Hunt, Keith

DEPARTMENT

Authority to recoup overpayment of benefits

Where an order allowing a claim is final, the Department may vacate the order on the basis of fraud but the Department cannot issue an order seeking recoupment under the terms of RCW 51.32.240 where more than a year had passed since discovery of the fraud. **….*In re Keith Hunt,* BIIA Dec., 92 6213 (1994)** [*Editor's Note*: Legislative changes to RCW.51.32.240 includes use of the term "willful misrepresentation" rather than "fraud" and allows three years of recoupment on discovery of willful misrepresentation. The Board's decision was appealed to superior court under Pierce County Cause No. 94-2-01893-6.]

Void order

Once an order allowing the claim became final, the Department may not set aside the allowance of a claim by an order rejecting the claim on the basis that a worker's condition was not the result of an injury or occupational disease and directing repayment of time-loss compensation with no reference to fraud where the Department had already issued an order allowing the claim which had become final. An order which attempts to do so is *void ab initio* and cannot direct repayment of benefits under the terms of RCW 51.32.240(1). **….*In re Keith Hunt,* BIIA Dec., 92 6213 (1994)** [*Editor's Note*: Consider impact of *Marley v. Department of Labor & Indus.*, 125 Wn.2d 533 (1995). The Board's decision was appealed to superior court under Pierce County Cause No. 94-2-01893-6.]

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: KEITH M. HUNT	)	**DOCKET NO. 92 6213**
	)	
	)	**DECISION AND ORDER**
CLAIM NO. N-113902	)	**DISMISSING APPEAL**

APPEARANCES:

Claimant, Keith M. Hunt, by
Law Offices of David B. Vail, per
Todd R. Renda

Employer, Construction Development, Inc., by
Washington Builder's Benefits Trust, per
Kevin Parnell, Owner, and Beki Ferris, Claims Specialist

Department of Labor & Industries, by
The Office of the Attorney General, per
Jeff B. Kray, Assistant

This is an appeal filed by the claimant on November 5, 1992 from an order of the Department of Labor and Industries dated September 10, 1992 which affirmed an order issued on December 12, 1991 which rejected the claim because the claimant's condition is not the result of the injury alleged. The condition pre-existed the alleged injury and is not related thereto and is not an industrial injury or occupational disease as defined by the industrial insurance laws. The order also directed the claimant to repay the Department the time loss compensation which had been paid, totaling $13,006.38. **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 the claimant to a Proposed Decision and Order issued on August 10, 1993 in which the order of the Department dated September 10, 1992 was reversed and remanded to the Department with direction to demand repayment of $10,544.82 time loss compensation from the claimant.

A brief review of the factual and procedural history of the claim is necessary in order to frame the issue on appeal. Keith M. Hunt alleged that he suffered an industrial injury at work on January 2, 1991. The claim was allowed by Department order dated January 24, 1991. No appeal was filed from that order. Mr. Hunt received surgical treatment of a separated shoulder and $10,544.82 in time-loss compensation benefits. In September 1991, two co-workers present on the day of the alleged injury

came forward and revealed that Mr. Hunt had staged the incident to obtain medical treatment for an injury incurred outside of work some days previously. The employer sent the new information to the Department.

On December 12, 1991, the Department issued an order rejecting the claim on the basis that the shoulder condition was not the result of the injury alleged, that it pre-existed the alleged injury and that it was not an industrial injury or occupational disease. The order also demanded repayment of $13,006.38 in time-loss compensation benefits. The order did not directly mention fraud, nor does the recoupment amount specifically include the 50% penalty allowed under RCW 51.32.240(4). Mr. Hunt filed a timely protest from the December 12, 1991 order, which was affirmed by a Department order of September 10, 1992.

The claimant appealed, citing the res judicata allowance order of January 24, 1991. According to the claimant, the December 12, 1991 order was not adequate to overcome allowance of the claim because (1) it did not specifically cite fraud and (2) it did not assess the fraud, penalties provided for by law.

