

Murphy, Stephen

AGGRAVATION (RCW 51.32.160)

"Deemed granted" application to reopen claim

PROTEST AND REQUEST FOR RECONSIDERATION (RCW 51.52.050)

Deemed-granted application to reopen claim

The employer's ability under RCW 51.52.060(5) to appeal a deemed-granted application to reopen on the merits does not create a comparable ability to protest a deemed-granted application to reopen.*In re Stephen Murphy*, BIIA Dec., 02 12603 (2003)

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

1 **IN RE: STEPHEN D. MURPHY)** **DOCKET NO. 02 12603**
2)
3)
4)
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6)
7 **CLAIM NO. W-146591**)
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9 **APPEARANCES:**

10 Claimant, Stephen D. Murphy, by
11 Delay, Curran, Thompson, Pontarolo & Walker, P.S., per
12 Michael J. Walker
13

14 Self-Insured Employer, Sacred Heart Medical Center, by
15 Craig A. Staples
16

17 Department of Labor and Industries, by
18 The Office of the Attorney General, per
19 Molly M. Parish, Assistant
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21 The self-insured employer, Sacred Heart Medical Center, filed an appeal with the Board of
22 Industrial Insurance Appeals on March 6, 2002, from an order of the Department of Labor and
23 Industries dated February 7, 2002. The order affirmed a prior Department order dated January 9,
24 2002, which indicated the Department was reopening the claim effective August 3, 2001, because
25 the decision to allow or deny reopening was not made by January 7, 2002, as required by
26 RCW 51.32.160. **APPEAL REMANDED FOR FURTHER PROCEEDINGS.**
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28 **DECISION**
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30 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
31 and decision on a timely Petition for Review filed by the self-insured employer to a Proposed
32 Decision and Order issued on October 28, 2002, in which the order of the Department dated
33 February 7, 2002, was affirmed.
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35 The issues presented to the Board on cross summary judgment motions are: (1) whether an
36 employer has the right to **protest** to the Department an order reopening a claim and deeming
37 granted an aggravation application, based on an untimely response to the aggravation application,
38 pursuant to RCW 51.32.160; (2) whether an employer protest from a "deemed granted" aggravation
39 application order provides the **Department** with authority to consider worsening; and (3) what rights
40 are extended to employers by RCW 51.52.060(5). We have granted review because our industrial
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1 appeals judge, in granting the claimant's summary judgment motion, overlooked the provision of
2 RCW 51.52.060(5), added by our Legislature in 1995. The Proposed Decision and Order is
3 vacated, and the matter is remanded to our hearings process.
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5 The parties agree that the Department did not issue a timely determinative order in
6 response to the claimant's reopening application within the requirements set forth in the statute.
7 Because of its failure to issue that timely determinative order, the Department issued an order that
8 declared the reopening application "deemed granted" under RCW 51.32.160. The employer timely
9 protested that decision, asking the Department to consider whether the claimant's condition related
10 to the industrial injury had worsened. The Department affirmed its "deemed granted" order, and
11 informed the employer that the order was based solely on the Department's failure to timely
12 process the reopening application, without addressing whether the claimant's compensable
13 condition had worsened.
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19 The employer contends in this appeal that when an employer **protests** from a "deemed
20 granted" order, the Department not only has authority to reconsider whether the Department timely
21 acted upon the aggravation application, but also has authority to consider whether there is
22 aggravation or worsening. The employer relies upon RCW 51.52.060(5), which provides:
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25 An employer shall have the right to appeal an application deemed
26 granted under RCW 51.32.160 on the same basis as any other
27 application adjudicated pursuant to that section.
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29 Thus, the employer contends that a "right to appeal" equates to a "right to protest" to the
30 Department. However, in order to give meaning to both RCW 51.32.160 and RCW 51.52.060(5),
31 we must conclude that the Legislature specifically used "appeal" language in RCW 51.52.060(5) to
32 require an employer challenging a "deemed granted" Department order to present evidence at the
33 Board as to whether there is actual worsening of the condition. In other words, the Department is
34 given, by virtue of RCW 51.52.060(5), no authority to look at issues of worsening when an employer
35 protests from a "deemed granted" order.
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39 The Board has held that RCW 51.52.060(5) gives an employer a right to appeal a "deemed
40 granted" decision, and challenge the application to reopen the claim on its merits (i.e., whether
41 there has been worsening to justify reopening of a claim). *In re Jacqueline I. Stinson*, Dckt.
42 No. 98 18114 (July 21, 1999). If the employer elects to exercise its right to appeal under
43 RCW 51.52.060(5), it will have the burden of going forward with the evidence, and establishing a
44 prima facie case that there was no objective worsening of any condition proximately caused by the
45 injury.
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1 In this appeal, there are material facts in issue as to whether there is objective worsening of
2 a condition caused by this industrial injury, and the employer and claimant must be given the
3 opportunity at hearing to present evidence. Summary judgment is inappropriate under these
4 circumstances. We deny both the claimant's and the self-insured employer's motions for summary
5 judgment and remand the matter to the hearing process for a hearing on the employer's appeal.
6 The employer must present a prima facie case by presenting evidence that the condition related to
7 the industrial injury of August 18, 1996, did not objectively worsen between January 7, 1997, when
8 the claim was closed without permanent partial disability, and February 7, 2002, when the order
9 reopening the claim was issued. A prima facie case would require support from a medical doctor.
10 If the employer presents a prima facie case of no worsening of the condition related to the injury of
11 August 18, 1996, the burden shifts to the claimant to establish entitlement to benefits.
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13 The Proposed Decision and Order of October 28, 2002, is vacated. This appeal is
14 remanded to the hearings process, pursuant to WAC 263-12-145(4), for further proceedings as
15 indicated by this order. The parties are advised that this order is not a final Decision and Order of
16 the Board within the meaning of RCW 51.52.110. At the conclusion of the further proceedings, the
17 industrial appeals judge shall, unless the matter is dismissed or resolved by an Order on
18 Agreement of Parties, enter a Proposed Decision and Order containing findings and conclusions as
19 to each contested issue of fact and law, based upon the entire record, and consistent with this
20 order. Any party aggrieved by such Proposed Decision and Order may petition the Board for
21 review of such further Proposed Decision and Order, pursuant to RCW 51.52.104.
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23 It is so **ORDERED**.

24 Dated this 14th day of February, 2003.

25 BOARD OF INDUSTRIAL INSURANCE APPEALS

26 /s/ _____
27 THOMAS E. EGAN Chairperson

28 /s/ _____
29 JUDITH E. SCHURKE Member