Whalen, Eugene

TIMELINESS OF CLAIM (RCW 51.28.050; RCW 51.28.055)

Oral reports in self-insured claims

The Board's decisions in *Coston* and *Craft* are overruled to the extent they hold an oral report of injury, made to a self-insured employer within one year of injury, is sufficient to constitute a timely claim. **….*In re Eugene Whalen*, BIIA Dec., 89 0631 (1990)** [dissent]

Physician's certification (RCW 51.28.020)

The one year limitation for filing an industrial injury claim (RCW 51.28.050) refers only to the worker's application for benefits, not the physician's certification. The failure to file the certificate of the physician within one year of the alleged injury does not time-bar the claim. **….*In re Eugene Whalen*, BIIA Dec., 89 0631 (1990)** [dissent]

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: EUGENE M. WHALEN	)	**DOCKET NO. 89 0631**
	)	
	)	**ORDER VACATING PROPOSED DECISION**
	)	**AND ORDER AND REMANDING APPEAL FOR**
CLAIM NO. T-245137	)	**FURTHER PROCEEDINGS**

APPEARANCES:

Claimant, Eugene M. Whalen, by
Tobin & Lepley, per
Patrick H. LePley

Self-Insured Employer, City of Seattle
by Douglas H. Jewett, City Attorney, per
Vicki M. Seitz, Assistant

This is an appeal filed by Eugene M. Whalen, claimant, on February 23, 1989 from an order of the Department of Labor and Industries dated February 15, 1989 which directed that the claim should remain rejected pursuant to a prior Department order dated June 10, 1988 on the grounds (1) that no licensed physician's report or medical proof has been filed as required by law, and (2) that no claim has been filed by said worker within one year after the day upon which the alleged injury occurred. **REMANDED FOR FURTHER PROCEEDINGS**.

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 self-insured employer to a Proposed Decision and Order issued on October 25, 1989, in which the order of the Department dated February 15, 1989 was reversed and the matter remanded to the Department to order the self-insured employer to process this claim as one which was timely filed.

> The issue raised by this appeal, as agreed by the parties, is:
> "whether or not an injured worker must not only report an industrial accident to an employer within one year but must also see a licensed physician and file medical proof of the injury within the same one year period."

Exhibit No. 2.

The parties have asked us to resolve this appeal based on a "bare bones" factual stipulation which does not supply enough information. In an attempt to remedy this situation, our review judge held a conference with the parties on January 26, 1990, to no avail. Since the parties have not agreed

to permit us to review the Department/self-insured employer's file, we are unable to resolve their dispute at this level based on the current record. Instead, we are compelled to vacate the Proposed Decision and Order and remand for further limited expedited proceedings.

The industrial appeals judge relied on In re Russell Francis Craft, BIIA Dec. 54 919 (1980) and In re Del R. Coston, Dckt. No. 58 765 (1983) to determine that the claimant had filed a timely application for benefits. Craft involved an oral report of accident and a conversation with the company nurse, which was recorded in her ledger, both within one year of the alleged injury. Coston appears to have involved an oral report on the date of injury and a written application for benefits received by the Department three days after the one year period had elapsed. To the extent that Coston and Craft may be read to hold that simply an oral report of injury made to a self-insured employer within one year of the date of injury constitutes a timely claim pursuant to RCW 51.28.050, those decisions are not legally supportable. See Wilbur v. Dep't of Labor & Indus., 38 Wn.App. 553 (1984).

We do not construe RCW 51.28.020 and 51.28.050, which both require the "filing" of an "application", to mean that such filing can be effectuated by a simple oral communication. The words "filing" and "application" obviously assume a written document of some sort. Otherwise, claims could be filed with the Department or with the self- insured employer by a simple oral statement, as could appeals to this Board. The result would be great uncertainty and chaos in the administration of claims and the adjudication of appeals.

Furthermore, Craft and Coston unnecessarily complicate the issues here. In citing those cases, the Proposed Decision and Order went off on a tangent instead of dealing with the actual issues in dispute. For, in this case, there was obviously more than an oral report; how much more, we cannot glean from this inadequate record. The parties' factual stipulation does not explicitly state that claimant's April 1, 1986 report of injury was in written form. However, there is certainly a reasonable inference to that effect, since they stipulated that the report was not "received" by the employer until April 2, 1986. This much, at least, we can determine from the parties' stipulation. Unfortunately, however, the parties have not agreed to provide us with a copy of the April 1, 1986 document or any other documents received by the self-insured employer and the Department in this case.

