NO. 46955-3-II

COURT OF APPEALS,
DIVISION II

OF THE STATE OF WASHINGTON

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KATHRYN A. LANDON, *APPELLANT,*

v.

THE HOME DEPOT, *RESPONDENT.*

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# BRIEF OF APPELLANT

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## ASSIGNMENT OF ERROR

The trial court erred in denying Kathryn Landon's Motion to Vacate Judgment on the Jury's Verdict and remand the case to the Department of Labor and Industries, to decide the case in the first instance as to whether she had an occupational disease or infection arising out of her employment at The Home Depot?

**Issues pertaining to the first Assignment of Error**

1. Did the Board of Industrial Insurance Appeals and the Superior Court for Cowlitz County have jurisdiction to hear Kathryn Landon's appeal, the Department of Labor and Industries not having initially decided the claim on the merits?

2. Could the parties stipulate to the jurisdiction of the Board of Industrial Insurance Appeals and the Superior Court for Cowlitz County to hear the appeal on the merits when the Department of Labor and Industries did not first decide the issue?

## STATEMENT OF THE CASE

The appellant-plaintiff, Kathryn Landon, had been employed by The Home Depot since October 8, 2008. She was part of Merchandising Execution Team, referred to as MET, going to various Home Depot stores, working in the different departments, setting and resetting displays of merchandise. Ms. Landon worked on the A Team which consisted of 20 members who would meet at a particular Home Depot store, and then break down into groups of four to five members per department. (Clerk's Paper, No. 5, Certified Appeal Board Record, Kathryn Landon, December 6, 2012, Direct, Page 10, Lines 9, 11, 13 and 24; and page 12, line 21)

On June 1, 2010, Kathryn Landon was working with her team at the Longview, Washington, store in the electrical department with four co-workers doing a lighting reset, consisting of light bulbs, fluorescent lighting, flush mount casings, and chandeliers. Her group had to reset the shelving, which means to take everything out, reset the shelving, and put in all new product. A lot of times Ms. Landon would have to get down on her belly to get underneath the shelving to get fallen product out. Then, sweep the floor, but sometimes the shelving was too low for a broom. On that day, Ms. Landon was working on the floor and started scratching her leg. She stopped work and started scratching some more. She kept working and

scratching her leg, and started thinking she had a bug bite of some sort. She was too far from the restroom, wanted to get her job done, and decided to wait until break to check it out. (CABR, Landon-Direct, page 14, lines 7, 9, 11, and 20; page 15, line 15; and page 16, lines 3 and19)

Kathryn Landon was having a tingling and tickling sensation just above the knee on her left leg, where she was scratching through her jeans. Ms. Landon is 5 feet 4 inches tall, and at the time she weighed 150 to 155 pounds. Ms. Landon was working alongside Scott Baker, another member of the MET team. A half hour later on break, Ms. Landon went to the restroom and saw a bug bite 2 1/2 inches above her left knee. The bug bite was red like a pin had poked her. The blood was smeared a little from scratching it, and there was a small welt around the bite. (CABR, Landon-Direct, page 16, line 19; page 17, lines 3, 5, 7, 11, 14, 16, 22 and 25; page 18, lines 2, 4, 9, 14, and 18)

In the restroom, Ms. Landon looked through her jeans to make sure there were no spiders, and took them off and actually shook them out, but did not find anything. In the break room, Ms. Landon told Scott Baker it was a bug bite, and they went back to work after the break. Scott Baker worked at The Home Depot on the MET team from February 2010 until December 2011. On June 1, 2010, working with Kathy Landon, doing an

electrical reset moving racks, down on the floor sweeping and cleaning, Ms. Landon said she felt like she had been bitten just above the knee on the left leg. Mr. Baker told her that if it was a spider bite she needed to be very concerned, because he had been bitten by a brown recluse and had gotten very sick. (CABR, Landon-Direct, page 18, line 20; page 20, lines 5 and 7, and Baker-Direct, page 63 lines 7, 9, 11, and 17; and page 64, lines 3, 11, 16, and 19; and page 65, line 6)

Working at The Home Depot there are spiders, mice, rats, and birds in almost all of the stores, and they have traps in almost all of The Home Depots for mice. In the garden department, they carry bird and grass seed which is a food source for mice and birds. A couple of weeks later, Ms. Landon showed Scott Baker the bug bite. Ms. Landon was wearing pedal pushers that day, and was able to pull them up and show him. Mr. Baker noticed a small black mark about the size of a pencil lead, and it looked like something was in there, but he did not know whether it was a scab or something that was left over. It was like she had been poked, something like a bite would have left, but there was not anything there that needed immediate attention. (CABR, Baker-Direct, page 66, line 24; page 67, line 2; page 68, line 26; page 69, line 22: and page 70, line 23)

At the time of the bug bite on June 1, 2010, Kathryn Landon could not tell if the bleeding was from the bite or scratching, and she did not seek medical attention. She put the bug bite in the back of her mind and continued working. A week or so later, Ms. Landon started getting a rash. She had heard about rashes and spider bites, and started to get a little concerned. Then, she came down with flu like symptoms with a sore throat and runny nose, which lasted a week, and she missed a couple of days work. The rash was getting worse. Ms. Landon was getting concerned, and went ahead in July and made an appointment with Sandy Niehm, her primary care provider since 2005. By the time she was able to get into see Sandy Niehm, it was the first part of August, and the rash was gone. (CABR, Landon-Direct, page 21, lines 2, 13, 21, and 25; and page 22, lines 3, 11, 22, 24, and 26)

