Svicarovich, John

APPLICATION TO REOPEN CLAIM

Accident report treated as application to reopen

An accident report may constitute an application to reopen for aggravation of condition where the Department has not been misled or prejudiced. The worker should not be penalized for using the wrong form in applying for additional benefits. ***….In re John Svicarovich*, BIIA Dec., 08,205 (1957)** [*Editor's Note*: *See also In re Stanley Lee*, BIIA Dec., 09,425 (1959) **APPLICATION FOR BENEFITS.**]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: JOHN L. SVICAROVICH	**)**	**DOCKET NO. 8205**
	)	
CLAIM NO. C-144976	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, John L. Svicarovich, by
James J. Solan

Employer, Wagar Lumber Company, by
Clark W. Adams

Department of Labor and Industries, by
The Attorney General, per
Stanton P. Sender, Assistant

Appeal filed by the claimant, John L. Svicarovich, on November 15, 1956, from an order of the supervisor of industrial insurance dated September 25, 1956, reopening the above-numbered claim for authorized treatment and action as indicated effective July 12, 1956. **MODIFIED AND REMANDED**.

DECISION

The claimant, John L. Svicarovich, filed a report of accident with the department of labor and industries on June 6, 1954, alleging that on May 19, 1954, he suffered a back strain while lifting lumber in the course of his employment with the Wagar Lumber Company of Aberdeen, Washington. His claim was allowed, medical treatment was provided, time-loss compensation was paid and on September 7, 1955, the supervisor of industrial insurance issued an order closing the claim with a permanent partial disability award of 5% of the maximum allowable for unspecified disabilities. On December 3, 1955, the claimant filed a report of accident with the department of labor and industries alleging that he suffered an acute low back condition as a result of an injury described as having occurred after finishing his shift at the National Plywood in Beaver, Washington, when he stepped across a puddle of water outside the plant door and felt a pain in his right side of November 6, 1955. This claim was assigned claim no. C-282933 by the department and was ultimately rejected by the supervisor's order of February 6, 1956, on the ground that at the time of injury the claimant was not in the course of his employment. On April 5, 1956, the claimant appealed from that rejection order and on April 26, 1956, this board granted the appeal. At a pre-hearing conference held in connection with that appeal in Aberdeen, Washington, on May 23, 1956,

the claimant's attorney, Mr. James J. Solan, moved the board for an order dismissing the claimant's appeal on claim no. C-282933, due to the fact that the claimant wished to initiate an application to reopen claim no. C-144976 on the ground of aggravation. Accordingly, on May 28, 1956, this board entered an order dismissing the claimant's appeal on claim no. C-282933. On July 12, 1956, the claimant filed an application to reopen the above-numbered claim (C-144976) on the ground of aggravation of condition. On September 25, 1956, the supervisor entered an order reopening said claim for authorized treatment and action as indicated, effective July 12, 1956. On November 15, 1956, the claimant appealed from the supervisor's order of September 25, 1956, and on December 13, 1956, this board granted the appeal.

A pre-hearing conference was held in connection with this appeal in Aberdeen, Washington, on March 13, 1957, pursuant to R.C.W. 51.52.095, and sec. 5.3, Rules of Procedure of this board. At that time the claimant was present in person and represented by his attorney, Mr. James J. Solan. The employer, Wagar Lumber Company, was represented by its attorney, Mr. Clark W. Adams, and the department of labor and industries was represented by Mr. Stanton P. Sender, assistant attorney general. At that conference, Mr. Solan stated that it was the claimant's position on this appeal that the injury alleged by the claimant in his accident report filed under claim no. C-282933 on December 1, 1955, was in fact an aggravation of his old injury of May 19, 1954, and for that reason the accident report filed December 1, 1955, should be construed as an application to reopen claim no. C-144976. Therefore, Mr. Solan contended that when the supervisor did reopen this claim (C-144976) in July, 1956, the effective reopening date should have been November 7, 1955, instead of July 12, 1956. (November 7, 1955, has been determined as the date of alleged injury covered by claim no. C-282933 instead of November 6, 1955). In support of his contention, Mr. Solan produced a letter dated February 6, 1957, from the claimant's attending physician, Dr. Edwin F. Leibold, of Forks, Washington. By stipulation of the parties at the conference on March 13, 1957, this letter was incorporated in the record as exhibit 1. It was further stipulated between the parties, through their respective counsel, that this matter should be submitted to the board for its decision on the basis of Exhibit one and the department file on claim no. C-144976 and claim no. C-282933.

We see no point in discussing the evidence in the record on the question of whether the acute condition suffered by the claimant on November 7, 1955, was due to a new injury on that date or was an aggravation of the condition resulting from his injury of May 19, 1954. The department

has determined that it was an aggravation of the old injury. The claimant did not appeal from that portion of the department's order of September 25, 1956, reopening his claim based on his 1954 injury, but only from that portion of the order fixing July 12, 1956, as the effective date of the reopening. Therefore, inasmuch as there was no appeal from the department's order by the employer, the board is limited to consideration only of the issue of the proper effective date of the reopening. Brakus v. Department of Labor and Industries, 48 Wn. (2d) 218. Resolution of this issue hinges on the question of whether or not the report of accident filed by the claimant on December 3, 1955, based on his purported "injury" of November 7, 1955, may properly be considered and treated as an application to reopen his claim based on his 1954 injury.

In the case of Georgia Pacific Plywood Company v. Department of Labor and Industries, 47 Wn. (2d) 893, which involved a question of whether a skin condition was due to an aggravation of a condition previously recognized and allowed as an occupational disease or to a new exposure while working for a different employer, our supreme court stated:

> "It was never intended that, when a workman's right to the benefits of the workmen's compensation act on one basis or another is clear, he should have to make a binding election between the possible causes of his condition..."

In the case of Kralevich v. Department of Labor and Industries, 23 Wn. (2d) 640, the claimant had filed an application to reopen his claim on the ground of aggravation of his condition within the time limited for appeal from an order closing his claim with no disability award and the department contended that the claimant was limited to a claim for aggravation only. In answering this contention, the court stated:

> "This contention is without merit. It appears that the department was nowise misled, nor did it suffer damage because of the matters referred to. No technical advantage may now be taken of the fact that, in asking that her claim be reopened, claimant used an inappropriate form..."

In examining the record in this case to determine whether or not the department was misled or prejudiced in any way because the claimant filed a report of accident based on a new injury rather than an application to reopen his claim based on his 1954 injury, it is noted that although the claimant made no mention of his 1954 back injury in his report of accident filed on December 1, 1955, it was accompanied by a letter from the employer stating that the claimant apparently

aggravated an old injury and requesting an investigation. The department then conducted a complete investigation which disclosed that the claimant had suffered a prior back injury "evidenced under claim C-144976" that the claimant stated that he had trouble with his back since then, "but nothing like what occurred on the evening of November 7th, 1955," that the employer contended the claimant's condition was an aggravation of his old injury and that the claimant's attending physician, Dr. Leibold, felt that the attack on November 7, 1955, was a new injury, but that "this could be an aggravation of a previous injury." (In exhibit one, Dr. Leibold states that the claimant's condition "was definitely an aggravation of his old condition, the previous injury to his back of May, 1954.")

As heretofore stated, it is now conceded that the claimant did suffer an aggravation of his injury of May 19, 1954, in November, 1955, rather than a new injury. The question of whether or not an incident such as that described on the claimant's report of accident filed on December 1, 1955, constitutes a "traumatic happening" and a separate and distinct injury or an aggravation of an old injury is not an easy one to determine and we do not think that the claimant should be penalized by the fact that he (or his doctor) used the wrong form in applying for relief. The department's investigation following receipt of the claimant's report of accident disclosed adequate evidence on which to base a determination that the claimant's acute back condition in November, 1955, was due to an aggravation of the condition resulting from his 1954 injury and, in the board's opinion, therefore, the report of accident filed on December 1, 1955, should properly have been treated as an application to reopen the claim based on that injury, which had been closed on September 7, 1955.

The only remaining issue to be considered is with reference to the claimant's contention that he is entitled to time-loss compensation and payment of medical expenses from November 7, 1955.

R.C.W. 51.28.040 provides that:

> "If change of circumstances warrants an increase or rearrangement of compensation, written application shall be made therefor. No increase or rearrangement shall be operative for any period prior to application therefor."

In the case of Fuller v. Department of labor and Industries, 169 Wash. 362, our supreme court held that the above quoted statute precluded payment of monthly compensation to a workman for a period prior to the date he filed an application to reopen his claim on the ground of aggravation of his condition. Construing the report of accident filed by the claimant in this case on December 1,

1955, as an application to reopen the claim based on his 1954 injury as requested by the claimant, he still would not be entitled to time-loss compensation, in the board's opinion, for any period prior to December 1, 1955, under the rule laid down in the Fuller case. However, the question of payment of medical expenses presents a somewhat different problem.

R.C.W. 51.32.010 provides that:

> "Each workman injured in the course of his employment, or his family or dependents in case of death of the workman, shall receive out of the accident fund compensation in accordance with this chapter,..." (Emphasis supplied)

R.C.W. 51.36.010 provides in part that:

> "Upon the occurrence of any injury to a workman entitled to compensation under the provisions of this title, he shall receive, in addition to such compensation and out of the medical aid fund, proper and necessary medical and surgical services,..." (Emphasis added).

The section of the act now codified under R.C.W. 51.28.040 was part of the original workmen's compensation act. (sec. 12, ch. 74, Laws of 1911, Page 364). No provision was made in the original act for medical aid. The first medical aid act was passed by the legislature in 1917 and in so doing the legislature clearly distinguished (as indicated by the section of the act last above quoted) between payments for medical expenses which were to be paid out of the medical aid fund and the "compensation" to which a workman was entitled under the workmen's compensation act, which is paid out of the accident fund, and specifically stated that medical services were to be furnished in addition to the "compensation" provided for by the act. It seems clear to the board, therefore, that the "compensation" referred to in R.C.W. 51.28.040 does not include payment of medical expenses which are payable out of the medical aid fund. Obviously, the legislature could not have intended this section of the act to apply to payment of medical expenses when it was originally enacted as there was no provision for medical aid in the original act.

