Bazan, Daniel

COMMUNICATION OF DEPARTMENT ORDER

Presumptions of mailing and receipt

Where uncontradicted testimony indicates that the worker was not at the address to which the Department addressed its order, nothing in the record established communication of the Department order. **….*In re Daniel Bazan*, BIIA Dec., 92 5953 (1994)**

SCOPE OF REVIEW

Department order not communicated

Where the worker had no actual knowledge of the contents of a Department order since it had never been communicated, the worker could not pursue an appeal from the contents of the order. Instead, the Board remanded the matter to the Department to either communicate the order to the worker or to issue a further determinative order. **….*In re Daniel Bazan*, BIIA Dec., 92 5953 (1994)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: DANIEL BAZAN	)	**DOCKET NO. 92 5953**
	)	
CLAIM NO. J-742302	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Daniel Bazan, by
Knies, Robinson & McMullen, per
Patrick R. McMullen and Lyle O. Hanson

Employer, Fibrex Corporation
None

Department of Labor and Industries, by
The Attorney General, per
Mary V. Wilson, Assistant

This is an appeal filed by the claimant, Daniel Bazan, on December 7, 1992 from an order of the Department of Labor and Industries dated January 15, 1991 which affirmed a prior order dated August 17, 1990, which closed the claim with time loss compensation as paid and with no award for permanent partial disability. **DISMISSED**.

PROCEDURAL MATTERS

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 claimant on October 4, 1993. The claimant petitioned for the review of a Proposed Decision and Order entered on August 13, 1993 wherein the appeal was dismissed. The time for filing the Petition for Review was extended by the Board to October 4, 1993, and when no Petition was received by October 8, 1993, the Board issued its Order Adopting Proposed Decision and Order. The Petition for Review from the claimant was received on October 11, 1993 with an affidavit that the petition had been mailed on October 4, 1993. The Board thereafter vacated the Order Adopting Proposed Decision and Order and acknowledged the Petition for Review.

DECISION

Because we differ in our conclusion from that of our industrial appeals judge, we will set forth those facts to explain the basis for our conclusions.

On January 15, 1991 a Department order was issued, affirming an order which closed the claim. Approximately two years thereafter, on December 7, 1992, a Notice of Appeal was filed from that Department order. On June 15, 1993, the Board ordered the appeal be granted subject to proof

of timeliness. The Notice of Appeal alleged the January 15, 1991 Department order was never received by Mr. Bazan and that he desired treatment and time loss compensation or, in the alternative, a permanent partial disability award.

Our industrial appeals judge determined that the issues were whether Mr. Bazan's Notice of Appeal was filed within the statutory period and whether the Department order of January 15, 1991 was "effective". We believe the issue should have been stated whether the January 15, 1991 Department order was communicated to Mr. Bazan and whether he is required to proceed on the merits once non-communication has been established.

The parties stipulated that the Department order was mailed by the Department in proper fashion to 1723 Euclid Avenue in Bellingham, Washington on January 15, 1991. The only issue litigated was whether Mr. Bazan ever received the Department order. The Department presented no evidence. At the pre-hearing conference, Mr. Bazan noted on the record that he would not present any evidence on the issues concerning his medical condition. The testimony revealed that Mr. Bazan was not at the Euclid address at the time the Department order was mailed. He never got the Department order and was unable to identify it when it was introduced into evidence as Exhibit 2.

At the time of the mailing of the Department order, Mr. Bazan was living at his mother's address, 326 North Pine, Burlington, Washington. She corroborated his testimony that no Department correspondence was received at her home. We agree with our industrial appeals judge's determination that the Department order was not communicated to the claimant.

Based upon his reading of certain cases cited in the Proposed Decision and Order, our industrial appeals judge then required the claimant to proceed on the substantive issues. Due to the failure of Mr. Bazan to proceed, the judge dismissed the appeal.

Nothing in the record establishes communication of the Department order at any time. Mr. Bazan was shown what was later stipulated to be a copy of that Department order of January 15, 1991, and introduced into evidence as Exhibit 2. He failed to identify it. The mere showing of such a document to a party during such a proceeding does not constitute "communication" within the meaning of RCW 51.52.050. In re Larry Lunyou, BIIA Dec., 87 0638 (1988). Nor is there anything in the record to show that the Department order was communicated to the attorney of record. We do not know, from the evidence, how the attorney of record obtained a copy of Exhibit 2.

