

## **Therriault, Ernest**

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

**Discretionary reopening by Director**

### **STANDARD OF REVIEW**

**Waiver of time limit for reopening claims**

In an appeal of Director's letter refusing to waive the time limit for filing an application to reopen the claim, the standard of review is whether the decision not to waive the time limit constitutes an "abuse of discretion." ...*In re Ernest Therriault*, BIA Dec., **90 0876 (1990)**

Scroll down for order.



1 Mr. Therriault has appealed two determinations made by the Department. Those appeals have  
2 been consolidated and we will address both in this decision. Docket No. 90 1365 is an appeal of a  
3 Director's letter refusing to exercise his discretion to reopen the claim over seven years from the first  
4 order closing this claim on March 20, 1974.  
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7 Mr. Therriault's burden of proof in that appeal is to show that the Director abused his  
8 discretionary authority to reopen pursuant to RCW 51.32.160. See Botica v. Dep't of Labor & Indus.,  
9 184 Wash. 573 (1935). Our review of the record leads us to the conclusion that the Director did not  
10 abuse his discretion and we will affirm that determination.  
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13 The second appeal, Docket No. 90 0876, is from a Department order refusing to reopen the  
14 claim because the application was received more than seven years after the first closing order. There  
15 is no question that Mr. Therriault's aggravation application was indeed filed beyond the seven year  
16 time limit. Thus, under RCW 51.32.160 as amended in 1988, his claim cannot be reopened for  
17 additional compensation. That is, unless the Director chooses to exercise his discretion and reopen  
18 this claim, Mr. Therriault cannot receive further time-loss compensation, permanent partial disability, or  
19 a pension. However, there is no time limitation for reopening for additional treatment. Therefore, if Mr.  
20 Therriault has proved by a preponderance of the evidence that his condition causally related to his  
21 industrial injury has objectively worsened between January 30, 1976 and February 8, 1990 so as to  
22 require further treatment, his claim can be reopened for that purpose. We believe Mr. Therriault has  
23 sustained that burden.  
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30 The industrial appeals judge admitted Exhibit 29, offered by the Department's representative, to  
31 the record. This exhibit is a letter from Dr. G. Christian Harris, a psychiatrist certified in his specialty, to  
32 Donna Wagner, a claims adjudicator for the Department of Labor and Industries. The letter is dated  
33 February 2, 1989 and details Dr. Harris's conclusions based on his sessions with Mr. Therriault on  
34 December 12, January 9, 12 and 20, 1989. Dr. Harris had previously seen Mr. Therriault in 1975.  
35 (Exhibit 9).  
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39 In his report of February 2, 1989, Dr. Harris diagnoses Mr. Therriault's psychiatric condition as a  
40 paranoid disorder causally related to the industrial injury. Dr. Harris believes Mr. Therriault's overall  
41 condition and level of functioning were clearly worse than at the time of closure and seemed treatable  
42 as of February 2, 1989. Dr. Harris recommended that Mr. Therriault be engaged in regular  
43 psychotherapeutic treatment for his condition (Exhibit No. 29).  
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1 This evidence is uncontested and it is clear to us that based on Dr. Harris's letter Mr.  
2 Therriault's claim should be reopened for further treatment. We should point out that Mr. Therriault's  
3 claim can only be reopened to provide him further treatment. Unless the Director exercises his  
4 discretion, RCW 51.32.160 specifically does not allow Mr. Therriault to receive any benefits such as an  
5 increase in his permanent partial disability awards or time-loss compensation or a pension.  
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### 9 **FINDINGS OF FACT**

- 10  
11 1. On November 17, 1972, the Department of Labor and Industries received  
12 an accident report alleging an industrial injury to the claimant, Ernest J.  
13 Therriault, on November 14, 1972, while in the course of his employment  
14 with Alaska Copper & Brass Company, Inc. On November 29, 1972, the  
15 Department paid time- loss compensation through November 30 by  
16 interlocutory order. On December 7, 1972, the Department issued an  
17 order allowing the claim and paying time-loss compensation through  
18 December 30, 1972.

