

Doney, Elmer

COMMUNICATION OF DEPARTMENT ORDER

Receipt of copy of Department order

Reference to an order in subsequent correspondence sent by the Department to the worker does not satisfy the requirement that a copy of the order must have been "communicated" to the worker. ...*In re Elmer Doney*, BIA Dec., 86 2762 (1987)

Scroll down for order.

**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

1 **IN RE: ELMER P. DONEY**) **DOCKET NO. 86 2762**
2)
3 **CLAIM NO. J-555890**) **DECISION AND ORDER**
4

5 APPEARANCES:

6
7 Claimant, Elmer P. Doney, by
8 Maxey Law Offices, per
9 Dana C. Madsen

10
11 Employer, Lydig Construction Corporation, by
12 Penser International Ltd., per
13 Kathy Lyons and Glenda Ross

14
15 Department of Labor and Industries, by
16 The Attorney General, per
17 Bruce Department and Art E. DeBusschere, Assistants

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19 This is an appeal filed by the claimant on August 8, 1986 from an order of the Department of
20 Labor and Industries dated July 22, 1986 which denied reopening of the claim for aggravation of
21 condition and denied responsibility for an unrelated glaucoma condition. Appeal dismissed for lack of
22 jurisdiction over subject matter.
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25 **DECISION**

26 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
27 and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order
28 issued on May 13, 1987 in which the order of the Department dated July 22, 1986 was affirmed.
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30 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no
31 prejudicial error was committed and said rulings are hereby affirmed.
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33 Initially we note that no stipulation of historical/jurisdictional facts was obtained during the
34 mediation/hearing process. Under the authority of In re Mildred Holzerland, BIIA Dec., 15,729 (1965),
35 we have therefore reviewed the microfiche of the Department file for jurisdictional purposes only.
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38 Based on the chronological facts, it now appears that the only question before us is whether the
39 Department had authority to consider Mr. Doney's application to reopen filed on June 2, 1986 and to
40 issue the order of July 22, 1986 which is the subject of this appeal. To answer that question, we must
41 first determine whether the "first terminal date" order of September 23, 1985, which denied a prior
42 application to reopen filed on August 19, 1985 and which denied responsibility for a glaucoma
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46 application to reopen filed on August 19, 1985 and which denied responsibility for a glaucoma
47 application to reopen filed on August 19, 1985 and which denied responsibility for a glaucoma

1 condition as unrelated to the industrial injury, was "communicated" to the claimant within the meaning
2 of RCW 51.52.050.¹ If not, then the Department order of September 23, 1985 never became final.
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4 The significance of this lack of finality would be two-fold: (1) the Department would have been
5 without authority to consider the subsequent application to reopen filed on June 2, 1986 and to issue
6 the order of July 22, 1986 which is the subject of this appeal (Reid v. Department of Labor and
7 Industries, 1 Wn.2d 430, 437 (1939)); and (2) the order of September 23, 1985 would have no res
8 judicata effect with respect to its purported denial of responsibility for the condition of glaucoma.
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10 After a careful review of the entire record, we conclude that the September 23, 1985
11 Department order was not communicated to Mr. Doney within the terms of RCW 51.52.050 and never
12 became a final order. In addition to the evidence as set forth in the Proposed Decision and Order, we
13 find the following matters relevant in arriving at this conclusion. There is no evidence the Department
14 order of September 23, 1985 was received by either the claimant, employer, or attending physician
15 within the normal course of the mails following its issuance. According to Robert Stanley Robinson,
16 M.D., the attending physician, he first saw the Department order of September 23, 1985 on January
17 31, 1987. Yoko Pelloux, Dr. Robinson's bookkeeper, testified that the order in question was in the
18 doctor's file but it was not date stamped and she did not know when it was received. Despite the
19 participation of a representative on behalf of the employer at the conferences held with respect to this
20 appeal, no evidence was presented by the Department indicating the order in question had been
21 received by the employer at or about the time of its issuance in 1985.
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23 The Department has produced insufficient evidence to establish proof of mailing of the
24 Department order of September 23, 1985. In order to establish proof of mailing and thereby establish
25 a presumption of receipt, the Department must establish that it deposited in the United States mail a
26 notice, properly addressed, stamped, and sealed. Farrow v. Department of Labor and Industries, 179
27 Wash. 453, 38 P.2d 240 (1934). No such proof was presented. The Department did present the
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¹ By way of procedural history we note that three applications to reopen have been filed -- On August 19, 1985,
February 6, 1986, and June 2, 1986. Each of these applications alleged aggravation of condition due to a glaucoma
condition causally related to the industrial injury. The Department responded to the first application by the Department
order of September 23, 1985. The Department responded to the second application of February 6, 1986 by letter of March
5, 1986, which was directed to the attending physician, Dr. Robert Stanley Robinson, and carbon copied to the claimant.
That letter stated that the Department order of September 23, 1985 had become final with respect to the denial of
responsibility for the glaucoma condition and denied Mr. Doney's February 6, 1986 application to reopen. The Department
letter of March 5, 1986 was not a statutory order and notice requiring appeal within sixty days of communication and does
not affect the outcome here.

