Singletary, Glenda

AGGRAVATION (RCW 51.32.160)

Last closing order not final

When the Department fails to properly communicate the original closing order, but reopens a claim in response to an application to reopen and provides benefits, the Board obtains jurisdiction over an appeal of an order that re-closes the claim despite the Department's failure to communicate the original closing order. *Distinguishing In re Ronald Leibfried*, BIIA Dec., 88 2274 (1990). ***….In re Glenda Singletary*, BIIA Dec., 06 12195 (2007)** [*Editor's Note:* Reversed on other grounds *Singletary v. Manor Health Care Corp.*, 116 Wn. App. 774 (2012).]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: GLENDA J. SINGLETARY	**)**	**DOCKET NO. 06 12195**
	)	
CLAIM NO. W-280241	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Glenda J. Singletary, by
David B. Vail & Jennifer Cross-Euteneier & Associates, per
David B. Vail

Self-Insured Employer, Manor Healthcare Corp., by
Wallace, Klor & Mann, P.C., per
Lawrence E. Mann

Department of Labor and Industries, by
The Office of the Attorney General, per
Kathryn S. Balzer, Paralegal

The claimant, Glenda J. Singletary, filed an appeal with the Board of Industrial Insurance Appeals on February 24, 2006, from an order of the Department of Labor and Industries dated December 29, 2005. In this order, the Department affirmed its order issued on July 29, 2005. In the July 29, 2005 order, the Department ended time loss compensation as paid to January 23, 2004; closed the claim without further award for time loss compensation or permanent partial disability; and determined that the self-insured employer cannot pay for medical services or treatment rendered after date of closure. The appeal is **DISMISSED**.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order issued on December 11, 2006, in which the industrial appeals judge dismissed the claimant's appeal from the order of the Department dated December 29, 2005.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed. We also affirm the rulings regarding the parties' discovery dispute, finding no abuse of discretion.

Glenda Singletary, the claimant, appealed a December 29, 2005 order in which the Department affirmed its July 29, 2005 order in which it closed her claim with time loss compensation as paid to January 23, 2004. The relief requested included the acceptance of several new conditions; time loss compensation from January 24, 2004 through December 29,

2005; and treatment or, in the alternative, permanent partial or total disability. Hearings were scheduled on December 6 and 7, 2006, for presentation of Ms. Singletary's evidence supporting her requested relief. 8/22/06 Interlocutory Order.

On October 16, 2006, Ms. Singletary filed a motion to dismiss this appeal for lack of jurisdiction. She alleged that a June 26, 2002 order in which the Department initially closed her claim had not been communicated to her prior to her filing a June 20, 2003 application to reopen the claim. Ms. Singletary asked that the claim be remanded to the Department with directions to consider the June 20, 2003 application to reopen as a protest to the closing order and to issue a further order in which the Department responds to the protest.

A preliminary hearing was scheduled for November 9, 2006, to hear evidence on the jurisdictional issue. On October 24, 2006, Ms. Singletary filed a motion to strike the December 6 and 7, 2006 hearing dates scheduled for presentation of her case for additional benefits, pending the outcome of the November 9, 2006 jurisdictional hearing. On October 30, 2006, a hearing was held on the motion to strike the December hearing dates. The motion was denied, as was Ms. Singletary's request for interlocutory review.

At the jurisdictional hearing on November 9, 2006, Ms. Singletary testified that she was injured at work on June 16, 2001, and her claim was accepted under Claim No. W-280241. Until July 2002, she resided at 11302 **18th** Avenue South, Apartment I-102, Tacoma, Washington. In July 2002, she moved to 10610 17th Avenue South, Apartment 610-D, Tacoma, Washington.

Ms. Singletary was handed Exhibit No. 1, a copy of the June 26, 2002 order closing her claim. She testified that the first time she had seen the order was at a September 25, 2006 discovery deposition conducted by the self-insured employer. When she closely reviewed the order, Ms. Singletary noticed that her address was listed as 11302 **118th** Avenue South. Ms. Singletary has never resided at this address or used it for receipt of mail. Her records confirmed that she had not received that order, or any other order, on or around June 26, 2002.

