Dupre, Fred

SECOND INJURY FUND (RCW 51.16.120)

Permanent partial disability payment (RCW 51.16.120(1))

Pursuant to RCW 51.16.120(1) a self-insured employer is liable only for the accident costs that would have resulted solely from the industrial injury, had there been no pre-existing disability. When the employer has previously paid a permanent partial disability award to the worker, the employer will not be required to pay a like amount into the pension reserve after a determination that the worker is permanently totally disabled and second injury fund benefits are authorized. **….*In re Fred Dupre*, BIIA Dec., 97 4784 (1999)**

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: FRED J. DUPRE	**)**	**DOCKET NO. 97 4784**
	)	
CLAIM NO. T-534223	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Fred J. Dupre, by
Law Offices of Prediletto, Halpin, Scharnikow & Nelson, P.S.
William L. Halpin

Self-Insured Employer, Weyerhaeuser Company, by
Kathryn D. Fewell

Department of Labor and Industries, by
The Office of the Attorney General, per
W. Stewart Hirschfeld, Assistant

The self-insured employer, Weyerhaeuser Company, filed an appeal with the Board of Industrial Insurance Appeals on June 30, 1997, from an order of the Department of Labor and Industries dated May 12, 1997. The order found that the claimant's preexisting disabilities combined with his industrially-related condition, render him totally and permanently disabled and found that the total amount of the permanent disability caused by the industrial injury would have resulted in an award of $18,000 as previously paid by the employer, and required the employer to pay $18,000 to the Department for the claimant's pension reserve with the balance of the pension reserve to be paid by the second injury fund. **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 March 22, 1999, in which the order of the Department dated May 12, 1997, was affirmed.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed and the rulings are affirmed.

We grant review because this appeal presents a unique fact situation requiring the interpretation of the statute governing self-insured employer contributions to a pension reserve under the second injury fund statute where the disability award for the injury giving rise to second injury fund relief has already been paid to the worker. The outcome advocated by the Department and adopted by the industrial appeals judge in the Proposed Decision and Order results in the self-insured employer paying the claimant's permanent partial disability award twice, once to the claimant in 1993 and again to the second injury fund in 1997. This result is contrary to the purpose of the second injury fund statute as interpreted by the Supreme Court in *Jussila v. Department of Labor & Indus.*, 59 Wn.2d 772, 778, 370 P.2d 582 (1962) and *Lyle, Inc. v. Department of Labor & Indus*., 66 Wn.2d 745, 405 P.2d 251 (1965).

The appeal was submitted on stipulated facts that may be summarized as follows: Mr. Dupre suffered from some unspecified "prior disabling conditions" when he injured himself working for Weyerhaeuser on July 19, 1991. The injury resulted in an award for cervical impairment equal to Category 3 of WAC 293-20-240 on May 5, 1993. The amount of the permanent partial disability award paid directly to Mr. Dupre by the self-insured employer was $18,000.

On September 26, 1994, Mr. Dupre's claim was reopened for benefits effective June 16, 1994. Benefits were paid and treatment provided until May 12, 1997, when Mr. Dupre was determined to be a permanently totally disabled worker effective June 6, 1997, because of the Category 3 cervical impairment superimposed on his prior disabling conditions. The pension order also directed the self-insured employer to pay an amount equal to the monetary value of the Category 3 cervical impairment to the Department per RCW 51.16.120. The self-insured employer objected that it had already paid that award to the claimant in 1993.

