

Hull, Thomas

PROTEST AND REQUEST FOR RECONSIDERATION (RCW 51.52.050)

Application to reopen treated as protest

After the Department issues an order allowing and closing the claim that does not become final because it is not communicated to the worker, an application to reopen filed by the worker is considered a protest to the order. However, the Department order reopening the claim for aggravation is not a clear or unmistakable determination of claim allowance or rejection. The appeal must be remanded to the Department to act on the worker's timely protest to the order allowing the claim. ...***In re Thomas Hull, BIIA Dec., 09 10455 (2010)*** [*Editor's Note:* The Board's decision was appealed to superior court under King County Cause No. 10-2-33459-9 KNT.]

Scroll down for order.

**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

1 **IN RE: THOMAS B. HULL**) **DOCKET NOS. 09 10455 & 09 15672**
2)
3 **CLAIM NO. X-536469**) **DECISION AND ORDER**

4 **APPEARANCES:**

5 Claimant, Thomas B. Hull, Pro Se

6 Employer, Northwest Cascade, Inc., by
7 Pratt Day & Stratton, PLLC, per
8 Gibby M. Stratton

9 Department Assistant Attorney,
10 The Office of the Attorney General, per
11 Brian L. Dew

12 In Docket No. 09 10455, the employer, Northwest Cascade, Inc., filed an appeal with the
13 Board of Industrial Insurance Appeals on January 15, 2009, from an order of the Department of
14 Labor and Industries dated November 26, 2008. In this order, the Department affirmed its order of
15 October 17, 2008, in which it reopened the claim effective August 21, 2008, for authorized medical
16 treatment and other benefits. The Department order of November 26, 2008, is **REVERSED AND**
17 **REMANDED.**

18 In Docket No. 09 15672, the employer, Northwest Cascade, Inc., filed an appeal with the
19 Board of Industrial Insurance Appeals on June 3, 2009, from an order of the Department of Labor
20 and Industries dated April 21, 2009. In this order, the Department reversed its orders dated
21 December 29, 2008 and February 5, 2009, and paid time loss compensation benefits from
22 August 21, 2008 through December 11, 2008. The Department order of April 21, 2008, is
23 **REVERSED AND REMANDED.**

24 **DECISION**

25 As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for
26 review and decision. The claimant and Department filed timely Petitions for Review of a Proposed
27 Decision and Order issued on April 29, 2010, in which the industrial appeals judge reversed and
28 remanded the orders of the Department dated November 26, 2008, and April 21, 2009.

29 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
30 no prejudicial error was committed. The rulings are affirmed.
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1 We have granted review to address certain procedural and jurisdictional ambiguities that
2 occasionally develop when the Department of Labor and Industries allows and closes a claim in a
3 single order as it has done here. We will restrict our discussion to key facts, acknowledging that
4 certain subordinate issues may not be reached.

5 Mr. Hull alleges that on July 2, 2007, he suffered an industrial injury while working for
6 Northwest Cascade Incorporated. Thereafter, he filed a claim with the Department of Labor and
7 Industries. On October 8, 2007, the Department issued an order simultaneously allowing and
8 closing the claim.

9 Nearly a year later, on September 8, 2008, Mr. Hull filed an application to reopen his claim.
10 The Department responded favorably, reopening the claim by way of its order dated October 17,
11 2008.

12 Upon receiving notice of reopening, the employer objected. On October 22, 2008, it filed a
13 protest to the October 17, 2008 order. The Department considered the protest and, on
14 November 26, 2008, issued an order affirming its October 17, 2008 order. The employer objected
15 again, and on January 15, 2009, filed documents with this Board appealing the Department order of
16 November 26, 2008.

17 The matter went to hearing where evidence with jurisdictional implications was developed.
18 Specifically, Mr. Hull testified that he did not receive the order of October 8, 2007, in which the
19 Department had allowed and closed his claim. Rather than dispute the question of receipt, counsel
20 for the employer stipulated that the order of October 8, 2007, had not been communicated to
21 Mr. Hull. There appears to be no evidence to the contrary in the record. Thereafter, the employer
22 went on to challenge allowance of the claim.

