Schank, Sherryl

BOARD

Remand for additional evidence

Where the Department received a call indicating a worker was employed during the period the worker received loss of earning power benefits, the call raised the question of mistake as to the amount of benefits properly payable but did not establish fraud and motion for summary judgment should have been denied. As a result, the Board remanded to hearing process to determine whether an overpayment existed and if so, whether the benefits were fraudulently obtained. **….*In re Sherryl Schank*, Order Setting Aside Proposed Decision and Order, BIIA Dec., 90 1542 (1991)** [dissent]

FRAUD

Discovery (RCW 51.32.240(4))

Where fraud is alleged in a matter where loss of earning power benefits are paid, the level of information sufficient to trigger an investigation, and thereby establish the date of discovery, would have to be more specific and detailed than a telephone report that worker was employed. **….*In re Sherryl Schank*, Order Setting Aside Proposed Decision and Order, BIIA Dec., 90 1542 (1991)** [dissent]

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: SHERRYL A. SCHANK	)	**DOCKET NO. 901542**
	)	
	)	**ORDER SETTING ASIDE PROPOSED**
	)	**DECISION AND ORDER, DENYING MOTION**
	)	**FOR SUMMARY JUDGEMENT, AND**
	)	**REMANDING APPEAL TO THE HEARING**
CLAIM NO. K-379415	)	**PROCESS**

APPEARANCES:

Claimant, Sherryl A. Schank, by
Goodwin, Grutz, & Scott, per
Daniel R. Fjelstad

Employer, Thrifty Foods & Burlington, Inc., by
Paul J. Chapman, Comptroller for Thrifty Foods and by
Duane Anderson, Manager, Arlington Store

Department of Labor and Industries, by
The Office of the Attorney General, per
Donna Brown, Assistant, and Whitney Cochran, Paralegal

This is an appeal mailed by the claimant, Sherryl A. Schank, on March 23, 1990, and received by this Board on March 26, 1990, for an order of the Department of Labor and Industries dated January 22, 1990 which demanded that the claimant refund to the Department an overpayment of benefits in the amount of $4,175.35, plus a penalty of 50 percent of that amount pursuant to RCW 51.32.240, for a total of $6,263.01, on the grounds that such overpayment was induced by fraud. The proposed Decision and Order is **SET ASIDE, SUMMARY JUDEGEMENT DENIED, AND THE APPEAL REMAND TO THE HEARING PROCESS**.

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 Department of Labor and Industries to a Proposed Decision and Order issued on March 15, 1991 in which the order of the Department dated January 22, 1990 was reversed, and the matter remanded to the Department to issue an order stating that the Department discovered the fraud on January 20, 1989; that the Department failed to demand repayment within one year of the discovery of the fraud; and that demand for repayment of time-loss or loss of earning power benefits and penalties for that period it time-barred pursuant to the provisions of RCW 51.32.240(4).

This matter was presented for decision on a summary judgment motion brought by the claimant. Ms. Schank alleges that the Department order demanding repayment of benefits plus a 50 percent penalty is time-barred since it was not made within one year of the discovery of the fraud as required by RCW 51.32.240(4). The essential facts of the case for the purpose of review the propriety of the summary judgment motion are not in dispute and are adequately set forth in the Proposed Decision and Order.

The issue is what constitutes "discovery of the fraud". Did the Department discover the fraud when it received a telephone call from Mr. Chapman, the comptroller for the employer, on January 20, 1989, providing information as to Ms. Schank's hours and wages during the period in dispute? Or, was the fraud discovered later when the Department received a memorandum and payroll records on January 23, 1989?

We have previously discussed the issue of what constitutes "discovery of the fraud". In re Robert A. Carder, BIIA Dec., 69,461 (1988). In Carder we stated "[t]he Department discovers fraud when it has sufficient facts in hand to commence an investigation." Carder at 6. We also cited Washington case law in support of the rule that a mere suspicion of fraud is insufficient to charge a party with possession of specific facts or evidence to require the party to exercise due diligence in investigating the fraud. Carder at 5. In Carder, it was not necessary for us to determine whether a telephone tip amounts to the kind of information which would constitute "discovery" of fraud. Carder at 6. That issue is presented by this case.

Based on the facts presented here, we find that the information provided by Mr. Chapman in the telephone call of January 20, 1989 was not sufficient to raise more than a suspicion of fraud. The Department did not "discover" the fraud until it received the payroll records and memorandum from the employer. An important distinction between this case and Carder is that Ms. Schank was receiving loss of earning power benefits – not full time loss compensation – during the period in question. The distinction between loss of earning power (LEP) benefits and time loss benefits is that one is a partial remedy and the other is exclusive. In a time loss situation any employment would be inconsistent with the benefit, whereas in a situation where LEP is paid, some employment is expected. Information that someone is working while receive LEP should not raise the same level of concern as it would in a time loss case. Therefore, if fraud is alleged where LEP is being paid, the level of information to trigger an investigation would have to be more specific and detailed.

The telephone message left at the Department on January 19, 1989 only stated that there was a question as to the appropriateness of loss of earning power benefits and/or the wage amount. This information is not sufficient to constitute "discovery" of fraud; it may only have indicated innocent mistake as to claimant's wage a mount and/or calculation of loss of earning power benefits.

The telephone call on January 20, 1989 between Mr. Chapman and an unidentified Department employee provided specifics as to Ms. Schank's hourly wages, average hours worked, and average bimonthly pay. Our Industrial Appeals Judge found this information to be sufficient to charge the Department with the necessary knowledge of facts or circumstances so as to constitute "discovery". We disagree. If Ms. Schank had been receiving full time loss compensation, this information may well have been sufficient, particularly in light of the fact that the comptroller of the company provided the information. Yet the Department obviously already had knowledge that Ms. Schank was working at least part-time, since she was receiving loss of earning power benefits. However, until the payroll records were received, the question of the extent to which Ms. Schank was entitled to loss of earning power benefits could not be addressed.

