

Lunyou, Larry

COMMUNICATION OF DEPARTMENT ORDER

Receipt of copy of Department order

The brief display of a Department order to the employer at a deposition does not satisfy the statutory requirement that a copy of the order be served on the employer by the Department. Being shown the order does not constitute "communication" or receipt of the order.*In re Larry Lunyou, BIIA Dec., 87 0638 (1988)*

Scroll down for order.

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

1 **IN RE: LARRY LUNYOU**) **DOCKET NOS. 87 0638, 87 0639 & 87 0741**
2)
3 **CLAIM NO. J-167282**) **DECISION AND ORDER**
4

5 **APPEARANCES:**

6 Claimant, Larry Lunyou, by
7 Hurst and Crossland, per
8 Phyllis Owens, Legal Assistant, and David K. Crossland
9

10 Employer, Walter Fairman Trucking, Inc., by
11 John H. Rayback
12

13 Department of Labor and Industries, by
14 The Attorney General, per
15 Wilhelm Dingler and William R. Strange, Assistants
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18 The appeals assigned Docket Nos. 87 0638 and 87 0639 were filed by the claimant on
19 February 19, 1987 from two orders of the Department of Labor and Industries. The first, dated
20 January 9, 1987, held in abeyance an order entered by the Department on June 26, 1985 that rejected
21 this claim solely for the reason that the Department was unable to substantiate an employer-employee
22 relationship at the time of the alleged injury. The second, dated January 14, 1987, adhered to the
23 provisions of the order dated June 26, 1985.
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26 The appeal assigned Docket No. 87 0741 is an appeal filed by the employer on March 2, 1987
27 from the Department order dated January 14, 1987. All three appeals were consolidated for hearing
28 and decision. This Board concludes that the Department had the authority to enter its orders of
29 January 9 1987 and January 14, 1987, and that the issues raised by the Department order of
30 January 14, 1987 are properly before us. The Department order of January 14, 1987 is **REVERSED**.
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33 **PROCEDURAL AND EVIDENTIARY MATTERS**
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35 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
36 and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order
37 issued on November 16, 1987 in which the order of the Department dated January 14, 1987 was
38 reversed and the claim remanded to the Department with directions to "accept the claim and reopen it
39 for further action as indicated."
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43 By written stipulation received at this Board on June 1, 1987 all parties to this action submitted
44 sixteen documents to be incorporated into the Board record for the purpose of determining the
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1 preliminary issue of jurisdiction. Those documents are marked as Exhibits 5-20 and identified as
2 follows:
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- 4 5. Motion for Summary Judgment;
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- 6 6. Supplemental Motion for Summary Judgment, dated July 15, 1986;
- 7
- 8 7. Memorandum in Support of Motion for Summary Judgment, dated July 15,
9 1986;
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- 11 8. Affidavit of John H. Rayback, dated July 15, 1986;
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- 13 9. Supplemental Memorandum in Support of Motion for Summary Judgment,
14 dated July 22, 1986;
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- 16 10. Supplemental Motion to Dismiss, dated August 5, 1986;
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- 18 11. Affidavit of Larry Lunyou, dated August 15, 1986;
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- 20 12. Affidavit of David K. Crossland, dated August 29, 1986;
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- 22 13. Memorandum in Opposition to Motion for Summary Judgment, dated
23 September 2, 1986;
- 24
- 25 14. Supplemental Memorandum in Opposition to Motion for Summary
26 Judgment, dated September 8, 1986;
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- 28 15. Affidavit of Larry Lunyou, dated September 8, 1986;
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- 30 16. Affidavit of David K. Crossland, dated October 3, 1986;
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- 32 17. Defendant's Supplemental Memorandum on Motion for Summary
33 Judgment, dated September 29, 1986;
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- 35 18. Affidavit of John H. Rayback, dated October 5, 1986;
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- 37 19. Order Denying Defendant's Motion for Summary Judgment, dated
38 February 17, 1987; and
- 39
- 40 20. Deposition of Walter L. Fairman, dated August 28, 1986.

