

Gardiner, Kirtley

TIME-LOSS COMPENSATION (RCW 51.32.090)

Provisional time-loss compensation (RCW 51.32.190(3) and RCW 51.32.210)

That the Department may recoup provisional time-loss compensation benefits if a claim is ultimately rejected does not extinguish its responsibility to pay provisional time-loss compensation for any period in which the worker is certified as unable to work prior to a determination of claim allowance. ...*In re Kirtley Gardiner*, BIIA Dec., 05 12349 (2006)

Scroll down for order.

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

1 **IN RE: KIRTLEY D. GARDINER**) **DOCKET NO. 05 12349**
2 **CLAIM NO. Y-260258**) **DECISION AND ORDER**
3

4 **APPEARANCES:**

5 Claimant, Kirtley D. Gardiner, Pro Se

6 Employer, Burke Electric,
7 None

8 Department of Labor and Industries, by
9 The Office of the Attorney General, per
10 Penny L. Allen, Assistant
11

12 The claimant, Kirtley D. Gardiner, filed an appeal with the Board of Industrial Insurance
13 Appeals on March 10, 2005, from a letter determination of the Department of Labor and Industries
14 dated February 24, 2005. In the letter determination, the Department denied Mr. Gardiner's request
15 for payment of provisional time loss compensation benefits for the reason that the order dated
16 January 15, 2002, in which the Department rejected the claim, had been affirmed by the Board of
17 Industrial Insurance Appeals in its order dated April 29, 2003, and had become final and binding on
18 the parties. The letter determination of the Department is **REVERSED AND THE CLAIM IS**
19 **REMANDED.**

20 style="text-align:center">**DECISION**

21 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
22 and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order
23 issued on December 9, 2005. In the Proposed Decision and Order, the industrial appeals judge
24 granted the Department's Motion for Summary Judgment and dismissed the claimant's appeal from
25 the order contained in the Department letter dated February 24, 2005.

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

28 We have granted review in order to reverse the Department's determination that it lacked
29 jurisdiction to consider the payment of provisional time loss compensation under RCW 51.32.210.
30 The factual situation presented by this appeal is essentially the same as that presented by *In re*
31 *Lynnette A. Murray*, BIIA Dec., 42,296 (1974). The only significant difference between these
32 appeals is the enactment of RCW 51.32.240(3), that allows recoupment of provisional time loss

1 compensation benefits paid when the claim has been rejected. This legislation in no way changes
2 our interpretation of the legislative intent that led to the enactment of RCW 51.32.210.

3 This appeal raises solely a question of law: whether the Department is required to determine
4 if Mr. Gardiner was entitled to provisional time loss compensation for the period from September 4,
5 2001 to January 15, 2002, a period that was prior to the Department's initial determinative order in
6 which the Department rejected this claim, issued on January 15, 2002. The Department order
7 subsequently became final when the Board, in its Decision and Order issued on April 29, 2003,
8 affirmed rejection of the claim, and that order was not appealed to superior court. This appeal was
9 filed from a Department letter dated February 24, 2005, in which the Department determined that
10 time loss compensation could not be paid as the order rejecting the claim had become final.

11 Based on our understanding of the basic legislative intent in adoption of RCW 51.32.210, we
12 are convinced that the Department's determination is incorrect and should be reversed. This
13 provision requires prompt action after a claim is filed, and when total temporary disability
14 compensation is payable the first payment is to be made within fourteen days after receipt of the
15 claim.

16 The record made at the hearing on the Department's Motion for Summary Judgment
17 establishes that no material fact is at issue and that the only question before the Board is the
18 application of the law to these facts. The facts are simple and straightforward. Mr. Gardiner filed
19 an Application for Benefits with the Department on October 10, 2001. The portion of the application
20 for benefits, filled out by the attending physician, indicates that the condition alleged to be related to
21 employment would cause Mr. Gardiner to "miss work." (Exhibit No. 3) In his response to the
22 Department's Motion for Summary Judgment, and during arguments on that motion, Mr. Gardiner
23 stated that he had refrained from engaging in gainful employment on the advice of his attending
24 physician. On January 15, 2002, the Department issued an order in which it rejected the claim. A
25 timely appeal was filed from that order. Following hearings, a Proposed Decision and Order was
26 issued in which the industrial appeals judge affirmed the rejection of the claim. A Petition for
27 Review was filed to the Proposed Decision and Order by Mr. Gardiner, and on April 29, 2003, the
28 Board issued a Decision and Order in which the Board affirmed the Department's order dated
29 January 15, 2002. No evidence was presented and no argument made that the Board's Decision
30 and Order was not communicated to Mr. Gardiner or that an appeal was filed from that order to
31 superior court. Thus, under the provisions of RCW 51.52.110, the "final decision and order of the
32 board shall become final." When the Board's Decision and Order became final, at the expiration of

1 the thirty-day appeal period, the Department order dated January 15, 2002, also became final. As
2 the Department had both personal and subject matter jurisdiction to issue the order dated January
3 15, 2002, under *Marley v. Department of Labor & Indus.*, 125 Wn.2d 533 (1995), that order is valid
4 and binding. However the finality of this order does not deprive the Department of jurisdiction to
5 consider Mr. Gardiner's entitlement to provisional time loss compensation.

