Kelp, Daniel

PROTEST AND REQUEST FOR RECONSIDERATION (RCW 51.52.050)

Filing by mail, proof of

A protest is timely if it is mailed within the requisite time period, even if it is not received by the Department. However, proof of office custom without proof of compliance with that custom in the specific instance is insufficient to create a presumption that the protest was mailed. *Citing Farrow v. Department of Labor & Indus.*, 179 Wash. 453 (1934) ***….In re Daniel Kelp*, BIIA Dec., 86 0686 (1988)** [*Editor's Note*: *Affirmed sub nom, Kaiser Alum. & Chem. Corp. v. Department of Labor & Indus*., 57 Wn. App. 886 (1990).]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: DANIEL W. KELP	)	**DOCKET NOS. 86 0686 & 86 0688**
	)	
CLAIM NO. S-516602	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Daniel W. Kelp, by
Richter, Wimberley, Ericson, Woods and Brown, P.S., per
Thomas L. Doran

Employer, Kaiser Aluminum and Chemical Corp., by
Winston and Cashatt, per
Stanley D. Moore

Department of Labor and Industries, by
The Attorney General, per
Linda Dunn McQuaid and Donald J. Verfurth, Assistants

The self-insured employer filed the two appeals with this Board on March 3, 1986.

The appeal assigned Docket No. 86 0688 is from a September 9, 1985 order of the Department of Labor and Industries, which directed the self-insured employer to accept responsibility for recurrence of asthma and to reinstate time-loss compensation effective November 14, 1984, and continuing, pending clarification of the claimant's employability status.

The appeal assigned Docket No. 86 0686 is from a January 8, 1986 Department letter, which stated that since the self-insured employer's protest letters of October 25, 1985, November 8, 1985, and December 16, 1985 had not been received in a timely manner the September 9, 1985 order of the Department had become final and binding and no further consideration of that order could be granted. The Department letter of January 8, 1986 is affirmed. The appeal of the Department order of September 9, 1985 is dismissed.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the employer to a Proposed Decision and Order issued on September 22, 1987 which affirmed the Department decision of January 8, 1986 (Docket No. 86 0686) and dismissed the employer's appeal of the Department order of September 9, 1985 (Docket No. 86 0688).

On November 9, 1987 the self-insured employer filed a Petition for Review and also filed at that time a copy of a deposition of Richard A. Stuart. The Petition for Review alleged that Mr. Stuart's

deposition was taken on January 16, 1987 with the intention that it be submitted to the Board as a part of the official record in this case. The self-insured employer requests that the deposition be now published, attached to the record, and considered in conjunction with the Petition for Review.

A thorough review of the Board record reveals no oral or written notice of Mr. Stuart's deposition nor any motion or stipulation to publish the deposition. Nevertheless, it is clear from several statements made on the record by the Industrial Appeals Judge and by counsel for the self-insured employer and counsel for the claimant that it was understood that Mr. Stuart's deposition would be made part of the record. The Petition for Review asserts that the self-insured employer was unaware that the deposition of Mr. Stuart was not a part of the record until the Proposed Decision and Order was entered. In the interest of completing the record in this matter, the deposition of Mr. Richard Stuart taken January 16, 1987 is hereby published and attached to the record in this matter.

Further review of the record of proceedings indicates that there are two exhibits identified as Exhibit No. 1--a document entitled "Historical/Jurisdictional Facts" and a series of letters between the employer's service company and the self-insured section of the Department. The former will continue to be identified as Exhibit No. 1 and the latter is renumbered Exhibit No. 2. The exhibit which is currently identified as Exhibit No. 2 (a November 8, 1985 letter from Mr. Stuart to the Department) is hereby renumbered Exhibit No. 3. Other evidentiary rulings in the record of proceedings have been reviewed and the Board finds that no further prejudicial error was committed and said rulings are hereby affirmed.

The issue presented by this appeal is whether the self-insured employer filed a timely protest from an order of the Department of Labor and Industries dated September 9, 1985. With the exception of Mr. Stuart's testimony, the Proposed Decision and Order set forth in sufficient detail the evidence presented. We will restrict our recitation of evidence to the additional testimony presented by way of Mr. Stuart's deposition.

The question of whether a protest has been timely filed requires the proof of two critical dates. The first is the date the Department order was communicated to the aggrieved party. RCW 51.52.050 and 51.52.060. The second is the date the protest was filed with the Department. RCW 51.52.050.

