

Womack, Anthony

DEPARTMENT

Authority to recoup overpayment of benefits

Because the self-insured employer's administrator knew of the circumstances that should have caused a discontinuation in time-loss compensation payments, the payments were issued pursuant to adjudicator error and do not fall within the constraints of RCW 51.32.240(1)(a). ...***In re Anthony Womack, BIIA Dec., 08 12365 (2009)*** [*Editor's Note: The Board's decision was appealed to superior court under Pierce County by claimant Cause No. 09-2-09874-9, employer Cause No. 09-2-09991-5.*]

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

1 **IN RE: ANTHONY WOMACK**) **DOCKET NO. 08 12365**
2 **CLAIM NO. W-756976**) **DECISION AND ORDER**

3 APPEARANCES:
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5 Claimant, Anthony Womack, by
6 Vail/Cross & Assoc., per
7 Chalmers C. Johnson

8 Self-Insured Employer, Catholic Health Initiatives, by
9 Vandenberg Johnson & Gandara, LLP, per
10 Sherry L. Davies

11 Department of Labor and Industries, by
12 The Office of the Attorney General, per
13 Penny L. Allen, Assistant

14 The claimant, Anthony Womack, filed an appeal with the Board of Industrial Insurance
15 Appeals on March 10, 2008, from an order of the Department of Labor and Industries dated
16 January 18, 2008. In this order, the Department affirmed Department orders dated October 8,
17 2007, and October 25, 2007. In the October 8, 2007 order, the Department found the claimant was
18 not entitled to time-loss compensation benefits from April 27, 2007, through August 21, 2007,
19 because Mr. Womack was incarcerated and under sentence. In the October 25, 2007 order, the
20 Department directed the claimant to pay the self-insured employer \$5,113.03 in overpaid time-loss
21 compensation benefits for the period of April 27, 2007, through August 21, 2007. The Department
22 order is **REVERSED AND REMANDED**.

23 **DECISION**

24 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
25 and decision on timely Petitions for Review filed by the claimant and the Department to a Proposed
26 Decision and Order issued on January 5, 2009, in which the industrial appeals judge affirmed the
27 order of the Department dated January 18, 2008. All contested issues are addressed in this order.

28 This matter was decided on summary judgment after the claimant and the self-insured
29 employer each filed motions for summary judgment. We also decide the matter on summary
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1 judgment. We have considered the following documents in reaching our decision:

- 2 1. Employer's Motion for Summary Judgment filed August 8, 2008;
- 3 2. Memorandum in Support of Employer's Motion for Summary Judgment filed
- 4 August 8, 2008;
- 5 3. Information filed under Pierce County Superior Court Cause No. 05-1-
- 6 03101-0 on June 22, 2005;
- 7 4. Second Amended Information filed under Pierce County Superior Court
- 8 Cause No. 05-1-03101-0 on April 20, 2006;
- 9 5. Statement of Defendant on Plea of Guilty filed under Pierce County
- 10 Superior Court Cause No. 05-1-03101-0 on April 20, 2006;
- 11 6. Judgment and Sentence filed under Pierce County Superior Court Cause
- 12 No. 05-1-03101-0 on April 20, 2006;
- 13 7. Deferred Sentence filed under Pierce County Superior Court Cause No. 05-
- 14 1-03101-0 on April 20, 2006;
- 15 8. Court Notice of Violation dated April 18, 2007, Pierce County Superior Court
- 16 Cause No. 05-1-03101-0;
- 17 9. Petition for Revocation of Suspended Sentence filed under Pierce County
- 18 Superior Court Cause No. 05-1-03101-0 on April 30, 2007;
- 19 10. Order Revoking Suspension of Sentence and Sentencing Defendant filed
- 20 under Pierce County Superior Court Cause No. 05-1-03101-0 on April 27,
- 21 2007;
- 22 11. Warrant of Commitment filed under Pierce County Superior Court Cause
- 23 No. 05-1-03101-0 on April 27, 2007;
- 24 12. Pierce County Corrections booking record for booking date April 13, 2007;
- 25 13. Claimant's Response to Defendant's Motion for Summary Judgment and
- 26 Claimant's Motion for Summary Judgment filed August 28, 2008;
- 27 14. Letter dated August 1, 2008, to the industrial appeals judge from the
- 28 self-insured employer's attorney;
- 29 15. Employer's Response to Claimant's Response to Employer's Motion for
- 30 Summary Judgment (or Partial Summary Judgment) and Claimant's Motion
- 31 for Summary Judgment filed September 4, 2008;
- 32 16. Letter dated August 2, 2007, from the claimant's attorney' to Tom Droscher,
- Claims Adjudicator, Department of Labor and Industries;
17. Letter dated September 20, 2007, from the self-insured employer's attorney
- to Tom Droscher, Claims Adjudicator, Department of Labor and Industries;
18. Declaration of Sherrie Winter dated September 4, 2008;