RCW 51.16.120 provides:

> (1) Whenever a worker has a previous bodily disability from any previous injury or disease, whether known or unknown to the employer, and shall suffer a further disability from injury or occupational disease in employment covered by this title and become totally and permanently disabled from the combined effects thereof or die when death was substantially accelerated by the combined effects thereof, then the experience record of an employer insured with the state fund at the time of said further injury or disease shall be charged and **a self-insured employer shall pay directly into the reserve fund *only* the accident cost which would have resulted solely from said further injury** or disease, **had there been no preexisting 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 such 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 fund. The department shall pass upon the application of this section in all cases where benefits are paid for total permanent disability or death and issue an order thereon appealable by the employer. Pending outcome of such appeal the transfer or payment shall be made as required by such order.
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> (2) The department shall, in cases of claims of workers sustaining injuries or occupational diseases in the employ of state fund employers, recompute the experience record of such employers when the claims of workers injured in their employ have been found to qualify for payments from the second injury fund after the regular time for computation of such experience records and the department may make appropriate adjustments in such cases including cash refunds or credits to such employers.
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> (3) To encourage employment of injured workers who are not reemployed by the employer at the time of injury, the department may adopt rules providing for the reduction or elimination of premiums or assessments from subsequent employers of such workers and may also adopt rules for the reduction or elimination of charges against such employers in the event of further injury to such workers in their employ.

(Emphasis added.)

The Department's interpretation of RCW 51.16.120 is based on an opinion issued by the Office of the Attorney General in 1984 when the statute was amended to include the language

referring to self-insured employers. AGO 1984 No. 15 sets out the Department's fundamental theory as follows:

> The concepts of permanent partial disability and total permanent disability are entirely separate concepts. The respective definitions of those terms appear in RCW 51.08.150 and 160; and see also, Ellis v. Department of Labor and Industries, 88 Wn.2d 844, 567 P.2d 224 (1977); Franks v. Department of Labor and Industries, 35 Wn.2d 763, 215 P.2d 416 (1950); and Fochtman v. Department of Labor and Industries, 7 Wn.App 286, 499 P.2d 255 (1972). Compensation for permanent partial disability is paid for loss of bodily function and has no relationship, per se, to the claimant's ability to work. Conversely, compensation for total permanent disability is paid solely for a claimant's inability to carry on a gainful occupation.
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> [T]he fact that a claimant was paid a permanent partial disability award earlier in a claim history should have no effect on the employer's responsibility to fund a subsequently awarded total disability pension. The pension must be fully funded. It is either an obligation of the state fund (in the case of a state fund employer) or of the employer (i.e., self-insurer). RCW 51.14.010. [Orig. Op. Page 3] And where the second injury fund contributes to the pension reserve fund under RCW 51.16.120(1), supra, the balance must be made up by the accident fund (in the case of a state fund employer) or it must likewise be paid by the self-insurer. Indeed, if the self-insurer were relieved of this obligation by virtue of its having previously paid a permanent partial disability award to the claimant, the state fund would then have to make up the difference--or the second injury fund would have to fund the entire total disability pension. Neither of those results, however, is contemplated by the workers' compensation act. Moreover, we should also note that if the second injury fund did not apply, the self-insuring employer would have to fund the entire pension--regardless of whether it had previously paid a permanent partial disability award to the claimant.

The fact situation assumed in AGO 1984 15 is on all fours with the facts in this appeal. If the opinion is controlling, the outcome in the Proposed Decision and Order is correct. However, we are concerned that AGO 1984 15 dwells on the philosophical differences between total temporary disability compensation and total permanent compensation at the expense of the statute's primary purpose, which is to limit the liability of both state fund and self-insured employers who extend job opportunities to previously disabled workers.

AGO 1984 15 was written 24 years after the Washington Supreme Court construed RCW 51.16.120 in the leading decision of *Jussila v. Department of Labor & Indus.*, 59 Wn.2d 772, 778, 370 P.2d 582 (1962). As the Court reiterated in *Lyle, Inc. v. Department of Labor & Indus*., 66 Wn.2d 745, 405 P.2d 251 (1965):

> We stated the purpose of this statute in *Jussila v. Department of Labor & Indus.* . . . : The Second-injury Fund is a special fund set up within the administrative framework of the workmen's compensation system *to* encourage the hiring of *previously handicapped workmen* by providing that the second employer will not, in the event such a workman suffers a *subsequent injury* on the job, be liable for a *greater disability* than actually results from the *second accident.*

(Italics theirs.)

Thus, the statute is intended to limit an employer's financial responsibility to the monetary cost of the disability actually resulting from the second injury. It is not intended to provide a mechanism for funding the pension reserve. In fact, the statutory provision for funding the second injury fund actually comes from an assessment on employers in RCW 51.44.040.

> (1) There shall be in the office of the state treasurer, a fund to be known and designated as the "second injury fund", which shall be used only for the purpose of defraying charges against it as provided in RCW 51.16.120 and 51.32.250, as now or hereafter amended. Said fund shall be administered by the director. The state treasurer shall be the custodian of the second injury fund and shall be authorized to disburse moneys from it only upon written order of the director.
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> (2) Payments to the second injury fund from the accident fund shall be made pursuant to rules and regulations promulgated by the director.
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> *(3)* **Assessments for the second injury fund shall be imposed on self-insurers pursuant to rules and regulations promulgated by the director to ensure that self-insurers shall pay to such fund in the proportion that the payments made from such fund on account of claims made against self-insurers bears to the total sum of payments from such fund.**

(Emphasis added.)

The Attorney General's assertion that if the self-insured employer does not contribute another permanent disability award payment it gets off unduly lightly financially is unfounded. The risk will be spread among self-insured employers, another measure that limits liability of individual employers who undertake to offer employment to workers who might otherwise be undesirable as employees because of physical infirmities.

Taking into account the statutory schemes to limit employer liability to the value of the last permanent partial disability award in second injury fund cases and to spread the cost of the second injury fund among similarly situated employers, the direction that the self-insured employer pay the permanent partial disability award into the pension reserve is secondary to the overall intent of the statute. It is not a substantive requirement but a direction that applies when the self-insured employer has not already been directed by the Department to pay the award to the injured worker. When the permanent partial disability award has already been paid to the injured worker, the intent of holding the self-insured employer responsible for the worker's permanent partial disability has been fulfilled by that payment. This interpretation is consistent with the treatment mandated for state fund employers in RCW 51.16.120(2). Section (2) instructs the Department to recompute the experience rating of state fund employers to reflect receipt of second injury fund relief achieved "after the regular time for computation of such experience records" and make any refund or credit resulting from the recalculation. Clearly the statute contemplates a decrease in the financial liability of the state fund employer. Indeed, this instruction would not be necessary if the intent of the statute were not to give the employer the immediate benefit of decreased liability. The words of the statute limiting the financial responsibility of the employers, whether self-insured or state fund must be given effect.

Even if one approaches the statute from the philosophical angle employed by the Attorney General, one arrives at a contrary result. The statute makes the self-insured employer liable only to

the extent of the accident cost "*which would have resulted had there been no pre-existing disability*." Since *neither* disability alone would have caused total permanent disability (defined as "claimant's inability to carry on a gainful occupation," according to the Attorney General) the self-insured employer is responsible only for what the Attorney General defines as "permanent partial disability . . . paid for loss of bodily function and [having] no relationship, per se, to the claimant's ability to work." This is consistent with the statutory direction that "the self-insured employer shall pay . . . *only* the accident cost which would have resulted *solely* from said further injury . . .."

On a final note, all the parties to the appeal seem content to consider any further contribution by the self-insured employer at this point a double payment to Mr. Dupre. We do not agree. Consider that Mr. Dupre's $18,000 permanent partial disability award was not large enough to cover the benefits that would have been due under his pension between May of 1993 and June of 1994. Consider also that his pension reserve is actually calculated based on his life expectancy as of June 6, 1997. The Department is not actually going to go back and pay Mr. Dupre for the period before June 6, 1997, when he was not medically determined to be totally permanently disabled. Nor is the Department going to pay total permanent disability compensation for the three years between the time the claim was reopened and the date as of which he was determined to be totally permanently disabled, a four year period during which the self-insured employer paid $64,477.24 in total temporary disability payments. The pension reserve looks only to the future. The amount of Mr. Dupre's reserve is calculated to pay a specific monthly benefit. It is essentially an annuity. One pays a set figure now for reliable increments of repayment in the future. Mr. Dupre is entitled to only the monthly amount provided for by law, so any further contribution by the self-insured employer at this point will not increase the pension reserve or the monthly benefits calculated thereon. Any further contribution from the self-insured employer would ultimately impact the second injury fund where it would be apportioned among other workers. The provision for insuring

that self-insured employers contributed on a proportionate basis to the second injury fund is already in place in RCW 51.44.040.

