

Burbank, Mary

RES JUDICATA

Aggravation

The *Jessie White* (48 Wn.2d 413) rule, permitting the assumption that there was no disability on the first terminal date where the claim was closed without a permanent partial disability award, is inapplicable where the causal relationship of the condition to the occupational exposure is at issue. The closure of a claim on the first terminal date without a permanent partial disability award does not establish that the worker had no disability on that date, but only that on that date there was no disability attributable to the occupational exposure. ...*In re Mary Burbank*, BIIA Dec., 30,673 (1969)

Scroll down for order.

1 proceedings were concerned with facts existing on the date of the Department order appealed from,
2 June 26, 1964. Hyde v. Department of Labor and Industries, 46 Wn. 2d 31 (1955).
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4 On May 29, 1967, the claimant filed an application to reopen her claim for aggravation of
5 condition. On April 8, 1968, the Department issued an order which denied this application. This
6 Department order of April 8, 1968, is now before us on appeal.
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8 The question before the Board on this appeal is: did the claimant suffer an increase of
9 permanent disability between June 26, 1964 and April 8, 1968, as a result of her exposure to
10 ammonia fumes in October of 1961? In the case such an increase did occur, the question before
11 the Board becomes: to what extent was the claimant permanently disabled on April 8, 1968, as a
12 result of her exposure of October 1961?
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16 At the outset, we note that the claimant has presented no medical testimony whatever
17 indicating that she has any permanent organic disability as a result of her industrial exposure. The
18 only medical witness she presented was Dr. Richard B. Jarvis, a psychiatrist, who saw her on only
19 one occasion and did not perform a physical examination upon her. Dr. Daniel R. Kohli, who
20 testified on behalf of the Department, is a specialist in psychosomatic medicine. He performed a
21 physical examination on the claimant but found no organic disorder. Thus, we are concerned here
22 purely with psychological difficulties, difficulties of the mind, not the body.
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27 The claimant contends on her appeal and in her exceptions to the Proposed Decision and
28 Order previously issued herein, that from a psychiatric standpoint she was permanently and totally
29 disabled on June 26, 1964, as a result of her October 1961 exposure to ammonia fumes. In the
30 course of her testimony, she described in minute detail a great number of conditions from which
31 she suffers subsequent to her exposure in 1961. These include aches and pains in various
32 portions of her anatomy, as well as reactions to a variety of odors with the emphasis on ammonia,
33 and reaction to foods, various household chemical compounds, and many different and varied
34 chemicals normally encountered in her daily life. These included but were not limited to hair
35 preparations, cosmetics, cigarette smoke. She conceived that poisons were going to her thyroid.
36 She felt she had lost stamina, and in the spring of 1962 conceived that her hair was falling out in
37 very drastic amounts. She says she has a very bad reaction from any kind of drug. She has turned
38 to herbs for relief. She has received chiropractic treatment and has placed herself on a strict
39 dietary regimen. Although the foregoing statement does not exhaust the symptomatology the
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1 claimant attributes to her industrial exposure, it does provide a rough picture of the diversity of her
2 complaints.
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4 During the course of her examination before this Board, she stated that her problems existed
5 in some measure in 1962 and 1964, only they have been growing progressively worse.
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7 Dr. Richard B. Jarvis examined the claimant on only one occasion. He stated that he was
8 not able to determine positively whether the claimant should be diagnosed as being in a paranoid
9 state or as having true paranoia. He thought the claimant's problem lay somewhere between a
10 paranoid state and true paranoia. She is delusional, but the rest of her personality appears to be
11 remarkably intact. Dr. Jarvis stated that in his opinion the mental illness creates an impairment
12 which does not permit the claimant to seek, gain, and hold substantial gainful employment. This he
13 considered a permanent condition.
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18 In the matter of causal relation between the industrial exposure and the claimant's medical
19 condition, Dr. Jarvis stated: "It is my opinion that the industrial exposure played a part only in the
20 sense that it provided the topical material for the delusional system which I detected." He further
21 stated, when asked if people such as the claimant were able to function adequately if they were not
22 exposed to some focusing event, that "if these people have a diagnosable paranoid state or true
23 paranoia regardless of whether one can detect a topical event, they are impaired in their function."
24 The effect of the focusing event (in this case the industrial exposure) is that "it allows for closer
25 organization of the delusional system, a more voluble and vociferous protestation of the case."
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30 It is interesting to note that in the matter of causal relationship, Dr. Jarvis stated that he
31 "didn't see causal connection in the sense that I usually understand it in industrial injury cases, I'm
32 speaking here of the medical definition of causal connection, there may be a different -- it may be
33 different in the law, the law is not my business." We have been unable to find any legal authority
34 for the proposition that causal relationship in the medical sense is any different from causal
35 relationship in the legal sense in matters of this kind.
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39 The only medical evidence in the record before this Board of organic changes that may have
40 come about as a result of the claimant's emotional state is that of Dr. Daniel R. Kohli. He observed
41 none of the physical symptoms claimed by the claimant. All of his tests, including laboratory tests,
42 were normal. He found no evidence whatever of organic disease process. He testified that if the
43 claimant were motivated, she could certainly perform gainful employment. He stated that if she had
44 not had this exposure at work, she would have attributed her problems to something else. He
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1 thought that between 1964 and 1968, the claimant's emotional component had worsened in that on
2 the latter date she believed it more that she was suffering the residuals of her exposure of October,
3 1961. Dr. Kohli had seen the claimant on May 21, 1964, and also on March 12, 1968, within a few