The employer apparently concedes that Mr. Whalen reported an injury to his right shoulder to his employer within a day of the occurrence of that injury, in writing. And obviously, pursuant to RCW 51.28.020, a self-insured claim is meant to be initially filed with the employer rather than the Department. Thus, the sole issue really in dispute appears to be whether Mr. Whalen was also

required to file a physician's certificate within one year of the date of injury, in order to perfect his claim pursuant to RCW 51.28.050. This issue was not addressed in the Proposed Decision and Order.

RCW 51.28.020 provides:

> Where a worker is entitled to compensation under this title he or she shall file with the department or his or her self- insuring employer, as the case may be, his or her application for such, together with the certificate of the physician who attended him or her, ...

The employer argues, and the self-insurance section of the Department apparently agrees, that an application for benefits is not complete unless it is accompanied by a doctor's certificate. While failure to provide medical certification may necessitate rejection of a claim on its merits, medical certification is not an integral part of the application for benefits, the absence of which renders the claim time-barred pursuant to RCW 51.28.050.

The employer correctly argues that, under the language of RCW 51.28.010 and 51.28.025, a claim is not compensable unless the worker "has received treatment from a physician, has been hospitalized, disabled from work, or has died as the apparent result of such accident and injury." RCW 51.28.010. However, RCW 51.28.020 clearly distinguishes between the claimant's "application" for benefits and the "certificate" of the attending physician. RCW 51.28.050 in turn simply provides that "no application shall be valid or claim thereunder enforceable unless filed within one year after the day upon which the injury occurred . . . ." (Emphasis added) Thus the one-year period in RCW 51.28.050 refers only to the claimant's application for benefits, not to the physician's certificate. Failure to file the "certificate of the physician" pursuant to RCW 51.28.020 within one year of the alleged injury does not time-bar the claim pursuant to RCW 51.28.050. It is only the claimant's application which must be filed within the one-year period.

Given our position on the legal issues raised, the parties may now be able to resolve this appeal by way of an Order on Agreement of Parties. If they are unable to do so, we direct that the record be supplemented with any written documents filed by the claimant or his doctor(s) with either the self-insured employer or the Department, concerning this claim for injury of April 1, 1986. We must also be able to determine, either by the date stamped received, by a stipulation of the parties, or, as a last resort, by testimony, when all documents were received. However, pursuant to the authority of RCW 51.52.095 concerning the narrowing of disputed issues, the parties are advised that we will not tolerate unnecessary testimony on issues which are not actually in dispute.

Under RCW 51.52.102, the additional evidence which we have requested "shall be received subject to any objection as to its admissibility, and, if admitted in evidence all parties shall be given full opportunity for cross-examination and to present rebuttal evidence." However, our industrial appeals judge will, of course, limit rebuttal and cross- examination to relevant issues. For example, the employer's proposal as contained in the transcript of the January 26, 1990 conference to present "some evidence of other industrial insurance claims filed and adjudicated on behalf of Mr. Whalen for the purpose of showing his knowledge of whether or not he needed to file an actual claim and physician's report to constitute application for workers' compensation benefits, and what information he may have been provided either when filing a claim as a state fund employee or with self-insured Seattle" is not relevant and shall not be permitted on remand. 1/26/90 Tr. at 3.

Pursuant to WAC 263-12-145(3) and RCW 51.52.102, the Proposed Decision and Order entered on October 25, 1989 is vacated and set aside. The appeal is remanded to the hearing process for the expedited scheduling of further proceedings consistent with this order. The evidence shall be limited to the issues properly before the Board, i.e., whether the Department correctly rejected the claim (1) because no licensed physician's report or medical proof had been filed as required by law, or (2) because no claim had been filed by the worker within one year after the day upon which the alleged injury occurred.

The parties are advised that this order is not a final Decision and Order of the Board within the meaning of RCW 51.52.110. Unless the appeal is dismissed or resolved by agreement of the parties, a further Proposed Decision and Order shall be issued after the parties to these proceedings have had an adequate opportunity to present such evidence as is appropriate to resolve the above-recited issues. Such Proposed Decision and Order, if any, shall be based upon the entire record, and the parties shall have the right, pursuant to RCW 51.52.104 to Petition for Review of such further Proposed Decision and Order.

It is so ORDERED.

