Malarchick, Mario

COMMUNICATION OF DEPARTMENT ORDER

Presumptions of mailing and receipt

The presumption of delivery of an order in the due course of the mail cannot be rebutted by a party's deliberate choice to avoid checking his mail or negligent decision to disregard or fail to read an order properly mailed and delivered to the correct address. The presumed date of delivery is the start of the time period in which to appeal or protest and the party's failure to check the mail will not delay the start of that time period. **….*In re Mario Malarchick*, BIIA Dec., 18 30609 (2019)** [dissent]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: MARIO MALARCHICK	**)**	**DOCKET NO. 18 30609**
	)	
CLAIM NO. BC-90838	**)**	**DECISION AND ORDER**

Mario Malarchick filed a claim for an injury to his left knee that occurred while working for Scimitar Construction. The Department rejected the claim and issued an order indicating it could not reconsider the order rejecting the claim because the protest was not filed within 60 days of communication. The sole issue before us is whether Mr. Malarchick filed a timely protest to the rejection order. Our industrial appeals judge found the protest untimely. We agree with our judge's decision, but grant review to further explain our reasoning. The Department order is **AFFIRMED**.

DISCUSSION

Mario Malarchick presented himself and Jill Bonnifield as witnesses to establish the date he received the May 10, 2018 Department order. He and Ms. Bonnifield are roommates living in Idaho. Mr. Malarchick was in the process of moving from Washington to Idaho around the time the Department issued the May 10, 2018 order. At the time, he received his mail at a P.O. Box in Grangeville, ID, approximately 10 miles from his home. He does not check his mail regularly.

On May 6, 2018, Mr. Malarchick drove Ms. Bonnifield and her granddaughter to the airport so they could rent a car to pick up her daughter in Boise. Meanwhile, Mr. Malarchick drove to Bellevue to rent a moving truck to empty his storage units and move his belongings to Idaho. He returned the truck in Idaho on May 12, 2018, and drove back to Bellevue with Ms. Bonnifield to pick up his car that evening. They returned home on May 13, 2018.

Mr. Malarchick acknowledged that he spoke to his claims manager on May 16, 2018, and learned that the claim rejection had been affirmed and he would be receiving an order in the mail. Based on the telephone conversation, he knew that he intended to appeal the claim rejection order.

Mr. Malarchick went to Grangeville for errands on May 16 and 17, 2018, and returned there again on May 21, 2018. He returned to town again on May 25, 2018, to check the mail. He received and read the Department order on May 25, 2018. He filed his protest on July 18, 2018.

The Department presented testimony from Thomas A. Thomas to establish the date of delivery of the May 10, 2018 order. Mr. Thomas has worked for the Department of Labor and Industries for 28 years. He is very familiar with the process of mailing Department orders and receiving outside communications. He provided a thorough explanation of that process during his testimony.

Based on his review of Mr. Malarchick's file, Mr. Thomas was able to determine that the May 10, 2018 Department order affirming claim rejection was properly mailed to Mr. Malarchick's correct address and according to Department procedures on May 10, 2018. He testified that allowing three business days for receipt would be common, and in this case that would make the date of delivery May 15, 2018. The order specifically stated that any appeal must be filed within 60 days of communication. Sixty days from May 15, 2018, would have been July 14, 2018. Mr. Thomas also testified that the Department received Mr. Malarchick's protest of the May 10, 2018 order via fax communication on July 18, 2018.

RCW 51.52.060 provides that the appellate time period does not begin to run until the Department's decision or order is "communicated" to the affected parties; but, it does not define communication. We have consistently held that a decision or order is communicated on the date it is received.

We start with a presumption that properly addressed mail will reach its destination. RCW 51.52.050 authorizes service of orders "by mail, which shall be addressed to such person at his last known address as shown by the records of the department," rather than by personal service. Evidence that a Department order is mailed to a worker at the last known address gives rise to a presumption that the order was received by the worker in the due course of the mails.[1] This is a rebuttable presumption.

Our approach in determining the date of receipt has been not only to consider when the order was mailed but also to examine circumstances that can cause an excusable delay in actual receipt. In 1947, upholding the Board's determination that a claimant's appeal was untimely, the Washington Supreme Court stated:

> The undisputed evidence, then, is to the effect that the letter was received and placed in the pocket of the respondent's bathrobe which hung at the side of his bed, and he knew that it was there. He also knew that the letter was from Olympia. The fact that the respondent says that he did not read the letter and did not know its contents is not controlling. The department had done all it was required to do in making 'communication' of its decision in closing the claim to the party affected thereby.[2]

In 1956, we agreed with this line of reasoning stating:

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[1] *In re John Karns*, BIIA Dec., 05,181 (1956).
[2] *Nafus v. Dep't of Labor & Industries*, 142 Wash. 48 (1947).

