

## **Houlihan, Thomas**

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### **[NOTICE OF APPEAL \(RCW 51.52.050, RCW 51.52.060\)](#)**

#### **Protest and notice of appeal**

A notice of appeal filed only with the Department cannot be treated as a protest and request for reconsideration. The Department's subsequent adherence order is therefore a nullity which does not divest the Board of jurisdiction over the appeal from the original order. ....*In re Thomas Houlihan, BIIA Dec., 67,414 (1985)*

Scroll down for order.



1            Assuming the proper authority of the Department to issue its order of August 8, 1979, we would  
2 have to agree. The resolution of this issue must turn, then, on whether the order of August 8, 1979  
3 was validly entered. If it was not, i.e., was a nullity as concluded in the Proposed Decision and Order,  
4 then this Board does have jurisdiction over the present appeal.  
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7            The record reveals that the order of August 8, 1979, was entered after two communications had  
8 been directed to the Department from one John S. Perazzo, a business agent for the claimant's union  
9 local. These communications were in the form of letters and are in the record before us as Exhibits 4  
10 and 5. The initial communication of Mr. Perazzo dated March 30, 1979 was prompted by the order of  
11 the Department dated March 19, 1979, which allowed Mr. Houlihan's claim for hearing loss as an  
12 industrial injury, (sic) awarded a 3.8% loss of hearing in both ears, and closed the claim. That order  
13 contained prefatory language on both pages 1 and 2 which read:  
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18            "Any protest or request for reconsideration of this order must be made in  
19 writing to the Department of Labor and Industries in Olympia within sixty  
20 days. A further appealable order will follow such a request. Any appeal  
21 from this order must be made to the Board of Industrial Insurance  
22 Appeals, Olympia, within sixty days from the date this order is  
23 communicated to the parties or the same shall become final."  
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25 It is critical to observe that in 1979 there were no statutory provisions, nor administrative regulations  
26 that have been cited to us, which bear at all upon the "alternative" of filing a request for  
27 reconsideration with the Department or an appeal to the Board of Industrial Insurance Appeals.  
28 Clearly, the only statutory provision bearing upon the appropriate language to be used in the prefatory  
29 paragraph to the Department's adjudicative orders was contained in RCW 51.52.050 and stated in  
30 pertinent part:  
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33            "... The copy, in case the same is a final order, decision or award, shall  
34 bear on the same side of the same page on which is found the amount of  
35 the award, a statement, set in blackfaced type of at least ten point body or  
36 size, that such final order, decision, or award must be appealed to the  
37 Board, Olympia, within sixty days, or the same shall become final."  
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40 Of even greater significance to the resolution of the issue in this appeal are the provisions contained in  
41 RCW 51.52.060, which has remained unchanged since last amended in 1977. That section  
42 delineates the process required for filing an appeal from "an order, decision, or award of the  
43 Department." It contains, in addition, five provisos enunciating the legal effect of the occurrence of  
44 certain operative facts, and further describes the authority of the department to act either on its own  
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1 initiative or arguably in response to a notice of appeal. The last proviso is that with which we are most  
2 concerned in this case, and it reads:  
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4 "... That the Department, either within the time limited for appeal, or within  
5 thirty days after receiving a notice of appeal, may modify, reverse or  
6 change any order, decision or award, or may hold any such order,  
7 decision, or award in abeyance for a period of ninety days which time  
8 period may be extended by the Department for good cause stated in  
9 writing to all interested parties for an additional ninety days, pending  
10 further investigation in light of the allegations of the notice of appeal, and  
11 the board shall thereupon deny the appeal, without prejudice to the  
12 appellant's right to appeal from any subsequent determinative order  
13 issued by the Department." (Emphasis added).  
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15 The Petition for Review argues that the Proposed Decision and Order was erroneous in attaching  
16 significance to the failure of the Department to act within a ninety-day period to issue a further order,  
17 which authority is granted by a different proviso in RCW 51.52.060. We agree with the position of the  
18 Department expressed in its Petition for Review that the Department's order of August 8, 1979 should  
19 not be termed invalid by its failure to adhere to the ninety-day requirement expressed in statute.  
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21 However, we disagree with the characterization in the Department's Petition that the written  
22 expressions contained in Exhibits 4 and 5 constituted "ambiguous requests for reconsideration". Had  
23 Exhibit 4 been ambiguous, i.e., reasonably construed as either a request for reconsideration or a  
24 notice of appeal, we would also be sympathetic to the Department's argument. However, our reading  
25 of those exhibits leads us to conclude undeniably that the only thing intended by their filing was that  
26 each was intended as a notice of appeal. Under the statutory scheme in existence then and now, an  
27 appeal can only be made to this Board. The fact that it was sent to the Department of Labor and  
28 Industries is not fatal to this Board's jurisdiction, in view of the second proviso contained in RCW  
29 51.52.060, which states:  
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31 "That failure to file notice of appeal with both the Board and the  
32 Department shall not be ground for denying the appeal if the notice of  
33 appeal is filed with either the Board or the Department:...." (Emphasis  
34 added).  
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36 It is our analysis of the provisions of RCW 51.52.060 that where a document is addressed to either the  
37 Board or the Department by a party aggrieved by an order, decision or award of the Department, and  
38 where such document can only be reasonably construed as a notice of appeal and not as a request  
39 for reconsideration, then the Department's sole authority to thereupon act would be to modify, reverse,  
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1 change, or hold in abeyance for a specific time period, the action from which the appeal was taken.  
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3 There exists no authority under such circumstances to simply later issue a so-called "adherence"  
4 order. It is our reading of Exhibits 4 and 5 that such could only be construed as a notice of appeal.  
5 "Appeal" language was specifically used even though not placed in the form of a pleading. Employees  
6 of the Department, who are experienced in matters of this kind, should have recognized those  
7 documents as intended appeals and forwarded them to this Board for processing. Failure of the  
8 Department to so do must not result in the appealing party being left without a remedy.  
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12 The Department's order of August 8, 1979 neither modified, reversed, changed, or held in  
13 abeyance its order of March 19, 1979. It simply "adhered" to the provisions of its prior order. Under  
14 the facts presented in this particular case, we think such action was ineffective to constitute a further  
15 and final adjudication of Mr. Houlihan's claim. The Department was without legal authority to issue an  
16 order with operative effect other than one consistent with the specific grant of authority in the final  
17 proviso of RCW 51.52.060. It attempted so to do; its attempt should be regarded as a nullity.  
18 Consequently, by reason of the timely notice of appeal filed with the Department from its order of  
19 March 19, 1979, the matter now before us must be considered timely, even though unfortunately  
20 receiving very belated attention. We do have jurisdiction to consider the merits, i.e., the percentage  
21 extent of the claimant's occupationally-related hearing loss, on which issue there is no dispute  
22 between the parties.  
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#### 28 **FINDINGS, CONCLUSIONS AND ORDER**

