

## **Coston, Del**

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### **TIMELINESS OF CLAIM (RCW 51.28.050; RCW 51.28.055)**

#### **Oral reports in self-insured claims**

A worker's oral report of injury within one year of its occurrence to his immediate supervisor, followed by the employer's knowledge of the worker's absence, constituted sufficient notice of a claim to the self-insured employer, imposing a duty on the self-insured employer under RCW 51.28.025 to make further inquiry of the worker and to report the injury to the Department. Although a written application for benefits was not filed until after the one year period for filing a claim had elapsed, the claim was considered timely. ...***In re Del Coston*, BIIA Dec., 58,765 (1983)** [dissent] [*Editor's Note: Overruled, In re Eugene Whalen*, BIIA Dec., 89 0631 (1990).]

Scroll down for order.

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

1     **IN RE: DEL R. COSTON**                             )     **DOCKET NO. 58,765**  
2   )  
3     **CLAIM NO. S-370711**                             )     **DECISION AND ORDER**  
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5 APPEARANCES:

6  
7       Claimant, Del R. Coston, by  
8       Theodore M. Ryan

9  
10       Employer, Arden Lumber Company, by  
11       Pain, Lowe, Coffin, Hamblen and Brooke, per  
12       James M. Kalamon

13  
14       Department of Labor and Industries, by  
15       the Attorney General, per  
16       Thomas B. Maloney and Larry Kuznetz, Assistants  
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18       This is an appeal filed by the self-insured employer, Arden Lumber Company, on February  
19     13, 1981 from an order of the Department of Labor and Industries dated December 19, 1980. The  
20     order appealed from adhered to the provisions of a prior Department order which allowed the claim  
21     for an industrial injury occurring on May 31, 1979. The Department order is **AFFIRMED**.  
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24                             **PROCEDURAL STATUS AND EVIDENTIARY RULING**

25       Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review  
26     and decision on a timely Petition for Review filed by the claimant, Del R. Coston, to a Proposed  
27     Decision and Order issued on September 27, 1982, in which the Department order dated  
28     December 19, 1980 was reversed, and the claim remanded with direction to reject the claim for  
29     failure to file it within the one- year period allowed by law.  
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33       The Board has reviewed the evidentiary rulings in the record of proceedings and finds that  
34     no prejudicial error was committed. Said rulings are hereby affirmed.  
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36                             **ISSUE**

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38       The issue presented by this appeal is extremely narrow in scope, and is limited to the single  
39     question whether or not the claimant timely filed a claim for benefits under the Workers'  
40     Compensation Act, arising out of an incident which occurred during the course of the claimant's  
41     employment with Arden Lumber Company on May 31, 1979.  
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43                             **DECISION**

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45       Considering the evidence in this matter, we find it established beyond doubt that on May 31,  
46     1979, claimant cost on reported to Mr. A. Larry Nelson that the Claimant had injured himself that  
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1 day while working the "green chain" in the self-insured employer's sawmill. On May 31, 1979, Mr.  
2 Nelson was working in his capacity as the employer's sawmill supervisor. At no time between May  
3 31, 1979 and June 3, 1980 did any agent of the self-insured employer advise the Department of Mr.  
4 Coston's potential industrial insurance claim.  
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7 On June 3, 1980, the employer first received written notice of the claimant's on-the-job injury  
8 and claim for benefits therefor. The claim, which was then filed with the Department on June 4,  
9 1980, asserted that the injury occurred on June 5, 1979. However, Mr. Coston was absent from  
10 work on June 5, 1979, and could not have sustained an industrial injury on that date.  
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13 Subsequently, on August 14, 1980, a second application for benefits was filed with the  
14 Department. This application reflected the correct date of the injury, May 31, 1979. Six days later  
15 the Department issued its order allowing the claim. Following a timely protest on behalf of the self-  
16 insured employer, the Department adhered to the provisions of its allowance order by order issued  
17 December 19, 1980. Thereupon the self-insured employer appealed, contending that Mr. Coston  
18 failed to meet the requirements of RCW 51.28.050, which requires that an application for industrial  
19 injury benefits must be filed within one year of the date upon which the alleged injury occurred.  
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22 The question posed by this appeal brings cause for this Board to again review a longstanding  
23 interpretation of the statutes and case law concerning those portions of the Industrial Insurance Act  
24 dealing with the time period for filing a notice and report of accident and application for  
25 compensation.  
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28 Section 51.28.020 of the Revised Code of Washington sets forth the duty of the injured  
29 worker to apply for benefits and states in pertinent part:  
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32 "Where a worker is entitled to compensation under this title he or she  
33 shall file with the department or his or her self-insuring employer, as the  
34 case may be, his or her application for such, together with the certificate  
35 of the physician who attended him or her, ...If application for  
36 compensation is made to a self-insuring employer, he or she shall  
37 forthwith send a copy thereof to the department." (Emphasis supplied)  
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40 The time period for filing an application for benefits is set forth in RCW 51.28.050:

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42 "No application shall be valid or claim thereunder enforceable unless  
43 filed within one year after the day upon which the injury occurred or the  
44 rights of dependents or beneficiaries accrued."  
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47 The statutes quoted seem to direct that a claimant solely has the duty to file an application for  
benefits within one year of the alleged injury. Cases decided under these statutes in former years

1 have made it clear that the legislature fully intended that claims had to be filed within one year  
2 following the date of the "accident". Ferguson v. Department of Labor and Industries, 168 Wash.  
3 677 (1982); Sandahl v. Department of Labor and Industries, 170 Wash. 380 (1932). The  
4 requirement for compliance with the one year requisite has been strictly applied. In fact, the  
5 Supreme Court has indicated the Department of Labor and Industries, and by inference this Board,  
6 has no power to make any exceptions to the requirements for "equitable" reasons, Leschner v.  
7 Department of Labor and Industries, 27 Wn. 2d 911 (1947), or to waive the application of the  
8 statute since allowance of a claim not filed in a timely fashion is void from the beginning. Wheaton  
9 v. Department of Labor and Industries, 40 Wn. 2d 56 (1952).

10 With respect to an employer's or physician's duty to report injuries on behalf of workers, the  
11 court's decision in Pate v. General Electric Company, Inc., 43 Wn.2d 185 (1953), has been held  
12 dispositive of the type of issue presented by this appeal. In that case, the court noted the employer  
13 under RCW 51.28.010 was only required to report an accident, and found that there was no  
14 statutory duty for an employer to file a claim for compensation for an injured worker. In that case,  
15 no report was filed, but even if it had, it would not have helped the injured worker since the  
16 exclusive manner to secure compensation in any particular case was by the filing of an application  
17 for benefits. The Court stated:

18 "The right to benefits under the Act must be founded upon a claim  
19 therefor, not upon a report of the accident to the department of labor and  
20 industries." (Emphasis supplied)

21 With respect to the physician's role in securing compensation for injured workers, the court in the  
22 Pate case stated a physician's duty to inform the claimant of his or her rights under the Act arises  
23 only after a "certificate of the physician" is requested by the claimant. Yet the court stated even that  
24 duty is limited:

25 "...It is not the purpose of the statute to place upon a physician the  
26 primary duty of timely instituting a claim on behalf of the workman or of  
27 advising him that he should, or should not, make such claim. The  
28 responsibility of initiating a claim is upon the workman..."

29 The court went on to suggest that if the result was to be any different, the legislature should amend  
30 the statute to cast a positive duty upon physicians and employers to relieve the burden of the  
31 injured worker for filing claims.

1 In 1971, the legislature amended several portions of the Industrial Insurance Act with the  
2 opportunity for larger employers to self-insure their workers' compensation liability. The question  
3 actually raised by this appeal is one which asks whether the advent of self-insurance changed the  
4 burden on a worker employed by a self-insured employer in reporting industrial injuries to the  
5 Department of labor and Industries.  
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9 The cases cited thus forth in this opinion all predate the concept of self-insurance in this  
10 state. Prior to the appearance of the self-insured employer, a worker was considered to be on a  
11 one-to-one relationship with the Department of Labor and Industries. Benefits under the Act flowed  
12 directly from the Department to the worker and not from the employer itself. The employer and the  
13 employee paid for those benefits with periodic payments into the accident and medical aid funds.  
14 The certification of self-insured employers changed this "flow" of benefits. Employees of self-  
15 insured businesses who become injured during the course of their employment now receive  
16 benefits directly from the employer. The administration of these claims within the Department of  
17 Labor and Industries is conducted by a separately managed section from "state fund" claims with  
18 which the self-insured employer directly communicates.  
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24 Once certified for self-insurance, employers use their own staff or contract with a  
25 professional service company to adjust their insurance claims. Such authority was broadened in  
26 1981 when self-insurers were given permission to adjudicate and close their own "medical only"  
27 claims, i.e., those not involving compensation. This process effectively separates the worker even  
28 further from the administration of the claim conducted by the self-insured section of the Department  
29 of Labor and Industries. The statute still requires the Department to be responsible for the  
30 adjudication of all "compensable" claims, but the Department does not bear the sole responsibility  
31 for compiling the claim file. It is dependent upon the self-insurer to provide the necessary  
32 information upon which to base its adjudicative decisions.  
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37 We take official notice that special "self-insurer accident report" forms have been printed by  
38 the Department (Form No. LI-207-2 SI Accident Report 5-78). The statute requiring a worker to file  
39 an application for compensation does not, however, require the use of any specific form. It can be  
40 inferred from the duty to file an application "together with the certificate of the physician who  
41 attended him" that some written instrument eventually be sued. The question which we are called  
42 upon to decide in this appeal concerns whether an effective application for compensation was  
43 made by Mr. Coston with his self-insured employer within one year of his alleged injury. For if he  
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1 did not, his claim must surely fail because no application for benefits was received by the  
2 Department of Labor and Industries until after a year had transpired.  
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4 In the case before us, the evidence shows that Mr. Coston injured his left hip in the course of  
5 his employment on May 31, 1979, and on that date notified his immediate supervisor, Larry Nelson,  
6 the sawmill supervisor, of the injury. Mr. Nelson was aware that Mr. Coston did not work the full  
7 day of May 31st or the day following. These circumstances should have raised the employer's level  
8 of consciousness concerning the seriousness of Mr. Coston's alleged injury. Under the  
9 circumstances presented, we believe the purposes of the Industrial Insurance Act would raise a  
10 duty upon the self-insured employer to inquire whether such injury necessitated the receipt of  
11 medical treatment, required hospitalization, and/or caused the claimant to be further disabled from  
12 work. If so, the employer should have advised Mr. Coston that if he intended his claim to be one for  
13 industrial insurance compensation, a certification from his physician would be necessary. To not so  
14 require such a duty upon a self-insured employer would effectively leave all claims management to  
15 the whim and caprice of individual supervisors or company risk managers, a circumstance not to  
16 date intended by the legislature.  
17

18 RCW 51.28.020 as earlier quoted indicates that if application for compensation is made to a  
19 self-insuring employer, "he or she shall forthwith send a copy thereof to the department". We  
20 believe the pronouns "he" or "she" were intended by the legislature to refer to the self-insuring  
21 employer and not to the worker<sup>1</sup>, thus placing the duty for notifying the Department of pending  
22 claims directly upon the self-insuring employer and relieving the claimant/worker of such a duty.  
23 We do not think the legislature intended that the claim of an employee of a self-insured business  
24 should be defeated for failure of that business to file a copy of the worker's application for benefits  
25 with the Department of Labor and Industries.  
26

27 Further, we believe a burden of deeper inquiry rests with a self-insured employer when given  
28 sufficient notice of a potential claim for injury because of its obligation under RCW 51.28.025 to  
29 report injuries or occupational diseases to the Department. That section of the statute although not  
30 limited to self-insured employers states in pertinent part:  
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32 "Whenever an employer has notice or knowledge of an injury or  
33 occupational disease sustained by any workman in his employment who  
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<sup>1</sup> Another example clearly revealing the use of the pronoun "he" to be in reference to the employer is contained  
in RCW 51.28.025.

1 has received treatment from a physician, has been hospitalized,  
2 disabled from work or has died as the apparent result of such injury or  
3 occupational disease, he shall immediately report the same to the  
4 department on forms prescribed by it..."

5  
6 Given the facts of a claimant's report of injury to his immediate supervisor on May 31, 1979,  
7 followed by knowledge of employee absence thereafter constituted sufficient notice for the  
8 employer to fulfill the duty placed upon it by RCW 51.28.025. Had this been done, we are confident  
9 the Department would have taken the initiative under RCW 51. 28.010 to inform Mr. Coston in non-  
10 technical language of his rights. In effect, the self-insured employer had knowledge of an alleged  
11 injury and should have been aware of its severity, but did not make inquiry of its significance even  
12 though it caused the claimant to be absent from work. Under the circumstances present in this  
13 claim and inherent in the duties of self-insured employers, we do not believe Mr. Coston's claim for  
14 injury of May 31, 1979 can be defeated by simple nonfeasance.

15  
16 The Department's order of December 19, 1980, which allowed the claim despite the fact that  
17 more than one year elapsed between May 31, 1979 and June 4, 1980 and/or August 14, 1980, is  
18 correct. The self-insured employer was properly directed to process the claim as one which was  
19 timely filed.

