

Miller, Pamela

COMMUNICATION OF DEPARTMENT ORDER

Failure to provide order to attorney or representative

The Department is required to send copies of orders to a party's representative. RCW 51.04.080 does not allow the Department to send a written notice, order, or warrant only to the worker and not to the worker's representative.*In re Pamela Miller, BIA Dec., 05 12252 (2006)*

Scroll down for order.

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

1 **IN RE: PAMELA K. MILLER**) **DOCKET NO. 05 12252**
2)
3 **CLAIM NO. W-529953**) **DECISION AND ORDER**

4 **APPEARANCES:**

5 Claimant, Pamela K. Miller, by
6 David B. Vail, Jennifer Cross-Euteneier & Associates, per
7 Jennifer Cross-Euteneier

8 Self-Insured Employer, Tacoma School District #10, by
9 Thomas G. Hall & Associates, per
10 Thomas G. Hall and Joseph A. Albo

11 The claimant, Pamela K. Miller, filed an appeal with the Board of Industrial Insurance
12 Appeals on March 8, 2005, from an order of the Department of Labor and Industries dated
13 January 14, 2005. In this order, the Department determined that it was unable to reconsider its
14 order of March 18, 2004, due to lack of jurisdiction. The Department order is **REVERSED AND**
15 **REMANDED.**

16 **DECISION**

17 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
18 and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order
19 issued on November 1, 2005, in which the industrial appeals judge dismissed Ms. Miller's appeal
20 from the January 14, 2005 Department order.

21 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
22 no prejudicial error was committed and the rulings are affirmed. We grant review because we
23 disagree with the industrial appeal judge's interpretation of RCW 51.04.080 and its application to
24 this case. We will briefly summarize the facts pertinent to deciding this matter.

25 Pamela K. Miller filed an Application for Benefits under the Industrial Insurance Act on
26 May 18, 2000, for an injury that occurred on May 3, 2000. On May 3, 2000, Ms. Miller worked for
27 Tacoma School District #10, a self-insured employer. On October 19, 2000, the self-insured
28 employer issued an order closing the claim. According to the appeal notice rights statement
29 included with the order, Ms. Miller could not file an appeal of the order with the Board of Industrial
30 Insurance Appeals (Board), but could appeal to the Department of Labor and Industries
31 (Department). Ms. Miller did not appeal the closing order.

1 On January 28, 2004, Ms. Miller filed an aggravation application to reopen her claim. On
2 January 29, 2004, the Law Office of David B. Vail & Associates submitted Notices of
3 Representation to the self-insurance section of the Department and to the third-party administrator
4 for the self-insured employer, Puget Sound Workers' Compensation Trust. The Department
5 received the Notice of Representation on January 30, 2004, but returned it to Mr. Vail's office on
6 February 5, 2004. The Department received Ms. Miller's application to reopen on February 6,
7 2004. Mr. Vail re-mailed the Notice of Representation on February 27, 2004. The Department
8 received it on March 1, 2004.

9 On March 18, 2004, the Department issued an order in which it denied Ms. Miller's
10 application to reopen her claim. In its order the Department included the statutorily required notice
11 of appeal rights. The Department did not send a copy of the order to Mr. Vail's office. On July 27,
12 2004, the Department issued a letter wherein it acknowledged Mr. Vail's Notice of Representation.
13 On November 30, 2004, Mr. Vail's office filed a formal protest of the Department's March 18, 2004
14 order. On January 14, 2005, the Department issued an order wherein the Department stated that it
15 lacked jurisdiction to reconsider its prior order because no protest or appeal was filed within sixty
16 days.

17 We note at the outset that the sixty-day time limit for filing appeals under RCW 51.52.060
18 begins to run only after the order is communicated. We have held that an order is not properly
19 communicated to a represented party unless a copy of the order is sent to that party's
20 representative. *In re Bell & Bell Builders (II)*, BIIA Dec., 90 5119 (1992); *In re David Herring*, BIIA
21 Dec., 57,831 (1981); *In re Better Brashear*, Dckt No. 96 3341 (August 8, 1997); and *In re Calvin*
22 *Keller, Dec'd*, Dckt. No. 894546 (March 15, 1991). In accordance with our prior rulings, the
23 sixty-day period for filing an appeal does not begin to run until the Department mails the order to the
24 party's representative. The cases cited herein did not address the application of the statute upon
25 which the industrial appeals judge relied in this case.

26 The industrial appeals judge relied on RCW 51.04.080 when he dismissed the claimant's
27 appeal.¹ The statute reads:

28 On all claims under this title, claimants' written notices, orders, or warrants shall not be
29 forwarded to, or in care of, any representative of the claimant, but shall be forwarded
30 directly to the claimant until such time as there has been entered an order on the claim
appealable to the board of industrial insurance appeals.

31 _____
32 ¹ We note for purposes of clarity that the correct disposition of this case, if we agreed with the industrial appeal judge's
decision, would have been to affirm the Department order, rather than to dismiss the appeal. The current posture of the
case, however, reflects the dismissal decision issued by the industrial appeals judge.

