Mitchell, Raymond

SECOND INJURY FUND (RCW 51.16.120)

Time-loss compensation

Second injury fund relief is not available to an employer for the amount of time-loss compensation paid to a worker prior to a determination of permanent total disability. **….*In re Raymond Mitchell*, BIIA Dec., 17,962 (1963)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: RAYMOND MITCHELL	**)**	**DOCKET NO. 17,962**
	)	
CLAIM NO. C-632176	**)**	**DECISION AND ORDER**

APPEARANCES:

Employer, Perham Fruit Company, by
Velikanje & Moore, per
E. F. Velikanje

Department of Labor and Industries, by
The Attorney General, per
John Martin and Kenneth E. Phillipps, Assistants

This is an appeal filed by the employer, Perham Fruit Company, on June 5, 1962, from a determination of the supervisor of industrial insurance communicated to the employer by letter dated May 14, 1962, charging the employer's cost experience with the sum of $11,500.00 pursuant to the provisions of R.C.W. 51.16.020, less the sum of $3,754.15 previously charged for time-loss compensation paid to the workman. **REVERSED AND REMANDED**.

DECISION

On April 18, 1962, the supervisor of industrial insurance issued an order classifying the claimant, Raymond Mitchell, as a totally and permanently disabled workman due to the injury for which this claim was filed, and placing him on the pension rolls. Subsequently, by letter dated May 14, 1962, the supervisor advised the employer that the pension reserve required for this claim amounted to $17,773.65 and that its cost experience was being charged with the sum of $11,500.00 in accordance with the provisions of R.C.W. 51.16.020, less time-loss compensation in the sum of $3,754.15 previously paid to the claimant and charged against the employer's account, making an additional charge of $7,745.85.

No appeal was taken by the employer from the supervisor's order of April 18, 1962, placing the claimant on the pension rolls, but on June 5, 1962, the employer filed an appeal from the assessment of charges as set forth in the supervisor's letter of May 14, 1962, alleging that the permanent partial disability suffered by the claimant "due solely to the injury for which this claim was filed, would be 25% of the amputation value of the leg below the knee," and praying that "the department of labor and industry directive be reversed, and that the employer be charged only 25% of the statutory charge and that the balance, or 75% be charged to second-injury fund."

On July 19, 1963, Hearing Examiner J. C. Bolinger, issued a Proposed Decision and Order sustaining the department's decision, based on a finding that "the workman had sustained no previous bodily infirmity or disability from any previous injury or disease, prior to October 2, 1959, which contributed to his total, permanent disability." On August 1, 1963, the employer filed a statement of exceptions, contending that the above-quoted finding was directly contrary to the only medical evidence in file, which was to the effect that the claimant had a pre-existing circulatory deficiency which precluded surgery to improve the claimant's condition due to his injury; that of the only two medical witnesses who testified, one stated "That without this bodily infirmity, in his opinion, the bodily injury would have resulted in a twenty-five percent (25%) permanent partial disability and about eight (8) months' time-loss compensation as compared to a permanent disability at complete time-loss," and that the other, "testified to the same effect that the claimant had a vascular disease, and that without this bodily infirmity, the claimant would have received a twenty percent (20%) permanent partial disability as a result of the injury, and would have had a time-loss of approximately six(6) months, as compared to a permanent partial disability and a complete time-loss."

It is apparent that the prayer in the employer's notice of appeal "That the employer be charged only 25% of the statutory charge and that the balance, or 75% be charged to the second injury fund," involves a misconception of the provisions of the so-called second-injury fund statute, which reads as follows:

> "Whenever a workman has sustained a previous bodily infirmity or disability from any previous injury or disease and shall suffer a further injury or disease in employment covered by this title and become totally and permanently disabled from the combined effects thereof, then the accident cost rate of the employer at the time of said further injury of disease shall be charged only with the accident cost which would have resulted solely from said further injury or disease, had there been no pre-existing disability, and which accident cost shall be based upon an evaluation of the disability by medical experts. The difference between the charge thus assessed to the employer at the time of said further injury or disease and the total cost of the pension reserve shall be assessed against the second injury account."

