Wernet, Dolan

SELF-INSURANCE

Closing order

RCW 51.32.055(11) allows the Department to adjust benefits when benefits were paid or not paid in a self-insured employer closing order. The fact that the self-insured employer closing order had become final does not ban the Department from requiring the self-insured employer to pay a permanent partial disability award to the worker. **….*In re Dolan Wernet*, BIIA Dec., 08 19992 (2010)**

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: DOLAN L. WERNET	)	**DOCKET NO. 08 19992**
	)	
CLAIM NO. W-859658	)	**ORDER VACATING PROPOSED DECISION**
	)	**AND ORDER AND REMANDING THE APPEAL**
	)	**FOR FURTHER PROCEEDINGS**

APPEARANCES:

Claimant, Dolan L. Wernet, Pro Se

Self-Insured Employer, Intermec, Inc., by Law Office of Gress & Clark, LLC, per James L. Gress

Department of Labor and Industries, by The Office of the Attorney General, per Beverly Norwood-Goetz, Assistant

The self-insured employer, Intermec, Inc., filed an appeal with the Board of Industrial Insurance Appeals on October 20, 2008, from an order of the Department of Labor and Industries dated September 9, 2008. In this order, the Department affirmed an August 13, 2008 order in which the Department directed the self-insured employer, under the authority of RCW 51.32.055(11), to pay the claimant a Category 3 dorsolumbar and lumbosacral impairment as a result of the claimant's December 20, 2005 industrial injury. The appeal is **REMANDED FOR FURTHER PROCEEDINGS**.

DECISION

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The self-insured employer filed a timely Petition for Review of a Proposed Decision and Order issued on September 21, 2009, in which the industrial appeals judge granted the Department's summary judgment motion, denied the self-insured employer's summary judgment motion and affirmed the order of the Department dated September 9, 2008. We have reviewed the evidentiary rulings in the record of proceedings and find that no prejudicial error was committed. The rulings are affirmed. We agree with our industrial appeals judge that the self-insured employer's summary judgment motion should be denied in its entirety. However, we conclude that the Department's summary judgment motion should be granted only in part because one genuine issue of material fact remains. We remand this appeal to the hearing judge to receive evidence limited to the one remaining contested issue as stated below.

Background

This appeal was tried by joint motions for summary judgment. The evidence submitted for consideration with these motions has been thoroughly described in the Proposed Decision and Order at 2-4, and will not be repeated herein.

The uncontested facts are as follows: On December 20, 2005, Mr. Wernet sustained an industrial injury to his low back while in the course of his employment with Intermec, a self-insured employer under the Industrial Insurance Act. The claim was allowed and benefits paid. Before September 20, 2006, Mr. Wernet had returned to work for Intermec with comparable wages and benefits. On September 20, 2006, the self-insured employer issued an order in which the employer closed the claim without a permanent partial disability award. No party filed a timely protest or appeal of that self-insured order. Approximately one year later a Department audit of Intermec's claims revealed the deficiencies in its actions in closing this claim. In response, on October 30, 2007, the self-insured employer filed a form with the Department requesting that claim closure be canceled and a permanent partial disability award be paid to Mr. Wernet. By an order dated December 3, 2007, the Department refused Intermec's request for the reason that there was no timely protest/appeal from the September 20, 2006 order. On December 31, 2007, the Department received a letter from Mr. Wernet which the Department concluded was both an appeal of the December 3, 2007 order and an application to reopen the claim. The claimant later dismissed the appeal. The Department issued an order in which it denied the application to reopen the claim, which became final without protest or appeal. Subsequently, on August 13, 2008, the Department issued an order in which it directed Intermec to pay the claimant a permanent partial disability award. The self-insured employer appealed the Department's September 9, 2008 order in which the Department affirmed the August 13, 2008 order.

