

Sandven, Marven

AGGRAVATION (RCW 51.32.160)

Applicability of 1988 amendments

The 1988 amendments to RCW 51.32.160 were remedial in nature and apply to any application to reopen a claim filed subsequent to the effective date of the amendments, June 9, 1988.*In re Marven Sandven, BIIA Dec., 89 3338 (1990)* [Editor's Note: See *Campos v. Department of Labor & Indus.*, 75 Wn. App. 379 (1994) determining that amendment's seven-year limitation does not violate equal protection.]

First closure based on medical recommendation

Under the 1988 amendments to RCW 51.32.160, closing orders which were issued prior to July 1, 1981 need not be based on medical recommendation, advice or examination in order to serve as the starting point for the seven year period in which the worker is entitled, as a matter of right, to apply to have the claim reopened for payment of additional disability benefits.*In re Marven Sandven, BIIA Dec., 89 3338 (1990); In re Mike Streubel, BIIA Dec., 89 4867 (1990)*

Objective evidence requirement

Under the 1988 amendments to RCW 51.32.160, the time limitation is removed for applying to reopen a claim to obtain additional medical services. However, in order to show entitlement to additional medical services, a worker must still establish, by a preponderance of the evidence, that the condition causally related to the industrial injury worsened or became aggravated on an objective basis between the relevant terminal dates.*In re Marven Sandven, BIIA Dec., 89 3338 (1990)*

RETROACTIVITY OF STATUTORY AMENDMENTS

Aggravation (RCW 51.32.160)

The 1988 amendments to RCW 51.32.160 were remedial in nature and apply to any application to reopen a claim filed subsequent to the effective date of the amendments, June 9, 1988.*In re Marven Sandven, BIIA Dec., 89 3338 (1990)*

TIMELINESS OF APPLICATION TO REOPEN CLAIM (RCW 51.32.160)

Applicability of 1988 amendments

Under the 1988 amendments to RCW 51.32.160, the time limitation is removed for applying to reopen a claim to obtain additional medical services.*In re Marven Sandven, BIIA Dec., 89 3338 (1990)*

1 The Board has reviewed the other evidentiary rulings in the record of proceedings and finds
2 that no prejudicial error was committed and said rulings are hereby affirmed.
3

4 DECISION

5 By his appeal, Marven Sandven raises the issue of his right to have this claim reopened for the
6 payment of additional disability benefits or the provision of additional medical treatment, pursuant to
7 RCW 51.32.160 as amended by Laws of 1988, ch. 161 § 11, p. 698 (effective June 9, 1988). Mr.
8 Sandven contends that the initial order closing his claim on May 11, 1979 was not a "closing order" as
9 that term is defined in RCW 51.32.160 (1988) and that he is therefore entitled as a matter of right to
10 have his aggravation application considered for further compensation or disability benefits, in addition
11 to the provision of further medical treatment. The question of the constitutionality of the 1988
12 amendment to RCW 51.32.160 is also raised tangentially.
13
14
15
16
17

18 In light of the manner in which the Supreme Court has previously dealt with legislative changes
19 regarding the process by which injured workers may apply to reopen their claims, we can find no
20 constitutional impediment to the 1988 amendments to RCW 51.32.160. See, e.g., Mattson v. Dep't of
21 Labor & Indus., 176 Wash. 345 (1934); Pate v. Dep't of Labor & Indus., 43 Wn.2d 736 (1953); and
22 Lane v. Dep't of Labor & Indus., 21 Wn.2d 402 (1944). It also appears to us as almost axiomatic that
23 the 1988 amendments were remedial in nature and apply to any application to reopen a claim on the
24 basis of aggravation of condition filed subsequent to the effective date of the amendment, June 9,
25 1988. As Mr. Sandven's application to reopen his claim was not filed with the Department until
26 October 13, 1988, the application was appropriately considered under the amended provisions of
27 RCW 51.32.160.
28
29
30
31

32 This claim was filed and allowed in 1978 and on May 11, 1979 the Department issued the initial
33 order closing the claim. After the claim was subsequently reopened in response to Mr. Sandven's May
34 20, 1980 application, the claim was again closed on December 15, 1982. On October 13, 1988 an
35 application to reopen for aggravation of condition was filed by Mr. Sandven with the Department and
36 the order denying this application, dated July 21, 1989, is the subject of this appeal. That order denied
37 the application as it related to compensation or disability benefits for the reason that it was not timely,
38 having been filed more than seven years after the first closing order became final. In addition, the
39 order also denied the application as it related to the provision of proper and necessary medical and
40 surgical services.
41
42
43
44
45
46
47

