David, Justin

SELF-INSURANCE

Authority to recoup overpayment of benefits

A self-insured employer is allowed to recoup an excess advance payment of an award for permanent partial disability up to one year after the date the initial Department order establishing permanent partial disability is entered. **….*In re Justin David*, BIIA Dec., 03 11776 (2004)** [dissent]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: JUSTIN DAVID	)	**DOCKET NO. 03 11776**
	)	
CLAIM NO. W-425936	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Justin David, Pro Se

Self-Insured Employer, Les Schwab Tire Centers, by
Reeve Shima, P.C., per
Elizabeth K. Reeve

Department of Labor and Industries, by
The Office of the Attorney General, per
James W. McCormick, Assistant

The self-insured employer, Les Schwab Tire Centers, filed an appeal with the Board of Industrial Insurance Appeals on January 10, 2003, from an order of the Department of Labor and Industries dated November 25, 2002. In this order, the Department: (1) affirmed an order dated October 3, 2002, in which the Department closed the claim with a permanent partial disability award equal to 2 percent of the amputation value of the right leg above the knee joint with short thigh stump (the total award due was $1,625.58); and (2) determined that no permanent partial disability payment was due since $10,972.61 was advanced on August 24, 2000. The Department order is **REVERSED AND REMANDED**.

PRELIMINARY EVIDENTIARY AND PROCEDURAL MATTERS

This matter comes before us through summary judgment motions (CR 56) filed by the self-insured employer and the Department. The evidence considered by us in this case comes from two sources: the declaration of Margo Matthews, the self-insured employer's claims administrator, which was intended only as part of the factual support for the employer's summary judgment motion.[1] The Department did not include affidavits or other factual supporting material as

[1] The self-insured employer also intended to file exhibits as part of the factual basis for its motion. For unknown reasons, these documents were not included in the employer's submissions for consideration during the hearing on the summary judgment motions. At the September 9, 2003 hearing, our industrial appeals judge correctly determined that submission of those documents was not necessary. 9/9/03 Tr. at 2-3. Thus, they were never made part of the record of this appeal.

directed by CR 56(e) with its motion. The extended factual narrative contained within the Department's "Cross Motion for Summary Judgment" did not comply with CR 56 and was not considered by us. In addition to Ms. Matthews' declaration, our industrial appeals judge appropriately took notice of the October 3, 2002 and November 25, 2002 Department orders.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the self-insured employer to a Proposed Decision and Order issued on October 22, 2003, in which the industrial appeals judge affirmed the Department order dated November 25, 2002. We have granted review to direct the Department to order recoupment of the erroneously paid portion of the advance of permanent partial disability benefits as requested by the self-insured employer.

Les Schwab Tire Centers, the self-insured employer, contests a Department order in which the Department affirmed claim closure and denied, sub silentio, the self-insured employer's request for the assessment of an overpayment of permanent partial disability benefits advanced to the claimant over two years prior to the issuance of the initial closing order that first set forth the amount of the permanent partial disability award. The Department, relying on the one-year recoupment limitation period in RCW 51.32.240(1), argued that the self-insured employer waived its right to recoupment because of the tardiness of its initial request for recoupment. Mr. David, although provided with notice of all the proceedings, chose not to participate in any of the proceedings.

Mr. David sustained an industrial injury to his right leg on November 23, 1998, during the course of his employment with the self-insured employer. The Department allowed the claim by its order dated November 16, 1998. On August 23, 2000, the claimant submitted a written request for a permanent partial disability advance based on financial hardship. At the time of the request, the self-insured employer had in its possession the results of an independent medical examination (IME) by Edward Coale, M.D., in which he determined that Mr. David had a permanent partial disability rating of 27 percent for the right leg. Jeffery Albright, M.D., the claimant's attending physician, concurred in the permanent partial disability rating. An award based on that rating would have been equal to $21,945.22.

On August 24, 2000, the self-insured employer paid the claimant an advance of 50 percent of the prospective permanent partial disability award, or $10,972.61. The claim did not close until the Department issued an order on October 3, 2002, in which it directed the self-insured employer to pay the claimant a permanent partial disability award equal to 2 percent of the right leg, which was equal to $1,625.58. The permanent partial disability rating and award first contained in the October 3, 2002 Department order were supported by medical evaluations obtained after that performed by Dr. Coale. The self-insured employer timely protested the October 3, 2002 order because it did not deduct the advance from the permanent partial disability award, as stated in the order, and also because it did not assess an overpayment for the difference between the advance and the amount of permanent partial disability benefits to which the claimant was entitled, according to the Department order. The employer asked for an overpayment order to be issued in the amount of $8,640.07, which would take into account an underpayment of time loss compensation in the amount of $706.96. The Department issued an order on November 25, 2002, in which the Department affirmed the October 3, 2002 order, but also stated that no additional permanent partial disability payment was due to the claimant since the employer had advanced the $10,972.61 in August 2000. The order did not contain any provision either assessing or declining to assess an overpayment. Thereafter, the employer appealed the November 25, 2002 order. Ms. Matthews stated in her declaration that the self-insured employer did not know the correct amount of the permanent partial disability owed to the claimant until after claim closure.

