Ellis, Thad

SCOPE OF REVIEW

Multiple injuries

Where the Department has rejected a claim for an injury alleged to have occurred on a specific date, the Board does not have jurisdiction to determine whether the worker sustained other injuries on other dates. The notice of appeal cannot expand the Board's authority to decide questions which have not been passed upon by the Department. The worker is not precluded, however, from pursuing additional claims at the Department level. **….*In re Thad Ellis*, BIIA Dec., 42,441 (1974)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: THAD W. ELLIS	)	**DOCKET NO. 42,441**
	)	
CLAIM NO. G339895	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Thad W. Ellis, by
Bovy, Cohen, Graham & Wampold, pr
Norman Cohen

Employer, Utah-Idaho Sugar Company, by
Vaughn Hubbard; and
Forrest Roberts, Northwest Sales Manager

Department of Labor and Industries, by
The Attorney General, per
Brian D. Scott, Assistant

This is an appeal filed by the claimant on April 11, 1973, from an order of the Department of Labor and Industries dated February 20, 1973, which rejected the claim for an alleged injury of December 21, 1971, for the reasons: (1) That there is no proof of a specific injury at a definite time and place in the course of employment; (2) That the claimant's condition is not an occupational disease as contemplated by Sec. 51.08-140 RCW. **SUSTAINED**.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on timely Petitions for Review filed by the employer and the Department of Labor and Industries to a Proposed Decision and Order issued by a hearing examiner for this Board on March 20, 1974, in which the order of the Department dated February 20, 1973 was reversed, and remanded to the Department with direction to allow the claim for an injury occurring "some time during the first week of April, 1972."

The Board has reviewed the evidentiary rulings of the hearing examiner. All rulings allowing evidence to be placed in the record of injuries occurring subsequent to the alleged injury of December 21, 1971, are hereby reversed, and all testimony relating to such subsequent injuries is hereby stricken from the record. All other evidentiary rulings are hereby affirmed.

Both the Department and the employer challenge the hearing examiner's proposed disposition of this claim on the ground that it exceeds the Board's power and authority in the premises. We must conclude that the challenge is well taken.

The record shows that the claimant filed a report of accident with the Department on August 24, 1972, alleging that he sustained an injury to his low back during the course of his employment on December 21, 1971. On February 20, 1973, the Department issued an order denying the claim for injury of December 21, 1971, and it is from this order that the instant appeal was prosecuted. In effect, the hearing examiner upheld the Department's order of February 20, 1973, in that he did not find that any injury was sustained on December 21, 1971. However, he then proceeded to find that the claimant had sustained an on-the-job back injury "some time during the first week of April, 1972," and concluded therefrom that the Department's order of February 20, 1973, rejecting the claim for injury of December 21, 1971, was incorrect, and that a claim should be allowed for an injury of April, 1972. Thus, we have the anomalous situation of a Departmental order being, in effect, both sustained and reversed in one and the same decision.

We must conclude that this was error. The Board is an appellate body. As such, it has no powers of original decision, but is limited to reviewing the correctness of those matters which have first been passed upon by the Department. Karniss v. Department of Labor & Industries, 39 Wn.2d 898; Turner v. Department of Labor & Industries, 41 Wn.2d 739; Hyde v. Department of Labor & Industries, 46 Wn.2d 31; Harper v. Department of Labor & Industries, 46 Wn.2d 404. In other words, the Board's scope of review is circumscribed by the Department order on appeal before the Board. The controlling maxim is as stated in Lenk v. Department of Labor & Industries, 3 Wn. App. 977:

> "The questions the board may consider and decide are fixed by the order from which the appeal was taken . . . as limited by the issues raised by the notice of appeal."

As applied to the instant case, the question for decision by the Board, as delineated by the department's order of February 20, 1973, was whether or not the claimant sustained an industrial injury on or about December 21, 1971 (or, in the alternative, whether or not the claimant's back condition constituted an occupational disease, since, for good measure, the Department in its order of February 20, 1973, denied the claim for injury of December 21, 1971, on that basis also). The fact that the claimant, in his notice of appeal to the Board, also alleged that he had sustained

industrial injuries to his back on three occasions subsequent to December 21, 1971 (including on April 4 or 5, 1972, allegedly), can be of no avail. The question of whether or not the claimant sustained any one or all three of these alleged injuries had not been presented to the Department and was not passed upon in its order of February 20, 1973. Accordingly, any question of these Board in this appeal.

