Carrell, Steven

DEPARTMENT

Authority to issue order while superior court appeal pending

Pursuant to RCW 51.52.110 a superior court appeal is not an automatic stay of the Board's decision. The Department has authority to administer the claim consistent with the Board's decision. Despite that authority, neither the Board nor the Department has jurisdiction to reconsider the subject matter of the order that is on appeal to superior court **…*In re Steven Carrell*, BIIA Dec., 99 11430 (1999)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: STEVEN W. CARRELL	)	**DOCKET NO. 99 11430**
	)	
CLAIM NO. T-295538	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Steven W. Carrell, by
Casey & Casey, P.S., per
Carol L. Casey and Gerald L. Casey

Self-Insured Employer, Pope & Talbot, Inc., by
Schwabe, Williamson & Wyatt, P.C., per
Elizabeth K. Reeve

The claimant, Steven W. Carrell, filed a protest and request for reconsideration with the Department of Labor and Industries on November 25, 1998, from an order of the Department dated November 17, 1998. The Department transmitted the protest and request for reconsideration to the Board to be treated as a direct appeal on February 9, 1999. The November 17, 1998 Department order indicated:

> On 10/26/98, the Board of Industrial Insurance Appeals made the following decision on your appeal: The order and notice of 01/10/97 has been corrected as follows: The order issued by the Department of Labor & Industries on April 3, 1997, that canceled the order of January 10, 1997 that closed the claim with time loss benefits through January 29, 1990 and directed the self-insured employer to pay a permanent partial impairment award of category 2 permanent cervical & cervico-dorsal impairments, is incorrect and is reversed. The Department is directed to issue an order closing the claim with time loss compensation as paid and with no award for permanent disability. This claim is closed.

APPEAL 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 August 9, 1999, in which the appeal was dismissed upon motions from the claimant and the self-insured employer, each requesting the appeal be dismissed. In his Petition for Review, the

claimant now complains that the industrial appeals judge incorrectly indicated, in Finding of Fact No. 1, that he had filed an appeal from the November 17, 1998 Department order and failed to indicate that he filed a protest and request for reconsideration from that order. We agree the appeal should be dismissed. We have granted review to make clear our view that the subject matter covered by the November 17, 1998 Department order, i.e., the correctness or incorrectness of that order, remains within the sole jurisdiction of the superior court.

The Department order of November 17, 1998, that closed the claim with time loss compensation as paid and without award for permanent partial disability, is a ministerial order that the Department issued in compliance with our determination in a prior Decision and Order in this claim, *In re Steven W. Carrell*, Dckt. No. 97 4501 (October 26, 1998). The November 17, 1998 Department order takes no action other than that directed in our prior Decision and Order. The language of the order leaves no doubt as to the Department's intentions that the order reflect a ministerial compliance with the prior order of this Board. The Department order states as much and recites in all material respects the language of Conclusion of Law No. 2 in the prior Decision and Order. The claimant took an appeal from that Decision and Order in Superior Court for Kitsap County, Cause No. 98-2-03371-3.

The appeal in the superior court is still pending. Nevertheless, when the Department issued its November 17, 1998 order, the Department included language stating that its ministerial order would become final within 60 days unless a request for reconsideration or an appeal was filed, including a statement that the Department would review the matter and send a new order upon receiving a request for reconsideration. The claimant filed a protest and request for reconsideration, requesting that the Department acknowledge that its order is not susceptible to appeal because the Board's prior Decision and Order, upon which the Department order is premised, is the subject of appeal in superior court. Instead of issuing a new order as the

Department had stated it would upon the filing of a request for reconsideration, the Department forwarded the claimant's protest and request for reconsideration to the Board ostensibly to be treated as a direct appeal. In retrospect, for reasons stated herein, we should have denied the appeal, rather than allow the appeal to proceed thus far. We now dismiss the appeal.

Both the claimant and the self-insured employer filed motions for summary judgment requesting we dismiss the present appeal. The claimant asserts the appeal should be dismissed because he filed a request for reconsideration of the November 17, 1998 order with the Department, thereby obligating the Department to issue a further order rather than forwarding the matter to the Board as an appeal. *See In re Santos Alonzo,* BIIA Dec., 56,833 (1981). The claimant is concerned that, had he not filed a request for reconsideration, the November 17, 1998 order might later be construed as binding upon him, despite his pending superior court appeal concerning the subject matter of that order. The claimant refers to *Marley v. Department of Labor & Indus.*, 125 Wn.2d 533 (1994), as a basis of concern that the Department order, because of its assertion that finality would occur within 60 days absent a protest or appeal, might be construed as final and binding even if it is found to be in error upon the further appeal of our Decision and Order to our courts.

