

Washington Metal Trades Ass'n

STANDARD OF REVIEW

Retrospective rating adjustments

The Department may have the authority, by regulation, to limit review of retrospective rating and claim valuation decisions at the Department. However, the Department cannot, simply by regulation, restrict or eliminate the Board's review of these types of Department decisions. Absent explicit legislative prohibition, Department orders concerning retrospective ratings are both appealable to and reviewable by the Board under the general terms of Chapter 51.52 RCW. ...*In re Washington Metal Trades Ass'n*, BIIA Dec., 89 2296 (1990)

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

1 **IN RE: WASHINGTON METAL) DOCKET NO. 89 2296**
2 **TRADES ASSOCIATION)**
3)
4 **GROUP IDENTIFICATION NO. 069) DECISION AND ORDER**

6 APPEARANCES:

7
8 Employer Group, Washington Metal Trades Association, by
9 Maxson Young Groves, per
10 Terry Peterson, General Counsel

11
12 Department of Labor and Industries, by
13 The Attorney General, per
14 Christa L. Thompson and Bryon L. Brown, Assistants

15 This is an appeal filed by the Washington Metal Trades Association (hereinafter referred to as
16 WMTA) on June 2, 1989 from a Retrospective Rating Additional Premium Notice issued on May 17,
17 1989 by the Department of Labor and Industries, which assessed an additional premium of
18 \$285,856.00 for the coverage year July 1, 1985 through June 30, 1986, with the payment due on July
19 16, 1989. **AFFIRMED.**

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PROCEDURAL AND EVIDENTIARY MATTERS

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 WMTA in response to a Proposed Decision and Order issued on January 19, 1990 in which the Additional Premium Notice of the Department dated May 17, 1989 was affirmed.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed and all rulings are hereby affirmed. In particular, in light of the provisions of WAC 296-17-915, the industrial appeals judge's ruling set forth at page 1, lines 19 through 23, of the Proposed Decision and Order is correct. Hindsight cannot be used to challenge the April 6, 1989 calculation of the case reserve. As noted by our industrial appeals judge, the fact that the Department closed the claim here in issue without a permanent partial disability award in September 1989 does not mean that the claimant may not ultimately be placed on the pension rolls, as predicted by the Department's disability adjudicator.

