Hansen, Wallace

AGGRAVATION (RCW 51.32.160)

"Deemed granted" application to reopen claim

The Department's failure to respond to a physician's submission of office notes recommending further treatment within the time prescribed by RCW 51.32.160, the application to reopen is deemed granted, notwithstanding the provisions of WAC 296-14-400. WAC 296-14-400 is invalid to the extent it is an attempt to delay the running of the 90-day period within which the Department is required to act following the filing of an application to reopen a claim for aggravation of condition. ***….In re Wallace Hansen,* BIIA Dec., 90 1429 (1991)** [*Editor's Note*: *Cf. Tollycraft Yachts v. McCoy*, 122 Wn.2d 426, 433 (1993).]

APPLICATION TO REOPEN CLAIM

Office notes treated as application to reopen

An application to reopen must be in writing, be individual in nature, and give the Department information regarding the reason for the application *Donati v. Department of Labor & Indus*., 35 Wn.2d 151 (1949)), but the Department may not require a worker to submit an application to reopen by using a particular form (WAC 296-14-400). Where worker's physician submitted office notes recommending further treatment, the Department should have treated the same as an application to reopen. ***...In re Wallace Hansen*, BIIA Dec., 90 1429 (1991)** [*Editor's Note*: *Cf. Tollycraft Yachts v. McCoy*, 122 Wn.2d 426, 433 (1993).]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: WALLACE W. HANSEN	**)**	**DOCKET NO. 90 1429**
	)	
CLAIM NO. J-338818	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Wallace W. Hansen, by
Casey & Casey, per
Carol Casey & Gerald Casey

Employer, Mission Creek Youth Forest Camp, by
None

Department of Labor and Industries, by
The Attorney General, per
Micheal D. Noah and Mitchell T. Harada, Assistants, and Steve LaVergne, Paralegal

This is an appeal filed by the claimant on March 22, 1990 from an order of the Department of Labor and Industries dated March 12, 1990, which declared the Department order of February 9, 1990, which purported to deny an application to reopen the claim for aggravation of condition, null and void since the Department had not received a request for reopening "as required by law" and the Department was therefore without jurisdiction to issue the February 9, 1990 order. **REVERSED AND REMANDED.**

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order issued on November 13, 1990 in which the order of the Department dated March 12, 1990 was affirmed.

The central issue in this appeal is whether the page of Dr. John C. Oakley's office notes received by the Department on April 12, 1989, constitutes an application to reopen the claim within the meaning of RCW 51.32.160. The claimant contends that the office notes constitute an application to reopen. Since the Department failed to act within ninety days of receiving Dr. Oakley's office notes, the claimant asserts that his application is "deemed granted" pursuant to RCW 51.32.160, as amended in 1988. The Department disagrees. The Department argues that the office notes are insufficient as a matter of law to constitute an application to reopen and that the Department is without jurisdiction to determine whether a claim should be reopened until an application form provided by the

Department has been completed by the worker and his doctor and filed with the Department. Neither the parties nor the Industrial Appeals Judge referred to WAC 296-14-400.

Our Industrial Appeals Judge determined that Dr. Oakley's progress notes did not constitute an application to reopen the claim. We disagree. Dr. Oakley's office notes contain sufficient information to meet the legal requirements of an application to reopen the claim for aggravation of condition. Under RCW 51.32.160, the Department was required to act on that application within ninety days of receipt. Since the Department failed to act on the application to reopen within that time period, the application to reopen this claim is deemed granted.

Wallace W. Hansen suffered a low back industrial injury on October27, 1983 while employed by Mission Creek Youth Forest Camp. His claim was allowed and closed on February 27, 1984, with medical treatment only. On August 28, 1985 Mr. Hansen filed an application to reopen the claim for aggravation of condition. On November 14, 1985 that application to reopen was granted by the Department and further treatment, including a lumbar spinal fusion, was provided. The claim was reclosed on December 31, 1987 with a permanent partial disability award for Category 5 of WAC 296-20-280.

On April 12, 1989 the Department received a copy of one page of office progress notes from Dr. John C. Oakley. Those office notes are Exhibit No. 2 and are attached to this Decision and Order. Dr. Oakley's notes include the Department's claim number for Mr. Hansen's industrial injury of October 27, 1983 and include a description of findings made by Dr. Oakley in March of 1989. Dr. Oakley indicated, among other things, that a CT scan and plain films taken in March 1989 showed "degenerative collapse of the L-5-S-1 level below his fusion at 4-5." Dr. Oakley recommended a 4-6 week program of physical therapy with a follow-up evaluation as to further treatment.

The Department did not respond to Dr. Oakley's office notes until five months later, on September 26, 1989. On that date, the Department directed a letter to Dr. Oakley, as well as to counsel for Mr. Hansen. Exhibit No. 3. The Department's letter stated that Mr. Hansen's claim had been closed on December 31, 1987 with a Category 5 permanent partial disability award, and inquired whether Dr. Oakley felt that the claimant's condition had worsened since the claim closure. If so, the Department directed Dr. Oakley to file a reopening application filled out by the doctor and Mr. Hansen. Finally, the letter indicated that if no reopening application was filed within thirty days the Department would assume Mr. Hansen's condition had not worsened.

Apparently no response was received, and more than four months later, on February 9, 1990 the Department issued an order denying reopening on the basis that there was no evidence of worsening since previous claim closure. Mr. Hansen appealed that order, and on March 12, 1990 the Department issued two orders. The first held the February 9, 1990 order in abeyance, and the second determined that, because the Department had not received an aggravation application from the claimant, the Department was "without jurisdiction to issue" the February 9, 1990 order and that order was null and void.

Initially Mr. Hansen argues that the February 9, 1990 order is a res judicata determination that Dr. Oakley's office notes constitute an application to reopen. Mr. Hansen apparently believes that since the Department issued an order denying reopening of the claim, the Department is now barred from arguing that Dr. Oakley's office notes do not constitute an application to reopen. This contention is without merit. In response to the claimant's notice of appeal, the Department issued an order on March 12, 1990, holding the February 9, 1990 order in abeyance pending further consideration. The Department was within its authority to do so. RCW 51.52.060. An order held in abeyance is without any force or effect and the Department must issue a further determinative order. Mr. Hansen can draw no support from the fact that the Department had previously issued and ultimately lawfully held its order of February 9, 1990 in abeyance.

The Industrial Insurance Act is to be liberally construed to reduce "to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment." RCW 51.12.010. Formal or technical requirements regarding the filing of requests for benefits solely on prescribed forms should not be construed so rigidly as to act as barriers to the fair administration of our Act. Our Supreme Court in Donati v. Dep't of Labor & Indus., 35 Wn.2d 151 (1949) discussed the requirements associated with filing an application to reopen a claim for aggravation of condition. In Donati, the claimant's counsel forwarded a letter to the Department, listing 18 claimants and their claim numbers, including Mr. Donati. The letter, however, failed to give any information regarding the basis of the claim for aggravation, but merely stated that the attorney had been retained by the 18 claimants to reopen their respective claims for aggravation. The Supreme Court held that the letter sent by claimant's counsel to the Department was insufficient to constitute an application to reopen Mr. Donati's individual claim. The court stated that the Act did not contemplate an en masse application, but required individual applications for reopening. In addition, the court determined that the application

must be in writing, and it must give the Department some information as to the reason for the application. Donati, supra, at 154.

The letter sent by Mr. Donati's counsel is quoted by the court as follows:

> We have lost some of our previous notes in the Gus Donati claim, but he definitely asked me on at least two different occasions to make application to reopen his claim, and I am writing to him to obtain formal authorization for change of address.

Donati, supra, at 153.

Donati indicates that an application to reopen must be in writing, must be individual in nature, and must give the Department some information regarding the reason for the application. Dr. Oakley's office notes for his examinations in March of 1989 meet these requirements. Those office notes clearly notify the Department of the degenerative collapse at the L5-S1 level below the fusion and the need for further treatment. Mr. Hansen's name and claim number appear at the top of the office notes. The CT scan mentioned in the notes revealed an objective worsening of Mr. Hansen's low back condition. Dr. Oakley clearly recommended further treatment for the same condition which had previously been covered by the industrial injury claim. Dr. Oakley apparently understood that he had an obligation to forward that information to the Department of Labor and Industries, and Exhibit No. 2 shows that he did so. The only thing not included in Dr. Oakley's notes is a specific request that Mr. Hansen's claim be reopened.