Res Judicata and the Application of RCW 51.32.050(11) and .240(2)

Intermec argues that because Mr. Wernet did not timely protest or appeal the September 20, 2006 self-insured order in which the employer closed this claim without any award for permanent partial disability, that order is final and binding. *Marley v. Department of Labor & Indus.*, 125 Wn.2d 533 (1994) and *Kingery v. Department of Labor & Indus.*, 132 Wn.2d 162 (1997). Thus, the Department is precluded by the doctrine of res judicata from directing it to pay the claimant a permanent partial disability award. Alternatively, the self-insured employer contends that the

Department can only rely on RCW 51.32.240(2) to extend the limitation period beyond the general 60-day period. Because that limitation period is one year, that limitation period had already run when the Department issued its order directing payment of the permanent partial disability and therefore that order was not valid. We disagree with both of these arguments.

The **general** 60-day protest and appeal period is codified in RCW 51.52.050 and .060. This provision applies to most orders issued by the Department. It also applies to orders issued by a self-insured employer pursuant to RCW 51.32.055(9), such as the September 26, 2006 order that was not protested or appealed within the 60-day time period. However, the 60-day protest and appeal period of RCW 51.52.050 and .060 is by no means the only protest or appeal period that may be applicable to an order of the Department. It is only the "default" provision regarding protest and appeal periods of orders issued under the workers' compensation system established by the legislature under Title 51, RCW.

In addition to the general 60-day period, the Legislature has promulgated a number of more specific limitation periods and the courts have created a number of exceptions to the doctrine of res judicata. *Marley; In re Jorge Perez-Rodriguez*, BIIA Dec. 06 18718 (2008). RCW 51.32.055(11) and RCW 51.32.240 both are exceptions to the general limitation period of RCW 51.52.050 and .060. Such exceptions to the general limitation period are limited in scope, applying only to certain types of orders and/or only when certain circumstances have occurred. The exception to the general 60-day limitation period created by RCW 51.32.055(11) does not nullify the closing order but only requires correction of amounts paid (or not paid) erroneously. Thus, the dismissal of the claimant's appeal from the Department's December 3, 2007 order declaring that no timely protest or appeal of the September 20, 2006 self-insured employer's closing order was filed does not bar the Department from using RCW 51.32.055(11) to require Intermec to pay the claimant a permanent partial disability award. The only action the Department could mandate is the adjustment in the payment of benefits paid or payment of benefits that should have been paid by the self-insured employer's closing order. Thus, the direction contained in the Department's August 13, 2008, and September 9, 2008 orders was consistent with this exception to the general limitation period.

We conclude that the one year limitation period set forth in RCW 51.32.240(2) does not apply in this situation. That statute is applicable only when a **recipient** of benefits requests adjustment. The adjustment requested by the self-insured employer in October 2007 does not fall within this statute because it was not a recipient of the benefits included in the order. The

Department itself also was not a recipient of benefits. Clearly the Department has no authority to act on its own motion under RCW 51.32.240(2). Additionally, we note that if RCW 51.32.240(2) applied in the manner advocated by the self-insured employer, it would essentially negate the two-year limitation period of RCW 51.32.055(11), a consequence that is at variance with the legislative intent expressed during the promulgation of the 1997 amendments to RCW 51.32.055.

Violations of Conditions of Closure of Self-Insured Claims

The RCW 51.32.055(11) 2-year period for correction of benefits paid or payable by a self-insured employer does not apply to all self-insured employer claim closure orders. The applicability of this statute in this instance is predicated on the Department's discovery of "a violation of the conditions of claim closure." The conditions of claim closure for self-insured employer orders are found in RCW 51.32.055 and WAC 296-15-450.

