

Lusk, Joanne

PERMANENT PARTIAL DISABILITY (RCW 51.32.080)

Pension due to combined effects may preclude payment of award under another claim

Sulgrove does not permit payment of a permanent partial disability award in one claim where a worker was on pension rolls under another claim due to the combined effects of the disability associated with both claims. ...***In re Joanne Lusk, BIIA Dec., 89 2984 (1991)***

PERMANENT TOTAL DISABILITY (RCW 51.08.160)

Combined effects of preexisting and subsequent disabilities

Where a worker was on pension rolls under one claim due to the combined effects of the disability associated with that claim, as well as another, the worker cannot receive a permanent partial disability award under the other claim. ...***In re Joanne Lusk, BIIA Dec., 89 2984 (1991)*** [*Editor's Note: Cf. In re Roy T. Sulgrove, BIIA Dec., 88 0869 (1989).*]

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1 attributable to her industrial injury of January 13, 1978 (Claim No. H-268570) and take such further
2 action as may be indicated or required by the law and the facts.

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4 The issue raised and litigated in these appeals is whether the claimant is entitled to an
5 additional permanent partial disability award under Claim No. H-268570. The Department placed the
6 claimant on the pension rolls effective July 7, 1989 as a result of the combined effects of the conditions
7 associated with Claim No. H-268570 and a subsequent claim, Claim No. J-344117.
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10 Mrs. Lusk argues that, since her condition in Claim No. H-268570 became medically fixed and
11 stable prior to the effective date of the pension (July 7, 1989), she is entitled to an increased
12 permanent partial disability award under the H claim. Mrs. Lusk bases this argument on the rationale
13 set forth in In re Roy T. Sulgrove, BIIA Dec., 88 0869 (1989). The Department contends that, because
14 the disability resulting from the neck and shoulder conditions covered under Claim No. J-344117 and
15 the disability resulting from the left leg condition covered under Claim No. H-268570 have combined to
16 produce the permanent total disability, no further permanent partial disability award is payable under
17 Claim No. H-268570.
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22 The Industrial Appeals Judge was persuaded that under Sulgrove Mrs. Lusk is entitled to an
23 increased permanent partial disability award in Claim No. H-268570. However, we do not believe that
24 Sulgrove is applicable to Mrs. Lusk's claims.
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26 The parties have submitted this matter on a stipulation of facts. A brief review of the facts is
27 necessary to fully understand the Department's actions.
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29 On January 13, 1978, Mrs. Lusk sustained an industrial injury to her left knee and ankle. The
30 claim, H-268570, was closed in January of 1979 with a permanent partial disability award equal to 5%
31 of the amputation value of the left leg at or above the knee joint with functional stump. An application
32 to reopen the claim was granted by the Department effective June 5, 1980. The claim was again
33 closed in July of 1982 with an increased permanent partial disability award equal to 15% of the
34 amputation value of the left leg at or above the knee joint with functional stump.
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39 On October 25, 1983, Mrs. Lusk sustained a second industrial injury involving her neck and
40 shoulders. This claim, J-344117, remained open until May 31, 1989.
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42 On January 9, 1985 Mrs. Lusk applied to reopen Claim No. H-268570 (left leg). This claim was
43 reopened effective December 26, 1984 and remained open until closed on May 31, 1989, in
44 conjunction with the closing order in Claim No. J-344117. This order awarded the pension as a
45 combined result of conditions associated with both claims.
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1 In Sulgrove, the claimant sustained an industrial injury in 1980. He filed a claim and was
2 eventually awarded a pension in 1987 as a result of that industrial injury. In 1986 (17 months prior to
3 being placed on the pension rolls as a result of his first industrial injury) the claimant submitted a
4 separate application for benefits based upon an asbestos-related occupational disease. Although the
5 Department assigned a claim number, it took no further action until after the closing order was issued
6 in the first claim. The Department then argued that because Mr. Sulgrove was placed on a pension in
7 the first claim, he could not legally receive any award for permanent partial disability under the
8 asbestos-related claim. In Sulgrove we stated that if the claimant's asbestosis was fixed and stable
9 and productive of a permanent partial disability prior to being placed on the pension rolls there was no
10 reason in law why he should not be entitled to a permanent partial disability award. We found no
11 double payment or overlapping of classifications. We held that if Mr. Sulgrove was entitled to a
12 permanent partial disability award under the asbestos claim, which the Department had failed to
13 promptly pay, the Department could not relieve itself of that obligation solely because Mr. Sulgrove
14 was subsequently determined to be permanently totally disabled under the separate injury claim.
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16 The facts in Mrs. Lusk's case are substantially different from those presented in Sulgrove. Mrs.
17 Lusk's permanent total disability is a result of the combined effects of two different injuries. At the
18 same time, it is the aggravation of the disability associated with Claim No. H-268570 which is now the
19 basis for the claimant's contention that she is entitled to an increased permanent partial disability
20 award. This aggravation occurred after the second injury. It is this same increased disability which is
21 contributing to Mrs. Lusk's permanent total disability. In other words, in awarding the pension, the
22 Department considered the increased impairment of the knee in Claim No. H-268570. The May 31,
23 1989 order in Claim No. J-344117 (affirmed by the August 22, 1989 Department order) charged the
24 entire pension reserve against the second injury fund, and explicitly determined that no permanent
25 disability associated with the neck or shoulder conditions in Claim No. J-344117 would have existed
26 "had there been no preexisting disability." In essence the Department concluded that the original left
27 leg disability caused by the industrial injury of 1978, together with any neck and shoulder disability
28 resulting from the 1983 industrial injury, as well as the subsequent aggravation of disability related to
29 the 1978 industrial injury, all combined to produce the permanent total disability.
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31 In awarding the pension the Department has expressly combined all disability associated with
32 the two separate industrial injuries, including any aggravation of the 1978 injury to the left knee. In
33 doing so, the Department has awarded all benefits due under both claims. The claimant cannot now
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1 seek to have a permanent partial disability award separate from the finding of permanent total
2 disability. To do so would compensate the injured worker twice for the same impairment.