Sandy Niehm is a family nurse practitioner with Bachelors of Nursing from Eastern Oregon College and a Master's of Science and Nursing from Gonzaga University. She is certified by the National Board of Nurse Practitioners, has been a nurse for 40 years, and been with the Vancouver Clinic as a nurse practitioner for 13 years. On August 10, 2010, Kathryn Landon presented herself to Ms. Niehm with a bug bite for some time on her left thigh with continued itching and slight redness, but no sign

of infection. Ms. Landon had noticed a red dot in the lateral aspect of the left thigh approximately three months ago, which became slightly scabbed and appeared irritated, but symptoms had resolved. A rash had been present for the last three months intermittently. She had symptoms of dizziness, but no other symptoms. On examination, Ms. Niehm found a pinpoint erythematous (red) lesion, which was non tender. There was no redness around the lesion. Ms. Niehm assessed, or diagnosed, an adverse reaction to an insect bite with intermittent dizziness, and prescribed a hydrocortisone cream two to three times a day with Benadryl cream as needed for itching. (CABR, Sandy Niehm, November 29, 2012, Direct, Page 8, lines 12 and 20; page 10, line 23; page 12, lines 2, 16, and 23; page 13, lines 11 and 24; and page 14, line 5)

After seeing Ms. Niehm on August 10, 2010, Kathryn Landon came down with flue like symptoms again and went back and saw another doctor. She had a sinus infection, sore throat, swollen glands, fever, and body aches and pains, which lasted ten days. She had never had the flu like this before. Ms. Landon continued working at The Home Depot, and in October 2010 started developing headaches. She mentioned to her supervisor that she was getting a lot of headaches, but just chalked it up to stress before the holidays. From January to June of 2011, Kathryn Landon would get dizzy and lose

equilibrium, and finally went back to Sandy Niehm. (CARB, Landon-Direct, page 22, line 11; page 23, lines 6, 8, and 11; page 24, line 14; page 25, line 12; and page 26, lines 12 and 21).

Because Ms. Landon was experiencing dizziness and headaches, Sandy Niehm ordered a magnetic resonance imaging, or MRI, of the brain that was performed on June 28, 2011. The MRI showed white matter lesions bilaterally suggestive of multiple sclerosis. Ms. Niehm recommended a neurological consultation, and on August 11, 2011, Ms. Landon saw a Board Certified neurologist, Ann Hamburg, MD, Dr. Hamburg ordered a battery of tests to learn the nature of the white matter changes. One of the tests performed, the serum Lyme test, or ELISA, which tests the person's antibody response to Lyme disease, was positive for Lyme disease. After a spinal tap was performed to verify that the Lyme disease had not affected her central nervous system, Dr. Hamburg diagnosed Lyme disease based on the abnormal limited lab value with the blood serum. Lyme disease is considered an infection easily treated with safe antibiotics, and Dr. Hamburg prescribed 100 milligrams of doxycycline, twice a day for 21 days, and referred Ms. Landon back to Sandy Niehm for further care. (Niehm –Direct, page 16, line 11; page 17, lines 13 and 22; page 18, line 4; Dr. Hamburg, December 4, 2012, Direct, page 4, line 11; page 5; line 5,

page 7, line 7; page 9, line 25; page 12, lines 3, 8, and 22; page 16, lines 17 and 25; and page 17, line 4).

When Sandy Niehm saw Kathryn Landon back on September 16, 2011, to discuss the diagnosis on Lyme disease, Ms. Niehm learned that for the first seven to ten days Ms. Landon was taking doxycycline she felt better. She had one pill left, and now has multiple symptoms and has never felt worse. Ms. Niehm restarted her on antibodies using Ceftin. Ms. Niehm was currently treating three patience with Lyme disease who acquired Lyme disease from tick bites. Rodents, deer, and birds carry ticks in the Northwest. Ms. Niehm has treated a total of six patients with Lyme disease. People do not always feel a tick bite, and tick bites can burn, itch, and may be painful depending on the person's sensitivity. Symptoms of Lyme disease are pain, swelling, redness, and fever. There can be an erythematous areas around the tick bite, depending on how long it has been embedded, or if it has been embedded. (CABR, Niehm-Direct, page 23, lines 3, 7, 12, 14, 17, and 20; page 24, line 4; page 26, line 3; Cross, January 22, 2013, page 31, line 20; page 33, lines 3, and 16; and page 34, lines 3 and 8)

On September 16, 2011, Sandy Niehm referred Ms. Landon to Sally Williams, MD, an infectious disease specialist. Ms. Niehm understood that

Dr. Williams performed a Western Blot test, and Lyme disease was not detected. The usual treatment for Lyme disease is antibiotic therapy. The patients Ms. Niehm has treated for Lyme disease have been on antibiotics for longer than six months. Ms. Niehm has continued to treat Ms. Landon, and her symptoms are consistent with other patients she has treated with Lyme disease. Based on Ms. Niehm's treating Ms. Landon over the past two years, and with her symptoms and the research Ms. Niehm has done, Kathryn Landon does have Lyme disease as a result of a tick bite on June 1, 2010. (CARB, Niehm-Direct, page 26, line 25; page 27, lines 5 and 12; Cross, page 35, lines 6 and 19; page 36, line 15; and page 37, lines 11 and 14)