We conclude that in so far as it requires the self-insured employer to pay $18,000 to the Department for the claimant's pension reserve with the balance of the pension reserve to be paid by the second injury fund, the Department order of May 12, 1997 is incorrect. The order should be reversed and the matter remanded to the Department for the issuance of a further order directing the pension reserve in this claim to be paid entirely from the second injury fund.

FINDINGS OF FACT

1. On July 31, 1991, claimant, Fred J. Dupre, filed an application for benefits alleging that he had sustained an industrial injury on July 19, 1991, during the course of employment with Weyerhaeuser Company. On September 19, 1991, the Department of Labor and Industries issued an order allowing the claim. On May 5, 1993, the Department issued an order that closed the claim and required the self-insured employer to pay the claimant an award for permanent partial disability consistent with Category 3 for cervical impairments which amounted to $18,000, plus interest on the installment payments of $342.58.

   On August 11, 1994, the claimant filed an application for aggravation of the condition caused by the industrial injury. On September 26, 1994, the Department of Labor and Industries issued an order reopening the claim effective June 16, 1994. On May 12, 1997, the Department issued an order that found the claimant's preexisting disabilities, combined with his industrially-related condition, to render him totally and permanently disabled and also found that the total amount of the permanent disability caused by the industrial injury would have resulted in an award of $18,000 as previously paid by the employer, and finally, required the employer to pay $18,000 to the Department for the claimant's pension reserve with the balance of the pension reserve to be paid by the second injury fund. On June 30, 1997, the self-insured employer filed a Notice of Appeal with the Board of Industrial Insurance Appeals. On August 19, 1997, the Board issued an order granting the appeal, assigning it Docket No. 97 4784, and directing that proceedings be held on the issues raised by the Notice of Appeal.

2. On July 19, 1991, the claimant, while in the course of employment with Weyerhaeuser Company, sustained an industrial injury.

3. As a proximate cause of the industrial injury of July 19, 1991, the claimant sustained an injury to his cervical spine that has resulted in a permanent partial impairment consistent with Category 3 for cervical impairments. This permanent partial disability and its residual effects when combined with the residual effects of the claimant's preexisting disabling conditions have resulted in the claimant being totally permanently disabled.

4. As of June 6, 1997, the accident cost that would have resulted solely from the industrial injury of July 19, 1991, had there been no preexisting disability was $18,000.

5. As of June 6, 1997, the self-insured employer, pursuant to an order of the Department issued on May 5, 1993, had paid directly to the claimant the accident cost of $18,000 together with interest in the amount of $342.58.

CONCLUSIONS OF LAW

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

2. Pursuant to the limitation in RCW 51.16.120(1) that the self-insured employer should be liable only for the accident cost that would have resulted solely from the industrial injury of July 19, 1991, the self-insured employer satisfied its obligation under the statute when it paid the total cost of the accident to the claimant in compliance with the Department order issued on May 5, 1993.

3. The order of the Department of Labor and Industries dated May 12, 1997, is reversed. The claim is remanded to the Department with instructions to issue a further order that establishes that the claimant's preexisting disabilities combined with his industrially-related condition to render him totally and permanently disabled and also found that the total amount of

the permanent disability caused by the industrial injury would have resulted in an award of $18,000 as previously paid by the employer, and directs the pension reserve to be paid by the second injury fund.

It is so ORDERED.

Dated this 21st day of July, 1999.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

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

/s/_____
JUDITH E. SCHURKE Member