

Thomas, Chad

[TIME-LOSS COMPENSATION \(RCW 51.32.090\)](#)

Termination from modified position

When a worker is terminated from a modified position for disciplinary reasons, it is not necessary that the self-insured employer reinstate time-loss compensation if the disciplinary termination was administered for reasons unrelated to the industrial injury and the discipline would have been administered to other employees in similar circumstances. ...*In re Chad Thomas, BIA Dec., 00 10091 (2001)* [Editor's Note: The Board's decision was appealed to superior court under Kitsap County Cause No. 01-2-02478-9.]

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

1 **IN RE: CHAD THOMAS**) **DOCKET NO. 00 10091**
2)
3 **CLAIM NO. P-776840**) **DECISION AND ORDER**
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5 **APPEARANCES:**

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7 Claimant, Chad Thomas, by
8 Law Office of Paul W. Bryan, per
9 Paul W. Bryan

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11 Employer, Salvation Army,
12 None

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14 Department of Labor and Industries, by
15 The Office of the Attorney General, per
16 Brian L. Dew, Assistant
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19 The claimant, Chad Thomas, filed an appeal with the Board of Industrial Insurance Appeals
20 on April 3, 2000, from an order of the Department of Labor and Industries dated February 1, 2000.
21 The order denied time loss benefits from July 1, 1999 through February 1, 2000, because the
22 Department determined the claimant was able to work. **AFFIRMED.**
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25 **DECISION**

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27 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
28 and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order
29 issued on January 12, 2001, in which the order of the Department dated February 1, 2000, was
30 affirmed.
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33 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
34 no prejudicial error was committed and the rulings are affirmed.
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36 The issue presented by this appeal and the evidence presented by the parties are
37 adequately set forth in the Proposed Decision and Order.
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39 After consideration of the Proposed Decision and Order and the Petition for Review filed
40 thereto, and a careful review of the entire record before us, we are persuaded that the Proposed
41 Decision and Order is supported by the preponderance of the evidence and is correct as a matter of
42 law. However, we have granted review to clarify the basis for this decision.
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1 The sole issue in this matter is Mr. Thomas's entitlement to time loss compensation for the
2 period of July 1, 1999 through February 1, 2000. Mr. Thomas is a 44-year-old man possessing a
3 high school degree and about 20 college credits. Sometime in late 1992, he began working as a
4 janitor for the Salvation Army. On December 16, 1997, he fell down some steps while carrying
5 items, injuring his back and neck. It is unclear whether he spent any time off work completely, but it
6 is undisputed that sometime after the injury Mr. Thomas's attending physician imposed physical
7 restrictions. It is also undisputed that these restrictions would preclude Mr. Thomas from working at
8 his usual janitorial job, or any other janitorial job that did not take his physical restrictions into
9 consideration. Accordingly, a light duty version of Mr. Thomas's janitor job was crafted, one which
10 took Mr. Thomas's physical restrictions into consideration, and Mr. Thomas performed this job.
11 Although Mr. Thomas testified that the modified job duties exceeded his physical capacities, there
12 is no medical testimony to support this. In fact, Dr. Edgar S. Steinitz, Mr. Thomas's attending
13 physician beginning June 3, 1999, testified that the modified janitorial work that Mr. Thomas was
14 doing at the Salvation Army was appropriate.

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16 However, Mr. Thomas's tenure at the Salvation Army was troubled. Indeed, he presented
17 evidence that he was given three letters of reprimand, each concerning aggressive or threatening
18 behavior or language toward others in the workplace. As a result of being given three letters of
19 reprimand for this inappropriate behavior, Mr. Thomas's employment with the Salvation Army was
20 terminated on June 30, 1999. He did not work between July 1, 1999 through February 1, 2000, and
21 contends that he is entitled to time loss compensation for this period due to the loss of the
22 modified-duty job.

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24 RCW 51.32.090(4) provides that an employer may request an injured worker's physician to
25 certify that the worker is capable of performing available work other than the worker's usual work.
26 However, RCW 51.32.090(4)(a) provides that if the available work subsequently comes to an end,
27 time loss compensation benefits shall resume if the worker cannot return to his usual work or lacks
28 the skills to obtain other available work within his physical restrictions. Here, Mr. Thomas argues
29 that he is entitled to time loss compensation payments for the period between July 1, 1999 through
30 February 1, 2000, because his modified-duty job effectively came to an end.