Under this statute, the employer's cost experience should be charged only with the monetary amount of the permanent partial disability which would have resulted solely from the injury and the

difference between that amount and the cost of the pension reserve, computed under the provisions of R.C.W. 51.16.020, should be charged against the second-injury account.

In the instant case, it is undisputed that the claimant was suffering from a pre-exisiting vascular disease, or circulatory impairment, prior to his injury of October 2, 1959, and that he became totally permanently disabled as a result of the "combined effects" of the injury and his pre-existing condition. Dr. Lugar, the claimant's attending physician, expressed the opinion that without the pre-existing infirmity, the claimant "would still have a 25% permanent partial disability as if his leg were off at or above the knee." While Dr. Angland expressed opinion that if it had not been for the "pre-existing vascular problem," the claimant's disability would probably be from "20 to 25% as compared to the amputation below the knee," he also stated that, as he had only seen the claimant on one occasion, he felt that Dr. Lugar was in a better position to evaluate the claimant's disability.

While the statement in the hearing examiner's proposed decision and order that "there is no evidence in this case of any pre-existing disability," is correct in the sense that there was no affirmative evidence as to what symptoms, if any, were produced by the pre-existing vascular condition, it must necessarily be inferred from the medical evidence that the claimant became totally permanently disabled as the result of the "combined effects" of this pre-existing condition and his injury, that there was a pre-existing disability. In this connection, it may be pointed out that this is not a case in which an injury lighted up or aggravated a pre-existing non-symptomatic non-disabling condition resulting in a disability, which under the rule laid down in the case of Miller v. Department of Labor and Industries, 200 Wash. 674, would be attributable to the injury, rather than the pre-existing condition. On the contrary, in this case, the medical evidence indicates that the pre-existing condition, simply made the condition due to the injury more disabling.

As heretofore noted, the employer requested in his notice of appeal that it "be charged only 25% of the statutory charge and that the balance, or 75%, be charged to the second-injury fund," and no mention was made therein to the question of time-loss compensation. However, at the conclusion of the hearing in this matter, counsel for the employer advanced the contention that the second-injury fund statute was also applicable to time-loss compensation and that the employer's cost experience should only be charged with such time-loss compensation as would have resulted in this case had it not been for the pre-existing disease or infirmity and that the difference should be charged to the second-injury fund.

Dr. Lugar testified that the claimant was totally disabled during the period from October 2, 1959 to April 18, 1962, and that this disability was "related" to his injury of October 2, 1959, and in a letter, dated May 18, 1962, to the employer's representative, Dr. Lugar estimated that "Under ordinary circumstances," the claimant "would probably have had eight months time-loss as the result of this injury."

Assuming that but for the claimant's pre-existing infirmities he would only have been totally temporarily disabled for a period of eight months due to his injury, it is also true that he was totally temporarily disabled during the entire period in question as the proximate result of his 1959 injury, that he would not have been totally temporarily disabled at all but for that injury, that his time-loss compensation when paid was properly charged against this employer's cost experience and that no appeal was taken from the orders paying such time-loss compensation and the resultant charges against his cost experience.

It is also clear that if the combined effects of the claimant's 1959 injury and pre-existing condition had resulted in greater permanent disability short of total permanent disability, the entire amount of time-loss compensation paid to the claimant would have properly been charged against the employer's cost experience, as the second-injury account statute is applicable only in cases involving total permanent disability.

The second-injury account statute, as above quoted, comes into play only when a workman is classified as totally, permanently disabled, and it seems apparent that its entire intent and purpose is to apportion the cost of the pension reserve between the employer at the time of the second or further injury and the second injury account. The pension reserve covers only the cost resulting from the classification of a workman as totally permanently disabled, which, were it not for the statute, would be charged entirely against the employer in addition to charges previously assessed. It necessarily follows, therefore, that the phrase "accident cost rate" as used in the statute above quoted refers only to the accident cost to be assessed as a result of such total, permanent disability classification, that is, such additional charges as would be assessed for permanent disability at the time the workman is classified as totally, permanently disabled.