It is undisputed in this case that the claimant suffered an acute exacerbation of his condition resulting from his injury of May 19, 1954, on or about November 7, 1955, necessitating medical attention, which was provided commencing November 8, 1955, and it would appear therefore that such medical expenses should be paid unless the department is, in fact, precluded from doing so by law.

As heretofore pointed out, R.C.W. 51.28.040 is applicable only to "compensation" payable out of the accident fund and, inasmuch as there is no statutory bar that we know of to payment of medical expenses incurred for treatment necessitated by an aggravation of a condition due to an injury prior to the filing of an application to reopen a claim, the board is of the opinion that necessary and proper medical expenses incurred by the claimant in this case subsequent to November 7, 1955, should be paid by the department, but that no time-loss compensation should be paid for any period prior to December 1, 1955

FINDINGS OF FACT

In view of the foregoing and after reviewing the entire record herein, the board finds as follows:

1. The claimant, John L. Svicarovich, filed a report of accident with the department of labor and industries on June 6, 1954, alleging that on May 19, 1954, he suffered a back strain while lifting lumber in the course of his employment with the Wagar Lumber Company of Aberdeen, Washington. His claim was allowed, medical treatment was provided, time-loss compensation was paid and on September 7, 1955, the supervisor of industrial insurance issued an order closing the claim with a permanent partial disability award of 5% of the maximum allowable for unspecified disabilities. On December 1, 1955, the claimant filed a report of accident with the department of labor and industries alleging that he suffered an acute low back condition as a result of an injury described as having occurred after finishing his shift at the National Plywood in Beaver, Washington, on November 6, 1955, when he stepped across a puddle of water outside the plant door and felt a pain in his right side. This claim was assigned claim no. C-282933 by the department and was ultimately rejected by the supervisor's order of February 6, 1956, on the ground that at the time of injury the claimant was not in the course of his employment. On April 5, 1956, the claimant appealed from that rejection order and on April 26, 1956, this board granted the appeal. At a pre-hearing conference held in connection with that appeal in Aberdeen, Washington, on May 23, 1956, the claimant's attorney, Mr. James J. Solan, moved the board for an order dismissing the claimant's appeal on claim no. C-282933, due to the fact that the claimant wished to initiate an application to reopen claim no. C-144976 on the ground of aggravation. Accordingly, on May 28, 1956, this board entered an order dismissing the claimant's appeal on claim no. C-282933. On July 12, 1956, the claimant filed an application to reopen the above-numbered claim (C-144976) on the ground of aggravation of condition. On september 25, 1956, the supervisor entered an order reopening said claim for authorized treatment and action as indicated, effective July 12, 1956. On November 15, 1956, the

claimant appealed from the supervisor's order of September 25, 1956, and on December 13, 1956, this board granted the appeal.

2. The workman suffered a sudden and acute aggravation of his back condition resulting from his injury of May 19, 1954, on November 7, 1955, which necessitated medical treatment, and the department's investigation in connection with the report of accident "filed by the claimant on December 1, 1955, developed sufficient information on which to base a determination that the claimant's condition was due to an aggravation of his May 19, 1954, injury rather than to a new injury.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the board concludes:

1. The report of "accident" filed by the claimant on December 1, 1955, should as a matter of law be considered and treated as an application to reopen claim no. C-144976.

2. Such medical expenses incurred by the workman subsequent to November 7, 1955, for treatment of his back condition, as may be determined by the department of labor and industries to be proper and necessary according to the law and the rules and regulations of the department should be paid for out of the medical aid fund.

3. The claimant should be paid time-loss compensation for such period of time subsequent to December 1, 1955, as the department may determine that he was totally, temporarily disabled due to the aggravation of his condition resulting from his injury of May 19, 1954.

ORDER

Now, therefore, it is hereby **ORDERED** that the order of the supervisor of industrial insurance be, and the same is hereby, modified insofar as it purports to limit the benefits to which the claimant is entitled to the period subsequent to July 12, 1956, and the above-numbered claim is remanded to the department of labor and industries with direction to pay such medical expenses as were incurred by the claimant for treatment of his back condition subsequent to November 7, 1955, and as may be determined by the department to be necessary and proper in accordance with the rules and regulations of the department, to pay the claimant time-loss compensation for such period of time subsequent to December 1, 1955, as the department may determine that he was totally, temporarily disabled due to the aggravation of his condition resulting from his injury of May 19,

1954, and to take such further action in connection with this claim as may be authorized or required by law.

Dated this 22nd day of April, 1957

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
J. HARRIS LYNCH Chairman

/s/_____
ARTHUR BORCHER Member

/s/_____
A. W. ENGSTROM Member