

## **Tapia-Fuentes, David**

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### **COMMUNICATION OF DEPARTMENT ORDER**

#### **Failure to provide order to retrospective rating group**

A retrospective rating group is a separate entity from an employer within the group, has an independent right to challenge adjudicative orders issued against an employer in the group, and the sixty-day limit for filing an appeal or protest does not begin to run until the order is communicated to the retrospective rating group. ....*In re David Tapia-Fuentes, BIIA Dec., 06 15128 (2007)* [Editor's Note: The Board's decision was appealed to superior court under King County Cause No.07-2-23740-2SEA.]

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1 was not timely. In its April 14, 2005 order, the Department reversed its order dated March 7, 2005,  
2 in which the Department closed the claim and ordered that the claim remain open for treatment and  
3 benefits. In the April 15, 2005 order, the Department stated that the claim was allowed for an injury  
4 of December 1, 2004, while the claimant, David Tapia-Fuentes, was working for B H Stordahl &  
5 Sons Inc., and that the claimant was entitled to benefits in accordance with the industrial insurance  
6 laws. Our industrial appeals judge concurred with the Department and found that Risk Finance's  
7 protest of July 20, 2005, was not timely with respect to the Department orders of April 14, 2005 and  
8 April 15, 2005.

9         Retrospective rating plans are the subject of RCW Chapter 51.18. A retrospective rating  
10 plan is a voluntary financial incentive in the workers' compensation insurance program offered by  
11 the Department of Labor and Industries. A retrospective rating plan is designed to reward  
12 employers who participate in the program when they are able to keep their claim costs below the  
13 pre-selected level that they have chosen. Reductions in claim costs are the result of improvements  
14 in workplace safety and outcomes of injured workers. WAC provisions 296-17-90401 through  
15 296-17-90497 contain the general and special rules which are applicable to retrospective rating  
16 groups and their retrospective rating plans. Each entity that sponsors a retrospective rating group  
17 is a separate entity from the employers it represents and must meet requirements set by the  
18 Department of Labor and Industries. RCW 51.18.030. The retrospective rating group is composed  
19 of employers who are substantially similar considering the services or activities performed by the  
20 employees of those employers. All of the employers within the group benefit if the group is  
21 successful in reducing claims costs. Likewise, all of the employers within the group are negatively  
22 affected if claim costs exceed expectations. Risk Finance established a retrospective rating group  
23 under the provisions of Chapter 51.18 RCW.

24         B H Stordahl & Sons Inc. was a member of the retrospective rating group sponsored by Risk  
25 Finance through December 31, 2004. After December 31, 2004, B H Stordahl became a member  
26 of a retrospective rating group named ABC. Employer Resources Northwest is the third-party  
27 administrator for the retrospective rating group, ABC.

28         In its Petition for Review, Risk Finance focuses on the distinction between it as an entity  
29 sponsoring a retrospective rating group and the employers within the retrospective rating group. In  
30 the Proposed Decision and Order, the industrial appeals judge made no distinction between the  
31 employer, B H Stordahl & Sons Inc., and Risk Finance. The industrial appeals judge considered  
32 the employer and Risk Finance as the same entity. Risk Finance contends that it has an

1 independent right as the retrospective rating group sponsor to challenge each order that is entered  
2 on claim files of the employers that it represents within the group.

3 According to the Stipulation of Facts filed by the parties, which forms the record in this  
4 appeal, Risk Finance contacted the Department and requested a copy of the March 7, 2005  
5 Department order, in which the Department allowed and closed the claim. Subsequently, the  
6 Department issued the April 14, 2005 and April 15, 2005 orders, in which the Department effectively  
7 reversed its March 7, 2005 Department order, in which the claim was closed. The Department's  
8 action in its April 14, 2005 order was to order that the claim remain open for further benefits and  
9 treatment. The April 14, 2005 and April 15, 2005 Department orders are part of the Stipulation of  
10 Facts. Neither of these orders was mailed to Risk Finance. The Department did mail the orders to  
11 Employer Resources Northwest, the third-party administrator for the employer's new retrospective  
12 rating group, ABC. On July 20, 2005, Risk Finance became aware of the April 14, 2005 and  
13 April 15, 2005 Department orders. Risk Finance then filed a protest with the Department of Labor  
14 and Industries.

15 Risk Finance argues that it is a separate entity from the employer and entitled to receive  
16 notice of the determinative orders on the claims that affect the members of the retrospective rating  
17 group. WAC 296-17-90453 is entitled "Disputes, protests and appeals." The provisions of WAC  
18 296-17-90453 provide that:

19 **Your responsibility:**

20 If you disagree with L&I over an adjudicative or reserving issue:

21 **You must:**

- 22 • File a written protest or appeal within sixty days after you receive the  
23 decision you disagree with.
- 24 • File a written protest or appeal as applicable to the retro adjustment  
25 order and notice within thirty days after you receive this order. This will  
26 preserve your right to relief if you prevail in your claim protest or appeal.