Mr. Stuart's testimony establishes the date the Department's order was received or communicated. The September 9, 1985 Department order was received by Mr. Stuart on behalf of the employer by at least September 23, 1985. There was some suggestion that the order may have been received earlier but this was not pursued by either the claimant or the Department. Thus, in order to

be timely, any protest filed by the employer must have been filed with the Department within sixty days after September 23, 1985.

The timely filing of a protest with the Department has the effect of placing the order protested in abeyance, requiring the issuance of a further determinative order by the Department. In re Santos Alonzo, BIIA Dec., 56,833 (1981). In order to establish that the protest was timely filed, an aggrieved party must show that the protest was mailed within sixty days of communication of the Department order. RCW 51.52.050 and .060; In re Rosey L. Berdon, Dckt. No. 86 4466 (March 15, 1988). Thus, the critical question is not whether or when the Department received the employer's protests in this case, but, rather, when the employer mailed the protests to the Department.

In order to establish mailing the employer must establish: (a) an office custom with respect to mailing, and (b) compliance with that custom in the specific instance. Farrow v. Department of Labor and Industries, 179 Wash. 453, 455 (1934). The only evidence supplied by the employer to meet the second element of the Farrow test was that Mr. Stuart had prepared letters of protest and had given them to his secretary for mailing. In order to warrant the presumption of proper mailing, it is not enough to have the person who wrote the letter testify that it was in fact prepared and ready for mailing. The person actually sealing the envelope, putting the stamp thereon and placing it in the mail must also testify.

> "The mailing clerk was not produced as a witness. So we have proof of the custom, but not proof of compliance with it. This has uniformly been held to be insufficient to establish proof of mailing." Farrow, supra, page 455.

A careful review of Mr. Stuart's deposition reveals that he could only testify as to what his custom was in sending out his correspondence. He stated that he placed the protests in a basket and assumed that they had been mailed by someone in his office. The mailing clerk, secretary or other person in charge of mailing was not presented and Mr. Stuart could not confirm, based on his own knowledge, that the protests had actually been mailed to the Department. Mr. Stuart's testimony does not establish the actual mailing of any protest within sixty days of September 23, 1985, the date the Department order of September 9, 1985 was communicated to the employer. The evidence presented is insufficient to establish proof of mailing. Farrow, 79 Wash. at 455. Therefore, the employer has not established that its protests were timely filed as required by RCW 51.52.050 and 51.52.060.

After consideration of the Proposed Decision and Order and the Petition for Review filed thereto, and a careful review of the entire record before us, including the deposition of Richard A. Stuart, we are persuaded that the Proposed Decision and Order is supported by the preponderance of the evidence and is correct as a matter of law.

Proposed Finding of Fact No. 1 is adopted as this Board's final Finding of Fact No. 1. Proposed Finding of Fact No. 2 is deleted and the following additional findings are entered:

FINDINGS OF FACT

2. The order of the Department of Labor and Industries dated September 9, 1985 was communicated to the self-insured employer no later than September 23, 1985. No appeal was filed by the self-insured employer from the Department order of September 9, 1985 within sixty days of communication of that order.

3. The self-insured employer's protest letters of October 25, 1985, November 8, 1985 and December 16, 1985 were not placed in the U.S. mails properly addressed to the Department, and with sufficient postage, within sixty days of communication of the Department order of September 9, 1985.

CONCLUSIONS OF LAW

1. In Docket No. 86 0688, the employer's notice of appeal from the Department order of September 9, 1985 was not timely filed pursuant to RCW 51.52.060 and that appeal is therefore be dismissed.

2. The Board has jurisdiction of the parties and subject matter of the employer's appeal in Docket No. 86 0686.

3. The employer's protests to the Department order of September 9, 1985 were not timely filed pursuant to RCW 51.52.050 and .060.

4. The decision of the Department contained in the letter of January 8, 1986 stating that since the self-insured employer's protest letters of October 25, 1985, November 8, 1985, and December 16, 1985 had not been received in a timely manner the September 9, 1985 order of the Department had become final and binding and no further consideration of that order could be granted, is correct and is affirmed.

It is so ORDERED.

Dated this 22nd day of April, 1988.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/S/
SARA T. HARMON Chairperson

/S/
FRANK E. FENNERTY, JR. Member