Nelson, Larry

DEPARTMENT

Authority to issue subsequent order while appeal pending

An appeal from a Department order does not necessarily deprive the Department of jurisdiction to issue subsequent orders on other aspects of an open claim which are not covered by the order on appeal. **….*In re Larry Nelson*, BIIA Dec., 89 0257 (1990)**
[*Editor's Note*: *Overruled in part*, *In re Betty Wilson*, BIIA Dec., **02 21517** (2004).]

SUSPENSION OF BENEFITS (RCW 51.32.110)

Refusal to attend medical examination

Where the worker's refusal to attend a medical examination is not based on a challenge to the examining physician's qualifications nor the employer's right to an independent medical evaluation but is based only on the requirement that the worker travel from Chehalis to Portland for the examination, the Department order directing the worker to attend will be affirmed where the worker has made the trip for other medical examinations without complaint, including trips to see his attending physician. **….*In re Larry Nelson*, BIIA Dec., 89 0257 (1990)**

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: LARRY W. NELSON	)	**DOCKET NO. 89 0257**
	)	
CLAIM NO. T-213811	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Larry W. Nelson, by
Aaby, Putnam, Albo and Causey, per
Wayne F. Lieb

Self-Insured Employer, Reynolds Metal Company, by
Roberts, Reinisch and Klor, per
Steven R. Reinisch

This is an appeal filed by the claimant, Larry W. Nelson, with the Department of Labor and Industries on January 11, 1989 and with the Board on January 23, 1989 from an order of the Department of Labor and Industries dated December 1, 1988. The order directed the self-insured employer to reschedule the claimant, Larry W. Nelson, for an examination with Dr. Emil Bardana and directed that the claimant appear for that examination. **AFFIRMED**.

DECISION

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 self-insured employer to a Proposed Decision and Order issued on September 6, 1989 in which the order of the Department dated December 1, 1988 was affirmed. The order of the Department dated January 13, 1989 was determined to be void and held for naught and the Department was directed to issue further interlocutory orders directing the self-insured employer to continue the payment of provisional time loss compensation.

On November 1, 1989, a document entitled Claimant's Reply and Cross- Petition for Review was received at the Board. Since claimant's counsel received the September 6, 1989 Proposed Decision and Order on September 8, 1989, the document received on November 1, 1989 cannot be construed as a timely Petition for Review and will, instead, be treated as a Reply to the Employer's Petition for Review.

Because an issue has been raised concerning our jurisdiction to address the Department order of January 13, 1989 in this appeal from the Department order of December 1, 1988, a copy of the January 13, 1989 order as contained in the Department file is hereby made part of the record in this appeal. See In re Mildred Holzerland, BIIA Dec., 15,729 (1965).

The Proposed Decision and Order identified the following as the issues in this appeal:

1. May the director delegate his authority granted by RCW 51.36.070 to select a physician or physicians to examine claimant and render a report?

2. If issue one is answered affirmatively, is Portland, Oregon a place reasonably convenient for the worker and as may be provided by the rules of the Department, to submit to an independent physical examination when claimant is a resident of Chehalis, within the meaning of RCW 51.32.110?

3. When the Department has issued an interlocutory order allowing a claim for benefits on a temporary basis, is the employer entitled to terminate time loss compensation benefits after a determinative order allowing a claim is followed by a timely abeyance order?

PD & O, at 1. The third issue is not properly before us.

In any appeal, the Board's jurisdiction is limited to issues which arise out of the Department order which is the subject of that appeal. The Department order dated December 1, 1988 provides:

> WHEREAS, Larry Nelson was scheduled for an exam with Dr. Bardana, and
>
> WHEREAS, the claimant did not keep the exam and refuses to be examined by Dr. Bardana, and
>
> WHEREAS, the claimant does not show good cause for not appearing for the exam by Dr. Bardana.
>
> IT IS HEREBY ORDERED that the employer reschedule the claimant, Larry Nelson, for an exam with Dr. Bardana and that the claimant appear for that exam.

The December 1, 1988 order does not address suspension of benefits or Mr. Nelson's entitlement to provisional time loss compensation. Although the parties have attempted by their stipulation to bring this issue before the Board, they cannot expand the Board's jurisdiction. We are without jurisdiction to consider the issue of Mr. Nelson's entitlement to provisional time loss compensation in this appeal.

The industrial appeals judge not only inappropriately addressed the time loss compensation issue, but he also exceeded the Board's appellate jurisdiction by determining that the Department order of January 13, 1989 was void ab initio. That order provided:

> WHEREAS, the department has been requested to make a determination regarding the claimants (sic) entitlement to time loss benefit (sic) while the claim is in abeyance, and
>
> WHEREAS, the allowance Order is held in abeyance because a medical exam is necessary to reach a determination,

> THEREFORE, time loss benefits are not payable while this claim is in abeyance.