1 As amended, the pertinent portions of RCW 51.32.160 provide:

2
3 If aggravation, diminution, or termination of disability takes place, the
4 director may, upon the application of the beneficiary, made within seven
5 years from the date the first closing order becomes final, or at any time
6 upon his or her own motion, readjust the rate of compensation in
7 accordance with the rules in this section provided for the same, or in a
8 proper case terminate the payment: PROVIDED, That the director may,
9 upon application of the worker made at any time, provide proper and
10 necessary medical and surgical services as authorized under RCW
11 51.36.010. "Closing order" as used in this section means an order based
12 on factors which include medical recommendation, advice, or examination.
13 Applications for benefits where the claim has been closed without medical
14 recommendation, advice, or examination are not subject to the seven year
15 limitation of this section. The preceding sentence shall not apply to any
16 closing order issued prior to July 1, 1981.

17
18 (Emphasis added.)

19 The statute, as amended, continues the seven year limitation for filing of applications, but
20 changes the event which commences this period. Previously an injured worker had seven years " ...
21 after the establishment or termination of . . . compensation . . ." in which to file an application. Now the
22 statute provides that the application be ". . . made within seven years from the date the first closing
23 order becomes final. . . ." In addition, the 1988 amendments removed any time limitation from
24 applications made to receive " ... proper and necessary medical and surgical services as authorized
25 under RCW 51.36.010."

26
27
28
29
30 Initially, we must determine which order issued by the Department of Labor and Industries
31 constituted the "first closing order". In addition to providing a definition of "closing order", the statute
32 provides that claims closed with orders that fall outside that definition are not subject to the seven year
33 limitation. However, the statute also provides that orders issued prior to July 1, 1981 are not subject to
34 the provision which eliminates the seven year limitation. While consideration of selected portions of
35 the statute might lead to the conclusion that any order must meet the definition in order to constitute a
36 closing order, that interpretation of the statute would not be consistent with the legislative intent. In
37 order to give meaning to the sentence contained in the statute relating to closing orders issued prior to
38 July 1, 1981, it is incumbent upon us to consider any order issued prior to that date as a "closing
39 order" whether or not it is ". . . based on factors which include medical recommendation, advice, or
40 examination."
41
42
43
44
45
46
47

1 As the initial closing order entered in Mr. Sandven's claim was issued on May 11, 1979, prior to
2 July 1, 1981, it is not relevant to the present inquiry whether or not it was based upon factors which
3 include medical recommendation, advice, or examination. By the clear provisions of RCW 51.32.160,
4 any first closing order issued prior to July 1, 1981 serves as the starting point of the seven year period
5 set forth in the statute. It follows that Mr. Sandven's aggravation application filed on October 13, 1988
6 was filed more than seven years after the date on which the first closing order became final, and
7 accordingly, he is not entitled as a matter of right to have his claim considered for readjustment of the
8 rate of compensation or for the payment of additional disability benefits.
9

10
11
12
13 As the proviso contained in RCW 51.32.160 has removed any time limitation for applying to
14 reopen a claim to obtain additional medical and surgical services, Mr. Sandven is entitled to have his
15 application for these services considered as a matter of right. In the absence of statutory language to
16 the contrary, the standards for determining aggravation of disability, established by case law prior to
17 the 1988 amendments, should continue to apply. Thus, Mr. Sandven, in order to show an entitlement
18 to additional treatment, must establish by a preponderance of the evidence that his condition causally
19 related to the industrial injury of February 6, 1978 worsened or became aggravated on an objective
20 basis between December 15, 1982 and July 21, 1989.
21

22
23
24
25 On February 6, 1978 Mr. Sandven was injured when a crane which was unloading his truck
26 struck electrical lines, causing them to break. As the lines fell, they struck claimant in the lower back,
27 causing electrical burns and low back pain. As of the first terminal date, December 15, 1982, claimant
28 had a permanent partial disability equal to Category 3 of WAC 296-20-280.
29

