Petersen, Tonja

APPEALABLE ORDERS

Orders held in abeyance (RCW 51.52.060)

Once the Department has exercised its authority to hold a prior order in abeyance, it may not reverse the abeyance order and attempt to avoid its responsibilities to issue a further order. Likewise, the Department may not return an appeal to the Board once it has elected to reassume jurisdiction following the filing of an appeal. **….*In re Tonja Petersen,* BIIA Dec., 12 10440 (2012)**

DEPARTMENT

Reassumption of jurisdiction (RCW 51.52.060)

The Department may not return an appeal to the Board once it has elected to reassume jurisdiction following the filing of an appeal. **….*In re Tonja Petersen,* BIIA Dec., 12 10440 (2012)**

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: TONJA G. PETERSEN	)	**DOCKET NO. 12 10440**
	)	
	)	**ORDER DENYING DEPARTMENT REQUEST**
	)	**TO VACATE ORDER RETURNING CASE TO**
CLAIM NO. AH-26232	)	**DEPARTMENT FOR FURTHER ACTION**

On January 11, 2012, the claimant, Tonja G. Petersen, filed a Notice of Appeal from a decision of the Department of Labor and Industries dated January 5, 2012. The January 5, 2012 Department order affirmed a Department order dated September 20, 2011. The September 20, 2011 order denied the claimant's application to reopen the claim. On February 7, 2012, the Department issued an order reassuming jurisdiction. On February 8, 2012, this Board issued an Order Returning Case to Department for Further Action, denying the appeal. On February 10, 2012, the Department issued a further order stating,

> The order dated 10/6/11 which places the 9/20/11 order in reassume status has been reversed.
>
> The Department did not have jurisdiction to issue this reassume based upon WAC 296-14-400.

On February 13, 2012 we received a written communication from the Department which stated, "CC had to reverse reassume and send appeal to BIIA." We consider this an attempt by the Department to return the appeal to this Board for further action. Since we previously returned the appeal to the Department by order dated February 8, 2012, we consider this as a request by the Department to vacate the February 8, 2012 Order Returning Case to Department for Further Action, denying the appeal, and to issue an order granting the appeal. The Department's request is **DENIED**.

The following events occurred in this claim:

1. On April 8, 2010, the Department issued an order closing the claim with an award for permanent partial disability. The employer filed a Protest and Request for Reconsideration with the Department on April 9, 2010. Although the April 8, 2010 order promised that a further appealable order would be issued in response to a protest, the Department record contains no such further order.
2. On November 1, 2010, the claimant filed an application to reopen the claim. In response, on December 10, 2010, the Department issued an order reopening the claim effective

November 1, 2010. The employer filed a protest and request for reconsideration with the Department on December 30, 2010. In response to that protest, on March 24, 2011, the Department issued an order correcting and superseding the December 10, 2010 order, and denying the application to reopen the claim. No protest or appeal was filed to the March 24, 2011 order denying the application to reopen the claim, and the claim remained closed.

3. On August 8, 2011, the claimant filed another application to reopen the claim. The Department issued an order on September 20, 2011, which denied the application to reopen the claim. The claimant filed a protest and request for reconsideration with the Department on October 3, 2011. On October 6, 2011, the Department issued an order reconsidering the September 20, 2011 order denying reopening of the claim. In response to the October 3, 2011 protest, the Department issued the January 5, 2012 order here on appeal, which affirmed the provisions of the September 20, 2011 order denying the application to reopen the claim. The claimant filed the present appeal on January 11, 2012, from the January 5, 2012 Department order. On February 7, 2012, the Department issued an order reassuming jurisdiction in this appeal, stating that it was reconsidering the order of January 5, 2012, and that it would issue a new order after further review. On February 8, 2012, this Board entered an Order Returning Case to Department for Further Action, denying the appeal. On February 10, 2012, the Department issued the order reversing the October 6, 2011 order, in which it reassumed jurisdiction to reconsider the September 20, 2011 order. On February 13, 2012, this Board received a written communication from the Department. This communication indicated that this appeal is being returned to the Board.

The claims consultant at the Department sent a letter to the claimant dated February 7, 2012. In that letter, the claims consultant stated that the April 8, 2010 closing order was not final and binding because a timely protest was received from the employer and was not resolved. It appears that this is the basis for the February 10, 2012 order. If so, the Department's analysis is not correct. Additionally, if the Department was under the impression that it could not reassume jurisdiction of the September 20, 2011 order because of the timelines stated in WAC 296?14?400, this is also not correct.

The Department relies on WAC 296?24?400 for its assertion that it lacked jurisdiction to issue the October 6, 2011 order reassuming jurisdiction. This is incorrect. WAC 296?24?400

merely describes procedures to be followed when an application to reopen the claim is filed pursuant to RCW 51.32.160; it does not address the broader question of the Department's jurisdiction.

