BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: RICHARD M. BALLARD	**)**	**DOCKET NO. 23 14950**
	)	
CLAIM NO. BH-93541	**)**	**DECISION AND ORDER**

In 2022, Richard M. Ballard was injured while working for Central Washington Asphalt, Inc. He was injured while riding a work bus from a job site. Mr. Ballard filed a workers' compensation claim. On August 29, 2022, the Department of Labor and Industries issued an order allowing the claim. On April 6, 2023, with no party protesting or appealing the August 29, 2022 order allowing the claim, the Department affirmed it. The employer appealed the April 6, 2023 order.

Mr. Ballard filed a motion for summary judgment. He asks that the employer's appeal be dismissed. The Department joined in the motion. They argued that the Department's August 29, 2022 order became final and binding and that the employer was not entitled to relief. The employer argued that a protest by Mr. Ballard kept that order from becoming final and binding. The industrial appeals judge agreed with Mr. Ballard and the Department. He dismissed Central Washington Asphalt's appeal. Central Washington Asphalt petitioned for review. After a careful consideration of the record and Washington law, we agree that Mr. Ballard and the Department are entitled to summary judgment. We hold that the April 6, 2023 order must be vacated because the Department had no authority to issue it. Therefore, the April 6, 2023 order is **REVERSED AND REMANDED** to the Department to vacate the order.

DISCUSSION

On July 29, 2022, Richard M. Ballard injured his neck, back, and shoulder while riding a bus provided by his employer, Central Washington Asphalt, Inc. On August 29, 2022, the Department issued an order allowing Mr. Ballard's workers' compensation claim. The Department provided treatment and wage replacement benefits.

On October 20, 2022, an attorney for Mr. Ballard filed a notice of appearance; protested an overpayment order issued October 11, 2022; and included a generic protest to any orders adverse to the claimant that were filed within the previous 60 days. By the end of October 2022, Retrospective Rating Group #10636 (the Retro Group) filed the following protests:

1. On August 31, 2022, it protested the August 30, 2022 and the August 31, 2022 time-loss orders;[1]

[1] Ex. 10, 12.

2. On October 3, 2022, it protested a September 27, 2022 time-loss order;[2]
3. On October 21, 2022, it protested a September 13, 2022 time-loss order;[3] and
4. On October 21, 2022, it again protested the August 30, 2022, August 31, 2022, and September 27, 2022 time-loss orders.[4]

The record does not show that either Central Washington Asphalt or the Retro Group protested or appealed the August 29, 2022 claim allowance order.

On April 6, 2023, more than seven months after it issued the August 29, 2022 claim allowance order, the Department issued an order affirming allowance. It is not clear why the Department took this action. Central Washington Asphalt appealed, and that appeal is before us.

Mr. Ballard filed a motion for summary judgment, asking us to dismiss the appeal. He argued that Central Washington Asphalt did not file a timely appeal of the August 2022 claim allowance order and that the Department issued the April 2023 order without statutory authority to do so. Central Washington Asphalt filed a cross-motion for summary judgment, arguing that Mr. Ballard's protest to any adverse orders prevented the August 2022 allowance order from becoming final and binding and gave Central Washington Asphalt a right to a hearing on the merits of the claim allowance. At the hearing on the summary judgment motions, the Department agreed that it had no authority to issue the April 2023 order and that summary judgment for Mr. Ballard was appropriate.

The parties agree that no issue of material fact exists in this case. On October 20, 2022, Mr. Ballard's attorney filed what is called a generic protest. Generic protests are routinely filed by attorneys as protective devices soon after a party comes to them for assistance with a workers' compensation claim. They are filed to protest any *adverse* orders that have been recently issued.[5]

The question is whether the generic protest that Mr. Ballard filed on October 20, 2022, was a valid protest of the August 29, 2022 allowance order. Did the protest reasonably put the Department on notice that Mr. Ballard was seeking action inconsistent with the Department's decision?[6]

To protest or appeal the allowance order, Central Washington Asphalt had to file an appeal within 60 days of receiving it or the order would become final and binding, even if it was incorrect.[7] The record shows the parties timely protested several Department orders in the 60 days after the

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[2] Ex. 16.
[3] Ex. 19.
[4] Ex. 17, 18, 20.
[5] *In re Misael Lopez Hernandez*, Dckt. No. 15 16634 at 1 (April 28, 2016).
[6] *In re Mike Lambert,* BIIA Dec., 91 0107 (1991).
[7] *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 538 (1994).

Department issued the August 2022 claim allowance order, but it does not show that Central Washington Asphalt protested or appealed the allowance order in that time.

Here, Central Washington Asphalt argues that Mr. Ballard's generic appeal of adverse orders should be construed as a valid protest of the allowance order, one that prevented the allowance order from becoming final and binding. Central Washington Asphalt contends that Mr. Ballard's generic protest required the Department to issue a further appealable allowance order and that, therefore, the Department had statutory authority to issue the April 2023 affirming order.

However, the Department had authority to issue a further order only if one of the following circumstances existed: (1) a protest or request for reconsideration has been filed within 60 days of the date the order was communicated;[8] (2) the Department, before the appeal deadline, asks for more evidence or further investigation; or (3) the Department, within the time limited for appeal, or within 30 days after receiving a notice of appeal, decides to change or reverse an order or to hold it in abeyance.[9]

Mr. Ballard and the Department argue that Mr. Ballard's generic protest was insufficient to prevent the August 2022 claim allowance from becoming final and binding. Under *Lambert*, Mr. Ballard asserts, a valid protest must be reasonably calculated to put the Department on notice that the party is seeking action inconsistent with the Department's decision or order. Further, the Department argues, a protest has to indicate an intent to appeal and has to challenge a specific Department decision or order,[10] something Mr. Ballard's generic protest did not include.

In 2016, we addressed these competing arguments in appeals with similar facts.[11] Those appeals involved Misael Lopez Hernandez, who filed a workers' compensation claim for an industrial injury that occurred in January 2013. The Department allowed the claim in February 2013. In April 2013, the Department issued an order setting Mr. Lopez Hernandez's wage rate and paying him time-loss compensation for a short period. Also in April 2013, a representative for Mr. Lopez Hernandez filed a generic protest to any adverse orders, which the Department apparently construed as a protest of the wage order, because in May 2013, the Department affirmed the April 2013 wage order.

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[8] RCW 51.52.050.
[9] RCW 51.52.060.
[10] *In re Lynette Murray* (I), BIIA Dec., 41,887 (1974).
[11] *In re Misael Lopez Hernandez,* BIIA Dec.,15 16635 (2016); *In Misael Lopez Hernandez,* Dckt. No. 15 16634 (April 28, 2016).

Further time-loss orders followed in fall 2013. Mr. Lopez Hernandez hired a new attorney, who filed a notice of appearance in November 2013 and protested any adverse orders. In May 2015, the Department issued two more orders—one affirming the February 2013 claim allowance and the other affirming the series of 2013 time-loss orders. The employer timely appealed both May 2015 orders. The appeals were consolidated for hearing, and the judge dismissed both appeals. The employer appealed the Proposed Decision and Order.

The Board determined that each case required a separate decision because of distinctive determinations made in each appeal. In the first *Lopez Hernandez* decision (Docket No. 15 16634), the Board held that the claimant's generic April 2013 protest did not reasonably put the Department on notice that he was protesting the allowance order because such action was inconsistent with his filing a claim in the first place. However, in the second *Lopez Hernandez* decision (Docket No. 15 16635), the Board held that Mr. Lopez Hernandez's generic protest filed in November 2013 could reasonably put the Department on notice that Mr. Lopez Hernandez was protesting the time-loss compensation orders, because he could have disagreed with the amount paid or the calculation used to determine his wage rate.

Central Washington Asphalt argues that the second *Lopez Hernandez* decision (Docket No. 15 16635) applies to Mr. Ballard's case, but we find that it doesn't. That decision specifically applies to how a generic protest affects time-loss orders.

The first *Lopez Hernandez* decision (Docket No. 15 16634) applies to Mr. Ballard's case because the issue is how a generic protest affects an allowance order. Central Washington Asphalt's argument in the present appeal is contrary to our conclusions in the *Lopez Hernandez* decision. We find that Mr. Ballard's generic protest did not reasonably put the Department on notice that its allowance order was being protested. Mr. Ballard filed the claim, and it is inconsistent that he would protest allowance of his claim.

Neither Central Washington Asphalt nor AGC (the Retro Group) protested or appealed the August 2022 allowance order, so it became final and binding on or about October 28, 2022. The April 2023 order must be vacated because the Department had no statutory authority to issue it.[12]

The Department and Mr. Ballard are asking us to apply the doctrine of res judicata or claim preclusion to bar this appeal. To invoke the doctrine of claim preclusion, a party must establish five elements as between a prior action and a subsequent challenged action: concurrence of identity . . .

[12] *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533 (1994).

(1) of subject matter; (2) of cause of action; (3) of persons and parties; (4) in the quality of the persons for or against whom the claim is made; and (5) the application of res judicata cannot work an injustice.[13] Here, the Department's prior order allowing this industrial insurance claim is the same thing being challenged in this appeal. It's the same subject matter, cause of action, and identical interested parties. Finally, there has been no evidence offered to explain how adhering to the earlier final claim allowance order would work an injustice against Central Washington Asphalt.

Motion for Summary Judgment

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[14] Here, all parties agreed that no material facts were in dispute, and all moved for summary judgment. We agree that Mr. Ballard and the Department are entitled to summary judgment. However, we do not dismiss the employer's appeal as they requested. Instead, for the reasons explained above, we reverse the April 6, 2023 order and remand this matter to the Department with direction to vacate the order and hold it for naught. The employer's cross-motion for summary judgment is denied.

DECISION

In Docket No. 23 14950, the employer, Central Washington Asphalt, Inc., filed an appeal with the Board of Industrial Insurance Appeals on April 21, 2023, from an order of the Department of Labor and Industries dated April 6, 2023. In this order, the Department affirmed the August 29, 2022 order allowing the claim. This order is incorrect and is reversed. This matter is remanded to the Department to vacate the order and hold it for naught.

FINDINGS OF FACT

1. On June 13, 2023, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History in the Board record solely for jurisdictional purposes.
2. Richard M. Ballard sustained an industrial injury on July 29, 2022, while employed by Central Washington Asphalt, Inc.
3. The pleadings and evidence submitted by the parties demonstrate that no general issue of material fact exists.
4. On August 29, 2022, the Department issued a Notice of Decision allowing the claim.

[13] *Weaver v. City of Everett*, 194 Wn.2d 464, 483 (2019).
[14] CR 56(c).

5. No party, including Central Washington Asphalt, protested or appealed the August 29, 2022 allowance order within 60 days of when that order was communicated.

6. The Department issued a Notice of Decision on April 6, 2023, affirming the August 29, 2022 allowance order.

7. On April 21, 2023, Central Washington Asphalt appealed the April 6, 2023 order.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter in this appeal.

2. The parties are entitled to a decision as a matter of law as contemplated by CR 56.

3. The August 29, 2022 allowance order became final and binding 60 days after it was communicated to the parties, that is, around the end of October 2022. RCW 51.52.060.

4. The Department had no authority to issue the April 6, 2023 order adhering to the August 29, 2022 claim allowance order and the Department and Mr. Ballard proved res judicata applies. *Marley v. Dep't of Labor & Indus.,* 125 Wn.2d 533 (1994).

5. The April 6, 2023 order is incorrect and is reversed. This matter is remanded to the Department to vacate the order and hold it for naught.

Dated: August 30, 2024.

BOARD OF INDUSTRIAL INSURANCE APPEALS

HOLLY A. KESSLER, Chairperson

ISABEL A. M. COLE, Member

Addendum to Decision and Order
In re Richard M. Ballard
Docket No. 23 14950
Claim No. BH-93541

Appearances

Claimant, Richard M. Ballard, by Brumback & Ottem Injury Law, per Sidney P. Ottem

Employer, Central Washington Asphalt, Inc., by Pratt Horstman & Stratton, PLLC, per Gibby M. Stratton

Retrospective Rating Group, AGC Group Retro #10636 (did not appear)

Department of Labor and Industries, by Office of the Attorney General, per James A. Yockey

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 employer filed a timely Petition for Review of a Proposed Decision and Order issued on March 19, 2024, in which the industrial appeals judge dismissed the appeal. The claimant filed a response to the Petition for Review.

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.