41 Exhibits 5 through 20 are hereby admitted for the sole purpose of resolving the jurisdictional
42 issue.
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44 The employer filed a Motion to Deny Petition for Review on December 15, 1987, contending
45 that claimant's Petition for Review was untimely filed since it was not filed within twenty days of
46 communication of the June 8, 1987 Interlocutory Order, which preliminarily determined the
47 jurisdictional issue. However, the interlocutory rulings of Industrial Appeals Judge are not subject to
direct review by the Board and failure to request review of an interlocutory ruling does not constitute a
waiver of the party's objection. WAC 263-12-115(6)(a) and (b). The error here lies not in claimant's
failure to petition for review of the interlocutory order of June 8, 1987, but in the Industrial Appeals

1 Judge's failure to include findings and conclusions on the jurisdictional question within the Proposed
2 Decision and Order. The employer's Motion to Deny Petition for Review is therefore denied.
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4 The Board has reviewed the other evidentiary rulings in the record of proceedings. We find that
5 no prejudicial error was committed and all other rulings are hereby affirmed.
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7 ISSUES

- 8 1. Whether the Department order of June 26, 1985 was communicated to the
9 employer within the meaning of RCW 51.52.050 so that the sixty day
10 statute of limitations became applicable?
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- 12 2. Whether the claimant sustained an industrial injury during the course of his
13 employment with Walter Fairman Trucking, Inc. on August 21, 1982?
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15 We answer both questions in the affirmative.

16 DECISION

17 1. Jurisdiction

18 Mr. Lunyou contends that the employer did not appeal or protest the Department order of June
19 26, 1985, which rejected this claim, within sixty days from the day on which a copy of that order was
20 first communicated to the employer. Accordingly, Mr. Lunyou argues that the order rejecting his claim
21 became final and binding, and that the Department lacked jurisdiction to enter both the order of
22 January 9, 1987, which held in abeyance the rejection order, and the order of January 14, 1987, which
23 adhered to the provisions of the rejection order. If the Department order of June 26, 1985 was
24 communicated to the employer more than sixty days before his protest was filed, the Department
25 would have been without jurisdiction to enter its orders of January 9, 1987 and January 14, 1987.
26 Perry v. Department of Labor and Industries, 48 Wn.2d 205, 292 P.2d 366 (1956).
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28 Mr. Lunyou also argues, without citing any authority, that a Yakima County Superior Court
29 order that denied the employer's motion to dismiss the civil action for lack of jurisdiction represents a
30 res judicata determination that this matter is not within the purview of the Industrial Insurance Act.
31 However, that order represents nothing more than a determination that the court could not conclude as
32 a matter of law that the civil action was barred by the exclusive remedy provisions of the Industrial
33 Insurance Act, RCW 51.04.010. It is therefore not a final adjudication of the issue.
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35 Concerning the finality of the Department order of June 26, 1985, Mr. Lunyou alleges for the first
36 time in his Petition for Review that a copy of the Department order of June 26, 1985 was provided to
37 the employer, along with interrogatories, in December of 1985. There is, however, no evidence in the
38 record to support this contention, and the claimant has requested this Board to remand the matter for
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1 further hearings on this issue. However, there is no indication that any restrictions were placed upon
2 the claimant's ability to submit evidence, and there is no indication that the claimant ever attempted to
3 present this evidence at the appropriate time or that the information was not discovered and could not
