

McCoy, Clyde

AGGRAVATION (RCW 51.32.160)

Effect of abeyance order on "deemed granted" provisions (RCW 51.32.160)

Where the Department elects to hold an order in abeyance pursuant to RCW 51.52.060, not in response to a protest or an appeal, the time limitations for action set forth in RCW 51.32.160 still apply.*In re Clyde McCoy, BIIA Dec., 91 0701 (1991)* [Editor's Note: Reversed, *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: CLYDE E. MCCOY) **DOCKET NO. 91 0701**
)
CLAIM NO. T-232827) **ORDER GRANTING RELIEF ON THE RECORD**

An appeal was filed by the claimant on February 11, 1991 from an order of the Department of Labor and Industries dated December 13, 1990. The order affirmed an order dated August 20, 1990 which affirmed an order dated May 3, 1990. The order of May 3, 1990 denied an application to reopen the claim for the reason that "medical information shows that the conditions(s) caused by the injury has not/have not worsened since the final claim closure." We find the application to reopen the claim was deemed granted on May 8, 1990. The order of December 13, 1990 is therefore reversed and this claim is remanded to the Department to reopen the claim and take further action as indicated by the facts and the law.

From a review of the Department record in this matter it appears that this claim was closed by an order dated April 12, 1989 with time loss compensation as paid to January 3, 1989 and without an award for permanent partial disability. On December 7, 1989 the Department received Mr. McCoy's application to reopen his claim. By this application Mr. McCoy sought treatment and compensation for a condition diagnosed by his physician as "strain of the lumbar spine and left hip." Thereafter, by an order dated March 6, 1990 the Department extended, to May 7, 1990, the time within which it could enter a decision on the application. The reason stated for the extension was to allow the self-insured employer to schedule an independent medical examination to assist the Department in making its reopening determination.

On May 3, 1990 the Department entered the above referenced order denying the application to reopen the claim. The very next day, May 4, 1990, the Department entered an order holding the order of May 3, 1990 in abeyance pending further consideration and the entering of a further determinative order. There is no indication that the order of May 4, 1990 was prompted by either a protest or an appeal of the May 3, 1990 order.

It does not appear that a medical examination of Mr. McCoy was ever arranged by the self-insured employer. We assume this was due, at least in part, to the fact the claimant now resides in Ohio. However, on July 21, 1990 Harry S. Reese, M.D. and Jacquelyn A. Weiss, M.D., Ph.D., conducted a "records review" of the claimant's medical records. They were of the opinion that the low back condition of which Mr. McCoy complained was not caused by his industrial injury, which they felt

1 only involved a contusion of the left hip. Without performing an examination they were unable to offer
2 an opinion as to whether there was objective evidence of worsening.
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4 In apparent response to this report of a records review the Department entered the order of
5 August 20, 1990 which affirmed the earlier order of May 3, 1990. Thereafter, on October 17, 1990, the
6 Department received the claimant's protest of the August 20, 1990 order. After holding the order of
7 August 20, 1990 in abeyance the Department directed that a medical examination be conducted. On
8 November 16, 1990 an examination was performed by Drs. Reese and Weiss. They diagnosed
9 chronic lumbosacral strain and chronic left sacroiliac joint sprain causally related to the industrial injury
10 on a more probable than not basis. They believed, among other things, that the claimant's condition
11 was fixed and stable; that no medical treatment was indicated; that there was no objective evidence of
12 worsening; and, that the permanent impairment was best described by Category 1 of WAC 296-20-
13 280. On December 13, 1990 the Department entered the order under appeal.
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15 The 1988 amendments to RCW 51.32.160 imposed time limitations on how long the
16 Department could take to act on an application to reopen a claim. LAWS of 1988, ch. 161, § 11.
17 Specifically, RCW 51.32.160 now provides:
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19 If an order denying an application to reopen filed on or after July 1, 1988,
20 is not issued within ninety days of receipt of such application by the self-
21 insured employer or the department, such application to reopen shall be
22 deemed granted. However, for good cause, the department may extend
23 the time for making a final determination on the application for an
24 additional sixty days.
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26 The time limitations imposed under the "deemed granted" provisions of RCW 51.32.160, unlike
27 time limitations contained elsewhere in Title 51 RCW, direct that certain consequences shall flow from
28 a failure of the Department or the self-insured employer to act on an application to reopen the claim.
29 For example, RCW 51.52.060 limits the time within which the Department can reconsider a decision,
30 once entered, but a failure of the Department to comply with the time limits does not carry any
31 consequence. See In re Edna E. Shore, Dckt. No. 89 5898 (September 28, 1990).
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33 Once the Department entered its order of May 3, 1990 it had technically complied with the time
34 limitations of RCW 51.32.160. However, on the following day the Department, on its own motion, held
35 the order of May 3, 1990 in abeyance pending further consideration. It is apparent the Department
36 wanted more time to act on the application to reopen the claim.
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1 But for the commands of RCW 51.32.160 this action by the Department would clearly be
2 authorized by RCW 51.52.060. Specifically, the fourth and fifth provisos to RCW 51.52.060 provide:

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4 ...That, if within the time limited for filing a notice of appeal to the board
5 from an order, decision, or award of the department, the department shall
6 direct the submission of further evidence or the investigation of any further
7 fact, the time for filing such notice of appeal shall not commence to run
8 until such person shall have been advised in writing of the final decision of
9 the department in the matter: *Provided, further,* That in the event the
10 department shall direct the submission of further evidence or the
11 investigation of any further fact, as above provided, the department shall
12 render a final order, decision, or award within ninety days from the date
13 such further submission of evidence or investigation of further fact is
14 ordered which time period may be extended by the department for good
15 cause stated in writing to all interested parties for an additional ninety
16 days...

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19 The sixth proviso to RCW 51.52.060 also provides:

20 ...That the department, either within the time limited for appeal or within
21 thirty days after receiving a notice of appeal, may modify, reverse or
22 change any order, decision, or award, or may hold any such order,
23 decision, or award in abeyance for a period of ninety days which time
24 period may be extended by the department for good cause stated in
25 writing to all interested parties for an additional ninety days pending further
26 investigation in light of the allegations of the notice of appeal, and the
27 board shall thereupon deny the appeal, without prejudice to the appellant's
28 right to appeal from any subsequent determinative order issued by the
29 department.

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31 The question presented is whether the Department can use these provisions to escape the time
32 limitations and consequences imposed by the Legislature through the 1988 amendments to RCW
33 51.32.160. We think not -- at least where an abeyance order is entered on the Department's own
34 motion and not in response to a protest or an appeal by an aggrieved party.

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37 There is an obvious conflict between the time limitations of RCW 51.32.160 and those of RCW
38 51.52.060. Still it is incumbent upon us to give meaning to the "deemed granted" provisions of RCW
39 51.32.160. For that reason we have held that the Department may not, on its own motion, apply the
40 abeyance provisions of RCW 51.52.060 to artificially extend the time for acting on an application to
41 reopen the claim. In re Bruce A. Stirpe, Dckt. No. 90 6416 (January 10, 1991); In re John F.
42 Aitchison, Dckt. No. 90 4447 (November 7, 1990); In re Virginia Watts, Dckt. No. 90 3816 (September
43 4, 1990); In re Donald D. Schroeder, Dckt. No. 90 3177 (July 16, 1990). To hold otherwise would
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1 render the time limitations imposed upon the Department by 51.32.160 "completely illusory."
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3 Schroeder, supra.

4 The time allowed the Department to act on the application to reopen the claim expired as of
5 May 8, 1990. There is no indication that before that date the Department had entered a final order
6 denying the application to reopen the claim. The application to reopen the claim was therefore
7 "deemed granted" pursuant to the provisions of RCW 51.32.160. Under the authority of RCW
8 51.52.080 relief is granted to the claimant based on the record of the Department. The order of
9 December 13, 1990 is reversed and this claim is remanded to the Department to reopen the claim and
10 take further action as indicated by the law and the facts.
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14 We make no determination at this time as to the extent of any compensation or benefits, if any,
15 to which the claimant is entitled.
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18 It is so ORDERED.

19 Dated this 4th day of March, 1991.
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