RCW 51.32.240(1) states:

> Whenever any payment of benefits under this title is made because of clerical error, mistake of identity, innocent misrepresentation by or on behalf of the recipient thereof mistakenly acted upon, or any other circumstance of a similar nature, all not induced by fraud, the recipient thereof shall repay it and recoupment may be made from any future payments due to the recipient on any claim with the state fund or self-insurer, as the case may be. The department or self-insurer, as the case may be, must make claim for such repayment or recoupment within one year of the making of any such payment or it will be deemed any claim therefor has been waived. The director, pursuant to rules adopted in accordance with the procedures provided in the administrative procedure act, chapter 34.05 RCW, may exercise his discretion to waive, in whole or in part, the amount of any such timely claim where the recovery would be against equity and good conscience.

The Department argues that this statutory language is clear and unambiguous and therefore not subject to interpretation. In its view, an advance of permanent partial disability is just another form of "payment of a benefit" within the meaning of the statute. Therefore, the one-year period to apply for recoupment began when the payment was made on August 24, 2000. Since the self-insured employer did not file a claim for recoupment until 2002, the Department determined that the self-insured employer's claim was untimely and, therefore, waived its right to recoupment by operation of RCW 51.32.240(1).

Adopting the Department's rationale and refusing to allow the self-insured employer to recoup the overpayment results in at least two major negative effects. The Industrial Insurance Act contains no requirement that permanent partial disability advances be granted either by the Department or by self-insured employers. Both Ms. Matthews' declaration and common sense lead us to believe that if recoupment is not possible in this type of situation, then approval of advances would be drastically curtailed or cease to be granted altogether. Without protection from unpredictable changes in permanent partial disability ratings by physicians, which can occur at multiple times during the life of a claim, the Department and self-insured employers would be unwise to authorize any advances of permanent partial disability benefits. Such a restriction or prohibition would not be consistent with the policy behind the Industrial Insurance Act, that is, to ease the suffering of injured workers. The second negative effect is the fact that if the Department prevails in this appeal, Mr. David will have received an unjustified windfall of over $8,000 in benefits to which he was not entitled under the Industrial Insurance Act.

We conclude that if recoupment of any portion of the permanent partial disability advance is to be authorized, it may be done only pursuant to the "catch-all" language of RCW 51.32.240(1) ["any other circumstance of a similar nature"].[2] The Department disputes the application of this subsection, contending that the cause of the overpayment was either a mistake of law or simply more than one year's inattention, delay, and lack of effective management of the claim by the self-insured employer. The Department argued that our significant decision of *In re Jonathan Cortese*, BIIA Dec., 90 2342 (1992) is authority that recoupment should not be allowed. Our

[2] RCW 51.32.080(4), which contains no limitation period for demanding recoupment, is not applicable since the permanent partial disability benefits paid to Mr. David were not paid pursuant to an erroneous adjudication. *See, e.g., In re Bob Watkins*, Dckt. No. 00 14667 (November 1, 2001). The other subsections of RCW 51.32.240 and other recoupment statutes within the Act, such as RCW 51.32.220 and RCW 51.32.230, also are not factually applicable to this situation.

industrial appeals judge agreed with the Department's ultimate conclusion, but relied instead on *In re Kathy Turgano*, Dckt. No. 99 17250 (February 21, 2001), in deciding that erroneous calculations and payments based thereon are included within the RCW 51.32.240(1) "catch-all" language.

We do not consider either *Cortese* or *Turgano* to be applicable to this appeal. The facts of those cases are materially dissimilar to this appeal. Both of those cases involved payments of time loss compensation and not permanent partial disability and had nothing to do with an advance of any benefit. More important, the circumstances surrounding the payment of the benefits later deemed to be an overpayment are much different than the payment in advance of such benefits as in this appeal.

