

Eddy, James

PERMANENT TOTAL DISABILITY (RCW 51.08.160)

Effective date of pension

The worker continued to be totally temporarily disabled until a vocational expert concluded that he was unable to benefit from vocational services. The vocational counselor's assessment and conclusion were necessary to establish vocational fixity and the worker's entitlement to permanent total disability benefits. The earliest date these facts are shown to be in existence is the date of the vocational counselor's assessment report. Accordingly, the date of the vocational counselor's assessment is the effective date of the worker status as permanently and totally disabled. *Citing In re Roger Neuman*, BIIA Dec., 97 7648 (1999). ...*In re James Eddy*, BIIA Dec., 99 18062 (2000)

Scroll down for order.

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

1 **IN RE: JAMES M. EDDY**) **DOCKET NO. 99 18062**
2)
3 **CLAIM NO. W-122246**) **DECISION AND ORDER**
4

5 **APPEARANCES:**

6
7 Claimant, James M. Eddy, by
8 D. James Tree

9
10 Self-Insured Employer, Boise Cascade Corporation, by
11 VavRosky, MacColl, Olson & Pfeifer, P.C., per
12 Stephen L. Pfeifer

13
14 Department of Labor and Industries, by
15 The Office of the Attorney General, per
16 Timothy S. Hamill, Assistant
17

18
19 The self-insured employer, Boise Cascade Corporation, filed an appeal with the Board of
20 Industrial Insurance Appeals on July 26, 1999, from an order of the Department of Labor and
21 Industries dated July 15, 1999. The order affirmed a Department order of April 23, 1999, and
22 directed the self-insured employer to pay time loss compensation benefits from July 25, 1998 to
23 April 28, 1999, in the amount of \$17,222.10. The Department issued two orders on April 23, 1999.
24 One of the orders awarded the claimant permanent total disability benefits effective April 29, 1999.
25 The other order indicated that the permanent partial disability caused by the industrial injury would
26 have resulted in a permanent partial disability award of \$11,588.59 and that the classification of
27 total permanent disability resulted from this disability combined and superimposed upon prior
28 disabling conditions. It directed the self-insured employer to submit to the Department of Labor and
29 Industries the sum of \$11,588.59 and stated that the balance of the pension reserve required to pay
30 the claimant's pension would be charged against the second injury fund account. **REVERSED**
31 **AND REMANDED.**
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1 **DECISION**

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3 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
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5 and decision on a timely Petition for Review filed by the Department of Labor and Industries to a
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7 Proposed Decision and Order issued on April 17, 2000. The Proposed Decision and Order
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9 reversed the Department order dated July 15, 1999, and remanded the matter to the Department
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11 with directions to issue an order determining that as of July 25, 1998, Mr. Eddy was a permanently
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13 and totally disabled worker caused by his May 11, 1997 industrial injury and to take such other and
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15 further action as is indicated by the law and the facts, including adjudication of the self-insured
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17 employer's entitlement to second injury fund relief.

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

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23 This matter was submitted for a decision on cross motions¹ for summary judgment filed by
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25 the self-insured employer and the Department pursuant to CR 56. The documents that we have
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27 considered in ruling on these motions include the following: Employer's Motion for Summary
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29 Judgment; Declaration of Vocational Rehabilitation Counselor Michelle Brooks; letter by Michelle
30
31 Brooks dated October 25, 1999; Department's Memorandum in Response and In Support of Cross
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33 Motion for Summary Judgment; letter to William Travis from Boise Cascade's counsel dated
34
35 January 20, 1999; Vocational Assessment by Michelle Brooks; Pension Benefits Section form
36
37 signed by Mr. Eddy; letter to industrial appeals judge from claimant's counsel dated February 7,
38
39 2000; Department letter of August 5, 1998; and Department Order of October 8, 1997.

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41 The parties agree that Mr. Eddy is permanently and totally disabled and that the self-insured
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43 employer is entitled to second injury fund relief. The sole issue raised by this appeal is the effective
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¹ The Department did not actually file any document entitled "Cross Motion for Summary Judgment." On February 4, 2000, this Board received a document from the Department entitled "Department's Memorandum in Response and In Support of Cross Motion for Summary Judgment." We construe this document as the Department's motion.

