Thomas, Herbert

BOARD

Two member Board

The Department order must stand when the Board is reduced to two voting members who disagree on the disposition of the appeal. **….*In re Herbert Thomas*, BIIA Dec., 42,061 (1973)** [*Editor's Note: But see Dep't of Ecology v. City of Kirklan*d, 84 Wn.2d 25 (1974).]

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: HERBERT E. THOMAS	**)**	**DOCKET NO. 42,061**
	)	
CLAIM NO. G-354780	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Herbert E. Thomas, by
Matt Sayre

Employer, Washington State Liquor Control Board,
None

Department of Labor and Industries, by
The Attorney General, per
Robert G. Swenson, Assistant

This is an appeal filed by the claimant on January 22, 1973, from an order of the Department of Labor and Industries dated November 21, 1972, which adhered to a prior order of October 30, 1972, rejecting this claim for the reason that no claim was filed by the claimant within one year after the day upon which the alleged injury occurred. **DEPARTMENT ORDER STANDS**.

DECISION

The present chairman of this Board must and does disqualify himself from participating in the decision on this case, inasmuch as he was a principal witness called to testify at a hearing which was held on the case prior to the date he became chairman.

The two other Board members, after complete discussions of the issue raised by this appeal, are in disagreement as to the decision which should be rendered. To fully understand the positions of the two members, their differing Statements of Positions appended hereto must be read.

Since the statute governing this Board requires a decision and order by at least two of the members, the Board is unable to render any decision or enter any order on the legal issue raised by this appeal.

There being no Board majority for either sustaining or reversing the Department's order of November 21, 1972, said order must stand. See Department of Ecology v. City of Kirkland, 8 Wn. App. 576 (1973); and State v. Beck, 56 Wn. 2d 474 (1960).

In the Board's opinion, this disposition of the case will still permit appropriate appeal and review in the courts, pursuant to RCW 51.52.110, 51.52.115, and 51.52.140. The reasoning set

forth in Department of Ecology v. City of Kirkland, supra, as to the court's review responsibility, appears equally applicable here.

Dated this 31st day of August, 1973.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
PHILLIP T. BORK Chairperson

/s/_____
R.H. POWELL Member

/s/_____
R.M. GILMORE Member

STATEMENT OF POSITION

R. H. Powell, Board Member
Board of Industrial Insurance Appeals

The issue here is singular; i.e., is the statute of limitations concerning the filing of an industrial insurance claim, RCW 51.28.050, tolled by failure of the workman's employer and the Department to comply with the provisions of RCW 51.28.010:

> "Notice of accident--Notification of workman's rights.
>
> Whenever any accident occurs to any workman it shall be the duty of such workman or someone in his behalf to forthwith report such accident to his employer, superintendent or foreman in charge of the work, and of the employer to at once report such accident and the injury resulting therefrom to the department and also to any local representative of the department.
>
> "Upon receipt of such notice of accident, the director shall immediately forward to the workman and/or his dependents notification, in nontechnical language, of his rights under this title."

In the case before us, the workman's employer did not forth-with report to the Department or its local representative the industrial injury which this workman allegedly incurred, as provided in RCW 51.28.010; and because of such failure, the director did not immediately forward to the workman in nontechnical language notification of his rights under the Act.

As I understand the theory of the workman, it is that the failure of his employer to forthwith report the accident and the subsequent failure of the director to notify him of his rights under Title 51 had the effect of tolling the statutory time limitations within which he must file application for

benefits as provided under RCW 51.28.050. I understand his argument to be that the requirements of RCW 51.28.010 clearly require notification to him by the director of his right to file an industrial insurance claim, including the time limitations contained in RCW 51.28.050, and that having not been so advised, he was unaware of the time limitation and did not for this reason file his application for compensation within one year from the time he alleges the industrial injury occurred.

The case law is clear, and the Department's argument persuasive, that prior to the enactment of the second paragraph of RCW 51.28.010 by the Legislature in 1971, the obligation to file a claim for compensation within one year was the sole responsibility of the workman. Circumstances of varied nature had caused this question to be placed before our Supreme Court, and in each instance, despite mitigating circumstances, the court has held that this obligation was the workman's and his alone. See:

Ferguson v. Department of Labor and Industries, 168 Wash. 677;

Sandahl v. Department of Labor and Industries, 170 Wash. 380;

Leschner v. Department of Labor and Industries, 27 Wn. 2d 911;

Wheaton v. Department of Labor and Industries, 40 Wn. 2d 56;

Pate v. General Electric, 43 Wn. 2d 185.

