Erection Co. (I)

SAFETY AND HEALTH

Reassumption of jurisdiction by Department

RCW 49.17.140 requires the Department to reassume jurisdiction, complete its informal conference process and issue a corrective notice of redetermination within 30 working days. The Department cannot extend the time for acting by issuing successive reassume orders. However, the failure of the Department to complete the process within the 30-day limit does not deprive the Department of jurisdiction to issue a subsequent corrective notice of redetermination absent a demand by the employer to transmit the original appeal to the Board. **….*In re Erection Co.* (I), BIIA Dec., 88 W134 (1990)** [*Editor's Note: Reversed in Erection Co. v. Labor & Industries*, 121 Wn.2d 513 (1993). Legislative changes to RCW 49.17.140 allow the parties to agree to extend the time to complete redetermination for an additional 45 days.]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: THE ERECTION COMPANY	**)**	**DOCKET NO. 88 W134**
	)	
CORRECTIVE NOTICE OF	**)**	
REDETERMINATION NO. 391816	**)**	**DECISION AND ORDER**

APPEARANCES:

Employer, The Erection Company, by
Oles, Morrison & Rinker, per
Mark F. O'Donnell

Department of Labor and Industries, by
The Attorney General, per
Elliott S. Furst, Assistant

This is an appeal filed by the employer, The Erection Company. The Department of Labor and Industries issued Citation and Notice No. 391816 on April 6, 1988. On April 14, 1988 the Department of Labor and Industries received a notice from the employer of the intent to appeal the Citation and Notice. On July 7, 1988 the Department issued a Corrective Notice of Redetermination No. 391816 which affirmed Citation and Notice No. 391816. That Corrective Notice was received by the employer on July 11, 1988. On August 5, 1988 the Department received a notice from the employer of the intent to appeal the Corrective Notice of Redetermination. The employer's notice of intent to appeal the Corrective Notice of Redetermination was dated August 2, 1988. **APPEAL DISMISSED**.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the employer to a Proposed Decision and Order issued on August 7, 1989 in which the employer's appeal from Corrective Notice of Redetermination No. 391816 was dismissed as being untimely filed pursuant to RCW 49.17.140.

On April 6, 1988 the Department of Labor and Industries issued a citation and notice alleging that The Erection Company was in violation of WAC standards promulgated under the Washington Industrial Safety and Health Act (WISHA), and assessed penalties in the sum of $14,420.00. On April 14, 1988 the Department of Labor and Industries received from the employer a notice of intent to appeal the citation. This notice was clearly within the 15 working day requirement for filing the notice of intent with the Department. See RCW 49.17.140(1). On April 25, 1988 the Department of Labor and Industries issued its first notice of reassumption of jurisdiction and notice of informal conference, setting the conference for May 10, 1988. This conference was never held. On May 10, 1988 the

Department issued a second notice of reassumption of jurisdiction and notice of informal conference. The informal conference was scheduled for May 25, 1988. The informal conference scheduled for May 25, 1988 did not occur. On June 1, 1988 the Department issued a third notice of reassumption of jurisdiction and notice of informal conference, setting the informal conference for June 16, 1988. This conference never occurred. On June 17, 1988 the Department issued the final notice of reassumption of jurisdiction and notice of conference, setting the conference for June 22, 1988. The informal conference was finally held on June 22, 1988. The employer did not attend. The Department issued the Corrective Notice of Redetermination (Redetermination) on July 7, 1988, affirming the original citation and notice in all respects.

There is some dispute as to the reason for the cancellation of the conferences. The employer asserts that at least some of the cancellations were at the request of the Department. The employer also asserts that the employer's absence at the final conference was occasioned by the fact that the employer's representative was involved in an automobile accident (affidavit of Karen Haugsven and Adam Jones). The Department, however, asserts that all of the continuances were at the request of the employer (affidavit of Mike Bahn).

