

Lopez Hernandez, Misael

PROTEST AND REQUEST FOR RECONSIDERATION (RCW 51.52.050)

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A protest filed to any "adverse orders" is reasonably calculated to put the Department on notice that the worker is requesting action inconsistent with an order setting the wage for time-loss compensation purposes and orders paying time-loss compensation based on the wage order. ...*In re Misael Lopez Hernandez*, BIIA Dec., 15 16635 (2016)

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

1	IN RE: MISael LOPEZ HERNANDEZ)	DOCKET NO. 15 16635
2)	
3)	ORDER VACATING PROPOSED DECISION
4)	AND ORDER AND REMANDING FOR FURTHER
	<u>CLAIM NO. AS-32552)</u>	PROCEEDINGS

5 On February 11, 2013, the Department issued an order allowing Mr. Hernandez's claim as
6 an industrial injury. The Department then issued an order on April 3, 2013, setting his wage rate
7 and paying him time-loss compensation benefits from February 4, 2013, through February 15,
8 2013. On April 11, 2013, Injury Advocates, LLC, submitted their Notice of Appearance with the
9 Department and generically appealed any adverse orders.

10 The Department continued to adjudicate Mr. Hernandez's claim and paid him time-loss
11 compensation benefits from August 30, 2013, through November 7, 2013, in five separate orders
12 (September 12, 2013; September 26, 2013; October 10, 2013; October 24, 2013; and November 7,
13 2013). In a letter dated November 15, 2013, John E. Wallace informed the Department that he had
14 been retained to represent Mr. Hernandez. Mr. Wallace's Notice of Appearance also generically
15 protested any adverse orders.

16 On May 28, 2015, the Department issued an order affirming as correct its previous
17 allowance order dated February 11, 2013. On May 29, 2015, the Department issued an order
18 affirming as correct the following orders: April 3, 2013; September 12, 2013; September 26, 2013;
19 October 10, 2013; October 24, 2013; and November 7, 2013. The employer filed timely appeals to
20 these orders and they were assigned Docket Nos. 15 16634 and 15 16635 respectively.

21 Both appeals were consolidated for the purpose of hearings and Mr. Hernandez filed a
22 Motion to Dismiss with respect to the employer's two appeals. On January 13, 2016, our industrial
23 appeals judge issued a single Proposed Decision and Order dismissing the employer's appeals
24 under both dockets..

25 The employer filed a Petition for Review. Deconsolidation of the employer's appeals is
26 necessary in this matter to address the distinct determinations we have made.

27 With respect to the employer's appeal under this docket, we conclude that the Department
28 could reasonably consider the orders dated September 12, 2013; September 26, 2013;
29 October 10, 2013; October 24, 2013; and November 7, 2013, as protested by Mr. Wallace's
30 November 15, 2013 generic protest. The Proposed Decision and Order of
31 January 13, 2016, is vacated and this appeal is **REMANDED FOR FURTHER PROCEEDINGS.**

1 **DISCUSSION**

2 The employer argues in their Petition for Review that Injury Advocates' April 11, 2013
3 generic protest operated to place the February 11, 2013 allowance order in an interlocutory status.
4 As an operation of this interlocutory status, the employer asserts that all subsequent orders
5 encompassed in the Department's May 29, 2015 order are void as a matter of law. We believe that
6 these arguments are without merit.

7 There is no dispute that Injury Advocates' protest dated February 11, 2013, and
8 Mr. Wallace's November 15, 2013 protest are what is referred to as "generic protests." As is often
9 the case, generic protests are routinely filed with the Department by law offices as emergency
10 protective devices soon after a party comes to them for assistance with a workers' compensation
11 claim. We have previously held that there are no strict requirements on the form of a protest and a
12 document will suffice as a protest if it is reasonably calculated to put the Department on notice that
13 the party is requesting action inconsistent with the decision of the Department.¹ Moreover, there
14 are most definitely circumstances where it might be reasonably argued and proven that a generic
15 protest, using only language such as "any order adverse to" the party issued within "the last sixty
16 days," may sufficiently put the Department on notice of an intent to protest a particular order.

17 When a generic protest is filed within 60 days of orders setting the rate of time-loss
18 compensation and paying time-loss compensation benefits at that rate, the Department can
19 reasonably consider those orders as protested. In other words, a case can be made that the
20 time-loss compensation rate set forth in the Department's April 3, 2013 wage order was incorrect
21 and too low, thereby rendering not only the wage order but all subsequent time-loss compensation
22 orders adverse. From our review of the Jurisdictional History, however, we note that the
23 Department construed Injury Advocate's generic protest as a protest to their wage order and
24 responded by issuing a determinative order on May 13, 2013. This order was neither protested
25 and/or appealed by any party and is now final and binding. The Department's attempt to affirm the
26 April 3, 2013 order in its order dated May 29, 2015, constitutes an error of law.

27 This then leaves Mr. Wallace's November 5, 2013 generic protest. It was filed within the
28 60-day period of the Department's orders dated September 12, 2013; September 26, 2013;
29 October 10, 2013; October 24, 2013; and November 7, 2013. The Department could reasonably
30 conclude that Mr. Hernandez disagreed with the amount paid or with the calculations of his
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32 ¹ *In re Mike Lambert*, BIIA Dec., 91 0107 (1991).

1 payments. It is for this reason that we vacate our hearing judge's January 13, 2016 Proposed
2 Decision and Order and remand the matter for further hearings regarding the question of
3 Mr. Hernandez's entitlement to time-loss compensation benefits from August 30, 2013, through
4 November 7, 2013, the period of time encompassed in the five non-final time-loss compensation
5 benefits orders. The Department's April 3, 2013 wage order affirmed on May 13, 2013, is final and
6 binding and is not to be included as an issue subject to further litigation.


7 **ORDER**

8 This appeal is remanded to the hearings process, as provided by WAC 263-12-145(4), for
9 further proceedings as indicated by this order. Unless the matter is settled or dismissed, the
10 industrial appeals judge will issue a new Proposed Decision and Order. The new order will contain
11 findings and conclusions as to each contested issue of fact and law. Any party aggrieved by the
12 new Proposed Decision and Order may petition the Board for review, as provided by
13 RCW 51.52.104. This order vacating is not a final Decision and Order of the Board within the
14 meaning of RCW 51.52.110.

15 Dated: April 28, 2016.

16 BOARD OF INDUSTRIAL INSURANCE APPEALS

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1 **Addendum to Decision and Order**
2 **In re Misael Lopez Hernandez**
3 **Docket No. 15 16635**
4 **Claim No. AS-32552**

5 **Appearances**

6 Claimant, Misael Lopez Hernandez, by Law Office of John E. Wallace, PLLC, per John E.
7 Wallace

8 Employer, Thomas Fragnoli Construction, by Holmes Weddle & Barcott, P.C., per Ann M.
9 Silvernale

10 Department of Labor and Industries, by The Office of the Attorney General, per Sharon
11 James

12 **Department Order(s) Under Appeal**

13 In Docket No. 15 16635, the employer, Thomas Fragnoli Construction, filed an appeal with
14 the Board of Industrial Insurance Appeals on June 29, 2015, from an order of the Department of
15 Labor and Industries dated May 29, 2015. In this order, the Department affirmed as correct the
16 following orders: April 3, 2013; September 12, 2013; September 26, 2013; October 10, 2013;
17 October 24, 2013; and November 7, 2013.

18 **Petition for Review**

19 As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
20 and decision. The employer filed a timely Petition for Review of the Proposed Decision and Order
21 issued on January 14, 2016.
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