

Cox, Kenneth

PERMANENT PARTIAL DISABILITY (RCW 51.32.080)

Twenty-five percent reduction (RCW 51.32.080(2))

The "neck" is not part of the "back" within the meaning of RCW 51.32.080(2), which requires a 25 percent reduction in awards for injuries to the "back" which are not substantiated by "marked objective clinical findings." Cervical awards must therefore be paid at 100 percent of monetary value. ...*In re Kenneth Cox*, BIIA Dec., 86 4543 (1988) [special concurrence] [*Editor's Note*: The 25 percent reduction authorized by RCW 51.32.080(2) probably only applies to injuries which occurred on or after March 23, 1979 but before July 1, 1988. See Laws of 1988, ch. 161 § 6, p. 691.]

Scroll down for order.

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

1 **IN RE: KENNETH R. COX**) **DOCKET NO. 86 4543**
2)
3 **CLAIM NO. S-786796**) **DECISION AND ORDER**
4

5 APPEARANCES:

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7 Claimant, Kenneth R. Cox, Pro Se

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9 Self-Insured Employer, Weyerhaeuser Company, by
10 Roberts, Reinisch & Klor, per
11 Kathryn D. Fewell

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13 Department of Labor and Industries, by
14 The Attorney General, per
15 Stephen D. Kinman and Christa L. Thompson, Assistants
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17 This is an appeal filed by the self-insured employer, Weyerhaeuser Company, on December
18 16, 1986 from an order of the Department of Labor and Industries dated December 4, 1986, adhering
19 to the provisions of a Department order dated November 6, 1986 directing the self-insured employer to
20 pay to claimant a permanent partial disability equal to 10% of the maximum allowed for unspecified
21 disabilities as compared to total bodily impairment at full monetary value. The Department order is
22 **AFFIRMED.**
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26 **ISSUE**

27 Are awards for permanent partial disabilities of the "neck" subject to the proviso in RCW
28 51.32.080(2) which provides for a 25% monetary reduction of awards for permanent partial disabilities
29 to the "back" where there are no marked objective clinical findings?
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32 **DECISION**

33 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
34 and decision on a timely Petition for Review filed by the self-insured employer to a Proposed Decision
35 and Order issued on November 24, 1987 in which the order of the Department dated December 4,
36 1986 was affirmed.
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39 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no
40 prejudicial error was committed and said rulings are hereby affirmed.
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42 The sole issue raised by the self-insured employer is the application of RCW 51.32.080(2)
43 which states in pertinent part:
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3 ". . . Provided, That compensation for unspecified permanent partial
4 disabilities involving injuries to the back that do not have marked objective
5 clinical findings to substantiate the disability shall be determined at an
6 amount equal to seventy-five percent of the monetary value of such
7 disability as related to total bodily impairment: ..."

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9 This section reduces awards of permanent partial disability for certain "back" injuries that are not
10 substantiated by sufficiently serious (i.e., "marked", see WAC 296-20-220(1)(a)) medical findings.
11 The employer contends that this section should be construed broadly to include in the definition of
12 "back" any similar anatomical structure; and therefore the "back" as used in such a context should be
13 viewed as synonymous with the word "spine". The spine, of course, includes other structures such as
14 the sacrum, coccyx, and neck. The employer, therefore, argues that permanent partial disability
15 awards involving any portion of the spine should be reduced by RCW 51.32.080(2) where there are no
16 marked objective clinical findings.
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21 In the present case the claimant, Mr. Kenneth R. Cox, was awarded a permanent partial
22 disability equal to 10% as compared to total bodily impairment for an injury to his neck. This was
23 based on a diagnosis of cervical strain, reversal of the cervical curve at C3-4, and slight interior
24 narrowing of the C3-4 intervertebral disc space. The claimant's impairment was best described by
25 Category 2 of WAC 296-20- 240, the categories of permanent cervical and cervico-dorsal
26 impairments. Category 2 does not include in its description any "marked" medical findings. WAC
27 296-20-220(1)(a). The self-insured employer argues that because, 1) the "back" incorporates similar
28 anatomical structures such as the "neck", and 2) there are no marked medical findings, that the
29 claimant's 10% disability award should be paid at 75% of the monetary value thereof pursuant to
30 RCW 51.32.080(2).
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35 While it is clear from the statute that the Legislature intended to reduce permanent partial
36 disability awards in a certain class of cases, the extent of that class is unclear. The meaning of the
37 word "back" may seem obvious at first, but upon further reflection it appears there is a question
38 whether the Legislature's use of the word "back" is intended broadly to include the whole spine, or
39 narrowly to include only the lumbar and dorsal spine.
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1 In choosing between the definitions, the Board must look to the Legislature's intent in using the
2 word "back". In construing a statute, the primary objective is to ascertain and implement the intent of
3 the Legislature by first considering the language of the statute. Service Employees International Local
4 6 v. Superintendent of Public Instruction, 104 Wn.2d 344, 348 (1985); State v. Von Thiele, 47 Wn.
5 App. 558, 562 (1987). "If the statutory language is plain and unambiguous, the court's inquiry must
6 end, for a statute's meaning must be derived from the wording of the statute itself." State v. Von
7 Thiele, at 562, citing Human Rights Commission v. Cheney School District No. 30, 97 Wn.2d 118
8 (1982). On the other hand, if the statute itself does not define the words used, those words must be
9 given their usual and ordinary meaning. Pacific Wire Works v. Department of Labor and Industries, 49
10 Wn. App. 229, 235 (1987).

