

**Karns, John**

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**COMMUNICATION OF DEPARTMENT ORDER**

**Presumptions of mailing and receipt**

Evidence that a Department order was mailed to the worker at his last known address gives rise to a presumption that the order was received by the worker in the due course of the mails. ....*In re John Karns*, BIA Dec., 05,181 (1956)

Scroll down for order.



1 claimant on July 21, 1954, and further that the employer's copy of said order mailed on the same  
2 date was received by the employer in Richland on July 22, 1954. The record further establishes  
3 that said order was addressed to the claimant's home at 1412 Marshall Street, Richland, Washing  
4 ton, and that he was living at that address at that time and at all times for the last five years. The  
5 claimant's testimony by which it was attempted to overcome the apparent defect on the face of the  
6 record with reference to the timeliness of his appeal is, to say the least, confusing and conflicting.  
7 He first testified with reference to the date he received the supervisor's order rejecting his claim as  
8 follows:  
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13 "Q Do you have any idea, though, just about the time that you received the  
14 answer that said you had no case?

15 "A No, I don't remember.

16 "Q You don't have any idea?

17 "A No.

18 "Q Now, answer me, do you know of your own knowledge whether or not  
19 your appeal, your Notice of Appeal was mailed within the 60 days that  
20 you got it?

21 "A No, I wouldn't swear to it." (Emphasis added)  
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23 He later stated that he gave the notice which he received rejecting his claim to his  
24 supervisor, Mr. A. E. Brown, "a couple of days" after he received it, but Mr. Brown, who was later  
25 called as a witness by the claimant, testified that the claimant at no time gave him any papers in  
26 connection with his claim. After the hearing had been recessed overnight, the original of the  
27 supervisor's order of July 21, 1954, which had been mailed to the claimant, was produced and  
28 identified at a hearing on the following day. At that time the claimant testified as follows with  
29 reference to his receipt of said order:  
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33 "Q Mr. Karns, I hand you Exhibit No. 2, which is a notice from the  
34 Department of Labor and Industries of the State of Washington, marked  
35 mailed July 21, 1954 by the Department of Labor and Industries, mailed  
36 to you, and I will ask you if you have any idea when you received that?  
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38 "A As far as I know, these things I get and sometimes the wife would get  
39 them and for two or three days or maybe a week she'll put it in the  
40 drawer. As far as I know, it would be the middle of August that I got  
41 anything like this.

42 "Q Well, now, is it within your knowledge, Mr. Karns, that your wife does put  
43 these things away?

44 "A Why, sure, she puts it away and keeps it. That is why I have all this  
45 stuff.

46 "Q Now, John, when did you receive this, to your knowledge?

47 "A Middle of August."

1 This last answer of the claimant was later explained on cross-examination as follows:  
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3 "Q Is it your testimony that you didn't receive it, in the sense you didn't get  
4 your hand on it in August, as it was misplaced you thought?

5 "A That is right." (Emphasis added)  
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7 Mr. Karns further testified on this subject as follows:  
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9 "Q It is your testimony now that Exhibit 2 you did receive that?

10 "A Wife says I had one like that. It is right.

11 "Q Have you seen it before?

12 "A She said she shown it to me.

13 "Q Do you remember ever seeing it?

14 "A Particularly I seen one but I didn't pay no attention to it."

15 "Q Well, now, that is what I am trying to get straightened out for the record.

16 So, now your testimony is that you did receive this one, Exhibit 2?

17 "A Yes.

18 "Q Where did this come from?

19 "A This come from Olympia.

20 "Q I understand that, but what did you do when you got it? Did you give it  
21 to your attorneys?

22 "A No.

23 "Q Where did you get this? Did you find this at your home?

24 "A This, well, I guess the attorney had that.

25 "Q When did you bring it to your attorney?

26 "A Well, if I took it, I took it down to him afterward.

27 "Q After what?

28 "A After I got the darn thing."

29 "Q How long after you got this did you go to see your attorney, by "this" I  
30 am referring to Exhibit 2?

31 "A About a week.

32 "Q About a week afterwards?

33 "A Yes." (Emphasis added)

34 Finally, on further cross-examination the claimant testified as follows:

35 "A When I got it, it was in August. It wasn't before August.

36 "Q You remember receiving it?

37 "A Yes.

38 "Q Where from?

39 "A Came from Olympia.

40 "Q When did you first get a hold of it?

41 "A About a week after it was brought to the house.

42 "Q Did you see it brought to the house?

43 "A No, I didn't see it brought to the house.

44 "Q Do you know when it was brought to your house?

