Stuckey, Marshall

PENSION RESERVE

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

PERMANENT PARTIAL DISABILITY (RCW 51.32.080)

Permanent partial disability award should not be converted to time-loss compensation where permanent total disability follows

PERMANENT TOTAL DISABILITY (RCW 51.08.160)

Reduction of benefits by prior permanent partial disability award

RCW 51.32.080(2) directs the Department, where permanent total disability follows permanent partial disability, to deduct a permanent partial disability award from the pension reserve and reduce the worker's monthly payments accordingly, to the extent the award exceeds the amount that would have been paid the worker if permanent total disability compensation had been paid in the first instance. The Department should not deduct the permanent partial disability award from retroactive time-loss compensation. *Citing In re Eino Antilla*, BIIA Dec., 21,097 (1963). **….*In re Marshall Stuckey*, BIIA Dec., 89 5977 (1991)** [*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, In re Esther Rodriguez*, BIIA Dec., 91 5594 (1993). *Reversed, Stuckey v. Department of Labor & Indus.*, 129 Wn.2d 289 (1996).]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: MARSHALL STUCKEY	)	**DOCKET NOS. 89 5977 & 90 2638**
	)	
	)	
CLAIM NO. J-514966	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Marshall Stuckey, by
Calbom & Schwab, P.S.C., per
G. Joe Schwab

Employer, Moses Lake Grant County Humane Society, by
None

Department of Labor and Industries, by
The Office of the Attorney General, per
Kent Mumma, Assistant, and Gary McGuire, Paralegal

The appeal assigned Docket No. 89 5977 is an appeal filed by the claimant on December 22, 1989 from an order of the Department of Labor and Industries dated December 7, 1989 which affirmed an order of the Department dated October 20, 1989 indicating that the claimant was found totally disabled by an order of the Board of Industrial Insurance Appeals dated October 3, 1989 and was therefore not entitled to the permanent disability award previously granted by a Department order of December (sic-October) 8, 1987. **REVERSED AND REMANDED**.

The appeal assigned Docket No. 90 2638 is an appeal filed by the claimant on May 17, 1990 from an order of the Department of Labor and Industries dated May 4, 1990 which affirmed an earlier order of the Department dated November 15, 1989 indicating that claimant's compensation rate for pension benefits was reduced to $0.00 per month effective December 16, 1989, due to offset for social security disability benefits including payments for both claimant and claimant's spouse. **AFFIRMED**.

DECISION

These appeals are before the Board pursuant to RCW 51.52.104 and RCW 51.52.106 on a timely Petition for Review filed by the claimant from a Proposed Decision and Order entered on February 15, 1991 affirming the Department orders of December 7, 1989 and May 4, 1990.

We agree with our industrial appeals judge's resolution of the issue concerning the social security disability offset. The Department's order of May 4, 1990 was properly affirmed. We have granted review because we disagree with our judge's determination that the Department was entitled

to deduct the prior award for permanent partial disability from the time loss compensation we had directed the Department to pay by our order of October 3, 1989.

The stipulated facts show that the claimant suffered an industrial injury on November 10, 1984, for which this claim was allowed. By an order dated August 4, 1987, the Department terminated time loss compensation with payment through July 15, 1987, based on the Department's determination that the claimant was unemployable due to causes unrelated to and subsequent to the industrial injury. By an order dated January 21, 1988, the Department adhered to the provisions of an order dated October 8, 1987 which denied responsibility for diabetes mellitus, high blood pressure, cerebral infarction and gout, and closed the claim with a $3,600.00 award for permanent partial disability for the right knee equal to 10% of the amputation value of the right leg above the knee joint with a short thigh stump, and time loss compensation as previously paid. The claimant filed a timely appeal from the order of January 21, 1988.

Thereafter, on October 3, 1989, this Board issued a Decision and Order (Docket No. 88 0589) reversing the Department's order of January 21, 1988. We directed the Department to accept responsibility for the condition of diabetes mellitus; pay time loss compensation for the period July 16, 1987 through January 20, 1988; and thereupon place the claimant on the pension rolls as totally and permanently disabled, effective January 21, 1988.

Upon remand to the Department, the claimant was placed on the pension rolls as directed by our order. However, in making the award for time loss compensation for the period July 16, 1987 through January 20, 1988, the Department deducted the $3,600.00 permanent partial disability award it had paid by its order of October 8, 1987.

Our industrial appeals judge concluded that the deduction taken by the Department was consistent with our decision in In re Eino Antilla, BIIA Dec., 21,097 (1963). In Antilla, the claimant had appealed a Department order closing his claim with time loss compensation as paid and with a permanent partial disability award. We had denied his appeal because the Department timely held its closing order in abeyance pending further investigation. The Department then continued the claim open for further treatment, and also reinstated time loss compensation and made an award for such compensation for an 11-month period commencing the day following the day time loss had last been paid. In making the award, the Department converted part of the permanent partial disability award it had previously paid to time loss compensation.

We subsequently denied the claimant's appeal of the Department order making this "conversion" deduction. We premised our denial on the fact that the claimant's condition was not fixed when his claim was closed as evidenced by the uncontested decision of the Department to hold the claim open for further treatment. Since his condition was not yet fixed, he was not, after all, entitled to a permanent disability award and it was therefore appropriate for the Department to treat the permanent disability award as an advance against future time loss compensation payable.

Had our prior Decision and Order in the instant case directed the Department to reopen Mr. Stuckey's claim for further treatment and resume the payment of time loss compensation, there is no question that Antilla would be controlling and would have allowed the Department to deduct the prior permanent partial disability award from past or future time loss compensation due. We would have thereby determined that the claimant's condition was not fixed when the claim was closed, a determination inconsistent with an award for permanent partial disability. However, in our Decision and Order in this case we determined that the claimant's condition was fixed and permanent when the claim was closed.

Granted, we disagreed with the Department's determination that the claimant's permanent disability was partial as opposed to total. But it is precisely this distinction, and the sequence of these determinations, which causes us to disagree with our industrial appeals judge.

RCW 51.32.080(2) provides:

> . . . .That in case permanent partial disability compensation is followed by permanent total disability compensation, any portion of the permanent partial disability compensation which exceeds the amount that would have been paid the injured worker if permanent total disability compensation had been paid in the first instance, shall be deducted from the pension reserve of such injured worker and his or her monthly compensation payments shall be reduced accordingly.

The specific language of RCW 51.32.080(2) is controlling under the facts here and distinguishes this case from our holding in Antilla. In Mr. Stuckey's case permanent partial disability compensation was followed by permanent total disability compensation. Rather than deduct the prior permanent partial disability award from retroactive time loss compensation, the statute commands the Department to deduct it from the pension reserve and reduce his monthly payments accordingly to the extent the permanent partial disability award "exceeds the amount that would have been paid the injured worker if permanent total disability compensation had been paid in the first instance" (i.e., January 21, 1988).

We make no comment as to whether or not the action we hereby order is, in the long run, financially more advantageous to the claimant than the action taken by the Department. Although he currently receives no monthly compensation benefits due to the social security offset, that may not hold true in the future. The action we take here may reduce any future monthly payment below what it might have otherwise been, by virtue of reducing the pension reserve. Further, it is unknown from the record herein whether and to what extent the claimant received pension benefits for the period from January 21, 1988 to December 16, 1989. If he was eligible to receive and did receive such benefits for periods prior to the date the Department established the pension reserve, in an amount greater than $3,600.00, there would be no deduction from the pension reserve, but rather, an overpayment of pension benefits. See In re Eleanor Lewis, BIIA Dec. 86 4139 (1988). Since this overpayment would have resulted from our determination that the Department had made an erroneous adjudication, it would appear that such overpayment would be subject to recovery, under RCW 51.32.240(3), against the $3,600.00 in time loss compensation we hereby direct the Department to pay. Of course that issue is not before us at this time.

In any case, having been asked to decide the issue, we must reverse the Department's order of December 7, 1989 and remand this matter to the Department with direction to pay time loss compensation for the period July 16, 1987 through January 20, 1988, less deduction for time loss compensation previously paid for that period, but without deduction for the previous permanent partial disability award of $3,600.00. The Department shall instead make adjustment for the prior permanent partial disability award in the manner contemplated by RCW 51.52.080(2) (last proviso) by deducting the same from the pension reserve and reducing monthly benefits accordingly, to the extent, if any, that it exceeds the amount of permanent total disability compensation had it been paid in the first instance, and take such other and further action as indicated by the law and the facts.

We hereby adopt Findings of Fact Nos. 1, 2 and 3 and Conclusions of Law Nos. 1 and 3 as contained in the Proposed Decision and Order, as our final findings and conclusions. We also make the following Conclusion of Law.

CONCLUSIONS OF LAW

2. The Department order of December 7, 1989, which affirmed the order of October 20, 1989 finding that the claimant was not entitled to the permanent partial disability award granted by the Department order of December (sic - October) 8, 1987 and offsetting same against his entitlement to time loss compensation, is incorrect and is reversed. The Department is directed to pay time loss compensation for the period July

16, 1987 through January 20, 1988, less time loss compensation previously paid for the same period, but without deduction for the previous permanent partial disability award of $3,600.00. The Department is directed to deduct the permanent partial disability award from the pension reserve and reduce the claimant's monthly compensation benefits accordingly, to the extent, if any, that the permanent partial disability award exceeds the amount that would have been paid if permanent total disability compensation had been paid in the first instance (January 21, 1988), and to take such other and further action as indicated by the law and facts.

It is so ORDERED.

Dated this 26th day of September, 1991.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/
S. FREDERICK FELLER Chairperson

/s/
PHILLIP T. BORK Member