Chriswell, Wade

PENSION RESERVE

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

Only the excess of a permanent partial disability award over the amount the worker would have received had he been awarded a pension in the first instance can be deducted from the pension reserve. **….*In re Eleanor Lewis* (I), BIIA Dec., 86 4139 (1988); *In re Wade Chriswell*, BIIA Dec., 43,742 (1974)** [*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. *Overruled to the extent decision is inconsistent with In re Esther Rodriguez*, BIIA Dec., 91 5594 (1993). The Board's decision in *Lewis* was appealed to superior court under Skagit County Cause No. 88-2-00145-9.]

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: WADE E. CHRISWELL	**)**	**DOCKET NO. 43,742**
	)	
	)	**ORDER GRANTING RELIEF**
CLAIM NO. C-697903	**)**	**ON THE RECORD**

Appeal filed by the claimant, Wade E. Chriswell, on February 25, 1974, from an order of the Department of Labor and Industries dated February 7, 1974, classifying the claimant as being totally and permanently disabled; placing him on the pension rolls effective February 1, 1974; charging a prior permanent partial disability award in the sum of $7,500.00 against the pension reserve, and reducing the claimant's monthly pension accordingly. **REVERSED AND REMANDED**.

DECISION

The appeal is addressed solely to the legal propriety of the Department's charging a prior permanent partial disability award in the sum of $7,500.00 against the pension reserve and the resultant reduction in the claimant's monthly pension allotment.

The Department file establishes that this claim was closed by order of the Department dated May 31, 1962, with a permanent partial disability award of 50% of the maximum allowable for unspecified disabilities ($3,750.00). The claimant appealed this award to the Board, and on June 8, 1964, the Board issued an order finding that the claimant's permanent partial disability as of May 31, 1962, was equal to 100% of the maximum allowable for unspecified disabilities ($7,500.00). Accordingly, on August 7, 1964, the Department issued an order pursuant to the Board's order of June 8, 1964, awarding the claimant 100% of the maximum allowable for unspecified disabilities in the sum of $7,500.00, less the prior award of $3,750.00

On September 14, 1964, the claimant filed an application to reopen the claim for aggravation of disability. By order dated January 14, 1965, the Department reopened the claim for treatment effective September 9, 1964, and for other action as indicated effective September 14, 1964. Time-loss compensation at the rate of $185.00 per month was instituted as of September 14, 1964. Ultimately, the claimant was adjudicated to be permanently and totally disabled by order of the Department dated February 7, 1974 and placed on the pension rolls effective February 1, 1974.

It is the claimant's contention that where a claim has been closed with a permanent partial disability award and after that closure and award have become final, the claim is then reopened for aggravation and a pension awarded pursuant thereto, the Department is without authority to charge the prior permanent partial disability award against the pension reserve.

If this were a case arising prior to 1949, the contention on appeal would be well taken. Beginning with Arnold v. Department of Labor & Industries, 168 Wash. 300, it became the settled law of this state that once a claim had been closed by final order with a permanent partial disability award, and thereafter reopened for aggravation and a pension awarded, the prior permanent partial disability award could not be deducted from the pension reserve. See also Dry v. Department of Labor & Industries, 180 Wash. 92; Segraves v. Department of Labor & Industries, 185 Wash. 333; Hagen v. Department of Labor & Industries, 193 Wash. 555; State ex rel. Stone v. Olinger, 6 Wn. 2d 643. The controlling rationale of Arnold and its progeny was that the legislature had failed to prescribe a rule governing the point in issue and in the absence of such, the statutorily prescribed rule for a "further accident" should be applied, to wit:

> "Should any further accident result in the permanent total disability of an injured workman, he shall receive the pension to which he would be entitled, notwithstanding the payment of a lump sum for his prior injury." RCW 51.32.060(15). (Emphasis supplied)

In 1949, however, the legislature broke its silence and enacted the last proviso of what is now RCW 51.32.080(2), to wit:

> "That in case permanent partial disability compensation is followed by permanent total disability compensation, any portion of the permanent partial disability compensation which exceeds the amount that would have been paid the injured workman if permanent total disability compensation had been paid in the first instance, shall be deducted from the pension reserve of such injured workman and his monthly compensation payments shall be reduced accordingly." See Laws of 1949, Chapter 219, Section 1.

Although the instant situation falls within the express provisions of this proviso, the Department failed to apply the same to its pension adjudication. By its order of February 7, 1974, the Department proposes to deduct all $7,500.00 of its prior permanent partial disability award from the pension reserve, whereas the statute prescribes that only the excess of such award over the amount which the claimant would have received had he been awarded a pension originally (instead of a permanent partial disability award) can be charged against the pension reserve. Thus, it is incumbent upon the Department to calculate such excess and limit its pension reserve charge thereto. In this regard, we shall make no attempt to calculate herein the amount of such excess since that is purely an administrative function which must be made by the Department in the first instance.

Now, Therefore, it is hereby ORDERED that the portion of the order of the Department of Labor and Industries dated February 7, 1974, assessing a charge of $7,500.00 against the pension reserve in this claim be, and the same is hereby, reversed, and this claim is hereby remanded to the Department with instructions to calculate the amount by which the permanent partial disability award of $7,500.00 granted the claimant as of May 31, 1962, exceeds the amount that would have been paid the claimant had he been awarded a pension on said date, and to thereafter charge the excess as found against the pension reserve in this claim.

Dated this 22nd day of March, 1974.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
PHILLIP T. BORK Chairman

/s/_____
R.H. POWELL Member