Bray, Noel, Jr.

APPEALABLE ORDERS

Self-insured employer's order (RCW 51.32.055)

A closing order issued by self-insured employer under the authority of RCW 51.32.055(7)(a) may conditionally close the claim. The closure is subject to reevaluation by the Department within two years on the basis that the claim was improperly or prematurely closed. **….*In re Noel Bray, Jr.*, BIIA Dec., 89 2484 (1991)** [dissent] [*Editor's Note*: The provisions cited apply only to claims accepted by self-insurers after June 30, 1986 and before July 1, 1990--the window period expressed in RCW 51.32.055(7)(d) does not apply to claims accepted after June 30, 1990 and closed with medical treatment only.]

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: NOEL I. BRAY, JR.	)	**DOCKET NOS. 89 2484 & 89 2484-A**
	)	
CLAIM NO. T-167975	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Noel I. Bray, Jr., by
Minnick & Hayner, per
Daniel J. Hess

Self-Insured Employer, Louisiana Pacific Corporation, by
Hall & Keehn, per
Thomas G. Hall

This decision involves the claimant's appeal and the self-insured employer's cross-appeal. Docket No. 89 2484 is an appeal filed by the claimant, Noel I. Bray, Jr. on June 12, 1989 and Docket No. 89 2484-A is a cross-appeal filed by the self-insured employer on July 12, 1989. Both appeals are from an order of the Department of Labor & Industries dated April 10, 1989 affirming an order dated January 4, 1989 which denied the claimant's application to reopen his claim for aggravation of condition on the basis that there was no adequate medical evidence establishing that the claimant's current condition was related to the industrial injury. **REVERSED AND REMANDED**.

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 claimant to a Proposed Decision and Order issued on May 24, 1990, in which the order of April 10, 1989 was reversed and the claim remanded with direction to deny the claimant's application to reopen his claim and to deny responsibility for the claimant's low back condition.

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

The claimant's appeal was presented and tried as an aggravation case. The employer's cross-appeal presented the issue of whether the Department order of April 10, 1989 should have not only denied the aggravation application, but also expressly denied responsibility for Mr. Bray's low back condition as unrelated to the industrial injury. Our industrial appeals judge determined that Mr. Bray's condition, causally related to his industrial injury of January 4, 1988, did not objectively worsen between June 2, 1988 and April 10, 1989 and that Mr. Bray's low back condition was not caused or aggravated by the industrial injury. We have granted review to examine an underlying issue, i.e.,

whether the order issued by the self-insured employer which first closed the claim became a final, res judicata, order? If the self-insured employer's order did not become final, what impact does that have with respect to the issues raised by these appeals?

RCW 51.32.055(7)(a) provides that claims accepted by self-insured employers after June 30, 1986 and before July 1, 1990, which involve only medical treatment and/or payment of temporary disability compensation, may be closed by the self-insured employer in a manner prescribed by Department rules. RCW 51.32.055(7)(c) provides:

> Upon closure of claims under (a) of this subsection the self-insurer shall enter a written order, communicated to the worker and the department self-insurance section, which contains the following statement clearly set forth in bold face type: 'This order constitutes notification that your claim is being closed with medical benefits and temporary disability compensation only as provided, and with the condition you have returned to work with the self-insured employer. If for any reason you disagree with the conditions or duration of your return to work or the medical benefits or the temporary disability compensation that has been provided, you may protest in writing to the department of labor and industries, self- insurance section, within sixty days of the date you received this order.' In the event the department receives such a protest the self-insurer's closure order shall be held in abeyance. The department shall review the claim closure action and enter a determinative order as provided for in RCW 51.52.050.

RCW 51.32.055(7)(d) provides:

> If within two years of claim closure the department determines that the self-insurer has made payment of benefits because of clerical error, mistake of identity, or innocent misrepresentation, or the department discovers a violation of the conditions of claim closure, the department may require the self-insurer to correct the benefits paid or payable. This paragraph shall not limit in any way the application of RCW 51.32.240.

Wac 296-15-070(4)(b) requires self-insured employers, upon closure of a medical only claim, to issue an order on a form prescribed by the Department, entitled "self-insurer's claim closure order and notice (LI-207-20)." WAC 296-14-400 provides: "When a claim has been closed by the department or self-insurer for sixty days or longer, the worker must file a written application to reopen the claim."

