Funk, Alfred

SECOND INJURY FUND (RCW 51.16.120)

Pre-existing disability

To qualify for second injury fund relief, an employer must establish that the disability resulting from the injury would not have been total but for the pre-existing conditions (*Jussila v. Department of Labor & Indus.*, 59 Wn.2d 772, 370 P.2d 582 (1962)). The legislature's reference "from the combined effects thereof" requires a factual finding that the previous injury or disease was an actual cause of the total disability. A pre-existing condition is not necessarily a pre-existing disability, particularly where a worker performs all tasks required of him up to the time of his injury. *Jussila*; *Lyle, Inc. v. Department of Labor & Indus.*, 66 Wn.2d 745, 405 P.2d 251 (1965). **….*In re Alfred Funk,* BIIA Dec., 89 4156 (1991)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: ALFRED C. FUNK	)	**DOCKET NO. 89 4156**
	)	
CLAIM NO. S-356915	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Alfred C. Funk, by
James J. Solan

Self-Insured Employer, Mayr Brothers Logging Company, Inc., by
Maxson Young Risk Management Services, per
Terry Peterson, General Counsel

Department of Labor and Industries, by
The Office of the Attorney General, per
Stephen T. Reinmuth, Assistant

This is an appeal filed by the self-insured employer, Mayr Brothers Logging Company, Inc., on September 25, 1989, from an order of the Department of Labor and Industries dated September 15, 1989 adhering to the provisions of a Department order dated May 30, 1989, which stated that by a separate order the claimant had been placed on the pension rolls effective October 28, 1988, and that second injury fund relief as provided by RCW 51.16.120 had been considered and determined not to be applicable to this claim. **AFFIRMED**.

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 July 6, 1990 which granted the Department's motion to dismiss the self-insured employer's appeal for failure to present a prima facie case and affirmed the order of the Department dated September 15, 1989.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed and said rulings are hereby affirmed. The evidence is adequately summarized in the Proposed Decision and Order. We will discuss the evidence only to the extent necessary to clarify our decision.

On May 30, 1989, as a result of prior litigation, the Department issued a ministerial order placing Mr. Funk on the pension rolls effective October 28, 1988, as a result of the industrial injury of April 21, 1980. On May 30, 1989, the Department also issued a separate order denying the

self-insured employer's request for second injury fund relief pursuant to RCW 51.16.120. The Department's denial of that request is the subject of this appeal.

In the Proposed Decision and Order, our Industrial Appeals Judge concluded that the employer had failed to establish a prima facie case since there was no evidence that "any known ... disabling conditions ... existed immediately prior to claimant's industrial injury of April 21, 1980." PD & O at 6 (Emphasis added).

The employer acknowledges that, prior to 1984, case law required an employer to "know" that the worker had a preexisting disability at the time of hiring in order to qualify for second injury fund relief. Rothschild Int'l v. Dep't of Labor & Indus., 3 Wash.App. 967, 478 P.2d 759 (1970); Lyle, Inc. v. Dep't of Labor & Indus., 66 Wn.2d 745, 405 P.2d 251 (1965). However, as the employer points out, the 1984 amendments to RCW 51.16.120 eliminated that requirement.[1] According to the employer, therefore, our Industrial Appeals Judge should not have required proof that Mr. Funk had a "known" preexisting disability in order to grant second injury fund relief. The employer argues that the only issue properly before us is whether Alfred Funk had a "previous bodily disability" within the meaning of RCW 51.16.120 which, in combination with the effects of the April 21, 1980 industrial injury, resulted in his permanent and total disability.

Since, based on this record, we must conclude that Mr. Funk did not have any preexisting bodily disability which combined with the April 1980 injury to render him permanently totally disability, we do not need to decide which version of RCW 51.16.120 applies here.[2]

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[1]The prior version of RCW 51.16.120 permitted second injury fund relief "[w] henever a worker has a previous bodily disability from any previous injury or disease and shall suffer a further disability from injury or occupational disease in employment covered by this title and become totally and permanently disabled from the combined effects thereof ...." In 1984, the statute was amended to provide for second injury fund relief "[w]henever a worker has a previous bodily disability from any previous injury or disease, whether known or unknown to the employer, and shall suffer a further disability from injury or occupational disease in employment covered by this title and become totally and permanently disabled from the combined effects thereof ...." Laws of 1984, ch. 63 § 1, p. 407.

