Wynkoop, Gerald

PROTEST AND REQUEST FOR RECONSIDERATION (RCW 51.52.050)

Department order, once protested, is not final order – See also Protest divests board of jurisdiction

Where the Department's order contains a promise that a further appealable order will follow the filing of a protest, the Department is required to issue a further and final order once a protest has been filed. **….*In re Gerald Wynkoop*, BIIA Dec., 34,133 (1970)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: GERALD M. WYNKOOP	**)**	**DOCKET NO. 34,133**
	)	
	)	**ORDER DENYING OBJECTIONS TO SETTING**
CLAIM NO. F-752309	**)**	**CASE FOR HEARING**

APPEARANCES:

Claimant, Gerald M. Wynkoop, by
Batali, Combs, Small & Kucklick, per
Jerome F. Combs, Hollis B. Small, and Alred J. Kucklick

Employer, American Smelting & Refining Company, by
Hugo Metzler, Jr.

Department of Labor and Industries, by
The Attorney General, per
James B. McCabe, Assistant

On November 25, 1968, the Department of Labor and Industries received a report of accident from the claimant in which it was alleged that he had suffered an industrial injury on July 27, 1968, while in the course of his employment with the American Smelting and Refining Company. On May 21, 1969, the Department entered an order allowing the claim. Printed on the order was the statement that:

> "ANY APPEAL FROM THIS ORDER MUST BE MADE TO THE BOARD OF INDUSTRIAL INSURANCE APPEALS, OLYMPIA, WITHIN SIXTY DAYS FROM THE DATE THIS ORDER IS COMMUNICATED TO THE PARTIES AFFECTED, OR THE SAME SHALL BECOME FINAL. COPY OF THE APPEAL MUST BE SENT TO THE DIRECTOR OF THE DEPARTMENT. ANY REQUEST FOR DEPARTMENTAL RECONSIDERATION OF THIS ORDER MUST BE MADE WITHIN SIXTY DAYS. A FURTHER APPEALABLE ORDER WILL FOLLOW SUCH REQUEST." (Emphasis added)

On May 26, 1969, the Department received a letter from employer's counsel, dated May 23, 1969, requesting the Department to reconsider its order allowing the claim. In this letter, the employer set forth the particulars of evidence in its possession which it felt militated against the claim of injury. On July 28, 1969, the Department informed the employer, by a letter to its counsel, that as a result of its investigation, it was satisfied that there was reasonable proof of the injury alleged, but that it would hold further action on the claim pending its consideration of any factual information the employer might offer to disprove anything in the Department file, which it was sending the employer

for its review. By a letter of the same date, July 28, 1969, the Department informed claimant's counsel that the claim of injury was being further investigated. Thereafter, on September 19, 1969, the Department entered an order adhering to the provisions of its order of May 21, 1969, and directing that the claim remain allowed pursuant thereto. On October 8, 1969, the employer filed a notice of appeal from the Department's order of September 19, 1969.

The appeal was granted by this Board and, following an informal conference, a hearing was held before one of the Board's hearing examiners. The issue tried was whether or not the Department had jurisdiction to enter its order of September 19, 1969, the order appealed from by the employer.

It is the claimant's contention that the Department's order entered on May 21, 1969, became res judicata when no appeal to this Board was taken from that order within sixty days of its communication to the parties. Thereafter, he argues, the Department had no power to issue an order such as its order of September 19, 1969, which is, therefore, he contends, a nullity from which no appeal will lie.

It is the employer's contention that, in view of the statement on the Department's order of May 21, 1969, that a further appealable order would follow any request for Departmental reconsideration, its letter of May 23, 1969, requesting such reconsideration and setting forth the evidence upon which its request was based, obliged the Department to give further consideration to the claim and thereafter to issue a further appealable order setting forth its final decision in the matter. From the procedural outline given above, it is apparent that this is also the theory upon which the Department acted in this case.

The Board has carefully reviewed the transcript of the proceedings held in connection with this matter and has considered the arguments and citations of authority contained in the documents submitted by the parties in support of their positions. We have concluded that the claimant's objections to having this case tried on its merits are themselves without merit and that the hearing examiner's order, setting this case for hearing, should be approved.

The Department's authority to proceed in the manner in which it did in this case and to enter orders such as its order of September 19, 1969, is based upon the third proviso of RCW 51.52.060, which reads as follows:

> "And provided, That, if within the time limited for filing a notice of appeal to the board from an order, decision, or award of the department, the department shall direct the submission of further evidence or the

> investigation of any further fact, the time for filing such notice of appeal shall not commence to run until such person shall have been advised in writing of the final decision of the department in the matter:"

This proviso of RCW 51.52.060 was first construed by the Washington Supreme Court in the case of Taylor v. Department of Labor and Industries, 175 Wash. 1, decided in November of 1933, when it was codified as Rem. Rev. Stat. § 7697(h). In the Taylor case, the workman's claim was closed on March 27, 1932, by an order awarding him four degrees permanent partial disability.

