

# Stuckey, Marshall

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## PENSION RESERVE

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

## PERMANENT PARTIAL DISABILITY (RCW 51.32.080)

Permanent partial disability award should not be converted to time-loss compensation where permanent total disability follows

## PERMANENT TOTAL DISABILITY (RCW 51.08.160)

**Reduction of benefits by prior permanent partial disability award**

RCW 51.32.080(2) directs the Department, where permanent total disability follows permanent partial disability, to deduct a permanent partial disability award from the pension reserve and reduce the worker's monthly payments accordingly, to the extent the award exceeds the amount that would have been paid the worker if permanent total disability compensation had been paid in the first instance. The Department should not deduct the permanent partial disability award from retroactive time-loss compensation. *Citing In re Eino Antilla*, BIIA Dec., 21,097 (1963). ...***In re Marshall Stuckey*, BIIA Dec., 89 5977 (1991)** [Editor's Note: Overruled, *In re Esther Rodriguez*, BIIA Dec., 91 5594 (1993). Reversed, *Stuckey v. Department of Labor & Indus.*, 129 Wn.2d 289 (1996).]

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

1     **IN RE: MARSHALL STUCKEY**                     )     **DOCKET NOS. 89 5977 & 90 2638**  
2   )  
3   )  
4     **CLAIM NO. J-514966**                             )     **DECISION AND ORDER**  
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6 **APPEARANCES:**

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8             Claimant, Marshall Stuckey, by  
9             Calbom & Schwab, P.S.C., per  
10            G. Joe Schwab

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12            Employer, Moses Lake Grant County Humane Society, by  
13            None

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15            Department of Labor and Industries, by  
16            The Office of the Attorney General, per  
17            Kent Mumma, Assistant, and Gary McGuire, Paralegal  
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19            The appeal assigned Docket No. 89 5977 is an appeal filed by the claimant on December 22,  
20 1989 from an order of the Department of Labor and Industries dated December 7, 1989 which affirmed  
21 an order of the Department dated October 20, 1989 indicating that the claimant was found totally  
22 disabled by an order of the Board of Industrial Insurance Appeals dated October 3, 1989 and was  
23 therefore not entitled to the permanent disability award previously granted by a Department order of  
24 December (sic-October) 8, 1987. **REVERSED AND REMANDED.**

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26            The appeal assigned Docket No. 90 2638 is an appeal filed by the claimant on May 17, 1990  
27 from an order of the Department of Labor and Industries dated May 4, 1990 which affirmed an earlier  
28 order of the Department dated November 15, 1989 indicating that claimant's compensation rate for  
29 pension benefits was reduced to \$0.00 per month effective December 16, 1989, due to offset for social  
30 security disability benefits including payments for both claimant and claimant's spouse. **AFFIRMED.**

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36   **DECISION**

37            These appeals are before the Board pursuant to RCW 51.52.104 and RCW 51.52.106 on a  
38 timely Petition for Review filed by the claimant from a Proposed Decision and Order entered on  
39 February 15, 1991 affirming the Department orders of December 7, 1989 and May 4, 1990.

