

Hanson, Gail

SUSPENSION OF BENEFITS (RCW 51.32.110)

Failure to comply (WAC 296-14-410)

The worker/appellant has the burden of proving that the Department did not comply with WAC 296-14-410(4)(a), which requires the Department to provide an opportunity to explain an apparent failure to cooperate prior to the suspension of benefits. ...*In re Gail Hanson*, BIIA Dec., 04 14071 (2005)

Scroll down for order.

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

1 **IN RE: GAIL A. HANSON**) **DOCKET NO. 04 14071**
2)
3 **CLAIM NO. P-083025**) **DECISION AND ORDER**
4

5 **APPEARANCES:**

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7 Claimant, Gail A. Hanson, by
8 Law Office of James R. Walsh, per
9 James R. Walsh

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11 Employer, Microdisk Services,
12 None

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14 Department of Labor and Industries, by
15 The Office of the Attorney General, per
16 H. Regina Cullen, Assistant
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18 The claimant, Gail A. Hanson, filed an appeal with the Board of Industrial Insurance Appeals
19 on April 5, 2004, from an order of the Department of Labor and Industries dated February 12, 2004.
20 In this order, the Department affirmed two prior orders dated January 26, 2004, and January 27,
21 2004. In its order dated January 26, 2004, the Department suspended the claimant's right to further
22 compensation effective January 24, 2004, for her failure to submit to medical treatment as
23 recommended, failure to submit to medical examination, and failure to cooperate in vocational
24 evaluation. In its order dated January 27, 2004, the Department suspended the claimant's right to
25 further time-loss compensation effective January 24, 2004, with time-loss compensation benefits
26 paid from January 20, 2004 through January 24, 2004, and kept the claim open. The Department
27 order is **AFFIRMED**.
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33 **DECISION**

34 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
35 and decision on a timely Petition for Review filed by the Department to a Proposed Decision and
36 Order issued on October 22, 2004, in which the industrial appeals judge reversed and remanded
37 the order of the Department dated February 12, 2004, due to the Department's failure to prove that
38 it sent the required "good cause letter" [WAC 296-14-410(4)(a)] to the claimant prior to suspending
39 her benefits. That affirmative defense was not pleaded nor the subject of proof by the claimant.
40 We have granted review because we believe the industrial appeals judge, in his Proposed Decision
41 and Order, erroneously placed the burden of proof of this affirmative defense to a suspension of
42 benefits order upon the Department. We reach the merits of this appeal and conclude that the
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1 claimant has failed to present any credible evidence of good cause for her failure to cooperate both
2 with medical treatment and vocational evaluation connected to this claim.
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4 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
5 no prejudicial error was committed. The rulings are affirmed.
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7 Burden of Proof and the WAC 296-14-410 "Good Cause" Letter

8 The burden of proof in a suspension of benefits case lies with the injured worker. *Andersen*
9 *v. Department of Labor & Indus.*, 93 Wn. App. 60 (1998); *In re Luiz Lopez*, BIIA Dec., 91 3608
10 (1992). The failure to send the "good cause" letter is most accurately characterized as an
11 affirmative defense to the suspension of benefits. Unless there is a specific statute or rule to the
12 contrary, the burden of proof of an affirmative defense rests on the proponent of that defense, in
13 this case Ms. Hanson. Three of our Significant Decisions, *Luiz Lopez*; *In re Willie Dunn*, BIIA
14 Dec., 91 0602 (1992); and *In re Johan Petry*, BIIA Dec., 92 0389 (1993), addressed the question of
15 whether the Department had provided the worker with written notice, per WAC 296-14-410, prior to
16 suspending benefits. In *Luis Lopez* and *Johan Petry*, the worker first alleged and then presented
17 evidence that no "good cause" letter was sent by the Department (or self-insurer). The Department
18 was unable to produce proof that such a letter was sent to the worker. These Significant Decisions
19 support the proposition that the burden of initial presentation of evidence or the burden of proof on
20 this affirmative defense rests with the worker contesting the suspension of benefits order. In *Willie*
21 *Dunn*, at page 6, we stated that: "The Department presented no evidence that it made an attempt to
22 comply with WAC 296-14-410." This statement should not be read to require the Department in all
23 appeals from suspension orders to present proof that such a letter was sent. It merely indicates
24 that the issue was raised by the worker, the failure to send the letter was supported by evidence in
25 the record, and the Department failed to present proof that such a letter had been sent. As such,
26 our decision in *Dunn* was not meant to change the order of presentation of evidence or the burden
27 of proof.
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29 In this case, Ms. Hanson did not allege nor did she attempt to prove that she did not receive
30 the required "good cause" letter. Without evidence sufficient to create a prima facie case that the
31 letter was not sent, the fact that the Department did not produce such a letter and place it into
32 evidence is irrelevant. The Department's January 26, 2004 suspension order cannot be reversed
33 on that ground.
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1 Good Cause for Non-cooperation with Treatment and Vocational Evaluations

2 The grounds upon which the Department may issue an order suspending benefits for
3 non-cooperation are set out in RCW 51.32.110(2):

4 If the worker refuses to submit to medical examination, or obstructs the
5 same, or, if any injured worker shall persist in unsanitary or injurious
6 practices which tend to imperil or retard his or her recovery, or shall
7 refuse to submit to such medical or surgical treatment as is reasonably
8 essential to his or her recovery or refuse or obstruct evaluation or
9 examination for the purpose of vocational rehabilitation or does not
10 cooperate in reasonable efforts at such rehabilitation, the department or
11 the self-insurer upon approval by the department, with notice to the
12 worker may suspend any further action on any claim of such worker so
13 long as such refusal, obstruction, noncooperation, or practice continues
14 and reduce, suspend, or deny any compensation for such period:
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16 In this case, the Department suspended Ms. Hanson's benefits based on three separate
17 grounds: (1) The claimant refused to submit to medical treatment that was reasonably essential to
18 her recovery in that she missed multiple physical therapy appointments between September 4,
19 2003 and November 24, 2003. (2) The claimant refused examination for the purpose of vocational
20 rehabilitation in that she did not appear for a physical capacities evaluation scheduled for
21 December 3, 2003 and December 4, 2003. (3) The claimant obstructed evaluation for the purpose
22 of vocational rehabilitation in that she did not comply with the vocational counselor's request that
23 she fill out a work history form. Even with all of these instances of non-cooperation, the Department
24 order suspending benefits could be reversed had the claimant proven "good cause" for her actions
25 deemed by the Department to be non-cooperative. Proof of the relevant factors necessary to
26 establish "good cause" is case specific. See, e.g., *Romo v. Department of Labor & Indus.*, 92 Wn.
27 App. 348 (1998). Ms. Hanson testified that "I have done nothing but cooperate" and "cooperating
28 is what got me here ultimately." 9/1/04 Tr. at 20. She promised that if given another chance she
29 will cooperate. Her own testimony reveals the untruth of these statements. Her testimony is not
30 credible at all.
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32 Ms. Hanson had inconsistent explanations as to why she missed the appointments. First
33 she started with outright denial: "any physical therapy appointments I had I cancelled." When
34 prompted further she explained variously: "Because I couldn't go to them." "My physical therapist
35 told me not to go." "Because I couldn't handle it. My body couldn't take it. It was too much for me.
36 And I needed massage therapy and not physical therapy." "It (the physical therapy) was too hard."
37 9/1/04 Tr. at 11.
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1 Ms. Hanson's explanations for missing both days of the physical capacities evaluation are
2 similarly inconsistent albeit more imaginative: "They made me leave." 9/1/04 Tr. at 15. She came
3 in late because her ride was late. She finished the first day but did not come in the second day
4 because of a big storm that made it too dangerous due to downed power lines. She did not drive
5 herself in because she was on a new medication. She could not remember the dates of the
6 physical capacities evaluation with her statements as to those dates varying between December 3,
7 2003 and December 6, 2003.
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11 Ms. Hanson's explanations for not sending the work history form to the vocational counselor,
12 Janice Star, were also contradictory and unbelievable. The following statements were all made by
13 Ms. Hanson during her testimony: At a meeting with the vocational counselor in her attorney's office
14 on November 17, 2003, she told the vocational counselor that she did not have the work history
15 form because she was waiting on information from the Social Security Administration and when she
16 received it she would send the form to her. She testified that when she got that information she
17 sent it to Ms. Star. Later in her testimony, the claimant stated that Ms. Star instructed her over the
18 phone that she should bring the work history document with her to the physical capacities
19 evaluation and hand it to them. At that point, Ms. Hanson admitted that she did not send the
20 information to Ms. Star. Finally, she testified that she did hand the documents to the evaluator
21 when she came to the physical capacities evaluation on December 3, 2003.
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28 On the day of her testimony and also during the fall of 2003, when the alleged
29 non-cooperation occurred, the claimant was ingesting the following analgesic and/or mood altering
30 medications, all of which she stated she received from her attending physician, Dr. Phillip
31 Matthews: Morphine (off and on for six years), Oxycontin (90 mg. every six hours), "extra strength"
32 percocet (she takes this "all day long"), Valium (10 mg. morning and night), and Topamax (50 mg.)
33 Throughout her testimony the claimant complained of short-term memory loss and inability to recall
34 matters. She described herself as feeling "not quite all there," "whacked out," and "pretty much out
35 of it" when taking these medications. Although overmedication might explain the inconsistencies
36 and incoherence within the claimant's testimony, our review of this "list" of medications and the
37 quantities of them that she allegedly consumes leads us to believe that this part of her testimony,
38 like the rest of it, was significantly exaggerated. 9/1/04 Tr. at 19.
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44 We conclude the Department correctly identified three separate grounds for suspension of
45 Ms. Hanson's benefits under the authority of RCW 51.31.110(2). We affirm the suspension order
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1 because the claimant did not present any evidence that was even remotely credible to show "good
2 cause" for the multiple non-cooperative actions.
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4 FINDINGS OF FACT

