

Barden, Joseph

PERMANENT PARTIAL DISABILITY (RCW 51.32.080)

Interest (RCW 51.32.080 (6))

During the period of time a worker was incarcerated interest does not accrue on the unpaid portion of an award for permanent partial disability benefits. Under RCW 51.32.040(3)(a) payments of benefits are "cancelled" during incarceration. Because there are no benefits owing to the worker during incarceration, it follows that no interest is owed. ...*In re Joseph Barden, BIIA Dec., 98 13526 (1999)* [dissent] [*Editor's Note: The Board's decision was appealed to superior court under Kitsap County Cause No. 99-01076-2.*]

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

1 IN RE: JOSEPH F. BARDEN) DOCKET NO. 98 13526
2)
3 CLAIM NO. K-342386) DECISION AND ORDER
4

5 APPEARANCES:
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7 Claimant, Joseph F. Barden, by
8 Casey & Casey, P.S., per
9 Gerald L. Casey and Carol L. Casey

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11 Employer, Lamphere Contract Services, Inc.,
12 None

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14 Department of Labor and Industries, by
15 The Office of the Attorney General, per
16 Ken Lederman, Assistant
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19 The claimant, Joseph F. Barden, filed an appeal with the Board of Industrial Insurance
20 Appeals on April 27, 1998, from an order of the Department of Labor and Industries dated April 16,
21 1998. The order affirmed a Department order dated January 14, 1998, and a payment order dated
22 February 13, 1998. **AFFIRMED.**

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27 DECISION
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29 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
30 and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order
31 issued on December 18, 1998, in which the order of the Department dated April 16, 1998, that
32 affirmed Department orders dated January 14, 1998 and February 13, 1998, was affirmed.
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37 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
38 no prejudicial error was committed and the rulings are affirmed.
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41 At the outset, we agree with the result reached by the Proposed Decision and Order. We
42 feel, however, that the reasons therefore need further clarification.
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45 There are two issues raised by Mr. Barden's Petition for Review. First, he contends that the
46 Department erred in attempting to deduct a previously paid permanent partial disability award in its
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1 January 14, 1998 order. Second, Mr. Barden contends that he is owed interest on the unpaid
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3 permanent partial disability award during the time he was incarcerated in prison. We will discuss
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5 these issues in order.

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7 On November 20, 1992, the Department closed Mr. Barden's claim by awarding him a
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9 permanent partial disability award of \$44,280 for mental health, cervical and right upper extremity
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11 impairments. The order, however, did not specifically deduct for the permanent partial disability
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13 awards previously paid. On August 8, 1990, the Department had awarded and paid to Mr. Barden
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15 a permanent partial disability award of \$2,700 in this same claim for 5 percent of the amputation
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17 value of the right arm at or above the deltoid insertion or by disarticulation at the shoulder, less a
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19 previous award of \$163.35.¹ The November 20, 1992 Department order awarded Mr. Barden
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21 7 percent amputation value of the right arm, Category 3 for permanent cervical impairment, and
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23 Category 3 for permanent mental health impairment, in the total amount of \$44,280. In this order
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25 the Department failed to note or deduct the \$2,700 permanent partial disability award previously
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27 paid in 1990.

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29 Mr. Barden was not paid the permanent partial disability award in 1992 because he was in
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31 prison. RCW 51.32.040(3). Upon his release from prison the Department issued a further order
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33 authorizing payment of the permanent partial disability. However, the January 14, 1998 order
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35 authorizing the payment to Mr. Barden included the language, "less previously paid permanent
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37 partial disability." Mr. Barden asserts that the Department cannot now add this language and
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39 deduct for the permanent partial disability paid in 1990 because the Department was bound by the
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¹ Mr. Barden asserts that the parties did not stipulate to this amount actually being paid. However, the parties attached
47 copies of all relevant orders to their factual stipulation, in particular the order of January 14, 1998, which specifies that
the previous \$2,700 permanent partial disability award had been paid. This is a substantive stipulation and not
jurisdictional. Further, Mr. Barden never alleged he had not received this amount.

1 determination of its earlier order. Mr. Barden cites RCW 51.32.240(1) as authority for his position.

