

Galen, John

SUSPENSION OF BENEFITS (RCW 51.32.110)

Good cause

Suspension of benefits for non-cooperation requires behavior that obstructs or delays the administration of a claim. The behavior must be deliberate and calculated to obstruct. Behavior that is not designed or intended to obstruct or delay is not non-cooperation. A worker who is willing, although unable, to discontinue his use of tobacco has not refused to cooperate and his benefits may not be suspended for non-cooperation. ...***In re John Galen, BIIA Dec., 03 18491 (2004)*** [*Editor's Note: The Board's decision was appealed to superior court under Whatcom County Cause No. 04-2-02677-2.*]

Scroll down for order.

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

1 **IN RE: JOHN A. GALEN**) **DOCKET NOS. 03 18491 & 03 18693**
2)
3 **CLAIM NO. X-161335**) **DECISION AND ORDER**
4 _____)

5 **APPEARANCES:**

6
7 Claimant, John A. Galen, by
8 Robinson & Kole, P.S., Inc., per
9 Nathan T. Dwyer

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11 Employer, Northwest Collision,
12 None

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14 Department of Labor and Industries, by
15 The Office of the Attorney General, per
16 Kerena A. Higgins, Assistant
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19 **Docket No. 03 18491:** On July 3, 2003, the claimant, John A. Galen, filed an appeal with
20 the Board of Industrial Insurance Appeals, from an order of the Department of Labor and Industries
21 dated July 1, 2003. In this order, the Department ended time loss benefits effective July 1, 2003,
22 because the claim was suspended. The Department order is **REVERSED AND REMANDED**.
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25 **Docket No. 03 18693:** On July 8, 2003, the claimant, John A. Galen, filed an appeal with
26 the Board of Industrial Insurance Appeals, from a Notice of Decision issued by the Department of
27 Labor and Industries on July 1, 2003. In this Notice of Decision, the Department suspended
28 Mr. Galen's right to further compensation effective July 1, 2003, for failure to submit to medical
29 treatment as recommended. The Department Notice of Decision is **REVERSED AND**
30 **REMANDED**.
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34 **DECISION**

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36 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
37 and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order
38 issued on August 25, 2004, in which the industrial appeals judge affirmed the Department order and
39 the Department Notice of Decision dated July 1, 2003.
40

41 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
42 no prejudicial error was committed. The rulings are affirmed.

43 We have granted review to reverse the Department orders and remand the claim to the
44 Department with directions to reinstate the claimant's right to compensation, effective July 1, 2003,
45 and to commence administration of this claim according to the law and the facts.
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1 The issue in these appeals is whether the Department was correct in suspending
2 Mr. Galen's benefits when he failed to stop smoking and was therefore ineligible for the
3 recommended surgery consisting of a full cervical fusion.
4

5 Mr. Galen sustained an industrial injury to his neck and low back on May 20, 1999.
6 Sometime in the fall of 2001, his physician recommended a full cervical fusion, but declined to
7 perform the surgery until Mr. Galen, who had smoked since 1971, abstained from smoking for a
8 specified period of time. The unrefuted evidence is that despite his long-standing habit, Mr. Galen
9 wanted to stop smoking and tried a number of modalities to do that. He did not achieve the
10 required non-smoking status and the surgery was not scheduled. At some point, the Department
11 informed Mr. Galen in writing that he must stop smoking and have surgery scheduled by a date
12 certain or his time loss benefits would be suspended. Effective July 1, 2003, the Department
13 suspended not only Mr. Galen's time loss compensation but his medical benefits as well.
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19 The Department's authority to suspend benefits is found in RCW 51.32.110(2):
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21 If the worker refuses to submit to medical examination, or obstructs the
22 same, or, if any injured worker shall persist in unsanitary or injurious
23 practices which tend to imperil or retard his or her recovery, or shall
24 refuse to submit to such medical or surgical treatment as is reasonably
25 essential to his or her recovery or refuse or obstruct evaluation or
26 examination for the purpose of vocational rehabilitation or does not
27 cooperate in reasonable efforts at such rehabilitation, the department or
28 the self-insurer upon approval by the department, with notice to the
29 worker may suspend any further action on any claim of such worker so
30 long as such refusal, obstruction, noncooperation, or practice continues
31 and reduce, suspend, or deny any compensation for such period:
32 PROVIDED, That the department or the self-insurer shall not suspend
33 any further action on any claim of a worker or reduce, suspend, or deny
34 any compensation if a worker has good cause for refusing to submit to
35 or to obstruct any examination, evaluation, treatment or practice
36 requested by the department or required under this section.
37

38 WAC 296-14-410(4) sets out the procedure the Department is required to follow prior to
39 suspending benefits. It reads, in relevant part:
40

41 (a) The department or self insurer must first send a letter to the
42 worker (or the worker's representative) advising that benefits may be
43 suspended and asking for an explanation for the noncooperation,
44 obstruction and/or delay of the management of the claim.
45

46 (b) The worker has thirty days to respond in writing to the letter.
47 This written response should include the reason(s) the worker has for
not cooperating with the department or self insurer.