30
31 While diagnostic studies such as x-rays, MRIs, and CAT scans reveal abnormalities, the record
32 does not support a conclusion that Mr. Sandven's condition causally related to the industrial injury
33 worsened between December 15, 1982 and July 21, 1989. The only expert witness to testify in Mr.
34 Sandven's behalf was the attending osteopath, Dr. Del Wetstone. He first saw the claimant on
35 October 10, 1988, ten years after the industrial injury. After performing an examination, he provided
36 treatment consisting of osteopathic manipulation and medication. The only other form of treatment he
37 could recommend was evaluation of the claimant by an orthopedic surgeon or neurosurgeon to
38 determine if there was a surgically correctable problem.
39
40
41
42
43
44
45
46
47

1 Although the medical witnesses presented on behalf of the self- insured employer did not have
2 the advantage of treating the claimant, they were, by their qualifications and specialization, able to
3 perform precisely the type of evaluation recommended by Dr. Wetstone. Dr. Jacquelyn A. Weiss, a
4 certified specialist in neurology and clinical neurophysiology, could find no consistent pattern of
5 neurological abnormality on examination. In fact, her findings on examination were sufficiently bizarre
6 that they would best be described as inconsistent neurological responses and were indicative, in her
7 view, of an attempt to mislead. As an example, during strength testing, Mr. Sandven demonstrated
8 extreme weakness in the legs, yet at other times during the examination he adopted a bizarre gait
9 which required great strength in the leg muscles. According to Dr. Weiss, claimant's industrially
10 related condition had not objectively worsened between the terminal dates.
11

12 Also testifying on behalf of the self-insured employer was Dr. Kenneth Sawyer, an orthopedic
13 surgeon who examined the claimant with Dr. Weiss on June 27, 1989. Based upon the same bizarre
14 physical findings testified to by Dr. Weiss, Dr. Sawyer diagnosed degenerative disc disease, status
15 post electrical shock injury, and a "markedly functional examination." He was of the opinion that the
16 degenerative disc disease was not in any way causally related to the electric shock injury of February
17 6, 1978. His last diagnosis of a "functional examination" was based upon Mr. Sandven's inappropriate
18 responses during examination, which suggested that Mr. Sandven was trying to make his condition
19 appear to be worse than it really was. Based upon a hypothetical question asking Dr. Sawyer to
20 compare his findings to those made by Dr. Huddleston close to the first terminal date of December
21 15, 1982, he responded that there was no objective evidence of worsening in Mr. Sandven's condition.
22 This is entirely consistent with the findings of Dr. Weiss, who, based upon a comprehensive
23 neurological examination, could find no demonstrable neurological defect in 1988 or 1989 which was
24 any different or greater than Mr. Sandven had as a result of his injury when the claim was closed on
25 December 15, 1982.
26

27 While Dr. Wetstone has provided Mr. Sandven with medication and osteopathic manipulative
28 treatment, this treatment appears to be palliative in nature. As previously pointed out, Dr. Wetstone
29 would rely upon an evaluation performed by an orthopedic surgeon or neurosurgeon to determine
30 whether the claimant has a problem amenable to surgical correction. In a very real sense, this
31 evaluation has been provided by Drs. Weiss and Sawyer and establishes clearly that neither surgical
32 nor any other form of treatment will alter the course of any conditions attributable to the industrial
33 injury.
34
35
36
37
38
39
40
41
42
43
44
45
46
47

1 Since the claimant's application to reopen his claim for aggravation of condition was filed more
2 than seven years after the first closing order of May 11, 1979 became final, and since he has not
3 established entitlement to further treatment based on aggravation, the Department acted correctly in
4 denying Mr. Sandven's application.
5
6

7 After consideration of the Proposed Decision and Order, the Petition for Review filed thereto by
8 the claimant, the Employer's Responsive Memorandum to Claimant's Petition for Review, and a
9 careful review of the entire record before us, we have determined that the Department order dated
10 July 21, 1989 is correct in its entirety and must be affirmed.
11
12

13 FINDINGS OF FACT

- 14
15 1. On March 9, 1978 the claimant, Marven Sandven, filed an application for
16 benefits with the Department of Labor and Industries, alleging that he had
17 suffered an industrial injury on February 6, 1978 during the course of his
18 employment with Associated Sand & Gravel Co. Inc. On September 27,
19 1978 the claim was allowed and on May 11, 1979 the Department issued
20 an order closing the claim with time loss compensation as paid to
21 February 12, 1978 and without further award for time loss compensation
22 or permanent partial disability.
23

24 On May 20, 1980 the claimant filed an application to reopen his claim for
25 aggravation of condition and on December 29, 1980 a Department order
26 was issued reopening the claim effective May 1, 1980 for treatment and
27 action as indicated. On August 9, 1982 the Department issued an order
28 closing the claim with time loss compensation as paid to May 9, 1982
29 inclusive, and directed the employer to pay the claimant an award in the
30 amount of \$3,000.00. On August 13, 1982 the claimant filed a protest and
31 request for reconsideration from the Department's order dated August 9,
32 1982. On December 15, 1982 the Department issued an order directing
33 that the claim shall remain closed pursuant to the order dated August 9,
34 1982.

