Dinescu, Dan

DEPARTMENT

Authority to recoup overpayment of benefits

If the Department paid the worker benefits that a self-insured employer should have paid, RCW 51.32.240 does not allow the Department to recoup the erroneously paid benefits from the self-insured employer. **….*In re Dan Dinescu*, BIIA Dec., 07 12380 (2009)**

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: DAN DINESCU	)	**DOCKET NO. 07 12380**
	)	
CLAIM NO. T-224769	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Dan Dinescu, Pro Se

Self-Insured Employer, Fisher Mills Communications, Inc., by
Eims & Flynn, P.S., per
Michael P. Graham

Department of Labor and Industries, by
The Office of the Attorney General, per
Mary V. Wilson, Assistant

The self-insured employer, Fisher Mills Communications, Inc., filed an appeal with the Board of Industrial Insurance Appeals on March 8, 2007, from an order of the Department of Labor and Industries dated February 6, 2007. In this order, the Department set a monthly compensation rate of $2,216.47 for Claim No. T-224769 (the self-insured claim) and $923.68 for Claim No. Y-270955 (the State Fund claim); determined that the claimant was entitled to time loss compensation under both claims for the period from March 18, 2004, to November 30, 2006, in the amount of $112,489.94; that he should have been paid at 50 percent of the rate due under Claim No. Y-270955 (the State Fund claim) and the remainder (the difference between the State Fund claim and the self-insured claim) under Claim No. T-224769, the self-insured claim; determined that for the period March 18, 2004, to November 30, 2006, the claimant received nothing from the self-insured employer, which should have paid $97,278.94; and ordered the self-insured employer to pay the claimant $82,067.94 plus a penalty of $20,516.98 for the delay of benefits, and to reimburse the State Fund in the amount of $15,211. The Department order is **REVERSED AND REMANDED**.

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 2, 2008, in which the industrial appeals judge reversed and remanded the order of the Department dated February 6, 2007. All contested issues are addressed in this order.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed. We have granted review because after careful consideration of this record, we agree with the self-insured employer's contention that it did not waive the issue of recoupment, and grant review to address this issue.

Mr. Dinescu is a 58-year-old Romanian man whose English skills are marginal. As of 2003, he had been working for Fisher Mills (a self-insured employer) for three years, and on July 1, 1993, he broke his ankle badly. Although the record is ambiguous, he apparently had an initial surgery just after the industrial injury. The claim was then closed and he returned to work. His ankle became painful such that the claim was reopened and arthroscopy and debridement surgery was performed in 1997. After a few months, he returned to his job at Fisher Mills. By 2001, the company was sold and Mr. Dinescu's employment was terminated. Unfortunately, Mr. Dinescu's ankle continued to be painful, and on August 16, 2004, surgery was performed and his ankle was permanently fused.

On October 12, 1999, Mr. Dinescu filed an application to reopen his ankle claim, which would have been shortly after it was closed after the second surgery. For some unknown reason, the application to reopen was not addressed for nearly five years. Finally, in 2004, a Department order issued in which the Department reopened the claim effective August 17, 1999, as a timely decision had not been made.

Meanwhile, Mr. Dinescu had taken a new job at Express Services (a State Fund employer) packaging fish. Unfortunately, on March 4, 2003, he injured his back. Again, the record is ambiguous as to the dates of surgery, but it appears that in 2005 Mr. Dinescu had laminectomies at L2-3 and L3-4 as a result of that industrial injury.

On February 6, 2007, the Department issued the following order under the auspices of claim T-224769 (the self-insured, Fisher Mills ankle claim), the text of which is as follows:

> The injured worker has two industrial insurance claims. The monthly compensation rate is $2,216.47 for claim T224769 (self-insured employer claim) and $923.68 for claim Y270955 (state fund claim) for perspective [*sic*] dates of injury.
>
> The injured worker was entitled to time loss compensation under both claims for the period from March 18, 2004 to November 30, 2006 in the amount of $112,489.94.
>
> Time loss compensation should have been paid at 50% of the rate due under Y270955 (state fund claim) and the remainder (the difference between the state fund claim and the self-insured employer claim) under T-224769, the self-insured employer claim.

> The injured worker was paid time loss compensation for the period from March 18, 2004 to November 30, 2006 in the amount of $30,422.00 by state fund.
>
> The injured worker received nothing from the self-insured employer, Fisher Mills Communications, Inc. The self-insured employer should have paid $97,278.94.
>
> The injured worker has been underpaid for the period by $82,067.94. Fisher Mills/Communications is ordered to pay the injured worker $82,067.94 plus a penalty in the amount of $20,516.98 for delay of benefits.
>
> State fund has paid an excess of time loss compensation to the injured worker in the amount of $15,211.00. Fisher Mills/Communications is ordered to reimburse the state fund in the amount of $15,211.00.

