
In the Matter of the Compensation of
PATRICK G. FLAHERTY, Claimant
WCB Case No. 14-03113
ORDER OF DISMISSAL
Unrepresented Claimant
Michael G Bostwick LLC, Defense Attorneys

Reviewing Panel: Members Lanning and Curey.

The Board has received a June 8, 2016 letter to Administrative Law Judge (ALJ) Smith and a June 10, 2016 request for Board review of the ALJ's May 10, 2016 order.¹ Sedgwick Claims Management Services, as the statutory claim agent under ORS 656.054, and Buck Butte Ranch, an alleged noncomplying employer (NCE), have moved to dismiss the request for Board review as untimely filed.² Because we conclude that a timely request for Board review has not been filed, we dismiss.

FINDINGS OF FACT

On May 10, 2016, ALJ Smith issued an order that: (1) determined that claimant was not a subject worker of the alleged NCE; (2) upheld Sedgwick's denial of claimant's occupational disease/injury claim; and (3) sustained the alleged NCE's objection to the claim. The ALJ's order contained a statement explaining the parties' rights of appeal, including a notice that a request for review must be filed with the Board and copies of the request provided to all other parties to the proceeding, within 30 days of the ALJ's order.

¹ Because claimant is not represented, he may wish to consult the Ombudsman for Injured Workers. He may contact the Ombudsman, free of charge, at 1-800-927-1271, or write to:

OMBUDSMAN FOR INJURED WORKERS
DEPT OF CONSUMER & BUSINESS SERVICES
PO BOX 14480
SALEM, OR 97309-0405

² We acknowledge that Sedgwick and the alleged NCE challenge claimant's wife's authority to proceed on her husband's behalf. Because we find that the June 9 e-mail was not a request for Board Review of the ALJ's order and that the e-mail and letter (which were both sent on June 10) were untimely filed, we need not reach this "authority" issue.

On June 9, 2016, the Board received an e-mail from claimant's wife, with attachments consisting of a June 8, 2106 letter addressed to ALJ Smith and additional evidence. The e-mail did not indicate that copies were being provided to the other parties to the proceeding. However, the attached June 8 letter indicated it was being copied to the alleged NCE's attorney, and to Sedgwick and its attorney.

On June 10, 2016, the Board received another e-mail from claimant's wife, which specifically requested review of the ALJ's order. The request indicated that copies were sent to the attorneys for the other parties.

On June 16, 2016, the Board received a hard copy of claimant's wife's June 8, 2016 letter, which was mailed by certified mail to the Board in an envelope postmarked June 10, 2016. While the body of the letter mirrored that of the attachment provided in claimant's wife's June 10, 2016 e-mail, this copy was not directed to ALJ Smith, but listed the Board's Salem address and the salutation "To whom it may concern." It also stated: "Attention: Board Review," and indicated that copies were being provided to the alleged NCE's attorney, Sedgwick, and its attorney.

Thereafter, Sedgwick and the alleged NCE moved for dismissal of the request for review, asserting that it was untimely filed.

CONCLUSIONS OF LAW AND OPINION

An ALJ's order is final unless, within 30 days after the date on which a copy of the order is mailed to the parties, one of the parties requests Board review under ORS 656.295. *See* ORS 656.289(3). Requests for Board review shall be mailed to the Board and copies of the request shall be mailed to all parties to the proceeding before the ALJ. ORS 656.295(2).

Compliance with ORS 656.295 requires that statutory notice of the request to the other parties to the proceeding be mailed, or actual notice received, within the statutory period. *Argonaut Ins. Co. v. King*, 63 Or App 847, 852 (1983). Failure to timely file and serve all parties with the request for Board review requires dismissal of the request for review. *See* ORS 656.289(3); *Mosley v. Sacred Heart Hosp.*, 113 Or App 234, 237 (1992); *Zurich Ins. Co. v. Diversified Risk Mgmt*, 300 Or 47, 51 (1985).

“Filing” means the physical delivery of a thing to any permanently staffed office of the Board, or the date of mailing. OAR 438-005-0046(1)(a). If filing of a request for Board review of an ALJ’s order is accomplished by mailing, it shall be presumed that the request was mailed on the date shown on a receipt for registered or certified mail bearing the stamp of the U.S. Postal Service showing the date of mailing. OAR 438-005-0046(1)(c). Pursuant to OAR 438-005-0046(1)(f), a party may also file a request for Board review of an ALJ’s order by means of e-mail. The e-mail requesting Board review must be directed to the following address: “request.wcb@oregon.gov.”

