Ackerson, Greg

AGGRAVATION (RCW 51.32.160)

"Deemed granted" application to reopen claim

Last closing order not final

When there has been an appeal of an order closing the claim and an application to reopen filed while the appeal is pending, the Department has 90 days from the final order of the Board or Court to issue an order on the application or the application will be deemed granted. The Department should not act upon an application to reopen the claim when the appeal from the claim closure is still pending in light of *Reid v. Department of Labor & Indus.*, 1 Wn.2d 430 (1939). *Distinguishing Marley v. Department of Labor & Indus*, 125 Wn.2d 533 (1995). **….*In re Greg Ackerson*, BIIA Dec., 94 1135 (1995)** [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under Whatcom County Cause No. 95-2-00808-5. The Board has partially overruled this decision to the extent the decision relies on the concept of subject matter jurisdiction. *In re Betty Wilson*, BIIA Dec., 02 21517 (2004), *In re Jorge Perez-Rodriquez*, BIIA Dec., 06 18718 (2008).]

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: GREG L. ACKERSON	**)**	**DOCKET NO. 94 1135**
	)	
CLAIM NO. T-193971	**)**	**DECISION AND ORDER**

APPEARANCES:

Greg L. Ackerson, by
Knies, Robinson & McMullen, per
Lyle O. Hanson

Intalco Aluminum Corp., by
Thomas G. Hall & Associates, per
Thomas G. Hall

This is an appeal filed by the claimant, Greg L. Ackerson, on February 18, 1994, with the Board of Industrial Insurance Appeals, from an order of the Department of Labor and Industries dated February 10, 1994, which cancelled previous orders of August 24, 1992 and October 14, 1993, and further, denied the application for reopening the claim filed on August 10, 1992, on the basis that the covered condition had not objectively worsened since the final claim closure. **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 self-insured employer, Intalco Aluminum Corporation, to a Proposed Decision and Order issued on September 23, 1994, granting the claimant's motion for summary judgment; concluding that the application to reopen the claim filed on August 10, 1992, is deemed granted by operation of RCW 51.32.160; and reversing and remanding the order dated February 10, 1994, to the Department with directions to reopen the claim and take such action as may be indicated by the law and the facts.

We are in agreement with the analysis contained in the Proposed Decision and Order, but have granted review to further consider that analysis in light of a recent Washington Supreme Court case, Marley v. Department of Labor & Indus., 125 Wn.2d 533 (1995). The discussion in Marley concerning what constitutes a lack of subject matter jurisdiction, however, does not cause us to change our belief that in the instant case the Department lacked subject matter jurisdiction to issue the order denying the aggravation application on August 24, 1992. We believe this case is distinguishable from Marley.

We also take this opportunity to elaborate on the application of provisions of RCW 51.32.160 when the issue of first claim closure is pending on appeal before the Board. We conclude that, under those circumstances, the Department must act within 90 days from the date on which the Board order addressing the initial claim closure is communicated, or the application will be deemed granted. In Mr. Ackerson's case, the Department did not issue an order in response to the aggravation application within 90 days of communication of the order affirming the Department's initial closure. On this issue, summary judgment in favor of Mr. Ackerson was proper, remanding this matter to the Department to have the application to reopen the claim for aggravation deemed granted.

On August 29, 1991, the Department issued an order affirming a prior order closing Mr. Ackerson's industrial insurance claim with a permanent partial disability award equal to a Category 3 low back impairment. Mr. Ackerson appealed that order to the Board of Industrial Insurance Appeals. While the claim was on appeal at the Board, Mr. Ackerson filed an application with the Department to reopen his claim for aggravation of condition. Mr. Ackerson filed the application to reopen with the Department on August 10, 1992. Two weeks later, on August 24, 1992, the Department entered an order denying the application to reopen on the basis that the condition had not objectively worsened since final claim closure.

After hearings before the Board on the appeal from the Department order of August 29, 1991, closing the claim with a permanent impairment award, a Proposed Decision and Order was issued on April 26, 1993, affirming the claim closure. On June 4, 1993, Mr. Ackerson petitioned the Board for review of the proposed order, and on June 16, 1993, the Board entered an order denying the Petition for Review, adopting the proposed decision that affirmed the claim closure. The Department received the Board order denying the Petition for Review on June 17, 1993.