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3 That section provides:

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5 Whenever any **payment** of benefits under this title is made because of
6 clerical error, mistake of identity, innocent misrepresentation by or on
7 behalf of the recipient thereof mistakenly acted upon, or any other
8 circumstance of a similar nature, all not induced by fraud, the recipient
9 thereof shall repay it and recoupment may be made from any future
10 payments due to the recipient . . . The department . . . must make claim
11 for such repayment or recoupment within one year of the making of any
12 such payment or it will be deemed any claim therefor has been waived.

13
14 (Emphasis added.)

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16 Based on the parties' Stipulated Facts and the argument of counsel, we assume that no
17 money payments were made to Mr. Barden in November of 1992. By citing RCW 51.32.240(1), we
18 assume that Mr. Barden would argue that the November 20, 1992 Department order was
19 tantamount to or equivalent to a payment of benefits even though no money was actually
20 dispersed. In other words, the Department order had the effect of binding the Department to an
21 eventual payment of the entire \$44,280 without deducting the prior \$2,700. However, the
22 November 20, 1992 order also withheld payment from Mr. Barden pursuant to the provisions of
23 RCW 51.32.040. As Mr. Barden received no money from the Department as a result of the 1992
24 order, there has been no erroneous or mistaken payment. Further, the deduction for the 1990
25 permanent partial disability in the January 14, 1998 order cannot be said to be a recoupment of
26 benefits paid. Reliance on RCW 51.32.240(1) is misplaced as there has been no "payment" made
27 to Mr. Barden within the meaning of this statute.

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40 Ultimately, it appears to us that Mr. Barden is attempting to hold the Department to the
41 language of its November 20, 1992 order that failed to deduct for previously paid permanent partial
42 disability. We do not need to reach the question of whether the provisions of the November 20,
43 1992 order have any binding effect in and of themselves as that order was not a final determination
44 of the Department. That order did not become final because Mr. Barden protested the order on
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1 December 7, 1992.² The parties' Stipulated Facts point out that the protest of December 7, 1992,
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3 was narrow in focus and did not object either to the amount of permanent partial disability awarded
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5 or the closure of the claim. However, once protested, the order of November 20, 1992, did not
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7 become final, thereby allowing the Department the latitude to address all issues addressed therein
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9 at a later date.

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11 The Department did respond to Mr. Barden's protest by means of its January 14, 1998 order.
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13 At this juncture, the Department was free to add whatever additional provisions and language as
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15 authorized by law. That order reiterated the basis for the award of permanent partial disability,
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17 affirmed closure of the claim effective November 20, 1992, and provided a schedule of payments as
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19 requested by Mr. Barden in the December 7, 1992 protest. The Department specified that the
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21 permanent partial disability award to be paid in January of 1998 was to be paid "less prior awards."

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23 Again, this was not an issue of recoupment as alleged by Mr. Barden, but rather an issue of
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25 accounting for monies already paid. The Department was not collecting back money, but simply
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27 ensuring that the full and proper benefit was paid and not more. We can envision no reasonable
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29 argument that could be made to require the Department to pay the \$44,280 awarded in 1992
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31 without deducting or accounting for prior permanent partial disability awards made in the same
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33 claim.

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35 We also note that the parties' Stipulated Facts specify that the August 8, 1990 order that
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37 authorized the payment of the \$2,700 permanent partial disability award was protested and was
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39 also not a final order. Thus, the Department was free to adjust or account for the money paid in
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42 ² The parties' Stipulated Facts also contains a copy for substantive purposes of the Department's order dated
43 November 20, 1992. We note that order contains what the Department refers to as "appeal only" language. Under the
44 authority of *In re Mildred Holzerland*, BIIA Dec., 15,729 (1965), we examined the Department's file to review this order.
45 We found that there was an additional page of the November 20, 1992 order that was not provided as a part of the
46 factual stipulation. That page of the order corrected and superseded the earlier order of September 2, 1992. This
47 additional page of the November 20, 1992 order contained both protest language and appeal language. Either under
the theory of *In re Santos Alonzo*, BIIA Dec., 56,833 (1981), which requires the Department to issue a further order
upon protest, or upon the theory of *In re Donzella Gammon*, BIIA Dec., 70,041 (1985), which gives the Department the
prerogative of considering a protest to an appealable only order, the order of November 20, 1992, did not become final.

