Streubel, Mike

AGGRAVATION (RCW 51.32.160)

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)**

TIMELINESS OF APPLICATION TO REOPEN CLAIM (RCW 51.32.160)

Applicability of 1988 amendments

Under the 1988 amendments to RCW 51.32.160, a claim may be reopened at any time for further treatment so long as worsening of condition has been shown. The seven year time limitation does not apply to a reopening for that limited purpose. ***….In re Mike Streubel*, BIIA Dec., 89 4867 (1990)** [*Editor's Note*: The Board's decision was appealed to superior court under Pierce County Cause No. 91-2-10973-2.]

Issue of timeliness of application may be raised for first time on appeal

The Department may raise the statute of limitations defense to the filing of an application to reopen a claim even though the order on appeal did not deny the application on timeliness grounds. *Citing Hutchins v. Department of Labor & Indus*., 44 Wn. App. 571 *review denied* 107 Wn.2d 1010 (1986) ***….In re Mike Streubel*, BIIA Dec., 89 4867 (1990)** [*Editor's Note*: The Board's decision was appealed to superior court under Pierce County Cause No. 91-2-10973-2.]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: MIKE L. STREUBEL	)	**DOCKET NO. 89 4867**
	)	
	)	**ORDER VACATING PROPOSED DECISION**
	)	**AND ORDER AND REMANDING APPEAL FOR**
CLAIM NO. G-648302	)	**FURTHER PROCEEDINGS**

APPEARANCES:

Claimant, Mike L. Streubel, by
David B. Vail and Associates, per
David B. Vail

Employer, Northwest Excavating Inc., by
None

Department of Labor and Industries, by
The Office of the Attorney General, per
Charles M. McCullough, Deborah Lazaldi, and Linda L. Williams, Assistants

This is an appeal filed by the claimant on November 2, 1989 from an order of the Department of Labor and Industries dated September 12, 1989 which adhered to the provisions of a Department order dated May 5, 1989 which denied the claimant's reopening application because the medical information showed that the condition(s) caused by the injury had not worsened since the final claim closure. **REMANDED FOR FURTHER PROCEEDINGS.**

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order issued on May 14, 1990 in which the claimant's appeal was dismissed.

We have granted review in order to remand this appeal to the hearing process for a decision on the merits.

Mike L. Streubel, the claimant, sustained an industrial injury on September 30, 1974. His claim was closed on December 1, 1977. The Department received an application to reopen his claim, due to aggravation of his condition, on March 20, 1989. On May 5, 1989 the Department issued an order denying the application because medical information showed no worsening of the claimant's condition since closure. A protest and request for reconsideration was received by the Department on May 12, 1989, and on June 5, 1989 the Department order dated May 5, 1989 was held in abeyance.

Mr. Streubel attended an independent medical examination on August 10, 1989. On September 12, 1989 the Department issued an order adhering to the provisions of the Department order dated May 5, 1989, denying the reopening application.

Mr. Streubel filed a timely notice of appeal to the September 12, 1989 order. We issued an order granting the claimant's appeal. The Department then filed a motion to dismiss the appeal for lack of jurisdiction. The Department's motion was based on RCW 51.32.160 as amended by the Legislature in 1988.

RCW 51.32.160 allows a worker to apply for reopening due to worsening of an industrially related condition within seven years of the date the first closing order became final, when the worker is seeking additional compensation such as time loss, a permanent partial disability award, or a pension. If the first closing order was issued after July 1, 1981, it must be based on medical recommendation, advice, or examination. Otherwise, the seven year time limitation does not apply. However, orders issued prior to July 1, 1981, like the first closing order in this case, need not meet these requirements. In re Marven Sandven, Dckt. No. 89 3338 (August 24, 1990), at 5.

There is no question that the first closing order in this claim became final long before July 1, 1981 (it was issued on December 1, 1977) and more than seven years prior to the date Mr. Streubel's aggravation application was filed (March 20, 1989). However, under RCW 51.32.160 as amended in 1988, a claim may be reopened at any time for further treatment so long as worsening of condition has been shown. The seven year time limitation does not apply to a reopening for that limited purpose.