Historically, when a claimant is entitled to time loss compensation for a given period of time from two different employers for two different injuries and claims, the Department, based on a policy, directs each responsible entity to pay a portion of the time loss compensation benefits, the sum of which is to equal the rate for the higher-paying claim. Here, the Department paid the entire sum payable under the State Fund claim for the above period of time. With this order the Department contends that it was responsible for half of the time loss rate for the State Fund claim, and the self-insured employer should have made up the difference between the Department's half and the self-insured time loss rate for the above period. The Department thus seeks to recoup from the self-insured employer half of what it (the Department) paid during that time.

The self-insured employer appealed this order, arguing three issues: first, that it should not be obligated to pay time loss compensation benefits after March 21, 2005, because the claimant was capable of reasonably continuous gainful employment based on his ankle injury alone; second, that the penalty owed to the claimant should be recalculated based on the fact that the self-insured employer does not owe the claimant the entire amount contended by the Department based on the decreased time loss obligation; and finally, for any periods the self-insured employer was obligated to pay time loss compensation concurrently with the Department, during which time the Department paid the entire amount owing under Claim No. Y-270955, the Department has no authority to recoup from the self-insured employer the additional half that the Department paid for that period.

Our industrial appeals judge determined that based on the ankle injury alone, Mr. Dinescu was capable of reasonably continuous gainful employment as of March 22, 2005, and thus that the self-insured employer owes back time loss compensation for the period of March 18, 2004, through March 21, 2005, and further that the self-insured employer owes a penalty to the claimant based on a percentage of that amount. She also stated in the Proposed Decision and Order that "At the

June 6, 2008 hearing, the self-insured employer stipulated that it owed concurrent time loss compensation to Mr. Dinescu, as well as a penalty and reimbursement to the Department, for the period March 18, 2004 through March 21, 2005, (6/6/08 Tr. page 9), thereby limiting the issue on appeal." Proposed Decision and Order, at 2.

The self-insured employer filed a Petition for Review, contending that indeed, it did **not** waive the issue of recoupment. We agree with our industrial appeals judge that the claimant was, more probably than not, capable of reasonably continuous gainful employment as of March 22, 2005, based strictly on his ankle condition. However, we disagree that the self-insured employer waived the issue of whether it is required to pay recoupment of half the time loss compensation the Department paid out for any periods of time loss compensation benefits that should have been paid concurrently. We have carefully reviewed that section of the transcript, and agree with the self-insured employer. Accordingly, we have granted review to address the issue of whether the Department has the statutory authority to recoup half of the time loss compensation benefits it paid for the period of March 18, 2004, through March 21, 2005, from the self-insured employer.

Turning then to the facts in support of the decision relative to time loss compensation, in addition to the above facts, Mr. Dinescu testified that he has technical certifications as a miller, a welder, and in the National Electric Code. He broke his left ankle when he fell from a ladder while working for Fisher Mills, and between 1993 and 1995 he had two surgeries as a result. After the claim closed in 1995, he returned to work for Fisher Mills. When his ankle again became painful, he applied to reopen his claim in 1996, underwent a third surgery, and then returned to work in 1998 at Fisher Mills when the claim closed.

In 2001, Fisher Mills was sold and Mr. Dinescu was laid off. He went to work at a recycling company, but was terminated for being too slow. He then obtained work at Express Service as a hand packager, but "broke his back" during the course of his employment on June 4, 2003. He has not worked since that time, as he believes he is too old and too sore. He applied to reopen his ankle claim in 1999, but no action was taken until 2004, at which time he underwent a fusion of his left ankle. Although he can no longer move his ankle, the fusion has alleviated some of the pain.

Mr. Dinescu recalls going to a physical capacities evaluation, and he also recalls that this caused back and ankle pain thereafter. With regard to his ankle, he believed that the screws began to come out. Ultimately, he had more surgery in 2007 to remove the hardware in his ankle. In June 2005, he spoke to a vocational rehabilitation counselor whom he understood wanted to send him to college. He declined vocational services, however; he felt his English skills were too poor and

further, he had just been awarded social security disability benefits. As of March 21, 2005, he did not feel he could even walk around the block, and taking into consideration his ankle condition alone, he does not feel he was capable of working. He could stand on his ankle for only a couple of hours, so he could not work as a hand packager. Moreover, he did not believe he could perform the job of forklift operator, as he could not get up and down, due to his ankle.

