

Maupin, Eddy (II)

PENSION RESERVE

Reduction

Where a worker has received time-loss compensation prior to becoming totally, permanently disabled, the amount of such time-loss cannot be included in any reduction of the pension reserve determined pursuant to RCW 51.32.080(4). ...*In re Eddy Maupin (II)*, BIIA Dec., 04 14768 (2005) [*Editor's Note*: The Board's decision was appealed to superior court under Clallam County Cause No. 05-2-01161-3.]

Scroll down for order.

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

1 **IN RE: EDDY V. MAUPIN**) **DOCKET NOS. 04 14768, 04 15995, 04 18789,**
2) **04 18989, 04 20797 & 04 21093**
3)
3 **CLAIM NOS. K-694358 & N-095422**) **DECISION AND ORDER**

4 **APPEARANCES:**

5
6 Claimant, Eddy V. Maupin, by
7 Casey & Casey, P.S., per
8 Gerald L. Casey and Carol L. Casey

9 Employer, Northwest Rock, Inc.,
10 None

11 Department of Labor and Industries, by
12 The Office of the Attorney General, per
13 Kay A. Germiot, Assistant

14 The claimant, Eddy V. Maupin, filed an appeal with the Board of Industrial Insurance Appeals
15 on April 21, 2004, from an order of the Department of Labor and Industries dated April 13, 2004, in
16 Claim No. K-694358 (Docket No. 04 14768). In this order, the Department affirmed its prior order
17 dated August 26, 2003, in which it determined that the wage for the job of injury was \$2,288 per
18 month and that Mr. Maupin was married with no children, on the date of injury. The Department
19 order is **AFFIRMED**.

20 The claimant, Eddy V. Maupin, filed an appeal with the Board of Industrial Insurance Appeals
21 on May 21, 2004, from an order of the Department of Labor and Industries dated April 30, 2004, in
22 Claim No. K-694358 (Docket No. 04 15995). In this order, the Department paid time-loss
23 compensation for the period of April 17, 2004 through April 30, 2004, in the total amount of \$553.28
24 under Claim Nos. K-694358 and N-095422, based on a monthly time-loss rate of \$2,371.08 and a
25 daily rate of \$79.04. The Department order is **AFFIRMED**.

26 The claimant, Eddy V. Maupin, filed an appeal with the Board of Industrial Insurance Appeals
27 on July 22, 2004, from an order of the Department of Labor and Industries dated July 15, 2004, in
28 Claim No. K-694358 (Docket No. 04 18789). In this order, the Department paid time-loss
29 compensation for the period of July 2, 2004 through July 15, 2004, in the total amount of \$565.67
30 under Claim Nos. K-694358 and N-095422, based on a monthly time-loss rate of \$2,424.44 and a
31 daily rate of \$80.81. The Department order is **AFFIRMED**.

1 The claimant, Eddy V. Maupin, filed an appeal with the Board of Industrial Insurance Appeals
2 on July 28, 2004, from an order of the Department of Labor and Industries dated July 19, 2004, in
3 Claim No. K-694358 (Docket No. 04 18989). In this order, the Department assessed an
4 overpayment in time-loss compensation in the amount of \$0.89, for the period of June 18, 2004
5 through July 1, 2004. The Department order is **AFFIRMED**.

6 The claimant, Eddy V. Maupin, filed an appeal with the Board of Industrial Insurance Appeals
7 on September 1, 2004, from an order of the Department of Labor and Industries dated July 22,
8 2004, in Claim Nos. K-694358 and N-095422. Two separate docket numbers were assigned,
9 Docket No. 04 20797 and Docket No. 04 21093. In the July 22, 2004 order, the Department
10 determined that the claimant was permanently and totally disabled as a result of the effects of the
11 conditions covered under Claim Nos. K-694358 and N-095422; terminated time-loss compensation
12 as paid through September 15, 2004; placed the claimant on a pension effective September 16,
13 2004; determined that the pension would be administered under Claim No. N-095422; and
14 deducted the previously paid permanent partial disability award of \$7,020, including interest if
15 applicable, from the pension reserve, resulting in a permanent reduction of the monthly pension
16 benefit. The Department order is **REVERSED AND REMANDED**.

