

Backstein, Robert

PROTEST AND REQUEST FOR RECONSIDERATION (RCW 51.52.050)

***Attorneys**

Even if the Department of Labor and Industries knows or should know that a claimant is represented, the Industrial Insurance Act requires a signed authorization before the Department can send copies of orders to a representative of an injured worker. Without such authorization, the Department is under no obligation to send orders to an attorney.***In re Robert Backstein, BIIA Dec., 20 10293 (2021)*** [Editor's Note: The Board's decision was appealed to superior court under Pierce County Cause No. 21-2-05703-1]

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IN RE: ROBERT S. BACKSTEIN) DOCKET NOS. 20 10293 & 20 10294
CLAIM NO. BC-21081) DECISION AND ORDER

The claimant, Robert S. Backstein, filed a claim with the Department of Labor and Industries. On December 12, 2018, the Department issued an order rejecting the claim. The order was communicated to Mr. Backstein, but not his attorney. A protest to the December 12, 2018 order rejecting the claim was filed on November 6, 2019. The Department issued an order on November 21, 2019, stating it could not reconsider the December 12, 2018 order rejecting the claim because it was not received within 60 days. Mr. Backstein appealed the November 21, 2019 Department order and the December 12, 2018 order rejecting the claim. This appeal was tried on cross motions for summary judgment. Our industrial appeals judge decided that both the protest and appeal of the December 12, 2018 order were not timely and affirmed the November 21, 2019, and December 12, 2018 orders. Mr. Backstein argues the protest was timely because the rejection was not communicated to his attorney and that the claim should be allowed. While we agree with our industrial appeals judge that the protest and appeal of the claim rejection was not timely, we have granted review to dismiss the appeal of the rejection order rather than affirm it and to explain our decision.

The Department's November 21, 2019 order is **AFFIRMED**. The appeal of the Department's December 12, 2018 order is **DISMISSED**.

DISCUSSION

The determinative issue in these consolidated appeals is whether Mr. Backstein's November 6, 2019 protest and January 6, 2020 appeal of the Department's December 12, 2018 order rejecting the claim, both clearly beyond the 60 days in which to file a protest or appeal, are nonetheless timely because the Department did not communicate the order to Mr. Backstein's attorney.

The following facts are not in dispute. The claimant, Robert Backstein, filed this claim, BC-21081, as a RCW 51.32.185 presumptive occupational disease for a cardiac condition on October 31, 2017. The Department issued an order rejecting the claim. This order was sent to Mr. Backstein at the last address he had supplied to the Department. The order was not sent to his attorney, Mr. Meyers. The order was not protested or appealed until November 2019. In this claim Mr. Backstein and Mr. Meyers never sent the Department notification signed by Mr. Backstein that

1 Mr. Meyers was his legal representative and that correspondence regarding the claim should be sent
2 to Mr. Meyers until the order was protested on November 4, 2019.

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4 Mr. Meyers now represents Mr. Backstein in four claims. In claims SE-18218 and BC-21079
5 Mr. Backstein signed a Notice of Appearance and change of address to Mr. Meyers. In a third claim,
6 BC-21080, Mr. Meyer's communicated with the Department about the claim, but it appears he did not
7 send the Notice of Appearance and change of address that was sent in the first two claims. We
8 cannot find in this record, nor does Mr. Backstein point to, any similar communication regarding this
9 claim before November 2019.

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11 The third claim, BC-21080, was filed on October 6, 2017. It was also rejected by the
12 Department on the same day as this claim, BC-21081. A copy of the rejection of the BC-21080 claim
13 was sent to Mr. Meyers. A copy of the rejection of this claim was not. Regarding the timeliness issue,
14 Mr. Backstein's sole argument in the Petition for Review is that the Department knew, or should have
15 known, to communicate the order to his attorney, Mr. Meyers.¹ We agree with our industrial appeals
16 judge that two statutes, RCW 51.28.070 and 51.04.080, control.

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18 RCW 51.28.070(1) provides:

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20 Information contained in the claim files and records of injured workers, under the
21 provisions of this title, shall be deemed confidential and shall not be open to public
22 inspection (other than to public employees in the performance of their official duties),
23 but representatives of a claimant, be it an individual or an organization, may review a
24 claim file or receive specific information therefrom **upon the presentation of the**
25 **signed authorization of the claimant.**²

26
27 RCW 51.04.80 provides:

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29 On all claims under this title, claimants' written notices, orders, or payments must be
30 forwarded directly to the claimant until such time as there has been entered an order on
31 the claim appealable to the board of industrial insurance appeals. Claimants' written
32 notices, orders, or payments may be forwarded to claimant in care of a representative
33 before an order has been entered **if the claimant sets forth in writing the name and**
34 **address of the representative to whom the claimant desires this information to be**
35 **forwarded.**³

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37 Even if the Department knew, or should have known, that Mr. Meyers was representing
38 Mr. Backstein, the above statutes still require a signed authorization before they are allowed to send
39 orders to a representative of an injured worker.

