

Belden, Raymond

AGGRAVATION (RCW 51.32.160)

"Deemed granted" application to reopen claim

Where the Department grants a worker's application to reopen for aggravation, the employer timely protests the reopening order, and the Department holds the reopening order in abeyance, the Department must deny the application to reopen within the time limits set out in RCW 51.52.060 or the application to reopen will be deemed granted.

...*In re Raymond Belden*, BIIA Dec., 12 14005 (2013) [*Editor's Note*: The Board's decision was appealed to Spokane County Superior Court, No. 13-2-01191-8.]

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1 Proposed Decision and Order as the documents called to our attention prior to issuing this order.
2 We agree with Mr. Belden and our industrial appeals judge that Mr. Belden's application to reopen
3 is deemed granted.

4 RCW 51.32.160(1)(d) provides that an application to reopen shall be granted if the
5 Department does not issue an order denying the application within the prescribed time period.
6 Here, the Department issued an order in which it granted the application to reopen within the
7 prescribed time frame but after a timely protest reversed its decision and denied the application
8 after the prescribed time frame had expired. We conclude that the statute requires the application
9 be denied within the prescribed time frame and the protest of an order that grants the application
10 does not relieve the Department of the obligation to deny the application within the statutorily
11 prescribed time frame.

12 Mr. Belden sustained an industrial injury on February 1, 2011, in the course of his
13 employment for Krueger Sheet Metal Company. The claim was allowed by Department order dated
14 February 11, 2011, and later closed by an April 29, 2011 order. The closing order was not
15 protested or appealed and it became final and binding.

16 On August 3, 2011, the Department received Mr. Belden's application to reopen his claim in
17 which he alleged worsening of conditions related to the industrial injury. On September 6, 2011,
18 the Department reopened the claim and approved payment of provisional time-loss compensation
19 benefits payments. The employer timely protested the September 6, 2011 order and each of the
20 time-loss compensation benefits orders. On October 27, 2011, the Department informed the
21 parties by its order that it was reconsidering the September 6, 2011 reopening order and the
22 provisional time-loss compensation benefits orders, thereby holding them in abeyance. After a
23 lengthy delay, on March 16, 2012, the Department corrected and superseded the September 6,
24 2011 order and denied Mr. Belden's application to reopen his industrial injury claim. On March 19,
25 2012, the Department issued an overpayment order for provisional time-loss compensation benefits
26 paid to Mr. Belden from July 15, 2011, through November 30, 2011. Mr. Belden filed a protest on
27 March 27, 2012. On April 5, 2012, the Department affirmed its March 16 and 19, 2012 orders.
28 Mr. Belden appealed the April 5, 2012 order to this Board.

1 RCW 51.32.160 governs applications to reopen closed claims for aggravation of condition.

2 Section (1)(d) provides:

3 If an **order denying** an application to reopen filed on or after July 1,
4 1988, is not issued within ninety days of receipt of such application by
5 the self-insured employer or the department, such application shall be
6 deemed granted. However, for good cause, the department may extend
7 the time for making the final determination on the application for an
8 additional sixty days.

7 (Emphasis added.)

8 This provision was added to RCW 51.32.160 in 1988. Laws of 1988, ch. 161, § 11.

9 Not long after the 1988 amendment was enacted there were a number of appeals in cases
10 in which the Department issued an "order denying" an application to reopen the claim within the
11 time prescribed but then on its own motion immediately directed that the order denying the
12 application to reopen be held in abeyance. We held such action by the Department was prohibited
13 because it rendered the "deemed granted" provision completely illusory. See, for example, *In re*
14 *John Aitchison*, BIIA Dec., 90 4447 (1990); *In re Donald Schroeder*, BIIA Dec., 90 3177 (1990); and
15 *In re Virginia Watts*, BIIA Dec., 90 3816 (1990). In each of those cases we held the applications to
16 reopen the claims were "deemed granted." However, the Washington Supreme Court later upheld
17 the Department's practice in *Tollycraft Yachts Corp. v. McCoy*, 122 Wn.2d 426 (1993). The court
18 held the right of the Department to hold a decision in abeyance under the provisions of
19 RCW 51.52.060 must be considered separately from the deemed granted provisions of
20 RCW 51.32.160. At the time, RCW 51.52.060 allowed the Department to hold an order in
21 abeyance for a period of ninety days, a period that could be extended up to an additional ninety
22 days for good cause.