11 The word "back" as used in RCW 51.32.080(2) does not lend itself to a plain and obvious
12 definition. The diverse arguments of the parties claiming to assert the ordinary meaning of "back"
13 serve only to highlight the inherent ambiguity in the application of RCW 51.32.080(2). The problem
14 here is that the back encompasses a part of the spine. But are all of the structures of the spine part of
15 the back? There is no answer to this question in the language of the statute itself.

16 Nor are the several dictionary meanings provided by the parties particularly helpful in arriving at
17 an ordinary meaning of the term "back". A typical example of these definitions is cited from Webster's
18 Ninth New Collegiate Dictionary (1985 ed.). This entry describes the back as: "The rear part of the
19 human body, esp. from the neck to the end of the spine". (Emphasis added) The problem of course is
20 that the word "from" is in itself ambiguous to the extent that it could mean inclusive of the neck or
21 exclusive of the neck.

22 Our state's appellate courts have shown some preference for Webster's Third New
23 International Dictionary. State v. Von Thiele, supra. State v. Olson, 47 Wn. App. 514. The 1986
24 edition of that volume defines back as "the rear part of the human body extending from the neck to the
25 end of the spine, esp. the portion from the shoulder to the waist". While this definition places
26 emphasis on the area below the shoulders, it does not indicate that this is an exclusive definition.

27 In construing a statute the objective, ultimately, is to carry out the intent of the Legislature.
28 Department of Transportation v. State Employees Insurance Board, 97 Wn.2d 454 (1982). The
29 Legislature's intent in using ambiguous words and provisions can, in some cases, be resolved by a
30 review of the legislative history preceding the enactment of the controversial provision. Department of
31 Transportation v. State Employees Insurance Board, at 458. The legislative history as presented by
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1 the parties in Exhibit No. 4 does not provide a specific definition. It is clear, however, that the
2 reduction provision of RCW 51.32.080(2) was part of an overall scheme to increase workers' benefits.
3 Exhibit 4, House Bill No. 612 Fiscal Note. This purpose together with the remedial nature of the
4 Industrial Insurance Act and the mandate to construe it liberally, suggests that a definition of "back"
5 should be made so as to avoid the limitation of benefits to injured workers any more than specifically
6 set forth. RCW 51.04.010. See Dennis v. Department of Labor and Industries, 109 Wn.2d 467, at
7 470 (1987).
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11 Another avenue of statutory construction in determining the intent of the Legislature is to review
12 the interpretation placed upon the statute by the administrative agency charged with its enforcement.
13 Hamma Hamma County v. Shorelines Hearings Board, 85 Wn.2d 441 (1975).
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16 "The primary foundation and rationale for this rule is that considerable
17 judicial deference should be accorded to the special expertise of
18 administrative agencies. Such expertise is often a valuable aid in
19 interpreting and applying an ambiguous statute in harmony with the
20 policies and goals the Legislature sought to achieve by its enactment. At
21 times administrative interpretation of a statute may approach "law
22 making", but we have heretofore recognized that as an appropriate
23 function for administrative agencies to "fill in the gaps" where necessary to
24 the effectuation of a general statutory scheme. It is likewise valid for an
25 administrative agency to "fill in the gaps" via statutory construction as long
26 as the agency does not purport to "amend" the statute." Mall Inc. v.
27 Seattle, 108 Wn.2d 369, 378 (1987); quoting Hamma Hamma County v.
28 Shorelines Hearings Board, *supra*.
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30 Thus the Department of Labor and Industries' interpretation of the word "back" can be a useful aid in
31 arriving at the intent of the Legislature. Dolman v. Department of Labor and Industries, 105 Wn.2d
32 560 (1986).
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34 It is uncontroverted that the Department's consistent application since the reduction provisions
35 were enacted in 1979 has been to limit the application of RCW 51.32.080(2) to lumbosacral and
36 dorso-lumbar disabilities.
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39 "(citing RCW 51.32.080(2))...No reduction of awards would apply to
40 disabilities involving the cervical spine, nor would a reduction be
41 appropriate for impairment of the pelvis or any unspecified disability other
42 than ones involving the lumbosacral, lumbar or dorsal spine." Exhibit No.
43 2, page F-6, Department of Labor and Industries Workers' Compensation
44 Manual.
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1 This interpretation by the Department is entitled to even greater weight at this juncture where the
2 administrative interpretation has been accompanied by a long period of silent acquiescence by the
3 Legislature. Colasurdo v. Waldt, 49 Wn. App. 257, 261 (1981). RCW 51.32.080 was further amended
4 by the Legislature in 1982 and in 1986, but the portion of the statute involved herein was unchanged
5 from the language enacted in 1979. The Legislature is presumed to have full knowledge of the existing
6 administrative interpretation. Its silence regarding the limitation of the word "back" to injuries involving
7 the lumbar and dorsal spines can be viewed as indicative of an acquiescence to such a definition.
8 See Sanchez v. Department of Labor and Industries, 39 Wn. App. 80, 85 (1984).