Thomas K. Green, M.D., is a physician certified as a specialist in orthopedic surgery. One of Dr. Green's colleagues initially repaired Mr. Dinescu's ankle, and it appears that Dr. Green took over Mr. Dinescu's care sometime in 1996 or 1997, when Mr. Dinescu's ankle began to be more symptomatic. Although a fusion was discussed, in April 1997 Dr. Green performed arthroscopy and debridement, but not a fusion. Dr. Green released Mr. Dinescu back to the job of injury in 1997, and then did not see him further until March 18, 2004, at which point Mr. Dinescu wanted to have an ankle fusion to relieve the pain. The fusion was done on August 16, 2004, and was successful at relieving Mr. Dinescu's pain.

After the fusion, Dr. Green referred Mr. Dinescu for a physical capacities evaluation to determine his capabilities. A physical capacities evaluation was performed by Theodore Becker, Ph.D., on February 20, 2005. This physical capacities evaluation was reviewed by Dr. Green, along with three job analyses, that of forklift operator, hand packager, and production assembler. Taking into consideration only the impairment caused by the ankle condition, Dr. Becker believed that Mr. Dinescu has the capabilities to perform the above three jobs, and Dr. Green agreed with this assessment.

Theodore Becker, Ph.D., is a physical therapist specializing in biomechanics. Dr. Becker performed a physical capacities evaluation on February 20, 2005. Although testing showed that Mr. Dinescu did not give a good effort, the testing was nonetheless valid, and Dr. Becker approved the jobs listed above.

Thomas Williamson-Kirkland, M.D., is a physician certified as a specialist in physical and rehabilitation medicine. Dr. Williamson-Kirkland evaluated Mr. Dinescu on June 5, 2007, as part of an independent medical examination at the request of a third-party administrator. Dr. Williamson-Kirkland reviewed voluminous records and examined Mr. Dinescu. Among those records were documents from Dr. Becker’s physical capacities evaluation. Dr. Williamson-Kirkland concurred with Drs. Green and Becker that Mr. Dinescu was capable of employment as a hand packager, a production assembler, or a forklift operator as of May 21, 2005. Because Mr. Dinescu has had his

ankle fused, Dr. Williamson-Kirkland believes that standing on it for protracted periods of time does not present any problems, as the fusion was intended to alleviate pain.

Cheryl Bednarik is a vocational rehabilitation counselor who began working with Mr. Dinescu on October 12, 2004. Initially, she began work at the request of the Department in connection with Mr. Dinescu's back claim, but then she was contacted by Sedgwick in connection with the self-insured claim.

Ms. Bednarik reviewed documentation from Dr. Green, Dr. Williamson-Kirkland, and Dr. Becker; in particular, she relied on their approval of the job analyses of hand packager, production assembler, and forklift operator. She did labor market surveys for each of these positions, and determined that Mr. Dinescu is capable of reasonably continuous gainful employment at any of these positions, but only when taking the ankle condition into consideration. She performed labor market surveys and determined that these jobs are available.

However, when Ms. Bednarik took both the ankle and the back condition into consideration, her determination was that Mr. Dinescu was unemployable. She then met with him, and explained that the process was to begin to develop a plan for vocational retraining. Somehow, Mr. Dinescu understood this to mean that he would be sent to college, which he did not wish to do because of his poor English skills. Ultimately, he declined vocational retraining.

The final witness was that of the Department, Paul Buehrens, M.D. Dr. Buehrens is a family practice physician who has provided treatment to Mr. Dinescu since 1995, and is familiar with both his ankle and back conditions.

In Dr. Buehrens' opinion, Mr. Dinescu is not capable of reasonably continuous gainful employment as either a hand packager or a production assembler. He noted that Mr. Dinescu came to him after the 4.5 hour physical capacities evaluation, complaining of ankle pain. In this regard, Dr. Buehrens testified that the ankle is fused with 10 percent plantar flexion, meaning that it points down 10 degrees, and to place his foot flat on the ground, Mr. Dinescu must extend it out in front of the other foot. In his opinion, both the jobs of hand packager or production assembler would require Mr. Dinescu to be on his feet for too long, and would be too painful. With regard to the position of forklift operator, though, Dr. Buehrens was somewhat ambiguous. He initially stated that Mr. Dinescu could perform this job, based strictly on the ankle condition, but then stated that Mr. Dinescu would be unable to perform the necessary lifting for this position.

Preliminarily, we are greatly disturbed by certain aspects of this matter. First and foremost, why was Mr. Dinescu's application to reopen ignored for five years? Certainly, the self-insured employer will undoubtedly be responsible for payment of a penalty, although such penalty is disproportionately small in the face of a five-year delay to even act on the application to reopen.

With regard to the issue of employability, we agree with the determination of our industrial appeals judge. We are not persuaded that Mr. Dinescu could stand on his ankle for six to eight hours a day, notwithstanding the opinions of Dr. Becker and Dr. Green. Mr. Dinescu's reaction after the physical capacities evaluation persuades us that his ankle would be simply too painful to stand on for that period of time. However, we are persuaded that he could perform the job of forklift operator. He testified that he drives a manual transmission car, and that he likes to do it. Further, Dr. Buehrens' testimony that he could not perform this job is ambiguous at best. Taking into consideration strictly Mr. Dinescu's ankle condition, we determine that he, more probably than not, was capable of reasonably continuous gainful employment as a forklift operator as of March 22, 2005.

Given the above, we agree that the self-insured employer is responsible for payment of time loss compensation benefits for the period of March 18, 2004, through March 21, 2005, plus any penalty thereby accruing. The penalty will, of necessity, need to be recalculated as it will be a percentage of the time loss compensation amount hereby awarded.

Turning, then, to the issue of whether the Department has the statutory authority to recoup half of what it paid to Mr. Dinescu during this period from the self-insured-employer, we note there is no statutory or regulatory authority in this regard. Certainly, there is no statutory or regulatory authority for the Department's practice of dividing the liability for time loss payments between the self-insured employer and the State Fund. There is reference in the record to a Departmental policy, but nothing whatsoever was provided to our industrial appeals judge for consideration. We would observe that the practice is in keeping with the notion that time loss compensation benefits are intended to be a wage replacement. Payment of double benefits would be contrary to that proposition, and would be "double dipping." In these situations there are two entities responsible and dividing the obligation in some fashion is a matter of common sense. The fact that there is no statutory or regulatory authority to do so is of little importance, as it is beneficial to all parties.

RCW 51.32.240 is the general statute that provides authority for recoupment of funds by the Department. That section of the statute, however, speaks to recoupment **from the recipient**, and the self-insured was not the recipient. As a practical matter, the self-insured employer is

responsible for payment of time loss compensation benefits for the period of March 18, 2004, through March 21, 2005, as was the Department. In keeping with its policy, the Department will undoubtedly direct that the self-insured employer pay its usual share of the time loss compensation benefits for the relevant period. This will result in an overpayment to the claimant, at which point the Department may choose to invoke the provisions of RCW 51.32.240 to recoup its money from Mr. Dinescu. We express no opinion on the merits of this action.

Finally, we affirm the evidentiary rulings of our industrial appeals judge. In its Petition for Review, the Department takes exception to rulings which prevented it from presenting evidence relative to the requirements for employers to inform the Department about a claimant's ability to work, and Fisher Mills' failure to do this. However, we do not find that this testimony would be relevant; the self-insured employer did not dispute that a penalty is due. Given this fact, there is no need for testimony to show that the self-insured employer failed to follow the necessary regulations.

FINDINGS OF FACT

1. On July 16, 1993, the claimant, Dan Dinescu, filed an Application for Benefits with the Department of Labor and Industries in which he alleged that he sustained an injury while in the course of his employment with Fisher Mills Communications, Inc. The claim was allowed and benefits were paid.

   On January 11, 1995, the Department issued an order in which it closed the claim. On August 26, 1996, the claimant filed an application to reopen the claim with the Department. On January 13, 1997, the Department issued an order in which it reopened the claim for aggravation. On March 17, 1997, the self-insured employer filed a Protest and Request for Reconsideration. On April 1, 1997, the Department issued an order in which it affirmed the January 13, 1997 order.

   On May 11, 1998, the Department issued an order in which it closed the claim. On May 15, 1998, the self-insured employer filed a Protest and Request for Reconsideration, and on July 11, 1998, the claimant filed a Protest and Request for Reconsideration. On March 30, 1999, the Department issued an order in which it found the overpayment due to salary recalculation not collectible; claim closed. On October 12, 1999, the claimant filed an application to reopen the claim with the Department. On April 16, 2004, the Department issued an order in which it reopened the claim for aggravation effective August 17, 1999.

