

## **Boudon, Crella**

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### **PERMANENT TOTAL DISABILITY (RCW 51.08.160)**

**Continuing medical benefits**

### **SECOND INJURY FUND (RCW 51.16.120)**

**Continuing medical benefits**

The pension was awarded with second injury fund relief available to the self-insured employer and continuing medical treatment for the worker. Because the second injury fund is not funded to provide for medical benefits, the ongoing medical treatment is the responsibility of the self-insured employer. ....*In re Crella Boudon, BIIA Dec., 98 17459 (2000)* [Editor's Note: The Board's decision was appealed to superior court under King County Cause No. 00-2-05182-4KNT.]

Scroll down for order.

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

1 **IN RE: CRELLA J. BOUDON** ) **DOCKET NOS. 98 17459 & 99 22359**  
2 )  
3 **CLAIM NO. T-380016** ) **DECISION AND ORDER**  
4

5 **APPEARANCES:**

6  
7 Claimant, Crella J. Boudon, by  
8 Rumbaugh, Rideout & Barnett, per  
9 Teri L. Rideout

10  
11 Self-Insured Employer, The Boeing Company, by  
12 Craig, Jessup & Stratton, per  
13 Rebecca D. Craig and Janet L. Smith

14  
15 Department of Labor and Industries, by  
16 The Office of the Attorney General, per  
17 Penny L. Allen, Assistant  
18

19  
20 These appeals were filed by the self-insured employer, The Boeing Company, with the  
21 Board of Industrial Insurance Appeals on August 24, 1998, regarding orders of the Department of  
22 Labor and Industries dated June 25, 1998.  
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25  
26 With respect to Docket No. 98 17459, the June 25, 1998 Department order confirmed that,  
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28 by separate order, the Department had placed the claimant on the pension rolls as a totally  
29 permanently disabled worker effective July 20, 1998, that the permanent partial disability caused by  
30 the industrial injury of June 19, 1989, would have resulted in an award equal to \$36,000 and that,  
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32 when the disability was combined with and superimposed upon prior disabling conditions, the  
33 classification of total permanent disability resulted. Accordingly, the Department ordered the  
34 self-insured employer to submit the sum of \$36,000 made payable to the Department of Labor and  
35 Industries and determined that the balance of the pension reserve required to pay the worker's  
36 pension would be charged against the second injury account. **REVERSED AND REMANDED.**  
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44 With respect to Docket No. 99 22359, the June 25, 1998 Department order stated that the  
45 claimant had been classified as permanently totally disabled and placed on the pension rolls  
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1 effective July 20, 1998, and authorized treatment to continue for the claimant's anti-depressant  
2 medication and medical monitoring thereof. **REVERSED AND REMANDED**

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5 **PROCEDURAL AND EVIDENTIARY MATTERS**  
6

7 The self-insured employer's Notice of Appeal specifically references both Department orders  
8 issued in this claim on June 25, 1998. The two Department orders have separate subject matters.  
9 One awards a pension and authorizes ongoing payment for medical treatment and medication  
10 associated with the claimant's psychiatric condition. That appeal was not specifically docketed.  
11 The second order directs second injury fund relief. That appeal was granted and assigned Docket  
12 No. 98 17459. At no point during the hearing process did the parties or the representatives of the  
13 Board notice the failure to assign a docket number to the first appeal. The jurisdictional facts  
14 relative to both appeals were stipulated into the record on May 3, 1999. 5/3/99 Tr., pp. 20-21. In  
15 addressing the Department's Petition for Review, the Board recognized the docketing error. By  
16 order dated December 6, 1999, the Board assigned the overlooked appeal Docket No. 99 22359.  
17 Because the parties proceeded with hearings as though the appeal in Docket No. 98 17459 had  
18 been granted from both Department orders of June 25, 1998, the appeals will be treated as having  
19 been consolidated for hearing. The complete record of proceedings in Docket No. 98 17459,  
20 including the May 3,1999 stipulation to the accuracy of the jurisdictional history prepared by the  
21 Board, is deemed to be the record in the appeal assigned Docket No. 99 2359.  
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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 Department to a Proposed Decision and  
38 Order issued on August 31, 1999, in which the order [*sic*] of the Department dated June 25, 1998,  
39 was reversed and remanded to the Department with directions to issue an order declaring the  
40 claimant a permanently totally disabled worker; determining that the self-insured employer was  
41 entitled to second injury fund relief as of June 1, 1996; directing that the self-insured employer  
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1 The Department also argues that it is appropriate to post-date the effective date of pension benefits  
2  
3 for administrative convenience.  
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5 The Board has addressed this issue on a number of occasions, and has designated one of  
6  
7 its decisions as a significant decision under RCW 51.52.160. *In re Harold J. McCormack*, BIIA  
8  
9 Dec., 90 3187 (1992). In *McCormack*, we held that the effective date for placing the claimant on  
10  
11 the pension rolls and for charging the balance of the pension reserve against the second injury fund  
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13 was the date the claimant became permanently and totally disabled. We rejected the effective date  
14  
15 selected by the Department, which was nearly one month after the date of the Department order  
16  
17 placing the claimant on the pension rolls. *In re Larry N. Sherwood*, Dckt. Nos. 92 1875 and  
18  
19 92 1879 (January 20, 1994); and *In re Roger D. Neuman*, Dckt. No. 97 7648 (July 9, 1999).  
20