19 On April 3, 1973, the Department issued an order closing the claim with  
20 payment of time- loss compensation through March 30, 1973. On April  
21 12, 1973, the Department issued an order paying time-loss compensation  
22 through April 15, 1973. On May 22, 1973, the Department issued an order  
23 terminating time-loss compensation with payment through April 15, 1973.

24 On March 20, 1974, the Department issued an order awarding permanent  
25 partial disability equal to 40% of total bodily impairment for physical  
26 residuals and 30% of total bodily impairment for psychiatric residuals,  
27 deducted advances on permanent partial disability, paid a cash award in  
28 the amount of \$2,000.00, indicated that the balance of permanent partial  
29 disability in the amount of \$14,250.00 would be paid at the rate of \$500.00  
30 per month plus 6% interest, terminated time-loss compensation as paid  
31 through October 1, 1973, and closed the claim.

32 On March 29, 1974, the employer filed a protest and request for  
33 reconsideration of the Department's order of March 20, 1974. On April 5,  
34 1974, the Department issued a letter responding to the protest and  
35 request for reconsideration of March 29, 1974. On April 22, 1974, the  
36 employer sent correspondence to the Department concurring with the  
37 Department's findings and recommendations.  
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39 On December 5, 1974, the claimant filed an application to reopen for  
40 aggravation of condition. On February 13, 1975, the Department issued  
41 an order denying claimant's application to reopen for aggravation of  
42 condition.  
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44 On January 23, 1976, the claimant filed an application to reopen for  
45 aggravation of condition. On January 30, 1976, the Department issued an  
46 order denying claimant's application to reopen for aggravation of condition.  
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1 On February 10, 1976, the claimant filed a Notice of Appeal with the  
2 Department of Labor and Industries which provided the Notice of Appeal  
3 to the Board of Industrial Insurance Appeals from the Department's order  
4 of January 30, 1976. On February 27, 1976, the Board issued its order  
5 granting the appeal in Docket No. 47,701. On June 23, 1976, the Board  
6 issued its Order on Agreement of Parties remanding Docket No. 47,701 to  
7 the Department of Labor and Industries to reopen the claim and to pay  
8 additional permanent partial disability equal to 20% as compared to total  
9 bodily impairment for psychiatric residuals and to close the claim.

10 On June 25, 1976, the Department issued its order reopening the claim,  
11 paying additional permanent partial disability equal to 20% for unspecified  
12 disability for psychiatric residuals, terminating time-loss compensation as  
13 paid and closing the claim.  
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15 In December 1984, the claimant filed an application to reopen for  
16 aggravation of condition. On April 8, 1985, the Department of Labor and  
17 Industries by correspondence denied claimant's December 1984  
18 application to reopen for aggravation of condition.

19 On October 24, 1986, the claimant filed an application to reopen for  
20 aggravation of condition and requested waiver of the seven year statute  
21 applicable to aggravation applications. On November 24, 1986, the  
22 Department forwarded correspondence to claimant denying claimant's  
23 request to reopen the claim under the discretionary authority of RCW  
24 51.32.160.  
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26 On December 11, 1986, the claimant filed a Notice of Appeal with the  
27 Board of Industrial Insurance Appeals from the Department's  
28 correspondence of November 24, 1986. On January 27, 1987, the Board  
29 of Industrial Insurance Appeals issued its order denying the appeal in  
30 Docket No. 86 4406.

31 On February 28, 1988, the claimant filed an application to reopen for  
32 aggravation of condition. On April 21, 1989, the Department issued its  
33 order denying claimant's application to reopen for aggravation of condition.  
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35 On May 2, 1989, the Board of Industrial Insurance Appeals received a  
36 Notice of Appeal from claimant from the Department's order of April 21,  
37 1989. On May 26, 1989, the Board of Industrial Insurance Appeals issued  
38 its order granting the appeal in Docket No. 89 1780. On November 16,  
39 1989, the Board issued its Order on Agreement of Parties in Docket No.  
40 89 1780 reversing the Department's order of April 21, 1989, and  
41 remanding the claim to the Department to give the Director the opportunity  
42 to exercise discretion and reopen the claim.