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41            We agree with our industrial appeals judge's resolution of the issue concerning the social  
42 security disability offset. The Department's order of May 4, 1990 was properly affirmed. We have  
43 granted review because we disagree with our judge's determination that the Department was entitled  
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1 to deduct the prior award for permanent partial disability from the time loss compensation we had  
2 directed the Department to pay by our order of October 3, 1989.  
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4 The stipulated facts show that the claimant suffered an industrial injury on November 10, 1984,  
5 for which this claim was allowed. By an order dated August 4, 1987, the Department terminated time  
6 loss compensation with payment through July 15, 1987, based on the Department's determination that  
7 the claimant was unemployable due to causes unrelated to and subsequent to the industrial injury. By  
8 an order dated January 21, 1988, the Department adhered to the provisions of an order dated October  
9 8, 1987 which denied responsibility for diabetes mellitus, high blood pressure, cerebral infarction and  
10 gout, and closed the claim with a \$3,600.00 award for permanent partial disability for the right knee  
11 equal to 10% of the amputation value of the right leg above the knee joint with a short thigh stump,  
12 and time loss compensation as previously paid. The claimant filed a timely appeal from the order of  
13 January 21, 1988.  
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19 Thereafter, on October 3, 1989, this Board issued a Decision and Order (Docket No. 88 0589)  
20 reversing the Department's order of January 21, 1988. We directed the Department to accept  
21 responsibility for the condition of diabetes mellitus; pay time loss compensation for the period July 16,  
22 1987 through January 20, 1988; and thereupon place the claimant on the pension rolls as totally and  
23 permanently disabled, effective January 21, 1988.  
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27 Upon remand to the Department, the claimant was placed on the pension rolls as directed by  
28 our order. However, in making the award for time loss compensation for the period July 16, 1987  
29 through January 20, 1988, the Department deducted the \$3,600.00 permanent partial disability award  
30 it had paid by its order of October 8, 1987.  
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33 Our industrial appeals judge concluded that the deduction taken by the Department was  
34 consistent with our decision in In re Eino Antilla, BIIA Dec., 21,097 (1963). In Antilla, the claimant had  
35 appealed a Department order closing his claim with time loss compensation as paid and with a  
36 permanent partial disability award. We had denied his appeal because the Department timely held its  
37 closing order in abeyance pending further investigation. The Department then continued the claim  
38 open for further treatment, and also reinstated time loss compensation and made an award for such  
39 compensation for an 11-month period commencing the day following the day time loss had last been  
40 paid. In making the award, the Department converted part of the permanent partial disability award it  
41 had previously paid to time loss compensation.  
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1 We subsequently denied the claimant's appeal of the Department order making this  
2 "conversion" deduction. We premised our denial on the fact that the claimant's condition was not fixed  
3 when his claim was closed as evidenced by the uncontested decision of the Department to hold the  
4 claim open for further treatment. Since his condition was not yet fixed, he was not, after all, entitled to  
5 a permanent disability award and it was therefore appropriate for the Department to treat the  
6 permanent disability award as an advance against future time loss compensation payable.  
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10 Had our prior Decision and Order in the instant case directed the Department to reopen Mr.  
11 Stuckey's claim for further treatment and resume the payment of time loss compensation, there is no  
12 question that Antilla would be controlling and would have allowed the Department to deduct the prior  
13 permanent partial disability award from past or future time loss compensation due. We would have  
14 thereby determined that the claimant's condition was not fixed when the claim was closed, a  
15 determination inconsistent with an award for permanent partial disability. However, in our Decision  
16 and Order in this case we determined that the claimant's condition was fixed and permanent when the  
17 claim was closed.  
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22 Granted, we disagreed with the Department's determination that the claimant's permanent  
23 disability was partial as opposed to total. But it is precisely this distinction, and the sequence of these  
24 determinations, which causes us to disagree with our industrial appeals judge.  
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26 RCW 51.32.080(2) provides:  
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28 . . . .That in case permanent partial disability compensation is followed by  
29 permanent total disability compensation, any portion of the permanent  
30 partial disability compensation which exceeds the amount that would have  
31 been paid the injured worker if permanent total disability compensation  
32 had been paid in the first instance, shall be deducted from the pension  
33 reserve of such injured worker and his or her monthly compensation  
34 payments shall be reduced accordingly.  
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36 The specific language of RCW 51.32.080(2) is controlling under the facts here and  
37 distinguishes this case from our holding in Antilla. In Mr. Stuckey's case permanent partial disability  
38 compensation was followed by permanent total disability compensation. Rather than deduct the prior  
39 permanent partial disability award from retroactive time loss compensation, the statute commands the  
40 Department to deduct it from the pension reserve and reduce his monthly payments accordingly to the  
41 extent the permanent partial disability award "exceeds the amount that would have been paid the  
42 injured worker if permanent total disability compensation had been paid in the first instance" (i.e.,  
43 January 21, 1988).  
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1 We make no comment as to whether or not the action we hereby order is, in the long run,  
2 financially more advantageous to the claimant than the action taken by the Department. Although he  
3 currently receives no monthly compensation benefits due to the social security offset, that may not  
4 hold true in the future. The action we take here may reduce any future monthly payment below what it  
5 might have otherwise been, by virtue of reducing the pension reserve. Further, it is unknown from the  
6 record herein whether and to what extent the claimant received pension benefits for the period from  
7 January 21, 1988 to December 16, 1989. If he was eligible to receive and did receive such benefits  
8 for periods prior to the date the Department established the pension reserve, in an amount greater  
9 than \$3,600.00, there would be no deduction from the pension reserve, but rather, an overpayment of  
10 pension benefits. See In re Eleanor Lewis, BIIA Dec. 86 4139 (1988). Since this overpayment would  
11 have resulted from our determination that the Department had made an erroneous adjudication, it  
12 would appear that such overpayment would be subject to recovery, under RCW 51.32.240(3), against  
13 the \$3,600.00 in time loss compensation we hereby direct the Department to pay. Of course that  
14 issue is not before us at this time.

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16 In any case, having been asked to decide the issue, we must reverse the Department's order of  
17 December 7, 1989 and remand this matter to the Department with direction to pay time loss  
18 compensation for the period July 16, 1987 through January 20, 1988, less deduction for time loss  
19 compensation previously paid for that period, but without deduction for the previous permanent partial  
20 disability award of \$3,600.00. The Department shall instead make adjustment for the prior permanent  
21 partial disability award in the manner contemplated by RCW 51.52.080(2) (last proviso) by deducting  
22 the same from the pension reserve and reducing monthly benefits accordingly, to the extent, if any,  
23 that it exceeds the amount of permanent total disability compensation had it been paid in the first  
24 instance, and take such other and further action as indicated by the law and the facts.

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26 We hereby adopt Findings of Fact Nos. 1, 2 and 3 and Conclusions of Law Nos. 1 and 3 as  
27 contained in the Proposed Decision and Order, as our final findings and conclusions. We also make  
28 the following Conclusion of Law.

#### 29 **CONCLUSIONS OF LAW**

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2. The Department order of December 7, 1989, which affirmed the order of October 20, 1989 finding that the claimant was not entitled to the permanent partial disability award granted by the Department order of December (sic - October) 8, 1987 and offsetting same against his entitlement to time loss compensation, is incorrect and is reversed. The Department is directed to pay time loss compensation for the period July

1 16, 1987 through January 20, 1988, less time loss compensation  
2 previously paid for the same period, but without deduction for the previous  
3 permanent partial disability award of \$3,600.00. The Department is  
4 directed to deduct the permanent partial disability award from the pension  
5 reserve and reduce the claimant's monthly compensation benefits  
6 accordingly, to the extent, if any, that the permanent partial disability  
7 award exceeds the amount that would have been paid if permanent total  
8 disability compensation had been paid in the first instance (January 21,  
9 1988), and to take such other and further action as indicated by the law  
10 and facts.

11 It is so ORDERED.

12 Dated this 26<sup>th</sup> day of September, 1991.

13 BOARD OF INDUSTRIAL INSURANCE APPEALS

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18 /s/  
19 S. FREDERICK FELLER Chairperson

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22 /s/  
23 PHILLIP T. BORK Member