21 In *Sherwood*, we concluded that the claimant was entitled to permanent total disability  
22  
23 benefits when his condition was both medically stable and when he was permanently precluded  
24  
25 from performing reasonably continuous gainful employment. We explained that:  
26

27 Receipt of total permanent disability benefits involves questions about  
28 whether an injured worker can return to the work force given any  
29 restrictions on physical functioning. Frequently these questions cannot  
30 be answered until well after an injured worker's condition is fixed. The  
31 reason that the determination of whether someone is totally permanently  
32 disabled cannot turn on the date of medical fixity is because frequently  
33 there are periods after medical fixity has been achieved when the  
34 worker is in vocational retraining programs. Such is the case with  
35 Mr. Sherwood. His vocational efforts continued well after the date that  
36 his condition was medically fixed. While his efforts to become  
37 re-employable eventually proved to be unsuccessful, he cannot be  
38 considered to be totally permanently disabled until such time as those  
39 efforts are shown to have failed in returning him to gainful employment.  
40

41 *Sherwood* at 3-4.  
42

43 In *Neuman*, we held that an injured worker is permanently totally disabled effective the date  
44  
45 the worker is both medically fixed and, as a vocational matter, is demonstrably permanently unable  
46  
47 to be gainfully employed on a reasonably continuous basis. The date the claimant becomes so

1 disabled is the date the claimant is entitled, by law, to permanent total disability benefits. It is also  
2  
3 the date the self-insured employer is entitled to second injury fund relief for cases in which the  
4  
5 claimant's disability is due to the combined effects of the industrial injury and the claimant's  
6  
7 pre-existing, disabling conditions. We noted the proper focus in identifying the effective date for  
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9 benefits and second injury fund relief is on the date that the worker is permanently totally disabled  
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11 as a matter of fact. We specifically rejected the date of medical fixity, the date the employer  
12  
13 submits documentation and a request to the Department to make a determination about permanent  
14  
15 total disability, and the prospective date selected by the Department after making its determination.  
16

17         Unlike the claimants in *Neuman* and *McCormack*, Ms. Boudon was not actively engaged in a  
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19 specific program of vocational training when her physical and mental conditions became medically  
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21 stable. According to the stipulated record, for purposes of permanent total disability Ms. Boudon's  
22  
23 physical condition was medically stable as of June 1, 1996, and her mental health condition was  
24  
25 stable as of February 24, 1997. The self-insured employer submitted the claimant's file to  
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27 vocational consultant Paul Green on December 11, 1997. In addition to the records provided by the  
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29 self-insured employer, Mr. Green sought information on medical fixity from treating orthopedist,  
30  
31 Dr. St. Elmo Newton, III. Mr. Green received that information in a letter dated January 13, 1998. At  
32  
33 some point, Mr. Green formed the opinion that vocational efforts would not benefit Ms. Boudon.  
34  
35 However, he did not document that opinion in writing until he drafted a written report on January 19,  
36  
37 1999, after this case was on appeal. In that report, he expressed the opinion that Ms. Boudon was  
38  
39 permanently totally disabled effective June 1, 1996.  
40

41         The industrial appeals judge determined that Mr. Green's efforts on behalf of Ms. Boudon  
42  
43 consisted solely of an employability assessment rather than active vocational training or placement  
44  
45 efforts. He then concluded that Ms. Boudon did not receive vocational services during the time the  
46  
47 outcome of her claim awaited Mr. Green's report. Relying on his interpretation of the *McCormack*,

