Johnson, Bennie

AGGRAVATION (RCW 51.32.160)

Proximate cause of worsened condition: new injury vs. aggravation

DEPARTMENT

Determination of new injury vs. aggravation (WAC 296-14-420)

Where a self-insured employer asserts that a worker's condition was the result of a new injury rather than an aggravation of the condition causally related to the industrial injury for which the employer was responsible, a Department order which included only the signature of the claims manager does not comply with WAC 296-14-420. To meet the requirements of WAC 296-14-420, the Department order must reflect that it is a single determination made jointly by the assistant directors for claims administration and self-insurance. **….*In re Bennie Johnson*, BIIA Dec., 91 4040 (1992)**

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: BENNIE E. JOHNSON	**)**	**DOCKET NO. 91 4040**
	)	
CLAIM NO. S-423446	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Bennie E. Johnson, by
Lembhard G. Howell, Attorney at Law

Self-Insured Employer, Wright Schuchart, Inc., by
Hall & Keehn, per
Gary D. Keehn, Attorney at Law, and Linda Bauer, Legal Assistant

Department of Labor and Industries, by
The Attorney General, per
Lynn D. W. Hendrickson, Loretta Vosk, and Douglas D. Walsh, Assistants

This is an appeal filed by the self-employer, Wright Schuchart, Inc., on July 29, 1991 from an order of the Department of Labor and Industries dated June 27, 1991 which affirmed the provisions of a prior order dated May 3, 1991 which stated as follows:

> Claim No. M-611242 was filed for an injury occurring on May 4, 1990. Medical evidence indicates this injury is an aggravation of the injury covered by Claim No. S-423446. Labor and Industries is consolidating these claims. All further correspondence concerning this claim should be under Claim No. S-423446.

REVERSED AND REMANDED.

PROCEDURAL AND EVIDENTIARY MATTERS

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 May 20, 1992 in which the order of the Department dated June 27, 1991 was affirmed.

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. However, the industrial appeals judge designated deposition Exhibit No. 1 from the Bennie Johnson deposition as Exhibit No. 1 for Board record purposes, but failed to admit it. It is hereby admitted as Exhibit No. 1.

Further, a telefacsimile of a four-page document obtained from the Department, constituting an agenda and part of the minutes for a March 14, 1991 JBC meeting, is hereby admitted as Exhibit No.

2. We are not sure what the acronym "JBC" stands for (Perhaps, Joint Benefits Committee?). However, it is clear that it is an intra-Department committee composed of claims personnel from both the Self-Insurance Section and the State Fund, along with legal advisors from the Attorney General's office, established to resolve claim-responsibility issues as between self-insurers and the State Fund, in implementation of WAC 296-14-420. Exhibit No. 2 clearly indicates that the Department initially recognized that this case is governed by this regulation, which provides as follows:

> **Payment of Benefits - Aggravation reopening/new injury.**
>
> (1) Whenever an application for benefits is filed that requires a determination of whether benefits shall be paid pursuant to the reopening of an accepted claim or allowed as a claim for a new injury or occupational disease, the department shall make the determination in a single order. Such determination shall be made jointly by the assistant directors for claims administration and self insurance.
>
> (2) Pending entry of the order, benefits shall be paid promptly by the entity responsible as if the claim were determined to be a new injury or occupational disease.
>
> (3) Time-loss compensation shall be paid at the lesser of the two entitlements that may apply to the claim until responsibility has been determined between state fund and self-insured employer, two self-insured employers, or two state fund employers.
>
> (4) If, upon final determination of the responsible insurer, the entity that paid benefits under subsection (2) of this section is determined not to be responsible for payment of benefits, such entity shall be reimbursed by the responsible entity for all amounts paid.

DECISION

The only substantive issue put before us is whether a traumatic incident sustained by the claimant while working for RWK Construction Company on May 14, 1990 (for which Claim No. M-611242 was filed) constituted an aggravation of his condition attributable to a prior injury sustained while working for Wright Schuchart, Inc. on August 14, 1981 (for which Claim No. S-423446 had been filed and accepted), or whether it constituted a new injury which should be allowed as a new claim for benefits. The limited probative evidence in our record on this issue is discussed in the Proposed Decision and Order. However, in light of the present recognition by all parties that WAC 296-14-420 does apply here, we believe this matter must be remanded to the Department to follow to completion the procedures required by the regulation.

