Rye, Valerie

PROTEST AND REQUEST FOR RECONSIDERATION (RCW 51.52.050)

Application to reopen treated as protest

An application to reopen a claim, filed by the worker in response to notification from a health care provider that her claim had been closed, can be construed as a timely protest to the self-insured employer's closure order even though it was filed more than sixty days after the order was issued where there is no evidence the order was properly communicated to the worker. **….*In re Valerie Rye*, BIIA Dec., 89 3010 (1990)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: VALERIE A. RYE	)	**DOCKET NO. 89 3010**
	)	
CLAIM NO. T-025754	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Valerie A. Rye, Pro Se; and by John Rye; and by
Bovy, Wampold & Munro, per
Allan W. Munro

Self-insured Employer, ESD # 121 Workers' Compensation Trust, by
Hall & Keehn, per
Gary D. Keehn and Linda Bauer and Elsie Roberts, Legal Assistants

This is an appeal filed by the claimant, Valerie A. Rye on June 19, 1989 from an order of the Department of Labor and Industries dated May 24, 1989 which denied the claimant's application to reopen her claim on account of aggravation and denied responsibility for an unrelated medical condition diagnosed as subscapular bursitis of the right shoulder. Department order vacated; **CLAIM REMANDED TO DEPARTMENT.**

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 self-insured employer to a Proposed Decision and Order issued on December 29, 1989 in which the appeal of the claimant was dismissed without prejudice to her right to file an appeal from the self-insured employer's order of December 12, 1988.

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.

Our industrial appeals judge determined that the self-insured employer's order dated December 12, 1988 was not received by Ms. Rye. We agree, based upon her testimony and particularly upon Exhibit Nos. 2, 3, and 4. We have granted review because our industrial appeals judge went on to determine that the May 24, 1989 Department order was void, and dismissed the claimant's appeal without prejudice to the claimant's right to file an appeal from the self-insured employer's order of December 12, 1988. This determination was erroneous in several respects.

First, a self-insured employer order cannot be appealed directly to the Board; it can only be protested to the Department. RCW 51.32.055(7)(a)(c). Second, there is a real question as to whether a self-insured employer order can become "final" in the same sense as a Department order. We discussed this question with respect to the 1981 version of RCW 51.32.055 in In re Grace Kiser, Dckt.

Nos. 88 0710 & 88 2049 (March 8, 1990). While the self-insured employer order in the present case was entered pursuant to the 1986 version of the statute (as further amended in 1988), essentially the same reasoning applies here as in Kiser.

The notification language required by the statute reads as follows:

> This order constitutes notification that your claim is being closed with medical benefits and temporary disability compensation only as provided, and with the condition you have returned to work with the self-insured employer. If for any reason you disagree with the conditions or duration of your return to work or the medical benefits or the temporary disability compensation that has been provided, you may protest in writing to the department of labor and industries, self- insurance section, within sixty days of the date you received this order.
>
> The statute goes on to state that:
>
> In the event the department receives such a protest the self- insurer's closure order shall be held in abeyance. The department shall review the claim closure action and enter a determinative order as provided for in RCW 51.52.050.

The notification language appearing on the December 12, 1988 self- insured employer order is consistent with this statutory language. See, Exhibit No. 5. However, the language heading the December 12, 1988 self- insured employer order is significantly different from that required for Department orders. RCW 51.52.050 requires that final orders issued by the Department must advise the parties that the "order, decision or award shall become final within sixty days from the date the order is communicated to the parties unless a written request for reconsideration is filed with the department of labor and industries, Olympia, or an appeal is filed with the board of industrial insurance appeals, Olympia." (Emphasis added)

In our opinion, advising a worker that he or she "may" file a written protest with the Department does not have the same effect as advising the worker that the order "shall become final" unless such a protest or an appeal is filed. Fundamental fairness requires that before an order be given res judicata effect, a worker must be clearly advised that the order will become final unless a written protest or notice of appeal is filed. See King v. Dep't of Labor & Indus., 12 Wn.App. 1, 528 P.2d 271 (1974). Pursuant to the explicit terms of RCW51.32.055(7)(c), the order issued by the self-insured employer on December 12, 1988 could not and did not so advise Ms. Rye. Therefore, regardless of whether the order was received by Ms. Rye, it would appear that it did not become a final res judicata determination.

We also wonder if the self-insured employer order was appropriately entered, since it appears that Ms. Rye may not have "returned to work with the self-insured employer of record" as required by RCW 5.32.055(7)(a), but was, instead, attending college at the time the order was issued. In addition, under the terms of RCW 51.32.055(7)(a), it is arguable that the self-insured employer may not have been authorized to enter the December 12, 1988 order, since the Department had already acted to enter a prior allowance order on April 5, 1988. The self-insured employer may only enter an order pursuant to RCW 51.32.055(7)(a) "if the claim is one with respect to which the department has not intervened under subsection (6) of this section ...."

