

Hirschman, Dorena

COMMUNICATION OF DEPARTMENT ORDER

Receipt of copy of Department order

A Department order deposited in the worker's mailbox while she was out of state on vacation was not effectively communicated to her until she returned home.***In re Dorena Hirschman, BIIA Dec., 09 17130 (2010)*** [Editor's Note: In *Arriaga v. Department of Labor & Indus.*, 183 Wn. App. 817 (2014), the Court of Appeals Division II declined to follow the Board's decision because it conflicts with the court's decisions in *Nafus v. Department of Labor & Indus.*, 142 Wash. 48 (1927) and *Rodriguez v. Department of Labor & Indus.*, 85 Wn.2d 949 (1975). In *Arriaga* the court held that actual delivery to the correct address constitutes communication under RCW 51.52.060.]

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1 The relevant facts are not in dispute. On May 7, 2009, the Department issued an order in
2 which it closed Ms. Hirschman's claim. The order was mailed to Ms. Hirschman's Montesano,
3 Washington home address no later than May 8, 2009.

4 On May 10, 2009, Ms. Hirschman left her home for a trip to Oregon and California. The
5 May 7, 2009 closing order had not yet arrived at her home. Ms. Hirschman returned home from her
6 trip late Sunday, May 17, 2009 but did not read the May 7, 2009 Department order until May 18,
7 2009. On July 14, 2009, Ms. Hirschman placed a letter in the U.S. Mail, in which she appealed the
8 May 7, 2009 Department order. Her appeal was received at the Board on July 15, 2009.

9 The self-insured employer contends that the order was communicated to Ms. Hirschman
10 when it reached her mailbox, regardless of whether Ms. Hirschman was home to receive and read
11 it. Ms. Hirschman argues that the order could not be communicated until she had returned home
12 and had the opportunity to read the letter. We agree with Ms. Hirschman's position.

13 Our decision is based on an analogous case, *In re Lance D. Hawthorne*, Dckt. No. 02 15875
14 (August 26, 2003). The question in *Hawthorne* was whether a Petition for Review of the Proposed
15 Decision and Order in Mr. Hawthorne's appeal had been filed within 20 days of the date that he was
16 presumed to have received the decision. This Board initially issued an order finding the Petition for
17 Review was untimely filed, but later granted the Petition for Review based on a declaration received
18 from Mr. Hawthorne. In the declaration, Mr. Hawthorne explained that he had been out of town and
19 had not received the Proposed Decision and Order until he returned home from his trip. His
20 Petition for Review had been filed within 20 days of the date that he returned home. We
21 considered this a timely filing, per RCW 51.52.104.

22 We find Ms. Hirschman's situation indistinguishable from that of Mr. Hawthorne.
23 RCW 51.52.104 and RCW 51.52.060(1)(a) each require aggrieved parties to file their challenges
24 within a specific time frame that starts with the date of "communication." In the case of a
25 Department "order, decision or award," the protest must be filed within 60 days of communication.
26 RCW 51.52.060(1)(a). Challenges to a proposed decision of the Board must be filed within 20 days
27 of communication. RCW 51.52.104.

28 Applying the ruling in *Hawthorne* to Ms. Hirschman's case, we conclude that the Department
29 order was not communicated to her until she returned home on May 17, 2009. Her appeal, placed
30 in the U.S. Mail on July 14, 2009, was therefore timely. Ms. Hirschman is entitled to a decision on
31 the merits of her appeal to the Department's May 7, 2009 closing order.

1 The February 23, 2010 Proposed Decision and Order is hereby vacated. This appeal is
2 remanded to the hearings process pursuant to WAC 263-12-145(4), for further proceedings as
3 indicated by this order. The parties are advised that this order is not a final Decision and Order of
4 the Board within the meaning of RCW 51.52.110. At the conclusion of further proceedings, the
5 industrial appeals judge shall, unless the matter is dismissed or resolved by an Order on
6 Agreement of Parties, enter a Proposed Decision and Order containing findings and conclusions as
7 to each contested issue of fact and law, based upon the entire record, and consistent with this
8 order. Any party aggrieved by the Proposed Decision and Order may petition the Board for review
9 of the Proposed Decision and Order, pursuant to RCW 51.52.104.

10 Dated: May 7, 2010.

11 BOARD OF INDUSTRIAL INSURANCE APPEALS

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14 /s/ _____
DAVID E. THREEEDY Chairperson

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