1 date of Mr. Eddy's award for permanent total disability and thus, the effective date of Boise
2 Cascade's entitlement to second injury fund relief. The Department order directed Boise Cascade
3 to pay temporary total disability benefits for the period July 25, 1998 to April 28, 1999. Boise
4 Cascade contends that Mr. Eddy was not temporarily totally disabled during the period in question
5 but rather, he was permanently totally disabled effective July 25, 1998. Our industrial appeals
6 judge found that Mr. Eddy became permanently and totally disabled as of July 25, 1998. We
7 disagree with this determination.
8

9
10 We note that the Department included with its Petition for Review a July 24, 1998
11 Employability Assessment Report (EAR), which, it contends, is the only vocational determination in
12 Mr. Eddy's claim file. We decline to reopen the record to admit the EAR. If the Department wished
13 to have this document considered, it should have filed it with the Board within the time frame that is
14 required under CR 56. The Department has offered no explanation for its failure to comply with the
15 time limits. In any event, even if we were to admit the EAR, it would not change the result of this
16 appeal.
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19 We agree with our industrial appeals judge that there is no genuine issue of material fact and
20 that summary judgment is appropriate in this case. We accept as true those facts presented by
21 Boise Cascade, however, we find those facts support the conclusion that Mr. Eddy was
22 permanently and totally disabled as of January 15, 1999, rather than July 25, 1998.
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25 Mr. Eddy sustained an injury to his right shoulder on May 11, 1997. Michelle Brooks'
26 October 25, 1999 letter includes the following facts: Mr. Eddy retired from Boise Cascade in
27 January 1998. On May 22, 1998, Mr. Eddy was evaluated by Dr. Scott Linder who stated Mr. Eddy
28 was medically fixed and stable and could have returned to his job at injury were it not for the
29 May 11, 1997 shoulder injury "coupled with other pre-existing unrelated factors." 10/25/99 V.R.C.
30 Michelle Brooks' letter. Attending physician, Dr. John Place, concurred with Dr. Linder on
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1 July 11, 1998. On July 25, 1998, an Eligibility Statement Form was submitted to the Department
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3 stating that Mr. Eddy was not eligible for vocational services. The self-insured employer
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5 discontinued time loss compensation.
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7 With its Motion for Summary Judgment the Department presented a copy of the January 15,
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9 1999 Vocational Assessment report by Michelle Brooks. In her report, Ms. Brooks relates
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11 Dr. Linder's opinion that Mr. Eddy's shoulder injury was stable, that he should permanently avoid
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13 "forceful activities" and working above shoulder height, and that he could return to his job as a
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15 Barker Operator at Boise Cascade based on the residual effects of his right shoulder injury.
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17 Ms. Brooks met with Mr. Eddy, evaluated his other medical limitations, together with his education
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19 and work history, and provided her opinion that she was "unaware of any job that would be deemed
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21 viable for the claimant, had he not retired." 1/15/99 Vocational Assessment at 4. She summarized
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23 her vocational opinion by stating, "Were it solely for his recent right shoulder injury, the claimant
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25 would either be able to resume work with the employer of record or likely benefit from retraining for
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27 anew [*sic*] vocational goal. However, the residual effects of that injury, coupled with other barriers,
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29 preclude him from being able to work." 1/15/99 Vocational Assessment at 6.
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31 The evidence clearly establishes that Mr. Eddy's industrially related right shoulder condition
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33 became medically fixed no later than July 11, 1998. In *In re Harold J. McCormack*, BIIA
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35 Dec., 90 3187 (1992) we held the effective date for placing a worker on the pension rolls is the date
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37 the worker becomes permanently and totally disabled, as a matter of fact. In *In re Larry Sherwood*,
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39 Dckt. Nos. 92 1875 & 92 1879 (January 20, 1994) we held a worker is permanently and totally
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41 disabled when the industrial condition is medically fixed and the worker is demonstrably unable to
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43 perform gainful employment on a reasonably continuous basis as a result of the condition
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45 proximately caused by the industrial injury. More recently, in *In re Roger Neuman*, BIIA
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47 Dec., 97 7648 (July 9, 1999), we reiterated that a permanent total disability date could be

1 retroactively established, but cautioned that it should not be established through the use of
2
3 hindsight.

