Keller, Calvin, Dec'd

COMMUNICATION OF DEPARTMENT ORDER

Failure to provide order to assignee of self-insured employer

Where the assignee of a self-insured employer did not inform the Department of its interest in the distribution of third party recovery until well after sixty days following the date of communication of the order to the employer, a later appeal filed by the assignee is not timely, and the Department's distribution order is binding upon the employer and its assignee. Where a law firm failed to specifically request a change of address to its care and has only informally communicated with the Department, the Department is not required by RCW 51.04.082 or RCW 51.52.050 to serve a copy of its order on the firm. ***….In re Calvin Keller, Dec'd,*** **BIIA Dec., 89 4546 (1991)** [*Editor's Note*: The Board's decision was appealed to superior court under Spokane County Cause No. 91-2-01677-6.]

NOTICE OF APPEAL (RCW 51.52.050, RCW 51.52.060)

Assignee as person affected or aggrieved

An assignee of a self-insured employer is not a "person affected" or "other person aggrieved" within the meaning of RCW 51.52.050 unless the Department is clearly put on notice of the assignee's interest in the subject matter of the order before the order's issuance. ***….In re Calvin Keller, Dec'd,*** **BIIA Dec., 89 4546 (1991)** [*Editor's Note*: The Board's decision was appealed to superior court under Spokane County Cause No. 91-2-01677-6.]

THIRD PARTY ACTIONS (RCW 51.24)

Assignment of interest in distribution of recovery

Where the assignee of a self-insured employer did not inform the Department of its interest in the distribution of third party recovery until well after sixty days following the date of communication of the order to the employer, a later appeal filed by the assignee is not timely, and the Department's distribution order is binding upon the employer and its assignee. ***….In re Calvin Keller, Dec'd,*** **BIIA Dec., 89 4546 (1991)** [*Editor's Note*: The Board's decision was appealed to superior court under Spokane County Cause No. 91-2-01677-6.]

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: CALVIN KELLER, DEC'D	**)**	**DOCKET NO. 89 4546**
	)	
CLAIM NO. S-779607	**)**	**DECISION AND ORDER**

APPEARANCES:

Surviving Spouse, Marian M. Keller, by
C. Steven Fury & Associates, per
Patricia D. Sanders, Legal Assistant and C. Steven Fury

Self-Insured Employer, City of Seattle, by
United Pacific Insurance Company, by
Evans, Craven & Lackie, P.S., per
Jarold P. Cartwright, Phil J. Van de Veer, and Gregory M. Kane

United Pacific Insurance Company
(as Assignee of Self-Insured Employer), by
Evans, Craven & Lackie, P.S., per
Jarold P. Cartwright, Phil J. Van de Veer, and Gregory M. Kane

Department of Labor and Industries, by
The Attorney General, per
Laurel Anderson, Paralegal and Stephanie M. Farrell and Mary Carroll Knox, Assistants

This is an appeal filed by the self-insured employer, City of Seattle, by and through its assignee, United Pacific Insurance Company (United), on October 12, 1989 from an order dated April 17, 1989, which corrected and superseded a prior order of April 11, 1989, and which provided:

> WHEREAS, the claimant has recovered $500,000.00, and RCW 51.24.060 requires distribution of the settlement proceeds as follows: (1) net share to attorney for fees and costs $182,761.79; (2) net share to claimant $337,518.09;
>
> WHEREAS, the Department of Labor & Industries and the Self-insured Employer declare a statutory lien against the claimant's third party recovery for the sum of $66,696.46;
>
> WHEREAS, the Department of Labor and Industries hereby remits to the claimant $949.10 pursuant to RCW 51.24.060(c)(i); and the Self-insured Employer is ordered to remit to the claimant $19,330.78;
>
> IT IS FURTHER ORDERED no benefits or compensation will be paid to or on behalf of the claimant until such time the excess recovery totaling $171,232.20 has been expended by the claimant for costs incurred as a result of the condition(s) covered under this claim.

APPEAL DISMISSED.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on the timely "Employer's Petition for Review" filed to a Proposed Decision and Order issued on August 22, 1990 in which the appeal was dismissed for lack of jurisdiction.

