

Kiser, Grace

PROTEST AND REQUEST FOR RECONSIDERATION (RCW 51.52.050)

Self-insured employer's order

RES JUDICATA

Self-insured employer's order

A closing order issued by a self-insured employer pursuant to RCW 51.32.055(7)(a) which advises the worker a written protest may be filed within 60 days but does not advise that the order shall become final within 60 days unless such a protest is filed, and which advises the worker to contact the self-insured employer's representative by phone regarding any questions, does not become a final order within 60 days of communication where the worker telephoned the self-insured employer's representative within 60 days to protest the claim closure.*In re Grace Kiser, BIIA Dec., 88 0710 (1990)*

Scroll down for order.

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

IN RE: GRACE A. KISER) **DOCKET NO. 88 0710 & 88 2049**
)
CLAIM NOS. S-776100 & S-551714) **DECISION AND ORDER**

APPEARANCES:

Claimant, Grace A. Kiser, by
Sterbick, Abel & Sterbick, per
Peter L. Sterbick

Self-Insured Employer, Fred Meyer, Inc., by
Roberts, Reinisch & Klor, per
Michael H. Weier

The appeal assigned Docket No. 88 0710 was filed by the claimant, Grace A. Kiser, on February 24, 1988 from an order of the Department of Labor and Industries dated December 29, 1987. That order adhered to the provisions of an order dated June 8, 1987, which closed Claim No. S-776100 with time loss compensation as paid to July 10, 1985 and with an award for permanent partial disability equal to 12% of the amputation value of the right leg at or above the knee joint with functional stump.

The appeal assigned Docket No. 88 2049 was filed by the claimant on May 17, 1988 from an order of the Department dated December 29, 1987. That order adhered to the provisions of an order dated June 22, 1987, which closed Claim No. S-551714 with time loss compensation as paid to July 17, 1984 and without award for permanent partial disability. The Department orders are **REVERSED AND REMANDED**.

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 employer to a Proposed Decision and Order issued on August 25, 1989 in which the orders of the Department dated December 29, 1987 were reversed and the claims remanded to the Department with directions to provide further medical treatment for the claimant's right knee condition and to accept the claimant's psychiatric diagnosis of depression as an element of these industrial injuries and to provide further psychiatric treatment.

Pursuant to the agreement of the parties, these appeals were consolidated for purposes of hearing and decision.

We note that two different documents were admitted into evidence, each denominated as Exhibit No. 1. The recitation of historical and jurisdictional facts pertaining to the appeal in Docket No.

1 88 2049, which was admitted into evidence during the conference held on July 20, 1988, is hereby
2 renumbered Exhibit No. 1A and readmitted. The Board has reviewed the other evidentiary rulings in
3 the record of proceedings and finds that no prejudicial error was committed and said rulings are
4 hereby affirmed.
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7 DECISION

