

Haugen, Clarence

[PROTEST AND REQUEST FOR RECONSIDERATION \(RCW 51.52.050\)](#)

Limitations on time to act

Where a worker timely protests and requests reconsideration of an order which promises issuance of a further order after receipt of a protest or request for reconsideration, the Department must enter a further order within the time limited by the fifth provision to RCW 51.52.060, with the period commencing on the date the Department received the protest. ...*In re Clarence Haugen*, BIA Dec., 91 1687 (1991)

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**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

1 **IN RE: CLARENCE HAUGEN**) **DOCKET NO. 91 1687**
2)
3) **ORDER DENYING APPEAL AND DIRECTING**
4 **CLAIM NO. J-732863**) **DEPARTMENT TO ENTER FURTHER ORDER**
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6 An appeal was filed by the claimant on March 27, 1991 from an order of the Department of
7 Labor and Industries dated March 4, 1991. The order held an order dated April 25, 1990 in abeyance
8 pending further consideration and the entering of a further determinative order.
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10 From a review of the Department record in this matter it appears that three orders were entered
11 by the Department on April 25, 1990. One paid time loss compensation for the period May 26, 1986
12 through December 31, 1986. Another terminated time loss compensation with payment for the period
13 January 1, 1987 through June 25, 1987. The other, which we assume was the last of the three,
14 closed the claim with time loss as paid and with awards for permanent partial disabilities equal to 5%
15 as compared to total bodily impairment (for the low back), paid at 75% of monetary value, and 10% of
16 the amputation value of the left leg at the ankle (syme), less prior awards. On May 22, 1990 the
17 Department received the claimant's protest of the closing of the claim, requesting that the claimant be
18 placed on the pension rolls as a permanently and totally disabled worker. On March 4, 1991 the
19 Department entered the abeyance order under appeal.
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21 In his notice of appeal the claimant challenges the Department's failure to comply with RCW
22 51.52.060. We assume the claimant is contending the Department is under a time constraint for
23 issuing a further order and that the time for issuing a further order has passed.
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25 Had the claimant filed an appeal of the order of April 25, 1990 with the Board, the Department
26 would have been allowed thirty days from receipt of the appeal to hold the order of April 25, 1990 in
27 abeyance for a period of ninety days. RCW 51.52.060 (sixth proviso). that time period could have
28 been extended for an additional ninety days for good cause stated in writing to all parties. At the
29 expiration of the time period the Department would have been legally obligated to issue a further
30 appealable order.
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32 In the instant case, however, the claimant did not file an appeal to the Board. He filed a request
33 for reconsideration with the Department. Further, the Department's abeyance order was not entered
34 "within the time limited for appeal" of the April 25, 1990 order. Therefore, the time limitations
35 contained in the sixth proviso to RCW 51.52.060 are not applicable.
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37 The fourth and fifth provisos to RCW 51.52.060 provide:
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1 That, if within the time limited for filing a notice of appeal to the board from
2 an order, decision or award of the department, the department shall direct
3 the submission of further evidence or the investigation of any further fact,
4 the time for filing such notice of appeal shall not commence to run until
5 such person shall have been advised in writing of the final decision of the
6 department in the matter: *Provided, further,* That in the event the
7 department shall direct the submission of further evidence or the
8 investigation of any further fact, as above provided, the department shall
9 render a final order, decision, or award within ninety days from the date
10 such further submission of evidence or investigation of further fact is
11 ordered which time period may be extended by the department for good
12 cause stated in writing to all interested parties for an additional ninety
13 days:
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15 Under the above provisos it is clear that had the Department held the order of April 25, 1990 in
16 abeyance "within the time limited for appeal" it would have been under the same time limitations to
17 issue a further order as are specified in the sixth proviso to RCW 51.52.060. Again, in the instant case
18 the Department did not take any overt abeyance action "within the time limited for appeal."
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20 The closing order of April 25, 1990 contains language promising that if a timely protest or
21 request for reconsideration is filed in response to the order, a further appealable order will be entered.
22 We have always held that if a timely protest or request for reconsideration is filed in response to an
23 order containing such language, it operates to automatically hold the order in abeyance and obligates
24 the Department to reconsider its decision and enter a further appealable order. See In re Santos
25 Alonzo, BIIA Dec., 56, 833 (1981); In re John Robinson, BIIA Dec., 59, 454 (1982). In Alonzo we
26 indicated that this procedure is authorized by the fourth proviso of RCW 51.52.060 allowing the
27 Department "to direct the submission of further evidence or the investigation of any further fact." *
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30 The issue presented by this appeal then, is whether the time limitations contained in the fifth
31 proviso to RCW 51.52.060 apply where a protest or request for reconsideration has been filed. If they
32 do apply, a further issue is whether the time within which the Department must enter a further order
33 begins on the date it received the protest or the date it issues an abeyance order in response to the
34 protest.
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43 *Prior to 1982 there was no express statutory reference to filing protests and requests for
44 reconsideration with the Department. Still, an informal protest procedure had been utilized for many
45 years. The authority for the procedure was derived from what is now the fourth proviso to RCW
46 51.52.060. See In re Betty Clayberg, BIIA Dec., 86 4295 (1988).
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1 In interpreting the provisions of RCW 51.52.050 and RCW 51.52.060 we have indicated that
2 requests for reconsideration and notices of appeal should be treated consistently. For example,
3 nothing in either RCW 51.52.050 or RCW 51.52.060 specifies the means by which the filing of a
4 protest may be perfected. Yet, we have held that since the filing of an appeal can be perfected by mail
5 so too should the filing of a protest. In re Betty Clayberg, BIIA Dec., 86 4295 (1988).
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8 As previously indicated, if the Department holds an order in abeyance on its own motion within
9 the time limited for appeal, it is subject to the time limitations contained in the fourth proviso of RCW
10 51.52.060. If, in response to an appeal, an abeyance order is entered within the time limited for
11 appeal or within thirty days of receiving the appeal, the Department is subject to identical time
12 limitations as contained in the sixth proviso of RCW 51.52.060. It would seem anomalous for there not
13 to be a similar time limit within which to respond to a protest. Inasmuch as the authority for the protest
14 procedure is derived from the fourth proviso of RCW 51.52.060, we therefore hold that the time
15 limitations contained in the fifth proviso limit the time within which the Department must enter a further
16 order in response to a protest. The more difficult issue concerns the date upon which the time
17 limitation period commences.
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20 The Department frequently enters abeyance orders in response to protests. A reading of the
21 fourth and fifth provisos to RCW 51.52.060 might suggest the time should commence from the date
22 such an order is entered. However, there is no requirement that such an order be entered and,
23 perhaps just as frequently, one is not. Further, as we said in Alonzo, a protest filed in response to an
24 order containing "protest" language "automatically" operates to set aside the Department's order and
25 hold it in abeyance. Alonzo, at 4. To that extent, the entry of an abeyance order is superfluous. It
26 only serves to confirm the abeyance action which has already occurred by operation of law.
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29 We also note that in this case the Department's abeyance order was entered nearly eleven
30 months after the orders of April 25, 1990 were entered, and nearly ten months after the protest was
31 received. Were we to find that the time within which the Department must act begins on the date the
32 Department enters an abeyance order, we would only discourage the Department from entering such
33 orders. At a minimum we would discourage the entry of timely abeyance orders. In either case, the
34 Department would be able to effectively set its own time limitations for responding to a protest.
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37 We therefore hold that where a timely protest has been filed in response to an order containing
38 language which invites the filing of a protest, the Department must enter a further order within the time
39 limited by the fifth proviso to RCW 51.52.060 (i.e., within ninety days or up to an additional ninety days
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1 for good cause stated in writing). Further, the time within which the Department must enter the further
2 order commences on the date the Department receives the protest.
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4 In the instant case the Department did not enter a further order within ninety days of receipt of
5 the claimant's protest on May 22, 1990, nor did it extend the time for issuing a further order before the
6 initial ninety day time period had elapsed. In any case, more than one hundred eighty days have
7 elapsed since May 22, 1990.
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10 On March 4, 1991 the Department could not further extend the time for responding to the
11 claimant's protest. The order of March 4, 1991 is, under the circumstances, a nullity and this appeal is
12 therefore denied. However, the Department is hereby directed to forthwith enter a further order in
13 response to the claimant's protest of the closing order of April 25, 1990. The denial of this appeal is
14 without prejudice to the right of any party to appeal such further order.
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18 It is so ORDERED.

19 Dated this 28th day of May, 1991.
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22 BOARD OF INDUSTRIAL INSURANCE APPEALS
23

24
25 /s/
26 SARA T. HARMON CHAIRPERSON
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29 /s/
30 FRANK E. FENNERTY, JR. MEMBER
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33 /s/
34 PHILLIP T. BORK MEMBER
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