

## **Alonzo, Santos**

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### **APPEALABLE ORDERS**

**Protest divests Board of authority to hear appeal**

### **PROTEST AND REQUEST FOR RECONSIDERATION (RCW 51.52.050)**

**Protest divests Board of jurisdiction over appeal**

When a Department order promises that a further appealable order will be issued if a protest is filed, a timely protest automatically sets the order aside and holds it in abeyance. The Board therefore lacks jurisdiction to hear an appeal from the original order since it is not a final order. ...*In re Santos Alonzo*, BIIA Dec., 56,833 (1981)

Scroll down for order.



1 A review of procedural events leading up to the filing of the notices of appeal with the Board  
2 is required to explain our decision. Mr. Alonzo applied for benefits from his self-insured employer  
3 by filing a report of accident on October 15, 1979, with the Department. The claim was allowed by  
4 order and notice of December 31, 1979, and Twin City Foods, Inc., his employer, was required to  
5 pay compensation. On April 14, 1980, the Department entered an order closing the claim with time  
6 loss as paid through October 16, 1979, and with a permanent partial disability award of 5% as  
7 compared to total bodily impairment payable at 75% of monetary value pursuant to RCW  
8 51.32.080(2), Laws of 1979, Chapter 104, § 1. The next relevant procedural item which was  
9 available prior to granting the appeal, as reflected by the claim file, was a copy of the notice of  
10 appeal filed by the claimant with this Board on May 12, 1980. Immediately following this document  
11 is the Board's order of June 4, 1980, granting the appeal (Docket No. 56,833). On June 20, 1980,  
12 the employer filed a notice of cross-appeal in accord with RCW 51.52.060 and WAC 263-12-075.  
13 That cross-appeal was granted on July 17, 1980 (Docket No. 56,833A).

14 As is the usual course of proceedings, a pre-hearing conference was held on August 22,  
15 1980, at which the presiding hearings examiner set forth a statement of jurisdictional facts,  
16 concurred in as accurate by the parties, which was entirely consistent with the facts recited in the  
17 preceding paragraph. To accomplish additional procedural matters, further conferences were held  
18 on September 17, 1980 and November 24, 1980. At neither of these was the fact disclosed which  
19 now gives rise to our concern over the Board's jurisdiction to order the relief sought. It was not until  
20 the hearing of December 10, 1980, that such information rose to the surface. At the outset of that  
21 hearing, the claimant through counsel moved voluntarily to dismiss his appeal. After a statement  
22 that the matter would be recommended to the Board for dismissal, the following colloquy occurred  
23 between employer's counsel and the hearings examiner:

24 "MR. CARRATO: I have no objection to that. I would like to correct one  
25 jurisdictional fact.

26 THE EXAMINER: Okay.

27 MR. CARRATO: And this is something that I was--I mistakenly made a  
28 statement that had there not been an appeal, that there would have  
29 been no cross-appeal and in consultation with my client I've been rather  
30 strenuously corrected on that. My client did, in fact, protest the Order of  
31 April 14, 1980 by letter of April 21, 1980, which protest was never  
32 responded to by the Department of Labor and Industries, because the  
33 claimant's appeal was granted as of June 4th. We, thereupon, cross-  
34 appealed making the same contentions that we had made in our protest.

