

# Washington Claims School

Presented by Reinisch Wilson Weier PC  
June 14, 2017  Lake Oswego, Oregon



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# Claim Resolution: Permanent Total Disability/Combined Effects Pensions

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### Permanent Total Disability

1. Permanent Total Disability differs from temporary total disability only in its duration. *Bonko v. DLI*, 2 Wash. App. 22, 466 P.2d 526 (1970); RCW 51.08.160
  - a. Loss of both legs, loss of both arms, or loss of one leg and one arm
  - b. Total loss of eyesight
  - c. Paralysis
  - d. Any other condition permanently incapacitating the worker from performing any work at any gainful occupation (full time minimum wage)
  
2. Is the worker employable? Can the worker perform gainful employment available in the competitive labor market and within the worker's qualifications on a reasonably continuous basis? *Fochtman v. DLI*, 7 Wn.App. 286, 499 P.2d 255 (1972); *In re Arden Breth*, BIIA Dec., 89 2211 (1990); *Leeper v. DLI*, 123 Wn.2d 803, 872 P.2d 507 (1994); Consider the following:
  - a. Preponderance of medical opinion on employment restrictions/ability to work
  - b. Age
    - i. Where the workers' age (73) and not her physical impairment from the injury is the reason she is not able to be hired, the worker is not permanently totally disabled as a result of the industrial injury. *In re Violet Canfield*, BIIA Dec., 60 811 (1983).
  - c. Education and training
  - d. Work History
  - e. Transferable skills (learned from schooling, jobs, certifications, volunteer, hobbies)
  - f. Pre-existing conditions, limitations, and disabilities

### 3. Permanent Partial Disability Award after Permanent Total Disability

- a. A worker classified as permanently and totally disabled cannot receive a permanent partial disability award for a later injury. (NEW CASE LAW)
  - i. Example: 1<sup>st</sup> injury occurs, claimant attempts to return to work and sustains 2<sup>nd</sup> injury, claimant then awarded pension for 1<sup>st</sup> injury, cannot also later receive PPD award for 2<sup>nd</sup> injury. *Sims v. DLI*, 195 Wash.App. 273, 381 P.3d 89 (July 26, 2016); *In re Roy Sulgrove*, BIIA Dec., 88 0869 (1989).
- b. When two claims caused disabilities, separate and distinct, each of which alone was sufficient to render the worker permanently and totally disabled, the worker may not receive a double recovery of permanent total disability benefits. *In re Lorraine Williams*, BIIA Dec., 07 24841 (2009).

### 4. Post Pension Treatment

- a. Director has discretion to authorize post pension treatment for a permanently and totally disabled worker to protect the worker's life or provide for the administration of medical and therapeutic measures including payment of prescription medications. RCW 51.36.010; *In re Debra Jarvis*, BIIA Dec., 10 14734 (2011).
- b. The Director has discretion to allow post pension treatment including medications to alleviate continuing pain. This includes medications which would be palliative and not curative. *In re Pablo Garcia*, BIIA Dec., 05 15329 (2006).
- c. Self-insured employer, not the second injury fund, is required to pay for claimant's ongoing post-pension medical treatment for claim related condition (here pre-existing asthma aggravated by a chemical exposure at work). Second injury fund is limited to accident costs so the self-insured employer is not entitled to second injury fund relief for medical costs related to the claim. *Boeing Co. v. Doss*, 183 Wash.2<sup>nd</sup> 54, 347 P.3d 1083 (April 16, 2015). (NEW CASE LAW)
- d. Director's discretionary decision is reviewable under an abuse of discretion standard, which is a more difficult standard than the usual preponderance of evidence standard.