4 have been discovered in time for him to present it at hearing. We also note that the claimant's
5 attorney chose not to appear and participate in the hearings held in this matter, and therefore chose to
6 forego the opportunity to cross-examine the employer, who testified at the hearing. Accordingly, the
7 claimant's motion to remand this matter for further proceedings is hereby denied.
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11 On its face it is quite clear that the order of June 26, 1985 was not mailed to the employer.
12 According to the affidavit of Mr. Will Patterson, a Disability Adjudicator III with the Department, when
13 an employer's account with the Department is closed, as occurred in this case prior to June 26, 1985,
14 that employer's name and address are removed from the Department's computer, and no further
15 orders or notices are thereafter sent to that employer. It is also evident that the employer in this case
16 had actual notice of the existence of the Department order of June 26, 1985, perhaps as early as
17 September 25, 1985. However, we are unwilling to equate notice of the existence of an order with the
18 statutory requirement that an order be "communicated."
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23 Further, although the employer in this case was shown a copy of the Department order of June
24 26, 1985 at a deposition held on August 28, 1986, we are also unwilling to conclude that the statutory
25 requirement of communication is satisfied by merely showing a copy of the order to the interested
26 party in such a context. In Rodriquez v. Department of Labor and Industries, 85 Wn.2d 949, 540 P.2d
27 1359 (1975) our Supreme Court stated that the word "communicated" contained in RCW 51.52.060
28 requires that a copy of the order be received by the party. 85 Wn.2d at 952. Further, this Board has
29 stated that communication of a Department order is satisfied by receipt of a copy of the actual order.
30 In re Elmer P. Doney, Dckt. No. 86 2762 (December 14, 1987). However, the employer in this case
31 did not "receive" a copy of the Department order during the deposition on August 28, 1986; rather, a
32 copy of the order was marked as Exhibit 7 to that deposition and was merely shown to the employer.
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39 Receiving a copy of a Department order, and being shown a copy of the order for a brief period
40 during the course of a deposition, are significantly different. First, a copy of the order was only
41 fleetingly shown to the employer, and it does not appear that he was given sufficient time to read the
42 entire order, and in particular to read the language advising of the time within which an appeal must be
43 filed. It is apparent that the employer expressed some difficulty reading during the course of the
44 deposition, and that the copy of the order in question was only one of ten exhibits shown to him over a
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1 short period of time. Further, when a party actually receives a copy of a Department order, he or she
2 may choose where, when, and with whom to peruse or discuss the contents of the order. In the
3 present case, the employer's attention was briefly directed to the order as he was being examined
4 under oath by the attorney for an adverse party. Clearly, the employer did not receive a copy of that
5 order at the deposition.
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9 Only upon communication of a Department order does the time within which a protest or appeal
10 must be filed begin to run as to that party. From the record before us it does not appear that the
11 Department order of June 26, 1985 was ever communicated to the employer within the meaning of
12 RCW 51.52.050. We therefore conclude that the employer's protest of the Department's order of June
13 26, 1985, which was received by the Department on October 30, 1986, and which was apparently
14 predicated upon actual knowledge of the contents of that Department order, was filed in a timely
15 manner, and that the Department had the authority to enter its orders of January 9, 1987 and January
16 14, 1987.
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21 2. Merits of the claim

