

Williams, Lorraine

PERMANENT TOTAL DISABILITY (RCW 51.08.160)

Permanent total disability under another claim

Although two claims caused disabilities, separate and distinct, each of which alone was sufficient in and of itself to render the worker permanently and totally disabled, the worker may not receive a double recovery of permanent total disability benefits.*In re Lorraine Williams, BIIA Dec., 07 24841 (2009)* [Editor's Note: The Board's decision was appealed to superior court under Yakima County Cause No. 09-2-01976-1.]

Scroll down for order.

**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

1 **IN RE: LORRAINE L. WILLIAMS**) **DOCKET NO. 07 24841**
2 **CLAIM NO. P-341360**) **DECISION AND ORDER**

3 APPEARANCES:
4

5 Claimant, Lorraine L. Williams, by
6 Smart, Connell & Childers, P.S., per
7 Darrell K. Smart

8 Employer, Goodwill Industries,
9 None

10 Department of Labor and Industries, by
11 The Office of the Attorney General, per
12 James A. Yockey, Assistant

13 The claimant, Lorraine L. Williams, filed an appeal with the Board of Industrial Insurance
14 Appeals on November 13, 2007, from an order of the Department of Labor and Industries dated
15 September 12, 2007. In this order, the Department closed the claim with a permanent partial
16 disability award of Category 2 permanent dorso-lumbar and/or lumbosacral impairments, with a
17 deduction for an assessed overpayment. The Department order is **REVERSED AND REMANDED**.

DECISION

18 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
19 and decision on a timely Petition for Review filed by the Department to a Proposed Decision and
20 Order issued on January 8, 2009, in which the industrial appeals judge reversed and remanded the
21 Department order dated September 12, 2007. Whether Ms. Williams timely protested the May 7,
22 2007 overpayment order is also within the scope of our review in this appeal. We have granted
23 review because we conclude that: (1) Ms. Williams did not timely protest the May 7, 2007
24 overpayment order, which is now final and binding; and (2) the September 12, 2007 order must be
25 reversed and the claimant categorized as a permanently and totally disabled worker under this
26 claim notwithstanding the earlier and similar categorization of her under a different claim.

27 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
28 no prejudicial error was committed. The rulings are affirmed except as follows: the objection at
29 page 19 in the deposition of Alicia Lee is sustained. In the deposition of Laura Farley, the objection
30 at page 10, line 19 is sustained and the testimony from page 10, line 16 through page 12, line 2 is
31 stricken; the objection at page 19, line 15 is sustained and the testimony from there through
32

1 page 20, line 14 is stricken. In the transcript of the testimony of Cosette Nash, the objection at
2 page 41, line 2 is sustained and the testimony from there to page 42, line 9 is stricken.

3 Finality of the May 7, 2007 Department Order

4 We extended the scope of our review in this appeal to include consideration of whether the
5 March 7, 2007 time-loss compensation overpayment order was timely protested. If we were to find
6 that a timely protest to that order had been filed, we would not have jurisdiction to adjudicate the
7 claimant's entitlement to total disability benefits for the entire period mentioned because the
8 Department had not issued an order in response to that timely protest. *In re Santos Alonzo*, BIIA
9 Dec., 56,833 (1981). Because the order under appeal in this matter was a closing order, such a
10 result would necessarily limit our jurisdiction. We have the inherent power to determine our own
11 jurisdiction. *Callihan v. Department of Labor & Indus.*, 10 Wn. App. 153 (1973). In order to properly
12 make that determination it was necessary to adjudicate the timeliness issue even though it involved
13 a different Department order.

14 On March 7, 2007, the Department issued an order in which it assessed an overpayment of
15 over \$13,000 in time-loss compensation benefits paid under this claim, P-341360 (hereinafter
16 referred to as the P-claim) through January 26, 2007, because Ms. Williams had been found to be
17 permanently and totally disabled under Claim No. X-208192 (hereinafter referred to as the X-claim)
18 retroactive to October 11, 2005. On March 12, 2007, Ms. Williams received that order. On
19 March 16, 2007, the Department issued another order under the P-claim in which it closed that
20 claim without a permanent partial disability award. On May 10, 2007, the claimant's attorney mailed
21 a letter to the Department in which he stated:

22 We are writing to protest the Department order issued on March 16,
23 2007.

24 We contend that Ms. Williams may have suffered permanent
25 impairment. Therefore, we respectfully request that a closing
26 independent medical evaluation be scheduled to assess if permanent
27 impairment has resulted from the industrial injury.