> If [RCW 51.52.060] were interpreted as meaning that such a decision or order is not "communicated" to a party until he chooses to pay attention to it and do something about it, there would be, in effect, no statute of limitations.[3]

Early Board decisions expected some level of diligence on the part of the recipient, but acknowledged that certain circumstances that interfere with actual receipt can be recognized as delays in effective communication. In our 1959 decision *In re Edward Morgan*, we contemplated such a situation when we found the claimant had regularly checked his mail at a private mail drop in anticipation of an appealable order, and excused a delay in challenging the order when the mail was not properly delivered.

> While it is possible that the order in question may have been delivered to 114 Occidental Avenue and misplaced by someone at that address, we do not believe that delivery at that address, under the circumstances, constituted "communication" to the claimant. **Although a claimant who deliberately or negligently disregards or fails to read a communication delivered to his residence may well be charged with knowledge or notice thereof,** the claimant in this case called for his mail each day and, in our opinion, it would be manifestly unjust and contrary to the legislative intent to charge him with notice of an order he did not receive based solely on a presumption of its receipt at a "mail depot" such as that maintained by Archie McDougall's employment agency.[4]

Most recently, the court of appeals in *Arriaga*[5] declined to follow our decision in *In re Dorena Hirschman.*[6] In the *Hirschman* appeal we determined Ms. Hirschman could not have received an order mailed while she was on vacation and found the order was not effectively communicated until the day she returned home from her trip. The court declined to follow *Hirschman* because it believed the holdings in *Nafus v. Dep't of Labor & Indus.*[7] and *Rodriguez v. Dep't of Labor & Indus*.[8] require only that the order be received and does not require it be actually read or understood; rather these decisions looked to whether the mailing was properly addressed and delivered.[9] The *Arriaga* court also distinguished *Morgan* because unlike the circumstance in *Morgan,* presumption of receipt had been established in *Arriaga*. The court noted that under supreme court precedent, communication does not require a party to have actually read a properly addressed and delivered order.[10] In *Arriaga*

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[3] *In re John Karns,* BIIA Dec., 05,181 (1956).
[4] *In re Edward Morgan*, BIIA Dec., 09,667 (1959) (emphasis added).
[5] *Arriaga v. Dep't of Labor & Indus.* 183 Wn. App. 817 (2014).
[6] BIIA Dec., 09 17130 (2010).
[7] 142 Wash. 48 (1927).
[8] 85 Wn.2d 949 (1975).
[9] *Arriaga,* at 827.
[10] *Arriaga,* at 827.

an order received by a doctor's office was determined to have been communicated when the order was received by the doctor's office, not the date the doctor actually saw the order.

We find that the May 10, 2018 order was communicated to Mr. Malarchik on May 15, 2018, which is the presumed delivery date. The order was mailed and delivered to his correct address at the time. In reaching our decision, we pay particular attention to the fact that Mr. Malarchick visited the town in which his P.O. Box was located at least three times after he was verbally informed that the order had been issued, but chose not to collect his mail on those occasions. There is no evidence to suggest the expected delivery date is incorrect, nor that Mr. Malarchick was prevented from accessing his P.O. Box prior to May 25, 2018. On the other hand, there is ample evidence that actual receipt of the order was delayed by Mr. Malarchick's own willful choices to avoid checking his P.O. Box on the three occasions he was in the near vicinity. The presumption of delivery in the due course of the mail cannot be rebutted by a party's deliberate or negligent decision to disregard or fail to read an order properly mailed and delivered to the correct address.[11] Mr. Malarchick did not file his protest within 60 days of May 15, 2018; therefore, it is untimely.

DECISION

In Docket No. 18 30609, the claimant, Mario Malarchick, filed an appeal with the Board of Industrial Insurance Appeals on August 24, 2018, from an order of the Department of Labor and Industries dated July 23, 2018. In this order, the Department stated it could not reconsider its order of May 10, 2018, because the protest was not received within 60 days. This order is correct and is affirmed.