The Redetermination was mailed to the employer and it was received by the employer on July 11, 1988. On August 5, 1988 the Department received the employer's notice of intent to appeal the Redetermination. The notice of intent to appeal the Redetermination is dated August 2, 1988. It is apparent that the employer's filing of the notice of intent to appeal the Redetermination exceeds the 15 working day time period set forth in RCW 49.17.140(3) and therefore is not timely.

It is the Department's contention that the Redetermination was a valid exercise of the Department's authority and that the Redetermination became a final order, since it was not timely appealed.

The employer raises two issues. First, the employer contends that the Department's authority to reassume jurisdiction and issue the Redetermination terminates at the expiration of 30 working days from the date that the Department first reassumed jurisdiction on April 25, 1988. Failing the issuance of the Redetermination within the 30 working day period, the employer reasons, the Department must forward the notice of intent to appeal promptly to the Board of Industrial Insurance Appeals for its consideration as an appeal. Under this theory the Department would lose jurisdiction to issue the Redetermination upon the expiration of the 30 working day period. Therefore the employer believes that there was no reason to appeal the Redetermination since it was issued without any authority.

Hence, according to the employer, the original notice of appeal to the original citation is still a valid appeal pending before the Board of Industrial Insurance Appeals and proceedings should be held on the merits of the appeal.

Second, the employer argues that should the Redetermination be deemed to be an effective exercise of the Department's authority, the acts of the Department caused the employer to delay in filing the notice of intent to appeal. Based on case law under the federal statutes, the employer argues that strict compliance with the 15 working day requirement for filing the appeal should therefore be waived.

The Industrial Appeals Judge, in the Proposed Decision and Order, only addressed the issue of whether the notice of intent to appeal from the Redetermination was timely filed. The Industrial Appeals Judge determined that the plain meaning of RCW 49.17.140(3) required the filing of the notice of intent to appeal within 15 working days. Since the notice of intent to appeal was filed after the 15 working day time period had elapsed, the industrial appeals judge dismissed the employer's appeal.

While we agree with the result reached by the Proposed Decision and Order, we have granted review to expand on the reasoning. RCW 49.17.140(3) provides:

> . . . the director may reassume jurisdiction over the entire matter, or any portion thereof upon which notice of intention to appeal has been filed with the director pursuant to this subsection. If the director reassumes jurisdiction of all or any portion of the matter upon which notice of appeal has been filed with the director, any redetermination shall be completed and corrective notices of assessment of penalty, citations, or revised periods of abatement completed within a period of thirty working days, which redetermination shall then became final subject to direct appeal to the board of industrial insurance appeals within fifteen working days of such redetermination with service of notice of appeal upon the director. In the event that the director does not reassume jurisdiction as provided in this subsection, he shall promptly notify the state board of industrial insurance appeals of all notifications of intention to appeal any such citations, any such notices of assessment of penalty and any employee or representative of employees notice of intention to appeal the period of time fixed for abatement of a violation and in addition certify a full copy of the record in such appeal matters to the board. (Emphasis added)

The clear import of this language, as interpreted by the Department in its administrative regulations, is that the decision to reassume jurisdiction, the informal conference process, and the issuance of a corrective notice of redetermination must all occur within a 30 working day period. See WAC

296-350-050. It is equally clear that the Department cannot extend the time for acting by issuing successive reassume orders.

Our review of case law in this state regarding the interpretation of statutory language also compels us to this result. The provisions of RCW 49.17.140 state that any redetermination "shall be completed and corrective notices of assessment of penalties, citations, or revised periods of abatement completed within a period of thirty working days" and that "[i]n the event that the director does not reassume jurisdiction as provided in this subsection, he shall promptly notify the state board of industrial insurance appeals of all notifications of intentions to appeal any such citations,. . ." (Emphasis added) The use of the word "shall" can only be construed as mandatory language directing the Department to act. Spokane County Ex Rel. Sullivan v. Glover, 2 Wn.2d 162 (1940); Liquor Control Board v. Personnel Board, 88 Wn.2d 68 (1977).