Ms. Singletary testified that she sought treatment for her industrial injury on June 20, 2003, due to pain she was experiencing. When she made the appointment, she believed that her claim was still open. At the doctor's office, she learned that the claim had been closed and was asked to complete the paperwork necessary to reopen the claim. On the application, Ms. Singletary wrote that her claim had been closed on June 27, 2002. Subsequently, the Department reopened her claim by order of September 9, 2003, effective June 12, 2003. Time loss compensation was paid to

January 23, 2004, and the claim remained open until it was closed by order of July 29, 2005. In its order presently on appeal, the Department affirmed the July 29, 2005 order.

Lorrie Sheehan testified that she is a workers' compensation claim adjuster for Crawford and Co., the self-insured employer's third-party adjudicator. She assumed responsibility for Ms. Singletary's file in April 2006, and did not personally send the June 26, 2002 closure notice. She certified Exhibit No. 1 as a true and correct copy of that order. It is standard procedure for a Crawford claim adjuster to send mail to the address on file for a particular claimant. Ms. Sheehan agreed that the June 26, 2002 closing order was sent to the **118th** Avenue South address, rather than to the address on file for Ms. Singletary on **18th** Avenue South.

On November 16, 2006, our industrial appeals judge issued an interlocutory order addressing the jurisdictional question. In this order, he concluded that it was likely that Ms. Singletary received the June 26, 2002 order closing her claim, despite the fact that it was mailed to the wrong address. He based this decision on the fact that the mail was not returned; the correct zip code was used; and that Ms. Singletary filed a reopening application indicating a date that approximated the date her claim had been closed. In the order the industrial appeals judge concluded that, taken as a whole, the record indicates that the Board had jurisdiction over the claimant's appeal of the December 29, 2005 order.

On December 5, 2006, Ms. Singletary filed a Notice of Intent to Rest on Jurisdiction and Not to Present Evidence on the Merits of the Claim Before the Board. In her motion, Ms. Singletary expressed distress

> over the prospect of having to expend funds to present evidence at a hearing on the merits of the claim before the Board because said expenditure may become needless and regrettable depending on whether the Board, in fact, lacks jurisdiction.

Claimant's Notice of Intent to Rest, Affidavit of Tara Jane Reck at 4. She contended that our decision, *In re Santos Alonzo,* BIIA Dec., 56,833 (1981), established a Board policy that claimants should not have to incur the expense of litigation at the Board of the substantive merits of their claims until Board jurisdiction has been finally resolved. In *Santos Alonzo*, we did express regret that the parties had expended time and money litigating the merits of the appeals prior to our ultimate conclusion that the Board lacked jurisdiction to render a decision on the merits. However, *Santos Alonzo* does not stand for the proposition that an appellant may rest on the jurisdictional issue at the Board, without presenting evidence on the merits of the appeal, where an industrial appeals judge has conducted a jurisdictional hearing and determined that the Board has jurisdiction

to decide the appeal. A claimant's anticipation that an industrial appeals judge's finding of Board jurisdiction will ultimately be overturned upon review at the Board, in superior court, or in appellate court, does not excuse her from making her case for further benefits at Board level. This practice encourages piecemeal litigation, which is neither expedient nor economical. Also, as noted in *Santos Alonzo*, in those cases where evidence supporting entitlement is presented at the Board and it is ultimately determined that a remand to the Department is required, the record created at the Board remains useful to the Department in adjudicating entitlement to the additional benefits. We hold that, upon a finding of Board jurisdiction by the industrial appeals judge, the appealing party is required to go forward with a prima facie case for the relief ultimately sought, or risk dismissal for failure to present evidence when due.

We now address Ms. Singletary's contention that this appeal should be dismissed on grounds that the Board lacked jurisdiction to decide the appeal. She also assigns error to the omission of findings and conclusions by the judge in his order dismissing the appeal. We agree that our industrial appeals judge should have entered findings and conclusions regarding jurisdiction in his dismissal order. An industrial appeals judge is required to include in a proposed decision, "findings and conclusions as to each contested issue of fact and law." RCW 51.52.104. Here, jurisdiction was a contested issue and appropriate findings and conclusions were required. Further, findings and conclusions establishing jurisdiction are a necessary prerequisite to any decision issued by this Board. Accordingly, we include appropriate findings and conclusions addressing jurisdiction in this decision and order.

