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COURT OF APPEALS
DIVISION II

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NO. 42642-1

STATE OF WASHINGTON
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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

CHARLES J. NAKANO,

Appellant,

v.

DEPARTMENT OF LABOR & INDUSTRIES FOR THE STATE OF
WASHINGTON,

Respondent.

**BRIEF OF RESPONDENT
DEPARTMENT OF LABOR AND INDUSTRIES**

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I. INTRODUCTION

This is a workers compensation case under RCW Title 51 of the Industrial Insurance Act (Act). Under the Act, a worker, employer, or other party who feels aggrieved by a decision of the Department of Labor and Industries (Department) must file either an appeal from that decision with the Board of Industrial Insurance Appeals (Board) or a request for reconsideration of that decision with the Department within 60 days of communication of the order.¹

Here, the Department issued an order on February 5, 2010, that found that Mr. Nakano had received industrial insurance benefits to which he was not entitled as a result of willful misrepresentation. The Board and the superior court each found that Mr. Nakano received the order on February 10, 2010, such that his April 13, 2010 request for reconsideration was untimely. As substantial evidence supports the Superior court's findings, this Court should affirm.

II. COUNTER STATEMENT OF THE ISSUES

1. Approximately two months after the Department order was mailed, Mr. Nakano's paralegal admitted to a Department employee that his office received the order on February 10, 2010 (which would mean the April 13, 2010 protest is late). He later confirmed the February 10th receipt date at a discovery deposition. At the hearing, the paralegal admitted there was a

¹ A request for reconsideration filed with the Department is also known as a "protest."

note on the order that stated the order had been copied to Mr. Nakano on February 10th and that this would mean the paralegal received the order around the 10th. Does substantial evidence support the superior court's finding that Mr. Nakano's attorney received the Department's order on February 10, 2010, and the finding that Mr. Nakano did not file a timely request for reconsideration or appeal of the February 5, 2010 Department order?

2. Did the trial court abuse its discretion by rejecting Mr. Nakano's equity claim when he failed to show any barrier that made him unable to appeal the February 5, 2010 order, show any misconduct on the part of the Department, or show equitable estoppel by demonstrating reasonable reliance?

III. STATEMENT OF THE CASE

A. History Of Mr. Nakano's Claim Before The Board

Charles Nakano filed a claim for workers' compensation benefits with the Department for an injury he sustained in June, 2008, allegedly while working for Nakano and Sons Logging, Inc. FF 1.1; BR 49; BR Ex. 4.² On February 5, 2010, the Department issued an order in his claim that found that Mr. Nakano knowingly provided false information to the Department to obtain workers' compensation benefits by means of willful misrepresentation. BR Ex. 4; FF 1.1.³

² The superior court's findings of fact and conclusions of law (attached as Appendix A) are referred to as "FF" and "CL." See CP 51. The certified appeal board record is referred to as "BR" followed by the witness name and page number. Exhibits are referred to as "BR Ex." The brief of appellant is referred to as "AB."

³ The February 5, 2010 order corrected and superseded an earlier willful misrepresentation order issued on October 6, 2009. FF 1.1. At the time the October 6, 2009 order was issued, Mr. Nakano was not represented by an attorney. BR Gruse at

Mr. Nakano was represented by attorney Jack Hanemann prior to and at the time the February 5, 2010 order issued. BR Nakano at 45; BR Gruse at 113. Under RCW 51.32.050 and RCW 51.32.060, Mr. Nakano had 60 days from the date the February 5, 2010 order was communicated to file either a written request for reconsideration of that decision with the Department or a written appeal of the order with the Board.

There is no dispute that Mr. Hanemann's office in fact received a copy of the order, although the parties disagree as to when his office received it. Mr. Nakano did not file a request for reconsideration of the February 5, 2010 order with the Department until April 13, 2010, and an appeal with the Board was not filed until April 14, 2010. FF 1.1; BR at 52-56. The Department issued an order on April 15, 2010, that found that Mr. Nakano's request for reconsideration of the February 5, 2010 order was not timely and therefore, it declined to reconsider the February 5, 2010 order. FF 1.1. Mr. Hanemann appealed both the February 5, 2010 order and the April 15, 2010 order that found that no timely protest had

113. Mr. Nakano became represented by an attorney in October 2009. BR Gruse at 113. Shortly after the October 6, 2009 willful misrepresentation order issued, the order was placed in abeyance by the Department to allow time for medical providers to bill the Department and because the case had been referred to the Lewis County Prosecutor's Office for consideration of criminal charges. BR Gruse at 113-14.

been filed from the February 5, 2010 order. FF 1.1. The two appeals were consolidated for hearing. BR 38.

The key factual question presented for the Board hearing was this: when did Mr. Hanemann's firm receive the February 5, 2010 order. As noted, his written appeal or protest must be filed within 60 days from that date to be timely. Therefore, if he received the February 5, 2010 order on or after Friday February 12, 2010, then his request for reconsideration of that order would be timely, and the February 5, 2010 order would not be final and binding. However, if he received the order before Friday February 12, 2010, then his request for reconsideration of that order would not have been timely, and the February 5, 2010 order would be final.

B. Testimony At the Board Hearing

1. The Department's Order Was Mailed Following the Normal Procedure

Alan Gruse is a fraud adjudicator with the Department. BR Gruse at 107-08. He was the author of the February 5, 2010 willful misrepresentation order at issue in this case. BR Ex. 4. The usual and customary practice for mailing orders is for Mr. Gruse to enter the order the day before the order is mailed. FF 1.3.⁴ Orders are printed overnight

⁴ Mr. Nakano has not assigned error to Finding of Fact 1.3 and it is a verity on appeal. *Mid Mountain Contractors, Inc. v. Dep't of Labor & Indus.*, 136 Wn. App. 1, 4, 146 P.3d 1212 (2006).

and given to Mr. Gruse to make copies and stuff into envelopes. FF 1.3. He then gives the envelopes to the mail services person, who takes the envelopes with the orders to the mail room. FF 1.3. The process is then for consolidated mail services to pick up the mail and transport it to the consolidated mail facility where postage is affixed and then transported to the post office in Tumwater. FF 1.3. The usual and customary mail practice was followed for the February 5, 2010 order. FF 1.3; BR Thomas at 98-100 (manager's testimony that order was mailed on February 5, 2010).

2. Mr. Hanemann's Procedure For Receipt Of Mail

Karen Elizabeth Neill testified that she works for Mr. Hanemann, Mr. Nakano's attorney. She has worked as his receptionist for two-and-a-half years. BR Neill at 11-12. In her experience it usually takes two to three days from the date an item is mailed by the Department for their office to receive it, although it sometimes takes longer. BR Neill at 34-35.

Under the procedures followed by Mr. Hanemann's office for the receipt of mail, the mail carrier drops off the incoming mail at the front desk. BR Neill 13. The mail is then sorted and all of Mr. Hanemann's mail is opened by the receptionist. BR Neill 13. The receptionist date stamps the mail on the bottom right hand corner of the back of each piece of mail. BR Neill 13. Once date stamped, the mail is then placed in

Mr. Hanemann's in-box. BR Neill 13. Mr. Hanemann then processes the mail by sorting it to the various paralegals that specialize in specific areas of practice. BR Neill 14. In February 2010, the paralegal who focused on labor and industries issues was Frank Parascondola. BR Neill at 14.

During the week of Monday, February 8, 2010, through Friday, February 12, 2010, Ms. Neill transitioned from the position of Mr. Hanemann's receptionist to that of legal secretary. BR Neill at 12. As of Monday, February 8, 2010, Julie Waller was Mr. Hanemann's new receptionist. BR Neill at 15. Ms. Neill was responsible for training Ms. Waller during this week. However on Tuesday, February 9, 2010, Ms. Neill was out of the office on personal matters. BR Neill at 15. On Friday, February 12, 2010, Ms. Neill was also unable to train Ms. Waller because Ms. Neill was herself in full time training for her new legal secretary position. BR Neill at 17. Ms. Waller had some issues with accuracy in processing the mail and did not date stamp all pieces of mail during that week. BR Neill at 34.

The February 5, 2010 order was not date stamped by Mr. Hanemann's office as to when it was received. BR Neill at 14. Ms. Neill could not testify as to when the order was received by their office. BR Neill at 35.

3. Telephone Discussion Between Alan Gruse And Frank Parascondola

a. January 2010 Discussion

Frank Parascondola testified that he was employed by Mr. Hanemann's office from July 2007 until June 2010. He was the workers' compensation paralegal in that office from 2008 until June 2010. BR Parascondola at 49.

Mr. Parascondola testified that he had a conversation with Mr. Gruse in early January 2010. BR Parascondola at 51. This took place after the Department placed in abeyance the original willful misrepresentation order of October 6, 2009, and before issuance of the February 5, 2010 order. Based on this conversation Mr. Parascondola testified it was his understanding that the civil willful misrepresentation matter would be put on hold until the criminal fraud case was completed. BR Parascondola at 51-54, 67-68.

Mr. Gruse testified that it is a common practice for the Department to hold fraud (civil willful misrepresentation) orders in abeyance pending the filing of criminal charges. BR Gruse at 114. This is to prevent the testimony of claimants in the civil proceedings from being used against them during their criminal trials. Once criminal charges are filed, the Department issues a new willful misrepresentation order that

either affirms or corrects and supersedes the original order. BR Gruse at 114. It is the *filing* of criminal charges that triggers the issuance of the new order, not the finalization of the criminal case, because finalization of the criminal case could take years. BR Gruse at 114-15. Once the civil order is filed, the Department asks the Board to stay the civil (willful misrepresentation) proceedings pending the outcome of the criminal matter. *See* BR Gruse at 114.

