

Lewis, Eleanor (I)

PENSION RESERVE

Deduction of prior permanent partial disability award (RCW 51.32.080(4)) (Previously RCW 51.32.080(2))

Only the excess of a permanent partial disability award over the amount the worker would have received had he been awarded a pension in the first instance can be deducted from the pension reserve. ...*In re Eleanor Lewis (I)*, BIIA Dec., 86 4139 (1988); *In re Wade Chriswell*, BIIA Dec., 43,742 (1974) [Editor's Note: 2011 legislative changes require the Department to deduct the amount of the permanent partial disability compensation without regard to whether total disability compensation could have been paid in the first instance. *Overruled to the extent decision is inconsistent with In re Esther Rodriguez*, BIIA Dec., [91 5594](#) (1993). The Board's decision in *Lewis* was appealed to superior court under Skagit County Cause No. 88-2-00145-9.]

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

1 **IN RE: ELEANOR LEWIS**) **DOCKET NO. 86 4139**
2)
3 **CLAIM NO. H-614547**) **DECISION AND ORDER**
4

5 APPEARANCES:

6
7 Claimant, Eleanor Lewis, by
8 McMullen, Reid, Reilly & Weyrich, per
9 Patrick R. McMullen

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11 Employer, Community Homewell, Inc.,
12 None

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14 Department of Labor and Industries, by
15 The Attorney General, per
16 Stephen A. Eggerman, Assistant
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18 This is an appeal filed by the claimant on November 12, 1986 from an order of the Department
19 of Labor and Industries dated October 17, 1986 which adhered to the provisions of a prior order dated
20 July 30, 1986 which reopened the claim effective February 13, 1982 and classified the claimant as a
21 permanently totally disabled worker and placed her on the pension rolls effective that date. In addition,
22 the order stated that \$24,113.49 which had been previously paid for permanent partial disability and/or
23 interest was to be charged against the pension reserve and the monthly payments reduced
24 accordingly. **REVERSED IN PART, AND REMANDED.**

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28 **DECISION**

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30 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
31 and decision on a timely Petition for Review filed by the Department of Labor and Industries to a
32 Proposed Decision and Order issued on June 29, 1987 in which the order of the Department dated
33 October 17, 1986 was reversed, and the claim remanded to the Department with direction to calculate
34 claimant's pension benefits without any reduction and to either recoup any compensation it may have
35 paid the claimant in excess of what she would have received had she been awarded a pension as of
36 February 13, 1982 or for the Director, pursuant to RCW 51.32.240(3), to exercise his discretion to
37 waive in whole or in part any such recoupment.

