

## **Leahy, Michael**

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### **SELF-INSURANCE**

#### **Closing order**

RCW 51.32.055 allows the Department two years to correct a defective closing order issued by a self-insured employer. ....*In re Michael Leahy, BIIA Dec., 04 20387 (2005)*

Scroll down for order.

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

1	<b>IN RE:     MICHAEL A. LEAHY</b>	)	<b>DOCKET NO. 04 20387</b>
2	<b>CLAIM NO. W-619092</b>	)	<b>ORDER VACATING PROPOSED DECISION</b>
3		)	<b>AND ORDER AND REMANDING THE APPEAL</b>
4		)	<b>FOR FURTHER PROCEEDINGS</b>

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**APPEARANCES:**

Claimant, Michael A. Leahy, Pro Se

Self-Insured Employer, Franklin Pierce School District No. 402, by  
Thomas G. Hall & Associates, per  
Thomas G. Hall

The claimant, Michael A. Leahy, filed an appeal with the Board of Industrial Insurance Appeals on August 25, 2004, from an order of the Department of Labor and Industries dated June 18, 2004. The June 18, 2004 order was communicated to the claimant on June 21, 2004, the Department received his protest to the order on August 18, 2004, and forwarded Mr. Leahy's protest to the Board on August 25, 2004, as a direct appeal. In this June 18, 2004 order, the Department reversed its prior order dated September 2, 2003, wherein the Department closed the claim per the self-insured employer's order dated February 18, 2003. In the June 18, 2004 order, the Department further directed the self-insured employer to pay the claimant a Category 2 permanent partial disability award for dorso-lumbar and/or lumbosacral impairments. The appeal is **REMANDED FOR FURTHER PROCEEDINGS.**

**DECISION**

The industrial appeals judge, in a Proposed Decision and Order issued on May 16, 2005, reversed and remanded the order of the Department dated June 18, 2004. Michael A. Leahy filed a timely Petition for Review. Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is therefore before the Board for review and decision. We vacate the Proposed Decision and Order and remand the appeal to our hearings process for further proceedings.

The industrial appeals judge bifurcated hearings in this appeal to, upon the self-insured employer's request, first hold a hearing to determine the legal viability of the June 18, 2004 Department order, which the claimant, Michael A. Leahy, had appealed. In the June 18, 2004 Department order, the Department provided Mr. Leahy an award for permanent partial disability upon closing, whereas the prior closing orders that it superseded did not provide Mr. Leahy any award for permanent partial disability.

1 On February 18, 2003, the self-insured employer, Franklin Pierce School District No. 402,  
2 issued a Self-Insured Order (SIO) wherein the employer closed the claim. Mr. Leahy testified that,  
3 and the industrial appeals judge determined that, Mr. Leahy received this order on February 20,  
4 2003. The key factual issue is whether Mr. Leahy timely protested the February 18, 2003 order.  
5 This is because the Department issued a subsequent September 2, 2003 order, in which it affirmed  
6 the February 18, 2003 order. Mr. Leahy then timely protested the September 2, 2003 order on  
7 October 22, 2003. It was following and in response to this later protest that the Department, on  
8 June 18, 2004, issued its order in which it reversed the September 2, 2003 order and closed the  
9 claim with an award for permanent partial disability. The self-insured employer argued, and the  
10 industrial appeals judge agreed, that without a timely protest of the original February 18, 2003  
11 closing order, the Department order of June 18, 2004, must be reversed with directions to the  
12 Department to acknowledge that its February 18, 2003 closing order had become final and binding.