## Second Injury Fund Relief (AKA Combined Effects Pension)

1. Second Injury Fund Relief is appropriate when permanent total disability is the result of the combined effects of previous bodily disability and the residuals of the worker's compensation claim. RCW 51.16.120, RCW 51.32.250, RCW 51.44.040.
  - a. All employers pay premiums into the Second Injury Fund to create the fund.
  - b. Purpose is to cover job modification costs for injured workers and to encourage the hiring of previously handicapped workmen by providing that the second employer will not, in the event of a subsequent injury on the job, be liable for a greater disability than actually results from the second accident. *Lyle, Inc. v DLL*, 66 Wn.2d 745, 405 P.2d 251 (1965); *In re Fred Dupre*, BIIA Dec., 97 4784 (1999).
  - c. When a combined effects pension is awarded, the employer is directed to pay the permanent partial disability award that is related to the workers' compensation claim, and the remaining pension is funded by the Second Injury Fund.
  - d. Accessing the Second Injury Fund will affect the employer's experience rating and cost employer to access.
    - i. Check with the Department to find out how it affects the employer.
2. To successfully obtain a combined effects pension, must show the following:
  - a. A previous bodily disability: pre-existing, symptomatic and partially disabling condition present prior to and at the time of the workers' compensation claim.
    - i. Requires evidence that the worker was employed in an objectively injured state, which either effectively impacted the worker's performance in the workplace or materially diminished the worker's functional ability to perform the essential activities associated with daily living. *Crown, Cork & Seal v. Smith*, 171 Wn.2d 866 (2011).
      1. Not met if had an unrelated condition preexisted the injury, but there was no discernible disability due to that condition until after the work injury had occurred *In re Coral Kaufman*, BIIA Dec., 59 962 (1982).
      2. Not met if pre-existing condition was dormant and only became symptomatic and disabling after the industrial injury. *In re Walter Larson*, BIIA Dec., 21 004 (1966); *In re Leonard Norgren*, BIIA Dec., 04 18211 (2006).
      3. Not met if the condition was not pre-existing the industrial injury and only arose subsequent to the industrial injury. *In re V. Pearl Howes*, BIIA Dec., 58 356 (1982).

4. Is met if condition pre-existed the injury and caused a significant physical impairment but was not diagnosed until after the injury. *In re Reuben Pister*, BIIA Dec., 61 785 (1983); *In re Carlton Hague*, BIIA Dec., 59 331 (1982).
  - b. A subsequent industrial injury or occupational disease.
  - c. Total and permanent disability resulting from the combined effects of the previous bodily disability and the subsequent industrial injury or occupational disease.
3. Effective Date of the Pension
- a. The effective date of permanent total disability is the date the worker is both medically fixed and as a vocational matter, demonstrably permanently unable to be gainfully employed on a reasonably continuous basis. *In re: Frederick J. Cuendet*, BIIA Dec. 99 21825 (2001); *In re James Eddy*, BIIA Dec., 99 18062 (2000); *In re: Roger D. Neuman*, BIIA Dec. 97 7648 (1999).
    - i. Medical fixity: The worker has reached maximum medical improvement and further treatment is not reasonable, proper, or necessary as it will not improve the worker's function or lessen the worker's disability. WAC 296-20-01002.
    - ii. Vocational fixity: Vocationally found totally and permanently disabled and won't benefit from vocational services. *In re Roger Nueman*, BIIA Dec., 97 7648 (1999); *In re James Eddy*, BIIA Dec., 99 18062 (2000); *In re Frederic Cuendet*, BIIA Dec., 99 21825 (2001).
  - b. Why does the effective date of the pension matter? (NEW CASE LAW) *DLI v. Ortiz*, 194 Wash.App. 146, 374 P.3d 258 (May 19, 2016)
    - i. If the employer paid time loss benefits after the appropriate effective date of the pension, the overpaid time loss will be repaid to the employer by the Department from the second injury fund.



