Rodgers, William

COLLATERAL ESTOPPEL

Department order in another claim

Where the worker filed both an application to reopen a prior claim for aggravation of condition and a new claim, the Department's denial of the application to reopen for the reason that the worker had sustained a new injury did not establish, as a matter of law, that the worker had sustained a new industrial injury. **….*In re William Rodgers*, BIIA Dec., 14,339 (1964)**

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: WILLIAM E. RODGERS	**)**	**DOCKET NO. 14,339**
	)	
CLAIM NO. C-559333	**)**	**DECISION AND ORDER**

Appeal filed by the claimant on September 27, 1960, from an order of the supervisor of industrial insurance dated August 23, 1960, adhering to an order of January 20, 1959, rejecting this claim for benefits under the workmen's compensation act. **SUSTAINED.**

DECISION

This matter comes before us by way of exceptions timely filed by the claimant to a Proposed Decision and Order issued in this matter by a hearing examiner on December 31, 1963, sustaining the department's rejection order of August 23, 1960.

The sole issue presented by the claimant's appeal is whether or not he sustained an injury to his back on or about September 17, 1958, while in the employ of Pend Oreille Mines and Metals Company.

A subsidiary issue concerning the claimant's competency to testify as a witness which is raised by the record requires some comment although, for reasons hereafter indicated, we do not believe it has any bearing on the ultimate issue as to whether or not the claimant sustained an industrial injury on September 17, 1958.

The claimant testified at the original hearing in this case that he had been confined in a mental institution at Medical Lake (Eastern State Hospital), as a result of a court commitment, for a period of about four months in 1959, and that he never obtained a "complete release," but was paroled to the custody of his wife.

No objection was made at that time by the employer or the department as to his competency to testify, nor was the question raised at either of two later hearings at which medical testimony was presented on behalf of the claimant. At a subsequent hearing, after medical evidence in the form of a report of an examination had been received in evidence by stipulation of the parties and the department rested its case, the employer placed in evidence, without objection, certified copies (exhibit 6) of an order of the Superior Court for Spokane County dated January 13, 1959, directing that the claimant, as a mentally ill person, be hospitalized at Eastern State Hospital "until released by the superintendent, chief officer or manager thereof," and of the "Supporting Physician's Report and Certificate of Examination," from which it appears that the claimant was then suffering from acute paranoid schizophrenia. The employer then moved orally and in writing to strike the entire

testimony of the claimant. The hearing examiner "tentatively" denied the employer's motion (anticipating review by the Board under the law and the Board's Rules of Practice and Procedure at that time). However, in his Proposed Decision and Order issued pursuant to Sec. 6, Ch. 148 Laws of 1963, the hearing examiner granted the employer's motion to strike the claimant's testimony, relying on the case of State v. Moorison, 43 Wn. (2d) 23.

We do not believe it necessary to determine whether or not the cited case would be controlling under the circumstances of the case her under consideration if the employer's objection had been made at the time the claimant testified. If the objection had been timely made, the examiner could, in accordance with the proper procedure (referred to by the court in State v. Moorison, supra, [p. 31]), have received "evidence bearing on that issue, including an examination of the witness" before permitting the witness to testify. In the absence of such an objection when the facts as to the claimant's commitment to a mental institution were known to the employer, there was no reason for, nor obligation on the claimant's part to present testimony as to the claimant's competency to testify at that time. This reasoning is in line with that of the Texas court in Texas Employer's Insurance Association v. Eubanks, 240 S. W. (2d) 811, in which it was held that "A failure to object to a known incompetent witness waives the objection." We conclude, therefore, that the employer's motion to strike the claimant's testimony should be denied.

Considering the entire record, including the claimant's testimony, we are unable to find any evidence that the claimant sustained an injury to his back on September 17, 1958. On the contrary, the claimant's own testimony conclusively establishes as a matter of fact, that there was no such injury. The relevant testimony is as follows:

> "Q. When you made this lift of this barrel of soda ash, I notice in your report of accident you say a sudden pain in the right low back region. Does it still bother you in that same area, the right low back?
>
> A. Yes, sir.
>
> Q. And that has been there ever since you had this injury, Mr. Rodgers?
>
> A. Yes. That's been there ever since 1956.
>
> Q. And then this injury, the 1958 injury just caused it to become worse; and is that about what it is?
>
> A. I don't believe it got any worse. That 1958 injury was a -- should have been, rather -- I tried to reopen the case and it was rejected. I knew it was the same case and I knew I hurt it every day that I worked." (Emphasis supplied).

