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)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: CLARENCE W. ALLEN	**)**	**DOCKET NO. 88 4656**
	)	
CLAIM NO. H-642201	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Clarence W. Allen, by
Landerholm, Memovich, Lansverk & Whitesides, Inc., P.S., per
Steven A. Memovich and Stephen D. Kinman

Employer, Everett Lyons Logging, by
None

Department of Labor and Industries, by
Office of the Attorney General, per
Bonnie Y. Terada, Assistant

This is an appeal filed by the claimant on December 12, 1988 from an order of the Department of Labor and Industries dated November 9, 1988 which adhered to the provisions of a Department order of October 4, 1988. The October 4, 1988 order modified an order dated February 16, 1988 from a final to an interlocutory order, reopened the claim to pay a permanent partial disability award equal to Category 6 for lumbar residuals less a preexisting permanent partial disability equal to Category 4 for lumbar residuals not reduced, for a total award of 25% as compared to total bodily impairment, less prior awards, and closed the claim with time loss compensation as paid. **AFFIRMED**.

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 July 4, 1989 in which the order of the Department dated November 9, 1988 was reversed and the matter remanded to the Department with directions to issue an order modifying its order of February 16, 1988 from a final order to an interlocutory order, reopening claimant's claim to pay additional permanent partial disability, determining that claimant's award for lumbar residuals should not be reduced, awarding claimant a permanent partial disability award for lumbar residuals over and above that which is attributable to a preexisting lumbar condition and compensating the claimant for unspecified disabilities of 28.75% as compared to total bodily impairment.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed and said rulings are hereby affirmed.

The claimant, Clarence W. Allen, sustained an injury to his low back in New York State in 1974. As a result of that injury, he underwent laminectomy surgery on the low back. The record is unclear as to whether Mr. Allen received any compensation for that injury under the New York workers' compensation system or any other compensation system. The claimant does not object to the Department's determination that the 1974 low back injury in New York State resulted in a disability equal to that described by Category 4 of WAC 296-20-280.

On December 4, 1979, while working in Onalaska, Washington, Mr. Allen sustained the industrial injury which is the subject of this appeal when he slipped and fell, injuring his low back. The claimant has offered no evidence to dispute the Department order determining that he now suffers from a permanent partial disability equal to Category 6 of WAC 296-20-280 for low back impairment. The issue in this appeal focuses on the extent of permanent partial disability arising from the industrial injury of 1979. The applicable statute is RCW 51.32.080(3) which provides:

> Should a worker receive an injury to a member or part of his or her body already, from whatever cause, permanently partially disabled, resulting in the amputation thereof or in an aggravation or increase in such permanent partial disability but not resulting in the permanent total disability of such worker, his or her compensation for such partial disability shall be adjudged with regard to the previous disability of the injured member or part and the degree or extent of the aggravation or increase of disability thereof.

The Industrial Appeals Judge in the Proposed Decision and Order determined that the preexisting disability attributable to the injury in New York State in 1974 must be reduced by 25% pursuant to former RCW 51.32.080 (amended Regular Session: Laws of 1988, ch. 161, § 6, p. 683, effective July 1, 1988) which provided that:

> Compensation for unspecified permanent partial disabilities involving injuries to the back that do not have marked objective clinical findings to substantiate the disability shall be determined at an amount equal to seventy-five percent of the monetary value of such disability as related to total bodily impairment:

The Industrial Appeals Judge reasoned as follows: Mr. Allen's preexisting disability is equal to a Category 4 impairment under our Administrative Code (WAC 296-20-280), which defines that level of disability as one which does not have marked objective clinical findings. Therefore, Mr. Allen's preexisting disability amounts to only75% of the disability described by Category 4 of WAC 296-20-280 and WAC 296-20- 680(3). While Category 4 for lumbosacral impairments translates into a

total bodily impairment of 15% pursuant to WAC 296-20-680(3), the Industrial Appeals Judge determined that Mr. Allen's preexisting permanent partial disability amounted to only 75% of the 15% of total bodily impairment, or 11.25% of total bodily impairment. Since pursuant to WAC 296-20-680(3), Category 6 for low back impairment equals 40% of total bodily impairment, the Industrial Appeals Judge subtracted 11.25% from 40% and arrived at a permanent partial disability of 28.75% of total bodily impairment attributable to the industrial injury of 1979. We disagree with this analysis. We believe the Department has correctly and accurately computed the extent of the disability suffered by Mr. Allen and has determined the correct monetary amount of compensation to be paid.