The industrial appeals judge concluded that, because an appeal from the December 1, 1988 order was pending at the Board, the Department was without jurisdiction to issue the January 13, 1989 order. This is incorrect.

An appeal from a Department order does not necessarily deprive the Department of jurisdiction to issue any subsequent orders. It depends on the nature of the order which has been appealed. For example, if a closing order is on appeal, it is certainly true that the Department cannot entertain an application to reopen for aggravation of condition. Reid v. Dep't of Labor & Indus., 1 Wn.2d 430 (1939). At the same time, however, if a claim is still open, the Department does not lose jurisdiction to continue issuing orders in the claim merely because some aspect of claims administration has been challenged by an appeal to the Board.

While the appeal of the order dated December 1, 1988 may have deprived the Department of jurisdiction to change its determination with respect to the examination to be performed by Dr. Bardana and the claimant's participation in that examination, it did not deprive the Department of the right to make decisions dealing with other aspects of the claim. The Department frequently issues determinative orders dealing with the payment of time loss compensation, treatment, and causal relationship of conditions while a claim is open. An appeal from these orders would deprive the Department of jurisdiction only in respect to the specific issues which are determined by the orders. Except where a Department order rejecting or closing a claim is appealed, jurisdiction remains with the Department to consider other elements of an open claim which are not covered by the order on appeal. Inasmuch as the subject of provisional time loss compensation was not in any way determined by the Department order dated December 1, 1988, the Department retained jurisdiction to issue the order dated January 13, 1989.

While the Department had jurisdiction to issue the order dated January 13, 1989, we do not have jurisdiction to consider the provisions of that order, as it is not the subject of the appeal presently before us. We do wish to note, however, that the employer, in its Petition for Review, has misconstrued our prior decisions in In re Sandra Lucille Walster I and II, BIIA Dec., 43,049 (October, 1973, November, 1973). As we noted in In re Berwyn G. Teague, Dckt. No. 87 1282 (July 7, 1988):

> . . . this Board has, in the past, specifically upheld a Department order which directed the self-insured employer to pay provisional time- loss compensation pursuant to RCW 51.32.190 while the claim was in

> abeyance and until a determinative Department order was entered as to claim allowance or rejection. In re Sandra Lucille Walster I and II, BIIA Dec., 43,049 (October 1973, November 1973). The purpose of the provisional time-loss compensation statute is to encourage speedy investigation and adjudication of claims by requiring the Department or the self-insured employer, as the case may be, to pay provisional time-loss compensation if it is certified, while the claim is under investigation. Thus, just as the claimant is encouraged to cooperate by the provisions of RCW 51.32.110, so the self-insured employer is encouraged to fulfill its duties by the provisions of RCW 51.32.190.

In re Berwyn G. Teague, Dckt. No. 87 1282 (July 7, 1988), at 5-6.

Returning to the narrow issues which are properly before us in this appeal, Mr. Nelson objects to being examined by Dr. Emil Bardana in Portland, Oregon. We can find no reason why he should not appear for such an examination. An examination such as the one which was directed here can be ordered under the provisions of either RCW 51.32.110 or RCW 51.36.070. Under RCW 51.32.110, an employee of the Department of Labor and Industries, such as Hermi Todd, has the legal authority to order or direct a medical examination. In addition, under the provisions of RCW 43.22.020 and .030, the Director of the Department of Labor and Industries may delegate the duties imposed upon him, such as the selection of a physician, as set forth in RCW 51.36.070. In re Sandra Lucille Walster, BIIA Dec., 43 449 (1973). As a claims consultant, Hermi Todd is clearly one of those people to whom the Director has delegated the authority to select physicians who will perform examinations of claimants.

The stipulation provides, inter alia, that:

> "The parties do not challenge Dr. Bardana's medical qualifications as an expert who is qualified to examine and render opinions regarding workers who allege that symptoms are the result of exposure to toxic substances in the workplace. . . . The parties agree that the employer is entitled to an independent medical evaluation with an expert such as Dr. Bardana.

Stipulated Facts at 7. Although claimant's notice of appeal asserts that Dr. Bardana's prior examinations and testimony demonstrate a bias in favor of the self-insured employer and against claimants, this contention is not supported by the record. Indeed, claimant's Reply to the Employer's Petition for Review contends that the question of Dr. Bardana's bias was not litigated and that "It was stipulated between the parties that that issue was not before this Board and should not be addressed at this stage." Claimant's Reply at 4-5. We do not know why the parties chose not to litigate this issue, but we can see no reason for granting claimant's request and reopening the record at this late stage to permit the parties to do so now, particularly in the absence of a timely Petition for Review filed

by the claimant. We are left, then, with the only remaining objection to the examination by Dr. Bardana, that is, that it would require the claimant to travel from Chehalis, Washington, to Portland, Oregon.