Thus, the Department correctly considered the merits of Mr. Streubel's aggravation application by sending him for an independent medical examination and issuing an order which adjudicated the merits of his application. Unfortunately, upon claimant's appeal to this Board, the Department's legal representative has chosen to assert a position inconsistent with that taken by the Department in adjudicating this claim. It is now the Department's position, and the Industrial Appeals Judge agreed, that RCW 51.32.160 acts as a complete jurisdictional bar to the reopening of this claim.

In response to the Department's motion to dismiss, the claimant states that "the Department failed to assert the seven year limitation period in RCW 51.32.160 as a defense to claimant's reopening application" and instead, "chose to deny Mr. Streubel's application upon medical grounds." PFR, at 5. According to the claimant, the Department is therefore precluded from raising the statute of limitations issue for the first time on appeal. In support of this position, claimant characterizes the time limitation contained in RCW 51.32.160 as a true statute of limitations rather than a non-claim statute,

citing Lane v. Dep't of Labor & Indus., 21 Wn.2d 420 (1944); Pape v. Dep't of Labor & Indus., 43 Wn.2d 736 (1953); and In re Bernard James, BIIA Dec. 04,394 (1955). Because the aggravation statute is not a non-claim statute, Mr. Streubel argues that the Department's failure to raise the statute of limitations defense at the Department level constitutes a waiver of that defense. Claimant urges that we disregard the more recent decision in Hutchins v. Dep't of Labor & Indus., 44 Wn.App. 571 (1986) rev. denied 107 Wn.2d 1010 (1986) as an "aberration which does not control this case." PFR, at 9.

Because we are denying the Department's motion to dismiss, we respond to claimant's arguments only briefly. First, as we have already pointed out, there is no statute of limitations on reopening a claim for treatment purposes. Therefore, the Department obviously cannot be said to have waived a non-existent statute of limitations when it denied claimant's aggravation application on medical grounds. Second, Pape, Lane, and James are inapposite here. Pape and Lane relate to the question of whether amendments to the aggravation statute apply retrospectively. James addresses the effect of the Director's discretionary decision to reopen a claim. Neither of those questions is before us in this appeal. Hutchins, on the other hand, is directly on point, since the court there specifically permitted the Department to raise the statute of limitations question under RCW 51.32.160 for the first time on appeal. Hutchins, at 576-577.

For the foregoing reasons, the Department has not waived its right to assert that Mr. Streubel's aggravation application is untimely with regard to the receipt of further compensation benefits such as time loss, permanent partial disability, or pension. The claimant is barred by RCW 51.32.160 from litigating those issues, since the Director has not chosen to exercise his discretion and waive the seven year time limitation regarding an application for those benefits.

The Proposed Decision and Order is vacated, and this appeal is remanded to the hearing process for the purpose of taking further evidence to ascertain if Mr. Streubel's condition, causally related to his industrial injury of September 30, 1974, objectively worsened between December 1, 1977 and September 12, 1989, and if so, whether the claimant was in need of further medical treatment for such worsened condition. The issues of time loss compensation, higher permanent partial disability, or permanent total disability as of September 12, 1989, are not before the Board because Mr. Streubel filed his application to reopen his claim due to aggravation of his condition more than seven years from the date the first closing order became final.

The parties are advised that this order is not a final decision and order of the Board within the meaning of RCW 51.52.110. Unless the appeal is dismissed or resolved by agreement of the parties, a further Proposed Decision and Order shall be issued after the parties to these proceedings have had an adequate opportunity to present such evidence as is appropriate to the limited issue herein, as set forth in the preceding paragraph. Such Proposed Decision and Order, if any, shall be based upon the entire record and the parties shall have the right, pursuant to RCW 51.52.104, to petition for review of such further Proposed Decision and Order.

It is so ORDERED.

Dated this 16th day of November, 1990.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
SARA T. HARMON Chairperson

/s/_____
FRANK E. FENNERTY, JR. Member

/s/_____
PHILLIP T. BORK Member