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30 The Proposed Findings Nos. 1 through 3 are adopted herein as a portion of this Board's final  
31 Findings. Proposed Findings 4 through 7 are stricken and are replaced by our Findings Nos. 4  
32 through 6 as follows:  
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- 34 4. On April 2, 1979, the Department received a document in the form of a  
35 letter dated March 30, 1979, filed on behalf of the claimant by a lay  
36 representative clearly showing the intent to be a notice of appeal from the  
37 Department order of March 19, 1979. Said document was directed to the  
38 attention of the adjudicator who had issued the order of March 19 and was  
39 not addressed to the attention of the Board of Industrial Insurance  
40 Appeals.  
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- 42 5. Following receipt of the notice of appeal dated March 30, 1979, the  
43 Department failed to forward the matter to the Board of Industrial  
44 Insurance Appeals to process as an appeal. On July 23, 1979 a further  
45 letter from the same lay representative on behalf of the claimant was filed  
46 with the Department again expressing the intent to file an appeal from the  
47 March 19, 1979 Department order.

1 6. On August 8, 1979 the Department issued an order which stated in its final  
2 paragraph:

3 "THEREFORE IT IS ORDERED That the Department does  
4 hereby adhere to the provisions of the aforesaid order and  
5 notice (of March 19, 1979) and that the claim shall remain  
6 closed pursuant thereto."  
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9 Proposed Findings 8 through 15 are renumbered as Findings 7 through 14 and are also hereby  
10 adopted as this Board's final Findings.

11 Proposed Conclusions 1, 2, 4 and 5 are adopted by reference herein as the Board's final  
12 conclusions. Proposed Conclusion No. 3 is stricken and is replaced by the conclusion which follows:  
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14 3. The order of the Department of Labor and Industries dated August 8,  
15 1979, which ordered that it "does hereby adhere" to the provisions of its  
16 prior order of March 19, 1979, was invalid and without legal effect in view  
17 of the Findings of Fact entered herein.  
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19 It is so ORDERED.

20 Dated this 29th day of April, 1985.

21 BOARD OF INDUSTRIAL INSURANCE APPEALS

22  
23  
24 /s/  
25 MICHAEL L. HALL Chairperson

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27 /s/  
28 FRANK E. FENNERTY, JR. Member

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30 /s/  
31 PHILLIP T. BORK Member  
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