In the January 2010 phone conversation Mr. Gruse told Mr. Parascondola that he had not yet heard from the prosecutor whether criminal charges would be filed and that the fraud order (civil) was still in abeyance. BR Gruse at 116. Mr. Gruse told Mr. Parascondola that the Department had to wait until criminal charges were filed before affirming the civil order, to protect Mr. Nakano's right from being compelled to testify before the Board. BR Gruse at 116.

In late January, Mr. Gruse received word that criminal charges had in fact been filed. At that point, he recalculated the amount owing under the original order to include bills received after that order was issued. He then issued the February 5, 2010 willful misrepresentation order, correcting and superseding the original October 6, 2009 order. BR Gruse at 115.

Mr. Gruse denied that he ever promised Mr. Parascondola he would not issue a new order until Mr. Nakano was convicted. *See* BR Gruse at 124. Mr. Gruse testified he advised Mr. Parascondola that what he did say was he would wait until criminal charges were filed because once criminal charges were filed a stay from the Board could be requested. BR Gruse at 124.

b. April 13, 2010 Discussion

On April 13, 2010, after the February 5, 2010 civil willful misrepresentation order had issued, Mr. Gruse called Mr. Parascondola to determine when the law office received the February 5, 2010 order. BR Gruse at 123. Mr. Parascondola testified he informed Mr. Gruse that if the Department mailed it on February 5, 2010, his office probably received it sometime during the week of February 8, 2010. BR Parascondola at 55. Mr. Gruse testified that he was advised by Mr. Parascondola that the order was received on February 8, 2010, and that Mr. Parascondola read out loud over the telephone the portion of the February 5, 2010 order that stated: “This order corrects and supersedes the order of October 6, 2009.” BR Gruse at 123-24.

When Mr. Gruse pointed out to Mr. Parascondola that the order would then be final if it was received on the 8th, Mr. Parascondola complained that he thought the Department would not proceed with the

civil case because of the pending criminal matter. BR Parascondola at 55-56.

c. April 14, 2010 Discussion

On April 14, 2010, Mr. Parascondola called Mr. Gruse. BR Gruse at 126. During this conversation Mr. Parascondola said that he was looking at the wrong order when he said his office received it on February 8, 2010. BR Gruse at 126. Mr. Parascondola had a copy of the February 5, 2010 order and it was not date stamped like it usually is. BR Gruse at 126-27. He said that he had a notation that said that they sent a copy to Mr. Nakano on the 10th.⁵ BR Gruse at 127. At his deposition, Mr. Parascondola confirmed that the order was “cc’d to the client on February 10th” and agreed that “he must received it around the 10th.” BR Parascondola at 82.

At the hearing, Mr. Parascondola confirmed that the order had a note on it that said it was sent to the client on the 10th and that would mean he received it on the 10th. BR Parascondola at 88, 65-66. He pointed out, however, that he could make mistakes. BR Parascondola at 82. He said that the first time he can remember getting the order was the 15th because

⁵ Mr. Nakano testified that he did not personally receive his copy of the February 5, 2010 order until sometime in June 2010. He believes this is due to confusion on the part of the post office between his and his son’s name. BR Nakano at 39. (CR 5(b) requires that when a party is represented by an attorney, service is made upon the attorney.)

he had a conversation with Mr. Hanemann about the order. BR Parascondola at 90, 80.

C. The Board And The Superior Court Found That Mr. Nakano's Appeal Of The February 5, 2010 Order Was Not Timely

After the hearings, the Board judge issued a proposed decision and order that dismissed Mr. Nakano's appeal of the February 5, 2010 order on grounds that it was not timely. BR at 50.⁶ The Board judge specifically found that Mr. Nakano, by and through his attorney, received the order on or before February 10, 2010. BR at 50. As a result, Mr. Nakano's protest and his appeal were both filed more than 60 days following the date that the February 5, 2010 order was communicated to Mr. Nakano through his attorney. BR at 50.

Mr. Nakano petitioned the full three-member Board for review of the proposed decision. BR at 3. The Board denied the petition for review and adopted the proposed decision as its own. BR at 2.

Mr. Nakano appealed the November 19, 2010 Board decision to superior court. CP at 1-2. The superior court decided that Mr. Nakano's appeal was untimely. The superior court found that the Department mailed the order on February 5, 2010. FF 1.4. It found that Mr. Nakano's attorney received the order on or before February 10, 2010. FF 1.5. The

⁶ The Board judge's decision is attached as Appendix B.

superior court also found that Mr. Nakano's April 13, 2010 protest was filed more than 60 days following February 10, 2010. FF 1.7. Based on the findings, the superior court concluded the protest was untimely. CL 2.3. Mr. Nakano now appeals this decision to this Court.

IV. SUMMARY OF THE ARGUMENT

The superior court, like the Board, found that Mr. Nakano's attorney received a copy of the February 5, 2010 order on or before February 10, 2010. BR at 50; FF 1.5. Mr. Nakano claims this is incorrect, directing the Court's attention to evidence which, in Mr. Nakano's judgment, supports the conclusion that he received the order after that date. However, his argument is misplaced, as the key issue on appeal is not whether any evidence would have supported a favorable ruling for him, but, rather, whether substantial evidence supports the superior court's finding that he received the order on or before February 10, 2010.

Here, substantial evidence supports that finding. Approximately two months after the receipt of the order, Mr. Nakano's paralegal admitted to a Department employee that his office had received the order on February 10, 2010, and later confirmed this admission at a discovery deposition. He admitted at hearing that there was a note on the order that a copy of it was sent to Mr. Nakano on February 10, 2010, and that this meant that he had received the order around the 10th. At the hearing, the

paralegal equivocated and thought perhaps the order was received on the 15th. The fact-finder weighed and rejected the paralegal's equivocations and relied on the earlier admissions of the paralegal as to the receipt date. Under the substantial evidence standard of review, this evidence is not re-weighed. Substantial evidence supports the superior court's finding of receipt of the order on February 10, 2010.

Alternatively, Mr. Nakano argues he should receive equitable relief because of alleged misleading conduct by the Department's fraud adjudicator that purportedly caused Mr. Nakano's attorney's paralegal to believe the order remained in abeyance.

Mr. Nakano's contention that the Department somehow misled him is not supported by the evidence. The order clearly stated on its face it must be protested or appealed within 60 days or it would become final.

Furthermore, a party seeking equitable relief from an otherwise final decision of the Department must show that there was some sort of barrier or circumstance causing the litigant to be unable to appeal. Mr. Nakano has failed to establish that any barrier existed that prevented him from appealing the February 5, 2010 order, which plainly advised him that the decision would become final unless he filed a timely protest or request for reconsideration from it. He also shows no misconduct on the part of the Department as the Department employee advised the

paralegal that the order would be held in abeyance pending filing of criminal charges, not pending finalization of the criminal matter.

The superior court properly affirmed the Board's dismissal of Mr. Nakano's appeal.

V. STANDARD OF REVIEW

Appellate review is limited to an examination of the record to see whether substantial evidence supports the findings made by the superior court, and whether the court's conclusions of law flow from the findings. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5-6, 977 P.2d 570 (1999).⁷ Substantial evidence is evidence in sufficient quantum to persuade a fair minded person that a finding is true. *William Dickson Co. v. Puget Sound Air Pollution Control Agency*, 81 Wn. App. 403, 411, 914 P.2d 750 (1996). Under the substantial evidence standard of review, the appellate court views the evidence and the reasonable inferences from the evidence in the light most favorable to the party (here the Department) who prevailed in the highest forum that exercised fact-finding authority (here the superior court), and accepts the fact-finder's views regarding the credibility of witnesses and the weight to be given reasonable but competing inferences. *Id.*

⁷ In a workers' compensation case, it is the decision of the superior court that is reviewed, not the Board. *See Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-80, 210 P.3d 355 (2009); RCW 51.52.115.

This Court reviews the superior court's decision on equitable claims for abuse of discretion. *Harman v. Dep't of Labor & Indus.*, 111 Wn. App. 920, 923, 47 P.3d 169 (2002).

The Court reviews a superior court's legal conclusions de novo. *Bennerstrom v. Dep't of Labor & Indus.*, 120 Wn. App. 853, 858, 86 P.3d 826 (2004). However, when an administrative agency is charged with application of a statute, the agency's interpretation of an ambiguous statute is accorded great weight. *City of Pasco v. Pub. Empl. Relations Comm'n*, 119 Wn.2d 504, 507-08, 833 P.2d 381 (1992).

Mr. Nakano cites to the rule of liberal construction in workers' compensation cases. AB at 10-11. While it is true that a court should liberally construe the terms of the Act in favor of those who come within its terms (*see* RCW 51.12.010), "persons who claim rights thereunder should be held to strict proof of their right to receive benefits provided by the act." *Cyr v. Dep't of Labor & Indus.*, 47 Wn.2d 92, 97, 286 P.2d 1038 (1955) (internal quotation omitted). The rule of "liberal construction" applies to legal questions arising from ambiguous statutory provisions, but it does not apply to questions of fact. *Ehman v. Dep't of Labor & Indus.*, 33 Wn.2d 584, 595, 206 P.2d 787 (1949).

VI. ARGUMENT

A. Substantial Evidence Supports The Superior Court's Finding That The Department's February 5, 2010 Order Was Communicated To Mr. Nakano's On February 10, 2010

Department orders that are neither protested nor appealed within 60 days from the date communicated to the parties become final and binding on the parties. RCW 51.52.050(1); RCW 51.52.060(1)(a); *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 538, 886 P.2d 189 (1994); *Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 169, 937 P.2d 565 (1997) (plurality).