1 any later order addressing permanent partial disability. This amount is really only an advance upon
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3 the award ultimately authorized by the orders of November 20, 1992 and January 14, 1998. A
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5 payment of permanent partial disability at a later date could be construed to include any advances
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7 or prior payments, even though such language might be omitted from the Department order. It
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9 strains analysis of the facts of this appeal to conclude the Department either made or authorized an
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11 erroneous payment or attempted an unauthorized collection.

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13 There has been no reduction of the permanent partial disability authorized and owing to
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15 Mr. Barden. He is entitled to the full \$44,280, but not more than that. We note there has been no
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17 claim or assertion by Mr. Barden that his medical condition arising out of this claim warrants any
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19 greater award than the total authorized in both the orders of November 20, 1992 and January 14,
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21 1998. Payment "less prior award" works no hardship upon him.

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23 We turn now to Mr. Barden's assertion that he is entitled to interest on the "cancelled"
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25 permanent partial disability award while he was incarcerated. The statute authorizing interest on
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27 payments of permanent partial disability is RCW 51.32.080(6). That section provides that when a
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29 large sum of permanent partial disability is spread over a period of time, interest will be paid on the
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31 unpaid amounts at the rate of 8 percent commencing with the second monthly payment. After
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33 Mr. Barden was released from prison, the Department commenced payment of the permanent
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35 partial disability award. Mr. Barden contends, however, that he should have received interest on
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37 the entire amount of the permanent partial disability not paid to him during the time that he was
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39 confined in prison. He alleges at page 5 of the Petition for Review that there is no exemption in the
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41 payment of interest on unpaid permanent partial disability due to incarceration. While interest is not
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1 specifically referred to in RCW 51.32.040(3)(a), this section does give the Department direction not
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3 to pay benefits during incarceration. RCW 51.32.040(3)(a) provides as follows:

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5 Any worker or beneficiary receiving benefits under this title who is
6 subsequently confined in, or who subsequently becomes eligible for
7 benefits under this title while confined in, any institution under conviction
8 and sentence shall have all payments of the compensation **cancelled**
9 during the period of confinement.

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11 (Emphasis added.) The Department argues that the effect of canceling benefits under this section
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13 has the effect of suspending entitlement altogether, thus, creating a situation where there is no
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15 unpaid balance within the meaning of RCW 51.32.080(6). The question we face is what effect does
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17 the word "cancelled" have upon Mr. Barden's entitlement to benefits during the period he was
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19 incarcerated?

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21 A general rule of statutory construction is that words used in statutes retain their ordinary
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23 meaning unless otherwise specified or indicated by the statute. *Gaylord v. Tacoma School Dist.*
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25 *No. 10, 88 Wn.2d 286, 291 (1977); Adams v. Department of Social & Health Services, 38 Wn. App.*
26
27 *13, 16 (1984). Webster's Third New International Dictionary 325 (1986) defines cancelled in the*
28
29 *following way: to destroy the force, effectiveness, or validity of: revoke, annul, invalidate.*
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31 *Compare with Black's Law Dictionary 206 (6th ed. 1990). Cancelled, as used in*
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33 *RCW 51.32.040(3)(a), means to revoke or invalidate (or destroy the validity) of any entitlement to*
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35 *benefits during the period of incarceration. We believe the plain meaning of the word and the*
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37 *statute indicates that Mr. Barden was not entitled to any benefits during his period of incarceration*
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39 *so that there was no payment owed to him.*

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41 The word "cancelled" we view as clear and unambiguous, indicating that there are no
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43 benefits owing to an incarcerated worker during the period of confinement. As there is no benefit
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45 owing it would not be consistent with the statute to create a right to interest on a nonexistent
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47 benefit. The worker can reassert the right to a benefit after incarceration, which Mr. Barden did in

1 the letter of notification by his counsel dated November 21, 1996. Clearly, upon the authorization of
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3 payment subsequent to his incarceration, Mr. Barden would be entitled to interest on "unpaid
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5 balances" as contemplated by RCW 51.32.080(6).
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7 From the foregoing we enter the following findings of fact and conclusions of law.
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9 **FINDINGS OF FACT**

- 10
11 1. The claimant, Joseph F. Barden, sustained an injury in the course of his
12 employment on November 12, 1986, and filed an application for benefits
13 with the Department of Labor and Industries on December 1, 1986. On
14 August 8, 1990, the Department issued an order closing the claim with
15 no monetary award for a Category 1 cervical impairment, no monetary
16 award for a Category 1 psychiatric disability, and paid \$2,700 for a
17 permanent partial disability equal to 5 percent of the amputation value of
18 the right arm at or above the deltoid insertion or by disarticulation at the
19 shoulder, less a previous award of \$163.35. This order was timely
20 protested by Mr. Barden. The Department entered a further order on
21 September 2, 1992, again closing the claim effective that date with time
22 loss compensation as paid to September 1, 1992, without further award
23 for time loss compensation or for additional permanent partial disability.
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25 Mr. Barden protested the Department's September 2, 1992 order. The
26 Department then entered an order on November 20, 1992, that closed
27 the claim with permanent partial disability awards for a Category 3
28 mental health impairment, a Category 3 cervical impairment, and a
29 permanent partial disability award equal to 7 percent of the amputation
30 value of the right upper extremity, in the total amount of \$44,280 and
31 noted that the award would be held until Mr. Barden was no longer
32 confined in any institution under conviction and sentence and so notified
33 the Department. Mr. Barden protested the November 20, 1992 order on
34 December 7, 1992.
35

36 On January 14, 1998, the Department issued an order for payment of
37 the permanent partial disability awards pursuant to its order of
38 November 20, 1992, or a total award of \$44,280, less the previously
39 paid \$2,700 to be paid with an initial lump sum payment of \$4,674.75
40 with a balance of \$36,905.25 to be paid at \$1,130.33 per month plus 8
41 percent interest per annum. Mr. Barden timely protested that order.
42

43 On February 13, 1998, the Department issued an order paying the
44 balance of the scheduled award in the amount of \$36,905.25.
45 Mr. Barden protested that order and on March 3, 1998, the Department
46 affirmed its order dated February 13, 1998. Mr. Barden appealed that
47 order and the Department subsequently held the March 3, 1998 order in
abeyance by Department order dated April 13, 1998.

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2 On April 16, 1998, the Department issued an order affirming its orders
3 dated January 14, 1998 and February 13, 1998. From that order
4 Mr. Barden filed a Notice of Appeal with the Board of Industrial
5 Insurance Appeals on April 27, 1998. The Board issued an order on
6 June 8, 1998, granting the appeal, assigning it Docket No. 98 13526,
7 and directing that further proceedings be held.
8

- 9 2. Joseph F. Barden sustained an industrial injury on November 12, 1986,
10 while in the course of his employment with Lamphere Contract Services,
11 Inc.
12
- 13 3. Joseph F. Barden was paid a total of \$2,700 permanent partial disability
14 award under Claim No. K-342386 by the Department of Labor and
15 Industries pursuant to its August 8, 1990 order, as documented by page
16 one of the Department order of January 14, 1998.
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- 18 4. As of the date of the November 20, 1992 Department order closing the
19 claim under Claim No. K-342386, Joseph F. Barden was incarcerated in
20 an institution under conviction and sentence.
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- 22 5. As of January 14, 1998, Joseph F. Barden was no longer incarcerated in
23 an institution under conviction and sentence and was entitled to a
24 permanent partial disability award for a Category 3 permanent mental
25 health impairment under the categories under WAC 296-20-340, for a
26 Category 3 permanent cervical impairment under WAC 296-20-240, and
27 for permanent partial disability award equal to 7 percent of the
28 amputation value of the right upper extremity, all for a total of \$44,280,
29 less prior awards.
30

31 **CONCLUSIONS OF LAW**

- 32
- 33 1. The Board of Industrial Insurance Appeals has jurisdiction over the
34 subject matter and the parties to this proceeding.
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- 36 2. The Department of Labor and Industries, as required by
37 RCW 51.32.040(3)(a), properly canceled benefits payable to Joseph F.
38 Barden due to his confinement in an institution under conviction and
39 sentence. The cancellation of benefits during incarceration does not
40 constitute an unpaid balance within the meaning of RCW 51.32.080(6).
41
- 42 3. Joseph F. Barden was not entitled to interest on benefits cancelled
43 during a period of incarceration within the meaning of
44 RCW 51.32.080(6).
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- 46 4. The November 20, 1992 order of the Department of Labor and
47 Industries was not a final order within the meaning of RCW 51.52.060.

