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

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

APPEARANCES:

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

Employer, Goodwill Industries,
None

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

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

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 Department to a Proposed Decision and Order issued on January 8, 2009, in which the industrial appeals judge reversed and remanded the Department order dated September 12, 2007. Whether Ms. Williams timely protested the May 7, 2007 overpayment order is also within the scope of our review in this appeal. We have granted review because we conclude that: (1) Ms. Williams did not timely protest the May 7, 2007 overpayment order, which is now final and binding; and (2) the September 12, 2007 order must be reversed and the claimant categorized as a permanently and totally disabled worker under this claim notwithstanding the earlier and similar categorization of her under a different claim.

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

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

Finality of the May 7, 2007 Department Order

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

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

> We are writing to protest the Department order issued on March 16, 2007.
>
> We contend that Ms. Williams may have suffered permanent impairment. Therefore, we respectfully request that a closing independent medical evaluation be scheduled to assess if permanent impairment has resulted from the industrial injury.

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

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

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

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

Entitlement to Permanent Total Disability Benefits Under this Claim

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

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

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

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

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

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

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

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

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

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

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

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

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

> Q. Okay. When you were injured in 1999, the time you had the X claim injury, were you working full time?
>
> A. Correct. Yes.
>
> Q. Were your wages different when you were working in 1999 than they were in 1996?
>
> A. I had -- well, I had received pay raises and working full time, but, yeah, my wages were -- hourly wages were a little bit more on full time. On the X claim my wages were based -- they were the same. I mean, just because I injured the shoulder, they didn't take any wage away from me.

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

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

FINDINGS OF FACT

1. On September 27, 1996, the claimant, Lorraine L. Williams, filed an Application for Benefits with the Department of Labor and Industries in which she alleged that she sustained an injury while in the course of her employment with Goodwill Industries on September 3, 1996. The claim 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

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

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

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

On September 12, 2007, the Department issued an order in which it closed the claim with a Category 2 permanent dorso-lumbar and/or lumbosacral 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.

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

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

4. On July 28, 1999, Ms. Williams sustained a shoulder injury during the course of her employment with the same employer and on the same job, for which she filed a claim for industrial insurance benefits. The Department assigned this claim No. X-208192, allowed it, and paid benefits under it. By a Board order dated January 23, 2007, Ms. Williams was determined to be totally and permanently disabled effective July 13, 2005, as a direct and proximate result of conditions arising from the shoulder injury that occurred on July 28, 1999, and is the subject of Claim No. X-208192, without regard to any conditions, restrictions, or disabilities proximately caused by the September 3, 1996 industrial injury that is the subject of Claim No. P-341360.

5. As of September 12, 2007, Ms. Williams was 57 years old. Her work history consisted primarily of physical labor in retail and food services industries. She had no skills that were transferable to sedentary work.

6. As of September 12, 2007, Ms. Williams' conditions, proximately caused by the September 3, 1996 industrial injury, had reached maximum medical improvement and resulted in permanent disability, as manifested by limitations in her ability to sit, stand, and walk. Those limitations prevented her from engaging in regular work activities for an eight-hour day and limited her to sedentary, less than full-time work.

7. As of September 12, 2007, the combination of physical limitations arising from Ms. Williams' September 3, 1996 low back injury, and the lack of transferable skills or experience, precluded her from obtaining or 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.

3. The March 7, 2007 Department order was not protested or appealed within the 60-day time limitation of RCW 51.52.050 and .060 and is final and binding on all parties to that order.

4. As of September 12, 2007, Ms. Williams was a permanently and totally disabled worker within the meaning of RCW 51.08.160 as a result of the residual effects of her September 3, 1996 industrial injury.

5 The September 12, 2007 order is incorrect and is reversed. This matter is remanded to the Department with direction to issue an order in which it classifies Ms. Williams as a permanently and totally disabled worker due to the effects of her September 3, 1996 industrial injury, effective September 12, 2007, and to take further action thereafter as indicated and consistent with her status as a permanently and totally disabled worker under Claim No. X-208192.

Dated: May 1, 2009.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

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

/s/_____
LARRY DITTMAN Member