Morgan, Edward

COMMUNICATION OF DEPARTMENT ORDER

Presumptions of mailing and receipt

Proof that a Department order was mailed on a particular date, properly addressed and with sufficient postage, creates a presumption that the order was received in the due course of the mails. However, persuasive testimony that the order was not received will overcome the presumption. **….*In re Edward Morgan*, BIIA Dec., 09,667 (1959)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: EDWARD S. MORGAN	**)**	**DOCKET NO. 9667**
	)	
CLAIM NO. C-362907	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Edward S. Morgan, by
Durham & Guimont, per
R. P. Guimont

Employer, Scott Paper Company, by
Dan English

Department of Labor and Industries, by
The Attorney General, per
Arthur S. W. Chantry and James S. Turner, Assistants

Appeal filed by the claimant, Edward S. Morgan, on January 16, 1958, from an order of the supervisor of industrial insurance dated January 2, 1958, directing that this claim remain closed pursuant to an order dated September 19, 1957. **REVERSED AND REMANDED**.

DECISION

The claimant, Edward S. Morgan, sustained an industrial injury in the course of his employment with the Scott Paper Company on September 12, 1956, when he was struck in his back by a log. The claim was allowed for medical treatment and time-loss compensation, and on July 19, 1957, the supervisor of industrial insurance issued an order "segregating" and denying responsibility for a pre-existing condition described as "old compression fracture, 1st lumbar vertebra, old healed fracture of pelvis, old fractures of 10th, 11th and 12th ribs," as unrelated to the injury for which the claim was filed. On September 18, 1957, the supervisor issued an order segregating and denying responsibility for a condition described as "mild arteriolar spasm", as unrelated to the injury for which the claim was filed. On the following day, September 19, 1957, the department entered an order closing the claim with no permanent partial disability award and demanding that the claimant refund an overpayment of time-loss in the amount of $110.00 for the period from May 1, 1957, to June 1, 1957. On September 27, 1957, the claimant appealed from the supervisor's order of September 18, 1957, and thereafter, on November 21, 1957, the board entered an order by agreement of the parties dismissing the claimant's appeal. On November 29, 1957, the claimant's attorney, Mr. R. P. Guimont, wrote to the department as follows:

> "Please check on the termination of this claim as the claimant has never received any disability award and has had considerable difficulty in carrying on his work because of pain in his back and legs. He has not been able to sleep nights and has considerable trouble in walking."

Thereafter, on December 5, 1957, the department sent a letter (exhibit 4) to Mr. Morgan in care of his attorney, Mr. Guimont, enclosing a form to reopen the claim for aggravation of condition. Thereafter, on January 2, 1958, the department entered an order stating:

> "WHEREAS, request has been made for reopening of the above-numbered claim and an application form having been forwarded to you to be completed in its entirety and returned to this office, and
>
> "WHEREAS, to date the completed reopening application has not been received;
>
> "THEREFORE IT IS ORDERED that the request for reopening be and is hereby denied for failure to submit adequate proof of aggravation of your condition due to this injury and your claim shall remain closed pursuant to the provision our Order and Notice dated September 19, 1957."

The claimant thereupon appealed from that order to this board on January 16, 1958, and on February 13, 1958, the board issued its order granting the appeal.

The claimant does not contend on this appeal that his condition became aggravated after September 19, 1957, but rather that he never received the department's closing order of September 19, 1957 and that the attempted closure of the claim by that order was therefore ineffective. All parties agreed that the only issues presented by this appeal was whether or not the order of September 19, 1957 was ever "communicated" to the claimant within the meaning of R.C.W. 51.52.060.

The record discloses that the claimant was living at the Morrison Hotel in Seattle, Washington in September, 1957, but that his mailing address at that time was 114 Occidental Avenue, Seattle, Washington. This is the address of Archie McDougall's Employment Agency, which for many years has taken care of mail for loggers and fishermen who move about and wish to have a permanent mailing address. The claimant testified definitely that he did not receive the supervisor's order of September 19, 1957, purporting to close his claim, although he called for his mail daily at 114 Occidental and did receive the supervisor's "segregation" under, dated September 18, 1957, and other communications from the department in connection with this claim.

To establish "communication" of the department's order of September 19, 1957, the employer and the department rely entirely on the presumption of receipt by the claimant in due

course of mails and contend that receipt by the "mailing agent" (presumably Archie McDougall) was receipt by the claimant.