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5 A permanent total disability determination is a combination of medical
6 and vocational fixity, and should turn on the facts **then in existence**. A
7 retroactive determination should be based on the date medical and
8 vocational experts **arrived at the determination** that the worker was
9 permanently totally disabled.

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11 *Neuman*, at 12. (Emphasis added.)

12
13 Boise Cascade, through the opinion of vocational expert, Michelle Brooks, has proffered
14 evidence Mr. Eddy was medically and vocationally fixed, and permanently totally disabled as of
15 July 25, 1998. In fact, this evidence engages the very use of hindsight cautioned against in
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17 *Neuman*. Ms. Brooks' letter of October 25, 1999, states that she was not involved in Mr. Eddy's
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19 case until it was referred to her for vocational assessment on October 20, 1998. Her opinion that
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21 Mr. Eddy was permanently totally disabled on July 25, 1998, is without foundation. The only facts
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23 **then in existence** as of July 25, 1998 were these: (1) Mr. Eddy was medically fixed; (2) he could
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25 not return to his job at the time of injury; and (3) he had retired from Boise Cascade. Given these
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27 facts, Mr. Eddy was totally temporarily disabled under RCW 51.
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31 Ms. Brooks' expert opinion, as a vocational counselor, was necessary to answer those
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33 questions required by law to determine whether Mr. Eddy was capable of obtaining and maintaining
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35 any other reasonably continuous gainful employment given the limitations imposed by his injury,
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37 together with any pre-existing conditions. This necessarily involved the contact Ms. Brooks had
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39 with Mr. Eddy to determine whether he intended to remove himself from the labor market
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41 completely, and evaluation of his transferable skills, education and physical limitations proximately
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43 caused by the industrial injury. Mr. Eddy continued to be totally temporarily disabled until a
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45 vocational expert concluded that he was unable to benefit from vocational services such as
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47 retraining and, as a result of limitations from his injury superimposed on pre-existing conditions was

1 permanently unable to perform reasonably continuous gainful employment. The vocational
2 counselor's assessment and conclusion were necessary to bring these facts into existence,
3 establish vocational fixity and Mr. Eddy's entitlement to permanent total disability benefits. The
4
5 earliest date these facts are shown to be in existence in this record is January 15, 1999, the date of
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7 Ms. Brooks' assessment report. Accordingly, we find this to be the date Mr. Eddy became
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9 permanently and totally disabled.
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13 We reverse the Department order of July 15, 1999, and remand this matter to the
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15 Department of Labor and Industries with directions to issue an order that determines that Mr. Eddy
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17 was temporarily totally disabled from July 25, 1998 through January 14, 1999, and permanently and
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19 totally disabled and entitled to benefits consistent with that status effective January 15, 1999.
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21 Further, the order shall provide that the self-insured employer is entitled to second injury fund relief
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23 as of that date.
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25 **FINDINGS OF FACT**

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27 1. On June 4, 1997, the claimant, James M. Eddy, filed an application for
28 benefits with the Department of Labor and Industries alleging he had
29 sustained an industrial injury to his right shoulder on May 11, 1997,
30 while in the course of employment with Boise Cascade Corporation, a
31 self-insured employer. The claim was allowed and benefits were paid.
32

33 On April 23, 1999, the Department issued two orders. One of the orders
34 determined that the claimant's condition had reached a fixed stage and
35 his injury had resulted in total and permanent disability, and placed him
36 on the pension rolls effective April 29, 1999.
37

38 The other Department order dated April 23, 1999, determined that
39 claimant's permanent partial disability caused by his industrial injury,
40 when combined with and superimposed upon his prior disabling
41 conditions, resulted in total permanent disability. The order required
42 Boise Cascade to remit to the Department an amount equal to
43 Mr. Eddy's permanent partial disability and determined that the
44 remaining balance of Mr. Eddy's pension reserve would be charged
45 against the second injury fund.
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2 The self-insured employer, Boise Cascade, protested the April 23, 1999
3 orders on May 6, 1999. Mr. Eddy also filed a protest to the
4 Department's orders of April 23, 1999, which the Department received
5 on May 28, 1999. On July 15, 1999, the Department issued an order
6 affirming its prior orders of April 23, 1999, and further directed the
7 employer to pay time loss compensation to Mr. Eddy for the period
8 July 25, 1998 through April 28, 1999 in the amount of \$17,222.10.
9