FINDINGS OF FACT

1. On October 15, 2018, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History in the Board record solely for jurisdictional purposes.
2. The Department stated in its Notice of Decision dated May 10, 2018, that the order could be appealed to the Board of Industrial Insurance Appeals. The order was communicated to Mr. Malarchick on May 15, 2018.
3. On July 18, 2018, Mario Malarchick submitted a fax to the Department of Labor and Industries. This document put the Department on notice of disagreement with its order dated May 10, 2018.

[11] *Arriaga.*

4. The fax received by the Department on July 18, 2018, was not filed with the Department within 60 days of the date the order was communicated to Mr. Malarchick.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter in this appeal.
2. Mario Malarchick did not file a timely Protest and Request for Reconsideration with the Department, from the Department order dated May 10, 2018, within the meaning of RCW 51.52.050.
3. The Department Notice of Decision dated July 23, 2018, is correct and is affirmed.

Dated: August 22, 2019.

BOARD OF INDUSTRIAL INSURANCE APPEALS

LINDA L. WILLIAMS, Chairperson

JACK S. ENG, Member

DISSENT

During the time period under consideration in this appeal, Mr. Malarchick was moving his household from Washington to Idaho, and then caring for his roommate and her granddaughter who were both sick. From the record, the claims manager advised Mr. Malarchick on May 16, 2018, that his claim had been denied and an order had been mailed to him. Mr. Malarchick said he'd watch for the order. Mr. Malarchick went into Grangeville the next day and he explained that he just went to get some medicine for his roommate and her granddaughter who were both sick, so he made a "quick trip of it."[12] Considering that it was only a day after he had been told that the order was in the mail it is unlikely that he would have expected it to have arrived in his mailbox in such a short time period. The next time Mr. Malarchick was in Grangeville was on May 21, 2018, when he got some medicine for his roommate and her granddaughter who were still sick. On May 23, 2018, he did not go to Grangeville, he went to Kamiah for a doctor's appointment for his roommate and her granddaughter who were diagnosed with bronchitis and an ear infection respectively. Finally, a couple of days later,

[12] Exhibit 1 at pg. 13.

on the 25th of May, Mr. Malarchick went to Grangeville and got the mail. That is when he received and read the order from the Department informing him that if he did not agree with the order he must file an appeal within "sixty days after **you receive** this notice."[13]

Mr. Malarchick also testified that the judge, in one of his phone conferences, told him he had 60 days from when he received the mail rather than 60 days from the mailing date. Mr. Malarchick was operating on the premise that the 60-day clock started from when he received the order. According to the date on the written appeal, Mr. Malarchick actually wrote his appeal on July 10, 2018, 60 days from the date on the order. And then, because he likely had no access to a fax until he made the trip back in to Grangeville, he faxed the protest in on July 18, 2018, likely thinking he still had six days before the time period elapsed.

This isn't a case on the merits. This is a case of determining whether Mr. Malarchick even gets an opportunity to **have** a case on the merits. The fact that Mr. Malarchick was honest about the trips he took to Grangeville in the interim between his phone conversation with the claims manager and date he got his mail actually worked against him. If he'd simply said he didn't go to the post office box because he was caring for his sick roommate and her granddaughter in that time period it is likely he would have been found to have been timely. The determination that Mr. Malarchick's appeal was untimely, however, will forever foreclose his rights under Title 51 simply because he was self-represented and not sophisticated enough to know that the term "when you receive it," has an alternative meaning in legalese than that which would be assigned to it in any other realm. This is the ultimate in form over substance and contrary to the liberal construction touted throughout the century of case law on Title 51 and, therefore, I dissent.

Dated: August 22, 2019.

BOARD OF INDUSTRIAL INSURANCE APPEALS

ISABEL A. M. COLE, Member

[13] Exhibit 1 at pg. 6 (emphasis added).

Addendum to Decision and Order
In re Mario Malarchick
Docket No. 18 30609
Claim No. BC-90838

Appearances

Claimant, Mario Malarchick, Self-Represented

Employer, Scimitar Construction (did not appear)

Retrospective Rating Group, Building Industry Association of WA #00025, by Alan Shepard Gruse, Lay Representative

Department of Labor and Industries, by Office of the Attorney General, per Annie Honrath

Petition for Review

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The claimant filed a timely Petition for Review of a Proposed Decision and Order issued on June 20, 2019, in which the industrial appeals judge affirmed the Department order dated July 23, 2018.

Other

The claimant filed a Petition for Review on July 22, 2018, as provided by RCW 51.52.104, and attached new evidence to the petition. We will not consider new evidence attached to a Petition for Review absent proof that the new evidence could not have been discovered with reasonable diligence during the hearings process. The new evidence is rejected.