In two previous decisions, we have looked at the "finality" of closing orders issued by self-insured employers pursuant to RCW 51.32.055. In re Grace Kiser, Dckt. Nos. 88 0710 & 88 2049 (March 8, 1990); In re Valerie A. Rye, Dckt. No. 89 3010 (August 2, 1990). In Kiser, the worker telephoned the employer's representative within 60 days of receiving the self-insured closing order and

protested the closure of her claim. The self-insured order contained the statutory notification language, but also specifically advised Ms. Kiser that if she had any questions regarding the order, she should contact the employer representative at the telephone number on the reverse side of the order. Thus, the claimant in Kiser was merely complying with the explicit advice given on the order. Both the Department and the self- insured employer treated the claimant's telephone call as a protest under RCW 51.32.055(7)(c) and, as required by that provision, a Department determinative order was issued in response to that protest. Under those circumstances, we agreed that the claimant was not required to file a written protest within 60 days of receiving the self-insured employer's order. The oral protest was sufficient.

In Rye, our discussion of the finality of a self-insured order was dicta, since we concluded that the self-insured order was not communicated to the claimant. In any event, as soon as Ms. Rye learned of the claim closure, she wrote to the self-insured employer, saying she would appreciate "your completing whatever is necessary to rectify the 'closed' status of this claim". Rye, at 5. At the self-insured employer's direction, Ms. Rye then filed an aggravation application. We held that that aggravation application should be construed as a timely protest under RCW 51.332.055(7)(c).

The Kiser and Rye decisions began to grapple with the question of whether, and to what extent, a self insured order becomes final. However, neither decision addressed the factual scenario presented by the current appeal. Mr. Bray's claim was filed on January 21, 1988. On June 2, 1988, the self-insured employer entered its claim closure order. No protest was filed by the claimant nor is any contention made that he did not receive the closure order. Rather, on December 12, 1988 an aggravation application dated December 7, 1988 was filed on Mr. Bray's behalf.

The self-insured employer order entered on June 2, 1988 was not initially made part of our record. In fact, the microfiche of the Department file provided to us when the appeal was filed contained only a copy of the address side of that order. The reverse side which contains the notification language had been omitted. The self-insured employer has provided a copy of both sides of the order at our request and it now becomes a part of our record.

The Employer's Supplemental Brief states that a copy of the aggravation application is attached and incorporated by reference. However, that document was not actually attached. We have therefore taken the liberty of copying the aggravation application from the microfiche of the Department file and it is hereby made part of the record.

The June 2, 1988 self-insured order was typed on form LI-207-20, Claim Closure Order and Notice, pursuant to WAC 296-15-070(4)(b). The order stated that Mr. Bray's claim was closed with medical benefits only as provided, and "[a]ny question you might have regarding this Order and Notice, please contact the Employer Representative on the reverse side". The order also stated:

> [A]ny protest or request for reconsideration of this order must be made in writing to the Department of Labor and Industries in Olympia within 60 days. A further, appealable order will follow such a request. Any appeal from this order must be made to the Board of Industrial Insurance Appeals, Olympia, within 60 days from the date this order is communicated to the parties, or the same shall become final.

The information provided to Mr. Bray by the form Order and Notice is confusing, and certainly does not follow literally the notification language provided for in RCW 51.32.055(7)(c). He is notified on the one hand that if he has any questions he can contact, presumably by phone, the employer representative. See, Kiser. There is no time limit imposed on such contact. But he is also told a protest must be made in writing to the Department within 60 days. There is no indication Mr. Bray will forfeit his ability to protest the order if he fails to act in 60 days. The notification language informs him only that the further appealable order issued by the Department following a protest will become final if it is not timely appealed to the Board.

However, our primary focus is not this inconsistency in the notification language. In Porter v. Dep't of Labor & Indus., 44 Wn.2d798, 271 P.2d 429 (1954), the court held that the notification language on an order is merely a warning of the statutory requirements relative to appeals. A variation between the language required by the statute and the notification language printed on an order is not "particularly important" unless the appellant was misled to his prejudice in the preparation of prosecution of his appeal. Porter, at 800-801.[1] Mr. Bray is not contending that he relied to his detriment on the admittedly conflicting notification language contained on the June 2, 1988 self-insured order.