The Proposed Decision and Order granted a motion for summary judgment brought by the surviving spouse, Marian Keller, on the issue of timeliness of the employer's appeal. The Department had also joined in the motion for summary judgment. The motion was considered upon documents, memoranda, affidavits, and oral arguments presented both in support of and opposition to the motion.

The deceased worker, Calvin Keller, drowned on August 19, 1984 during the course of his employment with the City of Seattle (City). The Department later ordered the City to fund a pension for Mr. Keller's surviving spouse and dependents. The City had an indemnification agreement with certain contractors involved in the project where Mr. Keller was working at the time of his death. The City brought suit on this agreement. United Pacific Insurance Company (United) insured these contractors. United retained the law firm of Evans, Craven & Lackie to represent its interests. The City and United, on behalf of the contractors, entered a settlement agreement whereby United would reimburse the City for claim costs and fund the pension reserve. As part of this agreement, the City assigned to United all of the City's rights of subrogation in Ms. Keller's tort actions arising out of the fatal accident, including the City's lien, as a workers' compensation self- insurer, against Ms. Keller's third party recoveries. Exhibit D.

United had already accepted a tender of defense from the City and other defendants relating to the third party actions commenced by Mrs. Keller. Exhibit D. On January 30, 1989 the third party actions were settled. Exhibit E. On April 17, 1989 the Department issued the order which is the subject of this appeal, specifying the distribution of the third party settlement proceeds. The order was sent to the City and to Mrs. Keller and to her attorney. The Department did not send the order to United or its attorneys, Evans, Craven & Lackie. The order was not formally communicated to United through its attorneys until August 8, 1989. United's attorneys filed a notice of appeal on October 6, 1989 by placing the appeal, properly addressed and stamped, in the U.S. mail. The appeal is designated as by "the self-insured employer, City of Seattle." Notice of Appeal.

Both prior to the issuance of the April 17, 1989 order and thereafter, representatives of the Department and Evans, Craven & Lackie were engaged in oral and written negotiations concerning the third party distribution and the amount already paid by the City to fund Ms. Keller's pension.

Exhibits A and B. On February 16, 1989 Mr. J. Cartwright, with Evans, Craven & Lackie, wrote to representatives of the Department concerning the distribution of the third party proceeds. With his letter (Exhibit A), Mr. Cartwright provided the Department with copies of the third party action release and settlement agreement (Exhibit E). Exhibit E does not mention the assignment, of the City's lien interest, to United. The assignment is recited only in the agreement between the City and United (Exhibit D) which was not sent to the Department until July 5, 1989. See letter, Exhibit B, Document No. 5. The February 16 letter did not specifically request that any future orders be directed to Mr. Cartwright or his firm.

The letter did discuss an anticipated dispute between the City and Ms. Keller concerning the manner in which an approximate amount of $64,000 should be distributed, including pro rata shares of attorney's fees and costs in the third party action. The letter concluded:

> Please advise regarding what procedures will be necessary to obtain immediate refund of the funds remaining in the reserve account and to protect the City's interest in connection with the $64,000 which may be claimed by Mrs. Keller and her counsel as attorneys fees. Thank you for your assistance.

Exhibit A.

We have been provided with an affidavit of Michael O'Brien, an employee of Evans, Craven & Lackie who engaged in the oral communications with Department staff. Mr. O'Brien's notes concerning these communications are attached to the affidavit. A note of April 7, 1989 references a conversation on that date between Mr. O'Brien and Department employee Tony Irving regarding the process of obtaining a refund of pension reserve funds paid by the City and necessary steps towards the Department issuing a third party distribution order. The note concludes: "If we don't get the order in a few weeks call her. Call her." Exhibit B. Document 1. A prior note of a March 22, 1989 conversation with Department employee Linda Messick referenced a similar discussion: ". . . and she stated that it would take two weeks expedited for her order. I should call if it takes longer." Id. Document No. 2.

A note of May 22, 1989 begins: "Linda Messick has issued a 3rd party order on 4-17-89 (the first step in a refund of 3 steps.)" Id. Document No. 3. A note of June 13, 1989 does not reference the order at all. Id. Document No. 4. A letter of July 5, 1989 from Mr. Cartwright to the Department requests an "accounting" but does not reference the already issued April 17, 1989 order. Id. Document No. 5. With a cover letter of August 2, 1989, the Department sent Mr. O'Brien a copy of the third party distribution order and the third party recovery worksheets.

On these facts, we consider Ms. Keller's and the Department's motion for summary judgment on the timeliness issue. As a preliminary matter, it is our belief that in this appeal the law firm of Evans, Craven & Lackie should be considered to represent the interests of two distinct parties, the City of Seattle as self-insured employer and United Pacific Insurance Company as assignee of the City's interests in the Department's April 17, 1989 third party distribution order which is the subject of this appeal. Mr. Cartwright indicated at a conference on July 19, 1990 that this was a "fair characterization" and that he had discussed this with both parties, who agreed "their interests, at this juncture, are identical. " 7/19/90 Tr. at 3. It has not been made entirely clear which arguments, in opposition to the motion for summary judgment, have been advanced either solely on behalf of the City or solely on behalf of United, or both. We do understand, however, that only United as assignee argues that it was an "other person affected" or "other person aggrieved" by the Department order and that, therefore, the sixty-day limitation on filing of appeals did not begin to run upon United until receipt of the order by its attorneys, Evans, Craven & Lackie. See RCW 51.52.050 and .060.

We consider United's argument even though Ms. Keller contends that the appeal in this matter was filed only on behalf of the City and not on behalf of United. It appears to us that Ms. Keller's attorney has understood the involvement of both the City of Seattle and United and the law firm representing them since well before the Department order was ever issued or an appeal taken from it. Ms. Keller's argument that only the City filed an appeal is in the nature of gaining a purely technical advantage. There would be no unfair prejudice to Ms. Keller or the Department in considering this appeal to have been filed on behalf of the City in its own right and on behalf of United as the City's assignee. We will, therefore, consider United to be joined as a party to the original appeal filed in this matter. See CR 17 and CR 19; Walter Implement, Inc. v. Focht, 42 Wn. App. 104, 106-107, 709 P.2d 1215 (1985).

We next, then, consider United's argument that the sixty day period for filing appeals did not begin to run against United until the April 17, 1989 order was communicated to United. We agree in this particular case with the ultimate conclusion reached in the Proposed Decision and Order, that the Department did not have a duty to serve the April 17, 1989 order on United as the assignee, and the sixty-day appeal period began to run whenever the order was properly communicated to the City. Our analysis of this issue is in part different from that stated in the Proposed Decision and Order, which takes the position that an assignee such as United always simply "stands in the shoes" of its assignor (here, the City) and that no duty is imposed on the Department to serve its orders "upon the assignee

in the absence of receipt of a notice of appearance, or a similar document, evidencing formal legal representation." Proposed Decision and Order at 7-8. We agree with our Industrial Appeals Judge that the Department has no duty to "'guess' or make assumptions" in this regard. Ibid. Nevertheless, the language used in the Proposed Decision and Order could be interpreted as overly restrictive with regard to the type of notice necessary to require the Department to serve an "other person affected" or "other person aggrieved" by its orders if the person is to be bound by an order. RCW 51.52.050 and .060.

In cases such as the present involving an assignor and assignee, the notice and service requirements are best derived from the law governing assignments. For instance, as between an assignee and a debtor, the burden of proving that a debtor has received actual or constructive notice of the assignment so as to shift his responsibility for performance of his obligation from the assignor to the assignee rests upon the assignee. 6 Am. Jur. 2d Assignments § 136 (1963). See, Smith v. Rowe, 3 Wn.2d 320, 100 P.2d 401 (1940). The courts have generally held that notice to the debtor of an assignment is necessary in order to charge the debtor with the duty of payment to the assignee. Prior to receipt of notice, the debtor is not bound by the assignment and may dispose of money involved in any way authorized by the assignor without liability to the assignee. 6 Am. Jur. 2d Assignments § 96 (1963). Stansbery v. Medo-Land Dairy, Inc., 5 Wn.2d 328, 337, 105 P.2d 86 (1940). Where notice to the debtor of an assignment is material, no special form of notice is required. Any notice is adequate if it reaches the person to be notified in such a manner and under such circumstances that a reasonable person would regard it as notice and be guided accordingly. 6 Am. Jur. 2d Assignments § 99 (1963).

