Cortese, Jonathan

SELF-INSURANCE

Authority to recoup overpayment of benefits

Where a self-insured employer continued paying time-loss compensation benefits due to the mistaken belief it was required to do so until the Department entered an order in response to its request to close the claim, the self-insured employer, is not entitled to recover the benefits under the provisions of RCW 51.32.240(1) since the payment was the result of a mistake of law rather than a clerical error, mistake of identity, or innocent misrepresentation, or any other circumstance of a similar nature. ***….In re Jonathan Cortese*, BIIA Dec., 90 2342 (1992)**

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: JONATHAN CORTESE	**)**	**DOCKET NO. 90 2342**
	)	
CLAIM NO. S-659121	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Jonathan Cortese, by
Aaby, Putnam, Albo & Causey, per
Joseph A. Albo, Attorney at Law and Laurel Anderson, Paralegal

Employer, Chevron USA Incorporated, by
Helsell, Fetterman, Martin, Todd & Hokanson, per
Mark C. Dean

This is an appeal filed by the claimant on May 8, 1990 from an order of the Department of Labor and Industries dated April 13, 1990 which affirmed Department orders dated August 10, 1989 and August 29, 1988. The August 29, 1988 order closed the claim without award for permanent partial disability; terminated time loss compensation as paid to July 31, 1987 and ordered the claimant to repay the self-insured employer an overpayment of time-loss compensation in the amount of $14,160.20 for the period August 1, 1987 through July 15, 1988. **REVERSED AND REMANDED.**

DECISION

Pursuant to RCW 51.52.104 and RCW 52.106, this matter is before the Board for review and decision on timely Petitions for Review filed by the claimant and the self-insured employer to a Proposed Decision and Order issued on June 7, 1991 in which the Department order of April 13, 1990 was affirmed, except to the extent it demanded repayment for the period July 31, 1987 to August 29, 1987.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed and said ruling are hereby affirmed. The evidence presented by the parties is adequately set forth in the Proposed Decision and Order. We will discuss the evidence only to the extent necessary to explain our decision.

Three issues are presented by this appeal. Two issues identified in the proposed decision: (1) the extent of permanent partial disability, and (2) the claimant's ability to be gainfully employed from August 1, 1987 through July 15, 1988, were properly resolved by our Industrial Appeals Judge. The evidence supports the conclusion that Mr. Cortese did not suffer any permanent disability as a result of the industrial injury. In addition, he was capable of reasonably continuance gainful employment during the relevant period. The third and major issue raised by this appeal concerns the Department's

authority to order Mr. Cortese to repay to the self-insured employer the money he had received in time loss compensation payments for the period August 1, 1987 through July 15, 1988.

The Department may order repayment of benefits within one year after making benefit payments:

> [w]henever 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,...

RCW 51.32.240(1).

A review of the circumstances under which the time loss compensation benefits were paid to Mr. Cortese is necessary to determine if those benefits can now be recouped. On April 2, 1986, Mr. Cortese was injured in the course of his employment with Chevron USA Incorporated. He received medical treatment and due to his initial inability to return to work, he began receiving time loss compensation payments. Mr.Cortese was last seen by his attending physician, Dr. Robert Zwick, in October 1986. Dr. Zwick reported to the self-insured employer in May, 1987 that he had not treated Mr. Cortese since October 24, 1986, that he was medically stable as of October 31, 1986, and he suffered from no permanent partial disability.

Chevron is a self-administered, self-insured employer. It did not use any standard forms to obtain certification of time loss. It did not inquire of Mr. Cortese as to his employment status, nor inform him that if he returned to work he should return the money. In fact, Mr. Cortese had not returned to work, but had enrolled in a seminary. Chevron issued time loss checks through the payroll department and the checks looked essentially identical to regular payroll checks.

It was not until June 11, 1987 that Chevron submitted an SIF-5 form to the Department requesting a final determination concerning Mr. Cortese's claim. In November 1987 and again in July 1988, Chevron requested the Department to issue an order closing the claim. The closing order was finally issued by the Department on August 29, 1988. Throughout this period, Chevron continued to pay time loss compensation based on the mistaken belief that the self-insured employer could not terminate time loss benefits without a determinative order from the Department.

Based upon these facts, does RCW 51.32.240(1) permit the Department to order repayment? We think not. This is not a "clerical error" as argued by Chevron in its Reply to the Claimant's Petition for Review. A clerical error implies an error in calculation or data entry, not a failure to properly administer the claim. Furthermore, this case does not involve a "mistake of identity" or an "innocent misrepresentation by or on behalf of the recipient which is mistakenly acted upon".

The only other provision of RCW 51.31.240(1) which could apply is "any other circumstance of a similar nature". We do not believe that a self-insured claim examiner's mistaken interpretation of the law, or slow claims management response by the Department, fit this provision. The provisions of the statute speak in terms of an error or mistake triggering the payment of benefits. There was no such triggering event in this case. There was simply inattention, delay, and lack of effective handling of the claim for well over a year.

