Frerotte, Mitch

PENALTIES (RCW 51.48.017)

Offsetting employment contract benefits against monetary award for permanent partial disability

An employment contract which provides the worker an injury protection benefit requiring the self-insured employer to pay a defined amount to the worker upon injury, but allows the self-insured employer reimbursement from any workers' compensation benefits received does not violate RCW 51.04.060 because it does not diminish the workers entitlement under the Act. A self-insured employer should not be penalized because it does not pay a subsequent award for permanent partial disability that is a lesser monetary award then the injury protection benefit. Once the self-insured employer has paid the injury protection benefit, it is not necessary that it pay a subsequent award for permanent partial disability only to have to recoup the payments. ***….In re Mitch Frerotte,* BIIA Dec., 99 18418 (2001)** *Overruling In re David Washington*, BIIA Dec., 67,458 (1986). [*Editor's Note*: See *National Football League Players Ass'n. v. National Football League Management Council*, March 25, 2011, No. 08 CIV 3658 (PAC), Order of the District Court of the Southern District of New York, Paul A. Crotty, Judge, holding the self-insured employer may not claim a dollar for dollar offset.]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: MITCH FREROTTE	**)**	**DOCKET NO. 99 18418**
	)	
CLAIM NO. T-923331	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Mitch Frerotte, by
Law Office of Mark C. Wagner, per
Mark C. Wagner

Self-Insured Employer, Football Northwest, LLC, dba Seattle Seahawks, by
Vandeberg, Johnson & Gandara, per
Charles R. Bush

Department of Labor and Industries, by
The Office of the Attorney General, per
David I. Matlick, Assistant

The self-insured employer, Football Northwest, LLC, dba Seattle Seahawks, filed an appeal with the Board of Industrial Insurance Appeals on August 13, 1999, from an order of the Department of Labor and Industries dated July 30, 1999. That order affirmed the order dated May 19, 1999, which found the employer unreasonably delayed paying benefits when due by failing to pay an award for permanent partial disability and therefore assessed a penalty in the amount of $6,107.62. **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 June 16, 2000, in which the order of the Department dated July 30, 1999, was affirmed.

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

The claimant and the self-insured employer signed a standard National Football League Player contract for the football season that began on February 1, 1994 and ended on February 1, 1995. Subsection 10 of the contract stated:

> Any compensation paid to Player under this contract or under any collective bargaining agreement in existence during the term of this contract for a period during which he is entitled to workmen's compensation benefits by reason of temporary total, permanent total, temporary partial, or permanent partial disability will be deemed an advance payment of workmen's compensation due the Player, and Club will be entitled to be reimbursed the amount of such payment out of any award of workmen's compensation.

A collective bargaining agreement in existence during the term of the contract provided an injury protection benefit to eligible players who were injured during a National Football League game or practice in the form of a one-time payment in a specified amount.

On August 2, 1994, Mr. Frerotte suffered a career-ending injury. It is undisputed that the employer kept the claimant on salary until February 16, 1996, and thereafter paid time loss compensation through November 5, 1996. All medical expenses incurred because of the injury were paid by the employer. No later than March 31, 1996, the employer paid Mr. Frerotte the sum of $175,000 in accordance with the collective bargaining agreement referenced above.

On January 15, 1998, the Department issued an order closing the claim with a direction to the employer to pay Mr. Frerotte an award for permanent partial disability consistent with Category 3 permanent cervical and/or cervico-dorsal impairments, in the sum of $24,431. The employer agreed with the terms of the order and did not appeal. The employer relied on the terms stated in § 10 of the player contract and, therefore, the employer did not pay the claimant an additional $24,431.31.

On May 19, 1999, the Department issued an order assessing a penalty in the amount of $6,107.62 against the self-insured employer for unreasonably delaying payment for the permanent partial disability award ($24,431.31).

We hold that the self-insured employer did not unreasonably delay paying benefits when due, and we remand the claim to the Department with directions to issue an order denying the claimant's request for a penalty against the self-insured employer because there was no unreasonable delay in payment of benefits.

We have considered and rejected the arguments made by Mr. Frerotte and the Department. We hold that the employer was not required to appeal the closing order if the only dispute with that order was that the award had already been paid; that the employer did not waive the right to invoke § 10 by voluntarily keeping the claimant on salary when he was eligible for time loss compensation; that § 10 of the player's contract does not violate RCW 51.04.060; that there was no unreasonable delay in payment of benefits; and, that the lump sum payment made pursuant to the collective bargaining agreement included an advance payment of the award for permanent partial disability.