The Legislature has given the Department broad authority to adjudicate workers' compensation claims. *Marley v. Department of Labor & Indus.,* 125 Wn.2d 533, 539 (1994). This includes the authority to hold a prior order in abeyance within the time limited for appeal, and to modify, reverse or change any order or hold an order in abeyance within thirty days after receiving a notice of appeal. RCW 51.52.060(4). Inasmuch as the issues of whether the claim should be reopened and whether the September 20, 2011 order should be held in abeyance, are within the broad authority given to the Department by the Legislature, the Department had jurisdiction to issue the October 6, 2011 abeyance order.

We note that the Department may have concerns about its jurisdiction because it failed to respond to the employer's April 9, 2010 protest and request for reconsideration of the April 8, 2010 closing order. However, this did not pose a jurisdictional bar to the Department's authority to respond to the November 1, 2010 application to reopen the claim. While adjudication by the Department of an application to reopen a claim before a closing order becomes final constitutes an error of law, when the March 24, 2011 Department order denying the November 1, 2010 application to reopen the claim became final, it superseded the closing order of April 8, 2010, and effectively closed the claim. *In re Jorge Perez-Rodriguez*, BIIA Dec., 06 18718 (2008).

To the extent the Department was concerned about not meeting the 90?day time limit for acting on an application to reopen a claim for aggravation, we do not consider this a valid basis for reversing the October 6, 2011 abeyance order. This topic was specifically addressed in our significant decision, *In re Edna Shore,* BIIA Dec., 89 5898 (1990).

> The Department order of March 30, 1989 which denied the application to reopen the claim was issued well within ninety days of February 3, 1989, the date on which the Department received the application. The Department therefore met the time requirement contained within RCW 51.32.160. When the claimant filed her notice of appeal from that order, the Department had the specific authority, pursuant to RCW 51.52.060, to hold its order of March 30, 1989 in abeyance for a period of ninety days, which time period could have been

extended by the Department for good cause stated in writing to all interested parties for an additional ninety days, pending further investigation.

Shore at 3. In the *Shore* case, we also noted that the Department's own regulation makes an exception to the 90-day requirement for acting upon an application to reopen the claim when the decision is appealed to the Board. *Shore* at 4.

We find no basis in fact or law for the Department to issue the February 10, 2012 order reversing the order dated October 6, 2011. The Department remains obligated to issue a further appealable order responding to the application to reopen this claim. We have held that a protest to an order in which the Department promises to issue a further order in response to a protest automatically places the protested order in abeyance. *In re Santos Alonzo*, BIIA Dec., 56,833 (1981). Under the circumstances in this case, the October 6, 2011 abeyance order was entirely appropriate in light of the October 3, 2011 protest. By issuing the October 6, 2011 order, the Department advised the parties of its intention to respond with a further appealable order. The order dated February 10, 2012, reversing the October 6, 2011 abeyance order, is wrong to the extent that it holds otherwise.

Once the Department has exercised its authority to hold a prior order in abeyance, it may not reverse the abeyance order and attempt to avoid its responsibility to issue a further order. Orders of the Department become final and binding on the parties if not protested or appealed within 60 days of communication of the orders. RCW 51.52.050; *Marley*, 125 Wn.2d, at 538. Once the Department has held an order in abeyance, whether on its own motion as authorized by statute or in response to a timely protest and request for reconsideration, that order can no longer become final and binding and it is not necessary for any party to file a further protest or an appeal.

If the Department were permitted to reverse an abeyance order, the result would be to shorten, and possibly eliminate, the time by which parties could file protests and appeals to orders previously held in abeyance, thereby denying the parties their right to contest the Department's previous actions. This deprivation of rights would be the result in this case if the Department were permitted to reverse the October 6, 2011 abeyance order. By doing so, it would avoid the obligation to issue a further order on the issue of whether the claim was open or closed. While the

claimant's appeal was filed in a timely manner to the January 5, 2012 affirming order, it was filed 113 days after the Department issued the September 20, 2011 order that denied the application to reopen the claim. As such, it was not timely to that order. The claimant would lose her opportunity to seek relief from the September 20, 2011 order. Such a denial of due process is impermissible. Likewise, the Department may not return an appeal to this Board once it has elected to reassume jurisdiction following the filing of an appeal.

The order of the Department dated February 10, 2012, is wrong as a matter of law. The Department is required to issue a further appealable order addressing the application to reopen the claim. Therefore, this matter is once again returned to the Department for further action. The Department's request to vacate the February 8, 2012 Order Returning Case to Department for Further Action is denied.

DATED: March 5, 2012.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/ _____

DAVID E. THREEDY Chairperson

/s/ _____

FRANK E. FENNERTY, JR. Member

/s/ _____

JACK E. ENG Member