Cuendet, Frederic

DEPARTMENT

Authority to recoup overpayment of benefits

When the self-insured employer has previously paid time-loss compensation benefits for a period after the effective date of the pension, the Department's authority to use the second injury fund for pension payment includes the authority to reimburse the self-insured employer from the second injury fund for payment of the total disability benefits. Recoupment or offset of the overpayment of total disability benefits is the responsibility of the Department of Labor and Industries. **….*In re Frederic Cuendet*, BIIA Dec., 99 21825 (2001)**

PERMANENT TOTAL DISABILITY (RCW 51.08.160)

Effective date of pension

The effective date of permanent total disability is the date the worker is both medically fixed and as a vocational matter, demonstrably permanently unable to be gainfully employed on a reasonably continuous basis. *Citing In re Roger Neuman*, BIIA Dec., 97 7648 (1999). The holding contained in the decision of *In re Mickey Chiu*, BIIA Dec. 97 7432 (1999) wherein it was determined the effective date of total disability to be the date of legal fixity is reversed. **….*In re Frederic Cuendet*, BIIA Dec., 99 21825 (2001)**

SECOND INJURY FUND (RCW 51.16.120)

Authority to reimburse self-insured employer for overpayment of time-loss compensation benefits

When the self-insured employer has previously paid time-loss compensation benefits for a period after the effective date of the pension, the Department's authority to use the second injury fund for pension payment includes the authority to reimburse the self-insured employer from the second injury fund for payment of the total disability benefits. Recoupment or offset of the overpayment of total disability benefits is the responsibility of the Department of Labor and Industries. **….*In re Frederic Cuendet*, BIIA Dec., 99 21825 (2001)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: FREDERIC J. CUENDET	)	**DOCKET NO. 99 21825**
	)	
CLAIM NO. T-040632	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Frederic J. Cuendet, by
Davis, Roberts & Reid, L.L.P., per
David W. Ballew

Self-Insured Employer, Airborne Freight Corp., by
Craig, Jessup & Stratton, per
Janet L. Smith and Rebecca D. Craig

Department of Labor and Industries, by
The Office of the Attorney General, per
William A. Garling, Jr., Assistant

The self-insured employer, Airborne Freight Corp., filed an appeal with the Board of Industrial Insurance Appeals on November 23, 1999, from an order of the Department of Labor and Industries dated October 22, 1999. The order affirmed the provisions of prior Department orders dated July 14, 1999 and July 15, 1999, which together placed the claimant on the pension rolls effective December 1, 1998, ordered the claimant to reimburse the self-insured employer all time loss compensation and medical benefits paid subsequent to the effective date of the pension, held that the second injury fund is applicable to this claim, ordered the self-insured employer to pay $18,000 for the permanent partial disability caused by this injury, and required the pension reserve to be charged against the second injury account. **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 10, 2001, in which the order of the Department dated October 22, 1999, was reversed and remanded to the Department with direction to consider the claimant a totally and permanently disabled worker effective April 3, 1997, and to provide second injury fund relief to the self-insured employer effective April 3, 1997.

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. We have granted review in order to resolve an inconsistency within some of our past significant decisions regarding the proper analysis

for determining the effective date of permanent total disability benefits (also referred to as pension benefits), and to direct that the Department reimburse the self-insurer for the time loss compensation it paid to the claimant for periods of time **after** the effective date of the permanent total disability benefits.

Mr. Cuendet's entitlement to a pension and the self-insurer's entitlement to second injury fund relief were not contested by any party to this appeal. The self-insurer contended that the claimant's entitlement to permanent total disability benefits should become effective on April 3, 1997, instead of the December 1, 1998 date determined by the Department order. The Proposed Decision and Order granted this relief to the self-insured employer. Although the self-insured employer's Petition for Review did not assign error to the Proposed Decision and Order's determination that the effective date of the pension benefits set by the Department was erroneous, this issue is still within the scope of our review. *In re Richard Sims*, BIIA Dec., 85 1748 (1986).

