

James, Bernard

AGGRAVATION (RCW 51.32.160)

Discretionary reopening by Director

Once the Director exercises the discretion to reopen a claim which otherwise could not be reopened due to the time limitations of RCW 51.32.160, the worker is entitled to benefits under the Act to the same extent as if there had been no time limitation bar.*In re Bernard James, BIIA Dec., 04,394 (1955)* [Editor's Note: See later statutory amendments, Laws of 1988, ch. 161, § 11.]

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

1 **IN RE: BERNARD JAMES**)
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3 **CLAIM NO. B-451886**)
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APPEARANCES:

Claimant, Bernard James, by
Walthev, Oseran and Warner, per
Charles F. Warner

Employer, Aberdeen Plywood, by
Lenihan and Ivers, per
Carl P. Jensen

Department of Labor and Industries, by
The Attorney General and
L. A. Dwinell, Assistant

This is an appeal filed by the claimant, Bernard James, on December 31, 1953, from an order of the supervisor of industrial insurance, dated November 2, 1953, closing this claim with time-loss compensation to March 1, 1953, inclusive, and without an award for permanent partial disability. **REVERSED AND REMANDED.**

DECISION

This case has been submitted to the board for decision on the basis of a stipulated set of facts and four exhibits. The facts to which the parties to this action have stipulated are as follows:

The claimant was injured on September 28, 1946, while in the employ of the Aberdeen Plywood Corporation. The injury occurred when the claimant fell a distance of 12 feet while scaling logs, and according to the report of accident, which was signed by Dr. Skarperud and filed with the department of labor and industries on October 4, 1946, resulted in a fracturing of the terminal end of the 7th cervical vertebra. By an order dated February 17, 1947, the claim was closed with no award for permanent partial disability and on or about May 6, 1952 the claimant filed with the department of labor and industries an application to reopen his claim on the ground of aggravation of condition. This application for reopening was supported by his then attending physician, Dr. Dwyer, but on or about May 14, 1952, the department entered an order denying the claimant's application to reopen on the ground that the five year statute had run. Shortly after the entry of the aforementioned order Dr. Skarperud wrote the department stating that the claimant's condition had become aggravated and that he was in need of further relief. Thereafter, on November 14, 1952, the director of the department of labor and

1 industries entered an order (exhibit 1) reopening the claim. On
2 December 17, 1952, the department had the claimant examined by a Dr.
3 Robson who found a herniated cervical disc and recommended traction.
4 On January 22, 1953, the claimant was operated on at the site of the 5th
5 cervical disc and on or about July 1, 1953, Dr. Dwyer informed the
6 department that the claimant's case was ready for closure and that he
7 had a permanent partial disability. On August 12, 1953, the department
8 had the claimant examined by Dr. Peterson of Tacoma, Washington,
9 and thereafter Dr. Peterson sent a report to the department of labor and
10 industries setting forth his findings of disability and recommending that
11 the claimant be paid an award of 35% of the amount allowable for
12 unspecified permanent partial disabilities. On November 2, 1953, the
13 supervisor of industrial insurance entered an order closing the claim with
14 time-loss compensation to March 1, 1953, inclusive, and with no
15 permanent partial disability award. From that order the claimant took a
16 timely appeal to the board of industrial insurance appeals and the board
17 entered an order granting the appeal.
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19 The exhibits that were made part of the record by agreement of the parties are the director's
20 order of November 14, 1952, (exhibit 1), the supervisor's order of November 2, 1953, closing the
21 claim with no permanent partial disability award, (exhibit 2), Dr. Wendell G. Peterson's report of his
22 findings and conclusions as a result of his examination of the claimant on August 12, 1953, (exhibit
23 3), and the claimant's notice of appeal.
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25 The order of the director of the department of labor and industries, dated November 14,
26 1952, provided that:
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28 "WHEREAS, the Director has been requested to consider an application
29 to reopen the above claim, on which the five-year Statute of Limitations
30 has operated, by exercising the discretionary authority conferred upon
31 him by Section 51.32.160, R.C.W. (and the ruling of the Supreme Court
32 of the State of Washington in Smith vs. Department of Labor and
33 Industries, 8 Wash. (2d) 587) and
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35 "WHEREAS, in accordance with said discretionary authority and by
36 reason of medical examination and investigation the Director finds that
37 there has been, in fact, an aggravation of the original injury;
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39 "IT IS HEREBY ORDERED THAT said application to reopen be and is
40 hereby granted."
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42 The statute upon which the director relied for his authority to reopen this claim, sec.
43 51.32.160 R.C.W. provides that:
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1 "If aggravation, diminution, or termination of disability takes place or be
2 discovered after the rate of compensation shall have been established
3 or compensation terminated, in any case the director, through and by
4 means of the division of industrial insurance, may, upon the application
5 of the beneficiary, made within five years after the establishment or
6 termination of such compensation, or upon his own motion, re-adjust for
7 further application the rate of compensation in accordance with the rules
8 in this section provided for the same, or in a proper case terminate the
9 payment."

