Lopeman, Darrel

RES JUDICATA

Allowance of claim

A final order paying time-loss compensation does not imply claim allowance with sufficient specificity to preclude further adjudication of the allowance issue. ***….In re Darrel Lopeman*, BIIA Dec., 06 13877 (2007)** [*Editor's Note*: The Board's decision was appealed to superior court under Grant County Cause No.07-2-007744-6.]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: DARREL D. LOPEMAN	)	**DOCKET NO. 06 13877**
	)	
CLAIM NO. AA-92752	)	**ORDER VACATING PROPOSED DECISION**
	)	**AND ORDER AND REMANDING THE APPEAL**
	)	**FOR FURTHER PROCEEDINGS**

APPEARANCES:

Claimant, Darrel D. Lopeman, by
Calbom & Schwab, P.S.C., per
G. Joe Schwab

Employer, Grant County Fire District #5,
None

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

The claimant, Darrel D. Lopeman, filed an appeal with the Board of Industrial Insurance Appeals on April 12, 2006, from an order of the Department of Labor and Industries dated April 4, 2006. In this order, the Department rejected the claim and assessed an overpayment of time loss compensation benefits in the amount of $20,313.58. The Department order is **REMANDED FOR FURTHER PROCEEDINGS**.

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 Department to a Proposed Decision and Order issued on January 8, 2007, in which the industrial appeals judge reversed and remanded the order of the Department dated April 4, 2006.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed. This case was properly tried on summary judgment and there are no material facts in dispute. The industrial appeals judge reversed the April 4, 2006 Department order and found that a determinative order awarding time loss compensation can bind the Department to claim allowance. We disagree with the industrial appeals judge's decision to grant summary judgment on this basis. The matter must be remanded to allow Mr. Lopeman to address the merits of his claim for benefits.

In this case, the Department issued a series of interlocutory orders in which it awarded time loss compensation benefits after the application for benefits was filed. On July 20, 2005, the Department issued a subsequent determinative order in which it paid time loss compensation benefits. On July 21, 2005, the Department issued an order in which it allowed the claim. On August 1, 2005 and August 15, 2005, the Department issued further determinative orders in which it paid time loss compensation benefits. On August 25, 2005, the Department issued an order in which it indicated that it would reconsider the allowance order. In the interim, the Department continued to issue interlocutory orders in which it paid time loss compensation benefits. On December 23, 2005, the employer protested allowance of the claim. On February 7, 2006 and April 4, 2006, the Department issued orders in which it rejected the claim.

We believe the Department should not be forced to allow the claim based on the July 20, 2005 determinative time loss order. A determinative time loss order informs the parties that the worker will be receiving time loss compensation benefits. It does not speak to claim allowance. Our Court of Appeals has historically required that Department orders include a clear and unmistakable determination that the claim has been allowed. The doctrine of res judicata cannot apply to a party's detriment when it lacks precise meaning. *King v. Department of Labor & Indus.*, 12 Wn. App. 1 (1974). Based on the Court's rationale in *King,* the Department's determinative time loss order fails to adequately notify the parties that the claim was allowed.

The Court of Appeals has continued to require clarity in orders issued by the Department. In an appeal issued subsequent to *King*, the Court held that prior Department orders failed to provide notice of the factual basis underlying the worker's wage determination. *Somsak v. Criton Technologies/Heath Tecna, Inc.*, 113 Wn. App. 84 (2002). Although the Department made adjustments to Ms. Somsak's time loss rate in several final orders, as well as the closing order, the Court found that none of the orders provided the specific facts used in the calculations. The Court permitted Ms. Somsak to challenge the wage rate based on the Department's failure to issue orders with adequate underlying explanations. Again, the Court emphasized the importance of fairness in the process, which can be had only when an order is clear on its face.

We remain mindful of our prior decisions on this issue in *In re Herbert Olive*, Dckt. No. 70,349 (August 7, 1986) and *In re Gary Johnson*, BIIA Dec., 86 3681 (1987). We agree with our industrial appeals judge that the fact pattern in *Olive* is nearly identical to that presented here. While the Department was bound to allow the claim in *Olive*, we cannot abide by that result in light of the Court's most recent ruling in *Somsak*.

We are broadening the scope of our decisions in *Johnson* and *Olive* based on the principles of fairness articulated by the higher court. We agree that it is fundamentally unjust to bind a party based on an unclear order or by any inference drawn from an order lacking in specificity. This includes implied claim allowance stemming from a determinative time loss order.

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 vacate the Proposed Decision and Order, and remand this matter for further proceedings consistent with this order, and pursuant to WAC 263-12-145(4). The parties are advised that this order is not a final Decision and Order of the Board within the meaning of RCW 51.52.110. At the conclusion of the further proceedings the industrial appeals judge shall, unless the matter is dismissed or resolved by an Order on Agreement of Parties, enter a Proposed Decision and Order containing findings and conclusions as to each contested issue of fact and law, based upon the entire record, and consistent with this order. Any party aggrieved by such Proposed Decision and Order may petition the Board for review pursuant to RCW 51.52.104.

It is so **ORDERED**.

Dated this 4th day of June, 2007.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

/s/_____
CALHOUN DICKINSON Member