On September 2, 1993, the claimant protested the Department order of August 24, 1992, denying his aggravation application. The Department then issued an order on October 14, 1993, declaring the order of August 24, 1992, void and reopening the claim effective May 12, 1992, for the reason that the decision allowing or denying the application for reopening was not timely as required by RCW 51.32.160. Intalco filed a timely appeal to the Board of Industrial Insurance Appeals from the order dated October 14, 1993. The Department held the order of October 14, 1993, in abeyance. On February 10, 1994, the Department issued an order cancelling previous orders of August 24, 1992 and October 14, 1993, and denied the application to reopen the claim. The claimant appealed from that order of February 10, 1994. It is this appeal which is before us in Docket 94 1135.

The essential element of an application to reopen a claim for worsening of a work-related condition is that there actually be a worsened or "aggravated" medical condition. Proof of medical worsening requires a comparison of the worker's condition over time. The components or elements of this comparison are the worker's condition when the claim was first closed with the worker's condition when the application to reopen is filed.[1] As long as the claim remains initially open, there can be no worsening of a condition because the medical condition must reach a plateau of medical stability, allowing the claim to be closed. Subsequent to medical stability and eventual claim closure, the worker may file for a worsened condition. The date of the original claim closure then provides a final and binding basis for comparison to determine if worsening has occurred.

If and when a worker does make an application to reopen a claim for a worsened condition related to work, the Department must timely consider such a request. RCW 51.32.160 provides that an application to reopen a claim for worsening or aggravation is "deemed granted" if the Department does not issue an order denying the application to reopen within 90 days of filing the application with the Department.

In the present case, the Department issued such an order denying Mr. Ackerson's application to reopen within 2 weeks of the filing of the application, on August 29, 1992. However, there was no first closing order in existence at the time of the denial which could have formed the basis of the requisite comparison of medical findings to determine if a worsening had occurred. Understandably, the claimant did not protest the August 29, 1992 order until September 2, 1993, a year later when the first claim closure had finally been determined. The claimant asserts that the order denying the aggravation application did not become final because the Department did not have subject matter jurisdiction at the time it issued the order on August 24, 1992. We agree.

In Marley, the Supreme Court held that an unappealed final order of the Department that rejects the surviving spouse's claim for benefits precludes the surviving spouse from rearguing the same claim at a later date. Mrs. Marley argued that the Department had incorrectly applied the law when it had issued the original decision denying her benefits, and that therefore the order was "void" when entered, and that she could attack the decision at any time. The Court held that an administrative order is not void unless the agency that entered the order lacked either personal

[1] These dates, the closing order, and the date of the application to reopen are often referred to as "terminal dates" in the lexicon of Washington industrial insurance. We will avoid the use of "terminal dates" in this decision to avoid confusing terms that might obscure the facts of this appeal.

jurisdiction over the parties or subject matter jurisdiction over the claim. An administrative agency has subject matter jurisdiction if it has authority to adjudicate the "type" of controversy involved in the claim.

At the time Mr. Ackerson filed his aggravation application, an appeal was pending before the Board regarding the issue of claim closure. In Reid v. Department of Labor & Indus., 1 Wn.2d 430 (1939), the Washington Supreme Court also stated that:

> It is a condition prerequisite to the reopening of a claim for . . . aggravation of disability that there be a determination as to the disability and the rate of compensation to be awarded therefor, and the further condition that there be a change in the claimant's condition since that determination. **That is to say, until there has been a final determination as to the amount of the award to which a claimant is entitled, there cannot be entertained a claim for aggravation**; as the standard by which to determine the award for aggravation, diminution, or termination of disability . . . **is the difference between [the] original award and** the amount to which he would be entitled because of his **condition subsequent thereto**.

(Emphasis added.) Reid, at 437.

The Reid Court recognized that the Department's authority to act upon the aggravation application is suspended or tolled until such time as there is a final determination of what the claimant's condition was as of the initial claim closure. Under such circumstances, it is more than just legal error for the Department to act upon an aggravation application. The Department is precluded from adjudicating aggravation types of issues so long as the first claim closure is pending on appeal. The "prerequisite" factors to create the issue of worsening are not yet in existence. Any action taken by the Department deciding whether the aggravation application should be accepted or denied, prior to a final and binding determination of initial claim closure, is void in that the Department lacks subject matter jurisdiction.