We do not find legal authority for the claimant's position that the employer waived its right to argue that the award had already been paid when it failed to appeal the closing order. A limitation on the right to make such an argument cannot be imposed until there has been an initial opportunity to make the argument. Inherent in the concept of finality is that a determination on a given issue has actually been made. Res judicata means a matter settled by law. *Black's Law Dictionary,* Revised 4th Ed. at 1470. Nothing in the record suggested that when the Department issued the closing order, it knew of or considered prior payment by the employer.

An order closing the claim with an appropriate impairment award is necessary even if the award has already been paid. Had the employer appealed the closing order on the basis that the award had already been paid, this Board might well have found that question exceeded its jurisdiction since the closing order in this claim did not address that issue.

The question of whether the one-time payment of $175,000, made to the claimant in 1996, was an advance payment of the disability award is before us in this appeal because the Department found that as of the date of the penalty order, the payment had not been made.

> No employer or worker shall exempt himself or herself from the burden or waive the benefits of this title by any contract, agreement, rule or regulation, and any such contract, agreement, rule or regulation shall be pro tanto void.

RCW 51.04.060.

"A plain reading of RCW 51.04.060 indicates that an employee may not contract with the employer to forego entitlement to benefits under the Act." *Solven v. Department of Labor & Indus.*, 101 Wn. App.189, 195 (2000).

A plain reading of §10 of the player contract fails to reveal any exemption from the burdens or the benefits of the Industrial Insurance Act. Had the benefits required by the closing order exceeded the amount of the one-time payment, the employer would be required to satisfy the full amount. There is no showing that the agreement between the employer and the claimant in any way diminished any of the claimant's entitlement under the Industrial Insurance Act.

Subsection 10 of the player's contract is a valid and enforceable clause.

In *In re Frank Madrid,* BIIA Dec., 86 0224-A (1987), this Board acknowledged the test for unreasonable delay to be "whether the employer had a genuine doubt from a medical or legal standpoint as to the liability for benefits." *State Compensation Insurance Fund v. Workers' Compensation Appeals Board,* 130 Cal. App. 3rd 933, 182 Cal. Rep. 171 (1982). Further, we accept the proposition as stated by Professor Larson that "generally, a failure to pay because of a good faith belief that no payment is due will not warrant a penalty." *Larson, Law of Workmens' Compensation*, Sec. 83.41 (b)(2).

When judged by the *Larson* test, the employer's conduct in this case was not unreasonable.

We must assume that the Department was aware of the on-going dispute between the parties when it issued the penalty order and that it made a determination that the $175,000 paid as part of the income protection clause of the collective bargaining agreement did not constitute an advance of a permanent partial disability award.

Our determination is that § 10 of the player contract constitutes a binding agreement between the parties. We are aware the contract refers to the employer's right to be reimbursed the amount of disability award. We interpret that to mean it is unnecessary for a self-insured employer to make, and then recoup, payment.

The facts of this case are analogous in all material respects to the facts in *David Washington*, BIIA Dec., 67,458 (1986).

In *Washington*, the claimant appealed from a Department decision not to assess a penalty order against the employer under RCW 51.48.017 for alleged unreasonable delay in payment of time loss benefits. The Department had previously ordered the employer to pay retroactive time loss compensation benefits to Mr. Washington. The employer withheld an amount equal to time loss benefits previously paid for the same period of time under a non-occupational accident and sickness program provided for in Mr. Washington's union contract with the employer. The majority in *Washington* held that the employer's withholding of funds violated RCW 51.04.060 and 51.32.040.

We have reconsidered the rule in *Washington* and have given careful thought to the rationale espoused by the dissenting member in that case, which we find to be the more reasonable approach under the circumstances of this case.

Here, Mr. Frerotte timely received all the money to which he was entitled (and more) and, in effect, received his benefits in advance of when they were due. We fail to see how advance

payment and advance receipt of a monetary benefit represents evasion of the burden or waiver of benefits under the Industrial Insurance Act.