"Within a few days," as the court stated, "A letter from the claimant's doctor, written on behalf of the claimant, was, in effect, treated as an application to reconsider the closing of the claim." Thereafter, on June 14, 1932, the Department informed the claimant that its further investigation confirmed the correctness of its closing order of March 27, 1932, and referred him to that order for the terms on which his claim was closed. On June 23, 1932, the claimant filed an application with the joint board of the Department of Labor and Industries for a rehearing. The application was granted by the joint board, which apparently treated it as an appeal from the order of March 27, 1932. Consequently, in the words of the Supreme Court, "the joint board declined to pass upon the merits of the claim, holding that the right of the claimant to appeal from the order of the department made in 1932 had expired and the statute of limitations had operated against the application of the claimant.'"

On the Department's appeal to the Supreme Court from a Superior Court judgment reversing the joint board, the Department, in support of the joint board's decision, relied upon the provisions of Rem. Rev. Stat. § 7697, substantially similar to the paralleled portion of RCW 51.52.060, relied upon by the claimant in the present case, which provided, again in the language of the Court in the Taylor case, "that one aggrieved by any such order, decision or award must, before he applies to the court, serve upon the director of labor and industries, within sixty days from the date on which such order, decision or award was communicated to the applicant, an application for a rehearing before the joint board of the department," and argued that because the application for rehearing was not made within sixty days of the communication to the claimant of the order of March 27, 1932, the application was too late. The court rejected this argument, holding that:

> "... the statute, reasonably construed, as applied to this case, means that the claimant had sixty days after the notice to him on June 14, 1932, within which to appeal or apply for a rehearing to the joint board of the department, and that his appeal or application to the joint board made and filed on June 23, 1932, was timely."

In the case of Bradbury v. Department of Labor and Industries, 177 Wash. 162, decided in April of 1934, the Court, noting that the claimant had apparently been mislead by the Department's promise to consider further evidence, came, in effect, to the same conclusion on similar facts.

It is on the authority of these cases, and not with the wish, as the claimant suggests, to enlarge the statute, that this Board in past orders, such as in the order In re Ira C. Kirkley, Claim No. F-637831, Docket No. 31,954, cited by both the employer and the claimant, has consistently upheld the propriety of the Department's issuing a further appealable order following a request for Departmental reconsideration where the Department has explicitly stated, as in the present case, that a further appealable order would follow any such request. It is our view that this statement is not meaningless surplusage under RCW 51.52.050, as the claimant's counsel argues, but is rather the Department's method of calling attention to the third proviso of RCW 51.52.060, and a statement of its intention to treat any request for Departmental reconsideration under the authority of that proviso of RCW 51.52.060. It is further our view that to hold otherwise would seriously prejudice the rights of injured workmen who frequently rely upon the assurance that a further appealable order will follow written request for reconsideration.

It may be noted that in attacking the authority of the Bradbury case, and presumably the Taylor case as well, although it is not mentioned in his argument, the claimant's counsel argues that they are not apropos because the joint board of the Department of Labor and Industries had much broader powers than does the Board of Industrial Insurance Appeals in deciding whether or not to entertain an appeal from the Department's orders. In support of this argument, claimant's counsel cites the case of Quarberg v. Department of Labor and Industries, 35 Wn. 2d 305, wherein it was decided, in December of 1949, after the joint board had gone out of existence, that under the broad powers that had been granted to it by Rem. Rev. Stat. § 10837, the joint board had discretion to consider an application for rehearing filed later than sixty days after the entry of the closing order.

This argument and the case cited in support of it are simply not in point. We are not here dealing with the powers of the Board of Industrial Insurance Appeals, the joint board's successor, but with the powers of the Department of Labor and Industries. Our question is not whether the employer could in October of 1969 file an appeal from the Department's order of May 21, 1969, but whether the Department's order of May 21, 1969, became final or was superseded by its order of September 19, 1969, from which the employer did file a timely notice of appeal.

It may be further noted that the cases of Brakus v. Department of Labor and Industries, 48 Wn. 2d 218, and Perry v. Department of Labor and Industries, 48 Wn. 2d 205, cited by the claimant, are not in point. In both the Brakus and Perry cases, with respect to the proposition for which they were cited, the question was whether the Department could, on its own motion, after the elapse of sixty days from a final order closing the claim, issue a new appealable order with respect to that claim. In neither case was there a request for Departmental reconsideration as is the case here.

It may be noted, finally, that the claimant contends that the third proviso of RCW 51.52.060 must be read together with the fourth proviso of that section, the proviso giving the Department authority to modify an order or hold such order in abeyance within the time limited for appeal to this Board or within thirty days after receiving notice of an appeal to this Board, and directing that the Board shall thereupon deny the appeal. The claimant argues that in order to preserve its right to issue a further appealable order, the Department in this case was required, within the time limited for appeal to this Board, to issue an order holding its order of May 21, 1969, in abeyance. We do not believe that this argument, substantially the same argument rejected by the Supreme Court in the Taylor case, that the third and fourth provisos of RCW 51.52.060 must be read together with this effect is tenable. The third proviso, under the authority of which the Department acted in this case, deals with the Department's authority to act in cases where Departmental reconsideration has been requested. The fourth proviso deals with the Department's authority to act in cases where there has been no request for Departmental reconsideration.

From our review of this matter, we have concluded that this case should be set for a hearing on the merits as directed by the hearing examiner in his order of May 27, 1970.

It is so ORDERED.

Dated this 9th day of July, 1970.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/ _____
ROBERT C. WETHERHOLT Chairman

/s/ _____
R.H. POWELL Member

/s/ _____
R.M. GILMORE Member