On October 25, 2011, Kathryn Landon also started treatment with Lindsay Roberson, a naturopathic physician in Longview, Washington. Dr. Roberson attended Southwest College of Naturopathic Medicine and Health Sciences in Tempe, Arizona, one of four accredited naturopathic colleges in the United States, and completed their four year curriculum. Dr. Roberson is Board Certified in Naturopathic Medicine, and has been in practice since June of 2009. As a naturopath, Dr. Roberson prescribes medication, but also works with nutrition, herbs, vitamins, and minerals to improve her patient's health. A large percentage of her practice is treating

Lyme disease and chronic infections. (CABR, Dr. Roberson, November 6, 2012, Direct, page 3, lines 16 and 18; page 4, lines 1, 4, and 19; page 5, line 6; page 6, lines 6 and 17; and Cross, page 53, line 25)

Lyme disease is a bacterial infection caused by the bacteria Borrelia Burgdorferi, the most common species of Lyme disease in the United States. Borrelia Burgdoferi is a spirochete shaped bacteria that infects ticks. When ticks feed on animals, such as deer, mice and humans, the bacteria is transmitted to the host. The spirochete bacteria has a life cycle within the host of seven to ten days, but can go into hibernation, change its form, and become a cyst, where it does not feed or reproduce. The cyst hides in the immune system, so that immune system does not recognize it and react to it. Then, when the host becomes weekend, the spirochete bacteria comes out and replicates itself. (CABR, Dr. Roberson-Direct, page 11, line 18; page 12, lines 2, 7, 14, and 20; page 13, line 5)

The symptoms of Lyme disease depend on each person. Initially, the patient may experience a rash, although it does not always occur. Patients may have flu like symptoms, swollen glands, aching body, fatigue, headaches, and migratory joint pain. Lyme disease is treated with antibiotics, usually for long periods of time, which are rotated every so many weeks. Treatment is also with diet with a low sugar and gluten free

diet, where the patient is consuming a lot of vegetables, clean protein, and fruit. Sugar is very inflammatory to the body, and also suppresses the immune system. Giving her antibiotics kills the good bacteria as well as the bad, and Dr. Roberson recommended that Ms. Landon stay on antibiotics until she was symptom free for at least two months. (CABR, Dr. Roberson-Direct, page 13, line 12; page 16, lines 7, 11, and 13; page 20, lines 12 and 17)

Dr. Roberson continued to treat Ms. Landon through July 26, 2012. Since Ms. Landon came to her with a diagnosis of Lyme disease, Dr. Roberson did not have her tested. Ms. Landon was still experiencing the symptoms of Lyme disease, and she still had the infection from Borrelia Burgdorferi. Dr. Roberson would like to remove the antibiotics and retest her, but she has not been symptom free, and that is not the wise thing to do. The treatment and adjustment of antibiotic medication that Ms. Landon has received is supportive of the diagnosis of Lyme disease. (CABR, Dr. Roberson-Direct, page 44, line 14; page 50, lines 7 and 9; Cross, page 53, line 6; Redirect, page 60, line 25; page 61, line 8)

By Order and Notice dated March 9, 2012, the Department of Labor and Industries denied Kathryn Landon's claim because it was not filed within one year of the date of injury on June 1, 2010. Then, on

May 11, 2012, the Department of Labor and Industries issued on Order and Notice affirming the order of March 9, 2012. On May 15, 2012, Kathryn Landon through her attorney appealed to the Board of Industrial Insurance Appeals maintaining that claimant has an occupational disease or infection pursuant to RCW 51.08.140, and not an industrial injury. The statute of limitations for an occupational disease or infection is two years pursuant to RCW 51.28.055, as opposed to one year for an industrial injury pursuant to RCW 51.32.050. At no time did the Department of Labor and Industries ever consider whether Ms. Landon's claim was an occupational disease or infection proximately caused by her employment at The Home Depot. (CABR, pages 49, 50 and 51)

Kathryn Landon's appeal to the Department order of May 11, 2012, proceeded to an evidentiary hearing before an industrial appeals Judge at the Board of Industrial Insurance Appeals pursuant to the Interlocutory Order Establishing Litigation Scheduled dated September 25, 2012. Kathryn Landon, Scott Baker, Sandy Niehm, RNP, Anne Hamburg, MD, and Lindsay Roberson, ND, testified for claimant, and James Leggett, MD, testified for the employer. Dr. Leggett, an infectious disease expert at Providence Medical Center in Portland, Oregon, only examined Ms. Landon once on December 5, 2012, at the request of the employer's

attorney pursuant to a CR 35 exam. (CABR, pages 62-65; Dr. Leggett, January 7, 2013, Direct, Page 6, lines 9, 20, and 22; and page 7, line 7)

