

## **Gorham, Sheri**

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### **SCOPE OF REVIEW**

#### **Segregation order**

Where the worker's protest to a segregation order requests that the Department accept a specific condition and the Department affirms the segregation order, the Board's scope of review extends to the specific condition alleged by the worker in her protest, notwithstanding the fact that the Department's affirmance order did not specifically segregate the condition sought by the worker. ...*In re Sheri Gorham*, BIIA Dec., 11 23281 (2013)

Scroll down for order.



1 claim based on Ms. Gorham's stipulation that the condition is not occupationally related. We  
2 granted review to address our scope of review regarding Ms. Gorham's mental health condition  
3 described as pain disorder.

#### 4 **ISSUE STATEMENT**

5 We are asked to decide if this Board has jurisdiction to determine whether Ms. Gorham's  
6 pain disorder is proximately caused by the industrial injury. Ms. Gorham argues that this Board has  
7 jurisdiction to decide the issue regarding the pain disorder because she notified the Department of  
8 her request to have the mental health conditions, described as pain disorder and depression,  
9 accepted as conditions under the claim and the Department's response addressed other mental  
10 health conditions. She reasons that having made the request, the Department was on notice and  
11 although pain disorder is not mentioned in the order, the order constitutes the Department's  
12 response to her request, and the response is a denial of the request. The Department argues that  
13 the Board's jurisdiction is appellate only, and absent a specific response to Ms. Gorham's protest  
14 the issue is not before this Board because the Department has the right to decide the issue first.

15 Because we find: (1) Ms. Gorham made a specific request for acceptance of her mental  
16 health conditions, including the pain disorder, when she filed a protest to the Department order  
17 segregating mental health conditions; (2) in response the Department affirmed its determination to  
18 segregate mental health conditions; and (3) the parties fully litigated the proximate cause of the  
19 pain disorder, we hold that the Department's response is a response to Ms. Gorham's request and  
20 constitutes a denial of her request to include the pain disorder as an accepted condition under the  
21 claim. The failure to specifically refer to pain disorder in the Department order does not deprive this  
22 Board from jurisdiction on the issue regarding the acceptance of mental health conditions, including  
23 pain disorder.

#### 24 **DECISION**

25 Sheri L. Gorham was employed by Quick Hand Work, Inc., from 2001 through November 9,  
26 2005. Her job involved repetitively taping and folding boxes. During the course of this employment,  
27 Ms. Gorham developed symptoms consistent with bilateral carpal tunnel syndrome. She filed an  
28 occupational disease claim, which the Department allowed in an order dated December 6, 2005.  
29 Ms Gorham underwent bilateral carpal tunnel release but her symptoms did not improve. In fact,  
30 shortly after her right wrist surgery, she developed contractures and was diagnosed with complex  
31 regional pain syndrome. The Department allowed this condition in an order dated March 18, 2009.  
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1 Ms. Gorham also developed mental health conditions. On August 7, 2009, the Department  
2 issued an order in which it segregated the conditions of post-traumatic stress disorder and  
3 depression as not caused by the industrial injury. The order did not address Ms. Gorham's pain  
4 disorder. On October 2, 2009, Ms. Gorham protested the August 7, 2009 order by sending a  
5 secure message electronically to the Department. Her message said: "Ms. Gorham is suffering  
6 from a major depressive disorder and a pain disorder causally related to the industrial injury of  
7 October 20, 2005 and its sequelae."

8 On April 18, 2011, the Department responded to Ms. Gorham's protest by affirming its  
9 August 7, 2009 order and stating, "the Department is not responsible for the conditions diagnosed  
10 as post-traumatic stress disorder and chronic and organic depression." Ms. Gorham appealed and  
11 the Department reassumed jurisdiction on July 20, 2011. The Department again affirmed its  
12 August 7, 2009 order in the September 13, 2011 order that is the subject of this appeal.

13 The Board's authority or scope of review is determined by the order under appeal and the  
14 Notice of Appeal. *Lenk v. Department of Labor & Indus.*, 3 Wn. App. (1970). *Brakus v. Department*  
15 *of Labor & Indus.*, 48 Wn.2d 218 (1956). This simple statement of our jurisdiction over issues, or  
16 our scope of review, while easy to repeat can be difficult to apply. One of the more difficult aspects  
17 in defining our scope of review is determining what issues the order under appeal has decided.  
18 That is the fundamental question before us in this appeal. Court decisions and decisions of this  
19 Board clearly reflect that we look beyond the actual language of the Department order to determine  
20 which issues the Department addressed in the order on appeal. In *Lenk*, the court determined that  
21 in an appeal to the Board of an order rejecting the claim, the Board had within its scope of review  
22 the ability to determine that an arthritic process was not caused by the worker's occupational  
23 exposure. In *Lenk*, the Board allowed the claim for a skin condition but also entered findings  
24 segregating the arthritis condition.

25 Although the Department did not address the specific conditions alleged by the claimant of  
26 "polyarthritis" in its order rejecting the claim, the *Lenk* court held that the Department order affirming  
27 rejection of the claim and stating that the worker's chronic degenerative joint disease was not due  
28 to the industrial injury was sufficient to raise the issue of the polyarthritis condition as being caused  
29 by the exposure at work. The essence of *Lenk* is that there was a request by the worker to have  
30 the Department accept the polyarthritis condition, which was made in the Application for Benefits.  
31 The initial order rejecting the claim stated only that the worker did not have an occupational disease  
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1 or industrial injury. The worker protested the rejection of the claim and the Department did not  
2 address the issue regarding the polyarthritis but affirmed the rejection order and added language  
3 about the claimant's chronic degenerative joint disease as being unrelated to the industrial injury.