23 We note that certain consequences flow from the failure to communicate a Department
24 order and briefly turn to *In re Glenda J. Singletary*, BIIA Dec., 06 12195 (2007). In that decision, we
25 determined that the Department order closing Ms. Singletary's claim had been misaddressed and
26 not communicated to Ms. Singletary. We concluded, "The June 20, 2003 application to reopen the
27 claim constituted a timely protest to the Department order of June 26, 2002. The Department's
28 subsequent action in reopening the claim and providing additional benefits constituted action by the
29 Department on this protest." *Singletary* at 7. Applying the rule in *Singletary* to the case at hand, it
30 follows that Mr. Hull's September 8, 2008 reopening application should constitute a timely protest to
31 the Department order of October 8, 2007, and that the Department's reopening order of October 17,
32 2008, should constitute action by the Department taken in response to Mr. Hull's protest.

1 January 21, 2009, the Board issued an order granting the appeal under
2 Docket No. 09 10455, and agreed to hear the appeal.

3 On December 24, 2008, the Department issued an order in which it paid
4 time loss compensation benefits for the period December 12, 2008
5 through December 23, 2008. On December 29, 2008, the Department
6 issued an order in which it denied time loss compensation benefits for
7 the period August 21, 2008 through December 11, 2008.

8 On February 5, 2009, the Department issued an order in which it
9 affirmed its order of December 29, 2008. On March 20, 2009, the
10 claimant filed a Notice of Appeal from the February 5, 2009 Department
11 order. (Docket No. 09 12973).

12 On April 20, 2009, the Department issued an order in which it
13 reassumed jurisdiction and reconsidered the February 5, 2009 order.
14 On April 21, 2009, the Board issued an order in which it returned the
15 case to the Department. (Docket No. 09 12973)

16 On April 21, 2009, the Department issued an order in which it paid time
17 loss compensation benefits for the period August 21, 2008 through
18 December 11, 2008. On May 29, 2009, the employer filed a Protest and
19 Request for Reconsideration of the April 21, 2009 order.

20 On June 3, 2009, the Department forwarded the protest to the Board as
21 a direct appeal. On June 8, 2009, the Board issued an order in which it
22 granted the appeal under Docket No. 09 15672, and agreed to hear the
23 appeal.

- 24 2. Thomas Hull alleges he injured his right shoulder on July 2, 2007, while
25 in the course of employment with Northwest Cascade, Inc., when he
26 used his right arm in an attempt to prevent a portable toilet from falling
27 over.
- 28 3. The Department order of October 8, 2007, simultaneously allowed and
29 closed the claim.
- 30 4. The order of October 8, 2007, was not communicated to Mr. Hull.
- 31 5. On September 8, 2008, Mr. Hull filed an application to reopen his claim.

CONCLUSIONS OF LAW

- 32 1. The Board of Industrial Insurance Appeals has jurisdiction over the
parties and subject matter of these timely appeals.
2. The Department order of October 8, 2007, was not communicated to
Mr. Hull, tolling the 60-day period for filing a protest or appeal.
3. Mr. Hull's September 8, 2008 reopening application constituted
Mr. Hull's timely Protest and Request for Reconsideration to the
October 8, 2007 order.
4. The Department orders of November 26, 2008 and April 21, 2009, are
incorrect and are reversed. These matters are remanded to the
Department with direction for the Department to act on the claimant's

1 timely protest to the October 8, 2007 order in a manner consistent with
2 this decision, and to take such other action as may be indicated by the
3 facts and law.

4 Dated: September 8, 2010.

5 BOARD OF INDUSTRIAL INSURANCE APPEALS
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8 /s/ _____
9 DAVID E. THREEEDY Chairperson

10
11 /s/ _____
12 LARRY DITTMAN Member
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