1 We have previously addressed the situation in which a worker's time loss compensation
2 benefits are ended due to termination from a modified-duty job for disciplinary reasons. See *In re*
3 *Sean Murphy*, Dckt. No. 95 5987 (February 14, 1997). In *Murphy*, we stated as follows:

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5 We determine that disciplinary termination from such work does
6 not require reinstatement of full time loss compensation, if the evidence
7 establishes that the disciplinary termination was administered for
8 reasons wholly unrelated to the industrial injury or receipt of workers'
9 compensation benefits and the discipline likely would have been
10 administered to any of the employer's workers in similar situations.
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12 *Murphy*, at 2.
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14 Certainly, Mr. Thomas believed that this discipline was unfairly given to him. Moreover, he
15 testified that he believed that he was terminated because he could no longer perform the full
16 spectrum of duties required of a janitor. However, Carol McNair testified that indeed, Mr. Thomas
17 was **not** terminated for any reasons connected with his industrial injury or the condition caused by
18 it. Further, we can easily infer that this discipline would have been administered to any other
19 employee who engaged in this type of behavior. Termination for repeated acts of aggressive
20 language or behavior is certainly appropriate, and there is no evidence that this behavior was
21 tolerated in other staff members. Thus, we determine that RCW 51.32.090 does not, under these
22 circumstances, require resumption of time loss compensation benefits.
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27 After consideration of the Proposed Decision and Order and the Petition for Review filed
28 thereto, and a careful review of the entire record before us, we are persuaded that the Proposed
29 Decision and Order reached the correct result, and we therefore affirm the Department order of
30 February 1, 2000.
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33 FINDINGS OF FACT 34

- 35 1. On December 16, 1997, the claimant, Chad Thomas, sustained an injury
36 in the course of his employment with the Salvation Army, and filed an
37 application for benefits with the Department of Labor and Industries on
38 December 24, 1997. On February 1, 2000, the Department entered an
39 order that denied time loss compensation benefits for the period
40 July 1, 1999 through February 1, 2000, because it had determined that
41 the claimant was able to work. The claimant mailed a Notice of Appeal
42 from that order on March 31, 2000, which was received at the
43 Board of Industrial Insurance Appeals on April 3, 2000. On May 8,
44 2000, the Board issued an order granting the appeal, subject to proof of
45 timeliness, assigning it Docket No. 00 10091, and directing that further
46 proceedings be held.
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2. On December 16, 1997, the claimant sustained an injury when he fell down some steps, causing injury to his neck, left shoulder, and low back.
 3. The injury on December 16, 1997, probably aggravated a pre-existing cervical degenerative disc disease.
 4. Following the injury, the employer, the Salvation Army, provided a modified job for the claimant that accommodated his physical restrictions, pursuant to RCW 51.32.090(4). The claimant performed this modified job for a period of time prior to June 30, 1999.
 5. As of June 30, 1999, the claimant had received at least three letters of reprimand for abusive or threatening language or behavior toward other staff members. As a result of this behavior, his employment was terminated by his employer, the Salvation Army.
 6. The claimant's verbally abusive and confrontational behavior toward other staff had occurred both prior to and after his injury of December 16, 1997, and he had been warned that such behavior would result in termination of his employment.
 7. There is no evidence that the modified job that the claimant was performing at the time he was terminated on June 30, 1999, came to an end.
 8. The claimant was terminated from his job by his employer because of his own behavior and not for any reason related to his industrial injury of December 16, 1997, or due to his receipt of workers' compensation benefits.

CONCLUSIONS OF LAW

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1. The appeal in this matter was timely filed.
 2. The Board of Industrial Insurance Appeals has jurisdiction of the subject matter and the parties to this appeal.
 3. The employer made modified work available to the claimant pursuant to the requirements of RCW 51.32.090(4) for the period of July 1, 1999 through February 1, 2000. The employer's termination of the claimant's employment on June 30, 1999, due to aggressive or threatening language or behavior, did not cause the modified work to come to an end within the meaning of RCW 51.32.090(4).

1 4. The order of the Department of Labor and Industries dated
2 February 1, 2000, is correct and is affirmed.
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4 It is so ORDERED.
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6 Dated this 31st day of July, 2001.
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8 BOARD OF INDUSTRIAL INSURANCE APPEALS
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12 /s/ _____
13 THOMAS E. EGAN Chairperson
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16 /s/ _____
17 JUDITH E. SCHURKE Member
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