Such was the state of the law before the enactment of the second paragraph of RCW 51.28.010 in 1971. There has been no opinion of our court dealing with this problem since the enactment of the second paragraph of this statute. The basic problem is whether the enactment of the second paragraph of this statute in 1971 changed the state of the law.

In my view, there is only one way in which RCW 51.52.010 can be read and reasonably interpreted, and that is precisely the manner in which the Legislature enacted it. The Legislature unequivocally placed a clear responsibility on the employer to advise the Department, and the local representative of the Department, forthwith of any industrial injury, and an equally unequivocal duty was placed on the director that upon receipt of such notification from the employer, he must immediately forward to the workman and/or his dependents, in nontechnical language, notification of his rights under Title 51. Such notification, to be meaningful, must of necessity contain the right the workman has to file a claim for compensation, the manner of so doing, and the time limitations imposed upon him for the performance of this act, as set forth in RCW 51.28.050. Any notification to a workman that does not contain this specific information is on its face defective, incomplete and meaningless. As the rights of the workman begin with his proper filing of an industrial insurance

claim, it is essential that any notification to him by the director explicitly include the information relating to this act of filing an application, including the time element involved.

It may well be argued that the strict enforcement of the obvious language of RCW 51.28.010 will impose upon employers a burdensome and unreasonable requirement. I want to avoid any quarrel with this argument one way or the other, as it is not for this Board to determine the wisdom or the folly of what the Legislature has done. I would say, however, that I do not believe that this would impose such an unreasonable and burdensome responsibility as some people would urge, but rather, it is a necessary and reasonable requirement, both of the employer and subsequently of the director, if the workmen of this state are to fully understand what their rights are under the Industrial Insurance Act, and to be properly advised of the very essential requirement of timely filing applications for compensation. I do recognize that before an employer can be expected to act, the occurrence of the injury must be known to him, as it was in this instance.

We have in evidence the report of accident, indicating the claimant filled out his portion of the accident report on September 28, 1972, and that his physician, Dr. W. F. Kluge, completed his portion on October 3, 1972. The employer's portion of the form was completed on October 11, 1972. The evidence is that the only act done by the employer with respect to notification to the Department of the occurrence of the alleged industrial injury was limited to the completion of the employer's portion of the accident report on October 11, 1972. It is obvious that this act did not comply with the provisions of RCW 51.28.010.

We also have in evidence, as Board Exhibit No. 5, a form which testimony discloses is customarily mailed by the Department of Labor and Industries to injured workmen after they have received the report of accident form from the injured workman. It is apparent that the procedure of mailing such document in the time sequence noted does not conform, nor meet the requirement, imposed upon the director by RCW 51.28.010, paragraph two. This form had been used by the Department prior to the enactment of the statute here in question and not revised by such enactment. For some reason (not stated in the record), there is not evidence that this form was mailed to the claimant in this case upon receipt of his accident claim for.

Assuming one would argue that this form, Exhibit No. 5, somehow or other meets the director's statutory obligation, I find it is defective in two major areas; i.e., it does not advise the workman of his rights to file a claim and the time limitations under which he must act, which is a

prerequisite to his acting properly in the first instance, nor does it include the critical information of his appellate rights beyond the decisions and orders of the Department of Labor and Industries.

It is further clear from this record that there is no means now employed, or historically employed, by the Department of Labor and Industries to advise workmen of their statutory rights to file an industrial insurance claim including the time limitations imposed by RCW 51.28.050. The witness best qualified to speak to this matter, Phillip T. Bork, had no knowledge that any such advice is given and further testified that although notices are supplied employers, to be posted upon the premises informing workmen that they are covered by the terms of the Industrial Insurance Act, such notice does not include advise as to the time limitations in which claims for compensation must be made. If such notices were drawn to include the several specific rights and procedures required of the workmen to secure benefits, they might well be considered as marginal compliance with the statute, adequate although in different form. Unfortunately, the posted notices are notably deficient.

