Gildon, Kenneth

COMMUNICATION OF DEPARTMENT ORDER

Failure to provide order to attending physician

When a closing order is mailed to an attending physician at an incorrect address rather than to that physician's professional address of record, it is not communicated as required by *Shafer v. Dep't of Labor & Indus.,* 166 Wn.2d 710 (2009). **….*In re Kenneth Gildon,* BIIA Dec., 18 11673 (2019)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: KENNETH GILDON	)	**DOCKET NO. 18 11673**
	)	
	)	**ORDER VACATING PROPOSED DECISION**
	)	**AND ORDER AND REMANDING THE APPEAL**
CLAIM NO. SC-14875	)	**FOR FURTHER PROCEEDINGS**

Mr. Gildon was assaulted and injured while working for Federal Express. His industrial insurance claim was allowed and benefits were paid. The Department's closing order was sent to the parties, including to Norman A. Seaholm, M.D., Mr. Gildon's attending physician. Mr. Gildon's attorney filed an appeal more than 60 days after the order was issued, and we granted the appeal subject to proof of timeliness. Mr. Gildon argues that his appeal is timely because the order did not become final and binding for a variety of reasons. Our industrial appeals judge disagreed and dismissed Mr. Gildon's appeal. We conclude that the Department failed to correctly communicate the affirming order to Dr. Seaholm, the attending physician for the claim, and for that reason the order did not become final and binding. As a result, Mr. Gildon's appeal is timely. The Proposed Decision and Order dated April 2, 2019, is vacated and this appeal is **REMANDED FOR FURTHER PROCEEDINGS**.

DISCUSSION

Kenneth Gildon was working for Federal Express in 2010. While at his workplace, on November 3, 2010, Mr. Gildon was surrounded by four men, and assaulted by one, the husband of a co-worker. He was punched and hit in the head. He fell to the ground and his glasses were knocked off and broken. He suffered a left shoulder strain and partial rotator cuff tear, as well as a tibial plateau fracture in his left knee. Mr. Gildon's industrial insurance claim was accepted and benefits were provided. As a result of the industrial injury, Mr. Gildon developed post-traumatic stress disorder (PTSD), panic disorder, anxiety, and major depressive disorder.

Norman A. Seaholm, M.D., is Mr. Gildon's attending physician for the claim. On referral from Dr. Seaholm, Mr. Gildon started treatment with Vanraj Varu, M.D., a psychiatrist, in 2012.

On March 14, 2016, the Department issued an order closing the claim with a Category 2 mental health permanent partial impairment award. On September 28, 2016, the Department issued an order affirming the March 14, 2016 closing order and sent it to (1) Phillips Law Firm, Mr. Gildon's legal representative at that time; (2) Federal Express Corp., in care of Sedgwick; (3) Dr. Norman Seaholm as the attending physician; and (4) Schuyler Wallace, the employer's attorney.

The record shows that the September 28, 2016 order was sent to Dr. Seaholm as the attending physician at MultiCare, in Kent, Washington. The record also shows that Dr. Seaholm's professional address is at MultiCare in Tacoma, Washington, that his address on his L&I provider listing was in Tacoma, Washington; and that he has been practicing in Tacoma since September 2005.

On October 20, 2016, Mr. Gildon was seen by Dr. Seaholm. In his October 20, 2016, chart note, Dr. Seaholm indicated that Mr. Gildon was seen in a routine follow-up on his work-related injury for his PTSD, chronic left knee pain, and chronic shoulder pain. The chart note provided that Mr. Gildon was to continue with medications and with Dr. Varu and return to see Dr. Seaholm in a month. Dr. Seaholm's chart note from October 20, 2016, was received by Sedgwick within 60 days of the September 28, 2016 order.

On February 8, 2018, Mr. Gildon filed an appeal to the September 28, 2016 order. The parties presented evidence on the issue of timeliness of the appeal. Mr. Gildon contends that the September 28, 2016 order did not become final and binding because:

1. Mr. Gildon did not receive the order;
2. The Department failed to communicate the order to Dr. Seaholm because it was sent to the wrong address;
3. Dr. Seaholm's October 20, 2016 chart note should have been construed as a protest; and
4. The Department should have, but did not, send the order to Dr. Varu as a treating provider.