For example, in the instant case, the pension reserve required as a result of this workman being classified as totally permanently disabled was $17,773.65. Of this amount, under the second-injury account statute, the claimant's permanent partial disability due solely to his injury, computed on the basis of 25% of the amputation value of one leg above the knee, or $1,593.75

would be charged against the employer's cost experience and the difference, amounting to $16,179.90 would be charged against the second-injury fund. The difference between the amount of time-loss compensation actually paid the claimant and eight months time-loss compensation (which is the only amount the employer contends should be charged against his cost experience), amounts to $2,754.15 and if this amount were charged against the second-injury account the total charge against the second-injury account would be $18,934.05, which is in excess of the cost of the pension reserve. This obviously could not be in accordance with the intent of the statute which is to apportion the cost of the pension reserve.

We conclude, therefore, that the employer's cost experience in this case should be charged at an amount equal to 25% of the amputation value of one leg above the knee in addition to the charges previously made for time-loss compensation paid and that the difference between the additional charge of 25% of the amputation value of one leg at or above the knee and the cost of the pension reserve should be charged to the second-injury account.

FINDINGS OF FACT

In view of the foregoing, and after reviewing the entire record herein, the Board finds as follows:

1. The claimant, Raymond Mitchell, sustained an injury in the course of his employment with the Perham Fruit Company on October 2, 1959, when he fell from the rear end of a truck, landing on his left heel on a stone, resulting in a comminuted fracture of the os-calcis. His claim, based on this injury, was allowed, treatment provided, and time-loss compensation paid during the period from October 3, 1959 to April 5, 1962, pursuant to orders issued monthly by the supervisor of industrial insurance, in a total sum of $3,754.15. On April 18, 1962, the supervisor issued an order classifying the claimant as a totally permanently disabled workman, and placing him on the pension rolls effective April 6, 1962. Thereafter, by letter dated May 14, 1962, the employer was advised that the pension reserve required for this claim amounted to $17,773.65 and that a charge of $7,745.85 was being made against this cost experience in addition to prior charges for time-loss compensation made in the sum of $3,754.15, making a total charge in the sum of $11,500.00 as provided for by R.C.W. 51.16.020. On June 5, 1962, the employer filed a notice of appeal from the assessment of charges outlined in the supervisor's letter of May 14, 1962, alleging that only 25% of the statutory charge should be assessed against his cost experience and that "the balance, or 75%, be charged to the second-injury fund."

2. On July 26, 1963, a hearing examiner of the Board issued a Proposed Decision and Order sustaining the supervisor's determination of assessment of charges communicated to the employer by his letter dated May 14, 1962, and the employer filed a statement of exceptions thereto within the time required by law.

3. The claimant was rendered totally permanently disabled due to his injury of October 2, 1959, superimposed upon and combined with a pre-existing infirmity, diagnosed as vascular disease, or circulatory impairment; the claimant would not have been totally permanently disabled as the result of his injury of October 2, 1959, but for said pre-existing condition and his permanent disability due solely to his October 2, 1959, was equal to 25% of the amputation value of one leg at or above the knee.

4. The claimant was totally temporarily disabled during the period from October 1959 to April 5, 1962 as a proximate result of his injury of October 2, 1959, and he would not have been totally temporarily disabled at all but for that injury, but it is estimated that had it not been for this pre-existing infirmities, he would only have been totally temporarily disabled for a period of approximately eight months.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Board concludes:

1. This Board has jurisdiction of the parties and subject matter of this appeal.

2. Under provisions of R.C.W. 51.16.120, the cost of the pension reserve in this case should be apportioned by charging the employer's cost experience a sum equal to 25% of the amputation value of one leg at or above the knee, and the difference between such charge and the total cost of the pension reserve, should be assessed against the second-injury account.

3. The determination of charges to be assessed against the employer's cost experience by the supervisor of industrial insurance as communicated to the employer by letter dated May 14, 1962, should be reversed and this matter should be remanded to the department of labor and industries with instructions to assess charges as outlined in Conclusion No. 2.

ORDER

Now, therefore, it is hereby ORDERED that the order of the supervisor of industrial insurance assessing charges against the cost experience of the employer herein as outlined in his letter to the employer dated May 14, 1962, be, and the same is hereby, reversed and this matter is

remanded to the department of labor and industries with direction to assess charges as above outlined in Conclusion No. 2.

Dated this 7th day of November, 1963.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
J. HARRIS LYNCH Chairman

/s/_____
R.H. POWELL Member

/s/_____
HAROLD J. PETRIE Member