

Clayberg, Betty

PROTEST AND REQUEST FOR RECONSIDERATION (RCW 51.52.050)

Filing by mail permissible

A protest from a Department order is effectively filed when it is properly posted in the U.S. Mail on or before the sixtieth day from the date the Department order was communicated to the party. ...*In re Betty Clayberg*, BIIA Dec., 86 4295 (1988)

Scroll down for order.

1 In addition, the Department order of December 19, 1985 contained the following standard
2 language: "Any protest or request for reconsideration of this order must be made in writing to the
3 Department of Labor and Industries in Olympia within sixty days. A further appealable order will follow
4 such a request." The Board has consistently held that this standard notice in effect constitutes a legal
5 covenant on the part of the Department to issue a further appealable order should a proper protest be
6 filed. In other words, a timely protest legally precludes the Department order under protest from
7 becoming final and binding. In re Santos Alonzo, BIIA Dec., 56,833 (1981).
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10 A written protest to the Department order of December 19, 1985 was mailed to the Department
11 by the claimant on January 2, 1986. That letter was never received by the Department.
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14 RCW 51.52.050 is silent with respect to how the filing of a protest is perfected. If filing is
15 effectuated by mailing, then Ms. Clayberg's protest was timely filed despite the fact that it was never
16 received by the Department. However, if filing is perfected only upon receipt, the claimant's protest
17 would not be considered timely filed and the Department order of December 19, 1985 rejecting the
18 claim would be final and binding.
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22 For many years prior to 1982 there was an informal procedure before the Department
23 permitting protests and requests for reconsideration. This procedure apparently arose because of the
24 Department's authority, after the issuance of an order, to direct the submission of further evidence or
25 the investigation of further facts under RCW 51.52.060. In filing protests, the parties complied with the
26 time limitations and filing requirements established for notices of appeal to the Board by RCW
27 51.52.060, which provides in pertinent part:
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31 "Any worker, beneficiary, employer, or other person aggrieved by an
32 order, decision, or award of the department must, before he or she
33 appeals to the courts, file with the board and the director, by mail or
34 personally, within sixty days from the day on which such copy of such
35 order, decision, or award was communicated to such person, a notice of
36 appeal to the board." (Emphasis added)
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38 Prior to 1982, RCW 51.52.050 read in pertinent part as follows:

39 "Whenever the department has made any order, decision, or award, it
40 shall promptly serve the worker, beneficiary, employer, or other person
41 affected thereby, with a copy thereof by mail, which shall be addressed to
42 such person at his or her last known address as shown by the records of
43 the department. The copy, in case the same is a final order, decision, or
44 award, shall bear on the same side of the same page on which is found
45 the amount of the award, a statement, set in black faced type of at least
46 ten point body or size, that such final order, decision, or award must be
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1 appealed to the board, Olympia, within sixty days, or the same shall
2 become final".
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4 By Laws of 1982, Ch. 109] 4, RCW 51.52.050 was amended as follows to explicitly include the de
5 facto protest procedure:
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7 "Whenever the department has made any order, decision or award, it shall
8 promptly serve the worker, beneficiary, employer, or other person affected
9 thereby, with a copy thereof by mail, which shall be addressed to such
10 person at his or her last known address as shown by the records of the
11 department. The copy, in case the same is a final order, decision, or
12 award, shall bear on the same side of the same page on which is found
13 the amount of the award, a statement, set in black faced type of at least
14 ten point body or size, that such final order, decision, or award (~~must be~~
15 ~~appealed to the board, Olympia, within sixty days, or the same shall~~
16 ~~become final~~) shall become final within sixty days from the date the order
17 is communicated to the parties unless a written request for reconsideration
18 is filed with the department of labor and industries, Olympia, or an appeal
19 is filed with the board of industrial insurance appeals, Olympia.
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21 In codifying the de facto protest procedure in 1982, the Legislature did not specify how the filing of a
22 protest was to be effectuated. RCW 51.52.050 does provide that the parties are to be notified of their
23 right to file a protest in the same language as they are notified of their right to file an appeal with the
24 Board. In addition, from a reading of RCW 51.52.050 and 51.52.060 in conjunction, it is clear that
25 either a protest or a notice of appeal to the Board can be filed with the Department. Thus the
26 requirements for effectuating the filing of a protest should be the same as those for a notice of appeal.
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28 RCW 51.52.060 permits the filing of a notice of appeal with the Department or with the Board
29 "by mail or personally." The Board has consistently interpreted that language to mean that the filing of
30 a notice of appeal is effectuated by mailing. In re Harold Francis, BIIA Dec., 68,154 (1985).
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32 By the same token, we believe consistency dictates that the filing of a protest is effectuated by
33 mailing. We therefore conclude that Ms. Clayberg's protest to the Department order of December 19,
34 1985, mailed on January 2, 1986, was timely filed. Thus, as a matter of law, this claim is still pending
35 a final determination before the Department.
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37 Accordingly, the appeal filed by the claimant on November 26, 1986, is dismissed for lack of
38 Board jurisdiction. The claim is returned to the Department for further administrative action and
39 adjudication and for the issuance of a further appealable order. The transcript of proceedings before
40 this Board will be available to the Department for its consideration as part of such further
41 administration and adjudication of this claim.
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1 In support of our conclusion that this Board is without jurisdiction over this appeal we make
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3 the following findings and conclusions on the jurisdictional question only:

4 **FINDINGS OF FACT**

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6 1. On December 9, 1985, Betty L. Clayberg filed an accident report with the
7 Department of Labor and Industries alleging occurrence of an industrial
8 injury on August 30, 1985 while in the course of her employment with
9 Arrow Machining Company, Inc. On December 19, 1985 the Department
10 issued an order rejecting the claim on the basis that there was no proof of
11 a specific injury at a definite time and place in the course of employment,
12 the claimant's condition is not the result of an industrial injury as defined by
13 the industrial insurance laws, and the claimant's condition is not an
14 occupational disease as contemplated by RCW 51.08.140. On January 2,
15 1986 the claimant mailed a letter of protest to the Department. On
16 November 26, 1986 the claimant filed a notice of appeal with the Board of
17 Industrial Insurance Appeals. On December 19, 1986 this Board issued
18 an order granting the claimant's appeal subject to proof of timeliness,
19 assigning it Docket No. 86 4295 and directing that proceedings be held.

20 **CONCLUSIONS OF LAW**

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22 1. Claimant's protest to the Department order of December 19, 1985 was
23 timely filed pursuant to RCW 51.52.050 and 51.52.060. Claimant's notice
24 of appeal from the Department order of December 19, 1985 was not timely
25 filed pursuant to RCW 51.52.050 and 51.52.060. The Board of Industrial
26 Insurance Appeals is without jurisdiction to hear this appeal from the
27 Department order of December 19, 1985 both because claimant's appeal
28 was untimely filed and because the December 19, 1985 order is not a final
29 appealable order.
- 30 2. Claimant's appeal is dismissed and the matter is returned to the
31 Department of Labor and Industries for further administrative action and
32 the issuance of a further order in response to claimant's timely protest and
33 request for reconsideration.

34 It is so ORDERED.

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36 Dated this 15th day of January, 1988.

37 BOARD OF INDUSTRIAL INSURANCE APPEALS

38 /s/ _____
39 SARA T. HARMON Chairperson

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

42 /s/ _____
43 PHILLIP T. BORK Member