This view gains further support from the legislative history of RCW 49.17.140. In 1986 the Washington State Legislature amended RCW 49.17.140, increasing the time allowed for the Department to complete the redetermination on reassumption of jurisdiction from 15 to 30 working days. Laws of 1986, ch. 20, § 1, p. 74. Review of the legislative history indicates that the Department was concerned with the time frame for processing the reassumptions and that the 15 working day time frame was insufficient. House Bill Report with attached Fiscal Note, Chris Cordes, House of Representatives, Commerce and Labor Committee, at 1.

In seeking the amendment of RCW 49.17.140 in 1986, the Department clearly interpreted that statutory provision the same as we do here, i.e., to require the completion of the reassumption process within the statutorily imposed time limitation. It was for that reason that the Department requested the expansion of the time period from 15 working days to 30 working days, because of the difficulty the Department was having meeting the shorter time frame.

Nonetheless, despite the fact that RCW 49.17.140 imposes a mandatory time period for the reassumption process, there is no sanction contained within the statute should the Department fail, as here, to meet the 30 working day time limitation. Specifically, the Legislature has not provided that the Department loses jurisdiction to act once the 30 working day period has expired.

In instances where the Legislature has intended to impose a consequence for the Board's or the Department's failure to act within a specified time period, it has been explicit. See, e.g., RCW 51.32.160 as amended by Laws of 1988, ch 161, § 11, p. 698; RCW 51.52.090. Under RCW 51.32.160, an application to reopen is deemed granted if the Department fails to act within 90 days,

unless the time is extended for an additional 60 days for good cause shown. Under RCW 51.52.090, an appeal is deemed granted if the Board fails to deny the appeal within 30 days, unless the period is extended for an additional 30 days. Unlike RCW 51.32.160 and 51.52.090, RCW 49.17.140 contains no sanctions. In this respect, RCW 49.17.140 is much like a number of provisions under the Industrial Insurance Act which impose time limitations without concomitant sanctions for non-compliance. See, e.g., RCW 51.52.060 and RCW 51.52.106. Under RCW 51.52.060, the Department has no more than 180 days to issue a further order when a protest has been filed or jurisdiction has been reassumed. Under RCW51.52.106, the Board has 180 days after a petition for review is filed to issue a final decision and order. Neither of these statutes imposes any consequences should the Department or Board fail to meet the time limitations. Certainly, a failure to act in a timely fashion does not divest either the Department or the Board of jurisdiction to act.

There is, of course, a remedy available outside of WISHA for failure to comply with the mandatory language of RCW 49.17.140. For, while failure to act does not divest the Department of jurisdiction in this matter, it would subject the Department to an action to mandate the performance required by the statute. RCW 7.16, et seq.

However, the question before us is whether there is any remedy within WISHA for the Department's failure to act within the 30 working day time frame. In answering this question we have considered not only WISHA (RCW 49.17 et seq) and its legislative history, but also the federal Occupational Safety and Health Act (OSHA)(29 U.S.C. § 651 et seq) and the decisional law derived from it.

WISHA was enacted in 1973. At that time, Washington joined a number of states which, by enacting their own industrial safety and health programs, maintained control over the program. The federal program, under OSHA, remains as a backdrop to the WISHA program. The WISHA standards, and enforcement of those standards, must meet or exceed the OSHA requirements in order for the state plan to meet with the Secretary of Labor's approval. 29 U.S.C. § 667. The provisions of RCW 49.17.140 for appeal and review of citations are taken in large part from the corresponding provisions of OSHA. 29 U.S.C. § 659.

OSHA, however, provides only for a direct appeal to the Review Commission, and does not provide for a reassumption of jurisdiction by the Secretary of Labor. OSHA requires the employer to file a "notice of contest" with the Secretary of Labor. The Secretary must immediately notify the Review Commission of the appeal.

The Washington procedure contains the extra reassumption step which is at issue here. However, while the federal procedure is not identical to our own, we find some assistance in interpreting RCW 49.17.140 in the case law under OSHA.