27 **Note:** We cannot provide relief in the computation of the retrospective  
28 premium even if your claim protest or appeal produces relief, unless you  
29 have also protested or appealed the retro refund/assessment notice and  
30 order.

31 Our reading of this WAC section convinces us that the Risk Finance is correct in its  
32 assertion that it has a right to protest or appeal an adjudicative Department order in a claim made  
against one of the employers in the retrospective rating group. The first note following the first

1 section of WAC 296-17-90453 states that: "We cannot provide relief in the computation of the  
2 retrospective premium even if your claim protest or appeal produces relief, unless you have also  
3 protested or appealed the retro refund/assessment notice and order."

4 This note convinces us that the portion of the WAC that states that the retrospective rating  
5 group has a right to file a written protest or appeal to a decision, includes decisions involving orders  
6 issued in a claim. The note, as we understand it, is a proviso to the retrospective rating group that  
7 it must protest or appeal two orders, one associated with the claim and attempt to get relief on that  
8 order, but they must also protest or appeal the retro fund assessment notice and order in order to  
9 get relief from the assessment. If the WACs that apply to the Department of Labor and Industries  
10 specifically give the retrospective rating group the right to challenge the adjudicative orders in a  
11 claim file that affects the retrospective rating group, the Department must communicate the order to  
12 the retrospective rating group in order to commence the running of the 60-day protest or appeal  
13 period.

14 In summary, we agree with Risk Finance, the retrospective rating group, that: (1) it is an  
15 independent entity separate from the employer and that notice to the employer is not necessarily  
16 notice to the retrospective rating group; (2) WAC 296-17-90453 gives the retrospective rating group  
17 an independent right to challenge adjudicative orders issued by the Department associated with a  
18 claim against one of the employers within the retrospective rating group; and (3) the sixty days for  
19 filing an appeal or a protest from those adjudicative orders in a claim file cannot begin to run until  
20 the orders are communicated to the retrospective rating group.

21 The Department order dated March 20, 2006, is incorrect and is reversed. This matter is  
22 remanded to the Department to find that the protest filed by Risk Finance, the retrospective rating  
23 group, on July 20, 2005, was a timely protest to the Department orders dated April 14, 2005 and  
24 April 15, 2005, in this claim.

#### 25 **FINDINGS OF FACT**

- 26 1. The claimant, David Tapia-Fuentes, filed an Application for Benefits with  
27 the Department of Labor and Industries on December 8, 2004, in which  
28 he alleged that he sustained an industrial injury on December 1, 2004,  
29 during the course of his employment with B H Stordahl & Sons Inc. On  
30 March 7, 2005, the Department issued an order in which it allowed the  
31 claim, and closed it as of that date based on available information that  
32 indicated medical treatment was concluded. The claimant protested this  
order on March 14, 2005, and the Department reversed the order on  
April 14, 2005, stating the claim would remain open for authorized  
treatment and benefits. On April 15, 2005, the Department issued an  
order in which it allowed the claim for injury on December 1, 2004, while

1 Mr. Tapia-Fuentes was working for B H Stordahl & Sons Inc., and stated  
2 that the claimant was entitled to benefits in accordance with the  
3 industrial insurance laws. Benefits were thereafter provided to the  
4 claimant.

5 The retrospective rating group, Risk Finance, protested the April 14,  
6 2005 and April 15, 2005 Department orders on July 20, 2005, and the  
7 Department affirmed the orders on March 20, 2006, on the basis the  
8 Department could not reconsider the orders as the protest(s) to them  
9 were not filed within the statutory 60-day time limitation. The  
10 retrospective rating group, Risk Finance, filed a Notice of Appeal from  
11 this order on May 16, 2006, with the Board of Industrial Insurance  
12 Appeals. The Board issued an order on May 25, 2006, in which it  
13 granted the appeal, assigned Docket No. 06 15128, and ordered that  
14 further proceedings be held.

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- 16 2. The retrospective rating group, Risk Finance, filed a protest with the  
17 Department of Labor and Industries within 60 days of the  
18 communication of the April 14, 2005 and April 15, 2005 Department  
19 orders.

#### 20 CONCLUSIONS OF LAW

- 21 1. The Board has jurisdiction over the parties to and the subject matter of  
22 this appeal.
- 23 2. Risk Finance's July 20, 2005 protest was timely filed to the Department  
24 orders of April 14, 2005 and April 15, 2005, as contemplated by  
25 RCW 51.52.050.
- 26 3. The Department order dated March 20, 2006, is incorrect and is  
27 reversed. This matter is remanded to the Department with instructions  
28 to consider the protest filed by the retrospective rating group, Risk  
29 Finance, filed on July 20, 2005, to the Department orders dated April 14,  
30 2005 and April 15, 2005, as a timely protest; issue a further appealable  
31 order in response to Risk Finance's timely protest of the Department  
32 orders dated April 14, 2005 and April 15, 2005; and take such further  
action as is appropriate under the law and the facts.

It is so **ORDERED**.

Dated: July 5, 2007.

BOARD OF INDUSTRIAL INSURANCE APPEALS

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

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