Thus, in this appeal, our focus is not on the inconsistent language contained on the Department-prescribed form LI-207-20, but rather on the interplay between RCW 51.32.055(7)(c) and (d), which are quoted above. Based on RCW 51.32.055(7)(c), we conclude that the June 2, 1988 self-insured order closed Mr. Bray's claim, at least conditionally, in the absence of a timely protest.

[1] In Kiser, the claimant was misled, to her potential detriment. The claimant there relied on the notification language and telephoned the self-insured employer representative rather than filing a written protest.

However, when he filed his application to reopen his claim six months later, well within the two year "window period" allowed by RCW 51.32.055(7)(d), the Department could and should have evaluated whether the original closing was proper. If there is no evidence that a claim had been improperly or prematurely closed, then the Department should process an aggravation application like any other, requiring that there be objective medical evidence establishing a worsening of the industrially-related condition or conditions. But, if there is evidence that the claim was improperly or prematurely closed, the Department is obligated under RCW 51.32.055(7)(d) to correct that error.

This interpretation is supported not only by the explicit language of RCW 51.32.055(7)(d), but also by the legislative history. Subsections (7)(a)-(d) were added to RCW 51.32.055 by Laws of 1986, ch. 55 § 1, p 181 (ESHB 1581). The Floor Synopsis of SHB 1581 notes that: "The Department is given authority to correct any error within two years of closure, including benefits paid or unpaid." (Emphasis added) Under the heading "Why it is needed", the following explanation is given: "With proper safeguards, as provided in the bill, prompt closure of uncomplicated, undisputed claims can reduce costs." (Emphasis added) See, also, Laws of 1986, ch. 55 § 2, which required the Department to conduct a special study of "the program established by section 1 of this act", i.e., the new subsections (7)(a)-(d) added to RCW 51.32.055. There is no question that the legislature intended that the Department should closely monitor self-insured claim closures and correct any errors which might have been made, either on the claimant's or the employer's behalf. That is precisely why the two year window period was created and why the self-insured employer was required by RCW 51.32.055(7)(a) and WAC 296-15-070(4)(b) to notify the Department of all medical only claim closures.

We turn, then, to the evidence presented in this appeal. On January 4, 1988, Mr. Bray climbed a stepladder at work to replace a switch. After removing the switch, he turned and stepped down onto icy, snow-covered asphalt. When his feet slipped out from under him, he fell, striking his rear end and the back of his head.

The self-insured employer presented no medical evidence, but suggests the following interpretation of claimant's medical witnesses' testimony: The original treating chiropractor, Dr. George Wenham, diagnosed only cervical and upper back conditions as causally related to the industrial injury. On February 12, 1988, one month after the initial visit of January 12, 1988, Mr. Bray presented with right hip and low back complaints. Although Dr. Wenham treated claimant for those complaints during the next three visits, he did not ultimately change his diagnosis of the conditions causally related to the industrial injury. The evaluation and treatment which the claimant received

beginning in the Fall of 1988 were all directed to the low back. According to the self-insured employer, Dr. Michael Martonick's and Dr. Guy Gehling's opinions that the claimant's low back condition is causally related to the industrial injury should be disregarded in favor of Dr. Wenham's initial diagnosis. The employer further argues that, since Mr. Bray's low back condition is not causally related to the industrial injury and since the medical witnesses' testimony is insufficient to prove aggravation, the claim should not reopened. The employer also objects to our addressing the question of whether Mr. Bray's claim was prematurely closed.

However, a more plausible interpretation of the evidence is that Dr. Wenham did not correctly assess the extent of Mr. Bray's problems causally related to the industrial injury when he treated him twelve times from January 12, 1988 through March 9, 1988. This, of course, presents the claimant with a difficult problem, since Dr. Wenham's x- rays and diagnoses were limited to the neck and upper back region, while the diagnostic tests performed in the Fall of 1988 were directed to the low back. thus, Mr. Bray is placed in the position of trying to compare apples with oranges. The chiropractic x-ray findings in early 1988 with respect to the neck and upper back simply cannot be compared with the CT scan and nerve conduction findings with respect to the low back in late 1988. Nonetheless, we find nothing in the testimony of Dr. Wenham which precludes the acceptance of Mr. Bray's low back condition as part of the residuals of this industrial injury.

Mr. Bray had seen Dr. Wenham on two previous occasions for back problems. In 1982, Dr. Wenham had provided five chiropractic adjustments to Mr. Bray for a lumbar injury. In 1984 and 1985, Dr. Wenham treated Mr. Bray for a mid back condition. Prior to this industrial injury of January 4, 1988, Mr. Bray had not received treatment since June 21, 1985.