The plain language of this rule requires a single determination, made jointly by the assistant directors for claims administration and self-insurance, when the issue before the Department is

whether a claim should be allowed as a new industrial injury or as an aggravation of a condition under a previously accepted claim. We disagree with our industrial appeals judge's statement that the employer's contention that the Department had failed to abide by its own regulation was abandoned because no evidence was presented to show that such joint determination had not been made. Even without Exhibit No. 2, the terms of the Department's May 3, 1991 order lead to the inescapable conclusion that it was not in fact a determination made jointly by the two designated officials. The order was issued solely by the Department's Self-Insurance section. As such, it is deficient on its face as a "jointly" made order. When this deficiency is considered in combination with Exhibit No. 2, there is absolutely no doubt. The minutes of the March 14, 1991 JBC meeting clearly indicate that no determination was reached at the meeting on the "aggravation vs. new injury" issue, either by the two designated assistant directors, or even jointly by two committee members, one a State Fund claims manager, and one a self-insurance claims manager (assuming, for purpose of our discussion here, that there can be delegation of this decision-making authority from the two assistant directors to others on their respective claims adjudication staffs). There was simply a statement that there would be "follow-up with Fred Weisdepp", a self-insurance claims manager, and that the Self-Insurance section would need to further investigate the matter, including having an independent medical examination (IME) performed. The meeting minutes concluded that "If it is decided that this claim belongs to Self-Insurance, it was suggested that the State Fund claim be consolidated into the self-insured claim." The Self-Insurance section did obtain the medical examination, by Dr. William Furrer, Jr., on April 4, 1991. Based thereon, the order of May 3, 1991 was entered. As previously noted, this was an order entered solely by the Self-Insurance section. It was not a determination made jointly by the assistant directors for Self-Insurance and for State Fund claims administration, nor was it a determination made jointly by delegated representatives of both those two officials.

Furthermore, and quite importantly, the record shows that, pursuant to subsection (2) of WAC 296-14-420, the claimant had received payment for medical treatment and time-loss compensation from the State Fund, under Claim No. M-611242. Payment of those benefits were stopped in April of 1991, when the IME report was received and the May 3, 1991 order was entered "consolidating" Claim No. M-611242 into previously existing Claim No. S-423446 as an "aggravation" thereof. This is an incorrect and incomplete administrative result under the terms and clear intent of WAC 296-14-420.

If the Department's order was (1) a jointly-entered determination (which it was not), and (2) if it had become final (which it did not, in view of the self-insured employer's appeal therefrom), then

subsection (4) of the rule would apply, and the State Fund would be entitled to reimbursement for all amounts it had paid prior to the "final determination of the responsible insurer" -- and of course the self-insurer would be responsible for any further benefits payable thereafter.

However, since the Department's order did not and has not yet become final, the State Fund should continue to pay, under subsection (2), further benefits as may be indicated until "final" determination of the responsible insurer is made. This is the obvious intent and meaning of the entire WAC rule, namely, that the injured worker should not have proper allowable benefits delayed just because two potential insurers are administratively disputing and/or litigating which of them should be ultimately held responsible.

We also note another important shortcoming in the Department's handling of the issues involved under WAC 296-14-420. Neither its order of May 3, 1991, nor its affirmance order of June 27, 1991, gave any notice to the state-fund insured employer, RWK Construction Company, of its adjudicative action. Consequently, that employer did not receive any notice of the self-insured employer's appeal seeking to establish RWK's responsibility for claimant's new injury of May 4, 1990, or of any proceedings held on the appeal. Since the purpose of the WAC is to make a final determination of which of two potential employer/insurers is to be held responsible for a claim, fundamental fairness and due process obviously require notice and opportunity to be heard to both employers.

Finally, the claimant has moved this Board for an order requiring resumption of time-loss compensation payments to the claimant, citing subsection (2) of WAC 296-14-420. This motion is not well taken at this time. First, there is no jurisdiction in this appellate tribunal to determinate claimant's entitlement to such compensation for periods after the Department's order from which appeal was taken. Secondly, the claimant did receive time-loss compensation until some time in April of 1991, and there is absolutely no medical evidence in this record that he was temporarily totally disabled at any time thereafter, whether due to his injury of August 14, 1981, his alleged injury of May 4, 1990, or any other cause. Investigation of this issue, and payment for such periods as he may be found to be entitled, must properly be decided by the Department on remand from this Board.

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 make the following.

FINDINGS OF FACT

1. On September 15, 1981 an application for benefits was received by the Department of Labor and Industries from the claimant alleging an industrial injury on August 14, 1981 while in the course of employment with the self-insured employer, Wright Schuchart, Inc. The claim was assigned No. S-423446.

On April 29, 1982 the Department issued an order closing the claim with time-loss compensation as paid to October 11, 1981 and no award for permanent partial disability.

On March 13, 1986 an application to reopen the claim on the ground of aggravation was received by the Department from the claimant.

On September 25, 1986 the Department issued an order reopening the claim effective February 26, 1986 for authorized treatment and action as indicated.