23 Responding to *Tollycraft*, in 1995 the legislature amended RCW 51.52.060, limiting the
24 Department's abeyance authority to that found in RCW 51.32.160(1)(d). RCW 51.52.060, in
25 relevant part, currently provides:

26 (4) The department, either within the time limited for appeal, or within
27 thirty days after receiving a notice of appeal, may:

28 (a) Modify, reverse, or change any order, decision, or award; or

29 (b)(i) Except as provided in (b)(ii) of this subsection, hold an order,
30 decision, or award in abeyance for a period of ninety days which time
31 period may be extended by the department for good cause stated in
32 writing to all interested parties for an additional ninety days pending
further investigation in light of the allegations of the notice of appeal; or

1 (ii) Hold an order, decision, or award issued under RCW
2 51.32.160 in abeyance for a period not to exceed ninety days from
3 the date of receipt of an application under RCW 51.32.160. The
4 department may extend the ninety-day time period for an additional
5 sixty days for good cause.

6 For purposes of this subsection, good cause includes delay that
7 results from conduct of the claimant that is subject to sanction under
8 RCW 51.32.110.

9 The board shall deny the appeal upon the issuance of an order under
10 (b)(i) or (ii) of this subsection holding an earlier order, decision, or award
11 in abeyance, without prejudice to the appellant's right to appeal from any
12 subsequent determinative order issued by the department.

13 **This subsection (4)(b) does not apply to applications deemed
14 granted under RCW 51.32.160.**

15 **(5) An employer shall have the right to appeal an application
16 deemed granted under RCW 51.32.160 on the same basis as any
17 other application adjudicated pursuant to that section.**

18 (Emphasis added).

19 Under the 1995 amendments, the time limitations of RCW 51.32.160(1)(d) and
20 RCW 51.52.060(4)(b)(ii) run concurrently. The abeyance provisions of RCW 51.52.060(4)(b)(ii) do
21 not apply when the application to reopen the claim has already been deemed granted. However,
22 the 1995 amendments also make it clear that an employer would still have the right to appeal a
23 "deemed granted" order to the Board and contest, on the merits, the issue of whether there had
24 been an aggravation of condition. Thus, while the deemed granted provision may limit an
25 employer's right to request reconsideration by the Department of an order determining an
26 application to reopen was "deemed granted," it does not preclude an employer from appealing such
27 an order to the Board. *In re Stephen Murphy*, BIIA Dec., 02 12603 (2003).

28 After the time limitations of RCW 51.32.160(1)(d) and RCW 51.52.060(4)(b)(ii) have passed,
29 the Department loses the authority to hold an order issued under RCW 51.32.160 in abeyance. *In*
30 *re Nancy Stumbaugh*, BIIA Dec., 95 7068 (1996). However, if the Department has entered a timely
31 order denying an application to reopen a claim under RCW 51.32.160(1)(d), the Department might
32 thereafter exceed the time limitations of RCW 51.52.060(4)(b)(ii) in response to a protest or appeal.
If a party has protested an order in which the Department denied reopening issued under
RCW 51.32.160, the Department has fulfilled its obligation under RCW 51.52.060(4)(b)(ii) and can
reconsider its decision. *In re Joseph Brown*, BIIA Dec., 96 4577 (1996).

