Powell, Marshall

SECOND INJURY FUND (RCW 51.16.120)

Knowledge of disabling condition

Prior to a 1984 statutory change to RCW 51.16.120 there was no requirement, other than Department policy, that the employer have knowledge of a worker's pre-existing disability in order to qualify for second injury fund relief. The 1984 change was a clarification and employer knowledge is not a prerequisite to qualification for relief from the fund. ***….In re Marshall Powell,* BIIA Dec., 97 6424 (1999)** [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 99-2-18528-5.]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: MARSHALL H. POWELL	**DOCKET NO. 97 6424**
CLAIM NO. S-643348	**DECISION AND ORDER**

APPEARANCES:

Claimant, Marshall H. Powell, by
Walthew, Warner, Costello, Thompson & Eagan, P.S., per
Robert H. Thompson, Sr.

Self-Insured Employer, Seattle School District No. 1, by
Karr, Tuttle, Campbell, per
William H. Beaver

Department of Labor and Industries, by
The Office of the Attorney General, per
John R. Zeldenrust, Assistant

The self-insured employer, Seattle School District No. 1, filed an appeal with the Board of Industrial Insurance Appeals on August 20, 1997, from an order of the Department of Labor and Industries dated July 3, 1997. The order affirmed an order dated March 26, 1997, that denied second injury fund relief to the employer. **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 January 8, 1999, in which the order of the Department dated July 3, 1997, was affirmed and the employer's appeal dismissed.

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. The employer-appellant presented its evidence supporting the appeal. Thereafter, the Department of Labor and Industries moved to dismiss the appeal pursuant to CR 41(b)(3). The Proposed Decision granted the Department's motion and dismissed the self-insured employer's appeal. The industrial appeals judge concluded that the employer-appellant had not shown a right to second injury fund relief because no evidence

was presented demonstrating that the employer was aware at the time of hire that the injured worker suffered from diabetes. We disagree with the legal conclusion that in order to prevail in a second injury fund relief claim, the employer must show knowledge at the time of hire of the claimant's disabling condition. We, therefore, reverse the proposed order dismissing the employer's appeal pursuant to CR 41(b)(3). However, rather than remanding the matter for a further hearing to receive evidence in the Department's defense, we conclude the Department has waived their right to present evidence. The Department rested upon submission of its Motion to Dismiss, deciding not to present any witnesses. The Department thereby waived the right to present evidence in the event the motion was not granted. In essence, the Department chose to rely upon the record as developed with the cross-examination of the witnesses presented by the employer, and the submitted motion. We distinguish this from a case wherein at the completion of the plaintiff's case, the defense moves to dismiss with a CR 41(b)(3) motion, and does not rest. CR 41 clearly states that in that instance, there is not a waiver of the right to present evidence in the event the motion is not granted. *Lonsdale v. Chesterfield,* 91 Wn.2d 189 (1978). We conclude that the hearings process was complete with the testimony of Kathy Papac; Dr. Bruce Francis; Dr. Edward L. Laurnen; Dr. Richard Marks; and Dr. Bruce Bradley. The evidence presented supports granting the employer's second injury fund relief claim since the Seattle School District met the requirements of RCW 51.16.120 as that statute existed in December 1983.

The claimant, Marshall H. Powell, began his employment with the Seattle School District as a custodian in September of 1966. He suffered an industrial injury to his knee on December 22, 1983. At the time of his injury, Mr. Powell had been a diabetic for over 20 years, and had been insulin dependent since 1981. On March 26, 1997, the Department issued an order finding him permanently and totally disabled as of November 26, 1996. The self-insured employer sought second injury fund relief, maintaining that the combined effects of Mr. Powell's diabetes and his

knee disability caused him to be permanently and totally disabled. The Department denied the employer second injury fund relief because the employer did not show that "but for" the previous disability, Mr. Powell would not have been permanently totally disabled. The Department further contends that the employer failed to show that the diabetes was disabling to Mr. Powell at the time he suffered an industrial injury on December 22, 1983, or that the employer had knowledge of the diabetes at the time of hire in 1966.

Rights of the parties under the Industrial Insurance Act are governed by the law in effect on the date of the injury. *Seattle School District No. 1 v. Department of Labor & Indus.,* 116 Wn.2d 352 (1991). On the date of Mr. Powell's industrial injury, the second injury fund statute, RCW 51.16.120, read in pertinent part as follows:

> Whenever a worker has a previous bodily disability from any previous injury or disease 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 . . . 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…The difference between the charge thus assessed . . . and the total cost of the pension reserve shall be assessed against the second injury fund.

In *Jussila v. Department of Labor & Indus.,* 59 Wn.2d 772 (1962), the court discussed the legislative purpose of the second injury fund in the oft quoted statement that the second injury fund was set up 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." However, the court articulated purposes other than encouraging employers to hire the handicapped. The court noted that the underlying premise in industrial insurance is for employers to bear the burden of the costs arising out of industrial injuries sustained by their own employees. The second injury fund and experience based premiums accomplish not only an inducement for workplace safety by rewarding employers with

reduced liability, but also avoid an unfair burden on other employers. In *Jussila,* the court noted that the second injury fund was not passed for the singular purpose of encouraging the hiring of handicapped, but was also designed to encourage workplace safety and avoid unfair financial burdens on employers.

The *Jussila* court held that where a worker with an industrially caused disability suffers a subsequent injury resulting in permanent total disability, there is no presumption that the earlier injury was a cause of the total disability for establishing an employer's right to reimbursement from the second injury fund. The court required the burden of proof be upon the employer in an appeal before the Board to show that the worker's total disability was, in part, the result of a previous disability, and that the disability would not have been total **but for** the previous disability. In other words, the Legislature did not intend the second injury fund law to apply to a case wherein the later injury was, in itself, sufficient to produce total permanent disability. *Jussila*, at 778.

In *Lyle v. Department of Labor & Indus.,* 66 Wn.2d 745 at 748 (1965), the Supreme Court held that:

> consistent with the purpose of the Second-injury Fund statute [*sic*], that the phrase, 'previous bodily infirmity' cannot be isolated to contemplate an unknown, preexisting and nondisabling condition. To effect the legislative intent the statute must be construed to presuppose a known, preexisting disabling injury or condition.

The *Lyle* court did not identify **who** is to "know" of the preexisting disabling condition--the worker, his/her doctors, or the employer. Nor did the court identify **when** the disabling condition must be known. However, the obvious intention of the court in using the word "known" was to require that the preexisting condition be **manifest, symptomatic and patent** to someone at the time of the second injury, and not be latent and non-symptomatic.

Even though these cases and the statute do not specifically delineate **employer** knowledge of a preexisting disability **at the time of hire** in order to obtain second injury fund relief, the

Department administratively construed these cases and the statute to require it. The Department maintained the position that the legislative purpose would be circumvented if employers, unaware of an existing disability at the time of hire, could seek the beneficent provisions of the second injury fund. According to the Department's argument, unless employers knew of the preexisting disability at the time of hire, they should not benefit from a fund whose purpose is to encourage employers hiring disabled workers in spite of that knowledge.

The Board has never specifically decided in a significant decision whether the Department's interpretation of RCW 51.16.120 requiring employer knowledge at the time of hire was a correct interpretation of the statute and the case law. The main focus of self-insured employers' litigation before the Board at this time with regard to the second injury fund was whether self-insured employers were entitled to second injury fund relief between 1971 and July 1977. In 1971 the Legislature created a special class of employers known as self-insurers as defined in RCW 51.08.173, and as qualified in Chapter 51.14 RCW. The Legislature did not amend the statutes governing the second injury fund so as to distinguish between state fund and self-insured employers. Most importantly, the Legislature made no changes in the mechanism for funding the second injury fund so as to require contributions from the self-insurers. Modifications made in 1972 to the funding statute for the second injury fund failed to provide the Director with authority to require self-insured employers to contribute to the second injury fund. Not until 1977 did the Legislature extend the funding provisions or benefits of RCW 51.16.120 to self-insured employers. The self-insurers sought through litigation both at the Board and in the appellate courts to have the provisions of RCW 51.16.120 applied to them retroactively, or pre-July 1,1977. Self-insureds argued that the critical date for fixing eligibility for second injury fund relief was the time when the total permanent disability becomes effective rather than the date of injury. *Seattle School Dist. No. 1 v. Department of Labor & Indus.*, 116 Wn.2d 352 (1991). The focus of the matters

litigated before the Board at this time rarely raised the issue of employer's knowledge of preexisting disability at the time of hire.

In 1991, the Board issued a significant decision that analyzed the meaning of "combined effects" in the second injury fund statute and the *Jussila* and *Lyle* cases. *In re Alfred Funk,* BIIA Dec., 89 4156 (1991). In *Funk,* the employer-appellant **conceded** and the Board, without analysis, stated **in dicta** that "case law required an employer to 'know' that the worker had a preexisting disability at the time of hiring in order to qualify for second injury fund relief." The Board actually held in *Funk* that the statute required the employer to show more than that the worker had a preexisting condition, but must demonstrate that the preexisting condition was a disability that was an actual cause of the total disability. In this present decision, we do not disturb the actual *Funk* decision. However, we acknowledge as incorrect the aforementioned **dicta** in *Funk.* We do not interpret either case law or the second injury fund statute as it existed prior to 1984 to require employer knowledge of the worker's previous infirmity at the time of hire in order to qualify for second injury fund relief.

In 1984, the Legislature amended RCW 51.16.120 by adding the words "whether known or unknown to the employer," referring to the worker's "previous bodily disability." RCW 51.16.120(1), as amended, Laws of 1984, ch. 63, § 1. The self-insured employer contends that the purpose of the 1984 amendment was to clarify the statute, and therefore that it should be applied retrospectively. While it is true that there is a presumption of prospective application from the effective date of an amendment, we conclude that the employer has presented ample and persuasive evidence of legislative intent that the 1984 amendment was a **clarification** of RCW 51.16.120. We, therefore, conclude that the 1984 amendment should be given retrospective application. Moreover, we conclude that there is no judicial interpretation of the statute requiring employer knowledge at the time of hire. *Jussila* and *Lyle* offer no such specific requirement.

Where the court has not previously interpreted the statute to mean something different and where the original enactment was ambiguous so as to generate dispute as to what the Legislature intended, the subsequent amendment shall be **effective from the date of the original act**, even in the absence of a provision for retroactivity. *Overton v. Economic Assistance Authority,* 96 Wn.2d 552, 557-558 (1981), citing *Carpenter v. Butler,* 32 Wn.2d 371 (1949*)*; *Johnson v. Morris,* 87 Wn.2d 922 (1976). (Emphasis added.)

The Legislature's intent in passing the 1984 amendment can be gleaned from the Bill Report for Senate Bill 3118 that provided the following background:

> The Department requires that an employer have knowledge of the previous injury in order to qualify for second injury fund relief. This prerequisite is based on its interpretation of case law. Proponents disagree with its interpretation and believe that employer knowledge of a previous injury is not required by statute or case law.

Thus, the Legislature considered *Jussila* and *Lyle,* and concluded that employer knowledge of the preexisting disability **was not a requirement**, by either the express language of the former RCW 51.16.120 or the case law in order for the employer to obtain second injury fund relief. Then Senator Philip Talmadge proposed SB 3118 to clarify that the statute never required employer knowledge of the preexisting disability at the time of hire. SB 3118 passed both the House and the Senate **unanimously**, further supporting that it was a clarifying amendment and it became effective June 7, 1984.

The following excerpt from the Senate Committee Hearing further illuminates the clarifying intention of the Legislature. Senator Talmadge, the amendment's sponsor, explained the purpose of the 1984 amendment:

> The fund was created as an inducement to employers to hire workers who were handicapped. The problem has been, in my judgment, that through an administrative interpretation by the Department of Labor and Industries, they have taken the position that the employer at the time of hiring of the individual had to know of the existence of the disability. The difficulty is quite frankly that some employees will not indicate that

> they've had previous disabilities or disabling injuries, and absent a very thorough pre-employment physical or a series of questions _____ to run a foul of guidelines now established by the State Human Rights Commission with respect to the hiring of the handicapped, the employer is not going to be able to know of the existence of the handicap. **I've read the cases relating to the second injury fund and it's my opinion that those cases say not that the employer has to know of the existence of the specific disability, but rather that the disability has to be something that has manifested itself, has to be known--it can't be latent arthritis, or something like that. But the Department takes the position that the employer actually has to know.**

February 1, 1983 Senate Committee on Commerce and Labor hearing. (Emphasis added.)

It is clear from this excerpt that the author of the 1984 amendment intended not to change the substance of the statute or prior Supreme Court precedent, but rather to change prior **interpretation by the Department of Labor and Industries**. Under these circumstances, the 1984 amendment is properly given retroactive effect. Because the amendment was a clarifying amendment, RCW 51.16.120(1) has always meant that an employer is entitled to second injury fund relief when the injured worker has a preexisting disability whether known or unknown to the employer, and that preexisting disability combines with the residuals from the industrial injury to cause permanent total disability.

