

McCallum, Shelby

JOINDER

Department as necessary party

The Department must be included as a party to an appeal where the outcome of the appeal may have a direct impact on the second injury fund.*In re Shelby McCallum*, BIIA Dec., 00 17408 (2001)

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

1 **IN RE: SHELBY J. MCCALLUM**) **DOCKET NO. 00 17408**
2)
3 **CLAIM NO. T-473899**) **ORDER VACATING PROPOSED DECISION**
4) **AND ORDER AND REMANDING APPEAL**
5) **FOR FURTHER PROCEEDINGS**
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7 **APPEARANCES:**

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9 Claimant, Shelby J. McCallum, by
10 Stephen J. Henderson, Lawyers, per
11 Elizabeth M. Knight

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13 Self-Insured Employer, The Boeing Company, by
14 Craig, Jessup & Stratton, per
15 Gibby M. Stratton and Marne J. Horstman

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18 The claimant, Shelby J. McCallum, filed an appeal with the Board of Industrial Insurance
19 Appeals on July 25, 2000, from an order of the Department of Labor and Industries dated July 18,
20 2000. The order affirmed the Department order dated May 16, 2000, which directed the claimant to
21 repay the self-insured employer \$62,653.97 in duplicate time-loss compensation benefits for
22 time-loss compensation paid from January 27, 1995 through February 9, 1998, because the
23 claimant was placed on a pension effective January 26, 1995. **REMANDED FOR FURTHER**
24 **PROCEEDINGS.**

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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 claimant to a Proposed Decision and Order
32 issued on September 5, 2001, in which the order of the Department dated July 18, 2000, was
33 reversed and remanded to the Department with directions to "reimburse the self-insured employer
34 for time-loss compensation benefits paid to the claimant from January 26, 1995 through February 9,
35 1998, and to seek reimbursement from the claimant, and to direct the claimant to refund to the self-
36 insured employer \$62,653.97 for time-loss compensation benefits paid from January 27, 1995
37 through February 9, 1998 that resulted in a duplication of benefits."

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39 We have granted review because the nature of this appeal requires that the Department
40 participate as a necessary party. As the hearing judge noted in the Proposed Decision and Order,
41 the facts of Ms. McCallum's appeal are analogous to those of *In re Frederic J. Cuendet*, Dckt.
42 No. 99 21825 (August 14, 2001). In that case, the self-insured employer appealed from an order
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1 directing the claimant to reimburse the employer for time-loss compensation benefits paid for a
2 period during which the claimant was ultimately determined to be permanently totally disabled
3 under circumstances justifying second injury fund relief pursuant to RCW 51.16.120. The Board
4 determined that the self-insured employer should be reimbursed from the second injury fund rather
5 than from the claimant. The Board noted that RCW 51.32.240(1) or (4) would allow the Department
6 to proceed directly against the claimant for reimbursement because under the second injury fund
7 the Department is the party responsible for administering payments in the pension case. Under
8 that same logic, the Department should be involved in any appeal involving the resolution of
9 overpayments that affect the second injury fund.
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11 We note that the Department was included as a party to the appeal in the *Cuendet* case
12 because the self-insured employer was the appealing party. In the current claimant appeal, the
13 Department was not included as a necessary party because, as in most claimant appeals involving
14 self-insured employers, the employer assumes the defense of the order on appeal and the
15 Department does not participate in defense of its order because the state fund is not directly
16 affected by the outcome of the appeal. In this instance, the outcome of the appeal may have a
17 direct impact on the second injury fund, which is administered by the Department under
18 RCW 51.16.120. This case was adjudicated on cross-motions for summary judgment from the
19 claimant and the self-insured employer. On remand, the industrial appeals judge may again
20 entertain such motions after the Department has been included as a party to the appeal and all
21 parties have had the opportunity to file supporting documents in accordance with the provisions of
22 CR 56.
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24 The Proposed Decision and Order dated September 5, 2001, is vacated. This matter is
25 remanded to the hearings process, pursuant to WAC 263-12-145(4), for further proceedings as
26 indicated by this order. The parties are advised that this order is not a final Decision and Order of
27 the Board within the meaning of RCW 51.52.110. At the conclusion of further proceedings, the
28 industrial appeals judge shall, unless the matter is dismissed or resolved by an Order on
29 Agreement of Parties, enter a Proposed Decision and Order containing findings and conclusions as
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