

## Haugen, Clarence

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### [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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26            In his notice of appeal the claimant challenges the Department's failure to comply with RCW  
27 51.52.060. We assume the claimant is contending the Department is under a time constraint for  
28 issuing a further order and that the time for issuing a further order has passed.  
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30            Had the claimant filed an appeal of the order of April 25, 1990 with the Board, the Department  
31 would have been allowed thirty days from receipt of the appeal to hold the order of April 25, 1990 in  
32 abeyance for a period of ninety days. RCW 51.52.060 (sixth proviso). that time period could have  
33 been extended for an additional ninety days for good cause stated in writing to all parties. At the  
34 expiration of the time period the Department would have been legally obligated to issue a further  
35 appealable order.  
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39            In the instant case, however, the claimant did not file an appeal to the Board. He filed a request  
40 for reconsideration with the Department. Further, the Department's abeyance order was not entered  
41 "within the time limited for appeal" of the April 25, 1990 order. Therefore, the time limitations  
42 contained in the sixth proviso to RCW 51.52.060 are not applicable.  
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45            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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29 The issue presented by this appeal then, is whether the time limitations contained in the fifth  
30 proviso to RCW 51.52.060 apply where a protest or request for reconsideration has been filed. If they  
31 do apply, a further issue is whether the time within which the Department must enter a further order  
32 begins on the date it received the protest or the date it issues an abeyance order in response to the  
33 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 28<sup>th</sup> day of May, 1991.  
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22 BOARD OF INDUSTRIAL INSURANCE APPEALS  
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24  
25 /s/  
26 SARA T. HARMON CHAIRPERSON  
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28  
29 /s/  
30 FRANK E. FENNERTY, JR. MEMBER  
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33 /s/  
34 PHILLIP T. BORK MEMBER  
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