Although not raised by either party nor discussed in the Proposed Decision and Order, WAC 296-14-400 provides, in pertinent part:

> When a claim has been closed by the department or self-insurer for sixty days or longer, the worker must file a written application to reopen the claim. An informal written request filed without accompanying medical substantiation of worsening of the condition will constitute a request to reopen, but the time for taking action on the request shall not commence until an application form provided by the department has been completed in full by the worker and the doctor and filed with the department or self-insurer, as the case may be.
>
> A formal application occurs when the worker and doctor completes and files the application for reopening provided by the department. Upon receipt of an informal request without accompanying medical substantiation of worsening of the worker's condition, the department or self-insurer shall promptly provide the necessary application to the worker for completion.

WAC 296-14-400 is apparently an attempt by the Department to delay the running of the ninety-day period within which the Department is required to act following the filing of an application to reopen a claim for aggravation of condition. Unless the application to reopen is on the Department form and includes medical substantiation, the regulation states that the time limit imposed by RCW 51.32.160 will not commence to run. To the extent the regulation purports to set forth stricter standards than the principles enunciated by the Supreme Court in Donati, it may not be valid. In any event, while Dr. Oakley's notes were not on an application to reopen form provided by the Department, they certainly contained clear medical substantiation of worsening, and lacked only the specific word "request."

We further note the Department's form Application to Reopen Claim, Exhibit No. 9. The questions asked of the physician in the "Doctor" portion of this form are virtually all answered by the information included in Dr. Oakley's progress notes. Furthermore, the form advises the worker that he "may use this form" to apply for reopening. This obviously implies that other documentary submissions also "may" be accepted as reopening applications. Thus, the form itself appears to contradict the regulation's attempt to require that only a filing of the Department-provided form will constitute a "formal" application to reopen.

The Department's regulation also appears to create two classes of written applications to reopen. If the written application is an informal one without accompanying medical substantiation of worsening of the condition, it will apparently constitute a request to reopen, for the purposes of RCW 51.28.040, so that benefits, if found to be factually justified, could be provided up to sixty days prior to the receipt of the application. However, the same document would not constitute an application to reopen within the meaning of RCW 51.32.160, which would trigger the "deemed granted" provisions of that statute. We find nothing within our Industrial Insurance Act indicating that the Department should "classify" applications to reopen in two separate categories for two separate purposes. If an application to reopen is legally sufficient, it should be so for all purposes. If the application meets the requirements set forth in Donati, it triggers the provisions of RCW 51.28.040, as well as the provisions of RCW 51.32.160.

We recognize that the Department receives a large volume of documents through the mail regarding numerous claims. We also recognize that the Department has a difficult task to perform in reviewing, analyzing, and acting on all of the requests received from injured workers, physicians, and others. Nonetheless, it is a task that has been assigned by the Legislature. By enacting the "deemed granted" provisions of RCW 51.32.160, the Legislature has mandated that an application to reopen for aggravation of condition is deemed granted if not acted upon within ninety days.

The Legislature has not dictated a particular form which must be filed. It seems to us if, as here, the claim is closed and the document filed contains an individual's name and claim number, medical substantiation of apparent worsening of the industrially related condition, and a proposed course of treatment or other activity regarding that condition, it adequately puts the Department on notice that the claimant is seeking reopening of his claim.

In summary, we believe Donati governs the formal requirements for filing an application to reopen for aggravation of condition. Donati requires that an individualized written application to reopen be filed by or on behalf of the claimant, which provides some information to the Department regarding the reason for the application. Dr. Oakley's office notes of March 1989 provide medical substantiation that Mr. Hansen's condition caused by the industrial injury has worsened and that he needs further treatment. Those office notes satisfy the Donati requirements. The provisions of WAC 296-14-400, which purport to require that an application to reopen for aggravation must be completed in full on a specific form provided by the Department before any action will be taken, appear to be even more stringent than the Donati requirements or the requirements of RCW 51.32.160.

Dr. Oakley's office notes were filed with the Department on April 12, 1989. Under the circumstances here presented, they constitute a legally sufficient application to reopen for aggravation of condition. The Department did not act on that application within ninety days of the date of receipt, i.e., by July 11, 1989. Thus, the application was deemed granted as of July 12, 1989.

FINDINGS OF FACT

1. On October 27, 1983 Wallace Hansen sustained an industrial injury to his low back while in the course of his employment with Mission Creek Youth Forest Camp. He filed a claim with the Department on November 2, 1983. The claim was allowed and after various administrative actions it was closed on December 31, 1987 with a permanent partial disability award equal to Category 5 of WAC 296-20-280.

2. On April 12, 1989 the Department received Exhibit No. 2, the progress notes of John C. Oakley, M.D., regarding Wallace Hansen, Claim No. J-338818. Those progress notes described examinations of Mr. Hansen's low back performed by Dr. Oakley on March 15, 1989 and March 29, 1989. The notes described objective physical findings of worsening of the back condition related to the industrial injury of October 27, 1983 and outlined a course of treatment to be followed.

3. The Department failed to act on the information contained in Dr. Oakley's office notes until September 26, 1989. On that date the Department sent a letter to Dr. Oakley and to claimant's counsel (Exhibit No. 3). The Department advised them that Mr. Hansen's claim had been closed on December 31, 1987 with a Category 5 permanent partial disability award and asked if Dr. Oakley felt claimant's condition had worsened since claim closure. If so, the Department directed Dr. Oakley to file a reopening application, filled out by the doctor and Mr. Hansen.

4. No reopening application on the Department's form was received. On February 9, 1990 the Department of Labor and Industries issued an order denying reopening of the claim.

5. On March 12, 1990 the Department held the February 9, 1990 order in abeyance. On March 12, 1990 the Department also issued an order indicating "WHEREAS, the Department denies reopening of this claim by order dated 2-9-90, and WHEREAS, no request for reopening has been made by the injured worker as required by law; the Department was without jurisdiction to issue the aforementioned order and that order is hereby declared null and void."

6. On March 22, 1990, the claimant filed a notice of appeal with the Board of Industrial Insurance Appeals from the March 12, 1990 order. On April 23, 1990 the Board issued an order granting the appeal, assigned it Docket No. 90 1429 and directed that further proceedings be held on the issues raised.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and the subject matter to this appeal.

2. The progress notes received by the Department from Dr. Oakley regarding Wallace Hansen's claim (J-338818) on April 12, 1989 constitute an application to reopen Mr. Hansen's claim for aggravation of condition within the meaning of RCW 51.32.160.

3. Because the Department failed to deny the claimant's reopening application within ninety days of receipt, the application to reopen filed with the Department on April 12, 1989 was deemed granted as of July 12, 1989, pursuant to the requirements of RCW 51.32.160 as amended in 1988.

4. The order of the Department of Labor and Industries issued on March 12, 1990 which declared the February 9, 1990 Department order null and void and declined to issue an order regarding reopening until a request to reopen was made "as required by law", is incorrect and is reversed and this matter is remanded to the Department to issue an order reopening the claim for aggravation of condition effective sixty days prior to April 12, 1989, and to provide benefits as indicated by the facts and allowed by law.

It is so ORDERED.

Dated this 10th day of June, 1991.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
SARA T. HARMON Chairperson

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

/s/_____
PHILLIP T. BORK Member

SPECIAL CONCURRING STATEMENT

I have joined in the foregoing Decision and Order, because I concur entirely with the discussion and resolution of the issue involved, and also concur with all Findings of Fact and Conclusions of Law.

However, I feel it is appropriate to comment, not only on the Department's unexplained five-month delay in responding to Dr. Oakley's written progress notes and its further delay in issuing a determinative order, but also on the apparent inactions of Mr. Hansen's counsel and Dr. Oakley, who played a role in delaying the determination of responsibility for the medical benefits which Mr. Hansen needed in the spring of 1989. In September 1989, the Department notified the doctor and claimant's counsel that it had reviewed the doctor's office notes, and requested further information; specifically, that the doctor and the claimant fill out and file an aggravation application form if claimant's condition had worsened. Quite apparently, neither counsel nor the doctor responded to this request, and more than four additional months of inaction went by.

RCW 51.36.060 and 51.48.060 place a duty on physicians to make reports as requested upon the condition or treatment of workers, and to file prompt reports and to render necessary assistance to

the injured worker. The application of these provisions is, of course, not in issue before us in the instant appeal. Suffice it to say that Mr. Hansen's interests appear to have been lost in the shuffle for a long period, with no apparent prompt attention by counsel, either. Had the requested information and application form been filed soon after September 1989, it appears that reopening of this claim could have occurred in the fall of 1989, rather than awaiting the much later disposition of this litigation over a quasi-legal issue.

Dated this 10th day of June, 1991.

_____

PHILLIP T. BORK Member