In addition, we do not believe that RCW 51.32.040 was intended to apply to this situation. Under these circumstances, there is no issue regarding protecting Mr. Frerotte's industrial insurance payments "from creditors" as there is no question that he has already received all benefits to which he is entitled. The employer is not a "creditor" here, it simply has no obligation to pay once again what it already has paid only to be burdened with seeking restitution in some other forum.

We overrule our decision in *Washington* and remand this clam to the Department to issue an order finding that the self-insured employer paid the award for permanent partial disability without unreasonable delay.

FINDINGS OF FACT

1. On September 19, 1994, the self-insured employer, Football Northwest, LLC, dba Seattle Seahawks, received an accident report from the claimant, Mitch Frerotte, alleging an injury to his neck on August 2, 1994, having occurred during the course of his employment. The claim was forwarded to the Department of Labor and Industries on November 15, 1995. The claim was allowed and benefits provided.

   On August 25, 1997, the Department issued an order that closed the claim with time loss compensation benefits paid through November 5, 1996, and directed the self-insured employer to pay the claimant an award for permanent partial disability equal to Category 3, permanent cervical and/or cervico-dorsal impairments.

   On September 10, 1997, the claimant filed a protest and request for reconsideration of the August 25, 1997 order. On November 26, 1997, the Department issued an order holding the August 25, 1997 order in abeyance. On January 15, 1998, the Department issued an order that affirmed the August 25, 1997 order.

   On February 19, 1998, the Board of Industrial Insurance Appeals received the claimant's appeal from the order dated January 15, 1998. On March 17, 1998, the Board issued an order granting the appeal and assigned it Docket No. 98 11321.

On December 2, 1998, the Board issued an Order Granting Claimant's Motion to Dismiss Appeal that was assigned Docket No. 98 11321.

On May 19, 1999, the Department issued an order finding the self-insured employer had unreasonably delayed payment of benefits by failing to make payment of the permanent partial disability award as of the date of the order, and ordered the self-insured employer to pay an additional amount of $6,107.62 to the claimant in addition to benefits previously paid under the claim. On May 24, 1999, the self-insured employer filed a protest and request for reconsideration of the May 19, 1999 order. On July 30, 1999, the Department issued an order affirming the May 19, 1999 order.

On August 13, 1999, the self-insured employer filed an appeal from the July 30, 1999 order with the Board of Industrial Insurance Appeals. On September 2, 1999, the Board issued an order granting the appeal and assigned it Docket No. 99 18418.

2. The claimant and the self-insured employer, dba the Seattle Seahawks, entered into a standard National Football League Player contract for the football season that began on February 1, 1994 and ended on February 1, 1995. Compensation paid to a player pursuant to the contract or any collective bargaining agreement in existence during the period of the contract when the claimant is eligible for specified workers' compensation benefits was deemed an advance payment of the compensation due the player.

3. On August 2, 1994, the claimant sustained an industrial injury to his neck during in the course of employment with Football Northwest, LLC, dba Seattle Seahawks, a self-insured employer.

4. Conditions proximately caused by the industrial injury of August 2, 1994 ended the claimant's career as a National Football League player.

5. The employer paid the claimant's salary until February 16, 1996, and thereafter, paid him time loss compensation through November 5, 1996. No later than March 31, 1996, the employer made a one-time payment to the claimant of $175,000, as required by the terms of the collective bargaining agreement.

6. The self-insured employer was not aggrieved by the Department order closing the claim for time loss compensation paid through November 5, 1996, and directing them to pay the claimant an award for permanent partial disability equal to Category 3, permanent cervical and cervico-dorsal impairments. The order did not constitute a determination that the award had not been paid.

CONCLUSIONS OF LAW

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

2. Subsection 10 of the National Football League's Player's contract does not violate RCW 51.04.060 and is a binding and enforceable agreement between the claimant and the employer.

3. The self-insured employer did not unreasonably delay payment of benefits when due within the meaning of RCW 51.48.017.

4. The Department order dated May 19, 1999, is reversed. This claim is remanded to the Department with directions to find the self-insured employer advanced payment of the permanent partial disability award to the claimant no later than March 31, 1996. The Department is directed to issue an order denying the claimant's request for a penalty assessment.

It is so ORDERED.

Dated this 2nd day of January, 2001.

BOARD OF INDUSTRIAL INSURANCE APPEALS

s/s_____
THOMAS E. EGAN Chairperson

s/s_____
JUDITH E. SCHURKE Member