Mandrell, Tony

NOTICE OF APPEAL (RCW 51.52.050, RCW 51.52.060)

Protest and notice of appeal

PROTEST AND REQUEST FOR RECONSIDERATION (RCW 51.52.050)

Protest of "Appealable Only" order

When a firm filed an appeal from an "appealable only" order from which it had already filed with the Department a letter requesting reconsideration within prescribed time limits and the Department had not transmitted the protest to the Board and did not reassume jurisdiction in the later appeal, the Board considered the Department's action an indication of its intent to treat the protest as a notice of appeal. *Citing In re Donzella Gammon*, BIIA Dec., **70,041** (1985). **….*In re Tony Mandrell*, BIIA Dec., 92 2819 (1993)**

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: TONY R. MANDRELL	)	**DOCKET NO. 92 2819**
	)	
	)	**ORDER VACATING PROPOSED DECISION**
	)	**AND ORDER AND REMANDING APPEAL TO**
	)	**THE HEARING PROCESS (Amends Decision**
CLAIM NO. M-531314	)	**dated 5/28/93)**

APPEARANCES:

Claimant, Tony R. Mandrell, by
Aaby, Putnam, Albo & Causey, per
Judith M. Proller, Attorney at Law, and Laurel Anderson, Paralegal (withdrawn)

Employer, TriCo Contracting, Inc., by
Steve Seeger, Director of Safety and Loss Control, and
Hall & Keehn, per
Thomas G. Hall and Charles E. Henshaw, Attorneys at Law

Department of Labor and Industries, by
Office of the Attorney General, per
Anne M. Skalley, Assistant, and Steve LaVergne, Paralegal

This is an appeal filed by the employer, TriCo Contracting, Inc., on June 5, 1992 from an order of the Department of Labor and Industries dated February 19, 1992 which affirmed a prior order dated December 30, 1991 which reopened the claim for aggravation of condition. **REMANDED TO THE HEARING PROCESS FOR HEARING ON THE MERITS**.

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 February 1, 1993, in which the appeal of the employer dated June 5, 1992 was dismissed and the matter was remanded to the Department of Labor and Industries with direction to take administrative action expeditiously on TriCo Contracting, Inc.'s April 16, 1992 letter and either enter a determinative order based on reconsideration of its order of February 19, 1992 or to transmit the letter to the Board so it may be acted on as an appeal.

The issue presented by this appeal, and the evidence presented through factual stipulations by the parties, are adequately set forth in the Proposed Decision and Order. However, we differ in our conclusions from those of our industrial appeals judge. For this reason, we set forth those facts upon which we base our decision.

This claim was filed for a low back injury sustained by Mr. Mandrell on November 19, 1990, in his employment for TriCo Contracting, Inc. The claim was allowed by the Department, and was closed on July 5, 1991, with a permanent partial disability award for low back impairment. On February 19, 1992 the Department issued an order which affirmed its December 30, 1991 order reopening this claim for aggravation of condition. The February 19 order stated it was appealable to this Board, but contained no language regarding parties' rights to protest or request reconsideration. In response to that order, the employer sent a letter to the Department on April 16, 1992, protesting all aspects of the claim. The Department received the letter on April 17, 1992. The February 19, 1992 Department order was not explicitly mentioned in that letter. However, the letter in essence referred to the February 19, 1992 order by noting that the Department had "granted with protests from TriCo the reopening of Mr. Mandrell's claim". Furthermore, other portions of the employer's letter referred to prior injuries Mr. Mandrell allegedly suffered in a 1979 auto accident and in a 1983 or 1984 fall on a boat deck, and protested that his physician stated in a March 6, 1992 letter that his aggravation was related to his "old back injury," not the November 19, 1990 industrial injury which was the basis of this claim.

On May 5, 1992 the Department sent a letter to the employer acknowledging receipt of its April 16, 1992 letter; pointing out that the claim had previously been allowed by a January 3, 1991 Department final order; stating that the Department understood that the employer was concerned about the effect of this claim on its premium rates; and stating that every effort would be made to "control future costs on this claim". The letter did not respond to the employer's objection to reopening this claim for aggravation, perhaps because the Department considered the February 19, 1992 reopening order to be appealable only to this Board, and not protestable to the Department. This letter was found in the Department file, after a review of that file pursuant to our right to do so to determine our jurisdiction. In re Mildred Holzerland, BIIA Dec., 15,729 (1965).

No further order was issued by the Department, nor was the employer's April 16, 1992 letter transmitted to the Board to treat as an appeal. On June 5, 1992 the employer filed this appeal with the Board. The appeal referenced the February 19, 1992 Department order, and was granted "subject to proof of timeliness."

The issue before us is whether we have acquired jurisdiction over the issue of whether or not this claim should be reopened for aggravation of condition. The answer to this question is dependent upon the answer to whether the employer's April 16, 1992 letter could be considered as constituting a

timely appeal from the Department order of February 19, 1992; or, whether we are foreclosed from so considering it because it only protested a so-called "non-protestable" or "appealable only" Department order.

Our industrial appeals judge dismissed the appeal of the employer. He found the Board does not have jurisdiction because the April 16, 1992 letter should be viewed at least as a protest of the February 19, 1992 order, and the Department must act on the letter and reconsider its order, or, at its option, transmit it to the Board as an appeal.

