Smith, Carmel

PROTEST AND REQUEST FOR RECONSIDERATION (RCW 51.52.050)

Application to reopen treated as protest

If an order denying an application to reopen is not communicated to the worker and contains language promising a further order if a protest is filed, a subsequent application to reopen should be treated as a timely protest and request for reconsideration of the first denial of the request to reopen. Following *In re Ronald Leibfried*, BIIA Dec., 88 2274 (1990). Distinguishing *In re Daniel Bazan*, BIIA Dec., 92 5953 (1994). ***….In re Carmel Smith*, BIIA Dec., 95 1795 (1996)** [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 96-2-21023-4.]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: CARMEL D. SMITH	)	**DOCKET NO. 95 1795 & 95 2197**
	)	
CLAIM NO. S-663875	)	**DECISION AND ORDER**

Claimant, Carmel D. Smith, by
Michael B. Markham

Self-Insured Employer, The Boeing Company, by
Law Office of Gary D. Keehn, per
Gary D. Keehn

The claimant, Carmel D. Smith, filed an appeal with the Board of Industrial Insurance Appeals on March 24, 1995, from orders of the Department of Labor and Industries dated January 23, 1995 and January 24, 1995. The order dated January 24, 1995, and assigned Docket No. 95 1795, affirmed an order dated March 22, 1994, that stated that the reopening of the claim was rejected and found that provisional time loss had been paid from December 26, 1993 to February 28, 1994, and requested the claimant to pay back, to the self-insured employer, $3,430.05. The order dated January 23, 1995, affirmed a Department order dated February 16, 1994, that denied the claimant's request that her claim be reopened. **REMANDED**.

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 March 18, 1996, in which the order of the Department dated January 23, 1995 and January 24, 1995, was dismissed.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed and the rulings are affirmed.

The Proposed Decision and Order remands this case to the Department for communication of a March 26, 1990 closing in accordance with our decision *In re Daniel Bazan,* BIIA Dec., 92 5953 (1994). We have granted review because we find that this case is

distinguishable from *Bazan,* and the rule of law that applies is that enunciated in our decision *In re Ronald K. Leibfried*, BIIA Dec., 88 2274 (1990).

We will first address the facts that distinguish this appeal from *Bazan*. In *Bazan*, the claimant established in the record that he had never received communication of the Department order closing his claim. Indeed, establishing non-communication was the sole purpose for which he participated in the hearing process. Mr. Bazan wished to compel the Department to comply with the requirement of communicating the order to him at his address of record. Under those circumstances, there is no alternative but to compel the Department to effect communication, even though the most likely result would be a reiteration of the decision to close the claim and a new appeal to the Board on the merits of the closing order. However, we carefully distinguished Mr. Bazan's appeal from that line of cases in which the aggrieved party chose to go forward with the appeal even in light of non-communication.

> Some of the cases concern situations of, what might be termed, "cured communication" or "constructive communication", where the parties wished to proceed with trial and did so. The [*Bazan*] case before us is different from those cases in that: 1) communication did occur at some point; and 2) a party was allowed to proceed, after the communication. Rodriguez v. Dep't of Labor & Indus., 85 Wn.2d 949 (1975); In re Larry Lunyou, supra; In re Elmer P. Doney, BIIA Dec., 86 2762 (1987); In re Mollie L. McMillon, BIIA Dec., 22,173 (1966); and In re David P. Herring, BIIA Dec., 57,831 (1981). None of the cases required a party to proceed in the circumstances of non-communication. We, therefore, do not believe Mr. Bazan was properly required to try the case on the merits at the time of the hearing.

Bazan at 6.

In the current appeal, our industrial appeals judge concluded that *Bazan* mandated a remand to the Department in *every* case in which a party establishes non-communication of a Department order. If, in fact, the party who is aggrieved by the order stipulates to a communication date or to "constructive" communication and wishes to proceed on the merits, the appeal may go forward. The judge must then consider the legal effect of the stipulated or constructive

communication. That issue leads us to a further discussion of what kind of action by the Department causes a party to be aggrieved.

