

## **Weighall, Charles**

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### **PROTEST AND REQUEST FOR RECONSIDERATION (RCW 51.52.050)**

#### **Application to reopen treated as protest**

An application to reopen a claim, filed in response to a Department closing order and within the time allowed for filing an appeal, can be construed as a request that the Department reconsider its closure of the claim, and requires the Department to issue a further final order. ...*In re Charles Weighall, BIA Dec., 29,863 (1970)*

Scroll down for order.



1 A careful reading of the information filled in by the claimant and his attending physician on  
2 Exhibit No. 1 clearly indicates that they did not intend the form entitled "Application to Reopen  
3 Claim for Aggravation of Condition" to be construed by the Department as any more than a request  
4 for the Department to reconsider its closing order pursuant to the admonition issued by the  
5 Department, and it is ridiculous to say that because the claimant and his attending physician used a  
6 Department form in an incorrect manner, the claimant is precluded from making a prima facie  
7 case. The Department's order of June 29, 1967, after paying the claimant a closing disability award,  
8 stated "No further notice will be issued relative to the determination of permanent partial disability,"  
9 but this does not mean the Department would not give reconsideration of its order upon a request  
10 being made within 60 days.

11 Our hearing examiner's Proposed Decision and Order recognizes the position taken by the  
12 claimant and by the Department in the use of the form, which was admitted in evidence for limited  
13 jurisdictional purposes as Exhibit No. 1. Our original hearing examiner (Mr. Tingvall) granted  
14 claimant's counsel's motion to consider the appeal a direct one (BR 15), but our hearing examiner  
15 (Mr. Driscoll) who issued the Proposed Decision and Order, totally ignored this ruling and accepted  
16 the Department's and employer's theory that the issue before the Board required the showing of an  
17 aggravation of condition. Mr. Driscoll, in his Proposed Decision and Order, then proceeded to find  
18 that the claimant had not made a prima facie case.

19 As already indicated, we think that Mr. Driscoll erred in not carefully reading the  
20 Department's closing order of June 29, 1967, the document filed as Exhibit No. 1, and the  
21 Department's final closing order of November 28, 1967. We have held before, and continue to  
22 hold, that where the Department enters an order stating:

23 "Any request for Departmental reconsideration of this order will follow  
24 such request."

25 That this invitation by the Department when responded to by a claimant or his employer requires  
26 the Department then to issue a further appealable order, and the statute of limitations does not run  
27 until such further appealable order is issued. As near as we can determine from the jurisdictional  
28 facts presented in this record, the next appealable order issued by the Department was on  
29 November 28, 1967; thus, this is a direct appeal. As to the extent of disability, it makes no  
30 difference whether the direct appeal is from the Department's order of June 29, 1967, or from its  
31 later order of November 28, 1967, since the evidence presented by both the claimant and the  
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1 Department indicates that the extent of the claimant's permanent disability due to his industrial  
2 injury of 1963 was essentially the same on both dates.  
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4 The Department's order of November 28, 1967, segregated and denied responsibility for a  
5 "present urinary tract condition" as unrelated to the injury covered by the claim. We can find no  
6 medical evidence in the record to support such a segregation. The testimony of Dr. Ralph V.  
7 Stagner, a urologist, who was an attending surgeon, stated "I would only say that I did not ever  
8 arrive at a urological diagnosis that would account for his symptoms." (BR 141)  
9

10 A careful reading of the medical evidence presented by both parties in this appeal convinces  
11 us that the claimant, as a result of his industrial injury of December 17, 1963, received serious  
12 internal injuries, some of which required surgical repair, and if we can believe the claimant's  
13 testimony, his passing of blood increased after the multiple surgeries required by his 1963 injury.  
14 Finding no medical basis for the Department's segregation and denial of responsibility paragraph in  
15 its order of November 28, 1967, we will reverse it.  
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20 It is obvious from the review of the record on this appeal that the June 29, 1967 closing  
21 evaluation of 50 per cent of the maximum allowable for unspecified disabilities for the claimant's  
22 permanent partial disability, attributable to his industrial injury of December 17, 1963, was based on  
23 an examination by Dr. Myron Kass, a psychiatrist, who examined Mr. Weighall at the request of the  
24 Department on April 7, 1967. Dr. Kass received a history of the claimant's earlier industrial and  
25 non-industrial injuries, his family background, his educational and work experience, and reviewed  
26 the Departmental file pertaining to the 1963 industrial injury and, after examining the claimant,  
27 diagnosed a post-traumatic conversion reaction, which was chronic, severe, fixated and referable to  
28 symptoms in the left groin and hip and back and left testicle area. Further, in his testimony,  
29 however, Dr. Kass stated that the claimant was no longer available on the open labor market and  
30 would only be able to work on a limited self-rehabilitation basis where he could regulate his own  
31 activities, hours and exertion. Based on Dr. Kass' testimony, we believe the claimant was rendered  
32 permanently totally disabled by the effects of his December 17, 1963 industrial injury, super-  
33 imposed upon his prior industrially and non-industrially related conditions.  
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41 In our review of the record on this appeal, we have read the testimony of Dr. Peter Fisher,  
42 who examined the claimant on March 11, 1968, and find it of no value whatever in determining the  
43 present appeal.  
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1 In all probability, this case is a combined effects case from the standpoint of Wildhaber-  
2 Howard Buck & Son Sales, the employer herein, but we need not at this time pass upon the  
3 question of second injury fund relief to the employer since the Department has not had an  
4 opportunity of considering the same.  
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7 **FINDINGS OF FACT**

