

Sound Dive Center

ASSESSMENTS

Communication of order (RCW 51.48.120)

The Department must resolve any doubts regarding who to communicate a Notice and Order of Assessment to by making an inquiry with the firm. ...*In re Sound Dive Center, BIIA Dec., 14 12707 (2015)*

Scroll down for order.

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

IN RE: SOUND DIVE CENTER) **DOCKET NO. 14 12707**
)
) **ORDER VACATING PROPOSED DECISION**
) **AND ORDER AND REMANDING THE APPEAL**
) **FOR FURTHER PROCEEDINGS**
FIRM NO. 813,235-00)

APPEARANCES:

Firm, Sound Dive Center, by
Law Office of Paul W Bryan, PLLC, per
Paul W. Bryan

Department of Labor and Industries, by
Jerry Billings, Litigation Specialist, and by
The Office of the Attorney General, per
Maureen A. Mannix

The firm, Sound Dive Center, filed a protest with the Department of Labor and Industries on July 1, 2014. The Department forwarded the protest to the Board of Industrial Insurance Appeals to be treated as an appeal. The firm appeals a May 27, 2014 Notice and Order of Assessment (NOA) in which the Department modified a May 4, 2011 NOA, reducing the assessment of taxes for the four quarters of 2010 from \$20,321.81 to \$15,585.59. The appeal is **REMANDED FOR FURTHER PROCEEDINGS**.

DECISION

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The firm filed a timely Petition for Review of a March 13, 2015 Proposed Decision and Order in which the industrial appeals judge dismissed the appeal as untimely.

The Department issued an NOA on May 27, 2014, and received a protest via email on July 1, 2014. The Department transmitted the protest to the Board, to be treated as an appeal. The threshold question is whether the appeal is timely. The resolution of that question depends on whether the NOA was properly served. We conclude that it was not. The 30-day time limit for filing a protest or appeal under RCW 51.48.131 was not triggered. The appeal is therefore timely.

The facts are undisputed. The Department did not serve the May 27, 2014 NOA on the firm at its address in Bremerton. Instead, it served the firm's accountant in Port Orchard by mail on May 30, 2014. Under RCW 51.48.131, any protest or appeal must be filed within 30 days of the

1 date an NOA is served. Thirty days after May 30, 2014 fell on Sunday, June 29, 2014. If the NOA
2 was properly served, the firm had until Monday, June 30, 2014, to file a protest or appeal.¹

3 The firm's accountant emailed a protest to the Department on July 1, 2014. That is one day
4 late under RCW 51.48.131, if service of the NOA was proper under RCW 51.48.120 and
5 RCW 51.04.082. But if the Department had to serve the NOA on the firm at its address in
6 Bremerton, the protest was timely because the Department failed to effectuate proper service. The
7 Department cited *Bell & Bell Builders (II)*² to support its position it was only required to mail the
8 order to the CPA as the firm's representative. The industrial appeals judge (IAJ) agreed. *Bell* is
9 distinguishable.

10 To determine whether the Department properly served the May 27, 2014 NOA, we must go
11 back to 2011. The Department issued an NOA on May 4, 2011. The address on the face of the
12 NOA was:

13 Yodaworks Inc.
14 Geoff Pentz, Owner
15 5000 Burwell Street
16 Bremerton WA 98312-3302

17 There was a United States Postal Service (USPS) track and confirm number next to that address.
18 According to Jerold Billings, a Department litigation specialist, that is how the Department tracks
19 whether the order has been received. The document associated with the USPS number was
20 signed for by Scott Pentz at the 5000 Burwell St. address in Bremerton on May 9, 2011.

21 Geoff Pentz, the firm's owner, protested the NOA by a May 23, 2011 letter ending with the
22 following statement:

23 Once contacted by the Department of Labor & Industries regarding reconsideration, I
24 will provide appropriate support documentation. Furthermore, Southard, Beckham,
25 Atwater & Berry CPA PS will represent Yodaworks, Inc. for the duration of the
26 reconsideration and/or appeals regarding field audit no. 0535966.³

27 The Department contends that language constituted a change of address. According to
28 Mr. Billings:

29 We serve to the last known address of the employer, if the employer has given us
30 notification that they're being represented by a lay person or an accountant or a

31 ¹RCW 1.12.040 ("The time within which an act is to be done . . . shall be computed by excluding the first day, and
32 including the last, unless the last day is a holiday, Saturday, or Sunday, and then it is also excluded.")

² *In re Bell & Bell Builders (II)*, BIIA Dec., 90 5119 (1992).

³ Exhibit No. 3.

1 lawyer then that becomes the representative who we serve the process on. That
2 becomes a change of address and we serve it to the representative.⁴

3 But when the Department held the May 4, 2011 NOA in abeyance on June 7, 2011, the address on
4 the face of that order was the same as on the NOA and the order was served on the firm at its own
5 address in Bremerton.

6 Three years later, the Department issued its May 27, 2014 order, modifying the May 4, 2011
7 NOA. Once again, the address on the face of the order was the firm's address in Bremerton, same
8 as with the May 4, 2011, and June 7, 2011 orders. But Mr. Billings explained that he had directed
9 the revenue agent to mail the order to the "registered agent or the representative Mr. Huff at that
10 CPA firm," with whom he had communicated during the reconsideration process.⁵ The May 27,
11 2014 NOA was served on the CPA at PO Box 706, Port Orchard, WA 98366, on May 30, 2014.
12 Mr. Pentz testified that the firm had not received a copy of the May 27, 2014 order at its address in
13 Bremerton and the Department does not dispute that.