With regard to the alleged injury that was properly in issue - the alleged injury of December 21, 1971 - we totally concur with the hearing examiner's evaluation of the evidence and his conclusion therefrom that no "injury" occurred. From the evidence as a whole, we think it can only be fairly concluded that the lifting incident of December 21, 1971 constituted no more than an episode of transitory back pain which cleared up within a few days at most. This incident, we are satisfied, was no more eventful than numerous other episodes of back pain which the claimant experienced every two or three months over the previous three or four years when lifting sacks of sugar on the job. It is undisputed that he neither sought nor received medical treatment for this lifting incident of December 21, 1971.

Finally, as for the contention that the claimant's back condition constituted an occupational disease, the entire body of evidence, both lay and medical, was addressed to the question of "injury". The back condition in issue was medically diagnosed as myofascitis - medically described as an inflammation of the muscles and ligaments of the lower lumbar spine. The only medical witness to testify in this matter stated that this condition was ordinarily due to an "injury", such as lifting, and he so attributed the condition in this particular case. In short, the claimant's back condition in this case (myofascitis) does not constitute an "occupational disease" which is statutorily described as "such disease or infection as arises naturally and proximately out of employment". RCW 51.08.140.

In summary, the Department's rejection of the claim for injury and/or occupational disease arising out of a lifting incident allegedly occurring on or about December 21, 1971, is hereby sustained. Our holding herein is without prejudice to the right of the claimant to pursue any proper claim made to the Department of Labor and Industries for any injury allegedly occurring on any occasion other than the December 21, 1971 occasion.

FINDINGS OF FACT

Based upon the record, the Board makes the following findings:

1. On August 24, 1972, the claimant filed a report of accident with the Department of Labor and Industries alleging that he sustained an injury to his low back during the course of his employment on December 21, 1971, four Utah-Idaho Sugar company. On February 20, 1973, the Department issued an order rejecting the claim for the reasons:

    1) That there is no proof of a specific injury at a definite time and place in the course of employment, and

    2) That the claimant's condition is not an occupational disease as contemplated by Sec. 51.08.140 RCW.

    On April 11, 1973, the claimant filed a notice of appeal to the Board, and on April 20, 1973, the Board issued an order granting the appeal.

2. Appellate proceedings were conducted before the Board of Industrial Insurance Appeals and on March 20, 1974, a hearing examiner for this Board entered a Proposed Decision and Order in connection with this appeal. Thereafter, within the period of time provided by law, Petitions for Review were filed by the employer and the Department, and the case was referred to the Board for review as provided by RCW 51.52.106.

3. For a period of some three to four years prior to December 21, 1971, the claimant had occasion to lift 100-pound bags of sugar during the course of his employment at two or three month intervals. On these occasions when the claimant was required to lift these 100-pound sacks of sugar, he would usually suffer some back pain, which would disappear within a short duration of time. The claimant neither sought nor received medical treatment for any of these episodes of temporary symptoms. On or about December 21, 1971, the claimant experienced another episode of back pain in the course of his employment while lifting 100-pound sacks of sugar. As with the prior episodes of back pain, the condition cleared up within a few days and the claimant neither sought nor received any medical treatment therefor.

4. The claimant has a condition diagnosed in August of 1972 as myofascitis of the low back. This condition was neither caused nor precipitated by the lifting incident of December 21, 1971.

CONCLUSIONS OF LAW

Based upon the foregoing findings, the Board makes the following conclusions:

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

2. The temporary back symptoms experienced by the claimant in the course of his employment on or about December 21, 1971 did not constitute an industrial "injury" within the meaning of the Workmen's Compensation Act.

3. Myofascitis of the low back caused by the strain of lifting does not constitute an "occupational disease" as defined by RCW 51- .08.140.

4. The order of the Department of Labor and Industries dated February 20, 1973, denying this claim for industrial injury and/or occupational disease occurring on December 21, 1971, is correct and should be sustained.

It is so ORDERED.

Dated this 6th day of November, 1974.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
PHILLIP T. BORK Chairman

/s/_____
R.M. GILMORE Member