28 In that letter, the claimant's attorney did not mention the March 7, 2007 order or the
29 overpayment of time-loss compensation benefits. The Department reassumed jurisdiction of the
30 March 16, 2007 order, and on September 12, 2007, issued another order in which it closed the
31 claim with a Category 2 low back permanent partial disability award that was offset against the
32 time-loss compensation overpayment. The claimant appealed the September 12, 2007 order,
resulting in this litigation.

1 We conclude that the May 10, 2007 letter from Ms. Williams' attorney was not a Protest or
2 Request for Reconsideration of the March 7, 2007 overpayment order because nothing in that letter
3 could reasonably have been calculated to put the Department on notice that the claimant was
4 requesting action inconsistent with that order. *In re Mike Lambert*, BIIA Dec., 91 0107 (1991).
5 Simply stated, the letter contains no statement at all regarding time-loss compensation or an
6 overpayment. It only sought review of the lack of any permanent disability award in the closing
7 order.

8 In the Proposed Decision and Order, the industrial appeals judge suggested that reasonable
9 notice to the Department can be inferred from that letter, when read together with earlier letters also
10 written by Ms. Williams' attorney to the Department, seeking to end vocational services under this
11 claim (the P-claim) because of the pension awarded under the X-claim. We find this rationale
12 unpersuasive because the Department had not assessed an overpayment at the time any of the
13 three earlier letters were written. Because those letters pre-dated the overpayment order they, too,
14 could not reasonably be construed as indicating disagreement with that order or the time-loss
15 compensation overpayment that it assessed.

16 The March 7, 2007 Department order is final and binding on the parties as it was not
17 protested or appealed within the time limitation prescribed by law. There is no question that the
18 Department had jurisdiction to issue such an order. *Marley v. Department of Labor & Indus.*, 125
19 Wn.2d 533 (1994); *In re Jorge Perez-Rodriguez*, BIIA Dec., 06 18718 (2008).

20 Entitlement to Permanent Total Disability Benefits Under this Claim

21 In support of her position that a worker can be classified as permanently and totally disabled
22 under more than one claim, Ms. Williams relies on *Shea v. Department of Labor & Indus.*, 12 Wn.
23 App. 410 (1974). The Department counters that this situation is more adequately addressed by
24 *Clauson v. Department of Labor & Indus.*, 130 Wn.2d 580 (1996). We conclude that **both** *Shea*
25 and *Clauson* apply to this situation, but it is *Shea* that controls the issue of whether a worker can be
26 classified as permanently and totally disabled under a claim when she is already so classified
27 independently under another claim. *Clauson* applies to this situation by preventing the worker from
28 receiving a windfall in the form of a "double pension," which, of course, was what the Department
29 was attempting to prevent from happening through its issuance of the March 7, 2007 overpayment
30 order.

31 The relevant facts are as follows: On September 3, 1996, Ms. Williams injured her low back
32 during the course of her employment. This claim, P-341360, was filed and allowed for benefits.

1 The claimant returned to work with the same employer and at the same job. On July 28, 1999, she
2 sustained an industrial injury to her right shoulder. Ms. Williams filed a claim, X-208192 (over which
3 we have no jurisdiction in this appeal), which was allowed. On May 23, 2000, the Department
4 closed the P-claim without a permanent partial disability award. The X-claim remained open.

5 In May 2003 Ms. Williams filed an application to reopen the P-claim, which the Department
6 denied. The claimant appealed that order to us. By order dated July 28, 2005, we directed that the
7 P-claim be reopened. Ms. Williams received time-loss compensation benefits under the reopened
8 P-claim from October 11, 2005, through January 26, 2007.

9 In the meantime, the Department attempted to close the X-claim by order dated July 13,
10 2005, which Ms. Williams appealed. On December 1, 2006, a Proposed Decision and Order was
11 issued under the X-claim, in which the industrial appeals judge classified the claimant as
12 permanently and totally disabled under that claim retroactive to July 13, 2005, thus inadvertently
13 creating a double payment of total disability benefits for that period of time.