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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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1 At issue is the correctness of the Department's action of charging the sum of \$24,113.49, which
2 had previously been paid the claimant pursuant to a permanent partial disability award, against her
3 pension reserve.
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5 On February 25, 1982, the Department issued an order closing this claim with a total award for
6 permanent partial disability of \$22,950.00 to be dispersed in the form of an initial cash payment of
7 \$3,038.48, and the balance of \$19,911.52 to be paid at the rate of \$358.51 per month, plus 6%
8 interest per annum on the unpaid balance, pursuant to RCW 51.32.080(4). This order was timely
9 protested by the claimant, and there followed a series of interactions involving both the Department
10 and this Board. Ultimately, the Department's adjudication of permanent partial disability was reversed
11 on appeal to this Board by an Order on Agreement of Parties dated July 18, 1986, which ordered the
12 claimant to be classified as permanently totally disabled effective February 13, 1982. Pursuant to the
13 Board's order, the Department issued an order on July 30, 1986, reclassifying the claimant as a
14 permanently totally disabled worker, and placing her on the pension rolls effective February 13, 1982.
15 The Department further ordered that the sum of \$24,113.49 (representing the total amount of money
16 the claimant had received up to that time pursuant to the Department's prior permanent partial
17 disability adjudication of February 25, 1982) be charged against the claimant's pension reserve, and
18 her monthly pension payments reduced accordingly.
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27 The situation at hand is squarely governed by the fourth proviso in RCW 51.32.080(2), which
28 provides:
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30 "...That in case permanent partial disability compensation is followed by
31 permanent total disability compensation, any portion of the permanent
32 partial disability compensation which exceeds the amount that would have
33 been paid the injured worker if total permanent disability had been paid in
34 the first instance, shall be deducted from the pension reserve of such
35 injured worker and his or her monthly compensation payments shall be
36 reduced accordingly." (Emphasis supplied)
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38 The record establishes that the last monthly permanent partial disability payment to the claimant was
39 on June 6, 1986, and that as of that date she would have received a total of \$22,564.37 in permanent
40 total disability payments had she been awarded a pension back in February, 1982, the date of "first
41 instance", instead of a permanent partial disability award. As previously noted, the permanent partial
42 disability compensation paid to the claimant, including interest, totaled \$24,113.49. Accordingly,
43 applying the plain and unambiguous language of the statute, the "portion of the permanent partial
44 disability compensation which exceeds the amount that would have been paid...if total permanent
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1 disability had been paid in the first instance" amounts to \$1,549.12 in this case, and that sum therefore
2 constitutes the charge which is to be properly deducted from the claimant's pension reserve for and on
3 account of the prior permanent partial disability award.
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5 The Department cites Trayle v. Department of Labor and Industries, 70 Wn.2d 141 (1967), in
6 support of its charge of the entire permanent partial disability compensation against the pension
7 reserve. The issue in Trayle was whether the enactment of RCW 51.32.070, establishing a minimum
8 pension of \$125.00 per month for certain prior pensioners, superseded RCW 51.32.080(2), supra, so
9 as to preclude a reduction in the pension of the claimant therein below \$125.00 per month because of
10 a prior permanent partial disability award. The correctness of the amount of the actual charge made
11 by the Department against the pension reserve because of the prior permanent partial disability award
12 was not even at issue in Trayle. Accordingly, the Department's reliance upon Trayle is misplaced.
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18 In sum, we hold that the correct charge against the claimant's pension reserve in this matter for
19 and on account of the prior permanent partial disability award is \$1,549.12, and the pension reserve
20 and the claimant's monthly compensation payments should be recalculated accordingly.
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22 We wish to note some further matters which, although technically not in issue before us in this
23 appeal, will enter into the Department's recalculations on remand. In August 1986, shortly following
24 issuance of its order of July 30, 1986, the Department sent the claimant the sum of \$4,419.40,
25 purportedly representing retroactive "pension benefits" for the period of February 13, 1982, to August
26 15, 1986. This sum represents an overpayment to the claimant, inasmuch as it is clear that for the
27 period from February 13, 1982 through June 6, 1986, the claimant had already received what would
28 have been full compensation under permanent total disability status, plus \$1,549.12 in excess. On the
29 other hand, for the period from August 15, 1986 forward, the Department has been underpaying the
30 claimant, by reason of its excessive charge against the pension reserve, and the consequent
31 excessive reduction in claimant's monthly payments. These respective overpayments and
32 underpayments must of course be readjusted in the Department's administrative recalculations. And
33 finally, the amount of the pension reserve necessary to fund the claimant's pension payments, and
34 from which the amount of \$1,549.12 should be deducted and claimant's monthly pension reduced
35 accordingly, should be, it seems to us, calculated on annuity values for the claimant as of June 6,
36 1986.
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1 **FINDINGS OF FACT**

2 Findings Nos. 1, 2, 3, and 4 of the Proposed Decision and Order entered in this matter on June
3 29, 1987 are hereby adopted by the Board and incorporated by this reference as the Board's Findings
4 Nos. 1, 2, 3, and 4. In addition, the Board finds:
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- 7 5. As of June 6, 1986, the claimant had received a total of \$24,113.49 in
8 permanent partial disability compensation, including interest, whereas she
9 would have received a total of \$22,564.37 in pension payments had she
10 been classified as a permanently totally disabled worker instead of a
11 permanently partially disabled worker back in February, 1982.
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13 **CONCLUSIONS OF LAW**

- 14 1. The Board of Industrial Insurance Appeals has jurisdiction of the parties
15 and subject matter of this appeal.
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17 2. That portion of the permanent partial disability compensation paid to the
18 claimant which exceeds the amount she would have been paid had she
19 been classified as a permanently and totally disabled worker in the first
20 instance is \$1,549.12, which constitutes the amount to be charged against
21 the claimant's pension reserve pursuant to the fourth proviso in RCW
22 51.32.080(2).
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24 3. The order of the Department of Labor and Industries dated October 17,
25 1986, adhering to its order of July 30, 1986, insofar as it calculates the
26 claimant's pension based upon a charge to her pension reserve of
27 \$24,113.49, should be reversed, and this claim remanded to the
28 Department with instructions to recalculate the claimant's pension based
29 upon a charge of \$1,549.12 to her pension reserve, with the remaining
30 \$22,564.37 of the permanent partial disability compensation previously
31 paid to the claimant to be credited and offset against the retroactive
32 pension compensation otherwise due the claimant.

33 It is so ORDERED.

34 Dated this 28th day of January, 1988.

35 BOARD OF INDUSTRIAL INSURANCE APPEALS

36 /S/
37 SARA T. HARMON Chairperson

38 /S/
39 FRANK E. FENNERTY, JR. Member

40 /S/
41 PHILLIP T. BORK Member