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4 In summary, we believe the facts of this case are substantially different from the facts in
5 Sulgrove. First, in Sulgrove the Department did not consider the disability in both claims when
6 classifying Mr. Sulgrove as a permanently totally disabled worker. In Mrs. Lusk's case the Department
7 considered the disability associated with Claim Nos. H-268570 and J-344117 and determined that
8 they both produced the permanent total disability. Second, in Sulgrove the Department failed to act on
9 the claimant's request for a permanent partial disability award until after putting Mr. Sulgrove on the
10 pension rolls in a different claim. The Department has not failed to respond to such a request in Mrs.
11 Lusk's case. The Department appropriately considered the disability associated with both claims and
12 determined that when combined they produced permanent total disability.

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14 Finally, we note that it would not appear to be to claimant's advantage to have a permanent
15 partial disability award paid under Claim No. H-268570. The provisions of RCW 51.32.080(2) would
16 then require "any portion of the permanent partial disability compensation which exceeds the amount
17 that would have been paid the injured worker if permanent total disability compensation had been paid
18 in the first instance ... [to] be deducted from the pension reserve ... and ... her monthly compensation
19 payments [would] be reduced accordingly."

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27 **FINDINGS OF FACT**

- 28 1. Docket No. 89 2984, Claim No. H-268570. On January 23, 1978 an
29 accident report from the claimant was received by the Department of
30 Labor and Industries alleging an industrial injury on January 13, 1978
31 while in the course of employment with the Issaquah School District.

32 On February 27, 1978 the Department issued an order allowing and
33 closing the claim for medical treatment only.

34 On April 28, 1978 a protest and request for reconsideration on behalf of
35 the claimant was received by the Department of Labor and Industries.

36 On May 8, 1978 the Department issued an order setting aside and holding
37 for naught the Department order dated February 27, 1978.

38 On January 23, 1979 the Department issued an order closing the claim
39 with a permanent partial disability award equal to 5% of the amputation
40 value of the left leg at or above the knee joint with functional stump and
41 time loss compensation as paid.

42 On June 24, 1980 claimant filed an application to reopen the claim for
43 aggravation of condition with the Department.
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1 On July 3, 1980 the Department issued an order reopening the claim
2 effective June 5, 1980 for authorized treatment.

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4 On July 8, 1981 the Department issued an order closing the claim with
5 time loss compensation as paid to June 19, 1981 and no further award for
6 permanent partial disability.

7 On August 31, 1981 the claimant filed a protest and request for
8 reconsideration from the Department order dated July 8, 1981 with the
9 Department.

10 On July 26, 1982 the Department issued an order modifying the
11 Department order of July 8, 1981 from final to interlocutory and reopened
12 the claim to pay the claimant a permanent partial disability award equal to
13 15% of the amputation value of the left leg at or above the knee joint with
14 a functional stump and closed the claim.

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16 On January 9, 1985 an application to reopen the claim for aggravation
17 was received by the Department from the claimant.

18 On January 16, 1985 the Department issued an order reopening the claim
19 effective December 26, 1984 for treatment and action as indicated.

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21 On May 31, 1989 the Department issued an order which determined that
22 the claimant's condition resulting from the injury of January 13, 1978
23 covered under Claim No. H-268570 and from the injury of October 25,
24 1983 covered under Claim No. J-344117 had reached a fixed stage
25 resulting in total and permanent disability and placed the claimant on the
26 pension rolls effective July 7, 1989 as a combined result of both injuries.

27 On May 31, 1989 the Department issued an additional order which
28 determined that second injury fund relief was not applicable in Claim No.
29 H-268570.

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31 On July 12, 1989 the claimant filed a notice of appeal with the Board of
32 Industrial Insurance Appeals from both Department orders dated May 31,
33 1989. On July 31, 1989 the Board issued an order granting the appeal
34 and assigning Docket No. 89 2984.

35 Docket No. 89 3984, Claim No. J-344117. On November 14, 1983 an
36 accident report from the claimant was received by the Department of
37 Labor and Industries alleging an industrial injury on October 25, 1983
38 while in the course of employment with Issaquah School District No. 411.