Although claimant now objects to the 87 mile trip from Chehalis to Portland, he has previously made this trip for medical examinations on numerous occasions without complaint. In addition, his attending physician at the time the application for benefits was filed in this claim, practiced in Portland, Oregon. In fact, that physician, Dr. William Morton, saw Mr. Nelson at the University of Oregon Health Sciences Center in Portland, which is also the location of the offices of Dr. Bardana. We can see no reason why the self-insured employer should not have Larry W. Nelson examined by Dr. Emil Bardana in Portland, Oregon, as directed by the Department order dated December 1, 1988. We concur entirely with the thorough and well-reasoned analysis of this issue contained in the Proposed Decision and Order.

After consideration of the Proposed Decision and Order, the Employer's Petition for Review filed thereto, the Claimant's Reply, and a careful review of the Stipulated Facts and the entire record before us, we have determined that the Department order dated December 1, 1988 is correct and must be affirmed.

FINDINGS OF FACT

1. On June 16, 1988 an application for benefits was filed with the Department of Labor and Industries by the claimant, Larry W. Nelson, alleging a compensable condition arising from chemical exposure and/or hearing loss during the course of employment with Reynolds Metal Company. On July 12, 1988, the Department issued an order allowing the claim for benefits on a temporary and interlocutory basis. On August 9, 1988, an order was issued by the Department of Labor and Industries indicating that time loss compensation payment by the self-insured employer had been reported and allowing the claim for medical treatment and such other benefits as may be authorized or required by law. On September 23, 1988, a protest and request for reconsideration was filed on behalf of the self-insured employer from the Department order dated August 9, 1988. On October 3, 1988, the Department issued an order holding its order of August 9, 1988 in abeyance. On December 1, 1988, the Department issued an order which stated as follows:

> WHEREAS, Larry Nelson was scheduled for an exam with Dr. Bardana, and
>
> WHEREAS, the claimant did not keep the exam and refuses to be examined by Dr. Bardana, and

> WHEREAS, the claimant does not show good cause for not appearing for the exam by Dr. Bardana.
>
> IT IS HEREBY ORDERED that the employer reschedule the claimant, Larry Nelson, for an exam with Dr. Bardana and that the claimant appear for that exam.

On January 11, 1989, the Department of Labor and Industries received claimant's notice of appeal from the Department order dated December 1, 1988. That notice of appeal was transmitted to and received by the Board on January 23, 1989.

On January 13, 1989, the Department issued an order providing:

> WHEREAS, the department has been requested to make a determination regarding the claimants (sic) entitlement to time loss benefit (sic) while the claim is in abeyance, and
>
> WHEREAS, the allowance order is held in abeyance because a medical exam is necessary to reach a determination,
>
> THEREFORE, time loss benefits are not payable while this claim is in abeyance.

On January 25, 1989, the Board issued an order granting the appeal, assigning it Docket No. 89 0257 and directing that further proceedings be held on the issues raised.

2. As of December 1, 1988, Mrs. Hermi Todd was a claims consultant employed by the Department of Labor and Industries and duly authorized by the Director of the Department of Labor and Industries to select physicians to perform medical examinations of claimants at the request of the Department or self-insured employers, and had the authority to direct claimants to appear for examination by such physicians.

3. Dr. Emil Bardana, of Portland, Oregon, has medical qualifications as an expert to examine and render opinions regarding the causal relationship of workers' conditions to the exposure of toxic substances in the workplace. The self-insured employer, Reynolds Metal Company, is entitled to have the claimant, Larry W. Nelson, evaluated by Dr. Bardana and Portland, Oregon is a reasonable location for Dr. Bardana to perform such an evaluation.

CONCLUSIONS OF LAW

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

2. The Department of Labor and Industries under the authority of RCW 51.32.110 and RCW 51.36.070 has appropriately ordered the self-insured employer to schedule an examination of the claimant, Larry W. Nelson, with Dr. Emil Bardana in Portland, Oregon and also has the authority to order the claimant to appear at said examination.

3. The Department order dated December 1, 1988 which ordered that the employer reschedule the claimant, Larry Nelson, for an examination with Dr. Bardana, and that the claimant appear for that examination, is correct and must be affirmed.

It is so ORDERED.

Dated this 15th day of March, 1990.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
SARA T. HARMON Chairperson

/s/_____
PHILLIP T. BORK Member