

Allen, Clarence

PERMANENT PARTIAL DISABILITY (RCW 51.32.080)

Segregation

Twenty-five percent reduction (RCW 51.32.080(2))

In applying RCW 51.32.080(3) to segregate preexisting disability, the percentage or category of the entire disability is reduced by the percentage or category of the prior disability. In cases involving disability to the back, it is not appropriate to reduce the prior disability by 25 percent when determining the disability attributable to the injury. The 25 percent reduction in awards required by former RCW 51.32.080 applies only to the monetary amount of the compensation for disability, not the extent of the disability.
...In re Clarence Allen, BIIA Dec., 88 4656 (1990)

Scroll down for order.

1 The claimant, Clarence W. Allen, sustained an injury to his low back in New York State in 1974.
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3 As a result of that injury, he underwent laminectomy surgery on the low back. The record is unclear as
4 to whether Mr. Allen received any compensation for that injury under the New York workers'
5 compensation system or any other compensation system. The claimant does not object to the
6 Department's determination that the 1974 low back injury in New York State resulted in a disability
7 equal to that described by Category 4 of WAC 296-20-280.
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10 On December 4, 1979, while working in Onalaska, Washington, Mr. Allen sustained the
11 industrial injury which is the subject of this appeal when he slipped and fell, injuring his low back. The
12 claimant has offered no evidence to dispute the Department order determining that he now suffers
13 from a permanent partial disability equal to Category 6 of WAC 296-20-280 for low back impairment.
14 The issue in this appeal focuses on the extent of permanent partial disability arising from the industrial
15 injury of 1979. The applicable statute is RCW 51.32.080(3) which provides:
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19 Should a worker receive an injury to a member or part of his or her body
20 already, from whatever cause, permanently partially disabled, resulting in
21 the amputation thereof or in an aggravation or increase in such permanent
22 partial disability but not resulting in the permanent total disability of such
23 worker, his or her compensation for such partial disability shall be
24 adjudged with regard to the previous disability of the injured member or
25 part and the degree or extent of the aggravation or increase of disability
26 thereof.
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28 The Industrial Appeals Judge in the Proposed Decision and Order determined that the preexisting
29 disability attributable to the injury in New York State in 1974 must be reduced by 25% pursuant to
30 former RCW 51.32.080 (amended Regular Session: Laws of 1988, ch. 161, § 6, p. 683, effective July
31 1, 1988) which provided that:
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34 Compensation for unspecified permanent partial disabilities involving
35 injuries to the back that do not have marked objective clinical findings to
36 substantiate the disability shall be determined at an amount equal to
37 seventy-five percent of the monetary value of such disability as related to
38 total bodily impairment:
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40 The Industrial Appeals Judge reasoned as follows: Mr. Allen's preexisting disability is equal to a
41 Category 4 impairment under our Administrative Code (WAC 296-20-280), which defines that level of
42 disability as one which does not have marked objective clinical findings. Therefore, Mr. Allen's
43 preexisting disability amounts to only 75% of the disability described by Category 4 of WAC
44 296-20-280 and WAC 296-20-680(3). While Category 4 for lumbosacral impairments translates into a
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1 total bodily impairment of 15% pursuant to WAC 296-20-680(3), the Industrial Appeals Judge
2 determined that Mr. Allen's preexisting permanent partial disability amounted to only 75% of the 15%
3 of total bodily impairment, or 11.25% of total bodily impairment. Since pursuant to WAC
4 296-20-680(3), Category 6 for low back impairment equals 40% of total bodily impairment, the
5 Industrial Appeals Judge subtracted 11.25% from 40% and arrived at a permanent partial disability of
6 28.75% of total bodily impairment attributable to the industrial injury of 1979. We disagree with this
7 analysis. We believe the Department has correctly and accurately computed the extent of the
8 disability suffered by Mr. Allen and has determined the correct monetary amount of compensation to
9 be paid.