1 This case is distinguishable from the aforementioned cases. Here the Department granted
2 Mr. Belden's application to reopen, then after a protest by the employer it held the reopening order
3 in abeyance for a significant time. The Department received Mr. Belden's application to reopen on
4 August 3, 2011. When the Department issued the order on September 6, 2011, and granted the
5 application, the period available for the Department to deny the application was not tolled. The
6 Department's decision window was until November 1, 2011, the 90th day following its receipt of the
7 application, and the last day it could take action on Mr. Belden's reopening application. The
8 Department did not take further action on the application within this time frame, nor did the
9 Department issue any order in which it declared there was good cause to extend the decision
10 period. Because no extension order was entered, and no "order denying" the application to reopen
11 the claim was issued by November 1, 2011, the application to reopen the claim is "deemed
12 granted."

13 The Department waited until March 16, 2012, before it denied Mr. Belden's request to
14 reopen his industrial injury claim. Here the remedy for the delay is specified by
15 RCW 51.32.160(1)(d). Mr. Belden's application to reopen his claim must be deemed granted. An
16 employer may appeal a deemed granted order in the same manner as any other application
17 adjudicated under this section. RCW 51.32.160(5). The Department order dated April 5, 2012, is
18 reversed and remanded, and we adopt our industrial appeals judge's findings of fact and
19 conclusions of law.

20 **FINDINGS OF FACT**

- 21 1. On July 16, 2012, an industrial appeals judge certified the parties had agreed
22 to include the Jurisdictional History in the Board record.
- 23 2. The claimant, Raymond W. Belden, sustained an injury on February 1, 2011,
24 while acting in the course of employment with his employer, Krueger Sheet
25 Metal Company. His claim for injury was timely filed, the claim was allowed,
26 and the claim was closed by a final order dated April 29, 2011
- 27 3. On August 3, 2011, Mr. Belden filed an application to reopen his claim for
28 aggravation of condition. On September 6, 2011, the Department issued an
29 order in which it reopened the claim, effective July 15, 2011. On October 26,
30 2011, the employer filed a Protest and Request for Reconsideration of the
31 order dated September 6, 2011. On October 27, 2011, the Department issued
32 an order in which it indicated it was reconsidering the order dated
September 6, 2011. At no time on or before November 1, 2011, did the
Department enter an order in which it extended for good cause the time in
which it had to issue a final determination.

- 1 4. No further order concerning the application to reopen the claim was entered by
2 the Department until March 16, 2012, at which time the Department entered an
3 order in which it corrected and superseded the order dated September 6,
4 2011, and denied the application to reopen the claim.
5 5. The documents submitted by the parties and other evidence demonstrate
6 there is no genuine issue as to any material fact.

7 **CONCLUSIONS OF LAW**

- 8 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to
9 and the subject matter of this appeal.
10 2. There are no genuine issues of material fact with respect to the issue of
11 whether the application to reopen the claim, filed on August 3, 2011, was
12 deemed granted under RCW 51.32.160(1)(d), and the claimant, Raymond W.
13 Belden, is entitled to a decision as a matter of law as contemplated by CR 56.
14 3. The application to reopen the claim filed August 3, 2011, was "deemed
15 granted" within the meaning of RCW 51.32.160(1)(d) because no order
16 denying the application was issued by the Department within ninety days of
17 the date it was received.
18 4. The order of the Department dated April 5, 2012, is incorrect and is reversed,
19 and this claim is remanded to the Department to issue a further order in which
20 it declares that the application to reopen the claim filed August 3, 2011, was
21 "deemed granted" on November 2, 2011, and to take such other and further
22 action as may be indicated by the facts and the law. This is without prejudice
23 to the right of the employer to appeal such further "deemed granted" order to
24 the Board, as allowed by RCW 51.52.060(5). The provisional time-loss
25 compensation benefits overpayment order of March 19, 2012, should be held
26 in abeyance until such time as there is a final order concerning the reopening
27 of the claim.

28 Dated: March 13, 2013.

29 BOARD OF INDUSTRIAL INSURANCE APPEALS

30 /s/ _____
31 DAVID E. THREEDY Chairperson

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