Dr. Leggett testified that the ELISA, administered on August 18, 2011, was positive, but the ELISA performed on October 14, 2011, after Ms. Landon had already started antibiotics therapy, was negative. The ELISA tests the patient's antibody response to Lyme disease. If the patient is treated early with antibodies, their antibody response may be reduced or curtailed. Because the second ELISA was negative, the Western Blot test was not performed. Without the Western Blot test being performed, Dr. Leggett could not diagnose Lyme disease. The diagnosis of Lyme disease requires a clinical diagnosis, as well as a positive Western Blot Test. Mr. Landon's symptoms are similar to symptoms of Lyme disease, but no clinician had documented the bulls eye rash which appears 80% of the time with Lyme disease. Dr. Leggett has not treated anyone with Lyme disease in over a year. (CABR-Dr. Leggett-Direct, page 12, lines 5, 10, 16, and 23; Cross, page 30, line 22; page 32, lines 10 and 12; page 39, line 22; page 40, lines 8 and 21; page 42, line 9; page 43, line 1; page 44, line 7; and Dr. Hamburg-Direct, page 14, line 8)

Though the question of whether Kathryn Landon had an occupational disease or infection had never been considered by the

Department, the Board judge, after deciding that the claim for occupational disease was timely filed within the two year statute of limitations, went on to decide that Ms. Landon did not have an occupational disease or infection within the meaning of RCW 51.08.140, rather than remand the case back to the Department to decide the issue in the first instance. That decision was adopted by the Board of Industrial Insurance Appeals, and Ms. Landon filed her appeal in Superior Court for Cowlitz County. The matter proceeded to a jury trial, and the jury affirmed the Board. Ms. Landon then timely filed her Motion to Vacate Judgment on Verdict and Remand to the Department of Labor Industries for further action, namely whether she had an occupational disease or infection arising naturally and proximately from the distinctive conditions of her employment at The Home Depot. The motion was denied, and Kathryn Landon has appealed to the Court of Appeals, Division Two, maintaining that the Board of Industrial Insurance Appeals and the Superior Court of Cowlitz County did not have jurisdiction to decide whether she had an occupational disease or infection. (CABR, pages 2 and 34-37, Clerk's Papers, Numbers 16, 17, 19 and 25)

## ARGUMENT

The Board of Industrial Insurance Appeals only has appellate jurisdiction to hear appeals from a final decision of the Department of Labor and Industries pursuant to RCW 51.52.060. The Superior Court only has appellate jurisdiction to hear appeals from a final decision and order of the Board of Industrial Insurance Appeals pursuant to RCW 51.52.110.

Because the Board of Industrial Insurance jurisdiction is purely statutory, the Board must satisfy itself that it has appellate jurisdiction to hear an appeal of an aggrieved person before it can proceed to hear and determine the claim of that person. If upon examination of the appeal, the Board finds that the Department of Labor and Industries has failed to make the initial determination on the claim, it must decline to grant the appeal. *Callihan v Dept. of Labor and Indus.*, 10 Wn. App. 153, 153, 516 P.2d 1073 (1973). Here, once the Board of Industrial Insurance Appeals decided that Kathryn Landon had filed her claim for occupational disease or infection within two years pursuant to RCW 51.28.055, it should have declined to hear the appeal on the merits, and remanded the claim to the Department to make the initial decision.

In *Lenk v Dept. of Labor and Indus.*, 3 Wn. App. 977, 983, 478 P. 2d 761 (1970), Lenk contended that when the Department of Labor and

Industries rejected his claim it did not consider the extent of the resulting effects of the exposure, so that when the Board of Industrial Insurance Appeals found that his arthritis condition was not causally related to the industrial exposure to creosote, it actually determined the extent of his disability which was not before the Board. In reversing the trial court, *Lenk v. Dept. of Labor and Indus.*, 3 Wn. App. at page 982, held that it is not disputed that the Board and Superior Court's jurisdiction is appellate only, and for the Board and trial court to consider matters not first determined by the Department, would usurp the prerogatives of the Department, the agency vested by statute with original jurisdiction.

In *Hanquet v. Dept. of Labor Indus.*, 75 Wn. App. 657, 879 P. 2d 326 (1994), Hanquet contended that denying an exclusion for coverage under the Worker Compensation Act by the Department under one section prohibited the Board from considering another section to deny coverage which the Department had not first considered. The Court of Appeals agreed and held that if a question is not passed upon by the Department, it cannot be reviewed either by the Board or the Superior Court. *Hanquet v. Dept. of Labor and Indus.*, 75 Wn. App. at page 664.

The issue of subject matter jurisdiction may be raised at any time, even on appeal. *Gilbertson v. Dept. of Labor and Indus.*, 22 Wn. App. 813,

815, 592 P.2d 665 (1979). In *Magge v. Rite Aid*, 167 Wn. App. 60, 277 P.3d 1 (2012), though both parties entered into a stipulation seeking to limit the scope of review in the appeal to the Board, the parties cannot stipulate to jurisdiction. Subject matter jurisdiction does not turn on an agreement of the parties. Either the tribunal has subject matter jurisdiction to decide the case, or it does not. *Magge v. Rite Aid*, 167 Wn. App. at page 75. There, assuming the Board exceeded its scope of review by earlier addressing whether Magee's claim constituted an occupational disease, because Magee did not challenge the decision on appeal of the earlier order in a prior proceeding, the decision was final and binding, and Magee could not now claim that she had an occupational disease. *Magge v. Rite Aid*, 167 Wn. App. at page 76.

The facts in *Marley v Dept. of Labor and Indus.*, 125 Wn.2d 533, 886 P.2d 189 (1994), are far different than the facts here. There, six years after the Department denied her claim, Marley sought to declare the Department's order void. The Department of Labor and Industries does not lack subject matter jurisdiction solely because it may lack authority to enter a given order. In other words, the Department may make the wrong decision, but that does not go to its jurisdiction to act. Here, the Department had not made a decision on whether to allow the claim for occupational

disease or infection, but only that the claim was not filed within one year of injury, and the Board and the trial court did not have jurisdiction to act.

Had the Department of Labor and Industries rejected the claim on the basis that Ms. Landon had not suffered an industrial injury in the course of her employment, the scope of revue before the Board would have included whether she had an occupational disease or infection. *In re Judith Burr*, BIIA Dec., 52,023 (1979). In *In re Rodney D. Williams*, Dckt. No. 12 7865 (August 12, 2013), the claimant appealed an order rejecting the claim for an industrial injury, because the claim was not filed within one year, as was the case here. There, the Board declined to consider whether the claimant sustained an occupational disease, and remanded the case back to the Department to consider the claim for occupational disease, which is what the Board should have done here.

**Attorney Fees**

Kathryn Landon maintains that if the decision of the Superior Court for Cowlitz County and the Board of Industrial Insurance Appeals is reversed on appeal to the Court of Appeals, she should recover her reasonable attorney fees, as fixed by this court, before the Superior Court

and Court of Appeals, and the fees of medical and other witnesses before the Board. RCW 51.52.130(1) Attorney and witness fees in court appeal provides:

> If on appeal to the superior or appellate court from the decision and order of the board, said decision and order is reversed or modified and additional relief is granted to the worker or beneficiary. . . a reasonable fee for the services of the worker's or beneficiary's attorney shall be fixed by the court. . . . In the case of self-insured employers, the attorney fee fixed by the court, for services before the court only, and the fees of medical and other witnesses and the costs, shall be payable directly by the self-insured employer. RCW 51.52.130(1)

The Home Depot is a self-insured employer, and the statute applies to them.

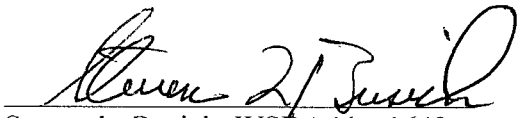
The additional relief granted to Ms. Landon on remand to the Department of Labor and Industries would be to maintain her claim for occupational disease and have the Department decide that issue in the first instance. *Hi-Way Fuel Co. v Estate of Allyn*, 128 Wn. App. 351, 363, 115 P. 3d 1031 (2005); *Oien v Department of Labor & Indus.*, 74 Wn. App. 566, 571, 874 P. 2d 878 (1994)

**Conclusion**

The Order and Judgment of the Superior Court for Cowlitz County dated October 30, 2014, should be reversed and remanded to the Department

of Labor and Industries to decide whether Kathryn Landon has an occupational disease or infection arising naturally and proximately from the distinctive conditions of her employment at The Home Depot.

Dated March 9, 2015



Steven L. Busick, WSBA No. 1643
Attorney for Kathryn Landon,
Appellant

2 of 2 DOCUMENTS

In re: JUDITH K. BURR

SIGNIFICANT DECISION

Docket No. 52,023, Claim No. H-324581

WASHINGTON STATE BOARD OF INDUSTRIAL INSURANCE APPEALS

*1979 WA Wrk. Comp. LEXIS 3*

April 18, 1979

**DISPOSITION:** Reversed and Remanded.

**COUNSEL:** Claimant, Judith K. Burr, *Pro se$*
Employer, Pacific Coast Services, per Henry Dehaan
Department of Labor and Industries, by The Attorney General, per James D. Pack and David W. Robinson, Assistants

**JUDGES:** Michael L. Hall, Sam Kinville

**OPINION:** DECISION AND ORDER

This is an appeal filed by the claimant on June 1, 1978, from an order of the Department of Labor and Industries dated May 25, 1978, which rejected her claim for benefits under the Industrial Insurance Laws of the State of Washington. 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 Department of Labor and Industries to a Proposed Decision and Order issued by a hearing examiner for this Board on January 19, 1979, in which the order of the Department dated May 25, 1978 was reversed, and the claim remanded to the Department with direction to allow the claim, and to take such other and further action as indicated, and required or allowed by law.

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

This claim was rejected by an order of the Department of Labor and Industries dated May 25, 1978, on the ground that claimant's condition was not the result of an industrial injury as defined by the industrial insurance laws.

After a hearing held before this Board, our hearing examiner entered a Proposed Decision and Order determining that the claimant developed a condition diagnosed as traumatic paresthesia in her left hand as a result of resting her left elbow on a table while telephoning at her place of employment over a two-day period. Our hearing examiner

determined that the condition described above was related to the trauma caused by resting the elbow on the table for a few hours and remanded the claim to the Department with directions to allow it. At no place in the body of his Proposed Decision and Order, or in his findings and conclusions and order, did the hearing examiner describe the condition either as an "industrial injury" or as an "occupational disease".

In his Petition for Review filed with this Board, counsel for the Department very effectively argues that the condition that the claimant developed could not be described as an "injury" within the definition of *RCW 51.08.100*. Counsel does not discuss whether the condition could be described as an occupational disease within the definition of *RCW 51.08.140*, possibly because the claim was not rejected on the ground it was not an "occupational disease" and furthermore, there was no mention of a disease in the hearing examiner's order. We agree with counsel, the claimant's condition does not constitute an "injury" within the definition of the statute.