4 These facts are similar to the facts in this appeal. Here Ms. Gorham protested rejection of  
5 her mental health conditions, asserting that depression and pain disorder should be accepted  
6 mental health conditions under the claim. The Department's response, as in *Lenk*, was to affirm a  
7 prior order that rejected acceptance of the mental health condition and with additional language  
8 segregated depression and post-traumatic stress disorder from the claim. We do not find it  
9 necessary to draw a distinction between an order allowing or rejecting the claim and an order  
10 allowing or rejecting a condition. In each situation, the worker seeks to have the condition or the  
11 claim accepted. The Department's response puts the issue in play and an appeal to the Board from  
12 that order raises the issue before this Board. In *Lenk*, the Department's response was not clearly  
13 directed to the question posed by the worker but the response was sufficient to allow the worker to  
14 raise the issue before the Board.

15 The Department in *Lenk* issued its first order regarding allowance of the claim using generic  
16 language. That language was simply that the worker's condition was not an industrial injury or  
17 occupational disease. This is still a common practice by the Department of Labor and Industries.  
18 The scope of our review from such an order requires that we understand what issues were before  
19 the Department at the time it issued its order. To facilitate this understanding we have long held  
20 that we may examine the Department file to determine our jurisdiction. *In re Mildred Holzerland*,  
21 BIIA Dec., 15,729 (1965). We have used *Holzerland* in situations where it is necessary to  
22 determine what issues were before the Department and therefore subject to our review. In *In re*  
23 *Louis Lobos*, Dckt No. 10 12602 (July 14, 2011) the worker appealed the Department order closing  
24 the claim without a permanent partial disability award. The issue of acceptance of a mental health  
25 condition was raised in the worker's Petition for Review challenging a finding of fact that found that  
26 the worker did not have a mental health condition caused by the industrial injury. On review, we  
27 examined the Department file to determine whether the Department had, in fact, accepted the  
28 mental health condition. We determined that the Department had authorized treatment for mental  
29 health conditions and we modified the findings to reflect that fact.

30 In *In re Jurene M. Stuart*, Dckt. No. 11 14464 (May 1, 2012), the principal issue litigated by  
31 the parties concerned claim suppression by the employer. We noted that there was nothing on the  
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1 face of the order under appeal that addressed claim suppression. Because this raised the issue of  
2 our scope of review, we utilized our authority under *Holzerland* and reviewed the Department file  
3 and discovered that the Department had issued a letter on the same date as the order on appeal  
4 concluding there was no evidence of claim suppression by the employer. We found that the claim  
5 suppression issue was within our scope of review and that CR 15(b) allowing amendments to the  
6 pleadings to conform to the evidence permitted us to reach this issue.

7 In *In re Albina Pascual*, BIIA Dec., 09 20949 (2010), the worker appealed from an order  
8 closing the claim with no permanent partial disability. At the hearing, the worker raised the issue of  
9 vocational services. Our industrial appeals judge determined that the issue of vocational services  
10 was not within the Board's jurisdiction in an appeal from a closing order. The Notice of Appeal  
11 consisted of three letters from the worker's chiropractor. In all three letters, he sought to have the  
12 claim reopened for vocational training. Two of the letters were addressed to the Department and  
13 were dated so that they were received at the Department after the initial order closing the claim but  
14 before the Department acted to affirm the closure. We stated that:

15 [T]he Department had ample notice from the outset that the claimant  
16 was seeking retraining and can be fairly assumed to have considered  
17 that issue when it held the June 3, 2009 closing order in abeyance,  
18 affirmed it on July 27, 2009, and chose not to reassume jurisdiction  
thereafter."

18 *Pascual* at 3.

19 The holding by the Court in *Lenk* allows this Board to examine the issues raised by the  
20 parties before the Department in order to determine if the Department has considered a particular  
21 issue. If the issue is before the Department and the Department responds to the issue by an order  
22 addressing the subject matter of the issue, then on an appeal to this Board that issue is within our  
23 scope of review.

24 We now turn to our colleague's dissent. The dissent raises a number of issues that we will  
25 address individually. First, the dissent incorrectly states that our rationale is that the September 13,  
26 2011 order constitutes an implicit segregation of Ms. Gorham's pain disorder. As we have set forth  
27 in our majority opinion, that is not the basis for our decision. Our decision is based on the fact that  
28 the Department had before it a specific request by Ms. Gorham regarding her mental health  
29 conditions. The Department considered her request raised in her protest to include mental health  
30 conditions, including the pain disorder, and responded to that request in its September 13, 2011  
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1 order. By refusing to allow the condition, the Department order in fact denied the request. This is  
2 consistent with the Court's decision in *Lenk* .

3 The dissent also finds that our decision creates a flawed and unworkable approach to our  
4 scope of review. The dissent fails to understand that our approach has been consistent and  
5 provides a practical resolution of issues raised before the Department by either the Application for  
6 Benefits or in a protest to a specific order. The dissent's approach would allow the Department to  
7 issue very narrow orders, even though a specific request for action on the claim was made by the  
8 worker. The Department cannot have unfettered control over the scope of the issues before it. The  
9 Department is required to respond to requests or protests by the worker or the employer and to  
10 have the issues appealable to the Board of Industrial Insurance Appeals. Following the dissent's  
11 rationale would result in situations where the Department could effectively deny a worker's request  
12 for medical treatment of a condition and prevent the worker from appealing to this Board until  
13 closure of the claim. Although our decision in *In Re Randy Jundul*, BIIA Dec., 98 21118 (1999)  
14 provides for resolution of all outstanding protests when a closing order is issued by the Department,  
15 this is not sufficient protection of the worker's right to seek medical treatment for conditions caused  
16 by the industrial injury. We must not allow the Department to deny acceptance of a condition and  
17 by failing to issue a specific order including specific language, prevent the worker from challenging  
18 the Department's decision. This is untenable.

19 The dissent incorrectly states that the Court in *Lenk* held that the Board's scope of review  
20 was limited to the issues the Department has addressed either explicitly or by necessary  
21 implication. We disagree. The holding as expressed by the dissent is not contained within the  
22 *Lenk* decision. Nowhere in *Lenk* does the court state that the Board's scope of review is limited to  
23 issues either addressed explicitly or by necessary implication. This is a standard set by the dissent,  
24 not by the court in *Lenk*.

25 The dissent focuses on the fact that Ms. Gorham did not raise the pain disorder in her Notice  
26 of Appeal. While this is a distinction from the facts in the *Lenk* case, the dissent fails to recognize  
27 that we routinely allow amendments to the Notice of Appeal and Civil Rule 15(b) allows amendment  
28 of pleadings to conform to the facts litigated. We note that here, the parties have litigated the issue  
29 of acceptance of the pain disorder as a mental condition under the claim.

30 The dissent focuses on a number of cases, arguing that this Board has limited its scope of  
31 review to only the explicit language of the Department's order when the Department has addressed  
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1 specific issues. The dissent cites *In re Tom Camp*, BIIA Dec., 38 035 (1973). *Camp* dealt with a  
2 time-loss compensation benefits order that was on appeal. The Proposed Decision and Order in  
3 *Camp* reversed the Department order paying time-loss compensation benefits but also denied time-  
4 loss compensation benefits for all future periods of time-loss compensation. The Board found that it  
5 lacked jurisdiction to address orders that had not been issued and were not on appeal before the  
6 Board. *Camp* is not on point.

7 The dissent also cites *In re Betty Connor*, BIIA Dec., 91 0634 (1992). In *Connor*, the  
8 self-insured employer appealed a Department order requiring the employer to pay time-loss  
9 compensation benefits. The Board held that it lacked jurisdiction to reach fixity of the claimant's  
10 conditions or the extent of disability in an order that only addressed time-loss compensation  
11 benefits. The Board stated that the Department had only addressed the issue of the claimant's  
12 employability when it issued the time-loss compensation order. Factually, *Connor* is not on point.  
13 Ms. Gorham protested a Department order denying acceptance of mental health conditions. She is  
14 not trying to have issues of a different nature included in her appeal to this Board as was  
15 Ms. Connor. In *Connor* we stated that the Department "must be allowed to initially adjudicate a  
16 claim." *Connor*, page 7. The distinction between the facts in *Connor* and the facts in the present  
17 appeal are that here the Department was on notice of the worker's request regarding the  
18 acceptance of the mental health conditions and responded to that request by issuing an appealable  
19 order. The Department was allowed to adjudicate the claim and in fact did.

20 The dissent also cites the case of *In re Ronald L. Taylor*, Dckt. No. 09 13618 (August 21,  
21 2010). The Board in *Taylor* addressed appeals from orders that denied responsibility for mental  
22 health conditions described as anxiety disorder, depression, and post-traumatic stress disorder.  
23 The Board reversed the Department order that rejected the mental health conditions. The  
24 Proposed Decision and Order in *Taylor* had directed treatment for the conditions ordered to be  
25 included under the claim by the Board. The Board held that where a Board order reverses an order  
26 rejecting a condition under the claim, it is premature for the Board to address the issue of treatment  
27 because it would exceed the scope of review because the Department had never considered that  
28 condition. *Taylor* is not on point.

29 The dissent cites *In re Carolyn E. Frank*, Dckt. No. 09 12165 (April 16, 2010). In *Frank*, the  
30 Department issued an order denying a condition described as cervical dystonia. The Board allowed  
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1 the condition but held that the issue of treatment was not before the Board because the Department  
2 clearly did not pass on it because it had not allowed the condition. *Frank* is not on point.

3 Additionally, the dissent relies on *In re Malcomb B. Warde*, Dckt. Nos. 94 3565, 94 5254,  
4 94 5851, and 94 6255 (February 7, 1996). Although the dissent states that the decision in *Warde* is  
5 particularly illustrative of our scope of review, we disagree. *Warde* is clearly distinguishable.  
6 *Warde* involved the appeal of a number of orders. Two of the orders on appeal concerned payment  
7 of time-loss compensation benefits. In one order, the Department accepted responsibility for the  
8 claimant's mental health condition described as depression. The Board held that where none of the  
9 orders had addressed the condition of a knee injury, and where resolution of the issue was not  
10 necessary to decide the appeals, the issue was not before the Board. This is clearly different from  
11 the situation involving Ms. Gorham. In Ms. Gorham's case, she is seeking acceptance of a mental  
12 health condition. She has described that condition to the Department as depression and pain  
13 disorder. The Department refuses to accept the pain disorder. This is clearly distinguishable from  
14 a situation where in Mr. Warde's case he was seeking acceptance of a right knee condition on an  
15 appeal from an order accepting a mental health condition. *Warde* is not on point.

16 All of the cases cited by the dissent have a common theme. They lack any protest or notice  
17 to the Department regarding the issue sought to be litigated before this Board. The dissent fails to  
18 understand the distinction. Notice to the Department coupled with the Department's response to  
19 the protest or notice brings the issue within our scope of review.

