

Bell & Bell Builders (II)

ASSESSMENTS

Communication of order (RCW 51.48.120)

Where service of a notice and order of assessment is perfected by mailing a notice by certified mail to the employer's last known address, and where an attorney or other representative has appeared before the Department on behalf of a firm and expressed desire to receive further communication from the Department regarding the assessment, the Department is obligated to direct all future correspondence to the firm's attorney or representative.*In re Bell & Bell Builders (II)*, BIIA Dec., 90 5119 (1992)

COMMUNICATION OF DEPARTMENT ORDER

Failure to provide order to attorney or representative

Where an attorney or other representative has appeared before the Department on behalf of a firm and expressed desire to receive further communication from the Department regarding the assessment of industrial insurance taxes, the Department is obligated to direct all future correspondence to the firm's attorney or representative.*In re Bell & Bell Builders (II)*, BIIA Dec., 90 5119 (1992)

Scroll down for order.

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

1 **IN RE: BELL & BELL BUILDERS**) **DOCKET NO. 90 5119**
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5 **FIRM NO. 330,966-00**) **ORDER ON REMAND FROM SUPERIOR COURT**
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APPEARANCES:

Employer, Bell & Bell Builders, by
Harlan C. Stientjes

Department of Labor and Industries, by
The Attorney General, per
Penny Allen and Byron L. Brown, Assistants

This is an appeal filed by the firm, Bell & Bell Builders, on October 11, 1990, from an order of the Department of Labor and Industries dated August 20, 1990 which affirmed Notice and Order of Assessment No. 85153 dated July 18, 1990, which assessed industrial insurance taxes against the firm in the amount of \$15,048.12 for the period April 1, 1987 through December 31, 1989.

REMANDED FOR FURTHER PROCEEDINGS.

PROCEDURAL HISTORY

On August 20, 1990, the Department of Labor and Industries issued an Order and Notice Reconsidering Notice and Order of Assessment. The Department did not receive a protest to said order, and no Notice of Appeal appeared to have been filed within the time allowed by RCW 51.48.131.

On October 22, 1990, the Department, pursuant to RCW 51.48.140, filed a warrant to collect the assessment in Thurston County Superior Court (Cause No. 90-2-02530-3). Bell & Bell Builders moved, in Superior Court, to dismiss the warrant. On December 19, 1990, following argument on the motion, Judge Paula Casey signed an Order Denying Motion to Dismiss. That order stated that Bell & Bell Builders had failed to show that a timely appeal had been made to the Board from the Notice and Order of Assessment. It further ordered that the warrant issued by the Court was to remain in effect and was deemed final pursuant to RCW 51.48.140.

As previously indicated, Bell & Bell Builders had also filed a Notice of Appeal from the Department's Order and Notice Reconsidering Notice and Order of Assessment with the Board. The appeal was filed on October 11, 1990. A hearing was held on the issue of the timeliness of the appeal

1 and our mediation-review judge issued a Proposed Decision and Order dismissing the appeal as not
2 being timely.
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4 We granted a Petition for Review of the Proposed Decision and Order and, on August 6, 1991,
5 issued a Decision and Order dismissing the appeal due to lack of jurisdiction. We did not predicate
6 our dismissal on the untimeliness of the appeal. Rather, we noted that the warrant constituted a
7 judgment of the Superior Court. RCW 51.48.140. We held that we could not exercise subject matter
8 jurisdiction over an appeal of an assessment which was already the subject of a judgment in Superior
9 Court. In re Bell & Bell Builders, Dckt. No. 90 5119 (August 6, 1991). On January 23, 1992,
10 Judge Paula Casey entered an Order of Remand, Vacating Earlier Order and Warrant. The order
11 stayed execution and enforcement of the warrant and remanded the Decision and Order to the Board
12 with direction that we consider evidence in the record and determine whether jurisdiction exists to
13 proceed on the merits, and issue a written decision regarding our jurisdiction or lack thereof. The
14 order further allowed us to reschedule such other and further hearings that we deem appropriate to
15 address the substantive merits of Bell & Bell Builders' appeal.¹
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22 **DECISION**

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24 Our prior Decision and Order did not deal with the issue of the timeliness of Bell & Bell Builders'
25 appeal to us, since we did not believe we had jurisdiction over the appeal in view of the intervening
26 Superior Court judgment. By its January 23, 1992 Order of Remand, the Superior Court has conferred
27 that jurisdiction upon us and we must issue a further order based on the record before us. Based on
28 our review of the record, we believe the firm's appeal was timely and this matter should proceed to be
29 heard on its merits.
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34 The firm's Petition for Review raises many points in support of its position. Though some may
35 be more persuasive than others, we believe there is one specific factor which convinces us that we
36 have jurisdiction to hear this appeal. On August 6, 1990, Harlan C. Stientjes, the firm's attorney,
37 mailed a request for reconsideration of the July 18, 1990 Notice and Order of Assessment of Industrial
38 Insurance Taxes to the Department of Labor and Industries. A review of the record shows that the
39 document was received by the Department on August 7, 1990. In the protest, Mr. Stientjes states the
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44 ¹Technically speaking, this is not a "remand" from Superior Court. No appeal from our Decision and Order was ever filed in
45 Superior Court in the manner provided by RCW 51.48.131. The matter is therefore not remanded to the Board as a result
46 of an appeal of our decision, but as a further disposition of the warrant filed under Superior Court Cause No. 90-2-2530-3.
47 However, we will proceed under authority given us by the Court, an authority which no party has questioned.