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

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

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

In Corak v. Dep't of Labor & Indus., 2 Wn. App. 792, 469 P.2d 957 (1970), the court was presented with a similar question. Eli Corak sustained two industrial injuries, the first in 1952, the second in 1965. Both injuries were to the low back and both resulted in permanent partial disability.

Mr. Corak argued that his compensation for the 1965 injury should be determined by subtracting the monetary amount received for the 1952 injury from the monetary amount he was entitled to as a result of the 1965 injury. The schedule of benefits had increased in the interim. The court rejected this theory, noting that such a scheme would be in conflict with the decision in Ashenbrenner v. Dep't of Labor & Indus., 62 Wn.2d 22, 380 P.2d 730 (1963), which requires that, in the absence of legislative language clearly requiring the retrospective application of a particular statute, compensation must be fixed in accordance with the compensation statute in effect at the time of the injury. The court stated that:

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

Corak, at 801 (Emphasis added).

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

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

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

The claimant's brief also focuses incorrectly on the provisions of former RCW 51.32.080(2), which provided for the 25% reduction of monetary compensation for back conditions which do not have marked objective clinical findings. The proper focus is, of course, on the extent of disability

attributable to the Washington industrial injury. Once that has been determined, the monetary amount of the award can be determined by simple reference to RCW 51.32.080.

The legislature has determined that a worker under our Act who was injured between March 23, 1979 and July 1, 1988 and who is determined to have a permanent partial back disability which does not have marked objective clinical findings, will be paid at 75% of the scheduled monetary award. This is a legislative determination confined entirely to monetary compensation under our Act. It plays no role in determining the extent of disability that Mr. Allen suffered as the result of an injury in New York State, nor does it apply in determining the extent of disability under our Act. Mr. Allen cannot increase the monetary award to which he is entitled under our Act for the 1979 Washington injury by artificially applying the 25% monetary reduction to lessen the disability caused by the New York injury. That is, the 25% monetary reduction provision cannot be used to reduce the extent of disability suffered as a result of the New York injury; it can only be used to reduce a monetary award paid for a Washington injury. Were we to apply the monetary reduction provision of RCW 51.32.080(2) to lessen the extent of disability sustained by claimant as a result of the New York injury, we would in effect be compensating Mr. Allen for a portion of the disability attributable to the injury sustained in New York with funds from our industrial insurance system.

The only remaining question then is whether former RCW 51.32.080(2) has any application to this claim. We conclude that it does not. Since Mr. Allen's overall permanent partial disability is rated within Category 6 of WAC 296-20-280 which, by its terms, requires "marked intermittent objective clinical findings", no reduction of the Washington monetary award is appropriate here. Indeed the Department so concluded by correcting the original permanent partial disability award and paying the eventual award at 100% of the monetary value.

Finally, to a significant degree the Proposed Decision and Order is premised on the perceived inequity between the way the Department pays awards when the increased permanent partial disability results from an aggravation of a single industrial injury as opposed to two separate events. The appeal before us does not raise the question of how the Department should pay increased permanent partial disability where aggravation of a single industrial injury has occurred and we will therefore not address that question here. With respect to the factual situation which is before us, we are confident that the Department has correctly determined the extent of physical disability attributable to the 1979 industrial injury, and has correctly translated that disability into a monetary award.

The Department order of November 9, 1988 which adhered to the provisions of a Department order of October 4, 1988 which awarded claimant a permanent partial disability award for lumbar residuals described as Category 6 less a preexisting Category 4, i.e., 25% as compared with total bodily impairment, is correct and is affirmed.

