeal involving a state fund insured employer, the recovery is assessed against, and collected from, the state fund. The Department of Labor and Industries, as the administrator of the state fund, is also a party defending the appeal.

The question of whether a bankruptcy stay against one of several co-defendants operates as a stay of proceedings against the other parties to the action was addressed by the Washington State Supreme Court in Matter of Johns-Manville Corp., 99 Wn.2d 193 (1983). In that case, Johns-Manville Corp. was one of a number of co-defendants alleged to be jointly and severally liable for asbestos exposure claims under a class action suit. The corporation filed for bankruptcy and obtained a stay. The court ruled that in the instance of jointly and severally liable co-defendants a stay against one party defendant does not operate as a stay against the remaining parties. Obviously, the employer and the Department in a worker's compensation appeal are not jointly and severally liable co-defendants. Any one of multiple co-defendants adjudged to be jointly and severally liable may be required to pay the plaintiff's entire recovery if the other co-defendants cannot. A state fund employer,

on the other hand, is entirely indemnified against any financial recovery even if the employer actively participates in the appeal.

The Johns-Manville court further analyzed whether the corporation was an indispensable party to the litigation under CR 19. The rule provides:

> (a) **Persons to be joined if Feasible.** A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (A) as a practical matter impair or impede his ability to protect that interest or (B) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. . . .
>
> **(b) Determination by Court Whenever Joinder Not Feasible** If a person joinable under (1) or (2) of subdivision (a) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: (1) to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Applying the criteria set forth in CR 19 to the instance of a state fund worker's compensation appeal, we can identify no compelling interest mandating the employer's participation. The state fund is the sole available source of benefits for the worker. Under those circumstances, many state fund insured employers opt not to participate in appeals before the Board at all. The presence or absence of the employer from the proceeding has no impact on the adequacy of the statutory relief available. Under the circumstances, we conclude that this Board need not suspend action against the Department in appeals in which the state fund employer enjoys the benefit of a bankruptcy stay.

We turn now to the resolution of this particular appeal. On June 13, 1991, Mary J. Propst filed an application for benefits alleging an occupational disease consisting of "symptoms of severe anxiety" arising as a consequence of her employment at Nutri/System. On June 25, 1991, the Department rejected the application for benefits on the basis that there was no specific injury and that the condition alleged was not an occupational disease. The reject order is consistent with RCW 51.08.142 which

provides that "claims based on mental conditions or mental disabilities caused by stress do not fall within the definition of occupational disease in RCW 51.08.140."[1]

The claimant concedes the applicability of RCW 51.08.140 to her situation, but challenges the constitutionality of the statute. The Department moved to dismiss the appeal because the Board lacks jurisdiction to hear constitutional issues. It is true that as a quasi-judicial body, this Board lacks authority to rule on constitutional questions. Bare v. Gorton, 84 Wn.2d 380 (1974). The presence of a constitutional question, however, does not deprive the Board of jurisdiction over an otherwise viable appeal. In re Arthur Ryals, Docket No. 87 2993, 87 3983 (September 26, 1989). The motion to dismiss, as argued, raised a legitimate question about the viability of this appeal under CR 12(b)(6), which provides that any party may bring a motion to dismiss a proceeding for failure to state a claim upon which relief can be granted.

Ms. Propst argued that the Department's motion to dismiss must be denied because of a factual dispute over whether the claimed stress-related occupational disease existed. In ruling on a motion to dismiss pursuant to CR 12(b)(6), the finder of fact must accept the allegations of the non-moving party as true. Dennis v. Heggen, 35 Wn. App. 432 (1983). The motion must be granted if it appears beyond doubt that the claimant can prove no set of facts that would entitle her to relief. Orwick v. City of Seattle, 103 Wn.2d 249 (1984). In the present case, Ms. Propst claims that the accumulated stresses of her employment caused her to develop a severe anxiety disorder. Conceding both the existence of the disorder and its alleged cause, there remains no relief that this Board can afford to her, as we are bound by the provisions of RCW 51.08.142 and WAC 296-14-300.

The claimant's attorney and the hearing judge were concerned that Ms. Propst be permitted to exhaust all "administrative remedies" available to ensure entree into the Superior Court where her constitutional argument might be presented. Exhaustion of administrative remedies is a doctrine peculiar to matters litigated under the Administrative Procedures Act, RCW 34.04. It does not apply to proceedings before this Board, which are conducted according to the Rules of Civil Procedure for Superior Courts unless otherwise specifically directed by statute or administrative regulation. WAC 263-12-125. In any event, an order granting a CR 12(b)(6) motion is a final appealable order from which Ms. Propst may launch her appeal to Superior Court.

[1] See W.A.C. 296-14-300 for the specific factors considered to constitute job related stress.

The Department's motion to dismiss this appeal for failure to state a claim on which relief may be granted is granted.

FINDINGS OF FACT

1. On June 13, 1991, the Department of Labor and Industries received an application for benefits from Mary J. Propst alleging she had developed symptoms of severe anxiety as a result of her conditions of employment at Nutri/System, Inc. On June 25, 1991, the Department issued an order rejecting the claim because there was no proof of a specific injury at a definite time and place and her condition was not the result of an industrial injury or occupational disease as defined by the Industrial Insurance Act. Following a timely protest by the claimant on April 20, 1992, the Department issued an order affirming its June 25, 1991 order rejecting the claim.

   On April 28, 1992, the claimant filed a notice of Appeal with the Board of Industrial Insurance Appeals from the April 20, 1992 order. On May 14, 1992, the Board issued an order granting the appeal, assigning Docket No. 92 2186 and directing that further proceedings be held.

2. Mary J. Propst's application for benefits under the Industrial Insurance Act is based entirely on allegations of mental conditions or mental disabilities caused by stress associated with her employment at Nutri/System, Inc.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties to and subject matter of this appeal.

2. Pursuant to the provisions of RCW 51.08.142 and WAC 296-14-300, the severe anxiety condition alleged by Mary J. Propst does not constitute a compensable occupational disease.

3. Pursuant to the provisions of CR 12(b)(6) Mary J. Propst has failed to state a claim on which relief can be granted. The claimant's April 28, 1992 appeal of the Department order dated April 20, 1992 which affirmed the provisions of the June 15, 1991 order rejecting the claim because there was no proof of an injury at a specific time and place and because the condition was not the result of an industrial injury or occupational disease is dismissed.

It is so ORDERED.
Dated this 15th day of October, 1993.

BOARD OF INDUSTRIAL INSURANCE APPEALS
/s/
S. FREDERICK FELLER Chairperson
/s/
FRANK E. FENNERTY, JR. Member
/s/
ROBERT L. McCALLISTER Member