1 decision, the industrial appeals judge set the effective date of the pension at the June 1, 1996 date  
2  
3 on which Ms. Boudon's doctor found her medical condition stable. This analysis did not take into  
4  
5 account the stipulation that Ms. Boudon's mental health condition was not medically stable until  
6  
7 February 24, 1997. In any event, neither of those dates addresses the vocational determination  
8  
9 that Ms. Boudon was unemployable. As we stated in *Neuman*:

10  
11 A permanent total disability determination is a combination of medical  
12 and vocational fixity, and should be based on the facts then in existence.  
13 A retroactive determination should be based on the date medical and  
14 vocational experts arrived at the determination that the worker was  
15 permanently totally disabled. The date of permanent total disability  
16 should not be set at the date of initiation of medical or vocational  
17 endeavors which . . . are intended to reduce a worker's disability or  
18 enhance the worker's ability to return to work, even if the courses are  
19 later determined to have been in vain. So long as the medical or  
20 vocational services were initiated as reasonably intended to reduce  
21 disability, they remain proper and necessary to their conclusion.

22  
23 *Neuman* at 12.

24  
25 An employability assessment is the first step in every vocational effort. Any vocational effort  
26  
27 in a case where a pension is ultimately awarded is going to have proven fruitless at some point.  
28  
29 The determination must, nonetheless, be made. In this case the self-insured employer, for  
30  
31 unknown reasons, did not even initiate the vocational assessment process until December 1997.  
32  
33 There is no indication in the record before us that Mr. Green formed his opinion that Ms. Boudon  
34  
35 was totally permanently disabled before he drafted his written opinion on January 19, 1999. That  
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37 date, however is nearly seven months after the June 25, 1998 order on appeal. From the record,  
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39 we can reasonably infer that Mr. Green had the necessary information to complete his employability  
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41 determination as of his receipt of Dr. St. Elmo Newton, III's January 13, 1998 letter. Accordingly,  
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43 January 13, 1998 is the date on which medical and vocational experts were in agreement that  
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45 Ms. Boudon was totally permanently disabled. That is the effective date that Ms. Boudon should be  
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1 placed on the pension rolls and the self-insured employer should be eligible for second injury fund  
2 relief.  
3

4  
5 With respect to Docket No. 99 22359, the Director determined that Ms. Boudon's case is one  
6  
7 in which it was appropriate to make a discretionary award of ongoing medical benefits after a  
8  
9 pension award. RCW 51.32.160. The Proposed Decision and Order directed that the cost of the  
10  
11 post-pension medical benefits should come from the second injury fund. There is no case directly  
12  
13 on point, however the Department's Petition for Review points out that the Board has previously  
14  
15 determined the limited nature of the relief provided by the second injury fund in the significant  
16  
17 decision *In re Raymond Mitchell*, BIIA Dec., 17, 962 (1963). In that case, a state fund employer  
18  
19 requested second injury fund relief for its experience rating for the cost of a pension to the extent it  
20  
21 exceeded the accident cost of the worker's leg injury. The employer further requested that the  
22  
23 accident cost be reduced by a proportionate share of the time loss compensation paid to the  
24  
25 claimant before the pension award. We allowed the relief as to the pension, but rejected the  
26  
27 request for relief as to apportionment of the cost of time loss compensation, noting that:

28  
29 The second-injury account statute . . . comes into play only when a workman is  
30 classified as totally, permanently disabled, and it seems apparent that its entire  
31 intent and purpose is to apportion the cost of the pension reserve between the  
32 employer at the time of the second or further injury and the second-injury  
33 account. The pension reserve covers only the cost resulting from the  
34 classification of a workman as totally permanently disabled, which, were it not for  
35 the statute, would be charged entirely against the employer in addition to  
36 charges previously assessed. It necessarily follows, therefore, that the phrase  
37 'accident cost rate' as used in the statute above quoted refers only to the  
38 accident cost to be assessed as a result of such total, permanent disability  
39 classification, that is, such additional charges as would be assessed for  
40 permanent disability at the time the workman is classified as totally, permanently  
41 disabled.

42  
43 *Mitchell* at 5-6.