Only the communications between the Department and United (or Evans, Craven & Lackie) prior to, and approximately sixty days after, the April 17, 1989 order are relevant to determining whether the Department was on notice that United would be affected by its April 17, 1989 order. There is nothing in the evidentiary materials presented in opposition to the motion for summary judgment which even remotely suggests that the Department had explicit or constructive notice of the assignment to United until a letter of July 5, 1989 to the Department from Mr. Cartwright of Evans, Craven & Lackie. This was well beyond sixty days following the April 17, 1989 third party distribution order. That letter, for the first time, spelled out United's involvement and enclosed the settlement agreement between the City, United, and United's insureds which made the assignment of the City's third party lien interests to United. In short, United's presentation of these communications does not directly, or by any reasonable inference, raise a genuine issue as to any material fact bearing on

United's defense against the motion for summary judgment on the timeliness issue. See CR 56; and In re David H. Potts, BIIA Dec., 88 3822 (1989). The only inference on this particular subject which can be drawn from the materials before us is that the Department was aware that staff of Evans, Craven & Lackie were inquiring of, and negotiating with, the Department concerning the City's interests in a refund of monies paid into the pension reserve and the third party distribution.

We have also considered whether the sixty-day period for filing appeals began to run against the City only after communication of the April 17, 1989 order to Evans, Craven & Lackie (as the City's attorneys) on August 8, 1989, even though the City had received the order directly some time in April 1989. See Affidavit of Mary Tannehil, Exhibit C. We have previously held that a Department order must be sent to a worker's last known address as shown by the records of the Department. RCW 51.52.050. When the worker has notified the Department of an address change to an attorney's address, an order sent to the worker at the worker's home address, rather than in care of his or her attorney, has not been "communicated" within the meaning of RCW 51.52.050 so as to start the running of the sixty-day appeal period. In re David Herring, BIIA Dec., 57,831 (1981). An order must be mailed to an employer at "the address of the employer as shown by the records of the Department. . . ." RCW 51.04.082. The rule stated in Herring is as applicable to employers as it is to workers.

The reasonable inference most favorable to the City which can be drawn from its evidence in opposition to the motion for summary judgment is the same as that which we have drawn thus far. The Department knew that Evans, Craven & Lackie was inquiring and negotiating on behalf of the City. No evidence whatsoever has been presented which would suggest that a change of address had been requested in care of Evans, Craven & Lackie. Certainly, no such request was made in writing and, even if we were to view it as sufficient, we could not reasonably infer that such a request was made in the conversations which Mr. O'Brien had with various Department staff. Mr. O'Brien appears to have set himself about making sure that the Department issued its distribution order, but neither his affidavit nor the conversation notes attached make any suggestion that he requested that Evans, Craven & Lackie receive a copy of the order, let alone that the firm address by substituted for, or added to, that of the City. His notes do contain language such as "[i]f we don't get the order in a few weeks Call her." (Emphasis supplied) Exhibit B, Document 1. However, nothing in the context of the notes or in Mr. O'Brien's affidavit suggests that Mr. O'Brien had considered, or that it had been discussed, whether he would receive the order through his client, or the City, or the Department. In fact, Mr. O'Brien learned

on May 22, 1989, well within the appeal period, that an order had been issued on April 17, 1989. Nevertheless, on the evidence before us, it appears nothing was done to obtain the order, or take an appeal from it at that time.

No genuine issue of material fact is raised in the evidence on the matter of whether any request was made to the Department that the firm of Evans, Craven & Lackie become an addressee for orders in which the City had an interest. No such change in the Department addressee records was requested either in writing or orally. The City has not drawn our attention to any provisions in the law which would generally require the Department to serve its orders on an attorney or other representative of a party interested in the orders solely because the attorney or other representative has dealt with the Department on behalf of the party. Without such authority, we are unwilling to place such a burden on the Department.

