Erickson, David

PROTEST AND REQUEST FOR RECONSIDERATION (RCW 51.52.050)

Must be in writing

In order to be effective, a protest of an order must be in writing. This requirement is not satisfied when a party phones the Department and an employee makes a notation of the phone conversation. *Distinguishing In re Grace Kiser*, BIIA Dec., **88 0710** (1990). ***….In re David Erickson,* BIIA Dec., 97 5247 (1998)**

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: DAVID L. ERICKSON	**)**	**DOCKET NO. 97 5247**
	)	
CLAIM NO. P-308811	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, David L. Erickson, by
David B. Vail & Associates, per
Michael S. Lind

Employer, OTW Forms,
None

Department of Labor and Industries, by
The Office of the Attorney General, per
Helen B. Fraychineaud, Assistant

The claimant, David L. Erickson, filed an appeal with the Board of Industrial Insurance Appeals on July 1, 1997, from an order of the Department of Labor and Industries dated May 2, 1997. The order stated that the Department could not reconsider its February 16, 1995 order because the protest was not received within the sixty-day limitation period, and therefore that order is final and binding. **AFFIRMED.**

PROCEDURAL AND EVIDENTIARY 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 to a Proposed Decision and Order issued on March 24, 1998, in which the order of the Department dated May 2, 1997, was affirmed. The parties submitted this case to us for decision through what the Proposed Decision and Order correctly determined were joint motions for summary judgment. Materials submitted to this Board included claimant's briefs received on January 13, 1998 and January 26, 1998, the Department's brief received on January 21, 1998, the affidavit of the claimant's attorney, Michael Lind (attached to the claimant's initial brief), and 12 documents attached to the briefs that were identified and

numbered by the Proposed Decision and Order as Exhibit Nos. 1-12. Considering the requirements of CR 56(c) and CR 56(e) as well as the contents of the documents themselves, we determine that the evidentiary portion of the record consists only of the following documents: the amended jurisdictional fact stipulation received on September 22, 1997, the affidavit of Michael Lind, and Exhibit Nos. 1-7 (attached to Mr. Lind's affidavit). Everything else, including the documents marked as Exhibit Nos. 8-12, are considered to be legal **argument**, not evidence.

DECISION

The issue in this appeal is whether a timely request for reconsideration (protest) was filed from the February 16, 1995 Department order that calculated the rate of the claimant's monthly time loss compensation benefit. There is no contention that any party or person aggrieved by that order filed an appeal with this Board. There are no genuine issues of material fact in this appeal. Instead, the application of the law to these facts, in particular RCW 51.52.050, is what is in dispute.

On January 20, 1995, Mr. Erickson sustained an industrial injury to his spine for which he filed an application for benefits with the Department of Labor and Industries. On February 16, 1995, the Department mailed an order allowing the claim and determined that the claimant's time loss compensation rate was $1,320 per month, based on his status as a single person with no dependents and wages of $2,220 per month as of the date of injury. This order contained "appeal-rights" language that complies with the RCW 51.52.050 requirements for such language. The order also asked the employer to contact the Department if it had light duty work available for the claimant.

Monday, April 17, 1995, was the sixtieth day after the mailing of this order. On the very next day, Tuesday, April 18, 1995, an employee of the Department received a telephone call from Steve Swanson, the owner of OTW Forms, who complained that the claimant had worked under the table

for another company and was bragging that he was now getting more money from time loss compensation than he made while working. The employer informed the Department employee that the claimant had not been a full-time worker; he had worked only four to five hours per day. The employer told the Department employee that he would try to find some light duty work for the claimant. The Department employee memorialized this conversation in the Department's computer system, presumably the same day he received the telephone call. Although the employer's telephone call was received on the sixty-first day after the order was mailed, there is no doubt that the telephone call occurred within the sixty-day request for reconsideration (protest) period mandated by RCW 51.52.050, inasmuch as the employer could not have received the February 16, 1995 order any earlier than the day after it was mailed.

The claimant's first written protest of the February 16, 1995 order's time loss compensation rate calculation was not received by the Department until December 11, 1995. The claimant has never claimed that the February 16, 1995 order was not communicated to him in a timely manner.

Citing our significant decision of *In re Grace Kiser*, BIIA Dec., 88 0710 (1990), Mr. Erickson contends that the entry of the substance of the employer's telephone call onto the Department's computer system on April 18, 1995, constituted a "written request for reconsideration" within the meaning of RCW 51.52.050. However, the definition of "write" or "writing" contained on page 3 of Exhibit No. 7 (a portion of *Webster's New Collegiate Dictionary 150th Anniversary Edition*) to which the claimant refers in his January 12, 1998 brief, is that of a transitive verb, not a noun, so it is not relevant. Common sense and the noun form of the word "writing" found on page 4 of Exhibit No. 7 make it clear that an oral statement is not writing. An oral statement was all that the employer gave the Department. The Department employee who entered the substance of that oral statement into the computer was not an "other person affected" by the February 16, 1995 order within the meaning of RCW 51.52.050.