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40 On August 7, 1985 the Department issued an order closing the claim with
41 time loss compensation as paid and no permanent partial disability award.

42 On August 16, 1985 the claimant filed a protest and request for
43 reconsideration with the Department of Labor and Industries. On
44 September 25, 1985 the Department issued an order holding the August
45 7, 1985 order in abeyance.
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1 On September 26, 1985 the Department issued an order assessing an
2 overpayment regarding time loss compensation and ordering the claim
3 remain open for treatment and action as indicated.

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5 On July 6, 1987 the Department issued an order closing the claim with
6 time loss compensation as paid to August 5, 1985 and no award for
7 permanent partial disability.

8 On July 20, 1987 the claimant filed a protest and request for
9 reconsideration with the Department. On August 25, 1987 the Department
10 issued an order holding the order dated July 6, 1987 in abeyance.

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12 On September 1, 1987 the Department issued an order setting aside and
13 holding for naught the order of July 6, 1987 and ordered the claim remain
14 open for treatment and action as indicated.

15 On May 31, 1989 the Department issued an order which determined that
16 the claimant's condition resulting from the injury of January 13, 1978
17 covered under Claim No. H-268570 and from the injury of October 25,
18 1983 covered under Claim No. J-344117 had reached a fixed stage
19 resulting in total and permanent disability and placed the claimant on the
20 pension rolls effective July 7, 1989 as a combined result of both injuries.

21 On May 31, 1989 the Department issued an order which determined that
22 no permanent disability would have existed as a result of the injury
23 covered by this claim had there been no preexisting disability; and
24 ordered that the entire pension reserve shall be charged against the
25 second injury account in accordance with RCW 51.16.120.

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27 On July 21, 1989 the claimant filed a protest and request for
28 reconsideration with the Department of Labor and Industries to the
29 Department order dated May 31, 1989. On August 22, 1989 the
30 Department issued an order affirming the provisions of the order dated
31 May 31, 1989 regarding Claim No. J-344117.

32 On September 18, 1989 the claimant filed an appeal with the Board of
33 Industrial Insurance Appeals from the Department order dated August 22,
34 1989. On October 17, 1989 the Board issued an order granting the
35 appeal and assigning Docket No. 89 3984.

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37 2. On January 13, 1978, while in the course of employment with School
38 District No. 411, the claimant sustained an industrial injury. This injury
39 was to the claimant's knees and left ankle. The claim was assigned Claim
40 No. H-268570. The claimant's condition and disability causally related to
41 the industrial injury of January 13, 1978 worsened between July 26, 1982
42 and May 31, 1989.
- 43 3. The claimant's condition resulting from the industrial injury of January 13,
44 1978 was fixed and stable as of May 31, 1989 and no further curative
45 treatment was recommended or indicated at that time.
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- 1 4. On October 25, 1983 the claimant sustained an industrial injury while in
2 the course of employment with School District No. 411 to her neck and
3 shoulder. This claim was assigned Claim No. J-344117.
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5 5. The claimant's condition resulting from the industrial injury of October 25,
6 1983 was fixed and stable as of May 31, 1989 and no further curative
7 treatment was recommended or indicated at that time.
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9 6. As of July 7, 1989, the claimant was totally and permanently disabled as a
10 result of the combined effects of the industrial injuries of January 13, 1978
11 and October 25, 1983.
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13 7. Claimant suffered no permanent partial disability as a result of the
14 industrial injury of October 25, 1983.

15 **CONCLUSIONS OF LAW**

- 16 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties
17 and subject matter of these appeals.
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19 2. The Department order dated May 31, 1989 regarding Claim No. H-268570
20 and Claim No. J-344117 which determined that the claimant's condition
21 resulting from the injury of January 13, 1978 covered under Claim No.
22 H-268570 and from the injury of October 25, 1983 covered under Claim
23 No. J-344117 had reached a fixed stage resulting in total and permanent
24 disability and which placed the claimant on the pension rolls effective July
25 7, 1989 as a result of the combined effects of Claim Nos. H-268570 and
26 J-344117, is correct and is affirmed.
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28 3. The Department order dated May 31, 1989 in Claim No. H-268570 which
29 denied second injury fund relief in Claim No. H-268570, is correct and is
30 affirmed.
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32 4. The Department order dated August 22, 1989 which adhered to the
33 provisions of an order dated May 31, 1989 regarding Claim No. J-344117
34 which determined that no permanent disability would have existed as a
35 result of the injury covered by Claim No. J-344117 had there been no
36 preexisting disability and ordered that the entire pension reserve shall be
37 charged against the second injury fund in accordance with RCW
38 51.16.120, is correct and is affirmed.

39 It is so ORDERED.

40 Dated this 14th day of June, 1991.

41 BOARD OF INDUSTRIAL INSURANCE APPEALS

42 /s/
43 SARA T. HARMON Chairperson

44 /s/
45 PHILLIP T. BORK Member
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