

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)

Scroll down for order.

**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

1 **IN RE: GERALD M. WYNKOOP**) **DOCKET NO. 34,133**
2)
3) **ORDER DENYING OBJECTIONS TO SETTING**
4 **CLAIM NO. F-752309**) **CASE FOR HEARING**
5 _____

6 APPEARANCES:

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

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

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

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

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26 "ANY APPEAL FROM THIS ORDER MUST BE MADE TO THE BOARD
27 OF INDUSTRIAL INSURANCE APPEALS, OLYMPIA, WITHIN SIXTY
28 DAYS FROM THE DATE THIS ORDER IS COMMUNICATED TO THE
29 PARTIES AFFECTED, OR THE SAME SHALL BECOME FINAL.
30 COPY OF THE APPEAL MUST BE SENT TO THE DIRECTOR OF THE
31 DEPARTMENT. ANY REQUEST FOR DEPARTMENTAL
32 RECONSIDERATION OF THIS ORDER MUST BE MADE WITHIN
33 SIXTY DAYS. A FURTHER APPEALABLE ORDER WILL FOLLOW
34 SUCH REQUEST." (Emphasis added)
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37 On May 26, 1969, the Department received a letter from employer's counsel, dated May 23, 1969,
38 requesting the Department to reconsider its order allowing the claim. In this letter, the employer set
39 forth the particulars of evidence in its possession which it felt militated against the claim of injury.
40 On July 28, 1969, the Department informed the employer, by a letter to its counsel, that as a result
41 of its investigation, it was satisfied that there was reasonable proof of the injury alleged, but that it
42 would hold further action on the claim pending its consideration of any factual information the
43 employer might offer to disprove anything in the Department file, which it was sending the employer
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1 for its review. By a letter of the same date, July 28, 1969, the Department informed claimant's
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3 counsel that the claim of injury was being further investigated. Thereafter, on September 19, 1969,
4 the Department entered an order adhering to the provisions of its order of May 21, 1969, and
5 directing that the claim remain allowed pursuant thereto. On October 8, 1969, the employer filed a
6 notice of appeal from the Department's order of September 19, 1969.
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9 The appeal was granted by this Board and, following an informal conference, a hearing was
10 held before one of the Board's hearing examiners. The issue tried was whether or not the
11 Department had jurisdiction to enter its order of September 19, 1969, the order appealed from by
12 the employer.
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15 It is the claimant's contention that the Department's order entered on May 21, 1969, became
16 res judicata when no appeal to this Board was taken from that order within sixty days of its
17 communication to the parties. Thereafter, he argues, the Department had no power to issue an
18 order such as its order of September 19, 1969, which is, therefore, he contends, a nullity from
19 which no appeal will lie.
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23 It is the employer's contention that, in view of the statement on the Department's order of
24 May 21, 1969, that a further appealable order would follow any request for Departmental
25 reconsideration, its letter of May 23, 1969, requesting such reconsideration and setting forth the
26 evidence upon which its request was based, obliged the Department to give further consideration to
27 the claim and thereafter to issue a further appealable order setting forth its final decision in the
28 matter. From the procedural outline given above, it is apparent that this is also the theory upon
29 which the Department acted in this case.
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33 The Board has carefully reviewed the transcript of the proceedings held in connection with
34 this matter and has considered the arguments and citations of authority contained in the documents
35 submitted by the parties in support of their positions. We have concluded that the claimant's
36 objections to having this case tried on its merits are themselves without merit and that the hearing
37 examiner's order, setting this case for hearing, should be approved.
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41 The Department's authority to proceed in the manner in which it did in this case and to enter
42 orders such as its order of September 19, 1969, is based upon the third proviso of RCW 51.52.060,
43 which reads as follows:
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45 "And provided, That, if within the time limited for filing a notice of appeal
46 to the board from an order, decision, or award of the department, the
47 department shall direct the submission of further evidence or the