## Washington State Department of Labor & Industries Pension Review Coversheet

([www.lni.wa.gov/ClaimsIns/Files/SelfIns/ClaimMgt/PensionReviewCoversheet.pdf](http://www.lni.wa.gov/ClaimsIns/Files/SelfIns/ClaimMgt/PensionReviewCoversheet.pdf))



## **Self-Insurance Pension Review Coversheet: Tips, Pointers, Reminders**

1. The vocational report should clearly answer the question, “Why can’t the worker return to work in any capacity?”
2. All documentation (medical and otherwise) cited by the vocational counselor in the report must be submitted to the department (preferably attached to the vocational report).
3. A wage order must be issued on all claims submitted for pension. It’s helpful if the 5A is submitted separate from the pension packet.
4. Please provide the date health care benefits ended!
5. Identify all accepted and/or treated conditions on the Pension Review Coversheet.
6. Make certain all conditions are fixed and stable with supporting documentation.
7. Flush out all contended post pension medical treatment.
8. If second injury relief is being requested, explain what the pre-existing condition is, why it’s pre-existing and how it has material effects on the worker in life and/or at work.
9. Prepare the worker for pension.
10. Be thorough in your review—make it your last review of this claim!

**Pension and Survivor Benefits:**

<http://www.lni.wa.gov/FormPub/Detail.asp?DocID=2454>

**Pension Review Coversheet:**

<http://www.lni.wa.gov/ClaimsIns/Files/SelfIns/ClaimMgt/PensionReviewCoversheet.pdf>



Washington State Department of Labor & Industries

**Pension Review Coversheet**

Claim Number: \_\_\_\_\_ Worker's Name: \_\_\_\_\_

Request submitted by: \_\_\_\_\_ Phone Number: \_\_\_\_\_ Ext. \_\_\_\_\_

**Claim File Documentation**

I have: (pick one option)

- Attached a copy of the complete claim file
- Attached a copy of all claim file information not previously submitted to the department.
- Already submitted a complete copy of the claim file. There is no additional claim file information to submit to the department.

**Vocational Documentation**

I confirm that: (pick one option)

- I have attached a copy of the complete vocational work-up (SIVRF), including all existing vocational documentation for this claimant.
- I already submitted a copy of the complete vocational work-up (SIVRF), including all existing vocational documentation for this claimant to the department on the following date: \_\_\_\_\_.

I confirm I have reviewed the vocational summary and that: (pick one option)

- I have attached a copy of every document mentioned or discussed in the vocational summary narrative.
- I already submitted a copy of every document mentioned or discussed in the vocational summary narrative to the department on the following date: \_\_\_\_\_.

**Time Loss**

I confirm that I have:

- Attached a current final SIF-5 **and included the date(s) health care benefits ended.**
- The SIF-5 shows all time-loss periods paid, with an explanation for any unpaid time-loss.
- For all open claims without a wage order: attached an SIF-5A and required payroll.

**Medical**

I have listed all **accepted and/or treated conditions** (including psych conditions) below:

(Space is limited, attach additional page if needed.)

- Yes, I have attached medical documentation to this coversheet which confirms that each of the above listed accepted condition(s) is fixed and stable or at maximum medical improvement?

**Post Pension Medical Treatment** (Pick one option)

- Claimant does **not** need ongoing medical monitoring/treatment for an accepted condition.
- Claimant does need ongoing medical monitoring/treatment for an accepted condition (life sustaining treatment needs and/or treatment required to alleviate chronic pain from the industrial injury). If so, complete information below in detail.

List all ongoing Medical Monitoring/Treatment (i.e. a complete list of the necessary prescriptions + frequency needed for medical monitoring. (Space is limited, attach additional page if needed.)

**Second Injury Fund Relief** (Pick one option)

- I am **not** requesting second injury fund relief be granted.
- I am requesting second injury fund relief be granted. Please note: The department will not consider this information, unless it first determines the claimant is entitled to a pension. (Complete information below in detail.)

List all pre-existing conditions & any formal or informal accommodations given. (Space is limited, attach additional page if needed.)

Both boxes below are required if requesting second injury fund relief.

- Yes, I certify I have attached **all medical reports or other documentation** to this coversheet which documents pre-existing disabling conditions.
- Yes, I further confirm I have attached medical reports to this coversheet which document a permanent partial disability (PPD) rating for ALL of the accepted conditions (including psych).

