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

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

APPEARANCES:

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

Employer, Microdisk Services,
None

Department of Labor and Industries, by
The Office of the Attorney General, per
H. Regina Cullen, Assistant

The claimant, Gail A. Hanson, filed an appeal with the Board of Industrial Insurance Appeals on April 5, 2004, from an order of the Department of Labor and Industries dated February 12, 2004. In this order, the Department affirmed two prior orders dated January 26, 2004, and January 27, 2004. In its order dated January 26, 2004, the Department suspended the claimant's right to further compensation effective January 24, 2004, for her failure to submit to medical treatment as recommended, failure to submit to medical examination, and failure to cooperate in vocational evaluation. In its order dated January 27, 2004, the Department suspended the claimant's right to further time-loss compensation effective January 24, 2004, with time-loss compensation benefits paid from January 20, 2004 through January 24, 2004, and kept the claim open. The Department order is **AFFIRMED**.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the Department to a Proposed Decision and Order issued on October 22, 2004, in which the industrial appeals judge reversed and remanded the order of the Department dated February 12, 2004, due to the Department's failure to prove that it sent the required "good cause letter" [WAC 296-14-410(4)(a)] to the claimant prior to suspending her benefits. That affirmative defense was not pleaded nor the subject of proof by the claimant. We have granted review because we believe the industrial appeals judge, in his Proposed Decision and Order, erroneously placed the burden of proof of this affirmative defense to a suspension of benefits order upon the Department. We reach the merits of this appeal and conclude that the

claimant has failed to present any credible evidence of good cause for her failure to cooperate both with medical treatment and vocational evaluation connected to this claim.

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

Burden of Proof and the WAC 296-14-410 "Good Cause" Letter

The burden of proof in a suspension of benefits case lies with the injured worker. *Andersen v. Department of Labor & Indus.*, 93 Wn. App. 60 (1998); *In re Luiz Lopez*, BIIA Dec., 91 3608 (1992). The failure to send the "good cause" letter is most accurately characterized as an affirmative defense to the suspension of benefits. Unless there is a specific statute or rule to the contrary, the burden of proof of an affirmative defense rests on the proponent of that defense, in this case Ms. Hanson. Three of our Significant Decisions, *Luiz Lopez; In re Willie Dunn*, BIIA Dec., 91 0602 (1992); and *In re Johan Petry*, BIIA Dec., 92 0389 (1993), addressed the question of whether the Department had provided the worker with written notice, per WAC 296-14-410, prior to suspending benefits. In *Luis Lopez* and *Johan Petry*, the worker first alleged and then presented evidence that no "good cause" letter was sent by the Department (or self-insurer). The Department was unable to produce proof that such a letter was sent to the worker. These Significant Decisions support the proposition that the burden of initial presentation of evidence or the burden of proof on this affirmative defense rests with the worker contesting the suspension of benefits order. In *Willie Dunn*, at page 6, we stated that: "The Department presented no evidence that it made an attempt to comply with WAC 296-14-410." This statement should not be read to require the Department in all appeals from suspension orders to present proof that such a letter was sent. It merely indicates that the issue was raised by the worker, the failure to send the letter was supported by evidence in the record, and the Department failed to present proof that such a letter had been sent. As such, our decision in *Dunn* was not meant to change the order of presentation of evidence or the burden of proof.

In this case, Ms. Hanson did not allege nor did she attempt to prove that she did not receive the required "good cause" letter. Without evidence sufficient to create a prima facie case that the letter was not sent, the fact that the Department did not produce such a letter and place it into evidence is irrelevant. The Department's January 26, 2004 suspension order cannot be reversed on that ground.

Good Cause for Non-cooperation with Treatment and Vocational Evaluations

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

> If the worker refuses to submit to medical examination, or obstructs the same, or, if any injured worker shall persist in unsanitary or injurious practices which tend to imperil or retard his or her recovery, or shall refuse to submit to such medical or surgical treatment as is reasonably essential to his or her recovery or refuse or obstruct evaluation or examination for the purpose of vocational rehabilitation or does not cooperate in reasonable efforts at such rehabilitation, the department or the self-insurer upon approval by the department, with notice to the worker may suspend any further action on any claim of such worker so long as such refusal, obstruction, noncooperation, or practice continues and reduce, suspend, or deny any compensation for such period:

In this case, the Department suspended Ms. Hanson's benefits based on three separate grounds: (1) The claimant refused to submit to medical treatment that was reasonably essential to her recovery in that she missed multiple physical therapy appointments between September 4, 2003 and November 24, 2003. (2) The claimant refused examination for the purpose of vocational rehabilitation in that she did not appear for a physical capacities evaluation scheduled for December 3, 2003 and December 4, 2003. (3) The claimant obstructed evaluation for the purpose of vocational rehabilitation in that she did not comply with the vocational counselor's request that she fill out a work history form. Even with all of these instances of non-cooperation, the Department order suspending benefits could be reversed had the claimant proven "good cause" for her actions deemed by the Department to be non-cooperative. Proof of the relevant factors necessary to establish "good cause" is case specific. *See*, *e.g.*, *Romo v. Department of Labor & Indus.*, 92 Wn. App. 348 (1998). Ms. Hanson testified that "I have done nothing but cooperate" and "cooperating is what got me here ultimately." 9/1/04 Tr. at 20. She promised that if given another chance she will cooperate. Her own testimony reveals the untruth of these statements. Her testimony is not credible at all.

Ms. Hanson had inconsistent explanations as to why she missed the appointments. First she started with outright denial: "any physical therapy appointments I had I cancelled." When prompted further she explained variously: "Because I couldn't go to them." "My physical therapist told me not to go." "Because I couldn't handle it. My body couldn't take it. It was too much for me. And I needed massage therapy and not physical therapy." "It (the physical therapy) was too hard." 9/1/04 Tr. at 11.

Ms. Hanson's explanations for missing both days of the physical capacities evaluation are similarly inconsistent albeit more imaginative: "They made me leave." 9/1/04 Tr. at 15. She came in late because her ride was late. She finished the first day but did not come in the second day because of a big storm that made it too dangerous due to downed power lines. She did not drive herself in because she was on a new medication. She could not remember the dates of the physical capacities evaluation with her statements as to those dates varying between December 3, 2003 and December 6, 2003.

Ms. Hanson's explanations for not sending the work history form to the vocational counselor, Janice Star, were also contradictory and unbelievable. The following statements were all made by Ms. Hanson during her testimony: At a meeting with the vocational counselor in her attorney's office on November 17, 2003, she told the vocational counselor that she did not have the work history form because she was waiting on information from the Social Security Administration and when she received it she would send the form to her. She testified that when she got that information she sent it to Ms. Star. Later in her testimony, the claimant stated that Ms. Star instructed her over the phone that she should bring the work history document with her to the physical capacities evaluation and hand it to them. At that point, Ms. Hanson admitted that she did not send the information to Ms. Star. Finally, she testified that she did hand the documents to the evaluator when she came to the physical capacities evaluation on December 3, 2003.

On the day of her testimony and also during the fall of 2003, when the alleged non-cooperation occurred, the claimant was ingesting the following analgesic and/or mood altering medications, all of which she stated she received from her attending physician, Dr. Phillip Matthews: Morphine (off and on for six years), Oxycontin (90 mg. every six hours), "extra strength" percocet (she takes this "all day long"), Valium (10 mg. morning and night), and Topamax (50 mg.) Throughout her testimony the claimant complained of short-term memory loss and inability to recall matters. She described herself as feeling "not quite all there," "whacked out," and "pretty much out of it" when taking these medications. Although overmedication might explain the inconsistencies and incoherence within the claimant's testimony, our review of this "list" of medications and the quantities of them that she allegedly consumes leads us to believe that this part of her testimony, like the rest of it, was significantly exaggerated. 9/1/04 Tr. at 19.

We conclude the Department correctly identified three separate grounds for suspension of Ms. Hanson's benefits under the authority of RCW 51.31.110(2). We affirm the suspension order

because the claimant did not present any evidence that was even remotely credible to show "good cause" for the multiple non-cooperative actions.

FINDINGS OF FACT

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

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

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

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

2. Between September 4, 2003 and November 24, 2003, the claimant missed multiple physical therapy appointments prescribed as treatment for accepted conditions under this claim.

3. The claimant did not appear for a physical capacities evaluation scheduled for December 3, 2003 and December 4, 2003, as part of the vocational evaluation related to this claim.

4. In November and December 2003, the claimant did not comply with the vocational counselor's request that she fill out a work history form in order to assist in the vocational evaluation of this claim.

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.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of this appeal.

2. The claimant refused to submit to medical treatment that was reasonably essential to her recovery and refused and obstructed evaluation and examination for the purpose of vocational rehabilitation, within the meaning of RCW 51.32.110(2).

3. The claimant did not have good cause within the meaning of RCW 51.32.110(2) to excuse her non-cooperation with medical treatment and vocational evaluation and examination under the auspices of this claim.

4. The order of the Department of Labor and Industries dated February 12, 2004, is correct and is affirmed.

It is so **ORDERED**.

Dated this 2nd day of March, 2005.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

/s/_____
CALHOUN DICKINSON Member