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6 1. On June 23, 1995, the claimant, Gail A. Hanson, filed an application for
7 benefits with the Department of Labor and Industries, in which she
8 alleged an injury to her lower left hip and back during the course of her
9 employment with Microdisk Services on June 15, 1995. On August 7,
10 1995, the Department issued an order in which it stated that the claim
11 was allowed, and benefits were provided.

12
13 On January 26, 2004, the Department issued an order in which it
14 suspended the claimant's right to further compensation effective
15 January 24, 2004, for her failure to submit to medical treatment as
16 recommended, failure to submit to medical examination, and failure to
17 cooperate in a vocational evaluation. On January 27, 2004, the
18 Department issued an order in which it suspended the claimant's right to
19 further time-loss compensation benefit effective January 24, 2004, with
20 time-loss compensation benefits as paid from January 20, 2004 through
21 January 24, 2004, and kept the claim open.

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23 On January 28, 2004, the claimant filed a Protest and Request for
24 Reconsideration with the Department from its orders dated January 26,
25 2004 and January 27, 2004. On February 12, 2004, the Department
26 issued an order in which it affirmed its orders dated January 26, 2004
27 and January 27, 2004.

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29 On April 5, 2004, the claimant filed a Notice of Appeal with the Board of
30 Industrial Insurance Appeals from the Department order dated
31 February 12, 2004. On May 4, 2004, the Board issued an order in which
32 it granted the appeal, assigned the appeal Docket No. 04 14071, and
33 ordered that further proceedings be held.

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35 2. Between September 4, 2003 and November 24, 2003, the claimant
36 missed multiple physical therapy appointments prescribed as treatment
37 for accepted conditions under this claim.
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39 3. The claimant did not appear for a physical capacities evaluation
40 scheduled for December 3, 2003 and December 4, 2003, as part of the
41 vocational evaluation related to this claim.
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43 4. In November and December 2003, the claimant did not comply with the
44 vocational counselor's request that she fill out a work history form in
45 order to assist in the vocational evaluation of this claim.
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47 5. The claimant did not have sound or rational bases or excuses for her
failure to cooperate with treatment of conditions related to this claim or
the vocational evaluation of the claim.

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3 **CONCLUSIONS OF LAW**
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- 5 1. The Board of Industrial Insurance Appeals has jurisdiction over the
6 parties to and the subject matter of this appeal.
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8 2. The claimant refused to submit to medical treatment that was
9 reasonably essential to her recovery and refused and obstructed
10 evaluation and examination for the purpose of vocational rehabilitation,
11 within the meaning of RCW 51.32.110(2).
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13 3. The claimant did not have good cause within the meaning of
14 RCW 51.32.110(2) to excuse her non-cooperation with medical
15 treatment and vocational evaluation and examination under the
16 auspices of this claim.
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18 4. The order of the Department of Labor and Industries dated February 12,
19 2004, is correct and is affirmed.

20 It is so **ORDERED**.

21 Dated this 2nd day of March, 2005.

22 BOARD OF INDUSTRIAL INSURANCE APPEALS
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25
26 /s/ _____
27 THOMAS E. EGAN Chairperson
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31 /s/ _____
32 CALHOUN DICKINSON Member
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