

## **Clubb, Joseph**

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### **SCOPE OF REVIEW**

#### **Discrimination claims (RCW 51.48.025)**

The decision of the Department that the worker failed to file the discrimination complaint within 90 days pursuant to RCW 51.48.025 is reviewable by the Board. ...*In re Joseph Clubb*, BIIA Dec., 10 19226 (2011)

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

<b>IN RE:    JOSEPH B. CLUBB</b>	)	<b>DOCKET NO. 10 19226</b>
	)	
<b>CLAIM NO. Y-284633</b>	)	<b>ORDER GRANTING CLAIMANT'S MOTION TO VACATE ORDER DENYING APPEAL AND ISSUING ORDER GRANTING APPEAL</b>
	)	

Joseph Clubb, pro se, filed an appeal on September 27, 2010, from a letter decision of the Department dated December 29, 2005. The letter decision was in response to Mr. Clubb's discrimination complaint filed with the Department, pursuant to RCW 51.48.025. In the letter, the Department declined to take action on the discrimination complaint because it was not received within 90 days of the alleged discriminatory act as required by RCW 51.48.025. On October 19, 2010, the Board issued an order denying the appeal, stating that the Board lacked jurisdiction to review Department determinations regarding investigations into alleged discrimination or determinations arising from such investigation. On November 1, 2010, the Board received a "Petition for Review" from Mr. Clubb addressing the October 19, 2010 Order Denying Appeal. We have treated this as a motion to reconsider.

Mr. Clubb argues that he was never informed about the 90-day time limit; that the letter decision of the Department, dated December 29, 2005, did not provide appeal rights; and that the Board should have jurisdiction to address these issues, as well as the underlying issue of "may the Board recommend that the Department investigate the alleged and provide a determination and findings."

We have taken the position in the past that appeals regarding discrimination determinations by the Department, under RCW 51.48.025 will be denied. This has been the Board's policy since at least 1992. See *In re Jeanie Zoolkoski*, Dckt. No. 92 5441 (November 24, 1992); *In re Michael H. Schafer*, Dckt. No. 03 21567 (November 24, 2003); *In re Manuela Hernandez*, Dckt. No. 08 17076 (September 2, 2008). These prior Board orders denying appeals from determinations by the Department regarding RCW 51.48.025, which prohibits retaliation by the employer against a worker for filing a claim, state that the statute is only enforceable by the superior court through an action by the Department or the worker. We find no reason to alter our previous decisions.

Mr. Clubb however, raises an issue not present in the earlier appeals in which we have addressed RCW 51.48.025. He seeks to challenge the Department letter determination that he was untimely in filing the discrimination complaint. He argues that if the Board determines that his complaint was timely, the Board should remand to the Department to conduct the investigation pursuant to RCW 51.48.025.

We are persuaded that RCW 51.48.025 provides a right to the worker to have a timely, effective investigation of the discrimination complaint upon the timely filing of the complaint with the Department. Without Board review of the threshold issue of timeliness of the filing of the complaint with the Department, the Department can, on its own, effectively eliminate this right and the worker has no recourse. The decision in this appeal that Mr. Clubb failed to file the discrimination complaint within 90 days is reviewable by this Board.

1 We vacate the Order Denying Appeal in this appeal and grant the appeal to allow Mr. Clubb  
2 an opportunity to challenge the Department determination that he failed to timely file his  
3 discrimination complaint pursuant to RCW 51.48.025.

4 Dated: January 21, 2011.

5 BOARD OF INDUSTRIAL INSURANCE APPEALS

6  
7 /s/ \_\_\_\_\_  
8 DAVID E. THREEEDY Chairperson

9  
10 /s/ \_\_\_\_\_  
11 FRANK E. FENNERTY, JR. Member

12  
13 /s/ \_\_\_\_\_  
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