On February 8, 1993, the claimant filed a motion to dismiss for lack of subject matter jurisdiction. The relief requested in the motion was reversal (sic) of the September 10, 1992 Department order and dismissal of the appeal. The hearing judge granted partial relief in that he concluded RCW 51.32.240(4) was inapplicable because the order as written made no mention of fraud, merely demanding repayment of time-loss compensation without mentioning medical benefits or the assessment of any penalty. Rather than dismissing the appeal at that point, however, the hearing judge directed that the case proceed to hearing on the basis that the claimant would have to prove he did not receive benefits as the result of error, innocent misrepresentation, or other circumstance not including fraud, per RCW 51.32.240(1) of the recoupment statute.

While we agree with our hearing judge that the December 12, 1991 order is not adequate to set aside the January 24, 1991 allowance order on the grounds of fraud, we conclude that the order is void ab initio, rather than voidable. The Board has no jurisdiction to hear an appeal of a void order, because a void order contains no decision or award from which an appeal can be taken. Perry v. Dep't of Labor & Indus., 48 Wn. 2d 205 (1956). Our determination that the December 12, 1991 order is void is made pursuant to the Board's inherent power to examine the order on appeal to determine whether it has jurisdiction to entertain an appeal. Callihan v. Dep't of Labor & Indus., 10 Wn. App. 153 (1973). The basis for that determination is discussed below.

Our initial inquiry centers on whether the January 24, 1991 order was, in fact, res judicata. The Department had 60 days from communication of the allowance order within which it could have withdrawn the order and conducted further inquiries into the circumstances of the alleged industrial injury. RCW 51.51.060 It did not do so. Neither Mr. Hunt nor the employer appealed. Therefore, the order became final at the expiration of the appeal period.

Even though an allowance order becomes final, the Department retains the authority to vacate the order if "fraud, or something of like nature, which equity recognizes as sufficient to vacate a judgment has intervened." Brakus v. Dep't of Labor & Indus., 48 Wn.2d 218, 221, citing Abraham v. Dep't of Labor & Indus., 178 Wash. 160 (1934); Luton v. Dep't of Labor & Indus., 183 Wash. 105 (1935); and LeBire v. Dep't of Labor & Indus., 14 Wn. 2d 407 (1942).

The Department contends that the order on appeal sets aside the allowance order on the basis of fraud; specifically that the claimant staged an industrial accident. Mr. Hunt asserts that a Department order must specifically recite fraud as the grounds for rejection of the claim in order to overcome a previous allowance order. We agree with the claimant.

Fraud cases are unique in worker's compensation appeals in this state with respect to both the burden of proof and the standard of proof required. In a "conventional" appeal, the appealing party has the burden of establishing that a Department order on appeal is erroneous. However, in the case of fraud, the Department has the burden of going forward to establish its case before the appealing party (in this case, Mr. Hunt) is required to present evidence to defeat or rebut the allegations of fraud. In re Del Sorenson, BIIA Dec., 89 2697 (1991). Furthermore, in presenting its case, the Department must go beyond the mere "preponderance of the evidence" mandated in other workers compensation appeals and prove its case by "clear and convincing" evidence. These higher standards are imposed on the Department in recognition of the seriousness of the allegations. No lesser standard should apply to orders setting aside previous acts of the Department on the basis of fraud.

We are mindful of the Supreme Court's admonition in Porter v. Dep't of Labor & Indus., 44 Wn.2d 798 (1954) that the language of Department orders should be such that the claimant is not "misled to his prejudice in the preparation or prosecution of his appeal." While there may have been some general acknowledgement by the parties as to what the Department tried to do, the order of December 12, 1991 does not employ the word fraud! It merely states, "The claimant's condition is not the result of the injury alleged, the condition pre-existed the alleged injury...." Even the amount claimed by the Department for recoupment is confusing. It represents neither the amount of benefits

actually paid to the claimant nor that amount plus the 50% penalty authorized by RCW 51.32.240(4) in the event of fraud.

