Holzerland, Mildred

BOARD

Jurisdiction determination based on Department file

The Board may review and take notice of the contents of the Department file, sua sponte, at any stage of the proceedings, in order to determine whether it has jurisdiction over the appeal. **….*In re Mildred Holzerland*, BIIA Dec., 15,729 (1965)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: MILDRED HOLZERLAND	**)**	**DOCKET NO. 15,729**
	)	
CLAIM NO. C-559030	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Mildred Holzerland, by
Walthew, Warner and Keefe, per
Eugene Arron, Thomas P. Keefe, Robert H. Thompson,
James E. McIver, and Charles F. Warner

Employer, Scott Paper Company, by
Bell, Ingram and Smith, per
Louis A. Bell

Department of Labor and Industries, by
The Attorney General, per
Franklin K. Thorp, Ronald H. Mentele, and Raymond E. Brown, Assistants

Appeal filed by the employer on May 3, 1961, from two orders of the supervisor of industrial insurance dated April 21, 1961, and April 25, 1961, respectively, the first of which adhered to a prior order dated September 15, 1960, awarding the claimant time-loss compensation from October 5, 1959 to August 5, 1960, and the second of which closed this claim with a permanent partial disability award equal to 10% of the maximum allowable for unspecified disabilities plus time-loss compensation from August 5, 1960, to April 14, 1961, inclusive; and a cross-appeal filed by the claimant on May 23, 1961, from the second of the aforesaid orders. **SUSTAINED** as to the order of April 21, 1961. **REVERSED AND REMANDED** as to the order of April 25, 1961.

DECISION

On February 17, 1964, a Proposed Decision and Order was issued in this matter. Timely exceptions were thereafter filed by both the employer and the department of labor and industries.

By way of exception, the employer takes issue with the Board's jurisdiction of this claim and we shall address ourselves initially to this question. At the original hearing in this matter, the employer stipulated that the Board had jurisdiction. However, during the course of subsequent hearings and after the claimant had rested, the employer challenged the Board's jurisdiction by way of a motion to dismiss, which was denied by the hearing examiner. The employer thereafter appealed this ruling to the Board pursuant to the Rules of Practice and Procedure then in effect governing appeals to the Board from rulings of hearing examiners. On March 25, 1963, the Board

issued an interlocutory order sustaining the examiner's denial of the employer's motion to dismiss, and ordering that the case be set for further hearing for the completion thereof.

The jurisdictional dispute arises out of the administrative processing of this claim at the department level. The department first closed this claim without award for permanent partial disability by order dated November 4, 1959. Thereafter, as recited in the jurisdictional facts, the department issued an order on January 13, 1960, placing its order of November 4, 1959, in abeyance pending further investigation. It is the employer's position that since no appeal was taken from the order of November 4, 1959, such order became final and res judicata so that the department was without jurisdiction to enter its order on January 13, 1960, and this Board has no jurisdiction to entertain an appeal in the premises, citing Perry v. Department of Labor and Industries, 48 Wn. (2d) 205, and White v. Department of Labor and Industries, 48 Wn. (2d) 413.

There can be no question but what the employer's position accords with the law as enunciated by the cited case authority. However, there is additional procedural information which has not as yet been brought to light, and which decisively distinguishes this case from Perry and White, supra.

Appearing at the bottom of the department's order of November 4, 1959, was the standard notation in black-faced type reading as follows: "NO PROTEST RELATIVE TO THIS ORDER OR APPEAL THEREFROM CAN BE RECOGNIZED UNLESS MADE WITHIN 60 DAYS FROM THE DATE OF CLAIMANT'S RECEIPT OF THIS ORDER."

Following the issuance of its order of November 4, 1959, the department received two timely letters of protest on behalf of the claimant - one, from her attending doctor, and the other, from a law firm. The letters were dated November 9, 1959, and December 9, 1959, respectively. The department file discloses an inter-office memorandum dated January 4, 1960, the text of which reads as follows:

> "Hold the final order in abeyance and have the claimant examined by a neurologist and an orthopedist in Seattle for further medical opinion regarding all questions."

