McMillon, Mollie

COMMUNICATION OF DEPARTMENT ORDER

Strict compliance with service provisions (RCW 51.52.050)

Where the Department did not mail the claimant a copy of the closure order until after the final resolution of the employer's appeal from that order, the worker could appeal the order within 60 days of service even though the worker appeared in the employer's appeal and had actual knowledge of the contents of the order. [*Editor's Note*: Department order affirmed in both appeals.] **….*In re Mollie McMillon*, BIIA Dec., 22,173 (1966)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: MOLLIE L. McMILLON	)	**DOCKET NO. 22,173**
	)	
CLAIM NO. C-477103	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Mollie L. McMillon, by
Walthew, Warner & Keefe, per
Eugene Arron, Charles F. Warner, Thomas P. Keefe, and James E. McIver

Employer, The Boeing Company, by
Holman, Marion, Perkins, Coie and Stone, per
Fred S. Merritt and Richard R. Albrecht

Department of Labor and Industries, by
The Attorney General, per
Robert O'Gorman, Virginia O. Binns, Gayle Barry, and Floyd V. Smith, Assistants

This is an appeal filed by the claimant on May 12, 1964, from an order of the Supervisor of Industrial Insurance dated April 27, 1964, which adhered to a prior order of the Supervisor dated August 2, 1963, closing this claim with a permanent partial disability award of 5 per cent of the amputation value of the right, major, hand at the wrist. **SUSTAINED**.

DECISION

This matter is before the Board for review and decision on a timely Statement of Exceptions filed by the claimant to a Proposed Decision and Order issued by a hearing examiner for this Board on June 30, 1965, in which the order of the Supervisor dated August 2, 1963, was sustained, and the subsequent orders of the Supervisor dated March 6, 1964 and April 27, 1964, were declared to be void.

It was the position of the employer and the Department, at the hearings held on this appeal, that the issues of fact raised by this appeal cannot now be determined because said issues had already been determined, and had become res judicata, by reason of the final disposition of a prior employer's appeal from the Supervisor's order of August 2, 1963. The Hearing Examiner, in his Proposed Decision and Order, held that this position was correct. The claimant, in her exceptions, contends that this position is incorrect as a matter of law, that the issue in this appeal is the correctness of the Supervisor's order of April 27, 1964, and that we must adjudicate that issue on its merits. For reasons hereinafter pointed out, we believe the claimant's position is correct and that we must decide the issues of fact presented herein.

The facts giving rise to the res judicata dispute are as follows:

On August 2, 1963, the Supervisor entered an order closing this claim with a permanent partial disability award of 5 per cent of the right, major, hand at the wrist, and time-loss compensation as paid, from which the employer filed an appeal on August 9, 1963. The claimant's copy of said order was not at that time mailed to her, presumably because of the employer's appeal. Nevertheless, claimant, through her attorneys, filed an appearance in the employer's appeal on August 30, 1963. Eventually, on December 18, 1963, this Board entered an order which found that the Supervisor's order of August 2, 1963, was correct in closing claimant's claim with payment of a permanent partial disability award of 5 per cent of the amputation value of the right, major, hand at the wrist, and accordingly sustained said order. There was no appeal to the Superior Court from this Board's order of December 18, 1963.

The claimant's copy of the Supervisor's order of August 2, 1963, was then mailed to the claimant on January 28, 1964, which was at the conclusion of the litigation thereon pursuant to the employer's appeal. On February 10, 1964, the claimant, having received a copy of this order through the mail on January 29, 1964, filed an appeal therefrom. The Supervisor then entered an order on March 6, 1964, making this order interlocutory pending further investigation. Consequently, this Board entered an order denying the appeal. Subsequently, on April 27, 1964, the Supervisor entered an order adhering to his prior order of August 2, 1963, from which the instant appeal was filed.

The statue involved in this dispute is RCW 51.52.050, which states as follows:

> "Whenever the department has made any order, decision, or award, it shall promptly serve the workman, beneficiary, employer, or other person affected thereby, with a copy thereof by mail, which shall be addressed to such person at his last known address as shown by the records of the department. The copy, in case the same is a final order, decision, or award, will bear on the same side of the same page on which is found the amount of the award, a statement, set in blackfaced type of at least ten point body or size, that such final order, decision, or award must be appealed to the board, Olympia, within sixty days, or the same shall become final."

It is clear that, as to the claimant's copy of the order of August 2, 1963, it was not "promptly served" upon her pursuant to the above statute, but was served upon her on January 28, 1964. Furthermore, said copy was "communicated" to her on January 29, 1964, and therefore, under usual circumstances, she would have sixty days from that date to appeal to this Board, pursuant to

the terms of RCW 51.52.060. However, the Hearing Examiner held that, since claimant had actual knowledge of said order in August of 1963 because of the employer's appeal therefrom, and entered a general appearance and participated in said appeal, the failure of service on her at that time did not matter and she was subject to the proceedings and bound by the determinations made therein.