[2]There is no case law directly on point. There are three Court of Appeals decisions dealing with the somewhat analogous question of when the 1977 amendments to RCW 51.16.120 and 51.44.040 apply . T.I.M.E.-D.C. v. Schuirman, 42 Wn.App. 607, 711 P.2d 1116, rev. denied, 105 Wn.2d 1014 (1986); Chicago Bridge & Iron Co. v. Dep't of Labor & Indus., 46 Wn.App. 252, 731 P.2d 1 (1986), rev. denied, 107 Wn.2d 1032, cert. denied, 484 U.S. 823, 98 L.Ed.2d 48, 108 S.Ct. 87 (1987); and, Seattle School Dist. v. Dep't of Labor & Indus., 57

The Industrial Insurance Act does not define the term "disability" as used in RCW 51.16.120. That term is interpreted in a number of court decisions. Jussila v. Dep't of Labor & Indus., 59 Wn.2d 772, 370 P.2d 582 (1962); Lyle, Inc. v. Dep't of Labor & Indus., 66 Wn.2d 745, 405 P.2d 251 (1965); and Rothschild Int'l v. Dep't of Labor & Indus., 3 Wn.App. 967, 478 P.2d 759 (1970). In Jussila, a logger with a previous impairment of 20 percent of the maximum allowed for unspecified disabilities was rendered permanently totally disabled by an injury which occurred with a second employer. That employer argued that any time a worker with a permanent partial disability suffers a subsequent injury resulting in permanent total disability, a "combined effects" pension should result as a matter of law, thus entitling the employer to second injury fund relief. The Court noted that the legislature, by including the language "from the combined effects thereof," intended a factual finding that the "previous injury or disease was an actual cause of the total disability. In other words, the legislature did not intend the Second-injury Fund law to apply to a case wherein the later injury was in itself sufficient to produce total permanent disability." Jussila, at 778. (Emphasis added.)

In Lyle, the worker suffered from preexisting degenerative arthritis which was rendered symptomatic by the second injury. The Court rejected the employer's request for second injury fund relief because the preexisting arthritic condition was not disabling. Mr. Lyle suffered from no preexisting "handicap," i.e., no injury or condition which was disabling. And in Rothschild, a longshoreman had suffered various injuries through the years, all of which were temporarily disabling in nature. Despite these previous injuries, the worker continued to do "everything" required of him as a longshoreman up to the time of his final injury. The court found that none of the preexisting conditions were "disabling" within the meaning of the statute.

Wn.App. 87, 786 P.2d 843, rev. granted, 115 Wn.2d 1001 (1990). In all three of these cases, the self-insured employer sought second injury fund relief in claims where the injury occurred prior to July 1, 1977. Up until 1971, all Washington employers were required to be insured with the state fund. In 1971, the Workers' Compensation Act was amended to permit self-insurance. However, the second injury fund provisions were not amended at that time to cover self-insured employers. It was not until the 1977 legislative session (effective July 1, 1977) that this apparent oversight was corrected. In T.I.M.E.-D.C. and Chicago Bridge Divisions I and III of the Court of Appeals both held that where the industrial injury occurred prior to July 1, 1977, the self-insured employer could not be accorded second injury fund relief. In Seattle School Dist., Division I revisited the question and held that second injury fund relief was available to the self-insured employer because the claimant's condition had worsened and she had become permanently totally disabled after the effective date of the 1977 amendments. The Washington Supreme Court has accepted review, presumably to resolve the apparent conflict among these three decisions.