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45 ¹ There is no contention that the Department did not properly communicate the claim rejection order to Mr. Backstein.

46 ² Emphasis added.

47 ³ Emphasis added.

1 Our hearings judge also pointed out that we addressed this issue recently in *In re Shawn R.*
2 *Smith*.⁴ In *Smith*, we explained:

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4 Mr. Smith also contends Mr. Carson's perfected legal representation on his behalf in
5 Claim No. AZ-34855 is sufficient compliance with RCW 51.04.080 such that the
6 Department should have mailed the rejection order to Mr. Carson under Claim
7 No. BB--76955. Authorization to represent an injured worker in one claim cannot be
8 construed as blanket representation of the injured worker in other claims. Blanket
9 assumptions regarding legal representation could bind the injured worker to pay fees
10 for representative services that may not be needed. Some claims may require
11 representative assistance while other claims may proceed without dispute. The injured
12 worker should retain the ability to choose when representation is required in a specific
13 claim. The requirement for written authorization in every claim minimizes the likelihood
14 of fraud or other compromise of the injured worker's rights.

15 Mr. Backstein's most focused argument on communication of the order, not included in his
16 Petition for Review, is in his Reply to Department's Response Re: Timeliness. First, he argues that
17 by sending his attorney a copy of its December 12, 2018 rejection order in another claim where no
18 notice of representation had been filed, the Department established a custom and practice. The
19 mailing of one order in contravention of the statute and what appears to be Department policy⁵ is a
20 mistake rather than establishment of custom and practice.

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22 Second, he argues that where the order was sent to his attorney in one claim and not the
23 other, liberal construction of the act mandates that this communication issue must be decided in his
24 favor. The principal of liberal construction applies only to the interpretation of statutes, not the
25 weighing of facts.⁶ Here, the statutes are clear. So too is the fact that Mr. Backstein's attorney did
26 not file a notice of appearance and change of address in this claim until November 2019.

27
28 Finally, in his timeliness reply brief, he argues that because the Department sent the order in
29 the one claim without notice of representation, it should be estopped from asserting that a notice of
30 representation is required in this appeal. Mr. Backstein did not point to any authority, nor did we find
31 any consistent with these facts.

32
33 To establish equitable estoppel against a governmental entity, a party must prove five
34 elements by clear, cogent, and convincing evidence: (1) a statement, admission, or act by the party
35 to be estopped, that is inconsistent with its later claims; (2) the asserting party acted in reliance on
36 the statement or action; (3) injury would result to the asserting party if the other party were allowed
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⁴ Docket No. 18 38210 (January 24, 2020).

⁵ Department's Cross Motion for Summary Judgment, Declaration of Jennifer Howard. ?

⁶ *Ehrman v. Dep't of Labor & Indus.*, 33 Wn.2d 584 (1994).

1 to repudiate its prior statement or action; (4) estoppel is : "necessary to prevent a manifest injustice;"
2 and (5) estoppel will not impair governmental functions.⁷
3

4 The first and second elements fail. The statutes are the statutes, both before and after the
5 Department sent a copy of the one and not the other claim rejection order to Mr. Backstein's attorney.
6 The Department is not asserting a position that it did not assert before. Second, Mr. Backstein does
7 not allege that he did not appeal the order in this claim **because** he received an order rejecting
8 another claim. There is contention of detrimental reliance at the time to protest or appeal claim
9 allowance in this record. The statutes are clear, to expect or rely on communication of Department
10 orders, the notice of representation and change of address must be filed in each claim.
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12 Mr. Backstein's attorney did not have a reasonable expectation he would receive any
13 Department orders issued in this claim. The order stating the Department could not reconsider the
14 order rejecting the claim should be affirmed. The appeal of the order rejecting the claim should be
15 dismissed as untimely.
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17 Because both the protest and appeal of the rejection order were not timely, we will not address
18 Mr. Backstein's arguments regarding the firefighter presumption and why this claim should be allowed.
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20 In reaching this decision, we have considered the full Board record, which included the following
21 documents. Civil Rule 56(h).
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- 23 1. The claimant's November 5, 2020 Motion for Summary Judgment.
- 24 2. The November 5, 2020 declaration of claimant's counsel, Ron Meyers, and attached
25 exhibits.
- 26 3. The Department's November 5, 2020 Cross Motion for Summary Judgment and
27 attached Declaration of Jennifer Howard and exhibits.
- 28 4. The claimant's June 29, 2020 briefing on timeliness and attached exhibits.
- 29 5. The Department's August 10, 2020 briefing on timeliness and attached exhibits.
- 30 6. The claimant's August 20, 2020 reply to the Department's timeliness brief.
- 31 7. The claimant's November 17, 2020 waiver of oral argument.
- 32 8. The Department's November 17, 2020 waiver of oral argument.