This clearly is the rule as to general appearances in civil suits in court. Muscek v. Equitable Savings & Loan Assn., 25 Wn. 2d 546. And we followed this principle in a somewhat similar case several years ago, In re Willis Fish, claim No. B-619108, Docket No. 6781, dtd January 18, 1956. However, an appeal from our order in that case resulted in a decision of the Superior Court that the claimant had a right to rely on the terms of the statute, i.e., have a copy of the Department order served upon him before his appeal period began to run. The gist of the Court's reasoning was contained in its memorandum decision, as follows:

> "In considering the Longshoremen's and Harbor Worker's Act, ...the Federal Court in Locomastic Corp. v. Parker, 54 Fed. Supp. 138, held that rules of civil procedure are supplanted in compensation cases to the extent that matters of procedure are provided for in the compensation act. This seems to be a necessary rule of construction, and, applying it, I conclude that under the terms of our Act res adjudicata has no application to the instant case..." (Emphasis supplied)

In other words, the rule that a general appearance in a court proceeding will waive improper service of process and make the party so generally appearing bound by the determinations made in such proceeding, does not apply to the procedures under the Act to the extent that the procedural matters are spelled out in the Act. In effect, the Department's failure to comply with the statute heretofore quoted rendered the order of August 2, 1963, null and void as to the claimant, and it was nothing more than a notice to the employer as to its intention to close the claim on the basis stated.

This is a persuasive argument, especially since, in the instant case, no party is harmed; and the Department itself, at the administrative level, apparently followed such argument. Following service of the Supervisor's order on the claimant on January 28, 1964, and claimant's appeal therefrom, the Department then entered its order of March 6, 1964, making the prior order interlocutory pending further investigation. This action was entirely in accord with the literal provisions of RCW 51.52.060. Further, the investigation consisted of a medical examination performed on April 7, 1964, upon the basis of which the subsequent closing order of April 27, 1964 was entered. For this Board to now review and determine the correctness of that last order will not

really work a hardship on the Department or the employer, since there was competent evidence presented to defend it, in the form of the testimony of the medical specialist upon whose opinions said order was base.

We turn, then, to deciding the merits of this appeal, i.e., the nature and extent of claimant's disability due to her industrial injury of July 9, 1957, as that disability existed on or about April 27, 1964.

On this issue, we have the testimony of two physicians. Dr. Robert N. Joyner, Jr., a general practitioner who gave the claimant some conservative treatment for this injury in 1963 and last examined her on February 14, 1964, testified on her behalf. Dr. Morris J. Dirstine, a general surgeon and a specialist in treatment of hand conditions, examined claimant on April 7, 1964, and testified on behalf of the Department and the employer.

The claimant's injury occurred on July 9, 1957, while "bucking" rivets, when vibration from an oversized rivet gun caused pain, and subsequently a "lump" or swelling, on the back of her right hand. The lump was surgically removed by a Dr. Freeman later in 1957.

Dr. Joyner first saw her for her hand condition in October of 1958, when he examined and took x-rays but did not prescribe any treatment. He did treat this condition, which he eventually diagnosed as "post-traumatic arthritis and cellulitis," on about nine occasions extending from January to June of 1963, the treatments consisting of injections of cortisone and deparone and "supportive prescriptions." Dr. Joyner then examined claimant for the last time on February 14, 1964, when his "finding" consisted of tenderness on manipulation of the right shoulder, tenderness in the area of the right elbow, wrist, and hand, and a slight enlargement of the fingers of the right hand.

As to whether or not claimant's condition was fixed, Dr. Joyner first testified that a further course of treatment, consisting of physiotherapy, diathermy, cortisone and injections and supportive prescriptions, might tend to alleviate "some of the acuteness" of claimant's symptoms. However, he further testified that claimant's condition was "relatively fixed;" that he really didn't know if he would make the same recommendation "at this time [time of his testimony] or not;" and on cross-examination, that her condition was essentially fixed "mainly because of the length of time the disability has been there." Dr. Joyner then gave his evaluation of claimant's permanent partial disability at "25% of the amputation value of the right upper limb....from the shoulder down."

Dr. Dirstine, at his examination of April 7, 1964, made practically no objective findings of abnormality in claimant's right arm or hand. All motions at the shoulder were normal and complete, elbow motions were normal, there was no atrophy of the upper arm or the forearm, supination and pronation of the forearm were normal, wrist motions were complete in range, the small surgical scar over the dorsum of the wrist was movable and non-adherent to underlying tissues, and all hand, thumb, and finger motions were normal. The only objective abnormality noted by Dr. Dirstine was a slight thickening of the snyovial sheath in the fourth dorsal osteofibrous canal, i.e., the canal in the back of the hand containing the extensor tendons for the index, middle, and ring fingers. This slight thickening, in the doctor's opinion, would not cause any physical impairment of hand functions but could account for the subjective complaints of soreness in this area on heavy use of the hand. Dr. Dirstine rated claimant's permanent partial disability, due to her complaints of discomfort and this one minor objective finding, at 5 per cent of the amputation value of the hand at the wrist.

