

## **Jensen, John (II)**

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### **PENSION RESERVE**

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

Compensation for and periods of temporary disability may not be considered in determining the extent to which the pension reserve will be reduced by a prior permanent partial disability award. ...***In re John Jensen (II), 32,619 (1970)*** [*Editor's Note: Overruled to the extent decision is inconsistent with In re Esther Rodriguez, BIIA Dec., 91 5594 (1993).*]

Scroll down for order.

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

1     **IN RE: JOHN JENSEN**                                     )  
2   )  
3     **CLAIM NO. C-105136**                                     )  
4   )  
   **DOCKET NO. 32,619**  
   **DECISION AND ORDER**

5 APPEARANCES:

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7         Claimant, John Jensen, by  
8         Walthew, Warner & Keefe, per  
9         Stephen M. Reilly and Robert H. Thompson

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11        Employer, Lohrer Logging Company,  
12        None

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14        Department of Labor and Industries, by  
15        The Attorney General, per  
16        Gayle Barry, Assistant

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18        This is an appeal filed by the claimant on February 28, 1969, as amended by an amended  
19        appeal filed on April 9, 1969, from an order of the Department of Labor and Industries dated  
20        February 5, 1969, which placed the claimant on the pension rolls, pursuant to a Superior Court  
21        Judgment, effective August 16, 1965, and charged the sum of \$2,785.00 of a previously-paid  
22        permanent partial disability award against the pension reserve and reduced monthly pension  
23        payments accordingly, **SUSTAINED**.

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27   **DECISION**

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29        Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review  
30        and decision on a timely Statement of Exceptions filed by the claimant to a Proposed Decision and  
31        Order issued by a hearing examiner for this Board on May 19, 1970, in which the order of the  
32        Department dated February 5, 1969, was sustained.

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34        The sole issue presented by this appeal is strictly a question of law, namely, whether or not  
35        the Department's deduction of \$2,785.00 from claimant's pension reserve was the proper amount of  
36        deduction to be made, under the terms of the last proviso of RCW 51.32.080(2). The claimant  
37        contends that the deduction should only be in the sum of \$428.00.

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39        The issue was submitted on a stipulated statement of facts, with certain letters attached  
40        thereto setting forth the legal positions of the parties. It was also agreed that the Department claim  
41        file could be utilized, if considered to be necessary or desirable. We do not so consider it.

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43        The pertinent agreed facts are as follows:  
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1 The claimant sustained an industrial injury on November 5, 1953, and his claim was originally  
2 closed by a Department order of December 16, 1953, with no permanent partial disability award.  
3 On August 3, 1954, he applied to reopen the claim for aggravation of condition, and the Department  
4 granted said application and reopened the claim for medical treatment. Thereafter, by reason of a  
5 series of Department closing orders and successive claimant's appeals therefrom, the claim  
6 effectively remained open until a Department closing order was entered on March 10, 1960, at  
7 which time it was conclusively determined that claimant had a permanent partial disability of 70 per  
8 cent of the maximum allowable for unspecified disabilities, the compensation paid for said disability  
9 being in the sum of \$4,200.00.

10 On December 23, 1960, the claimant applied to reopen the claim for aggravation of  
11 condition, which was denied by the Department on September 5, 1961. This was followed by  
12 another appeal to this Board, and then an appeal to the Superior Court, eventually resulting in a  
13 reopening of the claim, effective as of December 23, 1960, pursuant to a Superior Court judgment  
14 of March 11, 1965. There followed further Departmental action, including payment of time-loss  
15 compensation for temporary total disability from May 26, 1965, through August 15, 1965, but refusal  
16 to pay time-loss compensation for the period from December 23, 1960, to May 25, 1965; and by  
17 order of June 1, 1966, the Department closed the claim with no increase in permanent partial  
18 disability over that awarded as of March 10, 1960.

19 From the June 1, 1966 order, the claimant again appealed to this Board, resulting in our  
20 Decision and Order on May 9, 1968, finding the claimant to be entitled to time-loss compensation  
21 for the entire period from December 23, 1960 through August 15, 1965, but sustaining the  
22 Department's closure of the claim with no additional permanent disability award. On claimant's  
23 appeal to Superior Court from our Decision and Order, the Court entered judgment on November  
24 24, 1968, declaring claimant to be permanently totally disabled and entitled to a pension.  
25 Accordingly, on February 5, 1969, the Department entered its order placing claimant on the pension  
26 rolls as permanently totally disabled, effective August 16, 1965.

27 In view of the foregoing facts, it has been conclusively determined that claimant was  
28 permanently partially disabled on March 10, 1960, to the extent of 70 per cent of the maximum  
29 allowable for unspecified disabilities, for which he was compensated in the proper amount of  
30 \$4,200.00; that thereafter, on December 23, 1960, his condition had worsened so that he was  
31 temporarily totally disabled, and he remained so disabled from December 23, 1960 through August  
32 24, 1968, and he remained so disabled from December 23, 1960 through August  
33 16, 1965.

