Neuman, Roger

PERMANENT TOTAL DISABILITY (RCW 51.08.160)

Effective date of pension

The effective date of permanent total disability benefits is the date the worker is both medically fixed and as a vocational matter, demonstrably permanently unable to be gainfully employed. **….*In re Roger Neuman*, BIIA Dec., 97 7648 (1999)** [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 99-2-18088-7 KNT.]

Retroactive effective date of pension

A permanent total disability determination is a combination of medical and vocational fixity, and should turn on the facts then in existence. A retroactive determination should be based on the date medical and vocational experts arrive at the determination that a worker is permanently totally disabled. Our decision should not be interpreted as an invitation for parties to establish a date for permanent total disability by the use of hindsight. **….*In re Roger Neuman*, BIIA Dec., 97 7648 (1999)** [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 99-2-18088-7 KNT.]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: ROGER D. NEUMAN	)	**DOCKET NO. 97 7648**
	)	
CLAIM NO. T-828958	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Roger D. Neuman, Pro Se

Self-Insured Employer, The Boeing Company, by
Reinisch, Weier & Mackenzie, P.C., per
Michael H. Weier

Department of Labor and Industries, by
The Office of the Attorney General, per
Kay A. Germiat, Assistant

The self-insured employer, The Boeing Company (hereafter Boeing), filed an appeal with the Board of Industrial Insurance Appeals on September 29, 1997, from an order of the Department of Labor and Industries dated September 16, 1997. The order determined that the claimant's medical condition proximately caused by his industrial injury of July 13, 1993, was fixed and stable and had resulted in total and permanent disability. It further ordered that he be so classified and placed on the pension rolls effective November 1, 1997. **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 Department to a Proposed Decision and Order issued on November 13, 1998, in which the order of the Department dated September 16, 1997, was reversed and remanded to the Department with direction to issue an order declaring that as of September 9, 1996, the claimant was permanently totally disabled as a proximate result of his industrial injury of July 13, 1993.

The Board has reviewed the evidentiary rulings in the record of proceedings. In the Proposed Decision and Order, our industrial appeals judge determined that the testimony of William E. Travis that was taken on August 13, 1998, was irrelevant to the issues presented by this

appeal and struck his testimony in its entirety. We disagree. Mr. Travis' testimony is relevant in that it provides the basis for the Department's decision to place Mr. Neuman on the pension rolls effective November 1, 1997. The ruling is reversed, and the testimony of Mr. Travis is reestablished as part of the Board's record in this appeal.

We also reverse the ruling of our industrial appeals judge on page 23 of the August 13, 1998 transcript of testimony. The testimony that appears in colloquy from page 23, line 49 through page 24, line 25 is taken out of colloquy and is made part of the Board's record.

All other procedural and evidentiary rulings are affirmed.

We take notice that in a related appeal regarding Mr. Neuman's claim, which was assigned Docket No. 97 7649, Boeing was determined to be entitled to second injury fund relief. The Department did not file a Petition for Review from that proposed decision, which was adopted by this Board by order dated September 15, 1998, and became final and binding.

We are called upon in this appeal to decide whether a self-insured employer, who is otherwise entitled to second injury fund relief, should be denied that relief for the period of time the Department requires to adjudicate and complete administrative functions necessary to complete the process of placing the worker on the Department's pension rolls.

We agree with the result reached by our industrial appeals judge in the Proposed Decision and Order dated November 13, 1998, that Mr. Neuman was permanently totally disabled effective September 9, 1996.

We hold that a worker is permanently totally disabled effective the date the worker is both medically fixed and, as a vocational matter, is demonstrably permanently unable to be gainfully employed on a reasonably continuous basis as a result of the conditions proximately caused by the worker's industrial injury. We have granted review in order to discuss the basis for our decision.

As a result of his July 13, 1993 industrial injury while working for Boeing, Mr. Neuman sustained multiple injuries that included fractured bones in his left leg, right hip and face and a knee injury. The parties stipulated that Mr. Neuman's medical conditions proximately caused by his July 13, 1993 industrial injury, both physical and mental, were fixed and stable as of September 9, 1996.

On September 3, 1993, Jocelyn Nelson, a vocational rehabilitation counselor, was referred by Crawford and Company (Crawford) to assess Mr. Neuman's potential for return to gainful employment. Crawford was the administrator of workers' compensation claims filed with Boeing, which is a self-insured employer under the Washington Industrial Insurance Act. Ms. Nelson was aware that Mr. Neuman's conditions that were proximately caused by his industrial injury were "quite medically unstable" as of the date the referral was made. 8/13/98 Tr. at 9. She was asked to assess Mr. Neuman's skills and vocational strengths and weaknesses so that Boeing could readily make further vocational determinations once his conditions became medically stable.