It is apparent that, although Dr. Joyner made reference to some further treatment, he really felt it would not be of any permanent help but rather was for palliative relief of complaints. The essence of his whole testimony was clearly that claimant's condition was fixed and would not be altered by further treatment.

In evaluating claimant's permanent partial disability, the most striking thing is the very minimal objective findings made by both doctors. Dr. Joyner only testified about some "small amount" of enlargement in the right hand. Clearly, his reference to "tenderness" in the elbow and shoulder is subjective only. The essentially subjective nature of the disability is further revealed by the doctor's testimony that, although his tentative diagnosis was post-traumatic arthritis, "this condition can be given different titles,...but taking all these into consideration, the one thing the patient had was a post-traumatic pain and discomfort in the wrist which is a post-traumatic arthritis in itself." (Emphasis supplied)

In view of the site of original injury and complete lack of objective findings about the wrist, a rating at any level other than the wrist is not called for. Further, in spite of Dr. Joyner's status as a treating physician for about five months in 1963, it is clear that his rating is based almost entirely on complaints of the claimant. With the minimal objective findings here, and based on Dr. Dirstine's obviously more thorough examination, we must conclude in this case that the permanent partial disability is minimal. The Department's order should be sustained.

FINDINGS OF FACT

In view of the foregoing, the Board finds as follows:

1. On November 19, 1957, the claimant, Mollie L. McMillon, filed a report of accident with the Department of Labor and Industries alleging that she sustained an industrial injury to her right hand during the course of her employment with The Boeing Company on July 9, 1957, when she was "bucking rivets," i.e., holding a steel bar against a surface and an oversized gun was used to vibrate the rivets. On January 20, 1958, the Supervisor entered an order rejecting the claim from which the claimant filed an appeal to this Board on February 3, 1958. On August 31, 1961, this Board entered an order sustaining the Supervisor's order of January 20, 1958. On September 27, 1961, the claimant filed an appeal to the Superior Court of King County. On October 30, 1962, the Superior Court entered a judgment reversing the Board's order of August 31, 1961, which sustained the Supervisor's order of January 20, 1958, and remanded the claim to the Department with direction to allow the claim, and to reopen for treatment and action, effective July 9, 1957. On December 4, 1962, in compliance with the Superior Court judgment of October 30, 1962, the Supervisor entered an order reopening the claim for treatment and action effective July 9, 1957. Finally, on August 2, 1963, the Supervisor entered an order closing the claim with a permanent partial disability award of 5% of the amputation value of the right, major, hand at the wrist, and time-loss compensation as paid. A copy of said order was not at that time served on the claimant. On August 9, 1963, the employer filed an appeal from that order, which was granted by this Board on August 23, 1963. On August 30, 1963, the claimant, through counsel, filed a general appearance in the employer's appeal. On December 18, 1963, this Board entered an order sustaining the Supervisor's order of August 2, 1963, which found that the claimant had a permanent partial disability equal to 5% of the amputation value of the right, major, hand at the wrist. On January 28, 1964, the Supervisor mailed claimant's copy of his order of August 2, 1963, to claimant's counsel, which was received by claimant's counsel on January 29, 1964. On February 10, 1964, the claimant filed an appeal to this Board from the Supervisor's order of August 2, 1963. On March 6, 1964, the Supervisor entered an order making his prior order of August 2, 1963, interlocutory pending further investigation. Therefore, on the same date, this Board entered an order denying the appeal.

   Subsequently, on April 27, 1964, the Supervisor entered an order closing the claim by adhering to his prior order of August 2, 1963. On May 12, 1964, the claimant filed an appeal to this Board, and on May 29, 1964, the Board entered an order granting the appeal.

2. As the result of the injury of July 9, 1957, a swelling or "lump" on the back of claimant's right hand was surgically removed in 1957, and she received some conservative treatment for the hand, consisting of

injections of medication and supportive prescriptions, on about nine occasions from January to June of 1963.

3. By April 27, 1964, claimant's condition due to this injury was fixed, and no further treatment was indicated.

4. On April 27, 1964, claimant had minimal permanent partial disability resulting from this injury, manifested by some discomfort in the back of the hand on sustained use thereof, and a slight thickening of the synovial sheath in the fourth dorsal osteofibrous canal which did not impair the physical movements of the hand. This disability was equal to 5% of the amputation value of the right, major, hand at the wrist.

CONCLUSIONS OF LAW

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

1. This Board has jurisdiction, in view of the provisions of RCW 51.52.050 and 51.52.060, to determine the issue raised by this appeal, i.e., the correctness of the Supervisor's order issued on April 27, 1964.

2. The order of the Supervisor of Industrial Insurance dated April 27, 1964, closing this claim by adhering to a prior order that claimant's permanent partial disability was equal to 5% of the amputation value of the right, major, hand at the wrist, was correct and should be sustained.

It is so ORDERED.

Dated this 30th day of November, 1966.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
J. HARRIS LYNCH Chairman

/s/_____
R. H. POWELL Member

/s/_____
R. M. GILMORE Member