Midkiff, Michael

PERMANENT PARTIAL DISABILITY (RCW 51.32.080)

Schedule of benefits

When there are successive injuries to the same region of the body and different schedules of benefits are involved, the worker is entitled to the percentage of total bodily impairment due to the second injury, less the percentage of total bodily impairment from to the first injury, based on the schedule of benefits in effect on the date of the later injury. *Citing Corak v. Department of Labor & Indus*., 2 Wn. App. 792 (1970). ***….In re Michael Midkiff*, BIIA Dec., 95 4715 (1997)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: MICHAEL J. MIDKIFF	**)**	**DOCKET NO. 95 4715**
	)	
CLAIM NO. K-836835	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Michael J. Midkiff, by
Law Office of Dana Madsen, per
Dana C. Madsen

Employer, State of Washington, Department of Social and Health Services,
None

Department of Labor and Industries, by
The Office of the Attorney General, per
Cynthia A. Sypolt, Assistant

The claimant, Michael J. Midkiff, filed an appeal with the Board of Industrial Insurance Appeals on September 18, 1995, from an order of the Department of Labor and Industries dated August 18, 1995. The order affirmed an order dated December 28, 1994, that set aside and held for naught an earlier order, and closed the claim without award for permanent partial disability beyond that paid under Claim No. J-498190. **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 September 11, 1996, in which the order of the Department dated August 18, 1995, was reversed and remanded to the Department with direction to pay the claimant a permanent partial disability award commensurate with Category 2, WAC 296-20-280, in accordance with the schedule of benefits in existence on September 16, 1988, less prior awards, and to thereupon close the claim.

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

The claimant sustained an industrial injury to his low back on September 24, 1984. That claim was assigned Claim No. J-498190, and was eventually closed with an award for permanent partial disability consistent with that described by Category 2 of the categories of permanent dorso-lumbar and lumbosacral impairments, WAC 296-20-280.

The claimant suffered a second industrial injury to his low back on September 16, 1988. That claim was assigned Claim No. K-836835, and is the subject of the present appeal. The medical evidence in the record before us is undisputed that the claimant's current disability following the second industrial injury is best described by Category 2 of WAC 296-20-280, and the claimant does not object to that determination. Rather, because of an increase in the schedule of benefits, the claimant argues that he should be awarded the monetary difference between a Category 2 award under the schedule of benefits in effect at the time of his 1984 industrial injury, and a Category 2 award under the schedule of benefits in effect at the time of his 1988 industrial injury. We disagree.

The issue before us is the extent of disability proximately caused by the industrial injury of September 16, 1988. Because the claimant's low back had been permanently partially disabled prior to the latter injury, the applicable statute is RCW 51.32.080(5), that provides, as follows:

> 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.

We have previously stated that in applying this statute, the first step is to determine the extent of permanent partial disability attributable to the second industrial injury. *In re Clarence Allen,* Dckt. No. 88 4656 (February 14, 1990). This is accomplished by subtracting the preexisting

disability from the current disability; the difference represents the disability attributable to the second injury.

In the present case, it is undisputed that the claimant's current disability is best described by Category 2 of WAC 296-20-280, and that the preexisting disability is also best described by Category 2 of WAC 296-20-280. It is, therefore, evident that the claimant has suffered no increase in disability attributable to the second injury, and that the Department order on appeal is correct.

The result reached in the Proposed Decision and Order is premised on the erroneous assumption that, if the claimant's disability following the second injury had been greater than that described by Category 2, the Department would have first computed the dollar value payable for the claimant's current disability, and simply subtracted the dollar amount previously paid to the claimant. Such an approach can only be used when both awards are made pursuant to the same schedule of benefits.

When, as here, different schedules of benefits are involved, the Department must subtract the percentage of total bodily impairment resulting from the first injury from the percentage of total bodily impairment representing the claimant's current disability following the second injury; the difference is then paid to the claimant according to the schedule of benefits in effect on the date of the latter injury. *Corak v. Department of Labor & Indus.,* 2 Wn. App. 792, 469 P.2d 957 (1970). To do as suggested in the Proposed Decision and Order would have the effect of compensating the claimant for his earlier injury on the basis of the schedule of benefits in effect on the date of his second injury. Such a result would conflict with the long-established rule that disability is to be compensated in accordance with the schedule of benefits in effect on the date of the injury. *See, Ashenbrenner v. Department of Labor & Indus.,* 62 Wn.2d 22, 380 P.2d 730 (1963). Only the increased disability, if any, proximately caused by the 1988 industrial injury can be compensated under the schedule of benefits in effect in 1988.

The Department order of August 18, 1995, that affirmed an order dated December 28, 1994, that closed this claim with no award for permanent partial disability beyond that awarded in Claim No. J-498190, is correct and is affirmed.

FINDINGS OF FACT

1. On September 22, 1988, the Department of Labor and Industries received from the claimant, Michael J. Midkiff, a claim for benefits alleging injury on September 16, 1988, during the course of his employment with the Department of Social and Health Services. The claim was allowed and benefits provided. On August 18, 1995, the Department issued an order affirming the provisions of an order dated December 28, 1994, that closed the claim without award for permanent partial disability award beyond that paid under Claim No. J-498190 (Category 2, WAC 296-20-280).

   On September 18, 1995, the Board of Industrial Insurance Appeals received from the claimant a Notice of Appeal of the Department's order dated August 18, 1995, and assigned the appeal Docket No. 95 4715. On September 21, 1995, the Board issued an order granting the appeal.

2. On September 16, 1988, the claimant, while employed as a counselor for the Department of Social and Health Services, sustained an injury to his low back when descending wet steps, his feet slipped out from under him. Immediately thereafter he began experiencing numbness and burning in his buttocks and legs, greater on the right than the left.

3. As a proximate result of the injury of September 16, 1988, the claimant sustained a lumbosacral sprain with symptoms and signs consistent with periodic S1 nerve root irritation on the right, but without evidence of significant nerve root compression.

4. On September 24, 1984, the claimant sustained injury to his low back while employed by the Salvation Army. For that injury, the claimant received periodic chiropractic treatment, and did not miss significant time from work. That claim, No. J-498910, was closed with a permanent partial disability award reflected by Category 2, WAC 296-20-280. After claim closure, the claimant periodically had localized low back pain.

5. As of August 18, 1995, the claimant's condition, proximately caused by the industrial injury of September 16, 1988, was fixed and stable, not in need of further treatment, and resulted in permanent impairment best described by Category 2 of WAC 296-20-280.

6. As of August 18, 1995, the claimant had sustained no increase in disability proximately caused by the industrial injury of September 16, 1988.

CONCLUSIONS OF LAW

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

2. As of August 18, 1995, the claimant's impairment proximately resulting from the injury of September 16, 1988, was most accurately reflected in Category 2, WAC 296-20-280, as that regulation existed on September 16, 1988.

3. The order of the Department of Labor and Industries dated August 18, 1995, that affirmed an order dated December 28, 1994, that closed this claim with no award for permanent partial disability beyond that awarded under Claim J-498910, is correct, and is affirmed.

It is so ORDERED.

Dated this 28th day of January, 1997.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
S. FREDERICK FELLER Chairperson

/s/_____
JUDITH E. SCHURKE Member