

DeLozier, David

PERMANENT PARTIAL DISABILITY (RCW 51.32.080)

Multiple levels of the spine

WAC 296-20-250(1)(e) requires that any thoracic impairment that involves the cervical or lumbosacral area be evaluated under the rules for evaluating lumbosacral or cervical impairment. However, the rule is only used when the medical evidence does not permit a distinction when evaluating the conditions. Two separate and distinct areas of impairment allow for separate ratings of the impairment of thoracic and lumbosacral spine.*In re David DeLozier, BIIA Dec., 96 4488 (1997)* [Editor's Note: Reversed, *Department of Labor & Indus. v. DeLozier*, 100 Wn. App. 73 (2000).]

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

1 **IN RE: DAVID L. DELOZIER)** **DOCKET NO. 96 4488**
2)
3 **CLAIM NO. N-293185)** **DECISION AND ORDER**
4 _____

5 APPEARANCES:

6
7 Claimant, David L. Delozier, by
8 Annan & Fairley, per
9 Edgar (Ned) L. Annan

10
11 Employer, Conover Concrete Products Company,
12 None

13
14 Department of Labor and Industries, by
15 The Office of the Attorney General, per
16 O. Marie Palachuk, Assistant

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18 The claimant, David L. Delozier, filed an appeal with the Board of Industrial Insurance
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20 Appeals on July 3, 1996, from an order of the Department of Labor and Industries dated June 21,
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22 1996. That order affirmed the Department order dated September 12, 1995, that ended time loss
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24 compensation as paid to August 23, 1994, and closed the claim without further award for
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26 permanent partial disability or time loss compensation. **REVERSED AND REMANDED.**

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28 **DECISION**

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30 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
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32 and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order
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34 issued on June 27, 1997, in which the order of the Department dated June 21, 1996, was reversed
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36 and remanded to the Department with directions to issue an order closing the claim with time loss
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38 compensation as paid, and paying a permanent partial disability equal to Category 4, pursuant to
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40 WAC 296-20-280, less prior awards, and to take such further action as is required under the law
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42 and pursuant to the facts.

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44 The parties submitted the appeal to the Board for determination based on a factual
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46 stipulation of the parties dated April 23, 1997.
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1 The parties stipulated that Mr. Delozier sustained a compensable industrial injury on
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3 February 6, 1992, while in the course of his employment with Conover Concrete Products
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5 Company, Spokane, Washington. The Department, based on medical recommendations,
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7 accepted conditions diagnosed as lumbar strain/sprain with L5-S1 disc herniation and thoracic
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9 strain/sprain with right T11-12 disc herniation. Benefits were paid and the claim was closed with a
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11 permanent partial disability paid equal to Category 3 for dorso-lumbar and/or lumbosacral
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13 impairments. Mr. Delozier argued that these were injuries to separate and distinct portions of his
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15 spine and should be rated separately for the impairments caused. The Department argued that
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17 WAC 296-20-250(1)(e) requires any thoracic impairment that also involves the cervical or lumbar
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19 areas shall be evaluated only under the cervical and cervico-dorsal or dorso-lumbar and
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21 lumbosacral categories. The Department, therefore, argues that the resulting impairment in the
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23 instant case may only be rated under WAC 296-20-280 for lumbosacral or dorso-lumbar
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25 categories.

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27 Our industrial appeals judge accepted the argument of the Department and limited any
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29 compensation Mr. Delozier was to get to that which is awarded under dorso-lumbar and
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31 lumbosacral categories. We disagree.

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33 The parties stipulated that if he were called to testify, Dr. Jeffrey Hirschauer, the attending
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35 physician for Mr. Delozier between April 1992 and August 1993, would state the compression
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37 fractures at T11-12 were due to an industrial injury in 1986. Dr. Hirschauer received the history of
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39 the February 6, 1992 injury that Mr. Delozier slipped on some ice, fell backwards, landed on his
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41 back, hips, and back of his head, and felt a sudden severe onset of pain in both his lower thoracic
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43 spine and low back. X-rays taken in March 1992 showed the old fractures at T11-12, but the
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45 thoracic and lumbar spine films were otherwise unremarkable. An MRI scan of Mr. Delozier's
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47 lumbar spine taken April 27, 1992, did show a herniation of the disc between L5 and S1.

1 Dr. Hirschauer performed a discectomy on June 9, 1992, at that level. After the surgery,
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3 Mr. Delozier's thoracic pain continued. An MRI scan of the lumbar spine in September 1992
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5 showed the evidence of the discectomy at L5-S1 without any disc herniation at that level.
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7 However, an MRI scan done on November 9, 1992, of the dorso-lumbar spine showed a herniation
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9 at T11-12. Dr. Hirschauer performed a discectomy on March 31, 1993, to repair the disc herniation
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11 at T11-12. In Dr. Hirschauer's opinion, the thoracic disc problem occurred at the time of, or at least
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13 was subsequently aggravated by, the injury on February 6, 1992.

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15 The parties stipulated that if he were called to testify, Dr. Keith Mackenzie, also
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17 Mr. Delozier's attending physician since October 1993, would state that Mr. Delozier suffered two
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19 separate problems from his injury of February 6, 1992. Mr. Delozier suffered a thoracic problem,
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21 for which he underwent the T11-12 discectomy, and the lumbosacral problem, for which he
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23 underwent the L5-S1 laminectomy. Dr. Mackenzie would rate the dorsal area impairment
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25 separately from the lumbar impairment and the rating for the dorsal area would be Category 2,
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27 under WAC 296-20-250. With respect to the lumbosacral impairment, the doctor would rate that as
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29 a Category 4 under WAC 296-20-280.

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31 Lastly, the parties stipulated that if he were called to testify, Dr. Warren Adams would state
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33 that he, as a member of a panel, examined Mr. Delozier on October 3, 1993. He rated
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35 Mr. Delozier's impairment due to the industrial injury as Category 3 of WAC 296-20-280 for
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37 dorso-lumbar and lumbosacral impairments. Dr. Adams would state he again examined
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39 Mr. Delozier on April 12, 1996, in a panel setting, and his rating was Category 2 for thoracic
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41 impairment, with a preexisting Category 2 in that area, due to the old deformities at T11-12. If
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43 called to testify, Dr. Adams would reiterate his rating of Category 3 for Mr. Delozier's lumbosacral
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45 spine as of April 12, 1996.

1 WAC 296-20-250(1)(e) states: "Impairments which also involve the cervical or lumbar
2 areas shall be evaluated only under the cervical and cervico-dorsal or dorso/lumbar and
3 lumbar and cervico-lumbar categories." We understand this regulation as being confined to those instances of
4 lumbar and cervico-lumbar categories." We understand this regulation as being confined to those instances of
5 injury where it is impossible for the medical community to separate the impairments. The classic
6 examples would be where an injury encompassed juxtaposed cervical and thoracic vertebral
7 bodies or thoracic and lumbar vertebral bodies.
8

9 In the instant case, Mr. Delozier suffered impairments in his spine that are separated by a
10 considerable distance from each other. The impairment to his thoracic spine is at the level of
11 T11-12, which is near to the beginning of the lumbar area of the spine. The injury to the low back,
12 however, is at the bottom of the lumbar spine where it articulates with the sacrum. There are four
13 vertebral bodies and five discs in between the impaired areas of Mr. Delozier's spine.
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15 We have addressed such a situation on two occasions. In the case of *In re Lou Prickett*,
16 Dckt. No. 86 4669 (March 23, 1989), we noted that neither of the doctors involved in that case
17 could "make practical distinctions when discussing the clinical presentation of these problems, and
18 indicated that the impairment resulting in the cervical-thoracic spine alone and together does not
19 exceed that described by Category 2." *Prickett*, at 9. Because they were not separate, we
20 concluded that the thoracic impairment and the cervical impairment suffered by Ms. Prickett were
21 to be evaluated under WAC 296-20-240, categories of permanent cervical and cervico-dorsal
22 impairments. However, in the case of *In re Joanne McGrath*, Dckt. No. 90 1748 (August 19, 1991),
23 where Ms. McGrath suffered impairment in her thoracic spine at the level T11-12, and also at the
24 lumbar area at L4 through S1, we found Ms. McGrath had suffered a permanent partial disability in
25 each area of her spine, and those areas should be rated separately.
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27 In the instant case, the two attending physicians, and specifically, Dr. Mackenzie, indicate
28 that there are two separate and distinct areas of impairment in Mr. Delozier's spine. Both of those
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1 impairments are causally related to the industrial injury of February 6, 1992. Mr. Delozier should be
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3 compensated for those separate bodily impairments.
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5 After consideration of the Proposed Decision and Order, the Petition for Review filed
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7 thereto, and a careful review of the entire record before us, we make the following:
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9 **FINDINGS OF FACT**

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11 1. On February 10, 1992, the claimant, David L. Delozier, filed an
12 application for benefits with the Department of Labor and Industries
13 alleging an industrial injury on February 6, 1992, while in the course of
14 his employment with Conover Concrete Products Company. On
15 March 9, 1992, the Department issued an order allowing the claim. On
16 February 3, 1995, the Department issued an order allowing the lumbar
17 condition and a temporary aggravation to a preexisting condition, paid a
18 permanent partial disability award of Category 3, WAC 296-20-280, and
19 closed the claim.
20

21 On February 13, 1995, Mr. Delozier filed a protest and request for
22 reconsideration of the Department order dated February 3, 1995. On
23 March 27, 1995, the Department issued an order setting aside the
24 Department order dated February 3, 1995, and held the claim open for
25 treatment. On September 12, 1995, the Department issued an order
26 ending time loss compensation as paid to August 23, 1994, and closed
27 the claim without paying further awards of time loss compensation or
28 permanent partial disability.
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30 On September 25, 1995, Mr. Delozier filed a protest and request for
31 reconsideration of the Department order dated September 12, 1995.
32 On January 16, 1996, the Department issued an order holding the
33 Department order dated September 25, 1995, in abeyance. On
34 June 21, 1996, the Department issued an order affirming the provisions
35 of an order dated September 12, 1995.
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2 On July 3, 1996, Mr. Delozier filed a Notice of Appeal with the Board of
3 Industrial Insurance Appeals from the Department order dated June 21,
4 1996. On August 1, 1996, the Board issued an order granting the
5 appeal and assigning it Docket No. 96 4488.
6

- 7 2. In 1986, David L. Delozier suffered an industrial injury resulting in
8 compression fractures at T11-12. Mr. Delozier was off work for four
9 days and was treated conservatively approximately two dozen times per
10 year until 1992.
11
12 3. On February 6, 1992, while in the course of employment with Conover
13 Concrete Products Company, Mr. Delozier slipped on ice, causing him
14 to fall backwards and land on his back, hips, and the back of his head.
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16 4. The industrial injury of February 6, 1992, was a proximate cause of
17 Mr. Delozier's lumbosacral and thoracic strain/sprain, herniated discs
18 and surgical treatment.
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20 5. As of June 21, 1996, Mr. Delozier's conditions, proximately caused by
21 the industrial injury of February 6, 1992, were fixed and not in need of
22 further medical treatment.
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24 6. As of June 21, 1996, Mr. Delozier's permanent partial disabilities,
25 proximately caused by the industrial injury of February 6, 1992, were
26 equal to Category 4, WAC 296-20-280, for permanent dorso-lumbar and
27 lumbosacral impairments, and Category 2, WAC 296-20-260, for
28 permanent dorsal impairments.
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30 7. From August 23, 1994 to June 21, 1996, inclusive, Mr. Delozier was
31 capable of gainful employment on a reasonably continuous basis.
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33 CONCLUSIONS OF LAW

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35 1. The Board of Industrial Insurance Appeals has jurisdiction over the
36 parties and the subject matter of this appeal.
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38 2. From August 23, 1994 to June 21, 1996, inclusive, Mr. Delozier was not
39 a totally and temporarily disabled worker as contemplated by
40 RCW 51.32.090.
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42 3. The Department order dated June 21, 1996, that affirmed the provisions
43 of the Department order dated June 12, 1995, that closed the claim with
44 time loss compensation as paid to August 23, 1994, and without further
45 award for permanent partial disability, is incorrect and is reversed. This
46 claim is remanded to the Department to issue an order closing the claim
47 with time loss compensation as paid, and paying a permanent partial
disability equal to Category 4 of WAC 296-20-280, and a permanent

1 partial disability equal to Category 2 of WAC 296-20-260, less prior
2 awards.
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4 It is so ORDERED.
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6 Dated this 1st day of October, 1997.
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10 BOARD OF INDUSTRIAL INSURANCE APPEALS
11

12 /s/ _____
13 S. FREDERICK FELLER Chairperson
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16

17 /s/ _____
18 FRANK E. FENNERTY, JR. Member
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22 /s/ _____
23 JUDITH E. SCHURKE Member
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