Osborne, Kenneth

DEPARTMENT

Authority to modify order

Under RCW 51.52.060 the time within which the Department can modify or hold in abeyance a prior order is the "time limited for appeal." This "time" is not 60 days from the date shown on the order, but rather, 60 days from the date the order was communicated to the aggrieved party. **….*In re Kenneth Osborne*, BIIA Dec., 69,846 (1986)** [special concurrence] [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 86-2-20322-2.]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: KENNETH E. OSBORNE	**)**	**DOCKET NO. 69,846**
	)	
CLAIM NO. S-545872	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Kenneth E. Osborne, by
The Sharpe Law Firm, per
Mark Lange

Employer, The Boeing Company, by
Rolland & O'Malley, per
Wayne Williams and Thomas O'Malley

Department of Labor and Industries, by
The Attorney General, per
Carol J. Molchior & David W. Swan, Assistants

This is an appeal filed by the self-insured employer on February 19, 1985, from an order of the Department of Labor and Industries dated January 31, 1985 which adhered to the provisions of a prior order dated December 20, 1984 and allowed this claim for benefits for a left knee injury. **AFFIRMED**.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on timely Petitions for Review filed by the claimant and the Department of Labor and Industries to a Proposed Decision and Order issued on December 20, 1985 in which the order of the Department dated January 31, 1985 was declared void and was vacated.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed and said rulings are hereby affirmed.

ISSUE #1

The Proposed Decision and Order proposed to overturn the Department's allowance of this claim on the ground that no application for compensation (accident report) was filed by the claimant, Mr. Osborne, with the Department within one year from the date of injury. This proposed disposition completely ignores the fact that Mr. Osborne's employer, The Boeing Company, was self-insured.

In the case of a self-insured employer, a claimant's accident report or application for compensation is supposed to be filed by him with the employer, not with the Department. RCW 51.28.020 plainly so states. This is precisely what Mr. Osborne did in this case.

In evidence as Exhibit No. 1, is a copy of the employer's own report form, entitled "Supplementary Record of Occupational Injuries and Illnesses" and bearing the printed words "Workers Compensation" at the bottom. It is signed by Mr. Osborne. It discloses an on-the-job accident involving Mr. Osborne's left knee on October 12, 1981, when he "hit lat asp of L knee on jog." In the portion above his signature, the nature of injury is described as contusion, the body part affected as "L knee Lat edge," and source of injury as "jig." The medical report section, completed by M. McDonald, registered nurse, gives a diagnosis, shows that he was referred to an orthopedist, that a knee brace was prescribed, and certain medical restrictions placed on his physical activity for a period of time.

The report is dated October 16, 1981, four days following his accident with the jig. It was filled out at an in-plant clinic, and received by Boeing's claims service agency on October 21, 1981, nine days after the injury. Clearly this written document qualifies as an application for compensation, as it reasonably directed the self-insurer's attention to the fact that a particular injury had been sustained and that benefits under the workers' compensation act were claimed. See Nelson v. Department of Labor and Industries, 9 Wn. 2d 621, at pg. 629 (1941); Leschner v. Department of Labor and Industries, 27 Wn. 2d 911, at pg. 924 (1947). Thus, there is no basis for rejecting this claim for failure to file a claim within one year of the date of injury.

ISSUE #2

The employer contends that an earlier Department order of October 19, 1984, holding in abeyance its original order of August 17, 1984 (an order which had rejected this claim for not having been filed within one year of the date of injury) is null and void inasmuch as it was issued more than sixty days following the issuance of that original order of rejection. In other words, it is the employer's contention that the Department's rejection of this claim had already become res judicata, and thus not subject to any modification or change, prior to the issuance of the Department's subsequent abeyance order.

We do not agree with this contention. Under the statute, RCW 51.52.060, the time limitation within which the Department can modify or hold in abeyance a prior order is the "time limited for appeal." Under this same statute, the "time limited for appeal" from a Department order is not sixty days from the date shown on the order, but sixty days from the date such order "was communicated" to the aggrieved party. The employer is the appealing party in this appeal. As such, the employer had the burden of producing evidence to make a prima facie case on this issue. RCW 51.52.050. In

other words, it was the employer's burden to show that the Department's abeyance order of October 19, 1984, was issued more than sixty days following the communication of the Department's original rejection order of August 17, 1984, to Mr. Osborne, the aggrieved party as to such order.

