Discretionary reopening by Director

Once the Director exercises the discretion to reopen a claim which otherwise could not be reopened due to the time limitations of RCW 51.32.160, the worker is entitled to benefits under the Act to the same extent as if there had been no time limitation bar. ....In re Bernard James, BIIA Dec., 04,394 (1955) [Editor's Note: See later statutory amendments, Laws of 1988, ch. 161, § 11.]
IN RE: BERNARD JAMES

CLAIM NO. B-451886

APPEARANCES:

Claimant, Bernard James, by
Walthew, Oseran and Warner, per
Charles F. Warner

Employer, Aberdeen Plywood, by
Lenihan and Ivers, per
Carl P. Jensen

Department of Labor and Industries, by
The Attorney General and
L. A. Dwinell, Assistant

This is an appeal filed by the claimant, Bernard James, on December 31, 1953, from an order of the supervisor of industrial insurance, dated November 2, 1953, closing this claim with time-loss compensation to March 1, 1953, inclusive, and without an award for permanent partial disability. REVERSED AND REMANDED.

DECISION

This case has been submitted to the board for decision on the basis of a stipulated set of facts and four exhibits. The facts to which the parties to this action have stipulated are as follows:

The claimant was injured on September 28, 1946, while in the employ of the Aberdeen Plywood Corporation. The injury occurred when the claimant fell a distance of 12 feet while scaling logs, and according to the report of accident, which was signed by Dr. Skarperud and filed with the department of labor and industries on October 4, 1946, resulted in a fracturing of the terminal end of the 7th cervical vertebra. By an order dated February 17, 1947, the claim was closed with no award for permanent partial disability and on or about May 6, 1952, the claimant filed with the department of labor and industries an application to reopen his claim on the ground of aggravation of condition. This application for reopening was supported by his then attending physician, Dr. Dwyer, but on or about May 14, 1952, the department entered an order denying the claimant's application to reopen on the ground that the five year statute had run. Shortly after the entry of the aforementioned order Dr. Skarperud wrote the department stating that the claimant's condition had become aggravated and that he was in need of further relief. Thereafter, on November 14, 1952, the director of the department of labor and...
industries entered an order (exhibit 1) reopening the claim. On December 17, 1952, the department had the claimant examined by a Dr. Robson who found a herniated cervical disc and recommended traction. On January 22, 1953, the claimant was operated on at the site of the 5th cervical disc and on or about July 1, 1953, Dr. Dwyer informed the department that the claimant's case was ready for closure and that he had a permanent partial disability. On August 12, 1953, the department had the claimant examined by Dr. Peterson of Tacoma, Washington, and thereafter Dr. Peterson sent a report to the department of labor and industries setting forth his findings of disability and recommending that the claimant be paid an award of 35% of the amount allowable for unspecified permanent partial disabilities. On November 2, 1953, the supervisor of industrial insurance entered an order closing the claim with time-loss compensation to March 1, 1953, inclusive, and with no permanent partial disability award. From that order the claimant took a timely appeal to the board of industrial insurance appeals and the board entered an order granting the appeal.

The exhibits that were made part of the record by agreement of the parties are the director's order of November 14, 1952, (exhibit 1), the supervisor's order of November 2, 1953, closing the claim with no permanent partial disability award, (exhibit 2), Dr. Wendell G. Peterson's report of his findings and conclusions as a result of his examination of the claimant on August 12, 1953, (exhibit 3), and the claimant's notice of appeal.

The order of the director of the department of labor and industries, dated November 14, 1952, provided that:

"WHEREAS, the Director has been requested to consider an application to reopen the above claim, on which the five-year Statute of Limitations has operated, by exercising the discretionary authority conferred upon him by Section 51.32.160, R.C.W. (and the ruling of the Supreme Court of the State of Washington in Smith vs. Department of Labor and Industries, 8 Wash. (2d) 587) and

"WHEREAS, in accordance with said discretionary authority and by reason of medical examination and investigation the Director finds that there has been, in fact, an aggravation of the original injury;

"IT IS HEREBY ORDERED THAT said application to reopen be and is hereby granted."

The statute upon which the director relied for his authority to reopen this claim, sec. 51.32.160 R.C.W. provides that:
"If aggravation, diminution, or termination of disability takes place or be discovered after the rate of compensation shall have been established or compensation terminated, in any case the director, through and by means of the division of industrial insurance, may, upon the application of the beneficiary, made within five years after the establishment or termination of such compensation, or upon his own motion, re-adjust for further application the rate of compensation in accordance with the rules in this section provided for the same, or in a proper case terminate the payment."