1 However, jurisdictionally, there had been no final order entered on that  
2 protest letter of April 21st. That is, theoretically, still before the  
3 Department and my client has admonished me to clarify jurisdictionally  
4 that had there been no appeal they would have, in fact, pursued that  
5 protest and appealed any order denying the protest. So, that  
6 clarification needs to be made. It is my understanding that the April 21st  
7 protest is, in fact, still in abeyance, I would assume, pending the  
8 outcome of this appeal by the claimant."  
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10 In support of counsel's statement, there was marked and admitted as Exhibit No. 1 a document  
11 under the letterhead of Scott Wetzel Services, Inc., dated April 21, 1980, which purported to be a  
12 written protest letter on behalf of the self-insured employer, to the April 14, 1980 Department order  
13 closing the claim. Although we note that nowhere in the claim file forwarded by the Department to  
14 the Board for appeal processing was the original of Exhibit No. 1 to be found, we in no way doubt  
15 the veracity of counsel's statement that such document was forwarded to the Department.  
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19 Printed at the top of the department's order of April 14, 1980, in bold-face type is the  
20 following language:  
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22 "The claimant named herein has filed a claim for workman's  
23 compensation benefits with the self-insured employer named herein.  
24 The Department of Labor and Industries has been requested to issue a  
25 determinative order. The Department's order is set forth at the bottom of  
26 this page. Any protest or request for reconsideration of this order must  
27 be made in writing to the Department of Labor and Industries in Olympia  
28 within 60 days. A further appealable order will follow such a request.  
29 Any appeal from this order must be made to the Board of Industrial  
30 Insurance Appeals, Olympia within 60 days from the date this order is  
31 communicated to the parties, or the same shall become final."  
32 (Emphasis added.)  
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34 It has long been our understanding of the law of this state, as well as the administrative policy of the  
35 Board, that a "protest or request for reconsideration" filed with the Department in response to the  
36 admonitory language in the order automatically operates to set aside the Department's order and  
37 hold in abeyance the final adjudication of the matter until the Department officially acts to issue its  
38 final decision by a "further appealable order."  
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1 RCW 51.52.060 authorizes the Department to direct the submission of further evidence or  
2 the investigation of any further fact during the time limited for filing a notice of appeal, which action  
3 will effectively toll the appeal filing period. In addition, that same section authorizes the Department  
4 "within the time limited for appeal" to "modify, reverse, or change any order, decision, or award, or  
5 may hold any such order . . . in abeyance . . . pending further investigation."  
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9 We feel the promise of the Department in its Order and Notice that a further appealable  
10 order will follow a request for reconsideration is a statement of legal responsibility. We hold that it  
11 is an enforceable right available to an aggrieved party to require the Department to act within the  
12 authority granted to it in RCW 51.52.060 to modify or at least hold in abeyance its prior action. It  
13 seems abundantly clear that the employer herein was attempting to exercise that right in submitting  
14 its protest letter (Exhibit No. 1). In fact, employer's counsel admits that he felt the Board was  
15 lacking jurisdiction in that the Department had not yet entered its final order and the matter in  
16 counsel's words was "still before the Department." We agree.  
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20 The hearings examiner reserved ruling on this jurisdictional issue until the Proposed  
21 Decision and Order was entered and then concluded the Board had jurisdiction on the theory that  
22 the employer's cross-appeal inferentially withdrew its protest before the Department. We disagree.  
23 Employer's counsel's unsolicited statement regarding the "correction" of jurisdictional facts to us is  
24 a model of clarity in supporting the proposition that a determinative appealable order has yet to be  
25 entered by the Department. The Department simply cannot fulfill its legal responsibility to fully  
26 adjudicate a case merely by deferring such adjudication when a piece of paper containing the  
27 inscription "Notice of Appeal" is sent to the Board.  
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31 It is perhaps regrettable that the parties went to the expense of presenting evidence on the  
32 merits. Still, the transcript of the hearing proceedings will be available to the claims adjudication  
33 staff at the Department. It can be fully considered as part of the Department's final administrative  
34 action which must now take place, and we trust that such will be done.  
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38 The Board being without jurisdiction to entertain these appeals and there being no contested  
39 jurisdictional facts, the following are entered as conclusions:  
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- 41 1. The Board of Industrial Insurance Appeals does not have jurisdiction  
42 over the subject matter of these appeals as no final appealable order  
43 has been issued by the Department in the claim.  
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1 2. The appeals are dismissed and the matter is returned to the Department  
2 of Labor and Industries for further action to complete administrative  
3 adjudication of the claim.  
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5 It is so ORDERED.

6 Dated this 9th day of December, 1981.

7 BOARD OF INDUSTRIAL INSURANCE APPEALS  
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9  
10 /s/  
11 MICHAEL L. HALL Chairman

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13 /s/  
14 FRANK E. FENNERTY, JR. Member

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16 /s/  
17 PHILLIP T. BORK Member  
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