The parties stipulated that Mr. Cuendet's physical conditions proximately caused by the September 1, 1989 industrial injury were medically fixed and stable in 1993 and his psychiatric conditions caused by the industrial injury as of April 3, 1997, notwithstanding the provision of further psychological counseling thereafter. The parties stipulated that Dr. Andy Sands continued to provide reasonably necessary psychiatric treatment between April 3, 1997 and December 1, 1998. The testimony of Ann Larson, a vocational counselor, established that after she wrote her November 27, 1996 report no further efforts were directed to returning the claimant to the work force. The only additional work performed under this claim by Ms. Larson between November 1996 and September 1998 was addressed to the question of whether second injury fund relief was available to the self-insured employer. The Department first attempted to close the claim by an order dated July 14, 1999, which placed the claimant on the pension rolls effective December 1, 1998.

Under these facts, the Proposed Decision and Order was incorrect to determine that the effective date of the pension should be April 3, 1997. *In re Harold McCormack*, BIIA Dec., 90 3178 (1992); *In re Roger Neuman*, BIIA Dec., 97 7648 (1999). In *Neuman*, an injured worker was found to be medically fixed and stable on September 9, 1996, and vocational evidence showed that he was unable to work since the spring of 1996 due to the industrial injury and the effects of pre-existing medical conditions. The date of "legal fixity" (in that case the date of the Department order determining the claimant to be permanently and totally disabled) was September 16, 1997. The Department order set November 1, 1997, as the effective date of the worker's pension. The

Department chose this date for administrative reasons. We held that the effective date of permanent total disability to be "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." *Neuman*, at 2. Consistent with our holding, we determined September 9, 1996, to be the effective date of the worker's permanent total disability benefits and also as the date his employer was entitled to second injury fund relief.

Unfortunately, the legal analysis within *McCormack* and *Neuman* is irreparably inconsistent with the analysis of the same issue contained within *In re Mickey Chiu*, BIIA Dec., 97 7432 (1999), another of our significant decisions. In *Chiu*, medical evidence supported a finding that the worker was medically fixed and stable in 1996. The Department first attempted to close the claim on June 12, 1997. We determined the effective date of permanent total disability benefits to be June 12, 1997, which would have been the date of "legal fixity" had entitlement to loss of earning power benefits been at issue.

Application of the "legal fixity" doctrine to determine the effective date of permanent total disability benefits is not appropriate for the reasons we stated in *Neuman*:

> 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.

Neuman, at 7-8.

Furthermore, if the holding in *Chiu* was to apply to this case the effective date of Mr. Cuendet's pension would be July 14, 1999, a date that does not agree with the contentions and analysis of any of the parties and which would be prejudicial to the self-insurer while providing little or no monetary benefit to the worker. Choosing the date of "legal fixity" as the effective date for a

pension prevents provision of second injury fund relief to an employer for part of the period that the worker was **in fact** permanently and totally disabled. On the other hand, the worker will always be in total disability status, whether temporary or permanent, so there should be no gap between time loss compensation and pension benefits regardless of when the characterization of the wage replacement benefits changes. In light of these factors we overrule *In re Mickey Chiu*, BIIA Dec., 97 7432 (1999) and remove it from our significant decisions.

We determine that Mr. Cuendet is entitled to a pension (and the employer entitled to second injury fund relief) as of the date VRC Larson submitted her employability assessment report on September 10, 1998. At that time, and not before that time, Ms. Larson, based on medical and vocational evidence **then in existence**, determined that Mr. Cuendet was not eligible for vocational services because he was permanently totally disabled due to the effects of his industrial injury superimposed on pre-existing limitations. Ms. Larson's opinion that Mr. Cuendet was permanently incapable of working as of April 3, 1997, is based upon hindsight and certainly not based upon information or data that was known to her in April 1997. *Neuman*. *See also*, *In re James M. Eddy*, Dckt. No. 99 18062 (December 5, 2000).

