Flanigan, David

RES JUDICATA

Matters concluded by order rejecting a claim

The doctrine of res judicata does not preclude the worker from obtaining an award for disability for the full extent of his occupational hearing loss when a prior hearing loss claim rejection did not establish the extent of pre-existing hearing loss. ***….In re David Flanigan*, BIIA Dec., 02 18511 (2003)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: DAVID E. FLANIGAN	)	**DOCKET NO. 02 18511**
	)	
CLAIM NO. X-318877	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, David E. Flanigan, by
Springer, Norman & Workman, per
Robert R. Hall

Employer, Washington State Department of Transportation,
None

Department of Labor and Industries, by
The Office of the Attorney General, per
James S. Johnson, Assistant

The claimant, David E. Flanigan, filed an appeal with the Board of Industrial Insurance Appeals, on September 9, 2002, from an August 30, 2002 Department of Labor and Industries order. In this order, the Department affirmed a June 21, 2002 order and closed the claim with a permanent partial disability award equal to 10.30 percent of the complete loss of hearing in both ears. The Department order is **REVERSED AND REMANDED**.

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 Mr. Flanigan to a Proposed Decision and Order, issued on April 28, 2003, in which the industrial appeals judge affirmed the August 30, 2002 Department order.

This matter was submitted for decision based solely on stipulated facts and six exhibits. The only issue before us is to determine the amount of the permanent partial disability award Mr. Flanigan should receive in this claim. The parties have stipulated that Mr. Flanigan had hearing loss equal to 37.31 percent of the complete loss of hearing in both ears when this claim was closed. The parties further agreed that all of Mr. Flanigan's hearing loss was caused by occupational noise exposure. It is undisputed that the only reason Mr. Flanigan did not receive a permanent partial disability award in this claim consistent with the full 37.31 percent rating was that he had filed a prior claim for hearing loss. The Department rejected this claim, No. P-564171, on September 14, 1998. The Department obtained medical evidence that Mr. Flanigan's hearing loss at that time was equal to 27.01 percent of the complete loss of hearing in both ears. The Department, accordingly,

subtracted this sum from the 37.31 percent rating, because it believed the pre-existing hearing loss was noncompensable due to the rejection of the prior claim. Mr. Flanigan, therefore, received an award consistent with a bilateral 10.30 percent rating in this claim.

Although our industrial appeals judge and the parties considered other issues, such as the application of the last injurious exposure rule, and granting Mr. Flanigan relief on equitable grounds, these matters are not relevant to our decision. The sole issue we must decide is whether the Department's rejection of Claim No. P-564171 bars Mr. Flanigan from being compensated for all of his occupationally related hearing loss in this claim. To put it another way, do the doctrines of res judicata or collateral estoppel preclude Mr. Flanigan from being compensated for all of his occupational hearing loss? We have determined neither doctrine prevents Mr. Flanigan from receiving a permanent partial disability award for his total impairment.

The first question we must consider is whether the September 14, 1998 order rejecting Claim No. P-5647171 requires the reduction of a permanent partial disability award in this claim based on res judicata principles. Res judicata is a legal doctrine designed to curtail the relitigation of a claim. To reduce the disability award in this claim, we must decide the 1998 order (1) became final and binding, and (2) this appeal involves the identical subject matter, cause of action (or claims), and parties involved in the Department decision to reject the prior claim. *Somsak v. Criton Technologies/Heath Tecna, Inc.*, 113 Wn. App. 84, at 92 (2002).

There is no question the 1998 order became final and binding. However, an unappealed Department order is only res judicata regarding issues that were clearly addressed by the terms of the order. *Somsak* at 92, *citing Kingery v. Department of Labor & Indus.*, 132 Wn.2d 162, 169 (1997), and *King v. Department of Labor & Indus.*, 12 Wn. App. 1, 4 (1974). Fundamental fairness requires that the application of the doctrine "does not work an injustice on the party against whom it is to be applied." *Winchell's Donuts v. Quintana*, 65 Wn. App. 525 at 29-30 (1992).

The Department clearly did not address the same subject matter or claims raised in this appeal in its prior order. The Department never determined the nature and extent of Mr. Flanigan's industrially related hearing loss when it issued its September 14, 1998 order rejecting the prior claim. Yet these issues are what are at stake in this proceeding. In fact, from the parties' stipulation, it is unclear whether the Department was even aware that Mr. Flanigan had work-related hearing loss equal to 27.01 percent of the complete loss of hearing in both ears when it issued its 1998 order. The cause and extent of Mr. Flanigan's permanent hearing loss was obviously not addressed in the order. The Department issued the 1998 order because Mr. Flanigan

did not respond to a request to provide additional information about his work history. (The Department was attempting to determine whether Mr. Flanigan's hearing loss was caused by noise exposure during employment with a self-insured employer). Due to Mr. Flanigan's failure to respond to the Department's request, the Department did not adjudicate the merits of his claim and issued an order that rejected his claim on broad grounds. The order stated his claim was being rejected for one or more of the following reasons: his condition was not the result of an industrial injury or occupational disease, there was no proof that an industrial injury, and/or his condition, pre-existed the alleged injury.