14 On March 7, 2007, the Department issued the overpayment order under the P-claim, in
15 which it determined that time-loss compensation benefits had been overpaid under that claim, the
16 amount of the overpayment, and how it was to be collected. The P-claim closing order, issued nine
17 days later by the Department, was timely protested by Ms. Williams. On September 12, 2007, the
18 Department issued the order under appeal herein, in which it modified the earlier closing order only
19 by paying the claimant a Category 2 lumbosacral permanent partial disability award.

20 In *Shea*, the worker suffered from a non-industrial vascular disability that pre-existed the
21 industrial injury that occurred in 1964. Medical evidence showed that the pre-existing disability
22 progressed, and as of 1965 had permanently removed the worker from the competitive labor
23 market even without consideration of disabilities attributable to the 1964 industrial injury. The court
24 also concluded that as of 1971 the worker would also have been removed from the labor market
25 due to the disabilities proximately caused by the 1965 industrial injury (disregarding that
26 pre-existing non-industrial disability and its subsequent progression). The court ruled that in that
27 situation there was sufficient evidence for a trier of fact to find the worker to be permanently and
28 totally disabled, proximately caused by the later (industrial) disability. The Department contends
29 that *Shea* can be distinguished by the fact that in Ms. Williams' case the disabilities were caused by
30 multiple industrial injuries. The Department believes it would be illogical and lead to a possible
31 windfall of benefits if a worker could be classified as permanently and totally disabled separately
32 and independently under two claims. Neither Ms. Williams nor the Department believe the facts in

1 this case to show that, unlike *Shea*, the claimant's overall disability could be characterized as due
2 to the "combined effects" of both industrial injuries.

3 In *Clauson*, the basic fact pattern is the same as in *Shea* except that both disabilities were
4 industrial and that the worker was **not** seeking permanent total disability benefits under the claim
5 for the earlier injury (but which did not close until after the later claim had closed with pension
6 benefits awarded). The worker did not present proof that he was permanently and totally disabled
7 due to the earlier industrial insurance claim, but instead sought permanent partial disability benefits.
8 The Supreme Court said it was permissible to pay a permanent partial disability award because the
9 different types of permanent disability benefits (total and partial) did not compensate the same type
10 of disability. Permanent partial disability benefits compensate a worker only for anatomical or
11 functional impairment and are **not** wage replacement benefits. Thus, the court concluded that it
12 was permissible for a worker to receive both permanent total disability benefits and permanent
13 partial disability benefits under the circumstances wherein the injury that occurred that resulted in
14 permanent and total disability occurred after the injury that resulted in the permanent partial
15 disability and the claim for the permanent partial disability was still pending at the time the worker
16 became permanently and totally disabled under the later claim. According to the court, such a
17 situation did not provide the worker with a double recovery or a windfall of benefits.

18 Analyzing *Shea* and *Clauson* together in this case, we note that two separate issues are
19 addressed. The first issue is causation of permanent total disability status when there are multiple
20 claims. With regard to this issue, we conclude that *Shea* applies to Ms. Williams' situation. Here,
21 as in *Shea*, the expert testimony supports the conclusion that two disabilities exist, separate and
22 distinct, each of which alone was sufficient in and of itself to render the worker permanently and
23 totally disabled. *Clauson* did not address such a situation because independent of each other, only
24 one of them would render the worker permanently and totally disabled; the other resulted only in
25 permanent **partial** disability.

26 The second issue arises from the concern that a worker could receive a double recovery in
27 this type of multiple disability situations, along with the policy goal of preventing such a windfall of
28 benefits. In regard to this issue, we conclude that *Clauson* applies to prevent Ms. Williams from
29 simultaneously receiving the monetary equivalent of two pensions. **We specifically note that**
30 **nothing in *Shea* permits a double recovery of permanent total disability benefits by an**
31 **injured worker.** Presumably, the Department will calculate the monthly permanent total disability
32 benefit entitlement (pension) under each claim and pay the claimant at the rate of benefits that is

1 higher, but not pay the full amount of both entitlements for the same time periods. If, in the
2 process, there is an inadvertent double payment of total disability benefits for any period, the
3 Department can assess an overpayment in the amount of the lesser of the two entitlements.