* * * * * * * * * *

"Q. As I understand it, the trouble you are having with your back you apparently had it since back in 1956?

A. Yes, sir. As far as I know it's been that way ever since, except when I am not doing anything. This winter, last winter, I didn't do anything, and sometimes I think I am well and, gee whiz! I get out and walk a few steps or lift something and I know I am not well." (Emphasis added).

* * * * * * * * * *

"Q. You indicated that over the years you worried about the condition of your back. You indicated this has been bothering you for a number of years and did for several years prior to going into Medical Lake. Just when did your back trouble start?

A. As far as I can recall, it started as soon as I went back to work. I couldn't do my work.

Q. This was in 1956?

A. Yes, sir.

Q. Can I bring you down to September of 1958; this incident with the soda ash barrel? Did you actually hurt your back on that date or was this simply a continuing condition of your back that was bothering you?

A. It was what I think was a continuing condition because I lifted a one hundred pound sack of that stuff and big, heavy balls they put in the mill and that hurt my back when I had to stoop over and lift them up.

"Q. This was before September of 1958?

A. Yes, sir." (Emphasis added).

* * * * * * * * * *

Q. Let me understand this now: Your back had been bothering you since 1956, through the time you were working up there?

A. Yes, sir."

* * * * * * * * * *

"Q. All the doctors that have examined you, you have taken the position it was when you were pulled into the conveyor belt that your back was hurt and you wanted some treatment for it and that was what the claim was filed for in 1958; is that correct?

A. Yes, sir; as far as I can recall."

The claimant's medical evidence, consisting of the testimony of an orthopedist and a psychiatrist, adds nothing to his case.

The orthopedist received no history of any accident or injury occurring in 1958. Upon testifying, he was asked to express an opinion as to the cause of a back condition which he found based upon a hypothetical question which asked the doctor to assume that the claimant was injured in September, 1958, and had complaints as a result of such injury. Based upon these assumptions, the doctor quite logically stated that he would presume that the claimant had an injury in 1958, and his complaints occurred from such injury. This, of course, begs the very question in issue.

The testimony of the claimant's psychiatrist goes no further than tending to establish that the claimant has a mental condition precipitated by his feelings toward a doctor who last treated him on November 6, 1956, nearly two years prior to the alleged injury for which this claim was filed. It is interesting to note that the history received by this doctor was to the effect that the claimant did not actually have an accident on September 17, 1958, but that this date was simply picked at random by the claimant for the purpose of filling out an accident report and he did not have any more pain then than he did on any other day.

The claimant, in our opinion, has failed to establish a prima facie case.

There remains some question of whether the occurrence of an industrial injury on September 17, 1958, has been established under the doctrine of res judicata by virtue of a department order issued October 16, 1958, in connection with another claim. This question was not raised by the claimant in his notice of appeal or at any of the hearings held in this matter, except inferentially by introducing in evidence the above-mentioned order. However, the question was considered in the Proposed Decision and Order and the examiner concluded that it was not res judicata that the claimant had sustained an industrial injury on September 17, 1958. No reference was made to this determination in the Statement of Exceptions filed by the claimant which was based on the ground that "it has been established by a preponderance of the evidence that the claimant did sustain an industrial accident ... on or about September 17, 1958," and that the examiner erroneously granted the motion to strike the claimant's testimony.

