

## Johnson, Gary

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### RES JUDICATA

#### Allowance of claim

When the Department issues an order expressly addressing the issue of allowance of the claim, and that order is protested by the employer, the Department is obligated to specifically address the allowance issue in a further order. A subsequent determinative time-loss order, which the employer failed to timely protest or appeal, does not preclude the Department from later rejecting the claim. The determinative time-loss order cannot be construed as an implied allowance of the claim since it fails to clearly apprise the employer that the claim has been allowed. ....*In re Gary Johnson, BIA Dec., 86 3681 (1987)* [dissent]

Scroll down for order.

**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS  
STATE OF WASHINGTON**

1 **IN RE: GARY G. JOHNSON** ) **DOCKET NO. 86 3681**  
2 )  
3 ) **ORDER REMANDING FOR**  
4 **CLAIM NO. J-528767** ) **FURTHER PROCEEDINGS**  
5 \_\_\_\_\_

6 APPEARANCES:

7  
8 Gary G. Johnson, by  
9 Gerald L. Casey

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11 Employer, Snelson, Inc., by  
12 Randy Britsch

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14 Department of Labor and Industries, by  
15 The Attorney General, per  
16 William R. Strange, Assistant  
17

18 This is an appeal filed by the claimant on October 13, 1986 from an order of the Department of  
19 Labor and Industries dated September 29, 1986 which rejected the claim for the reasons that there is  
20 no proof of a specific injury at a definite time and place in the course of employment, the condition is  
21 not the result of an industrial injury, the condition pre-existed the alleged injury, and the condition is not  
22 an occupational disease. **REMANDED FOR FURTHER PROCEEDINGS.**  
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25 **DECISION**  
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27 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review  
28 and decision on a timely Petition for Review filed by the Department of Labor and Industries to a  
29 Proposed Decision and Order issued on February 24, 1987. That order in essence granted the  
30 claimant's Motion for Summary Judgment and determined that the Board lacked jurisdiction over the  
31 parties and subject matter of the claimant's appeal from the September 29, 1986 Department order  
32 rejecting the claim, because a prior determinative time-loss compensation order, which was neither  
33 appealed nor protested, had impliedly allowed the claim.  
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38 The record before us consists of the transcript of two conferences, Exhibit 1, claimant's Motion  
39 for Summary Judgment and attachments, and the Department's Response thereto and attachments.  
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41 The issue on appeal is whether an order paying time-loss compensation and containing the  
42 protest and appeal notification language of RCW 51.52.050, i.e., a determinative time-loss  
43 compensation order, impliedly allows a claim even though the employer has timely protested a prior  
44 determinative order specifically allowing the claim. The Department contends that, in these  
45 circumstances, a subsequent unappealed and unprotested determinative time-loss compensation  
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1 order is not res judicata on the question of the allowance of the claim, but only on the question of  
2 entitlement to the time-loss compensation awarded thereby.  
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4 The legal issue can only be fully understood in its factual context. Mr. Johnson filed an accident  
5 report on January 17, 1985 alleging an industrial injury occurring on January 4, 1985. On February  
6 11, 1985 the Department issued an interlocutory time-loss compensation order, i.e., an order pursuant  
7 to RCW 51.32.210, without the appeal and protest notification language of RCW 51.52.050. On  
8 February 21, 1985 the employer protested the February 11, 1985 order and contested the claim. On  
9 March 8, March 20, April 16, and May 8, 1985 the Department issued determinative time-loss  
10 compensation orders. The March 20, 1985 order specifically allowed the claim.  
11

12 In a protest dated May 3, 1985 the employer protested the March 20 and the April 16 orders,  
13 again contesting the validity of the claim. On May 8, 1985 the Department issued an order modifying  
14 all prior determinative orders, including the March 20, 1985 allowance order, to interlocutory orders.  
15

16 On May 13, 1985 the Department issued a further determinative time-loss compensation order  
17 which the employer failed to either protest or appeal. Further determinative time-loss compensation  
18 orders were issued on August 23 and October 16, 1985 and these were protested by the employer on  
19 October 23, 1985.  
20

21 On February 19, 1986 the Department issued an order rejecting the claim. The claimant timely  
22 appealed that order and the Department reassumed jurisdiction and issued a further order rejecting  
23 the claim on September 29, 1986. The claimant again timely appealed that reject order and it is that  
24 order which is the subject of this appeal.  
25

26 From this recitation three critical facts are apparent: (1) the employer timely protested the  
27 allowance order of March 20, 1985; (2) the Department did not issue a further determinative order in  
28 response to that protest, until the rejection order was issued on February 19, 1986; and (3) the  
29 employer did not timely protest or appeal the determinative time-loss compensation order of May 13,  
30 1985.  
31

32 In concluding that the May 13, 1985 determinative time-loss compensation order impliedly  
33 allowed the claim, the Proposed Decision and Order relied on the Board's prior decision in In re  
34 Herbert Olive, BIIA Dec., 70,349 (1986). Olive is distinguishable on its facts. In Olive, the employer  
35 failed to protest or appeal a determinative time-loss compensation order issued prior to the allowance  
36 order. In the instant appeal, the employer timely protested the allowance order but failed to protest or  
37 appeal a subsequent determinative time-loss compensation order. When an employer has diligently  
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1 and timely protested a specific allowance order, it cannot be required to appeal or protest a  
2 subsequent determinative time-loss compensation order to preserve its objection to the allowance of  
3 the claim. The employer has the right to rely on the Department's promise that a further appealable  
4 order will be issued in response to the protest. The May 13, 1985 time-loss compensation order was  
5 clearly not in response to the employer's protest to the allowance of the claim. The February 19, 1986  
6 reject order was that response.  
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10 The provisions of RCW 51.32.210 do not change this analysis. That provisional time-loss  
11 compensation section provides:  
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13 "The payment of this or any other benefits under this title, prior to the entry  
14 of an order by the Department in accordance with RCW 51.52.050 as now  
15 or hereafter amended, shall be not considered a binding determination of  
16 the obligations of the Department under this title. The acceptance of  
17 compensation by the worker or his or her beneficiaries prior to such order  
18 shall likewise not be considered a binding determination of their rights  
19 under this title."  
20

21 That language does not render a time-loss compensation order headed by the language of RCW  
22 51.52.050 binding with respect to issues which are not resolved by the order. When a prior allowance  
23 order has been timely protested and the Department has not issued a further determinative order in  
24 response to that protest, a subsequent determinative time-loss compensation order which has been  
25 neither appealed nor protested is a binding res judicata determination only with respect to the issues  
26 resolved by that order, i.e., entitlement to the time-loss compensation awarded thereby.  
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29 The case law fully supports this view. In King v. Department of Labor and Industries, 12 Wn.  
30 App. 1 (1974) the Court of Appeals was faced with the question of whether the language "the plaintiff  
31 did not suffer any permanent partial disability from a psychiatric standpoint as a proximate result of his  
32 industrial injury" clearly apprised the worker that his psychiatric condition was not causally related to  
33 the industrial injury. The court held:  
34

35 "Fundamental fairness requires that to constitute such a specific rejection  
36 of plaintiff's psychiatric condition a claimant must be clearly advised that  
37 any relationship between his psychiatric problems and his injury is finally  
38 determined. Finding of Fact No. 7 is not a model of clarity. However, in  
39 our opinion it is no more and no less than a determination that "the plaintiff  
40 did not suffer any permanent partial disability from a psychiatric standpoint  
41 as a proximate result of his industrial injury of October 15, 1962." In the  
42 absence of a clear and unmistakable final finding that a condition is neither  
43 caused by nor aggravated by an industrial injury, a workman should not be  
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1 precluded from thereafter litigating the causal relationship between the  
2 injury and his condition." King at 4.  
3

4 In this appeal, we are faced with the question of whether the employer was clearly apprised that the  
5 claim had been allowed by the following language contained in the May 13, 1985 Department order:  
6

7 "This order is issued to permit the payment of time loss, as listed below,  
8 without the necessity of further verification. Do not cash this warrant if you  
9 have returned to work, or if you are released to return to work by your  
10 doctor within the payment period. Please return the warrant to the  
11 Olympia office for correction.  
12

13 It is hereby ordered that 02 semi monthly time loss compensation  
14 payments be made as shown below for the compensation period  
15 beginning 04-22-85."  
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17 We conclude that this language was not a "clear and unmistakable" determination that the claim had  
18 been allowed, within the principle of King, supra.  
19

20 It is not sufficient to argue circuitously that the Department has no authority to issue a  
21 determinative time-loss compensation order unless the claim has been allowed and therefore any  
22 determinative time-loss compensation order must be binding on the employer as an allowance of the  
23 claim. The parties are only bound to the extent that an order specifically resolves an issue and notifies  
24 the parties of that resolution.  
25

26 Our conclusion is consistent with the Board's prior decision in In re Kerry G. Kemery, BIIA Dec.,  
27 62,634 (1983). In that case the Department had reopened a claim for aggravation of condition for the  
28 unstated reason that the industrial injury to the claimant's knee had later caused a low back condition.  
29 Relying on King, the Board concluded that the employer was bound by all determinative time-loss  
30 compensation orders which had been neither protested nor appealed, but could still litigate the  
31 question of whether the back condition was causally related to the industrial injury, since that question  
32 had never been specifically resolved in an order complying with RCW 51.52.050.  
33

34 The same result obtains here. The May 13, 1985 order is only binding on the employer with  
35 respect to the payment of time-loss compensation. The payment of time-loss compensation pursuant  
36 to that order did not operate as a sub silentio allowance of the claim. The Department's first response  
37 to the employer's timely protest of the March 20, 1985 allowance order was the issuance of its  
38 February 19, 1986 order rejecting the claim. Mr. Johnson's timely notice of appeal from that order was  
39 properly responded to by reassuming jurisdiction and then issuing the further rejection order of  
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1 September 29, 1986. Mr. Johnson has timely appealed the latter order to this Board which has  
2 jurisdiction over the parties and subject matter of the appeal.  
3

