

Chiu, Mickey

[PERMANENT TOTAL DISABILITY \(RCW 51.08.160\)](#)

Effective date of pension

The effective date of a pension is not merely the date of medical fixity. If totally disabled prior to the effective date of the pension, the worker is entitled to time-loss compensation benefits until the Department acts to change the classification from temporary to permanent. The effective date may be the date the Department first acted to close the claim. *Citing In re Douglas Weston*, BIIA Dec., 86 1645 (1987). ...***In re Mickey Chiu*, BIIA Dec., 97 7432 (1999)** [*Editor's Note*: The Board's decision was appealed to superior court under Spokane County Cause No. 99-2-01327-6. *Overruled, In re Frederic Cuendet*, BIIA Dec., 99 21825 (2001).]

Scroll down for order.

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

1 **IN RE: MICKEY CHIU**) **DOCKET NOS. 97 7432 & 97 7432-A**
2)
3 **CLAIM NO. T-602558**) **DECISION AND ORDER**
4 _____)

5 **APPEARANCES:**

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7 Claimant, Mickey Chiu, by
8 Solan, Doran, Milhem & Hertel, P.S., per
9 Jerry E. Hertel

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11 Self-Insured Employer, Safeway, Inc., by
12 Law Offices of Annan & Associates, per
13 Edgar (Ned) L. Annan

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16 In the matter assigned Docket No. 97 7432, the claimant, Mickey Chiu, filed an appeal with
17 the Board of Industrial Insurance Appeals on September 23, 1997, from an order of the Department
18 of Labor and Industries dated September 12, 1997. In the matter assigned Docket No. 97 7432-A,
19 the self-insured employer, Safeway, Inc., filed a cross-appeal with the Board on October 30, 1997,
20 from the Department order dated September 12, 1997. The September 12, 1997 order affirmed the
21 provisions of a prior Department order dated June 12, 1997, that closed the claim with time loss
22 compensation paid through July 13, 1996, and directed the self-insured employer to pay a
23 permanent partial disability award equal to Category 5 of WAC 296-20-280 for permanent
24 dorso-lumbar and/or lumbosacral impairments. **REVERSED AND REMANDED.**
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34 **DECISION**

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36 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
37 and decision on a timely Petition for Review filed by the self-insured employer to a Proposed
38 Decision and Order issued on November 3, 1998, in which the order of the Department dated
39 September 12, 1997, was reversed and remanded to the Department to pay time loss
40 compensation for the period from July 14, 1996 to September 12, 1997, provide benefits to the
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1 claimant attendant to his status as a permanently totally disabled worker as of September 12, 1997,
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3 and take such further action as is consistent with the law and the facts.
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5 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
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7 no prejudicial error was committed and the rulings are affirmed. The issue presented by this appeal
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9 and the evidence presented by the parties are adequately set forth in the Proposed Decision and
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11 Order. We agree with our industrial appeals judge that Mr. Chiu was incapable of performing
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13 reasonably continuous gainful employment from July 14, 1996 through September 12, 1997, given
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15 his age, education, work experience, and residual limitations proximately caused by the industrial
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17 injury of December 4, 1991. Our only disagreement with our industrial appeals judge is the date
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19 that Mr. Chiu became a permanently and totally disabled worker within the meaning of
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21 RCW 51.08.160. In our view, the correct date is June 12, 1997.
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23 Our review of the record in this matter reveals that the parties stipulated that the claimant's
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25 low back condition was fixed and stable as of September 12, 1997. The medical evidence,
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27 however, actually establishes that Mr. Chiu reached medical fixity before that date. The claimant's
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29 treating physician, Michael Carraher, M.D., was of the impression that the claimant's chronic low
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31 back condition was fixed and stable as of May 6, 1996, although he cautioned that surgery may be
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33 required at some point in the future. Likewise, Dr. Steven Sears, who testified on behalf of the
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35 employer, thought that Mr. Chiu had reached medical fixity as of October 16, 1996.
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37 This Board has held that time loss compensation benefits cannot be terminated based on
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39 medical fixity until the Department has acted to change the classification of the worker's disability
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41 from temporary to permanent. *In re Douglas Weston*, BIIA Dec., 86 1645 (1987). This action
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43 occurred on June 12, 1997, when the Department first closed Mr. Chiu's claim. Once the
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45 Department has classified a worker's condition as fixed and stable, the worker must present
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1 medical evidence to the contrary in order to make a case for temporary total disability benefits.
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3 *Weston*, at 4. Mr. Chiu did not present such evidence. Therefore, we conclude that Mr. Chiu's total
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5 disability became permanent as of June 12, 1997.

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7 After consideration of the Proposed Decision and Order and the self-insured employer's
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9 Petition for Review filed thereto, and a careful review of the entire record before us, we are
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11 persuaded that the Department order of September 12, 1997, is incorrect and must be reversed.
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13 This matter is remanded to the Department to issue an order directing the self-insured employer to
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15 pay the claimant time loss compensation benefits for the period July 14, 1996 to June 12, 1997; to
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17 find the worker permanently totally disabled effective June 12, 1997; and to provide benefits to the
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19 claimant attendant with his status as a permanently totally disabled worker.

