

Rodriquez, Dominga

PENSION RESERVE

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

For purposes of calculating the extent to which the pension reserve may be reduced by a prior permanent partial disability award, the "first instance", as used in RCW 51.32.080, is when the Department first determined that the worker had a particular permanent partial disability and began paying compensation therefor. In this case, there were two dates of "first instance" since the Department increased the permanent partial disability award after the claimant protested the initial closure. **...In re Dominga Rodriquez, BIIA Dec., 86 4340 (1988)** [*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).*]

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

1 **IN RE: DOMINGA RODRIQUEZ**) **DOCKET NO. 86 4340**
2)
3 **CLAIM NO. H-693806**) **DECISION AND ORDER**
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5 **APPEARANCES:**

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7 Claimant, Dominga Rodriquez, by
8 Prediletto, Halpin, Cannon & Scharnikow, P.S., per
9 William L. Halpin

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11 Employer, Mt. Adams Hop Ranches, Inc.
12 None

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14 Department of Labor and Industries, by
15 The Attorney General, per
16 A. Craig McDonald, Assistant
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18 This is an appeal filed by the claimant on December 1, 1986, from an order of the Department
19 of Labor and Industries dated November 20, 1986 which adhered to the provisions of an order dated
20 November 6, 1986. The November 6, 1986 order was issued pursuant to an order of this Board dated
21 October 17, 1986 and reopened the claim effective March 11, 1986, classified Ms. Rodriquez as a
22 permanently totally disabled worker and placed her on the pension rolls effective March 11, 1986. The
23 order of November 6, 1986 also determined that an overpayment of time-loss compensation payments
24 totaling \$2,673.01 existed which would be recovered from future monthly pension benefits, and
25 ordered that \$3,103.42 previously paid for permanent partial disability and/or interest be charged
26 against Ms. Rodriquez's pension reserve and the monthly payments reduced accordingly.
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31 **REVERSED AND REMANDED.**