8 After a careful review of the entire record, the Board finds:  
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- 10 1. The claimant sustained severe internal injuries resulting in a left inguinal  
11 hernia in the course of his employment as a mechanic with Wildhaber-  
12 Howard Buck & Son Sales, the employer, on December 17, 1963. The  
13 claim based thereon was allowed, time loss compensation was paid,  
14 several surgery repairs were performed, and on June 29, 1967 (mailed  
15 July 6, 1967), the Department of Labor and Industries issued an order  
16 closing the claim with a permanent partial disability award of 50% of the  
17 maximum allowable for unspecified disabilities. On August 21, 1967,  
18 the claimant complied with the Department's admonition in its closing  
19 order of June 29, 1967, that "Any request for Departmental  
20 reconsideration of this order must be made within sixty days. A further  
21 appealable order will follow such request," by filing a document (Exhibit  
22 No. 1) with the Department of Labor and Industries.  
23
- 24 2. On November 28, 1967, the Department entered an order reaffirming its  
25 June 28, 1967 order and segregating and denying responsibility for a  
26 "present urinary tract condition" as unrelated to the injury covered by the  
27 claim. On December 19, 1967, the claimant filed his notice of appeal.  
28 On January 5, 1968, the Board entered an order granting the appeal.
- 29 3. Appellate proceedings were conducted before the Board of Industrial  
30 Insurance Appeals, and on April 30, 1969, a hearing examiner for this  
31 Board entered a Proposed Decision and Order in connection with this  
32 appeal. Thereafter, within the period of time provided by law,  
33 exceptions were filed and the case referred to the Board for review as  
34 provided by RCW 51.52.106.
- 35 4. The information filled in by the claimant and his attending physician on  
36 Exhibit No. 1 clearly indicates that they did not intend the form entitled  
37 "Application to Reopen Claim for Aggravation of Condition" to be  
38 construed by the Department as any more than a request for the  
39 Department to reconsider its closing order pursuant to the admonition  
40 issued by the Department. We find as a fact that the next appealable  
41 order was issued by the Department on November 28, 1967, and  
42 therefore, the appeal is direct with no aggravation period involved.  
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- 44 5. As a result of his industrial injury of December 17, 1963, the claimant  
45 has undergone multiple surgeries for a left inguinal hernia, including the  
46 removal of the left testicle to strengthen the site of the hernia repair, and  
47 has sustained a post-traumatic conversion reaction, which was

1 diagnosed as chronic, severe, fixated and referable to symptoms in the  
2 left groin and hip and back and left testicle area by Dr. Myron Kass.

- 3  
4 6. The permanent physical and psychiatric disability attributable to the  
5 December 17, 1963 industrial injury, combined with the effects of the  
6 permanent disability from his prior back injury received while employed  
7 by the Northern Pacific Railroad, his general health situation prior to the  
8 industrial injury of 1963, and his limited education and work experience,  
9 has permanently removed the claimant from the labor market, as he can  
10 no longer carry on a full-time occupation on a reasonably continuous  
11 basis.
- 12 7. There is no medical evidence in the record on this appeal to support the  
13 Department's segregation and denial of responsibility for a "present  
14 urinary tract condition."

15 **CONCLUSIONS OF LAW**

16 Based upon the foregoing findings of fact, the Board concludes:  
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19 1. This Board has jurisdiction of the parties and subject matter of this  
20 appeal.  
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22 2. The issue presented by this appeal is the extent of claimant's disability  
23 on or about June 29, 1967, resulting from his industrial injury of  
24 December 17, 1963.  
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26 3. The orders of the Department of Labor and Industries dated June 29,  
27 1967 and November 28, 1967, are incorrect, and must be reversed and  
28 this claim remanded to the Department of Labor and Industries with  
29 direction to place the claimant on the pension rolls as a permanently  
30 totally disabled workman under the provisions of the Washington  
31 Workmen's Compensation Act.

32 It is so ORDERED.

33 Dated this 3rd day of March, 1970.

34 BOARD OF INDUSTRIAL INSURANCE APPEALS

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37 /s/  
38 ROBERT C. WETHERHOLT Chairman

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41 /s/  
42 R.H. POWELL Member

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45 /s/  
46 R.M. GILMORE Member  
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1 Revised Code of Washington, Section 51.52.120(2) provides:

2 "If, on appeal to the board, the order, decision or award of the department is reversed or  
3 modified and additional relief is granted to a workman or beneficiary, or in cases where a party  
4 other than the workman or beneficiary is the appealing party and the workman's or beneficiary's  
5 right to relief is sustained by the board, the board shall fix a reasonable fee for the services of his  
6 attorney in proceedings before the board if written application therefor is made by the attorney,  
7 workman or beneficiary. In fixing the amount of such attorney's fee, the board shall take into  
8 consideration the fee allowed, if any, by the director, for services before the department, and the  
9 board may review the fee fixed by said director. Any attorney's fee set by the department or the  
10 board may be reviewed by the superior court upon application of such attorney. Where the board,  
11 pursuant to this section, fixes the attorney's fee, it shall be unlawful for an attorney to charge or  
12 receive any fee for services before the board in excess of that fee fixed by the board. Any person  
13 who violates any provision of this section shall be guilty of a misdemeanor."  
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