It is true that in many cases the Board denies or dismisses appeals where a party has already timely protested or requested reconsideration of a Department order. In re Santos Alonzo, BIIA Dec., 56,833 (1981). The cornerstone of the Santos Alonzo case is the language, contractual in nature, found on most Department "final" orders, promising that if a protest or request for reconsideration is timely filed, the Department will consider the request and will issue a "further appealable order". Cf. RCW 51.52.050. In the instant case, the Department's February 19, 1992 order duly notified the parties of the right to appeal the order, but contained no protest language or the contractual promise to issue a further appealable order following a timely protest. Thus, the Department was not "bound" to reconsider its February 19, 1992 order. In re Donzella Gammon, BIIA Dec., 70,041 (1985).

What then should the Department do upon receipt of a timely document from a party expressing it is aggrieved by, and attempting to challenge, a Department order in a particular claim, where the order apparently indicates that it will not be reconsidered? First, the order can still be reconsidered. We quite often see cases where a so-called "non-protestable" order is timely protested, and the Department holds the order in abeyance and does, in fact, reconsider its determination. In this instance, the Department did not respond to the employer's April 16, 1992 challenge to the Department's reopening the claim.

Second, the Department, not having reconsidered its order, should have promptly transmitted the document to this Board for our consideration of whether it is a cognizable appeal. This process is frequently followed by the Department and accepted by this Board. As we observed in Gammon, RCW 51.52.050 and 51.52.060, when read together, permit that either a protest or an appeal may be validly filed with the Department.

Finally, RCW 51.52.060 permits the Department, within thirty days after receiving a notice of appeal, to modify, reverse or change its decision or to hold its terms in abeyance pending further consideration. Even if the Department opts not to reconsider its order in response to an appeal, it is

provided that opportunity. The Department's decision to act in response to an appeal is generally referred to as "reassuming jurisdiction."

In situations such as this case, where the Department declines to reassume jurisdiction in response to a later appeal filed with this Board, it is, in effect, stating its intent to treat the earlier protest as an appeal. The Department's action in returning the appeal to us, without having "reassumed jurisdiction", is tantamount to forwarding the protest to us for consideration of whether it is a cognizable appeal.

We do not believe the omission of language on a Department order regarding the right to protest, and the Department's refusal to consider a protest therefrom, can, by those facts alone, completely divest an aggrieved party of its review and appeal rights.

In Gammon, we went on to hold:

> However, we believe the letter of February 14, 1985 [from the claimant], did operate to toll the finality of the December 20, 1984 order. Fifty-six days elapsed between the date of the Department order and the letter's filing. The fact that the Department delayed in transmitting the matter to the Board is inconsequential to the claimant's rights herein. The letter of February 14, 1985 must properly, under the circumstances of this case, be considered a notice of appeal. Pursuant to RCW 51.52.060, the notice of appeal appears to have been timely filed and this Board must take jurisdiction over the appeal. Any other result would be untenable. We cannot believe that the legislature intended that the appeal rights of a party feeling aggrieved by a Department order, whether that party is a claimant or an employer, could be legally foreclosed by an administrative practice of "x-ing out" certain information on rights on a printed form, or by administrative delay in forwarding a document expressing dissatisfaction with a Department decision from one agency to another.

Gammon, at 4-5 (Emphasis added).

A similar position is required in the instant case. In both cases, a clear protest and request for reconsideration was filed with the Department by an aggrieved party within the sixty-day allowable period. In Gammon, the written document was forwarded to this Board after the appeal period elapsed. Here, the written document has not been formally transmitted to us by the Department. This is a distinction without a difference. The Department had the opportunity to reassume jurisdiction, pursuant to RCW 51.52.060, but elected not to. Furthermore, the employer's letter of April 16, 1992, expressing dissatisfaction with the Department's reopening order, is already in our record as Exhibit 1.

No useful purpose is served by remanding the claim to the Department simply for that agency to turn around and "transmit" the letter back to the Board.

We find that the letter of April 16, 1992 did operate to toll the finality of the February 19, 1992 order. The letter must properly, under the circumstances of this case, be considered as a notice of appeal. Pursuant to RCW 51.52.060, it was timely filed fifty-eight days after the date of the Department's challenged order, and the Board must take jurisdiction over the appeal. Clearly, all parties have been put on notice that the employer felt aggrieved by the order of February 19, 1992, and no confusion exists as to the employer's intent to challenge that order. This conclusion is consistent with the indication in RCW 51.52.060 that it is not a ground for denying an appeal if the notice of appeal is not filed with both the Board and the Department.

The Proposed Decision and Order of February 1, 1993 is vacated. This matter is remanded to the hearings process, pursuant to WAC 263-12-145(4), for further proceedings on the merits of the appeal, i.e., whether or not the claimant's low back condition became aggravated between July 5, 1991 and February 19, 1992, due to the effects of his November 19, 1990 injury.

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. At the conclusion of the further proceedings, the industrial appeals judge shall, unless the matter is dismissed or resolved by an Order on Agreement of Parties, enter a Proposed Decision and Order containing findings and conclusions as to each contested issue of fact and law, based upon the entire record, and consistent with this order. Any party aggrieved by such Proposed Decision and Order may petition the Board for review of such further Proposed Decision and Order, pursuant to RCW 51.52.104.

It is so ORDERED.

Dated this 16th day of June, 1993.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/
S. FREDERICK FELLER Chairperson

/s/
FRANK E. FENNERTY, JR. Member

/s/
PHILLIP T. BORK Member