It is my view that there is no case law now pertinent or material to the issue which we have before us; that the enactment of the second paragraph of RCW 51.28.010 must be interpreted as imposing an unqualified responsibility upon the director, which, in turn, is based upon the performance of certain responsibility of the employer contained in the first paragraph of RCW 51.28.010, and that the two taken together have only one meaning and are subject to one interpretation.

Failure of the workman to be advised as provided in RCW 51.28.010 of his rights, including his right to file a claim within the statutory time limitations, must be held to toll the statute of limitations, RCW 51.28.050, until such time as he is properly advised. It is well settled in the law that the statute is to be liberally construed to the benefit of the workman. This is an appropriate case for such construction.

STATEMENT OF POSITION

R. M. Gilmore, Board Member
Board of Industrial Insurance Appeals

The pertinent facts as to this appeal are these:

On August 10, 1971, the claimant sustained chest pains during the course of his duties with a Washington State Liquor Control Board store. Apparently he was unloading cases of liquor when he developed distress. He promptly told the assistant manager, Vera Werner, of his problem. The claimant continued to work at the store at lighter duties until August 28, 1971, when he went on sick

leave. Thereafter, he used up his annual leave and after an evaluation of his condition by a Dr. Kluge on September 28, 1971, he laid off the job permanently.

The Department of Labor and Industries received an accident report on October 10, 1972. The claim was denied by the Department on October 30, 1972, on the ground that it was not filed within one year after the day upon which the alleged injury occurred.

The Board issued an order granting claimant's appeal on condition that hearings be held to determine the propriety of the claimant's assertion that his failure to file a claim (Report of Accident) with the Department within one year should be overlooked because of his employer's and the Department's failure to comply with the provisions of the second paragraph of RCW 51.28.010.

The claimant's letter of protest in the Department's file indicates that the claimant first knew about the permanency of his condition on September 28, 1971, at the time Dr. Kluge made an evaluation and told him about his medical problem.

A resolution of this question revolves around the interpretation to be made on three statutes; namely RCW 51.28.010, RCW 51.28.020, and RCW 51.28.050. Those statutes read as follows:

> "51.28.010 Notice of accident—Notification of workman's rights. Whenever any accident occurs to any workman it shall be the duty of such workman or someone in his behalf to forthwith report such accident to his employer, superintendent or foreman in charge of the work, and of the employer to at once report such accident and the injury resulting therefrom to the department and also to any local representative of the department.
>
> "Upon receipt of such notice of accident, the director shall immediately forward to the workman and/or his dependents notification, in nontechnical language, of his rights under this title."
>
> "51.28.020 Workman's application for compensation--Physician to aid in. Where a workman is entitled to compensation under this title he shall file with the department or his self-insuring employer, as the case may be, his application for such, together with the certificate of the physician who attended him, and it shall be the duty of the physician to inform the injured workman of his rights under this title and to lend all necessary assistance in making this application for compensation and such proof of other matters as required by the rules of the department without charge to the workman. If application for compensation is made to a self-insuring employer, he shall forthwith send a copy thereof to the department."
>
> "561.28.050 Time limitation for filing application or enforcing claim for injury. No application shall be valid or claim thereunder enforceable

> unless filed within one year after the day upon which the injury occurred or the rights of dependents or beneficiaries accrued."

It is observed that the second paragraph of RCW 51.28.010 is a new amendment which became effective on July 1, 1971.

It is the claimant's contention in this case that he notified his employer that he had experienced chest pains while unloading boxes on August 10, 1971.

So far as can be determined, there are no decisions of either the Court of Appeals or the Supreme Court construing the impact of RCW 51.28.010 as amended in 1971 upon the applicability of the statute of limitations under RCW 51.28.050.

In Leschner v. Department of Labor and Industries, 27 Wn. 2d 911, the claimant reported an injury to her employer in February 1941 and was told that she should have her doctor send in a report of accident. The doctor she relied on failed to send in a report, and the claimant assumed that this had been taken care of. The claimant subsequently consulted another doctor and eventually, after a lapse of four years, a claim was sent to the Department. The Department rejected the claim because it was not timely filed. The court denied the claimant benefits, holding that the attending physicians of injured workmen are not agents of the Department and the Act gives them no power to alter any legal relationship between a claimant and the Department -- further, that the Department has no power to make exception to the requirement that claims be filed within one year from the date of the accident for "equitable reasons," the court adding that "equity aids the vigilant, not those who slumber on their rights."

