

Pruden, Randall

PERMANENT PARTIAL DISABILITY (RCW 51.32.080)

***Overpayment**

The Industrial Insurance Act doesn't permit the Director any discretion to waive an overpayment for previously paid permanent partial disability when the Department places the worker on a pension under the same claim.*In re Randall Pruden*, BIIA Dec., 2014546 (2021)

Scroll down for order.

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

IN RE: RANDALL J. PRUDEN) **DOCKET NO. 20 14546**
)
CLAIM NO. W-722080) **DECISION AND ORDER**

In February 2020, the Department found Randall Pruden to be permanently and totally disabled and placed him on a pension, less the amount of a permanent partial disability (PPD) award that had previously been paid. Our industrial appeals judge affirmed the Department order demanding repayment and interpreted RCW 51.32.240(4)(a) to mean that the Director does not have discretion to waive the deduction for previously paid PPD when that payment was not made erroneously. In his Petition for Review, Mr. Pruden argues that the Department lacks the authority to demand repayment of the PPD award when the worker never actually received payment, and that the Director of the Department abused his discretion by declining to waive repayment of the PPD. Although we agree with our industrial appeals judge's ruling, we grant review to provide further analysis as to why RCW 51.32.240 doesn't apply. The Department order dated March 11, 2020, is correct and is **AFFIRMED**.

DISCUSSION

Randall Pruden sustained an industrial injury in 2001 while working for Boeing, a self-insured employer. In April 2007, the Department closed the claim with a Category 2 PPD award for the low back, and a 15 percent PPD award for the right upper extremity, for a total award of \$20,323.47. At the time, Mr. Pruden was represented by attorney Peter Moote. Boeing sent the PPD award to Mr. Moote, as Mr. Pruden's attorney of record, but Mr. Moote never informed his client of the award and never sent him a copy of the closing order. In November 2010, attorney Peter Moote resigned from the Washington State Bar Association, in lieu of disbarment. In 2012, Mr. Moote was sentenced to 48 months in prison for embezzling \$2 million of his clients' money from the 1990s to 2011.¹

When the claim closed in 2007, Mr. Pruden had already returned to work and he didn't think much about his claim until 2011, when he sought to reopen it. He was unable to reach Mr. Moote at this time, so he hired a different attorney for the reopening application. In November 2011, the Department reopened the claim. In July 2019, the Department issued a closing order finding Mr. Pruden permanently and totally disabled, but ordering him to repay the previously paid PPD award. This was the first time Mr. Pruden was aware of the existence of the PPD award. Mr. Pruden appealed the 2019 closing order to the Board, seeking a waiver of the repayment obligation. On

¹ Exhibit J to Declaration of Attorney Spencer D. Parr, in Support of Claimant's Motion for Summary Judgment.

1 February 13, 2020, the parties agreed to remand the matter to the Department for further investigation
2 and consideration.
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4 On February 27, 2020, Mr. Pruden submitted a Request for Discretionary Waiver to the
5 Director of the Department. The request was received by the Director's office on March 4, 2020, but
6 there is no evidence that the Director formally responded to this waiver request. It appears that the
7 policy of the Director's office is not to consider any waiver request until the order demanding
8 repayment becomes final and binding. In March 2020, the Department issued another order that,
9 again, demanded recoupment of the previously awarded PPD. Mr. Pruden appealed this second
10 closing order to the Board, which is before us now.
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12 Legal Analysis

13 Mr. Pruden relies on RCW 51.32.240(4) for the proposition that the Director has discretion to
14 waive the repayment of the 2007 PPD award. RCW 51.32.240(4) provides:
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16 Whenever any payment of benefits under this title has been made pursuant to an
17 adjudication by the department or by order of the board or any court and timely appeal
18 therefrom has been made where the final decision is that any such payment was made
19 pursuant to an erroneous adjudication, the recipient thereof shall repay it and
20 recoupment may be made from any future payments due to the recipient on any claim
21 whether state fund or self-insured.
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23 (a) The director, pursuant to rules adopted in accordance with the procedures provided
24 in the administrative procedure act, chapter 34.05 RCW, may exercise discretion to
25 waive, in whole or in part, the amount of any such payments where the recovery would
26 be against equity and good conscience.²
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28 In *Birrueta v. Department of Labor and Industries*,³ the court explained that the statutory scheme of
29 RCW 51.32.240 is to repay the Department the following benefits:
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- 32 • Benefits overpaid because of clerical error, mistaken identity, or innocent mistake
33 [RCW 51.32.240(1)];
 - 34 • Temporary benefits advanced on a claim that is later denied [RCW 51.32.240(3)]; and
 - 35 • Benefits paid pursuant to an order that is later reversed (by the Department, the Board, or the
36 courts) on appeal [RCW 51.32.240(4)].⁴
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39 As the *Birrueta* court articulated, RCW 51.32.240(4) only applies when the Department, the Board,
40 or the courts reverse a prior order under which benefits were paid, where the final decision (of the
41 Department, the Board, or the court) was that the previous payment was made erroneously. In other
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45 ² Emphasis added.