1 testimony of Kathryn Lanzo, a disability adjudicator with the Department. She testified that she
2 generated the order of September 23, 1985 but she did not actually place it in the mail.
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4 The Department also presented the testimony of Jonnie Stewart, a disability adjudicator with
5 the Department of Labor and Industries. She testified she sent a letter to Dr. Robinson on March 5,
6 1986 with a carbon copy to the claimant in which she discussed the Department's closing order of
7 September 23, 1985. There is nothing in her testimony to indicate that she also sent a copy of that
8 order. The mere fact that reference was made to the September 23, 1985 order is not sufficient to
9 meet the statutory requirements providing the claimant with written notice of his rights to request
10 reconsideration or to appeal. RCW 51.52.050. Communication of a Department order is satisfied by
11 receipt of a copy of the actual order. Rodriguez v. Department of Labor and Industries, 85 Wn.2d 949
12 (1975).
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18 We are persuaded by Mr. Doney's testimony and all the surrounding circumstances that the
19 Department order of September 23, 1985 was not properly "communicated" to the claimant as
20 required by RCW 51.52.050 and never became final and determinative. The Department order of July
21 22, 1986, on appeal here, is therefore void. Mr. Doney's appeal from that order must be dismissed
22 without prejudice to his right to file an appeal from the Department order of September 23, 1985. In
23 such an appeal, the question of whether Mr. Doney has a glaucoma condition causally related to the
24 industrial injury of March 18, 1985 may properly be litigated.
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28 **FINDINGS OF FACT**

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30 1. On March 25, 1985 claimant filed an application for benefits with the
31 Department of Labor and Industries, alleging an industrial injury on March
32 18, 1985 while in the course of his employment with Lyding Construction
33 Corporation. On May 13, 1985, the Department issued an order allowing
34 the claim for medical treatment only and closing the claim.

35 On August 19, 1985, an application to reopen the claim on the grounds of
36 aggravation was received by the Department. On September 23, 1985
37 the Department issued an order denying the application to reopen and
38 denying responsibility for a glaucoma condition.

39 On February 6, 1986, an application to reopen the claim on the grounds of
40 aggravation was submitted to the Department by the claimant. On March
41 5, 1986 the Department sent a letter to the claimant's attending physician,
42 Dr. Robinson, with a copy to the claimant, informing them of the denial of
43 the reopening application and of the order of September 23, 1985 which
44 denied responsibility for the glaucoma condition.

45 On June 2, 1986, an application to reopen the claim on the grounds of
46 aggravation of condition was submitted to the Department. On July 26,
47

1 1986, the Department issued an order denying that application and
2 denying responsibility for the glaucoma condition. On August 8, 1986, a
3 notice of appeal was filed with the Board of Industrial Insurance Appeals
4 by the claimant. On, August 20, 1986 the Board issued an order granting
5 the appeal, assigning Docket No. 86 2762 and ordering that further
6 proceedings be held on the issues raised by the appeal.
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- 8 2. The September 23, 1985 Department order denying the application to
9 reopen filed by Mr. Doney on August 19, 1985, was never received by Mr.
10 Doney.

11 **CONCLUSIONS OF LAW**

- 12 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties
13 in this appeal.
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15 2. The Department order of September 23, 1985 was not communicated to
16 the claimant within the meaning of RCW 51.52.050 and has not yet
17 become a final and binding, determinative order. The Department was
18 without authority to consider the application to reopen filed on June 2,
19 1986 or to issue the order of July 22, 1986 purporting to make final
20 determination of the question of aggravation occurring since September
21 23, 1985. That order is therefore void, and this Board has no jurisdiction
22 over the issue of aggravation, if any, occurring since September 23, 1985.
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24 3. Claimant's appeal of the void order of July 22, 1986 is dismissed, without
25 prejudice to his right to file an appeal from the Department order of
26 September 23, 1985.

27 It is so ORDERED.

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29 Dated this 14th day of December, 1987.

30 BOARD OF INDUSTRIAL INSURANCE APPEALS

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34 /S/ _____
35 SARA T. HARMON Chairperson

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38 /S/ _____
39 FRANK E. FENNERTY, JR. Member

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42 /S/ _____
43 PHILLIP T. BORK Member
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