1 The industrial appeals judge interpreted the statute to mean that the first appealable order issued
2 by the Department must not be forwarded to the claimant's representative even if the Department
3 has received a notice of representation, but that the Department must send all subsequent written
4 communications, including the second appealable order, to the representative. We disagree with
5 the industrial appeal judge's interpretation.

6 The plain language of the statute refers to an order being **entered**, as opposed to issued or
7 mailed. We think that the correct interpretation of the statute requires the Department to mail the
8 first appealable order to a party's representative, assuming the Department has been notified that
9 the party is represented. The injured worker's rights are potentially permanently affected by the
10 entry of an order appealable to the Board. Once the injured worker's rights are subject to final
11 determination, the worker is entitled to representation of his or her choosing. According to our
12 understanding the Department would enter the appealable order, and then mail it to the claimant
13 and his or her designated representative. We believe this interpretation best meets the requirement
14 stated in *Clauson v. Department of Labor & Indus.*, 130 Wn.2d 580 (1996) that, "All doubts as to the
15 meaning of the Act are to be resolved in favor of the injured worker." *Clauson*, at 584. The protest
16 filed by Ms. Miller's representative on November 30, 2004, was a timely protest of the March 18,
17 2004 Department order. The Department order dated January 14, 2005, is incorrect and is
18 reversed. The matter is remanded to the Department to issue a further order regarding the
19 claimant's application to reopen her claim and to take further action as is appropriate under the law
20 and facts.

21 **FINDINGS OF FACT**

- 22
- 23 1. On May 18, 2000, Pamela K. Miller, the claimant, filed an application
24 with the Department of Labor and Industries in which she alleged that
25 she was injured on May 3, 2000, while in the course of her employment
26 with the self-insured employer, Tacoma School District #10. On
27 October 19, 2000, the self-insured employer issued an order wherein it
28 closed the claim without an award of permanent partial disability
29 benefits.

30 On February 6, 2004, the claimant filed an application to reopen her
31 claim. On March 18, 2004, the Department issued an order wherein it
32 denied the claimant's application to reopen her claim because the
Department found that medical evidence showed that the condition had

1 not objectively worsened since final claim closure. On November 30,
2 2004, Ms. Miller filed a protest to the Department's March 18, 2004
3 order. On January 14, 2005, the Department issued an order wherein it
4 stated that the Department was not able to reconsider its March 18,
5 2004, order due to lack of jurisdiction because no written protest or
6 request for reconsideration was received within the statutory time limits.
7 On March 8, 2005, the claimant filed a Notice of Appeal with the Board
8 of Industrial Insurance Appeals from the Department's January 14, 2005,
9 order. On March 30, 2005, the Board issued an order granting the
10 appeal under Docket No. 05 12252.

- 11 2. On May 3, 2000, the claimant, Pamela K. Miller, suffered an industrial
12 injury while in the course of her employment with Tacoma School
13 District #10.
- 14 3. The claim was closed on October 19, 2000. On January 28, 2004,
15 Ms. Miller mailed an Application to Reopen Claim. The Department
16 received the reopening application on February 6, 2004.
- 17 4. On January 29, 2004, a Notice of Representation was sent by
18 Ms. Miller's attorney, David B. Vail & Associates, to the Department of
19 Labor and Industries and to the self-insured employer's third-party
20 administrator, Puget Sound Workers' Compensation Trust.
- 21 5. On January 30, 2004 and on March 1, 2004, the self-insurance section
22 of the Department received the Notices of Representation Mr. Vail's
23 office submitted on behalf of Ms. Miller.
- 24 6. On March 18, 2004, the Department issued an order wherein it denied
25 the reopening application. The order was mailed to the claimant's home
26 address, but not to her representative.
- 27 7. The March 18, 2004 order was the first order issued under this claim that
28 was appealable to the Board of Industrial Insurance Appeals.
- 29 8. The March 18, 2004 order was not properly communicated to Ms. Miller
30 because it was not sent to her representative.
- 31 9. Ms. Miller did not file a protest or appeal of the March 18, 2004 order
32 until November 30, 2004.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of this appeal.
2. The Department's March 18, 2004 order was not properly communicated to Ms. Miller in accordance with RCW 51.52.050 and RCW 51.04.080.
3. Because the order was not properly communicated, Ms. Miller's November 30, 2004 protest was timely in accordance with RCW 51.52.060.

1 4. The Department order dated January 14, 2005, is incorrect and is
2 reversed. This matter is remanded to the Department to issue a further
3 order in response to Ms. Miller's November 30, 2004 protest and to take
4 such further action as is appropriate under the facts and the law.

5 It is so **ORDERED**.

6 Dated this 11th day of January, 2006.

7 BOARD OF INDUSTRIAL INSURANCE APPEALS

8
9
10 /s/ _____
11 THOMAS E. EGAN Chairperson

12
13 /s/ _____
14 FRANK E. FENNERTY, JR. Member

15
16 /s/ _____
17 CALHOUN DICKINSON Member