44  
45 The provision of medical benefits after a pension award is discretionary to the director. It is not an  
46  
47 anticipated cost that is built into the pension reserve. To pay the cost of the ongoing benefits from



1 the pension reserve would deplete the funds placed in the reserve to cover the cost of the pension  
2  
3 over the life of the worker. If the employer were a state fund employer, the Department would pay  
4  
5 the cost of the ongoing medical benefits from the medical aid fund, not the supplemental pension  
6  
7 reserve fund. The self-insured employer stands in the shoes of the Department with respect to  
8  
9 payment of medical benefits and must likewise pay the cost of Ms. Boudon's ongoing psychiatric  
10  
11 care.

### 12 **FINDINGS OF FACT**

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15 1. On June 25, 1989, the Department received an application for benefits  
16 from the claimant, Crella J. Boudon, alleging an industrial injury on  
17 June 19, 1989, to her back during the course of her employment with  
18 The Boeing Company.

19  
20 On August 30, 1989, the Department issued an order allowing the claim  
21 for treatment and benefits and noting that payment of time loss  
22 compensation had been reported by the self-insured employer.

23  
24 On June 25, 1998, the Department issued an order that stated that the  
25 injury had resulted in a fixed stage and caused total permanent  
26 disability. Accordingly, the Department classified the claimant and  
27 placed her on the pension rolls effective July 20, 1998, and allowed  
28 authorized treatment to continue for the claimant's anti-depressant  
29 medication and medical monitoring thereof.

30  
31 On June 25, 1998, the Department issued an order noting that by its  
32 separate order, the Department had placed the claimant on pension rolls  
33 as a totally permanently disabled worker effective July 20, 1998, and  
34 that the permanent partial disability proximately caused an industrial  
35 injury would have resulted in an amount of \$36,000. The order further  
36 noted that when disability is combined with and superimposed upon  
37 prior disabling conditions, the classification of total permanent disability  
38 resulted. Therefore, the Department ordered the self-insured employer  
39 to submit to the Department of Labor and Industries the amount of  
40 \$36,000 as a check payable to the Department of Labor and Industries  
41 and that the balance of the pension reserve required for paying the  
42 worker's pension would be charged against the second account.

43  
44 On August 24, 1998, the self-insured employer's Notice of Appeal was  
45 filed with the Board of Industrial Insurance Appeals concerning the  
46 Department orders of June 25, 1998. On October 13, 1998, the Board  
47 issued an order granting an appeal in this matter from the June 25, 1998  
Department order regarding second injury fund and pension reserve

1 balance, assigning Docket No. 98 17459, and directing that further  
2 hearings be conducted on the merits.

3  
4 On December 13, 1999, the Board issued a further order assigning  
5 Docket No. 99 22359 to the June 25, 1998 Department order placing the  
6 claimant on the pension rolls effective June 30, 1998, and allowing  
7 authorized treatment to continue for the claimant's anti-depressant  
8 medication and medical monitoring thereof.  
9

- 10 2. On June 19, 1989, during the course of her employment as an  
11 encapsulator with The Boeing Company, Crella J. Boudon injured her  
12 low back when she bent over to lift a 5-gallon can of Ketone.
- 13  
14 3. Prior to her industrial injury on June 19, 1989, the claimant received  
15 treatment for low back and left lower extremity difficulties that were best  
16 described as of August 1988 as Category 3 for permanent dorsolumbar  
17 and lumbosacral impairment.
- 18  
19 4. The claimant had experienced a history of child abuse and had  
20 symptoms of post-traumatic stress disorder as a result of these sexual  
21 and emotional abuses. This disorder had not resolved as of June 19,  
22 1989, and had interfered with her ability to function, contributing to her  
23 psychological pain and emotional distress.
- 24  
25 5. Ms. Boudon was 49 years old on the date of her industrial injury, last  
26 worked at The Boeing Company on April 1, 1994, and has not been  
27 employed in any job since that date.
- 28  
29 6. On November 28, 1989, the claimant commenced treatment by St. Elmo  
30 Newton, III, an orthopedist. The claimant's physical condition,  
31 proximately caused by her industrial injury of June 19, 1989, has been  
32 medically fixed and stable since June 1, 1996.
- 33  
34 7. Between June 1, 1996 and February 24, 1997, the claimant continued to  
35 receive psychiatric treatment for her psychiatric condition and pain  
36 symptoms caused by the industrial injury. Her mental health condition  
37 was medically stable as of February 24, 1997.
- 38  
39 8. During the period from December 11, 1997 to January 13, 1998, the  
40 self-insured employer provided vocational services on behalf of the  
41 claimant in the form of a vocational assessment, which was reasonably  
42 intended to evaluate and enhance her ability to return to work. The  
43 earliest date on which those services could have been determined to be  
44 unlikely to benefit the claimant was January 13, 1998.
- 45  
46 9. As of January 13, 1998, the claimant was totally, permanently disabled  
47 as a result of the combination of her physical limitations, psychiatric  
problems, and pain symptoms proximately caused by her industrial

1 injury of June 19, 1989, in view of her age, education, employment  
2 experience, transferable skills, and physical limitations.