20 The dissent also raises the issue that our decision will force the Department to adjudicate  
21 the claim according to the terms of the protesting party. The dissent argues that while  
22 RCW 51.32.055 (6) requires that the Department respond to a dispute that arises from the handling  
23 of the claim, it does not address the Department's failure to act in response to the request, and that  
24 by including the mental health issue of pain disorder as an issue within the scope of our review, we  
25 usurp the Department's jurisdiction and dictate a result not authorized by statute. We disagree.  
26 First, the Department should administer the claim consistent with the facts given to it by the worker,  
27 employer, medical providers, and others. A protest to a Department decision is information that  
28 may prove necessary in the administration of the claim. Requiring the Department to respond to an  
29 injured worker's request is not forcing the Department to adjudicate the claim according to the  
30 terms of the protesting party. It is simply requiring the Department to do what the law requires of it,  
31 that is, to administer the claim. Second, the Department did respond to the worker's protest.

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1 Although the Department had several opportunities to respond to Ms. Gorham's briefs and  
2 arguments in support of including pain disorder as an issue, the Department never argued that it did  
3 not consider pain disorder when it responded to Ms. Gorham's protest.

4 The dissent cites *In re Gordana Lukic*, Dckt. Nos. 02 20031 & 03 13722 (August 17, 2004).  
5 The dissent believes this decision stands for the proposition that the Board cannot interfere with the  
6 claims administration process. We agree. Although absent from the dissent's discussion, we  
7 believe the facts in the *Lukic* decision clearly show that it is not on point. In *Lukic*, the claimant  
8 appealed from two Department orders. One order ended time-loss compensation benefits and  
9 denied time-loss compensation benefits for a period of time. The second order closed the claim  
10 with no award for permanent partial disability. As a part of the appeal to the Board, Ms. Lukic  
11 requested that the Board direct the Department to provide an interpreter for her for all matters  
12 pending before the Department. Clearly, the determination by the Department on how to interact  
13 with the claimant in the administration of the claim remains with the Department. We see a distinct  
14 difference between ordering the Department to accept a mental health condition that has been  
15 raised by the worker in a formal protest to the Department and to which the Department issued a  
16 responsive order from the situation where the claimant is asking this Board to direct the Department  
17 to determine how it will communicate with the claimant during the claims administration. The  
18 dissent's reliance on *Lukic* is misplaced.

19 The dissent also raises the issue regarding the fact that the parties litigated the acceptance  
20 of the pain disorder. The dissent believes that the fact that the matter was litigated before the  
21 Board has no bearing on the issue regarding whether or not the Board has jurisdiction over the  
22 issue of the pain disorder. While we agree that the parties cannot enlarge the Board's scope of  
23 review, we note that our decision is not based only on the fact that the case was litigated before this  
24 Board, but rather that our scope of review extends to issues placed before the Department by the  
25 parties as the court set out in *Lenk*. The dissent states that the Department objected to the  
26 inclusion of the pain disorder at a June 1, 2012 telephone conference and that the only witness to  
27 testify prior to the June 1, 2012 telephone conference was Dr. C. Donald Williams. We note that a  
28 conference was held on June 1, 2012, apparently at the request of our industrial appeals judge. No  
29 transcript was made of the conference. However, the Interlocutory Order issued by our industrial  
30 appeals judge reflects that she became concerned with the scope of review issue and she  
31 determined that the pain disorder would not be included as a part of the appeal. She gave the  
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1 parties until July 12, 2012, to file briefs on the issue. On July 26, 2012, our industrial appeals judge  
2 issued her Interlocutory Order Denying Inclusion of Pain Disorder as an Issue on Appeal.  
3 Dr. Williams testified by deposition on May 10, 2012. Dr. Gail English testified by deposition on  
4 June 13, 2012. The remaining witnesses were called by the Department testified by deposition on  
5 July 12 and 13, 2012. All of the testimony presented in this appeal was taken prior to the July 26,  
6 2012 date of our industrial appeals judge's interlocutory order excluding the pain disorder from the  
7 appeal.

8 We turn now to the question of whether the Department should be directed to accept  
9 responsibility for the condition of pain disorder. Ms. Gorham presented the testimony of her  
10 attending physician, Gayle English, M.D., and psychiatrist, C. Donald Williams, M.D. The  
11 Department countered the testimony with two independent medical examiners, Richard L.  
12 Schneider, M.D., and Michael K. Freidman, D.O. In weighing the conflicting opinions of these  
13 experts, we find that Ms. Gorham presented the more persuasive case.

14 Drs. English and Williams testified that Ms. Gorham developed a pain disorder as a result of  
15 her occupationally related bilateral carpal tunnel syndrome and complex regional pain syndrome.  
16 The facts of this case support the opinions of these experts. Although Ms. Gorham received  
17 approximately nine months of counseling in 1995 because of spousal abuse, she did not need  
18 further mental health treatment until after the manifestation of her occupational disease in 2005.  
19 The primary problem Ms. Gorham had in 1995 was post-traumatic stress disorder. Her primary  
20 problems now are depression and a pain disorder. Moreover, Ms. Gorham has not been able to  
21 work since she suffered her occupational disease, and the testimony of her husband has  
22 convincingly established that her mental health has deteriorated because of her impaired physical  
23 functioning. Dr. Schneider agreed that Ms. Gorham met the criteria for a pain disorder as a result  
24 of the medical conditions that have caused her chronic pain. Although he does not believe that a  
25 pain disorder is a psychiatric condition, his opinion is out of step with the opinions of the other  
26 examiners. The only expert who did not diagnose a pain disorder was Dr. Freidman. However, he  
27 admitted that a pain disorder would not be an outrageous diagnosis and, in fact, "would make  
28 sense to me." Friedman Dep. at 4. The preponderance of the evidence establishes that  
29 Ms. Gorham's occupational disease was a proximate cause of her pain disorder.

30 The Department incorrectly denied responsibility for Ms. Gorham's depression and pain  
31 disorder. We reverse the Department order of September 13, 2011, and direct the Department to  
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1 accept responsibility for these conditions and to deny responsibility for the condition of  
2 post-traumatic stress disorder.

