

Jaz Services

ASSESSMENTS

Communication of order (RCW 51.48.120)

RCW 51.48.120 requires that service of a Notice of Assessment by mail be confirmed. If the USPS return receipt shows the Notice of Assessment was unclaimed, service of the Notice of Assessment is not confirmed and service by mail fails. ...*In re Jaz Services*, BIIA Dec., 13 11377 (2015)

Scroll down for order.

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

1 **IN RE: JAZ SERVICES LLC**) **DOCKET NO. 13 11377**
2)
3) **ORDER VACATING PROPOSED DECISION**
4) **AND ORDER AND REMANDING THE APPEAL**
5 **FIRM NO. 925,776-01**) **FOR FURTHER PROCEEDINGS**
6 _____

7 APPEARANCES:

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9 Firm, Jaz Services, LLC, by
10 Law Offices of Martin Silver, P.S., per
11 Martin Silver

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13 Department of Labor and Industries, per
14 Jerry Billings, Litigation Specialist, and by
15 The Office of the Attorney General, per
16 Scott T. Middleton
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18 Michael Daniels and Patricia Daniels filed an appeal with the Board of Industrial Insurance
19 Appeals on February 4, 2013, from a Department of Labor and Industries Order and Notice
20 Reconsidering Notice and Order of Assessment of Workers Compensation Taxes dated
21 December 14, 2012. In this order, the Department affirmed its Notice and Order of Assessment of
22 Corporate Officer Liability dated August 21, 2012, in which the Department assessed personally
23 Michael Daniels and Patricia Daniels, and their marital community, \$807,155.63 for the unpaid
24 taxes, penalties and interest that had accrued and were unpaid by the LLC, Jaz Services. The
25 appeal is **REMANDED FOR FURTHER PROCEEDINGS.**

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30 **PROCEDURAL AND EVIDENTIARY MATTERS**

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32 As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for
33 review and decision. The Department filed a timely Petition for Review of a Proposed Decision and
34 Order issued on November 17, 2014, in which the industrial appeals judge reversed and remanded
35 the Department order dated December 14, 2012. On February 26, 2015, the firm filed a Reply to
36 the Petition for Review.
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39 On June 6, 2013, the industrial appeals judge held a hearing on timeliness of the appeal that
40 Michael Daniels filed on his and Patricia Daniels' behalf. On September 6, 2013, the industrial
41 appeals judge issued an Interlocutory Order Finding a Timely Appeal. We agree with the timeliness
42 determination of the industrial appeals judge.
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45 Following issuance of the Interlocutory Order, a hearing was set for presentation of evidence
46 on the appeal by Michael Daniels and Patricia Daniels (the Daniels) and the Department of Labor
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1 and Industries. Before the hearing was held, the Daniels filed Appellant's Motion for Summary
2 Judgment and the Department filed its Opposition to the Daniels' Motion for Summary Judgment.
3 After briefing and a hearing on the motion, the industrial appeals judge issued the Proposed
4 Decision and Order in which she granted the Daniels' motion for summary judgment; reversed the
5 appealed order; and determined that the Daniels are not personally liable for the unpaid premiums
6 of Jaz Services, LLC.
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10 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
11 no prejudicial error was committed. The rulings are affirmed.
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13 DECISION

14 In this appeal Michael Daniels and Patricia Daniels contest the Department of Labor and
15 Industries' determination they are personally liable for the unpaid assessments of premiums and
16 penalties of Jaz Services, a limited liability corporation in which they were principals and that was
17 dissolved by the Secretary of State.
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19 Summary Judgment under Civil Rule 56 is appropriate only if there are no material facts.
20 and given the facts, the Daniels' should be granted relief from the appealed order. CR 56 permits
21 the court to pierce the formal allegations of fact in pleadings and grant relief by summary judgment
22 when determined by uncontroverted facts in affidavits, depositions, admissions, or answers to
23 interrogatories, there are no genuine issues of material fact. A material fact is one on which the
24 outcome depends in whole or in part. The burden is on the party moving for summary judgment to
25 show there is no issue of material fact. All reasonable inferences must be resolved against the
26 moving party, and the motion should be granted only if reasonable people could reach but one
27 conclusion.¹
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34 The industrial appeals judge determined the Daniels' appeal was timely based on an actual
35 hearing on this issue. The industrial appeals judge granted the Daniels relief from personal liability
36 by way of summary judgment. We discuss both here.
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38 **Appeal Timeliness.** We agree with the industrial appeals judge's determination that the
39 Daniels' appeal was timely filed. The Department directed its Order and Notice Reconsidering
40 Notice and Order of Assessment of Workers Compensation Taxes dated December 14, 2012, to
41 the Daniels by certified mail via the US Postal Service (USPS). The Daniels reside at the same
42 Woodinville address used by the Department in its mailing. Mr. Daniels testified that they receive
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47 ¹ See, *In re David Potts*, BIIA Dec., 88 3822 (1989)