Since the effective date of Mr. Cuendet's entitlement to permanent total disability benefits has been moved back in time to September 10, 1998, he may receive a double recovery (time loss compensation paid earlier by the self-insurer and pension benefits paid by the Department through the second injury fund) for the period of September 10, 1998 through December 1, 1998. The self-insured employer contends that it should be reimbursed from the second injury fund for time loss compensation it already paid to Mr. Cuendet during that time period. The effect of granting this request would be to make the Department, rather than the self-insured employer, the party that bears the burden of collecting from Mr. Cuendet any time loss compensation that was erroneously paid to him for that period of time. We believe that the self-insured employer's request is logical, consistent with the legislative policy behind the creation of the second injury fund, and more administratively efficient than the alternative.

The Proposed Decision and Order denied the self-insurer this additional relief, concluding that the Board does not have jurisdiction to direct the Department to reimburse the self-insurer from the second injury fund for time loss compensation it paid the claimant during the period stated above. We disagree. We believe that we have the jurisdiction to provide this relief to the self-insured employer. The July 14, 1999 order, which was affirmed by the Department order under appeal, contained the following provision: "It is therefore ordered that all time loss and/or medical

benefits paid subsequent to the effective date are due and refundable to the self-insured employer by the claimant." Clearly, the Department has adjudicated the issues of how the self-insurer is to be reimbursed for time loss compensation paid after the effective date of the pension and which party is supposed to seek reimbursement from Mr. Cuendet. The self-insurer's Notice of Appeal specifically asked for action inconsistent with that provision of the Department order when it asked for a Board order "to declare that the Employer shall recoup from the second injury fund any benefits paid by the Employer to the Claimant between April 3, 1997 and December 1, 1998." Clearly, the Notice of Appeal preserved those issues. Therefore, we have jurisdiction to hear and decide those issues. *Lenk v. Department of Labor & Indus.*, 3 Wn. App. 977 (1970).

RCW 51.44.040(1), which gives the Director of the Department authority to administer the second injury fund, does not give him sole discretion over payments made from that fund. Pursuant to RCW 51.16.120(1), the "total cost of the pension reserve" less the claim cost assessed against the employer should be assessed against the second injury fund. In this case, the self-insurer's claim cost is limited to the $18,000 assessed by the Department in its July 15, 1999 order. The balance of the pension reserve is to come from the second injury fund. By law, the self-insurer is relieved from paying further time loss compensation as of the effective date of the pension. The payment of the pension benefits is the responsibility of the Department. The Department's authority to use monies from the second injury fund for pension payments logically includes the power to reimburse the self-insured employer for payment of total disability benefits for which the Department is responsible, such as those paid by the employer to Mr. Cuendet between September 9, 1998 and December 1, 1998.

Our Supreme Court in *Jussila v. Department of Labor & Indus.*, 59 Wn.2d 772 (1962) noted that the second injury fund was created to finance incentives that encourage the hiring of previously disabled workers. Any rule or procedure that makes it easier for an employer to benefit from the fund tends to support this purpose. To place the burden of obtaining recoupment on the self-insured employer in this situation creates a disincentive for employers to hire previously disabled workers due to the time and expense of collecting overpayments from workers to whom no future benefits are owed. Thus, placing the responsibility of obtaining recoupment under these circumstances on the Department is consistent with the legislative purpose that resulted in the creation of the second injury fund.

Recoupment of overpayments is the subject of RCW 51.32.240. In this situation, either subsection (1) or (4) of that statute would place the burden of seeking recoupment on the

Department. Each of these subsections provides that the recipient of the erroneous payment "shall repay it and recoupment may be made from any future payments due to the recipient on any claim with the state fund or self-insurer, as the case may be." The self-insurer is no longer responsible for making any future payments, therefore, it cannot withhold portions of future payments to obtain reimbursement. The Department, on the other hand, has the responsibility to pay pension benefits from the second injury fund and, therefore, the ability to recoup any overpayment efficiently. In the event that some or all of the pension benefits payable to Mr. Cuendet for the period of April 3, 1997 to December 1, 1998, have not yet been paid to him, the Department (and not the self-insured employer) is in the position of using those benefits to offset the time loss compensation he erroneously received during that period. Thus, for the sake of administrative efficiency, placing the burden of recoupment on the Department is the logical choice.