In *Bazan*, we concluded that a party who has not received communication of an order is not aggrieved by the order itself, but is aggrieved by the Department's failure to properly communicate the order in compliance with RCW 51.52.050. While the lack of communication of the order may be one way in which a party can be aggrieved, it is not the only way. For example, a person who has been receiving time loss compensation may be aggrieved if the Department stops paying that benefit, even if the termination order is not communicated. The actual termination of benefits aggrieves the party. In the same way, a person whose entitlement to medical benefits is terminated is aggrieved even though the written order terminating benefits is not communicated. We addressed such a situation in *In re Ronald K. Leibfried.*

In *Leibfried*, the September 14, 1987 order closing the claim was not communicated to the claimant. On March 11, 1988, after learning of the closure from a third party, Mr. Leibfried filed a reopening application with the Department. The actual closing order was communicated to the claimant after he filed an appeal with this Board. On petition for review to the Board, we determined that the March 11, 1988, reopening application should be construed as a protest to the September 1987 closing order, that required that the Department issue a further appealable order.

> It is clear that the application for reopening filed on claimant's behalf on March 3, 1988, was filed in order to notify the Department of his need for continued treatment. The application therefore constituted a timely protest to the Department order of September 14, 1987, which closed the claim.
>
> However, the September 14, 1987 Department order contained language indicating that the Department would issue a further appealable order upon receipt of a protest. The filing of the protest automatically set the September 14, 1987 order aside and held it in abeyance. The Department must investigate further and enter another determinative order. In re Santos Alonzo, BIIA Dec., 56,833 (1981).

Leibfried at 4.

We went on to consider the issue of whether a Department order ruling on a reopening application can be considered a further determinative order where the result was denial of further benefits.

> The Industrial Appeals Judge construed the May 11, 1988 Department order (which denied the reopening application) as an order issued in response to the protest of March 3, 1988. He interpreted the May 11, 1988 order as adhering to the provisions of the September 14, 1987 closing order. We disagree. In issuing the May 11, 1988 order, the Department adhered to the provisions of a Department order of April 7, 1988, which denied the application to reopen for aggravation of condition. In doing so, the Department determined that there had been no objective worsening of the claimant's condition since the previous order issued by the Department on September 14, 1987. However, because the September 14, 1987 order never became final, the aggravation issue was not properly before the Department. Reid v. Dep't of Labor & Indus., 1 Wn.2d 430 (1939). Furthermore, there is a substantial difference between determining the need for further treatment in a claim prior to initial final closure, and determining whether there has been an aggravation of the condition since previous closure, as required by our aggravation statute. It is the former issue, not the latter, which must be decided by the Department. Our jurisdiction is limited to those issues actually determined by the Department. In re Ronald F. Holstrom, BIIA Dec., 70,033 (1986).

Leibfried at 4-5.

In the present appeal, Ms. Smith's claim was closed by Department order dated January 11, 1989. At that time she was represented by an attorney, Edwin Stone. On February 23, 1990, Ms. Smith filed a reopening application bearing her home address as her address of record. This served to put the Department on notice that she was pursuing reopening on a pro se basis. The Department overlooked this information and mailed the March 26, 1990 order denying benefits to the office of her former attorney.[1] We are satisfied with the hearing judge's determination that Ms. Smith's first knowledge of the March 26, 1990 deny order came from her review of the self-insured employer's records that she received in October 1995. Although Ms. Smith was represented by

Attorney Lynn Greiner after she filed her second reopening application, there is no evidence that that attorney was aware of the March 26, 1990 order or that Ms. Smith had access to a microfiche reader when she obtained the files from Attorney Greiner's office in January 1995.

A review of the Department microfiche in the present appeal pursuant to the holding of *In re Mildred Holzerland*, BIIA Dec., 15,729 (1965), reveals that the Department order of March 26, 1990, promised a further appealable order if a timely protest was filed. Although the Department considered the issue of worsening in both the order of March 26, 1990, and the order of February 16, 1994, the Department considered that issue in the context of different time periods. The order of March 26, 1990, covered the period from January 11, 1989 through March 26, 1990. As the Department was unaware the latter order had not been communicated, March 26, 1990 must have served as the first terminal date when the Department considered the reopening application filed on January 13, 1994. Therefore, the Department did not consider the first thirteen months of the aggravation period when issuing the February 16, 1994 order.

