

## **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)**

Scroll down for order.

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

1 **IN RE:     MICHAEL J. MIDKIFF                                     )** **DOCKET NO. 95 4715**  
2   )  
3 **CLAIM NO. K-836835   )** **DECISION AND ORDER**  
4 \_\_\_\_\_

5 **APPEARANCES:**

6  
7         Claimant, Michael J. Midkiff, by  
8         Law Office of Dana Madsen, per  
9         Dana C. Madsen

10  
11         Employer, State of Washington, Department of Social and Health Services,  
12         None

13  
14         Department of Labor and Industries, by  
15         The Office of the Attorney General, per  
16         Cynthia A. Sypolt, Assistant

17  
18         The claimant, Michael J. Midkiff, filed an appeal with the Board of Industrial Insurance  
19  
20 Appeals on September 18, 1995, from an order of the Department of Labor and Industries dated  
21  
22 August 18, 1995. The order affirmed an order dated December 28, 1994, that set aside and held  
23  
24 for naught an earlier order, and closed the claim without award for permanent partial disability  
25  
26 beyond that paid under Claim No. J-498190. **AFFIRMED.**

27  
28   )  
29   )  
30   )  
31   )  
32   )  
33   )  
34   )  
35   )  
36   )  
37   )  
38   )  
39   )  
40   )  
41   )  
42   )  
43   )  
44   )  
45   )  
46   )  
47   )

**DECISION**

30         Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review  
31  
32 and decision on a timely Petition for Review filed by the Department to a Proposed Decision and  
33  
34 Order issued on September 11, 1996, in which the order of the Department dated August 18, 1995,  
35  
36 was reversed and remanded to the Department with direction to pay the claimant a permanent  
37  
38 partial disability award commensurate with Category 2, WAC 296-20-280, in accordance with the  
39  
40 schedule of benefits in existence on September 16, 1988, less prior awards, and to thereupon  
41  
42 close the claim.

43  
44         The Board has reviewed the evidentiary rulings in the record of proceedings and finds that  
45  
46 no prejudicial error was committed and the rulings are affirmed.

1 The claimant sustained an industrial injury to his low back on September 24, 1984. That  
2 claim was assigned Claim No. J-498190, and was eventually closed with an award for permanent  
3 partial disability consistent with that described by Category 2 of the categories of permanent  
4 dorso-lumbar and lumbosacral impairments, WAC 296-20-280.  
5  
6  
7

8  
9 The claimant suffered a second industrial injury to his low back on September 16, 1988.  
10 That claim was assigned Claim No. K-836835, and is the subject of the present appeal. The  
11 medical evidence in the record before us is undisputed that the claimant's current disability  
12 following the second industrial injury is best described by Category 2 of WAC 296-20-280, and the  
13 claimant does not object to that determination. Rather, because of an increase in the schedule of  
14 benefits, the claimant argues that he should be awarded the monetary difference between a  
15 Category 2 award under the schedule of benefits in effect at the time of his 1984 industrial injury,  
16 and a Category 2 award under the schedule of benefits in effect at the time of his 1988 industrial  
17 injury. We disagree.  
18  
19  
20  
21  
22  
23  
24  
25  
26

27 The issue before us is the extent of disability proximately caused by the industrial injury of  
28 September 16, 1988. Because the claimant's low back had been permanently partially disabled  
29 prior to the latter injury, the applicable statute is RCW 51.32.080(5), that provides, as follows:  
30  
31  
32

33 Should a worker receive an injury to a member or part of his or  
34 her body already, from whatever cause, permanently partially disabled,  
35 resulting in the amputation thereof or in an aggravation or increase in  
36 such permanent partial disability but not resulting in the permanent total  
37 disability of such worker, his or her compensation for such partial  
38 disability shall be adjudged with regard to the previous disability of the  
39 injured member or part and the degree or extent of the aggravation or  
40 increase of disability thereof.  
41

42 We have previously stated that in applying this statute, the first step is to determine the  
43 extent of permanent partial disability attributable to the second industrial injury. *In re Clarence*  
44 *Allen*, Dckt. No. 88 4656 (February 14, 1990). This is accomplished by subtracting the preexisting  
45  
46  
47

1 disability from the current disability; the difference represents the disability attributable to the  
2  
3 second injury.

4  
5 In the present case, it is undisputed that the claimant's current disability is best described by  
6  
7 Category 2 of WAC 296-20-280, and that the preexisting disability is also best described by  
8  
9 Category 2 of WAC 296-20-280. It is, therefore, evident that the claimant has suffered no increase  
10  
11 in disability attributable to the second injury, and that the Department order on appeal is correct.

12  
13 The result reached in the Proposed Decision and Order is premised on the erroneous  
14  
15 assumption that, if the claimant's disability following the second injury had been greater than that  
16  
17 described by Category 2, the Department would have first computed the dollar value payable for  
18  
19 the claimant's current disability, and simply subtracted the dollar amount previously paid to the  
20  
21 claimant. Such an approach can only be used when both awards are made pursuant to the same  
22  
23 schedule of benefits.

24  
25 When, as here, different schedules of benefits are involved, the Department must subtract  
26  
27 the percentage of total bodily impairment resulting from the first injury from the percentage of total  
28  
29 bodily impairment representing the claimant's current disability following the second injury; the  
30  
31 difference is then paid to the claimant according to the schedule of benefits in effect on the date of  
32  
33 the latter injury. *Corak v. Department of Labor & Indus.*, 2 Wn. App. 792, 469 P.2d 957 (1970). To  
34  
35 do as suggested in the Proposed Decision and Order would have the effect of compensating the  
36  
37 claimant for his earlier injury on the basis of the schedule of benefits in effect on the date of his  
38  
39 second injury. Such a result would conflict with the long-established rule that disability is to be  
40  
41 compensated in accordance with the schedule of benefits in effect on the date of the injury. See,  
42  
43 *Ashenbrenner v. Department of Labor & Indus.*, 62 Wn.2d 22, 380 P.2d 730 (1963). Only the  
44  
45 increased disability, if any, proximately caused by the 1988 industrial injury can be compensated  
46  
47 under the schedule of benefits in effect in 1988.

1 The Department order of August 18, 1995, that affirmed an order dated December 28, 1994,  
2  
3 that closed this claim with no award for permanent partial disability beyond that awarded in  
4  
5 Claim No. J-498190, is correct and is affirmed.  
6

### 7 FINDINGS OF FACT

8  
9 1. On September 22, 1988, the Department of Labor and Industries  
10 received from the claimant, Michael J. Midkiff, a claim for benefits  
11 alleging injury on September 16, 1988, during the course of his  
12 employment with the Department of Social and Health Services. The  
13 claim was allowed and benefits provided. On August 18, 1995, the  
14 Department issued an order affirming the provisions of an order dated  
15 December 28, 1994, that closed the claim without award for permanent  
16 partial disability award beyond that paid under Claim No. J-498190  
17 (Category 2, WAC 296-20-280).  
18

19 On September 18, 1995, the Board of Industrial Insurance Appeals  
20 received from the claimant a Notice of Appeal of the Department's order  
21 dated August 18, 1995, and assigned the appeal Docket No. 95 4715.  
22 On September 21, 1995, the Board issued an order granting the appeal.  
23

24 2. On September 16, 1988, the claimant, while employed as a counselor for  
25 the Department of Social and Health Services, sustained an injury to his  
26 low back when descending wet steps, his feet slipped out from under  
27 him. Immediately thereafter he began experiencing numbness and  
28 burning in his buttocks and legs, greater on the right than the left.  
29

30 3. As a proximate result of the injury of September 16, 1988, the claimant  
31 sustained a lumbosacral sprain with symptoms and signs consistent  
32 with periodic S1 nerve root irritation on the right, but without evidence of  
33 significant nerve root compression.  
34

35 4. On September 24, 1984, the claimant sustained injury to his low back  
36 while employed by the Salvation Army. For that injury, the claimant  
37 received periodic chiropractic treatment, and did not miss significant  
38 time from work. That claim, No. J-498910, was closed with a  
39 permanent partial disability award reflected by Category 2, WAC 296-  
40 20-280. After claim closure, the claimant periodically had localized low  
41 back pain.  
42

43 5. As of August 18, 1995, the claimant's condition, proximately caused by  
44 the industrial injury of September 16, 1988, was fixed and stable, not in  
45 need of further treatment, and resulted in permanent impairment best  
46 described by Category 2 of WAC 296-20-280.  
47

1 6. As of August 18, 1995, the claimant had sustained no increase in  
2 disability proximately caused by the industrial injury of September 16,  
3 1988.

4  
5 **CONCLUSIONS OF LAW**  
6

- 7 1. The Board of Industrial Insurance Appeals has jurisdiction over the  
8 parties and subject matter of this appeal.  
9  
10 2. As of August 18, 1995, the claimant's impairment proximately resulting  
11 from the injury of September 16, 1988, was most accurately reflected in  
12 Category 2, WAC 296-20-280, as that regulation existed on  
13 September 16, 1988.  
14  
15 3. The order of the Department of Labor and Industries dated  
16 August 18, 1995, that affirmed an order dated December 28, 1994, that  
17 closed this claim with no award for permanent partial disability beyond  
18 that awarded under Claim J-498910, is correct, and is affirmed.  
19

20 It is so ORDERED.  
21

22 Dated this 28th day of January, 1997.  
23

24 BOARD OF INDUSTRIAL INSURANCE APPEALS  
25  
26  
27

28 /s/ \_\_\_\_\_  
29 S. FREDERICK FELLER Chairperson  
30

31  
32 /s/ \_\_\_\_\_  
33 JUDITH E. SCHURKE Member  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47