

Thompson, Loss

RES JUDICATA

Segregation order

A Department order segregating a condition of "degenerative arthritis" is too ambiguous to have a res judicata effect and does not preclude the worker, in an aggravation case, from establishing that the progression of an arthritic condition in his low back and hip is causally related to the industrial injury. ...*In re Loss Thompson*, BIA Dec., 13,473 (1962) [dissent]

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**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

1 **IN RE: LOSS THOMPSON**) **DOCKET NO. 13,473**
2)
3 **CLAIM NO. C-184512**) **DECISION AND ORDER**
4

5 APPEARANCES:

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7 Claimant, Loss Thompson, by
8 Walthew, Warner & Keefe, per
9 Eugene Arron, James E. McIver and Charles F. Warner

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11 Employer, Puget Sound Pulp and Timber Co.,
12 None

13
14 Department of Labor and Industries, by
15 The Attorney General, per
16 Robert O. Wells and Franklin K. Thorp, Assistants
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18 Appeal filed by the claimant, Loss Thompson, on March 29, 1960, from an order of the
19 supervisor of industrial insurance dated February 9, 1960, adhering to and reaffirming a prior order
20 dated August 7, 1959, denying an application to reopen this claim on the ground of aggravation of
21 condition. **REVERSED AND REMANDED.**
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24 **DECISION**