4 In the Proposed Decision and Order, the industrial appeals judge assumed that the P-claim
5 wage and compensation rates for Ms. Williams were higher than the rates she would be entitled to
6 in the later claim, the X-claim. However, the record contains no definitive information about the
7 wage rates that were calculated in setting the total disability benefit rates under either claim.
8 Ms. Williams herself was confused. Her only testimony about her wage rates was as follows:

9 Q. Okay. When you were injured in 1999, the time you had the X claim
10 injury, were you working full time?

11 A. Correct. Yes.

12 Q. Were your wages different when you were working in 1999 than they
13 were in 1996?

14 A. I had -- well, I had received pay raises and working full time, but, yeah,
15 my wages were -- hourly wages were a little bit more on full time. On
16 the X claim my wages were based -- they were the same. I mean, just
17 because I injured the shoulder, they didn't take any wage away from me.

18 9/15/08 Tr. at 9-10.

19 Thus, the record does not enable us to determine whether the rate of total disability benefits
20 was the same for both claims or, if not, under which claim it would be higher. Upon remand the
21 Department must make that determination and adjust Ms. Williams' monthly permanent total
22 disability entitlement (pension), if necessary, to prevent a windfall of benefits to her, but also to
23 ensure that she is awarded the larger of the two amounts if there is any difference in them. The
24 March 7, 2007 overpayment recoupment order is final and must be given legal effect regarding the
25 method of collection of the overpayment for the period at issue should any amount of the double
26 payment still be left to be recouped.

27 **FINDINGS OF FACT**

28 1. On September 27, 1996, the claimant, Lorraine L. Williams, filed an
29 Application for Benefits with the Department of Labor and Industries in
30 which she alleged that she sustained an injury while in the course of her
31 employment with Goodwill Industries on September 3, 1996. The claim
32 was allowed and benefits were paid. On May 23, 2000, the claim was
closed without an award for time-loss compensation benefits or
permanent partial disability.

On May 14, 2003, Ms. Williams filed an application to reopen. On
July 30, 2003, the Department extended its deadline to pass on the
reopening application until October 2003. On September 24, 2003, the

1 Department issued an order in which it denied the reopening application
2 because there was no objective worsening since the prior claim closure.
3 On November 21, 2003, the claimant filed a protest of the
4 September 24, 2003 order. On February 4, 2004, the Department
5 affirmed the September 24, 2003 order. On April 5, 2004, the claimant
6 filed a Notice of Appeal of the February 4, 2004 order. On April 16,
7 2004, the Board issued an Order Granting Appeal. On July 28, 2005,
8 the Board issued an order in which it directed the Department to reopen
9 the claim. On October 10, 2005, the Department issued an order in
10 which it reopened the claim pursuant to the Board decision.

11 On March 7, 2007, the Department issued an order in which it stated
12 that under Claim No. X-208192, Ms. Williams was placed on pension
13 effective July 13, 2005, and that she received time-loss compensation
14 benefits under Claim No. P-341360 for the period of October 11, 2005,
15 through January 26, 2007, in the amount of \$13,601.16. The
16 Department order went on to demand repayment of the time-loss
17 compensation amount, and said that a worker cannot be classified as
18 temporarily totally disabled and permanently totally disabled
19 simultaneously. The overpayment was to be repaid from pension
20 benefits payable under Claim No. X-208192. The March 7, 2007
21 Department order was received by Ms. Williams on March 12, 2007.

22 On March 16, 2007, the Department issued an order in which it ended
23 time-loss compensation benefits as paid through August 15, 1999, and
24 closed the claim without a permanent partial disability award. On
25 May 15, 2007, Ms. Williams filed a Protest and Request for
26 Reconsideration of the March 16, 2007, and March 7, 2007 Department
27 orders. The protest was mailed on May 10, 2007. On May 31, 2007,
28 the Department issued an order in which it held the March 16, 2007
29 order in abeyance.