The record only shows that about six months after the closing order was issued, Mr. Bazan was told by his chiropractor that the claim was closed. The Lunyou case, supra, holds that notice of the

existence of an order is not the same as communication. RCW 51.52.050; Rodriguez v. Dep't of Labor & Indus., 85 Wn.2d 949, 540 P.2d 1359 (1975).

Once it has been established that there was no communication of the Department order to Mr. Bazan, we must determine what issues are seasonable and litigable. The first sub issue involves the investigation of jurisdiction. Jurisdiction depends upon certain factors. One of them is whether the party who files the appeal because of non-communication, is truly aggrieved. If not aggrieved, a party has no standing before the adjudicatory body and cannot prosecute an appeal. RCW 51.52.050; RCW 51.52.060; Bankhead v. Tacoma, 23 Wn. App. 631, 597 P.2d 920 (1979); Pacific Wire Works v. Dep't of Labor & Indus., 49 Wn. App. 229, 742 P.2d 168 (1987); Peterson v. Dep't of Labor & Indus., 22 Wn.2d 647, 157 P.2d 298 (1945). Mr. Bazan sought not to litigate the substantive issues, i.e., the need for treatment at the time of the closing order; the entitlement to an award for permanent partial disability at that time.

We believe that Mr. Bazan is not aggrieved by the actual order of the Department. Mr. Bazan knows nothing about the contents of that Department order. All the record indicates is that he was told by his chiropractor that the claim had been closed. Mr. Bazan did not recognize the Department order when it was shown to him at the time of the hearing. To imply that Mr. Bazan knows the contents of the order so that he may be determined aggrieved by that order, begs the question. We believe Mr. Bazan is aggrieved and does have standing before this Board, but not as respects the contents of the Department order. He is aggrieved by the failure of the Department to abide by the statute which requires it to communicate the order to him. Black's Law Dictionary, 4th Ed., p. 60; Department of Labor & Indus. v. Cook, 44 Wn.2d 671, 269 P.2d 962 (1954); Yamada v. Hall, 145 Wash. 365, 260 Pac. 243 (1927).

The statute requires Mr. Bazan to be served with a copy of the Department order. RCW 51.52.050. The evidence is clear that he was not served. The Department failed in its statutory duty, through no fault of its own, but since it failed to communicate the order, that order never achieved operable power over Mr. Bazan as it never became final. In re Elmer P. Doney, BIIA Dec., 86 2762 (1987); In re Mollie L. McMillon, BIIA Dec., 22,173 (1966).

The appeal in this case was originally granted subject to proof of timeliness. However, the issue of timeliness of the appeal is easily answered. In this instance an appeal can only lie from the above defined failure of the Department to "promptly serve the worker". No appeal can actually be made as to the contents of the order until the Department complies with its obligation to serve or

communicate it to Mr. Bazan. When and if that finally happens, Mr. Bazan would have 60 days to file an appeal with this Board. The 60 day filing period, of course, has still not run due to the lack of communication. An appeal can be taken, at any reasonable time, from the Department's failure to serve an order, as in the present appeal. In re Larry Lunyou, supra.

As stated, our industrial appeals judge required the parties to proceed on the merits once the communication issue had been decided. Since we have determined that Mr. Bazan still does not legally know the contents of the Department order because of the failure of communication, it is a non sequitur to require Mr. Bazan to proceed to litigate the substantive issues to which that Department order gives rise. None of the cases cited by our judge stand for the proposition that a party is required to proceed on the merits once he has established that his appeal is timely as a result of a failure to communicate a Department order. Some of the cases concern situations of, what might be termed, "cured communication" or "constructive communication", where the parties wished to proceed with trial and did so. The case before us is different from those cases in that: 1) communication did occur at some point; and 2) a party was allowed to proceed, after the communication. Rodriguez v. Dep't of Labor & Indus., 85 Wn.2d 949 (1975); In re Larry Lunyou, supra; In re Elmer P. Doney, BIIA Dec., 86 2762 (1987); In re Mollie L. McMillon, BIIA Dec., 22,173 (1966); and In re David P. Herring, BIIA Dec., 57,831 (1981). None of the cases required a party to proceed in the circumstances of non-communication. We, therefore, do not believe Mr. Bazan was properly required to try the case on the merits at the time of the hearing.