FINDINGS OF FACT

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

   On February 16, 1988 the Department issued an order closing the claim with time loss compensation as paid, awarding claimant a permanent partial disability award for lumbar residuals over and above that which was attributable to a preexisting lumbar condition, and compensating claimant for unspecified disabilities of 25% as compared to total bodily impairment, for a total monetary award of $11,250.00. On April 11, 1988 claimant protested and requested the Department reconsider its order dated February 16, 1988. On May 2, 1988 the Department issued an order adhering to its prior order of February 16, 1988. On May 23, 1988 the Board of Industrial Insurance Appeals received claimant's notice of appeal from the Department order of May 2, 1988. On May 25, 1988 the Department issued an order holding its order of May 2, 1988 in abeyance. On June 8, 1988 the Board issued an order denying claimant's appeal in view of the Department's reassumption of jurisdiction in this matter.

   On October 4, 1988 the Department issued an order modifying its order of February 16, 1988 from a final order to an interlocutory order, reopening claimant's claim to pay additional permanent partial disability, determining that claimant's award for lumbar residuals should not be reduced, awarding claimant a permanent partial disability award for lumbar residuals over and above that which is attributable to a preexisting lumbar condition, and compensating claimant for unspecified disabilities of 25% as compared to total bodily impairment, in the monetary amount of $15,000.00, less previous award.

   On October 20, 1988 claimant protested and requested the Department reconsider its order dated October 4, 1988. On November 9, 1988 the Department issued an order adhering to its order of October 4, 1988. On December 12, 1988 the Board received claimant's Notice of Appeal from

the Department order dated November 11, 1988 [sic]. On December 16, 1988 the Board received claimant's amended Notice of Appeal from the Department order dated November 11, 1988 (sic). On December 23, 1988 the Board received claimant's second amended Notice of Appeal from the Department order dated November 9, 1988. On December 23, 1988 the Board issued an order granting claimant's appeal, assigning it Docket No. 88 4656 and directing that hearings be held on the issues raised in the appeal.

2. On December 4, 1979, while employed by Everett Lyons Logging, Clarence Allen suffered an injury to his low back when he slipped and fell.

3. As of November 9, 1988, Mr. Allen's low back condition related to his industrial injury was fixed and he was not in need of further medical care and treatment.

4. Prior to December 4, 1979, Mr. Allen had a preexisting permanent partial disability in his low back best described as Category 4 of WAC 296-20-280. This preexisting permanent partial disability was caused by a 1974 low back injury which occurred in New York State. As of November 9, 1988, the Washington industrial injury of December 4, 1979 had increased Mr. Allen's low back disability and his overall permanent partial disability was best described as Category 6 of WAC 296-20-280.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and the subject matter of this appeal.

2. Category 4 of WAC 296-20-280 equals 15% as compared to total bodily impairment pursuant to WAC 296-20-680(3). Category 6 of WAC 296-20-280 equals 40% as compared to total bodily impairment pursuant to WAC 296-20-680(3). Subtracting 15% from 40%, claimant's permanent partial disability as of November 9, 1988, attributable to the industrial injury of December 4, 1979, was 25.00% as compared to total bodily impairment, pursuant to RCW 51.32.080(3). The provisions of RCW 51.32.080(2) with respect to the reduction of monetary awards for back disabilities does not apply either to reduce Mr. Allen's preexisting disability caused by the New York injury or to decrease the monetary award to which claimant is entitled as a result of his 1979 Washington industrial injury.

3. The Department order dated November 9, 1988 adhering to a prior order dated October 4, 1988 which modified its order of February 16, 1988 from a final order to an interlocutory order, reopened claimant's claim to pay additional permanent partial disability, determined that claimant's award for lumbar residuals should not be reduced, awarded claimant a permanent partial disability award for lumbar residuals over and above that which is attributable to a preexisting lumbar condition and

compensated claimant for unspecified disabilities of 25% as compared to total bodily impairment, is correct and should be affirmed.

It is so ORDERED.

Dated this 14th day of February, 1990.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/
SARA T. HARMON Chairperson

/s/
PHILLIP T. BORK Member