3  
4 10. After January 13, 1998, the claimant experienced significant difficulties  
5 of chronic pain, sleep deprivation, concentration, and depressed mood  
6 that affected her ability to function. Despite the use of medication, there  
7 was no improvement in her mental condition of January 13, 1998.

8  
9 11. As of January 13, 1998, the claimant was totally and permanently  
10 disabled due to the combined effects of her industrial injury of June 19,  
11 1989, superimposed upon her preexisting low back and psychiatric  
12 disorders. In the absence of her preexisting conditions, the claimant's  
13 industrial injury alone would not have been sufficient to render her totally  
14 and permanently disabled.

### 15 **CONCLUSIONS OF LAW**

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17  
18 1. The self-insured employer's Notice of Appeal filed with the Board of  
19 Industrial Insurance Appeals on August 24, 1998, was timely filed within  
20 the meaning of RCW 51.52.060 and WAC 263-12-060.

21  
22 2. The Board of Industrial Insurance Appeals has jurisdiction over the  
23 parties and the subject matter of these appeals.

24  
25 3. As of January 13, 1998, to and including July 20, 1998, Crella J. Boudon  
26 was totally permanently disabled within the provisions of  
27 RCW 51.32.060, as a result of the combined effects of her industrial  
28 injury of June 19, 1989, superimposed upon her preexisting low back  
29 and psychiatric disorder.

30  
31 4. Effective January 13, 1998, The Boeing Company was entitled to  
32 distribution of further accident costs under the provisions of  
33 RCW 51.16.120, with respect to the industrial injury of Crella J. Boudon  
34 on June 19, 1989.

35  
36 5. With respect to Docket No. 99 22359, the Department order of June 25,  
37 1998, which stated that the claimant had been classified as permanently  
38 totally disabled and placed on the pension rolls effective July 20, 1998,  
39 and authorized treatment to continue for the claimant's anti-depressant  
40 medication and medical monitoring thereof, is incorrect. The order is  
41 reversed and the claim remanded to the Department with direction to  
42 issue a further order that classifies the claimant as permanently and  
43 totally disabled; places her on the pension rolls effective January 13,  
44 1998; and directs that authorized treatment shall continue for the  
45 claimant's anti-depressant medication and medical monitoring thereof,  
46 payable by the self-insured employer.

1 6. With respect to Docket No. 98 17549, the Department order of June 25,  
2 1998, which stated that by separate order, the Department had placed  
3 the claimant on the pension rolls as a totally permanently disabled  
4 worker effective July 20, 1998, that the permanent partial disability  
5 caused by the industrial injury of June 19, 1989, would have resulted in  
6 an amount of \$36,000 and that, when disability was combined with and  
7 superimposed upon prior disabling conditions, the classification of total  
8 permanent disability resulted. Accordingly, the Department ordered the  
9 self-insured employer to submit the sum of \$36,000 made payable to the  
10 Department of Labor and Industries and determined that the balance of  
11 the pension reserve required to pay the worker's pension would be  
12 charged against the second injury account, is incorrect. The order is  
13 reversed and the claim is remanded to the Department with direction to  
14 issue a further order that affords the self-insured employer second injury  
15 fund relief effective January 13, 1998, and to calculate the amount of the  
16 self-insured employer's required contribution taking into account the  
17 benefits paid by the self-insured employer between January 13, 1998  
18 and June 25, 1998.

19  
20 It so ORDERED.

21  
22 Dated this 26th day of January, 2000.

23  
24 BOARD OF INDUSTRIAL INSURANCE APPEALS

25  
26  
27  
28 /s/ \_\_\_\_\_  
29 THOMAS E. EGAN Chairperson

30  
31  
32  
33 /s/ \_\_\_\_\_  
34 FRANK E. FENNERTY, JR. Member

35  
36  
37  
38 /s/ \_\_\_\_\_  
39 JUDITH E. SCHURKE Member