1 Prior to suspending the claim, the Department did not request an explanation from Mr. Galen
2 or give him any reason to believe that an explanation could avoid the anticipated suspension. The
3 Department's failure to comply with WAC 296-14-410 is sufficient reason to reverse the order and
4 remand the claim with directions to lift the suspension. *In re Willie Dunn*, BIIA Dec., 91 0602
5 (1992).
6

7
8 The reason for that is clear. As we stated in *In re Johan Petry*, BIIA Dec., 92 0389 (1993):
9

10 When an injured worker's benefits are suspended, the worker and his or
11 her family can suffer extreme financial stress. Suspensions may also
12 prevent an injured worker from receiving necessary medical treatment,
13 thereby endangering the worker's health. Thus, orders suspending
14 benefits should not be issued without a careful review of the facts and
15 without giving the worker an opportunity to address the alleged
16 noncooperation.
17

18 *Petry*, at 2.

19 However, as in *Petry*, we will not remand the claim with directions to the Department to
20 comply with WAC 296-14-410. We will determine whether Mr. Galen failed to cooperate.
21

22 We will start by reviewing the definition of noncooperation.
23

24 (2) **What does noncooperative mean?** Noncooperation is behavior by
25 the worker (or worker's representative) which obstructs and/or
26 delays the department or self-insurer from reaching a timely
27 resolution of the claim.
28

29 (a) Noncooperation can include any one of the following:
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31 (i) Not attending or cooperating with medical examinations or
32 vocational evaluations requested by the department or self-insurer.
33

34 (ii) Failure to keep scheduled appointments or evaluations with
35 attending physician or vocational counselor.
36

37 (iii) Engaging in unsanitary or harmful actions that jeopardize or slow
38 recovery.
39

40 (iv) Not accepting medical and/or surgical treatment that is
41 considered reasonably essential for recovery from the industrial injury or
42 occupational disease.
43

44 WAC 296-14-410(2).
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1 Injured workers do not lose their right to decide what kind of medical treatment is
2 appropriate, and for that reason, Mr. Galen could not be required to submit to a full surgical fusion.
3
4 A surgical procedure with its inherent risks may be the only treatment option left, but that does not
5 mean it is reasonably essential for recovery within the meaning of the regulation. The surgery
6 would certainly result in less cervical mobility and might have other undesirable results. The
7 decision to take that risk belongs to the injured worker and is not a decision that can be thrust on
8 the worker by the Department.
9

10
11 If Mr. Galen cannot be required to submit to surgery, he cannot be required to take the steps
12 necessary to have the surgery. If Mr. Galen had refused the surgery or had refused to stop
13 smoking so that the surgery could be performed, he would be guilty of noncooperation.
14

15
16 However, Mr. Galen did not refuse treatment or fail to try to comply with the steps necessary
17 to have the surgery. Prior to the time the Department suspended his benefits, Mr. Galen was
18 willing to have the surgery and he tried a number of modalities to help him stop smoking. His
19 unrefuted testimony is that he tried and failed to quit smoking. We find the Department's argument,
20 made over and over again, that Mr. Galen could have stopped smoking if he had just exercised will
21 power is simply contrary to the universal acceptance of nicotine as an addictive drug.
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23
24 Noncooperation is, by definition, behavior that obstructs or delays the administration of the
25 claim. The behavior is deliberate and calculated to obstruct. Behavior that is not designed or
26 intended to obstruct or delay is not noncooperation. Mr. Galen had used nicotine, an addictive
27 substance, for thirty years, and although he was willing, he was unable, during the time at issue
28 here, to stop the use of that substance.
29

30
31 The Department was not delayed in the administration of this claim by Mr. Galen's actions
32 and was free at any time to take appropriate action. In our experience, it is not uncommon for the
33 Department to close a claim if a claimant declines recommended surgical treatment. The
34 Department could have performed its statutory obligation to administer claims by closing this claim
35 if no other treatment option was available with whatever award was appropriate.
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38 Having determined that the Department erred in its decision to suspend Mr. Galen's benefits,
39 we are remanding the claim to the Department with directions to reinstate the claimant's right to
40 benefits, effective July 1, 2003, and to take such other action as required by the facts and the law.
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FINDINGS OF FACT

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3 1. On June 4, 1999, the claimant, John A. Galen, filed an application for
4 benefits, alleging an injury to his neck and back on May 20, 1999,
5 during the course of his employment with Northwest Collision. The
6 claim was allowed and benefits provided.

