

Qualls, John

AGGRAVATION (RCW 51.32.160)

Temporary worsening

A prior finding that the worker's condition became aggravated requiring reopening of the claim for treatment establishes only a temporary increase in disability. In order to obtain an increased permanent disability award, the worker must still present proof of aggravation resulting in an increase in permanent disability. ...*In re John Qualls*, BIIA Dec., 28,430 (1969) [dissent]

RES JUDICATA

Aggravation

The reopening of a claim for treatment does not establish ipso facto an increase in permanent disability but only the existence of a temporary exacerbation requiring remedial medical treatment. ...*In re John Qualls*, BIIA Dec., 28,430 (1969) [dissent]

Scroll down for order.

1 on the other hand, first saw the claimant in April of 1963. He began treatment of him in November
2 1965, and continued to treat him until September of 1967.

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4 It is difficult to distill from the testimony of Dr. Brown any objective criteria upon which he
5 based his opinion that the claimant's condition was worse in 1967 than it had been in March of
6 1960. He found what he referred to as voluntarily restricted motion that added to limitation of
7 motion in all areas of his body, not only the neck but elsewhere. Other findings made in 1967 do
8 not appear to be significantly different from those made by Dr. Brown on his last examination of the
9 claimant in December of 1959.

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13 Dr. Burgess found that during the period of his treatment the claimant deteriorated generally
14 as far as his over-all physical and mental psychological status was concerned. Dr. Burgess did not,
15 however, state that this deterioration was the result of factors related to the industrial injury. He did
16 state that the claimant was totally unemployable in March of 1967.

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19 It is evident from Dr. Burgess' testimony that a good portion of his disability rating is based
20 upon the claimant's psychological state. He was unable to find any evidence of disuse of the
21 claimant's extremities and thought the claimant's neurological picture remained unchanged over the
22 period of his treatment.

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25 At some time in 1929, the claimant had suffered a severe head injury which ultimately
26 resulted in surgical intervention in the skull. That the claimant has suffered since that time from
27 severe problems directly related to that traumatic incident is not here in question. It is firmly
28 established by this record.

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31 To prevail in this appeal, the claimant must show: (1) the causal relationship between the
32 injury and the subsequent disability by medical testimony; (2) by medical testimony based in part
33 upon objective findings that an aggravation of the injury resulted in increased disability; (3) by
34 medical testimony that the increased aggravation occurred between the terminal dates of the
35 aggravation period; (4) by medical testimony, some of it based upon objective symptoms which
36 existed on or prior to the closing date, that his disability on the date of the closing order was greater
37 than the Department found it to be. Moses v. Department of Labor and Industries, 44 Wn. 2d 511;
38 Phillips v. Department of Labor and Industries, 49 Wn. 2d 195; Naillon v. Department of Labor and
39 Industries, 65 Wn. 2d 544.

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44 It is rules 2 and 4 above that we are here concerned with.
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1 In this Board's view, the claimant has not established by medical testimony, some of it based
2 upon objective symptoms, that there has been an aggravation or increase in claimant's disability
3 resulting from his industrial injuries. It is also our view that the opinions of the claimant's medical
4 witnesses of increase in disability are not based on medically objective criteria in any part.
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7 Although Dr. Brown was the claimant's attending physician prior to 1960, there is no
8 evidence before this Board that he served in that role between 1960 and 1967, when he performed
9 his last physical examination. Thus, it is our view that his opinion carries no more weight in this
10 matter on the question of aggravation of condition than does that of the medical witnesses who
11 testified on behalf of the Department. Dr. Burgess, on the other hand, was the claimant's attending
12 physician from 1963 through 1967. We have carefully studied his testimony, seeking therein to find
13 some unequivocal statement which would satisfy the above-enumerated rules concerning the
14 requirements for the establishment of aggravation in cases such as this. We have been unable so
15 to do.
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19 Taking the record as a whole, it is this Board's view that the deterioration of the claimant's
20 mental condition, and any deterioration of his physical condition subsequent to 1960 (when the
21 claimant was fifty-three years old), is more probably than not related to and attributable to the
22 combination of his advancing age and the mental condition suffered by the claimant, which pre-
23 existed the industrial injuries herein by some twenty-eight years.
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27 One issue remains to be dealt with. As previously stated, this matter was originally closed on
28 March 9, 1960, with an award of 35 per cent of the maximum allowable for unspecified disabilities.
29 Thereafter, on November 5, 1963, the claimant filed an application to reopen his claim for
30 aggravation. This was denied on March 19, 1964. An appeal was taken from this denial and, on
31 August 19, 1965, a Proposed Decision and Order was issued by a hearing examiner for this Board
32 (later adopted by Board order dated September 17, 1965). Finding No. 4 of said Proposed
33 Decision and Order read as follows:
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36 "4. Between March 9, 1960, and March 19, 1964, claimant's condition due
37 to his industrial injuries of December 7, 1957, and January 9, 1958,
38 became aggravated in such degree that on or before the latter date his
39 condition was no longer fixed and required treatment and further
40 diagnostic studies."
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1 The claimant contends that this finding establishes and makes res judicata the fact the
2 claimant had aggravation of his condition between March of 1960 and March of 1967. This fact, the
3 claimant contends, makes unnecessary any proof of aggravation as set forth hereinabove.
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5 We disagree. The above-quoted finding does no more than state the fact upon which the
6 examiner based his order to remand the claim to the Department for further treatment and
7 diagnostic studies. It is not a necessary implication that the aggravation necessary to establish
8 need for further treatment establishes ipso facto an increase in permanent disability. Needless to
9 say, the opposite implication is equally appropriate, that is, that the remand for treatment will
10 eliminate the problems for which the treatment is required. At best, the above-quoted finding
11 establishes that during a period of time within the aggravation period the claimant suffered a
12 temporary exacerbation subject to remedial medical action. The implication that the interim remand
13 by this Board to the Department for further treatment establishes the aggravation necessary in such
14 a case as this was not acceptable to the Supreme Court in the case of Dinnis v. Department of
15 Labor and Industries, 67 Wn. 2d 654 (1965). That, too, was an aggravation case, and between the
16 aggravation dates the claimant had received a back fusion. The court could find no reason to
17 dispense with proof of aggravation in that situation, and thereby, impliedly, adopted the rationale
18 that an interim reopening for treatment does not establish that aggravation necessary to support a
19 claim for increased disability on the second terminal date.
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28 FINDINGS OF FACT

29 After a review of the entire record, the Board finds:
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- 31 1. The claimant, John R. Qualls, sustained injuries on December 10, 1957,
32 and January 9, 1958, in the course of his employment for A. A. Brewer
33 of Renton, Washington. Two accident reports for these injuries were
34 processed by the Department of Labor and Industries under one claim
35 number, C-483904. The claim was allowed, medical treatment
36 provided, and time-loss compensation paid, and on August 29, 1958,
37 the Department entered a further order adhering to the prior closing
38 order of July 25, 1958. On September 17, 1958, claimant appealed to
39 this Board and on March 23, 1959, the Board entered an order
40 remanding the claim to the Department of Labor and Industries with
41 direction to reopen the claim to provide the claimant with further medical
42 treatment. Pursuant to this Board order, on April 1, 1959, the
43 Department entered an order reopening the claim for treatment and
44 action as indicated. On March 9, 1960, the Department entered a final
45 order closing the claim with no additional permanent partial disability
46 award. On April 1, 1960, the claimant appealed to this Board and on
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1 March 7, 1962, this Board reversed the Department's order and
2 instructed the Department to pay the claimant an additional 10% of the
3 maximum allowable for unspecified disabilities. On April 23, 1962, the
4 Department issued an order in compliance with the Board order.
5 Thereafter, on March 23, 1962, the claimant appealed the Board order
6 to the superior court, and on February 7, 1963, the superior court
7 awarded the claimant 35% of the maximum allowable for unspecified
8 disabilities, less prior awards paid. There-after, on March 19, 1963, the
9 Department issued an order in compliance with the superior court
10 judgment.

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12 2. On November 5, 1963, the claimant filed an application to reopen his
13 claim for aggravation and on March 19, 1964, the Department issued an
14 order denying this application. On April 9, 1964, the claimant appealed
15 to this Board. On August 19, 1965, a Proposed Decision and Order was
16 issued by a hearing examiner for this Board, which remanded the claim
17 to the Department for further treatment and diagnostic studies. On
18 September 17, 1965, the Board issued an order adopting the Proposed
19 Decision and Order, and on October 14, 1965, the Department issued
20 an order in compliance therewith. On March 28, 1967, the Department
21 issued an order closing the claim with no further permanent partial
22 disability award. On April 10, 1967, notice of appeal was filed with this
23 Board, and on April 28, 1967, this appeal was granted.

24 3. Appellate proceedings were conducted before the Board of Industrial
25 Insurance Appeals, and on July 9, 1968, a hearing examiner for this
26 Board entered a Proposed Decision and Order in connection with this
27 appeal. Thereafter, within the period of time provided by law,
28 exceptions were filed and the case referred to the Board for review as
29 provided by RCW 51.52.106.

30 4. Incorporated in the Proposed Decision and Order issued in a prior
31 appeal in this matter on August 19, 1965, (adopted by the Board on
32 September 17, 1965) was the following pertinent finding:

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34 "Between March 9, 1960, and March 19, 1964, claimant's condition due
35 to his industrial injuries of December 7, 1957, and January 9, 1958,
36 became aggravated in such degree that on or before the latter date his
37 condition was no longer fixed and required treatment and further
38 diagnostic studies."

39 5. Prior to his industrial injury of December 10, 1957, the claimant herein
40 had suffered from a severe injury to his skull in 1929 causing traumatic
41 brain damage and presently has residual intercranial scarring therefrom.
42 Residuals of this 1929 injury continued through the subsequent years up
43 to and including the months of December 1957 and January 1958, and
44 were chronic, and permanent. Furthermore, the claimant suffered from
45 pre-existing epileptic seizures, which were not related to his industrial
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1 injuries of December 10, 1957 and January 9, 1958, but are in fact due
2 to the 1929 injury.

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4 6. Between March 9, 1960 and March 28, 1967, there was no increase in
5 the claimant's permanent disability resulting from his industrial injuries of
6 December 10, 1957, and January 9, 1958, of an organic nature,
7 manifested by objective medical symptoms.
- 8 7. Between March 9, 1960 and March 28, 1967, there was no increase in
9 the claimant's mental or psychiatric disability which was the result of or
10 attributable to his industrial injuries of December 10, 1957, and January
11 9, 1958, nor was there any increase in brain or nerve damage during
12 said period which was related to said injuries.
- 13 8. The claimant failed to produce substantial medical evidence based upon
14 objective findings to prove any aggravation between March 9, 1960 and
15 March 28, 1967, due to his industrial injuries.
- 16 9. On March 28, 1967, the claimant's disabilities attributable to his
17 industrial injuries of December 10, 1957, and January 9, 1958, were not
18 greater in degree than 35% of the maximum allowable for unspecified
19 disabilities as had previously been awarded to him.

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21 **CONCLUSIONS OF LAW**

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23 Based on the foregoing findings of fact, this Board concludes:

- 24 1. This Board has jurisdiction of the parties and subject matter of this
25 appeal.
- 26 2. Between March 9, 1960 and March 28, 1967, the claimant's conditions
27 due to his industrial injuries of December 10, 1957, and January 9,
28 1958, did not become aggravated within the meaning of the Washington
29 Industrial Insurance Act.
- 30 3. The order of this Board dated September 17, 1965, adopting a Proposed
31 Decision and Order by an examiner for this Board issued on August 19,
32 1965, did not, by its findings, make res judicata that the claimant had
33 suffered any increased permanent disability between March 9, 1960 and
34 March 28, 1967. (See: Dinnis v. Department of Labor and Industries, 67
35 Wn. 2d 654.
- 36 4. The order of the Department of Labor and Industries issued herein on
37 March 28, 1967, is correct and should be sustained.

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40 It is so ORDERED.

41 Dated this 7th day of April, 1969.

42 BOARD OF INDUSTRIAL INSURANCE APPEALS

43 /s/

44 ROBERT C. WETHERHOLT

Chairman

45 /s/

46 R.M. GILMORE

Member

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DISSENTING OPINION

I believe there is sufficient credible evidence in the record to reasonably conclude that the claimant's permanent disability, causally related to the industrial injury, probably did worsen between the appropriate terminal dates. I would accept the opinion of Dr. J. Harold Brown, who had a very good basis for his medical opinion; he treated the claimant before the first terminal date and examined him again on or about the second terminal date. Dr. Brown's opinion is supported by that of Dr. Ernest Burgess. The weight of the evidence is such that this claim should be reopened and the claimant awarded a permanent total disability pension under the Act.

Dated this 7th day of April, 1969.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/ _____
R.H. POWELL Member