

## **Kemp, Brett**

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### **DEPARTMENT**

**Ambiguous orders**

### **PERMANENT PARTIAL DISABILITY (RCW 51.32.080)**

**Ambiguous orders**

### **RES JUDICATA**

**Ambiguous orders**

The Department's language closing a claim "without further award for permanent partial disability" is inherently ambiguous when the order is issued after reconsideration of a previous order paying an award for permanent partial disability. In such circumstance, it is impossible to determine if the Department intended that the award be paid and the doctrine of res judicata likely does not apply to the ambiguous determination. ....*In re Brett Kemp, BIIA Dec., 02 13145 (2003)*

Scroll down for order.



1 Part of this confusion derives, we believe, from the pattern of Department orders issued in  
2 this matter. We summarize these orders:  
3

- 4 8/21/01 The Department issues an order awarding the claimant a Category 2 permanent  
5 partial disability award for skin impairment and closed the claim.  
6
- 7 8/27/01 The claimant files a Notice of Appeal from the August 21 order.  
8
- 9 9/14/01 The Department reconsiders the August 21, 2001 order and states that it will issue a  
10 new order after further review.  
11
- 12 9/17/01 The Board issues an order returning the case to the Department for further action.  
13
- 14 12/16/01 The Department changed the August 21, 2001 order from a final to a temporary order  
15 and allowed the claim to remain open.  
16
- 17 2/15/02 The Department issues an order closing the claim effective February 15, 2002, and  
18 stating, "**there is no additional permanent partial disability.**"  
19
- 20 3/21/02 Claimant appeals the February 15, 2002 order.  
21

22 While the Department specifies in its February 15, 2002 order that there is, "no **additional**  
23 permanent partial disability," it does not specify what that permanent partial disability is. The  
24 Department clearly changed the status of its original order awarding permanent partial disability  
25 from final to temporary. We do not believe that an order simply closing the claim with, "no  
26 additional permanent partial disability" adequately addresses the content of any outstanding  
27 temporary order. We do not know, by the content of the February 15, 2002 order, whether the  
28 Department intended to confirm the previous Category 2 for permanent skin impairments awarded  
29 by the August 21, 2001 order, or some lesser amount.  
30  
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34 Again, we have seen the Department use similar language in recent orders. For example,  
35 we recently held in the matter of *In re Julian R. Green*, Dckt. No. 01 25707 (January 15, 2003), that  
36 the Department's language closing the claim without "further award for permanent partial disability"  
37 is inherently ambiguous when the Department had reconsidered a previous order paying an award  
38 for permanent partial disability. Citing *King v. Department of Labor & Indus.*, 12 Wn. App. 1 (1974),  
39 we also stated that fundamental fairness requires that a Department order be unambiguous in order  
40 to give it res judicata effect.  
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44 Gratefully, in Mr. Kemp's case, we need not speculate as to the Department's intent because  
45 the testimony of Frederick Braun, M.D., provides sufficient basis to address the totality of  
46 Mr. Kemp's permanent partial disability. We conclude that Mr. Kemp is entitled to a Category 2  
47

1 award for the categories of permanent skin impairments, and a further permanent partial disability  
2 award of 11 percent when compared to total bodily impairment for balance and memory. We will  
3 amend the Findings of Fact and Conclusions of Law accordingly.  
4

5 **FINDINGS OF FACT**  
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- 7  
8 1. On December 16, 1997, Mr. Kemp filed an application for benefits with  
9 the Department of Labor and Industries, alleging that he had sustained  
10 an industrial injury on December 16, 1997, during the course of his  
11 employment with Huizenga Brothers Construction, Inc. On  
12 January 12, 1998, the Department allowed the claim and paid time loss  
13 compensation. On May 5, 1998, the Department ended time loss  
14 compensation and closed the claim without further award.