33 We have of course considered Mr. Backstein's Petition for Review of our judge's Proposed
34 Decision and Order and the Department's answer thereto, in rendering this Decision and Order.
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46 ⁷ *Silver Streak Inc. v. Dep't of Labor & Indus.*, 159 Wn.2d. 868 (2007); *In re Colleen McColley Aldridge*, Dckt. No. 13 20204
47 (July 23, 2015).

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DECISION

1. In Docket No. 20 10293, the claimant, Robert S. Backstein, filed an appeal with the Board of Industrial Insurance Appeals on January 6, 2020, from an order of the Department of Labor and Industries dated December 12, 2018. In this order, the Department rejected the claim. Mr. Backstein's January 6, 2020 appeal of the Department's December 12, 2018 order is dismissed.
2. In Docket No. 20 10294, Mr. Backstein, filed an appeal with the Board of Industrial Insurance Appeals on January 6, 2020, from an order of the Department of Labor and Industries dated November 21, 2019. In this order, the Department rejected as untimely a November 4, 2019 protest to the Department's December 12, 2018 rejection order. This order is correct and is affirmed.

FINDINGS OF FACT

1. On March 4, 2020, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History in the Board record solely for jurisdictional purposes.
2. On October 31, 2017, the claimant, Robert Backstein, filed an application for benefits with the Department of Labor and Industries. The Department assigned it Claim No. BC-21081.
3. On December 12, 2018, the Department issued an order rejecting the claim. The order contained language advising Mr. Backstein that the order could be protested to the Department.
4. The December 12, 2018 order rejecting the claim was mailed to Mr. Backstein at his last known address.
5. Mr. Backstein did not file a protest or appeal of the December 12, 2018 order.
6. Mr. Backstein did not file a signed authorization or written notification of a change of address to his counsel, Ron Meyers, before November 4, 2019.
7. On November 4, 2019, Mr. Backstein's counsel, Ron Meyers, filed a notice of representation and protest to the December 12, 2018 order with the Department.
8. Mr. Meyers' November 4, 2019 protest was not filed within 60 days of the date the December 12, 2012 order was communicated to Mr. Backstein.
9. On January 6, 2020, Mr. Backstein, though his counsel, Mr. Meyers, filed an appeal with Board of Industrial Insurance Appeals of the December 12, 2018 order rejecting the claim.
10. The January 6, 2020 Notice of Appeal was not filed within 60 days of the date the December 12, 2012 order was communicated to Mr. Backstein.

- 1 11. Neither Mr. Backstein nor Mr. Meyers relied on any act, statement, or
2 admission of the Department of Labor and Industries or its
3 representatives as a reason for not protesting or appealing the
4 December 12, 2018 Department order within 60 days of its
5 communication to Mr. Backstein.
6
7 12. The pleadings and evidence submitted by the parties demonstrate that
8 there is no genuine issue as to any material fact.
9

10 **CONCLUSIONS OF LAW**

- 11 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties
12 and subject matter in these appeals.
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14 2. The Department's Cross Motion for Summary Judgement is granted, and
15 it is entitled to a decision as a matter of law as contemplated by CR 56.
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17 3. Mr. Backstein's Motion for Summary Judgement is denied.
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19 4. As of December 12, 2018, attorney Ron Meyers was not Mr. Backstein's
20 representative within the meaning of RCW 51.04.080 for Claim
21 No. BC-21081. The Department was not required to send the
22 December 12, 2018 order in BC-21081 to Mr. Meyers.
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24 5. Mr. Backstein is not entitled to the remedy of equitable estoppel against
25 the Department of Labor and Industries to excuse the filing of his protest
26 and Notice of Appeal of the Department's December 12, 2018
27 Department order within 60 days of its communication to Mr. Backstein.
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29 6. Mr. Backstein's November 16, 2019 protest of the Department's
30 December 12, 2018 order was not timely filed as required by
31 RCW 51.52.050.
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33 7. The Department's November 4, 2019 order is correct and is affirmed.
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35 8. Mr. Backstein's January 6, 2020 Notice of Appeal of the Department's
36 December 12, 2018 order was not timely filed as required by
37 RCW 51.52.060.
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39 9. Mr. Backstein's January 6, 2020 appeal of the December 12, 2018 order
40 is dismissed.
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Dated: April 14, 2021.

BOARD OF INDUSTRIAL INSURANCE APPEALS



LINDA L. WILLIAMS, Chairperson



JACK S. ENG, Member

**Addendum to Decision and Order
In re Robert S. Backstein
Docket Nos. 20 10293 & 20 10294
Claim No. BC-21081**

Appearances

Claimant, Robert S. Backstein, by Ron Meyers & Associates PLLC, per Ron Meyers
Employer, Puget Sound Regional Fire Authority, (did not appear)
Department of Labor and Industries, by Office of the Attorney General, per Pat L. DeMarco

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. Mr. Backstein filed a timely Petition for Review of a Proposed Decision and Order issued on January 20, 2021, in which the industrial appeals judge affirmed the orders of the Department dated December 12, 2018, and November 21, 2019. The Department filed a response to the Petition for Review on March 9, 2021.

Evidentiary Rulings

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed.