

Fruth, Craig

JOINDER

Department as necessary party

The Department is a necessary party to an appeal in light of WAC 296-14-420(1) where the issues on appeal involve whether a new injury or aggravation occurred and there are simultaneous applications filed under two different claim. ...*In re Craig Fruth, BIA Dec., 91 4490 (1992)*

Scroll down for order.

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

1 **IN RE: CRAIG W. FRUTH**) **DOCKET NOS. 91 5394 & 91 4490**
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4)
5) **ORDER JOINING A PARTY (THE DEPARTMENT**
6) **OF LABOR AND INDUSTRIES),**
7) **CONSOLIDATING DOCKET NOS. 91 5394 AND**
8) **91 4490, VACATING PROPOSED DECISION AND**
9) **ORDER IN DOCKET NO. 91 5394, AND**
10 **CLAIM NOS. T-469514 & T-240801**) **REMANDING APPEAL FOR FURTHER**
11) **PROCEEDINGS**

12 APPEARANCES:

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14 Claimant, Craig W. Fruth, by
15 Rutledge, Cary-Hamby & Scott, per
16 Peter T. Scott

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18 Self-Insured Employer, Seattle Times Company, by
19 Roberts, Reinisch, MacKenzie, Healy & Wilson, P.C., per
20 Deborah J. Lazaldi

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22 The Department of Labor and Industries, by
23 The Attorney General

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25 This is an appeal filed by the claimant, Craig W. Fruth, on October 23, 1991, from an order of the
26 Department of Labor and Industries dated August 26, 1991 which stated the Department was without
27 jurisdiction to reconsider its April 5, 1991 rejection order on the grounds that a request for
28 reconsideration was not received within time limits required by law. This appeal was assigned Docket
29 No. 91 5394 and concerned Claim No. T-469514. **REMANDED FOR FURTHER PROCEEDINGS.**

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33) **DECISION**

34 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and
35 decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order issued
36 on May 22, 1992 in which the order of the Department dated August 26, 1991 was affirmed.

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38 At the first conference, the claimant's appeals involving two separate claims were scheduled
39 and discussed. Our industrial appeals judge indicated that the appeal assigned Docket No. 91 5394 in
40 Claim No. T-469514, would be heard separately from the companion appeal, Docket No. 91 4490 in
41 Claim No. T-240801.

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43 The historical and jurisdictional facts and the record of evidence brought before the Board in
44 Docket No. 91 5394 reveal that the core issue is whether claimant's application for benefits should be
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1 considered under Claim No. T-469514 for a new alleged injury of March 6, 1991 in Docket No. 91
2 5394, or under an accepted Claim No. T-240801 for aggravation of a prior industrial injury of
3 December 27, 1989 in Docket No. 91 4490. While Docket No. 91 5394 presents a separate and
4 distinct jurisdictional issue, we believe that the law and the facts inextricably intertwine the two cases.
5 Separate hearings and decisions cannot result in a full and fair resolution of each case. We conclude,
6 therefore, that consolidation of Docket Nos. 91 4490 and 91 5394 is necessary for the resolution of
7 these appeals by this Board.
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11 The claimant and the self-insured employer agreed that the sole contested issue to be decided
12 in appeal Docket No. 91 5394 was the threshold question of jurisdiction, particularly, whether there
13 had been a timely protest of the Department's April 5, 1991 rejection order within the 60-day period
14 allowed by law. Essentially, the claimant requested the industrial appeals judge to decide whether
15 equitable estoppel prevents the assertion of the statute of limitations found in RCW 51.52.050. In
16 Oestreich v. Dep't of Labor & Indus., 64 Wn. App. 165, 169 (1992) the court stated that equitable
17 estoppel will toll a statute of limitations in cases where the defendant's actions have "fraudulently or
18 inequitably" invited a plaintiff to delay commencing a suit until the applicable statute of limitations has
19 expired. In addition to this question, the Petition for Review, raises for the first time, a new and
20 material issue of whether certain document(s) constitute a Protest and Request for Reconsideration as
21 contemplated by RCW 51.52.050. Also, we believe that the appeals present other significant
22 questions of fact and law which have not been previously addressed. Therefore, we will be remanding
23 this appeal to the hearing process to resolve all questions of law and fact. This being said, we believe
24 it would be premature to determine whether or not Oestreich establishes any precedent upon which
25 the Board could apply equitable estoppel based upon a self-insured's actions.
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28 As to the further issue raised by the Petition for Review, it is abundantly clear that neither the
29 parties nor our industrial appeals judge considered the legal significance under RCW 51.52.050 of Dr.
30 Bruce Bradley's letter of May 20, 1991, Exhibit No. 9. This document was received by the self-insured
31 employer on May 30, 1991, and, in turn, was mailed to the Department on June 3, 1991 along with a
32 speed-note of that date to the Department's adjudicator. Exhibit No. 8. In accordance with In re Harry
33 D. Pittis, BIIA Dec., 88 3651 (1989), this document must be construed to determine whether it effects a
34 protest and request for reconsideration as contemplated by RCW 51.52.050 and WAC 296-20-09701.
35 See also In re Terri J. Krause, Dckt. No. 88 2667 (August 3, 1989).
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1 Further, the parties and our industrial appeals judge failed to consider the effect of WAC 296-
2 14-420 upon the two applications for benefits filed by claimant. Claimant applied with the self-insured
3 under the new claim, T-469514 (Docket No. 91 5394), on March 15, 1991, copy received by the
4 Department on April 1, 1991; and applied with the Department under the same set of medical facts for
5 a reopening of the prior accepted claim, T-240801, on April 4, 1991 (Docket No. 91 4490). WAC 296-
6 14-420, Section 1, directs that where an application for benefits is filed which requires a determination
7 of whether benefits should be paid pursuant to reopening of an accepted claim or allowed as a claim
8 for a new injury or occupational disease, the Department shall make the determination by a single
9 order. This has not been done. The rule states that such a determination must be made jointly by the
10 assistant directors for claims administration and self-insurance¹.
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12 Obviously, the Department has not received notices nor has it been made a party of
13 interest to these proceedings. Given the plain language of WAC 296-14-420(1), and its obvious intent
14 to avoid piecemeal litigation and possibly conflicting administrative decisions, we believe that the
15 Department's presence is indispensable for a full and just adjudication of this issue. Therefore, the
16 Department will be joined and made an active party to further proceedings.
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18 For these reasons, in fairness to all parties, both appeals will be remanded to mediation to
19 allow all parties to reassess the facts and the applicability of WAC 296-14-420(1) and WAC
20 296-20-09701, and determine the amenability to settlement of these appeals without the need for
21 formal hearings. If these matters are not resolved in the mediation process, they should remain
22 consolidated and be set for hearings on all appropriate issues.
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24 The parties are advised that the instant order is not a final Decision and Order of the Board
25 within the meaning of RCW 51.52.110. At the time of the conclusion of proceedings the industrial
26 appeals judge shall, unless the appeals are dismissed or resolved by an Order on Agreement of the
27 Parties, enter a Proposed Decision and Order containing findings and conclusions as to each
28 contested issue of fact and law, based on the entire consolidated record. Any party aggrieved by
29 such Proposed Decision and Order may petition the Board for review of such further Proposed
30 Decision and Order, pursuant to RCW 51.52.104.
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32 We hereby, pursuant to WAC 263-12-415(3) and RCW 51.52.102, set aside and vacate the
33 Proposed Decision and Order in Docket No. 91 5394 dated May 22, 1992. Docket No. 91 4490 is
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35 ¹Since claimant worked for the same self-insured employer at times relevant to both of these claims, Sections 2, 3 and 4
36 of WAC 269-14-420 appear to have little bearing in these matters.
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1 hereby consolidated with Docket No. 91 5394. The Department of Labor and Industries is hereby
2 joined and made a party to these consolidated appeals, and appearances and notices of these
3 appeals will be amended accordingly. These matters are hereby remanded to the mediation process
4 and/or hearing process so that all parties have an opportunity to address all appropriate issues raised
5 by these consolidated appeals.
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9 It is so **ORDERED**.

10 Dated this 5th day of August, 1992.

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12 BOARD OF INDUSTRIAL INSURANCE APPEALS

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15 /s/
16 S. FREDERICK FELLER Chairperson

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19 /s/
20 FRANK E. FENNERTY, JR. Member

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23 /s/
24 PHILLIP T. BORK Member