This case is similar to In re: Beverly J. Mitchell, Dckt. No. 89 2357 (March 19, 1991). In Mitchell, the Department's claims manager failed to adequately review all medical information in the file before directing the payment of a considerable period of time loss compensation. The Board held that this failure was not a circumstance described in RCW 51.31.240(1). There is one distinction between Mitchell and this case. In Mitchell, the Department was allowed to recoup a portion of the time loss paid, since it had, at least in part, mistakenly acted upon a misrepresentation made by Ms. Mitchell on the time loss compensation card. No such similar facts exist in this case. Mr. Cortese did not incorrectly report his employment status. He had not returned to work. He had not been told by a physician he had been released to return to work. No inquiry was even made of him by the self-insured employer or the Department if he had or was capable of returning to work.

After consideration of the Proposed Decision and Order, the Claimant's and self-insured employer's Petitions for Review, the Employer's Reply to the Claimant's Petition for Review, and a careful review of the entire record before us, we are persuaded that the Department order of April 13, 1990 is incorrect and must be reversed, and the matter remanded to the Department with direction to issue an order terminating time loss compensation as paid through July 15, 1988 and closing the claim with time loss compensation as so paid and with no award for permanent partial disability.

FINDINGS OF FACT

1. On April 2, 1986, Jonathon A. Cortese was injured in the course of his employment with Chevron USA, Inc., a self-insured employer under the Industrial Insurance Act, when he attempted to lift a 35 pound pail of oil over the tailgate of a dump truck and the pail fell. On June 9, 1986, he filed an application for benefits with the Department of Labor and Industries.

   The claim was subsequently allowed and benefits paid. On August 29, 1988 the Department entered an order closing the claim with time loss compensation as paid to July 31, 1987 and without further award for time loss compensation or permanent partial disability, and ordered claimant to repay to the self-insured employer overpayment of time loss

compensation in the sum of $14,160.20 for the period August 1, 1987 through July 15, 1988. Following a timely protest and appeal the Department entered an order on April 13, 1990 affirming its order of August 10, 1989 which affirmed the August 29, 1988 order.

On May 8, 1990, the claimant filed a Notice of Appeal with the Board of Industrial Insurance Appeals. On June 4, 1990, the Board entered an order granting the appeal, assigning it Docket No. 90 2342, and directing that further proceedings be held.

2. The industrial injury sustained by claimant on April 2, 1986 was a cervico-dorsal strain.

3. As of April 13, 1990, claimant was 35 years of age with a college education, and his physical function was not impaired to any significant degree by the injury of April 2, 1986.

4. As of April 13, 1990, claimant's causally related cervico-dorsal strain was best described by Category 1 of WAC 296-20-240, categories of permanent cervical and cervico-dorsal impairments.

5. Between August 1, 1987 and July 15, 1988, claimant was capable of engaging in gainful employment on a reasonably continuous basis.

6. The payment of time loss compensation benefits between August 1, 1987 through July 15, 1988 was made as a result of a mistaken interpretation of the law by the self-insured claims examiner and/or because of ineffective claims management by the self-insurer, and/or slow claims management response by the Department, but was not the result of a clerical error, mistake of identity, innocent misrepresentation by or on behalf of the claimant mistakenly acted upon, or any other circumstance of a similar nature.

CONCLUSIONS OF LAW

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

2. Between August 1, 1987 and July 15, 1988, the claimant was not a temporarily totally disabled worker within the meaning of RCW 51.32.090.

3. As of April 13, 1990, the claimant had not sustained a compensable permanent partial disability as contemplated by RCW 51.32.080.

4. The operation of RCW 51.32.240(1) does not permit recoupment of time loss compensation benefits, paid by an otherwise final order, when the benefits were paid solely due to the mistaken interpretation of the law by the self-insured claims examiner and/or because of ineffective claims

management by the self-insured employer, and/or slow claims management response by the Department.

5. The order of the Department of Labor and Industries dated April 13, 1990 affirming the orders of August 10, 1989 and August 29, 1988 which closed the claim with time loss as paid to July 31, 1987, and without award for permanent partial disability, and demanded repayment to the self-insured employer for an overpayment of time loss compensation in the amount of $14,160.20 for the period August 1, 1987 through July 15, 1988, is incorrect and is reversed. The claim is remanded to the Department with directions to issue an order terminating time loss compensation as paid through July 15, 1988, and closing the claim with time loss compensation as so paid and with no award for permanent partial disability.

It is so **ORDERED**.

Dated this 6th day of January, 1992.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/ _____
FREDERICK FELLER Chairperson

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

/s/ _____
PHILLIP T. BORK Member