17 ISSUE

18 Did the Department correctly reduce the pension reserve by deducting the full amount of the
19 previously paid permanent partial disability award of \$7,020?

20 DECISION

21 **BRIEF OVERVIEW**

22 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
23 and decision on a timely Petition for Review filed by the Department, to a Proposed Decision and
24 Order issued on August 8, 2005. The Board has reviewed the evidentiary rulings in the record of
25 proceedings and finds that no prejudicial error was committed. The rulings are affirmed.

26 The industrial appeals judge affirmed all of the Department orders on appeal, except the
27 one dated July 22, 2004. By that order, the Department determined that Mr. Maupin was
28 permanently totally disabled as a result of the conditions covered under Claim Nos. K-694358 and
29 N-095422. The Department deducted the total amount of a previously paid permanent partial
30 disability award in Claim No. K-694358 from the pension reserve. The industrial appeals judge
31 reversed that order and "remanded to the Department with directions to readdress the issues
32 regarding permanent partial disability, the sequence of claim closure and appropriateness of

1 offsetting the pension reserve." Proposed Decision and Order at 12. We agree that these claims
2 should be remanded to the Department to recalculate any applicable reduction of the pension
3 reserve pursuant to RCW 51.32.080(4), but not for the reasons given in the Proposed Decision and
4 Order.

5 The industrial appeals judge incorrectly relied on *Clauson v. Department of Labor & Indus.*,
6 130 Wn.2d 580 (1996) for the proposition that Mr. Maupin is entitled to a pension under one claim
7 and a permanent partial disability award under the other. He remanded to the Department for a
8 determination of which industrial injury reached fixity first. Under his reasoning, the claimant should
9 be allowed to keep that permanent partial disability award and then receive a pension under the
10 other claim.

11 However, unlike the *Clauson* case, this is a combined effects pension. In its order, the
12 Department explicitly finds that Mr. Maupin is permanently totally disabled as a result of both
13 injuries. The claimant has presented no evidence challenging that determination. The industrial
14 appeals judge should therefore have relied on *In re Joanne Lusk*, BIIA Dec., 89 2984 (1991), which
15 precludes a claimant from receiving both a pension and a permanent partial disability award when
16 the pension is based on the combined effects of both injuries.

17 In addition, both the Department in its Petition for Review and the industrial appeals judge in
18 his Proposed Decision and Order ignore controlling legal authority--*Jacobsen v. Department of*
19 *Labor & Indus.*, 127 Wn. App. 384 (2005). The Department factored Mr. Maupin's receipt of
20 time-loss compensation from September 30, 2002 through September 15, 2004, into its calculation
21 of the extent to which the pension reserve should be reduced. *Jacobsen* now disallows this
22 longstanding practice. This case must therefore be remanded to the Department to recalculate
23 whether a reduction of the pension reserve is appropriate under *Jacobsen*.

24 **FACTUAL BACKGROUND**

25 In Claim No. K-694358 (the K claim), Mr. Maupin sustained an industrial injury on April 6,
26 1988, involving his left upper extremity and shoulder. In Claim No. N-095422 (the N claim), he
27 sustained an industrial injury on July 3, 1991, involving his back. Both injuries occurred with the
28 same employer. For some time, the claims have been administered together, and Mr. Maupin has
29 received time-loss compensation at the higher rate under the N claim. Each claim has been
30 charged its proportionate share of the time-loss benefits.

31 On September 30, 2002, the Department closed the K claim, paying Mr. Maupin a
32 permanent partial disability award equal to 13 percent of the left arm at or above the deltoid

1 insertion or by disarticulation at the shoulder. The total monetary value of that award was \$7,020.
2 Mr. Maupin filed a timely protest, and the closure order was eventually set aside and never became
3 final. The claim remained open and Mr. Maupin received time-loss compensation from
4 September 30, 2002 through September 15, 2004. On July 22, 2004, the Department issued one
5 order in both claims, placing Mr. Maupin on a pension roll as of September 16, 2004, because of
6 the combined effects of both injuries, and deducting the entire permanent partial disability award of
7 \$7,020 from the pension reserve.

8 **DISCUSSION**

9 **Did the industrial appeals judge err by relying on *Clauson v. Department of Labor &***
10 ***Indus.*, 130 Wn.2d 580 (1996)?** Yes.