25 The basic issue presented by this appeal, is the extent of increase, if any, in the claimant's
26 disability attributable to a left hip and low back injury he sustained while working for the Puget
27 Sound Pulp and Timber Co., on October 27, 1954, occurring between March 25, 1955, and
28 February 9, 1960.
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30 It is undisputed in this case that the claimant's left hip and low back condition worsened
31 during the period in issue due to the progression of an osteoarthritic condition and, in our opinion,
32 the record establishes that he was totally permanently disabled by reason thereof, when he last
33 applied to reopen his claim in July, 1959, and when his application was finally denied in February,
34 1960.
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37 It is the department's contention that (1) The increase in the claimant's disability was due to
38 the natural progression of a preexisting arthritic condition which was unrelated to his injury of
39 October 27, 1954, and, (2) in any event, it is res judicata by virtue of a department order dated
40 March 23, 1955, (issued two days prior to the order originally closing this claim) that the claimant's
41 arthritic condition was not aggravated or affected by his injury and that said order "precludes any
42 subsequent compensation on the basis of the arthritic condition."
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1 The record establishes that the claimant had no symptoms or complaints referable to his left
2 hip or low back prior to his injury on October 27, 1954, when he was struck by a falling tree and
3 knocked to the ground, and we are persuaded, after a careful review of all the testimony, that said
4 injury aggravated and made symptomatic a pre-existing non-disabling arthritic condition. We are
5 also persuaded that the injury was a materially contributing factor in the subsequent progression of
6 the claimant's arthritic condition and the increase in disability resulting therefrom.
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10 The department relies on the case of LeBire v. Department of Labor and Industries, 14 Wn.
11 (2d) 407, in support of its contention that the claimant is precluded from receiving any further relief
12 on the basis of his arthritic condition because no appeal was taken from the department order of
13 March 23, 1955, denying responsibility for a pre-existing "degenerative arthritis."
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16 The LeBire case, in our opinion, is clearly distinguishable on the facts from the case here
17 under consideration. In that case, the claimant's claim based on a right knee injury was closed by a
18 department order allowing him a permanent partial disability award for a right knee injury, but at the
19 same time, specifically "denying any and all responsibility or liability for treatment and disability
20 caused by the multiple chronic proliferative arthritis." The record in that case affirmatively showed
21 that the department's "segregation" order was based on the report of an examination of the
22 claimant by a medical commission which revealed that the claimant was suffering from a
23 generalized condition described as "multiple chronic proliferative arthritis involving many joints,"
24 which was unrelated to the claimant's injury and probably due to an infectious process. Following
25 an appeal by the claimant to the joint board of the department, it was agreed by all parties that the
26 claimant be paid an additional disability award for his right knee injury, but that "the department
27 might segregate and deny liability for pre-existing arthritic and gonorrhoeal infection." The claim was
28 remanded to the supervisor by an order of the joint board for payment and closure in accordance
29 with the terms of the agreement. Based on this order and the agreement of the parties, the
30 supervisor entered an order closing the claim on the terms prescribed, and again denying "any and
31 all responsibility and liability for treatment of the preexisting arthritis and gonorrhoeal infection and
32 any disability necessitated thereby." A subsequent application by the claimant to reopen his claim
33 on the basis of a worsening of his generalized proliferative arthritic condition was denied by the
34 department and thereafter a superior court judgment was entered dismissing an appeal from an
35 order of the joint board sustaining the department's order. On appeal to the supreme court, the
36 court held that the issues raised by the claimant's application to reopen his claim were res judicata
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1 by virtue of the prior orders of the joint board and the supervisor, from which no appeal was taken,
2 denying all responsibility and liability for the claimant's arthritic condition. In so holding, the court
3 stated:
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5 "It is also clear from the record that, by those orders, the department
6 adopted the findings and recommendations of the several medical
7 commissions and denied all responsibility and liability for disability and
8 treatment caused by arthritis or infection, and thereupon with the
9 knowledge and consent of the appellant, segregated the traumatic injury
10 from the remaining illness or disease, allowing compensation only for
11 time-loss and for a specified degree of permanent partial disability. In
12 other words, the department determined that at the time of his injury
13 appellant had a pre-existing disease of arthritis, that his arthritic
14 condition was not due or related to the knee injury, and that the
15 department would assume no responsibility whatever for the disability
16 caused by the disease. The basic issue thus determined by the joint
17 board is the same issue now presented on this appeal, namely, whether
18 appellant's arthritic condition is attributable to his knee injury."
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20 In the instant case, the department's order of March 23, 1955, reads as follows:
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22 "WHEREAS, this claim was filed for injury of above date, and
23 WHEREAS, medical evidence discloses preexisting conditions
24 described as: "degenerative arthritis" the department hereby denied
25 responsibility for this pre-existing condition as unrelated to the injury for
26 which the claim was filed;
27 THEREFORE, this claim having been allowed by sole reason of injury of
28 October 27, 1954, will be adjudicated on the above basis."
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31 The above quoted order by its terms simply denies responsibility for a pre-existing "degenerative
32 arthritis" in some un-specified part of the body. The claimant sustained an injury to his low back
33 and left hip and the crux of the issue here presented is whether such order constituted a final
34 determination binding on the claimant that said injury did not aggravate a pre-existing arthritic
35 condition in his low back and left hip and that the department would not be responsible for any
36 subsequent progression of an arthritic condition in his low back and left hip which might be shown
37 to be the result of an aggravation of that condition by his injury.
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40 In the LeBire case, the department specifically denied any responsibility or liability for
41 treatment of, or the disability resulting from, the claimant's generalized arthritic condition. Further,
42 the record affirmatively showed that this arthritic condition, which was due to an infectious process,
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1 involved multiple parts of the body, which had not been injured and that the clear intent was to limit
2 the department's responsibility to the injured right knee.
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4 Unlike the LeBire case, there is no medical evidence in this case as to the basis for the
5 above quoted order. Although the findings contained in a report of examination of the claimant
6 conducted by a physician on February 18, 1955 (on the basis of which the claimant's claim
7 presumably was originally closed) were stipulated into the record, there is no reference therein to
8 any arthritic condition and the portion of the report stipulated into evidence does not contain the
9 diagnosis, conclusions or recommendations of the examiner. We would be required to speculate
10 as to what the department intended by the segregation order of March 23, 1955, but certainly, by its
11 terms, the order is not inconsistent with an acceptance of responsibility for low back and left hip
12 disability resulting from an aggravation of an arthritic condition in those areas by the injury. The
13 order itself being ambiguous, indefinite, and uncertain, we are of the opinion that it is not res
14 judicata with respect to the issue raised by the testimony in this case, that is, the relationship
15 between the progression of the arthritic condition and the claimant's low back and left hip and his
16 injury of October 27, 1954.
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19 For the reasons above indicated, we conclude that the supervisor's order of August 7, 1959,
20 denying the claimant's application to reopen this claim on the ground of aggravation of condition,
21 should be reversed and the claim should be remanded to the department with direction to reopen
22 the claim, to re-classify the claimant as totally, permanently disabled and place him on the pension
23 rolls effective July 14, 1959.
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25 **FINDINGS OF FACT**

26 After a careful review of the entire record herein, the board finds as follows:
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- 28 1. The claimant, Loss Thompson, sustained an injury to his low back and
29 left hip when he was struck by a falling tree and knocked to the ground
30 while in the course of his employment with the Puget Sound Pulp and
31 Timber Company on October 27, 1954. His claim based on this injury,
32 filed with the department of labor and industries, was allowed, medical
33 treatment provided, and time-loss compensation paid. On March 23,
34 1955, the supervisor of industrial insurance entered an order as follows:
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36 "WHEREAS medical evidence disclosed a pre-existing condition
37 described as 'degenerative arthritis' the department hereby denies
38 responsibility for this pre-existing condition as unrelated to the injury for
39 which the claim was filed;
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41 THEREFORE, this claim having been allowed by sole reason of injury of
42 October 27, 1954, will be adjudicated on the above basis."
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1 On March 25, 1955, the supervisor entered a final order closing the
2 claim with a permanent partial disability award of 5% of the amputation
3 value of the left leg at or so near the hip that an artificial limb cannot be
4 worn.