22 This issue and the evidence presented by the parties concerning the merits of the claim are
23 very adequately set forth in the Proposed Decision and Order. Mr. Lunyou was injured while traveling
24 from his job site to the employer's base camp in a truck owned and furnished by his employer as an
25 incident to his employment. Under similar facts, our Supreme Court has held that such an injury was
26 within the coverage of the Industrial Insurance Act. Aloha Lumber Corp. v. Department of Labor and
27 Industries, 77 Wn.2d 763, 466 P.2d 151 (1970). We believe that Mr. Lunyou's injury occurred during
28 the course of his employment with his employer, Walter Fairman Trucking, Inc.
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32 After consideration of the Proposed Decision and Order, the claimant's Petition for Review filed
33 thereto, and the Employer's Motion to Deny Petition for Review, and a careful review of the entire
34 record before us, we are persuaded that the Department order of January 14, 1987, adhering to the
35 order of June 26, 1985, is incorrect and should be reversed and this claim remanded to the
36 Department with direction to enter an order allowing the claim and to take such other and further
37 action as may be indicated or required by law.
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42 **FINDINGS OF FACT**

- 43 1. On September 13, 1982 the Department of Labor and Industries received
44 an accident report alleging the occurrence of an industrial injury to the
45 claimant, Larry Lunyou, during the course of his employment with Pyramid
46 Trucking Company on August 21, 1982. On November 8, 1982 the
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1 Department entered an order allowing the claim and closing it for medical
2 treatment only. On November 10, 1982 the claimant filed a protest and
3 request for reconsideration of the Department order of November 8, 1982.
4 On November 16, 1982 the Department entered an order setting aside
5 and holding for naught its order of November 8, 1982, directing that
6 time-loss compensation be terminated with payment from August 22, 1982
7 through September 2, 1982, and closing the claim with no award for
8 permanent partial disability. On December 20, 1982 the claimant filed a
9 protest and request for reconsideration of the Department order of
10 November 16, 1982. On June 7, 1985 the Department entered an order
11 holding in abeyance its order of November 16, 1982. On June 26, 1985
12 the Department entered an order rejecting this claim for the reason that
13 the Department was unable to substantiate an employer-employee
14 relationship at the time of the alleged injury on August 21, 1982.

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16 On October 30, 1986 the employer filed a protest and request for
17 reconsideration of the Department order of June 26, 1985. On December
18 10, 1986 the employer filed a notice of appeal with the Board of Industrial
19 Insurance Appeals from the Department order of June 26, 1985. On
20 January 9, 1987 the Department entered an order reassuming jurisdiction
21 and holding in abeyance its order of June 26, 1985. Also on January 9,
22 1987 the Board entered an order returning the case to the Department for
23 further action.

24 On January 14, 1987 the Department entered an order adhering to the
25 provisions of its order of June 26, 1985. On February 19, 1987 the
26 claimant filed a notice of appeal with the Board from both the Department
27 order of January 9, 1987 and the Department order of January 14, 1987;
28 Docket Nos. 87 0638 and 87 0639 were assigned. On March 2, 1987 the
29 employer filed a notice of appeal with the Board from the Department
30 order of January 14, 1987; Docket No. 87 0741 was assigned. On March
31 11, 1987 the Board entered orders granting the claimant's appeals, and
32 directing that hearings be held on the issues raised by the notice of
33 appeal. On March 25, 1987 the Board entered an order granting the
34 employer's appeal, and directing that proceedings be held on the issues
35 raised by the notice of appeal.

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37 2. The Department order of June 26, 1985 which rejected this claim was not
38 mailed to, and was never received by the employer. On October 30, 1986
39 the employer filed a protest and request for reconsideration of the
40 Department order of June 26, 1985 with the Department.
- 41 3. On August 21, 1982 Larry Lunyou injured his right knee during the course
42 of his employment with Walter Fairman Trucking, Inc. At the time of the
43 injury, Mr. Lunyou was traveling from his job site to the employer's base
44 camp as a passenger in a truck owned and furnished by his employer as
45 an incident to his employment.
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3 **CONCLUSIONS OF LAW**
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- 5 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties
6 and the subject matter of this appeal.
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8 2. The Department order of June 26, 1985 was not communicated to the
9 employer within the meaning of RCW 51.52.050, and the sixty day statute
10 of limitations did not begin to run as to the employer. The Department of
11 Labor and Industries possessed jurisdiction to enter its orders of January
12 9, 1987 and January 14, 1987 in response to the employer's protest and
13 request for reconsideration received by the Department on October 30,
14 1986.
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16 3. The claimant, Larry Lunyou, sustained an industrial injury during the
17 course of his employment with Walt Fairman Trucking, Inc. on August 21,
18 1982. At the time of the injury Mr. Lunyou was an employee, within the
19 meaning of RCW 51.08.185, of Walt Fairman Trucking, Inc., an employer
20 within the meaning of RCW 51.08.070.
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22 4. The order of the Department of Labor and Industries dated January 14,
23 1987, which adhered to the provisions of a prior order dated June 26,
24 1985 that rejected this claim solely for the reason that the Department was
25 unable to substantiate an employer-employee relationship at the time of
26 the alleged injury, is incorrect and should be reversed, and the claim
27 remanded to the Department with direction to enter an order allowing the
28 claim and to take such other and further action as may be indicated or
29 required by law.

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31 It is so ORDERED.

32 Dated this 25th day of March, 1988.

33 BOARD OF INDUSTRIAL INSURANCE APPEALS

34 /S/
35 SARA T. HARMON Chairperson

36 /S/
37 FRANK E. FENNERTY, JR. Member

38 /S/
39 PHILLIP T. BORK Member
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