Our industrial appeals judge also cited In re Edward S. Morgan, BIIA Dec., 09,667 (1959), which stands for the proposition that a claim is not closed in the event the claimant has never received the closing order. That is still the law.

Having determined the lack of communication and the absence of a requirement to proceed on the merits, we then turn to the discussion of our ability to resolve the dilemma, that is, what relief should be given the claimant to assure that the benefits to which he may be entitled may be forthcoming. We have determined that we have sufficient jurisdiction to hear the appeal on the issue of non-communication. We also believe that such an order is voidable as respects the party who has not had communication of such an order. A non-communicated order may be viewed as the intention of the Department to act in a certain manner once communication to all necessary parties has been established. In re Mollie L. McMillon, supra. In that same case, the words "null and void" were used, as respects a Department order which has yet to be communicated. We deem that to be unfortunate

language. We prefer the term "voidable". The order is not a nullity to begin with, it simply is not final until communicated. Because the claim is still open, as a result of the non-communicated order to the claimant, and because such an order is not effective as concerns the claimant and because he is not aggrieved by the contents of the order, we believe we only have jurisdiction to dismiss the appeal and remand this matter to the Department. We strongly suggest that the Department either communicate the original Department order or issue a further determinative order, without prejudice to any party to appeal therefrom. This will be the extent of our order and suggestion to the Department.

After consideration of the Proposed Decision and Order, the claimant's Petition for Review filed thereto, and a careful review of the entire record before us, we make the following:

FINDINGS OF FACT

1. Mr. Bazan was injured during the course of his employment with Fibrex Corporation on May 17, 1986. He filed an application for benefits with the Department of Labor and Industries on May 23, 1986. The claim was accepted, benefits were provided, and the claim was closed on December 4, 1986 without an award for permanent partial disability.

   On September 15, 1987 Mr. Bazan filed an application with the Department to reopen his claim based on aggravation of condition. On October 9, 1987 the Department issued an order reopening the claim. On August 17, 1990 the Department issued an order closing the claim with time loss compensation as paid and with no award for permanent partial disability. On September 21, 1990 Mr. Bazan filed a Protest and Request for Reconsideration with the Department. On January 15, 1991 the Department issued an order affirming its order of August 17, 1990. Mr. Bazan never received the Department order of January 15, 1991.

   On December 7, 1992 Mr. Bazan filed a Notice of Appeal with the Board of Industrial Insurance Appeals, from the Department order of January 15, 1991. On June 15, 1993 the Board issued an Order Granting Appeal Subject To Proof Of Timeliness, and assigned it Docket No. 92 5953.

2. Mr. Bazan moved to 1723 Euclid Avenue, Bellingham, Washington, in August 1990. The Department order of January 15, 1991 was mailed by the Department to Mr. Bazan at that address. Mr. Bazan moved from the Bellingham address at some time near the end of December 1990. Mr. Bazan never received a copy of the January 15, 1991 Department order.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has only that jurisdiction over the parties and the subject matter of this appeal, which allows the Board to dismiss the appeal and remand the matter to the Department. The appeal from the Department's failure to communicate the January 15, 1991 order is timely.

2. The Department order dated January 15, 1991 was never communicated to Mr. Bazan pursuant to RCW 51.52.050. The order is not operable against Mr. Bazan. Mr. Bazan is not chargeable with the knowledge of the contents of that order and has no standing to appeal from such order as he is not aggrieved by it.

3. This claim should be remanded to the Department with the suggestion to either communicate the Department order of January 15, 1991 to the claimant or to issue a further determinative order in this matter, without prejudice to any party to appeal therefrom.

It is so ORDERED.

Dated this 8th day of March, 1994.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
S. FREDERICK FELLER Chairperson

/s/_____
FRANK E. FENNERTY, JR. Member

/s/_____
ROBERT L. McCALLISTER Member