

## **Gammon, Donzella**

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### **NOTICE OF APPEAL (RCW 51.52.050, RCW 51.52.060)**

#### **Protest and notice of appeal**

When the worker files a "protest" with the Department within 60 days of communication of the order despite the fact the formal protest language on the order has been crossed out, and the Department does not transmit the "protest" to the Board until after the appeal period has elapsed, the "protest" should be treated as a timely appeal. ....*In re Donzella Gammon, BIIA Dec., 70,041 (1985)*

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

#### **Protest of "Appealable Only" order**

When the protest language has been crossed out on an order, so that the Department has made no representation that a further determinative order will be issued, the Department has discretion to determine whether a document challenging its order is a protest or an appeal. If it is the latter, the Department should transmit the appeal to the Board. ....*In re Donzella Gammon, BIIA Dec., 70,041 (1985)*

Scroll down for order.



1 A careful review of this claim's chronology, however, does reveal that timely action was taken  
2 by the claimant sufficient to toll the finality of the order on appeal.  
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4 This claim was opened following the claimant's injury in March, 1981. The claim remained  
5 open until the Department issued an order on August 24, 1984 closing the claim with time-loss  
6 compensation through April 1, 1984 and without award for permanent disability. The claimant  
7 protested that action to the Department on September 18, 1984. The Department responded to the  
8 protest by holding its August 24, 1984 order in abeyance, pending further consideration. On  
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10 December 20, 1984 the Department issued another determinative order adhering to the closure of the  
11 claim. The Department attempted to obliterate from its December 20, 1984 order a printed recitation  
12 of the parties' rights to protest or request reconsideration of said order.  
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16 A letter from claimant's counsel was received by the Department on February 14, 1985. The  
17 substance of that communication challenged the correctness of the Department's order of December  
18 20, 1984, and set forth the reasons for so challenging. It also contained a statement of claimant's  
19 intent to "protest" to the Department as opposed to "appealing" to the Board.  
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22 Though this letter was filed within the sixty-day protest and/or appeal time limitation, the  
23 Department did not transmit it to this Board until March 14, 1985. Since 84 days had elapsed from the  
24 issuance of the Department order to receipt by this Board of the letter, the appeal was granted "subject  
25 to proof of timeliness".  
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28 The Proposed Decision and Order characterized the February 14, 1985 communication to be a  
29 timely protest, and directed the matter to be returned to the Department for further consideration. The  
30 employer's Petition for Review objects to this result, arguing that the language of the claimant's letter  
31 prevented it from being considered an appeal, and that the attempted expunging of the "right to  
32 protest" language from the Department's order prevented the letter from effectuating a protest. We  
33 are thus urged to dismiss this appeal outright.  
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37 As indicated above, parties' appeal rights (and rights to request reconsideration) are governed  
38 by statute. RCW 51.52.050 specifically provides, in part:  
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40 "Whenever the department has taken any action or made any decision  
41 relating to any phase of the administration of this title the worker,  
42 beneficiary, employer, or other person aggrieved thereby may request  
43 reconsideration of the department or may appeal to the board."  
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1 Because parties' enjoyment of review and appeal rights is regulated by the law creating those rights,  
2 we do not believe an attempted expunging of the protest language from the face of an order can, by  
3 that act alone, completely divest an aggrieved party of its review rights.  
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6 Nevertheless, the statute is silent and does not mandate or specify action the Department is to  
7 take upon receipt of a timely protest. When read together, RCW 51.52.050 and 51.52.060 permit that  
8 either a protest or an appeal may be filed with the Department. It appears to remain within the  
9 Department's discretion, when it has made no representation that a further determinative order will be  
10 issued, to determine whether the document challenging its order is to effectuate a protest or an  
11 appeal.<sup>1</sup> In this case, the Department advised the parties of its probable determination at the time of  
12 its order by attempting to obliterate, i.e., "x-ing out" that portion of its printed form explaining the  
13 request for reconsideration alternative. The fact that claimant's February 14, 1985 letter attempted to  
14 alter the Department's choice merely provided the Department with notice of claimant's intent and  
15 could not operate to bind the Department to entry of a further order.  
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21 However, we believe the letter of February 14, 1985 did operate to toll the finality of the  
22 December 20, 1984 order. Fifty-six days elapsed between the date of the Department order and the  
23 letter's filing. The fact that the Department delayed in transmitting the matter to the Board is  
24 inconsequential to the claimant's rights herein. The letter of February 14, 1985 must properly, under  
25 the circumstances of this case, be considered a notice of appeal. Pursuant to RCW 51.52.060, the  
26 notice of appeal appears to have been timely filed and this Board must take jurisdiction over the  
27 appeal. Any other result would be untenable. We cannot believe that the legislature intended that the  
28 appeal rights of a party feeling aggrieved by a Department order, whether that party is a claimant or an  
29 employer, could be legally foreclosed by an administrative practice of "x-ing out" certain information on  
30 rights on a printed form, or by administrative delay in forwarding a document expressing dissatisfaction  
31 with a Department decision from one agency to another.  
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37 Accordingly, the Proposed Decision and Order of June 20, 1985 is set aside and this appeal is  
38 remanded to Industrial Appeals Judge Ethel Williams to hold further proceedings on the merits of the  
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43 <sup>1</sup> The Department's determinative orders generally contain language in bold-faced type that a "further appealable  
44 order will follow" upon receipt of a request for reconsideration. This Board has in other cases directed the Department so to  
45 do where it is clear that only a request for reconsideration was intended by the aggrieved party. But here that "promise"  
46 was attempted to be obliterated from the printed form. Since no such obligation is created by statute, the Department's  
47 obligation to act on the instant protest is not bound by such "promissory" custom.

1 appeal. Parenthetically, we note that this disposition of the matter is in accord with the "alternative"  
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3 prayer for relief in the employer's Petition for Review.

4 This order shall not be considered the Board's final order herein. This remand is made without  
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6 prejudice to the right of any party to file a Petition for Review as prescribed by RCW 51.52.104 from  
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8 the Proposed Decision and Order to be hereafter entered.

9 It is so ORDERED.

10 Dated this 5th day of August, 1985.

11 BOARD OF INDUSTRIAL INSURANCE APPEALS

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14 /s/  
15 MICHAEL L. HALL Chairperson

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17 /s/  
18 FRANK E. FENNERTY, JR. Member

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20 /s/  
21 PHILLIP T. BORK Member

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