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11 Initially, we believe the Proposed Decision and Order states only half of the issue. The issue is
12 not simply "the method used to determine the monetary amount awarded claimant for his increased
13 disability". PDO at 5. Rather, the issue is two-fold: first, what is the extent of the permanent partial
14 disability attributable to this industrial injury as a percentage of total bodily impairment; and second,
15 what is the monetary amount of compensation? The second question can only be reached after the
16 first question has been resolved.

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18 Our Industrial Insurance Act, among other things, compensates individuals for permanent
19 partial disabilities attributable to industrial injuries. For unspecified disabilities the Act, in combination
20 with the medical aid rules, requires a determination of the extent of the disability. The extent of
21 disability, i.e., the appropriate category of impairment or percentage of total bodily impairment, is then
22 translated into the appropriate monetary amount according to the applicable schedule set forth in
23 RCW 51.32.080.

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25 The claimant suffers from a preexisting disability which is best described by Category 4 of WAC
26 296-20-280. The claimant's current condition and disability are best described by Category 6 of WAC
27 296-20-280. The Department correctly converted these category ratings to appropriate percentages
28 of total bodily impairment (TBI) pursuant to WAC 296-20-680(3), and subtracted the preexisting
29 disability of Category 4 (15% TBI) from the current disability of Category 6 (40% TBI), arriving at the
30 percentage of disability attributable to this industrial injury, (25% TBI). This method is supported both
31 by the statute and by case law.

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33 In Corak v. Dep't of Labor & Indus., 2 Wn. App. 792, 469 P.2d 957 (1970), the court was
34 presented with a similar question. Eli Corak sustained two industrial injuries, the first in 1952, the
35 second in 1965. Both injuries were to the low back and both resulted in permanent partial disability.
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1 Mr. Corak argued that his compensation for the 1965 injury should be determined by subtracting the
2 monetary amount received for the 1952 injury from the monetary amount he was entitled to as a result
3 of the 1965 injury. The schedule of benefits had increased in the interim. The court rejected this
4 theory, noting that such a scheme would be in conflict with the decision in Ashenbrenner v. Dep't of
5 Labor & Indus., 62 Wn.2d 22, 380 P.2d 730 (1963), which requires that, in the absence of legislative
6 language clearly requiring the retrospective application of a particular statute, compensation must be
7 fixed in accordance with the compensation statute in effect at the time of the injury. The court stated
8 that:

13 Sound reason and uniformity require that there be a segregation, so that
14 the workman is compensated for the disability attributable to the injury in
15 question alone. To accomplish this, it is necessary to make a factual
16 determination as to the percentage of permanent partial disability Corak
17 sustained which is attributable solely to the 1965 injury.

19 Corak, at 801 (Emphasis added).

20 The court, in Corak, noted that there was no medial testimony apportioning the disability
21 between Mr. Corak's 1952 injury and the 1965 injury. However, there was medical evidence that the
22 overall disability amounted to 65% of unspecified disabilities under the Act. As the court pointed out:

25 . . . Corak was awarded 15 per cent (sic) of the maximum allowed for
26 unspecified disabilities for his 1952 injury, and such order was not
27 appealed from, and is res judicata. The simple mathematics of the
28 situation dictate an award of 35 per cent (sic) of the maximum allowed for
29 unspecified disabilities.

31 Corak, at 801. The Corak case clearly indicates that the determination of the percentage extent of
32 disability must be made first; the monetary rate of compensation is not to be considered before the
33 extent of the disability is established. The Proposed Decision and Order fails to clearly distinguish
34 between these two separate questions -- the extent of disability, and the monetary amount of the
35 permanent partial disability award. In so doing, the Proposed Decision and Order incorrectly employs
36 the RCW 51.32.080(2) reduction of monetary compensation as a tool for determining the extent of
37 disability.

