Browne, Keith

DEPARTMENT

Ministerial orders

A Department order that purports to follow a finding of fact contained in a Board order is not ministerial unless the Board also directed the Department to take specific action consistent with the finding of fact. **….*In re Keith Browne*, BIIA Dec., 06 13972 (2007)**

RES JUDICATA

Ambiguous orders

Subject matter of appeal

Neither res judicata nor collateral estoppel will be accorded to a finding of fact from a prior Board decision when the subject matter of the prior and present appeal is dissimilar, or the earlier determination is ambiguous due to an internal inconsistency. **….*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: KEITH O. BROWNE	)	**DOCKET NO. 06 13972**
	)	
CLAIM NO. W-929966	)	**ORDER VACATING PROPOSED DECISION**
	)	**AND ORDER AND REMANDING APPEAL**
	)	**FOR FURTHER PROCEEDINGS**

APPEARANCES:

Claimant, Keith O. Browne, by
Law Office of William D. Hochberg, per
Grady B. Martin

Self-Insured Employer, Genie Industries Inc., by
Wallace, Klor & Mann, P.C., per
Lawrence E. Mann

Department of Labor and Industries, by
The Office of the Attorney General, per
Natalee Fillinger, Assistant

The claimant, Keith O. Browne, filed an appeal with the Board of Industrial Insurance Appeals on April 13, 2006, from an order of the Department of Labor and Industries dated March 30, 2006. In this order, the Department corrected its order of July 14, 2005, and stated: The claim is allowed for an industrial injury on January 23, 2004. The self-insured employer is directed to deny responsibility for the claimant's left knee, hip, cervical, and lumbar conditions; accept responsibility for a left shoulder condition; and provide such further and other relief as indicated by the law and the facts. As of June 10, 2004, the claimant's left shoulder condition, proximately caused by the industrial injury of January 23, 2004, was fixed, had reached maximum medical improvement, and was not in need of further medical treatment. The claimant's appeal 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 claimant to a Proposed Decision and Order issued on December 19, 2006, in which the industrial appeals judge affirmed the Department order dated March 30, 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. We have granted review because we conclude that all three summary judgment motions should be denied and the matter remanded for further proceedings consistent with the directions given below.

Procedural Background

Mr. Browne filed this claim in which he alleged that an industrial injury he sustained on January 23, 2004, had caused or aggravated a variety of orthopedic conditions throughout his body. The claim was rejected by the Department, which resulted in the claimant's timely appeal that was docketed by this Board as 04 16898. The scope of our review of that matter was limited to whether an industrial injury occurred, and if so, what condition or conditions were caused or aggravated by it. *Lenk v. Department of Labor & Indus.*, 3 Wn. App. 977, 982 (1970). After hearings were held, in which only the self-insured employer and the claimant participated, a Proposed Decision and Order, dated April 19, 2005, was issued.

In the April 19, 2005 Proposed Decision and Order, at page 2, our industrial appeals judge erroneously listed as an issue, ". . . as of June 10, 2004, (the date of the rejection order) was that condition fixed or in need of treatment?" After having determined that Mr. Browne had sustained an industrial injury that resulted in only a left shoulder condition, the industrial appeals judge did not discuss whether the shoulder condition required further treatment, which was appropriate due to the limitations on the scope of our review. However, the Proposed Decision and Order contained Finding of Fact No. 6 and Conclusion of Law No. 3, which were essentially identical, in which the industrial appeals judge stated that as of June 10, 2004, the claimant's left shoulder condition had reached maximum medical improvement and did not require further medical treatment. In contrast, Conclusion of Law No. 6, the conclusion of law that contained directions to the Department and/or the self-insured employer, did not contain any directions to provide or deny treatment or to close the claim. Instead, the industrial appeals judge directed the Department [*sic*] (self-insured employer) to "allow the claim as an industrial injury, deny responsibility for the claimant's left knee, hip, cervical and lumbar condition, accept responsibility for a left shoulder condition, and provide such further and other relief as indicated by the law and the facts." Unlike Finding of Fact No. 6 and Conclusion of Law No. 3, all of the directions contained in Conclusion of Law No. 6 were consistent with the scope of our review in Docket No. 04 16898.

The self-insured employer filed a Petition for Review of that Proposed Decision and Order. On June 23, 2005, we issued an Order Denying Petition for Review. Our June 23, 2005 order became final and binding on the parties when no appeal to superior court was filed.

On July 14, 2005, the Department issued an order in which it cited our June 23, 2005 order, contained the directions in Conclusion of Law No. 6 of the Proposed Decision and Order, but also included a provision that closed the claim. The Proposed Decision and Order that we adopted did not direct the Department or the self-insured employer to close the claim. After a long delay in the communication of that order to Mr. Browne, he filed a protest to the order. The Department followed up by issuing an order on March 30, 2006, in which it corrected what it termed as "the ministerial order and notice," this time noting that the employer in this claim is self-insured, but also replacing the claim closure language with the statement that "as of June 10, 2004 the claimant's left shoulder condition, proximately cause by the industrial injury of January 23, 2004 was fixed, had reached maximum medical improvement, and was not in need of further medical treatment." This last sentence was identical to Conclusion of Law No. 3 of the Proposed Decision and Order, but not with Conclusion of Law No. 6, the conclusion of law that contained the directions to the Department. Mr. Browne timely appealed this March 30, 2006 Department order.

The self-insured employer and the Department raise several legal grounds in support of their request that we dismiss Mr. Browne's appeal. These are: (1) that the order under appeal is merely ministerial and cannot be appealed; (2) that Mr. Browne's appeal is an attempted second litigation of the same claim or cause of action which is prevented by the doctrine of res judicata; and (3) that the doctrine of collateral estoppel prevents Mr. Browne from raising issues identical to those decided in the prior litigation, thus requiring dismissal of his appeal for lack of any remaining material facts at issue.

Was the March 30, 2006 Department Order Entirely Ministerial?

In the Proposed Decision and Order in the current appeal, Docket No. 06 13972, our industrial appeals judge relied on *Marley v. Department of Labor & Indus.*, 125 Wn.2d 533 (1994) and our significant decision *In re Orena Houle*, BIIA Dec., 00 11628 (2001) when stating that medical fixity findings of fact and conclusions of law from the earlier Proposed Decision and Order (Docket No. 04 16898) were not beyond our subject matter jurisdiction in that appeal. The finding and conclusion were beyond the scope of our review in that earlier appeal, however, and thus inclusion of Finding of Fact No. 6 and Conclusion of Law No. 3 were errors of law that could have been overturned had the claimant appealed to superior court. Mr. Browne did not do so and the

Board order in Docket No. 04 16898 became final. As noted in the cases cited above, an error of law in a final Board order normally is not subject to collateral attack in subsequent proceedings.

In the Proposed Decision and Order in the current appeal, the industrial appeals judge also correctly determined that the March 30, 2006 Department order was not entirely ministerial. It should be noted that the recitation within a Department order that it is a ministerial order does not make it so. We have held that a purely ministerial Department order merely implements a Board decision. *In re Alfred Greenwalt, Dec'd*, BIIA Dec., 43,070 (1973); *In re Delores Witbeck*, Dckt. No. 03 14114 (January 13, 2004). A ministerial order is one in which the Department "takes no action other than that directed" by the Board in its final order. *In re Steven Carrell*, BIIA Dec., 99 11430 (1999). We compare the directions contained within our final order with those contained in the subsequent Department order to determine if that Department order is in fact ministerial.

The only direction given to the Department by this Board in our final order in Docket No. 04 16898 was that contained in Conclusion of Law No. 6 of that order:

> This matter is remanded to the Department with directions to allow the claim as an industrial injury, deny responsibility for the claimant's left knee, hip, cervical and lumbar conditions, accept responsibility for a left shoulder condition, and provide such further and other relief as indicated by the law and the facts.

The provisions of the March 30, 2006 Department order that are consistent with the directions contained within Conclusion of Law No. 6 of the Proposed Decision and Order we adopted as our order under Docket No. 04 16898, are ministerial. However, the additional provision contained in the March 30, 2006 order, even though it was a direct quotation of Conclusion of Law No. 3 of our order, is **not** ministerial because it was not contained within our directions to the Department. *Carrell*. This distinction, based on the location of the provisions in question in our order, is not a distinction without a difference, as can be seen by examining the actions of the Department after the Board order in Docket No. 04 16898 became final. The Department first issued an order on July 14, 2005, in which it incorporated the directions to it from the Board, but also added language closing the claim. In addition to the fact that claim closure language was nowhere to be found in the final Board order, this action constituted an adjudication of the claimant's right to additional benefits as of July 14, 2005, one year **after** the order under appeal in the earlier litigation. Clearly, that portion of the July 14, 2005 order was not ministerial. The "correction" of the closure provision of the July 14, 2005 order by the Department, in its

March 30, 2006 order, is a rather obvious attempt to make claim closure itself unassailable as a ministerial decision, albeit some further order might have to be issued, stating whether or not the claimant was entitled to a permanent partial disability award.