Pursuant to RCW 51.32.240(1), the self-insured employer's claim for recoupment must be made within one year of "**the making of any such payment**." Within the context of RCW 51.32.240(1) that phrase refers to a **payment made in error** for one or more of the reasons enumerated by that subsection, including the "catch-all" provision. *Webster's II New College Dictionary* (1995), p. 16, defines an "advance" as "payment of money **before legally due**." In its adjectival form, that word is defined as "made or given **ahead of time**." In this case, the payment or advance was made **before** any permanent partial disability benefits were legally due to Mr. David. The advance was made **before** the Department had made any determination that could place the parties on notice that the amount of the advance was in error. In order to give meaning to all of the terms within RCW 51.32.240(1), the one-year limitation period cannot commence until the payment is actually in error. As such, the statutory one-year limitation period could not and did not begin to run when the advance of permanent partial disability benefits was paid to Mr. David.

We do not believe that an error in the amount of an advance is determinable merely because new medical information, whether from an independent medical examination report or attending doctor, conflicts with medical opinion(s) upon which payment of the advance was based. There are often differences of opinions among doctors about the extent of disability and other medical issues in any claim. It is not at all unlikely that two or more impairment ratings will coincide in any claim. In fact, large numbers of the appeals filed with and heard by us involve differences in medical opinion about impairment ratings. There can be no way for an employer or injured worker to know

which rating corresponds to the correct award or level of benefits until the Department issues an order specifying the award.

Therefore, we conclude that the RCW 51.32.240(1) limitation period should begin to run, **in the case of a permanent partial disability advance**, on the date of the initial Department order establishing the amount of the permanent partial disability award, or by an order or determination by a self-insured employer pursuant to RCW 51.32.055(9). In reaching this decision we are not grafting a discovery rule onto RCW 51.32.240(1). We believe that the one-year limitation period begins to run without regard to any date upon which the self-insured employer or the Department receives a new medical report specifying a different impairment rating, or any other circumstance by which either could be said to have discovered an error. The event that starts the running of the one-year limitation period is the issuance of one of the orders described above, which is a readily ascertainable event that does not rest on a subjective statement regarding when a party did discover or should have discovered medical or other information that suggests that an advance was in error.

On October 3, 2002, the Department first issued the order establishing the amount of the claimant's permanent partial disability award. On October 21, 2002, the Department received the self-insured employer's claim for recoupment in the form of a protest to that order. Therefore, the employer's claim for recoupment was timely. The Department's November 25, 2002 order should be reversed and the matter remanded to it to issue an order assessing an overpayment in the amount of $8,640.07, which would include an adjustment for the unpaid time loss compensation the self-insured employer admitted Mr. David should have received. Such an order does not prevent the claimant from applying to the Director of the Department for a waiver of the overpayment should appropriate circumstances for such a waiver be shown. RCW 51.32.240(1); WAC 296-14-200.

Because of our determination expressed above, we do not reach the self-insured employer's contentions in equity in support of its request for recoupment of the overpayment. We do point out, as did our industrial appeals judge, that the Board does not have equitable powers. *In re Seth Jackson*, BIIA Dec., 61,088 (1982).

FINDINGS OF FACT

1. On December 10, 1998, the claimant, Justin David, filed an application for benefits with the Department of Labor and Industries, alleging he sustained an industrial injury on November 23, 1998, during the course

of his employment with the self-insured employer, Les Schwab Tire Centers. On December 16, 1998, the Department issued an order in which it allowed the claim.

On October 3, 2002, the Department issued an order in which the Department closed the claim with time loss compensation benefits having been paid through March 15, 2002, and gave the claimant a permanent partial disability award equivalent to 2 percent of the amputation value of the right leg above the knee joint with short thigh stump. On October 21, 2002, the self-insured employer protested the Department order dated October 3, 2002. On November 25, 2002, the claimant also protested the October 3, 2002 order. On November 25, 2002, the Department issued an order in which it affirmed its prior order of October 3, 2002, and determined the self-insured employer did not owe a permanent partial disability award payment to the claimant as the self-insured employer had made an advance payment to the claimant on August 24, 2000.

On January 10, 2003, the employer filed a Protest and Request for Reconsideration with the Department from its November 25, 2002 order. On February 13, 2003, the Department sent the self-insured employer 's protest to the Board as a direct appeal. On March 11, 2003, the Board granted the employer's appeal and assigned it Docket No. 03 11776.

2. On November 23, 1998, Justin David sustained an industrial injury to his right leg while in the course of his employment with the self-insured employer.

3. On December 8, 1999, the claimant underwent an independent medical examination that was performed by Dr. Edward Coale, who concluded that the claimant's permanent partial disability was equivalent to 27 percent of the amputation value of his right leg. Dr. Coale's independent medical examination report was forwarded to the claimant's attending physician, Dr. Jeffery Albright, who agreed with Dr. Coale's permanent partial disability rating of 27 percent of the amputation value of the claimant's right leg.

