

Muasau, Saioloa

AGGRAVATION (RCW 51.32.160)

First terminal date: Order on Agreement of Parties

When an agreement back dates the effective date of claim closure, the effective date of claim closure need not be the same date that the Department last adjudicated the merits of the claim. The date the Department last adjudicated the merits of the claim is relevant to determination of the first terminal date. ...*In re Saioloa Muasau, BIA Dec., 17 12438 (2018)* [*Editor's note: The Board's decision was appealed to superior court under Pierce County Cause No. 18-2-09825-0.*]

Scroll down for order.

1 2015, the Department issued another order affirming the order dated August 3, 2015. On
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3 September 30, 2015, Ms. Muasau appealed the Department order dated September 15, 2015. The
4 Board granted the appeal and assigned it Docket No. 15 20437.

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6 On March 4, 2016, the Board issued an OAP that reversed and remanded the Department
7 order dated September 15, 2015, with direction to the Department to issue a new wage order, pay
8 Ms. Muasau time-loss compensation benefits from December 16, 2014, through May 6, 2015, and
9 close the claim as otherwise set forth in the Department order dated May 6, 2015, with permanent
10 partial disability as previously paid. During the course of this appeal, the parties stipulated that at
11 that time the Department agreed to reclose the claim effective May 6, 2015.

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13 Following issuance of the Board OAP on March 4, 2016, the Department issued a series of
14 orders in compliance with the OAP. The first order was issued on April 8, 2016, reversing the previous
15 wage order and stating that the Department will issue a new wage order in compliance with the Board
16 order dated March 4, 2016. On April 11, 2016, the Department issued a new wage order setting the
17 total gross wages as \$3,181.50, single with no dependents. The Department also issued an order
18 on April 12, 2016, directing payment of time-loss compensation as directed in the Board OAP.

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20 On April 13, 2016, the Department issued an order stating that in compliance with the Board
21 order dated March 4, 2016, the claim is closed with 6 percent permanent partial disability of the right
22 upper extremity, less previously paid permanent partial disability. On May 10, 2016, Ms. Muasau
23 filed a protest to the April 11, 2016 wage order and any other adverse orders. On May 11, 2016, the
24 Department issued an order that it was reconsidering the orders dated April 11, 2016, April 12, 2016,
25 and April 13, 2016.

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27 On August 23, 2016, Ms. Muasau filed an application to reopen her claim. On December 8,
28 2016, the Department issued a further wage order, adding health care benefits of \$678.35 a month
29 to the claimant's gross wages, which were now increased to \$3,859.85 a month, single with no
30 dependents. On December 12, 2016, the Department again closed the claim with 6 percent
31 permanent partial disability for the right upper extremity. On January 10, 2017, the Department
32 issued a further order adjusting the time-loss compensation rate based on the new wage rate.

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34 On January 11, 2017, the Department issued an order stating that the following action was
35 taken to comply with the Board order dated March 4, 2016, correcting and superseding the payment
36 order of December 12, 2016, awarding Ms. Muasau a 6 percent permanent partial disability for the
37 right upper extremity, less deductions previously paid, and closing the claim. On January 27, 2017,
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1 the Department issued the final order on appeal, which states that it acted in accordance with the
2 Board order dated March 4, 2016, and affirmed "the ministerial Order dated 01/11/2017."
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4 The parties are disputing the effective date of claim closure. Ms. Muasau contends that the
5 Board OAP directed the Department to close the claim effective May 6, 2015, so the Department
6 order dated January 27, 2017, on appeal should have indicted the correct closure date of May 6,
7 2015. In her notice of appeal, Ms. Muasau also states that she filed a reopening application on
8 August 23, 2016, which the Department has not yet acted on. Ms. Muasau claims that the first
9 terminal date for purposes of determining aggravation based on the prior OAP should be May 6,
10 2015, citing to *In re Jimmy Storer*.¹
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12 The Department argues in response that when Ms. Muasau appealed the ministerial orders
13 issued by the Department in compliance with the Board OAP, she asked the Department to continue
14 to adjudicate her claim by issuing additional orders establishing a wage rate that included health care
15 benefits, paying time-loss compensation at the newly established rate, and closing the claim.
16 Although the claimant protested "any adverse orders" after the ministerial orders of April 11, 2016,
17 April 12, 2016, and April 13, 2016, the only real contested issue with the protest was that the wage
18 rate was calculated without including health care benefits of \$678.35 a month, which would increase
19 the total gross monthly wages to \$3,859.85.
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21 The Department argues that May 6, 2015, cannot be the effective date of claim closure
22 because the Department continued to adjudicate her claim past that date. The Department contends
23 that it continued to adjudicate Ms. Muasau's claim until December 2016, when replacement orders
24 were issued reflecting the new wage rate and time-loss compensation payments. The Department's
25 position is that Ms. Muasau is trying to have it both ways by protesting the calculation of her wage
26 rate and asking the Department to close the claim effective May 6, 2015. The Department argues in
27 the alternative that if the Board agrees with Ms. Muasau that the effective closing date is May 6, 2015,
28 she should have to revert to the lower wage rate, even though the last wage rate order of December 8,
29 2016, appears to have become final and binding.
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31 In the Proposed Decision and Order, our industrial appeals judge disagreed with the positions
32 taken by both Ms. Muasau and the Department. First, she determined that the Board's scope of
33 review is limited to whether the Department's order of January 27, 2017, is a ministerial order. Then,
34 she held that the January 27, 2017 order was solely ministerial in purpose. In doing so, she also
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47 ¹ BIIA Dec., 86 4436 (1988).

