Houle, Orena

RES JUDICATA

Allowance of claim

SCOPE OF REVIEW

Allowance of claim

Although the Board exceeded its scope of review in a prior appeal in this claim when it ordered that the claim be allowed as a "temporary" aggravation of a pre-existing condition, that decision is final and the doctrine of *res judicata* prevents the Board from making a decision inconsistent with the prior determination regarding the temporary nature of the condition. **….*In re Orena Houle*, BIIA Dec., 00 11628 (2001)** [*Editor's Note*: Consider application of holding of In *re Keith Browne*, BIIA Dec., 06 13972 (2007).]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: ORENA A. HOULE	**DOCKET NO. 00 11628**
CLAIM NO. T-866054	**DECISION AND ORDER**

APPEARANCES:

Claimant, Orena A. Houle, by
Casey & Casey, P.S., per
Carol L. Casey

Self-Insured Employer, Sitca Corporation, by
Keehn Arvidson, PLLC, per
Gary D. Keehn

The claimant, Orena A. Houle, filed an appeal with the Board of Industrial Insurance Appeals on February 15, 2000, from an order of the Department of Labor and Industries dated January 14, 2000. The order affirmed the Department order of April 30, 1999, which had closed the claim without further award for time loss compensation or permanent partial disability. The January 14, 2000 order also determined that the claim had been accepted as a temporary aggravation of the claimant's pre-existing asthma and emphysema conditions. **AFFIRMED.**

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 September 29, 2000, in which the order of the Department dated January 14, 2000, was affirmed.

Orena A. Houle, a 59 year-old resident of Ewa Beach, Hawaii, filed an industrial insurance claim on April 19, 1994, in which she alleged exposure to resin and glue fumes while in the course of her employment with the K-2 Corporation of Vashon Island. Her claim was allowed and benefits provided.

In 1997, a disagreement arose as to whether Ms. Houle was temporarily totally disabled from the spring of 1996 through March of 1997 as a proximate result of her industrial condition. The Department of Labor and Industries issued an order dated March 7, 1997, which directed the self-insured employer, K-2 Corporation, to pay time loss for the period in question. K-2 Corporation appealed, arguing that Ms. Houle had fully recovered from her exposure to workplace fumes such that K-2 was no longer obligated to pay benefits.

This Board heard the appeal, identified by Docket No. 97 2041. Based on the preponderance of credible evidence, we established that during the period of April 5, 1996 through March 7, 1997, Ms. Houle had no physical restrictions relating to her January 27, 1994 occupational exposure. We further found that "As a proximate result of her January 27, 1994 occupational exposure while working for K-2 Corp., the claimant sustained a **temporary** aggravation of her pre-existing asthma and emphysema." 12/12/97 Decision and Order, at 2. (Emphasis added.) Following Ms. Houle's appeal to Superior Court, our Decision and Order of December 12, 1997, Docket No. 97 2041, became final.

On January 14, 2000, the Department of Labor and Industries issued the order that gave rise to the current appeal. In its order, the Department affirmed its closing order of April 30, 1999, and stated, "IT IS FURTHER ORDERED THAT THIS IS ACCEPTED AS A TEMPORARY AGGRAVATION OF PRE-EXISTING ASTHMA AND EMPHYSEMA CONDITIONS." Ms. Houle appealed. Pleading in the alternative, she sought either further treatment, a permanent partial disability award, or a total disability pension.

The employer filed a motion for summary judgment. Our industrial appeals judge considered the motion and determined that there were no genuine issues of material fact. Our judge further determined that it was res judicata that as a proximate result of the January 27, 1994 occupational exposure, Ms. Houle developed a temporary aggravation of her pre-existing asthma

and emphysema. He concluded that because Ms. Houle's condition was temporary, she was not entitled to further benefits within the meaning of Title 51 RCW.

Ms. Houle responded to our industrial appeals judge's ruling by filing a Petition for Review, bringing the matter before the Board again. She argued that the Board had gone too far in its earlier decision when it determined that her condition was temporary, noting that the subject of the March 7, 1997 Department order related to time loss compensation. The issue of whether her condition was temporary or permanent had not been passed on by the Department of Labor and Industries and was not properly before the Board. Ms. Houle argued that she was not legally precluded from seeking further benefits by way of her appeal of the closing order.

Two questions arise: First, did the Board go beyond its scope of review in Docket No. 97 2041 when it determined that Ms. Houle experienced a temporary aggravation of a pre-existing condition? Second, if the Board exceeded the scope of review, what legal consequences flow from that determination?

Without belaboring the matter, we find that we did exceed the scope of our review under Docket No. 97 2041. Arguably, it would have been sufficient in our first decision to simply conclude that Ms. Houle experienced an aggravation of a pre-existing condition and omit mention of whether it was temporary or permanent. Inclusion of the word "temporary" was technically not essential for deciding the question of Ms. Houle's employability or entitlement to time loss compensation. Quoting *In re Darlene Ross*, BIIA Dec., 88 4379 (1990), "[W]e exceeded our authority in the prior appeal by, in effect, making an advance determination regarding permanent disability." With that said, we turn to examine the question of what legal consequences flow from exceeding the scope of review.

The Department of Labor and Industries has original jurisdiction in matters relating to industrial insurance. The Legislature has granted the Department broad authority to decide claims

for workers' compensation. *See* RCW 51.04.020. The Department has original and exclusive jurisdiction, in all cases where claims are presented, to determine the mixed question of law and fact as to whether a compensable injury has occurred. *Marley v. Department of Labor & Indus*., 125 Wn.2d 533, 540 (1994); citing *Abraham v. Department of Labor & Indus*., 178 Wash. 160, 163 (1934).

The Board's jurisdiction, on the other hand, is appellate only and is considerably more limited than that of the Department. It is not disputed that the Board's and the Superior Court's jurisdiction is appellate only, and for the Board and the trial court to consider matters not first determined by the Department would usurp the prerogatives of the Department, the agency vested by statute with original jurisdiction. *Lenk v. Department of Labor & Indus*., 3 Wn. App. 977, 982 (1970), citing *Cole v. Department of Labor & Indus*., 137 Wash. 538 (1926). If a question is not passed upon by the Department, it cannot be reviewed either by the Board or the Superior Court. The questions the Board may consider and decide are fixed by the order from which the appeal was taken (*see Woodard v. Department of Labor & Indus*., 188 Wash. 93 (1936)) as limited by issues raised by the Notice of Appeal. *Brakus v. Department of Labor & Indus*., 48 Wn.2d 218 (1956). Superior Court has been found to lack jurisdiction in the instance where the Board exceeded its scope of review. The Supreme Court has consistently held that the Superior Court may not consider a question that was not properly before the Board. *Hanquet v. Department of Labor & Indus*., 75 Wn. App. 657, 663, 664 (1994).

At first blush, it appears that subject matter jurisdiction and scope of review are synonymous when used in the context of Washington State industrial insurance law. However, our Supreme Court's decision in *Marley* suggests that the court's use and interpretation of the two concepts is evolving.

The *Marley* court indicated that subject matter jurisdiction refers only to the kinds of controversies the Department or the Board may adjudicate. A tribunal lacks subject matter jurisdiction when it attempts to decide a type of controversy over which it has no authority to adjudicate. The focus must be on the words "type of controversy." If the type of controversy is within the subject matter jurisdiction, then all other defects or errors relate to something other than subject matter jurisdiction. *Marley*, at 533.

There is strong tendency in procedural law to treat various kinds of serious procedural errors as defects in subject matter jurisdiction. This is because characterizing a court's departure in exercising authority as jurisdictional may permit an objection to the departure to be taken belatedly. If the defect in the proceedings is treated as a matter of the court's jurisdiction, then under various circumstances it can be a basis for attack on the judgment after it has become final. In other words, the classification of a matter as one of jurisdiction is a pathway of escape from the rigors of the rules of res judicata. If, however, the defect is mere error of law, be it either procedural or substantive, the possibility for attacking the judgment is ordinarily not available. Restatement, Second, Judgments, sections 11-12. The procedural rules governing the timing of a challenge to the Board's scope of review have an important effect on the consequences of such a challenge. Under generally prevailing procedural rules, the question of whether the Board exceeded its scope of review may be raised at any time before the Board's decision becomes final, but not thereafter.