1 investigation of any further fact, the time for filing such notice of appeal
2 shall not commence to run until such person shall have been advised in
3 writing of the final decision of the department in the matter:"
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5 This proviso of RCW 51.52.060 was first construed by the Washington Supreme Court in the case
6 of Taylor v. Department of Labor and Industries, 175 Wash. 1, decided in November of 1933, when
7 it was codified as Rem. Rev. Stat. § 7697(h). In the Taylor case, the workman's claim was closed
8 on March 27, 1932, by an order awarding him four degrees permanent partial disability.
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11 "Within a few days," as the court stated, "A letter from the claimant's doctor, written on behalf
12 of the claimant, was, in effect, treated as an application to reconsider the closing of the claim."
13 Thereafter, on June 14, 1932, the Department informed the claimant that its further investigation
14 confirmed the correctness of its closing order of March 27, 1932, and referred him to that order for
15 the terms on which his claim was closed. On June 23, 1932, the claimant filed an application with
16 the joint board of the Department of Labor and Industries for a rehearing. The application was
17 granted by the joint board, which apparently treated it as an appeal from the order of March 27,
18 1932. Consequently, in the words of the Supreme Court, "the joint board declined to pass upon the
19 merits of the claim, holding that the right of the claimant to appeal from the order of the department
20 made in 1932 had expired and the statute of limitations had operated against the application of the
21 claimant."
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24 On the Department's appeal to the Supreme Court from a Superior Court judgment reversing
25 the joint board, the Department, in support of the joint board's decision, relied upon the provisions
26 of Rem. Rev. Stat. § 7697, substantially similar to the paralleled portion of RCW 51.52.060, relied
27 upon by the claimant in the present case, which provided, again in the language of the Court in the
28 Taylor case, "that one aggrieved by any such order, decision or award must, before he applies to
29 the court, serve upon the director of labor and industries, within sixty days from the date on which
30 such order, decision or award was communicated to the applicant, an application for a rehearing
31 before the joint board of the department," and argued that because the application for rehearing
32 was not made within sixty days of the communication to the claimant of the order of March 27,
33 1932, the application was too late. The court rejected this argument, holding that:
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35 "... the statute, reasonably construed, as applied to this case, means
36 that the claimant had sixty days after the notice to him on June 14,
37 1932, within which to appeal or apply for a rehearing to the joint board of
38 the department, and that his appeal or application to the joint board
39 made and filed on June 23, 1932, was timely."
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2 In the case of Bradbury v. Department of Labor and Industries, 177 Wash. 162, decided in April of
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4 1934, the Court, noting that the claimant had apparently been misled by the Department's promise
5 to consider further evidence, came, in effect, to the same conclusion on similar facts.
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7 It is on the authority of these cases, and not with the wish, as the claimant suggests, to
8 enlarge the statute, that this Board in past orders, such as in the order In re Ira C. Kirkley, Claim
9 No. F-637831, Docket No. 31,954, cited by both the employer and the claimant, has consistently
10 upheld the propriety of the Department's issuing a further appealable order following a request for
11 Departmental reconsideration where the Department has explicitly stated, as in the present case,
12 that a further appealable order would follow any such request. It is our view that this statement is
13 not meaningless surplusage under RCW 51.52.050, as the claimant's counsel argues, but is rather
14 the Department's method of calling attention to the third proviso of RCW 51.52.060, and a
15 statement of its intention to treat any request for Departmental reconsideration under the authority
16 of that proviso of RCW 51.52.060. It is further our view that to hold otherwise would seriously
17 prejudice the rights of injured workmen who frequently rely upon the assurance that a further
18 appealable order will follow written request for reconsideration.
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25 It may be noted that in attacking the authority of the Bradbury case, and presumably the
26 Taylor case as well, although it is not mentioned in his argument, the claimant's counsel argues that
27 they are not apropos because the joint board of the Department of Labor and Industries had much
28 broader powers than does the Board of Industrial Insurance Appeals in deciding whether or not to
29 entertain an appeal from the Department's orders. In support of this argument, claimant's counsel
30 cites the case of Quarberg v. Department of Labor and Industries, 35 Wn. 2d 305, wherein it was
31 decided, in December of 1949, after the joint board had gone out of existence, that under the broad
32 powers that had been granted to it by Rem. Rev. Stat. § 10837, the joint board had discretion to
33 consider an application for rehearing filed later than sixty days after the entry of the closing order.
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38 This argument and the case cited in support of it are simply not in point. We are not here
39 dealing with the powers of the Board of Industrial Insurance Appeals, the joint board's successor,
40 but with the powers of the Department of Labor and Industries. Our question is not whether the
41 employer could in October of 1969 file an appeal from the Department's order of May 21, 1969, but
42 whether the Department's order of May 21, 1969, became final or was superseded by its order of
43 September 19, 1969, from which the employer did file a timely notice of appeal.
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1 It may be further noted that the cases of Brakus v. Department of Labor and Industries, 48
2 Wn. 2d 218, and Perry v. Department of Labor and Industries, 48 Wn. 2d 205, cited by the claimant,
3 are not in point. In both the Brakus and Perry cases, with respect to the proposition for which they
4 were cited, the question was whether the Department could, on its own motion, after the elapse of
5 sixty days from a final order closing the claim, issue a new appealable order with respect to that
6 claim. In neither case was there a request for Departmental reconsideration as is the case here.
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10 It may be noted, finally, that the claimant contends that the third proviso of RCW 51.52.060
11 must be read together with the fourth proviso of that section, the proviso giving the Department
12 authority to modify an order or hold such order in abeyance within the time limited for appeal to this
13 Board or within thirty days after receiving notice of an appeal to this Board, and directing that the
14 Board shall thereupon deny the appeal. The claimant argues that in order to preserve its right to
15 issue a further appealable order, the Department in this case was required, within the time limited
16 for appeal to this Board, to issue an order holding its order of May 21, 1969, in abeyance. We do
17 not believe that this argument, substantially the same argument rejected by the Supreme Court in
18 the Taylor case, that the third and fourth provisos of RCW 51.52.060 must be read together with
19 this effect is tenable. The third proviso, under the authority of which the Department acted in this
20 case, deals with the Department's authority to act in cases where Departmental reconsideration has
21 been requested. The fourth proviso deals with the Department's authority to act in cases where
22 there has been no request for Departmental reconsideration.
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25 From our review of this matter, we have concluded that this case should be set for a hearing
26 on the merits as directed by the hearing examiner in his order of May 27, 1970.
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28 It is so ORDERED.
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30 Dated this 9th day of July, 1970.
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32 BOARD OF INDUSTRIAL INSURANCE APPEALS
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34 /s/
35 ROBERT C. WETHERHOLT Chairman
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37 /s/
38 R.H. POWELL Member
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40 /s/
41 R.M. GILMORE Member
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