

# Wheelock, Junior

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## AGGRAVATION (RCW 51.32.160)

Temporary worsening

## SCOPE OF REVIEW

### Aggravation

In an appeal from a Department order denying an application to reopen the claim, the Board has jurisdiction to determine whether the worker's disability temporarily worsened during the aggravation period and can award temporary total disability compensation for such period. ...*In re Junior Wheelock, BIA Dec., 86 4128 (1987)* [Editor's Note: The Board's decision was appealed to superior court under Cause No. 88-2-00404-2.]

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1 jurisdiction over the subject matter of time loss compensation in an appeal from a Department order  
2 denying an application to reopen a claim for aggravation of condition.  
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4 The Notice of Appeal filed by the claimant alleges aggravation of conditions proximately  
5 caused by a November 18, 1980 industrial injury. It alleges the aggravation occurred between the  
6 first terminal date of May 9, 1983, when the Department closed the claim with a permanent partial  
7 disability award equal to 25% as compared to total bodily impairment, and the second terminal date  
8 of November 3, 1986, when the Department denied the application to reopen the claim. The Notice  
9 of Appeal specifically prays for time loss compensation during the period of April 17, 1985 through  
10 November 3, 1986. Furthermore, claimant's proof indisputably established entitlement to the relief  
11 sought. Two qualified attending health care experts, Walter B. Thompson, D.C., and John J.  
12 Demakis, M.D., described the objective evidence of worsening taking place during the aggravation  
13 period which resulted in the need for medical treatment and entitlement to time loss compensation.  
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16 The Proposed Decision and Order correctly indicated that this Board's jurisdiction is  
17 appellate only. If a question has not been passed upon by the Department it cannot be reached by  
18 us. Lenk v. Department of Labor and Industries, 3 Wn. App. 977 (1970). However, it erred in  
19 concluding that the Department, in denying Mr. Wheelock's aggravation application, had not had  
20 the opportunity to consider the question of temporary total disability during the period of alleged  
21 aggravation.  
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24 The aggravation statute, RCW 51.32.160, addresses the question of whether a worker's  
25 "disability" has worsened since compensation was last determined or terminated. In Noll v.  
26 Department of Labor and Industries, 179 Wn. 213 (1934), the Supreme Court concluded that  
27 appellate review of a decision to deny an application to reopen of necessity encompasses the  
28 question of the extent of the worker's permanent disability as of the second terminal date. Based  
29 on Noll, the Board clearly has jurisdiction to determine whether a worker is permanently partially or  
30 permanently totally disabled as of the second terminal date when it reverses a Department order  
31 denying an application to reopen. By the same token, the Board has jurisdiction to determine that a  
32 worker was temporarily totally disabled during the aggravation period when it reverses a  
33 Department order denying an application to reopen. For when the Department determined that Mr.  
34 Wheelock's disability attributable to the industrial injury had not become aggravated between May  
35 9, 1983 and November 3, 1986, it of necessity determined that his disability had not worsened,  
36 either temporarily or permanently, during this period.  
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1 Thus, in reversing the Department order of November 3, 1986, we have jurisdiction to reach  
2 the question of whether Mr. Wheelock's disability due to the industrial injury of November 18, 1980  
3 worsened either temporarily or permanently. We conclude that his disability worsened temporarily  
4 so that he was rendered totally temporarily disabled during the period of April 17, 1985 through  
5 November 3, 1986 and required further medical treatment.  
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9 Based on a careful review of the Proposed Decision and Order, claimant's Petition for  
10 Review, and the employer's reply thereto, as well as the entire record, we are persuaded that the  
11 Proposed Decision and Order is supported by the evidence insofar as it concludes that Mr.  
12 Wheelock's conditions resulting from his industrial injury worsened between the terminal dates to  
13 the extent that they were not fixed and stable, and were in need of medical treatment. The  
14 Proposed Decision and Order, however, is incorrect under the law and the facts insofar as it fails to  
15 consider the evidence providing entitlement to time loss compensation based upon temporary total  
16 disability between April 17, 1985 and November 3, 1986. For, just as certainly as the Department  
17 order denied the benefits at issue, claimant's Notice of Appeal brought the issue to the appellate  
18 jurisdiction of this Board for resolution. To hold otherwise would be to foster piecemeal litigation.  
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### 23 **FINDINGS OF FACT**

- 24  
25 1. On December 5, 1980 an accident report was filed with the Department  
26 of Labor and Industries alleging that Junior Wheelock had sustained an  
27 industrial injury on November 18, 1980 while in the course of  
28 employment with Pacific Intermountain Express, a self-insured  
29 employer. On April 16, 1981 the Department issued an order allowing  
30 the claim. On March 23, 1982 the Department issued an order closing  
31 the claim with an award for permanent partial disability equal to 25% as  
32 compared to total bodily impairment. On May 17, 1982 the claimant  
33 protested and requested reconsideration of the aforementioned order.  
34 On July 26, 1982 the Department issued an order holding its March 23,  
35 1982 order in abeyance. On September 30, 1982 the Department  
36 issued an order adhering to the provisions of its March 23, 1982 order.  
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38 On May 3, 1983 an application to reopen the claim was filed by the  
39 claimant on the grounds of aggravation of condition. On May 9, 1983 the  
40 Department issued an order denying the application to reopen the claim  
41 for aggravation of condition.

42 On April 22, 1985 an application to reopen the claim for aggravation of  
43 condition was filed by the claimant with the Department. On March 7,  
44 1986 the Department issued an order denying the application to reopen  
45 the claim. On March 24, 1986 claimant protested and requested  
46 reconsideration of the aforementioned order. On April 22, 1986 the  
47 Department issued an order holding its March 7, 1986 order in

1 abeyance. On November 3, 1986 the Department issued an order  
2 adhering to the provisions of its March 7, 1986 order and directing the  
3 employer to pay for diagnostic studies. On November 21, 1986 this  
4 Board received claimant's Notice of Appeal from the Department's  
5 November 3, 1986 order. On December 12, 1986 the Board issued an  
6 order granting claimant's appeal and assigning it Docket Number  
7 86-4128.

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2. On November 18, 1980, while in the course of employment with PIE Nationwide, Inc., the claimant fell, striking his back and neck against a pipe and injuring his back and neck.
  3. On May 9, 1983 the conditions resulting from the November 18, 1980 industrial injury were fixed and stable and not in need of further curative treatment, and resulted in a permanent partial disability equal to 25% as compared to total bodily impairment.
  4. On May 9, 1983 claimant's low back conditions were not evidenced by an absent ankle reflex, smaller circumference of the left calf, lack of flexion at the waist, scoliosis or a positive straight leg raising test.
  5. As of November 3, 1986 the claimant's conditions proximately caused by his industrial injury included cervical and lumbar spondylosis, scoliosis, and a trapped nerve root and were evidenced by an absent ankle jerk, a smaller circumference of the left calf, a lack of flexion at the waist, a positive straight leg raising test, and increased pain. The conditions diagnosed included a herniated L5/S1 disc which was a proximate result of the industrial injury.
  6. Between May 9, 1983 and November 3, 1986, claimant's conditions proximately caused by his industrial injury of November 18, 1980, objectively worsened and were in need of further treatment.
  7. Claimant is a sixty-five year old man, who has a high school diploma, and has worked as a mechanic, heavy equipment operator, and truck driver.
  8. Between April 17, 1985 and November 3, 1986, claimant's conditions proximately caused by his industrial injury rendered him unable to perform any form of gainful employment on a reasonably continuous basis in light of his age, education and work experience.

#### **CONCLUSIONS OF LAW**

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and the subject matter to this appeal.
2. Between May 9, 1983 and November 3, 1986 claimant's disability due to the industrial injury of November 18, 1980 worsened within the meaning of RCW 51.32.160. As a result of the worsening of his disability, claimant required medical treatment and was temporarily totally disabled

1 within the meaning of RCW 51.32.090 during the period of April 17,  
2 1985 through November 3, 1986.

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4 3. The November 3, 1986 order of the Department of Labor and Industries  
5 which directed the self-insured employer to make payment for diagnostic  
6 studies, but otherwise adhered to the provisions of a prior order dated  
7 March 7, 1986, denying claimant's application to reopen his claim on the  
8 grounds of aggravation, is incorrect and should be reversed. This  
9 matter should be remanded to the Department of Labor and Industries  
10 with direction to reopen the claim and issue an order requiring the  
11 self-insured employer to reopen the claim and provide benefits including  
12 medical treatment and time-loss compensation for the period of April 17,  
13 1985 through November 3, 1986 and such other and further benefits as  
14 are indicated, authorized or required by law.

15 It is so ORDERED.

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17 Dated this 30th day of December, 1987.

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20 BOARD OF INDUSTRIAL INSURANCE APPEALS

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23 /S/  
24 SARA T. HARMON Chairperson

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27 /S/  
28 FRANK E. FENNERTY, JR. Member

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