4 months of both terminal dates herein.
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7 The foremost question before the Board on this appeal concerns the effect of the order of
8 this Board dated April 28, 1967, which adopted a Proposed Decision and Order issued by a hearing
9 examiner for this Board on December 12, 1966 (later appealed to and dismissed by the Superior
10 Court on September 28, 1967). The order adopted by the Board made the following relevant
11 findings of fact:
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- 14 "3. The medical evidence in the record does not show that the claimant's
15 condition, attributable to her exposure to ammonia fumes prior to June,
16 1962, worsened between June 25, 1962, and June 26, 1964.
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18 4. When her application to reopen her claim was denied on June 26, 1964,
19 the claimant's condition was fixed, in that no treatment therefor was
20 indicated, and she had no permanent disability as a result of her
21 exposure." (Emphasis added)
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23 Our Supreme Court stated in LeBire v. Department of Labor and Industries, 14 Wn. 2d 407
24 (1942):
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26 "It is now the settled rule in this state that an order or judgment of the
27 department resting upon a finding, or findings, of fact becomes a
28 complete and final adjudication, binding upon both the department and
29 the claimant unless such action of the department is set aside upon
30 appeal or is vacated for fraud or something of like nature. [Citing
31 cases]"
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33 That the claimant had an emotional problem in 1964, of the same nature as that she had in 1968, is
34 clear from the testimony of both Dr. Jarvis and Dr. Kohli. That whatever disabling effects she
35 suffered by reason of her emotional condition in 1964 is not causally related to her industrial injury
36 of 1961, when she breathed the ammonia fumes from the wet process copying machine, is
37 established as a matter of law by the judicial procedures undertaken subsequent to the Department
38 order of February 13, 1964. The time for establishing a causal connection between the claimant's
39 emotional difficulties of 1964 and her industrial exposure in 1961 was at the judicial proceedings
40 following the Department order of February 13, 1964. That issue cannot be relitigated here at this
41 time.
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1 An attempt was made at the hearings in this matter to rejuvenate the question of causal
2 relation between the claimant's emotional condition of 1964 and her exposure to ammonia fumes in
3 1961 by the use of questions designed to bring this case within the rule of the Jessie White case
4 (White v. Department of Labor and Industries, 48 Wn. 2d 413 [1956]). The rule is that where there
5 has been no appeal taken from a Department order closing a claim it becomes res judicata as to
6 the extent of injury at the time of closing order, but not res judicata as to subsequent aggravation.
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10 Having discovered from Dr. Jarvis that he did not think there was a causal relation between
11 the claimant's condition in 1968 and her industrial exposure of 1961 in the medical sense, the
12 claimant's attorney asked Dr. Jarvis:
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14 "Q [By Mr. Arron] Doctor, if you were to assume that she had no disability in
15 June of 1964, at least upon your observations and diagnosis of this
16 woman, in your opinion was there any aggravation of her condition
17 between June of '64 and April of '68?
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19 A [By Dr. Jarvis] Assuming no disability in 1964, I would be of the opinion
20 that her condition had become almost immeasurably worse in the four
21 and a half ensuing years." (Emphasis added)
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23 Actually, Dr. Jarvis was asked to assume a state of facts for which this record provides no
24 foundation whatever and the rule of the Jessie White case does not create it. That the claimant had
25 her "condition" in 1964 (and before her injury, for that matter) is clear from all of the medical
26 testimony, including that of Dr. Jarvis. That she had no disability in 1964 is not established, only
27 that she had no disability attributable to the exposure of 1961. The rule of the Jessie White case
28 functions when causal relation is not in issue. Under the facts obtaining in the present case, if the
29 condition the claimant had in 1964 worsened between 1964 and 1968, this is a worsening of a
30 condition causally unrelated to her industrial injury of 1961. Stated another way, in 1964, there was
31 no condition attributable to the industrial injury subject to aggravation.
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33 It is not to be inferred from the above that this Board believes the claimant's emotional
34 condition, whether or not attributable to her industrial injury, has been aggravated. We do not. The
35 essence of the medical testimony on this issue has been set forth above. The only element of
36 worsening appears to be that in the interim period between 1964 and 1968 the claimant has
37 become more "focused" upon her emotional problems (there being no medical evidence she suffers
38 any psychosomatic organic problem) and that she was more convinced that she was suffering from
39 disabling conditions attributable to her exposure in 1968 than she had been in 1964. Even if we
40 were to reject the mandate of the Supreme Court that a claim for aggravation cannot be sustained
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1 where it is based upon subjective symptoms alone (Moses v. Department of Labor and Industries,
2 44 Wn. 2d 511 [1954], Karlson v. Department of Labor and Industries, 26 Wn. 2d 310, 329, and
3 cases cited therein [1946]), we are unable to accept that "focusing" is a worsening of the claimant's
4 emotional problems. That the claimant suffered from a disabling emotional problem prior to her
5 industrial injury has been testified to by Dr. Jarvis. The terms "focusing" and "she believed it more"
6 imply a reorientation of this pre-existing problem, not an increase in the problem.
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10 Conspicuously absent is opinion testimony by Dr. Jarvis or Dr. Kohli concerning the
11 claimant's capacity to perform full-time gainful work in 1964. Some doubt naturally arises that she
12 was capable of work at that time in view of her severe emotional problems of 1964. Thus, a real
13 question of proximate cause of whatever disability the claimant had in 1968 arises. Due to the
14 premises upon which this decision is founded, however, we need not explore that matter further.
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18 For the reasons above set forth, we conclude that the claimant has failed to establish the
19 incorrectness of the Department order of April 8, 1968, and we must sustain that order.
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21 **FINDINGS OF FACT**