- 1 19. Letter dated July 25, 2007, from claims coordinator at Alternative Insurance
2 Management Services, Inc., to Tom Droscher, Claims Adjudicator,
3 Department of Labor and Industries;
4 20. Letter dated July 27, 2007, from claims adjudicator to Alternative Insurance
5 Management Services, Inc.
6 21. Summary of temporary total disability payments made to Anthony Womack
7 from April 22, 2007, through August 25, 2007;
8 22. Letter dated September 20, 2007, from the self-insured employer's attorney
9 to Tom Droscher, Claims Adjudicator, Department of Labor and Industries;
10 23. Letter dated October 22, 2007, from Alternative Insurance Management
11 Services, Inc. to Corina Groth, Claims Adjudicator, Department of Labor and
12 Industries;
13 24. Claimant's Reply to Defendant's Response to Plaintiff's Motion for Summary
14 Judgment.

15 From these submissions, we have determined there is no genuine issue of material fact and
16 the self-insured employer's decision to pay time-loss compensation benefits from April 27, 2007,
17 through August 11, 2007, was an adjudicator error not subject to recoupment under
18 RCW 51.32.240(1)(a). With regard to time-loss compensation benefits from August 12, 2007,
19 through August 21, 2007, the order paying those benefits was issued on August 28, 2007, and was
20 not final as of October 25, 2007. Therefore, the self-insured employer is entitled to a refund of the
21 benefits paid for that 10-day period.

22 Mr. Womack was incarcerated on April 27, 2007, under conviction and sentence. At some
23 point, the self-insured employer learned of the incarceration. Rather than stopping time-loss
24 compensation benefits, on July 25, 2007, the third-party administrator for the self-insured employer
25 requested the Department suspend benefits. The Department declined to suspend benefits,
26 indicating that incarceration was not considered non-cooperation. On September 20, 2007,
27 approximately one month after Mr. Womack was released from jail, the self-insured employer wrote
28 the Department explaining Mr. Womack had not been entitled to time-loss compensation benefits
29 because he was incarcerated under conviction and sentence. On October 22, 2007, the
30 self-insured employer wrote to the Department requesting the Department issue an overpayment
31 order.

32 It is clear from the record, the self-insured employer was aware, at least by July 25, 2007,
that Mr. Womack was not entitled to time-loss compensation benefits because of his incarceration.

1 It was not until October 22, 2007, the self-insured employer sought an overpayment order.

2 If the payments had been made pursuant to clerical mistake, innocent misrepresentation, or
3 circumstance of like nature, the Department could seek recoupment on behalf of the self-insured
4 employer under RCW 51.32.240(1)(a). We find the payments were issued pursuant to adjudicator
5 error, and do not fall within the constraints of RCW 51.32.240(1)(a). Therefore, the Department and
6 the self-insured employer could only seek repayment for time-loss compensation payments under
7 RCW 51.32.240(1)(b) and RCW 51.32.240(4), that is, those payments issued pursuant to orders
8 that were not final and binding as of October 25, 2007.

9 The Department may seek repayment of benefits under RCW 51.32.240(1)(a) under certain
10 circumstances. One of those circumstances is clerical error such as adding an amount to an award
11 that should have been subtracted. *In re Martina Peterson*, BIIA Dec., 94 0991 (1995). Another
12 circumstance is innocent misrepresentation. The statute includes a catch-all phrase to include
13 other circumstances of a similar nature.

14 In contrast to the types of errors covered by RCW 51.32.240(1)(a) are those erroneous
15 payments resulting from what is commonly called adjudicator error. Adjudicator error "includes the
16 failure to consider information in the claim file, failure to secure adequate information, or an error in
17 judgment." RCW 51.32.240(1)(b). Such payments can be recouped only under
18 RCW 51.32.240(1)(b) and RCW 51.32.240(4), if the order paying the benefits has not become final
19 and binding. This principle was set forth in our significant decision *In re Jonathan Cortese*, BIIA
20 Dec., 90 2342 (1992), where we held that the self-insured employer's decision to continue paying
21 benefits based upon the mistaken belief that it could not terminate them without a determinative
22 order from the Department, did not fall within those types of circumstances permitting recoupment
23 under RCW 51.32.240(1).