3 **FINDINGS OF FACT**

- 4 1. On January 24, 2012, an industrial appeals judge certified that the  
5 parties agreed to include the Jurisdictional History in the Board record  
6 solely for jurisdictional purposes.
- 7 2. Sheri L. Gorham developed bilateral carpal tunnel and complex regional  
8 pain syndrome that arose naturally and proximately out of distinctive  
9 conditions of her employment.
- 10 3. Sheri L. Gorham's depression was proximately caused by her  
11 occupational disease.
- 12 4. The issue of whether Sheri L. Gorham developed an occupationally  
13 related pain disorder was addressed in the Department order of  
14 September 13, 2011, and fully litigated by the parties.
- 15 5. Sheri L. Gorham's pain disorder was proximately caused by her  
16 occupational disease.
- 17 6. The condition of post-traumatic stress disorder was not proximately  
18 caused or aggravated by Ms. Gorham's occupational disease.

19 **CONCLUSIONS OF LAW**

- 20 1. Based on the record, the Board of Industrial Insurance Appeals has  
21 jurisdiction over the parties and the subject matter of this appeal.
- 22 2. The issue of whether Sheri L. Gorham developed a pain disorder  
23 proximately caused by her occupational disease is within the Board's  
24 scope of review.
- 25 3. The Department order dated September 13, 2011, is incorrect and is  
26 reversed. The matter is remanded to the Department of Labor and  
27 Industries to issue and order in which it accepts responsibility for the  
28 conditions of depression and pain disorder, and denies responsibility for  
29 the condition of post-traumatic stress disorder.

30 Dated: April 1, 2013.

31 BOARD OF INDUSTRIAL INSURANCE APPEALS

32 /s/ \_\_\_\_\_  
DAVID E. THREEEDY Chairperson

/s/ \_\_\_\_\_  
FRANK E. FENNERTY, JR. Member

1 **DISSENT**

2 I disagree with the majority's decision to permit Ms. Gorham to seek allowance of her pain  
3 disorder in this appeal. Because the majority's decision departs from the case law that defines our  
4 scope of review, I dissent.

5 The sole issue raised in the Petition for Review is whether the scope of our review  
6 encompasses Ms. Gorham's request for allowance of her pain disorder. The Department did not  
7 mention this condition in its August 7, 2009 order or its September 13, 2011 affirming order.  
8 Nonetheless, the majority concludes that we have the authority to address the question of whether  
9 Ms. Gorham developed an occupationally related pain disorder because she sought allowance of  
10 that condition in her protest of the August 7, 2009 order. The majority's rationale is that the  
11 September 13, 2011 order constituted an implicit segregation of Ms. Gorham's pain disorder. This  
12 rationale subverts the applicable case law that we are bound to follow under the principle of stare  
13 decisis. It also creates a flawed and unworkable approach to our scope of review.

14 The inability of the majority to identify a single case in which we or the courts have reached a  
15 similar result based upon analogous facts reveals the novelty of its approach in the instant appeal.  
16 The cases the majority relies on emphasize this point.

17 It is well established that the Board's jurisdiction is appellate only. *Turner v. Department of*  
18 *Labor & Indus.*, 41 Wn.2d 739 (1953). As an appellate body, the questions we may consider are  
19 fixed by the order by which the appeal was taken, as limited by the issues in the Notice of Appeal.  
20 *Lenk v. Department of Labor & Indus.*, 3 Wn. App. 977 (1970). The majority believes that the  
21 court's analysis in *Lenk* supports its decision. The majority is incorrect.

22 In *Lenk*, the claimant filed an occupational disease claim citing injurious exposure to  
23 creosote. The Department rejected the claim and the claimant appealed. The Board directed the  
24 Department to allow the claim for a skin condition. However, the Board also determined that the  
25 claimant's polyarthritis was unrelated to his exposure and should be segregated. The superior  
26 court struck the Board's segregation finding on the basis that the Board exceeded its scope of  
27 review. The Court of Appeals reversed the superior court and reinstated the Board's decision. It  
28 concluded that the Department's reject order was a determination that the claimant's polyarthritis  
29 was unrelated to the exposure because the claim was filed for that condition.<sup>1</sup> Confirmation of this

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31 <sup>1</sup> The court questioned the Board's finding as to the claimant's skin condition because the record did not establish that  
32 the Department had considered whether the condition was occupationally related. But the court let the finding stand  
because the parties did not challenge it on appeal.

1 conclusion was found in the claimant's Notice of Appeal in which the claimant requested allowance  
2 of his arthritic condition.

3 The majority concedes that *Lenk* is factually distinguishable. However, it views *Lenk* as  
4 authority for the proposition that the Board may review the issues the Department implicitly  
5 addressed in its order irrespective of whether the issues are necessary to resolve the appeal. The  
6 majority misconstrues the court's holding. *Lenk* holds that the Board's scope of review is limited to  
7 the issues the Department has addressed either explicitly or by **necessary** implication. The court  
8 in *Lenk* concluded that the Board had the authority to determine whether the claimant's polyarthritis  
9 was occupationally related, not because the issue was implicitly addressed in the Department's  
10 order as the majority suggests, but because resolution of the issue was necessary to decide the  
11 merits of the claim. Here, it would be inaccurate to say that the Department must have addressed  
12 the cause of Ms. Gorham's pain disorder when all it did was affirm its decision to segregate two  
13 other mental health conditions. Ms. Gorham's depression, post-traumatic stress disorder, and pain  
14 disorder are separate and distinct mental conditions. The expert testimony in the record bears this  
15 out. The Department did not need to determine the cause of Ms. Gorham's pain disorder in order  
16 to resolve the question of whether it should accept responsibility for her depression and  
17 post-traumatic stress disorder.