20 21 **FINDINGS OF FACT**

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23 1. On December 13, 1991, the claimant, Mickey Chiu, filed an application
24 for benefits with the Department of Labor and Industries, alleging an
25 industrial injury to his back on December 4, 1991, in the course of
26 employment with Safeway, Inc.

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28 On January 2, 1992, the Department issued an order allowing the claim
29 for medical treatment.

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31 On June 12, 1997, the Department issued an order closing the claim
32 with time loss compensation paid through July 13, 1996, and directed
33 the self-insured employer to pay a permanent partial disability equal to
34 Category 5 for permanent dorso-lumbar and/or lumbosacral
35 impairments.

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37 On July 11, 1997, the claimant filed a Notice of Appeal with the Board of
38 Industrial Insurance Appeals from the Department order dated June 12,
39 1997.

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41 On July 30, 1997, the self-insured employer filed a Notice of Appeal with
42 the Board from a Department order dated June 12, 1997, that was
43 received at the Department on July 29, 1997, as a protest and request
44 for reconsideration and forwarded to the Board as a direct appeal.

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46 On August 20, 1997, the Board issued an order denying both appeals
47 docketed under 97 5338 and 97 5832.

1 On September 12, 1997, the Department issued an order affirming the
2 provisions of the June 12, 1997 order.

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4 On September 23, 1997, the claimant filed a Notice of Appeal with the
5 Board from the Department order dated September 12, 1997.

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7 On October 30, 1997, the self-insured employer filed a cross-appeal
8 with the Board from the Department order dated September 12, 1997.

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10 On November 12, 1997, the Board issued an order granting the
11 claimant's appeal and assigning it Docket No. 97 7432.

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13 On November 19, 1997, the Board issued an order granting the
14 self-insured employer's cross-appeal and assigned it Docket
15 No. 97 7432-A.

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17 2. On December 4, 1991, the claimant sustained an industrial injury while
18 in the course of employment with Safeway, Inc., when he fell 10 feet
19 through a ceiling.
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21 3. The industrial injury of December 4, 1991, was a proximate cause of the
22 claimant's compression fractures of L1, L3, L4, and T11. The conditions
23 proximately caused by the industrial injury produced clinical findings of a
24 palpable deformity at the area of the significant L1 fracture, kyphosis of
25 the lumbar spine, and limited lumbar range of motion.
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27 4. The industrial injury of December 4, 1991, was not a proximate cause of
28 the claimant's mental health and neurological conditions, if they existed.
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30 5. As of June 12, 1997, the claimant's conditions, proximately caused by
31 the industrial injury of December 4, 1991, were fixed and not in need of
32 further necessary and proper treatment.
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34 6. Mickey Chiu, an Asian restaurant manager and chef, was born on
35 January 11, 1951, and emigrated from Taiwan to the United States in
36 1979. He graduated from high school and attended college for one year
37 in Taiwan. His singular work history limits his transferable skills to
38 operating a cash register, seating customers, and ordering supplies.
39 Mr. Chiu lacks the ability, beyond the third grade level, to comprehend,
40 concept or understand, speak, read, write, or otherwise communicate in
41 English. Mr. Chiu's left index finger is amputated at the terminal phalanx
42 joint and he has difficulty manipulating and performing fine finger
43 dexterity.
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7. The industrial injury of December 4, 1991, proximately caused the following limitations: exertional activities were limited to sedentary work; sitting, standing, and walking alternately is limited to no more than half time; bending is limited to a seldom basis; and lifting and carrying was limited to 20 pounds occasionally, 10 pounds frequently and 5 pounds continuously. The claimant requires frequent rest periods when he must recline up to 50 percent of the day.
 8. From July 14, 1996 through June 12, 1997, the claimant was incapable of performing and obtaining gainful employment on a reasonably continuous basis, including but not limited to employment as a small products assembler, electronics worker, restaurant host, general clerk, or wire worker due to the claimant's age, education, training and experience, reaction to the injury, loss of function, and physical capacities, proximately caused by the industrial injury of December 4, 1991.

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CONCLUSIONS OF LAW

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1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and the subject matter of this appeal.
 2. As of June 12, 1997, the claimant's conditions, proximately caused by the industrial injury of December 4, 1991, were fixed and did not require further necessary and proper treatment within the meaning of RCW 51.36.010 and WAC 296-20-01002.
 3. The claimant was a totally and temporarily disabled worker due to the residual effects, proximately caused by the industrial injury of December 4, 1991, from July 14, 1996 to June 12, 1997, as contemplated by RCW 51.32.090.
 4. As of June 12, 1997, the claimant was a permanently and totally disabled worker, due to the residual effects proximately caused by the industrial injury of December 4, 1991, as contemplated by RCW 51.08.160.
 5. The Department order dated September 12, 1997, that affirmed the provisions of an order dated June 12, 1997, is incorrect and is reversed. The claim is remanded to the Department to pay time loss compensation for the period from July 14, 1996 to June 12, 1997, provide benefits to the claimant attendant to his status as a permanently

1 totally disabled worker as of June 12, 1997, and take such further action
2 as is consistent with the law and the facts.

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4 It is so ORDERED.

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6 Dated this 12th day of February, 1999.

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8 BOARD OF INDUSTRIAL INSURANCE APPEALS

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11 /s/ _____
12 THOMAS E. EGAN Chairperson

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

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