Fiedler, Edwin

AGGRAVATION (RCW 51.32.160)

"Deemed granted" application to reopen claim

An order extending the time in which the Department must act on an application to reopen the claim must be entered before the initial time allowed by RCW 51.32.160 has passed. An order purporting to further extend the time, entered after the first extension period has passed, is ineffective, since at the time such order was entered the application to reopen the claim had already been "deemed granted" by operation of RCW 51.32.160. **….*In re Edwin Fiedler,* BIIA Dec., 90 1680 (1990)**

Where the last order closing the claim has been appealed and is not yet final the Department is not under any obligation to act upon a subsequent application to reopen the claim until a final order has been entered by either the Board or the Court, as the case may be. Under the circumstances of this case the time within which the Department had to act on the application to reopen the claim could not begin any sooner than the date upon which the Department received a conformed copy of the Superior Court's Stipulated Order of Dismissal. *Reid v. Department of Labor & Indus*., 1 Wn.2d 430 (1940). ***….In re Edwin Fiedler,* BIIA Dec., 90 1680 (1990)** [*Editor's Note:* Consider impact, if any, of *Marley v. Department of Labor & Indus*., 125 Wn.2d 533 (1995) *See In re Greg Ackerson*, BIIA Dec., 94 1135 (1995).]

Extension of time to act on application to reopen claim

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Last closing order not final

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Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: EDWIN E. FIEDLER	**)**	**DOCKET NO. 90 1680**
	)	
CLAIM NO. S-321320	**)**	**ORDER GRANTING RELIEF ON RECORD**

An appeal was filed by the claimant, on March 29, 1990, from an order of the Department of Labor and Industries dated March 21, 1990. The order corrected and superseded an order dated March 2, 1990 and purported to extend, to May 4, 1990, the time within which the Department must act on the application to reopen the claim.

From a review of the Department record in this matter it appears that this claim was closed by an order dated March 26, 1987. Thereafter, an appeal was filed by the claimant, with the Board (Docket No. 87 1179). On March 14, 1988 we entered an order denying petitions for review filed by the claimant and the self-insured employer and adopting as the final order of the Board a Proposed Decision and Order dated January 28, 1988. The Proposed Decision and Order reversed the Department order of March 26, 1987, directed the Department to require the self-insured employer to pay an award for permanent partial disabilities of 15% as compared to total bodily impairment, less any advance of permanent partial disability paid under the claim, and to thereupon close the claim with time-loss compensation as paid to October 31, 1985.

Thereafter, both the claimant and the self-insured employer filed appeals to the Superior Court of King County. On October 9, 1989 the claimant filed an application to reopen the claim. By a Stipulated Order of Dismissal, filed with the Court on December 1, 1989, the Court dismissed the appeals of both the claimant and the self-insured employer. A copy of the stipulated order is date stamped as having been received by the Department on December 5, 1989.

On March 2, 1990 the Department entered an order extending, to March 9, 1990, the time to act on the application to reopen the claim. This was to allow the self-insured employer to schedule a medical examination. No further order was entered by the Department, prior to the order of March 21, 1990, which either denied the application to reopen the claim or further extended the time within which the Department must act on the application.

This appeal raises the issue of whether the claimant's application to reopen the claim is "deemed granted" pursuant to the 1988 amendments to RCW 51.32.160, Laws of 1988, ch. 161 11. As amended, RCW 51.32.160 provides in part that:

> If an order denying an application to reopen filed on or after July 1, 1988, is not issued within ninety days of receipt of such application by the self-insured employer or the department, such application shall be deemed

> granted. However, for good cause, the department may extend the time for making the final determination on the application for an additional sixty days.

The application of this statutory provision is complicated in a case in which the last order closing the claim is not yet final at the time the Department receives the application to reopen the claim (i.e., where an appeal therefrom has been taken to the Board or the courts). In Reid v. Dep't of Labor and Indus., 1 Wn.2d 430, 437 (1939) the court stated:

> It is a condition prerequisite to the reopening of a claim for additional compensation by reason of aggravation of disability that there be a determination as to the disability and the rate of compensation to be awarded therefor and the further condition that there be a change in the claimant's condition since that determination. That is to say, until there has been a final determination as to the amount of the award to which a claimant is entitled, there cannot be entertained a claim for aggravation; as the standard by which to determine the award for aggravation, diminution, or termination of disability. . . is the difference between [the] original award and the amount to which he would be entitled because of his condition subsequent thereto.

See also State ex. Rel Stone v. Olinger, 6 Wn.2d 643 (1940).

In light of Reid the Department would not be under any obligation to act upon an application to reopen a claim until a final order had been entered, by either the Board or the Court as the case may be, concerning an appeal of the last order closing the claim. See also WAC 296-14-400 (last paragraph).

Given the time constraints imposed by RCW 51.32.160, we conclude that the time within which the Department must have acted on the application to reopen the claim could not begin any sooner than the date upon which the Department received a conformed copy of an order of the Court dismissing the appeals. Although the prior order of the Department may have become "final" at the time the Court dismissed the appeal, it would be ridiculous to require the Department to act until it was in fact notified of the final disposition of the appeal of its prior order. See In re Juan Farias, Dckt. No. 90 0707 (March 23, 1990). Therefore, the Department initially had until March 5, 1990 (90 days from December 5, 1989) to either deny the application to reopen the claim or extend the time within which it must act on the application.

The Department did act on March 2, 1990, within this initial 90 day period, to extend the period from March 5, 1990 to March 9, 1990. However, the Department did not enter any order, on or before

March 9, 1990, which extended the time to act on the application to reopen the claim beyond that date. Thus, at the time the Department entered the order of March 21, 1990 the claimant's application to reopen the claim was already "deemed granted" by operation of RCW 51.32.160.

The order of March 21, 1990 is therefore reversed and this matter is remanded to the Department to reopen the claim and direct the self-insured employer to provide the claimant with such benefits, and take other action, as may be indicated by the law and the facts.

It is so ORDERED.

Dated this 30th day of April, 1990.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
SARA T. HARMON Chairperson

/s/_____
FRANK E. FENNERTY, JR. Member

/s/_____
PHILLIP T. BORK Member