The proposed decision to remand the claim to the Department for re-communication of the March 26, 1990 order was not based on Ms. Smith's expressed desire to reach that outcome, but rather on the hearing judge's interpretation of *Bazan*. 1/26/96 Tr., at 3-4. There is no indication in the record that all parties were not willing to proceed on the merits of the appeal. We could remand the appeal to the hearing process to make a specific inquiry, but because of the *Alonzo* problem noted above, even if the parties do wish to proceed, the result would still be a remand to the Department for the issuance of a further appealable order. In the interest of judicial economy, the claim should be remanded to the Department for reconsideration of any worsening of Ms. Smith's industrially-related condition for the period beginning January 11, 1989, and the issuance of a further determinative order.

[1] Interestingly, later correspondence from the Department, after Ms. Smith filed a second reopening application bearing only

FINDINGS OF FACT

1. On December 10, 1985, the claimant, Carmel Smith, filed an application for benefits with the Department of Labor and Industries alleging that she sustained an industrial injury on November 14, 1985, during the course of her employment with the Boeing Company.

   The claim was accepted and benefits paid. On February 1, 1988, the Department issued an order closing the claim without an award for permanent partial disability. This order was protested within sixty days by the claimant and on March 8, 1988, the Department issued an order holding the closing order in abeyance.

   On January 11, 1989, the Department issued an order adhering to the February 1, 1988 order.

   On February 23, 1990, the claimant filed an application to reopen her claim with the Department of Labor and Industries. On March 26, 1990, the Department issued an order denying the reopening application.

   On January 13, 1994, the claimant filed an application to reopen her claim. On February 16, 1994, the Department issued an order denying the application. On March 22, 1994, the Department issued an order demanding that the claimant repay, to the self-insured employer, $3,430.05, that she received as provisional time loss compensation. Both orders were protested by the claimant within sixty days. The February 16, 1994 order was held in abeyance on August 4, 1994, and the March 22, 1994 order was held in abeyance on November 2, 1994.

   On January 23, 1995, the Department issued an order affirming the February 16, 1994 order. On January 24, 1995, the Department issued an order affirming the Department order dated March 22, 1994. The claimant filed appeals from these orders with the Board of Industrial Insurance Appeals on March 24, 1995. On April 20, 1995, the Board issued orders extending time to act on the appeals an additional ten days. On April 24, 1995, the Board issued orders granting the appeals and assigning them Docket Nos. 95 1795 and 95 2197 and ordering that further proceedings be held.

2. Mr. Edwin Stone had previously represented Ms. Smith during the administration of her claim, but she had not retained him past the January 11, 1998 closure. The reopening application she filed on February 23, 1990, informed the Department of her mailing address. The Department order dated March 26, 1990, was mailed to the claimant in care of Mr. Stone. Mr. Stone did not forward the order to

her home address, was properly directed to her at that address.

Ms. Smith and she never received the order from any other source before October 1995.

3. The Department order of March 26, 1990, contained language that informed the claimant that if she filed a timely protest from the order, the Department would issue a further determinative order.

4. The Department did not consider Ms. Smith's protest of the March 26, 1990 order, and did not issue a further determinative order in response to the protest.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has only that jurisdiction over the parties and the subject matter of this appeal, which allows the Board to dismiss the appeal and remand the matter to the Department.

2. Ms. Smith's January 13, 1994 reopening application constitutes a timely protest to the Department order of March 26, 1990. That protest automatically set aside the Department order of March 26, 1990, and held it in abeyance.

3. This matter is remanded to the Department of Labor and Industries to take administrative action expeditiously on the claimant's timely protest and request for reconsideration of the order of March 26, 1990, and to enter a determinative order based on reconsideration of said order.

It is so ORDERED.

Dated this 8th day of July, 1996.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
S. FREDERICK FELLER Chairperson

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

/s/_____
ROBERT L. McCALLISTER Member