

Fugate, Merle

AGGRAVATION (RCW 51.32.160)

Discretionary reopening by Director

The Director has discretion to waive the seven year limitation for filing an application to reopen a claim provided there are sufficient facts to support a finding that an aggravation of disability has occurred. The required factual basis is not within the determination vested in the discretion of the Director and the Board therefore has jurisdiction to decide whether the worker's condition worsened between the terminal dates. ...***In re Merle Fugate, BIIA Dec., 86 1526 (1987)*** [dissent] [*Editor's Note: The Board's decision was appealed to superior court under King County Cause No. 87-2-22610-7.*]

Scroll down for order.

1 industrially related disability takes place, the Director, upon application of the beneficiary made within
2 seven years after the establishment or termination of compensation, or upon his own motion, may
3 reopen the claim and provide further benefits.
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6 In this case, the last order terminating compensation was issued by the Department on June
7 28, 1976. On November 13, 1984, more than eight years after the effective date of the last
8 determinative order, Mr. Fugate asked the Director of the Department of Labor and Industries to
9 exercise his discretion under RCW 51.32.160 to reopen his claim. By letter dated July 29, 1985, the
10 Director granted the request to reopen Mr. Fugate's claim. This letter was not initially sent to the
11 self-insured employer, which learned of the reopening through claimant's counsel. Following several
12 protests and requests for reconsideration from the employer, the Department eventually issued an
13 order on March 10, 1986, reaffirming the July 29, 1985 determination, and directing that the claim be
14 reopened pursuant to the discretionary authority of the Director as set forth in RCW 51.32.160. The
15 self-insured employer appealed from this order, contending that Mr. Fugate's "condition resulting from
16 the accepted industrial injury did not become aggravated and that the Department acted improperly in
17 reopening the claim."
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20 In support of his position that the Board has no jurisdiction to hear this appeal, Mr. Fugate cites
21 Smith v. Department of Labor and Industries, 8 Wn. 2d 587, 113 P. 2d 57 (1941). The issue in Smith
22 was whether the Director had the authority, upon his own motion, to reopen a claim for aggravation
23 after the statutory period for a claimant's application for such reopening had run. The court held that
24 under the statute the Department had the discretion to reopen a claim for aggravation upon the motion
25 of the Director, without limitation as to time. Smith did not hold, nor does it stand for the proposition,
26 that the Director's discretionary action is not reviewable or that the requirements of showing
27 aggravation can be ignored by the Department.
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30 The plain wording of RCW 51.32.160 dictates that whether the reopening occurs based on an
31 application made by the beneficiary or by the Director's own motion, it must first and foremost be
32 based on a determination that aggravation has occurred. If the Director waives the seven-year time
33 limitation of the statute, the requirement of establishing aggravation of disability still applies. It would
34 indeed be anomalous to hold a claimant who sought reopening after the statutory seven-year period
35 had elapsed to a lower standard of proof than a claimant who filed an application to reopen within the
36 seven year period. Thus the Director cannot reopen without evidence of aggravation due to the
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1 industrial injury. The decision to waive the seven-year statute of limitations is discretionary, the
2 determination that there is a factual basis for reopening is not.
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4 We find support for this interpretation in Perry v. Department of Labor and Industries, 48 Wn. 2d
5 205, 292 P. 2d 366 (1956). In Perry, the Department sought, on its own motion, to reopen a claim
6 more than sixty days after an order was issued closing the claim and from which no appeal was taken.
7 The Department reopened to pay additional permanent partial disability and again closed the claim.
8 The court held "the Department had no right, on its own motion, to reopen the claim in the absence of
9 a showing of aggravation, diminution, or termination within the purview of RCW 51.32.160." Perry at
10 209-210. See also, Smith v. Department of Labor and Industries, 8 Wn. 2d 587, 589, 113 P. 2d 57
11 (1941).
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13 In addition, this Board has previously held that a claimant is entitled to appeal any decision of
14 the Department subsequent to the date of the Director's order using his discretionary authority under
15 RCW 51.32.160 to reopen a claim. In re Bernard James, BIIA Dec., 4394 (1955). In James we
16 discussed the fact that the Director was not required to reopen the claim but, once he had done so on
17 his own motion, the Department was bound to award the claimant whatever compensation the facts
18 and the law showed he was entitled to, and the claimant had the right to appeal any such decision on
19 the merits.
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21 Furthermore, RCW 51.52.050 specifically provides that any action taken or decision made by
22 the Department relating to any phase of the administration of the Industrial Insurance Act is
23 appealable to the Board by either the worker, beneficiary, employer, or other person aggrieved
24 thereby. To interpret RCW 51.32.160 to give absolute discretion to the Director to reopen claims after
25 the seven year statutory period has run without appellate review of the question of whether
26 aggravation has actually occurred would contravene the provisions of RCW 51.52.050. We therefore
27 conclude that we have jurisdiction to resolve the issue raised by this appeal, i.e., whether Mr. Fugate's
28 condition, due to his industrial injury of June 19, 1974, worsened and became more disabling between
29 June 28, 1976 and March 10, 1986.
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31 Mr. Fugate sustained his industrial injury on June 19, 1974, when he was struck in the back by
32 a road grader. He then rolled about on the ground, trying to avoid being run over. He was initially
33 treated by Dr. Kenneth Kay for a spraining injury to his back. Mr. Fugate continued to see Dr. Kay up
34 until his claim was closed in 1977. He later returned to see Dr. Kay in 1984, complaining of back
35 difficulties which Dr. Kay characterized as being related to spinal stenosis.
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1 In the opinion of Dr. Kay, an orthopedic surgeon, the physical traumas that Mr. Fugate had
2 experienced throughout his life caused a thickening of the tissues surrounding the spinal cord, thereby
3 affecting the function of the nerves. Dr. Kay testified that the spinal stenosis was aggravated by the
4 industrial injury in the past, and that Mr. Fugate's current aggravation was "at least somehow in part"
5 related to his industrial accident. However, Dr. Kay also stated that Mr. Fugate's condition would have
6 been about the same in 1984, even if he had not had the industrial injury in 1974. Dr. Kay's testimony
7 does not support a conclusion that Mr. Fugate's spinal stenosis was, more probably than not, the
8 result of his industrial injury, as opposed to a natural progression of the preexisting condition.
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10 In addition to the question of causal relationship between the alleged worsening of Mr. Fugate's
11 spinal stenosis and his 1974 industrial injury, Mr. Fugate's case fails in another important regard.
12 There is no objective evidence of a worsening of Mr. Fugate's low back disability. Whether an
13 aggravation or worsening of an industrial injury has occurred, and the extent thereof, must be
14 established by comparative testimony. Phillips v. Department of Labor and Industries, 49 Wn. 2d 195,
15 298 P. 2d, 1117 (1956). Whether there is aggravation or whether the aggravation is due to the
16 industrial injury must be established by medical testimony. Nagel v. Department of Labor and
17 Industries, 189 Wn. 631, 66 P. 2d 318 (1937). Dr. Kay makes no comparison of actual objective
18 findings which reveal any change in Mr. Fugate's low back condition in the period between 1976 and
19 1986. Both Dr. John Aberle and Dr. Kenneth Sawyer concluded that Mr. Fugate had no organic
20 change or worsening in his low back resulting from his industrial injury during this period of time,
21 based on their examinations and review of medical records. Although special consideration must be
22 given to the opinion of the treating physician, Groff v. Department of Labor and Industries, 65 Wn.2d
23 35, 395 P.2d (1964), the testimony of Dr. Kay is insufficient to establish either a causal relationship
24 between Mr. Fugate's spinal stenosis and his industrial injury or a worsening of his industrially related
25 condition.
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27 After consideration of the entire record, it is our conclusion that Mr. Fugate's low back condition
28 of spinal stenosis is not causally related to his industrial injury in 1974, and his low back condition
29 which was causally related to his injury in 1974 did not worsen and become more disabling during the
30 aggravation period. Accordingly, the Department order of March 10, 1986, reopening Mr. Fugate's
31 claim for further authorized treatment and action as indicated, is hereby reversed and this claim
32 remanded to the Department of Labor and Industries to deny reopening of his claim.
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FINDINGS OF FACT

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3 1. On July 17, 1974 claimant, Merle J. Fugate, filed a report of accident with
4 the Department of Labor and Industries, alleging the occurrence of an
5 industrial injury on June 19, 1974 while in the course of his employment
6 with King County. On June 28, 1976, the Department issued an order
7 closing the claim with a permanent disability of 10% of the maximum
8 allowed for unspecified disability as compared to total bodily impairment.
9 On August 3, 1976, the claimant filed a notice of appeal with the Board of
10 Industrial Insurance Appeals. On July 1, 1977, the Board issued an order
11 on agreement of parties reversing the Department order of June 28, 1976
12 and remanding it to the self-insured employer, King County, with direction
13 to pay the claimant an additional permanent disability award of 5% of the
14 maximum allowable for unspecified disabilities as compared to total bodily
15 impairment and thereupon to close the claim. On July 21, 1977, pursuant
16 to the order of the Board of Industrial Insurance Appeals, the Department
17 issued an order modifying its former order from a final to an interlocutory
18 order and closed the claim with a permanent disability award of 15% of the
19 maximum allowable for the unspecified disabilities, as compared to total
20 bodily impairment.

21 On November 13, 1984, the Department received a petition from the
22 claimant for the Director to exercise his discretion pursuant to RCW
23 51.32.160 to reopen the claim for aggravation more than seven years after
24 the date of closure. On July 29, 1985, the Director of the Department of
25 Labor and Industries reopened the claim under the authority of RCW
26 51.32.160 but issued the order in the form of a letter, without notifying the
27 employer. On October 25, 1985 the employer filed a protest and request
28 for reconsideration. On November 4, 1985, the Department issued a
29 formal order reopening the claim effective September 14, 1984 for
30 authorized treatment and action as authorized by law. On December 26,
31 1985 the employer filed a protest and request for reconsideration. On
32 March 10, 1986 the Department issued an order reaffirming the July 29,
33 1985 determination. On May 7, 1986, the self- insured employer filed a
34 notice of appeal with the Board of Industrial Insurance Appeals. On June
35 18, 1986, the Board issued an order granting the employer's appeal,
36 assigning it Docket No. 86 1526, and ordering that hearings be held on the
37 issues raised.

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39 2. On June 19, 1974, while in the course of employment with King County,
40 Mr. Fugate was struck in the back by a road grader. As a result, he
41 suffered a spraining injury to his back.

42 3. Prior to his industrial injury, Mr. Fugate suffered from a congenital
43 condition of spinal stenosis, a narrowing of the neural canal of the spine.
44 In 1984, Mr. Fugate began to have increased symptomatology from his
45 spinal stenosis, but there were no additional objective findings. The
46 increase in symptoms was not the result of the 1974 industrial injury. Any
47 change in Mr. Fugate's spinal stenosis resulted from the natural

1 progression of this preexisting condition and was unaffected by the
2 industrial injury of June 19, 1974.

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4 4. Between June 28, 1976 and March 10, 1986 Mr. Fugate had no objective
5 evidence of a worsening of his low back sprain condition, causally related
6 to his industrial injury of June 19, 1974.

7 **CONCLUSIONS OF LAW**

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9 1. This Board has jurisdiction over the parties and subject matter of this
10 appeal.
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12 2. For the Director of the Department of Labor and Industries to reopen a
13 claim on his own motion following expiration of the seven year period set
14 forth in RCW 51.32.160, there must be a showing that the disability due to
15 the industrial injury for which the claim is reopened has become
16 aggravated between the time compensation was last established or
17 terminated and the time of the Director's order reopening the claim.
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19 3. Mr. Fugate's disability, causally related to his industrial injury of June 19,
20 1974, did not become aggravated within the meaning of RCW 51.32.160
21 between June 28, 1976 and March 10, 1986.
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23 4. The Department order of March 10, 1986 which reaffirmed the Order
24 Granting Request to Readjust Claim entered on July 29, 1985, in which
25 the Director of the Department of Labor and Industries reopened the claim
26 under the discretionary authority vested in him by RCW 51.32.160 is
27 incorrect and is reversed and the claim is remanded to the Department to
28 issue an order denying claimant's request to reopen for the reason that
29 there is no objective evidence of any worsening of disability due to the
30 industrial injury of June 19, 1974.

31 It is so ORDERED.

32 Dated this 17th day of December, 1987.

33 BOARD OF INDUSTRIAL INSURANCE APPEALS

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35 /s/
36 SARA T. HARMON Chairperson

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38 /s/
39 PHILLIP T. BORK Member

40 **DISSENT**

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42 I disagree with the Board majority decision. The statute, RCW 51.32.160, permits the Director
43 of the Department of Labor and Industries to reopen a claim, upon his own motion, beyond the seven
44 year period in which a beneficiary may make application. This is a discretionary function vested with
45 the Director and as such it is not reviewable by this Board nor is it appealable by the employer.
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1 Even accepting the decision of the majority that the Director's discretion applies only to the
2 waiver of the time limit and not to the requirement of establishing aggravation, I believe the claimant
3 has established a worsening of his industrially related condition. Dr. Kay, Mr. Fugate's attending
4 physician, is of the opinion that the current aggravation of Mr. Fugate's spinal stenosis is related, at
5 least in part, to the industrial injury. Dr. John Aberle, who examined Mr. Fugate in 1977 and again in
6 1986, testified that Mr. Fugate's low back condition was generally worse in 1984 than it was when he
7 saw him in 1977.
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11 Generally, the testimony of the treating physician is to be given special consideration because
12 of the number of times a physician has seen the patient, the long period of time over which the patient
13 has been seen, and the physician's intent to treat the patient rather than merely to examine him. Groff
14 v. Department of Labor and Industries, 65 Wn. 2d 35, 45, 395 P. 2d 33 (1964); Spalding v.
15 Department of Labor and Industries, 29 Wn. 2d 115, 128-129, 186 P. 2d 76 (1947). I find the
16 testimony of Dr. Kay, an orthopedic surgeon certified in his field, to be persuasive and sufficient to
17 establish Mr. Fugate's right to further benefits.
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21 The guiding principle in construing provisions of the Industrial Insurance Act is that the Act is
22 remedial in nature and is to be liberally construed to achieve its purpose of providing compensation to
23 all covered employees injured in their employment, with doubts resolved in favor of the worker. RCW
24 51.12.010; Sacred Heart Medical Center v. Carrado, 92 Wn.2d 631, 635, 600 P.2d 1015 (1979). The
25 evidence presented establishes Mr. Fugate's industrial injury aggravated his preexisting spinal
26 stenosis. In the period from 1976 to 1986 Mr. Fugate's spinal stenosis was aggravated, resulting in
27 greater disability requiring further medical care. I would therefore reverse the Proposed Decision and
28 Order and affirm the Department order of March 10, 1986, which reopened Mr. Fugate's claim,
29 effective September 14, 1984 for authorized treatment and other actions as authorized by law.
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36 Dated this 17th day of December, 1987.

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39 /s/ _____
40 FRANK E. FENNERTY, JR., Member
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