30 On September 12, 2007, the Department issued an order in which it
31 closed the claim with a Category 2 permanent dorso-lumbar and/or
32 lumbo-sacral impairment and deducted the award from monies assessed
in the overpayment order. On November 13, 2007, Ms. Williams filed a
Notice of Appeal of the September 12, 2007 order. The Notice of
Appeal was mailed within 60 days of the date the September 12, 2007
order was received by Ms. Williams. On December 19, 2007, the Board
issued an Order Granting Appeal under Docket No. 07 24841, and
agreed to hear the appeal.

2. On September 3, 1996, Ms. Williams injured her low back when she was lifting boxes in the course of her employment with Goodwill Industries.
3. On May 10, 2007, Ms. Williams' legal representative mailed a letter to the Department, in which he stated:

We are writing to protest the Department order issued on
March 16, 2007.

1 We contend that Ms. Williams may have suffered permanent
2 impairment. Therefore, we respectfully request that a
3 closing independent medical evaluation be scheduled to
4 assess if permanent impairment has resulted from the
5 industrial injury.

6 In the May 10, 2007 letter, Ms. Williams' attorney made no reference to
7 the March 7, 2007 overpayment order or to any overpayment of benefits
8 under Claim No. P-341360.

- 9 4. On July 28, 1999, Ms. Williams sustained a shoulder injury during the
10 course of her employment with the same employer and on the same job,
11 for which she filed a claim for industrial insurance benefits. The
12 Department assigned this claim No. X-208192, allowed it, and paid
13 benefits under it. By a Board order dated January 23, 2007,
14 Ms. Williams was determined to be totally and permanently disabled
15 effective July 13, 2005, as a direct and proximate result of conditions
16 arising from the shoulder injury that occurred on July 28, 1999, and is
17 the subject of Claim No. X-208192, without regard to any conditions,
18 restrictions, or disabilities proximately caused by the September 3, 1996
19 industrial injury that is the subject of Claim No. P-341360.
- 20 5. As of September 12, 2007, Ms. Williams was 57 years old. Her work
21 history consisted primarily of physical labor in retail and food services
22 industries. She had no skills that were transferable to sedentary work.
- 23 6. As of September 12, 2007, Ms. Williams' conditions, proximately
24 caused by the September 3, 1996 industrial injury, had reached
25 maximum medical improvement and resulted in permanent disability, as
26 manifested by limitations in her ability to sit, stand, and walk. Those
27 limitations prevented her from engaging in regular work activities for an
28 eight-hour day and limited her to sedentary, less than full-time work.
- 29 7. As of September 12, 2007, the combination of physical limitations
30 arising from Ms. Williams' September 3, 1996 low back injury, and the
31 lack of transferable skills or experience, precluded her from obtaining or
32 performing reasonably continuous, gainful employment in the
competitive labor market when considered in conjunction with her age,
education, training, work history, transferable skills, and pre-existing
disabling medical conditions., and without considering any conditions,
restrictions, or disabilities that were caused by the July 28, 1999
shoulder injury that is the subject of Claim No. X-208192.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of this appeal.
2. The May 10, 2007 letter from Ms. Williams' attorney to the Department was not a Protest or Request for Reconsideration from the March 7, 2007 Department order. The language in that letter was not reasonably calculated to put the Department on notice that Ms. Williams was disputing the terms of that order.

- 1 3. The March 7, 2007 Department order was not protested or appealed
2 within the 60-day time limitation of RCW 51.52.050 and .060 and is final
3 and binding on all parties to that order.
4 4. As of September 12, 2007, Ms. Williams was a permanently and totally
5 disabled worker within the meaning of RCW 51.08.160 as a result of the
6 residual effects of her September 3, 1996 industrial injury.
7 5. The September 12, 2007 order is incorrect and is reversed. This matter
8 is remanded to the Department with direction to issue an order in which
9 it classifies Ms. Williams as a permanently and totally disabled worker
10 due to the effects of her September 3, 1996 industrial injury, effective
11 September 12, 2007, and to take further action thereafter as indicated
12 and consistent with her status as a permanently and totally disabled
13 worker under Claim No. X-208192.

14 Dated: May 1, 2009.

15 BOARD OF INDUSTRIAL INSURANCE APPEALS

16 /s/
17 THOMAS E. EGAN Chairperson

18 /s/
19 FRANK E. FENNERTY, JR. Member

20 /s/
21 LARRY DITTMAN Member