While Dr. Wenham testified that Mr. Bray did not complain about low back problems related to the January 4, 1988 injury until February 12, 1988, one month after the initial visit, he also pointed out that he quite frequently sees such delayed complaints. Furthermore, in response to a hypothetical question asking Dr. Wenham to assume that a lumbar facet fracture had been diagnosed in the late Fall of 1988, Dr. Wenham indicated that the industrial injury "could have done it", and that "it could have easily have happened". 4/17/90 Tr. at 47.

According to Mr. Bray, by March 9, 1988, after two months of treatment (12 visits) with Dr. Wenham and no relief, he stopped treatment. On April 18, 1988, despite the fact that Dr. Wenham had not seen the claimant for over five weeks, the doctor advised the employer that he thought Mr. Bray's condition was fixed and stable and his claim was ready for closure.

Mr. Bray testified that his symptoms continued to worsen. On November 10, 1988, he saw Dr. Michael Martonick, a board-certified internist. He told the doctor of the numbness he was experiencing in his toes. Dr. Martonick referred claimant to Dr. Guy Gehling, a neurosurgeon, in December, 1988.

CT scan and nerve conduction testing were performed. Dr. Gehling diagnosed mild neurogenic claudification, mild right S1 radiculopathy and severe mechanical degenerative back pain. He believed the industrial injury exacerbated Mr. Bray's pain complaints since he believed the back and radicular leg pain occurred after the injury. While Dr. Gehling could not state more probably than not that the S1 radiculopathy was caused by the industrial injury, he did state that the facet fracture at L4-5 on the left was, more probably than not, related to the trauma.

Dr. Martonick was of the opinion that Mr. Bray's fractured facet joint at L4-5 as well as the S1 radiculopathy were causally related to the 1988 industrial injury. Dr. Martonick diagnosed degenerative arthritis but did not causally relate that condition to the industrial injury.

Dr. Martonick proceeded to file an application to reopen Mr. Bray's claim dated December 7, 1988. In his testimony, Dr. Martonick stated: "My feeling is that the claim should probably not have been closed, that the patient had an ongoing process." Martonick Dep. at 15. as the Proposed Decision and Order correctly points out, none of the expert witnesses adequately established an objective worsening of claimant's condition causally related to the January 4, 1988 industrial injury, occurring after the initial June 2, 1988 "medical only" closure.

Given the sequence of events which we have detailed, however, it seems likely that this claim was in fact prematurely closed, before the claimant's industrially-related condition had been adequately diagnosed and treated. At the very least, the Department order of April 10, 1989 is incorrect in determining that the claimant's "current condition" was not related to the industrial injury. While claimant obviously had preexisting degenerative arthritis which was not caused by the industrial injury, it is equally apparent from Dr. Gehling's testimony that his L4-5 facet fracture was causally related on a more probable than not basis to the industrial injury. Since the aggravation application was denied on the basis that claimant's low back condition was not causally related to the industrial injury, the Department order must be reversed. On remand, the Department's self-insurance section must evaluate whether Mr. Bray's claim was prematurely closed and whether the self-insured employer order of June 2, 1988 should be corrected, pursuant to RCW 51.32.055(7)(d).

FINDINGS OF FACT

1. On January 21, 1988, the claimant, Noel I. Bray, Jr., filed an accident report with the Department of Labor and Industries alleging that he had sustained an injury while in the course of his employment with Louisiana Pacific Corp., a self-insured employer, on January 4, 1988. On June 2, 1988, the self- insured employer issued an Order and Notice of Claim Closure stating that the claim was closed with medical benefits only as provided. On December 12, 1988, the claimant filed an application to reopen his claim for aggravation of the condition caused by the industrial injury. On January 4, 1989, the Department denied the aggravation application for the reason that there was no adequate medical evidence that the claimant's current condition was related to the industrial injury. After a January 20, 1989 protest and request for reconsideration, the Department held the January 4, 1989 order in abeyance on February 7, 1989. On April 10, 1989, the Department issued an order affirming the January 4, 1989 order.

   On June 8, 1989, the claimant mailed his notice of appeal which was received by the Board of Industrial Insurance Appeals on June 12, 1989. On June 22, 1989, the Board issued an order granting the appeal subject to proof of timeliness, assigning it Docket No. 89 2484 and directed that proceedings be held on the issues raised therein.