11 This is a combined effects pension, with facts nearly identical to those in *In re Joanne Lusk*,
12 BIIA Dec., 89 2984 (1991). In *Lusk*, the Board held that when a worker is permanently totally
13 disabled as a result of the combined effects of two injuries, the worker is not entitled to both a
14 pension and a permanent partial disability award.

15 Instead of relying on *Lusk*, the industrial appeals judge reversed the Department order based
16 on *Clauson*. That reliance is misplaced. Like the current appeal, *Clauson* involved two separate
17 injuries and two separate claims. However, there the similarity ends. In *Clauson*, the worker was
18 permanently totally disabled as a result of one injury, entirely independent of the other. The Court
19 held he could therefore receive a pension under one claim and a permanent partial disability award
20 under the other.

21 In the current appeal, the Department explicitly determined that Mr. Maupin was "totally and
22 permanently disabled as a result of the effects of the conditions covered under claim K694358 and
23 claim number N095422." As a result, unlike *Clauson*, this is a combined effects pension. *Lusk*
24 therefore applies, meaning that Mr. Maupin is not entitled to both the permanent partial disability
25 award and the pension.

26 **In determining whether the pension reserve should be reduced based on the**
27 **claimant's receipt of the permanent partial disability award, may the Department take into**
28 **consideration the fact that Mr. Maupin received time-loss benefits for the period of**
29 **September 30, 2002 through September 15, 2004?** No.

30 RCW 51.32.080(4) provides:

31 If permanent partial disability compensation is followed by permanent
32 total disability compensation, any portion of the permanent partial
disability compensation which exceeds the amount that would have
been paid the injured worker if permanent total disability compensation
had been paid in the first instance, shall be deducted from the pension

1 reserve of such injured worker and his or her monthly compensation
2 payments shall be reduced accordingly.

3 Barbara Mickelson, the Department pension adjudicator who issued the July 22, 2004 order, briefly
4 explained the process the Department uses in determining whether the pension reserve should be
5 reduced under RCW 51.32.080(4). That process is also described in various court and Board
6 decisions.

7 The starting point is the date of first instance. In this case, that date was September 30,
8 2002, when the \$7,020 in permanent partial disability benefits was paid. The Department then
9 looks at the period between that date and the date the worker was placed on a pension. In this
10 case, that period was September 30, 2002 to September 16, 2004.

11 The Department then determines what the worker would have received if pension benefits
12 had been commenced on the date of first instance. In making that determination, the Department
13 considers any temporary disability benefits the worker may have received during the intervening
14 period and compares that amount with what he would have received in pension benefits.

15 Mr. Maupin received time-loss benefits for the entire period of September 30, 2002 through
16 September 15, 2004. Comparing those benefits with what he would have received, the Department
17 apparently concluded they were equivalent. From the Department's perspective, that meant the
18 entire permanent partial disability award exceeded the amount Mr. Maupin would have received if
19 he had been placed on a pension as of September 30, 2002. The Department therefore attempted
20 to recoup the entire \$7,020 award by deducting that amount from the pension reserve.

21 The Board has previously upheld this calculation method. *In re Esther Rodriguez*, BIIA Dec.,
22 91 5594 (1993); *In re John Jensen*, BIIA Dec., 32, 619 (1970). However, in *Jacobsen*, the Court
23 specifically disallowed this method, holding that the Department cannot consider whether a worker
24 received temporary disability benefits in the intervening period when it is determining the
25 appropriate reduction of the pension reserve. *Jacobsen*, 127 Wn. App. at 388-389.

26 Mr. Maupin relied on *Jacobsen* at hearing and in his hearing brief. Claimant's Hearing Brief
27 at 3-4; 5/18/05 Tr. at 28-30. *Jacobsen* was decided on April 19, 2005, but the Department filed a
28 motion for reconsideration. That motion was still pending before the Court of Appeals when the
29 Claimant's Hearing Brief was filed on June 1, 2005. On June 29, 2005, the Court issued an order
30 granting the motion, but only insofar as some misstatements needed to be corrected. The original
31 holding remained unchanged. *Jacobsen* is therefore a final published opinion.