1 decided that the Department last decided the merits or last adjudicated Ms. Muasau's claim on
2 September 15, 2015. In the Department order dated September 15, 2015, the Department affirmed
3 a closing order dated August 3, 2015, which affirmed the earlier closing order dated May 6, 2015. As
4 discussed above, the September 15, 2015 order was the Department order on appeal that resulted
5 in the OAP now in dispute.
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9 A ministerial order is one in which the Department takes no action other than that directed.²
10 An issuance of a Department order pursuant to the terms of a Board OAP is merely a ministerial act.³
11 It is not an "order, decision, or award" of the Department from which an appeal can be taken to the
12 Board, or which the Department could reconsider, within the meaning of RCW 51.52.050 and
13 RCW 51.52.060.⁴ Ordinarily, the Board will deny an appeal of a purely ministerial order before
14 hearings are scheduled,⁵ but the appealing party in this case alleged that the order did not comply
15 with the OAP and thus was not purely ministerial.
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19 The language of the order itself leaves no doubt that the Department intended that the order
20 reflect a ministerial compliance with the Board OAP. It states, "in accordance with the order of the
21 Board of Industrial Insurance Appeals, dated 03/04/16 . . . the ministerial Order dated 01/11/17, is
22 affirmed." In all material respects, the January 11, 2017 order, which was affirmed by the January 27,
23 2017 order, recites the language in the May 6, 2015 closing order as directed in the Board OAP,
24 which ordered the Department to "[c]lose the claim as otherwise set forth in the Department order
25 dated May 6, 2015, with permanent partial disability as previously paid."
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30 The order takes no action other than that directed in the Board OAP issued on March 4, 2016.
31 Therefore, it is solely ministerial. Although the Department order dated January 27, 2017, would
32 have been much clearer if it had simply stated that the effective date of claim closure is May 6, 2015,
33 the fact that the order lacks this language does not mean that it is not ministerial or changes the
34 effective date of closure. We hold that the effective date of claim closure for Ms. Muasau's claim is
35 May 6, 2015, consistent with the agreement of the parties as reflected in the Board OAP issued on
36 March 4, 2016.
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40 Because we find that the Department order of January 27, 2017, is solely ministerial, the Board
41 does not have jurisdiction to reconsider the subject matter of the January 27, 2017 order. The
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45 ² *In re Steven Carrell*, BIIA Dec., 99 11430 (1999).

46 ³ *In re Jimmy Storer*.

47 ⁴ *In re Jimmy Storer*.

⁵ See *In re Donald Workman*, BIIA Dec., 00 24102 (2001).

1 January 27, 2017 order is not an "order, decision, or award" of the Department from which an appeal
2 can be taken to the Board within the meaning of RCW 51.52.050 and RCW 51.52.060. Therefore,
3 we must dismiss Ms. Muasau's appeal. But in dismissing Ms. Muasau's appeal, we also feel that it
4 is necessary to clarify for the parties that the effective date of claim closure is not necessarily the
5 same as the date the Department last adjudicated the merits of the claim, a date that is important to
6 determine the first terminal date for purposes of establishing aggravation of a particular condition.
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10 The law is well settled that for purposes of determining the first terminal date in an aggravation
11 case, it is not the date of the final Board order,⁶ or the date of a Department ministerial order issued
12 to effectuate the terms of an OAP,⁷ it is the date through which the Department last considered the
13 merits of the claim or adjudicated the claim. Typically, that date would be the date of the order under
14 appeal resulting in an OAP, but in a least one case, *In re Ernest Kish*,⁸ the Board held that when the
15 parties agreed in an OAP that the Department should adjudicate a claim through a later date, that
16 became the first terminal date.
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18 At this time, the issue of whether there has been an aggravation of Ms. Muasau's claim is not
19 before us. Therefore, it is premature to make a determination of the first terminal date. But we would
20 like to respond to the Department's argument that May 6, 2015, cannot be the effective date of claim
21 closure because the Department contends that it continued to adjudicate her claim past that date. In
22 light of our holding that the Department orders following issuance of the Board's OAP were solely
23 ministerial, based on established precedent, the date the Department last adjudicated the merits of
24 Ms. Muasau's claim was September 15, 2015.
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26 **DECISION**

