

## **McCoy, Clyde**

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### **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: The Board's decision was appealed to superior court under Cowlitz County Cause No. 91-2-00373.]

Scroll down for order.



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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13 We make no determination at this time as to the extent of any compensation or benefits, if any,  
14 to which the claimant is entitled.  
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16 It is so ORDERED.  
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18 Dated this 4<sup>th</sup> day of March, 1991.  
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