1 their mail in "just one of ten mail boxes up the street and it's picked up and dived (*sic*) accordingly
2 personal and business."² Mail is picked up by Mr. Daniels, his wife, and two teenage children.
3 Mr. Daniels testified that he did not receive the Order and Notice until it was personally served on
4 him on January 9, 2013, and that he timely filed his appeal within thirty days on February 4, 2013.
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7 Jerold Billings, a Litigation Specialist with the Department, explained the Department's
8 practice of mailing by certified mail, then receiving USPS return receipts. Handwritten notes on a
9 return receipt indicate the dates USPS placed notice of the held mail in the mailbox of the intended
10 recipient. If the Department receives an indication that certified mail has been unclaimed or the
11 party has moved, the Department may try several measures such as re-mailing to a corrected
12 address or, as in the Daniels' case, personal service.
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16 The USPS return receipts related to the December 14, 2012 Order sent by certified mail on
17 December 28, 2012, was unclaimed. The receipts show notifications to the intended recipient of
18 December 29, 2012, January 15, 2013, and January 30, 2013. Exhibit No. 3; 6/6/13 Tr. at 24-35.
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21 There is no dispute over the fact that the December 14, 2012 order was not delivered to and
22 left at the Daniels' residence by the USPS. And, there is no dispute over the fact that the Daniels
23 did not receive the December 14, 2012 order until Mr. Daniels received it by personal service on
24 January 9, 2013. Mr. Daniels electronically filed his appeal on February 4, 2013.
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27 The Department may avail itself of alternative means to serve a written notice of
28 assessment on an employer: service by mailing by a method for which "receipt can be confirmed or
29 tracked to the employer's last known address or served in the manner prescribed for the service of
30 summons in a civil action."³ A notice of assessment becomes final thirty days from "the date the
31 notice of assessment was served" unless a written request for reconsideration is filed with the
32 Department or an appeal is filed with the Board.⁴
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36 The Department contends that the thirty days within which the Daniels must have appealed
37 should be counted from the date of mailing by certified mail, December 28, 2012, and contends the
38 Daniels' appeal over thirty days later on February 4, 2013, is untimely. We disagree with the
39 Department's contention. We agree with the industrial appeals judge's determination that the thirty-
40 day appeal period ran upon the date Mr. Daniels received the assessment, January 9, 2013, and
41 his appeal within thirty days on February 4, 2013, is timely. The Department's argument fails to
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46 ² 6/6/13 Tr. at 6.

47 ³ RCW 51.48.120

⁴ RCW 51.48.131.

1 distinguish between the statutory provisions for optional **means** of service and **actual** service. The
2 means initially utilized by the Department, certified mail, was permitted, but failed. The assessment
3 was not left for the Daniels to view. The statute, in allowing for certified mail, contemplates that
4 "receipt be confirmed."⁵ Receipt by Daniels was not confirmed until successful personal service on
5 January 9, 2013. The appeal is timely.
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9 **The Daniels' Substantive Defense.** The Department's authority for personal liability
10 assessments is contained in RCW 51.48.055. In their Motion for Summary Judgment, the Daniels
11 seek to rely on subsection (4) of this statute: "The officer, member, manager, or other person is not
12 liable if all of the assets of the corporation or Limited Liability Company have been applied to its
13 debts through bankruptcy or receivership."
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16 To support their Motion for Summary Judgment, the Daniels presented evidence that Jaz
17 Services filed for Chapter 7 bankruptcy through Mr. Daniels on February 7, 2013, listing assets of
18 \$100. And the Daniels presented evidence that the bankruptcy court at the outset indicated that
19 creditors should not proceed with proof of claims unless they were further notified to provide such.
20 Eventually the court closed the bankruptcy case with an indication there were no assets to
21 distribute.
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25 We reject the Daniels' reliance on the bankruptcy defense allowed in RCW 51.48.055 (4)
26 because their Chapter 7 filing did not occur until after the Department issued its orders that are the
27 subject of this appeal. The Board must determine whether an appealed Department order was
28 correct as of the time the Department issued its order and not as of some later date. The term *nunc*
29 *pro tunc*⁶ commonly refers to whether a court should, based on new facts, change its prior order
30 issued before new material facts came into existence. The Daniels ask this Board to direct the
31 Department to change its personal liability assessment against them based on material facts, the
32 fact of bankruptcy, that exist now but that did not exist when the Department issued its personal
33 liability assessment against them. This would require the exercise of equitable powers this Board
34 lacks.⁷
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40 We find this appeal timely, but we deny the Daniels' Motion for Summary Judgment. The
41 Proposed Decision and Order of November 17, 2014, is vacated. This order vacating is not a final
42 Decision and Order of the Board within the meaning of RCW 51.52.110.
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45 ⁵ RCW 51.48.120

46 ⁶ Latin, literally meaning "now for then."

47 ⁷ See *In re Johanna Hoerner, Dec'd*, BIIA Dec., (1986).

1 We note there may be issues raised as contested in future proceedings not yet identified
2 and on which no evidence has been provided. These are such as control or supervision and willful
3 failure to pay, as referenced in subsections (1) and (2) of the governing statute; whether the
4 personal liability assessment was accurate in amount in light of subsection (2); and, whether either
5 of the Daniels was a mandatorily covered person directed not to pay as referenced in subsection
6 (3) of the statute. We express no view or inclination regarding the existence of any or whether they
7 warrant presentation of evidence and/or briefing. There may be issues other than these and we
8 have referenced these solely to underscore our obligation to provide opportunity for further hearing.
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10 This appeal is remanded to the hearings process as provided by WAC 263-12-145(4), for
11 further proceedings as indicated by this order. Unless the matter is settled or dismissed, the
12 industrial appeals judge will issue a new Proposed Decision and Order. The new order will contain
13 findings and conclusions on each contested issue of fact and law. Any party aggrieved by the new
14 Proposed Decision and Order may petition the Board for review, as provided by RCW 51.52.104.
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21 Dated: April 9, 2015.
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23 BOARD OF INDUSTRIAL INSURANCE APPEALS
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26
27 /s/ _____
28 DAVID E. THREEEDY Chairperson
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32 /s/ _____
33 FRANK E. FENNERTY, JR. Member
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37 /s/ _____
38 JACK S. ENG Member
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