Preiser, Christopher

AGGRAVATION (RCW 51.32.160)

Last closing order not final

SCOPE OF REVIEW

Aggravation

After the Department's decision to reopen the claim for aggravation becomes final, even if based on a mistake of law, the decision defeats any argument relating to the finality of the prior closing order and the reopening order sets the date upon which further benefits can be considered. **….*In re Christopher Preiser*, BIIA Dec., 09 19683 (2010)** [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under Snohomish County Cause No. 10-2-09709-9.]

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: CHRISTOPHER B. PREISER	)	**DOCKET NO. 09 19683**
	)	
CLAIM NO. AC-78426	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Christopher B. Preiser, by
Law Office of Dale Wagner, per
Jesse F. Haas

Employer, Goodfellow Brothers, Inc.,
None

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

The claimant, Christopher B. Preiser, filed an appeal with the Board of Industrial Insurance Appeals on September 9, 2009, from an order of the Department of Labor and Industries dated August 28, 2009. In this order, the Department denied time loss compensation benefits from October 7, 2006, through November 12, 2008, because the order closing the claim was final and binding and because the claimant was found able to work. The Department order is **AFFIRMED**.

DECISION

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The claimant filed a timely Petition for Review of a Proposed Decision and Order issued on June 1, 2010, in which the industrial appeals judge affirmed the Department order dated August 28, 2009.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed. The parties attached several exhibits to their motions and memoranda that were not identified by our industrial appeals judge or admitted into evidence. We find that the decision in this matter rests on a principle of law relating to the jurisdictional history of this claim such that there is no need to admit the documents into evidence. We have granted review simply to clarify our reasons for affirming the Department order and to issue a decision based on stipulated facts, rather than on a motion for summary judgment.

This matter was decided by our industrial appeals judge on summary judgment. We note that no motion for summary judgment was filed by either party. Although the lack of a specifically

identified motion is not fatal to deciding a matter on summary judgment, we believe the appropriate manner for deciding this case is to render a decision based on stipulated facts. The stipulated facts are found in the record in the Claimant's Response to Department's Motion for Summary Judgment, and declaration and exhibits therein, filed on April 5, 2010. Not all of the facts listed in the document are critical to this decision. We rely upon the following facts in making this decision:

1. The claimant filed an Application for Benefits, which was received by the Department on March 20, 2006. The claim was allowed under Claim No. AC-78426.
2. On October 6, 2006, the Department issued an order in which it closed Claim Number AC-78426 with a permanent partial disability award for Category 2 cervical impairment.
3. The claimant filed a timely protest to the October 6, 2006 order on November 15, 2006. The Department placed the October 6, 2006 order in abeyance on December 11, 2006.
4. On April 26, 2007, the Department issued an order in which it affirmed its October 6, 2006 order.
5. On November 20, 2008, the Department received an application to reopen claim number AC-78426 for aggravation. The Department reopened the claim by an order dated January 28, 2009.
6. On August 28, 2009, the Department issued an order in which it denied time-loss compensation benefits from October 7, 2006, through November 12, 2008.
7. On September 9, 2009, the claimant appealed the order dated August 28, 2009.

Much of Mr. Preiser's argument in this case attempted to establish that his attending physician protested the April 26, 2007 closing order, thereby preventing the order from becoming final and binding. Thus, according to Mr. Preiser, the claim was never closed, and it is within the Board's jurisdiction to determine whether Mr. Preiser was temporarily totally disabled between October 7, 2006, and November 12, 2008. The claimant's argument fails to recognize our previous significant decision *In re Jorge Perez-Rodriquez,* BIIA Dec. 06 18718 (2008).

Although not identical, the situation in Mr. Perez-Rodriquez's appeal was similar to the situation presented here. The Department issued an order in which it closed Mr. Perez-Rodriquez's claim on November 29, 1995. After a timely protest was filed, the Department issued an order on January 23, 1996, in which it placed the closing order in abeyance. The Department affirmed the abeyance order, not the closing order, on April 1, 1996. The claimant's provider filed timely protests to the April 1, 1996 order. The Department did not act on those protests.

Mr. Perez-Rodriguez filed applications to reopen his claim for aggravation in February and March 1997. The Department denied the reopening applications by order dated April 30, 1997. After a timely protest, the Department affirmed the April 30, 1997 order on January 12, 1998. No protest or appeal was filed to that order.

Mr. Perez-Rodriquez filed another application to reopen his claim in April 2006. The reopening application was denied by the Department and became the subject of the appeal assigned Docket number 06 18718. One of the questions raised in that appeal was whether the Department had subject matter jurisdiction to adjudicate the reopening applications when the closing order never became final and binding. The Board found that the lack of a final and binding closing order did not preclude the Department from taking action on the reopening application, only that the action was a mistake of law. Therefore, once the order denying the application to reopen became final and binding, it became res judicata under *Marley v. Department of Labor & Indus.,* 125 Wn.2d 533 (1994). The Board specifically overruled prior cases holding that the lack of a final and binding closing order was a jurisdictional bar to any action on an application to reopen the claim.

Although the facts in this case differ slightly from those in *Perez-Rodriguez*, we find the same principle applies. Rather than denying Mr. Preiser's application to reopen his claim, the Department reopened the claim. Neither the claimant, nor the employer, protested the decision to reopen the claim, and the order is now final and binding. The reopening of a claim by necessity precludes the Department from administering the claim as if it were never closed. If, in fact, the claimant and/or his representative believed the claim had not been closed, the time to raise the issue was when the Department acted upon the application to reopen the claim. Prior rulings and the Court's decision in *Marley* require this outcome.

