

## **Storer, Jimmy**

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### **AGGRAVATION (RCW 51.32.160)**

#### **First terminal date: effect of subsequent ministerial order**

The issuance of a Department order pursuant to the terms of a Board Order on Agreement of Parties is merely a ministerial act. It does not adjudicate the merits of the claim beyond the date of the Department order which was the subject of the Board order. Therefore, the date of the Department order appealed, and not the date of the subsequent ministerial order, is the first terminal date of subsequent aggravation period. (*Karniss v. Department of Labor & Indus.*, 39 Wn.2d 898 (1952)). ...***In re Jimmy Storer, BIIA Dec., 86 4436 (1988)*** [*Editor's Note: The Board's decision was appealed to superior court under Stevens County Cause No. 88-2-00328-7.*]

Scroll down for order.



1 proximately caused by his industrial injury worsened, we have granted review to clarify the proper  
2 aggravation period.  
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4 Prior to issuance of the November 14, 1986 order and the order to which it adheres, the  
5 Department order last considering the merits of Mr. Storer's claim was issued on July 2, 1981. That  
6 order was appealed to this Board, and was reversed by a Board Order on Agreement of Parties dated  
7 February 8, 1982, remanding the claim to the Department with direction to require the self-insured  
8 employer to pay intermittent time-loss compensation for a period of 42 1/2 days between December  
9 12, 1979 and July 2, 1981 and to thereupon close the claim with permanent partial disability as  
10 previously paid. Thereafter, on February 19, 1982, pursuant to the Board's Order on Agreement of  
11 Parties, the Department entered an order exclusively ministerial in purpose, fulfilling the directive of the  
12 Board's order dated February 8, 1982. The February 19, 1982 Department order did not adjudicate  
13 the merits of the claim beyond July 2, 1981. All matters related to the claim were thus conclusively  
14 determined up to July 2, 1981 and no further. Thus July 2, 1981 is the first terminal date for the  
15 aggravation period at issue in the instant appeal. Karniss v. Department of Labor and Industries, 39  
16 Wn.2d 898 (1952).  
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24 Having determined the proper terminal dates, we return to the question of whether Mr. Storer  
25 has established, by objective medical findings, that the disability related to his 1978 industrial injury  
26 became aggravated between July 2, 1981 and November 14, 1986. The Proposed Decision and  
27 Order correctly summarizes and weighs the evidence presented. Based on the reasoning and  
28 evidentiary analysis set forth in the Proposed Decision and Order, we find that Mr. Storer has  
29 presented sufficient evidence to establish worsening of his condition causally related to his 1978  
30 industrial injury between July 2, 1981 and November 14, 1986. Since the medical evidence  
31 establishes that Mr. Storer's condition worsened specifically on or about March 4, 1985, at a time after  
32 both July 2, 1981 and February 19, 1982, the substitution of the correct first terminal date does not  
33 affect the determination on the ultimate issue in this case. Consequently, the Department order dated  
34 November 14, 1986, which affirmed a prior order denying Mr. Storer's application to reopen this claim  
35 on the grounds of aggravation, is incorrect and should be reversed. This claim should be remanded to  
36 the Department with direction to reopen the claim and direct the self-insurer to provide medical  
37 treatment and such other and further benefits as indicated, authorized or required by law.  
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3 **FINDINGS OF FACT**  
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5 1. On April 18, 1978, an accident report was filed with the Department of  
6 Labor and Industries alleging that Jimmy R. Storer sustained an industrial  
7 injury on April 3, 1978 while in the course of his employment with Wallula  
8 Container, a self-insured employer under the Industrial Insurance Act. On  
9 October 2, 1978, the Department issued an order allowing the claim. On  
10 January 4, 1979, the Department issued an order providing an award for  
11 permanent partial disability equal to 10% of the maximum allowed for  
12 unspecified disabilities as compared to total bodily impairment, time-loss  
13 compensation as paid through August 28, 1978, and closing the claim.  
14 On February 1, 1979, the Department received a medical update, which  
15 was considered a protest and request for reconsideration. On August 7,  
16 1979, the claimant further protested and requested reconsideration of the  
17 Department's January 4, 1979 order. On October 26, 1979, the  
18 Department issued an order modifying from final to interlocutory its  
19 January 4, 1979 order and providing that the claim remain open for  
20 treatment and action as indicated and determining that the award for  
21 permanent partial disability be considered an advance on any disability  
22 award.

23 On November 29, 1979, an application to reopen on grounds of  
24 aggravation of condition was filed with the Department.

25 On December 12, 1979, the Department issued an order closing the claim  
26 with time-loss compensation as paid and with no additional award for  
27 permanent partial disability. On December 17, 1979, the claimant filed a  
28 protest and request for reconsideration of the December 12, 1979 order.

29 On January 29, 1980, the Department issued an order denying the  
30 claimant's application to reopen on grounds of aggravation and held that  
31 the claim remained closed pursuant to the provisions of its December 12,  
32 1979 order.

33 On February 7, 1980, the Department issued an order holding its  
34 December 12, 1979 and January 29, 1980 orders in abeyance.

35 On July 2, 1981, the Department issued an order adhering to the order  
36 dated December 12, 1979. On August 7, 1981, the claimant filed his  
37 notice of appeal with the Board of Industrial Insurance Appeals from the  
38 Department's July 2, 1981 order. On August 26, 1981, the Board issued  
39 an order granting the appeal. On February 8, 1982, the Board issued an  
40 Order on Agreement of Parties reversing the Department's July 2, 1981  
41 order and remanding the claim to the Department with directions to reopen  
42 the claim, enter an order requiring the self-insured employer to pay  
43 intermittent time-loss compensation for a 42 1/2 day period between  
44 December 12, 1979 and July 2, 1981, and, thereupon, to close the claim  
45 with the award for permanent partial disability previously granted. On  
46 February 19, 1982, the Department issued an order pursuant to the Board  
47 order dated February 8, 1982.

1 On June 21, 1985, claimant filed an application to reopen on grounds of  
2 aggravation of condition with the Department. On September 30, 1985,  
3 the Department issued an order denying the aggravation application and  
4 holding that the claim remained closed pursuant to the provisions of the  
5 Department's February 19, 1982 order.  
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7 On October 2, 1985, claimant's attorney mailed the Department a letter  
8 stating that the claimant's March 1985 injury was an aggravation of the  
9 claimant's old injury and that the claim should be reopened. On October  
10 4, 1985, the September 30, 1985 Department order was received at the  
11 Department upon return from the U.S. Post Office. On November 27,  
12 1985, the Department remailed its September 30, 1985 to a corrected  
13 claimant's address. On December 23, 1985, the Department received a  
14 letter from the claimant's attorney requesting that the October 2, 1985  
15 letter be considered a protect and request for reconsideration of the  
16 September 30, 1985 order, which was received at the attorney's office on  
17 December 5, 1985, and requesting an abeyance order.

18 On January 17, 1986, the Department issued an order holding its  
19 September 30, 1985 order in abeyance.

20 On January 22, 1986, the Department received an application to reopen  
21 on grounds of aggravation of condition.  
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23 On November 14, 1986, the Department issued an order adhering to the  
24 provisions of its September 26, 1985 (sic--September 30, 1985) order. On  
25 December 8, 1986, the claimant filed his notice of appeal with the Board of  
26 Industrial Insurance Appeals from the Department's November 14, 1986  
27 order. On December 19, 1986, the Board issued an order granting the  
28 appeal, assigning it Docket No. 86 4436, and directing that further  
29 proceedings be held in the matter.

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31 2. On April 3, 1978, while in the course of employment with Wallula  
32 Container, Jimmy R. Storer sustained an injury to his low back while  
33 pulling boards on a dry chain.  
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35 3. As a proximate result of the industrial injury occurring on April 3, 1978,  
36 claimant required medical treatment to his low back until July 2, 1981,  
37 when claimant's dorso-lumbar and lumbosacral condition proximately  
38 caused by his industrial injury of April 3, 1978 was fixed and stable and  
39 produced a permanent impairment most consistent with the degree of  
40 impairment represented by Category 3 of WAC 296-20-280 for  
41 dorso-lumbar and lumbosacral impairments. The claimant's condition was  
42 evidenced by slight spasm upon full flexion, a slight narrowing of the L5/S1  
43 disc, and limited straight leg raising.  
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45 4. Between July 2, 1981 and November 14, 1986 the claimant's disability  
46 attributable to his dorso- lumbar and lumbosacral condition objectively  
47 worsened with increased objective findings of disability, including  
protruding or herniated disc at the L5/S1 level, increased spasm, severe

1 restrictions of range of motion and straight leg raising, and increased  
2 narrowing of the L5/S1 disc space.

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4 5. Between July 2, 1981 and November 14, 1986 the claimant's back  
5 condition proximately caused by his 1978 industrial injury worsened to the  
6 extent that it was no longer fixed and stationary, but required curative  
7 medical treatment.
- 8 6. The worsening of claimant's low back condition occurred when he, while at  
9 home, bent from the waist to pick up a shovel on or about March 4, 1985.  
10 This activity was within the activities which claimant could be reasonably  
11 expected to undertake within the restrictions produced by the 1978  
12 industrial injury.
- 13 7. Subsequent to March 4, 1985, an L5/S1 disc herniation developed, which  
14 would not have resulted but for claimant's April 3, 1978 industrial injury  
15 and its sequelae.

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17 **CONCLUSIONS OF LAW**

- 18 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties  
19 and the subject matter of this appeal.
- 20 2. Claimant's condition proximately caused by his industrial injury of April 3,  
21 1978 became aggravated within the meaning of RCW 51.32.160 between  
22 July 2, 1981 and November 14, 1986.
- 23 3. The order of the Department dated November 14, 1986 which adhered to  
24 the provisions of an order dated September 26, 1985 (sic--September 30,  
25 1985), denying claimant's application to reopen his claim on the grounds  
26 of aggravation of condition and providing that the claim would remain  
27 closed pursuant to the provisions of a February 19, 1982 order, is incorrect  
28 and should be reversed. This claim is remanded to the Department with  
29 direction to reopen the claim and direct the self-insured employer to  
30 provide treatment and such other and further benefits as indicated,  
31 authorized or required by law.

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33 It is so ORDERED.

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35 Dated this 26th day of October, 1988.

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37 BOARD OF INDUSTRIAL INSURANCE APPEALS

38  
39 /S/ \_\_\_\_\_  
40 SARA T. HARMON Chairperson

41  
42 /S/ \_\_\_\_\_  
43 FRANK E. FENNERTY, JR. Member