The self-insured employer contends the present appeal should be dismissed because the subject matter of the November 17, 1998 Department order is pending before the superior court, thus depriving the Board of jurisdiction. The self-insured employer notes that the Department's inclusion of language in the November 17, 1998 Department order purporting to provide protest or appeal rights is ineffective to vest the Department or the Board with jurisdiction to consider a matter already pending in superior court.

Clearly, neither this Board nor the Department of Labor and Industries has jurisdiction to reconsider the subject matter of the November 17, 1998 Department order. The Department's

issuance of the order is merely a ministerial act in compliance with our prior order issued under RCW 51.52.106. It is not an "order, decision, or award" of the Department, from which an appeal would lie to this Board or which the Department could reconsider, within the meaning of RCW 51.52.050 and RCW 51.52.060. Further, the subject matter is on further appeal, under RCW 51.52.110, and within the jurisdiction of the Superior Court for Kitsap County. The matter is not susceptible to the Department exercising its own original jurisdiction to issue an "order, decision, or award" within the meaning or RCW 51.52.050 and RCW 51.52.060 in order to allow for its reconsideration or our determination on appeal. *See In re Alfred Greenwalt, Dec'd*, BIIA Dec., 43,070 (1973).

We, therefore, agree with the self-insured employer that the Department cannot vest itself with authority to reconsider the substance of its November 17, 1998 order, nor vest in us the authority to entertain an appeal regarding the substance of that order, by the mere inclusion of language purporting to grant protest or appeal rights.

For like reasons, the claimant can be assured that the superior court retains jurisdiction over the subject matter of the November 17, 1998 Department order. Again, the subject matter of that order is identical to the subject matter of our prior Decision and Order that is presently on appeal in Kitsap County Cause No. 98-2-03371-3. The Department's issuance of the order is a ministerial act in compliance with our prior Decision and Order, the latter of which is subject to pending superior court jurisdiction, and not subject to the Department's original jurisdiction. The Department's recitation that the November 17, 1998 order shall become "final" unless another request for reconsideration or appeal is timely filed cannot operate to divest the superior court of jurisdiction. The November 17, 1998 order is not a "final" order within the meaning of RCW 51.52.050. No appeal or request for reconsideration or protest can lie from the November 17,

1998 Department order, and the claimant need not file such in order to preserve his rights to have the matter decided in our courts. He has already secured that right.

We note that the court in *Marley* held that a Department order may become final, regardless of legal error, where the Department had both personal and *subject matter jurisdiction* to bind the parties to its factual and legal determinations. Here, the Department does not have subject matter jurisdiction to bind the parties to the content of the November 17, 1998 order. That jurisdiction is presently vested in the superior court.

Finally, we recognize that a pending superior court appeal does not necessarily act to stay the effect of a determination of this Board. See RCW 51.52.110 and *In re Harold N. Heaton*, BIIA Dec., 68,701 (1986). Thus, when an appeal is pending in our courts, the Department must still be able to issue a ministerial order in compliance with any of our determinations issued under Chapter 51.52 RCW. At the same time in such circumstances, we suggest that the Department should indicate its recognition that when an appeal is pending in the courts on the matter, such pendency renders the ministerial order subject to change if so directed by the courts. This is particularly true when, as here, a party has informed the Department of the pending appeal and noted the inappropriateness of the language contending that another protest or appeal is necessary to prevent the order from becoming final.

The language prescribed by our Legislature in RCW 51.52.050, informing aggrieved parties of their protest and appeal rights and warning of order finality absent timely exercise of their rights, is applicable only when the Department has issued an "order, decision, or award" pursuant to its *original* jurisdiction. The informative warning language of RCW 51.52.050, such as is used in the Department's November 17, 1998 order, does not accurately convey the status of the ministerial order nor the parties' rights when such order is issued pursuant to an order of this Board or a

judgment of our courts. We suggest the Department use some other language to acknowledge the status of its ministerial orders pending court appeals.