**If you have any questions and don't know the pension adjudicator's name and contact information, call the receptionist at 360-902-6901.**



## Case Hypotheticals

**Question #1:** In 2003, Cassidy Curmudgeon injured her left arm at work and her claim was allowed. A closing order was issued on the 2003 claim which Ms. Curmudgeon appealed. While the appeal to the 2003 claim closing order was pending, Ms. Curmudgeon was injured at work in 2011 and that claim was also allowed. Then the Board subsequently ruled that Ms. Curmudgeon was a permanently and totally disabled worker as of September 24, 2010 as a result of the 2003 work injury. The medical evidence shows claimant should be rated with 10% PPD as it relates to the 2011 claim. When the 2011 claim closes, is Ms. Curmudgeon entitled to receive a PPD award?

**Question #2:** In 2005, Greg Greedy injured his low back during the course of his employment and his claim was allowed. Mr. Greedy returned to work with the same employer performing his same job. In 2006 he injured his right shoulder at work and his claim was allowed. Can Mr. Greedy be found totally and permanently disabled under both claims? If so, can he be awarded two pensions under the claims?

**Question #3:** The Department determined that Sarah Somber's depression was related to the industrial injury and directed the self-insured employer to pay for all related services. After she was placed on a pension, the supervisor of industrial insurance issued a letter authorizing post pension treatment for the accepted condition of depression by way of various anti-depressants and periodic medical monitoring. Medical opinion was that if Ms. Somber were no longer able to receive the anti-depressant medications and medical monitoring, she would commit suicide. Is the employer responsible for paying the post-pension prescription medications and medical monitoring? What if the treatment was not potentially life-saving medications, but only palliative psychiatric treatment?

**Question #4:** Same scenario as above, except that the Department authorized second injury fund pension. Ms. Somber requires additional post-pension medical treatment. Who is responsible for the costs of claimant's ongoing post-pension medical treatment: the employer or the Department via the second injury fund?

**Question #5:** Larry Leery received a pension due to his low back condition and thereafter began hanging out with a friend who worked at a gas station. Mr. Leery periodically performed services at his friend's gas station. This was done on an informal, voluntary, and intermittent basis, for a total of 10 different times over about eight months. He did not receive any wages or other remuneration in exchange for those services. Should Mr. Leery's pension be terminated? What if the employer obtained medical evidence that Mr. Leery's disability had decreased since receiving the pension award?

**Question #6:** Laura Lofty injured her left leg in an industrial incident. Subsequent to the industrial injury, she was diagnosed with cancer and underwent a prolonged and debilitating treatment course including surgery and chemotherapy. The medical evidence was that the cancer was not caused or aggravated by the industrial injury and that it was present one year prior to the work injury but did not result in any discernible disability prior to the industrial injury. The evidence shows that because of the cancer and the work injury combined, Ms. Lofty cannot return to any form of work or be retrained. Is a combined effects pension an option for Ms. Lofty?

**Question #7:** Melanie Marred was injured at work. Although these conditions were present and symptomatic for years before the work injury, only after the work injury was Ms. Marred was diagnosed with diabetes, migraines, severe arthritis, and advanced Parkinson's disease. These pre-existing conditions limited and affected Ms. Marred's abilities and activities at work and in her daily life before the work injury occurred. The evidence is that Ms. Marred cannot return to any form of work or be retrained due to the work injury in combination with the conditions that were present but undiagnosed before the work injury. Is Ms. Marred entitled to a combined effects pension when the pre-existing conditions were only discovered after the industrial incident?

**Question #8:** James Jolly was injured while working for Frozen Foods Company. The claim was allowed and time loss was paid continuously up to June 1, 2015. A combined effects pension was granted and the pension effective date was deemed to be January 1, 2015. Can the employer recover the overpaid time loss amount that was paid from January 2, 2015 up to June 1, 2015? If yes, who should repay the employer the overpaid time loss?



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