IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

RICKY E. BENSCH,	)	
	)	No. 56361-1-I
Appellant,	)	
	)	
v.	)	DIVISION ONE
	)	
DEPARTMENT OF LABOR	)	
AND INDUSTRIES,	)	UNPUBLISHED OPINION
	)	
Respondent.	)	FILED: September 18, 2006

PER CURIAM. This case concerns whether the Washington State Department of Labor and Industries properly denied Ricky Bensch's application to reopen his claim for benefits. Because Bensch failed to establish that his health had deteriorated due to his industrial injury since his claim was initially closed, we affirm.

FACTS

On July 16, 1997, Bensch suffered an injury to his back while at work. He filed a claim for benefits under the Industrial Insurance Act, Title 51 RCW. The Department of Labor and Industries allowed the claim, providing physical therapy and other treatment. As part of the treatment, Bensch underwent a two-level spinal fusion. Bensch's claim was eventually closed on August 30, 2002, without any award or rating for permanent partial disability. There was no appeal from this order.

Approximately nine months later, Bensch applied to reopen the case for aggravation of condition. On August 7, 2003, the Department rejected the application

because the medical record showed the condition had not worsened since final claim closure. The Board of Industrial Insurance Appeals affirmed that decision. In so doing, the Board entered the following undisputed findings of fact:

1. On July 24, 1997, the claimant, Ricky E. Bensch, filed an application for benefits with the Department of Labor and Industries, alleging the occurrence of an industrial injury on July 16, 1997, during the course of his employment with All Steel, Inc. On August 30, 2002, the Department issued an order in which it closed the claim with no permanent partial disability award and time loss compensation ended as paid through June 25, 2002.

   On May 23, 2003, the claimant filed an application to reopen his claim for aggravation of condition. On August 7, 2003, the Department issued an order in which it denied the application to reopen because the medical record showed that the claimant's condition had not worsened since the final claim closure. On August 11, 2003, the claimant filed a Notice of Appeal with the Board of Industrial Insurance Appeals, which was assigned Docket No. 03 15445. On September 18, 2003 the Board issued an order granting the appeal and directing that further proceedings be held.
2. On February 6, 1989, Mr. Bensch sustained an industrial injury to his lower back. He filed a claim as a result of this industrial injury, which was allowed by the Department of Labor and Industries and closed on January 2, 1991, with an award for a permanent partial disability most accurately described by Category 2, WAC 296-20-280.
3. The claimant suffered another industrial injury to his lumbar spine on July 16, 1997, while carrying an oxygen bottle up a ladder during the course of his employment. Mr. Bensch filed a claim with the Department of Labor and Industries for the conditions proximately caused by this industrial injury. The claim was allowed by the Department, and was assigned Claim No. P-781951.
4. On August 30, 2002, the Department closed Claim No. P-781951 without an award for permanent partial disability. This order was not appealed and became final and binding.
5. Between August 30, 2002 and August 7, 2003, Mr. Bensch's low back condition, proximately caused by the industrial injury of July 16, 1997, did not objectively worsen or become aggravated.

Bensch appealed to the King County Superior Court. Following a bench trial,

the court ruled in favor of the Department. This appeal followed.

DISCUSSION

Bensch contends that the superior court erred in concluding that the Department properly denied his application to reopen his workers' compensation claim. RCW 51.52.110 allows decisions of the Board to be appealed to superior court. In an appeal of the Board's decision, the superior court holds a *de novo* hearing limited solely to the evidence presented to the Board. The findings and conclusions of the Board "are prima facie correct until the superior court, by a preponderance of the evidence, finds them incorrect." Grimes v. Lakeside Indus., 78 Wn. App. 554, 560, 897 P.2d 431 (1995). In reviewing the superior court's decision, the role of the court of appeals "is to determine whether the trial court's findings, to which error is assigned, are supported by substantial evidence and whether the conclusions of law flow therefrom." Du Pont v. Dep't of Labor & Indus., 46 Wn. App. 471, 476-77, 730 P.2d 1345 (1986). "Substantial evidence is evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." Grimes, 78 Wn. App. at 560-61.

Washington's Industrial Insurance Act authorizes the reopening of a claim if an aggravation of a disability occurs after the claim is closed.