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6 Subsequently on October 7, 1955, and on March 6, 1956, the claimant
7 wrote letters to the department with respect to reopening his claim, but
8 he did not fill out or return the application form sent to him by the
9 department and on November 17, 1955, and March 6, 1956, the
10 supervisor issued orders denying the claimant's requests to reopen his
11 claim because of his failure to submit the completed application forms.

- 12 3. On July 14, 1959, the department received a further letter from the
13 claimant requesting that his claim be reopened for aggravation and this
14 was followed by receipt of a completed application form on July 28,
15 1959. On August 7, the supervisor issued an order denying the
16 application. On August 17, 1959, the claimant appealed the last-
17 mentioned order to the board of industrial insurance appeals, but on
18 September 8, 1959, the supervisor entered an order holding the order of
19 August 7, 1959, in abeyance, pending further investigation, and
20 therefore, on September 11, 1959, this board entered an order denying
21 the appeal. On February 9, 1960, the supervisor entered a final order,
22 reaffirming and adhering to the order of August 7, 1959, and directing
23 that the claim remain closed. On March 29, 1960, claimant appealed
24 the last-mentioned order to this board and on April 14, 1960, the board
25 entered an order granting the appeal.
- 26 4. The claimant had no symptoms, complaints or disability referable to his
27 left hip or low back prior to his injury on October 27, 1954, and as a
28 result of said injury, he suffered a symptomatic aggravation of a pre-
29 existing osteoarthritic condition in his low back and left hip.
- 30 5. As a further result of the aggravation of the pre-existing, non-
31 symptomatic osteoarthritic condition in the claimant's low back and left
32 hip due to his injury on October 27, 1954, said arthritic condition
33 progressed and worsened subsequent to March 25, 1955, and his
34 disability by reason thereof increased to the extent that he was no
35 longer able to engage in a gainful occupation when he applied to reopen
36 his claim on July 14, 1959.
- 37 6. The claimant's low back and left hip conditions were fixed on or about
38 July 14, 1959, in that no treatment was indicated which would lessen his
39 disability.

40 **CONCLUSIONS OF LAW**

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

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44 1. This board has jurisdiction of the parties and subject matter contained
45 herein.
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2. It is not res judicata by virtue of the department's order of March 23, 1955, denying responsibility for a pre-existing condition described as "degenerative arthritis" that the claimant suffered no aggration of an osteoarthritic condition in his low back and left hip as a result of his injury of October 27, 1950, or that the progression of said condition occurring after March 25, 1955, was unrelated to said injury.
3. The order of the supervisor of industrial insurance dated February 9, 1960, should be reversed and the above-numbered claim remanded to the department of labor and industries with direction to reopen the claim to reclassify the claimant as a totally, permanently disabled workman and place him on the pension rolls effective July 14, 1959.

ORDER

Now, therefore, it is hereby ORDERED that the order of the supervisor entered herein on February 9, 1960, be, and the same is hereby, reversed and the above-numbered claim is remanded to the department of labor and industries with direction to reopen the claim to reclassify the claimant as a totally, permanently disabled workman and place him on the pension rolls effective July 14, 1959.

Dated this 11th day of September, 1962.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/ _____
J. HARRIS LYNCH Chairman

/s/ _____
R. H. POWELL Member

DISSENTING OPINION

It seems to me that on March 23 and 25, 1955, the department rather clearly informed the claimant, in essence, "we recognize that you had an injury and we will pay you a permanent disability award, but there is no relationship between your condition and the 'degenerative arthritis' which you had before the injury and therefore we deny responsibility for such condition." That matter cannot be relitigated and I would, accordingly, sustain the Supervisor's order of February 9, 1960, on that basis, and in any event, the claimant's present inability to work is due to the natural progression of his pre-existing degenerative arthritic condition. Nagel v. Department of Labor and Industries, 189 Wash. 631; Carlson v. Department of Labor and Industries, 200 Wash. 533; and LeBire v. Department of Labor and Industries, 14 Wn. (2d) 407.

Dated this 11th day of September, 1962.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/ _____
HAROLD J. PETRIE Member