The claimant has presented uncontradicted evidence that she developed a condition while employed in covered employment within the state of Washington, and that the condition grew out of, and is related to, her activity at work.

*RCW 51.08.140* defines an occupational disease as follows:

> "'Occupational disease' means such disease or infection as arises naturally and proximately out of employment under the mandatory or elective adoption provision of this title." (Emphasis supplied)

In *Simpson Logging Company v. Department of Labor and Industries, 32 Wn.2d 472*, our Supreme Court held that:

> "Under the present act, no disease can be held not to be an occupational disease as a matter of law, where it has been proved that the conditions of the extrahazardous employment in which the claimant was employed naturally and proximately produced the disease, and but for the exposure to such conditions the disease would not have been contracted." (Emphasis supplied)

"Disease" has been defined as any departure from health or illness in general (Webster's New World Dictionary). It's also been described as a particularly destructive process with a specific cause and characteristic symptoms. Dorland's Medical Dictionary (23rd edition) defines "disease" as "a definite morbid process having characteristic train of symptoms; it may affect the whole body or any of its parts, and its etiology, pathology, and prognosis may be known or unknown." A traumatic paresthesia, requiring medical treatment, would appear to fall within these definitions.

In rejecting the claim, the Department gave its reason in the typewritten portion of its order as:

> "That claimant's condition is not the result of an industrial injury as defined by the industrial insurance laws."

In that portion of its order, no mention was made concerning whether the claim might be compensable as an occupational disease. However, the "accident report" which Ms. Burr filed with the Department operates not just as a request for benefits for an "injury". Such report is most properly termed an application for compensation, as that is the term which the statute uses to describe the document a person must file to initiate a claim with the Department. *RCW 51.28.020*.

Being a general application for benefits, the Department must consider the claim as one for either an industrial injury or occupational disease. The Department cannot adjudicate the allowance of a claim on one ground only, i.e., injury. The Department's duty is to adjudicate an application for compensation on its merits as either an injury or disease. In fact, we believe the Department can be held responsible for having done so in this case.

We make this conclusion without reservation upon a simple reading of the printed portion of the Department's order form. Immediately preceding the typewritten reason for rejecting the claim, the printed form reads: "This claim for

injury, accident or occupational disease is rejected because . . . ." (Emphasis supplied) By noting in its printed order, alternative grounds by which an application for compensation can be considered, we assume the Department has taken the opportunity to do so.

Thus, even though the Department's order typed in a single reason for rejecting the claim, we believe it also acted to reject the claim as an occupational disease. By so doing, the issue of the claimant's condition as an occupational disease properly lies within the jurisdiction of this Board to determine.

Upon a consideration of the record before us in accord with the foregoing discussion, we conclude that Ms. Burr did develop an occupational disease within the meaning of the Workers' Compensation Act. We further conclude, therefore, the Department's order of May 25, 1978, is incorrect and this matter should be remanded to the Department with direction to allow the claim.

**FINDINGS**

After a careful review of the record, the Board finds as follows:

1. On May 18, 1978, the claimant, Judith K. Burr, filed an application for workers' compensation benefits with the Department of Labor and Industries alleging the onset of a compensable condition on April 26, 1978, while she was employed by Pacific Coast Services. On May 25, 1978, the Department issued an order rejecting the claim for reason that the "claimant's condition is not the result of an industrial injury as defined by the industrial insurance laws." On June 1, 1978, the claimant filed a notice of appeal with this Board, and on June 23, 1978, the Board granted the appeal.

2. While talking on the telephone during working hours on April 26 and April 27, 1978, the claimant repeatedly rested her left elbow on a table and as the result of this maneuver of her left upper extremity during this two day period, she developed a condition, traumatic paresthesia, involving her left hand and fingers, and which required medical treatment.

3. The claimant's traumatic paresthesia in her left upper extremity was the natural and proximate result of positions required in the performance of her employment.

**CONCLUSIONS**

Based on the foregoing findings of fact, the Board concludes as follows:

1. This Board has jurisdiction of the parties and the subject matter of this appeal.

2. The claimant developed an occupational disease within the meaning of the Industrial Insurance Act on or about April 27, 1978, while in the course of her employment with Pacific Coast Services.

3. The order of the Department of Labor and Industries dated May 25, 1978, effectively rejecting her application for benefits was incorrect, should be reversed, and the claim remanded to the Department with direction to allow the claim for an occupational disease, and to take such other and further action as may be indicated, and required or authorized by law.

It is so ORDERED.

BOARD OF INDUSTRIAL INSURANCE APPEALS

Michael L. Hall Chairman

Sam Kinville Member

**CONCUR:** August P. Mardesich

**DISSENTBY: DISSENTING OPINION**

The Department argues well and convincingly that claimant suffered no "injury" such as falls within either statute law or case law. The Proposed Decision and Order recognizes this and addresses itself instead to finding an occupational disease.

"Occupational disease," according to the law, "means such disease or infection as rises naturally and proximately out of employment . . ." (Emphasis supplied). Note the conjunctive "and."

Nowhere in the testimony is there found any evidence, claim or assertion that claimant's condition is the type of condition or disease which might rise "naturally and proximately" out of the employment.

It does not appear to be within the authority of this Board to make such findings without testimony from some medical expert that claimant's condition might naturally arise from the employment. There is no testimony to that effect in the record.

Dated this 18th day of April, 1979.