It is undisputed that Intermec had written notice of the permanent partial disability rating of Dr. Suk Bo Lee, Mr. Wernet's attending physician, prior to the issuance of its order closing this claim. No contrary rating had been made. Pursuant to RCW 51.32.055(2) a permanent partial disability determination was required to close this claim. Intermec should have closed the claim with the permanent partial disability award as supported by Dr. Lee's written opinion. WAC 296-15-450(6)(b)(iii)(B). Alternatively, if it disagreed with that opinion, Intermec had the option of obtaining a supplemental medical opinion or forwarding the claim to the Department for it to make the permanent partial disability determination. WAC 296-15-450(3). However, Intermec did none of these things, instead issuing an order in which it closed the claim without any permanent partial disability award. In doing so it violated the conditions of claim closure within the meaning of RCW 51.32.055(11).

An additional violation of the conditions of claim closure was documented in the declaration of Sandra Aguillard, and accompanying exhibits, filed on May 20, 2009. They show that Intermec did not comply with WAC 296-15-450(6) in that it did not submit to the Department the documentation required by that regulation, that is, the SIF-5 form required by WAC 296-15-450(6)(b)(iv) as well as other required documents.

The exhibits presented by the self-insured employer as part of its motion for summary judgment and attached to its reply brief did not rebut in any fashion the evidence of the violations of conditions of claim closure that had been presented by the Department.

Entitlement to Appeal Department Order Issued Pursuant to RCW 51.32.055(11)

Intermec contends that it has the right to appeal the Department order issued under the authority of RCW 51.32.055(11) that requires it to pay the Category 3 permanent impairment award in order "to correct the benefits paid or payable." The Department contends that because the self-insured employer did not avail itself of the pre-claim closure remedies provided by RCW 51.32.055, it has lost the right to contest such a "correction" order. The Department asserts that to hold otherwise would remove any remedy for gamesmanship by the self-insured employer. It asserts that there would be no negative consequence to a self-insured employer who would ignore the proper procedures in an effort to close claims quickly. If the worker and/or the Department do not notice the errors within two years, there would be no recourse. If one of them does notice these errors, the employer could still appeal any order issued by the Department with which it disagreed. We discount the Department's assertion because even without a restriction of employer appeal rights the Department has several means of ensuring a self-insured employer's good behavior. The Industrial Insurance Act provides several penalties against self-insured employers who attempt to delay or avoid payments, violate or fail to comply with rules promulgated by the Department, or unreasonably make it necessary for workers to resort to legal proceedings to obtain compensation. See, RCW 51.04.060, 51.14.095 and 51.48.017. RCW 51.14.080 also permits the Department to de-certify a self-insured employer if a pattern of improper behavior is shown.

RCW 51.32.055 is silent as to whether a Department order issued pursuant to sec. 11 is appealable by any party, self-insured employer or worker. If there is no specific direction regarding the right to appeal an order issued by the Department (or the self-insured employer) pursuant to a specific statute such as RCW 51.32.055(11), the Industrial Insurance Act's general appeals statute, RCW 51.52.060, applies to define appeal rights. That statute specifically provides workers and employers who are "aggrieved by an order, decision, or award of the department" the right to appeal to the Board from the order in question. In this case, there is no question that the self-insured employer was aggrieved by the Department order entered pursuant to RCW 51.32.055(11).

Additionally, we find telling the lack of any specific legislative statement limiting or denying the right to appeal orders issued by the Department pursuant to RCW 51.32.055. The denial of appeal rights, with the potential infringement on due process of law, is of sufficient gravity that we

believe that such a denial cannot be inferred in the absence of a specific legislative provision. This is especially true here when the legislative history in front of us provides proof of contrary legislative intent.

In this case, the examination of the legislative history pertaining to the 1997 statutory amendments, *Laws of 1997,* Ch. 416, which authorized self-insured employers to issue closing orders just like the one issued by Intermec, provides probative information in ascertaining the legislature's intent regarding appeals from these orders. We take official notice of this legislative history, including explanatory notes submitted to the legislature. *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91 (1992). Legislative reports and explanatory notes and presentations to the legislature may be considered by us. The focus is not on where the materials are found but on whether they are sufficiently probative in assisting the court in ascertaining the intent of the legislature. *Biggs v. Vail*, 119 Wn.2d 129 (1992); *Seattle Times Co. v. County of Benton*, 99 Wn.2d 251 (1983).