27 In Docket No. 17 12438, the claimant, Saioloa S. Muasau, filed an appeal with the Board of
28 Industrial Insurance Appeals on March 8, 2017, from an order of the Department of Labor and
29 Industries dated January 27, 2017. In this order, the Department affirmed a ministerial order dated
30 January 11, 2017, in accordance with a Board order dated March 4, 2016. In the order dated
31 January 11, 2017, in order to comply with the Board order dated March 4, 2016, the Department
32 corrected and superseded the order of December 12, 2016, awarded Ms. Muasau a 6 percent
33 permanent partial disability, and closed the claim. The appeal is dismissed.
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45 ⁶ *In re Donald Workman*.

46 ⁷ *In re Jimmy Storer*, BIIA Dec., 86 4436 (1988).

47 ⁸ BIIA Dec., 12 20993 (2014).

FINDINGS OF FACT

1. On May 2, 2017, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History in the Board record solely for jurisdictional purposes.
2. Saiolua Muasau developed an occupational disease for the conditions diagnosed as right wrist flexor tenosynovitis and right wrist strain that arose of the distinctive conditions of her employment with Gensco, Inc.
3. On September 15, 2015, the Department issued an order affirming an order dated May 6, 2015, closing Ms. Muasau's claim with a 6 percent permanent partial disability award for her right upper extremity. On September 30, 2015, Ms. Muasau filed a timely appeal to the Department order dated September 15, 2015. The Board granted Ms. Muasau's appeal and assigned it Docket No. 15 20437.
4. On March 4, 2016, the Board issued an Order on Agreement of Parties under Docket No. 15 20437, which reversed and remanded the order dated September 15, 2015, with direction to the Department to issue a new wage order, pay Ms. Muasau time-loss compensation benefits from December 16, 2014, through May 6, 2015, and close the claim as otherwise set forth in the Department order dated May 6, 2015.
5. The parties stipulated that as part of the Board OAP issued on March 4, 2016, the Department agreed to reclose the claim effective May 6, 2015.
6. On April 11, 2016, the Department issued a new wage order. On April 12, 2016, the Department issued an order paying Ms. Muasau time-loss compensation benefits from December 16, 2014, through May 6, 2015. On April 13, 2016, the Department issued an order stating that in compliance with the Board order dated March 4, 2016, Ms. Muasau is awarded 6 percent permanent partial disability for her right upper extremity, less any previously paid permanent partial disability.
7. On May 10, 2016, Ms. Muasau protested the Department order dated April 11, 2016, order along with any other adverse orders. The Department issued a new wage order dated December 8, 2016. On December 12, 2016, the Department closed the claim again with a 6 percent permanent partial disability award for her right upper extremity, less any previously paid permanent partial disability.
8. On January 27, 2017, the Department issued the order on appeal, which states that in accordance with the Board order dated March 4, 2016, the ministerial order dated January 11, 2017, is affirmed. In the January 11, 2017 order, the Department stated that in compliance with the Board order dated March 4, 2016, it was correcting and superseding the order of December 12, 2016, awarding Ms. Muasau a 6 percent permanent partial disability award, less any previously paid permanent partial disability award, and closing the claim.



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9. The Department order dated January 27, 2017, was a ministerial order in compliance with the Board order dated March 4, 2016, issued under Docket No. 15 20437. The order did not communicate any original order, decision, or award made by the Department.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties in this appeal.
2. The Department order dated January 27, 2017, was solely ministerial and closed the claim effective May 6, 2015. The 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. Ms. Muasau's appeal from the Department order dated January 27, 2017, is dismissed because the Board does not have subject matter jurisdiction to affirm or correct the order.

18 Dated: June 28, 2018.

19 BOARD OF INDUSTRIAL INSURANCE APPEALS

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Addendum to Decision and Order
In re Saiolua S. Muasau
Docket No. 17 12438
Claim No. AR-66828

Appearances

Claimant, Saiolua S. Muasau, by Law Office of Thomas F. Feller, PLLC, per Thomas F. Feller
Employer, Gensco, Inc., None
Retrospective Rating Group Lay Representative, Approach Management Services, None
Department of Labor and Industries, by Office of the Attorney General, per Kay A. Germiot

Petition for Review

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The claimant filed a timely Petition for Review of a Proposed Decision and Order issued on April 23, 2018, in which the industrial appeals judge affirmed the Department order dated January 27, 2017.

Evidentiary Rulings

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed.