



State of Washington

Board of Industrial Insurance Appeals

Decisions Delisted as Significant by Year

2025

DELISTED

PARTY ACTIONS (RCW 51.24)

Distribution of recovery

Under RCW 51.24.060, the Department must pay a proportionate share of the reasonable attorneys' fees and costs incurred by a worker in obtaining a third party recovery. The numerator of the proportionate share calculation is the actual amount which the Department has, or will, benefit from the recovery. The Department benefits from the recovery to the extent of the balance remaining after deducting fees and costs and the worker's 25 percent share, or the benefits "paid and payable", whichever is the lesser.***In re Bruce Wilson, BIIA Dec., 86 4043 (1987)*** [concurrence]

Reason for Delisting: The statute changed to eliminate "and payable."

DELISTED

JOINDER

Single claim, multiple possible employers/insurers

In the allowance of a claim as an occupational disease, it is acceptable to remand a claim to the Department to determine the impacted state fund employers when the Department has agreed to the allowance of the claim because the state fund will be the responsible insurer. It is not acceptable to remand to the Department to determine the responsible insurer. All potential insurers must be joined to allow complete relief among the parties. Distinguishing *In re Juan Muñoz*, BIIA Dec., 05 11698 (2007).

....***In re Steve Crookshanks, BIIA Dec., 16 10351 (2016)***

Reason for Delisting: Overruled by *In re Maria Gomez*, BIIA Dec., 16 23157 (2018). The Board no longer holds that it is unacceptable to remand to the Department to determine the responsible insurer. If the record established that distinctive conditions of work within Washington caused an occupational disease, the claim can be remanded to the Department to determine the responsible insurer.

DELISTED

BOARD

Reassignment of Industrial Appeals Judge

Parties to an appeal may file an affidavit of prejudice to disqualify an industrial appeals judge assigned to conduct hearings, but after the hearings have been completed by one judge, the parties may not disqualify a judge who was reassigned solely for the purpose of issuing a Proposed Decision and Order.***In re Gail Gomez, BIIA Dec., 17 15610 (2018)*** [Editor's note: The Board's decision was appealed to superior court under King County Cause No. 19-2-00765-6 KNT.]

Reason for Delisting: In 2021, the BIIA Rules of Practice and Procedure were amended to permit a notice of disqualification when an appeal has been assigned to a new industrial appeals judge for the writing of a Proposed Decision and Order. WAC 263-12-091.

2024

DELISTED

PERMANENT TOTAL DISABILITY (RCW 51.08.160)

Obtaining work vs. performing work

Whether a worker can obtain work is not a factor in determining whether the worker is permanently totally disabled. The question is whether the worker can perform any substantial gainful employment which exists in the competitive labor market and is within the worker's qualifications.

....***In re Violet Canfield, BIIA Dec., 60,811 (1983)*** [concurrence] [Editor's Note: See *Leeper v. Department of Labor & Indus.*, 123 Wn.2d 803 (1994)]

Reason for Delisting: No longer good law. It has long been held that a worker's ability to obtain employment is a factor in determining whether the worker is totally disabled. The statement about the ability to obtain employment in *In re Violet Canfield* is no longer supportable. See, for example, *Leeper v. Department of Labor & Indus.*, 123 Wn.2d 803 (1994) (disapproving the analysis in *Graham v. Weyerhaeuser Co.*, 71 Wn. App. 55, 856 (1993)) and 6A Wash. Prac., WPI 155.07 (7th ed.) ("Total disability is an impairment of mind or body that renders a worker unable to perform or obtain a gainful occupation with a reasonable degree of success and continuity. It is the loss of all reasonable wage-earning capacity.").

2023

DELISTED

Hearing loss

The two-year limitation period for filing a compensable hearing loss claim begins to run on the last day of injurious exposure, not the day after.

....*In re James Scales*, BIIA Dec., 09 10566 (2009)

Reason for Delisting: This significant decision was overruled sub silentio by the Washington Supreme Court in *Kovacs v. Dep't of Labor & Indus.*, 186 Wn.2d 95 (2016) (holding that the day of injury is excluded from time calculation in determining when the statute of limitations runs in industrial injury claims).]

DELISTED

Assessments

RCW 51.48.120 requires that service of a Notice of Assessment by mail be confirmed. Where the USPS return receipt shows the Notice of Assessment was unclaimed, service of the Notice of Assessment is not confirmed and service by mail fails. **....*In re Jaz Services*, BIIA Dec., 13 11377 (2015)**

Reason for Delisting: Overruled by *Simmons v. Dep't of Labor & Indus.*, No. 84529-I (slip opinion filed October 30, 2023), in which the court held that where the Department mailed a Notice of Assessment to a sole-proprietor employer's last known address by certified mail with return receipt requested, the Department complied with RCW 51.48.120, and the 30-day clock to protest or appeal began to run regardless of the fact that the owner of the sole proprietorship was out of town and didn't actually receive the Notice of Assessment. RCW 51.48.120 doesn't require actual receipt by the employer.]

2021

DELISTED

PENALTIES (RCW 51.48.017)

Unreasonable delay

Where the Department determines that a penalty is due for unreasonable delay in payment of benefits, the amount "then due" as set out in RCW 51.48.017 is the aggregate amount due. **....*In re Josannah Hopkins, Order Denying Motion for Reconsideration*, BIIA Dec., 13 21202 (2015)**

Reason for Delisting: April 2022 the decision is removed from the Board's significant decisions because the Legislature amended RCW 51.48.017. Effective September 1, 2020, every time a self-insured employer unreasonably delays or refuses to pay benefits as they become due, they are required to pay a penalty not to exceed the greater of one thousand dollars or 25 percent of either the amount due or of each

underpayment made to the claimant. Josannah Hopkins is no longer good law.]