

Woodley, Michael

PENSION RESERVE

Deduction of prior permanent partial disability award (RCW 51.32.080(4)) (Previously RCW 51.32.080(2))

The date of first instance for purposes of deducting awards made for permanent partial disability from the pension reserve must be established by a formal order determining the extent of permanent disability. The date of a cash advance on the permanent partial disability award does not establish the date of the first instance pursuant to RCW 51.32.080(4) ...*In re Michael Woodley, BIIA Dec., 01 16625 (2002)* [Editor's Note: The Board decision was appealed to superior court under Clallam County Cause No. 02-2-00852-9.]

Scroll down for order.

1 After careful review of the Petitions for Review filed on behalf of both the Department and
2 Mr. Woodley, and after careful review of the Proposed Decision and Order, we believe that both the
3 Department and our industrial appeals judge have failed to correctly identify the date of first
4 instance as provided for in RCW 51.32.080(4).
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7 This appeal calls for us to yet again construe RCW 51.32.080(4). This statute provides:

8 If permanent partial disability compensation is followed by
9 permanent total disability compensation, any portion of the permanent
10 partial disability compensation which exceeds the amount that would
11 have been paid the injured worker if permanent total disability
12 compensation had been paid in the first instance, shall be deducted
13 from the pension reserve of such injured worker and his or her monthly
14 compensation payments shall be reduced accordingly.
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16 The purpose of this section is to avoid any windfall to a claimant that might result from the payment
17 of both a permanent partial disability and permanent total disability benefits.
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19 Initially, there was some confusion regarding the question of how to construe the "date of
20 first instance." When this Board first construed this issue, we concluded that the date of first
21 instance was the date of the first payment of permanent partial disability, which became final. It
22 appears that the Department of Labor and Industries still makes this distinction according to the
23 testimony of Laura Farley, a Claims Adjudicator 5 for the Department of Labor and Industries.
24 Ms. Farley's testimony was presented by the claimant in this matter, no doubt for the purpose of
25 determining which date the Department used for calculating the reduction from the pension reserve.
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28 Since the Supreme Court issued its decision in *Stuckey v. Department of Labor & Indus.*,
29 129 Wn.2d 289 (1996), this Board has ceased to draw a distinction between final and non-final
30 orders. *In re Coral D. Osbourn*, Dckt. Nos. 97 6940 and 97 7540 (June 9, 1999). For the purpose
31 of calculating the deduction from the pension reserve, the Department used June 24, 1987, as the
32 date of first instance, as this was the first award of permanent partial disability that became final.
33 This was not the first award of permanent partial disability. Therefore, we find it necessary to
34 reverse the Proposed Decision and Order and remand this matter to the Department with directions
35 to calculate deductions from the pension reserve using the correct date of first instance.
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38 In the present case, Mr. Woodley received several payments of permanent partial disability.
39 Some of these were merely advances on permanent partial disability. Two others were formal
40 awards of permanent partial disability. The dates are as follows:
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4/12/85 The Department paid an advance of permanent partial
disability of \$3,000

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2 4/26/85 The Department paid an advance of permanent partial
3 disability of \$3,000
4
5 11/13/86 The Department paid an advance of permanent partial
6 disability of \$2,500
7
8 2/5/87 The Department's first order determining the amount of
9 permanent partial disability and closing the claim
10
11 2/17/87 The claimant protests the closure of the claim and the
12 award of permanent partial disability
13
14 6/24/87 The Department awards additional permanent partial
15 disability and closes the claim. The order is not protested
16 or appealed.
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18 For the purposes of RCW 51.32.080(4), we do not believe that mere advances on
19 permanent partial disability should be construed as the date of first instance. Logically, there is no
20 determination as to the actual extent of permanent partial disability. An advance is merely an
21 estimate that there likely will be permanent partial disability but not a determination as to the
22 eventual amount of a disability award. We conclude that only formal orders determining the extent
23 of permanent partial disability, as opposed to a mere cash advance, should be used as the date for
24 the "first instance" calculation under RCW 51.32.080(4). Based on the dates above, it is clear that
25 the first Department order determining the extent of permanent partial disability was on February 5,
26 1987. We remand this matter to the Department with directions to recalculate deductions from the
27 pension reserve using February 5, 1987, as the correct date of first instance.
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29 Upon remand, we also direct the Department to follow the additional guidance on calculating
30 the amounts, if any, to be deducted from the pension reserve based on our decision of *Osborn*
31 referred to above. For example, the Department should consider periods of time loss
32 compensation that were paid following the initial award of permanent partial disability on
33 February 5, 1987. As we noted in *Osborn*, amounts paid for temporary total disability after the
34 "first instance" are not subtracted from the permanent partial disability award when determining the
35 deduction amount. See *In re John Jensen*, BIIA Dec., 32,619 (1970). We continue to affirm our
36 holding of *In re Esther Rodriguez*, BIIA Dec., 91 5594 (1993) for the proposition that interest on
37 unpaid amounts of permanent partial disability shall not be deducted from the pension reserve
38 pursuant to RCW 51.32.080(4). The Department should clearly set forth the basis of all
39 calculations pursuant to RCW 51.32.080(4) to facilitate further review and/or appeal if necessary.
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1 **FINDINGS OF FACT**
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- 3 1. On August 21, 1981, the Department of Labor and Industries received an
4 Application for Benefits in which the claimant, Michael L. Woodley, alleged
5 the occurrence of an industrial injury on July 29, 1981, during the course
6 of his employment with Weber Construction.
7