During the course of her vocational assessment, Ms. Nelson became aware that prior to July 13, 1993, Mr. Neuman had disabling conditions involving his heart and lumbar spine. She personally monitored Mr. Neuman's progress during his participation in a work-hardening program in July and August 1994. From November 1994 through January 1995, she conducted labor market surveys regarding various types of work in order to determine whether Mr. Neuman had the potential to perform the work. As part of her assessment, Ms. Nelson had Mr. Neuman undergo vocational testing of his academic and other skills and aptitudes in December 1995.

Based on the data she obtained and the observations she made, Ms. Nelson determined in the spring of 1996 that if only the effects of his July 13, 1993 industrial injury were taken into consideration, Mr. Neuman was capable of obtaining and performing work as an electronics assembler in the competitive labor market. By June 1996, however, Ms. Nelson concluded that if

the effects of his industrial injury were considered in combination with disabilities caused by his preexisting cardiac and lumbar conditions, Mr. Neuman could not obtain or perform any gainful employment in the competitive labor market.

The Department produced no evidence to challenge the accuracy of Ms. Nelson's conclusions.

William Travis has been a pension adjudicator for the Department of Labor and Industries for twenty years and has been the Department's only pension adjudicator for self-insured claims since 1986. When a self-insured employer requests that a worker be declared eligible for permanent total disability benefits, Mr. Travis said that he investigates multiple factors pertinent to such a determination. He routinely investigates whether the self-insured employer should receive second injury fund relief as part of his investigation. In addition, in making the determination, Mr. Travis said:

> I routinely request the indulgence of the self-insured community in situations like Mr. Neuman's, whereby I postdate the date effective of the pension because we have a tremendous amount of correspondence that is required back and forth between the injured worker and the Department in order to set up the pension. . . . We have to have the injured worker complete a questionnaire relative to vital statistical elements, such as birth date, other than vital statistics. And then in the vast majority of cases, the injured worker has to make an option determination based on statutory requirements that a particular option be exercised by the injured worker having to do with a conversion of a pension to the surviving dependent upon the death of the pensioner.

8/13/98 Tr. at 60.

Notwithstanding his usual practice of postdating the effective date of orders declaring a worker to be permanently totally disabled, Mr. Travis testified that on some occasions, he issues orders that declare a worker to be permanently totally disabled as of a date prior to the date of his order.

> it's my opinion that to facilitate the closure of the close [*sic*] and an agreement of the parties, I will agree to retro date a pension back to a date that meets the agreement of the parties involved to facilitate the closure of the claim.
>
> This, of course, based on the fact that we have reached medical fixity and the information is present that would support a final determination on the claim.

8/13/98 Tr. at 69.

On December 17, 1996, Crawford forwarded relevant information to Mr. Travis and requested that he issue an order determining that Mr. Neuman was permanently totally disabled as a proximate result of his July 13, 1993 injury combined with pre-existing impairments and requested second injury fund relief. Mr. Travis testified that he communicated with Crawford by telephone in February 1997, and at that time Crawford requested that they be allowed to submit more documentation. Crawford submitted another request to the Department in August 1997. Mr. Travis further testified that the decision to place Mr. Neuman on the pension rolls effective November 1, 1997, was in order to allow the Department time to perform actions in preparation for the Department's administration of Mr. Neuman's pension benefits.

The Department asserts that the principle of *Lenk v. Department of Labor & Indus.,* 3 Wn. App. 977 (1970) deprives this Board of jurisdiction to adjust the date when Mr. Neuman should be determined to have been permanently totally disabled. In that case, the Court of Appeals declared that the Board obtains jurisdiction only to adjudicate issues addressed by the Department in the order under appeal. The September 16, 1997 Department order here appealed determined that Mr. Neuman was permanently totally disabled as of November 1, 1997. The Department argues that this Board's jurisdiction is limited to determining whether the November 1, 1997 date is the correct date and if not, the claim must be remanded to the Department to set an effective date for payment of pension to Mr. Neuman other than November 1, 1997.

The Department's argument misconstrues the extent to which *Lenk* limits our jurisdiction. The Department presented no authority to support its contention that the Court of Appeals intended to so broadly restrict our jurisdiction. Its interpretation of the holding of the case would virtually guarantee a multiplicity of litigation in workers' compensation claims.