9 The self-insured employer has the burden of presenting compelling reasons why the
10 Department's interpretation is in conflict with the intent and purpose of the statute in this case. Pacific
11 Wire Works v. Department of Labor and Industries, *supra*; Vliet v. Department of Labor and Industries,
12 30 Wn. App. 709 (1981). The evidence presented by the employer does not demonstrate that the
13 Department's implementation of the reduction provisions of RCW 51.32.080(2) is contrary to the intent
14 and purpose of the Industrial Insurance Act. Defining the "back" to mean "spine" would run counter
15 not only to the over all remedial purposes of the Industrial Insurance Act but also to the specific
16 legislative intent of this section to raise benefits, by reducing the amount of permanent partial disability
17 awards in cases not specifically or clearly set forth by the Legislature. The Department's application of
18 RCW 51.32.080(2) construes the term "back" to prevent reduction of benefits to injured workers where
19 such reduction was not clearly intended.

20 The "back" has, in other kinds of cases, been defined narrowly by this Board as well. In re
21 Bernard James, BIIA Dec., 4,394 (1955). In James the claimant had received a 40% permanent
22 partial disability award for his back in an earlier claim involving specifically the low back. Upon an
23 application to reopen his instant claim involving a cervical spine, i.e., neck injury, his physician stated
24 that he had sustained an additional 35% permanent partial disability for neck impairment. The
25 Department declined to pay the 35% award relying on the language of RCW 51.32.080(d) (now RCW
26 51.32.080(3)) providing that previous permanent partial disability should be deducted from any
27 increased disability involving the same body part. The Board concluded that the neck was not the
28 same part of the body as the back, and that the additional 35% should be paid.

29 More recently the Board considered the specific "reduction" proviso of RCW 51.32.080(2)
30 which is the subject of this appeal. We cited Dorland's Medical Dictionary defining "back" as the
31 posterior part of the trunk from the neck to the pelvis, and further stated: "Clearly, the neck is not a
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1 part of the trunk of the body, as the neck connects the head to the trunk. Since the neck is not a part of
2 the trunk, it is not a part of the back as defined by Dorland. Accordingly, the reduction...is not properly
3 applied to cervical impairments." In re Thelma E. Cramer, Dckt. Nos. 69,296 and 69,296-A, at 4
4 (February 26, 1986).
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7 The evidence presented by the parties tends more to obscure a clear understanding of the
8 word "back" than to clarify. The stipulated testimony of Dr. Richard Ulery does, however, set the
9 apparent confusion in relief.
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11 "....The "back" is not an anatomical structure, but rather, an area of the
12 body. If "back" is interpreted to refer to the spine, the neck is a part of the
13 spine." (Emphasis supplied)
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15 We agree that "back" is not a characterization of an anatomical structure and does not, therefore,
16 include in its definition all the anatomical structures of the spine. The back in laymen's terms refers to
17 the lumbar and dorsal spine. The neck in laymen's terms refers clearly to the cervical spine. The
18 Department's construction and application accords with our understanding of the Legislature's intent in
19 using the word "back". Therefore, awards of permanent partial disability for injuries involving the neck
20 or cervical spine should not be reduced under the provisions of RCW 51.32.080(2).
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25 Finally, the employer raises the point that the Board has, in the past, approved two agreed
26 orders which reduced permanent partial disability awards for cervical injuries using the provisions of
27 RCW 51.32.080(2). Exhibits 5 and 6. Such agreed orders cannot be viewed as binding precedent in
28 committing the Board to a specific position on an issue of law presented to us in a fully contested
29 manner.
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32 After consideration of the Proposed Decision and Order and the Petition for Review filed
33 thereto, and a careful review of the entire record before us, we are persuaded that the Proposed
34 Decision and Order is supported by the preponderance of the evidence and is correct as a matter of
35 law.
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38 The Proposed Findings Nos. 1-3 are hereby adopted as this Board's final findings and are
39 incorporated herein by this reference. Additionally, the following finding is hereby entered:
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41 **FINDINGS OF FACT**
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- 43 4. As of December 4, 1986, claimant's permanent impairment proximately
44 caused by the industrial injury to his neck, which was sustained on
45 November 14, 1985, was consistent with that degree of impairment
46 represented by Category 2 of WAC 296-20-240, without marked objective
47 findings on clinical examination.

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The proposed conclusions and order are hereby adopted as this Board's final conclusions and order and are incorporated herein by this reference.

It is so ORDERED.

Dated this 25th day of March, 1988.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/
SARA T. HARMON, Chairperson

/s/
FRANK E. FENNERTY, JR., Member

/s/
PHILLIP T. BORK, Member