We note that the employer stipulated that in the event the effective date of Mr. Cuendet's pension is changed as a result of this appeal, the employer will waive reimbursement of any bills for psychiatric treatment through December 1, 1998. At the same time, the parties stipulated that this treatment was reasonably necessary. Based on the parties' stipulation we enter a finding that this treatment was proper and necessary. However, based on our significant decision of *In re Anthony Lajcin*, BIIA Dec., 99 12440 (2000), medical benefits subsequent to the effective date of a retroactive pension would not be subject to reimbursement by the injured worker in any event.

FINDINGS OF FACT

1. On December 5, 1989, the Department of Labor and Industries received an application for benefits filed on behalf of the claimant, Frederic J. Cuendet, alleging an industrial injury on September 1, 1989, during the course of his employment with Airborne Freight Corp. The claim was allowed and benefits were paid to the claimant. On October 22, 1999, the Department issued an order affirming the provisions of prior Department orders dated July 14, 1999 and July 15, 1999, placing the claimant on the pension rolls effective December 1, 1998, and ordering the claimant to reimburse the self-insured employer all time loss compensation and holding that the second injury fund relief is applicable to this claim and ordering the self-insured employer to pay $18,000 for the permanent partial disability caused by this injury and requiring the pension reserve to be charged against the second injury account, respectively. On November 23, 1999, the Board of Industrial Insurance Appeals received a Notice of Appeal filed on behalf of the self-insured employer.

2. On September 1, 1989, Mr. Cuendet sustained an industrial while lifting freight during the course of his employment with Airborne Freight Corp.

3. In spring 1993, Mr. Cuendet's upper digestive tract condition, exacerbated by the September 1, 1989 industrial injury, had reached maximum medical improvement.

4. Between April 3, 1997 and December 1, 1998, Mr. Cuendet received proper and necessary psychiatric treatment for conditions proximately caused by or aggravated by his industrial injury of September 1, 1989.

5. As of April 3, 1997, Mr. Cuendet's psychiatric condition, exacerbated by the September 1, 1989 industrial injury, had reached maximum medical improvement.

6. As of September 10, 1998, Mr. Cuendet was permanently unable to be gainfully employed on a reasonably continuous basis when considering the combined effects of his pre-existing conditions and the September 1, 1989 industrial injury, work history, education, and physical restrictions.

7. Between September 10, 1998 and December 1, 1998, the self-insured employer paid time loss compensation to Mr. Cuendet under this claim.

CONCLUSIONS OF LAW

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

2. As of September 10, 1998, Mr. Cuendet was a totally and permanently disabled worker within the meaning of RCW 51.32.060.

3. Effective September 10, 1998, Airborne Freight Corp. was entitled to distribution of further accident costs with regard to this claim under the provisions of RCW 51.16.120.

4. The self-insured employer is entitled to be reimbursed from the second injury fund for the time loss compensation it paid the claimant for the period of September 10, 1998 through December 1, 1998. Recoupment or offset of any overpayment of total disability benefits to the claimant for that time period is the responsibility of the Department.

5. The order of the Department of Labor and Industries dated October 22, 1999, is incorrect and is reversed. This claim is remanded to the Department with direction to consider Mr. Cuendet a totally and permanently disabled worker effective September 10, 1998, and to provide second injury fund relief to the self-insured employer effective September 10, 1998, including reimbursement of any time loss

compensation it paid to Mr. Cuendet for the period of September 10, 1998 through December 1, 1998.

It is so ORDERED.

Dated this 14th day of August, 2001.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

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

/s/_____
JUDITH E. SCHURKE Member