We specifically do not decide the issue of whether any documents submitted by the claimant's provider should have been treated as a protest of the April 26, 2007 closing order requiring further consideration by the Department. Regardless of whether a timely protest was filed to the April 26, 2007, the order reopening the claim is final and binding. The Department's decision to reopen the claim, even if based upon a mistake of law, superseded any argument relating to the prior closing order of April 26, 2007. The reopening of a claim, even if based on a mistake of law, set the date upon which further benefits could be considered. Benefits may be allowed for up to 60 days prior to the filing of the application to reopen. RCW 51.28.040. The finality of the reopening

order precludes the Department from paying benefits prior to the effective date of the reopening. The Department order is affirmed.

FINDINGS OF FACT

1. The claimant, Christopher B. Preiser, filed an Application for Benefits with the Department of Labor and Industries on March 20, 2006, in which he alleged he sustained an industrial injury on February 28, 2006, during the course of his employment with Goodfellow Brothers, Inc. The claim was allowed as an occupational disease, with a date of manifestation of March 1, 2006, and benefits were paid. On October 6, 2006, the Department issued an order in which it closed the claim. On November 15, 2006, the claimant filed a protest and request for reconsideration of the closing order. The Department affirmed the October 6, 2006 closing order on April 26, 2007.

   On November 20, 2008, Mr. Preiser filed an application to reopen his claim for aggravation. On January 28, 2009, the Department issued an order in which it reopened the claim effective November 13, 2008. On January 29, 2009, the employer filed a protest to the January 28, 2009 Department order. On April 17, 2009, the Department issued an order in which it affirmed the January 28, 2009 order. On August 28, 2009, the Department issued an order in which it denied time-loss compensation benefits for the period of October 7, 2006, through November 12, 2008, inclusive because the claim closure was final and binding and the claimant was found able to work.

   On September 9, 2009, Mr. Preiser filed a Notice of Appeal from the August 28, 2009 order with the Board of Industrial Insurance Appeals. On October 13, 2009, the Board issued an Order Granting Appeal under Docket No. 09 19683, and agreed to hear the appeal.

2. Neither the claimant, nor the employer filed a protest or appeal of the April 17, 2009 Department order that reopened the claim effective November 13, 2009. The April 17, 2009 order reopening Mr. Preiser's claim effective November 13, 2008 is final and binding.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of these appeals.

2. Regardless of whether the April 26, 2007 closing order became final and binding, the Department had jurisdiction to issue the April 17, 2009 order reopening Mr. Preiser's claim. The issuance of the order may have been erroneous as a matter of law, but the order is not void.

3. The failure of Mr. Preiser to protest or appeal the April 17, 2009 reopening order rendered if final and binding on him. There are no facts or circumstances that justify relieving him from the res judicata effect of the order.

4. Mr. Presier is not entitled to receive time-loss compensation benefits between October 7, 2007 and November 12, 2008, because the order reopening his claim had the legal effect of rendering his claim closed during that period of time. An injured worker cannot receive benefits for a period of time in which the claim is closed and prior to 60 days before the filing of an application to reopen the claim.

5. The Department order dated August 28, 2009, is correct and is affirmed.

DATED: October 12, 2010.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
DAVID E. THREEDY Chairperson

/s/_____
LARRY DITTMAN Member

DISSENT

I respectfully dissent. The decision of the Department to reopen the claim is fundamentally different than a decision denying a reopening. In the former case, the claim is opened and benefits paid. In Mr. Preiser's case, the claim was not closed in April 2007, because his provider wrote to the Department and expressed her disagreement with the decision to close the claim. The Department never issued a further order. Therefore, up to the point the Department issued the order reopening the claim, the claim was not closed. My view is consistent with the Supreme Court's decision in *Reid v. Department of Labor & Indus.,* 1 Wn.2d 430 (1939). I believe the Court did establish a jurisdictional requirement that would render the Department's decision reopening the claim void. In that decision, the Supreme Court wrote, "Until disposition was made of the appeal from the [closing] order . . . there was no basis for a claim for aggravation of disability." *Reid,* at 437. The court identifies the necessity of a final and binding closing order as a "condition prerequisite" to the reopening of a claim. *Reid, at 437.* I understand the decision to mean that until a closing order becomes final and binding, the Department lacks jurisdiction to entertain an application to reopen the claim. If the Department acts without jurisdiction, the action is void.

Based upon my understanding of the *Reid* decision, I do not agree with the Board's holding in *Perez-Rodriquez* decision. Even if the decision were correct with regard to the facts of that case,

however, I would distinguish this case because the Department has not issued a final and binding order closing the claim since April 2007. In my view, when the Department denies an application to reopen, the decision operates like another closing order. We have held that the date of the most recent order denying reopening becomes the first terminal date for purposes of determining whether worsening or aggravation has occurred. A Department decision reopening a claim does not have the same effect as a closing order, and should not necessarily turn a non-binding closing order into a final and binding order.

The Department's April 26, 2007 order has not become final and binding. I believe the Department's order reopening the claim is void for lack of jurisdiction. That being the case, I would remand this matter to the hearing judge to hear evidence about Mr. Preiser's ability to work during the time period in question and his entitlement to time-loss compensation benefits.

BOARD OF INDUSTRIAL INSURANCE APPEALS

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