On November 21, 1986 the Department issued an order holding the order dated September 25, 1986 in abeyance.

On May 18, 1987 the Department issued an order reaffirming the provisions of the Department order dated September 25, 1986 and further closing the claim without permanent partial disability award.

On May 27, 1987 a protest on behalf of the claimant was received by the Department.

On June 8, 1987 the Department issued an order holding the May 18, 1987 order in abeyance.

On July 6, 1987 the Department issued an order setting aside and holding for naught the Department order dated May 18, 1987 and closed the claim with time-loss compensation from September 8, 1986 to January 23, 1987 and no permanent partial disability award.

On August 26, 1987 a notice of appeal from the claimant was received by the Board of Industrial Insurance Appeals. Thereafter, the Board issued an order granting the appeal.

On November 8, 1988 a Proposed Decision and Order was issued which affirmed the provisions of the July 6, 1987 Department order.

On March 7, 1989 the Board issued an order affirming the Department order dated July 6, 1987.

On March 29, 1989 a notice of appeal from the Board's order dated March 7, 1989 was filed in Superior Court.

On August 31, 1990 a Superior Court judgment was entered setting aside and holding for naught the Department order dated July 6, 1987 and ordering the claim be reopened for authorized treatment and action as indicated.

On January 11, 1991 the Department issued an order setting aside and holding for naught the Department order dated July 6, 1987 and ordering the claim remain open for authorized treatment and action as indicated.

On May 3, 1991 the Department issued an order which stated as follows:

> Claim number M 611242 was filed for an injury occurring on 05-04-90. Medical evidence indicates this injury is an aggravation of the injury covered by claim number S 423446. Labor and Industries is consolidating these claims. All further correspondence concerning this claim should be under claim number S 423446.

On May 20, 1991 a protest from the employer, Wright Schuchart, Inc., was received by the Department.

On June 27, 1991 the Department issued an order which affirmed the provisions of the May 3, 1991 order.

On July 29, 1991 a notice of appeal from the self-insured employer was received by the Board.

On August 26, 1991 the Board issued an order granting the appeal and assigning Docket No. 91 4040.

2. On August 14, 1981 the claimant sustained an industrial injury to his back while in the course of employment with the self-insured employer, Wright Schuchart, Inc., when he was lifting a steel block.

3. As a proximate result of the 1981 industrial injury the claimant sustained a condition diagnosed as a lumbosacral strain.

4. On May 4, 1990 while in the course of his employment with RWK Construction, the claimant allegedly sustained an injury to his back when he was lifting racks. He filed a State Fund claim with the Department, which was assigned No. M-611242.

5. Section 420 of Washington Administrative Code Chapter 296-14 requires a single determinative order to be made jointly by the assistant directors for claims administration and self-insurance within the Department of Labor and Industries, whenever an application for benefits is filed which requires a determination of whether an on-the-job incident is to be considered as an aggravation of a condition under an already accepted claim or as a claim for a new injury.

6. The Department order of May 3, 1991 which was affirmed by Department order dated June 27, 1991, from which this appeal was taken, was issued by a disability adjudicator in the Department's self-insurance section -- not by either or both of the assistant directors for claims administration and self-insurance.

7. The minutes of the joint committee meeting on March 14, 1991, concerning the determination to be made by the Department as to whether

the incident on May 4, 1990 was an aggravation of a previously accepted condition or was a new industrial injury, indicate no determination was made by the two assistant directors, or jointly be any of their respective claims adjudication staffs.

8. No determination as to whether the incident of May 4, 1990 was a new industrial injury or an aggravation of a previously accepted condition has been made jointly by the assistant directors for claims administration and self-insurance, or jointly by their respective designated claims adjudication staffs.

CONCLUSIONS OF LAW

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

2. The order of the Department of Labor and Industries dated May 3, 1991 which stated as follows:

> Claim number M 611242 was filed for an injury occurring on 05-04-90. Medical evidence indicates this injury is an aggravation of the injury covered by claim number S 423446. Labor and Industries is consolidating these claims. All further correspondence concerning this claim should be under claim number S 423446.

is incorrect and must be reversed, and the matter remanded to the Department with directions to follow to completion all requirements of WAC 296-14-420; to have the determination made jointly by the assistant directors for claims administration and self-insurance and/or their respective claims designees, on the issue of whether the incident of May 4, 1990 was a new industrial injury or an aggravation of the previously accepted condition resulting from the industrial injury of August 14, 1981; to send notice of any such joint determination to both potential affected employers; and continue to apply subsection (2) of WAC 296-14-420 pending final determination of the responsible insurer.

It is so **ORDERED**.

Dated this 30th day of November, 1992.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
S. FREDERICK FELLER Chairperson

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

/s/_____
PHILLIP T. BORK Member