

Leahy, Michael

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.

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.
32

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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