We do not agree with Ms. Singletary's contention that this Board lacks jurisdiction to decide the merits of her appeal. We base our determination on *In re Thomas E. Hansen*, Dckt. No. 94 1283 (July 9, 1996), a Board decision that is factually indistinguishable from Ms. Singletary's case. Although *Hansen* has not been designated as "significant" pursuant to RCW 51.52.160, we have recognized that we are bound as a quasi-judicial agency by the "duty of consistency" to follow our prior decisions, unless there are "articulable reasons" for not doing so. *In re Diane K. Deridder*, Dckt. No. 98 22312 (May 30, 2000). We find no basis for disregarding the *Hansen* decision.

In *Hansen,* the claimant appealed from a May 25, 1994 Department order closing the claim. In a preliminary jurisdictional hearing, the industrial appeals judge determined that an earlier closing order of July 28, 1986 was properly communicated to Mr. Hansen. The Board disagreed, finding that Mr. Hansen had proven that the July 28, 1986 order had not been communicated to him.

To establish proof of mailing and a presumption of receipt of a document, it is necessary to establish that the document was deposited in the United States mail, "properly addressed, stamped, and sealed." *In re Elmer Doney*, BIIA Dec., 86 2762 (1987). This can be proven by actual evidence of the addressing, stamping, sealing, and mailing or through testimony setting forth the mailing custom within a large organization and compliance with the custom in a particular instance. *Farrow v. Department of Labor & Indus*., 179 Wash. 453, 455 (1934). In Ms. Singletary's case, it is uncontroverted that the address to which the closing order was sent contained a significant typographical error in the street number. As Ms. Sheehan acknowledged, it was not Crawford's office custom to mail orders to addresses that were incorrectly typed. Ms. Singletary has proven that the June 26, 2002 closing order was not communicated to her.

Mr. Hansen filed a reopening application on October 28, 1988, and the Department reopened the claim, provided benefits, and closed the claim by order of May 25, 1994 (the order on appeal). We found that these facts distinguished Mr. Hansen's case from the decision *In re Ronald Leibfried,* BIIA Dec., 88 2274 (1990), which is cited by Ms. Singletary. In *Liebfried*, the initial closing order was not communicated to the claimant but an aggravation application had been submitted and denied by the Department. Mr. Liebfried appealed the denial of the reopening application. The Board in *Liebfried* determined that since the initial closing order had not been communicated, it had not become final and therefore the aggravation issue was not before the Board. Instead, the aggravation application was considered a timely protest to the closing order because it notified the Department of the claimant's continuing need for treatment. Mr. Liebfried's appeal was dismissed and the claim remanded to the Department to act on the protest.

The Board determined that Mr. Hansen's aggravation application was a protest from the July 28, 1986 order because the appeal period had not run, due to non-receipt of the order. But the fact that the Department had reopened Mr. Hansen's claim and provided additional benefits required a different result than in *Liebfried*. In Mr. Hansen's case, there was no need to remand to the Department to act on the protest because the Department had already litigated entitlement to further benefits, "at least from the date it reopened the claim forward." Therefore, the Board could consider whether Mr. Hansen was entitled to seek further benefits "for the entire period from before the closure of his claim in 1986 and through May 25, 2004, without any need to establish aggravation of his condition." In Ms. Singletary's case, as in *Hansen*, her application to reopen was granted and benefits were provided. A dismissal on jurisdictional grounds with remand to the

Department is not required because Ms. Singletary's entitlement to benefits post-reopening have been addressed by the Department.