10 On July 26, 1999, the self-insured employer filed an appeal of the
11 Department's order of July 15, 1999 with the Board of Industrial
12 Insurance Appeals. On August 24, 1999, this Board granted the appeal,
13 assigned it Docket No. 99 18062, and directed that further proceedings
14 be held.
15

- 16 2. On May 11, 1997, the claimant, James M. Eddy, sustained an industrial
17 injury to his right shoulder while acting in the course of his employment
18 with Boise Cascade Corporation.
19
- 20 3. Mr. Eddy sustained a permanent partial disability to his right shoulder
21 proximately caused by his industrial injury resulting in an award of
22 \$11,588.59.
23
- 24 4. Mr. Eddy's condition proximately caused by his industrial injury of
25 May 11, 1997, was medically fixed and stable and had reached
26 maximum medical improvement as of July 11, 1998.
27
- 28 5. On July 25, 1998, an Employability Statement Form was issued,
29 determining that Mr. Eddy was not eligible for vocational services. At
30 the Department's request, the self-insured employer submitted
31 Mr. Eddy's file to vocational counselor, Michelle Brooks, on October 20,
32 1998, for a vocational assessment. Ms. Brooks submitted her
33 vocational assessment report on January 15, 1999, concluding that
34 Mr. Eddy was not eligible for vocational services due to the combined
35 effects of his pre-existing disabilities and the residuals of the May 11,
36 1997 industrial injury.
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- 38 6. As of January 15, 1999 there were sufficient facts in existence to assess
39 Mr. Eddy's employability.
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- 41 7. Mr. Eddy was a temporarily totally disabled worker from July 25, 1998
42 through January 15, 1999.
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- 44 8. From a vocational standpoint, Mr. Eddy was permanently unable to be
45 gainfully employed on a reasonably continuous basis as of January 15,
46 1999.
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1 9. As of January 15, 1999, Mr. Eddy was permanently precluded from
2 performing reasonably continuous gainful employment due to the
3 combined effects of his industrial injury of May 11, 1997, superimposed
4 upon his pre-existing disabling cervical spine, left and right shoulder,
5 and hyperthyroidism conditions.
6

7 **CONCLUSIONS OF LAW**
8

- 9 1. The Board of Industrial Insurance Appeals has jurisdiction over the
10 parties and subject matter of this appeal.
11
12 2. As of January 15, 1999, James M. Eddy was a permanently and totally
13 disabled worker within the meaning of RCW 51.32.060, as a result of the
14 combined effects of his industrial injury of May 11, 1997, superimposed
15 upon his pre-existing disabilities.
16
17 3. Effective January 15, 1999, Boise Cascade Corporation was entitled to
18 second injury fund relief under the provisions of RCW 51.16.120 with
19 respect to the May 11, 1997 industrial injury sustained by James M.
20 Eddy.
21
22 4. The order of the Department of Labor and Industries dated July 15,
23 1999, is incorrect and is reversed. The matter is remanded to the
24 Department of Labor and Industries with directions to issue an order that
25 determines that the claimant was temporarily totally disabled from
26 July 25, 1998 through January 14, 1999, and was a permanently and
27 totally disabled worker and entitled to benefits consistent with that status
28 effective January 15, 1999. Further, the order shall provide that the
29 self-insured employer is entitled to second injury fund relief as of
30 January 15, 1999.
31

32 It is so ORDERED.
33

34 Dated this 5th day of December, 2000.
35

36 BOARD OF INDUSTRIAL INSURANCE APPEALS
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38
39 /s/ _____
40 THOMAS E. EGAN Chairperson
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42
43 /s/ _____
44 FRANK E. FENNERTY, JR. Member
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47 /s/ _____
JUDITH E. SCHURKE Member