Rodriguez, Esther

DEPARTMENT

Authority to recoup overpayment of benefits

In the context of the Department's calculation of the offset of a previously paid permanent partial disability award against the pension reserve, where the Department had also paid an additional award for permanent partial disability by an order which never became final, the Department could deduct the erroneously paid permanent partial disability -- which was neither a permanent partial disability or temporary total disability award -- from time-loss compensation benefits under RCW 51.32.240(3). **….*In re Esther Rodriguez*, BIIA Dec., 91 5594 (1993)** [*Editor's Note*: Considered application in light of *Stuckey v. Department of Labor & Indus*., 129 Wn.2d 289 (1992).]

PENSION RESERVE

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

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 to reduce the worker's monthly payments accordingly to the extent the award exceeds the amount of benefits that would have been paid the worker if permanent total disability compensation had been paid in the first instance. The "first instance" refers to the first time that the worker receives a permanent partial disability award. *Overruling In re Marshall Stuckey*, BIIA Dec., 89 5977 (1991); *In re Eleanor Lewis* (I), BIIA Dec., 86 4139 (1988). **….*In re Esther Rodriguez*, BIIA Dec., 91 5594 (1993)** [*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. *Principle upheld, Stuckey v. Department of Labor & Indus.*, 129 Wn.2d 289 (1996).]

PERMANENT PARTIAL DISABILITY (RCW 51.32.080)

Permanent partial disability award paid in lieu of pension benefits

Even though worker requested permanent partial disability benefits instead of permanent total disability benefits, the receipt of pension benefits is mandatory if a worker is permanently and totally disabled. **….*In re Esther Rodriguez*, BIIA Dec., 91 5594 (1993)** [*Editor's Note: Principle upheld in Stuckey v. Department of Labor & Indus.*, 129 Wn.2d 289 (1996)]

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: ESTHER I. RODRIGUEZ	**)**	**DOCKET NO. 91 5594**
	)	
CLAIM NO. H-819863	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Esther I. Rodriguez, by
Casey & Casey, P.S., per
Carol L. Casey and Gerald L. Casey, Attorneys

Employer, Conifer Realty, Inc., by
None

Department of Labor and Industries, by
Office of the Attorney General, per
Aaron K. Owada and John R. Christensen, Assistants

This is an appeal filed by the claimant, Esther I. Rodriguez, on November 1, 1991 from an order of the Department of Labor and Industries dated October 18, 1991 which terminated time loss compensation benefits effective November 28, 1991 and determined that Ms. Rodriguez was totally and permanently disabled and awarded her benefits therefor, effective November 29, 1991. The order also determined that a permanent partial disability award in the sum of $3,592.24, including interest, would be charged against the pension reserve and the monthly payments would be reduced. Additionally, the order determined that because Ms. Rodriguez was totally permanently disabled and not permanently partially disabled, the permanent partial disability award, plus interest, in the amount of $2,250.00 was considered an overpayment and would be deducted from the monthly benefits until the amount was paid in full. The order also determined that medical treatment would not be covered after the effective date of total permanent disability. **REVERSED AND REMANDED**.

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 of Labor and Industries to a Proposed Decision and Order issued on February 11, 1993 in which the order of the Department dated October 18, 1991 was reversed and the matter was remanded to the Department to issue an order finding Ms. Rodriguez to be a permanently totally disabled worker as of October 18, 1991 and recalculating the pension reserve and monthly pension payments without any deduction for any permanent partial disability awards and pay Ms. Rodriguez any amounts deducted from the monthly pension payments.

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.

DECISION

Esther Rodriguez was injured on December 22, 1980 in the course of her employment. Ms. Rodriguez does not challenge the portion of the Department order under appeal which determined that she is a permanently totally disabled worker. Ms. Rodriguez does first argue, however, that she has the option of receiving permanent partial disability benefits in lieu of pension benefits.

Dr. John Richardson, Ms. Rodriguez's treating neurologist, testified that she sustained a permanent partial disability equal to Category 4 of cervical and cervico-dorsal impairments and a permanent partial disability equal to Category 2 of lumbar and lumbosacral impairment as a result of the December 22, 1980 industrial injury. However, Dr. Richardson also testified that Ms. Rodriguez was permanently totally disabled as a result of the industrial injury as of October 18, 1991.