R.C.W. 51.52.104 provides in part that "Such statement of exceptions shall set forth in detail the grounds therefor and the party or parties filing the same shall be deemed to have waived all objections or irregularities not specifically set forth therein." Although there may be some doubt as to whether the claimant may properly advance the res judicata theory in the event an appeal is taken from the Board's decision in light of the above quoted provisions of the statute, we felt that the importance of this question as being the only possible theory on which the claimant might

prevail on this appeal should be given consideration by the Board. The facts pertaining to this issue, as revealed by the record, which includes exhibits one through four, are as follows:

On November 27, 1956, the claimant filed a report of accident with the department alleging therein he had sustained an injury during the course of his employment with Pend Oreille Mines and Metals Company on October 29, 1956, when his right hand became caught in a conveyor belt, thereby injuring his right hand, arm and shoulder. His claim was allowed and assigned Claim Number C-377555 and ultimately closed on February 5, 1957. On October 14, 1958, the claimant filed an application to reopen Claim Number C-377555, alleging his condition due to the injury covered by that claim had become worse as a result of lifting a barrel of soda ash. Apparently based on the claimant's own statement, and without further investigation, the department two days later, issued an order reading as follows:

> "WHEREAS, this claim was closed by Order and Notice dated February 5, 1957, and application has now been made for further consideration on the ground of aggravation and,
>
> WHEREAS, the information discloses that the present complaints are caused by a new injury of September 17, 1958, and not due to the natural progression of the injury for which this claim is filed.
>
> THEREFORE IT IS ORDERED, that the application be denied and that the claim shall remain closed pursuant to the provisions of the afore-mentioned Order and Notice." (Emphasis supplied).

Since no appeal was taken from this order, the question presented is whether or not it is res judicata on the basis of the recital therein to the effect that the claimant's complaints were caused by a new injury of September 17, 1958, that the claimant did, in fact, sustain an industrial injury on that date.

This theory, in our opinion, is wholly without merit. In applying to reopen Claim Number C-377555, the claimant was not alleging that he had sustained a new industrial injury. The only issue tendered by such application was whether or not his condition attributable to his 1956 injury had worsened subsequent to the closure of Claim Number C-377555 on February 5, 1957, due to that injury. The finding that his condition was due to a new injury in 1958, which was based on the claimant's own statement in the application, constitutes merely an incidental finding to the adjudication of the issue presented. Such finding was wholly un- essential to the determination of the matter in issue and is not necessary to uphold the department's adjudication that the claimant's condition due to his 1956 injury had not worsened due to that injury.

It is of controlling significance that the recital in question simply refers to an "injury" of September 17, 1958. Even if taken as a binding adjudication, this finding is of no legal consequence. The injury must be established as an industrial injury. The order of October 16, 1958, does not expressly classify the injury as such, nor does it indicate that the injury was sustained during the course of any extrahazardous employment.

The employer could not appeal the order of November 16, 1958, unless it were aggrieved thereby. In this respect, the employer would have no reason to appeal unless it were somehow put on notice that such order had formally determined that the new injury therein referred to had been sustained by the claimant during the course of his employment with the Pend Oreille Mines and Metals Company. At best, it is perhaps possible to infer as much if the claimant's application to reopen Claim Number C-377555 could be considered in conjunction with the order of October 16, 1958, since the application listed September 17, 1958, as the date the claimant's condition became worse and Pend Oreille Mines and Metals Company was listed in the space entitled "Present or Last Employer." However, the law does not provide for service of such an application on the employer and there is no showing that the employer ever received a copy thereof or was notified of its contents. Thus, it cannot be held that the employer was put on notice that the new injury referred to in the order of October 16, 1958, was sustained during its employment of the claimant. Our court has held the doctrine of res judicata to be inapplicable where one of the parties had no notice of the proceeding itself. In re Krueger's Estate, 11 Wn. (2d) 329. By like token, the doctrine would be inapplicable here where one of the parties was not put on notice that a finding made in a proceeding involved the rights of such party.

Further militating against the theory of the doctrine of res judicata here is the rule that to make a judgment res judicata in a subsequent action, there must be a concurrence of identity of subject matter, of cause of action, of persons and parties and in the quality of the persons for or against whom the claim is made. In re McDonalds' Estates, 10 Wn. (2d) 692; Watkins v. City of Seattle, 2 wn. (2d) 695; Clubb v. Sentinel Life Insurance Company, 197 Wash. 308; Johnson v. National Bank of Commerce, 152 Wash. 47; Northern Pacific Railway Company v. Snohomish County, 101 Wash. 686.

In the instant matter we have two distinct causes of action or claims. If the claimant sustained a new injury in 1958, a different schedule of compensation benefits would be applicable than if there were only an aggravation of a 1956 injury, since the legislature amended the law in 1957, and the law in existence at the time of the injury controls the claim therefor in all respects. Ashenbrenner v. Department of Labor and Industries, 62 Wn. (2d) 22, and cases cited therein.

