McCollum, James

SCOPE OF REVIEW

Occupational disease and industrial injury as alternative theories

Although the Department order under appeal did not specifically reject the claim as an occupational disease, the worker's accident report must be viewed as a claim for benefits for either an injury or an occupational disease, and the Department is obligated to adjudicate the claim under both theories. However, while the Board may have jurisdiction over the occupational disease issue, a remand to the Department was appropriate in this case. **….*In re James McCollum*, BIIA Dec., 62,296 (1983)**

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: JAMES H. MCCOLLUM	**)**	**DOCKET NO. 62,296**
	)	
CLAIM NO. H 898809	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, James H. McCollum, by
Delay, Curran, Thompson and Pontarolo, per
Robert H. Thompson, Jr. and Michael J. Pontarolo

Employer, Barton Oldsmobile Company
None

Department of Labor and Industries, by
The Attorney General, per
Robert C. Milhem, Jerry Hertel, and Gregory M. Kane, Assistants

This is an appeal filed by the claimant on June 4, 1982 from an order of the Department of Labor and Industries (Department) dated May 11, 1987. The order adhered to the provisions of a prior Department order rejecting the claim on the grounds there was no proof of a specific injury as that term is defined by the Industrial Insurance laws. The Department order is reversed and the claim is remanded for further consideration.

PROCEDURAL STATUS AND EVIDENTIARY RULINGS

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order issued on May 3, 1983, in which the order of the Department dated May 11, 1982 was sustained.

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

DECISION

The evidence presented by the parties is adequately set forth in the Proposed Decision and Order. We agree with the determination therein that James H. McCollum did not sustain an industrial injury to his back during the course of his employment with Barton Oldsmobile Company. We also agreed with the decision not to resolve in this appeal the issue of whether or not Mr. McCollum's back condition is the result of an occupational disease. Review has been granted because, in our judgment, the Department erred in failing to consider whether the claim which was filed qualified as an occupational disease. An order remanding the claim is appropriate to assure the Department resolves that issue in an informed manner.

The claimant has fallen far short of sustaining his burden of proving by a preponderance of the credible evidence that he sustained a sudden traumatic injury during the course of his employment. Militating strongly against this theory of recovery are the facts that (1) no accident was reported to the employer or to the claimant's examining and treating physician, and (2) it appears that even as of the date Mr. McCollum testified at a hearing of his appeal, he remained mystified concerning the correct date of any alleged traumatic incident.

It is also clear from the record what the Department has not yet considered whether the claimant contracted an occupational disease within the meaning of the Workers' Compensation Act. The Department order from which appeal was taken is different from many other Department orders we have seen in "reject" cases, in that it makes no reference whatsoever to occupational disease. Nevertheless, the accident report which Mr. McCollum filed on August 4, 1981, as supplemented by the information on the employer's portion of that report received by the Department on August 24, 1981, must properly be viewed as an "application" or "claim" for benefits either as an injury or an occupational disease. In holding that the Department should not restrict its inquiry to the industrial injury issue upon receipt of one of the "Accident Report" forms it supplies, we note that the Department does not distribute any forms entitled "Occupational Disease Report". Therefore, workers seeking benefits under the Act will almost invariably utilize the "Accident report" form even when they believe they have contracted an occupational disease. In such cases the Department is obligated to investigate and rule upon the existence of an occupational disease. It was error for the Department not have yet done so in this case.

Because the jurisdiction of this Board is appellate only, we can consider only matters which are first determined by the Department, Lenk v. Department of Labor and Industries, 3 Wn. App. 977 (1970), as limited by the issues raised by the notice of appeal, Brakus v. Department of Labor and Industries, 18 Wn. 2d 218 (1956). Although there is merit to the claimant's argument that we have jurisdiction to decide the occupational disease question based upon this record (because the notice of appeal raises the occupational disease question and the Department was placed on notice at the first conference that the occupational disease theory would be pursued), we believe the better approach to this case is to remand the claim to the Department with instructions to consider the "accident report" as an application for benefits which encompasses an occupational disease claim and to investigate and pass upon the claim on that basis.

After consideration of the Proposed Decision and Order, the Petition for Review filed thereto, and a careful review of the entire record before us, we hereby enter the following:

FINDINGS OF FACT

1. On August 4, 1981 the Department of Labor and Industries received a report of accident from James H. McCollum alleging the occurrence of an industrial injury to his low back during the course of this employment with Barton Oldsmobile Company on July 1, 1981. The employer's portion of the report received on August 24, 1981 did not indicate an injury on any specific date, but rather lower back pain increasing in severity "for last several years". The claim was assigned Claim No. H 898809. On March 26, 1982, the Department issued its order rejecting the claim on grounds there was no proof of a specific injury at a definite time and place in the course of employment, and the claimant's condition was not the result of an industrial injury as that term is defined in the Workers' Compensation Act. A protest and request for reconsideration of the Department's March 26, 1982 order was filed with the Department, and by order dated May 11, 1982, the Department adhered to the provisions of its order rejecting the claim. A notice of appeal was filed on behalf of the claimant on June 4, 1982, and on June 23, 1982, the Board of Industrial Insurance Appeals issued its order granting the appeal, assigned it Docket No. 62,296, and directed that proceedings be held on the issues therein raised.

2. The question of whether or not Mr. McCollum contracted an occupational disease arising naturally and proximately out of his work for Barton Oldsmobile Company has not yet been addressed and passed upon by the Department of at the administrative level.

3. Neither during the course of his employment on or about April 1, 1981, nor during the course of his employment on or about July 1, 1981, did James H. McCollum sustain a sudden and tangible happening of a traumatic nature to his low back, producing an immediate or prompt result.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, This Board concludes as follows:

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

2. On or about April 1, 1981, claimant James H. McCollum did not sustain an industrial injury within the meaning of the Workers' Compensation Act.

3. On or about July 1, 1981, claimant James H. McCollum did not sustain an industrial injury within the meaning of the Workers' Compensation Act.

4. The Department's standard "Accident" (form number LI- 210-18) constitutes and application for industrial insurance benefits, which necessarily encompasses an application for benefits based on alleged occupational disease. Upon receipt of an "Accident Report", the question of whether the applicant for benefits has either sustained an industrial injury or contracted an occupational disease, is properly before the Department for investigation and administrative adjudication.

5. The order of the Department of Labor and Industries dated May 11, 1982, which rejected Claim No. H 898809 on the grounds there was no proof of a specific injury at a definite time and place in the course of employment, and the claimant's condition was not the result of an industrial injury, was correct on the grounds so stated, but was incorrect in failing to determine whether or not the claimant had contracted an occupational disease, should be reversed, and this claim remanded to the Department with the direction to consider the application for benefits filled by Mr. McCollum on August 4, 1981, as one which encompasses an occupational disease claim.

It is so ORDERED.

Dated this 20th day of July, 1983.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/
MICHAEL L HALL Member

/s/
PHILLIP T BORK Member