43 On February 2, 1990, the Department issued an order superseding and  
44 holding for naught its order of April 21, 1989, pursuant to the order of the  
45 Board of Industrial Insurance Appeals of November 16, 1989.  
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1 On February 8, 1990, the Department issued an order denying claimant's  
2 application to reopen for aggravation of condition received on February 28,  
3 1989, because the application had not been received within the seven  
4 year time limitation established by RCW 51.32.160.

5 On February 8, 1990, the Director of the Department of Labor and  
6 Industries sent correspondence to the claimant refusing to exercise his  
7 discretionary authority to reopen the claim beyond the seven year time  
8 limitation prescribed by RCW 51.32.160.

9 On February 16, 1990, the Board of Industrial Insurance Appeals received  
10 a Notice of Appeal from claimant from the Department's order of February  
11 8, 1990. On March 16, 1990, the Board of Industrial Insurance Appeals  
12 issued its order granting the appeal, assigning it Docket No. 90 0876 and  
13 ordering that further proceedings be held.

14 On February 16, 1990, the Board of Industrial Insurance Appeals received  
15 a Notice of Appeal from the claimant from the Director's letter of February  
16 8, 1990. On March 16, 1990, the Board issued its order granting the  
17 appeal, assigning it Docket No. 90 1365 and ordering that further  
18 proceedings be held.

- 19 2. On November 14, 1972, while in the course of his employment with Alaska  
20 Copper & Brass Company the claimant, Ernest J. Therriault, experienced  
21 an industrial injury. He suffered multiple burns and psychiatric impairment  
22 as a result of this injury.
- 23 3. As a result of his industrial injury the claimant has suffered a psychiatric  
24 condition which was diagnosed as a depressive reaction as of March 7,  
25 1974.
- 26 4. As of February 2, 1989, the claimant was suffering from a paranoid  
27 disorder which was causally related to his industrial injury of November 14,  
28 1972.
- 29 5. Between January 30, 1976, and February 8, 1990, the claimant's  
30 psychiatric condition causally related to his industrial injury worsened.
- 31 6. As of February 8, 1990, the claimant's psychiatric condition was not fixed  
32 and stable and was in need of further treatment.
- 33 7. Claimant's application to reopen for aggravation of condition was filed with  
34 the Department on February 28, 1988. His claim was first closed on  
35 March 20, 1974.
- 36 8. The Director of the Department of Labor and Industries did not abuse his  
37 discretion in his letter dated February 8, 1990, when he declined to reopen  
38 this claim upon his own motion.

#### 39 **CONCLUSIONS OF LAW**

- 40 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties  
41 and the subject matter to these appeals.

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2. Between January 30, 1976, and February 8, 1990, the claimant's condition, causally related to his industrial injury worsened within the meaning of RCW 51.32.160 and required further treatment.
  3. The Director of the Department of Labor and Industries did not abuse his discretion in refusing to reopen the claim on his own motion pursuant to his authority under RCW 51.32.160 and the letter of February 8, 1990, which refused to reopen the claim on that basis is affirmed.
  4. The Department order of February 8, 1990, which denied claimant's reopening application because it was beyond the seven year limit provided by law is incorrect and is reversed and the claim is remanded to the Department of Labor and Industries to reopen the claim to provide the claimant with treatment for his psychiatric condition and to take whatever further action is indicated and allowed by law.

15 It is so ORDERED.

16 Dated this 26<sup>th</sup> day of October, 1990.

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18 BOARD OF INDUSTRIAL INSURANCE APPEALS

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22 /s/  
23 SARA T. HARMON Chairperson

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25  
26 /s/  
27 FRANK E. FENNERTY, JR. Member

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29  
30 /s/  
31 PHILLIP T. BORK Member