Counsel for each of the parties stipulated in writing that the department's closing order of September 19, 1957, "was mailed by the Department of Labor and Industries to the claimant Edward S. Morgan and the employer Scott Paper Company, and that the copies sent to the claimant and the copies sent to the employer have not been returned to the Department of Labor and Industries".

At the outset it is noted that it was not stipulated, and there is no proof of the date of mailing, or that the envelope in which the order was mailed "was properly addressed to the addressee at his post office address" or that it was properly stamped with sufficient postage thereon", which are essential facts to give rise to a presumption of receipt in due course of mails. 20 Am. Jur. Sec. 197; Farrow v. Department of Labor and Industries; 179 Wash. 453; Lieb v Webster, 30 Wn. (2d) 43.

However, disregarding this somewhat technical deficiency in the proof of proper mailing, and assuming that the evidence is sufficient to give rise to the presumption of receipt by the addressee in due course of mails, we are persuaded that the claimant's testimony and all the surrounding circumstances are sufficient to overcome any such presumption.

In Gibson v. House, 81 Wash. 102, our Supreme Court stated (P.109):

> "Though the mailing of a letter is prima facie evidence that it was received, this court has distinctly held that it is nothing more, and that it will have but little weight against positive testimony that the letter was not received. Ault v. Interstate Sav. & Loan Ass'n, 15 Wash. 627, 47, Pac 13".

The fact that the claimant admits receiving the department's "segregation" order of September 18, 1957, and promptly took it to his attorney, tends, in our opinion, to corroborate his testimony that he did not receive the order of September 19th, as it seems reasonable that, if he had received it, he would also have taken that order to his attorney.

While it is possible that the order in question may have been delivered to 114 Occidental Avenue and misplaced by someone at that address, we do not believe that delivery at that address, under the circumstances, constituted "communication" to the claimant. Although a claimant who deliberately or negligently disregards or fails to read a communication delivered to his residence may well be charged with knowledge or notice thereof, the claimant in this case called for his mail each day and, in our opinion, it would be manifestly unjust and contrary to the legislative intent to

charge him with notice of an order he did not receive based solely on a presumption of its receipt at a "mail depot" such as that maintained by Archie McDougall's employment agency.

We conclude therefore that this claim was never closed insofar as the claimant is concerned and that it should be remanded to the department to take further appropriate action.

FINDINGS OF FACT

In view of the foregoing, and after reviewing the entire record, the board finds:

1. The claimant, Edward S. Morgan, sustained an industrial injury in the course of his employment with Scott Paper Company on September 12, 1956, when he was struck in his back by a log. The claim was allowed for medical treatment and time-loss compensation, and on July 19, 1957, the department issued an order segregating a "pre-existing condition of old compression fracture, 1st lumbar vertebra, old healed fracture of the pelvis, old fractures of 10th, 11th and 12th ribs," as unrelated to the injury for which the claim was filed. On September 18, 1957, the department of labor and industries issued an order segregating a condition described as "mild arteriolar spasm," as unrelated to the injury for which the claim was filed. On the following day, September 19, 1957, the department entered an order closing the claim with no permanent partial disability award and demanding that the claimant refund an over-payment of time-loss in the amount of $110.00 for the period from May 1, 1957, to June 1, 1957. On September 27, 1957, the claimant appealed from the supervisor's order of September 18, 1957, and thereafter, on November 21, 1957, the board entered an order by agreement of the parties dismissing the claimant's appeal.

2. On December 5, 1957, the department in answer to a letter of inquiry from the claimant's attorney, Mr. Guimont, sent the claimant a form for application to reopen the claim for aggravation. The claimant did not fill out or return the form and thereafter, on January 2, 1958, the department entered an order directing that the claim would remain closed in view of the claimant's failure to fill out the form. The claimant thereupon appealed from that order to this board on January 16, 1958, and on February 13, 1958, the board issued its order granting the appeal.

3. The supervisor's order of September 19, 1957, was never received by the claimant.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the board concludes:

1. The board has jurisdiction of the parties and subject matter of this appeal.

2. The supervisor's order of September 19, 1957, purporting to close this claim was ineffective as far as the claimant was concerned in that it was

never "communicated" to him and the claim should be remanded to the department with direction to take such further action as may be indicated and authorized or required by law.

ORDER

Now, therefore, it is hereby ORDERED that the above-numbered claim be remanded to the department of labor and industries with direction to take such action as may be indicated and authorized or required by law in view of the board's conclusion that the claim is still open.

Dated this 25th day of August, 1959.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
J. HARRIS LYNCH Chairman

/s/_____
JOE DAVIS Member