The provisions of the March 30, 2006 Department order that are ministerial (the allowance of the claim for a right shoulder injury occurring on January 23, 2004, and the segregation of various other conditions from the claim) cannot be attacked in this appeal. If those provisions had been the only ones from which the appeal was filed, the Board would be required to dismiss the appeal for lack of subject matter jurisdiction. *Carrell*; *In re Steven Fridell*, Dckt. No. 04 14032 (August 22, 2005).

Should the Doctrine of Res Judicata be Applied to Defeat the Claimant's Appeal?

In the December 19, 2006 Proposed Decision and Order, our industrial appeals judge stated, in Conclusion of Law No. 3:

> The Findings of Fact and Conclusions of Law in the Board's Proposed Decision and Order dated April 19, 2005, are res judicata, and final and binding on the claimant, self-insured employer, and Department.

In this conclusion of law, our industrial appeals judge, unfortunately, fails to distinguish between the doctrines of res judicata and collateral estoppel. The doctrine of collateral estoppel may apply to factual determinations such as those contained within the findings of fact which merely pertain to a single factual issue as opposed to the entire claim or cause of action. In contrast, the doctrine of res judicata applies to entire claims or causes of action rather than individual facts. As stated in *Hyatt v. Department of Labor & Indus.*, 132 Wn. App. 387, 394 (2006):

> Courts apply the doctrine of res judicata to prevent repetitive litigation of claims or causes of action arising out of the same facts and to "avoid repetitive litigation, conserve judicial resources, and prevent the moral force of court judgments from being undermined." *Hisle v. Todd Pac. Shipyards Corp.*, 113 Wn. App. 401,410, 54 P.3d 687 (2002), *aff'd,* 151 Wn. 2d 853, 93 P.3d 108 (2004). Res judicata applies when (1) there has been a final judgment on the merits in a prior action between the same parties; and (2) the prior and present actions involve (a) the same subject matter, (b) the same cause of action, (c) the same persons and parties, and (d) the same quality persons for or against whom the claim is made. *Hisle*, 113 Wn. App., at 410.

The doctrine of res judicata should not be applied in this case for two reasons: (1) the subject matter of the prior and present actions is dissimilar; and (2) the earlier determination is so inconsistent that it would be unfair to apply the doctrine of res judicata in this situation.

In the prior litigation, the scope of our review did not extend to the consideration of what benefits Mr. Browne would receive beyond mere allowance of the claim. But even with the erroneous extension of that portion of the scope of our review by provisions of that order, our scope of review over the provision of those benefits ended as of June 30, 2004, the date of the Department order under review in Docket No. 04 16898. Nothing in our earlier order extended the scope of our review beyond June 30, 2004.

In its July 14, 2005 order, the Department adjudicated the claimant's entitlement to benefits beyond June 10, 2004. In its July 14, 2005 order, the Department included a provision to close the claim. That order implicitly contained determinations by the Department that as of July 14, 2005, the claimant was not entitled to further benefits of any kind, including time-loss compensation, treatment, or permanent partial disability up to the date of closure. The March 30, 2006 order (which "corrected" the July 14, 2005 order), constitutes an attempt to limit the duration for which treatment benefits could be provided to June 10, 2004. Mr. Browne, by way of his Notice of Appeal, contested that limitation. Thus, the provision of treatment benefits through at least July 14, 2005, and probably March 30, 2006, is within the scope of the Board's review in this litigation. *Lenk.* That being the case, it is clear that the subject matter of this litigation, the duration of the claimant's entitlement to benefits, is not identical to the subject matter of the earlier litigation.

As noted above, our earlier order contains a number of inconsistencies regarding the directions given to the Department and/or the self-insured employer. These inconsistencies render the final order in that appeal inherently ambiguous as to whether the Department was required by that order to take any further action beyond allowing the claim and segregating a number of conditions.

In previous cases we have considered whether the doctrine of res judicata should be applied in situations involving inherently ambiguous orders. In our significant decision *In re Rick Yost*, BIIA Dec., 01 24199 (2003), we stated:

> However, before a party can be precluded by principles of res judicata from litigating a specific issue at a later time, the party must have had clear and unequivocal notice of issues adjudicated by the prior order, so that the party has had an opportunity to challenge the specific finding. *King v. Department of Labor & Indus.*, 12 Wn App. 1 (1974). Indeed, we have held on several occasions that an order of the Department will not be held to have a res judicata effect unless it

> specifically apprises the parties of the determinations being made. *See In re Lyssa Smith*, BIIA Dec., 86 1152 (1988); *In re Gary Johnson*, BIIA Dec., 86 3681 (1987).