13 It may be argued that our industrial appeals judge was lacking authority to consider the legal  
14 viability of, and reverse on such grounds, the June 18, 2004 Department order, as requested by  
15 Franklin Pierce School District No. 402. After all, the school district had not itself appealed from the  
16 June 18, 2004 order. Nevertheless, we do not find it necessary to reach that issue. A Department  
17 staff member indicated Mr. Leahy's protest of the February 18, 2003 order did not appear on the  
18 microfiche until August 2003, and staff from Franklin Pierce School District No. 402's third party  
19 administrator testified that it did not receive a protest within sixty days of February 18, 2003.  
20 However, Karen Green, of the third party administrator, testified that the administrator mailed a  
21 complete copy of the claim file to the Department on May 8, 2003. 3/29/03 Tr. at 16. There is no  
22 direct explanation in the record of what prompted this mailing of the complete file to the Department  
23 on May 8, 2003. We also note Ms. Green testified she had received a phone call from Mr. Leahy  
24 on February 20, 2003, and that he was upset at the closure and that she forwarded him a copy of a  
25 medical evaluation with a letter in which she encouraged him to protest directly to the Department  
26 or the third party administrator. When coupled with Mr. Leahy's testimony that he, on April 18,  
27 2003, filed a protest of the February 18, 2003 self-insured order that he received February 20,  
28 2003, we find that the most reasonable inference is that Mr. Leahy was correct in his testimony and  
29 that the May 8, 2003 mailing of the complete file was in response to receipt of the protest by either  
30 the Department or the third party administrator for Franklin Pierce School District No. 402.

1 Finally, RCW 51.32.055(11) allows the Department to require a self-insured employer to  
2 correct the benefits paid or payable if the Department discovers a violation of the conditions of  
3 claim closure. See also WAC 296-15-450. This claim was accepted after July 31, 1997, in which  
4 event the provisions of RCW 51.32.055(9) apply with regard to the contents of the notice.  
5 RCW 51.32.055(9)(c) requires that the order include the following language in bold-face type:

6 This order constitutes notification that your claim is being closed with  
7 such medical benefits and temporary disability compensation as  
8 provided to date and with such award for permanent partial disability, if  
9 any, as set forth below, and with the condition that you have returned to  
10 work with the self-insured employer. If for any reason you disagree with  
11 the conditions or duration of your return to work or the medical benefits,  
12 temporary disability compensation provided, or permanent partial  
13 disability that has been awarded, you must protest in writing to the  
Department of labor and Industries, Self-Insurance Section, within sixty  
days of the date you receive this order. If you do not protest this order  
to the department, this order will become final.

14 The February 18, 2003 self-insured order, Exhibit No. 1, did not contain language adequately close  
15 to the prescribed language. The February 18, 2003 order did not contain any reference to the  
16 status of temporary total disability compensation or permanent partial disability awards, nor to the  
17 status or duration of return to work with the self-insured employer. Neither did the order suggest,  
18 as specifically required, that Mr. Leahy protest if he disagreed for any of the reasons that were to be  
19 again recounted in the order. Rather, the self-insured order merely indicated that the claim was  
20 being closed with medical benefits only and that, if Mr. Leahy disagreed with this order, he must  
21 protest in writing within sixty days or the order would become final.

22 We find that the self-insured order was so defective in its compliance with the conditions of  
23 closure under RCW 51.32.055(9) that the Department, even absent a timely protest, would have  
24 had the authority to require correction within two years under RCW 51.32.055(11).

25 The Proposed Decision and Order dated May 16, 2005, is vacated. This matter is  
26 remanded to the hearings process, pursuant to WAC 263-12-145(4), for further proceedings as  
27 indicated by this order. The parties are advised that this order is not a final Decision and Order of  
28 the Board within the meaning of RCW 51.52.110. At the conclusion of further proceedings, the  
29 industrial appeals judge shall, unless the matter is dismissed or resolved by an Order on  
30 Agreement of Parties, enter a Proposed Decision and Order containing findings and conclusions as  
31 to each contested issue of fact and law, based on the entire record, and consistent with this order.  
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1 Any party aggrieved by the Proposed Decision and Order may petition the Board for review,  
2 pursuant to RCW 51.52.104.

3 It is so **ORDERED**.

4 Dated this 10th day of October, 2005.

5 BOARD OF INDUSTRIAL INSURANCE APPEALS

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/s/ \_\_\_\_\_  
THOMAS E. EGAN Chairperson

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/s/ \_\_\_\_\_  
FRANK E. FENNERTY, JR. Member

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/s/ \_\_\_\_\_  
CALHOUN DICKINSON Member

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