18 In addition, Ms. Gorham did not mention her pain disorder in the Notice of Appeal, which  
19 further distinguishes this case from *Lenk*. To the contrary, Ms. Gorham requested "the allowance of  
20 the denied conditions." (Page 2 of the Notice of Appeal.) The Department did not deny the  
21 allowance of Ms. Gorham's alleged pain disorder in its September 11, 2011 order.

22 The majority also incorrectly relies on *In re Jurene M. Stuart*, Dckt No. 11 14464 (May 1,  
23 2012). There, the claimant appealed the Department order rejecting the claim. The principal issue  
24 litigated by the parties, however, was claim suppression by the employer, which was not addressed  
25 in the order under appeal. We determined that the claim suppression issue was within the scope of  
26 our review because: (1) the Department adjudicated the issue in a separate letter it issued on the  
27 same day as its order; (2) the claimant identified both the Department's order and letter in her  
28 Notice of Appeal, which should have resulted in two docket numbers; and (3) the parties litigated  
29 the issue by express or implied consent, which allowed us to amend the pleadings to conform to the  
30 evidence under CR 15(b). These facts distinguish *Stuart* from the instant case because the  
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1 Department did not adjudicate Ms. Gorham's pain disorder, nor was there an agreement to litigate  
2 the allowance of that condition.

3 *In re Albina Pascual*, BIIA Dec., 09 20949 (2010) is also inapposite. There, we determined  
4 that the issue of whether the claimant was entitled to vocational services was properly before us in  
5 her appeal from the Department's closing order. *Pascual* is not helpful because Ms. Gorham's  
6 appeal is not from an order closing her claim.<sup>2</sup> We have drawn a distinction between appeals from  
7 closing orders and orders issued in an open claim when it comes to defining our scope of review.  
8 *In re Merle Free, Jr.*, BIIA Dec., 89 0199 (1990) and *In re Randy Jundul*, BIIA Dec., 98 2118 (1999).

9 In *Jundul*, we held that a closing order constitutes a Department determination, explicit or by  
10 necessary implication, of the worker's entitlement to any and all benefits as of the date of that order.  
11 Our rationale in *Free* and *Jundul* was based on considerations that are not present here. Because  
12 a closing order resolves all aspects of the claim as of the date the order is issued, it logically follows  
13 that unresolved issues are subsumed within the closing order by necessary implication. In addition,  
14 the parties must have an avenue to litigate contested issues in the event the Department fails to  
15 address outstanding protests prior to claim closure. Limiting the Board's scope of review to the  
16 express terms of the closing order would deprive the parties of this right.

17 Next, the majority asserts that its decision is in line with CR 15(b). CR 15(b) authorizes  
18 amendments of pleadings to conform to the evidence in two instances. The first is when the issues  
19 not raised in the pleadings are tried by the "express or implied consent of the parties." The second  
20 is when there has been an objection on the grounds that the evidence is "not within the pleadings."  
21 Under these circumstances, the court may allow the amendment when "the presentation of the  
22 merits of the action will be subserved thereby and the objecting party fails to satisfy the court that  
23 the admission of such evidence would prejudice him in maintaining his action or defense upon the  
24 merits." The facts of this case do not fall within the parameters of CR 15(b).

25 Although the Department's representative initially agreed that the pain disorder issue could  
26 be litigated, he later objected at an unreported telephone conference held on June 1, 2012. During  
27 the conference, the industrial appeals judge orally ruled that the issue was beyond the Board's  
28 scope of review (page 1 of PD&O). However, she gave the parties an opportunity to file briefs  
29 before issuing her written order. The only expert who had testified prior to the June 1, 2012  
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31 <sup>2</sup> The majority also cites *In re Louis Lobos*, Dckt No. 1012602 (July 14, 2011). But that case, like *Pascual*, concerned an  
32 appeal from a closing order, which distinguishes it from this appeal.

1 conference was Dr. Williams. Ms. Gorham's other expert, Dr. English, did not testify until June 13,  
2 2012. During the deposition of Dr. English, the Department's representative objected to  
3 Dr. English's opinion as to the cause of the pain disorder. These facts do not establish an express  
4 or implied agreement to litigate the allowance of Ms. Gorham's pain disorder.

5 Moreover, the Department did not object to Dr. English's opinion because of a defect in the  
6 pleadings. Rather, the objection was interposed because the evidence was beyond the scope of  
7 review. CR15 (b) does not authorize an amendment of pleadings under those circumstances.

8 Even if there were a tacit agreement, however, it would not give us the authority to address  
9 the pain disorder issue. Scope of review is a legal matter for the Board to decide. *In re Robert J.*  
10 *Neff*, Dckt No. 09 12651 (May 26, 2010). It is not dictated by the parties' stipulation or the evidence  
11 in the record. We recognized this principle in *In re Waheed Al-Maliki*, BIIA Dec., 01 14923 (2003).  
12 There, the claimant and the employer appealed the Department order in which the Department  
13 allowed a condition, segregated another condition, and denied the claimant's request for time-loss  
14 compensation benefits because of a light-duty release and the employer's accommodation of the  
15 light-duty restrictions. In addressing the disputed time-loss issue, the parties litigated the allowance  
16 of a number of conditions that were not mentioned in the order under appeal. We determined that  
17 these conditions were beyond the scope of the appeal despite the allegations in the Notice of  
18 Appeal or the evidence in the record. In arriving at this conclusion, we explained:

19 The Board's scope of review is limited to the issues that the Department  
20 previously decided. We cannot expand upon those issues. *Lenk v.*  
21 *Department of Labor & Indus.*, 3 Wn. App. 977, 982 (1970). The order  
22 under appeal addressed only two conditions, lumbar strain and  
23 degenerative disc disease. It is not a closing order; the Board does not  
24 have the latitude to address other issues outstanding in the claim. See  
25 *In re Jay Brooks*, Dckt. No. 01 19907 (March 19, 2003).