45 "A No, I couldn't tell you when it was brought to the house because I don't  
46 get the mail out of the box all the time." (Emphasis added)  
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1 After the claimant had testified, his counsel stated that "we will call Mrs. Karns for the  
2 purpose of this jurisdictional question," but Mrs. Karns was never called.  
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4 The law is well established that failure to file an appeal within the time prescribed by statute  
5 prohibits this board from considering the merits of an appeal and that the burden is on the appellant  
6 to prove that the appeal was timely. Nafus v. Department of Labor and Industries, 142 Wash. 48;  
7 Smith v. Department of Labor and Industries, 1 Wn. (2d) 305; Lewis v. Department of Labor and  
8 Industries, 146 Wash. Dec. 365. In the Smith case the department records disclosed that the  
9 supervisor's order, from which the appeal was taken, was mailed to the claimant on August 20,  
10 1937, and the notice of appeal therefrom was filed with the joint board on October 26, 1937. The  
11 appeal was granted "Subject to proof that the statute of limitations had not operated against the  
12 appeal," but the claimant offered no evidence to show that the appeal was timely. The Supreme  
13 Court held that "the burden was upon appellant to challenge the existence of the apparent  
14 imperfection revealed by the record" and stated:  
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21 "The giving of notice of appeal within the time prescribed by statute is  
22 jurisdictional. Failure to comply with that jurisdictional requirement  
23 prohibits the joint board from considering the merits of a claimant's  
24 appeal.

25 In the case of Nafus v. Department of Labor and Industries, 142 Wash.  
26 48, 251 Pac 877, this court, in considering the question of appeals to the  
27 superior court quoted with approval the following statement in 11 Cyc.  
28 696:

29 'A court of special, limited, or inferior jurisdiction must by its record show  
30 all essential or vital jurisdictional facts of its authority to act in the  
31 particular case, and in what respect it has jurisdiction. This rule also  
32 applies to jurisdiction over special statutory proceedings exercised in  
33 derogation of, or not according to, the course of the common law. So  
34 the necessary jurisdictional facts must affirmatively appear by averment  
35 and proof to bring the case within the jurisdiction of such court."  
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37 In the Lewis case, supra, the court stated the rule as applicable to this board as follows:

38 "... Although the board of industrial insurance appeals is a quasi-judicial  
39 body (Floyd v. Department of Labor and Industries, 44 Wn. (2d) 560,  
40 269 P. (2d) 563), it is only a tribunal of special statutory jurisdiction, and  
41 the essential facts to show its jurisdiction must be proven before it can  
42 consider the merits of a particular case. (Smith v. Department of Labor  
43 and Industries, supra). Respondent has failed to prove these essential  
44 facts in this case. The burden was upon her to do so. MacVeigh v.  
45 Division of Unemployment Compensation, 19 Wn. (2d) 383, 142 P. (2d)  
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1 900. Therefore, the board of industrial insurance appeals had no  
2 jurisdiction as to respondent's case." (Emphasis added)  
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4 As heretofore pointed out, the record in the case here under consideration establishes that  
5 the supervisor's order rejecting this claim was mailed to the claimant, addressed to his home at  
6 1412 Marshall, Richland, Washington, on July 21, and that the claimant was living at that address  
7 at that time. These facts are sufficient to give rise to a presumption that the order was received by  
8 the claimant in "due course" of the mails. Avgerinon v. First Guaranty Bank, 142 Wash. 73. Such  
9 a presumption was also obviously the basis of the holding of the supreme court in the case of Smith  
10 v. Department of Labor and Industries, (supra) that "the burden was upon the appellant to  
11 challenge the existence of the apparent imperfection revealed by the record," inasmuch as there  
12 was no evidence in that case of the time of receipt of the order by the claimant. It is further  
13 established in this case that the employer's copy of the supervisor's rejection order, also mailed  
14 from Olympia on July 21, 1954, was received by the employer in Richland on July 22, 1954, so that  
15 it may further be presumed that the claimant's copy of said order was delivered to his home in  
16 Richland on July 22, 1954, or certainly not later than July 23rd. In either case, the appeal therefrom  
17 filed on September 24, 1954, would not be timely. The specific question presented, therefore, is  
18 whether or not there is any evidence in this record sufficient to overcome this presumption of  
19 communication of the supervisor's order of July 21, 1954, to the claimant on July 22 or 23, 1954.  
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28 Although the claimant testified that he did not get "hold" of the order until sometime in  
29 August, which was "about a week after it was brought to the house," he also testified that he did  
30 not know when it was brought to the house "because I don't get the mail out of the box all of the  
31 time." Clearly this testimony is not sufficient to overcome the presumption of delivery to his home  
32 on July 22 or July 23, 1954. His testimony as to when he actually obtained physical possession of  
33 the order in question, and as to what he did with it thereafter, is so vague, conflicting and  
34 inconsistent that in the board's opinion it can be given no probative weight whatsoever. However,  
35 even if his testimony that he did not actually get "hold" of the order and do something about it until  
36 "about a week after it was brought to the house" were accepted, it is noted that he admitted that his  
37 wife said "she shown it to me" and that "I didn't pay no attention to it," so that it is apparent that he  
38 saw and was aware of the communication from the department before that time. The issue  
39 therefore is further narrowed to the question of whether it can be said that the order was not  
40 "communicated" to the claimant because he didn't "pay no attention to it." The statute (R.C.W. Sec.  
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1 51.52.050) does not provide for personal service of the department's decisions and orders on the  
2 parties affected thereby, but merely that they be served "by mail, which shall be addressed to such  
3 person at his last known address as shown by the records of the department." Although R.C.W.  
4 Sec. 51.52.060 provides that the time limited for appeal does not begin to run until the department's  
5 decision or order is "communicated" to the persons affected thereby, if this were interpreted as  
6 meaning that such a decision or order is not "communicated" to a party until he chooses to pay  
7 attention to it and do something about it, there would be, in effect, no statute of limitations. This fact  
8 was recognized by our supreme court in the case of Nafus v. Department of Labor and Industries,  
9 142 Wash. 48. In holding that the claimant's appeal in that case was not timely, the court stated:

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15 "The controlling question is whether the appeal was prosecuted within  
16 time and this depends upon whether notice of the closing of the claim on  
17 April 23, 1925, was communicated to the respondent. The testimony of  
18 the respondent above set out shows that he received the letter of April  
19 23, 1925, and that it was in the pocket of his bathrobe that hung at the  
20 side of his bed. He says that the nurse read it and its contents were not  
21 communicated to him. Mr. Hammond testified that when he asked the  
22 respondent with reference to receiving a letter that he said that the letter  
23 was in his bathrobe. The undisputed evidence, then, is to the effect that  
24 the letter was received and placed in the pocket of the respondent's  
25 bathrobe which hung at the side of his bed, and he knew that it was  
26 there. He also knew that the letter was from Olympia. The fact that the  
27 respondent says that he did not read the letter and did not know its  
28 contents is not controlling. The department had done all it was required  
29 to do in making 'communication' of its decision in closing the claim to  
30 the party affected thereby. There is no evidence from which it could be  
31 found that the respondent was not competent to understand the nature  
32 of the communication at the time. It follows that the appeal was not  
33 taken within twenty days after notice of the decision of the department  
34 closing the claim had been communicated to the respondent."  
35 (Emphasis added)

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37 In the case here under consideration the claimant apparently does not know whether he or  
38 his wife took the communication from the department out of the mailbox. He stated merely that  
39 sometimes his "wife would get them and for two or three days or maybe a week, she'll put it in the  
40 drawer," but he also stated that he did not know when the notice was delivered to his house  
41 "because I don't get the mail out of the box all the time." Even if it were assumed that his wife did  
42 get the communication first, the fact remains that the claimant admitted that she showed it to him  
43 and he didn't pay any attention to it. If it were a fact that Mrs. Karns did not call her husband's  
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1 attention to the department's rejection order until sometime after it was received, this fact could  
2 easily have been established by Mrs. Karns, but she was not called as a witness and no attempt  
3 was made to explain why she was not called to testify. The board is of the opinion therefore that  
4 the claimant had failed to sustain his burden of proving that his appeal was filed within the time  
5 required by law. Inasmuch as the record does not affirmatively establish that the board has  
6 jurisdiction, the claimant's appeal must be dismissed.  
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### 10 **FINDINGS OF FACT**

11 In view of the foregoing and after reviewing the entire record herein, the board finds as  
12 follows;  
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- 14 1. The claimant, John T. Karns, filed a report of accident with the  
15 department of labor and industries on July 12, 1954, alleging that he  
16 suffered a loss of hearing as a result of exposure to noise in the course  
17 of his employment with the General Electric Company at its Hanford  
18 atomic project operations. His claim was rejected by an order of the  
19 supervisor of industrial insurance mailed to all parties on July 21, 1954.  
20 The claimant's copy of said order was addressed to his home at 1412  
21 Marshall Street, Richland, Washington, and the claimant was living at  
22 that address at that time and at all times subsequent thereto. The  
23 claimant filed a notice of appeal from the last mentioned order of the  
24 supervisor of industrial insurance with this board on September 24,  
25 1954, and the board granted the appeal "Subject to proof of timeliness"  
26 by order dated October 7, 1954.  
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- 28 2. The above-mentioned order of the supervisor of industrial insurance  
29 mailed July 21, 1954, was delivered to the claimant's residence at 1412  
30 Marshall Street, Richland, Washington, on July 22, 1954, or July 23,  
31 1954, and the claimant was living at said residence and actually present  
32 thereat on those dates.  
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### 34 **CONCLUSIONS OF LAW**

35 Based on the foregoing findings of fact, the board concludes:

- 36 1. The supervisor's order of July 21, 1954, rejecting the above-numbered  
37 claim was "communicated" to the claimant within the meaning of R.C.W.  
38 Sec. 51.52.060, not later than July 23, 1954.  
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- 40 2. The claimant's appeal from the above-mentioned order of the supervisor  
41 of industrial insurance filed with this board on September 24, 1954, was  
42 not filed within the time required by R.C.W. 51.52.060.  
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- 44 3. This board does not have jurisdiction to consider the merits of the  
45 claimant's appeal.  
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**ORDER**

Now, therefore, it is hereby **ORDERED** that the appeal of the above-named claimant filed herein on September 24, 1954, be, and the same is hereby, dismissed.

Dated this 7<sup>th</sup> day of February, 1956.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/ \_\_\_\_\_ Chairman

/s/ \_\_\_\_\_ Member

/s/ \_\_\_\_\_ Member