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33) **DECISION**

34 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
35 and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order
36 entered on November 13, 1987 in which the order of the Department dated November 20, 1986 was
37 affirmed.
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39 This appeal was submitted on a factual stipulation and the contents of the Department file. We
40 have reviewed both.
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42 The issue raised is whether March 31, 1982 or October 1, 1981 is the date of "first instance" for
43 purposes of calculating the reduction of the pension reserve by "any portion of the permanent partial
44 disability compensation which exceeds the amount that would have been paid the injured worker if
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1 permanent total disability compensation had been paid in the first instance . . ." RCW 51.32.080(2).
2 We conclude that October 1, 1981 is the date of first instance with respect to the permanent partial
3 disability award for cervical impairment which was made on that date, and that March 31, 1982 is the
4 date of first instance with respect to the mental impairment award which was made on that date.
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7 Ms. Rodriquez injured her neck during the course of her employment with Mt. Adams Hop
8 Ranches on May 2, 1980. Her claim was allowed, and on October 1, 1981, the Department issued an
9 order which closed the claim with an award for permanent partial disability equal to 10% as compared
10 to total bodily impairment for cervical impairment. Ms. Rodriquez timely protested this closing order
11 and the Department issued an order on December 3, 1981, adhering to the provisions of the October
12 1, 1981 order. Following an appeal to the Board, the Department reassumed jurisdiction and held the
13 December 3, 1981 order in abeyance. According to the parties' stipulation, the sole action of the
14 Department thereafter was to evaluate the extent of Ms. Rodriquez's permanent partial impairment.
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17 On March 31, 1982, the Department issued an order which reopened the claim and closed it
18 with the original award for permanent partial disability equal to 10% as compared to total bodily
19 impairment for her cervical impairment and an additional award of 10% as compared to total bodily
20 impairment for mental health residuals. On May 21, 1982 the Department issued an order holding the
21 order of March 31, 1982 in abeyance pending further consideration, apparently in response to a
22 complaint received from Employment Security, challenging payment of time-loss compensation for
23 certain periods. However, on October 12, 1982, the Department adhered to the provisions of the
24 March 31, 1982 order and no further appeal was taken by any party.
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27 On August 22, 1983, Ms. Rodriquez filed an application with the Department to reopen her
28 claim for aggravation of condition. The Department denied the application on April 11, 1984. On May
29 2, 1984, Ms. Rodriquez filed a notice of appeal with this Board from the April 11, 1984 order. The
30 appeal was granted, proceedings were held, and on March 19, 1985, this Board issued an Order
31 Adopting a Proposed Decision and Order entered on February 20, 1985, which reversed the
32 Department's April 11, 1984 order and remanded the claim to the Department with directions to
33 reopen it for provision of treatment and for such order action as was indicated by the law and the facts.
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36 After reopening the claim, the Department paid Ms. Rodriquez time loss compensation
37 pursuant to the provisions of several orders, including one dated March 11, 1986. Ms. Rodriquez
38 appealed the March 11, 1986 order to this Board, contending that she was permanently totally
39 disabled rather than temporarily totally disabled. On October 17, 1986, we issued an Order on
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1 Agreement or Parties which reversed the Department's March 11, 1986 order and remanded the claim
2 to the Department with directions to issue an order determining Ms. Rodriguez to be a permanently
3 totally disabled worker and to place her on the pension rolls effective March 11, 1986. The
4 Department order of November 6, 1986 (reaffirmed by the Department order of November 20, 1986)
5 followed, as did this appeal.
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9 That portion of the Department order of November 6, 1986 which placed Ms. Rodriguez on the
10 pension rolls is ministerial in nature, since it simply complied with the Board order of October 17, 1986.
11 However, the manner in which the pension reserve should be reduced by previously paid permanent
12 partial disability was not before us nor addressed by us in the prior order. Therefore, that portion of
13 the Department order which determines that the pension reserve should be reduced by \$3,103.42, an
14 amount previously paid for permanent partial disability and interest, is not ministerial and we have
15 jurisdiction in this appeal over the claimant's challenge to the Department's method of applying the
16 RCW 51.32.080(2) reduction provisions.
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20 When it issued its order of November 6, 1986 (and the adherence order of November 20,
21 1986), the Department reduced Ms. Rodriguez's pension reserve pursuant to RCW 51.32.080(2)
22 which provides:
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25 "Provided further, that in case permanent partial disability compensation is
26 followed by permanent total disability compensation, any portion of the
27 permanent partial disability compensation which exceeds the amount that
28 would have been paid the injured worker if permanent total disability
29 compensation had been paid in the first insurance shall be deducted from
30 the pension reserve of such injured worker and his or her monthly
31 compensation payments shall be reduced accordingly."
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33 In interpreting this statute, the Department contends that the "first instance" as contemplated by RCW
34 51.32.080(2) is the date of the final order which directed payment of a permanent partial disability
35 award. In Ms. Rodriguez's case, the Department determined that that particular order was the one
36 issued on March 31, 1982. Accordingly, the Department subtracted \$8,896.58 which Ms. Rodriguez
37 would have received in permanent total disability benefits between March 31, 1982 and August 11,
38 1983 (when the claim was reopened and she began to receive temporary total disability payments)
39 from the \$12,000.00 she received in permanent partial disability payments pursuant to the order of
40 March 31, 1982. The remainder of \$3,103.42 was determined to be the excess she received in
41 permanent partial disability payments compared to what she would have received in permanent total
42 disability payments had she been placed on a pension on March 31, 1982.
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1 Ms. Rodriguez contends that the "first instance" in this case is October 1, 1981, when it was
2 first established that her industrially related condition was fixed and stable and the claim was closed
3 with an award for permanent partial disability. She argues that the only action taken by the
4 Department between October 1, 1981 and March 31, 1982 was to correct the error made in the first
5 order which resulted in payment of an incorrectly low permanent partial disability award. It is clear that
6 had the Department paid Ms. Rodriguez compensation for both her cervical and mental health
7 impairments on October 1, 1981, there would be no excess. Ms. Rodriguez believes that the
8 Department's error in computing the extent of her permanent partial disability should not result in any
9 reduction of her pension benefits.

10 The Department urges that we have previously interpreted the meaning of "first instance" in a
11 manner consistent with its interpretation in this case in In re John Jensen, BIIA Dec., 32,619 (1970), a
12 case which it contends had identical facts to those now before us.

13 It is difficult to discern the exact factual background of Jensen. The case was presented on
14 stipulated facts from which it appears that the claim was originally closed on December 16, 1953,
15 without award for permanent partial disability, that it was reopened pursuant to Mr. Jensen's
16 application to reopen for aggravation of condition filed on August 3, 1954 and that:

17 "Hereafter, by reason for a series of Department closing orders and
18 successive claimant's appeals therefrom, the claim effectively remained
19 open until a Department closing order was entered on March 10, 1960, at
20 which time it was conclusively determined that claimant had a permanent
21 partial disability of 70 per cent (sic) of the maximum allowable for
22 unspecified disabilities, the compensation paid for said disability being in
23 the sum of \$4,200.00." Jensen, at 2.

24 The Board determined, in the course of discussing calculations to be made in effectuating RCW
25 51.32.080(2) that, "the date of "first instance" here, of course, is March 10, 1960." Jensen, at 4.

26 From the statement of facts presented, we are unable to discern whether any determination
27 had been made prior to March 10, 1960 that Mr. Jensen's industrially related condition was medically
28 fixed and that he had sustained a permanent partial disability. If that determination was first made on
29 March 10, 1960, then Jensen would not be inconsistent with the claimant's argument in the instant
30 appeal. However, because of the unclear factual background of Jensen, we are unable to determine
31 that it presents any persuasive authority, either way, on the issue before us.

32 Furthermore, the precise issue decided in Jensen was that compensation for, and periods of,
33 temporary total disability between the date of "first instance" and the date the order was issued which

1 determined the claimant to be totally permanently disabled should not be included in calculating the
2 excess pursuant to RCW 51.32.080(2). Thus, the issue before us now was not raised by the parties
3 or decided by the Board in Jensen.
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6 Indeed, we know of no authority which addresses the precise issue before us in this appeal.
7 None of the Board Decisions and Orders cited to us by the parties is directly on point. The question of
8 when the date of first instance occurs would therefore appear to be one of first impression.
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10 We do not wholeheartedly adopt either the Department's or the claimant's analysis, but instead
11 forge a middle ground. We can see no basis for relating the March 31, 1982 award for mental
12 impairment back to October 1, 1981. By the same token, we can see no logical reason to ignore the
13 fact that payment of the cervical impairment award was first ordered on October 1, 1981 and never
14 rescinded by any subsequent order.
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18 We are convinced that the finality of the Department order which establishes the existence of
19 permanent partial disability is not necessarily the key to determining the date of "first instance." The
20 critical inquiry is when the Department first determined that the claimant had a particular permanent
21 partial disability and began paying compensation therefor. In this case, with respect to cervical
22 impairment, that date was October 1, 1981 when the claim was closed with an award for permanent
23 partial disability equal to 10% as compared to total bodily impairment. It appears that the Department
24 paid the monetary award for the permanent partial disability in the interim between October 1, 1981
25 and March 31, 1982, in spite of Ms. Rodriguez's protest that she was entitled to a greater amount. It
26 does not appear Ms. Rodriguez alleged in her protest that her condition was not fixed and stable as of
27 October 1, 1981. More importantly, in its subsequent order the Department did not conclude that her
28 cervical condition was not "permanent" and disabling. October 1, 1981 was, therefore, the first
29 instance when the Department recognized that Ms. Rodriguez's industrially related cervical condition
30 was fixed and that she was entitled to permanent partial disability compensation for cervical
31 impairment. By the same reasoning, March 31, 1982 was the first instance when the Department
32 recognized that Ms. Rodriguez's mental impairment was fixed and disabling and directed payment of a
33 10% permanent partial disability award therefor.
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41 In so concluding, we note that the Department does not appear to actually have a policy that
42 the "first instance" is the date of finality of a Department order establishing permanent partial disability.
43 Were such a policy in effect, the Department could not have determined that the March 31, 1982 order
44 closing Ms. Rodriguez's claim was the "first instance", inasmuch as that order was held in abeyance
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1 and, like the October 1, 1981 order, never became final. The final order closing the claim with both
2 permanent partial disability awards was dated October 12, 1982, when the Department adhered to the
3 provisions of the March 31, 1982 order. Thus, if the Department in fact has such a policy, it did not
4 adhere to it in the present case.
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7 Based on the foregoing, we hold that, in the particular circumstances of this case, where an
8 order awarding permanent partial disability compensation is protested on the ground of inadequacy
9 of such compensation and a subsequent order merely increases the compensation for permanent
10 partial disability, the date of "first instance" for purposes of computing the reduction of the pension
11 reserve required by RCW 51.32.080(2) is the date of the original order, with respect to the amount of
12 permanent partial disability paid by that order. The date of "first instance" with respect to any
13 subsequent increased award for permanent partial disability is the first date on which the Department
14 ordered that the increased amount be paid. Thus, in this appeal, the date of first instance for the
15 cervical impairment award is October 1, 1981 and the date of first instance for the mental impairment
16 award is March 31, 1982.
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22 **FINDINGS OF FACT**

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24 1. On May 12, 1980 Dominga Rodriguez filed a claim for benefits alleging
25 that she sustained an injury on May 2, 1980 during the course of her
26 employment with Mt. Adams Hop Ranch. On July 11, 1980, the
27 Department issued an order allowing the claim and benefits, including
28 time-loss compensation, were paid.

29 On October 1, 1981, the Department issued an order which closed the
30 claim with time-loss compensation as paid and an award for permanent
31 partial disability equal to 10% as compared to total bodily impairment for
32 cervical impairment. On November 18, 1981, Ms. Rodriguez filed a
33 protest and request for reconsideration with the Department from its
34 October 1, 1981 order. On December 3, 1981, the Department issued an
35 order which adhered to the provisions of the October 1, 1981 order. On
36 December 10, 1981, the claimant filed a notice of appeal with the Board of
37 Industrial Insurance Appeals from the December 3, 1981 Department
38 order. On December 28, 1981, the Department issued an order which
39 reassumed jurisdiction of the claim and held the order of December 3,
40 1981 in abeyance. On December 29, 1981, this Board issued an order
41 returning the claim to the Department for further action. On March 31,
42 1982, the Department issued an order reopening the claim to pay awards
43 for permanent partial disability equal to 10% as compared to total bodily
44 impairment for cervical impairment and 10% as compared to total bodily
45 impairment for mental health impairment, less prior awards, whereupon
46 the claim was closed. On May 21, 1982, within sixty days of March 31,
47 1982, the Department issued an order which held the March 31, 1982

1 order in abeyance. On October 12, 1982, the Department issued an order
2 which adhered to the provisions of the March 31, 1982 order.