1 The industrial appeals judge did not analyze the effect of *Jacobsen* on the facts of this case.
2 According to Ms. Mickelson, the result here would have been markedly different if the *Jacobsen*
3 rule had been applied. 5/18/05 Tr. at 28-30. We agree. Under *Jacobsen*, the Department may
4 only compare the permanent partial disability award with the two years of pension benefits
5 Mr. Maupin would otherwise have received. Given that comparison, it is likely that there will be no
6 reduction of the pension reserve. Claimant's Hearing Brief at 4. However, that is for the
7 Department to determine in the first instance on remand.

8 **May the Department reduce the pension reserve based on the claimant's receipt of**
9 **any interest associated with the payment of the permanent partial disability award? No.**

10 The Department order says "\$7,020.00, **including interest if applicable**, previously paid to
11 this worker for permanent partial disability, is being deducted from the pension reserve." (Emphasis
12 added). It does not appear that any interest was in fact paid in this case; it appears that the
13 Department only reduced the pension reserve based on the permanent partial disability award
14 itself. However, because the Department order uses the quoted language, we once again remind
15 the Department that RCW 51.32.080(4) refers only to the permanent partial disability award itself,
16 not any associated interest. We have said as much in the past. See, e.g., *In re Esther Rodriguez*,
17 BIIA Dec., 91 5594 (1993); *In re Maria M. Gonzalez*, Dckt. No. 04 17398 (July 26, 2005). The Court
18 of Appeals explicitly approved that analysis in *Janssen v. Department of Labor & Indus.*,
19 125 Wn. App. 461 (2005).

20 **CONCLUSION**

21 Like the industrial appeals judge, we affirm all of the orders on appeal, except for the July 22,
22 2004 order. That order is reversed and the claims are remanded to the Department with
23 instructions to calculate any reduction of the pension reserve in light of *Jacobsen*.

24 **FINDINGS OF FACT**

- 25 1. **Claim No. K-694358:** On November 14, 1988, the claimant, Eddy V.
26 Maupin, filed an Application for Benefits with the Department of Labor
27 and Industries, in which he alleged he sustained an industrial injury on
28 April 6, 1988, while in the course of his employment with Northwest
Rock, Inc. The claim was allowed and benefits were provided.

29 On September 30, 2002, the Department closed the claim with a
30 permanent partial disability award equal to 13 percent of the left arm at
31 or above the deltoid insertion or by disarticulation at the shoulder. The
32 monetary value of the award was \$7,020. On November 14, 2002,
Mr. Maupin protested that order. On March 27, 2003, the Department
affirmed the September 30, 2002 order. On April 3, 2003, Mr. Maupin

1 appealed March 27, 2003 Department order to the Board of Industrial
2 Insurance Appeals. On April 23, 2003, the Department held the
3 March 27, 2003 order in abeyance. On April 24, 2003, the Board
4 returned the case to the Department for further action. On April 24,
5 2003, the Department modified the September 30, 2002 order from final
6 to interlocutory and stated that the claim would remain open for
7 treatment and action as indicated.

8 On August 26, 2003, the Department determined that Mr. Maupin's
9 gross monthly wage was \$2,288 and that he was married, with no
10 children. On September 30, 2003, Mr. Maupin protested the August 26,
11 2003 order. On April 13, 2004, the Department affirmed the August 26,
12 2003 order. On April 21, 2004, Mr. Maupin appealed the April 13, 2004
13 order to the Board (Docket No. 04 14768).

14 On April 30, 2004, the Department paid time-loss compensation from
15 April 17, 2004 through April 30, 2004, dividing the payments between
16 Claim No. K-694358 and Claim No. N-095422. On May 21, 2004, the
17 Board issued an order in Docket No. 04 14768, extending the time to act
18 on the appeal for an additional ten days. On May 21, 2004, the claimant
19 appealed the April 30, 2004 order to the Board (Docket No. 04 15995).
20 On June 1, 2004, the Board issued an order in Docket No. 04 14768, in
21 which it granted the appeal from the Department order of April 13, 2004.

22 On June 21, 2004, the Board issued an order in Docket No. 04 15995, in
23 which it extended the time to act on the appeal for an additional ten
24 days. On June 30, 2004, the Board granted the appeal in Docket
25 No. 04 15995, from the Department order of April 30, 2004.