   On February 6, 2007, the Department issued an order in which it set a monthly compensation rate of $2,216.47 for Claim No. T-224769 (the self-insured claim) and $923.68 for Claim No. Y-270955 (the State Fund claim); determined that the claimant was entitled to time loss

compensation under both claims for the period March 18, 2004, to November 30, 2006, in the amount of $112,489.94; that he should have been paid at 50 percent of the rate due under Claim No. Y-270955 (the State Fund claim) and the remainder (the difference between the State Fund claim and the self-insured claim) under Claim No. T-224769, the self-insured claim; the claimant was paid time loss compensation benefits for the period from March 18, 2004, to November 30, 2006, in the amount of $30,422 by the State Fund, but for the period March 18, 2004, to November 30, 2006, the claimant received nothing from the self-insured employer, which should have paid $97,278.94; and ordered the self-insured employer to pay the claimant $82,067.94 plus a penalty of $20,516.98 for the delay of benefits, and to reimburse the State Fund in the amount of $15,211.

On March 8, 2007, the self-insured employer filed a Notice of Appeal with the Board of Industrial Insurance Appeals. On April 16, 2007, the Board granted the appeal under Docket No. 07 12380 and agreed to hear the appeal.

2. On July 1, 1993, Dan Dinescu sustained an industrial injury during the course of his employment with Fisher Mills Communications, Inc., when he fell from a ladder, breaking his left ankle. His left ankle was treated surgically in 1993 and 1995, with ankle fusion surgery in 2004 and removal of a screw from the ankle in 2007. From March 18, 2004, through March 21, 2005, the claimant was not capable of reasonably continuous gainful employment, proximately caused by the residuals of his industrially related ankle injury in July 1993.

3. Mr. Dinescu returned to his job of injury after the 1993 and 1995 ankle surgeries. He went to work for a different employer in 2002. In 2003, he suffered a low back injury while in the employment of a State Fund employer (Claim No. Y-270955), requiring surgical treatment, and he never returned to work. From March 18, 2004, through November 30, 2006, Mr. Dinescu's industrial injury of 2003 and its residuals precluded him from reasonably continuous gainful employment, and he received temporary total disability benefits during this period from the Department in connection with Claim No. Y-270955.

4. Mr. Dinescu is 58 years old. He completed ten years of school in Romania. He then had three years of technical school for maintenance mechanics. After moving to the United States, he took dental technician training in 1981, earned a welding school certificate in 1984, completed Operative Practical Millers Units training in 1994, and earned a forklift operator's license. His English skills and communication are satisfactory. From 1990 through 2001, he worked for Fisher Mills, where he milled wheat and made flour 80 to 90 hours a week, walking approximately two miles a day and carrying up to 100-pound bags, until 2001, when the company was sold and Mr. Dinescu was terminated.

5. During the period from March 22, 2005, through November 30, 2006, inclusive, the residual effects of the July 1, 1993 industrial injury alone did not preclude Mr. Dinescu from obtaining or performing reasonably continuous, gainful employment in the competitive labor market, when considered in conjunction with his age, education, work history, and pre-existing condition(s).

6. Fisher Mills does not dispute that a penalty should be assessed in connection with this claim for its unreasonable delay in paying time loss compensation when due for the period of March 18, 2004, through March 21, 2005.

CONCLUSIONS OF LAW

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

2. For the period of March 18, 2004, through November 30, 2006, the claimant was temporarily totally disabled, proximately caused by the industrial injury of 2003 in connection with State Fund Claim No. Y-270955, and the claimant received temporary total disability benefits as authorized by RCW 51.32.090 from the Department for this period under the auspices of Claim No. Y-270955.

3. For the period of March 18, 2004, through March 21, 2005, the claimant was temporarily totally disabled, proximately caused by the industrial injury of July 1997 in connection with self-insured Claim No. T-224769, and is entitled to benefits pursuant to RCW 51.32.090.

4. For the period of March 22, 2005, through November 30, 2006, the claimant was not temporarily totally disabled as a proximate result of the industrial injury of July 1993 in connection with self-insured Claim No. T-224769, within the meaning of RCW 51.32.090.

5. The Department may not recoup from the self-insured employer any part of the time loss compensation benefits it (the Department) paid to the claimant at any time from March 18, 2004, through November 30, 2006, under Claim No. Y-270955.

6. The self-insured employer, Fisher Mills Communications, Inc., unreasonably delayed payment of time loss compensation benefits for the period of March 18, 2004, through March 21, 2005, within the meaning of RCW 51.48.017.

7. The Department order of February 6, 2007, is incorrect and is reversed. This matter is remanded to the Department with direction to issue a further order directing the self-insured employer to pay time loss compensation benefits for the period of March 18, 2004, through March 21, 2005; to deny payment of time loss compensation benefits for the period of March 22, 2005, through November 30, 2006; and to calculate and direct the self-insured employer to pay to the claimant a

penalty for unreasonable delay of payment of time loss compensation benefits for the period of March 18, 2004, through March 21, 2005.

Dated: January 15, 2009.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

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