We also recognize that some Department orders containing intended ministerial language may go beyond the directive of the Board or the courts, or the order might be viewed by an aggrieved party as failing to effectuate the directive of the Board or the courts. We thus suggest that the Department consider whether, in circumstances such as those described herein, it would have been sufficient for the Department to have in some manner conveyed to the parties its understanding: that (1) the November 17, 1998 order was intended only as a ministerial order in compliance with the Board's order; (2) that it understood jurisdiction over the matter to be pending in the courts; and (3) that an aggrieved party should file a request for reconsideration or an appeal only if the party believed the order to inaccurately reflect the Board's Decision and Order or considered the order to go beyond the Board's Decision and Order in an exercise of original Department jurisdiction. In any event, we do not believe an appeal to this Board should have been necessary in the present circumstances.

We have considered the Proposed Decision and Order, the Claimant's Petition for Review, the Claimant's Motion for Summary Judgment and the affidavits and memorandum attached thereto, and the Employer's Response to Claimant's Motion for Summary Judgment (which we note contains the self-insured employer's own motion). Based upon these and the entire record before us, we find that the appeal should be dismissed. We make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. On September 28, 1989, Steven W. Carrell, the claimant, filed an application for industrial insurance benefits, alleging he sustained an industrial injury/occupational disease on or about August 14, 1989, to his neck during the course of his employment with Pope & Talbot, Inc., a self-insured employer. On January 10, 1997, the Department of Labor and Industries issued an order indicating the Department was closing the claim with time loss compensation benefits paid through January 29, 1990, and directing the self-insured employer to pay a permanent partial disability award equal to Category 2 of WAC 296-20-240, the categories of permanent cervical and cervico-dorsal impairments.

   On March 10, 1997, the claimant filed a protest and request for reconsideration from the January 10, 1997 order and, on March 21, 1997, the Department held that order in abeyance. On April 3, 1997, the Department issued an order indicating the January 10, 1997 order was canceled. On June 2, 1997, the self-insured employer filed a Notice of Appeal with the Board of Industrial Insurance Appeals from the April 3, 1997 order and, on July 2, 1997, the Board issued an order granting the appeal subject to proof of timeliness, assigning it Docket No. 97 4501, and directed that further proceedings be held.

   On July 20, 1998, a Proposed Decision and Order was issued, but on September 11, 1998 and September 17, 1998, the self-insured employer and claimant, respectively, filed petitions for review of that Proposed Decision and Order. On October 26, 1998, the Board issued a Decision and Order that indicated the Board had jurisdiction over the parties and the subject matter of the timely appeal(s); the Department order dated April 3, 1997, was incorrect and was reversed; Department was directed to issue an order closing the claim with time loss compensation as paid and with no award for permanent partial disability. On November 16, 1998, the claimant filed an appeal in Kitsap County Superior Court from the Board's Decision and Order and it was docketed under Cause No. 98-2-03371-3. On November 17, 1998, the Department issued an order in compliance with the Board's Decision and Order dated October 26, 1998. The Department order contained language indicating the order would become final if no request for reconsideration or appeal was filed within 60 days, and language indicating the Department would reconsider the matter and issue a further order if a timely request for reconsideration was received. On November 25, 1998, the Department received a protest and request for reconsideration from the claimant of the November 17, 1998 Department order. On February 9, 1999, the Department transmitted the claimant's protest and request for reconsideration to the Board as a direct appeal from the November 17, 1998 order. On March 31, 1999, the Board issued an order granting the appeal subject to proof of

timeliness, assigned it Docket No. 99 11430, and directed that further proceedings be held.

2. The order of the Department dated November 17, 1998 was intended by the Department, and was in fact, only a ministerial order in compliance with this Board's Decision and Order of October 26, 1998, in Docket No. 97 4501. The order did not communicate any original order, decision or award made by the Department.

CONCLUSIONS OF LAW

1. There are no material facts at issue in this appeal and the appeal is susceptible to resolution as a matter of law.

2. The Board of Industrial Insurance Appeals has jurisdiction over the parties to this appeal. The Board of Industrial Insurance Appeals does not have jurisdiction over the subject matter of the November 17, 1998 Department order. The order is a ministerial order of the Department and is subject to the jurisdiction of the Superior Court for Kitsap County in Cause No. 98-2-03371-3. The November 17, 1998 Department order is not an order, decision or award of the Department within the meaning of RCW 51.52.050 and RCW 51.52.060.

3. The claimant's appeal from the November 17, 1998 Department order must be dismissed because this Board does not have subject matter jurisdiction to affirm or correct the order.

It is so ORDERED**.**

Dated this 7th day of October, 1999.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

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

/s/_____
JUDITH E. SCHURKE Member