26 On July 15, 2004, the Department paid time-loss compensation from
27 July 2, 2004 through July 15, 2004, indicating that benefits were also
28 being paid under Claim No. N-095422 for the same time period.

29 On July 19, 2004, the Department assessed an overpayment of
30 time-loss compensation benefits in the amount of \$0.89.

31 On July 22, 2004, the Department determined that Mr. Maupin was
32 permanently and totally disabled as a result of the effects of the
conditions covered under Claim No. K-694358 and Claim No. N-095422;
terminated time-loss compensation as paid through September 15,
2004; placed the claimant on a pension effective September 16, 2004;
determined that the pension would be administered under Claim
No. N-095422; and deducted the previously paid permanent partial
disability award of \$7,020, including interest if applicable, from the
pension reserve, resulting in a permanent reduction of monthly pension
benefits.

1 On July 22, 2004, Mr. Maupin appealed the July 15, 2004 order to the
2 Board (Docket No. 04 18789). On July 28, 2004, Mr. Maupin appealed
3 the July 19, 2004 order to the Board (Docket No. 04 18989). On
4 August 6, 2004, the Board granted the appeal in Docket No. 04 18789,
5 from the Department order of July 15, 2004. On August 26, 2004, the
6 Board granted the appeal in Docket No. 04 18989, from the Department
7 order of July 19, 2004.

8 On September 1, 2004, Mr. Maupin appealed the July 22, 2004 order to
9 the Board (Docket No. 04 20797). On October 1, 2004, the Board
10 extended the time to act on that appeal for an additional ten days. On
11 October 11, 2004, the Board extended the time to act on that appeal for
12 an additional ten days. On October 14, 2004, the Board granted the
13 appeal in Docket No. 04 20797, from the Department order of July 22,
14 2004.

15 **Claim No. N-095422:** On September 17, 1991, Mr. Maupin filed an
16 Application for Benefits with the Department, in which he alleged that he
17 sustained an industrial injury on July 3, 1991, while in the course of his
18 employment with Northwest Rock, Inc. The claim was allowed and
19 benefits were provided.

20 On July 22, 2004, the Department determined that Mr. Maupin was
21 permanently and totally disabled as a result of the effects of the
22 conditions covered under Claim No. K-694358 and Claim No. N-095422;
23 terminated time-loss compensation as paid through September 15,
24 2004; placed the claimant on a pension effective September 16, 2004;
25 determined that the pension would be administered under Claim
26 No. N-095422; and deducted the previously paid permanent partial
27 disability award of \$7,020, including interest if applicable, from the
28 pension reserve, resulting in a permanent reduction of monthly pension
29 benefits.

30 On September 1, 2004, Mr. Maupin appealed the July 22, 2004 order to
31 the Board. On October 1, 2004, the Board extended the time to act on
32 that appeal for an additional ten days. On October 11, 2004, the Board
extended the time to act on that appeal for an additional ten days. On
October 14, 2004, the Board granted the appeal from the Department
order of July 22, 2004 and assigned it Docket No. 04 21093.

2. On April 6, 1988, Eddy V. Maupin suffered an industrial injury to his left shoulder, wrist, and fingers, while in the course of his employment with Northwest Rock, Inc. (Claim No. K-694358).
3. On July 3, 1991, Mr. Maupin suffered an industrial injury to his back while in the course of his employment with Northwest Rock, Inc. (Claim No. N-095422).