7
8 On April 10, 2003, the Department issued a letter in which the
9 Department accepted medical conditions diagnosed as sprain of neck
10 and lumbar region sprain and advised the claimant that if he did not
11 stop smoking and schedule surgery by May 12, 2003, time loss benefits
12 would be suspended pending cessation of smoking and scheduled
13 surgery. The Department does not pay for treatment to stop smoking.

14
15 Following the claimant's timely appeal of the letter dated April 10, 2003,
16 the Department issued an order dated April 28, 2003, in which the
17 Department reconsidered the letter and an order dated April 29, 2003,
18 in which it set the letter aside and promised a further determinative
19 order.

20
21 On April 30, 2003, the Board of Industrial Insurance Appeals returned
22 the claim to the Department for further action.

23
24 On July 1, 2003, the Department issued an order in which it ended time
25 loss benefits on June 30, 2003, because the claim was suspended.

26
27 On July 3, 2002, the claimant filed an appeal from the order dated
28 July 1, 2003, with the Board of Industrial Insurance Appeals. On
29 August 12, 2003, following time Orders Extending Time To Act On
30 Appeal, the Board issued an Order Granting Appeal and assigned the
31 appeal Docket Number 03 18491.

32
33 On July 1, 2003, the Department issued a Notice of Decision in which
34 the Department suspended the claimant's right to further compensation
35 for failure to submit to medical treatment as recommended.

36
37 On July 8, 2003, the claimant filed an appeal from the Notice of
38 Decision dated July 1, 2003, with the Board of Industrial Insurance
39 Appeals. On August 12, 2003, following timely Orders Extending Time
40 To Act On Appeal, the Board issued an Order Granting Appeal and
41 assigned the appeal Docket Number 03 18693.

- 42
43 2. On May 20, 1999, the claimant sustained an injury to his neck and low
44 back during the course of his employment with Northwest Collision.

- 45
46 3. Following the industrial injury, a single level cervical fusion was
47 performed that failed.

- 1 4. Sometime after September 2001, a physician recommended to the
2 claimant that he undergo a full cervical fusion, but declined to perform
3 the surgery until the claimant stopped smoking.
- 4
- 5 5. On July 1, 2003, the Department suspended Mr. Galen's entitlement to
6 time loss compensation and medical treatment for failure to submit to
7 medical treatment as recommended.
- 8
- 9 6. The Department failed to send Mr. Galen a letter advising him that
10 benefits may be suspended for noncooperation that asked him to
11 provide an explanation for his action within thirty days.
- 12
- 13 7. Mr. Galen has smoked since 1971. In preparation for the surgery, he
14 tried various methods designed to help him stop smoking.
- 15
- 16 8. Prior to the July 1, 2003 suspension of benefits, the claimant had not
17 remained nicotine free and had not scheduled surgery.
- 18
- 19 9. Nicotine is an addictive substance. Mr. Galen was not able to stop
20 smoking in preparation for the recommended surgery. His inability to
21 stop smoking did not constitute a refusal to submit to medical or
22 surgical treatment reasonably essential to his recovery.
- 23
- 24 10. Mr. Galen had the right to refuse to submit to a full cervical fusion.
- 25
- 26 11. Mr. Galen's failure to comply with the requirements to obtain the
27 recommended surgery did not prevent the Department from reaching a
28 timely resolution of the claim.
- 29

CONCLUSIONS OF LAW

- 32 1. The Board of Industrial Insurance Appeals has jurisdiction over the
33 parties to and the subject matter of these appeals.
- 34
- 35 2. John W. Galen did not obstruct or delay the Department from reaching a
36 timely resolution of the claim or refuse to submit to surgical treatment
37 reasonably essential to his recovery, within the meaning of
38 RCW 51.32.110(2), by failing to stop smoking or schedule surgery for a
39 full cervical fusion.
- 40
- 41 3. The Department failed to comply with the requirement of
42 WAC-296-14-410(4) when it suspended the claim without affording
43 Mr. Galen an opportunity to explain why surgery had not been
44 scheduled.
- 45
- 46 4. The Department order and the Department Notice of Decision dated
47 July 1, 2003, are incorrect and are reversed. The claim is remanded to
the Department with directions to reinstate benefits effective

1 July 1, 2003, and to take other action as required by the law and the
2 facts.
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4 It is so **ORDERED**.

5 Dated this 28th day of October, 2004.
6

7 BOARD OF INDUSTRIAL INSURANCE APPEALS
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10
11 /s/ _____
12 THOMAS E. EGAN Chairperson
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16 /s/ _____
17 FRANK E. FENNERTY, JR. Member
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21 /s/ _____
22 CALHOUN DICKINSON Member
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