1 following: "The employer requests that the Department of Labor and Industries holds in abeyance the
2 Notice of Assessment until further investigation can be done by the Department in cooperation with the
3 attorney for the employer. Arrangements to review the employer's records may be made through the
4 undersigned attorney." Notice of Appeal, Exh. A, at 2.
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7 The key question, based on the language of the firm's protest, is whether the protest also
8 constituted a change of the firm's address. If it can be construed as such, even if the firm received the
9 Order and Notice Reconsidering the Notice and Order of Assessment, it was not communicated to it
10 as required by law. See In re David Herring, BIIA Dec., 57,831 (1981); In re Calvin Keller, Dec'd.,
11 Dckt. No. 89 4546. (March 15, 1991).
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14 Service of a notice and order of assessment is perfected by mailing the notice, by certified mail,
15 to the "employer's last known address." RCW 51.48.120. In Herring, we held that to be
16 "communicated" pursuant to RCW 51.52.050, "copies of the order or actual knowledge of the contents
17 and meaning of the orders must be directed to the last known address of the claimant (or his
18 authorized representative as shown by the Department's records)." In re David Herring, supra at 3.
19 We have also held that the rationale of Herring applies to employers. In re Calvin Keller, Dec'd., supra
20 (construing RCW 51.04.082). See also Kaiser Aluminum & Chemical Corp. v. Dep't of Labor & Indus.,
21 57 Wn. App. 886, 889, 790 P.2d 1254 (1990).
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24 It is obvious that the Department was aware, as of August 7, 1990, that Harlan C. Stientjes was
25 the authorized representative of Bell & Bell Builders. There was an explicit instruction given by Mr.
26 Stientjes that, in its reconsideration, the Department was to deal directly with him rather than the firm
27 itself. The Department should have followed those directions and all further correspondence should
28 have been sent to Mr. Stientjes. For some reason, it was not.²
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31 We hold that where an attorney or other representative has appeared before the Department
32 on behalf of a firm and has expressed a desire to receive further communications from the Department
33 concerning an assessment of industrial insurance taxes, the Department is obligated to direct all future
34 correspondence to the firm regarding such assessment to the firm's attorney or representative.
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37 Based on the above facts and law, we believe the Department's Order and Notice
38 Reconsidering Notice and Order of Assessment was not communicated to the firm until September 13,
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44 ²The Department apparently recognized its obligation to communicate through Mr. Stientjes. Its August 20, 1990 Order and
45 Notice Reconsidering Notice and Order of Assessment reflects that a copy was to be sent to him. There is no indication
46 from the record, however, that a copy was ever received by him prior to September 13, 1990. 11/28/90 Affid. of Harlan C.
47 Stientjes.

1 1990, when it was received at the office of Mr. Stientjes. The Notice of Appeal, filed by the firm, was
2 filed with the Board on October 11, 1990. That being the case, the appeal was timely filed, pursuant to
3 RCW 51.48.120 and 51.48.131, and we have jurisdiction to hear the substantive issues presented by
4 the appeal.
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7 Based on the Court's order of remand to the Board, the Decision and Order previously issued
8 on August 6, 1991 is vacated and this appeal is remanded to the hearings process for the purpose of
9 taking further evidence dealing with the substantive issues raised by the firm's Notice of Appeal. The
10 parties are advised that the instant order is not a final decision of the Board within the meaning of
11 RCW 51.48.131. Unless the appeal is dismissed or resolved by agreement of the parties, a further
12 Proposed Decision and Order shall be issued after the parties to these proceedings have had an
13 adequate opportunity to present such evidence as is appropriate to the issues herein. Such Proposed
14 Decision and Order, if any, shall be based upon the entire record, and the parties shall have the right,
15 pursuant to RCW 51.52.104, to petition for review of such further Proposed Decision and Order.
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21 It is so **ORDERED**.

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23 Dated this 3rd day of August, 1992.
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25 BOARD OF INDUSTRIAL INSURANCE APPEALS

26
27 /s/
28 S. FREDERICK FELLER Chairperson
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31 /s/
32 PHILLIP T. BORK Member
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