The City argues that principles of equitable estoppel should be applied against the Department. The City argues that, due to the interactions with the Evans, Craven & Lackie law firm, the City had a right to rely upon a belief that the Department would (whether required by other provisions in the law or not) promptly send the law firm a copy of the April 17, 1989 order. We agree with the Proposed Decision and Order on this issue. We have held that, in appropriate cases, we will apply equitable principles and grant relief accordingly. For instance, in In re State Roofing & Insulation, Inc., Dckt. No. 89 1770 (February 4, 1991) we did grant relief on equitable principles. We differentiated the relief sought in State Roofing from that sought in In re Isaias Chavez, Dec'd., BIIA Dec., 85 2867 (1987); In re Ronald E. Jamieson, BIIA Dec., 62,551 (1983): and In re Seth E. Jackson, BIIA Dec., 61,088 (1982). In Chavez, Jamieson, and Jackson, the granting of equitable relief would have required that we extend the extent of our jurisdiction and/or that we expand an equitable doctrine beyond the confines of its reach as determined by our courts. In the present case, the granting of equitable relief sought by the City would clearly extend our jurisdiction in derogation of RCW 51.52.060 which requires that a party file its appeal within sixty days after communication of the order to the party. The April 17, 1989 order was communicated to the City some time in April 1989 and the appeal was not filed until October 1989. Finding the appeal timely would extend our jurisdiction on equitable principles, which we refuse to do in this case.

We further agree with the Proposed Decision and Order that, even if equitable relief were considered, it would not be appropriate given the facts of this case. We do not find that any representation had been made by the Department that it would in fact send the order to Evans,

Craven & Lackie. We do not view it as reasonable that a law firm would rely upon any such assumption in such an important matter. No evidence was presented to the effect that there was, in fact, any such reliance by the City or Evans, Craven & Lackie. And, even if reliance had occurred and was reasonable at an earlier point in time, the reliance would have no longer been reasonable once Mr. O'Brien learned on May 22, 1989 that an order had been issued on April 17, 1989 which the law firm had not received. No evidence has been presented of steps taken to appeal the order or obtain a copy prior to the letter of July 5, 1989. The elements of equitable estoppel have not been shown to exist, nor do we believe any genuine issue of material fact regarding the elements necessary to estoppel has been raised. See Revenue v. Martin Air Conditioning, 35 Wn. App. 678, 682-683, 668 P.2d 1286 (1983).

The appeal filed by the City of Seattle and/or United Pacific Insurance Company from the April 17, 1989 order is dismissed for lack of Board jurisdiction as untimely. In so holding, we adopt from the Proposed Decision and Order Findings of Fact Nos. 1 through 5, inclusive, and Nos. 7 through 9, inclusive, and add the following to Finding of Fact No. 9 at page 16, line 22 of the Proposed Decision and Order: "Neither did the assignee of the City of Seattle, prior to April 17, 1989 or within sixty days after the April 17, 1989 order was communicated to the City, informally or impliedly notify the Department of its status as assignee or that it had an interest in the subject matter of the April 17, 1989 order or that it expected to receive a copy of the same." We adopt, from the Proposed Decision and Order, Conclusions of Law Nos. 1 and 2 and in addition make the following Conclusions of Law:

CONCLUSIONS OF LAW

3. An assignee of a self-insured employer is not an "other person affected" or "other person aggrieved thereby" within the meaning of RCW 51.52.050 unless the Department is clearly put on notice of the assignee's interest in the subject matter of the order prior to issuance of the order. Since the Department was not informed of United Pacific Insurance Company's interest in the April 17, 1989 order until well after sixty days following the date of communication of the order to the City of Seattle, the later appeal filed on October 12, 1989 is untimely and the April 17, 1989 order is binding upon the City of Seattle and its assignee, United Pacific Insurance Company.

4. Neither RCW 51.04.082 nor RCW 51.52.050 nor any other provision in the law required the Department to serve a copy of the April 17, 1989 order upon the law firm of Evans, Craven & Lackie. The time limitations of RCW 51.52.060 began to run against the City of Seattle in April 1989 when the City received the order.

5. In light of the facts of this case, the doctrine of equitable estoppel should not be applied by the Board in favor of either United Pacific Insurance Company or the City of Seattle.

6. No timely appeal to the Board was filed, as required by RCW 51.52.060, within sixty days of communication of the April 17, 1989 order. The order dated April 17, 1989 is final and res judicata as against the City of Seattle and its assignee, United Pacific Insurance Company.

7. The Board does not have jurisdiction of the subject matter to this appeal. The appeal is hereby dismissed.

It is so ORDERED.

Dated this fifteenth day of March, 1991.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
SARA T. HARMON Chairperson

/s/_____
FRANK E. FENNERTY, JR. Member