4. The claimant asked the self-insured employer for an advance payment on his projected permanent partial disability award. On August 24, 2000, the self-insured employer paid the claimant $10,972.61 as a 50 percent advance payment of that projected award. The amount of the advance paid by the self-insured employer to the claimant was based on Dr. Coale's permanent partial disability rating and on Dr. Albright's ratification of Dr. Coale's rating. At the time the

self-insured employer advanced the money to the claimant no permanent partial disability payment had been legally determined to be due to him.

5. On August 20, 2002, the self-insured employer sent the Department a letter in which the employer requested a refund of the 50 percent advancement on the permanent partial disability award the self-insured employer had paid to the claimant because the claimant's permanent partial disability was lower than initially thought.

6. The claimant and the self-insured employer did not know the amount of the claimant's entitlement to permanent partial disability benefits until October 3, 2002, when the Department issued an order in which it closed the claim with a permanent partial disability rating of 2 percent of the amputation value of the claimant's right leg. The monetary amount of this award was $1,625.58.

7. As of October 3, 2002, the self-insured employer had underpaid the claimant $706.96 in time loss compensation.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of this appeal.

2. The self-insured employer's advance of permanent partial disability benefits to the claimant constituted an erroneous payment of benefits resulting from circumstance(s) of a similar nature within the meaning of RCW 51.32.240(1).

3. The date upon which the RCW 51.32.240(1) one-year limitation period on claiming recoupment of an erroneously paid advance of permanent partial disability benefits began to run on October 3, 2002, the date of the first Department order in which the Department established the amount of the claimant's entitlement to that benefit.

4. The self-insured employer's claim for repayment or recoupment of the advance of permanent partial disability benefits was made within the time limitation for such claim prescribed by RCW 51.32.240.

5. The Department order dated November 25, 2002, is incorrect and is reversed. The claim is remanded to the Department to issue an order directing the claimant to repay the self-insured employer for an

overpayment of benefits in the amount of $8,640.07, and otherwise affirming the provisions of the October 3, 2002 order

It is so **ORDERED**.

Dated this 11th day of May, 2004.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

/s/_____
CALHOUN DICKINSON Member

DISSENT

I respectfully disagree with the majority's interpretation of the applicable statute, RCW 51.32.240(1). The plain language of the statute requires a determination that in order to require repayment of the advance payment of an award for permanent partial disability, the employer must make the request for repayment or recoupment within one year of having made the payment. The statute has been quoted in its entirety in the majority opinion. At issue is the phrase, "must make claim for such repayment or recoupment within one year of the making of any such payment or it will be deemed any claim therefor has been waived." There is nothing ambiguous about this statute. It is clear that the request for repayment must be made within one year of the payment. Les Schwab Tire Centers waited two years before requesting the Department issue an order indicating an overpayment of benefits has been paid. The request was not timely.

In its Cross Motion for Summary Judgment, the Department asserted many facts that illustrate why the self-insured employer missed its opportunity to request repayment prior to the expiration of the one-year limitation contained in the statute. In August 2000, after a request from the claimant for an advancement on a permanent partial disability award, the self-insured employer wrote a check in the amount of 50 percent of the amount of the monetary award for permanent partial disability that would be payable based on a December 8, 1999 examination done by Edward Coale, M.D. This doctor's opinion was that Mr. David had an impairment equal to 27 percent of the amputation value of the lower extremity. However, on November 21, 2000, Mr. David was

examined by a panel of independent medical examiners, which concluded that he had a 2 percent impairment of the right lower extremity. Based on the November 21, 2000 IME report, the employer could have, at that time, requested reimbursement for the overpayment in the advance of the award for permanent partial disability. For unknown reasons, no request was made.

In August 2001, the claimant was again examined by a panel of independent medical examiners. They concluded that he should have a seven percent impairment based on total medial meniscectomy having been performed. At that time, the self-insured employer may still have had the ability to request a repayment. No request was made.

The self-insured employer, although having the opportunity and the information required within one year of making the advance payment, did not request repayment. It is clear that the self-insured employer's authority to demand recoupment of benefits is limited to those provided by statute. *See Deal v. Department of Labor & Indus.,* 78 Wn.2d 537 (1970). The majority's interpretation of the statute effectively eliminates the one-year limitation and allows the recoupment to be made at any time so long as an order has not been issued. If the legislature had intended the limitation to start with the entry of an order, they could have so stated. The statute provides only a one-year time frame, starting from the time that the payment is made. Without statutory authority for demanding repayment more that one year after payment of the advance, there is no basis on which the Department or the self-insured employer can require Mr. David to repay the advance. The Department order should be affirmed.

Dated this 11th day of May, 2004.

BOARD OF INDUSTRIAL INSURANCE APPEALS

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