1 **DECISION**

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3 The Proposed Decision and Order very adequately sets forth the evidence relevant to the
4 issues presented by this appeal. We have granted review because the industrial appeals judge
5 applied an inappropriate standard of review to determine the correctness of the Department order in
6 question.
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9 WMTA argues in its Petition for Review that the Department's third mandatory adjustment of
10 the employer group's retrospective premium for the 1985-1986 coverage year incorrectly included a
11 pension reserve within the claim value reserved for one claim, that of Sofoklis Kasoutsas, Claim No.
12 J-660145. WAC 296-17-915(1) states, in part:
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14 No claim value shall be revised between valuation dates and no
15 retroactive adjustment of a retrospective premium adjustment shall be
16 made because of disputation concerning the judgment of the claims
17 examiner or because of subsequent developments except as specifically
18 provided in the following cases: . . .
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21 The employer group essentially argues that Michael P. Holderman, a disability adjudicator with the
22 Department, made an error in judgment in determining the assigned claim value. Citing WAC
23 296-17-915(1), our industrial appeals judge determined that WMTA could not challenge the assigned
24 claim value before this Board, since the difference in view- points between WMTA's and the
25 Department's claim valuation experts was "strictly a 'judgment call' ". That is, our industrial appeals
26 judge essentially determined that the Department order of May 17, 1989 could not be reviewed by this
27 Board insofar as it involved a claim-value dispute between the opinions of two experts.
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31 The language of the regulation is clear. The Department may have the authority to limit, by
32 regulation, review of retrospective rating and claim valuation decisions at the Department level.
33 However, the Department does not dictate this Board's procedures or the scope of review on appeals
34 before the Board. The Department cannot, simply by a WAC regulation, effectively remove its expert's
35 opinions from Board review.
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39 We are aware of no statutory provision which restricts or eliminates the Board's review of the
40 type of Department decision at issue here. Absent such explicit legislative prohibition, the Department
41 order of May 17, 1989 is both appealable to and reviewable by this Board under the general terms of
42 Ch. 51.52 RCW. See RCW 51.52.050.
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1 WMTA, as the appellant, has the burden of presenting a prima facie case. Once the
2 Department has offered rebuttal evidence, WMTA is held to strict proof and must prove its case by a
3 preponderance of the evidence. Stafford v. Dep't of Labor & Indus., 33 Wn.App. 231, 234 (1982)
4 review denied, 99 Wn.2d 1020 (1983). We apply these legal standards to the question of whether the
5 third mandatory adjustment of the employer group's retrospective premium for the 1985-1986
6 coverage year was correct.
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10 At the hearing WMTA argued that even if a pension reserve should have been established in
11 the claim of Mr. Kasoutsas, it was incorrectly computed by the Department. The Proposed Decision
12 and Order found against the employer group on this issue. The employer group having not re-raised
13 that issue in its Petition for Review, the sole issue before us is the correctness of Mr. Holderman's
14 determination that an appropriate reserve in the Kasoutsas claim was for 1,931 days of time loss
15 compensation equal to \$67,527.00 (of which 1,201 days or \$41,712.00 had already been paid),
16 \$100.00 for miscellaneous costs, and a pension reserve with no permanent partial disability award
17 included. Mr. Holderman concluded that the claimant would be placed on the pension rolls as of April
18 16, 1991. Beverly Lewis, a pension benefit supervisor with the Department, determined that the
19 proper pension reserve based upon the determinations made by Mr. Holderman would be
20 \$150,855.00.
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24 Gail A. Injinmej, a claims administrator for Maxson Young Groves, was the group coordinator
25 for the employer group. She testified that the Department has reserved the Kasoutsas claim three
26 times, the last time being April 6, 1989. Ms. Injinmej testified that, had she reserved the claim on April
27 6, 1989 she would have reserved it for an additional six months of time loss compensation and a
28 permanent partial disability award equal to Category 2, permanent cervical impairment.
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32 The testimony of Ms. Injinmej and Mr. Holderman presents the following picture of Mr.
33 Kasoutsas. Mr. Kasoutsas was born on October 26, 1930 in Greece. His education was limited to the
34 tenth grade, in Greece during World War II. His work history in Greece is unclear but seems to have
35 consisted solely of driving taxis and buses. When he came to America is also unclear, but evidently
36 occurred in the not-too-distant past. Mr. Kasoutsas' only job in the United States was as a grinder for
37 Western Steel Casting Co., one of the employers who comprise WMTA. This job involved a light to
38 medium exertion level. Mr. Kasoutsas is fluent in Greek, but evidently cannot read or write English.
39 He has needed an interpreter at most, if not all, of his examinations. His employer hires a lot of Greek
40 immigrants and apparently several supervisors speak Greek.
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1 Mr. Kasoutsas suffered a head injury when he was struck by a piece of steel on October 28,
2 1985. The Department accepted responsibility for a laceration and contusion as a result of that injury.
3 As of April 6, 1989, the Department had not accepted or denied a psychiatric condition under this
4 claim, although the state fund was paying for medications to treat that condition. A May 1987 letter in
5 the Department file from a panel psychiatrist causally related the psychiatric condition to the industrial
6 injury. Other conditions which one or more physicians had causally related to the injury included
7 dizziness, vertigo and headaches.
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11 We have reviewed the respective expert qualifications of Ms. Injinmej and Mr. Holderman. We
12 find that they are both qualified to evaluate claims and set reserves therefor, but that neither is
13 substantially more qualified than the other. Ms. Injinmej has worked in the insurance industry for
14 approximately 18 years, however she has spent a relatively short period of time managing workers'
15 compensation claims for members of WMTA. Mr. Holderman has spent approximately eight years
16 with the Department of Labor and Industries and has spent 3 1/2 years of that time as a disability
17 adjudicator, reserving claims.
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20 Pursuant to WAC 296-17-915, the critical date is April 6, 1989, the date on which Mr.
21 Holderman reserved the claim value for the third time. The very nature of a case reserve is that it is a
22 prediction of what will happen in the future. Hindsight cannot be used to challenge that prediction.
23 However, under WAC 296-17-916 the employer group received the three mandatory annual
24 adjustments to which it was entitled. Further, as noted in the Proposed Decision and Order, the
25 employer group had the option of requesting two more retrospective premium adjustments, but
26 apparently declined to utilize that mechanism, which would have enabled it to obtain two further
27 readjustments based upon subsequent developments.
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30 Most of the medical and vocational information available to Mr. Holderman at the time of his
31 April 6, 1989 reserving of the claim came from 1986 and 1987. This included a physical therapist's
32 physical capacities evaluation which showed that the claimant was physically limited to a sedentary
33 position. Other testing showed that the claimant performed at a sixth grade level in mathematics and
34 that he had low cognitive skills and low vocational potential. Other information showed that the
35 claimant's depression and considerable secondary gain from the injury were also significantly affecting
36 his ability to return to work. A job description of a light clean-up job with his former employer had been
37 circulated and approved by two of the claimant's past attending physicians, but not by the current
38 attending physician as of April 1989. A panel examination performed in October 1988 indicated that
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1 the claimant was able to perform light to medium work physically, but that cognitive return to work.
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3 The panel examination deferred its findings until a neuropsychological examination was performed.
4 The results of that examination, which was performed in April 1989, were not available to Mr.
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6 Holderman when he reserved the claim.

