

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**

1 **IN RE: DARREL D. LOPEMAN**) **DOCKET NO. 06 13877**
2)
3 **CLAIM NO. AA-92752**) **ORDER VACATING PROPOSED DECISION**
4) **AND ORDER AND REMANDING THE APPEAL**
5) **FOR FURTHER PROCEEDINGS**
6 _____

7 **APPEARANCES:**

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9 Claimant, Darrel D. Lopeman, by
10 Calbom & Schwab, P.S.C., per
11 G. Joe Schwab
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13 Employer, Grant County Fire District #5,
14 None
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16 Department of Labor and Industries, by
17 The Office of the Attorney General, per
18 Tomás S. Caballero, Assistant
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21 The claimant, Darrel D. Lopeman, filed an appeal with the Board of Industrial Insurance
22 Appeals on April 12, 2006, from an order of the Department of Labor and Industries dated April 4,
23 2006. In this order, the Department rejected the claim and assessed an overpayment of time loss
24 compensation benefits in the amount of \$20,313.58. The Department order is **REMANDED FOR**
25 **FURTHER PROCEEDINGS.**
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29 **DECISION**

30 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
31 and decision on a timely Petition for Review filed by the Department to a Proposed Decision and
32 Order issued on January 8, 2007, in which the industrial appeals judge reversed and remanded the
33 order of the Department dated April 4, 2006.
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36 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
37 no prejudicial error was committed. The rulings are affirmed. This case was properly tried on
38 summary judgment and there are no material facts in dispute. The industrial appeals judge
39 reversed the April 4, 2006 Department order and found that a determinative order awarding time
40 loss compensation can bind the Department to claim allowance. We disagree with the industrial
41 appeals judge's decision to grant summary judgment on this basis. The matter must be remanded
42 to allow Mr. Lopeman to address the merits of his claim for benefits.
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1 In this case, the Department issued a series of interlocutory orders in which it awarded time
2 loss compensation benefits after the application for benefits was filed. On July 20, 2005, the
3 Department issued a subsequent determinative order in which it paid time loss compensation
4 benefits. On July 21, 2005, the Department issued an order in which it allowed the claim. On
5 August 1, 2005 and August 15, 2005, the Department issued further determinative orders in which it
6 paid time loss compensation benefits. On August 25, 2005, the Department issued an order in
7 which it indicated that it would reconsider the allowance order. In the interim, the Department
8 continued to issue interlocutory orders in which it paid time loss compensation benefits. On
9 December 23, 2005, the employer protested allowance of the claim. On February 7, 2006 and
10 April 4, 2006, the Department issued orders in which it rejected the claim.
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12 We believe the Department should not be forced to allow the claim based on the July 20,
13 2005 determinative time loss order. A determinative time loss order informs the parties that the
14 worker will be receiving time loss compensation benefits. It does not speak to claim allowance.
15 Our Court of Appeals has historically required that Department orders include a clear and
16 unmistakable determination that the claim has been allowed. The doctrine of res judicata cannot
17 apply to a party's detriment when it lacks precise meaning. *King v. Department of Labor & Indus.*,
18 12 Wn. App. 1 (1974). Based on the Court's rationale in *King*, the Department's determinative time
19 loss order fails to adequately notify the parties that the claim was allowed.
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21 The Court of Appeals has continued to require clarity in orders issued by the Department. In
22 an appeal issued subsequent to *King*, the Court held that prior Department orders failed to provide
23 notice of the factual basis underlying the worker's wage determination. *Somsak v. Criton*
24 *Technologies/Heath Tecna, Inc.*, 113 Wn. App. 84 (2002). Although the Department made
25 adjustments to Ms. Somsak's time loss rate in several final orders, as well as the closing order, the
26 Court found that none of the orders provided the specific facts used in the calculations. The Court
27 permitted Ms. Somsak to challenge the wage rate based on the Department's failure to issue orders
28 with adequate underlying explanations. Again, the Court emphasized the importance of fairness in
29 the process, which can be had only when an order is clear on its face.
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31 We remain mindful of our prior decisions on this issue in *In re Herbert Olive*, Dckt.
32 No. 70,349 (August 7, 1986) and *In re Gary Johnson*, BIIA Dec., 86 3681 (1987). We agree with
33 our industrial appeals judge that the fact pattern in *Olive* is nearly identical to that presented here.
34 While the Department was bound to allow the claim in *Olive*, we cannot abide by that result in light
35 of the Court's most recent ruling in *Somsak*.
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1 We are broadening the scope of our decisions in *Johnson* and *Olive* based on the principles
2 of fairness articulated by the higher court. We agree that it is fundamentally unjust to bind a party
3 based on an unclear order or by any inference drawn from an order lacking in specificity. This
4 includes implied claim allowance stemming from a determinative time loss order.
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7 After consideration of the Proposed Decision and Order and the Petition for Review filed
8 thereto, and a careful review of the entire record before us, we vacate the Proposed Decision and
9 Order, and remand this matter for further proceedings consistent with this order, and pursuant to
10 WAC 263-12-145(4). The parties are advised that this order is not a final Decision and Order of the
11 Board within the meaning of RCW 51.52.110. At the conclusion of the further proceedings the
12 industrial appeals judge shall, unless the matter is dismissed or resolved by an Order on
13 Agreement of Parties, enter a Proposed Decision and Order containing findings and conclusions as
14 to each contested issue of fact and law, based upon the entire record, and consistent with this
15 order. Any party aggrieved by such Proposed Decision and Order may petition the Board for
16 review pursuant to RCW 51.52.104.
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22 It is so **ORDERED**.

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24 Dated this 4th day of June, 2007.
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26 BOARD OF INDUSTRIAL INSURANCE APPEALS
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30 /s/ _____
31 THOMAS E. EGAN Chairperson
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34 /s/ _____
35 CALHOUN DICKINSON Member
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