In Brennan v. OSAHRC & Bill Echols Trucking Co., 487 F.2d 230, 1 OSHC 1399 (5th Cir. 1973), the Court interpreted the provisions of 29 U.S.C. § 659(c) which require the Secretary of Labor to immediately forward to the Review Commission the notice of contest filed with the Secretary. In Echols the Secretary failed to promptly transmit the notice of contest and the Review Commission therefore dismissed the citation.

In reversing the decision of the Review Commission and remanding for hearing, the Court stated that:

> . . . viewed in light of the purpose of the Act, the requirement that the secretary promptly transmit notices of contest is obviously designed to protect employees rather than employers. Congress' statement of purpose at the beginning of the Act make this abundantly clear:
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> > "The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources -"
>
> 29 U.S.C. Sec. 651(b). Prompt transmittal is important for hastening abatement of health or safety hazards to employees because, if the employer contests in good faith, the period for correction permitted by the Secretary "shall not begin to run until the entry of a final order by the Commission. . . ." 29 U.S.C. Sec. 659(b). We can find no justification for permitting an employer to reap the benefits of its own ambiguous correspondence and to go unpenalized for an admitted serious violation of a safety standard under the banner of a rule designed to protect employees. Congress could not have intended such a result, and it gave the Commission no authority to produce such a result.

Echols, at 235. (See also Secretary of Labor v. Pennsylvania Electric Co., 11 OSHC 1235 (1983) and Secretary of Labor v. Texas Masonry, Inc., 11 OSHC 1835 (1984).)

WISHA, like OSHA, provides that the time for correction of the violation does not commence until a final order is entered following an appeal to the Board. RCW 49.17.140(2). Given the similarity of the language of the WISHA and OSHA provisions regarding the time for processing appeals, and

the corresponding purpose of both acts, we believe the purpose of the 30 working day time limitation under RCW 49.17.140 is to ensure that the ultimate action on a contested citation will occur in a timely fashion and thus extend the greatest possible protection to workers facing hazardous conditions in the workplace. Timely handling of these matters by our Department of Labor and Industries is an essential element of the effectiveness of our Industrial Safety and Health Act. In this light, the purpose of the time limitation for processing a reassumption is not to benefit employers, but to benefit workers. Since the goal of the Legislature was to protect workers from hazardous working conditions, the Legislature could not have intended that an employer would benefit from the Department's inability to timely complete the reassumption process. Yet that would be precisely the result if we were to determine that the Department lost jurisdiction to act once the 30 working day period had elapsed.

Instead, we believe RCW 49.17.140 provides two options for the Department upon the filing of the notice of intent to appeal. The Department may either decline to reassume jurisdiction and forward the notice of appeal directly to this Board, or the Department may reassume jurisdiction and issue a corrective notice of redetermination within 30 working days. If the Department is unable to complete the redetermination process within the initial 30 working day period, the Department should not attempt to extend the time for acting by issuing successive reassume orders, but should instead forward the appeal directly to the Board. Failure to timely complete the reassume process, however, does not deprive the Department of jurisdiction to issue a subsequent corrective notice of redetermination.

If The Erection Company was dissatisfied with the length of time the Department was taking during the reassumption process, the company could have demanded that the Department transmit its notice of appeal to this Board pursuant to the terms of RCW 49.17.140. The employer, however, failed to take any such action in this case and therefore acquiesced in the delay which occurred at the Department. In the absence of such a demand, the Department proceeded to issue the Corrective Notice of Redetermination on July 7, 1988. Upon the issuance of that corrective notice, the question of timeliness with respect to the reassumption process became moot, and The Erection Company's failure to timely appeal the corrective notice to this Board requires dismissal of the appeal. This interpretation of RCW 49.17.140 preserves the employer's rights under the Act as well as the right of employees to a timely determination regarding hazardous working conditions.