4 It is hereby ORDERED that claimant's Motion for Summary Judgment be denied and the matter  
5 be remanded to the industrial appeals judge for further proceedings on the merits of the claimant's  
6 appeal.  
7

8 It is so ORDERED.  
9

10 Dated this 13th day of July, 1987.  
11

12 BOARD OF INDUSTRIAL INSURANCE APPEALS  
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16 /S/  
17 SARA T. HARMON, Chairperson

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20 /S/  
21 PHILLIP T. BORK Member  
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23  
24 **DISSENTING OPINION**

25 I must dissent from the majority opinion in regards to the disposition of this appeal.  
26

27 The issue is whether a final, determinative order paying time-loss compensation results in the  
28 allowance of a claim if no prior determinative order allowing the claim has been entered. The  
29 Department contends that an order of this type is not res judicata on the question of the allowance of  
30 the claim in which it was entered.  
31

32 The Department issued a series of determinative time-loss compensation orders as well as a  
33 determinative order allowing the claim. The employer timely protested all of these orders. The  
34 Department modified the allowance order, changing it from a determinative order to an interlocutory  
35 order. Thereafter, additional determinative time-loss compensation orders were issued, all of which  
36 were timely protested by the employer except for an order dated May 13, 1985. Subsequently, the  
37 Department issued its September 29, 1986 rejection order, which the claimant appealed.  
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41 The Department of Labor and Industries, being a creature of statute, has only the power  
42 specifically given to it by the Legislature and must act within the prescribed boundaries thereof.  
43 Wheaton v. Department of Labor and Industries, 40 Wn.2d 56 (1952). In general, the Department has  
44 no authority to pay benefits unless it has already determined a valid claim exists. An exception to this  
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1 principle is found within RCW 51.32.210 which provides for the payment of provisional temporary  
2 disability compensation (including time-loss compensation) in an expedited manner, "prior to the entry  
3 of an order by the Department in accordance with RCW 51.52.050..." (see also, RCW 51.04.030 and  
4 WAC 296-20)  
5

6  
7 The May 13, 1985 Department order contains appealable language and is an order in  
8 accordance with RCW 51.52.050. RCW 51.32.210, when read in conjunction with RCW 51.52.050,  
9 indicates that the issuance of a time-loss compensation order with appealable language constitutes a  
10 binding determination of the parties' rights under the Washington State Industrial Insurance Act. If  
11 there is no appeal of such an order within 60 days of its communication to the parties, that order is  
12 final and the issues and rights determined therein are res judicata. As stated above, the Department  
13 does not have the authority to issue a determinative order providing benefits for an unaccepted claim.  
14 To state that the May 13, 1985 order did not accept the claim would require the belief that the  
15 Department issued an order with the knowledge and intent to act beyond its legal authority. The more  
16 logical interpretation of the Department's action in issuing this order is that the claim was to be allowed  
17 thereby. While the Department contends that such a result is unfair to the employer, any harm caused  
18 to the employer is because of its neglect of its appeals rights.  
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21 Since the May 13, 1985 order was not timely appealed (no party, including the employer,  
22 contended that communication of this order was delayed or did not occur such that a protest or appeal  
23 was timely filed) and since the Department did not hold this order for naught, place it in abeyance or  
24 otherwise modify it, the order is final and res judicata as to all the matters determined therein,  
25 expressly or by implication.  
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28 It follows that if the May 13, 1985 Department order allowing the claim is res judicata as to that  
29 issue, the Department was without authority to issue the September 29, 1986 order rejecting the claim.  
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32 I would thereby incorporate the IAJ's proposed Finding of Fact No. 1 as the Board's final finding  
33 found in the Proposed Decision and Order issued on February 24, 1987. Also proposed Finding of  
34 Fact No. 2 is adopted as my final finding except that the date of the order referred to in the body of the  
35 finding is corrected to May 13, 1985. Additionally, I would enter Finding of Fact No. 3 as follows:  
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### 38 **FINDINGS OF FACT**

- 39  
40 3. The order of May 13, 1985 was not protested or appealed within 60 days  
41 of its communication to the parties, nor did the Department of Labor and  
42 Industries hold the order for naught, place it in abeyance or otherwise  
43 modify it within that time period.  
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**CONCLUSIONS OF LAW**

I would also propose the following Conclusions of Law:

1. The Board of Industrial Insurance Appeals has jurisdiction over the subject matter and parties of this appeal.
2. The order of May 13, 1985, which paid time-loss compensation was an order issued in accordance with RCW 51.52.050.
3. The order of May 13, 1985 accepted the claim and is final and res judicata as to that issue.
4. The order of the Department of Labor and Industries dated September 29, 1986 which rejected the claim for the reasons that there is no proof of a specific injury at a definite time and place in the course of employment, the condition is not the result of an industrial injury, the condition pre-existed the alleged injury and the condition is not an occupational disease, is correct and should be reversed and this claim remanded to the Department with instruction to treat the claim as allowed by its order dated May 13, 1985 and to provide further relief consistent therewith.

Dated this 13th day of July, 1987.

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