6 RCW 51.32.210 provides:

7 Claims of injured workmen of employers who have secured the payment
8 of compensation by insuring with the department shall be promptly acted
9 upon by the department. **Where temporary disability compensation
10 is payable, the first payment thereof shall be mailed within fourteen
11 days after receipt of the claim at the department's offices in
12 Olympia and shall continue at regular semimonthly intervals.** The
13 payment of this or any other benefits under this title, prior to the entry of
14 an order by the department in accordance with RCW 51.52.050 as now
15 or hereafter amended, shall be not considered a binding determination
16 of the obligations of the department under this title. The acceptance of
17 compensation by the worker or his or her beneficiaries prior to such
18 order shall likewise not be considered a binding determination of their
19 rights under this title. (Emphasis added).

20 The overriding object of this statute is to promote prompt initial action on the allowance or
21 rejection of all claims. Prompt early action is particularly important in cases where temporary total
22 disability is concerned, which led to the adoption of the "14-day" requirement. To give effect to the
23 objective in mind when the "14-day law" was adopted requires the commencement of payment of
24 time loss compensation within that period. Considering the 14-day requirement in light of all the
25 other language in this statute, it is clear that, if in fact, there is temporary total disability due to a
26 condition alleged to be covered under the claim; compensation for it must be paid, until a
27 determinative initial order is entered by the Department. This is the clear intent that led to the
28 enactment of this statute. If the intent were otherwise, there would be no need for the portions of
29 the statutes providing that payment by the Department, and acceptance by the claimant of such
30 compensation, prior to the entry of a determinative order, is not a "binding determination" of their
31 respective rights and obligations under the Act. Clearly, such payments are contemplated, or the
32 statute would not have to provide for their non-binding nature. Thus, until a determinative order on
allowance or rejection is entered, the Department must comply with the "14-day" provision and pay
time loss compensation to the claimant for whatever period prior to the entry of the determinative
order that the claimant is in fact temporarily totally disabled due to the condition for which the claim
was filed. Once a determinative order is entered, whether it allows or rejects the claim that is

1 challenged through an appeal, there is no requirement to continue any payments while the issue of
2 allowance is being litigated to a final conclusion before this Board or the courts.

3 The reason for this statutory requirement is a practical one, namely, that when a worker is
4 rendered temporarily unable to work because of a physical condition caused, or alleged to be
5 caused by employment, frequently an urgent economic need for prompt payment of temporary
6 disability compensation as wage replacement exists. The Legislature has apparently decided that
7 this social and economic need of workers outweighs the prevention of the payment of any
8 compensation until a determinative administrative decision has been made.

9 In 1986, the Legislature enacted what is now codified as RCW 51.32.240(3). This
10 subsection provides for repayment of temporary disability benefits if a claim is ultimately rejected.
11 Laws of 1986, ch. 54, § 1. Prior to the enactment of RCW 51.32.240(3), a consequence of this
12 statutory approach of forcing prompt administrative determinations on allowance or rejection of
13 claims was that in a few cases the claimant retained payment of provisional time loss compensation
14 where it is later determined that no benefits were payable. In light of that statutory provision, this is
15 no longer required. The removal of that consequence supports our interpretation of
16 RCW 51.32.210, as it was not amended, and highlights the effectiveness of the statute in achieving
17 its purpose, that within 14 days after a claim is filed with the Department a determination will be
18 made regarding the payment of time loss compensation. The enactment of the provisions
19 contained in subsection (3) do not require that we reverse our holding in *Murray* or *In re Melvin*
20 *Oshiro*, BIIA Dec., 67,112 (1985).

21 We are convinced that the information necessary to determine Mr. Gardiner's entitlement to
22 provisional time loss compensation was available to the Department as soon as the application for
23 benefits was filed. That application contains sufficient information to establish that the attending
24 physician was of the opinion that Mr. Gardiner should refrain from working due to conditions alleged
25 to be related to employment. Mr. Gardiner relied on the advice of his attending physician in
26 refraining from engaging in gainful employment while undergoing treatment. Payment of time loss
27 compensation is supported in situations where the injured worker relies on an attending physician in
28 refraining from engaging in gainful employment, even though the attending physician is
29 subsequently proved to be wrong as to the direction given. See *In re Charles E. Hindman*, BIIA
30 Dec., 32,851 (1970).

31 While there are no contested factual matters that relate to resolution of this appeal, there are
32 questions that will have to be resolved administratively when the claim is remanded. There are

1 insufficient facts in the record to determine Mr. Gardiner's entitlement to provisional time loss
2 compensation, and the period of his entitlement to receive provisional time loss compensation if any
3 is due. The Department shall then pay Mr. Gardiner the appropriate benefit. RCW 51.32.240(3)
4 provides that the recipient of provisional time loss compensation benefits should repay the benefits
5 if the claim is ultimately rejected. Once the Department pays provisional time loss compensation
6 benefits, the Director may then determine in his discretion under RCW 51.32.240(3), whether to
7 waive repayment or recoupment.