Thus, in Marley, the Department had the authority to decide whether Mrs. Marley was living in a state of abandonment under RCW 51.08.020, and whether she was eligible for workers' compensation benefits as a beneficiary. The Court held that even if the Department makes a legal error in determining whether or not Mrs. Marley is a beneficiary, the Department had the authority to decide that "type" of controversy--issues of eligibility in workers' compensation claims. The Department's order may not be attacked as a "void" order simply because it interpreted the law wrongly. But, in the present case, we must conclude that Reid divests the Department of authority to decide issues of aggravation of condition when the issue of what a claimant's condition is on the first terminal date is pending on appeal. That "type" of controversy "cannot be entertained" by the

Department until such time as the first claim closure becomes final. This is more than the Marley facts in that there was no authority to issue the order in the first place and not a question of an otherwise authorized order which erred in applying the law. We therefore conclude that the Department ruled on the aggravation application when it did not have jurisdiction over the subject matter regarding the issue of a reopening of the claim for worsening or aggravation of condition. The Department order of August 24, 1992, is void and non-binding on the parties.

Benefits as a beneficiary. The Court held that even if the Department makes a legal error in determining whether or not Mrs. Marley is a beneficiary, the Department had the authority to decide that "type" of controversy--issues of eligibility in workers' compensation claims. The Department's order may not be attacked as a "void" order simply because it interpreted the law wrongly. But, in the present case, we must conclude that Reid divests the Department of authority to decide issues of aggravation of condition when the issue of what a claimant's condition is on the first terminal date is pending on appeal. That "type" of controversy "cannot be entertained" by the Department until such time as the first claim closure becomes final. This is more than the Marley facts in that there was no authority to issue the order in the first place and not a question of an otherwise authorized order which erred in applying the law. We therefore conclude that the Department ruled on the aggravation application when it did not have jurisdiction over the subject matter regarding the issue of a reopening of the claim for worsening or aggravation of condition. The Department order of August 24, 1992, is void and non-binding on the parties claim for benefits that is filed. If a worker files a claim for benefits beyond the statutory time limitations, the Department lacks subject matter jurisdiction to consider and rule upon that application. Wilbur v. Department of Labor & Indus., 38 Wn. App. 553, 556, 686 P.2d 509 (1984). Although the language in Marley may be argued to overrule Reid and Wilbur, we do not believe it goes that far as neither of these cases were cited or discussed.

Intalco also contends that the Board order of June 16, 1993, does not become final until 30 days after communication of the order to the Department because during that period the order could have been appealed to superior court, and the Board order might not have become the final order on the issue of claim closure. Intalco argues that the 90-day proviso contained in RCW 51.32.160 begins to run only after the 30 days expire, and the order of the Board has not been appealed to superior court. Thus, under the theory advanced by Intalco, the Department would have 120 days from the date of the Board order to issue an order dealing with the aggravation application, or it is deemed granted.

In In re Edwin E. Fiedler, BIIA Dec., 90 1680 (1990), the Board specifically addressed the issue of when the 90 days begins to run in cases where the first closing order is on appeal in superior court. The Board held that the 90 days began to run when the Department received a conformed copy of an order from the court dismissing the appeal. Voluntarily dismissing the appeal in superior court caused the Department order under appeal to become final. When the Department receives the order of dismissal, it has 90 days to act on the aggravation application, or the application to reopen is deemed granted.

We also take direction from the Court of Appeals, Division Three decision, Pillsbury Co. v. Department of Labor & Indus., 69 Wn. App. 828 (1993). The court held that, under the former RCW 51.32.160, requiring an application to reopen an industrial injury claim within 7 years of the date the compensation terminated, the 7-year period begins to run on the date the Board enters an order affirming claim closure and terminating benefits. That order was not appealed to superior court. The Pillsbury Court does not offer an additional 30-day period from the date of the Board order, but concludes that the period starts from the date the Board order is issued. In Pillsbury, the Court of Appeals relies upon two Washington cases addressing what date commences the running of the statute of limitation for filing an application to reopen a closed claim--Hunter v. Department of Labor & Indus., 190 Wash. 380 (1937); and Hutchins v. Department of Labor & Indus., 44 Wn. App. 571 (1986).

