

## **Holstrom, Ronald**

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### **SCOPE OF REVIEW**

#### **Aggravation**

When the Department denies an application to reopen for aggravation of condition which has alleged the existence of a new condition and the Board reverses that order, the Board cannot reach the issues of treatment and disability but must remand to give the Department an opportunity to rule on those questions in the first instance.

***...In re Ronald Holstrom, BIA Dec., 70,033 (1986)***

Scroll down for order.



1 The issue presented by this appeal and the evidence presented by the parties are adequately  
2 set forth in the Proposed Decision and Order. In its Petition for Review the Department does not  
3 contest the determination that claimant's industrially related condition became aggravated between  
4 September 13, 1976 and February 15, 1985. The Department contends, however, that our Industrial  
5 Appeals Judge exceeded this Board's scope of review in going further and rating the claimant's  
6 permanent partial disability. The claimant contends that the allegation in his notice of appeal that he  
7 was seeking an increased permanent partial disability award is sufficient to place that issue before us.  
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10 This Board's jurisdiction is appellate only. If a question has not been passed upon by the  
11 Department, it cannot be reached by us. The issues which may be resolved by the Board "are fixed  
12 by the order from which the appeal was taken [citation omitted] as limited by the issues raised by the  
13 notice of appeal [citation omitted]." Lenk v. Department of Labor and Industries, 3 Wn. App. 977, 982  
14 (1970) (emphasis added). Claimant's allegation that he is entitled to an increased permanent partial  
15 disability award cannot bring that issue within our appellate jurisdiction unless that question has first  
16 been considered by the Department. The notice of appeal can never expand the boundaries of our  
17 review, but should instead ideally narrow the issues to be litigated.  
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20 The claim for aggravation in this case involves a new condition, focal segmental amyotrophy,  
21 which arose after the first terminal date. The Department rejected the claimant's application to reopen  
22 because it considered this condition unrelated to the industrial injury. Having made that determination,  
23 the Department had no occasion to go further and determine the need for treatment or, alternatively,  
24 the extent of permanent disability due to a condition which it had already determined was not causally  
25 related to the industrial injury.  
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28 There is a fundamental difference between an aggravation case in which the worker contends  
29 that the same condition which existed at the time of the first terminal date has worsened and an  
30 aggravation case in which the worker contends that a new condition causally related to the industrial  
31 injury has arisen since the first terminal date. In the former case, the causal relationship of the  
32 condition to the industrial injury has already been accepted by the Department. Thus to determine if  
33 that accepted condition has worsened, the Department must, of necessity, determine whether that  
34 condition is fixed and, if so, the extent of increased permanent disability. Inherent in a determination  
35 that an accepted condition has not worsened is the determination that no treatment is necessary and  
36 that there is no increase in permanent disability. Noll v. Department of Labor and Industries, 179  
37 Wash. 213 (1934).  
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1 On the other hand, a "new condition" aggravation case is analogous to a reject case. The  
2 threshold issue before the Department is whether the new condition is in fact causally related to the  
3 industrial injury. If the Department determines that there is no causal relationship, then it obviously  
4 need not go any further. The Department does not, and should not be expected to, engage in a  
5 hypothetical inquiry to determine whether it would have found that the claimant had an increased  
6 permanent disability if it had decided that the condition was causally related to the industrial injury.  
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10 The court in Noll implicitly recognized this distinction between "same condition" and "new  
11 condition" aggravation cases by distinguishing such reject cases as Cole v. Department of Labor and  
12 Industries, 137 Wash. 538 (1926). In Cole the court held that when the Department rejects a claim it  
13 does not pass upon the question of the extent of permanent disability. Thus, when a Department  
14 order rejecting a claim is reversed, the claim must be remanded to the Department to consider those  
15 questions which have not yet been resolved, for example, the extent of permanent disability.  
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18 In Noll the court approved the Cole holding, stating:

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20 "Clearly, in the Cole case, in deciding that the injuries were not the result  
21 of a fortuitous event, the department had no occasion to examine into the  
22 nature and extent of those injuries, or to determine what, if any, award  
23 should be made therefor, and very clearly this court there applied the  
24 correct rule." Noll at 216."  
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26 The decision of Shufeldt v. Department of Labor and Industries, 57 Wn. 2d. 758 (1961) cited by the  
27 Department in support of its Petition for Review is also instructive to the extent that it presents the flip  
28 side of the issue raised by this case. The court in Schufeldt held that when the issue raised is  
29 whether a condition is causally related to an industrial injury, the claimant is not required to present  
30 evidence on the question of extent of disability. Conversely, the question of extent of disability should  
31 not be reached by this Board when the only question decided by the Department was the threshold  
32 question of whether the condition was causally related to the industrial injury.  
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35 In the present case, the Department concluded that claimant's focal segmental amyotrophy  
36 was not causally related to the industrial injury of April 6, 1976. The Department did not determine nor  
37 make any investigation whether that condition was fixed or productive of any permanent disability.  
38 Our Industrial Appeals Judge exceeded the scope of this Board's review in reaching those questions.  
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40 After consideration of the Proposed Decision and Order, the Department's Petition for Review,  
41 the claimant's Reply, and the entire record, we are persuaded that the Proposed Decision and Order is  
42 supported by the preponderance of the evidence insofar as it concludes that claimant's focal  
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1 segmental amyotrophy is causally related to the industrial injury and constitutes a worsening of  
2 claimant's condition attributable to the industrial injury between the two terminal dates. The Proposed  
3 Decision and Order is incorrect, however, in going further and rating claimant's permanent partial  
4 disability due to that condition. That question has not been passed upon by the Department and the  
5 Department will be given an opportunity to consider that issue on remand.  
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9 **FINDINGS OF FACT**

10 Proposed Findings of Fact 1, 2, 3 and 4 are adopted as this Board's findings and are  
11 incorporated herein by reference. Proposed Findings of Fact 6 and 7 are deleted. Finding 5 is  
12 corrected to read as follows:  
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- 14 5. As of February 15, 1985 claimant's condition causally related to the  
15 industrial injury of April 6, 1976 was diagnosed as focal segmental  
16 amyotrophy secondary to anterior horn cell or motor root injury to the  
17 spinal cord at the eighth cervical and first thoracic segments resulting in  
18 denervation to claimant's hand muscles causing marked atrophy. As a  
19 result of the atrophy claimant has lost strength in his hands and the ability  
20 to do fine coordinated finger movements.  
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22 **CONCLUSIONS OF LAW**

23 Proposed Conclusions of Law 1 and 2 are adopted as this Board's Conclusions and  
24 incorporated herein by reference. Conclusion 3 is deleted, and in its stead the following Conclusion is  
25 entered:  
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- 27 3. The order of the Department of Labor and Industries dated February 15,  
28 1985, adhering to the provisions of a prior order dated November 16, 1983  
29 denying claimant's application to reopen his claim for aggravation of  
30 condition, is incorrect and should be reversed and the claim remanded to  
31 the Department of Labor and Industries to allow the application to reopen  
32 the claim and to provide benefits as indicated and authorized by law.  
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34 It is so ORDERED.  
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36 Dated this 25th day of March, 1986.  
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38 BOARD OF INDUSTRIAL INSURANCE APPEALS

39 /s/ \_\_\_\_\_  
40 GARY B. WIGGS Chairperson

41 /s/ \_\_\_\_\_  
42 FRANK E. FENNERTY, JR. Member

43 /s/ \_\_\_\_\_  
44 PHILLIP T. BORK Member  
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