

Fulps, Glen

APPEALABLE ORDERS

Protest divests Board of authority to hear appeal

PROTEST AND REQUEST FOR RECONSIDERATION (RCW 51.52.050)

Protest divests Board of jurisdiction over appeal

Where a Department order included a statement of protest rights as required by RCW 51.52.050, but did not promise the issuance of a further appealable order after the filing of a protest, a protest to that order deprived the Board of jurisdiction. *Citing In re Santos Alonzo*, BIIA Dec., **56,833** (1981). ...*In re Glen Fulps*, BIIA Dec., **94 7894** (1995)

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

IN RE: GLEN R FULPS) **DOCKET NO. 94 7894**
)
CLAIM NO. H-472864) **ORDER DENYING APPEAL**

Glen R. Fulps, Sr., filed an appeal with the Board of Industrial Insurance appeals on December 7, 1994 from an order of the Department of Labor and Industries dated August 11, 1994. The order denied responsibility for peripheral vascular disease, popliteal artery occlusion and atherosclerotic vascular disease as unrelated to the effects of the industrial injury.

The Department record includes a request for reconsideration of the August 11, 1994, filed by Mr. Fulps with the Department on August 22, 1994. The August 11, 1994 order included a notification of protest and/or appeal rights, which stated in part:

THIS ORDER WILL BECOME FINAL 60 DAYS AFTER YOU RECEIVE
IT UNLESS YOU FILE A WRITTEN REQUEST FOR
RECONSIDERATION OR AN APPEAL WITHIN THAT TIME.

The language is in accord with the directive of RCW 51.52.050.

This Board has long determined that a timely protest and request for reconsideration deprives it of jurisdiction in an appeal of the protested order. In re Santos Alonzo, BIIA Dec., 56,833 (1981). In Alonzo, the appealed order included the same "protest rights" or admonitory language as in this instance, but added the following statement:

A FURTHER APPEALABLE ORDER WILL FOLLOW SUCH A
REQUEST.

As noted in Alonzo, at page 4:

It has long been our understanding of the law of this state, as well as the administrative policy of this Board, that a "protest or request for reconsideration" filed with the Department in response to the admonitory language in the order automatically operates to set aside the Department's order and hold in abeyance the final adjudication of the matter until the Department officially acts to issue its final decision by a "further appealable order."

(Emphasis in original).

Our later decisions have focused upon the promise to enter a further appealable order and have concluded that the promise requires the entry of a further order. This is somewhat misleading, however. Once a party files a timely protest to a Department order notifying the party of his/her rights under RCW 51.52.050, the order is automatically placed in abeyance. The

1 Department's inclusion of language promising the entry of a further order is merely a recognition of
2 the impact of a timely protest.
3

4 An order which includes a statement of the protest rights, or the admonitory language,
5 carries with it the implicit recognition that a protest will result in further action by the Department.
6 Otherwise, the admonitory language invites a useless act -- the order would invite a protest but
7 include no assurance that the Department would respond in some way. We do not believe RCW
8 51.52.050, or the law as developed, intends that outcome. The Department is obliged to enter a
9 further order upon the timely filing of a protest in response to admonitory language in the order.
10 The Department's obligation does not depend upon whether or not the protested order includes
11 explicit language advising the parties that a further order will be entered.
12

13 The Department, by omitting the clause assuring the entry of a further appealable order,
14 cannot change the impact of a timely protest and/or request for reconsideration. This Board does
15 not have jurisdiction over an appealed order where a party timely protested an order which includes
16 the protest rights or admonitory language required by RCW 51.52.050. For that reason, we must
17 deny this appeal.
18

19 The Department is obliged under RCW 5152.050 to respond to Mr. Fulps' timely protest of
20 the August 11, 1994 order. The Department cannot transmit the appeal to this Board for
21 consideration as in those instances where the order only includes a notification of appeal rights.
22 CF. In re Tony Mandrell, BIIA Dec., 92 2819 (1993); In re Donzella Gammon, BIIA Dec., 70,041
23 (1985).
24

25 As a result, we conclude that the Department is still obliged to issue that further
26 determination even if the protest rights notification does not include a promise to issue a further
27 appealable order. The order dated August 11, 1994 is not a final order of the Department of Labor
28 and Industries. It is therefore ORDERED that this appeal be denied. Denial of this appeal is
29 without prejudice to the right of any party to appeal any further order of the Department.
30

31 Dated this 2nd day of February, 1995.

32 BOARD OF INDUSTRIAL INSURANCE APPEALS
33 /s/ _____
34 S. FREDERICK FELLER Chairperson
35 /s/ _____
36 FRANK E. FENNERTY, JR. Member
37 /s/ _____
38 ROBERT L. McCALLISTER Member
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