15 On July 2, 1998, Mr. Kemp filed a Protest and Request for  
16 Reconsideration from the May 5, 1998 Department order. On  
17 August 14, 1998, the Department held the May 5, 1998 order in  
18 abeyance. On December 7, 1998, Mr. Kemp filed a general protest to  
19 any adverse orders issued by the Department.  
20

21 On January 13, 1999, the Department set aside and held for naught the  
22 May 5, 1998 order, held the claim open for treatment until  
23 January 13, 1999, and then closed the claim without further award. On  
24 January 25, 1999, Mr. Kemp filed a Protest and Request for  
25 Reconsideration from the January 13, 1999 Department order. On  
26 January 19, 2001, the Department reversed the January 13, 1999 order,  
27 and held the claim open.  
28

29 On August 21, 2001, the Department closed the claim with a permanent  
30 partial disability award of Category 2 for permanent skin impairments.  
31 On August 27, 2001, Mr. Kemp filed a Notice of Appeal with the Board  
32 of Industrial Insurance Appeals from the August 21, 2001 order. On  
33 September 14, 2001, the Department issued an order reconsidering the  
34 August 21, 2001 order, and noted that an additional order would issue  
35 after further review. On September 17, 2001, the Board of Industrial  
36 Insurance Appeals issued an Order Returning Case to Department for  
37 Further Action. On December 16, 2001, the Department issued an  
38 order changing the August 21, 2001 order from a final to a temporary  
39 order, and kept the claim open.  
40

41 On February 15, 2002, the Department ended time loss compensation  
42 and closed the claim without further award. On March 21, 2002,  
43 Mr. Kemp filed a Notice of Appeal with the Board of Industrial Insurance  
44 Appeals from the February 15, 2002 order. On April 19, 2002, the  
45 Board issued an order granting the appeal, assigned it Docket  
46 No. 02 13145, and directed that proceedings be held on the issues  
47 raised by the Notice of Appeal.

- 1 2. On December 16, 1997, Mr. Kemp sustained an industrial injury to his  
2 head and face while in the course of his duties with employer  
3 Huizenga Brothers Construction, Inc.  
4  
5 3. The industrial injury of December 16, 1997, proximately caused  
6 Mr. Kemp to suffer a contusion to his left face with fractures, a closed  
7 head injury, and a minimal to mild concussion.  
8  
9 4. The industrial injury of December 16, 1997, proximately caused  
10 Mr. Kemp to suffer a head injury, with continued memory and balance  
11 difficulties.  
12  
13 5. All of Mr. Kemp's medical conditions, proximately caused by his  
14 December 16, 1997 industrial injury, had reached medical maximum  
15 improvement as of February 15, 2002.  
16  
17 6. As of February 15, 2002, Mr. Kemp's memory and balance conditions  
18 proximately caused by the effect of the industrial injury were medically  
19 fixed and stable and not in need of further proper and necessary  
20 medical treatment. Mr. Kemp sustained a permanent impairment as a  
21 result of these conditions equal to 11 percent as compared to total  
22 bodily impairment.  
23  
24 7. As of February 15, 2002, Mr. Kemp's skin conditions to the structures of  
25 his face were medically fixed and stable and not in need of further  
26 proper and necessary medical treatment. Mr. Kemp sustained a  
27 permanent impairment as a result of these conditions, which is most  
28 accurately described by Category 2 of WAC 296-20-470 for permanent  
29 skin impairment.

### **CONCLUSIONS OF LAW**

- 30  
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32 1. The Board of Industrial Insurance Appeals has jurisdiction over the  
33 parties and the subject matter of this timely filed appeal.  
34  
35 2. As of February 15, 2002, Mr. Kemp sustained a permanent partial  
36 disability within the meaning of RCW 51.32.080, equal to Category 2 of  
37 WAC 296-20-470 Categories for skin impairments.  
38  
39 3. As of February 15, 2002, Mr. Kemp was permanently partially disabled  
40 within the meaning of RCW 51.32.080, as described as 11 percent when  
41 compared to total bodily impairment for memory and balance.  
42  
43 4. The Department order of February 15, 2002, is incorrect and is  
44 reversed. This matter is remanded to the Department of Labor and  
45 Industries with instructions to award Mr. Kemp a Category 2 award for  
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47

1 the categories of permanent skin impairment and a permanent partial  
2 disability award of 11 percent as compared to total bodily impairment,  
3 less prior awards, and to thereupon close the claim.  
4

5 It is so **ORDERED**.

6  
7 Dated this 19th day of March, 2003.

8 BOARD OF INDUSTRIAL INSURANCE APPEALS  
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11  
12 /s/ \_\_\_\_\_  
13 FRANK E. FENNERTY, JR. Member  
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16 /s/ \_\_\_\_\_  
17 JUDITH E. SCHURKE Member  
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