Be that as it may, we do not believe Ms. Rye actually received the self-insured employer order of December 12, 1988, and the question of aggravation of condition after that date was not appropriately before the Department when the May 24, 1989 Department order was issued. It is clear from Exhibit Nos. 2, 3, and 4 that the first knowledge Ms. Rye had which indicated the claim might have been closed, was when she received a letter dated March 23, 1989 from Medi-Rent, a medical equipment supplier (Exhibit No. 2), notifying her that their billing had not been paid by ESD # 121, and therefore they were billing Ms. Rye "privately for all denied charges." This letter also noted that the reason given for denial of the charges was "Claim Closed 12-12-88." Ms. Rye promptly responded to this notification by sending a letter dated April 4, 1989 to the self-insured employer, "Attn: Peg Sturdevant, Claim Specialist." (Exhibit No. 3). In this letter Ms. Rye stated:

> I received notification from Medi-Rent (see enclosure) that they had not received payment and that my claim was closed. My last written communication from you last summer asked if I was still under treatment. My reply to you was yes I was still under treatment but in the process of having to transfer from one physician to another. I have had NO OTHER written or oral communication from ESD, hence the closure notification from Medi Rent was disturbing.
>
> As I informed last summer, I am temporarily located in Ellensburg, Wa., and am under the care of Dan L. Hiersche, M.D., as well as Kittitas Valley Community Hospital Physical Therapy Dept. and would appreciate your completing whatever is necessary to rectify the "closed" status of this Claim.
>
> Please feel free to contact me or Dr. Hiersche should you have any questions.

Peg Sturdevant responded to Ms. Rye's letter by a handwritten note thereon dated April 13, 1989, stating:

> Valerie, please have your doctor fill out a "reopening application" and send to our office and I will forward it to the dept. Thank you.
>
> Peg

Ms. Rye promptly responded to this instruction by submitting a reopening application, completed by herself and Dr. Hiersche, which the Department received on April 20, 1989. Clearly, Ms. Rye believed that this was the proper action to take to "rectify" the assumed closed status of her claim.

We hold that the application to reopen, considered in light of the above-summarized correspondence leading up to its submission, effectively constituted Ms. Rye's protest to the self-insured employer's order of December 12, 1988. It was timely pursuant to RCW 51.32.055(7)(c), since she did not have knowledge of the existence of the order until at least March 23, 1989. The Department is therefore obligated by the terms of that statutory section to "review the claim closure action and enter a determinative order as provided for in RCW 51.52.050."

Finding of Fact No. 1 and Conclusion of Law No. 1 of the Proposed Decision and Order are hereby adopted by the Board and incorporated herein by this reference. In addition, the following findings and conclusions are entered:

FINDINGS OF FACT

2. The December 12, 1988 self-insured employer order closing the claim was never received by Valerie Rye. The first knowledge she had that such an order had been entered was by way of a letter from a medical equipment supplier dated March 23, 1989, billing her privately for some medical charges which the self-insured employer had denied because "Claim Closed 12-12-88". On April 4, 1989, Ms. Rye wrote the self-insured employer, asking for whatever action was necessary to rectify the apparent "closed" claim status. On April 13, 1989, the employer's claims specialist advised Ms. Rye in writing to have her doctor fill out a "reopening application" to be forwarded to the Department. Such completed reopening application was received by the Department on April 20, 1989, which was 28 days, at most, following her first knowledge of the existence of the closing order.

CONCLUSIONS OF LAW

2. The question of whether claimant's condition had become aggravated since December 12, 1988 was not properly before the Department when it issued the order of May 24, 1989. Instead, the claimant's application to reopen, received by the Department on April 20, 1989, when considered in light of the preceding correspondence as outlined in Finding No. 2, constituted a timely protest to the self-insured employer order of December 12, 1988 and, pursuant to RCW 51.32.055(7)(c), the

Department must enter a determinative order as provided by RCW 51.52.050 in response to that protest.

3. The Department order of May 24, 1989 is vacated. The claim is remanded to the Department to review the claim closure action and issue a determinative order, in response to claimant's protest of the self-insured employer's order of December 12, 1988, deciding whether or not the claim was appropriately closed by the self- insured employer on December 12, 1988.

It is so ORDERED.

Dated this 2nd day of August, 1990.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/
SARA T. HARMON Chairperson

/s/
FRANK E. FENNERTY, JR. Member

/s/
PHILLIP T. BORK Member