Here, the question of when the February 5, 2010 order was communicated to Mr. Nakano through his attorney is a pure question of fact. Since it is a question of fact, this Court must uphold the superior court's finding that it was communicated to Mr. Nakano through his attorney as of February 10, 2010, so long as substantial evidence supports that finding. *See Ruse*, 138 Wn.2d at 5. As substantial evidence supports the superior court's finding that the February 5, 2010 order was communicated to Mr. Nakano's attorney no later than February 10, 2010, this Court should uphold the superior court's finding.

Indeed, much of the evidence would allow a trier of fact to reasonably conclude that the February 5, 2010 order was communicated to him on or before February 10, 2010. Mr. Thomas testified that the

February 5, 2010 willful misrepresentation order was mailed on Friday, February 5, 2010. BR Thomas at 98-100.⁸ Ms. Neill testified that in her two-and-a-half year experience at Mr. Hanemann's office, they usually receive mail from the Department within two to three days of mailing. BR Neill at 34-35. This office considers time-loss compensation payments from the Department late if they arrive more than two days after the date they were mailed. *Accord* CR 5(b)(2)(A) (service by mail deemed complete on third day following mailing). A reasonable trier of fact could infer, from this, that the order was received on either February 8, 2010, or February 9, 2010, and, thus, that Mr. Nakano's protest and his request for reconsideration from the February 5, 2010 order was untimely.

Similarly, Mr. Nakano's reliance on postal publications indicating that first class mail is delivered later than five days, ten percent of the time is misplaced. BR Ex's. 2, 3. If first class mail is delivered later than five days ten percent of the time, then it follows that the mail is delivered in

⁸ This, and other testimony regarding the Department's mailing procedures, provides substantial evidence supporting Finding of Fact 1.4 that it was mailed on February 5, 2010. Although Mr. Nakano assigns error to Finding of Fact 1.4 (AB 8), he does not dispute that the Department followed its usual and customary practice for mailing orders as found in the uncontested Finding of Fact 1.3. A fact-finder may rely on evidence of following usual and customary mailing practice to establish the date of mailing. *See Farrow v. Dep't of Labor & Indus.*, 179 Wash. 453, 455, 38 P.2d 240 (1934). Contrary to Mr. Nakano's suggestion at AB 8, evidence from the post office is not necessary to show date of mailing. "Upon proof of mailing, it is presumed the mail proceeds in due course and the letter is received by the person or entity to whom it is addressed." *Kaiser Alum. & Chem. Corp. v. Dep't of Labor & Indus.*, 57 Wn. App. 886, 889, 790 P.2d 1254 (1990).

five days or less in the other 90 percent of all cases. Thus, if anything, this evidence suggests it is more probable than not that the order was communicated to Mr. Nakano on or before February 10, 2010. In any event, this evidence does not establish that no reasonable trier of fact could have concluded that Mr. Nakano received the order on or before February 10, 2010.

Mr. Nakano argues that if his attorney's office had received the order by February 9, 2010, or February 10, 2010, the order would have been mentioned in conversations and the personal notes of paralegal Parascondola on February 9, 2010, and February 10, 2010. *See* AB at 3-5, 12. The absence of reference to the February 5, 2010 order in these communications is said to be evidence that Mr. Hanemann's office did not have the order. This argument is an improper invitation for this Court to re-weigh the evidence and this Court should reject it as inconsistent with the standards governing substantial evidence review. In any event, it is contradicted by Mr. Parascondola's own testimony.

Indeed, the weight of Mr. Parascondola's testimony and admissions points to receipt of the order on or before February 10, 2010. Mr. Parascondola testified he did not know for a fact when the February 5, 2010 order was received by their office. BR Parascondola at 54. On direct examination by Mr. Nakano's attorney Mr. Parascondola admitted

that he told Mr. Gruse that they received the order around February 10, 2010. BR Parascondola at 65-66. On cross-examination he agreed that he would have had a copy of the order in his possession by February 10, 2010. BR Parascondola 88. On further cross-examination, Mr. Parascondola testified that if he had the order in his hand on February 10, 2010, it likely arrived in their office probably that day or before. BR Parascondola at 90. Mr. Parascondola admitted to Mr. Gruse on April 10, 2010, that his office received the order on February 8, 2010, even reading a portion of the order over the phone that stated: ““This order corrects and supersedes the order of October 6, 2009.”” BR Gruse at 123-24. He retracted the February 8, 2010 receipt date in a subsequent conversation with Mr. Gruse. BR Parascondola 65. But in this April 14, 2010 conversation, Mr. Parascondola admitted to Mr. Gruse that there was a note on the order that said that they sent a copy of it to Mr. Nakano on February 10, 2010. BR Gruse at 126-27. At his deposition, Mr. Parascondola confirmed that he had sent the order to Mr. Nakano on the 10th and agreed that he must have received it around the 10th. BR Parascondola at 82.

The fact-finder could believe Mr. Parascondola’s contemporaneous statements made in April 2010 about the note on the order that indicated the order was copied to the Mr. Nakano on February 10th. The fact-finder

could disregard Mr. Parascondola's equivocations about making mistakes sometimes. BR Parascondola at 82. The fact-finder could believe the deposition statements and the admissions at the hearing that corroborate his statements made in April 2010 that his office received the order on February 10, 2010. Based on Mr. Parascondola's testimony and admissions, a reasonable trier of fact could conclude that the February 5, 2010 order was communicated to Mr. Nakano on or before February 10, 2010.

The Board and the superior court found that Mr. Hanemann's office received a copy of the order on or before February 10, 2010. BR at 50; CP at 50-54. The Department contends the order could have been received on this date or it could have been received by Mr. Hanemann's office on Monday February 8, 2010, or Tuesday, February 9, 2010. This would be in keeping with Mr. Parascondola's retracted admission and the usual mailing conditions for receipt of mail by Mr. Hanemann's office, documented above. Tuesday, February 9, 2010, is also the date that Ms. Waller, the new receptionist who admittedly forgot to stamp 10 to 15 pieces of mail that week, was working without the benefit of Ms. Neill's supervision.⁹ BR Neill at 15. In any event, the substantial weight of

⁹ Mr. Nakano argues the new receptionist was supervised by someone else that day and accordingly the mail would have been date stamped on the 9th. See AB 6. The person supervising Ms. Waller did not testify and there is no evidence that this person

evidence establishes that Mr. Nakano's attorney was in receipt of the February 5, 2010 willful misrepresentation order on or before February 10, 2010.

While Mr. Nakano acknowledges in very general terms that the substantial evidence standard applies in this appeal, he makes no serious attempt to demonstrate that no reasonably fair-minded person could have concluded that the February 5, 2010 order was communicated to him by February 10, 2010 or earlier based on the totality of the evidence in the record. Instead, Mr. Nakano directs this Court's attention to evidence that, in his opinion, would support the conclusion that the order was communicated to his attorney's office at some time after February 10, 2010. AB at 2-8, 11-18. His argument is misplaced, as it is premised on a fundamental misapprehension of the nature of his burden in this appeal. To prevail, he must show not only that a reasonable trier of fact could have concluded that he received the order after February 10, 2010, but that *no* reasonable person could have concluded that he received the order on February 10, 2010. *See William Dickson Co.*, 81 Wn. App. at 411 (substantial evidence is evidence in sufficient quantum to persuade a fair

would have ensured all mail was date stamped. Indeed this is contradicted by Ms. Neill's testimony that pieces of mail the week of the 8th were not date stamped. BR Neill at 34. Moreover, any inferences in regard to whether the mail was date stamped or not during the week of the 8th must be drawn in favor of the Department under the substantial evidence standard of review. *See William Dickson Co.*, 81 Wn. App. at 411.

minded person that a finding is true). As he failed to demonstrate that no reasonable trier of fact could have done so, his attempts to challenge the superior court's findings necessarily fail.

The superior court's finding that Mr. Nakano received the February 5, 2010 order by February 10, 2010, was amply supported by the evidence.

B. Mr. Nakano Is Not Entitled To Equitable Relief

Mr. Nakano argues that the superior court should have afforded him equitable relief from the finality of the Department's February 5, 2010 order, even if it found that his protest and his appeal from that order were not timely. AB at 16-18. The plea for equitable relief is premised upon his claim that certain actions by the Department misled Mr. Parascondola into believing a willful misrepresentation order would not be issued until after a criminal conviction. AB at 16-18.

It is well settled that a party who has failed to file a timely appeal from a decision of the Department may only be excused for this under narrow circumstances, and that equitable relief is rarely granted in that situation. *Lynn v. Dep't of Labor & Indus.*, 130 Wn. App. 829, 839, 125 P.3d 202 (2005). Appellate courts have granted equitable relief in those circumstances only where a worker has established *both* that the Department engaged in some form of misconduct *and* that some sort of

barrier existed that prevented a timely appeal. *See Kingery*, 132 Wn.2d at 173-77 (Talmadge, J, plurality) (discussing *Ames v. Dep't of Labor & Indus.*, 176 Wash. 509, 30 P.2d 239 (1934); *Rodriguez v. Dep't of Labor & Indus.*, 85 Wn.2d 949, 540 P.2d 1359 (1975)); *Lynn*, 130 Wn. App. at 839.