Ms. Rodriguez's desire to receive permanent partial disability benefits in lieu of permanent total disability benefits, is somewhat novel. Our review of the Industrial Insurance Act leads us to conclude the compensation for permanent total disability, as provided under RCW 51.32.060, is mandatory. RCW 51.32.060(1) provides, in part: "When the supervisor of industrial insurance shall determine that permanent total disability results from the injury, the worker shall receive monthly, during the period of such disability: . . . ." (Emphasis added). The balance of this statute sets forth the various methods to compute the monthly compensation payable when permanent total disability has been determined. The only reference in the Act which would indicate an alternate form of compensation when permanent total disability has been established is found in RCW 51.32.130. This section provides for a lump-sum payment in cases of death or permanent total disability. This conversion from the monthly compensation amount to a lump-sum payment rests in the discretion of the Department.

We can find no authority for a worker to request payment of a permanent partial disability award when permanent total disability has been determined by the Department and is not challenged by the worker. Ms. Rodriguez concedes she is permanently totally disabled as a result of the industrial injury. Additionally, the evidence presented in the record before us is persuasive and unrebutted that she is permanently and totally disabled. Hence, as long as Ms. Rodriguez continues in the status of a permanently totally disabled worker, she should receive the compensation authorized by the Act.

The remaining issues in this appeal relate to: (1) the Department's calculation of the deduction, due to a previously paid permanent partial disability award plus interest, from the pension reserve

pursuant to RCW 51.32.080(2); and (2) the Department's deduction of a later erroneously paid permanent partial disability award from the monthly pension benefits as an overpayment of pension benefits pursuant to RCW 51.32.240(3).

In order to fully understand the impact of the Department's order, it is necessary to briefly review the actions of the Department in this case. This claim was originally allowed for an industrial injury of December 22, 1980. The claim was closed on May 25, 1982 with a permanent partial disability award equal to 10% of total bodily impairment for a cervical impairment. This closing order became final.

On April 15, 1983, Ms. Rodriguez filed an application to reopen her claim for a worsening of her condition related to the original injury of December 22, 1980. The claim was reopened by Department order dated April 22, 1983. The effective date of reopening was March 23, 1983.

The claim remained open until May 5, 1986 when the Department issued an order attempting to close the claim with a permanent partial disability award equal to 10% of total bodily impairment for cervical condition, over and above a pre-existing 10%, and a permanent partial disability award equal to 5% of total bodily impairment for lumbar impairment paid at 75% of the monetary value. This order was protested by the claimant on May 14, 1986.

The Department order of May 5, 1986, which paid the permanent partial disability award, never became a final order of the Department. Following the protest the Department ultimately ordered the claim to remain open. By doing so, the Department determined that Ms. Rodriguez's condition was not fixed and stable and ordered further medical treatment and time loss compensation. Eventually, the Department issued the October 18, 1991 order under appeal which closed the claim with a determination that Ms. Rodriguez was permanently totally disabled.

In calculating the benefits for permanent total disability to be paid Ms. Rodriguez, the Department is required to consider the requirements of RCW 51.32.080(2), which provide:

> 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 worker if permanent total disability compensation had been paid in the first instance, shall be deducted from the pension reserve of such injured worker and his or her monthly compensation payment shall be reduced accordingly.

This section provides a method for the Department to account for previously paid permanent partial disability awards when the worker is ultimately determined to be permanently and totally disabled.

In other words, if the Department pays a permanent partial disability award and later it is determined[1] that the injured worker was entitled to permanent total disability benefits, the Department must arrange for the payment of monetary sums in such a way that the worker will not receive more than the maximum amount he or she would be authorized. We believe RCW 51.32.080(2) intends the worker to receive only the benefits due, and not a "windfall" or a double recovery in the form of a permanent partial disability benefit which would have been in addition to the benefits that should be paid for permanent total disability. In order to avoid this, RCW 51.32.080(2) provides an accounting procedure for the Department to compare the permanent partial disability award with pension payments, and to the extent that any permanent partial disability that would have been payable from the date of the permanent partial disability award exceeds the pension entitlement, the excess must be deducted from the pension reserve. This could have the effect of somewhat reducing the monthly pension payments.

The operative portion of RCW 51.32.080(2) is the phrase "first instance". This phrase is potentially subject to some confusion. For example, it could refer to the first time an injured worker was determined to be permanently totally disabled. If this were the case our decision in this appeal would be substantially different. We believe, however, that "first instance" refers to the first time an injured worker receives a permanent partial disability award. This is consistent not only with the apparent legislative purpose of RCW 51.32.080(2) and our own previous decisions, but also consistent with the decisions of the courts of this state.