This order is vague. It does not indicate which condition is being rejected. It certainly did not clearly inform Mr. Flanigan that he had hearing loss consistent with a 27.01 percent impairment rating that was being denied in this claim. Hence, the order did not clearly address the nature and extent of Mr. Flanigan's occupational hearing loss. Absent clear language in the 1998 order specifying that Mr. Flanigan had hearing loss that was being segregated from the claim, it would be unfair to bar Mr. Flanigan from being compensated for his full impairment in this claim. This is especially true in light of the parties' stipulation that all of Mr. Flanigan's hearing loss is occupationally related due to noise exposure during employment insured through the state fund, *i.e.*, the Department.

Furthermore, the 1998 order not only did not involve the same subject matter and claim at issue here, but it also did not involve the same parties. The first claim did not identify a specific employer. In fact, it was rejected because the Department ostensibly could not determine whether the employer at risk on the claim was a state fund or self-insured employer. This claim, however, has been allowed with the Department of Transportation as the state fund employer.

In conclusion, res judicata does not preclude Mr. Flanigan from obtaining a disability award for the full extent of his occupational hearing loss. The nature and extent of Mr. Flanigan's hearing loss was not actually determined in the prior claim; the order denying the claim was too vague to notify him that he had permanent hearing loss that was non-compensable; and the parties in the two claims are not identical.

Despite this conclusion, we must also determine if Mr. Flanigan is collaterally estopped from receiving the higher disability award. Collateral estoppel is a doctrine also intended to prevent relitigation. However, this doctrine prevents a second litigation of issues, even if a different claim or cause of action is asserted. Phillip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 Wash.L.Rev. 805, 829 (1985). Like res judicata, collateral estoppel can apply to

prior adjudications by administrative agencies. The requirements for the application of this doctrine are: "(1) identical issues; (2) a final judgment on the merits; (3) the party against whom the plea is asserted must have been a party to . . . the prior adjudication; and (4) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied." *Manor v. Nestle Food Co,* 78 Wn. App. 5, 12 (1995), *citing Malland v. Department of Retirement Sys.*, 103 Wn.2d 484, 489 (1985).

From our prior discussion, it should be clear that we lack the prerequisite identity of issues for this doctrine to apply. In order to have the identity of issues that is a prerequisite for this doctrine to operate as a bar, the extent of Mr. Flanigan's permanent partial disability due to his hearing loss would have to have been clearly decided by the Department. *Vargas v. State*, 116 Wn. App. 30, 37 (2003). To reiterate, there is no evidence the Department adjudicated this issue in the prior claim. Since the Department's decision to reject the prior claim did not involve a factual adjudication regarding Mr. Flanigan's hearing impairment, he is not precluded from obtaining a disability award for his entire permanent disability in this claim.

In conclusion, we note that applying either res judicata or collateral estoppel to reduce Mr. Flanigan's disability award would be unjust. We note Mr. Flanigan has had to file four claims for occupational hearing loss, over a four-year period, before obtaining any benefits. It is undisputed that all of Mr. Flanigan's hearing loss is occupationally related. Nonetheless, various claims managers have required Mr. Flanigan to file multiple claims against both state fund and self-insured employers. We have previously held that the law should not require a claimant to pursue separate claims against separate insurers for the same alleged occupational disease. Instead, as much as possible, a worker's eligibility should be adjudicated in a single claim, in which all relevant employers are notified. *In re Edwin Wirkkala*, Dckt. No. 00 23933 (September 5, 2002). Obviously, the Department did not follow this principle in adjudicating Mr. Flanigan's claim for hearing loss. The Department's decision to deny his first claim until it could verify he was not injured during self-insured employment should not bar Mr. Flanigan from obtaining an award for his entire occupational impairment. In hindsight, the rejection order in the prior claim appears premature. Mr. Flanigan should not have his permanent partial disability award reduced because the Department sought to adjudicate separate claims for different employers.

In conclusion, we have determined that Mr. Flanigan should receive a permanent partial disability award for his entire hearing loss, since it was all caused by occupational noise exposure. The rejection of his prior claim does not bar his receipt of the award in this claim since the nature

and extent of Mr. Flanigan's hearing loss was not clearly and necessarily determined in the prior order. We, therefore, reverse the August 30, 2002 order and remand this matter to the Department with instructions to close the claim with an award equal to 37.31 percent of the complete loss of hearing in both ears.

