

Kleest, Robert, Jr.

DEPARTMENT

Ambiguous orders

When the Department issues an order affecting the finality of an earlier order, the effect of the original order may not be revived by a third order unless the third order is drafted in such a way that it unambiguously states the Department's final action. ...*In re Robert Kleest, Jr.*, BIIA Dec., 02 13352 (2002)

Scroll down for order.

**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

IN RE: ROBERT F. KLEEST, JR.)	DOCKET NO. 02 13352
)	
CLAIM NO. X-364986)	ORDER GRANTING RELIEF ON THE RECORD
)	

On December 4, 2001 claimant, Robert F. Kleest, Jr., filed an appeal to an order of the Department of Labor and Industries dated October 4, 2001.¹ The October 4, 2001 order declared null and void a Department order dated July 24, 2001 that had corrected and superseded a Department order dated May 30, 2001 and kept the claim open for further treatment. The May 30, 2001 order had closed the claim.

An agency order is void only if the agency lacks subject matter jurisdiction over the issue, *i.e.*, when the agency attempts to decide a type of controversy over which it has no authority. *Marley v. Department of Labor and Industries*, 125 Wn. 2d 533, 539-40 (1994). In contrast, the Department had clear authority to correct and supersede its May 30, 2001 order closing the claim. By statute the Department may modify, reverse or change any order if it does so within the time limited to appeal that order. RCW 51.52.060 (4)(a). The Department order of July 24, 2001 followed by 55 days the May 30, 2001 order it corrected and superseded. In this case the time limited for appeal ran no earlier than July 29, 2001, *i.e.* 60 days after May 30, 2001. RCW 51.52.060 (1)(a). The Department timely modified, changed or superseded the May 30, 2001 order by its order of July 24, 2001. Thus, the July 24, 2001 order was *not* void. Therefore, the order of October 4, 2001 was incorrect as a matter of law in declaring the July 24, 2001 order to be void.

The Department order of October 4, 2001 did not resurrect and give renewed effect by the May 30, 2001 order. RCW 51.52.060(4) contemplates that the Department may issue further orders affecting the finality of earlier orders. However, we have previously held that once an order has ceased to be a final order of the Department through issuance of such a further order, the original order may not be revived by issuance of yet another, third order that declares an intermediary to be "null and void." *In re Brian N. Wiwel*, Docket No. 02 13848 (April 15, 2002). To allow such a result could deprive parties of their rights to appeal an order by shortening, or perhaps eliminating, the time during which an appeal from the original, substantive order may be brought under RCW 51.52.060. By issuing its order of October 4, 2001, the Department attempted to resurrect the May 30, 2001 order well past the time the claimant would otherwise have been able to appeal the closure of his claim under the May 30, 2001 order.²

¹ Claimant's notice of appeal was postmarked on December 3, 2001, the 60th day following the date of the order appealed. We consider this mailing to be a timely appeal for purposes of RCW 51.52.060. *In re Harold Francis*, BIIA Dec., 68,154 (1985).

² The October 4, 2001 order, in and of itself, raises only the issue whether the order of July 24, 2001 was "null and void." It did not re-raise all of the substantive issues addressed by the May 30, 2001 order. By October 4, 2001, the appeal period for the May 30, 2001 order had expired. The claimant had already filed a timely notice of appeal on June 19, 2001 from the Department's order of May 30, 2001. That appeal, assigned Docket No. 01 17153, was dismissed on October 19, 2001, because the May 30, 2001 order was no longer the final written determination of the Department concerning claim closure, within the meaning of RCW 51.52.060, since the Department issued its order of July 24, 2001. On January 23, 2002 we received a motion from the claimant to vacate the Order Dismissing Appeal pursuant to CR 60. By separate order, we have denied that motion because, after the issuance of the July 24, 2001 order the May 30, 2001 order also was no longer a final written determination.

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Furthermore, we do not believe that the October 4, 2001 order directly and unambiguously announces its ostensible effect of closing the claim. Fundamental fairness requires that the Department's closure of the claim be unambiguous for it to have *res judicata* effect. *King v. Department of Labor & Indus.*, 12 Wn. App. 1, 4-5 (1974). Thus, the Department must issue yet another order clearly disposing of the issue of whether this claim is to remain open or is to be closed.

Because the Department had subject matter jurisdiction over this claim, and as the July 24, 2001 order was a determination of a type that the Department had statutory authority to determine, we conclude that the order of October 4, 2001 was incorrect as a matter of law. Pursuant to RCW 51.52.080, we hereby grant relief on the record. It is therefore ORDERED that the Department's order of October 4, 2001 is reversed, and the matter is remanded to the Department for entry of an order clearly disposing of the issue of whether this claim is to remain open or is to be closed. This is without prejudice to the right of any party to appeal from any further order of the Department.

DATED this 7th day of May, 2002.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/ _____
THOMAS E. EGAN Chairperson

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

/s/ _____
JUDITH E. SCHURKE Member