1 15, 1965, and received proper time-loss compensation for that entire period in the amount of  
2 \$6,303.00; and that as of August 16, 1965, he became permanently totally disabled and entitled to  
3 a monthly pension therefor.  
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5 On these settled facts, the only question is the proper amount to be deducted from the  
6 pension reserve, pursuant to the application to this case of the last proviso of RCW 51.32.080(2),  
7 which states as follows:  
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10 "Provided further, That in case permanent partial disability  
11 compensation is followed by permanent total disability compensation,  
12 any portion of the permanent partial disability compensation which  
13 exceeds the amount that would have been paid the injured workman if  
14 permanent total disability compensation had been paid in the first  
15 instance, shall be deducted from the pension reserve of such injured  
16 workman and his monthly compensation payments shall be reduced  
17 accordingly."  
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19 The date of "first instance" here, of course, is March 10, 1960. From and after that date, the only  
20 period of time for which the claimant did not receive monthly compensation was the period from  
21 March 10, 1960 through December 22, 1960. Based on the pension schedule in effect as of the  
22 date of this injury, claimant's pension for said period would have been at the rate of \$150.00 per  
23 month, for a total sum of \$1,415.00. Subtracting this amount from the permanent partial disability  
24 award of \$4,200.00 leaves a net amount of \$2,785.00. This is the "portion of the permanent partial  
25 disability compensation which exceeds the amount that would have been paid the injured workman  
26 if permanent total disability compensation had been paid in the first instance," and therefore is the  
27 amount which must be deducted from the pension reserve pursuant to the statute, according to the  
28 Department's position.  
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34 The claimant, on the other hand, contends that the pension reserve deduction should be  
35 arrived at by calculating what claimant's permanent total disability compensation would have been  
36 for the entire period from March 10, 1960 through August 15, 1965 (including the "cost-of-living"  
37 increases in pensions resulting from amendments to RCW 51.32.070, effective July 1, 1961, and  
38 July 1, 1965, which increases are payable out of appropriations from the state's general fund), -- a  
39 total of \$10,075.00 per claimant's arithmetic -- and then subtracting said amount from the total of all  
40 compensation claimant actually received on and after March 10, 1960, i.e., the permanent partial  
41 disability award of \$4,200.00, plus time-loss compensation from December 23, 1960 through  
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1 August 15, 1965, of \$6,303.00, for a total of \$10,503.00 -- leaving a net "overpayment" to claimant  
2 of \$428.00, which should be deducted from the pension reserve.  
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4 In our opinion, the claimant's argument clearly cannot be accepted. In the first place, it  
5 simply does not comply with the statutes' plain terms. There is no provision in the statute for  
6 including temporary disability compensation in the calculation of the pension reserve deduction; the  
7 statutory formula only is concerned with compensation for permanent partial disability and  
8 permanent total disability. Claimant's calculation "formula" is simply one of his own devising without  
9 a legislative basis.  
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13 Secondly, the period from December 23, 1960 through August 15, 1965, cannot be utilized in  
14 computing the amount that would have been paid to claimant under a permanent total disability  
15 classification, for the very compelling reason that it is already an established res judicata fact that  
16 he was temporarily totally disabled during said period.  
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19 In short, compensation for, and periods of, temporary disability must simply be removed from  
20 any calculation in cases to which this statute applies.  
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22 The only logical and legal application of the statute, which accords with its purpose, is to  
23 consider only the period of time during which the claimant could have been classified as  
24 permanently totally disabled, but was not so classified because of a prior claim closure with  
25 permanent partial disability compensation. That period, in this case, was the period from March 10,  
26 1960 through December 22, 1960, which is what the Department considered. The Department's  
27 method of determining the pension reserve deduction was correct as a matter of law.  
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### 31 **FINDINGS AND CONCLUSIONS**

32 There being no dispute as to the facts, and the pertinent stipulated facts having been set  
33 forth hereinabove, they are incorporated herein by this reference.  
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35 The Board concludes from said facts, as matters of law, that:  
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- 37 1. This Board has jurisdiction of the parties and subject matter of this  
38 appeal.
- 39 2. The amount of \$2,785.00 constitutes the portion of claimant's permanent  
40 partial disability compensation which exceeds the amount of permanent  
41 total disability compensation he would have been paid in the first  
42 instance, based on the facts of this case, within the meaning and intent  
43 of the last proviso of RCW 51.32.080(2)  
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- 45 3. The order of the Department of Labor and Industries dated February 5,  
46 1969, deducting \$2,785.00 from claimant's pension reserve and  
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1 reducing the monthly pension payments accordingly, is correct and must  
2 be sustained.

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4 It is so ORDERED.

5 Dated this 30th day of November, 1970.

6 BOARD OF INDUSTRIAL INSURANCE APPEALS  
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10 /s/  
11 ROBERT C. WETHERHOLT Chairman

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13 /s/  
14 R.H. POWELL Member

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17 /s/  
18 R.M. GILMORE Member  
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