

Shore, Edna

AGGRAVATION (RCW 51.32.160)

"Deemed granted" application to reopen claim

DEPARTMENT

Reassumption of jurisdiction (RCW 51.52.060)

The provisions of RCW 51.32.160, as amended in 1988, which render an application to reopen a claim "deemed granted" if an order denying the application is not issued within 90 days of receipt of the application, do not apply where the Department denied the application within the time allowed but, following the filing of an appeal, reassumed jurisdiction over the claim and held its order denying the application in abeyance.***In re Edna Shore, BIIA Dec., 89 5898 (1990)*** [Editor's Note: The Board's decision was appealed to superior court under Clallam County Cause No. 91-2-00740-6.]

Scroll down for order.

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

1 **IN RE: EDNA E. SHORE**) **DOCKET NO. 89 5898**
2)
3) **ORDER VACATING PROPOSED DECISION**
4) **AND ORDER AND REMANDING APPEAL FOR**
5 **CLAIM NO. F-713323**) **FURTHER PROCEEDINGS**

6 APPEARANCES:

7
8 Claimant, Edna E. Shore by
9 Casey & Casey, P.S., per
10 Gerald L. Casey and Carol L. Casey

11
12 Employer, Fraternal Order of Eagles # 483,
13 None

14
15 Department of Labor and Industries, by
16 The Attorney General, per
17 Art E. DeBusschere, Assistant, and Shawn Ruth, Paralegal

18
19 This is an appeal filed by the claimant, Edna E. Shore, on December 22, 1989 from an order of
20 the Department of Labor and Industries dated December 7, 1989. The order affirmed an order dated
21 March 30, 1989, which determined that the claimant was not eligible for disability benefits because the
22 application to reopen the claim for aggravation of condition was not received within the appropriate
23 time limit, and denied medical benefits to the claimant for the reason that there was no evidence that
24 the condition covered under this claim had worsened. **REMANDED FOR FURTHER**
25 **PROCEEDINGS.**

26
27
28 **DECISION**

29
30
31 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
32 and decision on a timely Petition for Review filed by the Department of Labor and Industries to a
33 Proposed Decision and Order issued on July 9, 1990 in which the order of the Department dated
34 December 7, 1989 was reversed, and this claim remanded to the Department with direction to reopen
35 the claim, and take such further action as is indicated by the law and the facts.

36
37
38 We have granted review for the purpose of remanding this matter to the hearing process, for a
39 decision on the merits of whether the conditions causally related to the claimant's industrial injury of
40 August 7, 1968 worsened or became aggravated between March 9, 1987 and December 7, 1989,
41 such as to require further medical treatment.

42
43
44 This claim was first closed on March 11, 1971 and was last closed effective March 9, 1987.
45 Ms. Shore's application to reopen the claim was filed on February 3, 1989. The order denying that
46
47

1 application was issued by the Department on March 30, 1989. On April 27, 1989 Ms. Shore filed a
2 notice of appeal with this Board from the Department order of March 30, 1989. Pursuant to the
3 authority provided by RCW 51.52.060, the Department, on May 3, 1989, held its order of March 30,
4 1989 in abeyance and reassumed jurisdiction over the matter. It was not until December 7, 1989 that
5 the Department issued its order, which is the subject of this appeal, that affirmed the order of March
6 30, 1989 denying the application to reopen the claim.
7

8
9
10 RCW 51.32.160, as amended in 1988, provides that an application to reopen a claim shall be
11 "deemed granted" if an order denying the application is not issued within ninety days of receipt of the
12 application. For good cause, the Department may extend the time for making the determination on the
13 application for an additional sixty days. Our Industrial Appeals Judge determined that the Department
14 had ninety days from the date on which it reassumed jurisdiction over this matter, May 3, 1989, in
15 which to issue a further order denying the application. Because its order of December 7, 1989 was
16 entered more than ninety days from that date, it was concluded that the reopening application was
17 deemed granted. We disagree.
18

19
20
21
22 The Department order of March 30, 1989 which denied the application to reopen the claim was
23 issued well within ninety days of February 3, 1989, the date on which the Department received the
24 application. The Department therefore met the time requirement contained within RCW 51.32.160.
25 When the claimant filed her notice of appeal from that order, the Department had the specific authority,
26 pursuant to RCW 51.52.060, to hold its order of March 30, 1989 in abeyance for a period of ninety
27 days, which time period could have been extended by the Department for good cause stated in writing
28 to all interested parties for an additional ninety days, pending further investigation. Obviously the
29 Department did not act within the time limitations for further investigation provided by RCW 51.52.060.
30

31
32
33
34 However, unlike the provisions of RCW 51.32.160, RCW 51.52.060 contains no remedy to a
35 party when the Department has failed to comply with its time limitations. We have held that the
36 Department may not deny an aggravation application and, on its own motion, issue an abeyance order
37 pursuant to RCW 51.52.060 in an attempt to artificially expand the time limitations provided by RCW
38 51.32.160. In re Donald D. Schroeder, Dckt. No. 90 3177 (July 16, 1990). To allow such action would
39 render the time limitations of RCW 51.32.160 completely illusory. On the other hand, there is nothing
40 in RCW 51.32.160 which otherwise purports to modify the provisions of RCW 51.52.060, which allow
41 the Department to reconsider any decision previously made when an appeal from such decision has
42 been filed. When a party aggrieved by an order denying a reopening application has filed a protest or
43
44
45
46
47

1 notice of appeal from that order, and the Department issues an abeyance order in response thereto,
2 the provisions of RCW 51.52.060 apply. The Department's failure to comply with the time limitations
3 contained within RCW 51.52.060 may subject the Department to an action for mandamus (See, e.g.,
4 RCW 7.16, et seq.) but will not result in the application to reopen being "deemed granted" pursuant to
5 the provisions of RCW 51.32.160.
6
7

8
9 It is noted that the Department duly promulgated a regulation to implement the 1988
10 amendments to RCW 51.32.160. The pertinent portions of that regulation are completely in accord
11 with our view on the issue here before us. We quote:
12

13 The director at any time may, upon the worker's application to reopen for
14 aggravation or worsening of condition, provide proper and necessary
15 medical and surgical services as authorized under RCW 51.36.010
16

17 Applications for reopenings filed on or after July 1, 1988, must be acted
18 upon by the department within ninety days of receipt of the application by
19 the department or the self-insurer. The ninety-day limitation shall not
20 apply if the worker files an appeal or request for reconsideration of the
21 department's denial of the reopening application.
22

23 Emphasis added. WAC 296-14-400 Reopenings for Benefits.

24 Pursuant to WAC 263-12-145(3) and RCW 51.52.102, we hereby set aside the Proposed
25 Decision and Order entered on July 9, 1990 and remand this appeal to the hearing process for the
26 scheduling of further proceedings on the sole issue of whether the claimant's conditions causally
27 related to her industrial injury of August 7, 1968 worsened or became aggravated between March 9,
28 1987 and December 7, 1989, such as to require further medical treatment. A further Proposed
29 Decision and Order shall be issued after the parties to these proceedings have had an opportunity to
30 present such evidence as is appropriate to this limited issue. The Proposed Decision and Order shall
31 be based upon the entire record and the parties shall have the right, pursuant to RCW 51.52.104, to
32 petition for review of such further Proposed Decision and Order.
33
34
35
36
37

38 It is so ORDERED.

39 Dated this 28th day of September, 1990.

40
41 BOARD OF INDUSTRIAL INSURANCE APPEALS

42 /s/

43 _____
44 SARA T. HARMON

Chairperson

45 /s/

46 _____
47 PHILLIP T. BORK

Member