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11 Our supreme court in the case of Smith v. Department of Labor and Industries, 8 Wn. (2d)
12 587, interpreted this statute to mean that the time limitation in the statute (5 years) has reference
13 solely to the application of the beneficiary and that the legislature conferred continuing jurisdiction
14 upon the director of the department of labor and industries so that he might at any time upon his
15 own motion grant additional compensation to an injured workman, if he found that there had been,
16 in fact, an aggravation of the injury. Further, in the case of Botica v. Department of Labor and
17 Industries, 184 Wash. 573, our supreme court held that it was within the discretion of the director to
18 determine whether or not he would reopen the claim upon his own motion and that no action to
19 compel him to exercise his discretion would lie.

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21 It is apparently the position of the department and the employer that in a case, such as this,
22 where the claimant has lost his right to have his claim reopened due to the operation of the five
23 year statute of limitations, and the claim has been reopened only by virtue of the director's exercise
24 of the discretionary power granted by R.C.W. 51.32.160, the claimant has no right to appeal to this
25 board and have reviewed any decision of the department made subsequent to the director's order
26 reopening the claim. It is apparently the position of the claimant herein that, although by operation
27 of the five year statute he had lost his right to have his claim reopened, where in fact it was
28 reopened by order of the director pursuant to the authority given him by statute, the situation is the
29 same as if the five-year period had not run and he is entitled to have reviewed any decision of the
30 department subsequent to the date of the director's order reopening the claim. The board is of the
31 opinion that the claimant's view is the correct one.

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33 The five year limitation contained in R.C.W. 51.32.160 is a statute of limitations and relates to
34 remedies only, rather than a statute of non-claim which extinguishes a right. Lane v. Department of
35 Labor and Industries, 21 Wn. (2d) 429; Pape v. Department of Labor and Industries, 43 Wn. (2d)
36 736. It is well established that a statute of limitations is a defense which may be waived either
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1 expressly or by failing to plead the statute and in such case the party whose remedy would have
2 been barred by the statute may pursue his right in the same manner as if the statutory time has not
3 run. Generally speaking no officer or agency of the state has the right to waive the defense of the
4 statute of limitations, Nagel v. Department of Labor and Industries, 189 Wash. 631, but it seems
5 clear that such authority is expressly conferred upon the director of the department of labor and
6 industries by virtue of R.C.W. 51.32.160. It is, therefore, the opinion of the board that when the
7 director entered his order of November 14, 1952, reopening this claim by exercising the
8 discretionary authority conferred upon him by sec. 51.32.160, R.C.W. he did waive the statute of
9 limitations and by that action put the claimant in the same position he would have been had the five
10 year period not run. It is true that the director did not have to open this claim but the board believes
11 that, having reopened the claim on its own motion, the department was bound to award the
12 claimant whatever compensation the facts and law showed he was entitled to and that the claimant
13 may call upon this board to determine whether or not that was done. Seagraves v. Department of
14 Labor and Industries, 185 Wash. 333; Quarberg v. Department of Labor and Industries, 35 Wn. (2d)
15 305.