8 Consideration of the Proposed Decision and Order, Mr. Gardiner's Petition for Review filed
9 thereto, and a careful review of the entire record before us, persuades us that the Department was
10 incorrect in determining that it could not act on Mr. Gardiner's request for payment of provisional
11 time loss compensation benefits for the reason that the Department's order dated January 15,
12 2002, wherein the Department rejected the claim, had been affirmed by the Board of Industrial
13 Insurance Appeals by its order dated April 29, 2003, and had become final and binding on the
14 parties. The Motion for Summary Judgment is granted, the order contained in the Department's
15 letter is reversed, and the claim is remanded to the Department to issue a determinative order
16 regarding Mr. Gardiner's entitlement to the payment of provisional time loss compensation.

17 **FINDINGS OF FACT**

- 18 1. On September 4, 2001, Kirtley D. Gardiner filed an Application for
19 Benefits with the Department of Labor and Industries, in which he
20 alleged that on August 23, 2001, he sustained an industrial injury or
21 developed an occupational disease during the course of his employment
22 with Burke Electric, LLC. On October 10, 2001, the Department issued
23 an order in which it denied the claim for headaches due to mental stress
in the workplace. On January 15, 2002, the Department issued an order
in which it rejected the claim for occupational disease.

24 On January 25, 2002, the claimant filed a Notice of Appeal with the
25 Board of Industrial Insurance Appeals to the rejection order. On
26 March 5, 2002, the Board granted the appeal. On March 14, 2003, a
27 Proposed Decision and Order was issued in which the industrial appeals
28 judge affirmed the Department order dated January 15, 2002, in which
29 the Department rejected the claim. On April 1, 2004, the claimant filed a
30 Petition for Review with the Board and on April 29, 2003, the Board
31 issued a Decision and Order in which it affirmed the Department's
32 January 15, 2002 rejection order.

On February 16, 2005, Mr. Gardiner filed a letter with the Director of the
Department of Labor and Industries, in which he requested that
provisional time loss compensation be paid and the claim allowed. On
February 24, 2005, the Director issued a written response to the

1 claimant in which the Director indicated that the claim had been rejected
2 and provisional time loss compensation would not be paid on the
3 rejected claim. On February 25, 2005, the claimant filed a Notice of
4 Appeal with the Department that was forwarded to the Board of
5 Industrial Insurance Appeals as a direct appeal, and received on
6 March 10, 2005. On March 17, 2005, the Board denied the appeal and
7 on July 8, 2005, after further consideration, the Board issued an order in
8 which it granted the appeal.

- 9 2. On September 4, 2001, Kirtley D. Gardiner filed an Application for
10 Benefits with the Department of Labor and Industries with medical
11 certification that he was not to work due to the alleged diagnosed
12 injuries.
- 13 3. On April 29, 2003, the Board of Industrial Insurance Appeals issued a
14 Decision and Order in which the Board affirmed the Department's
15 January 15, 2002 order. The Department, in that order, rejected the
16 claim for benefits filed by the claimant under Claim No. Y-260258.
- 17 4. Kirtley D. Gardiner did not file a Notice of Appeal with the superior court
18 of the state of Washington, as provided by RCW 51.52.110, to the
19 Board's April 29, 2003 Decision and Order.
- 20 5. There is no issue of fact that is material to the resolution of this appeal.

CONCLUSIONS OF LAW

- 21 1. The Board of Industrial Insurance Appeals has jurisdiction over the
22 parties to and the subject matter of this appeal.
- 23 2. The Board of Industrial Insurance Appeals Decision and Order dated
24 April 29, 2003, in which the Board affirmed the Department order dated
25 January 15, 2002, rejecting the claim for benefits filed by the claimant
26 under Claim No. Y-260258, and the Department order dated
27 January 15, 2002, became final and binding because no appeal to the
28 Board's Decision and Order was filed by the claimant to the Superior
29 Court of the state of Washington, pursuant to the provisions of
30 RCW 51.52.110.
- 31 3. Having no issue of fact material to the resolution of this appeal, the
32 Motion for Summary Judgment must be granted pursuant to RCW
51.52.140, WAC 263-12-125, and CR 56.
4. RCW 51.32.210 provides the Department authority to consider and
provide temporary total disability benefits to a claimant, notwithstanding
ultimate rejection of the claim.

1 5. The order contained in the Department of Labor and Industries letter
2 determination dated February 24, 2005, is incorrect and is reversed.
3 The claim is remanded to the Department to issue a determinative order
4 regarding Mr. Gardiner's entitlement to the payment of provisional time
5 loss compensation under RCW 51.32.210, and to take such further
6 action as may be authorized or indicated by the law and the facts.

7 It is so **ORDERED**.

8 Dated this 20th day of March, 2006.

9 BOARD OF INDUSTRIAL INSURANCE APPEALS

10
11 /s/
12 THOMAS E. EGAN Chairperson

13
14 /s/
15 FRANK E. FENNERTY, JR. Member

16
17 /s/
18 CALHOUN DICKINSON Member