46 ³ 188 Wn. App. 831 (2015).

47 ⁴ *Birrueta*, at 839-840.

1 words, when benefits are paid pursuant to an order that is later reversed by an adjudication (by the
2 Department, the Board, or the courts), the recipient of the erroneous payment must repay it.
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4 A close reading of the language shows that RCW 51.32.240(4) is inapplicable here for two
5 reasons. First, the prior order at issue here is the April 2007 closing order awarding PPD to
6 Mr. Pruden, **not** the February 2020 order at issue in this appeal demanding recoupment of the prior
7 PPD award. The April 2007 order was never protested or appealed, timely or otherwise (although
8 we recognize that this was through no fault of Mr. Pruden's). Second, neither the Department, the
9 Board, nor the courts have reversed the 2007 closing order to determine that the previous PPD
10 payment (to the attorney) was made erroneously. Indeed, the payment of PPD to Mr. Pruden's
11 attorney of record was proper.
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13 Mr. Pruden argues that the Director abused his discretion by declining to waive repayment of
14 the PPD award. However, his argument fails. Because RCW 51.32.240(4) does not apply,
15 subsection (4)(a) regarding the Director's discretion cannot possibly apply either. Subsection (a) of
16 RCW 51.32.240(4) is not triggered unless RCW 51.32.240(4) applies in the first place. Because the
17 2007 closing order was never reversed, the Director has no discretion to waive repayment of the PPD
18 award. In addition, the Director has not yet officially responded to Mr. Pruden's waiver request, as it
19 is their policy of to wait until the underlying order demanding repayment has become final and binding.
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21 As explained above, the applicable statute here is not RCW 51.32.240. Rather, it is
22 RCW 51.32.080(4):
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24 If permanent partial disability compensation is followed by permanent total disability
25 compensation, all permanent partial disability compensation paid to the worker under
26 the claim or claims for which total permanent disability compensation is awarded shall
27 be, at the choosing of the injured worker, either: (a) Deducted from the worker's monthly
28 pension benefits until the total award or awards paid are recovered; or (b) deducted
29 from the pension reserve of such injured worker and his or her monthly compensation
30 payments shall be reduced accordingly. Any interest paid on any permanent partial
31 disability compensation may not be deducted from the pension benefits or pension
32 reserve.
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34 Under this statute, previously paid PPD awards must be deducted from the worker's monthly
35 pension amount or from the total pension reserve. Unlike RCW 51.32.240, there are no provision in
36 RCW 51.32.080 that grants the Director discretion to waive the Department's recovery of the PPD
37 award.
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39 Similarly, RCW 51.32.220 requires a worker to repay pension benefits that duplicate social
40 security disability benefits, which is known as the social security "offset." Like RCW 51.32.240, this
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1 statute specifically carves out an exception to the repayment requirement. RCW 51.32.220(6) gives
2 the Director discretion to waive all or part of the recovery where it would be against equity and good
3 conscience. In *Stuckey v. Department of Labor & Industries*,⁵ the court stated that these two statutory
4 schemes (RCW 51.32.240 and RCW 51.32.220) conferring equitable powers on the Director reflect
5 the Legislature's intent to avoid unduly burdening a claimant who must make repayment.⁶
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9 In *Kingery v. Department of Labor & Industries*,⁷ the court observed that the only statutory
10 authority the Department has to correct its own errors is RCW 51.32.240. The court stated:

11 In several of the subsections of RCW 51.32.240, the Legislature conferred equitable
12 authority upon the Department. . . . This language indicates **the Legislature knows**
13 **how to permit equitable relief if needed**. The Legislature could confer statutory
14 authority on the Department to grant relief in cases like Mrs. Kingery's. It has not done
15 so.⁸
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17 Here, the Legislature did not confer equitable authority on the Department to grant relief under
18 RCW 51.32.080(4) involving the recoupment of previously paid PPD awards from a worker's pension.
19 The Legislature has shown that it knows how to give the Department discretion to provide equitable
20 relief, and it did not do so in RCW 51.32.080.
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23 The Board acknowledges that Mr. Pruden has a sympathetic case. Unfortunately,
24 RCW 51.32.240 doesn't contemplate relief in this situation because it only allows the Department to
25 correct its own mistakes or errors. The language of the statute makes clear that it does not extend
26 to situations involving an attorney's mistakes, misconduct, or fraud. Although the result here may be
27 harsh, the Department cannot bear the costs of attorney malpractice or incompetence, as reflected
28 in the plain language of RCW 51.32.240.
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45 ⁵ 78 Wn. App. 625 (1995).

