Robinson, John

APPEALABLE ORDERS

Protest divests Board of authority to hear appeal

A protest automatically operates to set aside and hold an order in abeyance pending the issuance of a further appealable order. Thus, even though an appeal from a Department order had already been filed by the worker, the employer's subsequent but timely protest of the order appealed leaves the Board without jurisdiction to hear the worker's appeal. **….*In re John Robinson*, BIIA Dec., 59,454 (1982)**

PROTEST AND REQUEST FOR RECONSIDERATION (RCW 51.52.050)

Contents

A request by the employer that the Department "reassume jurisdiction" constitutes a protest and request for reconsideration. **….*In re John Robinson*, BIIA Dec., 59,454 (1982)**

Protest divests Board of jurisdiction over appeal

A protest automatically operates to set aside and hold an order in abeyance pending the issuance of a further appealable order. Thus, even though an appeal from a Department order had already been filed by the worker, the employer's subsequent but timely protest of the order appealed leaves the Board without jurisdiction to hear the worker's appeal. **….*In re John Robinson*, BIIA Dec., 59,454 (1982)**

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: JOHN A. ROBINSON	)	**DOCKET NOS. 59,454 & 59,454A**
	)	
CLAIM NO. S-287057	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, John A. Robinson, by
Richter, Wimberley & Ericson, per
Daniel P. Harbaugh

Employer, Hygrade, by
Winston & Cashatt, per
Stanley D. Moore

This is an appeal filed by the claimant on May 8, 1981, and a cross-appeal by the employer on June 11, 1981, from an order of the Department of Labor and Industries dated April 30, 1981, denying the claimant's application to reopen the claim for alleged aggravation on the ground that the conditions complained of, anxiety and alcohol dependence, are unrelated to the injury covered by this claim. **APPEALS DISMISSED.**

DECISION

This matter comes before the Board following receipt of a timely Petition for Review filed by the claimant from a Proposed Decision and Order issued October 9, 1981, which attempted to remand the claim to the Department with direction to permit investigation by the self-insured employer of the claimant's application to reopen for aggravation of condition. This recommended disposition was based upon the assumption that this Board had indeed attained jurisdiction over the subject matter of these appeals. For reasons discussed infra, we must conclude no jurisdiction lies in the Board. Both the claimant's appeal and the employer's cross-appeal must be dismissed and the claim must be returned to the Department for completion of pending adjudication on claimant's aggravation application.

A review of salient procedural events is required to explain our decision. Mr. Robinson was injured November 4, 1978 during the course of his employment with Hygrade, Inc., a self-insured employer. In due and timely course, he filed an application for benefits with the Department of Labor and Industries. The claim was allowed, compensation was paid, and treatment provided. Eventually, following a course of litigation before this Board, the claim was closed on November 17, 1980 with an award for permanent partial disability amounting to 15% as compared to total bodily impairment.

A few months after this final action Mr. Robinson submitted an application to the Department on March 12, 1981, to reopen his claim based on aggravation of condition. On April 30, 1981 the Department issued an order denying the application, giving as its reason that the evidence showed no aggravation of the injury but did show that conditions complained of (anxiety and alcohol dependence) were unrelated to the injury covered by the claim. From this formal order and notice Mr. Robinson, through legal counsel, filed a notice of appeal to this Board which was received on May 8, 1981.

In addition to the typewritten language just capsulated, the remainder of the printed document of April 30, 1981 contained statutorily required wording explaining appeal rights as well as the following wording which has become a recognized integral part of a formal Department order and notice:

> " . . . Any protest or request for reconsideration of this order must be made in writing to the Department of Labor and Industries in Olympia within 60 days. A further appeal-able order will follow such a request . . . ." (Emphasis added.)

Subsequent to the receipt of the claimant's notice of appeal at this agency, the employer through legal counsel hand-delivered a communication dated June 3, 1981 to a Department of Labor and Industries' employee, requesting the Department to "reassume jurisdiction" of the claim pursuant to RCW 51.52.060.

We believe the said communication was tantamount to a "protest" or "request for reconsideration" of the Department's order, and such communication was made within 60 days of the entry of the Department's formal order and notice. Under such circumstances, the issue is presented whether this Board necessarily attains jurisdiction in an appeal where a timely protest is made to the Department even though the protest is made after a notice of appeal by another party has been filed with this Board. In a recent Decision and Order (In re Santos Alonzo, Docket No. 56,833 and 56,833A dated December 9, 1981) this Board dismissed appeals which were received pursuant to RCW 51.52.060, but which had been filed after the self-insured employer had filed a request for reconsideration with the Department of Labor and Industries.

It has long been our interpretation of the printed wording in the Department's orders which is quoted supra, that a "protest" or "request for reconsideration" filed with the Department in response to the admonitory language in the order automatically operates to set aside the Department's order and hold in abeyance the final adjudication of the matter until the Department officially acts to issue

its final decision by a "further appealable order." RCW 51.52.060 authorizes the Department to direct the submission of further evidence or the investigation of any further facts during the time limited for filing a notice of appeal, which action will effectively toll the appeal filing period. In addition, that same section authorizes the Department "within the time limited for appeal" to "modify, reverse, or change any order, decision, or award, or may hold any such order . . . in abeyance . . . pending further investigation". We have very recently reiterated that language printed on the order is the Department's promise of further action and under most circumstances amounts to a statement of legal responsibility. Under such circumstances, it amounts to an enforceable right available to an aggrieved party to require the Department to act within the authority of RCW 51.52.060 to modify or at least hold in abeyance its prior action.

It is patent in an examination of our transcript of proceedings that the employer was attempting to exercise that right in submitting its letter of June 3, 1981. It is vital--and obviously equitable-- that the employer as well as the worker have an opportunity to acquaint the Department with its version of facts. In the case of a self-insured employer, which would be fully responsible for defending the Department's action, there must be an opportunity to discover the nature of the claim being made by the worker and the reason for the Department's action on that claim. Where, as here, the self-insured employer was not even aware of the application to reopen for aggravation and was not consulted prior to entry of the denial order, the employer should at least have an opportunity for access to the Department. An appeal to the Board by the claimant would prohibit that access since the Department is not a necessary party to the appeal. Consequently, this Board will not accept jurisdiction under such circumstances. The Department's failure to issue a further determinative order was presumably on the ground that a notice of appeal had previously been filed with the Board. However, in the circumstances of this case, the Department simply cannot fulfill its legal responsibility to complete its adjudication merely by deferring such adjudication when a piece of paper containing the inscription "notice of appeal" is sent by the claimant to the Board. The self-insured employer her, being unaware of the aggravation application, had a right to rely on the Department's promise that it would issue a further determinative order if a protest or request for reconsideration was filed within 60 days. We believe the Department, in light of the procedural facts of this case, must be required to recognize that promise and must maintain its jurisdiction until that further determinative order is issued.

The Board being of the opinion that it is without jurisdiction to entertain the claimant's appeal and the employer's cross-appeal in this matter, and there being no contested jurisdictional facts, the following are entered as conclusions:

1. The Board of Industrial Insurance Appeals does not have jurisdiction over the subject matter of these appeals, i.e., whether or not claimant's application to reopen the claim for aggravation should be allowed, as no final determinative order has been rendered by the Department on said issue.

2. The appeals are dismissed and the matter is returned to the Department of Labor and Industries for further appropriate action to complete administrative adjudication of the claimant's aggravation application.

It is so ORDERED.

Dated this 26th day of January, 1982.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
MICHAEL L. HALL Chairman

/s/_____
FRANK E. FENNERTY, JR. Member

/s/_____
PHILLIP T. BORK Member