

Continental Sports Corp.

[NOTICE OF APPEAL \(RCW 51.52.050, RCW 51.52.060\)](#)

Timeliness

Where a notice of appeal was delivered to a private express delivery company on the 30th day and the Board received it on the 31st day, the appeal was not timely since delivery to the private delivery agent was not the same as delivery to the U.S. Mail as set forth in RCW 51.48.131. ...***In re Continental Sports Corp., BIIA Dec., 90 2027 (1991)*** [*Editor's Note: Reversed, Continental Sports Corp. v. Department of Labor & Indus., 128 Wn.2d 594 (1996).*]

Scroll down for order.

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

1 **IN RE: CONTINENTAL SPORTS) DOCKET NO. 90 2027**
2 **CORP.)**
3)
4 **FIRM NO. 538,933-00) DECISION AND ORDER**
5 _____

6 **APPEARANCES:**

7
8 Employer, Continental Sports Corporation, by
9 Raekes, Rettig, Osborne, Forgette & O'Donnell, per
10 Diehl R. Rettig (now withdrawn)

11
12 Department of Labor and Industries, by
13 The Attorney General, per
14 Sharon M. Brown, Assistant, and Gary McGuire, Paralegal

15
16 This is an appeal filed by the employer on April 19, 1990 from an order of assessment of
17 industrial insurance taxes dated March 14, 1990, which assessed industrial insurance taxes due and
18 owing for the period July 1, 1988 through March 31, 1989 in the amount of \$116,235.43. Appeal
19 dismissed.
20
21

22 **DECISION**

23
24 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
25 and decision on a timely Petition for Review filed by the Department of labor and Industries to a
26 proposed Decision and Order issued on February 8, 1991. The Proposed Decision and order
27 determined that the firm's appeal was timely filed.
28

29
30 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no
31 prejudicial error was committed and said rulings are hereby affirmed.

32
33 The issue raised in this appeal is whether the firm complied with the terms of RCW 51.48.131,
34 which requires that a notice of appeal from a Department notice and order of assessment be filed
35 within thirty days of the date the notice of assessment is served on the employer.
36

37 The facts surrounding this issue are not in dispute. The notice of assessment of industrial
38 insurance taxes was served on the firm on Mach 19, 1990 at the firm's offices in Kennewick,
39 Washington. On the same day, the firm staff in Kennewick faxed a copy of the notice of assessment
40 to the company's main office in Vancouver, B.C. Following receipt of the copy by fax, the firm's
41 accountant, Gary Mathieson, contacted representatives of the Department by phone on April 18, 1990.
42 As a result of these conversations, Mr. Mathieson told the Department representatives that he was
43 going to have the notice of appeal couriered to Olympia on that day for filing with the Board of
44
45
46
47

1 Industrial Insurance Appeals. April 18, 1990 was the 30th day following the service of the notice and
2 order of assessment on the employer. Mr. Mathieson placed the notice of appeal with a private
3 delivery company, Federal Express, for overnight delivery. The notice of appeal was delivered to the
4 Board on April 19, 1990, the 31st day.
5
6

7 The controversy in this case focuses on the employer's use of the private delivery service to
8 deliver the notice of appeal to the Board. The industrial appeals judge relied on previous Board
9 decisions: In re Daniel W. Kelp, BIIA Dec., 86 0686 (1988) and In re Betty L. Clayberg, BIIA Dec., 86
10 4295 (1988), and found that filing of the notice of appeal is effective upon mailing of the notice of
11 appeal. The industrial appeals judge, however, also determined that use of a "reputable commercial
12 delivery service" is tantamount to mailing and therefore the notice of appeal was filed when it was
13 delivered to the Federal Express agent on April 18, 1990, and is thus timely. We disagree.
14
15
16
17

18 While the Industrial Appeals Judge is correct in relying on In re Daniel W. Kelp and In re Betty
19 L. Clayberg for the proposition that filing is effectively accomplished upon mailing of the notice of
20 appeal, there is no authority to equate the use of a private delivery agent as a substitute for the mail.
21 RCW 51.48.131 provides:
22

23 A notice of assessment becomes final thirty days from the date the notice
24 of assessment was served upon the employer unless: (1) A written
25 request for reconsideration is filed with the department of labor and
26 industries, or (2) an appeal is filed with the board of industrial insurance
27 appeals and sent to the director of labor and industries by mail or
28 delivered in person.
29
30

31 Our reading of the statute convinces us that the Legislature intended only two methods for filing the
32 notice of appeal with this Board. The notice of appeal can be placed in the mail, at which time it is
33 effectively filed, or the notice of appeal can be delivered in person to the Board.
34

35 The firm argues that the private delivery agent is a reputable company and can be equated with
36 mail service. We, however, believe that the use of the term "mail" in the statute has specific meaning.
37 Mail is defined as "the bags of letters and the other postal matter conveyed under public authority from
38 one post office to another." Webster's Third New International Dictionary, 1361 (1986). "Mails" is
39 defined as "a nation's postal system." Webster's Third New International Dictionary, 1361 (1986). We
40 believe that the use of the term "mail" has a specific and very narrow connotation when used in this
41 statutory scheme. We do not believe that the Legislature would have intended the statute to read: "by
42 mail or any other agent, as designated by the appealing party". If the position enunciated in the
43
44
45
46
47

1 Proposed Decision and Order, and urged by the firm is adopted, we believe this would be the impact
2 of the statutory language.
3

4 We are also somewhat confused by the statement in the Proposed Decision and Order that
5 delivery of the notice of appeal to the Federal Express agent would constitute delivery to a "person"
6 within the meaning of RCW 51.48.131, so as to constitute a timely filing. We believe this is a
7 misstatement of the law of agency. The notice of appeal in this case was effectively filed with the
8 Board on April 19, 1990 "in person" by the firm's agent, Federal Express. The filing occurred when the
9 firm's agent presented the notice of appeal with Federal Express, the firm's agent. Delivery to one's
10 own agent does not constitute delivery to a third party.
11

12 Finally, we find no merit in the firm's contention that equitable estoppel should be applied so as to
13 excuse the late filing. Equitable estoppel requires three elements: (1) a statement which is
14 inconsistent with a claim made after the statement; (2) reliance by the other party on the truth of the
15 statement; and (3) injury to the party which results from allowing the first party to contradict or
16 repudiate the initial admission or statement. McDaniels v. Carlson, 108 Wn.2d 299 (1987). Even if
17 this Board was inclined to grant equitable relief on this issue, we do not believe the elements of
18 equitable estoppel have been established. Mr. Mathieson's testimony merely indicates that in his
19 conversations with representative from the Department, he believed that it was satisfactory to courier
20 the appeal on April 18, 1990, the 30th day. His testimony is very narrow, in that there was no
21 discussion with the Department as to when anybody expected the courier to deliver the notice of
22 appeal. His testimony indicates only that he would have the item couriered on the 30th day. Mr. Clark
23 Miller, a Federal Express manager, indicated that there were three forms of delivery provided by
24 Federal Express. These include a same day delivery, an overnight delivery, and two-day delivery. Mr.
25 Miller testified that the firm selected the overnight delivery service, knowing that the appeal would
26 therefore be filed or delivered on April 19, 1990. These facts are insufficient to raise the equitable
27 estoppel defense against the Department.
28

29 Since the notice of appeal filed by the firm in this matter was filed on the 31st day following the
30 service of the notice of assessment of industrial insurance taxes on the firm, the appeal is untimely
31 and this Board lacks jurisdiction to consider the merits of the appeal. Therefore the appeal must be
32 dismissed.
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47