In appeals in which the Department order on appeal closes a claim "with time loss compensation as paid to" a date certain, this Board has jurisdiction to decide whether the worker is eligible for time loss compensation benefits during any periods of time prior to the date certain set out in the Department order. Our jurisdiction in this appeal is no different. By adjudicating that Mr. Neuman was permanently totally disabled as of November 1, 1997, the Department put at issue whether the claimant should have been so classified as of an earlier date and gave us jurisdiction to set such a date.

The Department further argues that in *Harris v. Department of Labor & Indus.,* 120 Wn.2d 461 (1993), our Supreme Court established a general rule that divests this Board of authority to set a date of permanent total disability earlier in time to the date the Department declares a worker permanently totally disabled. In *Harris,* the Department reduced benefits paid to the widow of a permanently totally disabled worker because her husband was not actually receiving permanent total disability benefits under the Industrial Insurance Act as of July 1, 1986. RCW 51.32.225(1) exempted from the social security retirement deduction any worker who was in receipt of permanent total disability benefits prior to July 1, 1986. Mrs. Harris argued that the exemption from the deduction should be applied to claims in which the date of the worker's injury was July 1, 1986. Recognizing that the statute's language was unambiguous, the Supreme Court held that, for purposes of the statute, a worker "receives" benefits when the worker takes possession of the benefits.

The court in *Harris* did not address the issue of when Mr. Harris became permanently totally disabled. The issues did not include whether his medical conditions caused by his industrial injury were fixed and stable, and he was vocationally permanently totally disabled prior to July 1, 1986. Accordingly, the issues decided by the court in *Harris* were far attenuated from the issue presented by this appeal.

The Department urges that if we determine that a worker should be deemed permanently totally disabled prior to the date of the Department order placing the worker on the agency's pension rolls, this Board acts inconsistently with its decisions involving time loss compensation and loss of earning power benefits. We have held that the latter benefits cannot be terminated until the Department issues an order that effectively declares the worker's medical condition to be fixed and stable. *In re Charles Deering,* BIIA Dec. 25 904 (1968).

The only difference between temporary and permanent total disability is the duration of disability. Accordingly, posits the Department, payments to a permanently totally disabled worker should be construed as for temporary disability up to the date the Department issues an order that declares the worker's condition permanently fixed and stable. In this appeal, that order was issued on September 16, 1997.

The fundamental rationale for requiring the Department to issue an order that terminates time loss compensation or loss of earning power benefits is to ensure that aggrieved parties have an opportunity to timely challenge the Department's action. The date of the Department's order has been referred to as the date of "legal fixity." Establishing a date of legal fixity is not critical in claims in which a worker is determined to be permanently totally disabled. If the worker is receiving ongoing temporary total disability benefits on the date he or she is declared permanently totally disabled, no interruption of wage replacement benefits will occur. If time loss compensation or loss of earning power benefits have been terminated prior to the date the Department declares the

worker permanently totally disabled, the Department will presumably have previously issued an order from which the worker could appeal. Requiring that a date of legal fixity be established before the effective date of commencement of permanent total disability benefits would serve no purpose.

Next, the Department contends that because collateral information must be obtained to allow proper calculation of pension benefits prior to placing a worker on the agency's pension rolls, retro-dating the effective date of permanent total disability is barred.

RCW 51.32.050(7) provides that "for claims filed on or after July 1, 1986, every worker who becomes eligible for permanent total disability benefits shall elect an option as provided in RCW 51.32.067." RCW 51.32.067 lists options for the distribution of benefits to be paid to a disabled worker and/or his or her beneficiaries upon the death of the worker. The Department argues that RCW 51.32.050(7) **requires** a worker to elect an option **prior** to the effective date upon which he or she is determined to be permanently totally disabled. The record did not evidence the date when Mr. Neuman made such an election, but it seems clear that he had not done so as of September 9, 1996.

The Department's argument is without merit. No provision of either RCW 51.32.050(7) or RCW 51.32.067 requires a worker to elect an option **prior** to the effective date of permanent total disability benefits.

