

Soesbe, Jennifer

TIME-LOSS COMPENSATION (RCW 51.32.090)

Termination from modified position

An injured worker who is terminated from a modified position for cause is not barred from receiving time-loss compensation benefits if the worker is otherwise entitled to the benefits. ...*In re Jennifer Soesbe*, BIIA Dec., 02 19030 (2003) [Editor's Note: The Board's decision was appealed to superior court under Thurston County Cause No. 03-2-02077-7.]

Scroll down for order.

1 On March 1, 2002, Ms. Soesbe reported to work for a modified job with her employer of
2 injury, which had been approved by her physician. Before her shift ended, her employment had
3 been terminated for disciplinary reasons wholly unrelated to the industrial injury.
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5 A worker who cannot return to the job of injury is not entitled to temporary total disability
6 when a physician certifies that an alternate job with the employer of injury is within the worker's
7 capacity to perform and the employer has made the job available to the worker. If the alternate job
8 becomes unavailable before the worker has recovered sufficiently to return to regular employment,
9 or if in the physician's judgment, the worker should not continue in the job, entitlement to wage
10 replacement resumes. RCW 51.32.090(4)(a).
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12 In this claim, the Department paid time loss benefits from March 1, 2002 through July 26,
13 2002. The industrial appeals judge reversed the Department order and denied benefits for that
14 period.
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16 We grant review because we find the claimant was not entitled to time loss benefits so long
17 as she was capable of performing the modified job with the employer of injury, but her entitlement
18 to time loss resumed on the day her physician found her unable to work.
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20 We have previously determined that when a job an injured worker has been certified to do
21 ends for disciplinary reasons unrelated to the industrial injury and in accord with action that would
22 be taken against other workers similarly situated, that job is "available" within the meaning of the
23 statute. "In such circumstances, we will find that the employer has continued to make the work for
24 which he or she has been shown qualified under RCW 51.32.090(4) available, but for the actions of
25 the worker." *In re Sean Murphy*, Dckt. No. 95 5987 (February 14, 1997). *See also In re Chad*
26 *Thomas*, BIIA Dec., 00 10091 (2001). An employer is not required to tolerate behavior from an
27 injured worker that it would not tolerate from an employee who was not injured, nor does an
28 employer exercise its right to have a satisfactory work force at the cost of replacing wages for an
29 employee who would be earning the wage, but for his or her own behavior.
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31 For the period of March 1, 2002 through June 2, 2002, Ms. Soesbe was not a totally
32 temporarily disabled worker. She was not precluded from gainful employment and was not entitled
33 to time loss compensation.
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35 Ms. Soesbe's circumstances changed on June 3, 2002, when her physician determined that
36 she could no longer perform gainful employment. This Board has never held that an injured worker
37 who was terminated for cause is barred from receiving time loss compensation that they would
38 otherwise be entitled to. We have merely held that a modified job does not come to an end within
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1 the meaning of RCW 51.32.090(4) when an injured worker is terminated for cause. If a terminated
2 worker becomes unable to perform any gainful employment or if she can work but has decreased
3 earning power, she is entitled to receive the benefits indicated by the law. Ms. Soesbe was unable
4 to work from June 3, 2002 through July 26, 2002, and she is entitled to time loss compensation
5 benefits for that period.
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8 The Department order dated August 8, 2002, is reversed. The claim is remanded to the
9 Department with directions to deny the claimant time loss compensation for the period of March 1,
10 2002 through June 2, 2002, and pay time loss compensation for the period of June 3, 2002 through
11 July 26, 2002.
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14 **FINDINGS OF FACT**

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- 16 1. On March 5, 2002, the claimant, Jennifer K. Soesbe, filed an application
17 for benefits, alleging an injury to her mid and low back on February 28,
18 2002, during the course of her employment with Liberty Country Place,
19 Inc. (Northwest Country Place, Inc). On March 15, 2002, the
20 Department issued an order allowing the claim.
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23 Between March 14, 2002 and July 30, 2002, the Department issued
24 orders that paid the claimant time loss compensation for the period of
25 March 1, 2002 through July 26, 2002.

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27 On August 8, 2002, in response to the employer's timely protests of the
28 time loss orders, the Department issued an order that affirmed orders
29 dated August 13, 2002 [*sic*], July 30, 2002, July 2, 2002, June 20, 2002,
30 June 19, 2002, April 29, 2002, April 15, 2002, April 1, 2002, and
31 March 14, 2002, that paid the claimant time loss compensation from
32 March 1, 2002 through July 26, 2002.

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34 On August 28, 2002, the employer filed an appeal from the order dated
35 August 8, 2002, with the Board of Industrial Insurance Appeals and on
36 October 17, 2002, following timely Orders Extending Time to Act on
37 Appeals, the Board issued an Order Granting Appeal and assigned
38 Docket No. 02 19030.

- 39 2. On February 28, 2002, the claimant, Jennifer K. Soesbe, sustained an
40 injury during the course of her employment with Northwest Country
41 Place, Inc., a nursing home.
42
- 43 3. The claimant's ability to perform certain tasks necessary to accomplish
44 her job of injury was impaired as a result of the industrial injury. The
45 employer provided the claimant with a modified job that had been
46 approved by her physician.
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- 1 4. On March 1, 2002, the claimant's employment was terminated by the
2 employer for disciplinary reasons wholly unrelated to the industrial
3 injury or the receipt of workers' compensation benefits. The employer
4 would have taken the same action against any employee whose actions
5 were similar to the claimant's actions.
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7 5. From March 1, 2002 through June 2, 2002, the claimant was capable of
8 performing the modified job that would have been available to her
9 except for the disciplinary termination.
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11 6. For the period of June 3, 2002 through July 26, 2002, the claimant was
12 unable to perform any gainful employment.
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14 **CONCLUSIONS OF LAW**

- 15
16 1. The Board of Industrial Insurance Appeals has jurisdiction over the
17 parties and the subject matter to this appeal.
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19 2. For the period of March 1, 2002 through June 2, 2002, the claimant
20 was released by her physician to perform work other than her usual
21 work that was available with her employer of injury, and she was,
22 therefore, not entitled to receive total temporary disability benefits
23 pursuant to RCW 51.32.090(4).
24
25 3. For the period of June 3, 2002 through July 26, 2002, the claimant was
26 precluded by the residuals of the industrial injury from performing
27 reasonably continuous gainful employment, and she was a temporarily
28 totally disabled worker, entitled to benefits, pursuant to RCW 51.32.090.
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30 4. The Department order dated August 8, 2002, is incorrect and is
31 reversed. The claim is remanded to the Department with instructions to
32 deny time loss compensation for the period of March 1, 2002 through
33 June 2, 2002, and to pay time loss compensation for the period of
34 June 3, 2002 through July 26, 2002.
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36 It is so ORDERED.

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38 Dated this 25th day of September, 2003.

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40 BOARD OF INDUSTRIAL INSURANCE APPEALS

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43 /s/ _____
44 THOMAS E. EGAN Chairperson

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46 /s/ _____
47 CALHOUN DICKINSON Member