14 Mr. Billings cited *Bell* as authority for mailing the order to an address different from the one
15 on the order. In dismissing the appeal, the IAJ relied on *Bell* "which required service upon a firm's
16 representative."⁶ *Bell* is distinguishable.

17 RCW 51.48.131 establishes a deadline of "thirty days from the date the notice of assessment
18 was served upon the employer" for filing a protest or appeal. The critical question constitutes
19 proper service. To answer that question, we turn to RCW 51.48.120 and 51.04.082.
20 RCW 51.48.120 requires that the NOA be mailed to "the employer's last known address." If service
21 is effectuated by mailing, RCW 51.04.082 requires that the order "shall be addressed to the
22 address of the employer as shown by the records of the department."

23 In *Bell*, the firm's attorney protested an NOA, stating: "The employer requests that the
24 Department of Labor and Industries holds in abeyance the Notice of Assessment until further
25 investigation can be done by the Department in cooperation with the attorney for the employer.
26 Arrangements to review the employer's records may be made through the undersigned attorney."⁷
27 The Department sent the subsequent NOA directly to the firm and the appeal from that order was
28 filed more than 30 days after the NOA was received by the firm. If the NOA were properly served,
29 the appeal would be untimely under RCW 51.48.131. However, the Board found the appeal timely

30 ⁴ 1/21/15 Tr. at 13.

31 ⁵ 1/21/15 Tr. at 24.

32 ⁶ Proposed Decision and Order, at 2.

⁷ *Bell*, at 3.

1 because the NOA should have been served on the firm's attorney. The Board held "that where an
2 attorney or other representative has appeared before the Department on behalf of a firm and has
3 expressed a desire to receive further communications from the Department concerning an
4 assessment of industrial insurance taxes, the Department is obligated to direct all future
5 correspondence to the firm regarding such assessment to the firm's attorney or representative."⁸

6 The facts in the current appeal differ from those in *Bell* in several key respects. In *Bell*, the
7 attorney filed the protest, demonstrating that he was the firm's legal representative. Here, the
8 owner of the firm filed the May 23, 2011 protest, not his CPA. In response, the Department held the
9 NOA in abeyance, mailing that order directly to the firm, not the CPA. The Department gave no
10 indication to the firm that its address had been changed to that of the CPA. The May 27, 2014 NOA
11 also had the firm's own address on its face, not the CPA's, a further indication that the Department
12 had not changed the firm's address in its records.

13 In addition, the Department itself must have considered the meaning of the language in
14 Mr. Pentz's May 23, 2011 protest ambiguous because it communicated directly with the firm on
15 June 7, 2011, not with the CPA. And because that order was served on Mr. Pentz, there was no
16 reason for him to expect that the Department would not send him the follow-up order.

17 That subsequent order was issued three years after the protest was received. The Board
18 addressed a similar time lag issue in *In re Betty Brashear*,⁹ a case involving whether an order was
19 properly communicated to an injured worker. In *Brashear*, a law firm filed a notice of representation
20 with the Department while the injured worker's claim was in closed status. Ms. Brashear later
21 applied to reopen her claim and the Department sent the responsive order to her, not her attorney.
22 She failed to file a protest or appeal. Her attorney later notified the Department he had never
23 received a copy of the order. The Department then issued an order stating that it could not
24 reconsider the order because it had not been timely protested.

25 Ms. Brashear appealed and the Board held that when there was uncertainty whether a party
26 was represented, the Department was obligated to "make reasonable inquiry."¹⁰ "As a rule,
27 ambiguity should always be resolved in favor of notice and inquiry."¹¹ The Board reversed the
28 Department order and remanded with direction to "communicate the June 24, 1994 order to the
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30 ⁸ *Bell*, at 3

31 ⁹ *In re Betty Brashear*, Dckt. No. 96 3341 (August 8, 1997).

32 ¹⁰ *Brashear*, at 4.

¹¹ *Brashear*, at 4.

1 claimant and the claimant's representative pursuant to RCW 51.52.050, and to further consider any
2 protests and request [*sic*] for reconsideration which may be filed thereto."¹²

3 Here, the Department sent the June 7, 2011 order directly to the firm even after it received
4 the May 23, 2011 letter that Mr. Billings now argues constituted a change of address. Likewise, the
5 May 27, 2014 order listed the firm's address, not the CPA's. Yet Mr. Billings sent the order to an
6 address other than the one on the order. Prior to taking that action, he should have resolved any
7 doubts by inquiring where the firm wanted the order to be sent, particularly because the firm's right
8 to protest or appeal was at stake.

9 Because the Department failed to properly serve the NOA on the firm, the 30-day time limit
10 for filing a protest or appeal was not triggered. The firm's July 1, 2014 protest, which the
11 Department has transmitted to the Board to be treated as an appeal, was therefore timely filed.
12 The March 13, 2015 Proposed Decision and Order dismissing the appeal as untimely is vacated.
13 This order is not a final Decision and Order of the Board within the meaning of RCW 51.52.110.
14 The appeal is remanded to the hearings process, as provided by WAC 263-12-145(4), for further
15 proceedings on the merits. Unless the appeal is settled or dismissed, the industrial appeals judge
16 will issue a new Proposed Decision and Order. The new order will contain findings and conclusions
17 on each contested issue of fact and law. Any party aggrieved by the new Proposed Decision and
18 Order may petition the Board for review, as provided by RCW 51.52.104.

19 Dated: June 8, 2015.

20 BOARD OF INDUSTRIAL INSURANCE APPEALS

21
22
23 /s/ _____
24 DAVID E. THREEDY Chairperson

25
26 /s/ _____
27 FRANK E. FENNERTY, JR. Member

28
29 /s/ _____
30 JACK S. ENG Member

31 _____
32 ¹² *Brashear*, at 6.