August P. Mardesich Member

**Legal Topics:**

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDIBenefit DeterminationsMedical BenefitsGeneral OverviewWorkers' Compensation & SSDICompensabilityInjuriesAccidental InjuriesWorkers' Compensation & SSDICompensabilityInjuriesOccupational Diseases

1 of 1 DOCUMENT

IN RE: RODNEY D. WILLIAMS

DOCKET NO. 12 17865; CLAIM NO. SC-77586

WASHINGTON STATE BOARD OF INDUSTRIAL INSURANCE APPEALS

*2013 WA Wrk. Comp. LEXIS 195*

August 12, 2013

**DISPOSITION:** REVERSED AND REMANDED

**COUNSEL:** Claimant, Rodney D. Williams, by Law Office of William D. Hochberg, per William D. Hochberg

Self-Insured Employer, The Microsoft Corporation, by Pratt, Day & Stratton, PLLC, per Nancy Thygesen Day

**JUDGES:** DAVID E. THREEDY, Chairperson; FRANK E. FENNERTY, JR., Member

**OPINION: [*1] DECISION AND ORDER**

The claimant, Rodney D. Williams, filed an appeal with the Board of Industrial Insurance Appeals on June 28, 2012, from an order of the Department of Labor and Industries dated May 29, 2012. In this order, the Department affirmed a February 10, 2012 Department order in which it denied the claim because it was not filed within one year after the day on which the alleged injury occurred. The Department order is **REVERSED AND REMANDED.**

**PROCEDURAL MATTERS**

The claimant filed a timely Petition for Review of a Proposed Decision and Order issued on April 11, 2013, in which the industrial appeals judge affirmed the Department order dated May 29, 2012. As provided by *RCW 51.52.104* and *RCW 51.52.106*, this matter is before the Board for review and decision.

The industrial appeals judge decided this appeal based on Motions for Summary Judgment filed by the self-insured employer, The Microsoft Corporation, and the claimant, Rodney D. Williams. A hearing was held on the motions on January 4, 2013. Prior to issuing the April 11, 2013 Proposed Decision and Order, the Board received [*2] Claimant's Motion for Reconsideration with an attached Declaration of Daniel L. Peterson, M.D. This motion was not identified in the Proposed Decision and Order as a document considered. We have considered the document, although such consideration does not materially affect our determination of this matter. We also consider the following documents in reaching our decision:

. Employer's Motion for Summary Judgment, with its attachments, including the declarations of Nancy Thygesen Day, Susan M. Dray, Ph.D., and Garrison Ayers M.D., and their exhibits;

. Claimant's Motion for Summary Judgment and its attachments, including the declarations of Rodney D. Williams,

Lillian Kaufer, and Peter A. Hashisaki, M.D., and their attachments:

. Employer's Response to Claimant's Motion for Summary Judgment;

. Claimant's Response to Employer's Motion for Summary Judgment;

. Employer's Reply to Claimant's Response to Employer's Motion for Summary Judgment;

. Claimant's Reply to Employer's Response to Claimant's Motion for Summary Judgment; and

. Corrected Declaration of Rodney D. Williams.

**DECISION**

The claim for benefits filed on August 24, 2011, by Rodney D. Williams arose out of his July [*3] 2007 business trip to India for Microsoft and his subsequent contention that he contracted a serious, likely viral, illness while on that trip. Adjudicating the claim as only for an industrial injury, the Department of Labor and Industries rejected Mr. Williams' claim as untimely based on the one-year filing limitations period on industrial injury claims contained in *RCW 51.28.050*. Mr. Williams argues that whether or not it found any injury claim time-barred the Department should have considered whether Mr. Williams had a timely claim for occupational disease and, if so, should have considered whether his claim should have been allowed for an occupational disease. We agree with Mr. Williams.

Microsoft contends the Department action rejecting Mr. Williams' claim was correct even though it addressed the claim only as for an industrial injury. Microsoft argues that if Mr. Williams contracted a disease while in India, it was due to a mosquito bite that Microsoft contends is materially analogous to a single harmful needle puncture and, therefore, only an industrial injury within the meaning of *RCW 51.08.100* [*4] , barred by the one-year limitations period in *RCW 51.28.050*. *See, In re Virginia P. Oakley*, Dckt. No. 97 3117-X (August 31, 1998).

Microsoft's analysis fails. The question of whether or not Mr. Williams actually sustained an occupational disease is not before us. Rather, the issue properly before this Board is whether Mr. Williams filed a claim for occupational disease, which claim should have been **considered** by the Department before rejecting the claim as an untimely claim for industrial injury. We find that the information supplied by Mr. Williams on his Self Insurer Accident Report is sufficient to require consideration by the Department of the claim as a claim for occupational disease. On the Self Insurer Accident Report, an item directed Mr. Williams to describe the "Part of body injured or exposed." Mr. Williams wrote "Febrile virus with encephalitis." On the same document, Mr. Williams was directed: "Describe in detail how your injury or exposure occurred; include tools, machinery, chemicals or fumes that **may** have been involved." (Emphasis added.) Mr. Williams wrote: "Traveling for work doing global research. Arrived in [*5] Mumbai India then had severe febrile illness in Mysore India with post viral encephalitis syndrome from arborvirus-insect bite." Exhibit A, Employer's Motion for Summary Judgment; also attached to Declaration of Lillian Kaufer with Claimant's Motion for Summary Judgment.