Our industrial appeals judge found that the September 28, 2016 order was final and binding, and dismissed the appeal as untimely. We agree with our industrial appeals judge that Mr. Gildon did receive the order through his legal representative, that the Department was not obligated to provide the order to Dr. Varu as a treating provider, and that Dr. Seaholm's chart note did not put the Department on notice as to a protest to claim closure.

However, our complete review of the record leads us to conclude that the order did not become final and binding because the order was not sufficiently communicated to Dr. Seaholm as the attending physician.

RCW 51.52.050(1) and RCW 51.52.060(1)(a) provide that a Department order becomes final and binding 60 days after it is communicated to the worker, beneficiary, employer, or other person affected thereby, unless a request for reconsideration or appeal is timely filed. In *Shafer*[1] the

[1] *Shafer v. Department of Labor & Indus.*, 166 Wn.2d 710, 718 (2009).

Washington Supreme Court held that an industrial insurance claim was not closed until the attending physician received a copy of the closure order.

We have addressed a similar situation in another case, *In re Mary Watkines.*[2] There, the closing order was not sent to the attending provider but was sent to another medical practitioner, a treating provider, at the same clinic. The Board found it to be "insufficient to communicate an order to the community of medical providers where an attending medical provider practices." The Board also found that, even though the order was available in the electronic medical record, it had not been communicated to the attending provider.

Here, the employer and our industrial appeals judge relied on the fact that Dr. Seaholm was able to access an electronic copy of the September 26, 2016 order in Mr. Gildon's electronic medical record with MultiCare. We conclude that when an industrial insurance claim closing order is mailed to an attending physician at an incorrect address, rather than to that physician's professional address of record at the clinic where the doctor actually works, it is not communicated as required by *Shafer.* That failure to communicate an order is not remedied by the availability of the order in a claimant's electronic medical record. Dr. Seaholm was not given the critical opportunity to directly receive a copy of the closing order at his professional address, and to review it, and decide whether or not he would protest that closing order on behalf of the claimant.

Because the September 28, 2016 order was not communicated to Dr. Seaholm, the 60 days did not run. Because the order on appeal did not become final, we conclude that Mr. Gildon's appeal was timely, and this matter should be remanded to the hearings process for presentation of evidence on the merits of the underlying order.

Our review of the record also suggests that there may have been duplicate exhibits admitted. We note that Exhibit 7 and Exhibit 21 may be duplicates of Exhibit 1, Employer's Response to Claimant's First Set of Requests for Admissions. We suggest that industrial appeals judge review the exhibits to determine whether all three exhibits should remain in the record.

ORDER

This appeal is remanded to the hearings process, as provided by WAC 263-12-145(5), for further proceedings as indicated by this order. Unless the matter is settled or dismissed, the industrial appeals judge will issue a new Proposed Decision and Order. The new order will contain findings and conclusions as to each contested issue of fact and law. Any party aggrieved by the new

[2] Dckt. No. 17 11670 (2017).

Proposed Decision and Order may petition the Board for review, as provided by RCW 51.52.104. This order vacating is not a final Decision and Order of the Board within the meaning of RCW 51.52.110.

Dated: June 26, 2019.

BOARD OF INDUSTRIAL INSURANCE APPEALS

LINDA L. WILLIAMS, Chairperson

ISABEL A. M. COLE, Member

Addendum to Order
In re Kenneth Gildon
Docket No. 18 11673
Claim No. SC-14875

Appearances

Claimant, Kenneth Gildon, by Law Office of Thomas F. Feller PLLC, per Thomas F. Feller

Self-Insured Employer, Federal Express Corp, by Wallace, Klor, Mann, Capener & Bishop P.C., per Christopher A. Bishop

Department Order(s) Under Appeal

In Docket No. 18 11673, the claimant, Kenneth Gildon, filed an appeal with the Board of Industrial Insurance Appeals on February 8, 2018, from an order of the Department of Labor and Industries dated September 28, 2016. In this order, the Department affirmed the provisions of a March 14, 2016 order closing the worker's claim with time-loss compensation benefits paid through March 23, 2015, and an award for permanent partial disability consistent with Category 2 for permanent mental health impairments.

Petition for Review

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The claimant filed a timely Petition for Review of Proposed Decision and Order issued on April 2, 2019. The employer filed a response to the Petition for Review.