



Boeing & Doss v. DLI

By Jennifer A. Kramer and Shawna G. Fruin • May 13, 2014

The Washington Court of Appeals recently issued a decision favorable to self-insured employers with regard to post-pension treatment in Second Injury Fund pension cases. The issue in *The Boeing Co. & Patricia Doss v. Dep't of Labor and Indus.*, No. 69759-1, (WA Ct. of Appeals Div. 1, March 31, 2014) was: who pays for Department-authorized post-pension treatment in self-insured Second Injury Fund pensions?

Facts:

The worker, Patricia Doss, was placed on the pension rolls with the costs of pension charged to the Second Injury Fund after sustaining an injury while in the course of employment with self-insured employer Boeing. An injury involving chemical exposure had aggravated her pre-existing, symptomatic asthma condition. The Department of Labor and Industries issued a post-pension treatment order relative to ongoing medication for asthma, directing Boeing to pay for that treatment.

Boeing appealed, arguing the Second Injury Fund should pay for the post-pension treatment pursuant to RCW 51.16.120(1): in Second Injury cases, the self-insured employer pays "only the accident cost which would have resulted solely from the further injury or disease, had there been no preexisting disability." The Board affirmed the Department directive, but the Superior Court reversed, concluding that the Second Injury Fund pays post-pension treatment. The Department appealed to the Court of Appeals.

At the Court of Appeals, the Department asked the Court to follow the Board's significant decision, *In re Bouden*, BIIA Dec. 98 17456 & 99 22359 (2000). In *Bouden*, the Board held that self-insured employers pay Second Injury Fund post-pension treatment, reasoning that the alternative (having the Second Injury Fund pay for post-pension treatment) would deplete the Second Injury Fund. However, the Court of appeals declined to follow *Bouden*, noting: 1) that a self-insured employer's Second Injury Fund premiums include an assessment of treatment; 2) the unambiguous language of RCW 51.16.120(1); 3) the purpose of the Second Injury Fund; and 4) the fact that state-fund employer's do not pay for Second Injury Fund post-pension treatment. Accordingly, the Court of Appeals held Doss's post-pension treatment must be paid by the Second Injury Fund.

The Department's current policy requiring self-insured employers to pay for any post-pension treatment in second Injury cases is incorrect.

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Boeing & Doss v. DLI (continued)

Holding:

In self-insured Second Injury Fund pensions, the Second Injury Fund pays Department-authorized post-pension treatment when the need for the treatment was not caused solely by the injury.

Impact:

This is a good case for self-insured employers because it indicates the Department's current policy requiring self-insured employers to pay for any post-pension treatment in second Injury cases is incorrect. From a practical standpoint, this decision could result in more conservative analyses by the Department as to whether post-pension treatment is required per the terms of RCW 51.36.010. Our attorneys are happy to discuss the impact of this case on any particular claims with which you may be dealing. ■

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