Mr. Nakano appears to suggest that it is only necessary for him to establish “misconduct” on the Department’s part, and that, if he does so, it necessarily follows that he is entitled to equity, regardless of whether any barrier existed that prevented a timely appeal from the Department’s order. AB at 18. Mr. Nakano relies on the concurring opinion in *Kingery* for the proposition that the worker need not be incompetent. AB at 18. In Judge Madsen’s concurrence, she said that “I agree with Justice Alexander that the court’s equitable powers are not limited to cases where it is shown that the claimant is *essentially* incompetent.” *Kingery*, 132 Wn.2d at 178 (emphasis added). Total incompetence is not necessary. This, however, does not mean that there is not a requirement to show *some* barrier to understanding the need to appeal. The requirement to show circumstances where there is a barrier to appealing has been recognized in cases subsequent to *Kingery*. *See Lynn*, 130 Wn. App. at 839. In construing *Kingery*, the court in *Fields Corp.* stated that “equitable relief from res judicata is not limited to circumstances in which the claimant was

incompetent or illiterate; CR 60 and/or ‘the court’s equitable powers’ permit the court to grant relief under other circumstances also.” *Dep’t of Labor & Indus. v. Fields Corp.*, 112 Wn. App. 450, 459, 45 P.3d 1121 (2002). In *Fields Corp.*, the circumstances were that it was “impossible” to know to appeal. *Id.* at 460. Under this test, there still needs to be some circumstance that presents some barrier to timely appealing.

Furthermore, a worker seeking equitable relief must, like any other party seeking equitable relief, establish the basic elements of such a claim. Here, Mr. Nakano essentially contends that he is entitled to equitable estoppel. Under the law of equitable estoppel, Mr. Nakano must prove by clear, cogent, and convincing evidence that: (1) the Department made an admission, statement, or act that was inconsistent with the Department’s later claim; (2) he reasonably relied on the Department’s admission, statement, or act; (3) he would be injured by allowing the Department to repudiate or act inconsistently with the prior admission or act; (4) estoppel is necessary to prevent a manifest injustice; and (5) the exercise of governmental powers will not be hindered as a result. *v. Dep’t of Soc. Health & Serv.*, 122 Wn.2d 738, 743, 863 P.2d 535 (1993).

Mr. Nakano is not entitled to equitable relief for at least three reasons. First, he has failed to show that any barrier existed that made it impossible for him to understand the need to timely appeal the February 5,

2010 order. Second, he has failed to support his assertion that the Department engaged in any sort of misconduct that interfered with his ability to understand that it was incumbent upon him to file a timely appeal from the February 5, 2010 order if he disagreed with it. Finally, Mr. Nakano has failed to establish that the elements of equitable estoppel have been met, as he did not “reasonably rely” on any statement by a Department employee when he failed to file a timely appeal from the February 5, 2010 order.

1. Mr. Nakano Has Failed To Establish That Any Barrier Existed To Him Understanding The February 5, 2010 Order Or The Requirement To File A Timely Appeal From That Decision

Courts have granted equitable relief in industrial insurance 60-day time limit cases where there was evidence that some sort of barrier existed that rendered the worker incapable of filing a timely appeal from the Department decision. *See, e.g., Ames*, 176 Wash. 509. For example, in *Ames* the worker was adjudged insane and committed to a state hospital at the time of the order rejecting his claim. *Id.* at 510. Similarly, in *Rodriguez*, the worker was an “extreme illiterate” Mexican-American farm worker, unable to read or write in either Spanish or English, and who spoke only Spanish. *Rodriguez*, 85 Wn.2d at 950. The Department was

aware of his language barriers, but nonetheless sent Mr. Rodriguez orders that were written (exclusively) in English. *See id.* at 955, 950.

In the instant case, there is no evidence that any sort of barrier existed that rendered Mr. Nakano incapable of understanding the order or filing a timely appeal from the Department's order and it is undisputed that the order he received gave him the notice required by RCW 51.52.050. Moreover, Mr. Nakano was represented by legal counsel at all relevant times. There is no question his attorney was competent to understand the contents of the Department's February 5, 2010 order and the process to appeal the order, and he does not argue otherwise. Since no barrier existed that rendered Mr. Nakano incapable of understanding the February 5, 2010 order or that rendered him incapable of challenging it if he believed it to be erroneous, he may not receive equitable relief from it. *See Lynn*, 130 Wn. App. at 839 (equitable relief granted when "(1) the claimant was unable to understand the order and the appellate process and (2) L&I committed some misconduct in communicating the order"); *cf. Fields Corp.*, 112 Wn. App. at 460 (employer was entitled to equitable relief from an order it failed to timely appeal where the parties stipulated that "'it was impossible', not just difficult or improbable," for the employer to have known that it should challenge the Department's order until after the deadline to appeal it had elapsed, and because the employer

was diligent in challenging that order once the error within it had become evident.).

Here, nothing in the record suggests either that Mr. Nakano was unable to understand the February 5, 2010 order, nor does anything support the conclusion that it was “impossible” for him to ascertain any facts in a timely manner that were relevant to the issue of whether he had committed willful misrepresentation or not. Thus, he does not meet the elements for equitable relief under the standard announced in either *Lynn* or *Fields Corp.* See *Lynn*, 130 Wn. App. at 839; *Fields Corp.*, 112 Wn. App. at 459.

2. Mr. Nakano Has Failed To Demonstrate That The Department Engaged In Any Misconduct

Mr. Nakano suggests that the Department committed misconduct because a Department employee made statements that his former paralegal, Mr. Parascondola, understood to mean that no fraud order would be issued until a criminal conviction was made. AB at 16-17. The trial court acted within its discretion to reject this argument. The evidence shows that the Department employee stated that the fraud order would be issued once criminal charges had been *filed*. BR Gruse 116. Thus, the confusion resulted from a misunderstanding on Mr. Parascondola’s part, rather than because a Department employee said something that was not

true. Any inferences in this regard must be drawn in favor of the Department in the abuse of discretion standard of review. *See State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967 (1999) (an abuse of discretion occurs when a trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons.)

The fact that a paralegal for the law firm representing Mr. Nakano was unable to distinguish between the *filing* of a criminal action and the *finalization* of a criminal action is not evidence of misconduct on the part of the Department in communicating its order to the appellant.

The allegations of Department misconduct are all directed at detrimental reliance by a paralegal. There is no allegation that Mr. Nakano's attorney was duped by the alleged bad conduct of the Department. There is only garden variety neglect present here that does not merit the application of equitable principles. *See Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990). The evidence simply does not support a conclusion that the Department committed misconduct in communicating the February 5, 2010 order to Mr. Nakano. The trial court did not abuse its discretion in rejecting Mr. Nakano's equity claim based on the Department's evidence.

3. Mr. Nakano Has Failed To Establish That He “Reasonably Relied” On Any Statement Of The Department When He Failed To File A Timely Challenge To The February 5, 2010 Order

Even if it were true that the Department employee told the paralegal that no fraud order would be issued until a criminal conviction was made, it was not reasonable for Mr. Nakano’s attorney to rely on this alleged statement in direct contradiction to the plain written language of the February 5, 2010 order. Both pages of the February 5, 2010 order clearly state in bold print that the order becomes final 60 days from the date it is communicated, unless a request for reconsideration is filed with the Department or an appeal is filed with the Board. BR Ex. 4

The record here does not support a finding of either reasonable reliance or even reliance in fact. Mr. Parascondola testified that even though he was operating under an incorrect assumption that Mr. Nakano’s civil case would be “on hold until the pendency of the criminal matter” he would “of course . . . monitor” the file. BR Parascondola at 53-54. And after the order was issued, Mr. Parascondola said he tickled the order for further action after a conversation with Mr. Hanemann in February 2010. BR Parascondola at 91. This testimony is evidence that he did not in fact rely on statements from the Department to consciously decide not to file a timely appeal in reliance on the Department’s alleged assurance.

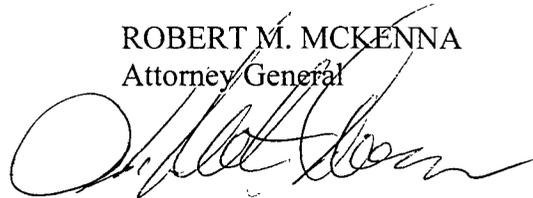
Mr. Nakano's failure to timely file a challenge to the February 5, 2010 order was not the result of reliance upon statements from the Department. Nor are the other elements of equitable estoppel (*Kramarevcky*, 122 Wn.2d at 743) demonstrated here. Equity cannot overcome the legal consequences of a final order and permit equitable relief, based on the circumstances presented in this case.

VII. CONCLUSION

For the reasons discussed above, the Department respectfully requests that this Court affirm the September 22, 2011 judgment of the superior court, which affirmed the decisions of the Department and the Board.

RESPECTFULLY SUBMITTED this 7th day of March, 2012.

ROBERT M. MCKENNA
Attorney General



W. MARTIN NEWMAN
Assistant Attorney General
WSBA No. 36768
P.O. Box 40121
Olympia, WA 98504-0121
(360) 586-7710

FEDERAL
COURT OF APPEALS
DIVISION II

12 MAR -8 PM 1:38

PROOF OF SERVICE

I certify that I served a copy of this document on all parties
or their counsel of record on the date below as follows:

STATE OF WASHINGTON
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by causing them to be placed in the United States Mail
and via email to:

Jack W. Hanemann
Jack W. Hanemann, Inc. PS
State & Sawyer Bldg, Suite 101
2120 State Ave NE
Olympia, WA 98506
jwh@hbjlaw.com

by placing them with ABC-Legal Messengers, Inc.

by giving them to overnight messenger service.

Hand delivered by

I certify under penalty of perjury under the laws of the state
of Washington that the foregoing is true and correct.

DATED this 17th day of March, 2012, at Tumwater,

Washington

Jerei Bargabus
JEREI BARGABUS
Legal Assistant

APPENDIX A

ORIGINAL

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Rec'd & Filed
Lewis County Superior Court
SEP 22 2011
Kathy A. Brack
Lewis County Clerk

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF LEWIS

CHARLES J. NAKANO,

Petitioner,

v.

STATE OF WASHINGTON
DEPARTMENT OF LABOR AND
INDUSTRIES,

Respondent.

