

## **Davis, Jackie, Jr., Dec'd**

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### **TIMELINESS OF CLAIM (RCW 51.28.050; RCW 51.28.055)**

#### **Survivors' benefits**

The surviving children's claim for benefits was timely even though filed more than one year after the worker's death since a claim for benefits for the children of a subsequent marriage had been filed within the one year period. The second application for benefits should be treated as an application for rearrangement of compensation based on a change of circumstances pursuant to RCW 51.28.040, and the Department therefore retained continuing jurisdiction under that statute to include the additional surviving children. *...In re Jackie Davis, Jr., Dec'd, BIIA Dec., 66,123 (1985)*

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS

STATE OF WASHINGTON

In Re: JACKIE L. DAVIS, JR., DEC'D.	)	DOCKET NO. 66,123
	)	
Claim No. H-131758	)	DECISION AND ORDER
	)	

APPEARANCES:

Petitioners, Tila Davis and Jackie L. Davis, minor beneficiaries, by their mother, Valli Burdett, and by, Fristoe, Taylor and Schultz, per Don Taylor

Employer, Salt Creek Timber Products, (Finaled)

Department of Labor and Industries, by The Attorney General, per H. Andrew Saller, Jr. and Robert K. Costello, Assistants

This is an appeal filed by Valli Burdett on behalf of Jackie L. Davis III and Tila M. Davis, children of Jackie L. Davis, Jr., on October 25, 1983 from an order of the Department of Labor and Industries dated October 4, 1983. The order denied Valli Burdett's application for benefits for her two children for the reason that no claim was received within one year from the date of death of Jackie L. Davis, Jr. Reversed and remanded.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by Tila M. Davis and Jackie L. Davis III to a Proposed Decision and Order issued on December 12, 1984 in which the order of the Department dated October 4, 1983 was affirmed.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed and said rulings are hereby affirmed.

The issue presented by this appeal is whether Tila M. Davis and Jackie L. Davis III, the children of Jackie L. Davis, Jr., are entitled to benefits under the Industrial Insurance Act as beneficiaries of their deceased father. We answer in the affirmative.

The following facts are established by the record. Jackie L.

3/25/93

1 Davis, Jr. and Valli Burdett (Davis) were married on September 25,  
2 1969 in Clallam County. Two children were born as issue of the  
3 marriage, Jackie Lee Davis III on July 7, 1970 and Tila Marie Davis,  
4 on July 26, 1971. The marriage of Jackie L. Davis, Jr. and Valli  
5 Burdett (Davis) was dissolved on January 31, 1972. Jackie L. Davis,  
6 Jr. subsequently married Roxanne Kanatzar and his third child,  
7 Travis L. Davis, was born as an issue of this marriage. Jackie  
8 Davis and Roxanne Davis were subsequently divorced.

9 On February 26, 1977 Jackie L. Davis was killed in an  
10 industrial accident. A timely claim for benefits was filed on  
11 behalf of Travis L. Davis by Roxanne Kanatzar, who had knowledge  
12 of, but did not mention or apply for benefits for, the two other  
13 children of Jackie L. Davis, Jr. The claim for benefits for Travis  
14 L. Davis was allowed by Department order on June 10, 1977. Valli  
15 Burdett did not learn that the death of Jackie L. Davis, Jr. was the  
16 result of an industrial accident until mid-August, 1983. On  
17 September 27, 1983, Valli Burdett filed for benefits on behalf of  
18 Jackie L. Davis III and Tila M. Davis. This application for  
19 benefits was denied by the Department order under appeal here, for  
20 the reason that no claim for benefits for those children was  
21 received within one year of the death of Jackie L. Davis, Jr. At  
22 the time of issuing the original order of June 10, 1977 granting  
23 benefits to Travis L. Davis, the Department did not know of the  
24 existence of other potential beneficiaries.

25 RCW 51.28.030 provides:

26  
27 "Where death results from injury the parties entitled to  
28 compensation under this title, or someone in their behalf,  
29 shall make application for the same to the Department or  
30 self-insurer as the case may be, which application must be  
31 accompanied with proof of death and proof of relationship  
32 showing the parties to be entitled to compensation under  
33 this Title, certificates of attending physician, if any,  
34 and such proof as required by the rules of the Department.  
35

36 "Upon receipt of notice of accident under RCW 51.28.010,  
37 the director shall immediately forward to the party or

1 parties required to make application for compensation under  
2 this section, notification, in non-technical language, of  
3 their rights under this Title."  
4

5 RCW 51.28.050 provided, at all times applicable to this case:  
6

7 "No application shall be valid or claim thereunder  
8 enforceable unless filed within one year after the day  
9 upon which the injury occurred or the rights of  
10 dependents or beneficiaries accrued."  
11

12 The latter statute was construed by the Court of Appeals in  
13 Wilbur v. Department of Labor and Industries, 38 Wn.App. 553  
14 (1984). In Wilbur the court stated:

15 "The timely filing of the worker's claim is a statutorily  
16 imposed jurisdictional limitation upon his right to receive  
17 compensation and upon the Department's authority to accept  
18 the worker's claim for benefits...Any allowance of a claim  
19 not timely filed would be void ab initio...Accordingly, the  
20 Department had no alternative but to reject Wilbur's claim  
21 unless his untimely filing is excused by some recognizable  
22 rule of law or equity,..."  
23

24 The general statutes of limitations for civil causes of action  
25 in this state are set forth in RCW Chap. 4.16. They do contain  
26 exceptions, including one which tolls the statutes for minors. In  
27 addition, the courts have developed a "discovery rule" as an  
28 exception to the statutes. This rule is set forth in Peters v.  
29 Simmons, 87 Wn.2d 400 (1976), and states that the statute of  
30 limitations starts to run when the plaintiff discovers or with  
31 reasonable diligence should have discovered the cause of action  
32 (legal malpractice). The court expanded upon this rule in Ohler v.  
33 Tacoma General Hospital, 92 Wn.2d 507 (1979), when it held that a  
34 parent's knowledge of a possible cause of action is not imputed to a  
35 minor child if not specifically communicated to the child.

36 Professor Larson in his treatise on Workers' Compensation has  
37 set forth the general rule for tolling of the statute of  
38 limitations:

39 "The time period for notice or claim does not begin to  
40 run until the claimant, as a reasonable person, should  
41 recognize the probable compensable nature of the

1 injury." 3 Larson § 78.41(a).  
2

3 With respect to a worker filing for benefits, Larson's treatise  
4 lists judicial holdings in a majority of states, analyzing  
5 limitations of actions provisions. These holdings place  
6 significance where the worker "knew or had reason to know", was  
7 "aware of the import", "would recognize the nature, seriousness and  
8 probable compensability", or "had actual knowledge" of the duty to  
9 file. The trend towards liberalization of application of statutes of  
10 limitations is documented at 3 Larson § 784.1(b) where it is stated:  
11

12 "The number of jurisdictions that are still capable of  
13 destroying rights for failing to file a claim at a time  
14 when its existence could not reasonably have been known  
15 has dwindled to three or four at the most...  
16

17 "With respect to the application of this rule to other benefits,  
18 Professor Larson states:  
19

20 "When the independent claim period for death benefits  
21 begins to run, the excuses, waivers and grounds for  
22 tolling (the statute of limitations)...apply just as they  
23 would to an employee's claim." 3 Larson § 78.61.  
24

25 The specific question of the tolling of the statute of  
26 limitation under the circumstances presented in this case has never  
27 been addressed by our court. In those instances where the tolling  
28 issue has been addressed at all, the court has held, as a general  
29 rule, that the timely filing of a claim for benefits is a limitation  
30 on the right to benefits, and that right is extinguished by a  
31 failure to file in a timely manner, Wheaton v. Department of Labor  
32 and Industries, 40 Wn.2d 56 (1952); and that a beneficiary's rights  
33 accrue and the statute of limitations therefor begins to run upon  
34 the death of the claimant, Beels v. Department of Labor and  
35 Industries, 178 Wn. 301 (1934).  
36

The court has recognized one exception to this strict rule: A

1 claim for benefits, filed more than one year after the occurrence  
2 of an industrial injury, has been allowed where a claim for that  
3 industrial injury had been filed but the condition for which the  
4 late application for benefits was made was not manifest at the time  
5 the original application was filed. Crabb v. Department of Labor  
6 and Industries, 186 Wash. 505 (1936). In that case the claimant  
7 sustained an industrial injury consisting of a sprained ankle, for  
8 which he filed a timely application for benefits. The claim was  
9 allowed and closed. More than one year after the industrial injury,  
10 the claimant developed neck problems, and filed an application for  
11 benefits alleging the neck condition resulted from the same  
12 industrial injury. The issue, as seen by the court, was whether the  
13 filing of the application for the sprained ankle was sufficient  
14 compliance with the statute so as to allow an "additional  
15 application for compensation" more than one year after the date of  
16 injury, for other injuries resulting from the same accident which  
17 were unknown to the claimant within the statutory one year period.  
18 Citing with approval Shelly Oil Company v. Standby, 297 Pac. 235,  
19 the court felt that it could not be argued that the claimant's neck  
20 condition was an aggravation of the injury to the ankle but felt that  
21 the filing of the original application conferred a continuing  
22 jurisdiction on the Department to "entertain" the additional  
23 condition even though the condition for which claim was then being  
24 made had not manifested itself at the time the original application  
25 was filed.

26 Given the facts of the instant case and the underlying  
27 reasoning in Crabb, supra, we do not find it necessary to decide this  
28 appeal on any theory about the tolling of the statute of  
29 limitations. It is established that an application was timely filed

1 on behalf of Travis L. Davis, one of the beneficiaries of Jackie L.  
2 Davis, Jr. At the time the Department was unaware of the existence  
3 of other beneficiaries, and was therefor unable to comply with RCW  
4 51.28.030, which requires the Department to notify eligible  
5 beneficiaries of their rights. In our opinion, by virtue of the  
6 timely application for benefits filed on behalf of Travis L.  
7 Davis, the Department obtained continuing jurisdiction over the  
8 claim of all children-beneficiaries of Jackie L. Davis, Jr.

9 RCW 51.28.040 states:

10 "If change of circumstances warrants an increase or  
11 rearrangement of compensation, like application shall be  
12 made therefore. Where the application has been granted,  
13 compensation and other benefits if in order shall be  
14 allowed for periods of time up to sixty days prior to  
15 the receipt of such application."  
16

17 One of the purposes of this statute is to allow for an  
18 increase (or decrease) in the compensation paid as a result of a  
19 change in the number of beneficiaries after compensation had been  
20 awarded. See the discussion in Foster v. Department of Labor and  
21 Industries, 161 Wash. 54 (1931). Clearly, the discovery of two  
22 additional beneficiaries, previously unknown to the Department of  
23 Labor and Industries, constitutes a "change of circumstances".  
24 Having once obtained jurisdiction of the claim through the  
25 application for benefits filed in a timely manner, we believe the  
26 Department has the authority to "rearrange" the compensation  
27 following such a change in circumstances. Foster, supra; Crabb,  
28 supra. The application for benefits filed by Valli Burdett on  
29 behalf of Tila M. Davis and Jackie L. Davis III should be treated  
30 as what we believe it is in fact, an application for a  
31 rearrangement of benefits based upon a change in circumstances.

32 FINDINGS OF FACT

33 Based upon a careful review of the entire record, the  
34 following findings of fact are made:

1. On February 26, 1977, Jackie L. Davis, Jr. sustained a fatal injury while in the course of his employment with Salt Creek Timber Products. On April 5, 1977 an accident report and application for survivor's benefits was filed by Roxanne Kanatzar on behalf of Travis L. Davis, child of Jackie L. Davis, Jr. That application was allowed by the Department by order of June 10, 1977.
2. On September 27, 1983 an application for benefits was filed by Valli Burdett on behalf of Jackie L. Davis III, and Tila M. Davis, children of Jackie L. Davis, Jr. On October 4, 1983, the Department issued an order denying this second application for benefits on the ground that it had not been filed within one year of the worker's date of death. On October 25, 1983, a notice of appeal was filed with the Board of Industrial Insurance Appeals, which issued its order on November 15, 1983 granting the appeal and assigning Docket No. 66,123.
3. Valli Davis (Burdett) and Jackie L. Davis, Jr. were married on September 25, 1969. Two children were born as issue of this marriage, Jackie L. Davis III, on July 7, 1970 and Tila M. Davis on July 26, 1971. The marriage of Jackie L. Davis, Jr. and Valli Davis (Burdett) was dissolved by entry of a decree of divorce on January 31, 1972.
4. Subsequent to the divorce from Valli Burdett, Jackie L. Davis, Jr. married Roxanne Davis (Kanatzar). One child was born of this marriage, Travis L. Davis. Sometime prior to February 26, 1977, the marriage of Jackie L. Davis and Roxanne Kanatzar was dissolved by decree of divorce. At the time of filing for survivor's benefits on behalf of Travis L. Davis on April 5, 1977, Roxanne Kanatzar knew of the existence of Jackie L. Davis III and Tila M. Davis. Roxanne Kanatzar did not include Jackie L. Davis III and Tila M. Davis as beneficiaries in her application for survivor's benefits filed on April 5, 1977.
6. Valli Burdett, mother of Jackie L. Davis III and Tila M. Davis, although exercising reasonable diligence in attempting to ascertain the cause of death of Jackie L. Davis, Jr., did not know that his death was the result of an industrial injury until sometime in August, 1983. On April 5, 1977, and thereafter until September 27, 1983, the Department of Labor and Industries did not know of the existence of Jackie L. Davis III and Tila M. Davis, and did not know that Jackie L. Davis, Jr. had beneficiaries other than Travis L. Davis.
7. The application of Valli Burdett for benefits on behalf of Jackie L. Davis III and Tila M. Davis, filed on September 27, 1983, advised the Department of Labor and Industries of the existence of two additional beneficiaries of Jackie L. Davis, Jr.



1  
2  
3 CONCLUSIONS OF LAW  
4  
5

- 6 1. The Board of Industrial Insurance Appeals has  
7 jurisdiction of the subject matter and the parties to  
8 this appeal.  
9
- 10 2. The filing of an application for benefits on behalf of  
11 Jackie L. Davis III and Tila M. Davis by Valli Burdett  
12 on September 27, 1983, constituted a notification and  
13 application to the Department of a change in  
14 circumstances warranting a rearrangement of  
15 compensation, within the meaning of RCW 51.28.040.  
16
- 17 3. Jackie L. Davis III and Tila M. Davis are  
18 beneficiaries of Jackie L. Davis, Jr. and entitled to  
19 benefits as such, as provided under the Worker's  
20 Compensation Act of the State of Washington.  
21
- 22 4. The order of the Department of Labor and Industries  
23 dated October 4, 1983, is incorrect, should be  
24 reversed, and this matter remanded to the Department  
25 with instructions to issue an order to place Jackie L.  
26 Davis III and Tila M. Davis on the pension rolls as  
27 beneficiaries of Jackie L. Davis, Jr. effective 60  
28 days prior to September 27, 1983, and to rearrange the  
29 compensation payable by law in light of there being  
30 three surviving beneficiaries of Jackie L. Davis, Jr.,  
31 effective 60 days prior to September 27, 1983.  
32

33 It is so ORDERED.

34  
35 Dated this 25th day of March, 1985.  
36

37 BOARD OF INDUSTRIAL INSURANCE APPEALS

38  
39  
40 /s/ \_\_\_\_\_  
41 MICHAEL L. HALL Chairman

42  
43  
44 /s/ \_\_\_\_\_  
45 FRANK E. FENNERTY, JR. Member

46  
47  
48 /s/ \_\_\_\_\_  
49 PHILLIP T. BORK