1 5. The order of the Department of Labor and Industries dated April 16,
2 1998, that affirmed the orders of the Department dated January 14,
3 1998 and February 13, 1998, is correct and is affirmed.
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5 It is so ORDERED.
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7 Dated this 9th day of April, 1999.
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9 BOARD OF INDUSTRIAL INSURANCE APPEALS
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13 /s/ _____
14 THOMAS E. EGAN Chairperson
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17 /s/ _____
18 JUDITH E. SCHURKE Member
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22 **DISSENT**
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24 I dissent from the majority because I do not agree about the effect or the meaning of the
25 word "canceled" as used in RCW 51.32.040(3)(a). The majority construes "canceled" as
26 completely removing the entitlement to any payments of compensation during the period of
27 incarceration. However, the statute also provides:
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32 After discharge from the institution, payment of benefits due afterward
33 shall be paid if the worker or beneficiary would, except for the provisions
34 of this subsection (3), otherwise be entitled to them.
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36 Thus, the benefits are not invalidated or voided, but merely delayed as the worker remains entitled
37 to payments for authorized compensation after incarceration.
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40 In the present appeal, the Department determined that Mr. Barden was entitled to
41 compensation for a specified amount of permanent partial disability. His incarceration did not
42 change his disability or remove his entitlement to coverage under the Industrial Insurance Act. At
43 worst, all RCW 51.32.040(3)(a) does is delay the payment for those benefits that Mr. Barden was
44 otherwise properly entitled to. During the period of delay in the payment of these benefits the
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1 Department retained the sums that would have been paid to Mr. Barden. The Department was
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3 committed by statute to pay Mr. Barden all payments of compensation upon his release from
4
5 prison.
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7 In the court of appeals decision in *Hyde v. Wellpinit School District No. 49 et al*, 32 Wn. App.
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9 465 at 471, the court, in turn, cited Black's Law Dictionary in defining interest as "the compensation
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11 allowed . . . for the use . . . or detention of money." Assuming that the Department properly
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13 withheld Mr. Barden's permanent partial disability upon incarceration, this money was certainly an
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15 amount he was entitled to by the Department's own determination. I again remind the majority that
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17 the Industrial Insurance Act was to provide sure and certain relief for workers injured in the course
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19 of their employment and that the Act should be liberally construed for the purpose of reducing to a
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21 minimum the suffering and economic loss arising from injuries in the course of employment.
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23 RCW 51.04.010 and RCW 51.12.010. Mr. Barden was awarded the total amount of permanent
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25 partial disability of \$44,280 in November of 1992. This amount was detained from Mr. Barden and
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27 the Department had the benefit of it during this time.
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29 The purpose of the disability award was to reduce Mr. Barden's economic suffering. The
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31 money was detained until 1998. Clearly, due to inflation and other factors, the amount paid to
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33 Mr. Barden in 1998 does not have the same value to him as it would have had, had he received it in
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35 1992. The fact that the Department may have been authorized to detain these funds does not
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37 address the issue that the permanent partial disability, when paid in 1998, does not have the same
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39 financial effect that it would have had in 1992. The clear mandate of the Industrial Insurance Act is
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41 to construe the provisions of the Act liberally so as to reduce economic suffering. Irrespective of
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43 the reason why payment of the permanent partial disability award may have been delayed, it is
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45 clear that the Department benefited while Mr. Barden has suffered a real and an actual loss in the
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47 value of his disability award.

1 Pronouncements of the Legislature should not be construed to reach absurd or illogical
2 results. Although interest is not specifically referred to in RCW 51.32.040(3)(a), it would be illogical
3 to assume that interest should not be paid given the fundamental purposes of the Industrial
4 Insurance Act. Mr. Barden should be paid interest on his permanent partial disability award for the
5 entire time that it was detained by the Department of Labor and Industries.
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10 Dated this 9th day of April, 1999.
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12 BOARD OF INDUSTRIAL INSURANCE APPEALS
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15 /s/ _____
16 FRANK E. FENNERTY, JR. Member
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