

Watson, Ronald

DEPARTMENT

Authority to issue subsequent order while appeal pending

Entry of a subsequent order that affirms an order that paid time-loss compensation benefits does not deprive the Board of jurisdiction over issues raised by the appeal of the order closing the claim.*In re Ronald Watson, BIA Dec., 96 5309 (1997)*

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

1 **IN RE: RONALD A. WATSON**) **DOCKET NO. 96 5309**
2)
3 **CLAIM NO. M-322948**) **ORDER VACATING PROPOSED DECISION**
4) **AND ORDER AND REMANDING APPEAL FOR**
5) **FURTHER PROCEEDINGS**
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7 **APPEARANCES:**

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9 Claimant, Ronald A. Watson, by
10 Solan & Solan, P.S., per
11 Stephen J. Solan and Michael P. Solan
12

13 Employer, Maurer Services Company,
14 None
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16 Department of Labor and Industries, by
17 The Office of the Attorney General, per
18 Martha A. French, Assistant
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20 The claimant, Ronald A. Watson, filed an appeal with the Board of Industrial Insurance
21 Appeals on August 8, 1996 (mailed August 7, 1996), from an order of the Department of Labor and
22 Industries dated June 7, 1996 (communicated June 10, 1996). The order affirmed an order dated
23 August 16, 1995, that closed the claim with an award for permanent partial disability for 21 percent
24 of the amputation value of the left leg above the knee joint with short thigh stump (3 inches or
25 below the tuberosity of the ischium). **REMANDED FOR FURTHER PROCEEDINGS.**
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32 **DECISION**

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34 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
35 and decision on a timely Petition for Review filed by the Department of Labor and Industries to a
36 Proposed Decision and Order issued on April 10, 1997, in which the order of the Department dated
37 June 7, 1996, was remanded to the Department for further administrative action.
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42 We have granted the Department's Petition for Review because the Proposed Decision and
43 Order incorrectly determined that any Department order issued within 30 days of an appeal
44 necessarily constitutes Department reassumption of jurisdiction over the order on appeal and
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1 deprives this Board of jurisdiction. We remand the appeal to the hearing process because the
2 parties agreed the merits of the appeal could be addressed in a motion for Summary Judgment,
3 but the claimant was not afforded the opportunity to file responsive pleadings as required by CR
4 56.
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9 The Board's jurisdiction over an appeal is restricted when the Department issues an order
10 within 30 days after the appeal has been filed. RCW 51.52.060(4) provides as follows:
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12 The department, either within the time limited for appeal, or within
13 thirty days after receiving a notice of appeal, may:

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

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

20 (ii) Hold an order, decision, or award issued under RCW 51.32.160
21 in abeyance for a period not to exceed ninety days from the date of
22 receipt of an application under RCW 51.32.160.
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27 The board shall deny the appeal upon the issuance of an order
28 under (b)(i) or (ii) of this subsection holding an earlier order, decision, or
29 award in abeyance, without prejudice to the appellant's right to appeal
30 from any subsequent determinative order issued by the department.
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32 If for some reason an appeal has been granted at the Board before the Department takes a timely
33 action allowed under RCW 51.52.060(4), the Board can only respond to such an action by
34 dismissing the appeal.
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36 Because the Proposed Decision and Order does not contain a summary of the relevant facts
37 and Department actions in this case, we present the following chronology:
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41 11-13-90 Claimant files application for benefits for leg/ankle injury of 11-5-90.
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43 11-21-90 Time-loss compensation rate established as single with no dependents.
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45 6-7-91 Claim closed; first terminal date.
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47 1-8-92 Reopening application.