The record is persuasive that at the time of the 1983 industrial injury, Mr. Powell had been an insulin dependent diabetic for several years, and probably had the beginnings of peripheral neuropathy in both feet as a result of diabetes. In addition to the intake of insulin, Mr. Powell, as a 20-year diabetic, would have had to carefully monitor his nutritional intake to maintain the diabetes. Clearly, Mr. Powell had received treatment for the diabetes, and that condition was known and symptomatic at the time of his industrial injury. While the record is devoid of specific information about whether the diabetes, and visits to his doctors for the diabetic condition, caused Mr. Powell to miss any work, we still find the evidence sufficient to conclude that the diabetes was disabling to Mr. Powell prior to the 1983 industrial injury. Dr. Bruce Bradley saw Mr. Powell within a year of the

industrial injury, noted the peripheral neuropathy, and felt that it most probably was present at the time of the industrial injury. Insulin therapy is administered to diabetic patients with more difficulty keeping their blood sugars in control. Even with the insulin therapy, just **before** the 1983 industrial injury, Mr. Powell demonstrated elevated blood sugars. We conclude that the need for monitoring diet and insulin level, and the peripheral neuropathy in both feet, had to have substantially and negatively impacted Mr. Powell's daily functioning and efficiency. We conclude that the record establishes that Mr. Powell's active micro-vascular disease of diabetes, more probably than not, was disabling prior to 1983.

The next determination is whether the diabetic condition combined with the residuals from Mr. Powell's 1983 industrial injury to his knee, and that the effects from both conditions combined to render him totally permanently disabled as of November 26, 1996. The self-insured employer established through the testimony of a vocational consultant and Dr. Marks that but for the effects from the diabetes, Mr. Powell would have been capable of light, sedentary gainful employment in 1996, when the Department placed him on a pension. When the residuals from the industrial injury, however, are combined with the effects of the diabetes, Mr. Powell was permanently totally disabled. Given this record, we conclude that the employer is entitled to second injury fund relief pursuant to RCW 51.16.120. The order denying the employer second injury fund relief is reversed and remanded to the Department with direction to allow Seattle School District No. 1 second injury fund relief in this claim.

FINDINGS OF FACT

1. The claimant, Marshall H. Powell, filed an application for benefits with the Department of Labor and Industries on February 10, 1984, for an injury sustained on December 22, 1983, during the course of employment with Seattle School District No. 1. The claim was accepted and benefits provided. On March 26, 1997, the Department issued an order finding the claimant permanently and totally disabled effective November 26, 1996. On July 3, 1997, the Department issued an order affirming an order of March 26, 1997, that denied second injury fund

relief to Seattle School District No. 1. On August 20, 1997, Seattle School District No. 1 filed an appeal with the Board of Industrial Insurance Appeals from the July 3, 1997 order. On September 24, 1997, the Board granted the appeal, assigned it Docket No. 97 6424 and ordered that hearings be held.

2. Mr. Powell sustained an industrial injury to his knee while working as a janitor for Seattle School District No. 1 on December 22, 1983, for which he received surgery. As of December 22, 1983 Mr. Powell had diabetes for 20 years. He had to monitor his diabetes through diet and had been to physicians to monitor his high level of sugars in the blood. He had been insulin dependent since 1981. As a result of his diabetes, he had peripheral neuropathy in both feet manifested by stocking-type numbness.

3. As of November 26, 1996, Mr. Powell was permanently totally unable to engage in gainful employment as a result of the combined effects from the preexisting and symptomatic diabetes mellitus and the left knee residuals from the 1983 industrial injury. But for the disabling diabetes condition that preexisted the December 22, 1983 injury, the residuals from the industrial injury to the left knee would not have resulted in Mr. Powell's permanent total disability as of November 1996.

CONCLUSIONS OF LAW

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

2. Prior to December 22, 1983, Mr. Powell had a previous bodily disability from his known and active diabetes disease within the meaning of RCW 51.16.120.

3. Employer knowledge of the preexisting disability at the time of hire of the injured worker is not required by RCW 51.16.120. The 1984 amendment to RCW 51.16.120 was a clarifying amendment, and second injury fund relief has been available to self-insured employers since 1977 whether the disabling condition was known or unknown to the employer at the time of hire.

4. Seattle School District No. 1 is entitled to second injury fund relief pursuant to RCW 51.16.120.

5. The Department order of July 3, 1997, is incorrect and is reversed. This claim is remanded with direction to the Department to allow the employer second injury fund relief pursuant to RCW 51.16.120.

It is so **ORDERED**.

Dated this 21st day of July, 1999.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

/s/_____
JUDITH E. SCHURKE Member