No such showing was made herein. On the contrary, the only specific evidence bearing upon this point is Mr. Osborne's un-contradicted testimony that he never did receive the Department's original order of August 17, 1984, rejecting his claim. This testimony is buttressed by further evidence. The Department's abeyance order was not prompted by any protest or request for reconsideration or appeal on Mr. Osborne's part--an action he would very likely have taken had he actually received the rejection order dated August 17, 1984. Rather, the abeyance order was prompted by a general field audit of the employer's claim records by the Department's self-insurance regulatory section. As part of this audit, the report form in evidence herein as Exhibit 1, along with other documents regarding Mr. Osborne, was found in the files of the employer's service agency on or about October 16, 1984. Based on such audit, the self-insurance section felt the rejection order of August 17, 1984 may have been a mistake; and the Department, on its own motion, caused to be entered the abeyance order of October 19, 1984, pending further review as a result of the audit.

Furthermore, we take official notice of the fact that August 17, 1984 was a Friday, and even had the parties--the claimant as well as the employer -- received that order in due course of the mails, it would have been "communicated" at the earliest on Monday, August 20, 1984. The abeyance order of October 19, 1984 was issued within sixty days from that date.

ISSUE #3

Finally, the employer contends that Mr. Osborne suffered no condition in his left knee causally related to his on-the-job accident to the knee on October 12, 1981.

It is undisputed that while working on October 12, 1981, Mr. Osborne struck the lateral aspect of his left knee on a metal jig, causing that knee to immediately become painfully symptomatic. In our view, the clear weight of the medical evidence in this matter establishes that this trauma to the left knee caused a contusion, and a pre-existing non-disabling condition of the knee, medically described as chondromalacia of the patella, to become acutely symptomatic and in need of medical treatment at that time. Clearly the most persuasive evidence supporting this conclusion was that of Dr. Karl Singer, orthopedic surgeon who examined and diagnosed claimant's left knee condition, on referral from his family physician, on October 15, 1981, just three days following the work-place event.

It is noted that the parties presented considerable medical evidence about later evaluations and treatment of the claimant, commencing in December 1983 and extending through all of 1984, including surgical procedures done on December 20, 1983, July 16, 1984, and December 4, 1984. By that period of time the claimant had complaints and problems in both knees, and the December 20, 1983 surgery was a chondroplasty and quadriceps realignment on both knees, to attempt to correct a mechanical malalignment of the patella/femoral articulations and change the "pull" of the quadriceps muscles on both patellae. The further surgery on July 16, 1984 was again done bilaterally, to correct the malalignment of the patallae in relation to the femurs and quadriceps muscles.

There was, not surprisingly, sharp divergence of opinion among the medical witnesses as to whether this much later period of treatment and surgeries involving both knees had any causal relationship to the left knee jig-striking injury in October 1981. However, we view this question as beyond the scope of the issues determinable in this appeal. The Department's simple allowance order in this claim did not purport to determine the entire nature and extent of claimant's ongoing conditions or problems, and whether or not they are related to his left knee incident of October 12, 1981. Those matters are subject to the further claims-handling process, and further Departmental administrative adjudications.

The Department simply determined by its order here on appeal that Mr. Osborne did in fact sustain an industrial injury to his left knee on October 12, 1981, for which the claim should be allowed for "medical aid and compensation as may be indicated." Clearly, that limited decision was correct.

FINDINGS OF FACT

1. On March 23, 1984, the Department of Labor and Industries received an accident report alleging that the claimant, Kenneth E. Osborne, had sustained an industrial injury to his left knee on October 15, 1981, in the course of his employment for the Boeing Company. On August 17, 1984, the Department issued an order rejecting the claim on the ground that no accident report had been filed within one year of the date of injury. On October 19, 1984, the Department issued an order holding its rejection order of August 17, 1984, in abeyance. On December 20, 1984, the Department issued an order setting aside and holding for naught its rejection order of August 17, 1984, and allowing the claim for a left knee injury. On January 22, 1985, the employer filed a protest and request for reconsideration with the Department. On January 31, 1985, the Department issued an order adhering to the provision of its prior order of December 20, 1984, allowing the claim. On February 19, 1985, the employer filed a notice of appeal with the Board of Industrial Insurance

Appeals, and on February 26, 1985, the Board issued an order granting the appeal.

2. On October 16, 1981, the claimant filed a written report with the self-insured employer on a form supplied by the employer, entitled "Supplementary Record of Occupational Injuries and Illnesses" and bearing the printed words "Workers Compensation." This report alleged that the claimant had sustained a traumatic on-the-job accident on October 12, 1981 to his left knee. This report further contained a medical section which was completed by a registered nurse employed by the employer showing, among other things, a medical diagnosis of the left knee, that claimant had been referred to an orthopedist, that a knee brace was prescribed, and that medical restriction was placed on claimant's physical activity for a period of time.

3. There is no evidence that the Department's rejection order of August 17, 1984, was ever communicated to or received by the claimant.

4. On October 12, 1981, the claimant struck the lateral aspect of his left knee on a metal jig during the course of his employment for the Boeing Company. This trauma to the left knee caused a contusion, and a pre-existing non-disabling condition of the left knee, medically described as chondromalacia of the patella, to become acutely symptomatic and in need of medical treatment on October 12, 1981 and thereafter.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction of the parties and subject matter of this appeal.

2. On October 12, 1981, the claimant sustained an industrial injury to his left knee within the meaning of RCW 51.08.100.

3. The claimant filed an application for compensation with his self-insured employer, the Boeing Company, within one year of the date of said left knee injury, within the contemplation of RCW 51.28.020.

4. The Department's initial order of August 17, 1984, rejecting this claim, never became res judicata.

5. The order of the Department of Labor and Industries dated January 31, 1985, which allowed this claim as an industrial injury, is correct, and should be affirmed.

It is so ORDERED.

Dated this 30th day of July, 1986.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/S/

GARY B. WIGGS Chairperson

/S/

FRANK E. FENNERTY, JR. Member

/S/

PHILLIP T. BORK Member

SPECIAL CONCURRING STATEMENT

I feel compelled to make additional comments, due to references made by all three parties to two prior Decisions and Orders of this Board which discussed one of the issues also presented here, i.e., whether or not a valid claim for benefits under the Act was filed with the self-insured employer within one year after the date of the claimant's injury.

Those cases are In re Russell Craft, Docket No. 54,919, Board Decision of October 27, 1980; and In re Del Coston, Docket No. 58,765, Board Decision of January 27, 1983. Counsel for the claimant and the Department, in their Petitions for Review here, contend in effect that Craft and Coston are controlling in this case. Counsel for the employer, on the other hand, contends that those cases are wrong in their reasoning and inapplicable on their facts.

I do not accept that Craft and Coston are controlling here; and I believe that the Board majority in those cases was wrong in its reasoning as to what constituted a sufficient claim or application for compensation. I dissented in Coston, and my predecessor dissented in Craft. It is important to note our reasons for so doing.

In both cases the Board majority recognized that no written notice or report or application of any sort had been filed with the self-insurer within the one-year period, but only verbal advice or notice had been given by the claimant within that time. Yet the majority managed to conclude that the verbal information was enough to constitute a claim, and so the claims were held to be timely filed. Our dissents were on the basis that only verbal notice is not legally sufficient. I am convinced that the law is settled that in order to quality as a "claim" or "application for compensation", some sort of written document is required. The plain wording of RCW 51.28.020 and 51.28.050 clearly compels such a conclusion.

What is the test for determining what kind of written document(s) is sufficient to constitute a valid claim or application for compensation? That legal criterion has been in effect ever since 1941. The writing which is received is sufficient when it "reasonably directs attention to the fact that an injury, with its particulars, has been sustained and that compensation is claimed." Nelson v. Department of Labor and Industries, 9 Wn. 2d 621, at 629 (1941). This principle was reiterated in Leschner v. Department of Labor and Industries, 27 Wn. 2d 911, at 924 (1947), where it was further stated that the filing statute does not require the use of any specific form. Those judicial pronouncements are still the law today.

This then is the crucial difference between Craft and Coston and this case. There, only verbal advice was given by the claimant, and no writing of any sort was filed which could constitute a claim within the one year period; in my view, Craft and Coston should have been rejected as time-barred. Here, an adequate written document was filed (Exhibit 1) which, in line with the Nelson principle, did reasonably direct attention to the fact that a particular injury was sustained and that benefits under the Act were claimed, within only a few days after the injury occurred. This claim is is not time-barred.

Employer cites two more recent judicial decisions which, it is alleged, make it clear that the older series of cases, holding that compliance with the one-year statute be strictly required, are still applicable. Wilbur v. Department of Labor and Industries, 38 Wn. App. 553 (1984); and Roth v. Kay, 35 Wn. App. 1 (1983). It is true that these cases do so hold. However, they do not derogate from the result reached here. There are factual and procedural differences between Wilbur and Roth and this case, not the least of which is that the employers in those cases were state fund-insured, not self-insured, and thus claimants' written applications for compensation had to be filed within one year with the Department. Clearly such was not done, so Wilbur and Roth were time-barred. Here, as pointed out in our foregoing Decision, since the employer is self-insured, the claimant's written application for compensation was supposed to be filed with the employer. For reasons heretofore fully set forth, such was done, within only a few days after the one-year period began to run.

I have accordingly joined in the foregoing final Board decision because, on the issue of timeliness of this claim, as well as on the other issues presented, it is correct in fact and law in light of this record.

Dated this 30th day of July, 1986.

/S/_____
PHILLIP T. BORK, Member