In Pate v. General Electric, 43 Wn. 2d 185 (1953), the question arose as to the liability of the employer in a situation where the claimant reported an injury to the employer but the employer did not report the accident to the Department of Labor and Industries under RCW 51.28.010, and also the physician who was in the employment of the employer did not inform the claimant of his rights under the Act. The Supreme Court held that in this set of circumstances, the employee was not entitled to recover from the employer, stating that the employer is only required by the statute to report the accident; he is not required by the statute to file a claim for compensation on behalf of the injured workman. The court indicated that the report to be made by the employer is designed to have only statistical value for information to the Department, and the court quoted from the Wheaton case with approval to the effect that the filing of an application is the exclusive manner in which action by the Department may be had in any particular case and the right of the workman to

the compensation secured. The court went on to state further that with reference to the physician's duties as set out in RCW 51.28.020, it is not the purpose of that statute to place upon the physician the primary duty of timely instituting a claim on behalf of the workman or of advising him that he should or should not make such a claim, and that the responsibility of initiating a claim is upon the workman. Further, that when it has been initiated, it then becomes the duty of the physician to perform his statutory duty as outlined. The court quoted with favor the decision in Leschner, supra.

It is clear to me that the timeliness provision in the one year statute of limitations is completely and entirely separate and independent of any duties of the employer under RCW 51.28.010, or the physician under RCW 51.28.020. The alleged breach of responsibility by the employer under RCW 51.28.010 is independent of the claimant's responsibility to file a claim under RCW 51.28.050.

To hold the statute of limitations under RCW 51.28.050 does not begin to run until the employer has made a report to the Department would be directly contrary to the holding of the Pate case, where the court very clearly separated the employer's report and the workman's claim to the Department. The Legislature did not amend the statutory one-year limitation provision, and by adding the last paragraph of RCW 51.28.010, the Legislature did not in any way amend the timeliness statute. The wording of the timeliness statute and the decisions of the Supreme Court construing it must be followed and therefore the Department acted correctly in rejecting this claim.

I am convinced that any report by the employer to the Department under RCW 51.28.010 is not a claim for benefits by the claimant. Despite the duty which is imposed upon the Department to forward to the workman notification of his rights under RCW 51.28.010, the claimant would still have to file for those rights. To establish rights under the Act, the claimant or someone in his behalf, must file a claim.

RCW 51.28.010 refers to the term "accident" in setting forth the duties of the employer and the director thereunder. This poses a problem in itself. There are of course countless "accidents" which occur in industrial employment which, by fortunate circumstance, no one is injured. There are thousands of so-called first-aid cases requiring nothing but the most minor attention. Whether the Legislature intended that all accidents be reported regardless of whether anyone was injured or not is going to take some type of reasonable administrative approach to the problem. However, this has nothing to do with the direct responsibility which a worker has under the Act to file a claim.

In the case at hand, there was no accident per se in that the claimant merely complained of chest pains on August 10, 1971. Is it a reasonable view that an employer must report to the

Department every complaint of pain which is made by an employee? I think not, as we are still dealing with work-injury insurance and the results of industrial accidents and injuries.

In the case before us, it would be manifestly improper to saddle the employer with the responsibility of knowing the nuance of the "unusual exertion" concept as it pertains to the definition of an injury under the Act. Certainly an employer should not be held responsible for knowledge of the unique doctrine set forth in Windust v. Department of Labor and Industries, 52 Wn. 2d 33 and in succeeding heart cases. In this case before us, it is yet to be determined if the claimant had an injury, i.e., that his box-handling activities on August 10, 1971, constituted unusual exertion which in turn could causally relate the activities to his heart condition.

Finally, if it is unknown whether or not the claimant had an injury, under what stretch of imagination could the employer be held responsible for reporting chest pains to the Department?

The employer could not be expected to believe that such a situation met the provisions of RCW 51.28.010 "...and of the employer to at once report such accident and the injury resulting therefrom ...."

I would sustain the Department's order of November 21, 1972.