7 Mr. Holderman noted that Dr. Carter, a psychiatrist hired by the Department, had expressed the
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9 opinion back in 1987 that the claimant's depression was causally related to the industrial injury. See
10 Exhibit No. 4. He therefore felt that the state fund would ultimately be found responsible for Mr.
11 Kasoutsas' psychiatric condition. In evaluating the claim, he also stressed that, while the physicians
12 who performed the panel examination felt that the claimant could return to light duty work, the results
13 of an extensive physical capacities evaluation conducted by a registered physical therapist supported
14 the conclusion that Mr. Kasoutsas would, at best, be able to perform sedentary work.

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17 Given the claimant's lack of facility with the English language, his inability to return to the only
18 job that he has performed in the United States, the fact that he has a psychiatric condition which at
19 least one psychiatrist who examined the claimant for the Department believes is causally related to the
20 industrial injury, and his limited physical capacities as set forth in the physical capacities evaluation
21 performed by a physical therapist at the behest of the Department, we are persuaded that Mr.
22 Holderman reasonably and correctly reserved Mr. Kasoutsas' claim on April 6, 1989.

23 **FINDINGS OF FACT**

- 24 1. On May 17, 1989, the Department of Labor and Industries issued a
25 Retrospective Rating Additional Premium Notice to Washington Metal
26 Trades Association assessing it the amount of \$285,856.00, for the
27 coverage year July 1, 1985 through June 30, 1986, with the payment due
28 on July 16, 1989. On June 2, 1989, the employer group filed a notice of
29 appeal with the Board of Industrial Insurance Appeals. On June 16, 1989,
30 the Board issued an order granting the employer group's appeal,
31 assigning it Docket No. 89 2296 and directing that further proceedings be
32 held.
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- 34 2. On October 28, 1985, Sofoklis Kasoutsas was struck on the head by a
35 steel casting while in the course of his employment with Western Steel
36 Casting Co., thereby sustaining an industrial injury. The Department
37 assigned this claim No. J-660145. This claim was open on April 6, 1989.
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- 39 3. Western Steel Casting Co. is a member of the Washington Metal Trades
40 Association, which is an employer group for purposes of participation in
41 the Department's retrospective rating program.
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4. Mr. Kasoutsas was born on October 26, 1930 in Greece. His education was limited to the tenth grade in Greece. His employment in Greece consisted of driving taxis and buses. His only job in the United States has been as a grinder for Western Casting Company. That job required light to medium exertion. Mr. Kasoutsas is fluent in Greek, but cannot read or write English. A psychiatrist examined Mr. Kasoutsas in 1987 at the Department's request and concluded that he had a psychiatric condition causally related to the industrial injury. A registered physical therapist performed a physical capacities evaluation and concluded that, as a result of the industrial injury, Mr. Kasoutsas was limited to sedentary work at best. Based on this and other information available to the Department as of April 6, 1989, the Department's disability adjudicator reserved Claim No. J-660145 as described in Findings of Fact Nos. 5 and 6.
 5. On April 6, 1989, a disability adjudicator for the Department of Labor and Industries reserved the claim value of Claim No. J-660145. As part of this reserving process, this disability adjudicator determined that the claimant would likely be placed on a permanent total disability pension effective April 16, 1991. The Department pension desk calculated a pension reserve for the claim which was included within the total incurred losses and additional retrospective premium.
 6. In calculating the pension reserve for Claim J- 660145, as of April 16, 1991, the Department used the following information: claimant's age, 60 years; claimant's monthly wages at the date of injury, \$1,613.92; claimant's monthly time- loss compensation rate at 65% of his wages, \$1,049.05; that claimant was married and without dependents. The Department also used the following actuarially approved assumptions: that claimant's wife was three years younger than he, and assumptions on the affect that a social security offset would have on the amount of the claimant's benefits. The Department of Labor and Industries included within its pension reserve, an amount calculated as a surviving spouse's pension reserve.

CONCLUSIONS OF LAW

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1. The Board of Industrial Insurance Appeals has jurisdiction over the subject matter and parties to this proceeding.
 2. The Department's calculation of the claim reserve for Claim No. J-660145 on April 6, 1989, including reserving the claim for a pension as of April 16, 1991, was correct.
 3. The Department's calculation of the amount of the pension reserve for Claim J-660145, as of April 16, 1991, is correct.

1 4. The Retrospective Rating Additional Premium Notice issued by the
2 Department of Labor and Industries on May 17, 1989, which assessed the
3 Washington Metal Trades Association the amount of \$285,856.00 for
4 coverage year July 1, 1985 through June 30, 1986 with the payment
5 thereon due by July 16, 1989, is correct and is sustained.
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7 It is so ORDERED.
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9 Dated this 31st day of August, 1990.
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11 BOARD OF INDUSTRIAL INSURANCE APPEALS
12

13 /s/
14 SARA T. HARMON Chairperson
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16 /s/
17 FRANK E. FENNERTY, JR. Member
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19 /s/
20 PHILLIP T. BORK Member
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