35 On October 13, 1988, the claimant filed an application to reopen his claim
36 for aggravation of condition. On October 21, 1988 the Department issued
37 an order denying the claimant's application to reopen for the reason that it
38 was not presented within the statutory time limit of seven years from the
39 date compensation was terminated on May 11, 1979. On November 3,
40 1988 a protest and request for reconsideration was filed by the claimant.
41 On December 2, 1988 the Department issued an order affirming its prior
42 order of October 21, 1988. On December 6, 1988 the claimant filed a
43 notice of appeal with the Board of Industrial Insurance Appeals. On May
44 10, 1989, the Board issued an Order on Agreement of Parties remanding
45 the claim to the Department to further investigate whether the claimant
46 was in need of proper and necessary medical services for conditions
47 causally related to his industrial injury and to take such further action as is

1 appropriate. On May 17, 1989 the Department issued an order setting
2 aside the December 2, 1988 order. On July 21, 1989, the Department
3 issued a further order denying the application to reopen the claim for the
4 reasons that it was not received within the time limitations set by law and
5 that there was no evidence that the condition covered by the claim had
6 worsened, so as to entitle claimant to further medical benefits. On July 28,
7 1989, the claimant filed a notice of appeal with the Board of Industrial
8 Insurance Appeals. On August 2, 1989, the Board issued an order
9 granting the appeal, assigned it Docket No. 89 3338 and ordered that
10 hearings be held on the issues raised by the notice of appeal.

- 11 2. The Department order dated May 11, 1979 was the first closing order in
12 this claim and became final sixty days after it was communicated to the
13 claimant.
- 14 3. The application to reopen the claim on the basis of aggravation of
15 condition filed on October 13, 1988, was filed more than seven years after
16 the first closing order issued on May 11, 1979 became final.
- 17 4. Between December 15, 1982 and July 21, 1989, claimant's condition
18 causally related to the industrial injury of February 6, 1978 did not worsen
19 or become aggravated or cause him to have increased impairment or
20 disability.
- 21 5. Between December 15, 1982 and July 21, 1989, and as of the latter date,
22 there was no medical treatment available which would reduce the
23 claimant's disability attributable to the industrial injury and throughout this
24 period the conditions causally related to the industrial injury were fixed and
25 permanent.
26
27

28 **CONCLUSIONS OF LAW**

- 29 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties
30 and the subject matter to this appeal.
- 31 2. The claimant's application to reopen his claim on the basis of aggravation
32 of condition filed on October 13, 1988 was not timely within the provisions
33 of RCW 51.32.160, as it was filed more than seven years after the first
34 closing order dated May 11, 1979 became final. As a result, the
35 Department order of July 21, 1989 properly denied disability benefits.
- 36 3. The claimant's aggravation application filed on October 13, 1988 entitled
37 the claimant to a determination under the provisions of RCW 51.32.160 of
38 his entitlement to proper and necessary medical and surgical services as
39 authorized under RCW 51.36.010.
- 40 4. Between December 15, 1982 and July 21, 1989, the claimant's condition
41 causally related to his industrial injury of February 6, 1978 did not worsen
42 or become aggravated and was not in need of proper and necessary
43 medical and surgical services as authorized under RCW 51.36.010.
44
45
46
47

1 5. The order of the Department of Labor and Industries dated July 21, 1989
2 determining that the application to reopen the claim on the grounds of
3 aggravation of condition was not filed within the time limitations set by law
4 and determining that the claimant's condition causally related to the
5 industrial injury had not worsened and he was not entitled to medical
6 services for conditions causally related to the industrial injury, is correct
7 and is affirmed.

8 It is so ORDERED.

9 Dated this 24th day of August, 1990.

10 BOARD OF INDUSTRIAL INSURANCE APPEALS

11
12
13
14
15
16 /s/ _____
17 SARA T. HARMON Chairperson

18
19
20 /s/ _____
21 PHILLIP T. BORK Member

22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47