To work as an effective notice of the Department's intention to pursue recoupment of benefit payments induced through fraud, the Department order should have clearly stated that fraud was the basis for the recoupment, the amount of the benefits alleged to have been overpaid and the amount of penalty assessed. Absent such specific information, the Department order on appeal appears to be exactly what the claimant alleges it to be - an attempt by the Department to set aside a res judicata allowance order on the basis of a new factual determination as to the time the claimant's condition arose. The order was issued beyond the 60 days allowed by RCW 51.50.060. It had no effect; therefore, the claimant was not aggrieved and no appeal may be taken. Perry v. Dep't of Labor & Indus., supra.

Having concluded that the order on appeal is void, we also note that the Department has lost its right to demand recoupment of benefits already paid to Mr. Hunt. RCW 51.32.240 provides, in pertinent part:

> Payments made due to error, mistake, erroneous adjudication, fraud, etc.
>
> (4) Whenever any payment of benefits under this tile has been induced by fraud, the recipient thereof shall repay any such payment together with a penalty of fifty percent of the total of any such payments . . . . Such repayment or recoupment must be demanded or ordered within one year of the discovery of the fraud.

(Emphasis added.)

In In re Sorenson, supra, we addressed the question of timeliness of a fraud recovery according to RCW 51.32.240. We concluded that the statute of limitations for recoupment begins running as soon as the Department has in hand information which would lead to discovery of the fraud if pursued. In Mr. Hunt's case, the Department received notice of his co-workers' inculpatory statements in September 1991. The Department had only until September 1992 to pursue recoupment of benefits on the basis of fraud.

In his motion to dismiss, the claimant asserts that the Department's failure to perfect a recoupment order within the statutory time bars the Department from raising the issue of fraud "at this late date." We disagree. The one year limitation in RCW 51.32.240(4) specifically addresses repayment of benefits. It does not foreclose the Department from issuing a further order specifically setting aside the allowance order on the basis of fraud!

FINDINGS OF FACT

1. On January 7, 1991, Keith M. Hunt filed an application for benefits with the Department of Labor and Industries alleging an industrial injury on January 2, 1991 in the course of his employment for Construction Development, Inc. The claim was allowed by Department order dated January 24, 1991 and benefits were paid. On December 12, 1991, in response to a timely protest, the Department issued an order affirming the provisions of an order dated September 10, 1992 which rejected the claim because the claimant's condition is not the result of the injury alleged, the condition pre-existed the alleged injury and is not related thereto and is not an industrial injury or occupational disease as defined by the industrial insurance laws. The order also directed the claimant to repay the Department the time-loss compensation which had been paid, totaling $13,006.38.

   On November 5, 1991 the claimant appealed the September 10, 1992 to the Board of Industrial Insurance Appeals. On November 25, 1992, the Board issued an order allowing the claim, assigning Docket No. 92 6213, and directing that further proceedings be held.

2. The allowance order of January 24, 1991 was not appealed by any party in the 60 days following its communication to the claimant.

3. The December 12, 1991 Department order purporting to reject Keith M. Hunt's claim for benefits did not specifically recite fraud as a basis of the rejection, nor did it specify the nature and amount of any penalties imposed pursuant to RCW 51.32.240(4).

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has no jurisdiction over the parties to and subject matter of this appeal.

2. The Department order of December 12, 1991, as affirmed in the Department order of September 10, 1992, did not provide the claimant with effective notice that the claim was rejected on the equitable grounds of fraud.

3. The Department order of September 10, 1992 which affirmed an order issued on December 12, 1991 which rejected the claim because the claimant's condition is not the result of the injury alleged, the condition pre-existed the alleged injury and is not related thereto and is not an industrial injury or occupational disease as defined by the industrial insurance laws

and which directed the claimant to repay the Department the time-loss compensation which had been paid, totaling $13,006.38 is void.

The appeal therefrom should be dismissed.

It is so ORDERED.

Dated this 21st day of January, 1994

BOARD OF INDUSTRIAL INSURANCE APPEALS

/S/
S. FREDERICK FELLER Chairperson

/S/
FRANK E. FENNERTY, JR. Member

/S/
ROBERT L. McCALLISTER Member