22 Based on the record made at the hearings held in this matter, this Board finds:
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- 24 1. The claimant sustained an occupational exposure to chemical fumes
25 from a wet process copying machine in October of 1961 while in the
26 course of employment with Castle Industries, Inc. Her claim was at first
27 rejected, but thereafter allowed on June 25, 1962, and closed at that
28 time with no permanent partial disability award. On January 21, 1964,
29 the claimant filed an application to reopen her claim on the ground of
30 aggravation of her condition. On June 26, 1964, the Department
31 entered an order adhering to its prior order of February 13, 1964, which
32 denied her application to reopen her claim. On September 23, 1964, the
33 claimant appealed to this Board. After a hearing before the Board, the
34 examiner, on December 12, 1966, entered a proposed order sustaining
35 the Department. On April 28, 1967, the Board adopted the examiner's
36 order. (See Finding No. 2, infra.) The claimant appealed to the
37 Superior Court, but this was dismissed with prejudice by an order dated
38 August 28, 1967 (Snohomish County Superior Court, Cause No. 90510).
- 39 2. The Decision and Order of the Board of Industrial Insurance Appeals
40 dated April 28, 1967, adopting the findings and conclusions of the
41 Proposed Decision and Order dated December 12, 1966 (see Finding
42 No. 1, supra, for the subsequent judicial proceedings), found:
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45 3. The medical evidence in the record does not
46 show that the claimant's condition,
47 attributable to her exposure to ammonia

1 fumes prior to June, 1962, worsened
2 between June 25, 1962, and June 26, 1964.

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4 4. When her application to reopen her claim
5 was denied on June 26, 1964, the claimant's
6 condition was fixed, in that no treatment
7 therefor was indicated and she had no
8 permanent disability as a result of her
9 exposure."
- 10 3. On May 29, 1967, the claimant filed an application to reopen her claim
11 for aggravation of condition. On January 4, 1968, the Department
12 issued an order denying the application. On January 26, 1968, the
13 claimant appealed to this Board. On February 14, 1968, there was a
14 Department order holding the Department order of January 4, 1968, in
15 abeyance. On April 8, 1968, the Department entered an order adhering
16 to the order of January 4, 1968. On April 28, 1968, the claimant
17 appealed to this Board and on May 10, 1968, the Board granted the
18 appeal and assigned it Docket No. 30,673.
- 19 4. Appellate proceedings were conducted before the Board of Industrial
20 Insurance Appeals and on March 14, 1969, a hearing examiner for this
21 Board entered a Proposed Decision and Order in connection with this
22 appeal. Thereafter, within the period of time provided by law,
23 exceptions were filed and the case referred to the Board for review as
24 provided by RCW 51.52.106.
- 25 5. On and before June 26, 1964, the claimant herein suffered from a
26 manifest and disabling emotional and psychiatric condition manifested
27 by symptomatology of, but not limited to, a fixated idea that she was
28 suffering from the effects of exposure to various ordinary farm,
29 household, and cosmetic products including facial cosmetics, sprays
30 used in farming, hair preparations, and cleansing compounds.
31 Furthermore, she was fixated on the idea that certain foods were
32 causing her internal problems, that her hair was falling out, that her skin
33 was changing color, that she had epilepsy, that she suffered from liver
34 dysfunction, and various and sundry other physical problems.
35 Furthermore, she was fixated upon the idea that all of these problems
36 were in some way connected to her exposure to fumes from an office
37 copying machine in October of 1961.
- 38 6. On June 26, 1964, the claimant did not suffer from any physical
39 condition of an organic nature attributable to her industrial exposure of
40 October, 1961.
- 41 7. On April 8, 1968, the claimant herein was not suffering from any physical
42 condition of an organic nature attributable to her industrial exposure of
43 October, 1961.
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