Leitner, Andrew

INJURY (RCW 51.08.100)

Injury v. occupational disease

An industrial injury claim denied as untimely will not be remanded for consideration as a timely application for occupational disease when the application was clear and detailed in expressing a claim based on a specific injury occurring at a definite time and place. **….*In re Andrew Leitner*, BIIA Dec., 15 18574 (2016)** [*Editor's Note:* The Board's decision was appealed to superior court under Pierce County Cause No. 16-2-12291-0.]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: ANDREW P. LEITNER	**)**	**DOCKET NO. 15 18574**
	)	
CLAIM NO. SZ-41100	**)**	**DECISION AND ORDER**

Claimant Andrew P. Leitner, a firefighter, filed a Self-Insurer Accident Report (SIF-2) with self-insured City of Tacoma on April 23, 2015. Mr. Leitner reported and requested industrial insurance benefits for an industrial injury of November 2, 2013. The Department of Labor and Industries denied Mr. Leitner's application for benefits as untimely by an order dated May 20, 2015, which Mr. Leitner appealed. The industrial appeals judge, on cross motions for summary judgment, found Mr. Leitner's application untimely for the alleged industrial injury but reversed the May 20, 2015 Department order and remanded to the Department to consider Mr. Leitner's application as an application for benefits for an occupational disease. The City of Tacoma requests that the Board affirm the Department order. Mr. Leitner requests that we remand this matter to the industrial appeals judge to hear his case for occupational disease. We **AFFIRM** the Department order finding Mr. Leitner's claim for industrial injury untimely.

DISCUSSION

When filing his claim with the City of Tacoma on April 23, 2015, Mr. Leitner identified the exact date ("11/2/13"), the exact time("09:15" a.m.), and the exact location of the accident ("Tacoma Yacht Club"). He described in detail how the accident occurred—after he opened a rear door, "a very powerful gust of wind slammed the door back into my upper back." He described the immediate and prompt result—"I felt a very sharp pain in center of back between my shoulders. My left arm felt numb and ached."[1] Mr. Leitner reported this incident to his superiors shortly after it occurred. But he indicated "the pain decreased throughout the remainder of my shift."[2] Mr. Leitner did not inform the City of Tacoma or the Department of Labor and Industries that he was seeking any benefit on account of this incident or that he had sought medical care until April 23, 2015; and no medical report was earlier received by the City or the Department.

We agree with our industrial appeals judge's determination that Mr. Leitner's claim for industrial injury was untimely. Mr. Leitner did not file any formal request for benefits or any other reasonable

[1] Exhibit No. 1.
[2] Exhibit No. 2.

non-form notice that he had sustained an injury for which medical care was sought within the year after the day on which his alleged injury occurred.[3]

We deny Mr. Leitner's request that we remand this matter to our industrial appeals judge for a hearing on whether he sustained an occupational disease. We also decline adoption of the industrial appeals judge's decision to remand this matter to the Department to consider whether Mr. Leitner has sustained an occupational disease. We have previously exercised such option in appropriate circumstances, even though the appealed Department order did not explicitly address the question of whether the worker had sustained an occupational disease. We distinguish the facts of this case because Mr. Leitner filed only an industrial injury claim rather than an occupational disease claim.

In this appeal we cannot take evidence and decide the appeal on an occupational disease theory or remand this claim to the Department to consider this claim as one for occupational disease. As filed, Mr. Leitner's claim, although untimely, was abundantly clear and detailed in expressing that it was a filed for a specific alleged industrial injury at a definite time and place. No indication whatsoever was provided to the City or to the Department to suggest that Mr. Leitner might have or might be alleging an occupational disease. It would be unreasonable to expect that a claims adjudicator for the City or the Department should have imagined or investigated the claim as one for occupational disease prior to issuance of the Department order rejecting the claim as untimely. Prior to commencement of litigation at the Board, Mr. Leitner's counsel had not identified the occupational disease theory. Rather, the occupational disease theory was raised only as it became evident that efforts to show a timely industrial injury claim had failed. These are not proper circumstances in which this Board should allow a claim, previously presented to the self-insured employer as only an industrial injury claim and decided as such, to be converted into a claim for occupational disease. If he desires, Mr. Leitner may file a separate claim for occupational disease.

DECISION

In Docket No. 15 18574, the claimant, Andrew P. Leitner, filed an appeal with the Board of Industrial Insurance Appeals on July 17, 2015, from an order of the Department of Labor and Industries dated May 20, 2015. In this order, the Department denied Mr. Leitner's claim for industrial injury because no claim had been filed by Mr. Leitner within one year after the day on which the alleged injury occurred. This order is correct and is affirmed.

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[3] See: RCW 51.28.050; *In re Leroy Norris*, BIIA Dec., 92 1471 (1993); and, *In re Charles Pierce*, BIIA Dec., 91 4625 (1993).

FINDINGS OF FACT

1. On September 9, 2015, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History in the Board record solely for jurisdictional purposes.

2. On April 23, 2015, and not before, Andrew P. Leitner filed an Self-Insurer Accident Report with the self-insured employer, City of Tacoma, alleging in detail (specific date, time, place, and accident) how his alleged industrial injury occurred on November 2, 2013. Mr. Leitner did not, prior to issuance of the appealed May 20, 2015 Department of Labor and Industries order, inform the City or the Department that he might contend under the claim that he sustained an occupational disease, nor did he present any evidence that would have caused a reasonable claims adjudicator or processor to suspect such.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter in this appeal.

2. Andrew P. Leitner's claim is a claim for industrial injury within the meaning of RCW 51.08.100 and RCW 51.28.050 and is not valid or enforceable because it was not filed within a year after the day on which the alleged injury occurred.

3. Andrew P. Leitner's claim before the Board is not a claim that should have been considered by the Department as an occupational disease claim within the meaning of RCW 51.08.140, nor should it be considered by the Board as an appeal from denial of an occupational disease claim within the meaning of RCW 51.52.060.

4. No remaining material facts have been placed in issue and the self-insured employer, City of Tacoma, is entitled to judgment as a matter of law.

5. The order of the Department of Labor and Industries dated May 20, 2015, is correct and is affirmed.

Dated: October 17, 2016.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
DAVID E. THREEDY Chairperson

/s/_____
JACK S. ENG Member

Addendum to Decision and Order
In re Andrew P. Leitner
Docket No. 15 18574
Claim No. SZ-41100

Appearances

Claimant, Andrew P. Leitner, by Ron Meyers & Associates, PLLC, per Ron Meyers

Self-Insured Employer, City of Tacoma, per Thomas G Hall & Associates, per Ryan S. Miller

Petition for Review

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The employer filed a timely Petition for Review of a Proposed Decision and Order issued on June 16, 2016, in which the industrial appeals judge reversed and remanded the Department order dated May 20, 2015. The claimant filed a response to the Petition for Review.

Evidentiary Rulings

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed.

Other

The Board has decided this matter based upon the testimony of record of proceedings at hearing and the cross motions for summary judgment and other pleading filed by the parties.