As previously noted, the department thereafter issued an order on January 13, 1960, placing the order of November 4, 1959, in abeyance pending further investigation.

The maxim that an order of the department becomes final and res judicata if no appeal therefrom is taken within sixty days is subject to two express provisos contained in R.C.W.

51.52.060. Under the first of such provisos, an order of the department does not become "final" if, within sixty days thereafter (i.e., within the time limited for filing an appeal), the department directs the submission of further evidence in which case the department is required to thereafter make a further decision on the merits. Such further decision then becomes the "final" decision and the time for appeal therefrom does not begin to run until the aggrieved parties are advised thereof in writing.

Under the second of such provisos, an order of the department does not become final if the department, either within sixty days thereof (i.e., within the time limited for an appeal), or within thirty days of the receipt of a notice of appeal, modifies, reverses, changes or holds in abeyance such order.

It is arguable that both provisos find a proper application to the instant situation. However, it is sufficient to say that we are of the opinion that the case falls within the first thereof, and we express no opinion as to the applicability of the second. There is nothing in the statute which requires the department to issue a formal order when it directs the submission of further evidence in the case. Nor is the department required to notify, by written communication or otherwise, any party of such direction. In short, we think the department memorandum of January 4, 1960, constituted a direction by the department that further evidence be submitted within the purview of R.C.W. 51.52.060, and, being within the sixty day limitation period for filing an appeal, precluded the order of November 4, 1959, form becoming final. The order of January 13, 1960, holding the order of November 4, 1959, in abeyance, and issued over sixty days thereafter, is superfluous and wholly immaterial at this juncture. The department made no further decision on the merits of the claim until March 11, 1960, when it issued an order adhering to its order of November 4, 1959. The order of March 11, 1960 was appealed by the claimant on April 14, 1960 - well within the statutory period for filing an appeal.

Accordingly, we hold the Board has jurisdiction of the appeal.

It should be pointed out that the department memorandum of January 4, 1960, was not read into the record as part of the jurisdictional facts, nor otherwise placed in evidence by the parties. This is understandable since it was filed in the department file out of its chronological order, being the final document appearing therein, and would be readily overlooked. Obviously, the parties were unaware of its existence. It was discovered by the Board through a search of the department file on its own initiative. Since this document was not made part of the record in this case by the parties, the legal propriety of the Board's taking note thereof on its own motion warrants a brief comment.

It is to be noted that once an appeal is filed, the department is required by law to transmit its file to the Board. R.C.W. 51.52.070. At that juncture, the contents thereof are reviewed by the Board without limitation or restriction. See R.C.W. 51.52. 080. If, from such review, it appears to the Board that it has jurisdiction and a hearing is ordered, it is customary to have the procedural history thereof read into the record and stipulated to by the parties for jurisdictional purposes. This is done, not to bring such matters within the Board's province so as to enable it to determine whether or not it has jurisdiction, but as an accommodation to the Board and higher reviewing authorities so as to place all aspects of the case, both procedural and substantive, in one unified record for ease of review. The Board has previously reviewed the procedural history of each case in the department file and determined its jurisdiction in the premises prior to granting the appeal. If, as here, the Board's jurisdiction is thereafter challenged on a procedural point, we think it both proper and valid to resort back to the department file for purposes of again reviewing the procedural history of the case to see if we have jurisdiction. This we have done.

Finding No. 3 of the Proposed Decision and Order reads as follows:

> 3. The claimant's condition, attributable to her injury of December 4, 1958, was not fixed at the time her claim was closed on April 25, 1961, in that, she was then, and still is, in need of further treatment."

Based thereon, it was concluded that the claim should be reopened for further treatment (Conclusion No. 1).

The employer accepts to the above finding and conclusion on the ground that there is no evidence nor reasonable inference therefrom in the record that claimant's condition was not fixed on or about April 25, 1961, and that the evidence establishes the contrary.