FINDINGS OF FACT

1. On February 1, 2001, the Department of Labor and Industries received an application for benefits that alleged the claimant, David E. Flanigan, sustained an occupational disease during his employment with the Washington State Department of Transportation (DOT). The Department subsequently allowed the claim as an occupational disease for bilateral hearing loss.

   On June 21, 2002, the Department issued an order that closed the claim with a permanent partial disability award equal to 10.30 percent of the complete loss of hearing in both ears. On August 12, 2002, the claimant protested this order. On August 30, 2002, the Department issued an order that affirmed the June 21, 2002 order.

   On September 9, 2002, the claimant filed a Notice of Appeal from the August 30, 2002 order with the Board of Industrial Insurance Appeals. On October 9, 2002, the Board granted the appeal and assigned it Docket No. 02 18511.

2. On December 1, 1997, the Department received an application for benefits from Mr. Flanigan alleging occupational hearing loss. The application was accompanied by a work history form listing JJW-BST, Inc., a state fund employer, as the employer at the time of the last injurious exposure. That application was assigned Claim No. P-564171.

3. On July 30, 1998, the Department sent Mr. Flanigan a letter requesting that he correct and resubmit an employment work history form. The Department was seeking to determine whether a self-insured employer was responsible for his hearing loss claim. Mr. Flanigan did not respond to the Department's request for additional information. As a result, on September 14, 1998, the Department issued an order rejecting the claim. The order did not list any employer. The order indicated the claim was rejected because there was no proof of a specific injury at a definite time and place in the course of employment; because the claimant's condition was not the result of industrial injury; because the claimant's condition was not an occupational disease; and/or the claimant's condition pre-existed the alleged injury. Mr. Flanigan did not file a timely protest or appeal from this order.

4. In January 1999, Mr. Flanigan filed a new application for benefits, assigned claim P-812568, also for work-related hearing loss. The Department forwarded information in both this and the prior claim files to

a self-insured employer, SDS Lumber Co., and directed it to consider the material as an application for benefits for occupational hearing loss. Based on medical information that Mr. Flanigan did not have injurious noised exposure while employed by SDS Lumber Co., this third claim, Claim No. W-006644, was rejected on November 23, 1999.

5. On February 1, 2001, the Department received another application for benefits alleging occupational hearing loss, with the DOT as the employer at the time of the last injurious exposure. That application was assigned Claim No. X-318877. On June 21, 2002, the Department issued an order awarding Mr. Flanigan a permanent partial disability award equal to 10.30 percent of the complete loss of hearing in both ears. Following a timely protest, the Department issued an August 30, 2002 order affirming its June 21, 2002 order.

6. If called to testify, Dr. Kelly Lindgren, would testify that all of the claimant's hearing loss was caused by occupational noise exposure, with the last injurious exposure occurring while Mr. Flanigan was employed by DOT. Dr. Lindgren would further testify that, as of September 9, 2002, Mr. Flanigan had hearing loss equal to 37.31 percent of the complete loss of hearing in both ears. Dr. Lindgren would also testify that, as of September 14, 1998, Mr. Flanigan had hearing loss equal to 27.01 percent of the complete loss of hearing in both ears.

7. There is no evidence the Department had received any information detailing the nature and extent of Mr. Flanigan's occupationally related hearing loss when it issued the order rejecting Claim No. P-564171, on September 14, 1998.

8. Although the September 14, 1998 order became final and binding, it did not involve the same subject matter, claims, or parties involved in the current appeal. The nature and extent of Mr. Flanigan's hearing loss was not actually determined in the order issued on September 14, 1998, in Claim No. P-564171. This order was also too vague to notify Mr. Flanigan that he had any permanent hearing loss that was not compensable. Finally, the parties in this claim are not identical with the parties in Claim No. P-564171.

CONCLUSIONS OF LAW

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

2. The principals of res judicata and collateral estoppel do not bar Mr. Flanigan from obtaining a permanent partial disability award for the entire extent of his occupationally related hearing impairment in this claim.

3. Pursuant to the provisions of RCW 51.32.080, Mr. Flanigan is entitled to a permanent partial disability award equal to 37.31 percent of the complete loss of hearing in both ears in this claim.

4. The August 30, 2002 Department order is incorrect and is reversed. This matter is remanded to the Department with instructions to close the claim with a permanent partial disability award equal to 37.31 percent of the complete loss of hearing in both ears.

It is so ORDERED.

Dated this 24th day of July, 2003.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

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