# Jensen, John (I)

## AGGRAVATION (RCW 51.32.160)

**First terminal date findings**

An Order on Agreement of Parties on the first terminal date, based on an examination by a particular physician, establishes the findings which must serve as the basis of comparison to determine if worsening has occurred between the terminal dates. **….*In re John Jensen* (I), BIIA Dec., 16,316 (1964)**

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

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| **IN RE: JOHN JENSEN** | **)** | **DOCKET NO. 16,316** |
| | **)** | |
| **CLAIM NO. C-105136** | **)** | **DECISION AND ORDER** |

On November 18, 1963, Hearing Examiner Donald D. Haley entered a Proposed Decision and Order in the above-entitled appeal. Thereafter, within the period provided by law, the claimant filed a written statement of exceptions to Findings of Fact numbered 3 and 4 and Conclusion number 2 contained in said Proposed Decision and Order.

The Board has reviewed the evidentiary rulings of the Hearing Examiner and finds that no prejudicial error was committed, and said rulings are hereby affirmed. The Board has considered the Proposed Decision and Order, the statement of exceptions thereto, and has carefully reviewed the entire record in this case.

The issue presented by this appeal is the extent of the increase, if any, in the claimant's permanent disability between March 10, 1960, and September 5, 1961, attributable to an injury the claimant sustained on November 5, 1953, in the course of his employment with Lohrer Logging Company. Karniss v. Department of Labor and Industries, 39 Wn. (2d) 898.

The claimant recognized that it was his burden to present evidence to establish such aggravation and in so doing, asked a physician, Dr. Wilbur J. Dugaw, who had examined him in September, 1961, to compare findings then made with the findings made by a physician in February, 1960. Ordinarily, of course, such a comparison would be a valid method to establish increase in permanent disability. However, under the peculiar factual circumstances prevailing in the history of this workman's claim, we do not believe such a comparison provides a valid basis to establish aggravation.

It is apparent from the record that the physician who examined the claimant in February, 1960, Dr. Douglas H. Murray, furnished a report of that examination to the department which, in turn, provided the bases for the department's order of March 10, 1960, closing the claim with no additional permanent disability award greater than 55% of the maximum unspecified award theretofore paid the claimant in February, 1958. However, neither Dr. Murray's findings nor his conclusions ever formed the basis of a final, determinative award because the claimant appealed the department's March 10, 1960, order to this Board.

Thereafter, the Board issued an order in August, 1960, upon an agreement of the parties that the findings and conclusions of Dr. Ernest M. Burgess, based on his examination of the claimant on

June 24, 1960, formed a valid basis for determination of the claimant's permanent disability as of March 10, 1960. This order provided that the claimant's permanent disability should have been increased from 55% to 70% of the maximum allowable for unspecified disabilities as of March 10, 1960. The claimant, having accepted the benefit of Dr. Burgess' findings and consequent increased award, cannot be permitted to now utilize the findings of some other physician, whose findings he specifically rejected, as the "base" for establishing any subsequent aggravation. Reid v. Department of Labor and Industries, 1 Wn. (2d) 430.

Dr. Dugaw was not asked to compare his findings with the findings made by Dr. Burgess in June, 1960. So we do not have the benefit of his opinion as to whether there was an increase in permanent disability during the period at issue. Although there may be some question as to the propriety or efficacy of our doing so, as laymen, we have compared Dr. Dugaw's findings with Dr. Burgess' findings and we cannot state that there is objective evidence of any worsening of Mr Jensen's condition which is attributable to the injury he sustained in 1953.

The claimant makes the further contention that he should receive compensation for bilateral inguinal herniae, which he first noticed in late 1958, and for which he has received neither treatment nor compensation. We note, initially, that this is not a new condition which developed subsequent to the closing of the claim in March, 1960, and hence cannot be the basis for satisfying the deficiency of a showing of aggravation under the theory of Knowles v. Department of Labor and Industries, 28 Wn. (2d) 970.

Rather than being a new condition, the claimant contends that he first noticed this condition two days after surgery performed on his low back in 1958 by Dr. Burgess, that he "could feel when these herniae broke loose", that he had a stinging sensation in the groin on both sides, that "this hernia has been enlarging slightly ever since it occurred", and that he has worn a home-made truss for such conditions since shortly after he returned home from surgery. Although the department has informally refused to accept responsibility for the hernia conditions, no formal order specifically denying responsibility for them has ever been issued. It is clear, however, that the condition has been in existence since prior to the March, 1960, closing order, that it was then disabling at least to the extent that he felt obliged to wear a truss, and that the matter had been made known to the department prior to that time. It appears to us, therefore, that it is now res judicata that the workman's hernia condition is not causally related to the 1953 injury. Donati v. Department of Labor and Industries, 35 Wn. (2d) 151. In any event, it is apparent from the testimony of Dr.

Dugaw, that the hernia plays a "minimal" part in Mr. Jensen's overall disability; that this condition did not worsen between March 10, 1960 and September 5, 1961, and that if it were corrected it would not lessen his disability.

We conclude, therefore, that the claimant has failed to establish that his permanent disability, attributable to the 1953 injury, increased during the aggravation period. Therefore, the supervisor's order of September 5, 1961, should be sustained.

However, the Board specifically amends the Hearing Examiner's findings numbered 3 and 4 as follows:

Finding No. 3

> On October 10, 1958, the claimant submitted to a laminectomy and surgical fusion of the 5th lumbar vertebra to the sacrum for conditions attributable to the injury he sustained in 1953. While recuperating from this surgery he first noticed a stinging sensation on both sides of his groin and thereafter has continuously worn a home-made truss for bilateral herniae. Prior to March 10, 1960, he contended that the hernia conditions were the responsibility of the department of labor and industries and although the department has refused to accept responsibility therefor, no formal order specifically denying responsibility has ever been issued. On or about September 5, 1961, these hernia conditions continued to exist. They play a minimal part in his overall disability and although they might be corrected, such correction would not lessen his disability.

Finding No. 4

> There is no valid medical evidence in the record to establish that the claimant's permanent disability causally related to his 1953 injury increased between March 10, 1960, and September 5, 1961.

Based on the foregoing, the Board adopts the Hearing Examiner's proposed conclusion number 1, and the proposed conclusion number 2 is amended to read as follows:

Conclusion No. 2

> It is res judicata by reason of the supervisor's order of March 10, 1960, as subsequently modified by this Board's order of August 31, 1960, that the claimant's hernia conditions are not attributable to the 1953 injury.

In addition, the Board concludes as follows:

3. The claimant has failed to present sufficient evidence to establish, prima facie, his entitlement to any greater benefits under the workmen's compensation act than he has already received, and the supervisor's

order of September 5, 1961, denying his application to reopen this claim should be sustained.

In view of the foregoing, the Board adopts the proposed order of the Hearing Examiner, and the same is incorporated herein by reference.

It is so ORDERED.

Dated this 3rd day of February, 1964.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/
R. H. POWELL Member

/s/
HAROLD J. PETRIE Member