In order for Mayr Brothers Logging Company to obtain second injury fund relief, it was required to show that Mr. Funk's preexisting conditions were disabling. It is undisputed that Mr. Funk had two preexisting conditions, a congenital heart condition and degenerative arthritis. However, as Jussila, Lyle, and Rothschild demonstrate, a preexisting condition is not the same as a preexisting disability.

Dr. Arthur Anderson, a cardiovascular specialist, was unable to recall what symptoms of heart disease, if any, Mr. Funk experienced prior to 1981. In fact, Dr. Anderson stated he would have recommended Mr. Funk undergo heart valve replacement surgery even in the absence of any symptoms. In light of Mr. Funk's testimony that his congenital heart condition never interfered with his ability to work as a logger and he never received treatment for the condition prior to 1981, we are unable to find that the heart condition constituted a preexisting disability under the second injury fund relief statute.

Dr. Hugh E. Toomey, an orthopedic surgeon and Mr. Funk's treating physician, was aware of Mr. Funk's multiple prior injuries and degenerative arthritis. Yet, Dr. Toomey stated that Mr. Funk was adamant that he did not suffer any disability or limitations due to his arthritis prior to the 1980 injury. While Dr. Toomey did express an opinion that 70 percent of Mr. Funk's knee impairment preexisted the industrial injury and was caused by degenerative changes in the knee joint, he also stated that the underlying arthritis was made symptomatic by the 1980 industrial injury. In this respect, the facts in this case are no different from the facts in Lyle. The employer has presented no evidence upon which we could base a finding that the preexisting arthritic condition was disabling.

Despite the preexisting heart problem and degenerative arthritis Mr. Funk was able to continue in his life-long occupation of logging until the time of the industrial injury in 1980. The injuries he suffered then were quite severe. He was knocked unconscious and suffered three fractured ribs, a concussion, an injury to his neck, left shoulder and knee. As a result of the industrial injury, Mr. Funk underwent a cervical fusion and total knee replacement.

At the time of his industrial injury, Mr. Funk was approximately 58 years old, he had a ninth grade education, and had spent his entire work life in the strenuous occupation of a logger. Despite his congenital heart condition and despite the fact that he had sustained numerous industrial injuries throughout his career, he continued to work as a logger, apparently without limitation. Following the analysis set forth in Jussila, we cannot say based on this record that the disability resulting solely from the 1980 industrial injury would not have been total but for the preexisting conditions. Jussila, at 778. To the contrary, we find that the April 1980 industrial injury rendered Mr. Funk totally permanently

disabled independent of his preexisting conditions. There simply are no "combined effects" existent here.

After review of the record, the Proposed Decision and Order, and the self-insured employer's Petition for Review, we are persuaded that the Department order of September 15, 1989 is correct and should be affirmed. Proposed Findings of Fact Nos. 1, 2, 3, 4, and 5, and Proposed Conclusion of Law No. 1 are correct and are hereby adopted as this Board's final findings and conclusion. In addition, the following findings and conclusions are entered:

FINDINGS OF FACT

6. As of October 28, 1988, claimant was precluded by the residuals of his industrial injury of April 21, 1980 from engaging in gainful employment on a reasonably continuous basis, in occupations for which he is qualified by his education, training and experience. The industrial injury was in itself sufficient to cause the permanent total disability.

CONCLUSIONS OF LAW

2. As of October 28, 1988, claimant was a totally and permanently disabled worker within the meaning of RCW 51.08.160 and WAC 296-20-01002 as a direct and proximate result of his industrial injury of April 21, 1980 and the residuals therefrom.

3. The self-insured employer, Mayr Brothers Logging Company, Inc., is not entitled to second injury fund relief as provided by RCW 51.16.120.

4. The Department order dated September 15, 1989, which adhered to the provisions of the Department order dated May 30, 1989, which denied second injury fund relief as provided in RCW 51.16.120, is correct and is affirmed.

It is so ORDERED.

Dated this 4th day of February, 1991.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
SARA T. HARMON Chairperson

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

/s/_____
PHILLIP T. BORK Member