

## **McCormack, Harold**

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### **PENSION RESERVE**

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

### **PERMANENT TOTAL DISABILITY (RCW 51.08.160)**

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

### **SECOND INJURY FUND (RCW 51.16.120)**

**Date of charge against pension reserve**

Where the evidence indicates second injury fund relief is appropriate, the self-insured employer is entitled to have the pension reserve charged against the second injury fund as of the date of onset of the worker's permanent total disability, not the date the Department identified as the date it was placing the worker on the pension rolls. ...*In re Harold McCormack*, BIIA Dec., 90 3178 (1992)

Scroll down for order.



1 denying the motion for summary judgment, but calling for the presentation of medical testimony on the  
2 issue of the date of medical fixity of the claimant's condition. The Proposed Decision and Order  
3 awards second injury fund relief as of the date of onset of permanent total disability established in the  
4 record. While we disagree with our industrial appeals judge as to the exact date of onset of  
5 permanent total disability, we do not disagree with the direction that second injury fund relief should  
6 begin with that date. The order of January 7, 1991 is reversed and the motion for partial summary  
7 judgment is hereby granted.  
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11 On June 4, 1991, the Department of Labor and Industries submitted Exhibit No. 8 to the Board by  
12 mail and moved for its admission. The exhibit was received after the issuance of the Proposed  
13 Decision and Order in this matter. The self-insured employer objects to its admission on the grounds  
14 that it is cumulative and contains hearsay. Exhibit No. 8 is rejected.  
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17 The Board has reviewed the remaining evidentiary rulings in the record of proceedings and finds  
18 that no prejudicial error was committed and said rulings are hereby affirmed.  
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### 21 **DECISION**

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23 The Proposed Decision and Order contains an accurate summary of the testimony presented and  
24 we will address the specifics of this case only as necessary to explain our decision. At issue is the  
25 date on which the residual disability from Harold J. McCormack's March 4, 1980 industrial injury, in  
26 combination with pre-existing degenerative changes and right carpal tunnel surgery, rendered him  
27 permanently totally disabled. The Department, in its closing order of May 25, 1990 designated June  
28 22, 1990 as the date on which Mr. McCormack became eligible for pension. The self-insured  
29 employer argued, and our industrial appeals judge agreed, that Mr. McCormack was actually  
30 permanently totally disabled as of February 11, 1983. For the reasons set forth below, we find that the  
31 record establishes the Mr. McCormack was permanently and totally disabled as of November 21,  
32 1984.  
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35 The Department's Petition for Review properly challenges the industrial appeals judge's assertion  
36 that the parties agreed that Mr. McCormack was temporarily totally disabled from March 4, 1980  
37 through the date of medical fixity of his industrially related condition. If the evidence supported that  
38 conclusion, then we would only need to affirm the Proposed Decision and Order, because the medical  
39 testimony clearly shows that the claimant's industrially related condition was medically fixed as of  
40 February 11, 1983.  
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1 While the claimant's medical condition was fixed as of February 11, 1983, there remained a  
2 dispute as to whether he was employable on that date. In December 1982, his then attending  
3 physician, Dr. Daniel M. Spengler, released him to work as a security guard in a position offered by the  
4 self-insured employer. Although the record is unclear, it appears that Mr. McCormack only attempted  
5 to return to work for a couple of half days. It appears the self-insured employer, relying on the  
6 attending physician's release, paid only loss of earning power benefits rather than full time-loss  
7 compensation from December 1982 through at least June 1983.  
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11 The self-insured employer presented no evidence that Mr. McCormack was unemployable  
12 between December 1982 and November 21, 1984. Exhibit No. 7, a 1983 vocational report concluding  
13 that Mr. McCormack was then unemployable, was admitted for the limited purpose of establishing that  
14 the Department was on notice that the claimant sought a pension, not for the truth of the matter  
15 asserted. It cannot be used to establish that Mr. McCormack was unemployable at that time.  
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18 The Department presented the testimony of vocational expert Stephen Weinhouse, who  
19 evaluated the claimant at the employer's request in 1982. He concluded that although Mr.  
20 McCormack could not return to his former employment as a truck driver, he could perform several  
21 other jobs, including security guard. Mr. Weinhouse's testimony, in combination with the attending  
22 physician's approval of the security guard position actually offered by the employer, leads us to  
23 conclude that Mr. McCormack was employable in February 1983.  
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26 We are left with the question of whether Mr. McCormack became totally permanently disabled at  
27 some point after February 11, 1983 but before June 22, 1990. We accept on that question the  
28 testimony of Dr. Frank G. Gleeson. Dr. Gleeson was Mr. McCormack's attending physician from  
29 November 21, 1984 through December 1990. He determined that Mr. McCormack was totally  
30 permanently disabled on November 21, 1984. Dr. Gleeson did sign a job analysis for a modified  
31 security guard position in January 1985; however, he also sent the employer a letter stating he did not  
32 believe the claimant could perform the job. Dr. Gleeson's opinion was bolstered by the medical  
33 records of the late Dr. Charles G. Hutter who saw the claimant multiple times in 1983 and 1984.  
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36 The Department presented only one medical witness who saw the claimant after 1983, Dr. Phillip  
37 J. Suver. Based on one examination each year in 1986, 1988 and 1989, Dr. Suver concluded that Mr.  
38 McCormack was able to work with restrictions on lifting, bending, repetitive movement and gripping  
39 and so long as he avoided head and neck movements and eye fixation which aggravated his  
40 degenerative neck condition. Considering the multiplicity of limitations Dr. Suver would impose on a  
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1 claimant who was born in 1923, had an eighth grade education, and a work history consisting entirely  
2 of strenuous labor as a truck driver, we have no difficulty accepting the conclusions of Mr.  
3 McCormack's attending physician over that of the forensic examiner. We conclude that the record  
4 establishes Mr. McCormack was permanently and totally disabled as of November 21, 1984. He  
5 should be placed on the pension rolls effective that date and the balance of the pension reserve  
6 should thereupon be charged against the second injury fund. Thus, the employer should receive  
7 second injury fund relief effective that date.  
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11 Proposed Findings of Fact Nos. 1, 2, and 3, and proposed Conclusions of Law Nos. 1 and 2, are  
12 hereby adopted as this Board's final findings and conclusions. In addition, the following findings and  
13 conclusions are entered:  
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16 **FINDINGS OF FACT**