38 The claimant's brief also focuses incorrectly on the provisions of former RCW 51.32.080(2),
39 which provided for the 25% reduction of monetary compensation for back conditions which do not
40 have marked objective clinical findings. The proper focus is, of course, on the extent of disability
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1 attributable to the Washington industrial injury. Once that has been determined, the monetary amount
2 of the award can be determined by simple reference to RCW 51.32.080.
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4 The legislature has determined that a worker under our Act who was injured between March
5 23, 1979 and July 1, 1988 and who is determined to have a permanent partial back disability which
6 does not have marked objective clinical findings, will be paid at 75% of the scheduled monetary
7 award. This is a legislative determination confined entirely to monetary compensation under our Act. It
8 plays no role in determining the extent of disability that Mr. Allen suffered as the result of an injury in
9 New York State, nor does it apply in determining the extent of disability under our Act. Mr. Allen cannot
10 increase the monetary award to which he is entitled under our Act for the 1979 Washington injury by
11 artificially applying the 25% monetary reduction to lessen the disability caused by the New York injury.
12 That is, the 25% monetary reduction provision cannot be used to reduce the extent of disability
13 suffered as a result of the New York injury; it can only be used to reduce a monetary award paid for a
14 Washington injury. Were we to apply the monetary reduction provision of RCW 51.32.080(2) to lessen
15 the extent of disability sustained by claimant as a result of the New York injury, we would in effect be
16 compensating Mr. Allen for a portion of the disability attributable to the injury sustained in New York
17 with funds from our industrial insurance system.
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19 The only remaining question then is whether former RCW 51.32.080(2) has any application to
20 this claim. We conclude that it does not. Since Mr. Allen's overall permanent partial disability is rated
21 within Category 6 of WAC 296-20-280 which, by its terms, requires "marked intermittent objective
22 clinical findings", no reduction of the Washington monetary award is appropriate here. Indeed the
23 Department so concluded by correcting the original permanent partial disability award and paying the
24 eventual award at 100% of the monetary value.
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26 Finally, to a significant degree the Proposed Decision and Order is premised on the perceived
27 inequity between the way the Department pays awards when the increased permanent partial
28 disability results from an aggravation of a single industrial injury as opposed to two separate events.
29 The appeal before us does not raise the question of how the Department should pay increased
30 permanent partial disability where aggravation of a single industrial injury has occurred and we will
31 therefore not address that question here. With respect to the factual situation which is before us, we
32 are confident that the Department has correctly determined the extent of physical disability attributable
33 to the 1979 industrial injury, and has correctly translated that disability into a monetary award.
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1 The Department order of November 9, 1988 which adhered to the provisions of a Department
2 order of October 4, 1988 which awarded claimant a permanent partial disability award for lumbar
3 residuals described as Category 6 less a preexisting Category 4, i.e., 25% as compared with total
4 bodily impairment, is correct and is affirmed.
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8 **FINDINGS OF FACT**

- 9 1. On January 24, 1980 the Department of Labor and Industries received an
10 accident report alleging that Clarence Allen had suffered an industrial
11 injury to his low back during the course of his employment at Everett
12 Lyons Logging on December 4, 1979. On June 29, 1987 the Department
13 issued an order closing claimant's claim with time loss compensation as
14 paid to January 28, 1986 without further award of time loss compensation
15 or permanent partial disability. On August 13, 1987 the Department issued
16 an order modifying its order of June 29, 1987 from a final order to an
17 interlocutory order and keeping claimant's claim open for authorized
18 treatment and action as indicated.

19 On February 16, 1988 the Department issued an order closing the claim
20 with time loss compensation as paid, awarding claimant a permanent
21 partial disability award for lumbar residuals over and above that which was
22 attributable to a preexisting lumbar condition, and compensating claimant
23 for unspecified disabilities of 25% as compared to total bodily impairment,
24 for a total monetary award of \$11,250.00. On April 11, 1988 claimant
25 protested and requested the Department reconsider its order dated
26 February 16, 1988. On May 2, 1988 the Department issued an order
27 adhering to its prior order of February 16, 1988. On May 23, 1988 the
28 Board of Industrial Insurance Appeals received claimant's notice of appeal
29 from the Department order of May 2, 1988. On May 25, 1988 the
30 Department issued an order holding its order of May 2, 1988 in abeyance.
31 On June 8, 1988 the Board issued an order denying claimant's appeal in
32 view of the Department's reassumption of jurisdiction in this matter.
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34 On October 4, 1988 the Department issued an order modifying its order of
35 February 16, 1988 from a final order to an interlocutory order, reopening
36 claimant's claim to pay additional permanent partial disability, determining
37 that claimant's award for lumbar residuals should not be reduced,
38 awarding claimant a permanent partial disability award for lumbar
39 residuals over and above that which is attributable to a preexisting lumbar
40 condition, and compensating claimant for unspecified disabilities of 25%
41 as compared to total bodily impairment, in the monetary amount of
42 \$15,000.00, less previous award.