   On July 12, 1989, the employer filed a notice of cross-appeal from the Department order of April 10, 1989. On July 28, 1989, the Board issued an order granting the appeal, assigning it Docket No. 89 2484-A and directed that proceedings be held on the issues raised therein.

2. On January 4, 1988 the claimant, Noel Bray, Jr., was injured when he slipped and fell stepping down from a ladder on to snow and ice-covered asphalt while in the course of his employment with Louisiana Pacific Corporation. He struck his rear end and the back of his head.

3. As a result of the injury of January 4, 1988, Mr. Bray experienced subluxations of C-2, T-3, T-4, T-5 and T-6 vertebrae, as well as a facet fracture of L4-L5.

CONCLUSIONS OF LAW

1. The Notice of Appeal filed on behalf of the claimant was timely filed. The Board of Industrial Insurance Appeals has jurisdiction over the parties and the subject matter of these appeals.
2. Pursuant to RCW 51.32.055(7)(d), the Department should consider whether this claim was improperly or prematurely closed by the self-insured order of June 2, 1988.
3. The Department order of April 10, 1989 affirming the order of January 4, 1989 which denied Mr. Bray's application to reopen his claim on the basis that there was no adequate medical evidence establishing that Mr. Bray's current condition was related to the industrial injury, is incorrect and should be reversed, and this claim is remanded to the Department with directions

to enter an order determining that conditions diagnosed as subluxations of C-2, T-3, T-4, T-5 and T-6 vertebrae, as well as a facet fracture of L4- L5, are causally related to the industrial injury of January 4, 1988. The Department is further directed to determine whether this claim was improperly or prematurely closed by the self-insured order of June 2, 1988 and to take further action accordingly.

It is so ORDERED.

Dated this 14th day of January, 1991.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
SARA T. HARMON Chairperson

/s/_____
FRANK E. FENNERTY, JR. Member

DISSENT

I have no quarrel with the Board majority's discussion of the underlying legal issue, i.e., whether or not the self insured's order closing this claim became a final binding order, and if not, how that impacts on the proper disposition of this case. Thus, I concur in the majority's discussion of this issue, including the effect and intent of the 1986 amendatory legislation adding subsections (7)(a)-(d) to RCW 51.32.055. Specifically, I concur in the discussion from page 2, line 20, through page 8, line 20.

It is important to note, in this regard, that subsections (7)(a)- (d) only apply to claims accepted by self-insurers after June 30, 1986 and before July 1, 1990. For claims accepted since that time period, self-insurers may n longer close claims involving temporary disability compensation, but may still close claims involving medical treatment only, subject solely to subsection (8) of RCW 51.32.055. A corollary of this, of course, is that the window period in subsection (7)(d), for Department evaluation and correction of self-insurer's claim closure orders within two years, likewise does not apply to claims accepted after June 30, 1990. Thus, the "non-finality of closure" holding here is of limited future applicability.

Where I part company with the Board majority is in its determination that this claim was "likely" prematurely closed because at least some of Mr. Bray's low back condition was related to the January 4, 1988 injury. I am completely convinced that only a neck and upper back condition was related to

the injury; that such condition was resolved within two or three months; and that the claim closure order of June 2, 1988 was not improperly or prematurely entered.

Mr. Bray has indeed had periodic low back problems over the years, including at least two episodes for which he received treatment several years prior to the 1988 injury. He further sought treatment very late in 1988 for what he subjectively reported as more severe low back complaints. There was a failure of proof that his low back condition in late 1988 was objectively any worse than it had been many years prior thereto. More significantly, the attempts by Drs. Martonick and Gehling to causally connect the claimant's low back condition as they found it in late 1988 to the January, 1988 injury were based on fatally flawed misunderstandings as to the temporal relationship between the injury and the later development of claimant's low back complaints. In my view, the claimant's entire evidence on causal relationship is one of speculation and surmise. As further support for this view, I adopt the evidentiary analysis set forth in the Proposed Decision and Order and in the Employer's Reply to Claimant's Petition for Review.

I would adopt the proposed finding and conclusions, thereby concluding that the self-insurer's claim closure order of June 2, 1988 was correct and proper; that claimant's reopening application should be denied; and that there should be no responsibility under this claim for claimant's low back condition.

Dated this 14th day of January, 1991.

/s/
PHILLIP T. BORK Member