- 1 4. On September 30, 2002, the Department closed Claim No. K-694358
2 with a permanent partial disability award equal to 13 percent of the left
3 arm at or above the deltoid insertion or by disarticulation at the shoulder.
4 The total monetary value of that award was \$7,020, which the
5 Department paid to Mr. Maupin at that time. On November 14, 2002,
6 Mr. Maupin protested that order. On March 27, 2003, the Department
7 affirmed the September 30, 2002 order. On April 3, 2003, Mr. Maupin
8 appealed to the Board of Industrial Insurance Appeals. On April 23,
9 2003, the Department held the March 27, 2003 order in abeyance. On
10 April 24, 2003, the Board returned the case to the Department for further
11 action. On April 24, 2003, the Department modified the September 30,
12 2002 order from final to interlocutory and stated that the claim would
13 remain open for treatment and action as indicated. The Department
14 thereafter paid additional time-loss compensation for the period of
15 September 30, 2002 through September 15, 2004.
- 16 5. Mr. Maupin's gross monthly wage in Claim No. K-694358 was \$2,288.
17 When he was injured on April 6, 1988, he was married with no children.
- 18 6. For the period of April 17, 2004 through April 30, 2004, Mr. Maupin was
19 entitled to time-loss compensation in the total amount of \$553.28 under
20 Claim Nos. K-694358 and N-095422, based on a monthly time-loss rate
21 of \$2,371.08 and a daily rate of \$79.04.
- 22 7. For the period of July 2, 2004 through July 15, 2004, Mr. Maupin was
23 entitled to time-loss compensation in the total amount of \$565.67 under
24 Claim Nos. K-694358 and N-095422, based on a monthly time-loss rate
25 of \$2,424.44 and a daily rate of \$80.81.
- 26 8. Time-loss compensation benefits were overpaid in Claim No. K-694358
27 in the amount of \$0.89 during the period of June 18, 2004 through
28 July 1, 2004.
- 29 9. On July 22, 2004, the Department determined that Mr. Maupin was
30 permanently and totally disabled as a result of the effects of the
31 conditions covered under Claim No. K-694358 and Claim No. N-095422;
32 terminated time-loss compensation as paid through September 15, 2004;
placed the claimant on a pension effective September 16, 2004;
determined that the pension would be administered under Claim
No. N-095422; and deducted the previously paid permanent partial
disability award of \$7,020, including interest if applicable, from the
pension reserve, resulting in a permanent reduction of the monthly
pension benefit.
10. In calculating the reduction of the pension reserve, the Department
considered the time-loss compensation benefits Mr. Maupin received
during the period of September 30, 2002 through September 15, 2004.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of these appeals.
2. The Department correctly calculated Mr. Maupin's monthly wage in Claim No. K-694358, pursuant to RCW 51.08.178.
3. The Department correctly calculated the time-loss compensation benefits in Claim Nos. K-694358 and N-095422 for the periods of April 17, 2004 through April 30, 2004, and July 2, 2004 through July 15, 2004, pursuant to RCW 51.08.178 and RCW 51.32.060.
4. The Department was entitled to recoup the overpayment of \$0.89 in Claim No. K-694358, pursuant to RCW 51.32.240.
5. The Department incorrectly calculated the reduction of the pension reserve under RCW 51.32.080(4), because it considered Mr. Maupin's receipt of time-loss compensation during the period of September 30, 2002 through September 15, 2004. *Jacobsen v. Department of Labor & Indus.*, 127 Wn. App. 384 (2005).
6. The Department order dated April 13, 2004, in Docket No. 04 14768 is correct and is affirmed.
7. The Department order dated April 30, 2004, in Docket No. 04 15995 is correct and is affirmed.
8. The Department order dated July 15, 2004, in Docket No. 04 18789 is correct and is affirmed.
9. The Department order dated July 19, 2004, in Docket No. 04 18989 is correct and is affirmed.
10. The Department order dated July 22, 2004, in Docket Nos. 04 20797 and 04 21093 is incorrect and is reversed. Claim Nos. K-694358 and N-095422 are remanded to the Department with direction to issue an order in both claims: determining that Mr. Maupin is totally and permanently disabled as a result of the effects of the conditions covered under Claim Nos. K-694358 and N-095422; terminating time-loss compensation as paid through September 15, 2004; placing the claimant on a pension effective September 16, 2004; determining that the pension will be administered under Claim No. N-095422; and calculating any reduction of the pension reserve under RCW 51.32.080(4) as a result of the previously paid permanent partial

1 disability award of \$7,020 in light of *Jacobsen v. Department of Labor &*
2 *Indus.*, 127 Wn. App. 384 (2005). The Department may not deduct any
3 interest from the pension reserve.

4 It is so **ORDERED**.

5 Dated this 6th day of December, 2005.

6 BOARD OF INDUSTRIAL INSURANCE APPEALS

7
8
9 /s/ _____
10 THOMAS E. EGAN Chairperson

11
12 /s/ _____
13 FRANK E. FENNERTY, JR. Member

14
15
16 /s/ _____
17 CALHOUN DICKINSON Member