46 ⁶ *Stuckey*, at 633-634.

47 ⁷ 132 Wn.2d 162 (1997).

⁸ *Kingery*, at 171 (emphasis added).

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DECISION

In Docket No. 20 14546, the claimant, Randall J. Pruden, filed an appeal with the Board of Industrial Insurance Appeals on March 25, 2020, from an order of the Department of Labor and Industries dated March 11, 2020. In this order, the Department affirmed a prior order dated February 25, 2020, placing Mr. Pruden on a pension effective August 16, 2019, less the amount he was previously paid for a permanent partial disability award. This order is correct and is affirmed.

FINDINGS OF FACT

1. On June 4, 2020, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History in the Board record solely for jurisdictional purposes.
2. Randall Pruden sustained an industrial injury on October 26, 2001, while working for The Boeing Company.
3. On April 16, 2007, the Department closed Mr. Pruden's claim with permanent partial disability (PPD) awards for: Category 2 dorso-lumbar and/or lumbosacral impairments; and 15 percent of the amputation value of the right arm at or above the deltoid insertion or by disarticulation at the shoulder; for a total award of \$20,323.47.
4. At the time of the 2007 claim closure, Mr. Pruden was represented by attorney Peter Moote. Boeing sent the PPD award to Mr. Moote, as Mr. Pruden's attorney of record. Mr. Moote did not inform Mr. Pruden of the PPD award, nor did he give his client any portion of the award.
5. In November 2010, Mr. Moote resigned from the Washington State Bar Association, in lieu of disbarment. On September 21, 2012, Mr. Moote was sentenced to serve 48 months in prison for stealing approximately \$2,000,000 from his clients from the 1990s through early 2011.
6. On July 10, 2019, the Department issued a closing order, finding Mr. Pruden to be permanently and totally disabled effective August 16, 2019, and requiring him to repay previously paid permanent partial disability award. This was the first time Mr. Pruden became aware of the existence of the April 2007 permanent partial disability award.
7. On September 6, 2019, the Department affirmed its July 10, 2019 order. Mr. Pruden appealed the September 6, 2019 order to the Board, in Docket No. 19 25040, seeking a waiver of the repayment obligation. On February 13, 2020, the parties agreed to remand the matter to the Department for further investigation and consideration.
8. On February 25, 2020, the Department issued another order demanding repayment of the previously paid PPD award. On February 27, 2020, Mr. Pruden submitted a Request for Discretionary Waiver to Joel Sacks, the Director of the Department of Labor & Industries.

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9. On March 11, 2020, the Department affirmed its order dated February 25, 2020, without addressing Mr. Pruden's Request for Discretionary Waiver. Mr. Pruden appealed the March 11, 2020 order to the Board, in Docket No. 20 14546.

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CONCLUSIONS OF LAW

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1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter in this appeal.
 2. RCW 51.32.240(4) does not apply because payment of the PPD award pursuant to the April 16, 2007 closing order was not made pursuant to an erroneous adjudication.
 3. RCW 51.32.080(4) requires the previously paid PPD award to be deducted from Mr. Pruden's monthly pension benefits or from his pension reserve. RCW 51.32.080 does not provide for the discretionary waiver of the requirement to repay a previously paid PPD award.
 4. The Department order dated March 11, 2020, is correct and is affirmed.

19 Dated: March 8, 2021.

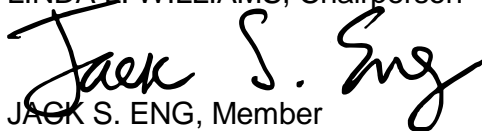
20 BOARD OF INDUSTRIAL INSURANCE APPEALS

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Addendum to Decision and Order
In re Randall J. Pruden
Docket No. 20 14546
Claim No. W-722080

Appearances

Claimant, Randall J. Pruden, by Washington Law Center, PLLC, per Spencer D. Parr

Self-Insured Employer, The Boeing Company, by Sedgwick CMS, per Erik Samuelsen, Lay Representative

Department of Labor and Industries, by Office of the Attorney General, per James S. Johnson

Petition for Review

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The claimant filed a timely Petition for Review of a Proposed Decision and Order issued on December 1, 2020, in which the industrial appeals judge affirmed the Department order dated March 11, 2020.

Evidentiary Rulings

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed.