

Rios, Jose

PENSION RESERVE

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

The date of an order closing the claim and paying an award for permanent partial disability, which the Department subsequently modifies from final to temporary, can be the date of first instance for purposes of calculating the pension reserve.***In re Jose Rios, BIA Dec., 07 15155 (2008)*** [*Editor's Note: 2011 legislative changes require the Department to deduct the amount of the permanent partial disability compensation without regard to whether total disability compensation could have been paid in the first instance. The Board's decision was appealed to superior court under Yakima County Cause No. 08-2-00702-1.*]

Scroll down for order.

1 by each party with their respective Motion for Summary Judgment. The Department order that is
2 the subject of this appeal was based in part on that order.

3 The claimant filed a Motion for Summary Judgment and the Department filed a
4 Cross-Motion for Summary Judgment. We have reviewed the motions, the memoranda in support
5 of the motions, and the attached exhibits. The facts are not in dispute and the parties are entitled to
6 judgment as a matter of law.

7 This decision is based on these undisputed facts. The Department allowed the claim filed
8 by Mr. Rios for an industrial injury that occurred on July 25, 2002. On May 27, 2004, the
9 Department issued an order that closed the claim with a permanent partial disability rating equal to
10 Category 2, permanent dorso-lumbar and/or lumbosacral impairments, and issued a warrant in the
11 amount of \$7,455.81, as the award for that impairment. On August 11, 2004, following the
12 claimant's timely appeal, the Department modified its May 27, 2004 order from final to temporary,
13 allowed the claim to remain open for authorized treatment and benefits, and declared that the
14 award for permanent partial disability would be considered an advance against any future benefits
15 payable from the accident fund. It appears that the Department resumed payment of time-loss
16 compensation to the claimant. On November 8, 2006, the Department again issued an order that
17 closed the claim with the same rating for permanent partial disability that was set out in the May 27,
18 2004 order. No warrant was issued with that order. The claimant's appeal from that order was
19 resolved with a Board Order on Agreement of Parties, which found as of November 8, 2006,
20 Mr. Rios was totally and permanently disabled, and entitled to pension. The Department issued an
21 order that complied with the Order on Agreement of Parties and deducted \$7,455.81 from the
22 pension reserve, which represents the entire impairment award the claimant received on
23 May 27, 2004.

24 The issue in this appeal is whether the deduction was proper. We find that a deduction of
25 \$7,455.81 is improper. We remand to the Department to calculate any deduction pursuant to
26 RCW 51.32.080(4), using May 27, 2004, as the date of first instance, without regard to interest or
27 temporary disability benefits paid to Mr. Rios between May 27, 2004, and November 8, 2006.

28 The statutory authority to reduce the pension reserve when an injured worker's status is
29 changed from permanent partial disability to permanent total disability is found in
30 RCW 51.32.080(4), which at the time relevant to this appeal read:

31 If permanent partial disability compensation is followed by permanent
32 total disability, any portion of the permanent partial disability, which

1 exceeds the amount that would have been paid the injured worker if
2 permanent total disability compensation had been paid in the **first**
3 **instance**, shall be deducted from the pension reserve of such injured
4 worker and his or her monthly compensation payments shall be reduced
accordingly. (Emphasis added.)

5 There is no statutory definition of the term "first instance." The definition of first instance as
6 the date of the first order issued by the Department that establishes permanent partial disability,
7 whether that order becomes final or not and without regard to subsequent orders that may close
8 and then reopen the claim, comes from case law. *Stuckey v. Department of Labor & Indus.*,
9 129 Wn.2d 289 (1996); *In re Michael Woodley*, BIIA Dec., 01 16625 (2002); *In re Eddie Maupin*,
10 BIIA Dec. 04 14768 (2005); and *Jacobsen v. Department of Labor & Indus.*, 127 Wn.App. 384
11 (2005).

12 The first Department order that established a permanent partial disability for Mr. Rios was
13 issued on May 27, 2004. After Mr. Rios appealed the May 27, 2004 order, the Department
14 reassumed jurisdiction and issued an order on August 11, 2004, which changed the order of
15 May 27, 2004, from final to temporary, allowed the claim to remain open for medical treatment and
16 other appropriate benefits, and noted that the permanent partial disability award would be
17 considered an advance against any future benefits payable from the accident fund.

18 The industrial appeals judge relied on *Woodley* to hold that the order issued on May 27,
19 2004, does not constitute the date of first instance pursuant to RCW 51.32.080(4) because in
20 *Woodley*, we held that mere advances on permanent partial disability should not be construed as
21 the date of first instance. The action the Department took with regard to Mr. Woodley is different
22 from the action they took with regard to Mr. Rios. Mr. Woodley received advance payments for
23 permanent partial disability on April 12, 1985, April 26, 1985, and November 13, 1986, **before** the
24 Department issued the first order that determined the extent of disability. That order was issued on
25 February 5, 1987, and that then was the date of first instance in the *Woodley* case. That is true
26 even though the February 5, 1987 order was protested, the claim was closed with an increased
27 award for permanent partial disability, the claim was reopened, and finally closed with a pension
28 effective December 16, 2000.