Our supreme court in the case of Smith v. Department of Labor and Industries, 8 Wn. (2d) 587, interpreted this statute to mean that the time limitation in the statute (5 years) has reference solely to the application of the beneficiary and that the legislature conferred continuing jurisdiction upon the director of the department of labor and industries so that he might at any time upon his own motion grant additional compensation to an injured workman, if he found that there had been, in fact, an aggravation of the injury. Further, in the case of Botica v. Department of Labor and Industries, 184 Wash. 573, our supreme court held that it was within the discretion of the director to determine whether or not he would reopen the claim upon his own motion and that no action to compel him to exercise his discretion would lie.

It is apparently the position of the department and the employer that in a case, such as this, where the claimant has lost his right to have his claim reopened due to the operation of the five year statute of limitations, and the claim has been reopened only by virtue of the director's exercise of the discretionary power granted by R.C.W. 51.32.160, the claimant has no right to appeal to this board and have reviewed any decision of the department made subsequent to the director's order reopening the claim. It is apparently the position of the claimant herein that, although by operation of the five year statute he had lost his right to have his claim reopened, where in fact it was reopened by order of the director pursuant to the authority given him by statute, the situation is the same as if the five-year period had not run and he is entitled to have reviewed any decision of the department subsequent to the date of the director's order reopening the claim. The board is of the opinion that the claimant's view is the correct one.

The five year limitation contained in R.C.W. 51.32.160 is a statute of limitations and relates to remedies only, rather than a statute of non-claim which extinguishes a right. Lane v.Department of Labor and Industries, 21 Wn. (2d) 429; Pape v. Department of Labor and Industries, 43 Wn. (2d) 736. It is well established that a statute of limitations is a defense which may be waived either
expressly or by failing to plead the statute and in such case the party whose remedy would have
been barred by the statute may pursue his right in the same manner as if the statutory time has not
run. Generally speaking no officer or agency of the state has the right to waive the defense of the
statute of limitations, Nagel v. Department of Labor and Industries, 189 Wash. 631, but it seems
clear that such authority is expressly conferred upon the director of the department of labor and
industries by virtue of R.C.W. 51.32.160. It is, therefore, the opinion of the board that when the
director entered his order of November 14, 1952, reopening this claim by exercising the
discretionary authority conferred upon him by sec. 51.32.160, R.C.W. he did waive the statute of
limitations and by that action put the claimant in the same position he would have been had the five
year period not run. It is true that the director did not have to open this claim but the board believes
that, having reopened the claim on its own motion, the department was bound to award the
claimant whatever compensation the facts and law showed he was entitled to and that the claimant
may call upon this board to determine whether or not that was done. Seagraves v. Department of
Labor and Industries, 185 Wash. 333; Quarberg v. Department of Labor and Industries, 35 Wn. (2d)
305.

A review of the report of Dr. Wendell Peterson (exhibit 3), which the parties agreed the board
might consider for the purpose of determining the extent of the claimant's disability, if it first
determined that he had a right to appeal from the supervisor's order of November 2, 1953,
convinces the board that when the department closed the claimant's claim with no award for
permanent partial disability it did not award him the compensation which the law and the facts show
him to be entitled to.

Dr. Peterson's report revealed that he received a history from the claimant that following the
injury of September 28, 1946, his neck continued to bother him off and on, accompanied by some
discomfort down his left arm, but he was able to stay on the job. There would be recurrent attacks
of pain in the left side of the neck and into the arm but these would clear up from time to time.
However, in May, 1952, the claimant had a particularly severe attack of pain in the neck and left
arm which was excruciating and did not let up. On January 20, 1953, Dr. Robson performed
surgery on the claimant's neck which surgery afforded him excellent relief from pain, and on March
1, 1953, he returned to his former employment. Dr. Peterson also received a history that in 1938
the claimant had sustained an injury to his sacro-iliac for which he received a permanent partial
disability award of 40 degrees. The claimant told Dr. Peterson that his lower back had given him no
trouble the past few years. On physical examination Dr. Peterson found that extension of claimant's
neck was markedly restricted, forward flexion was moderately restricted, lateral flexion to right and
left sides were moderately restricted, and rotation was moderately to markedly restricted. There
was pain in the neck on all the extremes of motion. According to Dr. Peterson, examinations of AP
and lateral view x-rays taken September 30, 1946, showed the cervical spine to be straight,
suggesting muscle spasm, with some irregularity of the spinous process of the 7th cervical vertebra
which could not definitely be identified as a fracture. Films taken on May 6, 1952, also showed the
cervical spine to be straight and revealed a definite narrowing of the interspace between C5 and 6
which was not present in the films of September 30, 1946. Dr. Peterson concluded that the
claimant's condition at the time of his examination was fixed, that there was no indication for further
treatment, that he was able to work and that his claim should be closed with an award of 35% of the
amount allowable for unspecified permanent partial disabilities, from which should be deducted any
previous permanent partial disability award.