Whether Mr. Williams' description was sufficient to constitute a claim for occupational disease is a matter of law. We have previously used a "reasonable notification" standard in determining whether a sufficient claim for benefits was made to the Department. *In re Leroy Norris*, BIIA Dec., 92 1471 (1993) and *In re Charles Pierce*, BIIA Dec., 91 4625 (1993). We hold that Mr. Williams' description of an illness "febrile virus with encephalitis" contracted while "[t]raveling for work doing global research" was sufficient to place the Department on notice that Mr. Williams was making a claim for occupational disease. Mr. Williams' description, on demand by the query terms of the form itself, of what "may" have caused the disease (possibly a mosquito bite) is beside the point for purposes in the present procedural posture at the Board. The Department could have considered this answer or other available information [*6] and determined that Mr. Williams' condition is not an occupational disease. The Department did not do so but rather left the issue unaddressed in rejecting the claim.

The Department order failed to address Mr. Williams' occupational disease claim. The Department determination to reject the claim, addressing the claim only as for industrial injury, is incorrect insofar as claim rejection was premised wholly on the one-year filing claim applicable to industrial injury claims. The Department must adjudicate Mr. Williams' claim for occupational disease. Until that is accomplished by written order of the Department, the questions of whether Mr. Williams contracted an occupational disease and/or whether such claim is barred by the longer filing limitation applicable to occupational disease claims is not properly within the scope of this Board's appellate review authority. *Lenk v. Department of Labor & Indus., 3 Wn. App. 977, 982 (1970).*

We have considered the Proposed Decision and Order, Claimant's Petition for Review, Employer's Response to Claimant's Petition for Review, and Claimant's Reply to the Employer's Response to the Claimant's Petition for Review. [*7] Based on a thorough review of the entire record before us, including the materials related to the Motions for Summary Judgment and Claimant's Motion for Reconsideration, we make the following Findings of Fact and Conclusions of Law.

**FINDINGS OF FACT**

1. On August 21, 2012, an industrial appeals judge certified that the parties agreed to include the Amended Jurisdictional History in the Board record solely for jurisdictional purposes.

2. On August 24, 2011, the claimant, Rodney D. Williams, filed an Application for Benefits (Self Insured Accident Report assigned Claim No. SC-77586) with the Department of Labor and industries in which he alleged that he contracted a febrile virus with encephalitis during the course of his employment traveling for work doing global research with the self-insured employer, The Microsoft Corporation

3. The appealed Department of Labor and Industries order dated May 29, 2012, affirmed the Department's February 10, 2012 order in which the Department denied the claim for the stated reason: "No claim has been filed by said worker within one year after the day upon which the alleged injury occurred." The Department did not determine whether Mr. Williams' [*8] claim should be allowed or denied as a claim for occupational disease either on substantive or timeliness grounds.

4. The pleadings and evidence submitted by the parties demonstrate that there is no genuine issue as to any material fact bearing on the matter of whether Mr. Williams' claim should been considered and adjudicated as a claim for occupational disease.

**CONCLUSIONS OF LAW**

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

2. The claimant, Rodney D. Williams, is entitled to a decision in his favor as a matter of law as contemplated by *CR 56.*

3. The self-insured employer, Microsoft Inc., is not entitled to a decision in its favor as a matter of law as contemplated by *CR 56.*

4. The Application for Benefits (Self Insured Accident Report assigned Claim No. SC-77586) which claimant Rodney D. Williams caused to be filed with the Department of Labor and Industries on August 24, 2011, was sufficient as a claim for occupational disease within the meaning of *RCW 51.08.140* and *RCW 51.28.055* [*9] . The Department did not, within the meaning of *RCW 51.32.010* and *RCW 51.52.050*, determine whether Mr. Williams is entitled to compensation for an occupational disease, either on timeliness or substantive grounds.

5. The order of the Department of Labor and Industries dated May 29, 2012, is incorrect and is reversed. This matter is remanded to the Department of Labor and Industries to consider and adjudicate Mr. Williams' claim for

occupational disease and to determine whether he sustained an occupational disease and/or whether his claim for occupational disease was timely filed. This is without prejudice to the Department's determination as to whether Mr. Williams' claim is not timely insofar as considered as an industrial injury claim.

**Legal Topics:**

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDIAdministrative ProceedingsClaimsTime LimitationsClaim PeriodsWorkers' Compensation & SSDICompensabilityInjuriesOccupational DiseasesWorkers' Compensation & SSDIRemedies Under Other LawsExclusivityGeneral Overview

IN THE COURT OF APPEALS, DIVISION II

OF THE STATE OF WASHINGTON

| | | |
|---|---|---|
| KATHRYN LANDON, Appellant, v. THE HOME DEPOT Respondent. | ) | Court of Appeals Case No. 46955-3-II<br>Cowlitz County Case No. 13-2-00945-6<br><br>PROOF OF SERVICE |

I certify that on the 9th day of March, 2015, I deposited in the United States Mail, with proper postage prepaid, Brief of Appellant, dated March 9, 2015, addressed as follows:

Counsel for Respondent
Lance M, Johnson, Attorney
Sather Byerly Holloway LLP
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Portland, OR 97204-3613

(x) U. S. Mail

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct:

March 9, 2015, Vancouver, WA

Steven L. Busick, WSBA #1643



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