Keierleber, Kenneth

JOINDER

Multiple claims and employers

An employer, other than the one for which the worker was working at the time of the alleged injury, is not an aggrieved party within the meaning of RCW 51.52.060, but because there is an issue related to identification of the responsible employer, the matter should be remanded to the Department pursuant to WAC 296-14-420 for consideration of the employer to be charged. **….*In re Kenneth Keierleber*, BIIA Dec., 91 5087 (1993)**

NOTICE OF APPEAL (RCW 51.52.050, RCW 51.52.060)

Aggrieved party

An employer, other than the one for which the worker was working at the time of the alleged injury, is not an aggrieved party within the meaning of RCW 51.52.060. **….*In re Kenneth Keierleber*, BIIA Dec., 91 5087 (1993)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: KENNETH D. KEIERLEBER	)	**DOCKET NO. 91 5087**
	)	
	)	**DECISION AND ORDER DENYING ASPLUNDH TREE EXPERT COMPANY'S MOTION TO BE ADMITTED AS AN AGGRIEVED PARTY AND CLAIMANT'S MOTION FOR REMAND TO THE DEPARTMENT PURSUANT TO WAC 296-14-420, AND DISMISSING ASPLUNDH TREE EXPERT COMPANY'S NOTICE OF APPEAL**
CLAIM NO. M-621674	)	

APPEARANCES:

Claimant, Kenneth D. Keierleber, by
George D. Conrad, Attorney at Law

Employer, Wright Tree Service, Inc., by
None

Moving Party, Asplundh Tree Expert Co., by
Preston, Thorgrimson, Shidler, Gates & Ellis, per
Charles R. Bush, Attorney at Law

Department of Labor and Industries, by
The Attorney General, per
James S. Kallmer, Assistant, and Jane A. Downey, Paralegal

This is an appeal filed on behalf of Asplundh Tree Expert Company on October 9, 1991 from a letter of the Department of Labor and Industries dated October 3, 1991. The October 3, 1991 letter determined that Asplundh Tree Expert Company was not the employer involved in Claim No. M-621674 and did not have dispute or protest rights to challenge the May 2, 1991 Department order entered in Claim No. M-621674 regarding claimant's alleged injury while employed by Wright Tree Service, Inc. **APPEAL DISMISSED**.

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 Asplundh Tree Expert Company to a Proposed Decision and Order issued on August 5, 1992, which dismissed the appeal filed on behalf of Asplundh Tree Expert Company on the ground that said employer was not a party "aggrieved" by the Department's order in Claim No. M-621674 and thus did not have standing to challenge said order.

This matter was submitted on the record, which comprised oral arguments presented by the parties at a conference held on May 4, 1992; written motions, as well as briefs in support of and in opposition to the motions; and on five exhibits admitted during the conference.

The Proposed Decision and Order accurately sets forth the facts in this case and correctly resolves the issue as to Asplundh's lack of standing as an aggrieved party. We have granted review because we are disturbed by the Department's failure to coordinate the administration of two separate claims involving the claimant, Kenneth Keierleber. We believe the Department should have evaluated these claims under the "joint determination" procedures mandated by WAC 296-14-420.

A brief review of the facts in this case is necessary in order to fully understand the problems presented. Mr. Keierleber allegedly suffered two injuries. The first injury occurred on June 5, 1990 during his employment with Asplundh Tree Expert Company, a self-insured employer. The injury was to Mr. Keierleber's right shoulder. Mr. Keierleber filed an application for benefits, the claim was accepted, and benefits were provided under Claim No. T-320091.

After having returned to work as a tree trimmer in early or mid-August 1990, Mr. Keierleber allegedly suffered a second injury on September 28, 1990. At the time of the alleged second injury Mr. Keierleber was employed by Wright Tree Service, Inc. The injury was again to the right shoulder. Mr. Keierleber filed an application for benefits under Claim No. M-621674. This was a State Fund claim. The Department of Labor and Industries issued an order rejecting this second claim on May 2, 1991, and also demanded reimbursement from Mr. Keierleber of provisional time-loss compensation which the Department had paid for the period of September 29, 1990 through April 29, 1991. Neither Mr. Keierleber nor the employer, Wright Tree Service, Inc., protested or appealed from the May 2, 1991 order rejecting Claim No. M-621674. During this entire time the self-insured claim, Claim No. T-320091, remained open.

In September of 1991 Asplundh Tree Expert Company discovered the rejection order in Claim No. M-621674. Asplundh then filed a protest to the Department's rejection of the claim in Claim No. M-621674, in which Wright Tree Service, Inc. was the employer. The Department responded to this protest by a letter to Asplundh dated October 3, 1991. The Department indicated that it was not going to consider Asplundh's protest to the May 2, 1991 rejection order in Claim No. M-621674 because Asplundh lacked standing to dispute the order since Asplundh was not the employer. It is from this October 3, 1991 letter that Asplundh has appealed to this Board.

Asplundh argues that it has the right to litigate here the acceptance or rejection of the claim in Claim No. M-621674, a State Fund claim. Asplundh believes it is entitled to participate in the administration of Claim No. M-621674 and litigate the acceptance or rejection of this claim because the adjudication regarding the acceptance or rejection of the claim could impact the administration of the earlier claim, Claim No. T-320091. Both claims involve injury to the same part of the body.