Yost, at 4.

We have held that fundamental fairness prevents res judicata effect from being given to Department orders that are this ambiguous. *Yost; In re Brett Kemp*, BIIA Dec., 02 13145 (2003). This same holding should apply to any inherently ambiguous Board order, such as the one we issued in Docket No. 04 16898.

Does the Doctrine of Collateral Estoppel Apply to Limit the Issues in this Appeal?

The doctrine of collateral estoppel should not be applied in this case to prevent Mr. Browne from proving that he required further proper and necessary treatment subsequent to June 10, 2004, for his left shoulder condition, proximately caused by the January 23, 2004 industrial injury. Many of the same issues discussed above regarding the application of the doctrine of res judicata are also applicable when considering whether the doctrine of collateral estoppel should be applied to prevent re-litigation of individual facts or issues.

In our significant decision, *In re Eleanor Lewis (II)*, BIIA Dec., 89 2474 (1990), at 3-4, we described the application of collateral estoppel and the elements that have to exist for its application.

> Collateral estoppel bars the "relitigation of an issue or determinative fact after the party estopped has had a full and fair opportunity to present a case." *McDaniels v. Carlson*, 108 Wn.2d 299,303 (1987). For collateral estoppel to apply, the following questions must be answered affirmatively:
>
> (1) Was the issue decided in the prior adjudication identical with the one presented in the action in question?
>
> (2) Was there a final judgment on the merits?
>
> (3) Was the party against whom the plea is asserted a party or in privity with the party to the prior adjudication?
>
> (4) Will the application of the doctrine not work an injustice on the party against whom the doctrine is to be applied?

Much of the same rationale we believe applies to prevent application of the doctrine of res judicata also applies to prevent application of the doctrine of collateral estoppel in this case. In *Eleanor Lewis (II)*, we noted the distinction between "evidentiary facts," which were defined as

being "merely collateral to the original claim," and "ultimate facts," the latter being facts "directly at issue in the first controversy upon which the claim rests." See, also, *McDaniels*, at 305-306. In Mr. Browne's earlier appeal, the issue was whether he had sustained an industrial injury. The causation of multiple conditions that were present on or after the date of the alleged industrial injury also was the subject of proof in the earlier litigation. However, the "facts" contained within Finding of Fact No. 6 regarding medical fixity of a condition over four months after the date of the industrial injury (the occurrence of which was at issue in that appeal) were not within the scope of our review, and therefore were not relevant to the decision on the ultimate issue in that appeal. These facts, at most, are properly characterized as "evidentiary" facts and not as "ultimate" facts in regard to that earlier litigation.

In recognition of the difficulty of distinguishing ultimate facts from evidentiary facts, we discussed, in *Lewis*, a "different approach" based on a law review article, Trautman, "Claim and Issue Preclusion in Civil Litigation in Washington," 60 Wash.L.Rev. 805 (1985). In this article, Professor Trautman argued that whether collateral estoppel should be applied with regard to a specific issue should be based on the importance of that issue, as recognized by the parties and the judge at the time of the first judgment, and the foreseeability of the significance of that issue in regard to subsequent legal actions at the time of the first action. We find it difficult to believe that during an "allowance" appeal, the need for testimony regarding future treatment needs and duration would have been considered by the parties. Surely, we cannot suggest that whenever an "allowance" appeal is tried, the parties must litigate the appeal as if all potential future benefits are at issue. Under Professor Trautman's analysis, we do not believe we have privity of the issue between the earlier litigation and this appeal. And in fact, we believe that by analyzing this issue as Professor Trautman did, the unfairness of the application of collateral estoppel to Mr. Browne's appeal is clearly illustrated, thus also requiring a negative response to the fourth prerequisite for the application of that doctrine.

The Proposed Decision and Order dated December 19, 2006, is vacated. This matter is remanded to the hearings process, pursuant to WAC 263-12-145(4), for further proceedings as indicated by this order. 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 further proceedings, the industrial appeals judge shall, unless the appeal 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 on the entire record, and consistent with this order.

Any party aggrieved by the 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/_____
FRANK E. FENNERTY, JR. Member

/s/_____
CALHOUN DICKINSON Member