Following the instructions of the *Marley* court, we conclude the Board has appellate subject matter jurisdiction in all matters relating to industrial insurance as well as other select controversies as may be specified by the Legislature. At the same time, we believe there is a distinction between subject matter jurisdiction and scope of review. Scope of review serves to limit the issues the Board has authority to consider, restricting the Board to those matters already passed upon by the

Department of Labor and Industries. However, we believe *Marley* supports the conclusion that scope of review is not jurisdictional, per se.

When the Board exceeds the scope of its review, it commits an error of law by passing on an issue or issues not properly before it. In doing so, it is exposed to potentially dramatic and unpleasant reversal either by Superior Court, the Court of Appeals, or the Supreme Court. Obviously, this Board labors to stay within the scope of its review. If, however, the Board exceeds the scope of review and its resulting order becomes final, the order is final and binding with respect to the parties, the Department, the Board, and the courts. The rules of res judicata apply. Committing error of law does not deprive the Board of jurisdiction. Courts do not lose subject matter jurisdiction merely by interpreting the law erroneously. If the phrase "subject matter jurisdiction" is to maintain its rightfully sweeping definition, it must not be reduced to signifying that a court has acted without error. *Marley v. Department of Labor & Indus*., 125 Wn.2d 533, 539 (1994), citing *In re Major*, 71 Wn. App. 531, 534-535 (1993).

Applied to the facts of this case, we find that our Decision and Order in Docket No. 97 2041 became final. It is res judicata that Ms. Houle sustained a temporary aggravation of her pre-existing asthma and emphysema as a result of her occupational exposure. We affirm the judgment of our industrial appeals judge in the present matter. We overrule *In re Darlene Ross*, BIIA Dec., 88 4379 (1990) to the extent it is inconsistent with this decision.

After consideration of the Proposed Decision and Order and the Petition for Review filed thereto, and a careful review of the entire record before us, we are persuaded that the Proposed Decision and Order is supported by the preponderance of the evidence and is correct as a matter of law.

FINDINGS OF FACT

1. On April 19, 1994, the claimant, Orena A. Houle, filed an application for benefits alleging that she had sustained an occupational exposure on January 27, 1994, during the course of employment with Sitca Corporation. The claim was allowed and benefits paid. On January 14, 2000, the Department issued an order affirming the Department's order of April 30, 1999, which had closed the claim without further award for time loss compensation or permanent partial disability. The January 14, 2000 order also determined that the claim had only been accepted as a temporary aggravation of the claimant's pre-existing asthma and emphysema conditions. On February 15, 2000, the claimant filed a Notice of Appeal with the Board of Industrial Insurance Appeals. On March 23, 2000, the Board issued an order granting the appeal, assigning it Docket No. 00 11628, and directing that proceedings be held on the issues raised by the Notice of Appeal.

2. On January 27, 1994, the claimant, while in the course of employment with Sitca Corporation, was exposed to chemicals in the workplace. It is res judicata that the claimant developed a temporary aggravation of her pre-existing asthma and emphysema, which was naturally and proximately caused by the occupational exposure of January 27, 1994.

3. The claimant's condition naturally and proximately caused by her occupational exposure of January 27, 1994, has resolved.

4. Any further pulmonary restrictions from and after April 5, 1996, were proximately caused by the claimant's pre-existing asthma and emphysema conditions.

5. There are no genuine issues of material fact.

CONCLUSIONS OF LAW

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

2. There are no genuine issues of material fact within the meaning of CR 56(c) and summary judgment is appropriate.

3. As the claimant's accepted condition has resolved, she is not entitled to additional benefits within the meaning of Title 51 RCW for her occupational exposure of January 27, 1994.

4. The order of the Department of Labor and Industries dated January 14, 2000, is correct and is affirmed.

Dated this 22nd day of February, 2001.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

/s/_____
JUDITH E. SCHURKE Member