## Watts, Virginia

## AGGRAVATION (RCW 51.32.160)

"Deemed granted" application to reopen claim

The Department may not deny an application to reopen a claim and then promptly enter an abeyance order, on its own motion pursuant to RCW 51.52.060, thereby attempting to give itself up to 180 additional days to act on the application. To allow such action would render the time limitations of RCW 51.32.160 completely illusory. Where the Department has entered such an abeyance order but has not made a final decision to deny the application within the time allowed by RCW 51.32.160, the application to reopen the claim is deemed granted. ....In re John Aitchison, BIIA Dec., 90 4447 (1990); In re Donald Schroeder, BIIA Dec., 90 3177 (1990); In re Virginia Watts, BIIA Dec., 90 3816 (1990) [Editor's Note: Rule reversed by Tollycraft Yachts v. McCoy, 122 Wn.2d 426 (1993).]

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

IN RE: VIRGINIA WATTS	)	DOCKET NO. 90 3816
	)	
CLAIM NO. G-372836	)	ORDER GRANTING RELIEF ON THE RECORD

An appeal was filed by the claimant, on July 26, 1990 from an order of the Department of Labor and Industries dated May 22, 1990. The order affirmed an order dated November 6, 1989 which denied an application to reopen the claim filed on June 15, 1989 for the reason that the conditions caused by the injury had not worsened since claim closure.

From a review of the Department record in this matter it appears that this claim was first closed by an order dated September 20, 1976 with an award for unspecified disabilities of 23% as compared to total bodily impairment. Although an appeal therefrom was taken to the Board (Docket No. 49,003) that appeal was subsequently dismissed at the request of the claimant by a Board order dated April 5, 1977. Thus, the order of September 20, 1976 did not become final until April 5, 1977.

In 1982 the claim was reopened following application by the claimant and closed without additional disability award. Following a further appeal to the Board (Docket No. 66,153) the claim was again closed pursuant to an Order on Agreement of Parties dated April 13, 1984, with the payment of additional time loss compensation but with no additional award for permanent partial disability.

A further application to reopen the claim was filed on April 28, 1986. By an order dated June 4, 1986 the Department denied the application to reopen the claim. On August 13, 1986 the Department received a protest of the order of June 4, 1986 from the claimant's attorney. The letter of protest was dated, and presumably mailed, on August 12, 1986. The Department responded to this protest by a letter dated September 10, 1986 explaining that it considered the protest untimely. The letter suggested that the attorney appeal to the Board or present evidence that the protest was timely filed. It does not appear that the claimant's attorney contested the Department's decision that the protest was untimely. We therefore conclude that the order of June 4, 1986 had been received by the attorney in due course but yet not timely protested within the time allowed by RCW 51.52.050.

On June 15, 1989 the Department received yet another application to reopen the claim. By an order dated September 8, 1989 it extended, to November 13, 1989, the time within which it could act on the application. On November 6, 1989 the disability adjudicator issued an order denying the application to reopen the claim. The following day the disability adjudicator entered a further order holding the order of November 6, 1989 in abeyance. The reason for this sequence of orders was explained in a letter dated November 7, 1989. The time limit for acting on the application to reopen

was approaching and the disability adjudicator wished to obtain further correspondence from the attending physician. Thereafter, on May 22, 1990, the disability adjudicator issued the order which is the subject of this appeal.

As previously indicated we proceed from a determination that the protest of the order of June 4, 1986 was not timely and that order became final. For, if the protest was timely then the application to reopen the claim filed on April 28, 1986 is still before the Department and the Department would have no reason or obligation to consider the later application received on June 15, 1989. Accord Reid v. Dep't of Labor & Indus., 1 Wn.2d 430, 437 (1939).

The application to reopen the claim filed on June 15, 1989 was subject to the 1988 amendments to RCW 51.32.160. Laws of 1988, ch. 161, § 11. Under those amendments an application to reopen the claim which is not denied within ninety (90) days of receipt is "deemed granted." That time limit can be extended an additional sixty (60) days for good cause. The extension decision must be made within the initial ninety (90) day period. In re Edwin E. Fiedler, Dckt. No. 90 1680 (April 30, 1990).

In this case the disability adjudicator was fully aware that the maximum time allowed to act on the application to reopen would expire on November 13, 1989. In an attempt to circumvent the legislative directive to act promptly on applications to reopen claims, the disability adjudicator purported to deny the application to reopen on November 6, 1989, only to immediately hold that order in abeyance for another six months. We recently held that the Department may not utilize the "abeyance" provisions of RCW 51.52.060, on its own motion, to avoid the time limitations of RCW 51.32.160. In re Donald D. Schroeder, Dckt. No. 90 3177 (July 16, 1990). To allow the Department to do so would render the time limitations of RCW 51.32.160 "completely illusory." Id.

We find that the application to reopen the claim was "deemed granted: on November 13, 1989. The order of May 22, 1990 is therefore reversed and this claim is remanded to the Department with direction to reopen the claim and provide benefits as authorized by the law and the facts.

It is so ORDERED.

Dated this 4<sup>th</sup> day of September, 1990.

BOARD OF INDUSTRIAL IN /s/	NSURANCE APPE	ALS
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