The record firmly establishes that the claimant has physical disability in her neck plus a psychological condition described as an anxiety reaction. The claimant's attending physician, Dr. John A. Flynn, a general physician and surgeon, last saw her with respect to her injury in October, 1960. He stated that he did not feel at that time that he had anything more that he could contribute in the way of treatment, but expressed no opinion as to whether or not her condition was fixed. When asked if he concurred in the department's closure of her claim on April 25, 1961, he stated in effect that he was not consulted concerning such closure and made no judgment at that time, but upon reflection it would have been his hope that such closure and the disability award would have a therapeutic effect so as to relieve the claimant's symptoms and thereby accomplish that which he

had been unable to do by his course of treatment. It was his opinion that the claimant's psychiatric condition was due to the injury.

Dr. Edwin E. Sprecher, an orthopedist, was one of the department's medical witnesses. He had examined the claimant on two occasions - February 11, 1960, and March 14, 1961. At the time of his 1960 examination, he diagnosed a psychiatric condition which, in his opinion, was in need of treatment. He found no significant change in the claimant's condition as a result of his 1961 examination. He felt that the claimant's problem was chiefly of a psychiatric nature and that her condition could be improved if she were able to overcome her tenseness. However, in his opinion, her psychiatric condition was unrelated to her industrial injury and he felt that any residual condition attributable to the injury was fixed as of April 25, 1961, when her claim was closed. Paralleling the testimony of Dr. Flynn, it was also his thought and hope that the closure of her claim with a disability award would have a salutary effect upon the claimant emotionally and thereby improve her condition. Whether or not he felt her psychiatric condition, regardless of its causal relationship, was still in need of treatment or was treatable as of April 25, 1961, does not appear in the record. In other words, he felt the claimant's industrially related condition was fixed at the time her claim was closed, but his opinion in this respect did not encompass her psychiatric condition which he felt was not related to her injury.

The department also presented the testimony of Dr. Donald Stafford, a neurosurgeon. He testified that although the claimant's injury was not the fundamental cause of her psychiatric condition, it was the precipitating factor which brought on such condition. He was of the opinion that the claimant was in need of rehabilitation - both physically and emotionally - to be accomplished by both physical and psychiatric means used in conjunction with each other. He explained that the success of physical treatment such as graduated exercises and other forms of conservative treatment to the tight, stiff muscles in her neck would be dependent upon her emotional health. Thus, treatment for both her physical and psychiatric condition would be the prescription for her rehabilitation.

In our opinion, the evidence makes out a case for treatment and Finding No. 3 of the Proposed Decision and Order is well supported by the record.

The employer excepts to Findings 2 and 3 of the Proposed Decision and Order on the ground that they are not true findings of fact, but mere legal conclusions which leaves the Decision and Order unsupported by factual findings.

While Finding No. 3, supra, simply constitutes a finding of an ultimate fact, there is no legal requirement that all the evidentiary facts be detailed in the findings. Such a procedure would be both impractical and unduly burdensome. However, we do feel that the finding should be more specific as to the "condition" therein referred to and will be modified accordingly. Finding No. 2 consists of the statement that the claimant was "temporarily totally disabled" from October 5, 1959 to April 14, 1961, as a result of her injury of December 4, 1958. Admittedly, this comes closer to being a pure legal conclusion than a finding of fact, and accordingly should be modified. No contention is made that, even as a legal conclusion, it is not supported by the evidence. The record discloses that during the period in question, the claimant was unable to work due to continuing headaches, neck distress, nervousness and fatigue attributable to her injury.

The department's exceptions are to Finding No. 3 and to the conclusion based thereon (Conclusion No. 1), on the ground that there is no medical evidence to support such finding. This contention was previously answered in our response to the employer's exceptions and no further comment is necessary.

We have reviewed all evidentiary rulings in the record and find no prejudicial error. Such rulings are hereby affirmed.