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21 Based upon the foregoing, and after a careful review of the entire record, the proposed  
22 findings, conclusions and order are hereby stricken. In their place, we hereby enter the following:

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25 **FINDINGS OF FACT**

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30 1. On June 3, 1980, the self-insured employer, Arden Lumber Company,  
31 received a report of accident wherein the claimant alleged the  
32 occurrence of an industrial injury on June 5, 1979 during the course of  
33 his employment with said employer. The report was sent to the  
34 Department of Labor and Industries and received by the Department on  
35 June 4, 1980. On August 14, 1980, the Department received a second  
36 report of accident alleging that the claimant sustained the industrial  
37 injury during the course of his employment on May 31, 1979. On August  
38 20, 1980, the Department issued an order directing that the claim for  
39 injury sustained on May 31, 1979 be allowed as an industrial injury. A  
40 protest and request for reconsideration of the Department's August 20,  
41 1980 allowance order was filed on October 9, 1980 by the employer,  
42 and on December 19, 1980, the Department issued its order adhering to  
43 the provisions of the August 20, 1980 order allowing the claim. A notice  
44 of appeal from that order was filed on behalf of the self-insured  
45 employer on February 13, 1981, and on March 5, 1981, this Board  
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1 issued its order granting the appeal and directed that proceedings be  
2 held on the issues raised by the appeal.

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4 2. On May 31, 1979, the claimant injured his left hip when he slipped from  
5 a platform during the course of his employment with Arden Lumber  
6 Company.  
7  
8 3. Arden Lumber Company had been informed by May 31, 1979 that the  
9 claimant had injured his hip in the course of his employment earlier that  
10 same day. The employer was put on notice of the seriousness of the  
11 injury by the claimant's absence from work thereafter. Such notice was  
12 sufficient for the self-insured employer to institute processing of a claim  
13 for industrial insurance compensation.

### 14 **CONCLUSIONS OF LAW**

15 Based upon the foregoing findings of fact, this Board concludes as follows:

- 16 1. The Board of Industrial Insurance Appeals has jurisdiction of the parties  
17 and subject matter of this appeal.  
18  
19 2. The order of the Department of Labor and Industries dated December  
20 19, 1980 allowing this claim, is correct and should be affirmed.

21 It is so ORDERED.

22 Dated this 27th day of January, 1983.

23 BOARD OF INDUSTRIAL INSURANCE APPEALS

24  
25 /s/  
26 MICHAEL L. HALL Chairman

27  
28 /s/  
29 FRANK E. FENNERTY, JR. Member

### 30 **DISSENTING OPINION**

31  
32 I would adopt the Proposed Decision and Order of September 27, 1982, and thereby order  
33 the rejection of this claim because of failure to file it within the one-year period permitted by law. To  
34 do otherwise, in my opinion, ignores the guideposts of statutory construction and judicial decisions  
35 which have been consistently applied to this issue for many, many years.

36  
37 Most of the judicial authority has been cited in the Board majority's discussion, and it is  
38 certainly true, as the majority states, that the requirement for compliance with the one-year statute  
39 "has been strictly applied". Moreover, it is settled law that in order to qualify as a "claim" or  
40 "application for compensation," some sort of "writing" must be received which "reasonably directs  
41 attention to the fact that an injury, with its particulars, has been sustained and that compensation is  
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1 claimed." Nelson v. Department of Labor and Industries, 9 Wn. 2d 621, at 629 (1941); Leschner v.  
2 Department of Labor and Industries, 27 Wn. 2d 911, at 924 (1947). Indeed, this Board has  
3 previously followed this principle. In re Carl Kinder, Docket No. 44,967, Decision of March 12,  
4 1976.  
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7 There is no evidence or contention that anything in writing was filed by this claimant within one  
8 year from May 31, 1979. But the majority asserts that the rules were somehow changed by the  
9 advent of self-insurance in 1971, at least as to the claim-filing duty of workers employed by self-  
10 insured employers. I submit that this is simply not the case.  
11

12 The only change brought about by the advent of self-insurance concerns where the written  
13 claim or application for compensation should be filed, not how or within what time limit. Laws of  
14 1971, Ex. Sess., Chapter 289, Section 38 simply amended RCW 51.28.020 to provide that the  
15 claimant's application be filed "with the department or his self-insuring employer, as the case may  
16 be". No change at all was made by the legislature in the strict one-year time limit requirement,  
17 RCW 51.28.050, and it has remained exactly in the same language since 1927.  
18

19 The majority holds, in effect, that simply the claimant's verbal advice to his employer's  
20 supervisor on the day of the alleged injury was sufficient to constitute a valid "claim". I disagree.  
21 Would the majority take the position also that mere verbal notice to an agent of the Department  
22 would preclude the necessity for filing a written application for benefits under the law? I assume  
23 they would not. It would open the door to a multitude of possibilities and contentions as to  
24 adequacy of required claim notice, in derogation of long- settled legal principles.  
25

26 There is no place for a "double standard" on this issue. Whether the employer is self-insured  
27 or state fund-insured has no bearing on the one-year requirement. The duty of filing a timely written  
28 claim is still on the claimant as a matter of law, in my view.  
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30 Accordingly, I dissent from the Board majority's decision.  
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32 Dated this 27th day of January, 1983.  
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34 /s/ \_\_\_\_\_  
35 PHILLIP T. BORK Member  
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