We note that, following the industrial appeals judge's determination of Board jurisdiction, the parties in *Hansen* proceeded to a hearing on the merits and litigated Mr. Hansen's entitlement to benefits. Ms. Singletary was given the opportunity to litigate entitlement to further benefits subsequent to the industrial appeals judge's determination of Board jurisdiction. She was provided with a reasonable period of time to schedule necessary witnesses supporting her claim for relief but made no effort to do so. Instead, Ms. Singletary chose to rest her case rather than present evidence of entitlement to benefits when due on December 6, 2002. Pursuant to RCW 51.52.102 and WAC 296-12-115(8), this appeal is properly dismissed.

FINDINGS OF FACT

1. On July 23, 2001, the claimant, Glenda J. Singletary, filed an application for benefits with the Department of Labor and Industries in which she alleged that she sustained a right shoulder injury on June 16, 2001, while in the course of her employment with Manor Healthcare Corporation, a self-insured employer. The claim was allowed and benefits paid. On June 26, 2002, the self-insured employer issued an order in which it ended time loss compensation as paid to August 3, 2002, and closed the claim effective June 26, 2002, without further award for time loss compensation or permanent partial disability.

   On June 20, 2003, an application to reopen the claim for aggravation of condition was received by the Department. By order of September 9, 2003, the Department reopened the claim effective June 12, 2003, for authorized treatment and action as indicated. On July 29, 2005, the Department issued an order in which it closed the claim with time loss compensation as paid to January 23, 2004, and without further award for time loss compensation or permanent partial disability. On September 22, 2005, the claimant filed a Protest and Request for Reconsideration of the July 29, 2005 Department order. On December 29, 2005, the Department issued an order in which it affirmed its July 29, 2005 order.

   On February 24, 2006, the claimant filed a Notice of Appeal with the Board of Industrial Insurance Appeals to the December 29, 2005 Department order. On April 3, 2006, the Board issued an order in which it granted the appeal, assigned Docket No. 06 12195, and directed that proceedings be held.

2. The order of the Department dated June 26, 2002, in which the employer closed Ms. Singletary's claim, was addressed to the claimant at 11302 **118th** Avenue South, Apartment I-102, Tacoma, Washington 98444. Ms. Singletary has never lived at this address or received mail

at this address. She resided at 11302 **18th** Avenue South, Apartment I-102, Tacoma, Washington 98444 until sometime in July 2002, when she moved to 10610 17th Avenue South, Apartment 610-D, Tacoma, Washington.

3. At the time the June 20, 2003 application to reopen Ms. Singletary's claim was filed on her behalf, the Department order of June 26, 2002 had not yet been communicated to her. The application to reopen put the Department on notice that the claimant was seeking additional benefits for her industrial injury and that she did not want her claim to be closed.

4. On September 9, 2003, Ms. Singletary's claim was reopened effective June 12, 2003. Time loss compensation benefits were paid to January 23, 2004. The claim was closed by the Department in its order of July 29, 2005, which was affirmed by the Department in its order of December 29, 2005.

5. A conference, which the claimant's attorney attended, was held pursuant to due and proper notice on August 22, 2006. At this conference, hearings were scheduled for December 6 and 7, 2006, for the presentation of the evidence in support of the claimant's appeal. Relief requested included acceptance of conditions as proximately caused by the industrial injury of June 16, 2001, time loss compensation from January 24, 2004 through December 29, 2005, and treatment or, in the alternative, permanent partial or total disability.

6. On October 25, 2006, the claimant moved to strike the hearing dates pending the outcome of the jurisdictional hearing scheduled for November 9, 2006. Following a hearing on the motion, the motion was denied. On December 5, 2006, the claimant filed a Notice of Intent to Rest on Jurisdiction and Not to Present Evidence on the Merits of the Claim Before the Board. A hearing for presentation of Ms. Singletary's evidence was held pursuant to due and proper notice on December 6, 2006, and the claimant presented no evidence at that time.

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 June 20, 2003 application to reopen the claim constituted a timely protest to the Department order of June 26, 2002. The Department's subsequent action in reopening the claim and providing additional benefits constituted action by the Department on this protest.

3. The claimant's appeal is dismissed pursuant to RCW 51.52.102 and WAC 263-12-115(8), for failure to present evidence when due.

It is so **ORDERED**.

Dated this 23rd day of March, 2007.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

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

/s/_____
CALHOUN DICKINSON Member