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A review of the report of Dr. Wendell Peterson (exhibit 3), which the parties agreed the board might consider for the purpose of determining the extent of the claimant's disability, if it first determined that he had a right to appeal from the supervisor's order of November 2, 1953, convinces the board that when the department closed the claimant's claim with no award for permanent partial disability it did not award him the compensation which the law and the facts show him to be entitled to.

Dr. Peterson's report revealed that he received a history from the claimant that following the injury of September 28, 1946, his neck continued to bother him off and on, accompanied by some discomfort down his left arm, but he was able to stay on the job. There would be recurrent attacks of pain in the left side of the neck and into the arm but these would clear up from time to time. However, in May, 1952, the claimant had a particularly severe attack of pain in the neck and left arm which was excruciating and did not let up. On January 20, 1953, Dr. Robson performed surgery on the claimant's neck which surgery afforded him excellent relief from pain, and on March 1, 1953, he returned to his former employment. Dr. Peterson also received a history that in 1938 the claimant had sustained an injury to his sacro-iliac for which he received a permanent partial disability award of 40 degrees. The claimant told Dr. Peterson that his lower back had given him no

1 trouble the past few years. On physical examination Dr. Peterson found that extension of claimant's
2 neck was markedly restricted, forward flexion was moderately restricted, lateral flexion to right and
3 left sides were moderately restricted, and rotation was moderately to markedly restricted. There
4 was pain in the neck on all the extremes of motion. According to Dr. Peterson, examinations of AP
5 and lateral view x-rays taken September 30, 1946, showed the cervical spine to be straight,
6 suggesting muscle spasm, with some irregularity of the spinous process of the 7th cervical vertebra
7 which could not definitely be identified as a fracture. Films taken on May 6, 1952, also showed the
8 cervical spine to be straight and revealed a definite narrowing of the interspace between C5 and 6
9 which was not present in the films of September 30, 1946. Dr. Peterson concluded that the
10 claimant's condition at the time of his examination was fixed, that there was no indication for further
11 treatment, that he was able to work and that his claim should be closed with an award of 35% of the
12 amount allowable for unspecified permanent partial disabilities, from which should be deducted any
13 previous permanent partial disability award.
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16 In the opinion of the board the history received by Dr. Peterson and his findings upon
17 comparison of x-rays taken of September 30, 1946, and May 6, 1952, definitely establishes that the
18 claimant's disability as a result of the neck injury he sustained on September 28, 1946, worsened to
19 the extent that he is entitled to an award of 35% of the amount allowable for unspecified permanent
20 partial disabilities. A brief filed on behalf of the department of labor and industries in connection
21 with this appeal indicates that the department's failure to pay the claimant the award recommended
22 by Dr. Peterson was based on the fact that Dr. Peterson recommended that any previous
23 permanent partial disability award should be deducted from the amount he recommended and the
24 fact that as a result of a previous injury to his low back the claimant had received an award of 40
25 degrees. In taking this position the department apparently relied upon R.C.W. sec. 51.32.080 (d)
26 which provides that:
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29 "Should a workman receive an injury to a member or part of his body
30 already, from whatever cause, permanently partially disabled, resulting
31 in the amputation thereof or in an aggravation or increase in such
32 permanent partial disability but not resulting in the permanent total
33 disability of such workman, his compensation for such partial disability
34 shall be adjudged with regard to the previous disability of the injured
35 member or part and the degree or extent of the aggravation or increase
36 of disability thereof." (Emphasis added)
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1 It is true that the 40 degree award the claimant received as a result of the injury to his low
2 back in 1938 is a greater disability award than the 35% unspecified recommended by Dr. Peterson,
3 but the board does not consider R.C.W. 51.32.080 (d) applicable in this case for it does not believe
4 that the low back and the neck are the same part of the body within the meaning of that statute.
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7 In view of the foregoing the board is of the opinion that the order of the supervisor of
8 industrial insurance dated November 2, 1953, should be reversed and the claim remanded to the
9 department of labor and industries with direction that the claim be reopened and the claimant
10 awarded 35 % of the amount allowable for unspecified permanent partial disabilities.
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13 FINDINGS OF FACT

14 Based on the foregoing and after reviewing the entire record herein, the board finds as
15 follows:
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- 17 1. The claimant, Bernard James, sustained an industrial injury to his neck
18 on September 28, 1946, while in the employ of the Aberdeen Plywood
19 Corporation at Aberdeen, Washington.
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- 21 2. On October 4, 1946, the claimant filed with the department of labor and
22 industries an accident report and claim for compensation. His claim was
23 allowed and by an order dated February 17, 1947, the claim was closed
24 with no award for permanent partial disability. On or about May 6, 1952,
25 the claimant filed with the department of labor and industries an
26 application to reopen his claim on the ground of aggravation of condition
27 and on or about May 14, 1952, the department entered an order denying
28 the claimant's application to reopen his claim on the ground that the five
29 year statute of limitations had run. On November 14, 1952, the director
30 of the department of labor and industries, on his own motion, entered an
31 order reopening the claim subsequent to November 14, 1952, the
32 claimant was afforded medical treatment for his neck including traction
33 and surgery, paid time-loss compensation, and on November 2, 1953,
34 the supervisor of industrial insurance entered an order closing his claim
35 with time-loss compensation to March 1, 1953, inclusive, and with no
36 permanent partial disability award. From that order the claimant took a
37 timely appeal to this board and the board entered an order granting the
38 appeal.
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- 40 3. The claimant's disability, resulting from his industrial injury of September
41 28, 1946, increased between February 17, 1947, and November 2,
42 1953, to such an extent that his loss of bodily function as a result of his
43 industrial injury of September 28, 1946, entitles him to an award of 35%
44 of the amount allowable for unspecified permanent partial disabilities.
- 45 4. The order of the supervisor of industrial insurance herein dated
46 November 2, 1953, closing this claim with no award for permanent
47 partial disability is in error and must be reversed and the claim

1 remanded to the department of labor and industries with direction that
2 the claim be reopened the claimant awarded 35% of the amount
3 allowable for unspecified permanent partial disabilities and the claim
4 thereupon be closed.

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6 **CONCLUSIONS OF LAW**

7 Based on the foregoing findings of fact, the board concludes:

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9 1. The director of the department of labor and industries had authority to,
10 on his own motion, reopen the claimant's claim, although more than five
11 years had elapsed since it was last closed.
- 12 2. Having reopened the claimant's claim on its own motion the department
13 was bound to award the claimant whatever compensation the facts and
14 law showed he was entitled to and the claimant had a right to call upon
15 this board to determine whether or not that was done.
- 16 3. The board has jurisdiction of the parties and the subject matter.
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18 4. The order of the supervisor of industrial insurance herein dated
19 November 2, 1953, closing this claim with no award for permanent
20 partial disability is in error and must be reversed and the claim
21 remanded to the department of labor and industries with direction that
22 the claim be reopened the claimant awarded 35% of the amount
23 allowable for unspecified permanent partial disabilities and the claim
24 thereupon be closed.

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26 **ORDER**

27 Now, therefore, it is hereby **ORDERED** that the order of the supervisor of industrial
28 insurance herein dated November 2, 1953, be, and the same is hereby, reversed and the claim
29 herein remanded to the department of labor and industries with direction that it be reopened the
30 claimant awarded 35% of the amount allowable for unspecified permanent partial disabilities, and
31 the claim thereupon be closed.

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33 Dated this 17th day of May, 1955.

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36 BOARD OF INDUSTRIAL INSURANCE APPEALS

37 /s/ _____

38 J. HARRIS LYNCH Chairperson

39 /s/ _____

40 ARTHUR BORCHER Member

41 /s/ _____

42 A.W. ENGSTROM Member