We agree with the industrial appeals judge that, although Asplundh may have been able to intervene in an appeal filed by the claimant or by Wright Tree Service, Inc. concerning the rejection of the claim in Claim No. M-621674, we do not believe that Asplundh has separate standing to appeal the order rejecting this claim in the first instance. Asplundh is not prejudiced in its ability to administer its Claim No. T-320091 or to potentially engage in litigation therein, regarding the issue of whether or not there was any causal relationship between the claimant's post-September 28, 1990 shoulder condition and the first injury of June 5, 1990. We do note, however, that Mr. Keierleber may well be in some difficulty since the State Fund claim involving Wright Tree Service, Inc. under Claim No. M-621674 has been rejected and neither Mr. Keierleber nor Wright Tree Service appealed therefrom. Mr. Keierleber runs a risk that his post-September 28, 1990 shoulder condition will not be covered under Claim No. T-320091 as well.

We concur with the analysis in the Proposed Decision and Order that Asplundh is not aggrieved and does not have standing to seek to litigate the rejection order in Claim No. M-621674. It would stretch the meaning of "aggrieved" to impossible lengths to hold that one employer can appeal from an adjudication made in a separate claim involving a different claimed injury occurring in work for a different employer. The administrative and procedural turmoil, the questionable "finality" of any decision or order, and the impact on the necessary and well-recognized principle of res judicata, would be highly destructive to an efficient and reasonably certain administration of the entire compensation system.

Nevertheless, we are perplexed by the procedures -- or lack thereof -- used by the Department to administer these inter-related claims. We believe that at the administrative level, the Department should handle claims in a manner to do substantial justice to all the parties involved. Indeed, the Department has attempted to do exactly that by promulgation of a regulation, WAC 296-14-420. This regulation is clearly intended to provide a method for resolving disputes between insurers whenever the real issue before the Department is whether a claim should be allowed as a new industrial injury or as an aggravation of a condition which occurred under a previously accepted claim, and at the same

time to provide timely allowable benefits to the injured worker while two potential insurers are involved in the administrative determinations and/or litigation as to which of them should be finally held responsible. Such determinations are required to be made jointly by the assistant directors for claims administration and self-insurance and are required to be made in one joint or combined order. Further, payments of indicated benefits to the worker are to be made pending "final determination" of the responsible insurer. The insuring "entity" who pays the interim benefits is entitled to reimbursement for these benefits if the final determination is that it is not responsible for the claim.

WAC 296-14-420 covers the situation where a new claim has been filed and there exists the question of whether the new application should be allowed or whether benefits should be paid pursuant to the "reopening" of a previously accepted claim. In Mr. Keierleber's case he suffered the subsequent alleged injury while his claim with Asplundh was still open. It is a distinction without a difference to suggest that WAC 296-14-420 would not apply in Mr. Keierleber's situation because the previous claim was still open and did not require a "reopening" determination. In any event, the Department's own application of its WAC does not exclude these two claims from the intra-Departmental joint decision-making and review process, under the provisions of WAC 296-14-420.

In the recent case of In re Bennie E. Johnson, Dckt. No. 91 4040 (November 30, 1992) we had occasion -- and the necessary jurisdiction --- to consider in detail the proper implementation of this regulation! In Johnson, as here, the previously accepted claim was in an open status when the new application for benefits was filed, and the Department had to determine whether the claim should be allowed for a new injury or considered as an aggravation of the condition under the previously accepted claim. The Department recognized that WAC 296-14-420 applied, as the matter was considered by its Joint Benefits Committee. The Joint Benefits Committee is a group composed of claims personnel from both the Self-Insured Section and the State Fund and was established to resolve claim-responsibility issues between successive insurers, in implementation of WAC 296-14-420.

The procedural and evidentiary facts in Johnson, supra, showed that the attempted joint determination procedures under the regulation got "off the tracks" in several respects, and we found it necessary to identify such requirements and procedures in considerable detail, and to remand the matter to the Department to carry to completion all requirements of WAC 296-14-420. For informational and guidance purposes, we attach a copy of our Decision and Order in Johnson as Attachment "A" hereto.

Since, as we have previously determined, we have no jurisdiction to consider the correctness of the Department's rejection order of May 2, 1991, for lack of an appeal from any aggrieved party having standing to challenge such order, we cannot here direct any further or different Department action as to this claim. We do here raise two questions: Does the mandatory nature of WAC 296-14-420, in specifically requiring several things that "shall" be done "whenever" the aggravation versus new injury issue is presented to the Department by a new application for benefits, make an order which does not comply with the regulation's requirements an invalid or void order?; and, Did the Department know -- or should it be charged with knowing, through its sophisticated claims-record processing systems -- of the existence and status of these two claims sufficient to cause the Department to resolve them pursuant to WAC 296-14-420? (As a further ancillary question, can the Department still make a determination under WAC 296-14-420 at this late date?) We leave these questions to the Department to ponder as we assume that both Asplundh Tree Expert Company and Mr. Keierleber will, in any event, ask the Department to consider them.

ORDER

After consideration of the Proposed Decision and Order dated August 5, 1992, and the Petition for Review filed thereto, and a careful review of the entire record before us, we are persuaded that the Proposed Decision and Order reached the correct result as a matter of law. Asplundh Tree Expert Company's motion to be acknowledged as an aggrieved party, before this Board, and claimant's motion that we order a remand of this claim to the Department, are hereby denied. The appeal filed by Asplundh Tree Expert Company on October 9, 1991 from the Department letter dated October 3, 1991 is hereby dismissed for lack of Asplundh's standing as an aggrieved party.

It is so ORDERED.

Dated this 1st day of March, 1993.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
S. FREDERICK FELLER Chairperson

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

/s/_____
PHILLIP T. BORK Member