Timely protests and appeals to Washington Department orders

By Anna M. McFaul and Casondra J. Albrecht • February 4, 2015

What does it mean to "communicate" an order in Washington?[1] The Washington Court of Appeals has held in *Mario Arriaga v. Dep't of Labor & Indus.*[2] that documents properly mailed and delivered are "communicated," regardless of whether some mistake prevents the receiving party from reading the order.

Generally, when the Washington Department of Labor and Industries or a self-insured employer issues an order, any party adversely affected by the order has sixty days from the date the order is communicated within which to file a protest or appeal.[3]

Arriaga sustained injuries to his right upper arm, face and scalp, for which a claim was allowed by the Department. The Department issued an order in 2008 segregating a degenerative cervical disc condition from the claim, and this order was mailed to Arriaga's attending physician, Justin Sherfley, M.D., D.O. Through an inter-office error, Dr. Sherfley did not see the order before it was placed in Arriaga's file, and no appeal was brought until two years later, in 2010. Arriaga appealed the order in 2011, which the Department refused to reconsider because the protest was not received within the 60-day statutory timeline. The Board accepted review, but ultimately dismissed the appeal as untimely. The Thurston County Superior Court also dismissed the appeal as untimely.

In his briefs to the Court of Appeals, Arriaga argued the 60-day deadline tolled when Dr. Sherfley became aware of the order's existence in 2010. The Department responded the order was "communicated" when it was properly addressed and received by Dr. Sherfley's office in 2008. The Court of Appeals reviewed relevant Supreme Court precedent, and noted a 1926 case[4] in which the worker did not read the contents of a letter because he was in the hospital. The Supreme Court held in 1926 that the department made all efforts it could to accomplish the "communication," and the worker's failure to read the letter did not affect the decision. Further, in 1975, the Supreme Court also held "communicated" means only that a copy of an order be received by the worker.[5]

Failure to read Department orders and timely contest them does not delay the deadline to file a protest or appeal

The Court of Appeals further distinguished intra-office mail delivery breakdown in a doctor's office from instances where a worker was on vacation, or did not receive the mailing at all. A delay in Dr. Sherfley's knowledge of

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the order could not be excusable neglect to extend the statutory deadline to protest or appeal of the statute. Arriaga represents that the obligations of the Department to notify aggrieved parties of orders ends when such documents are properly mailed and delivered. This case also confirms that failure to read Department orders and timely contest them does not delay the deadline to file a protest or appeal. The Department, Board, Circuit Court, and Court of Appeals all declined to broadly read the statute and allow an error of that kind to delay the appeal deadline.

If you have questions about whether a Department order has been properly communicated or whether a protest or appeal was filed in a timely manner, please contact our office for further assistance. ■

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[1] RWC 51.52.060(1)(a)

[2] *Mario Arriaga v. Dep't of Labor & Indus*, No. 32287-4-III (COA Div. 3 9/30/14)

[3] RCW 51.52.050; RCW 51.52.060

[4] *Nafus v. Dep't of Labor & Indus*., 142 Wash. 48, 251 P. 877 (1927).

[5] *Rodriguez v. Dep't of Labor & Indus*., 85 Wn.2d 949, 540 P.2d 1359 (1975) (The Supreme Court did, however, grant equitable relief because the worker was illiterate.)

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