26 We note that the claimant, in his Notice of Appeal, requested  
27 acceptance of all conditions proximately caused by the industrial injury  
28 and that the parties litigated the allowance of the conditions diagnosed  
29 as herniated lumbar disc, plantar fasciitis of the right foot, complex  
30 regional pain syndrome, and depression. But neither the Notice of  
31 Appeal, nor the parties' litigation of particular issues, can expand the  
32 Board's jurisdiction.

33 *Al-Maliki* at 3.

34 The majority fails to acknowledge that we have limited our scope of review to the explicit  
35 language of the Department's order when the Department has addressed specific issues. See,

1 *In re Tom Camp*, BIIA Dec., 38,035 (1973), *In re Betty Connor*, BIIA Dec., 91 0634  
2 (1992), *In re Ronald L. Taylor*, Dckt. No. 09 13618 (August 21, 2010), *In re Carolyn E. Frank*, Dckt.  
3 No. 09 12165 (April 16, 2010), and *In re Malcome E. Warde*, Dckt. Nos. 94 3565, 94 5254, 94 5851  
4 and 94 6255 (February 7, 1996). *Warde* is particularly illustrative. In *Warde*, the employer filed  
5 three appeals.<sup>3</sup> Two of the appeals were taken from time-loss orders. The third appeal was filed  
6 from an order that affirmed an order in which the Department accepted responsibility for the  
7 claimant's depression. On review, the employer challenged the industrial appeals judge's  
8 proximate cause determination regarding the claimant's right knee condition. We held we lacked  
9 the authority to determine whether the industrial injury caused a right knee condition based on *Lenk*  
10 because none of the orders addressed the condition, and resolution of the issue was not necessary  
11 to decide the appeals. The reasoning of *Warde* should prevail here.

12 The majority's decision is also at odds with *Connor*. In that case, the employer appealed an  
13 order in which the Department affirmed an order directing the payment of time-loss compensation  
14 benefits pending a determination of the claimant's ability to work. In its Notice of Appeal, the  
15 employer sought closure of the claim with time-loss compensation benefits as paid. The Board held  
16 that the relief sought was beyond the scope of review because the Department's order only  
17 addressed the claimant's employability, not the fixity of her medical condition or the extent of her  
18 permanent impairment. In *Connor*, as in the instant case, the Department issued the order under  
19 appeal after reconsidering its prior order. Although the *Connor* decision does not indicate whether  
20 the affirming order was the result of the employer's protest, it is reasonable to believe that the  
21 employer had asked the Department to close the claim after learning that it would be required to  
22 pay further time-loss compensation benefits. Applying the majority's logic, the affirming order in  
23 *Connor* would be considered an adjudication of claim closure to the extent the Department was  
24 aware of the employer's request when it issued the order.

25 The majority attempts to distinguish *Connor*. It contends that Ms. Gorham is not trying to  
26 have issues of a different nature included in her appeal as was the case in *Connor*. The majority  
27 does not, however, explain what it means by "issues of a different nature." This standard is  
28 arbitrary and open to multiple interpretations that will add uncertainty to our scope of review. More  
29 importantly, the *Connor* decision did not turn on the "nature" of the issues raised in the employer's  
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31 <sup>3</sup> The claimant also appealed one of the time-loss orders because it included a deduction for an assessed  
32 overpayment.

1 appeal. It was based on the fact that the Department had not adjudicated the relief the employer  
2 was seeking in the order under appeal. Similarly, in this case, Ms. Gorham is seeking to include an  
3 issue (allowance of her pain disorder) that the Department has not adjudicated either expressly or  
4 by necessary implication. *Connor* is on point.

5 Also on point is *In re James M Griffith*, Dckt. No. 09 21383 (November 29, 2010), which is  
6 based on *Connor*. In *Griffith*, the Department issued an order in which it denied responsibility for  
7 the condition diagnosed as "depression disorder." Because the condition was retarding recovery of  
8 the accepted condition, however, the Department authorized treatment on a temporary basis.  
9 Following the claimant's protest, the Department issued an affirming order. The claimant appealed.  
10 The parties were allowed to fully litigate the issue of whether the claimant developed a major  
11 depressive disorder proximately caused by the industrial injury. The industrial appeals judge  
12 affirmed the Department order and entered a finding of fact in which he determined that "the June  
13 15, 2009 industrial injury did not proximately cause nor aggravate Mr. Griffith's preexisting  
14 psychological condition(s) and did not cause a major depressive disorder." The Board held that this  
15 finding of fact went too far. It held that "The wording of the order under appeal indicates that the  
16 Department addressed the causal relationship of a condition diagnosed as depressive disorder to  
17 the industrial injury but did not consider whether the claimant suffers from any other psychological  
18 conditions or if he does, whether there is a causal link to the injury" (*Griffith* at 2). In affirming the  
19 Department's order, the Board made "no finding regarding psychological conditions other than the  
20 diagnosed condition of depressive disorder referred to in the Department order" (*Griffith* at 2).

21 The majority's decision does not withstand scrutiny under *Griffith*. In *Griffith*, the Board  
22 looked to the content of the order under appeal to determine the scope of review, not the  
23 statements the claimant may have made to the Department in his protest. In addition, the Board  
24 was not swayed by the fact that the parties had fully litigated the issue of whether the Department  
25 should have allowed the condition of major depressive disorder. Nor did it matter that this issue  
26 was substantially similar in nature to the issue addressed in the Department's order (allowance of  
27 depressive disorder). *Griffith* precludes the Board from making any findings regarding the cause of  
28 Ms. Gorham's pain disorder.