In the opinion of the board the history received by Dr. Peterson and his findings upon
comparison of x-rays taken of September 30, 1946, and May 6, 1952, definitely establishes that the
claimant's disability as a result of the neck injury he sustained on September 28, 1946, worsened to
the extent that he is entitled to an award of 35% of the amount allowable for unspecified permanent
partial disabilities. A brief filed on behalf of the department of labor and industries in connection
with this appeal indicates that the department's failure to pay the claimant the award recommended
by Dr. Peterson was based on the fact that Dr. Peterson recommended that any previous
permanent partial disability award should be deducted from the amount he recommended and the
fact that as a result of a previous injury to his low back the claimant had received an award of 40
degrees. In taking this position the department apparently relied upon R.C.W. sec. 51.32.080 (d)
which provides that:

"Should a workman receive an injury to a member or part of his body
already, from whatever cause, permanently partially disabled, resulting
in the amputation thereof or in an aggravation or increase in such
permanent partial disability but not resulting in the permanent total
disability of such workman, his compensation for such partial disability
shall be adjudged with regard to the previous disability of the injured
member or part and the degree or extent of the aggravation or increase
of disability thereof." (Emphasis added)
It is true that the 40 degree award the claimant received as a result of the injury to his low back in 1938 is a greater disability award than the 35% unspecified recommended by Dr. Peterson, but the board does not consider R.C.W. 51.32.080 (d) applicable in this case for it does not believe that the low back and the neck are the same part of the body within the meaning of that statute.

In view of the foregoing the board is of the opinion that the order of the supervisor of industrial insurance dated November 2, 1953, should be reversed and the claim remanded to the department of labor and industries with direction that the claim be reopened and the claimant awarded 35% of the amount allowable for unspecified permanent partial disabilities.

**FINDINGS OF FACT**

Based on the foregoing and after reviewing the entire record herein, the board finds as follows:

1. The claimant, Bernard James, sustained an industrial injury to his neck on September 28, 1946, while in the employ of the Aberdeen Plywood Corporation at Aberdeen, Washington.

2. On October 4, 1946, the claimant filed with the department of labor and industries an accident report and claim for compensation. His claim was allowed and by an order dated February 17, 1947, the claim was closed with no award for permanent partial disability. On or about May 6, 1952, the claimant filed with the department of labor and industries an application to reopen his claim on the ground of aggravation of condition and on or about May 14, 1952, the department entered an order denying the claimant's application to reopen his claim on the ground that the five years statute of limitations had run. On November 14, 1952, the director of the department of labor and industries, on his own motion, entered an order reopening the claim subsequent to November 14, 1952, the claimant was afforded medical treatment for his neck including traction and surgery, paid time-loss compensation, and on November 2, 1953, the supervisor of industrial insurance entered an order closing his claim with time-loss compensation to March 1, 1953, inclusive, and with no permanent partial disability award. From that order the claimant took a timely appeal to this board and the board entered an order granting the appeal.

3. The claimant's disability, resulting from his industrial injury of September 28, 1946, increased between February 17, 1947, and November 2, 1953, to such an extent that his loss of bodily function as a result of his industrial injury of September 28, 1946, entitles him to an award of 35% of the amount allowable for unspecified permanent partial disabilities.

4. The order of the supervisor of industrial insurance herein dated November 2, 1953, closing this claim with no award for permanent partial disability is in error and must be reversed and the claim
remanded to the department of labor and industries with direction that 
the claim be reopened the claimant awarded 35% of the amount 
allowable for unspecified permanent partial disabilities and the claim 
thereupon be closed.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the board concludes:

1. The director of the department of labor and industries had authority to, 
on his own motion, reopen the claimant's claim, although more than five 
years had elapsed since it was last closed.

2. Having reopened the claimant's claim on its own motion the department 
was bound to award the claimant whatever compensation the facts and 
law showed he was entitled to and the claimant had a right to call upon 
this board to determine whether or not that was done.

3. The board has jurisdiction of the parties and the subject matter.

4. The order of the supervisor of industrial insurance herein dated 
November 2, 1953, closing this claim with no award for permanent 
partial disability is in error and must be reversed and the claim 
remanded to the department of labor and industries with direction that 
the claim be reopened the claimant awarded 35% of the amount 
allowable for unspecified permanent partial disabilities and the claim 
thereupon be closed.

ORDER

Now, therefore, it is hereby ORDERED that the order of the supervisor of industrial 
insurance herein dated November 2, 1953, be, and the same is hereby, reversed and the claim 
herein remanded to the department of labor and industries with direction that it be reopened the 
claimant awarded 35% of the amount allowable for unspecified permanent partial disabilities, and 
the claim thereupon be closed.

Dated this 17th day of May, 1955.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/ 
J. HARRIS LYNCH Chairperson

/s/ 
ARTHUR BORCHER Member

/s/ 
A.W. ENGSTROM Member