The request for Board review of an ALJ’s order needs only to state that the party requests a review of the order. ORS 656.295(1). While no “magic words” are required, the statute contemplates a modicum of information sufficient to clearly identify a document as a party’s request for Board review of an ALJ’s order. *Gerardo V. Soto, Jr.*, 35 Van Natta 1801, 1803 (1983). Where a party has not expressly requested Board review, but their intention to do so is both clear and unmistakable, we have concluded that we have jurisdiction pursuant to ORS 656.295. *See Rochelle M. Gordon*, 40 Van Natta 1808 (1988).

Here, the June 8, 2016 letter was received, on June 9, by the Board’s e-mail address that concerns the filing of a request for hearing/review/ briefing extensions. Nevertheless, the letter was addressed to ALJ Smith. Furthermore, the letter neither requested Board review nor expressed dissatisfaction with ALJ Smith’s order. Considering such circumstances, we conclude that the June 8, 2016 letter (received at the Board’s e-mail address on June 9) did not evince a clear and unmistakable intent to request Board review of the ALJ’s May 10 order.³ *See Andrey G. Glizin*, 59 Van Natta 2745 (2007); *Donna M. Munoz*, 43 Van Natta 1712 (1991). Consequently, we hold that the June 8 letter did not constitute a request for Board review. ORS 656.295(1); *Soto*, 35 Van Natta at 1803.

Moreover, the thirtieth day after the ALJ’s May 10, 2016 order was June 9, 2016. Therefore, the final day to perfect a timely appeal of the ALJ’s order was June 9, 2016. The Board received the second e-mail submission, which clearly requested review of the ALJ’s order, on June 10, 2016. Thus, this request was

³ Claimant’s letter was likely a motion for reconsideration of the ALJ’s order. Unfortunately, because the letter was submitted on June 9, 2016, the 30th day after the ALJ’s order, the ALJ had no time to reconsider his order. *See David L. Tucker*, 53 Van Natta 683, 684 (2001) (absent “clear and unmistakable” intention to request Board review, request addressed to ALJ treated as request for reconsideration of ALJ’s order); *John W. Wharton*, 41 Van Natta 1673, 1674 (1989) (same).

“filed” with the Board on that date. *See* OAR 438-005-0046(1)(a), (f). Inasmuch as June 10, 2016 was more than 30 days after the ALJ’s order, the request was untimely filed.⁴ *See* ORS 656.289(3).

In conclusion, because the ALJ’s May 10 order was not appealed, stayed, withdrawn, modified or republished within 30 days of its issuance, it has become final by operation of law. ORS 656.289(3); *Farmers Ins. Group v. SAIF*, 301 Or 612, 619 (1986); *Int’l Paper Co. v. Wright*, 80 Or App 444 (1986); *Fischer v. SAIF*, 76 Or App 656, 659 (1986). Consequently, we lack authority to review the ALJ’s order.

Finally, we acknowledge that claimant has not had the benefit of legal representation. We further realize that an unrepresented party is not expected to be familiar with administrative and procedural requirements of the Workers’ Compensation Law. However, instructions for requesting review were clearly stated on the ALJ’s order. Moreover, we are not free to relax a jurisdictional requirement. *See Michael N. Lamb*, 55 Van Natta 1569 (2003); *Larry L. Kaden*, 53 Van Natta 1479, 1480 (2001).

Accordingly, this matter is dismissed.

IT IS SO ORDERED.

Entered at Salem, Oregon and on July 8, 2016

⁴ Similarly, even if we interpreted the copy of the June 8, 2015 letter that was mailed by certified mail to the Board on June 10, 2016, as a request for Board review, it was “filed” when it was mailed to the Board on June 10, which was more than 30 days after the ALJ’s order. *See* OAR 438-005-0046(1)(c) (if filing of a request for Board review of an ALJ’s order is accomplished by mailing, it shall be presumed that the request was mailed on the date shown on a receipt for registered or certified mail). Therefore, that “request” was also untimely filed. *See* ORS 656.289(3).