In *Department of Labor & Indus. v. Freeman,* 87 Wn. App. 90 (1997), Mr. Freeman sustained an industrial injury on June 20, 1989, for which he was in receipt of temporary total disability benefits through February 3, 1992. On February 4, 1992, Mr. Freeman died from causes unrelated to his industrial injury. Mrs. Freeman subsequently filed a timely application for survivor's benefits with the Department. Her claim was ultimately allowed, but a dispute arose whether benefits payable by the Department to her were properly calculated under the terms of RCW 51.32.067 as it existed prior to July 1, 1986, or under the terms of the statute as it read after it was amended

effective July 1, 1986. Prior to July 1, 1986, beneficiaries received essentially the same benefits the worker had been receiving prior to death. After July 1, 1986, compensation to a beneficiary was calculated in accordance with the option that the worker chose in connection with being declared permanently totally disabled. Mr. Freeman died without choosing one of the options. Mrs. Freeman contended that the Department had no authority to designate one of the options as applicable for calculation of her benefits and that, therefore, she should receive the same benefits as were paid to her husband.

The Court of Appeals held that when an injured worker dies before electing one of the options of RCW 51.32.067, the Department has authority to make an election on behalf of the surviving spouse that maximizes the benefits received by the beneficiary. The case illustrates that a worker need not choose a benefit option under the statute prior to being declared permanently totally disabled.

Should a survivor of a permanently totally disabled worker be paid benefits prior to designation of a payment option, any error in the level of benefits paid may be later adjusted. The Department has authority to tailor future pension payments in order to adjust for any overpayment or underpayment made to a claimant for periods of time during which he or she is later determined to have been entitled to permanent total disability benefits. The Department's argument is not supported by statutory or case authority or by practical necessity.

Mr. Travis described a number of administrative functions that must be accomplished in order to place a worker on the "pension rolls." We agree with the Department that postdating the date when a worker is placed on the Department's pension rolls is practical for administrative purposes. However, denying second injury fund relief for the period during which the Department obtains information needed for administrative functions is prejudicial to the employer entitled to the relief. The evidence in this record shows that Mr. Neuman's medical conditions proximately caused

by his July 13, 1993 industrial injury were fixed and stable and that he was demonstrably permanently unable to work as of September 9, 1996. The Department did not declare his permanent total disability status until September 16, 1997, when it prospectively placed him on the pension rolls effective November 1, 1997. Between September 9, 1996 and November 1, 1997, Boeing was solely accountable for the costs of Mr. Neuman's claim. Again, from this record, we find that the self-insured employer is entitled to second injury fund relief for that period of time.

The Department argues that a worker cannot be determined to be permanently totally disabled as of a date earlier than the date of the Department order declaring them permanently totally disabled, or prior to the effective date of the worker's placement on the pension rolls. We see no compelling or legal reason that the date a worker's name is added to the Department's pension rolls for administrative purposes should have any bearing on the date a worker is declared to be effectively permanently disabled. The date the Department makes the determination that a worker is permanently totally disabled has no inherent significance other than the fact that it is the date the Department made the decision. Further, the only significance of the date the Department places the worker on the pension rolls is to establish the effective date of the Department's administration of benefits from the pension rolls.

We have also considered whether the date of permanent total disability should be the date the Department receives the information that demonstrates a worker is permanently totally disabled and that the employer is entitled to second injury fund relief. The Department contends that Boeing, as a self-insured employer, should not be entitled to second injury fund relief during the period they "controlled administration of the claim." We recognize that actions to administer claims do not generally occur contemporaneously with a worker's change in status. The Department, in its role as adjudicator, must take action after the fact. On self-insured pension cases, that action takes place not only after the fact, but also after the self-insurer has gathered documentation and

submitted it to the Department for a determination. The date a self-insurer submits documentation to the Department is a date that is also necessarily a function of the administration of the claim. In its Petition for Review, the Department argues against the establishment of "fictitious pension dates" for the purposes of second injury fund relief. We agree. However, we find the date a self-insured employer submits documentation for Department adjudication to be no less fictitious than the prospective date placing a worker on the pension rolls, since the employer can submit a request prematurely or without sufficient information for the Department to make a determination. We can find no legal basis to support this date as the date of permanent total disability. We believe the focus should be on the date that the worker is permanently totally disabled as a matter of fact.

In *In re Larry N. Sherwood,* Dckt. Nos. 92 1875 & 92 1879 (January 20, 1994), we held that, "The date an injured worker is entitled to be placed on the pension rolls is the date the condition is fixed and stable, and permanently prevents the worker from performing reasonably continuous gainful activity." The date does not hinge solely on the date of medical fixity but on the date the worker is both medically fixed and demonstrably unable to obtain or perform gainful employment activity on a reasonably continuous basis as a proximate result of his or her industrial injury. We believe that the principle enunciated in *Sherwood* is sound, both legally and factually.