The fact that a Department employee entered the substance of the employer's telephone call into the Department's computer system does not make it writing filed with the Department. This assertion is simply an attempt to negate the RCW 51.52.050 requirement that a request for reconsideration (protest) to the Department be in writing. The issue is not the proper administration of claims by the Department as the claimant asserts in his Petition for Review, but is instead the responsibility of any aggrieved party, employers and injured workers included, to follow a clear and specific statutory process of which they have been notified.

Our decision in *Kiser* does not support Mr. Erickson's contentions. In that case, a self-insured order contained appeal language that was materially deficient in warning Ms. Kiser of the consequences of not filing a written appeal or request for reconsideration. The order stated that Ms. Kiser "may" protest in writing within sixty-days, without mentioning that failure to do so would result in that order becoming final. When coupled with language within the order that asked Ms. Kiser to contact the employer by phone if she had questions, the material deficiencies within that order's protest language misled Ms. Kiser, to her prejudice, into believing that a protest could be made by phone with the result that she did not file a written appeal or request for reconsideration within the statutory sixty-day period. *Kiser* is not to be construed as an exception to the requirement that a request for reconsideration to the Department be in writing. Instead, that case is an example of when an order's appeal language was so materially deficient that the worker was prejudiced thereby and thus excused from filing a written request for reconsideration within the sixty-day limitation period. See, *Porter v. Department of Labor & Indus.*, 44 Wn.2d 798 (1954).

Mr. Erickson notes that shortly after the employer's telephone call was received, the Department issued an order paying time loss compensation in an amount that was considerably

less than that required by the time loss compensation calculation contained within the February 16, 1995 order. He argues that this action shows that the Department considered the employer's telephone call to be a request for reconsideration. This contention merely is a *post hoc* argument; it is insufficient to prove a causal link between the two events in question absent evidence that a written protest was filed in a timely manner. The Proposed Decision and Order correctly noted that the claimant offered no evidence to back up his suspicion. Without any additional evidence, we decline to give credence to that suspicion.

Inasmuch as the claimant has not proven that a timely request for reconsideration was filed within sixty-days of the communication of the February 16, 1995 order, that order became final and binding on him and all other parties. Therefore, the Department is entitled to a judgment as a matter of law, and its summary judgment motion is granted. The claimant's summary judgment motion is denied. The Department's May 2, 1997 order that declined to reconsider the February 16, 1995 order must be affirmed.

FINDINGS OF FACT

1. On January 20, 1995, the claimant, David L. Erickson, sustained an injury to his spine while in the course of his employment with OTW Forms. On February 2, 1995, the claimant filed an application for benefits with the Department of Labor and Industries. On February 16, 1995, the Department issued an order that allowed the claim and provided that the claimant's time loss compensation rate had been set at $1,320 per month based on his status as a single person with no dependents and wages of $2,200 per month as of the date of his injury. This order asked the employer to call the Department if it had light-duty work available for the claimant. The February 16, 1995 order was mailed to the claimant, his employer and a medical provider. The February 16, 1995 order notified all parties that it would become final 60 days after receipt unless a written request for reconsideration or appeal was filed with the Department or the Board of Industrial Insurance Appeals.

2. On April 18, 1995, the employer contacted an employee of the Department by telephone. The employer complained that the claimant had worked under the table for another company and was bragging that he was now getting more money from time loss compensation than he made while working. The employer informed the Department employee that the claimant had not been a full-time worker; he had only worked four to five hours per day. The employer told the Department employee that he would try to find some light-duty work for the claimant.

3. On April 18, 1995, the Department employee entered the substance of his telephone conversation with the employer into the Department's computer system.

4. On December 11, 1995, the claimant filed a written protest and request for reconsideration with the Department of any adverse order entered within the last sixty-days and stated that his time loss compensation rate had been incorrectly calculated and paid. On May 2, 1997, the Department issued an order that stated that it could not reconsider the February 16, 1995 order because no protest was received within the sixty-day limitation period and that the order had become final and binding. On July 1, 1997, the claimant filed a Notice of Appeal with the Board of Industrial Insurance Appeals. On July 28, 1997, this Board issued an order granting the claimant's appeal, assigning it Docket No. 97 5247, and directing that further proceedings be held.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the subject matter and the parties to this appeal.

2. There are no genuine issues of material fact. The Department is entitled to a judgment as a matter of law. The Department's motion for summary judgment is granted. The claimant's motion for summary judgment is denied.

3. The Department's February 16, 1995 order, that informed the parties of their right to file a request for reconsideration, complied with RCW 51.52.050.

4. The April 18, 1995 telephone call from the employer to an employee of the Department was not a written request for reconsideration within the meaning of RCW 51.52.050.

5. The entry into the Department's computer system of the substance of the telephone conversation with the employer by the Department employee does not constitute a written request for reconsideration by a person affected by the February 16, 1995 Department order within the meaning of RCW 51.52.050.

6. No written request for reconsideration of the Department order dated February 16, 1995, was filed within the sixty-day limitation period provided by RCW 51.52.050 and, therefore that order became final and binding.

7. The order of the Department of Labor and Industries dated May 2, 1997, that stated that it cannot reconsider the February 16, 1995 order because no protest was received within the sixty-day limitation period and that the order had become final and binding, is correct and is affirmed.

It is so ORDERED.

Dated this 21st of August, 1998.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

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

/s/_____
JUDITH E. SCHURKE Member