In applying these cases to the present issue, we conclude that the date commencing the 90-day period contained in the present statute is the date the Board order is communicated to the Department.[2]

In the present case, on June 17, 1993, the Department received the Board order affirming the first claim closure. The Department had until September 15, 1993, to act on Mr. Ackerson's

[2] We acknowledge that an appeal from a Board order within 30 days to superior court would continue to suspend the requirement for further Department action on the application to reopen. It might be tempting to argue that the Department should not be required to act on a previously filed application to reopen until such time it was certain it had to respond, that is to say, that the Board's order was unappealed and therefore final. We do not think it is a hardship on the Department to be prepared to act on an application to reopen. Under the facts of this appeal, the Department has had the application in its possession for quite some time (around 9 months), and could adequately plan for the evaluation needed to rule on the reopening request. Medical examinations, for example, could be scheduled with sufficient "lead time" to cancel them without penalty if an appeal were filed. If no appeal is filed, then the Department can still obtain the information necessary to resolve the reopening issues within the 90-day period of time provided in RCW 51.32.160. In any event, such concerns are irrelevant in light of our decision here and in light of Pillsbury.

aggravation application before it was deemed granted by operation of RCW 51.32.160. It did not act, and Mr. Ackerson's claim is deemed reopened.

FINDINGS OF FACT

1. Gregory L. Ackerson filed a claim for industrial insurance benefits on February 9, 1988, alleging an injury to have occurred during the course of his employment at Intalco Aluminum Corporation. The claim was allowed and benefits paid. On July 24, 1991, the Department issued an order closing the claim with time loss compensation and a permanent partial disability award equal to Category 3 for low back impairment, paid at 75 percent of the monetary value. Mr. Ackerson timely protested the order of July 24, 1991, and the Department issued an order on August 29, 1991, affirming the July 24, 1991 order. Mr. Ackerson timely appealed the order of August 29, 1991, to the Board and on November 15, 1991, the Board granted the appeal and assigned it Docket 91 5453.

   On August 10, 1992, Mr. Ackerson filed with the Department an application to reopen his claim for aggravation of condition. On August 24, 1992, the Department issued an order denying the application to reopen on the basis that the covered condition had not objectively worsened since final claim closure.

   On April 26, 1993, the Board issued a Proposed Decision and Order affirming the Department order of August 29, 1991. On June 4, 1993, Mr. Ackerson petitioned for review of the proposed decision of April 26, 1993. On June 16, 1993, the Board issued an order denying the claimant's petition for review.

   On September 2, 1993, Mr. Ackerson protested the order of August 24, 1992. On October 14, 1993, the Department issued an order declaring the order of August 24, 1992, as null and void, and reopening the claim effective May 12, 1992, on the basis that the decision was not made by July 25, 1993, as required by RCW 51.32.160. On December 8, 1993, the self-insured employer appealed the October 14, 1993 order. The Department held the order of October 14, 1993, in abeyance and on February 10, 1994, the Department issued an order cancelling orders of August 24, 1992 and October 14, 1993, and denying the application to reopen received on August 10, 1992, on the basis that the covered condition had not objectively worsened since final claim closure.

   On February 18, 1994, Mr. Ackerson filed a Notice of Appeal from the provisions of the Department order of February 10, 1994, and on March 21, 1994, the Board issued an order granting the appeal and assigning it Docket 94 1135.

2. On June 17, 1993, the Department received formal communication that the Board had denied the claimant's Petition for Review of the proposed decision issued on April 26, 1993, affirming the provisions of the Department order of August 29, 1991, and closing the claim with a

permanent partial disability award equal to Category 3 for low back impairment, paid at 75 percent of the monetary value.

3. The Department failed to issue an order denying Mr. Ackerson's application to reopen his claim within 90 days of the receipt of the Board's order denying the claimant's Petition for Review of the closing order of August 29, 1991, and furthermore failed to take further action to extend the time for making a final determination on the application.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over the parties and subject matter to this appeal.

2. The Department order dated August 24, 1992, is null and void. The Department did not have jurisdiction over the subject matter of the type of controversy until such time as the first claim closure became final.

3. The claimant's application to reopen his claim filed on August 10, 1992, is deemed granted by operation of RCW 51.32.160.

4. A review of the Board record establishes no genuine issue of material fact in this appeal.

5. Gregory Ackerson is entitled to judgment as a matter of law pursuant to CR 56.

6. The order of the Department dated February 10, 1994, which cancelled the previous orders of August 24, 1992 and October 14, 1993, and denied the reopening application received on August 10, 1992, is incorrect and is reversed. This matter is hereby remanded to the Department with direction to reopen the claim and take such action as may be indicated by the law and facts.

It is so **ORDERED**.