FINDINGS OF FACT

After reviewing the record in the light of the exceptions taken, and in the light of the foregoing, the Board makes the following findings:

1. On December 4, 1958, the claimant sustained an industrial injury during the course of her employment with the Scott Paper Company when a log of tissue paper fell from a height of approximately six to eight feet and struck her on the head. Her claim based thereon was allowed and on November 4, 1959, the department issued an order closing the claim without award for permanent partial disability. On November 9, 1959, the claimant's attending physician wrote a letter of protest to the department, and on December 9, 1959, a law firm wrote the department a letter of protest on behalf of the claimant. On January 4, 1960, the department, by interoffice memorandum, directed that further medical evidence be submitted in the claim and that its closing order of November 4, 1959, be held in abeyance pending further investigation. On January 13, 1960, the department issued an order holding the order of November 4, 1959, in abeyance pending further investigation. On March 11, 1960, the department issued an order adhering to its order of November 4, 1959, and directing that the claim remain closed pursuant thereto. On April 13, 1960, the claimant filed a notice of appeal. On April 29, 1960, the department issued an order making its orders of

November 4, 1959 and March 11, 1960, interlocutory, pending further investigation. On May 5, 1960, the Board issued an order denying the appeal on the grounds that the order appealed from was not a final order. On August 24, 1960, the department issued an order awarding the claimant time-loss compensation for the period from October 5, 1958 to August 5, 1959, inclusive. On September 15, 1960, the employer filed a notice of appeal. On September 15, 1960, the department issued an order superseding its prior order of August 24, 1960, and correcting the period of time-loss compensation to read from October 5, 1959 to August 5, 1960. On August 5, 1960, the Board issued an order granting the employer's appeal. On January 31, 1961, the Board issued an order, based upon an agreement of the parties, remanding the claim to the department with instructions to hold its order of August 24, 1960 (as amended by the order of September 15, 1960), in abeyance pending (1) the arrangement of a commission medical examination as recommended by the claimant's attending physician, and (2) the entry of a further determinative order based on the report of such examination without prejudice to the right of either the claimant or the employer to appeal from any further order issued and specifically without prejudice to the employer's right at that time to challenge the correctness of the department's order of August 24, 1960, as amended by the order of September 15, 1960, and the correctness of the department's action in reopening this claim for further treatment.

2. On February 17, 1961, the department issued an order, pursuant to the Board's order of January 31, 1961, holding the order of September 15, 1960, which in turn had corrected the still earlier order of August 24, 1960, in abeyance pending medical examination of the claimant and a further order. On April 21, 1961, the department issued an order adhering to its order of September 15, 1960. On April 25, 1961, the department issued an order closing the claim with a permanent partial disability award of 10% of the maximum allowable for unspecified disabilities, plus time-loss compensation for the period August 5, 1960 to April 14, 1961. On May 3, 1961, the employer appealed the orders of April 21, 1961 and April 25, 1961. On May 18, 1961, the Board issued an order granting the employer's appeal. On May 23, 1961, the claimant filed a cross-appeal to the order of April 25, 1961. On June 1, 1961, the Board issued an order granting the claimant's appeal.

3. The claimant's condition attributable to her industrial injury of December 4, 1958, was such that she was unable to engage in gainful employment from October 5, 1959 to April 14, 1961, by reason of complaints of continuing headaches, pain and stiffness in her neck, nervousness and general fatigue, part of which are on a physical basis and part due to a psychiatric condition described as an anxiety reaction due to her injury.

4. The claimant's condition as above described attributable to her industrial injury of December 4, 1958, was not fixed at the time her claim was

closed on April 25, 1961, in that she was then, and still is, in need of further treatment therefor.

CONCLUSIONS OF LAW

Based upon the foregoing findings, the Board concludes:

1. The Board has jurisdiction of the parties and subject matter of the employer's appeal.

2. The Board has jurisdiction of the parties and subject matter in the claimant's appeal.

3. The order of the supervisor of industrial insurance dated April 21, 1961, is correct and should be sustained.

4. The order of the supervisor of industrial insurance dated April 25, 1961, is incorrect insofar as it closed this claim with a permanent partial disability award equal to 10% of the maximum allowable for unspecified disabilities, and this claim should be remanded to the department of labor and industries with instructions to reopen the claim to provide the claimant with further treatment, and to take such other and further action as may be authorized or required by law.

It is so ORDERED.

Dated this 25th day of January, 1965.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
J. HARRIS LYNCH Chairman

/s/_____
R. H. POWELL Member