29 The majority denies that it is treating the September 13, 2011 order as an implied  
30 segregation of Ms. Gorham's pain disorder. On page six of its opinion, the majority states "By  
31 refusing to allow the condition, the Department order in fact denied the request." However, the  
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1 Department did not deny Ms. Gorham's request to allow her pain disorder. Indeed, the order  
2 makes no mention of this condition at all. To support its decision, the majority is forced to speculate  
3 about the Department's intentions in issuing the September 13, 2012 order. Because the  
4 Department did not expressly segregate Ms. Gorham's pain disorder in the September 13, 2011  
5 order, the only way the majority can obtain jurisdiction is to conclude that the order constituted an  
6 implied denial of the condition.

7 The effect of the majority's decision is that Ms. Gorham's protest amended the Department  
8 order of August 7, 2009, to include the denial of her pain disorder. But what if Ms. Gorham had  
9 also sought allowance of a knee condition or a period of time-loss compensation benefits? Would  
10 these issues also be before us by implication? The majority does not address these questions. Yet  
11 these are the very questions we will have to grapple with in the aftermath of the majority's opinion.

12 The majority attempts to distinguish the cases I have cited on the basis that "They lack any  
13 protest or notice to the Department regarding the issue sought to be litigated before the Board."  
14 (Page 14 of opinion.) Granted, Ms. Gorham's October 2, 2009 protest informed the Department of  
15 her request to accept responsibility for her pain disorder. However, the Department's knowledge of  
16 this request does not mean that any further Department action must be an adjudication of that  
17 request.

18 As the agency vested with original jurisdiction, the Department has the prerogative to  
19 determine how a claim is to be administered. The Board cannot interfere with the claim's  
20 administration process. *In re Gordana Lukic*, Dckt. Nos. 02 20031 and 03 12722 (August 17,  
21 2004). Yet the majority's decision will force the Department to adjudicate the claim according to the  
22 terms of the protesting party. This is not what the Legislature intended in enacting  
23 RCW 51.32.055(6). Although the statute allows the worker, employer, or self-insurer to request the  
24 Department to resolve a dispute that arises from the handling of the claim, the Department has the  
25 discretion to determine when it will respond to the dispute. In fact, the statute does not prescribe  
26 any consequences in the event the Department fails to intervene. By deeming the Department's  
27 affirming order as a response to all of the issues raised in Ms. Gorham's protest, the majority has  
28 usurped the Department's original jurisdiction and dictated an outcome that is not authorized by the  
29 statute.

30 The majority also fails to recognize that the Department was not required to address  
31 Ms. Gorham's pain disorder in the September 13, 2011 order. The order of April 7, 2009, contained  
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1 a statement of protest rights in which the Department promised to reconsider its order in response  
2 to a timely filed protest. We have held that the Department's promise is a statement of legal  
3 responsibility that obligates the Department "to modify or at least hold in abeyance its prior order."  
4 *In re Santos Alonzo*, BIIA Dec., 56,833 (1981). Under *Alonzo*, Ms. Gorham's protest of the April 7,  
5 2009 order obligated the Department to revisit the issues it had addressed in that order; namely,  
6 whether the conditions of depression and post-traumatic stress disorder should be allowed under  
7 the claim. The Department fulfilled this obligation when it issued its affirming order on  
8 September 13, 2011. *Alonzo* imposed no obligation on the Department to address the issue of  
9 whether Ms. Gorham's pain disorder should be accepted because that issue was not adjudicated in  
10 the order of April 7, 2009. To conclude that the Department adjudicated the pain disorder issue  
11 when it had no obligation to address the condition in its affirming order and, in fact, did not do so, is  
12 a legal fiction.

13 Finally, the majority believes that Ms. Gorham should not have to wait for the Department to  
14 issue an additional order denying responsibility for her pain disorder because it would only serve to  
15 encourage piecemeal litigation. The majority fails to recognize, however, that Ms. Gorham could  
16 have avoided piecemeal litigation had she also appealed the Department order of September 9,  
17 2012. In this order, the Department set aside claim closure, determined that Ms. Gorham's  
18 conditions no longer needed treatment, and kept the claim open for vocational benefits. Instead of  
19 filing an appeal, Ms. Gorham opted to protest, which authorized the Department to take further  
20 action. The September 9, 2012 order would have given Ms. Gorham the opportunity to litigate the  
21 allowance of her pain disorder based on a *Jundul* analysis. In addressing the question of whether  
22 Ms. Gorham still needed treatment, the Department had to first determine the conditions it was  
23 willing to accept under the claim. The Department was aware that Ms. Gorham was seeking  
24 allowance of her pain disorder when it issued the September 9, 2011 order. Therefore, it could be  
25 argued that the order was a denial of her request by **necessary** implication. Because Ms. Gorham  
26 failed to appeal the September 9, 2012 order, she has no cause to complain.

27 The majority's decision elevates judicial economy over the well-established legal limits of our  
28 jurisdiction. In the process, the majority has impermissibly expanded the scope of our review by  
29 allowing Ms. Gorham to set the parameters, notwithstanding the express terms of the  
30 September 13, 2011 Department order. Because the order did not address Ms. Gorham's pain  
31 disorder either expressly or by necessary implication, we lack the authority to direct the Department  
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1 to accept responsibility for this condition. The industrial appeals judge's ruling as to our scope of  
2 review is correct as a matter of law. I would adopt the Proposed Decision and Order as the final  
3 order of this Board.

4 Dated: April 1, 2013.

5 BOARD OF INDUSTRIAL INSURANCE APPEALS  
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7  
8 /s/ \_\_\_\_\_  
9 JACK S. ENG Member

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