8 Thereafter, the claim was allowed and benefits were paid.
9

10 On February 5, 1987, the Department issued an order awarding a
11 permanent partial disability of 5 percent of total bodily impairment, due to
12 compression fractures of T3 and T4 of the thoracic spine, and paid a
13 permanent partial disability of 25 percent of the amputation value of the
14 left leg at or above the knee joint with functional stump, and a further
15 permanent partial disability of 5 percent of the right leg at the ankle, less
16 previously paid permanent partial disability, with time loss compensation
17 as paid, and closing the claim.
18

19 On February 17, 1987, the claimant protested the Department order of
20 February 5, 1987.
21

22 On June 11, 1987, the Department entered an order holding the
23 February 5, 1987 order in abeyance.
24

25 On June 24, 1987, the Department issued an order closing the claim with
26 an award for permanent partial disability equal to Category 4 of dorso-
27 lumbar and lumbosacral impairments, paid at 75 percent of the monetary
28 value, and for 63 percent of the amputation value of the left leg above the
29 knee joint with short thigh stump, and compensation for unspecified
30 disabilities of 15 percent as compared to total bodily impairment, and
31 permanent partial disability for 15 percent of the amputation value of the
32 right leg at the ankle, less previously paid permanent partial disability, with
33 time loss compensation as paid.
34

35 On November 18, 1987, the claimant filed an application to reopen the
36 claim due to worsening of condition.
37

38 On June 15, 1988, the Department issued an order denying the
39 application to reopen the claim.
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41 On June 27, 1988, the claimant protested the Department order of
42 June 15, 1988.
43

44 On August 18, 1988, the Department issued an order holding the June 15,
45 1988 order in abeyance.
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47 On October 11, 1988, the Department issued an order affirming the order
of June 15, 1988, denying the application to reopen the claim.

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2 On November 29, 1988, the claimant filed a Notice of Appeal with the
3 Board of Industrial Insurance Appeals from the Department order of
4 December 11, 1988.

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6 On January 17, 1990, the Board issued an Order Denying Petition for
7 Review, affirming the Department's order of October 11, 1988.

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9 On February 8, 1991, the Superior Court for Clallam County issued an
10 order reversing the Department's order of January 17, 1990, and directed
11 the reopening of the claim.

12
13 On February 4, 1991, the Department of Labor and Industries issued an
14 order reopening the claim, effective November 11, 1987. Thereafter, the
15 claim remained open and benefits were paid.

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17 On November 7, 2000, the Department issued an order which terminated
18 time loss compensation as paid to December 15, 2000, placed the
19 claimant on a pension effective December 16, 2000, determined the
20 permanent partial disability of \$27,764.32, including interest if applicable,
21 previously paid by an order that had become final was to be deducted
22 from the pension reserve, and denied responsibility for Hepatitis C as not
23 being caused by, nor aggravated by, the industrial injury.

24
25 On January 4, 2001, the Department received a Protest and Request for
26 Reconsideration, filed on behalf of the claimant, from the November 7,
27 2000 Department order.

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29 On April 25, 2001, the Department issued an order affirming the provisions
30 of the Department order dated November 7, 2000.

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32 On June 18, 2001, the Board received a Notice of Appeal, filed on behalf
33 of the claimant, from the April 25, 2001 Department order (Docket
34 No. 01 16625).

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36 2. On July 29, 1981, the claimant, Michael L. Woodley, was struck by a log,
37 resulting in injuries to his right ankle and left knee, during the course of his
38 employment with Weber Construction.
- 39
40 3. As of December 16, 2000, Michael L. Woodley was determined to be a
41 totally and permanently disabled worker, and was awarded benefits
42 therefore.
- 43
44 4. The first award of permanent partial disability was made by a Department
45 order dated February 5, 1987.
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47 5. The Department deducted from the pension reserve the amount of
\$163.94 for interest on unpaid permanent partial disability.

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2 6. The Department paid advances on permanent partial disability to
3 Mr. Woodley on April 12, 1985, April 26, 1985, and November 13, 1986.
4 An advance payment is not a determination of extent of disability.
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6 **CONCLUSIONS OF LAW**
7

- 8 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties
9 and the subject matter to this appeal.
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11 2. The Department of Labor and Industries was incorrect in reducing the
12 claimant's pension reserve by the amount of interest paid on permanent
13 partial disability payments within the meaning of RCW 51.32.080(4).
14
15 3. The date of first instance within the meaning of RCW 51.32.080(4) is
16 February 5, 1987.
17
18 4. Advances on permanent partial disability awards are not awards of
19 permanent partial disability within the meaning of RCW 51.32.080(4).
20
21 5. The order of the Department of Labor and Industries dated April 25, 2001,
22 is incorrect and is reversed. The claim is remanded to the Department
23 with direction to recalculate the pension reserve based on the date of the
24 first award of permanent partial disability on February 5, 1987, to include
25 any such additional awards of permanent partial disability paid thereafter,
26 to recalculate without deduction of the pension reserve for the amount of
27 any interest paid on awards of permanent partial disability, and to
28 determine the extent, if any, that the pension reserve may be properly
29 reduced by such prior awards of permanent partial disability based on the
30 effective date of permanent total disability benefits on December 16, 2000,
31 and based on consideration of the amount of award of temporary total
32 disability benefits made after February 5, 1987.
33

34 It is so ORDERED.
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36 Dated this 28th day of August, 2002.
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38 BOARD OF INDUSTRIAL INSURANCE APPEALS
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42 /s/ _____
43 THOMAS E. EGAN Chairperson
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46 /s/ _____
47 JUDITH E. SCHURKE Member