Dated this 27th of March, 1990.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
SARA T. HARMON Chairperson
/s/_____
PHILLIP T. BORK Member

DISSENT

The current Board majority apparently is unaware that the Act is to be liberally construed on behalf of the injured worker. The Board has issued significant decisions on two occasions dealing with similar situations as presented by Mr. Whalen. In re Russell Francis Craft, BIIA Dec., 54,919 (1980), and In re Del R. Costen, BIIA Dec., 58,765 (1983) these dealt with claimants who reported injuries to self-insured employers but did not file an application for benefits with the Department of Labor and Industries within one year of the date of the industrial injury. In both of these cases, the Board determined that a self-insured employer who is given notice of an industrial injury, either orally or in writing, has a duty to advise the worker that if he intends to seek industrial insurance compensation, a certification from a physician would be necessary. The Board went on to state "To not so require such a duty upon a self-insured employer would effectively leave all claims management to the whim and caprice of the individual supervisors or company risk managers, circumstances not to date intended by the Legislature." Costen, p. 6; Craft, p. 7-8. The Board majority rather than merely remanding this matter back for the taking of additional testimony has taken the opportunity to present dicta that Craft and Costen were not accurate statements of the law. Craft and Costen were issued after an extensive discussion of prior cases and the legislative history of the workers' compensation act. That Board focused on the changes effectuated in 1971 with the development of self-insured employers. That Board quite rightly noted the importance of ensuring that the development of a system of self-insurers did not diminish the protection of workers. Since those decisions, the Legislature has continued to give the self-insured employer more and more responsibility and control over their workers in regard to workers' compensation. Faced with this increasing control by self-insured employers over a worker's rights to benefits, the Board majority now seeks to reduce the legal protection to be afforded to injured workers. In this specific case, everyone acknowledges that at a minimum Mr. Whalen notified his employer orally that he sustained an injury. If self-insured employers truly cared about "their" workers, as much as they testified to the Legislature when they want bills which would expand their control over the administration of workers' compensation programs, they should not be litigating cases like this.

It should be noted that the employer in Craft did not have the Board's decision in Craft reviewed by a court of competent jurisdiction. The employer in Costen did appeal to Superior Court and the Superior Court affirmed the Board's decision. The employer made no appeal from the Superior Court decision. The self-insured employers have acquiesced to the Board and Court's decisions in Craft and Coston. The current Board has now decided on its own to reverse those decisions. They have made

this decision despite the fact that it is clearly unnecessary for them to do so in this case which merely involves remanding the case back for further hearings. The Board majority has managed to do what the employer community has not been able to do, and that is change the interpretation of the law to further penalize the worker.

There is good and sufficient reason to impose a higher obligation upon a self-insured employer than the Department. We are all aware that the Department acts as a trustee for all injured workers in the administration of claims. The self-insured employer, on the other hand, know full well that any benefits paid to an injured worker reduce the overall profitability of the firm. One would have to be extremely naive not to be aware of the likelihood that an administrator for a self-insured employer will act for the benefit of the employer and not for the benefit of the injured worker. This distinction was clearly noted by Judge Buckley who stated in affirming the Board's decision in Coston:

> Although RCW 51.28.050 must be enforced, knee jerk enforcement requiring at all times a written application could well mean abiding by the letter of the law, but causing serious breach of the intent of the law, and in fact in instances thwarting the very purpose of the law. An employee is not necessarily sophisticated and versed in filing claims nor in many instances would even know that he was supposed to do so and if so how. The employer has a pecuniary interest in not reporting. Requiring in all instances a written application properly filed with the Department of Labor & Industries places the employer, in some instances, in the position to successfully avoid payment of a proper claim, encourages the employer to mislead an employee to the employee's detriment and, in effect, puts the fox in the hen house with the sole key. One half of the scenario was given in this case by the employer failing to follow the statute, the other half of the scenario appeared in Leschner v. Dept. of Labor & Indus., supra. There the employer provided a staff of doctors for the employee. These doctors did not
>
> > "--inform the injured workman of his--rights under this title and--lend all necessary assistance in making his application for compensation.--"
>
> The employee was unaware of the reporting requirement if she even know of the existence of industrial insurance. No application was filed. Far greater risk exists to the industrial insurance system by the suggested knee-jerk approach than that of use of commonsense in connection therewith.

It may well be true that the obligation placed upon employers in Craft and Costen may reduce the amount of certainty in the administration of claims. But, if giving injured workers a fair opportunity

results in increased uncertainty for claims administrators or this Board, so be it. Under the Board majority's reinterpretation of the Industrial Insurance Act, injured workers with injuries sustained while working for their employers will most certainly be disallowed.

Accordingly, I must dissent from the Board majority's reinterpretation of the Industrial Insurance Act. By this action legitimate claims of injured workers will most certainly be disallowed.

/s/
FRANK E. FENNERTY, JR. Member