29 The point of our holding in *Woodley* is that "first instance" within the meaning of the statute
30 is the date of the **first** Department determination of impairment. The significant event is the
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1 determination of permanent partial disability. The Department's subsequent decision to treat an
2 award paid to an injured worker as an advance against future benefits has no impact on that
3 determination.

4 The Department order dated April 11, 2007, is reversed and the matter remanded to the
5 Department with direction to determine if any portion of the permanent partial disability
6 compensation exceeds the amount that would have been paid if permanent total disability had been
7 paid on May 27, 2004, to deduct any excess from the pension reserve, and reduce the monthly
8 compensation accordingly. Pursuant to *Jacobsen*, the time-loss compensation paid to the claimant
9 after issuance of the May 27, 2004 order cannot be factored into the calculation.

10 **FINDINGS OF FACT**

- 11 1. On August 5, 2002, the claimant, Jose Rios, filed an Application for
12 Benefits, in which he alleged an injury to his back and left leg on
13 July 25, 2002, during the course of his employment with Washington
14 Fruit & Produce Company. The claim was allowed and benefits
provided.

15 On May 27, 2004, the Department issued an order in which it closed the
16 claim with an award for permanent partial disability as described by
17 Category 2, permanent dorso-lumbar and lumbo-sacral impairments.

18 On June 30, 2004, following the claimant's June 9, 2004 appeal of the
19 May 27, 2004 order, the Department held the May 27, 2004 order in
abeyance.

20 On August 11, 2004, the Department issued an order in which it
21 changed its order dated May 27, 2004, from final to temporary and
22 allowed the claim to remain open for authorized treatment and benefits.
23 The award for permanent partial disability paid in the amount of
24 \$7,455.81 was considered an advance against any future benefits
payable from the accident fund.

25 On November 8, 2006, the Department issued an order in which it
26 closed the claim with an award for permanent partial disability as
27 described by Category 2, permanent dorso-lumbar and/or lumbo-sacral
impairments. No warrant was issued.

28 On November 27, 2006, the claimant appealed the Department order
29 dated November 8, 2006, to the Board of Industrial Insurance Appeals.

30 On April 6, 2007, the Board issued an Order on Agreement of Parties in
31 which it directed the Department to award the claimant permanent total
32 disability benefits effective November 8, 2006.

1 On April 11, 2007, the Department issued an order in which it placed
2 the claimant on pension effective November 8, 2006, and deducted
3 from the pension reserve the sum of \$7,455.81 previously paid to the
4 claimant as an award for permanent partial disability.

5 On May 1, 2007, the claimant filed an appeal from the Department
6 order dated April 11, 2007, with the Board of Industrial Insurance
7 Appeals.

8 On May 31, 2007, and on June 11, 2007, the Board issued Orders
9 Extending Time to Act on Appeal.

10 On June 13, 2007, the Board issued an Order Granting Appeal and
11 assigned the appeal Docket No. 07 15155.

- 12 2. The claimant, Jose Rios, has an allowed claim for an injury sustained
13 on July 25, 2002, during the course of his employment with Washington
14 Fruit & Produce Company.
- 15 3. The affidavits and exhibits submitted by the parties demonstrate that
16 there are no genuine issues as to any material facts.

17 **CONCLUSIONS OF LAW**

- 18 1. The Board of Industrial Insurance Appeals has jurisdiction over the
19 parties to and the subject matter of this appeal.
- 20 2. The claimant is entitled to a decision as a matter of law as
21 contemplated by CR 56.
- 22 3. The Department order issued on May 27, 2004, was the first order
23 issued by the Department in which it established permanent partial
24 disability, and is the date of first instance as contemplated by
25 RCW 51.32.080(4).
- 26 4. The Department order dated April 11, 2007, is incorrect insofar as it
27 deducted \$7,455.81, previously paid to the worker for permanent partial
28 disability. The claim is remanded to the Department to recalculate the
29 pension reserve based on May 27, 2004, as the date of first instance,
30 without regard to interest or time-loss compensation benefits paid to the
31 claimant between May 27, 2004, and April 11, 2007, and, pursuant to
32 the Board Order on Agreement of Parties dated April 6, 2007, terminate

1 time-loss compensation as paid through October 25, 2006, and place
2 the claimant on pension effective November 8, 2006.

3
4 It is **ORDERED**.

5 Dated: January 23, 2008.

6 BOARD OF INDUSTRIAL INSURANCE APPEALS

7
8 /s/ _____
9 THOMAS E. EGAN Chairperson

10
11 /s/ _____
12 FRANK E. FENNERTY, JR. Member

13
14 /s/ _____
15 CALHOUN DICKINSON Member