- 17  
18 4. Mr. McCormack's condition causally related to the industrial injury of  
19 March 4, 1980 was best described as the residuals of an anterior  
20 discectomy and cervical fusion at C5-6 and C6-7, superimposed on pre-  
21 existing degenerative changes and also carpal tunnel surgery for the right  
22 wrist.  
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24 5. As of February 11, 1983, Mr. McCormack's physical condition causally  
25 related to the industrial injury of March 4, 1980 was medically fixed and  
26 stable and his permanent partial disability was best described as Category  
27 4 of cervical and cervico-dorsal impairments, WAC 296-20-240 and 5% of  
28 the amputation value of the right arm at the wrist.  
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30 6. As of November 21, 1984, the combined effects of his March 4, 1980  
31 industrial injury and his pre-existing disabling conditions left Mr.  
32 McCormack with the following physical restrictions: lift no more than 5  
33 pounds occasionally; carry 0 pounds; no sitting, standing or walking for  
34 any great length of time; no repetitive head or neck movements.  
35  
36 7. As of November 21, 1984 to and including June 22, 1990, Mr. McCormack  
37 was permanently unable to perform any reasonably continuous gainful  
38 employment as a result of his industrial injury of March 4, 1980 together  
39 with his pre-existing physical conditions, and his age, education and work  
40 experience.

41 **CONCLUSIONS OF LAW**

- 42 3. As of November 21, 1984, to and including June 22, 1990, Harold J.  
43 McCormack was totally permanently disabled within the provisions of  
44 RCW 51.32.060 as a result of the combined effects of his industrial injury  
45 of March 4, 1980 and his pre-existing disabling condition.  
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47 4. Effective November 21, 1984, the Tradewell Group, Inc. was entitled to  
distribution of further accident costs under the provisions of RCW

1 51.16.120 with respect to the industrial injury of Harold J. McCormack on  
2 March 4, 1980.

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4 5. The Department order of May 25, 1990 which placed the claimant on the  
5 pension rolls as of June 22, 1990 with the balance of the pension reserve  
6 charged against the second injury account, is incorrect and should be  
7 reversed and the claim remanded to the Department with direction to  
8 place the claimant on the pension rolls effective November 21, 1984 and  
9 to thereupon charge the balance of the pension reserve against the  
10 second injury account.

11 It is so **ORDERED**.

12 Dated this 9<sup>th</sup> day of January, 1992.

13 BOARD OF INDUSTRIAL INSURANCE APPEALS

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16  
17 /s/ \_\_\_\_\_  
18 S. FREDERICK FELLER Chairperson

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21 /s/ \_\_\_\_\_  
22 FRANK E. FENNERTY, JR. Member

23  
24  
25 /s/ \_\_\_\_\_  
26 PHILLIP T. BORK Member