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- 2 8-31-92 Claim reopened effective 12-19-91.
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- 4 9-14-92 Employer protests reopening and payment of time-loss compensation.
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- 6 10-8-92 Department order holding order of 8-31-92 in abeyance.
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- 8 12-8-92 Department order of 8-31-92 affirmed.
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- 10 11-30-93 Employer protests 11-22-93 time-loss order.
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- 12 8-16-95 Department order closing claim with additional permanent partial disability
- 13 award and no mention of time-loss compensation.
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- 15 8-21-95 Claimant protests closing order.
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- 17 6-7-96 Department order affirming closing order; second terminal date. No mention
- 18 of time-loss compensation. Received by claimant 6-10-96.
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- 20 8-8-96 Claimant's Notice of Appeal of Docket No. 96 5309. Relief requested is that
- 21 reopening be backdated to November 1, 1991.
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- 23 8-20-96 Department order affirming 11-22-93 time-loss order which had been protested
- 24 by employer and not responded to before claim closure.
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26 The industrial appeals judge concluded that the August 20, 1996 order addressing the
27 employer's November 30, 1993 protest of a time-loss compensation order constituted a *sub silentio*
28 reassumption of jurisdiction over the order appealed on August 8, 1996. The only apparent basis
29 for this conclusion is the fact that the Department issued the August 20, 1996 order within 30 days
30 after the appeal was filed. Considering the actual impact of the August 20, 1996 order on the
31 June 7, 1996 order reveals that it did not modify, change, or reverse anything pursuant to
32 RCW 51.52.060. Instead, the August 20, 1996 order *affirmed* an order issued before the claim was
33 closed. If it were to have any impact at all on the closing order, then, it would have to be to abate
34 it. An order is abated only when the Department is considering changing the order. That is clearly
35 not the case here. The Department stood by an earlier action that had no impact on the closure.¹
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¹ What the Department *did* do with its August 20, 1996 order is invite a further appeal of the time-loss compensation paid for a two-week period in November 1993. The claimant took advantage of that opening to file an appeal in Docket

1 The order of August 20, 1996 did not deprive the Board of jurisdiction over the claimant's appeal of
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3 August 8, 1996.

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5 Turning to the merits of the claimant's appeal, the Department order of August 31, 1992,
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7 that determined that the claim should be reopened on December 19, 1991, contained protest and
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9 appeal language. The employer protested the order. The Department held it in abeyance and
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11 ultimately affirmed it on December 8, 1992. The claimant did not protest or appeal within 60 days
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13 of December 8, 1992. Absent any problem in communicating the order to the claimant, the order
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15 became final with respect to reopening and with respect to the effective date of reopening. This
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17 appeal could properly be disposed of on summary judgment, *but only if the claimant was given the*
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19 *proper opportunity to respond under the terms of CR 56.* The claimant has not had that
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21 opportunity.

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23 In the course of an informal conference on January 24, 1997, the parties decided the appeal
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25 could be resolved on a Motion for Summary Judgment. The industrial appeals judge set the
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27 hearing on the motion for March 3, 1997. He directed that the parties should file
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29 "contemporaneous" briefs by February 26, 1997. This direction conflicts with the time frames of
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31 CR 56, which provide that the moving party (the Department) should file 28 days in advance of the
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33 hearing, the non-moving party should file 11 days in advance of the hearing, and any rebuttal is
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35 due 5 days in advance of the hearing. At some point, the hearing was reset to March 13, 1997, at
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37 the Department's request, but the time frame for filing was also extended and the claimant's
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39 attorney did not receive the Department's brief until March 10, 1997. He did not have time to
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41 respond before the hearing.

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43 On March 13, 1997, the parties argued the Motion for Summary Judgment. On
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45 March 14, 1997, the claimant's attorney presented telephonic and written objections to the
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No. 96 7107, alleging an error in the calculation of his time-loss compensation rate. That appeal was resolved by a

1 industrial appeals judge's failure to follow the time frame set forth in CR 56. He requested that he
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3 be allowed to file a responsive brief within the time allowed by CR 56.
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5 There is no response to the claimant's motion in the record. However, according to the
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7 Proposed Decision and Order in Docket No. 96 5309, the claimant's attorney withdrew his motion
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9 after "an informal telephone conversation." The importance of responsive pleadings in CR 56 is
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11 highlighted by the fact that the rule does not permit the responding party to rest on the pleadings
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13 already in the file. In light of the fact that we are vacating the order remanding the appeal to the
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15 Department, we deem it appropriate to give the claimant a further opportunity to file a response to
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17 the Department's Motion for Summary Judgment. In order to expedite the resolution of this appeal,
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19 the matter should be remanded to the mediation section for further proceedings consistent with this
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21 decision.
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23 The Proposed Decision and Order issued in this appeal on April 10, 1997, is hereby vacated
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25 and the appeal is remanded to the mediation section with direction to convene a conference to
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27 schedule for filing of further briefs in connection with the Department's Motion for
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