Prior to 1949, prior final awards of permanent partial disability were not deductible from the pension reserve. With the passage of RCW 51.32.080(2), the Legislature acted to change that.

> A worker who becomes permanently partially disabled as a result of a work related injury is entitled to a lump sum payment for the disability according to a schedule set forth in RCW 51.32.080. A worker who becomes permanently totally disabled as a result of a work related injury is entitled to a monthly pension, the amount of which is determined according to RCW 51.32.060. If a worker is permanently partially disabled and received a lump sum award for that injury, then later becomes permanently totally disabled, the monthly disability pension to which that worker is entitled as compensation for the total disability will be reduced to

[1]This determination may be made by the Department following a protest or reassumption, or by this Board or by an order of Superior Court following an appeal of a Department order.

> reflect the lump sum payment already received for the permanent partial disability. RCW 51.32.080(2).

Labor and Industries v. Auman, 110 Wn.2d 917 at 919, 756 P.2d 1311 (1988). Indeed, the previous lump sum permanent partial disability award could be construed as an advance on the permanent total disability benefit. Trayle v. Dep't of Labor & Indus., 70 Wn.2d 141, 422 P.2d 520 (1967).

Roger Bryant, pension adjudicator for the Department of Labor and Industries, testified regarding the computations set forth in the Department's order of October 18, 1991. Mr. Bryant testified that the permanent partial disability award ordered on May 25, 1982 was in the sum of $6,000.00. Additionally, there was $93.58 paid in interest on that award. In attempting to account for this previously paid permanent partial disability award under the provisions of RCW 51.32.080(2), the Department calculated permanent total disability benefits payable between May 25, 1982 and March 23, 1983. This amounted to the sum of $2,501.34. The Department used the date of "first instance" under the statute as the date of the order first awarding permanent partial disability or May 25, 1982. The "final" date for the period to determine the permanent total disability benefits payable was March 23, 1983 the effective date of the reopening of the claim following the application to reopen which was filed by the claimant on April 15, 1983. The Department then subtracted the permanent total disability benefits due and payable between May 25, 1982 and March 23, 1983 in the sum of $2,501.34 from the permanent partial disability award plus interest of $6,093.58. This resulted in the sum of $3,592.24 which the Department deducted from the pension reserve and reduced the monthly payments accordingly pursuant to its interpretation of RCW 51.32.080(2).

Mr. Bryant also testified regarding the Department's calculation of the second permanent partial disability award which was paid on May 5, 1986. This permanent partial disability award amounted to $2,250.00. Mr. Bryant testified that since a protest was filed to the order which awarded the permanent partial disability award and the claim was ordered to remain open following that protest, the order paying the permanent partial disability award never became final. The Department determined that since the order awarding the permanent partial disability had not become final the provisions of RCW 51.32.080(2) did not apply. Instead, the Department chose to offset the permanent partial disability award in the amount of $2,250.00 from monthly pension benefits. The Department made this offset pursuant to the provisions of RCW 51.32.240(3).

RCW 51.32.240(3) provides that:

> Whenever any payment of benefits under this title has been made pursuant to an adjudication by the department or by order of the board or any court and timely appeal therefrom has been made where the final decision is that any such payment was made pursuant to an erroneous adjudication, the recipient thereof shall repay it and recoupment may be made from any future payments due to the recipient on any claim with the state fund or self-insurer, as the case may be. The director, pursuant to rules adopted in accordance with the procedures provided in the administrative procedure act, chapter 34.05 RCW, may exercise his discretion to waive, in whole or in part, the amount of any such payments where the recovery would be against equity and good conscience.

The Department argues that RCW 51.32.240(3) is applicable in this situation since the order paying the final permanent partial disability award of $2,250.00 never became final and was an "erroneous adjudication."

The Department believes its order issued on October 18, 1991 correctly applies the provisions of RCW 51.32.080(2) and 51.32.240(3) to account for and recover the previously paid permanent partial disability awards in this case. Ms. Rodriguez contends that the Department has incorrectly applied RCW 51.32.080(2). She believes that there should be no deduction for a previously paid permanent partial disability award from the pension reserve. Additionally, Ms. Rodriguez believes that any attempt by the Department to apply RCW 51.32.240(3) is misplaced and that the Department may not recover any previously paid permanent partial disability award by offsetting current or future pension payments.

We agree with the Department that in following RCW 51.32.080(2), the date of "first instance" is the date of the first award of permanent partial disability and we have so held in a long line of cases. In re John Jensen, BIIA Dec., 32,619 (1970); In re Wade Chriswell, BIIA Dec., 43,742 (1974); In re Eleanor Lewis, BIIA Dec., 86 4139 (1988); In re Dominga Rodriguez, BIIA Dec., 86 4340 (1988). We note that both Eleanor Lewis and Dominga Rodriguez were unanimous decisions of this Board.

We disagree, however, with the Department's inclusion of interest with the permanent partial disability when calculating the difference between these sums and the pension payments. We do not believe RCW 51.32.080(2) contemplates the inclusion of interest paid on permanent partial disability awards. We hold that RCW 51.32.080(2) (which specifically refers only to permanent partial disability compensation) does not include interest paid on the permanent partial disability award. To the extent that any of our prior decisions may be inconsistent with this opinion, they are overruled.

Turning now to the "award" paid by the Department on May 5, 1986, we disagree with our industrial appeals judge that the $2,250.00 constitutes a permanent partial disability compensation. This sum was changed from a final order of compensation to an interlocutory order on August 12, 1986. Thereafter, the Department paid Ms. Rodriguez temporary total disability benefits or time loss compensation. By so doing, the Department recognized that the permanent partial disability award was premature and ordered that further treatment be provided. As permanent partial disability and temporary total disability are mutually exclusive classifications, Ms. Rodriguez was not entitled to any award for permanent partial disability on May 5, 1986.

The problem is the Department has done nothing about the $2,250.00 since it was paid in 1986. It could have converted this amount, as we have previously held, to time loss compensation, but did not do so. In re Eino Antilla, BIIA Dec., 21,097 (1963). Antilla did not involve a deduction from the pension reserve under RCW 51.32.080(2). After Antilla, the Board attempted to distinguish a situation where further time loss compensation and permanent total disability were directed on appeal from an order which was determined to have erroneously paid a permanent partial disability award, and the Board held that the Department could not account for the erroneously paid permanent partial disability by reducing the amount of time loss compensation. In re Marshall Stuckey, BIIA Dec., 89 5977 (1991). Given our analysis herein, we deem the holding in Stuckey ill advised. Stuckey must be overruled because as of the date of medical fixity the worker was not partially disabled, but totally disabled on a permanent basis. Therefore, an erroneous payment had been made.

At this juncture, Ms. Rodriguez has received a sum of money which is neither a permanent partial disability award nor temporary total disability compensation. It is unquestionably a remaining overpayment which was determined to have been erroneously paid when the Department closed the claim on October 18, 1991, not with an award of permanent partial disability, but rather, with an award of permanent total disability. Given this analysis, we agree with the Department that the amount paid to Ms. Rodriguez on May 5, 1986 was erroneously paid and may be recouped under the provisions of RCW 51.32.240(3).

In view of our holding that the award paid on May 5, 1986 does not constitute an award paid for permanent partial disability, we do not need to enter into a discussion of how to compute permanent partial disability awards paid on different dates. Thus, we do not confront the possible issue of multiple dates of "first instance" except to restate our belief that "first instance" refers to the

"first advance" on permanent total disability benefits paid to an injured worker in the form of a permanent partial disability award.

In trying to determine if there is an excess to be deducted from the pension reserve, as required by RCW 51.32.080(2), we do note that in the process of comparing the permanent partial disability award paid on May 25, 1982 with the pension payments that would have been paid starting at that time, that no period where Ms. Rodriguez was receiving temporary total disability benefits should be included in the calculation. John Jensen, supra.

Finally, the Department's attempt to place Ms. Rodriguez on the pension rolls effective November 29, 1991 is in error. The testimony of Dr. Richardson establishes that Ms. Rodriguez was permanently totally disabled as of October 18, 1991. The date of permanent total disability must conform to the evidence. The facts in this record establish that Ms. Rodriguez was permanently totally disabled as of October 18, 1991.

We remand this claim to the Department to determine if there is an excess of permanent partial disability payments over the amount of pension benefits, if such benefits had been paid on the "first instance" on May 25, 1982 with no deduction for interest paid, and for other action consistent with this order.

FINDINGS OF FACT

1. On February 10, 1981 Esther Rodriguez filed an application for benefits with the Department of Labor and Industries alleging that she injured her neck and back on December 22, 1980 while working for Conifer Realty, Inc. The Department accepted the claim and provided benefits.

   On May 25, 1982, the Department entered an order paying compensation for a permanent partial disability equal to 10% of unspecified disabilities in the amount of $6,000.00 plus interest of $93.58 and closed the claim with time loss compensation as paid.

   Ms. Rodriguez filed an application to reopen for aggravation of condition on April 15, 1983. On April 22, 1983, the Department ordered the claim reopened effective March 23, 1983 for authorized treatment and action as indicated.

   On May 5, 1986, the Department entered an order paying compensation for permanent partial disabilities equal to 10% as compared to total bodily impairment for cervical impairment over and above pre-existing 10% impairment; and a permanent partial disability award equal to 5% as

compared to total bodily impairment for lumbar impairment paid at 75% of the monetary value, less prior awards, and closed the claim.

On October 18, 1991, the Department of Labor and Industries issued an order which terminated time loss compensation benefits as paid through November 28, 1991, found the claimant to be permanently and totally disabled effective November 29, 1991, charged the permanent partial disability award in the sum of $3,592.24 made on May 25, 1982 against the pension reserve, reduced the monthly payment, found that since the worker is totally and permanently disabled and not permanently partially disabled the permanent partial disability award plus interest in the amount of $2,250.00 is considered an overpayment and will be deducted from monthly benefits until the amount is paid in full and ordered that medical treatment will not be covered after November 29, 1991.

On November 1, 1991, the claimant filed a notice of appeal of the Department order of October 18, 1991. On December 11, 1991 the Board granted the appeal and assigned Docket No. 91 5594 and directed that further proceedings be held.

2. On December 22, 1980 while in the course of her employment with Conifer Realty, Esther Rodriguez sustained an industrial injury when the car she was driving was involved in a collision. As a result of the collision, Ms. Rodriguez sustained an injury to her neck and back.

3. As of October 18, 1991, the claimant's condition causally related to the industrial injury of December 22, 1980 were fixed and stable.

4. As of October 18, 1991 and as a result of the industrial injury of December 27, 1980, Ms. Rodriguez was incapable of gainful employment on a reasonably continuous.

5. On May 5, 1986, Ms. Rodriguez was erroneously paid the sum of $2,250.00 as an award for permanent partial disability.

CONCLUSIONS OF LAW

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

2. As of October 18, 1991, Ms. Rodriguez was a permanently and totally disabled worker within the meaning of RCW 51.08.160, and as such, shall receive compensation under the Industrial Insurance Act as a permanently totally disabled worker as set forth in RCW51.32.060.

3. The date of first instance within the meaning of RCW 51.32.080(2) is May 25, 1982, when Ms. Rodriguez was paid a permanent partial disability award in the amount of $6,000.00.

4. Interest in the amount of $93.58 paid to Ms. Rodriguez on May 25, 1982 is not a permanent partial disability award within the meaning of RCW 51.32.080(2).

5. The October 18, 1991 order of the Department of Labor and Industries, which terminated time loss compensation benefits as paid through November 28, 1991, found the claimant was a permanently and totally disabled worker effective November 29, 1991, charged a portion of the permanent partial disability award in the sum of $3,592.24 made on May 25, 1982 against the pension reserve, reduced the monthly payment, found that since the worker is totally and permanently disabled and not permanently partially disabled, the permanent partial disability award plus interest in the amount of $2,250.00 is considered an overpayment and will be deducted from monthly benefits until the amount is paid in full, and ordered that medical treatment will not be covered after November 29, 1991, is incorrect and should be reversed. This matter is remanded to the Department of Labor and Industries to issue an order finding the claimant to be a permanently totally disabled worker as of October 18, 1991, with direction to determine the amount, if any, of the previously paid permanent partial disability in the amount of $6,000.00, without interest, which may be in excess of pension payments that would have been paid from May 25, 1982, and to deduct any such excess in accordance with RCW 51.32.080(2), and to determine that an overpayment existed in the amount of $2,250.00, and to order the deduction of the overpayment from future monthly pension payments.

It is so ORDERED.

Dated this 16th day of September, 1993.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/ _____
S. FREDERICK FELLER Chairperson

/s/ _____
ROBERT L. McCALLISTER Member