43 On October 20, 1988 claimant protested and requested the Department
44 reconsider its order dated October 4, 1988. On November 9, 1988 the
45 Department issued an order adhering to its order of October 4, 1988. On
46 December 12, 1988 the Board received claimant's Notice of Appeal from
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1 the Department order dated November 11, 1988 [sic]. On December 16,
2 1988 the Board received claimant's amended Notice of Appeal from the
3 Department order dated November 11, 1988 (sic). On December 23, 1988
4 the Board received claimant's second amended Notice of Appeal from the
5 Department order dated November 9, 1988. On December 23, 1988 the
6 Board issued an order granting claimant's appeal, assigning it Docket No.
7 88 4656 and directing that hearings be held on the issues raised in the
8 appeal.

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- 10 2. On December 4, 1979, while employed by Everett Lyons Logging,
11 Clarence Allen suffered an injury to his low back when he slipped and fell.
- 12 3. As of November 9, 1988, Mr. Allen's low back condition related to his
13 industrial injury was fixed and he was not in need of further medical care
14 and treatment.
- 15 4. Prior to December 4, 1979, Mr. Allen had a preexisting permanent partial
16 disability in his low back best described as Category 4 of WAC 296-
17 20-280. This preexisting permanent partial disability was caused by a
18 1974 low back injury which occurred in New York State. As of November
19 9, 1988, the Washington industrial injury of December 4, 1979 had
20 increased Mr. Allen's low back disability and his overall permanent partial
21 disability was best described as Category 6 of WAC 296-20-280.

22 **CONCLUSIONS OF LAW**

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- 24 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties
25 and the subject matter of this appeal.
- 26 2. Category 4 of WAC 296-20-280 equals 15% as compared to total bodily
27 impairment pursuant to WAC 296-20-680(3). Category 6 of WAC
28 296-20-280 equals 40% as compared to total bodily impairment pursuant
29 to WAC 296-20-680(3). Subtracting 15% from 40%, claimant's permanent
30 partial disability as of November 9, 1988, attributable to the industrial injury
31 of December 4, 1979, was 25.00% as compared to total bodily
32 impairment, pursuant to RCW 51.32.080(3). The provisions of RCW
33 51.32.080(2) with respect to the reduction of monetary awards for back
34 disabilities does not apply either to reduce Mr. Allen's preexisting disability
35 caused by the New York injury or to decrease the monetary award to
36 which claimant is entitled as a result of his 1979 Washington industrial
37 injury.
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- 39 3. The Department order dated November 9, 1988 adhering to a prior order
40 dated October 4, 1988 which modified its order of February 16, 1988 from
41 a final order to an interlocutory order, reopened claimant's claim to pay
42 additional permanent partial disability, determined that claimant's award
43 for lumbar residuals should not be reduced, awarded claimant a
44 permanent partial disability award for lumbar residuals over and above
45 that which is attributable to a preexisting lumbar condition and
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1 compensated claimant for unspecified disabilities of 25% as compared to
2 total bodily impairment, is correct and should be affirmed.

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4 It is so ORDERED.

5 Dated this 14th day of February, 1990.

6 BOARD OF INDUSTRIAL INSURANCE APPEALS

7
8 /s/
9 _____
10 SARA T. HARMON Chairperson

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12 /s/
13 _____
14 PHILLIP T. BORK Member

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