NO. 10-2-01649-8

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This matter came on regularly before the Honorable James Lawler, in open court on September 2, 2011. The Plaintiff, Charles J. Nakano, appeared by his counsel, Jack W. Hanemann; the Defendant, Department of Labor and Industries (Department), appeared by its counsel, Robert M. McKenna, Attorney General, per W. Martin Newman, Assistant Attorney General. The court reviewed the records and files herein, including the Certified Appeal Board Record, and briefs submitted by counsel, and heard argument of Counsel. Therefore, being fully informed, the court makes the following:

I. FINDINGS OF FACT

1.1 On July 28, 2008, the Department of Labor and Industries received an Application for Benefits alleging a June 28, 2008 industrial injury to Charles J. Nakano while in the course of employment. On August 1, 2008, the Department issued an order in which it rejected the claim. On August 8, 2008, the Department issued an order in which it cancelled the August 1, 2008 order, and on August 13, 2008, issued an order in which it allowed the claim as an industrial injury.

1 On October 6, 2009, the Department issued an order in which it rejected the claim and
2 assessed the claimant \$985,973.92 for overpaid medical and time-loss compensation
3 benefits, including a 50 percent penalty, on the basis of willful misrepresentation. On
4 October 7, 2009 the claimant protested the October 6, 2009 order; on October 7, 2009,
5 the Department issued an order in which it held the October 6, 2009 order in abeyance.
6 On February 5, 2010, the Department issued an order in which it corrected and
7 superseded its prior order dated October 6, 2009, the order rejected the claim, and it
8 assessed the claimant \$992, 820.93 for overpaid medical and time-loss compensation
9 benefits, including a 50 percent penalty, on the basis of willful misrepresentation

10 On April 13, 2010, the claimant filed a protest to the Department order dated February
11 5, 2010. On April 14, 2010, the claimant filed a Notice of Appeal to the Department
12 order dated February 5, 2010, with the Board of Industrial Insurance Appeals. The
13 Board accepted the appeal under Docket No. 10 14497, and agreed to hear the appeal.

14 On April 15, 2010, the Department issued an order in which it determined it could not
15 reconsider the February 5, 2010 order because the claimant's protest was not received
16 within the time permitted for protests. On May 24, 2010, the claimant filed a Notice of
17 Appeal to the Department order dated April 15, 2010, with the Board. The Board
18 accepted the appeal under Docket No. 10 15897, and agreed to hear the appeal.

19 1.2 As of February 5, 2010, Jack W. Hanemann was the claimant's attorney and
20 representative for the alleged industrial injury; his mailing address is 2120 State
21 Avenue NE, Suite 101, Olympia, WA 98506.

22 1.3 The usual and customary practice for mailing orders is for the adjudicator to enter the
23 order the day before the order is mailed. Orders are printed over night at the
24 Department of Information Services. The orders are then routed to the adjudicator.
25 After the adjudicator receives the order, which is the date of the order, the adjudicator
26 makes a worker copy, provider copy, and employer copy; staples the order; stuffs the
envelope; and gives it to the mail services person. The mail services person takes the
envelope, which contains the order, to the mail room. Consolidated Mail Services picks
up the mail from the Department mail room and transports it to Consolidated's facility
where postage is affixed and it is then transported to the Post Office in Tumwater. The
markings on the order indicate it was scanned on February 5, 2011. This usual and
customary practice was followed for the February 5, 2010 order.

1.4 On February 5, 2010, the department mailed its order dated February 5, 2010, to
Charles Nakano, c/o Hanemann Bateman, et al, at 2120 State Avenue NE, Suite 101,
Olympia, WA 98506. The order was properly addressed, had the correct postage, and
was delivered to the United States Post Office for regular mail delivery to the claimant.

1.5 Charles J. Nakano, through his attorney and representative, received a copy of the
February 5, 2010 order, on or before February 10, 2010.

- 1 1.6 Charles J. Nakano filed a protest to the February 5, 2010 order on April 13, 2010.
2 1.7 Charles J. Nakano's April 13, 2010 protest was filed more than 60 days following
3 February 10, 2010.
4 1.8 Hearings were held at the Board of Industrial Insurance Appeals (Board) on July 29,
5 2010 and August 31, 2010.

6 Thereafter an Industrial Appeals Judge issued a Proposed Decision and Order on
7 September 29, 2010, from which Plaintiff filed a timely Petition for Review on
8 November 9, 2010. On November 19, 2010 the Board, having considered Plaintiff's
9 Petition for Review denied the same and adopted the Proposed Decision and Order as
10 the Board's final order.

11 Based upon the foregoing Findings of Fact, the court now makes the following

12 II. CONCLUSIONS OF LAW

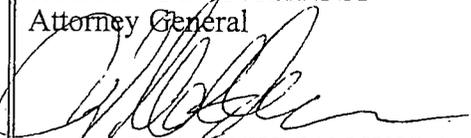
- 13 2.1 This court has jurisdiction over the parties to, and the subject matter of, this appeal.
14 2.2 In Docket No. 10 14497, the Board of Industrial Insurance Appeals has jurisdiction
15 over the parties.
16 2.3 Charles J. Nakano did not file a timely protest to the Department order dated
17 February 5, 2010, and that order became final and binding, as contemplated by
18 RCW 51.52.050 and *Marley v. Department of Labor & Indus.*, 125 Wn.2d 533 (1994).
19 2.4 The appeal filed by Charles J. Nakano on April 14, 2010, to the Department order dated
20 February 5, 2010, is dismissed.
21 2.5 In Docket No. 10 15897, the Board of Industrial Insurance Appeals has jurisdiction
22 over the parties and the subject matter of this appeal.
23 2.6 Charles J. Nakano did not file a timely protest to the Department order dated
24 February 5, 2010, and that order became final and binding, as contemplated by
25 RCW 51.52.050 and *Marley v. Department of Labor & Indus.*, 125 Wn.2d 533 (1994).
26 2.7 Because the Department order dated February 5, 2010, became a final and binding
order, the Department was not able to reconsider that order, as provided by
RCW 51.52.051.
2.8 The Department order dated April 15, 2010, is correct and is affirmed.
2.9 The Board's November 19, 2010 order that adopted the September 29, 2010 Proposed
Decision and Order is correct and should be affirmed.

1
2 3.0 The February 5, 2010 and April 14, 2010 Department orders are correct and should be
3 affirmed.

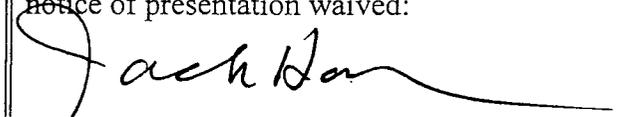
4 DATED this 22 day of September, 2011.

5
6 
JUDGE

7 Presented by:
8 ROBERT M. MCKENNA
9 Attorney General

10 
11 W. MARTIN NEWMAN WSBA No. 36768
Assistant Attorney General

12 Copy received,
13 Approved as to form and
14 notice of presentation waived:

15 
16 JACK W. HANEMANN
WSBA No. 6609
Attorney for Plaintiff

APPENDIX B

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

2430 Chandler Court SW, P O Box 42401
Olympia, Washington 98504-2401 • www.bia.wa.gov
(360) 753-6824

In re: **CHARLES J NAKANO**

Docket No. 10 14497 10 15897

Claim No. X-477367

**ORDER DENYING PETITION
FOR REVIEW**

A Proposed Decision and Order was issued in this appeal by Industrial Appeals Judge **WAYNE B. LUCIA** on **September 29, 2010**. Copies were mailed to the parties of record.

A Petition for Review was filed by the Claimant on **November 9, 2010**, as provided by RCW 51.52.104.

The Board has considered the Proposed Decision and Order and Petition(s) for Review. The Petition for Review is denied (RCW 51.52.106). The Proposed Decision and Order becomes the Decision and Order of the Board.

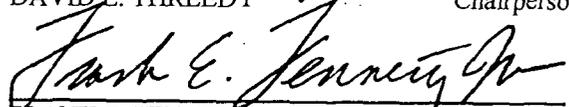
Dated: November 19, 2010.

BOARD OF INDUSTRIAL INSURANCE APPEALS



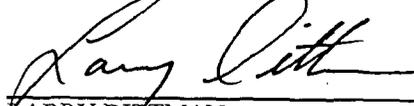
DAVID E. THREEDY

Chairperson



FRANK E. FENNERTY, JR

Member



LARRY DITTMAN

Member

c: DEPARTMENT OF LABOR AND INDUSTRIES

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

1 IN RE: CHARLES J. NAKANO) DOCKET NOS. 10 14497 & 10 15897
2 CLAIM NO. X-477367) PROPOSED DECISION AND ORDER

3 INDUSTRIAL APPEALS JUDGE: Wayne B. Lucia
4

5 APPEARANCES:

6 Claimant, Charles J. Nakano, by
7 Hanemann, Bateman & Jones, per
8 Jack W. Hanemann

9 Employer, Nakano & Sons Logging, Inc.,
10 None

11 Department of Labor and Industries, by
12 The Office of the Attorney General, per
13 W. Martin Newman, Assistant

14 In Docket No. 10 14497, the claimant, Charles J. Nakano, filed an appeal with the Board of
15 Industrial Insurance Appeals on April 14, 2010, from an order of the Department of Labor and
16 Industries dated February 5, 2010. In this order, the Department corrected a prior order dated
17 October 6, 2009, and as a result, denied the claim and assessed the claimant an overpayment of
18 \$992,820.93, including penalty. The claimant's appeal is **DISMISSED**.