The employer's second contention is that the 15 working day requirement for filing the notice of intent to appeal the Corrective Notice of Redetermination should be waived, because of misconduct

on the part of the Department. This argument is without merit. We recognize that the decisional law in OSHA cases provides that the time period can be extended, if there is affirmative misrepresentation by the Secretary regarding the requirements for filing the notice of contest. Assuming such a rule existed in this state and pertained to the time limits of RCW 49.17.140, we do not believe the facts of this case show any affirmative misrepresentation by the Department in issuing the Redetermination. The Redetermination clearly contains language indicating that the employer must act within 15 working days of the issuance of the corrective notice. The facts as we interpret them, even most favorably for the employer in this instance, merely amount to the employer's negligence in failing to timely file the notice of intent to appeal from the Redetermination.

The employer, in a supplemental memorandum filed with this Board on January 26, 1990, seeks to rely on the recent decision in Graves v. Vaagen Brothers Lumber, 55 Wn. App 908,___ P.2d (1989), in support of the proposition that the untimeliness of the employer's appeal should be excused. The employer's reliance on Graves is misplaced. Graves was clearly limited to the narrow facts of that case, which involved an appeal to Superior Court which was mailed within the applicable appeal period. Here The Erection Company clearly did not mail its notice of appeal of the Corrective Notice of Redetermination within the statutory time allowed for appeal. We will not expand the narrow holding on the facts in Graves to encompass the obviously different facts of this case.

We therefore conclude that the employer's untimely appeal from the July 7, 1988 Corrective Notice of Redetermination must be dismissed.

FINDINGS OF FACT

1. On March 21, 1988, an employee of the Department of Labor and Industries conducted an inspection of the employer's work site located at Two Union Square, Seattle, Washington.

   On April 6, 1988 the Department issued Citation and Notice No. 391816, alleging one serious, willful and repeated violation of WAC 296-615-5225(1)(B), for which a penalty of $14,000.00 was assessed; a general repeated violation of WAC 296-155-110(2), for which a penalty of $420.00 was assessed; a general violation of WAC 296-155- 110(3)(E), for which no penalty was assessed; a general violation of WAC 296-620-5409(1), for which no penalty was assessed; and a general violation of WAC 296-155-100(1)(A), for which no penalty was assessed, with a total penalty assessment of $14,420.00.

   On April 7, 1988 Citation and Notice No. 391816 was received by the employer, The Erection Company.

On April 14, 1988 the employer, The Erection Company, filed a notice of appeal from Citation and Notice No. 391816 with the Department of Labor and Industries.

On April 25, 1988 the Department issued a notice of reassumption of jurisdiction and notice of informal conference.

On May 10, 1988 the Department issued a notice of reassumption of jurisdiction and notice of informal conference.

On June 1, 1988 the Department issued a notice of reassumption of jurisdiction and notice of informal conference.

On June 17, 1988 the Department issued a notice of reassumption of jurisdiction and notice of informal conference.

On July 7, 1988 the Department issued Corrective Notice of Redetermination No. 391816, affirming the earlier Citation and Notice in all respects; this Corrective Notice of Redetermination was received by the employer, The Erection Company, on July 11, 1988.

On August 2, 1988 the employer, The Erection Company, placed its notice of appeal in the U.S. Mails, addressed to the Department of Labor and Industries which received the notice of appeal on August 5, 1988.

On September 19, 1988 the Board of Industrial Insurance Appeals received the employer's notice of appeal, which had been forwarded to the Board by the Department of Labor and Industries.

CONCLUSIONS OF LAW

1. The notice of appeal filed by the employer, The Erection Company, from Corrective Notice of Redetermination No. 391816 is not timely within the meaning of RCW 49.17.140. Corrective Notice of Redetermination No. 391816, dated July 7, 1988, became final and binding on the parties on August 1, 1988.

2. This Board has no jurisdiction over the subject matter of this appeal.

3. The notice of appeal filed by the employer, The Erection Company, from Corrective Notice of Redetermination No. 391816, which affirmed the provisions of Citation and Notice No. 391816, issued on April 6, 1988 and which assessed penalties for five violations totaling $14,420.00 must be dismissed for lack of subject matter jurisdiction.

It is so ORDERED.

Dated this 23rd day of February, 1990.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____

SARA T. HARMON Chairperson

/s/_____

FRANK E. FENNERTY, JR. Member

/s/_____

PHILLIP T. BORK Member