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4 On August 23, 1983, Ms. Rodriguez filed an application to reopen the
5 claim for aggravation of condition. On April 11, 1984, the Department
6 issued an order which denied the application to reopen the claim. On May
7 2, 1984, Ms. Rodriguez filed a notice of appeal with this Board from the
8 April 11, 1984 Department order. On May 17, 1984, this Board issued an
9 order which granted the appeal, assigned it Docket No. 67,630 and
10 directed that further proceedings be held. On March 19, 1985, this Board
11 issued an Order Adopting a Proposed Decision and Order which had
12 been issued on February 20, 1985 which reversed the Department's order
13 of April 11, 1984 and remanded the claim to the Department with
14 directions to reopen the claim for treatment and other action as required
15 by the law and the facts. On April 4, 1985, the Department issued an
16 order which complied with the Board's order of March 19, 1985 and
17 reopened the claim effective August 11, 1983 for payment of benefits,
18 including time-loss compensation.

19 On March 11, 1986, the Department issued an order which authorized
20 payment of time-loss compensation to Ms. Rodriguez for the period from
21 March 1, 1986 through April 30, 1986, less a deduction for previous
22 overpayment. On May 5, 1986, Ms. Rodriguez filed a notice of appeal
23 with this Board from the March 11, 1986 Department order. On May 21,
24 1986, this Board granted the appeal, assigned it Docket No. 86 1817 and
25 directed that further proceedings be held. On October 17, 1986, this
26 Board issued an Order on Agreement of Parties which reversed the
27 Department's order of March 11, 1986, and remanded the claim to the
28 Department with directions to issue an order which determined that Ms.
29 Rodriguez was a totally and permanently disabled worker and which
30 placed her on the pension rolls effective March 11, 1986. On November
31 6, 1986, the Department issued an order which complied with the Board's
32 order of October 17, 1986. The order also determined that an
33 overpayment of time- loss compensation payments totaling \$2,673.01
34 existed which would be recovered from future monthly pension benefits,
35 and ordered that \$3,103.42 previously paid for permanent partial disability
36 and/or interest be charged against Ms. Rodriguez's pension reserve and
37 the monthly benefits reduced accordingly.

38 On November 17, 1986, Ms. Rodriguez filed a protest and request for
39 reconsideration with the Department from its November 6, 1986 order. On
40 November 20, 1986, the Department issued an order which adhered to the
41 provisions of the November 6, 1986 order. On December 1, 1986, Ms.
42 Rodriguez filed a notice of appeal with this Board from the Department's
43 order of November 20, 1986. On December 16, 1986, this Board granted
44 the appeal, assigned it Docket No. 86 4340 and directed that further
45 proceedings be held.
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CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and the subject matter to this appeal.
2. For purposes of calculating the reduction, if any, of Ms. Rodriguez's pension reserve, October 1, 1981 is the date of "first instance" for the permanent partial disability award for cervical impairment and March 31, 1982 is the date of "first instance" for the permanent partial disability award for mental health impairment, within the meaning of RCW 51.32.080(2).
3. The Department order of November 20, 1986 which adhered to the provisions of an order of November 6, 1986 which reopened the claim pursuant to an order of this Board dated October 17, 1986, classified Ms. Rodriguez as permanently totally disabled, placed her on Permanent pension rolls effective March 11, 1986, determined that an overpayment of time-loss compensation totaling \$2,673.01 would be recovered from future monthly pension benefits, and deducted \$3,103.42 previously paid for permanent partial disability and/or interest against the pension reserve and reduced monthly benefits accordingly, is incorrect. That order should be reversed and this claim remanded to the Department with directions to issue an order which complies with this Board's order of October 17, 1986, determines that an overpayment for time- loss compensation of \$2,673.01 existed and orders that it be recovered from future monthly pension benefits, and which calculates a deduction for previously paid permanent partial disability and/or interest, if any, to be charged against the pension reserve with an appropriate reduction of monthly payments based on a date of "first instance" within the meaning of RCW 51.32.080(2) of October 1, 1981 for the permanent partial disability award for cervical impairment and of March 31, 1982 for the permanent partial disability award for mental impairment.

It is so ORDERED.

Dated this 21st day of June, 1988.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/ _____
SARA T. HARMON, Chairperson

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

/s/ _____
PHILLIP T. BORK Member