19 In Docket No. 10 15897, the claimant filed an appeal with the Board on May 24, 2010, from a
20 Department order dated April 15, 2010. In this order, the Department determined it could not
21 reconsider its February 5, 2010 order because a protest had not been received within the 60-day
22 time limit. The Department order is **AFFIRMED**.

23 **ISSUE**

24 The issue presented on appeal is whether the claimant made a timely protest or appeal to
25 the Department order dated February 5, 2010.

26 **PROCEDURAL AND EVIDENTIARY MATTERS**

27 The parties did not agree to include the Jurisdictional Histories in the Board's record.

28 A hearing was held July 29, 2010. Karen E. Neill, Charles J. Nakano, and Frank
29 Parascondola each testified for the claimant. The Department's evidence was offered through the
30 testimony of John M. Conley, Thomas A. Thomas, and Alan Gruse. At the hearing, the claimant
31 moved to expand hearing time to add an unnamed witness, representing the employer, who "may
32 have relevant evidence." 7/29/10 Tr. at 7. The motion was denied on the record.

1 The following exhibits were considered during the hearing in these appeals:

- 2 1. A copy of an envelope postmarked July 23, 2010, rejected as Exhibit
3 No. 1;
- 4 2. United States Postal Service performance assessment, rejected as
5 Exhibit No. 2;
- 6 3. United States Postal Service customer service self-help tool, rejected as
7 Exhibit No. 3;
- 8 4. Department order dated February 5, 2010, admitted as Exhibit No. 4;
- 9 5. A copy of an envelope postmarked May 6, 2010, rejected as Exhibit
10 No. 5;
- 11 6. A copy of an envelope postmarked April 21, 2010, rejected as Exhibit
12 No. 6;
- 13 7. A facsimile cover sheet, dated February 9, 2010, admitted as Exhibit
14 No. 7;
- 15 8. File notes, admitted as Exhibit No. 8;
- 16 9. File notes, admitted as Exhibit No. 9;
- 17 10. A copy of Department R-Log notes, originally admitted as during the
18 hearing; that ruling is changed and Exhibit No. 10 is rejected;
- 19 11. A copy of Department R-Log notes, rejected as Exhibit No. 11; and
- 20 12. A copy of pages 21 through 25 of Frank Parascondola's discovery
21 deposition, rejected as Exhibit No. 12.

22 EVIDENCE

23 The evidence pertinent to these appeals has to do with when the claimant, via his attorney,
24 received the Department order dated February 5, 2010. As of the date of the order, Mr. Nakano
25 was represented by the firm of Hanemann, Bateman, and Jones, specifically, Mr. Hanemann.

26 Karen E. Neill, was a receptionist for the attorney until February 8, 2010, when she became
27 a legal assistant. Her replacement, Julie Walker, required training, which began February 8, 2010,
28 and was given by Ms. Neill. The United States Postal Service (USPS) delivers mail directly to the
29 front desk area of the office where the receptionist sits. Typically, the receptionist sorts and opens
30 the mail, and most correspondence, and particularly Department orders, is date stamped on the
31 back side of the document.

32 On February 8, 2010, a Monday, Ms. Neill and Ms. Walker worked together the entire
day. All mail was correctly stamped that day, according to Ms. Neill. On Tuesday, February 9,
2010, Ms. Neill did not work. The next day, February 10th, training resumed. On Thursday,
February 11th, the new receptionist worked by herself, except for the mail routine which Ms. Neill

1 supervised. On Friday, February 12, 2010, Ms. Walker worked alone and handled the mail without
2 assistance. Ms. Neill testified all mail she was involved with the week of the 8th was date stamped.
3 She noted Ms. Walker did not place dates on about 10 to 15 items of correspondence during her
4 first week working for the law firm.

5 Ms. Neill said the USPS occasionally takes more than three days to deliver mail to the firm;
6 and once or twice each month, mail comes three to five days after their mailing dates. Generally
7 speaking, items mailed on Fridays arrive on Mondays.

8 The claimant, Charles J. Nakano, who testified Mr. Hanemann represented him, said he got
9 a copy of the February 5, 2010 order about 1 to 1½ months before his July 29, 2010 testimony. His
10 copy was not date stamped and it did not have any pencil markings on it. Mr. Nakano stated
11 Exhibit No. 4 was his copy of the order.

12 Mr. Frank Parascondola, who worked for the law firm from July 2007 until June 25, 2010,
13 was the paralegal for workers' compensation cases, including Mr. Nakano's case. He recalled
14 telephone conversations with Alan Gruse, a Department fraud adjudicator. The Department had
15 made a civil fraud allegation with monetary assessment and penalty, and criminal charges were
16 being considered by the Lewis County Prosecuting Attorney.

17 Mr. Parascondola recounted his recollection of a January 2010 conversation: "So Mr. Gruse
18 proceeded to tell me that we had to protect his rights and that as soon as that case is done in Lewis
19 County, the criminal matter is over, we could proceed with this matter." 7/29/10 Tr. at 52. He
20 further stated:

21 So after I spoke with Mr. Gruse and he informed me of that, I talked
22 to the criminal attorney -- and I can't remember his name. It's in the
23 notes -- and told him that, you know, there's nothing that we could do,
24 we're supposed to, you know, wait until the pendency of that matter
regarding that, that issue of the case.

25 7/29/10 Tr. at 53. And, "I just thought the case was on hold. I had no idea. I didn't think anything
26 was going on. I -- of course I'd monitor it, you know, but I just thought we were waiting for the
27 criminal matter to get done so we could proceed with the L & I matter." 7/29/10 Tr. at 54.

28 On April 13, 2010, Mr. Parascondola said he got a call from Mr. Gruse who wanted to know
29 when the firm had received the February 5, 2010 order. The witness said he thought it was
30 sometime during the week of February 8, 2010. Because of that call, Mr. Parascondola understood
31 the Department was going forward with its fraud order; this prompted him to file facsimile protest
32 the same day.

1 More conversation between Mr. Parascondola and the Department took place on April 13
2 and 14, 2010:

3 I actually made two phone calls. Well, I actually made one phone call.
4 I left a message for him. I believe it was like 5:00, 5:01, right -- their
5 phones were off, so it was either right at closing time or afterhours, to let
6 him know that I thought we received this around the 10th of February
7 because it looks from the documents that I'm looking at that I would
8 have sent it around the 10th because of documents. And I thought that
9 it said cc'd to the client on the 10th on the order. I mean, it could have,
10 could have, could not have. I don't know. But I just said that I wanted to
11 clarify that we did not get it on the 8th as the first part of the
12 conversation that we had, indicated it looks like we got it sometime after
13 that and I thought it was around the 10th sometimes -- sometime --

14 I just thought it was around that time because all the -- everything
15 indicated around that time that I had sent it to the client. . . .

16 7/29/10 Tr. at 65-66. And:

17 And I think we may have had a conversation, and that's where I told him
18 that I thought that I had received it on the 10th.

19 And he said it's still late. I wasn't thinking anything of the late. I was just
20 about when I had got it. Because I was still under the belief that we
21 couldn't proceed with his case. I was still astonished that we were
22 proceeding.

23 7/29/10 Tr. at 66-67.

24 Mr. Hanemann's office had been unable to establish contact with the identified employer,
25 Nakano & Sons Logging, Inc., and on February 9, 2010, Mr. Parascondola sent the employer's
26 bookkeeper, Carol Nakano, a facsimile requesting a call. Mr. Parascondola said if he had known
27 about the February 5, 2010 order, he would have mentioned it in his facsimile. The facsimile is
28 Exhibit No. 7.

29 Exhibit Nos. 8 and 9, are handwritten notes which journal Mr. Parascondola's activities while
30 working Mr. Nakano's workers' compensation file at the Law Office. The dates on those records
31 are January 7, 2010, February 3, 2010, February 9, 2010, and February 10, 2010.
32 Mr. Parascondola said he would have made note of the fraud order in the notes if he had been
aware of it.

During cross-examination, Mr. Parascondola described a "blue folder" in which important
documents pertaining to various files were kept, including the February 5, 2010 order. About that
order, the following dialog occurred:

1 Q. And did you make any sort of notation on that order?

2 A. Yes.

3 Q. What notation did you make?

4 A. The bottom one of the corners I believe I put that I cc'd that order to the
5 client on the 10th of February, assuming it was the 10th, and I believe
6 I testified to that also.

6 And:

7 Q. Is it your testimony that the notes you put on the order was dated
8 February 10th?

9 A. Yes. My recollection is yes.

10 7/29/10 Tr. at 88. ("I believe I testified to that also" may have been a reference to
11 Mr. Parascondola's July 15, 2010 discovery deposition.) There were earlier questions and answers
12 about Mr. Parascondola's discovery deposition:

13 Q. And do you recall testifying on your July 15, 2010 discovery deposition
14 that the order said cc'd to the client on February 10th, so he must have
15 received it around the 10th?

16 A. Yes, because the documents I was looking at when I was talking to
17 Mr. Gruse, the document said cc'd client on 2/10 of 2010, assuming it
18 was the 10th and assuming it was the document.

19 I remember calling him and telling him that I was looking at the incorrect
20 document, I believe, in one of the conversations. So I really don't know
21 when I got it. And you may want to ask him that. I mean, I think
22 I remember saying that, too.

20 7/29/10 Tr. at 82.

21 Elsewhere in his testimony, Mr. Parascondola said he recalled having the February 5, 2010
22 order on February 15, 2010; he remembered a February 15, 2010 conversation with
23 Mr. Hanemann, who told him to tickle it for 30 days later.

24 John M. Conley works for the Washington Consolidated Mail Services (CMS). He described
25 the process for transporting documents from the Department mailroom to CMS. Department mail is
26 picked up by courier at either 2:15 p.m. or 3:45 p.m.; it is already in envelopes; the mail is taken to
27 CMS where postage is applied and it undergoes zip code sorting. The envelopes, with postage and
28 in zip order, are then taken to the USPS bulk mail unit in Tumwater sometime between 5 and 7 p.m.

29 Thomas A. Thomas is a Department Imaging Process supervisor; about that, he said:

30 I'm essentially a consultant for all processes that result in claim file
31 images being established on the imaging system; including inbound and
32 outbound correspondence or workers' compensation claims, as well as
five other business areas within the Department.

1 [Imaging] is the official storage means for documents relevant to
2 worker's compensation claims. It's the legal record of documents sent
out by the Department and received by the Department.

3 7/29/10 Tr. at 97. Paper copies of correspondence are not kept, all are imaged.

4 Mr. Thomas said he reviewed parts of the file for Claim No. X-477367, and particularly, each
5 document in the span between February 5, 2010, and April 16, 2010. He said the February 5, 2010
6 order was mailed on February 5, 2010, and the file did not show that any copies mailed to the
7 parties were returned as undeliverable. Mr. Thomas said the order was mailed February 5, 2010,
8 "[b]ased on my knowledge of the procedures for printing, routing within the Department, and
9 mailing, the evidence I see in the file, including the batch in which the document was scanned."

10 7/29/10 Tr. at 99-100. And:

11 When paper documents are imaged, they're prepared for scanning in
12 batches. The batches are scanned and the date, the electronic tattoo,
13 the electronic date stamp is applied to the images. The batch is
14 recorded as to when it was scanned, and it will include multiple
documents all received in the same bundle of mail on the same date.

15 7/29/10 Tr. at 100. The tattoo is applied to each scanned page and is a string of characters
16 identifying the date received, device it was scanned on, the batch number, and the pages within the
17 batch.

18 Mr. Thomas checked the file for protests to the February 5, 2010 order. The first protest
19 came to the Department's facsimile server on April 13, 2010, at 4:15 p.m., with an amended protest
20 following the same date at 4:54 p.m. There were no other protests, according to the witness.

21 During cross-examination, Mr. Thomas testified fraud orders are handled differently than
22 other Department orders.

23 Actually, in the case of fraud orders in particular, there's a sort of a
24 walk-through process, a hand-carried process, so that it's essentially
25 simultaneous. When the adjudicator gets the order, they also have the
26 file copy. So they stuff the originals for mailing. They insert them in the
27 envelope and either directly hand back the file copy for transport to
imaging or would put it in an envelope for return by campus mail at a
later point in the same day.

28 7/29/10 Tr. at 101-02. Regarding the February 5, 2010 order, Mr. Thomas said the usual and
29 customary practice would be for the adjudicator to enter the order on February 4, 2010; overnight
30 orders are printed at the Department of Information services, where they are initially delivered to the
31 Department at 5:30 a.m. The orders are then routed to the adjudicator. Mr. Thomas added:

1 What I know is that the file copy was returned from the adjudicator by
2 the afternoon of February 5th due to the fact that that's the date we gave
3 the batch and the associated documents received also on February 5th.
4 So that's the evidence I see that confirms that it physically made the trip
5 from DIS to L & I mailroom or Computer Operations Center to the
6 adjudicator and then back to the imaging section in our Tumwater
7 location on that date, all of February 5th.

8 7/29/10 Tr. at 106-07.

9 Mr. Alan Gruse is a Department fraud adjudicator who issued the February 5, 2010 order as
10 well as a predecessor order on October 6, 2009. His office is at 243 Israel Rd., which is near the
11 Department's main office.

12 The October 6, 2009 order was entered into the system on the prior day; this is consistent
13 with the overnight printing and mailing procedure. On October 6th, Mr. Gruse entered an abeyance
14 order. One purpose was to put the matter on hold to give medical providers notice that further
15 services would not be paid; to get outstanding bills for services prior to October 6, 2009, into the
16 system. The October 6th order, which was entered into the system the day before, on the 5th, was
17 a willful misrepresentation (fraud) order; the October 7, 2009 order, entered on the 6th, placed the
18 first order in abeyance. A second factor in placing the fraud order in abeyance is the Lewis County
19 Prosecuting Attorney was considering filing criminal fraud charges against Mr. Nakano. Mr. Gruse
20 said without the abeyance, the claimant could be placed in the position of having to testify before
21 the Board before criminal charges had been filed. The October 7, 2009 order was to protect
22 Mr. Nakano from that prospect, according to Mr. Gruse.

23 In January 2010, Mr. Gruse became aware criminal charges against the claimant had been
24 filed by the prosecutor, after which February 5, 2010 order was issued.

25 About the order, Mr. Gruse said he entered it into the system February 4, 2010, because an
26 overnight printing process is involved. On February 5, 2010, Mr. Gruse got printed copies of the
27 order from Mike Threatt, who works in the Department mail room. Deliveries are made at 10 and
28 11 a.m. Mr. Gruse then described the physical process when he gets orders from Mr. Threatt:

29 [H]is first stop is at my desk to hand off the fraud orders. And he hands
30 them to me regardless if they're one of my orders or one of the other two
31 adjudicators' orders. He just dumps them on me and then I hand them
32 to whoever they should go to. And then he goes around the corner right
behind my desk and picks up the outgoing mail and drops off incoming
mail, and then he makes his rounds throughout our floor to the different
programs.

1 And while he's doing that, what I typically do is -- because, you know,
2 we don't do many willful misrepresentation orders. I mean, they're just
3 not that common.

4 When I get my orders from Mike, I staple the -- because they're at least
5 always two pages, sometimes three. I staple the worker copy, the
6 employer copy, and the provider copy, and then I fold each of those
7 copies, stuff each of those into an envelope, make sure that the address
8 shows in the windowpane.

9 And then I hand them to Mike as he's heading back out to the elevator.
10 I mean, it only takes me, you know, a few minutes to do this, and it takes
11 him longer than that to do his mail run. So I hand them to him as he's
12 heading out, and he takes them over to the central office to the
13 mailroom.

14 And then with the remaining file copy that I have I'll make multiple copies
15 of that, and I put that -- I put the original file copy stapled into the tub
16 that goes to the imaging system, which Thomas Thomas had been
17 talking about.

18 7/29/10 Tr. at 110-11.

19 Mr. Gruse and Mr. Parascondola had several telephone conversations. In the first call,
20 which Mr. Gruse believed took place on the 6th or 7th of January 2010; Mr. Parascondola asked
21 about the status of the fraud order. He was told the Department was still waiting to find out from the
22 prosecutor. He said, "I know at one point I told him that we have to wait until criminal charges are
23 filed before we affirm our order, which is to protect the rights of his client, or Mr. Nakano in this
24 case, from being compelled to testify at the Board." 7/29/10 Tr. at 116.

25 On April 13, 2010, Mr. Gruse received an inquiry from a Department revenue agent asking if
26 there had been any kind of protest on the claim. The witness then checked the claim records,
27 including medical information, looking for a protest; none was found. Mr. Gruse then telephoned
28 Mr. Parascondola, about which he said:

29 At that point I placed a call to Mr. Hanemann's office and spoke to Frank
30 because by this time I knew Frank was the paralegal handling this. And
31 I simply asked him if I could verify a date on a particular order. And he
32 said, "What case are we talking about?" And I gave him the claim
33 number. And he said, "Yeah. I have that file right here."

34 And I says, "Well" -- he says, "What order are you inquiring about?"
35 I says, "I'm just trying to find out what date you received the
36 February 5th, 2010 order." And he said, "February 5th. February 5th.
37 Oh, it's right here. We got it on the 8th."

38 And I said, "So it's final and binding, then." And he said, "Well, what do
39 you mean?" And I said, "Well, if you got it on the 8th, today's the 13th.
40 It's final and binding."

1 And he said, "Well, what is this order?" And he started reading it. And
2 the first thing he read was "This order corrects and supersedes the order
3 of October 6th, 2009."

4 Q. So he read that out loud?

5 A. He read that out loud to me.

6 Q. Over the phone?

7 A. Over the phone. . . .

8 7/29/10 Tr. at 123-24. The conversation deteriorated; Mr. Parascondola said Mr. Gruse
9 had promised him not to issue a new order until the client was convicted; the witness said he would
10 not have said that, nor would he leave an order on hold until a criminal matter was concluded.
11 Inconsistently, Mr. Gruse testified: "What I did say was that I would wait until criminal charges
12 were filed, because once criminal charges were filed, we could ask for a stay from the Board."

13 7/29/10 Tr. at 124.

14 Mr. Gruse said he arrived for work the next morning, April 14, 2010, and found a telephone
15 message waiting for him. He said, "And so I played my message, and there was a call from Frank
16 that come in afterhours indicating that he was looking at the wrong order when he told me that he
17 received it on the 8th and that he would like me to call him to discuss this." 7/29/10 Tr. at 125. At
18 about 8 a.m., Mr. Parascondola called. The witness said:

19 And he told me that -- he repeated what he said in the voice mail, that
20 he was looking at the wrong order when he told me that they received it
21 on the 8th. And I says, "Okay. Then when did you receive it?" And he
22 says, "Well, I have a note" -- he said that "The order wasn't stamped in
23 like it usually is." He says, "But I do have a note on my order saying that
24 we sent a copy to Mr. Nakano on the" --

25 (The witness's answer was interrupted here by a question by the
26 Assistant Attorney General.)

27 7/29/10 Tr. at 126.

28 But he said that they had sent a copy -- he had a notation that they had
29 sent a copy to the claimant, Mr. Nakano, on the 10th. So I said to
30 Frank, "Well, okay. If you received -- or if you sent a copy to
31 Mr. Nakano on the 10th, it'd be fair to say that your office had to have
32 received it either on or before the 10th, correct?" And he said, "Yes."
33 And I says, "Okay. Well, then it's still final and binding."

34 7/29/10 Tr. at 127.

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DECISION

The issues presented by these appeals involve whether the Department's February 5, 2010 order became final and binding. Mr. Nakano, as the appealing party, had the burden to show he made a timely protest to the order. RCW 51.52.050; WAC 263-12-115.

The Board of Industrial Insurance Appeals has limited jurisdiction and may only decide those issues in controversy which fall within the limits of its legislative mandate. Department orders which are neither protested nor appealed within 60 days following receipt and communication become final and binding on the parties, even if the order is incorrect. See RCW 51.52.050; RCW 51.52.060; *Marley v. Department of Labor & Indus.*, 125 Wn.2d 533 (1994).

Organizations which process large volumes of mail, like the Department, are not able to recall the details of a specific item or letter. For that reason, it is enough to show the organization's customary practice, and that the practice was followed in the instance of concern. *Farrow v. Department of Labor & Indus.*, 179 Wash. 453 (1934). As that proof is made, the intended recipient is presumed to have received the letter in the due course of the mail service. Department witnesses (John M. Conley, Thomas A. Thomas, and Alan Gruse) described the customary practice for fraud orders and how the practice was adhered to in this matter. The witnesses described how the order was entered into the system on February 4, 2010, printed overnight, how the envelopes were stuffed, addressed, postage applied, and delivered to the USPS bulk mail terminal in Tumwater. The claimant is presumed to have received the order in the usual course of the mails. Receipt is equivalent to communication of a Department order, within the meaning of RCW 51.52.050. *Rodriguez v. Department of Labor & Indus.*, 85 Wn.2d 949 (1975).

The February 5, 2010 order was sent to the law firm as Mr. Nakano's representative. The representative stands in the shoes of the claimant; communication of a Department order to the attorney is equivalent to delivery to the client. Mr. Hanemann's firm did receive the February 5, 2010. When that occurred is dispositive.

The absence of a date-received annotation to the February 5, 2010 order is not a barrier here. The testimony of Mr. Gruse and Mr. Parascondola is enough to determine when Mr. Hanemann's firm came into possession of the order.

Mr. Frank Parascondola, the former paralegal for the firm, was the individual on point for this injury claim. He got at least one copy of the February 5, 2010 order and placed it in the "blue file," a folder Mr. Parascondola kept for documents of import or requiring action or monitoring. When he and Mr. Gruse talked on April 13, 2010, and discussed when the firm got the order,

1 Mr. Parascondola said February 8, 2010. This must be an estimate, because the order had not
2 been date stamped. It is the further conversations that are important.

3 In those other conversations between Mr. Gruse and Mr. Parascondola, the former firm
4 employee said he cc'd the order to the claimant on February 10, 2010. Mr. Gruse recalled that
5 date; Mr. Parascondola said the same thing in a discovery deposition; and he more or less adopted
6 the February 10, 2010 date in his hearing testimony. Considering the evidence as a whole, the
7 claimant's attorney had received February 5, 2010 Department order by February 10, 2010, and
8 perhaps earlier.

9 The claimant's protest to the February 5, 2010 order was filed by facsimile on April 13, 2010.
10 Orders become final 60 days following the date they are communicated to a party. The February 5,
11 2010 order was communicated to the claimant's Counsel on February 10, 2010. It became final
12 January 11, 2010. Each page of the order, Exhibit No. 4, warns the parties it becomes final
13 60 days after communication without protest or appeal. Claimant did not file a timely protest or
14 appeal to the order.

15 Claimant, through Mr. Parascondola's testimony, suggested a protest was not made
16 because he thought the Department had put the matter on hold, pending the outcome of a criminal
17 charge filed by the Lewis County Prosecuting Attorney. Mr. Gruse denies having said the
18 Department was going to wait until the criminal aspect had been concluded. The facts and dialog
19 between Mr. Parascondola and Mr. Gruse in early January 2010, left ample room for a
20 misunderstanding to develop. When the Department issued its February 5, 2010 order, complete
21 with written warning it would become final in 60 days unless protested or appealed, any remaining
22 differences of viewpoint should have been cleared up. The written warning should have been
23 sufficient to dispel any notion the Department was waiting for a criminal resolution before trying to
24 collect allegedly fraudulent gains from the claimant.

25 The Board lacks broad equitable powers. *In re Isaias Chavez, Dec'd.*, BIIA Dec., 85 2867
26 (1987). (See *In re State Roofing & Insulation, Inc.*, BIIA Dec., 89 1770 (1991), declining to expand
27 jurisdiction over untimely appeal.) The courts have emphasized finality of orders not timely
28 protested or appealed. *Marley*.

29 Because Mr. Nakano did not make a timely protest to the February 5, 2010 order, it became
30 final and binding, thereby precluding the Board from having jurisdiction over that order. His direct
31 appeal of the order, Docket No. 10 14497, must be dismissed for lack of jurisdiction.
32

1 Docket No. 10 15897 is an April 27, 2010 appeal to a Department order dated April 15, 2010.
2 That order responded to Mr. Nakano's April 13, 2010 protest of the February 5, 2010 order, and it
3 determined the order protested had become final and binding. The claimant's appeal to the Board
4 in Docket No. 10 15897 was timely, so jurisdiction is proper. Because the February 5, 2010 order
5 had become final, the follow-up order responding to an untimely protest is correct and is affirmed.

6 FINDINGS OF FACT

- 7 1. On July 28, 2008, the Department of Labor and Industries received an
8 Application for Benefits alleging a June 28, 2008 industrial injury to
9 Charles J. Nakano while in the course of employment. On August 1,
10 2008, the Department issued an order in which it rejected the claim. On
11 August 8, 2008, the Department issued an order in which it cancelled
the August 1, 2008 order, and on August 13, 2008, issued an order in
which it allowed the claim as an industrial injury.

12 On October 6, 2009, the Department issued an order in which it rejected
13 the claim and assessed the claimant \$985,973.92 for overpaid medical
14 and time-loss compensation benefits, including a 50 percent penalty, on
15 the basis of willful misrepresentation. On October 7, 2009, the claimant
16 protested the October 6, 2009 order; on October 7, 2009, the
17 Department issued an order in which it held the October 6, 2009 order in
18 abeyance. On February 5, 2010, the Department issued an order in
19 which it corrected and superseded its prior order dated October 6, 2009,
the order rejected the claim, and it assessed the claimant \$992,820.93
for overpaid medical and time-loss compensation benefits, including a
50 percent penalty, on the basis of willful misrepresentation.

20 On April 13, 2010, the claimant filed a protest to the Department order
21 dated February 5, 2010. On April 14, 2010, the claimant filed a Notice
22 of Appeal to the Department order dated February 5, 2010, with the
Board of Industrial Insurance Appeals. The Board accepted the appeal
under Docket No. 10 14497, and agreed to hear the appeal.

23 On April 15, 2010, the Department issued an order in which it
24 determined it could not reconsider the February 5, 2010 order because
25 the claimant's protest was not received within the time permitted for
26 protests. On May 24, 2010, the claimant filed a Notice of Appeal to the
27 Department order dated April 15, 2010, with the Board. The Board
accepted the appeal under Docket No. 10 15897, and agreed to hear
the appeal.

- 28 2. As of February 5, 2010, Jack W. Hanemann was the claimant's attorney
29 and representative for the alleged industrial injury; his mailing address is
30 2120 State Avenue NE, Suite 101, Olympia, WA 98506.
- 31 3. On February 5, 2010, the Department mailed its order dated February 5,
32 2010, to Charles Nakano, c/o Hanemann Bateman, et al, at 2120 State
Avenue NE, Suite 101, Olympia, WA 98506. The order was properly

1 addressed, had the correct postage, and was delivered to the United
2 States Post Office for regular mail delivery to the claimant.

- 3 4. Charles J. Nakano, through his attorney and representative, received a
4 copy of the February 5, 2010 order, on or before February 10, 2010.
5 5. Charles J. Nakano filed a protest to the February 5, 2010 order on
6 April 13, 2010.
7 6. Charles J. Nakano's April 13, 2010 protest was filed more than 60 days
8 following February 10, 2010.

9 **CONCLUSIONS OF LAW**

- 10 1. In **Docket No. 10 14497**, the Board of Industrial Insurance Appeals has
11 jurisdiction over the parties.
12 2. Charles J. Nakano did not file a timely protest to the Department order
13 dated February 5, 2010, and that order became final and binding, as
14 contemplated by RCW 51.52.050 and *Marley v. Department of Labor &*
15 *Indus.*, 125 Wn.2d 533 (1994).
16 3. The Board of Industrial Insurance Appeals does not have jurisdiction
17 over the subject matter of this appeal.
18 4. The appeal filed by Charles J. Nakano on April 14, 2010, to the
19 Department order dated February 5, 2010, is dismissed.
20 5. In **Docket No. 10 15897**, the Board of Industrial Insurance Appeals has
21 jurisdiction over the parties and the subject matter of this appeal.
22 6. Charles J. Nakano did not file a timely protest to the Department order
23 dated February 5, 2010, and that order became final and binding, as
24 contemplated by RCW 51.52.050 and *Marley v. Department of Labor &*
25 *Indus.*, 125 Wn.2d 533 (1994).
26 7. Because the Department order dated February 5, 2010, became a final
27 and binding order, the Department was not able to reconsider that order,
28 as provided by RCW 51.52.051.
29 8. The Department order dated April 15, 2010, is correct and is affirmed.

30 DATED: SEP 29 2010

31
32
for 
WAYNE B. LUCIA
Industrial Appeals Judge
Board of Industrial Insurance Appeals