We find telling the lack of any specific legislative statement limiting or denying the right to appeal orders issued by the Department pursuant to RCW 51.32.055. The denial of appeal rights, with the attendant infringement on due process of law is of sufficient gravity that we believe that such a denial cannot be inferred in the absence of a specific legislative provision. This is especially true here when the legislative history in front of us provides proof of contrary legislative action.

In reviewing the legislative history, we note that an early version (perhaps the initial version) of HB 1607 included a provision limiting appeals to the Board from orders issued by the Department when issued upon request of a self-insured employer. It was unclear to the Department whether this provision extended to Department orders issued under the authority of RCW 51.32.055(11). Department of Labor and Industries Fiscal Note for H.B. 1607. Nonetheless, this provision was removed while the bill was in committee. We infer from this that the legislature considered and then rejected limitations on the right to appeal, both for employers and for workers, when it extended the power to close permanent partial disability claims in certain instances to self-insured employers.

The Existence of a Genuine Issue of Material Fact

It is res judicata that Mr. Wernet sustained an injury to his low back during the course of his employment with Intermec on December 20, 2005, and that the conditions related to this injury had reached maximum medical improvement by September 20, 2006, the date the self-insured employer issued its order closing the claim. The materials the parties presented in support of their

respective Motions for Summary Judgment reveal only one rating, Category 3, by Dr. Lee. Therefore, we deem there to be no genuine issue of material fact regarding the rating of permanent partial impairment to the claimant's low back as of the date of claim closure.

There is one more element to be proven, however. This element is the proximate cause or causes of the low back permanent impairment. The record before us reveals a genuine issue of material fact exists as to this issue. Dr. Lee's June 7, 2006 chart note (Attachment E to the Declaration of Beverly Norwood Goetz, filed on May 20, 2009) does not mention causation in discussing his partial impairment rating. His May 11, 2006 chart note (Attachment D to the Declaration of Beverly Norwood Goetz, filed on May 20, 2009) however clearly indicates that treatment he was providing to the low back was for the industrial injury. Dr. Lee's January 11, 2006 chart note (an attachment to the self-insured employer's reply brief, filed on May 27, 2009) reveals a history of the claimant having seen Dr. Schmitt in July 2005 for low back pain radiating down the left leg. A CT scan was taken in June 2005 that revealed degenerative findings at multiple levels of the lumbosacral spine, including a disc protrusion and stenosis. Dr. Lee's assessment in January 2006, just after the injury, was L5 radiculopathy that was consistent with the earlier CT findings. This information shows that shortly before the industrial injury, the claimant had an active low back condition exhibiting similar symptoms and radiographic findings to those post-injury and for which he received medical treatment. When reviewed as a whole, this medical information supports a finding that a genuine issue of material fact exists regarding the cause or causes of Mr. Wernet's low back permanent impairment as of September 20, 2006.

The Proposed Decision and Order dated September 21, 2009, is vacated. Intermec's summary judgment motion is denied. The Department's summary judgment motion is granted in part and denied in part. This appeal is remanded to the hearing process, pursuant to WAC 263-12-145(4), for additional proceedings to be scheduled to take evidence on the sole remaining factual issue:

> **As of September 20, 2006, was the December 20, 2005 industrial injury a proximate cause of any, some or all of the claimant's Category 3, WAC 296-20-280, permanent low back impairment?**

This appeal is remanded to the hearings process, pursuant to WAC 263-12-145(4), for further proceedings as indicated by this order. Unless the matter is dismissed or resolved, the industrial appeals judge will issue a new Proposed Decision and Order. The new order will contain

findings and conclusions as to each contested issue of fact and law. Any party aggrieved by the new Proposed Decision and Order may petition the Board for review, pursuant to RCW 51.52.104.

Dated: February 5, 2010.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

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

/s/_____
LARRY DITTMAN Member