Of further significance is the fact that the evidence necessary to support a claim for a new injury is not the same as that required to support a claim for aggravation. Under these circumstances, the two claims must be considered as distinct and separate and the doctrine of res judicata cannot be applied. See Spokane Security Finance Company v. Crowley Lumber Company, 150 Wash. 559.

For the foregoing reasons, we conclude the claimant has not established that he sustained an industrial injury on or about September 17, 1958, while in the employ of Pend Oreille Mines and Metals Company, either as a matter of fact or under the doctrine of res judicata.

Based upon a careful review of the record, the Board finds as follows:

1. On November 18, 1958, the claimant, William E. Rodgers, filed with the department of labor and industries an accident report in which he alleged that he had sustained an injury while in the course of his employment with Pend Oreille Mines and Metals Company on September 17, 1958. On January 20, 1959, the supervisor of industrial insurance entered an order rejecting the claim and on February 9, 1960, the supervisor of industrial insurance entered a further order holding the order of January 20, 1959, in abeyance, pending further investigation. On August 23, 1960, the supervisor of industrial insurance entered a final order adhering to the order of January 20, 1959, and rejecting the claimant's claim for benefits under the industrial insurance act. On September 27, 1960, the claimant filed an appeal to the Board of Industrial Insurance Appeals and by an order dated October 20, 1960, the Board granted the appeal.

2. The claimant, William E. Rodgers, did not sustain an injury, as defined by the industrial insurance act, in the course of his employment with the Pend Oreille Mines and Metals Company on or about September 17, 1958.

3. On November 27, 1956, the claimant filed a report of accident with the department of labor and industries alleging that he had sustained an injury during the course of his employment with Pend Oreille Mines and Metals Company on October 29, 1956, when his right hand became caught in a conveyor belt, thereby injuring his right hand, arm and shoulder. His claim was allowed and assigned Claim Number C-377555 and was ultimately closed on February 5, 1957. On October 14, 1958,

the claimant filed an application to reopen Claim Number C-377555, alleging his condition had become worse as a result of lifting a barrel of soda ash on September 17, 1958. In the space provided on such application for "Present or Last Employer," the claimant listed Pend Oreille Mines and Metals Company. There is no evidence that the employer ever received a copy of such application. On October 16, 1958, the department issued an order reading as follows:

"WHEREAS, this claim was closed by Order and Notice dated February 5, 1957, and application has now been made for further consideration on the ground of aggravation and,

WHEREAS, the information discloses that the present complaints are caused by a new injury of September 17, 1958, and not due to the natural progression of the injury for which this claim is filed:

THEREFORE IT IS ORDERED, that the application be denied and that the claim shall remain closed pursuant to the provisions of the aforementioned Order and Notice."

No Appeal was ever taken from the department's order of October 16, 1958.

4. The claimant was committed to the Eastern State Hospital as a mentally ill person with a diagnosis of acute paranoid schizophrenia by an order of the Superior Court for Spokane County dated January 13, 1959. He remained in that institution for a period of about four months after which he was paroled to his wife.

5. No objection to the competency of the claimant to testify was interposed by any party at the time he testified, but subsequently after both the claimant and the department had rested their cases, the employer moved to strike all the claimant's testimony on the ground that he was mentally incompetent to testify.

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

1. This Board has jurisdiction of the parties and subject matter of this appeal.

2. The employer's motion to strike the claimant's testimony should be denied.

3. It is not res judicata by virtue of the department's order of October 16, 1958, that the claimant sustained an injury on September 17, 1958, in the course of his employment with the Pend Oreille Mines and Metals Company.

4. The order of the supervisor of industrial insurance issued herein August 25, 1960, rejecting the claim of William E. Rodgers for an alleged industrial injury on September 17, 1958, is correct and should be sustained.

ORDER

Now, therefore, it is hereby ORDERED that the order of the supervisor of industrial insurance issued herein August 23, 1960, be, and the same is hereby, sustained.

Dated this 8th day of June, 1964.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
J. HARRIS LYNCH Chairman

/s/_____
R. H. POWELL Member

/s/_____
HAROLD J. PETRIE Member