Dated this 13th day of April, 1995.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/ _____
S. FREDERICK FELLER Chairperson

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

DISSENT

The Board majority ignores the clear, direct, language of the Supreme Court in the Marley decision concerning when an order is void and non-binding. In Marley, the Supreme Court specifically

adopts the Restatement (Second) of Judgments Section 11 definition of subject matter jurisdiction: "[a] judgment may properly be rendered against a party only if the court has authority to adjudicate the **type of controversy** involved in the action." The Court goes on to explain:

> We italicize the phrase "type of controversy" to emphasize its importance. A court or agency does not lack subject matter jurisdiction solely because it may lack authority to enter a given order. **. . .** A tribunal lacks subject matter jurisdiction when it attempts to decide a type of controversy over which it has no authority to adjudicate.

(Emphasis added.) Marley, at 539. If the type of controversy is within the authority of an agency to decide, then all other defects or errors go to something other than subject matter jurisdiction. "A lack of subject matter jurisdiction implies that an agency has **no authority to decide the claim at all**, let alone a particular kind of relief." (Emphasis added.) Marley, at 539.

The Marley Court proceeds to identify what matters are within the authority of the Department of Labor and Industries, stating that the Legislature has granted the Department of Labor and Industries broad authority to decide claims for workers' compensation (at 539), that the Department has subject matter jurisdiction **to adjudicate all claims for workers' compensation** (at 542), and that the type of controversy involved in the Marley case (whether Mrs. Marley was living in a state of abandonment under RCW 51.08.020) is within the Department's domain to decide, whether decided rightly or wrongly (at 543).

The Marley Court did not identify exceptions to the Department's authority to act in workers' compensation claims. Entitlement to workers' compensation is within the broad **type of controversy** the Department of Labor and Industries has authority to decide. Applications to reopen workers' compensation claims are precisely the **type of controversy** within the Department's authority to adjudicate.

Mr. Ackerson filed an application to reopen his claim, and the Department issued the August 24, 1992 order denying the reopening application. On what basis does the majority conclude there is a limitation on the Department's authority to deal with that reopening application? The majority cited Reid as authority for its conclusion that the Department lacks subject matter jurisdiction over aggravation applications where there is an appeal pending. In fact, the Reid Court made absolutely no mention of divesting the Department of jurisdiction to act on an aggravation application. The Reid Court pointed out the logical inconsistency of acting on an aggravation application before findings at the first terminal date have been conclusively determined. Without that determination, there are no

first terminal date findings to compare with the second terminal date findings, so the issue of aggravation "cannot be entertained."

It is indeed legal error for the Department to have decided on the aggravation application when the issue of aggravation was not ripe. Had the August 24, 1992 order been timely appealed to the Board, the matter would have been returned to the Department with direction to await the outcome of the first claim closure proceedings before acting on the aggravation application.

The order of August 24, 1992, denying Mr. Ackerson's aggravation application is nothing more than legal error committed in the valid exercise of the Department's jurisdiction. The majority has no authority to conclude that the Legislature placed limitations on the Department's authority to act in workers' compensation cases as they conclude here. As the Marley Court pointed out, any erroneous decision is binding until corrected in a manner provided by law. Marley, at 543. The statute provides for protests to the Department or appeals to the Board to correct erroneous Department decisions. Mr. Ackerson had 60 days from the date the order was communicated to him to file an appeal. His failure to timely appeal that order transformed the order into a final adjudication of Mr. Ackerson's aggravation application, valid and binding on him.

The majority cites Reid and Wilbur as judicial authority consistent with its conclusion that there are limits on the authority of the Department. Wilbur, a Court of Appeals case, does not hold that the Department lacks subject matter jurisdiction to rule upon applications for benefits filed beyond the statutory time limitations. The Department, of course, has authority and subject matter jurisdiction over applications for benefits under the Industrial Insurance Act. Abraham v. Department of Labor & Indus., 178 Wash. 160 (1934). Wilbur holds that the time limit for filing a claim is a jurisdictional requirement which cannot be waived, and the Department correctly rejected a claim not filed within one year of the date of the accident. The Department has the subject matter jurisdiction to decide whether an application is timely filed. Marley does not overrule either Wilbur or Reid.

A straightforward, fair, reading of the Marley case simply does not leave room for the Board majority to conclude as it does. This appeal should be reversed and remanded to the Department with direction to issue an order finding the denial of the aggravation application of August 24, 1992, final and binding. The "deemed granted" provisions of RCW 51.32.160 have no applicability in this case and do not operate to reopen the claim.

Dated this 13th day of April, 1995.

/s/_____
ROBERT L. McCALLISTER Member