We hold that a worker is permanently totally disabled effective the date the worker is both medically fixed and, as a vocational matter, is demonstrably permanently unable to be gainfully employed on a reasonably continuous basis as a proximate result of the worker's industrial injury. Should any preexisting disabling medical conditions also be a proximate cause of permanent total disability, the employer at risk may be entitled to second injury fund relief effective the same date.

Our holding here is also consistent with our decision in *In re Harold McCormack,* BIIA Dec. 90 3178 (1992), in which we held:

> Where the evidence indicates second injury fund relief is appropriate, the self-insured employer is entitled to have the pension reserve

> charged against the second injury fund as of the date of onset of the worker's permanent total disability, not the [prospective] date the Department identified as the date it was placing the worker on the pension rolls.

In this appeal, the parties' stipulation established that Mr. Neuman was medically fixed and stable as of September 9, 1996, and the employer's vocational witness persuasively supported that he was demonstrably permanently totally disabled from a vocational standpoint as of September 9, 1996 as well. We caution that our decision that a permanent total disability date can be retroactively established in a Department order should not be interpreted as an invitation for parties to establish a date of permanent total disability by the use of hindsight. A permanent total disability determination is a combination of medical and vocational fixity, and should turn on the facts then in existence. A retroactive determination should be based on the date medical and vocational experts arrived at the determination that the worker was permanently totally disabled. The date of permanent total disability should not be set as of the date of initiation of medical or vocational endeavors which, at the time of their implementation and course, are intended to reduce a worker's disability or enhance the worker's ability to return to work, even if the courses are later determined to have been in vain. So long as the medical or vocational services were initiated as reasonably intended to reduce disability, they remain proper and necessary to their conclusion.

In this appeal, the order of the Department dated September 16, 1997 is reversed and this matter is remanded to the Department with directions to issue an order that Mr. Neuman's industrial injury of July 13, 1993, combined with the effects of preexisting disabling cardiac and lumbar impairments proximately caused him to become permanently totally disabled effective September 9, 1996.

FINDINGS OF FACT

1. On July 27, 1993, The Boeing Company, a self-insured employer under the Washington Industrial Insurance Act, received an application for benefits on behalf of Roger D. Neuman, alleging that he had been

injured during the course of his employment with The Boeing Company on July 13, 1993. The application for benefits was subsequently forwarded to the Department of Labor and Industries. On September 7, 1993, the Department allowed the claim for benefits. On September 16, 1997, the Department issued an order that declared that Mr. Neuman's conditions proximately caused by his industrial injury were fixed and stable and had rendered him permanently totally disabled. The order declared that Mr. Neuman would be placed on the Department's pension rolls as of November 1, 1997. On September 29, 1997, The Boeing Company filed a Notice of Appeal with the Board of Industrial Insurance Appeals from the September 16, 1997 order of the Department. This Board extended the time within which it had to consider the appeal on October 29, 1997, but granted the appeal on November 7, 1997. The November 7, 1997 order assigned the appeal Docket No. 97 7648 and directed that further proceedings be held.

2. Mr. Neuman was injured during the course of his employment with Boeing on July 13, 1993.

3. The claimant sustained fractures of his left leg, right hip and face, and a knee injury, proximately caused by his industrial injury of July 13, 1993.

4. From a vocational standpoint, as of June 1996, Mr. Neuman was capable of performing work as an electronics assembler, if only the effects of his July 13, 1993 industrial injury were taken into consideration.

5. As of June 1996, based on previous vocation evaluations of his employability, Mr. Neuman was not capable of obtaining and performing gainful work activity on a reasonably continuous basis in the competitive labor market if the effects of his July 13, 1993 industrial injury and the effects of his preexisting disabling cardiac and lumbar impairments were taken into consideration.

6. The claimant's conditions proximately caused by his industrial injury of July 13, 1993, were medically fixed and stable and not in need of further necessary and proper medical treatment as of September 9, 1996.

CONCLUSIONS OF LAW

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

2. The claimant was permanently totally disabled within the meaning of RCW 51.08.160 as a proximate cause of his industrial injury of July 13, 1993, as of September 9, 1996.

3. The order of the Department of Labor and Industries dated September 16, 1997, is incorrect and is reversed. This matter is remanded to the Department with directions to issue an order that determines that as of September 9, 1996, the claimant was permanently totally disabled as a proximate cause of his July 13, 1993 industrial injury, and to take such other and further action as is indicated by the law and the facts, including a determination pursuant to our adjudication in Docket No. 97 7649 that the self-insured employer is entitled to second injury fund relief effective September 9, 1996.

It is so **ORDERED**.

Dated this 9th day of July, 1999.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

/s/_____
JUDITH E. SCHURKE Member