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9 The issues presented by these appeals and the evidence presented by the parties are very
10 adequately set forth in the Proposed Decision and Order. We have granted review solely because we
11 were unable to determine from the record before us whether this Board possessed jurisdiction to
12 consider the claimant's appeal that was assigned Docket No. 88 2049. We are now satisfied that such
13 jurisdiction exists.
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16 Based upon a review of proposed Finding of Fact No. 1 and Exhibit No. 1A, it would appear
17 that on March 28, 1983 the Department entered an order closing Claim No. S-551714 with medical
18 benefits only, and that on October 11, 1984, the Department issued an order setting aside and holding
19 for naught its order of March 28, 1983. Absent a showing that a timely protest or notice of appeal was
20 filed in writing with either the Department or the Board in Olympia, or that the order of March 28, 1983
21 was first communicated to the claimant less than sixty days before the issuance of the order of
22 October 11, 1984, the order of March 28, 1983 would have become final and binding and the
23 Department would have been without authority to issue its order of October 11, 1984. See, RCW
24 51.52.050 and RCW 51.52.060; Brakus v. Dep't of Labor & Indus., 48 Wn.2d 218, 292 P.2d 865
25 (1956). Therefore, pursuant to the authority recognized in In re Mildred Holzerland, BIIA Dec., 15,729
26 (1965), we have reviewed the contents of the Department file in order to determine whether we have
27 jurisdiction over this appeal.
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34 Based upon that review, it is clear that the order of March 28, 1983 was not an order issued by
35 the Department of Labor and Industries; rather, that order was issued by the self-insured employer
36 pursuant to the authority provided by RCW 51.32.055(7)(a) as it existed at that time. Laws of 1981,
37 ch. 326, § 1(7), p. 1540. A copy of the March 28, 1983 order is included as part of the record.
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40 For several reasons, we are unwilling to conclude that it was necessary for the claimant to file a
41 protest in writing within sixty days of her receipt of the order issued by the self-insured employer on
42 March 28, 1983 in order to prevent that order from becoming final and binding. First, the statutory
43 authority under which the order of March 28, 1983 was issued by the employer required that the
44 following statement be clearly set forth in bold-face type:
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1 This order constitutes notification that your claim is being closed with
2 medical benefits only, as provided. If for any reason you disagree with this
3 closure, you may protest in writing to the Department of Labor and
4 Industries, Olympia, within 60 days of the date you received this order.
5 The department will then review your claim and enter a further
6 determinative order. (Emphasis added).
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8 This language is significantly different from that found in RCW 51.52.050, which requires that
9 final orders issued by the Department advise the parties that the "order, decision or award shall
10 become final within sixty days from the date the order is communicated to the parties unless a written
11 request for reconsideration is filed with the department of labor and industries, Olympia, or an appeal
12 is filed with the board of industrial insurance appeals, Olympia." (Emphasis added) In our opinion,
13 advising a worker that he or she may file a written protest with the Department does not have the
14 same effect as advising the worker that the order shall become final unless such a protest or appeal is
15 filed. Fundamental fairness requires that before an order be given res judicata effect, a worker must be
16 clearly advised that the order will become final unless a written protest or notice of appeal is filed.
17 See, King v. Dep't of Labor & Indus., 12 Wn. App 1, 528 P.2d 271 (1974). The order issued by the
18 self-insured employer on March 28, 1983 did not so advise Ms. Kiser.
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25 Further, the front side of the March 28, 1983 order advised the claimant to contact the
26 self-insured employer's representative if the claimant had any questions regarding the order and
27 notice; a toll-free telephone number for the employer's representative was provided. The parties to
28 this appeal have stipulated that on April 5, 1983 the claimant did in fact telephone the self-insured
29 employer's representative and protested the closure of her claim. It should be pointed out that at all
30 times the self-insured employer has treated that telephone call as an adequate protest of the order of
31 March 28, 1983.
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35 Under these facts, we can only conclude that the order issued by the self-insured employer on
36 March 28, 1983 did not become final, and that the Department did possess jurisdiction to issue its
37 order of October 11, 1984, which set aside and held for naught the order of March 28, 1983. This
38 Board therefore has jurisdiction over both appeals. Concerning the merits of the issues raised by the
39 notices of appeal, we are in agreement with the results reached by our industrial appeals judge.
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43 After consideration of the Proposed Decision and Order, the self- insured employer's Petition
44 for Review filed thereto, the claimant's Reply to the Employer's Petition for Review, and a careful
45 review of the entire record before us, we are persuaded that the Department order of December 29,
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1 1987, which adhered to the provisions of an order dated June 8, 1987 that closed Claim No. S-776100
2 with time loss compensation as paid to July 10, 1985 and with an award for permanent partial disability
3 equal to 12% of the amputation value of the right leg at or above the knee joint with functional stump,
4 and the Department order of December 29, 1987, which adhered to the provisions of an order dated
5 June 22, 1987 that closed Claim No. S-551714 with time loss compensation as paid to July 17, 1984
6 and without award for permanent partial disability, are incorrect and should be reversed, and these
7 claims remanded to the Department to direct the self-insured employer to provide further treatment of
8 the claimant's right knee condition, to accept the claimant's psychiatric diagnosis of depression as an
9 element of these industrial injuries, and to provide further psychiatric treatment.

10 Proposed Findings of Fact Nos. 2 through 8 and proposed Conclusions of Law Nos. 1 through
11 4 contained in the Proposed Decision and Order are hereby adopted as the final findings and
12 conclusions of the Board. In addition, the Board hereby substitutes the following Finding of Fact No. 1
13 for proposed Finding of Fact No. 1:

14 **FINDINGS OF FACT**

- 15 1. On January 3, 1983 the Department of Labor and Industries received an
16 accident report describing the occurrence of an industrial injury to the
17 claimant during the course of her employment with Fred Meyer, Inc. on
18 December 6, 1982. On March 28, 1983, the self-insured employer issued
19 an order closing the claim with medical benefits only. That order did not
20 clearly advise the claimant that the order would become final unless a
21 written protest or notice of appeal was filed. The order advised the
22 claimant to telephone the self-insured employer's representative if she had
23 any questions regarding the order, and the claimant telephoned the
24 employer's representative on April 5, 1983 protesting closure of her claim.

25 On October 11, 1984, the Department issued an order setting aside and
26 holding for naught the order of March 28, 1983, and ordering that the claim
27 remain open for authorized treatment and action as indicated. On June
28 22, 1987, the Department issued an order closing Claim No. S- 551714
29 with time loss compensation as paid to July 17, 1984 and without award
30 for permanent partial disability. On July 1, 1987, the Department received
31 the claimant's protest and request for reconsideration of its order of June
32 22, 1987. On August 4, 1987, the Department issued an order holding in
33 abeyance its order of June 22, 1987, and on December 29, 1987, the
34 Department issued an order adhering to the provisions of its order of June
35 22, 1987. On May 17, 1988, the Board of Industrial Insurance Appeals
36 received the claimant's notice of appeal from the Department order of
37 December 29, 1987; Docket No. 88 2049 was assigned. On June 7,
38 1988, the Board issued an order granting the appeal subject to proof of
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timeliness, and directing that proceedings be held on the issues raised by the notice of appeal.

It is so ORDERED.

Dated this 8th day of March, 1990.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/
SARA T. HARMON Chairperson

/s/
FRANK E. FENNERTY, JR. Member