We are not saying here that a particular way of delivering the information to the Department controls on the issue of "discovery of fraud". Rather, we are saying that, based on the facts of this case when considered with the particular problem presented in a loss of earning power situation, that the Department did not discover the fraud until the documentation had been received on January 23, 1989.

In a motion for summary judgment, all reasonable inferences must be resolved against the moving party. In re David H. Potts, BIIA Dec., 883822 & 88 3115 (1989), citing Hash v. Children's Orthopedic Hospital, 110 Wn. 2d 912, 757 P.2d 507 (1988). We cannot say that the employer's phone call on January 20, 1989 indicated anything more than information and a request for an inquiry as to whether Ms. Schank was receiving excessive loss of earning power benefits. It raised the question of mistake as to amount of benefits properly payable, but not that there was fraud on the claimant's part. At most, it may have raised a suspicion of fraud. The memorandum received by the Department on January 23, 1989 was the first time the Department had information contending that Ms. Schank was falsely reporting her income.

In addition to the issue of the date of discovery of the fraud, Ms. Schank alleges that the one-year period in which the Department must demand or order repayment does not end until the order

is communicated to the claimant. Ms. Schank argues the repayment order mailed on January 22, 1990 could not have been received any earlier than January 23, 1990. Since we have found that discovery of the fraud took place on January 23, 1989, she alleges the one-year statutory period had run and the repayment demand was time-barred. Again, we disagree.

RCW 51.32.240(4) states, ". . . Such repayment or recoupment must be demanded or ordered within one year of the discovery of the fraud." There are no Board or appellate court decisions construing the terms "demanded or orderd". In support of her position, Ms. Schank cites both Board and appellate decision which discuss what constitutes "filing" and "communicated" under the provisions of Title 51 RCW. We do not find these decisions helpful. Generally, where a term is not defined, that term must be accorded its plain and ordinary meaning unless a contrary intent appears. Dennis v. Dep't of Labor & Indus., 109 Wn. 2d 467, 745 P.2d 1295 (1987). We have had an opportunity to construe other time limitations imposed by statute to determine if the Department has acted in a timely fashion. RCW 51.52.069 (sixth proviso) provides that the Department "within the time limited for appeal, or within thirty days after receiving a notice of appeal" may hold the order under appeal in abeyance. We have held that it is the date the abeyance decision is made, rather than the date it may have been mailed to the parties, which determines whether the Department has acted in time. In re Benson Wood, Dckt. No. 90 1810 (May 3, 1990). Further, it would lead to absurd results if the Department had to attempt to predict when its orders will be received in order to comply with the one-year requirement of RCW 51.32.240(4). The enforcement of the Department's demand order may be contingent on a party's receipt of the order; but, that does not affect the timeliness of when the demand is made.

After consideration of the Proposed Decision and Order, the Petition for Review, and the Response to the petition for Review, and a careful review of the entire record before us, we are persuaded that the Proposed Decision and Order which granted the claimant's summary judgment is incorrect. We deny the summary judgment motion and remand the appeal to the hearing process to determine whether an overpayment of benefits to Ms. Schank exists and, if so, whether those benefits were fraudulently obtained.

The parties are advised that this order is not a final decision and order of the Board within the meaning of RCW 51.52.110. At the conclusion of the proceedings the Industrial Appeals Judge shall, unless the matter is dismissed or resolved by agreement of the parties, enter a Proposed Decision and Order containing findings and conclusions as to each contested issue fact and law,

consistent with this decision. Any party aggrieved by such Proposed Decision and Order may petition the Boar for review of such further Proposed Decision and Order, pursuant to RCW 51.52.104.

It is so ORDERED.

Dated this 25th day of September, 1991.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
S. FREDERICK FELLER Chairperson

/s/_____
PHILLIP T. BORK Member

DISSENT

The majority finds that the detailed wage information provided by the comptroller for the employer to the Department is insufficient to constitute "discovery" of fraud. I disagree. As pointed out in our industrial appeals judge's Proposed Decision and Order, Carder requires only knowledge of fact or circumstances, not the possession of documentary evidence. Carder at 5.

It is significant to note that the telephone tip the Department received on January 20, 1989 was not an anonymous tip, as distinguished from the tip received in Carder. The call was from Paul Chapman, the employer's comptroller, the same employer for whom Ms. Schank worked at the time of her injury. In the call, Mr. Chapman provided the Department with specific information as to Ms. Schank's hourly wage, average hours worked, and income per month. As the employer on the claim, Mr. Chapman had knowledge of Ms. Schank's wages and hours at the time of injury as well as the specifics of any difference in wages that existed to justify the payment of loss of earning power benefits.

In Carder we said "[t]he Department discovers fraud when it has sufficient facts in hand to commence an investigation." Carder at 6. Sufficient facts were in hand on January 20, 1989. Receipt of the documentation on January 23rd was merely part of the investigative process. To find otherwise is to reward the Department for its lack of diligence in pursuing this matter. By August 14, 1989, a Department investigator had completed his investigation and recommended the issuance of a fraud order. Nevertheless, the order was not issued until January 22, 1990, more than one year after the Department had sufficient facts in hand. The Department gambled on the date of "discovery" of the fraud, and lost.

I would conclude that Ms. Shank's summary judgment motion should be granted on the basis that the Department demand for repayment of loss of earning power benefits and the assessment of penalties is time-barred pursuant to RCW 51.52.240(4).

Dated this 25th day of September, 1991.

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