> To prevail on an aggravation claim, a claimant must prove through medical evidence that (1) the industrial injury caused the aggravation, and (2) his condition became aggravated during the time between the first and second terminal dates. Phillips v. Department of Labor & Indus., 49 Wn.2d 195, 197, 298 P.2d 1117 (1956). The second terminal date is the date of the most recent closure or denial of an application to reopen a claim for aggravation …; the first terminal date is the date of the last previous closure or denial of such an application …. Karniss v.

> Department of Labor & Indus., 39 Wn.2d 898, 901-02, 239 P.2d 555 (1952).

Grimes, 78 Wn. App. at 561. The injured worker bears the burden of producing some objective medical evidence, verified by a physician, that his or her injury has worsened since the initial closure of the claim. Tollycraft Yachts Corp. v. McCoy, 122 Wn.2d 426, 432, 858 P.2d 503 (1993). RCW 51.32.160 provides in relevant part:

> If aggravation, diminution, or termination of disability takes place, the director may, upon the application of the beneficiary, made within seven years from the date the first closing order becomes final, or at any time upon his or her own motion, readjust the rate of compensation in accordance with the rules in this section provided for the same, or in a proper case terminate the payment.

Bensch points to the fact that the physicians who examined him agreed that, at the time his claim for benefits was closed on August 30, 2002, he had a permanent partial disability that was best described as Category 4. WAC 296-20-280. In deciding whether his industrial injury was later aggravated within the meaning of RCW 51.32.160, Bensch argues that the proper comparison is not between his medical condition on August 30, 2002, and his medical condition on August 7, 2003, when the Department refused to reopen his claim, but between the way his condition was described in the August 30, 2002 Department order and his medical condition on August 7, 2003. He argues that since the closure order did not describe him as having any permanent partial disability and since the record clearly shows that he had a permanent partial disability on the latter date, "his condition was worse, as a matter of law." Brief of Appellant at 4. Thus, Bensch argues, the Department should have reopened his claim in order to pay his permanent partial disability award. The Board

decided to the contrary. In so doing, it correctly applied the law.

The approach urged by Bensch does not meet the requirements for reopening a workers' compensation claim pursuant to RCW 51.32.160. The uncontroverted medical evidence is that there was no actual change in Bensch's physical condition between August 30, 2002, and August 7, 2003. Bensch's claim of aggravation is not based on the actual deterioration of his condition during the relevant time period but, rather, on the belief that the Department mistakenly closed his claim without a permanent partial disability award.

RCW 51.32.160 is not a means to attack a final order of the Department. "The Industrial Insurance Act … provides that an aggrieved worker must file an appeal within 60 days after issuance of a Department action or final order. RCW 51.52.050, .060(1)(a)." Solven v. Dep't of Labor & Indus., 101 Wn. App. 189, 193, 2 P.3d 492 (2000). Where, as here, no timely appeal was taken, the Department's closing order is deemed final and binding. Marley v. Dep't of Labor & Indus., 125 Wn.2d 533, 543, 886 P.2d 189 (1994); Lynn v. Dep't of Labor & Indus., 130 Wn. App. 829, 836, 125 P.3d 202 (2005); Solven, 101 Wn. App. at 193. The proposition urged by Bensch has previously been rejected by both the Supreme Court, Dinnis v. Dep't of Labor & Indus., 67 Wn.2d 654, 657, 409 P.2d 477 (1965), and the Court of Appeals. Quine v. Dep't of Labor & Indus., 14 Wn. App. 340, 540 P.2d 927 (1975).[1]

[1] In Quine, the court described the issues as follows: "In essence, claimant's position is that the original award for permanent partial disability was incorrect at the time it was entered; and although no appeal was taken from that order, claimant should now be awarded permanent total disability status without having to show aggravation of his condition." 14 Wn. App. at 342. This describes the argument Bensch now makes.

Bensch cites White v. Department of Labor & Industries, 48 Wn.2d 413, 293 P.2d 764 (1956), for the proposition that the Department's August 30, 2002 order was res judicata as to the extent of his injuries at the time of initial claim closure. White is not controlling. Unlike the situation here, the claimant in White presented medical evidence showing that his condition had, in fact, worsened between the date of the initial closing order and the date of his application to reopen his claim.

The decisions in Dinnis and Quine control the disposition of this case. Based on those decisions, the Department properly denied Bensch's application to reopen his claim for benefits. There was no error.

Affirmed.

FOR THE COURT:

Dwyer, J.

Appelwick, C.J.

Becker, J.