24 We find the *Cortese* case to be directly on point with the circumstances presented in this
25 case. The self-insured employer continued to pay time-loss compensation benefits under the
26 mistaken belief it could not terminate them unless the Department issued an order suspending
27 benefits. Mr. Womack was not entitled to the benefits. This fact is not disputed. The self-insured
28 employer's decision to pay the benefits was an adjudicator error. To the extent those time-loss
29 compensation orders issued by the self-insured employer became final and binding, the
30 Department and the self-insured employer are prohibited from seeking repayment.

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1 Prior significant and non-significant decisions on this issue could suggest some possible
2 confusion about whether adjudicator error is a circumstance similar to clerical error or innocent
3 misrepresentation such that RCW 51.32.240(1)(a) should apply. This is due to legislative changes
4 to RCW 51.32.240. Prior to 2004, "adjudicator error" was not addressed in the statute as a
5 limitation to the Department's ability to recoup benefits. In 2004, the Legislature added a section to
6 RCW 51.32.240 that provided that the Department could recoup benefits due to adjudicator error
7 only if the order in which the Department overpaid the benefits had not become final. Laws of
8 2004, ch. 243 § 5. To the extent any of our earlier decisions could be read to mean that adjudicator
9 error was covered under RCW 51.32.240(1), those decisions are overruled. The Department may
10 not seek repayment of benefits issued pursuant to adjudicator error unless the orders paying those
11 benefits are not final and binding. RCW 51.32.240(1)(b) and RCW 51.32.240(4).

12 Although we find the self-insured employer may not recoup the majority of the benefits paid
13 to Mr. Womack while he was incarcerated, our decision should not be read to excuse any
14 responsibility on the part of Mr. Womack and his attorney to return time-loss compensation benefits
15 as soon as they are received if the claimant and/or his attorney know the claimant is not entitled to
16 the benefits.

17 **FINDINGS OF FACT**

- 18 1. On December 12, 2003, the claimant, Anthony Womack, filed an
19 Application for Benefits in which he alleged that he sustained an injury
20 on November 18, 2002, while in the course of his employment at
21 St. Joseph Hospital and Medical Center. The claim was allowed and
benefits were paid.

22 On October 8, 2007, the Department issued an order in which it found
23 that time-loss compensation benefits were not payable from April 27,
24 2007, through August 21, 2007, because Mr. Womack was not entitled
25 while he was incarcerated and under sentence. On October 25, 2007,
26 the Department issued an order in which it directed the claimant to pay
the self-insured employer overpaid time-loss compensation benefits for
the period April 27, 2007, through August 21, 2007, in the amount of
\$5,113.03.

27 On December 3, 2007, the claimant filed a Protest and Request for
28 Reconsideration of the Department order dated October 25, 2007. On
29 December 5, 2007, the claimant filed a Protest and Request for
30 Reconsideration of the Department order dated October 8, 2007. On
31 January 18, 2008, the Department affirmed the Department orders
dated October 8, 2007, and October 25, 2007. On March 10, 2008, the
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1 claimant filed a Notice of Appeal with the Board of Industrial Insurance
2 Appeals from the Department order dated January 18, 2008. On
3 March 18, 2008, the Board granted the claimant's appeal under Docket
4 No. 08 12365, and agreed to hear the appeal.

- 5 2. On November 18, 2002, the claimant, Anthony Womack, sustained an
6 industrial injury to his back while in the course of employment with
7 St. Joseph Hospital and Medical Center.
- 8 3. The claimant was incarcerated under conviction and sentence during
9 the period from April 27, 2007, through August 21, 2007, inclusive. He
10 was not entitled to receive time-loss compensation benefits during that
11 time.
- 12 4. The self-insured employer paid the claimant time-loss compensation
13 benefits for the period from April 27, 2007, through August 21, 2007,
14 inclusive, by orders issued on May 8, 2007; May 22, 2007; June 5,
15 2007; July 11, 2007; July 17, 2007; July 31, 2007; August 14, 2007; and
16 August 28, 2007.
- 17 5. With the exception of the August 28, 2007 time-loss compensation
18 order, the time-loss compensation orders had become final and binding
19 on October 25, 2007, when the Department issued the order in which it
20 demanded repayment. The August 28, 2007 time-loss compensation
21 order paid time-loss compensation benefits from August 12, 2007,
22 through August 21, 2007.
- 23 6. The affidavits and exhibits submitted by the parties demonstrate that
24 there is no genuine issue as to any material fact.

CONCLUSIONS OF LAW

- 25 1. The Board of Industrial Insurance Appeals has jurisdiction over the
26 parties to and the subject matter of this appeal.
- 27 2. With regard to benefits for the period of April 27, 2007, through
28 August 11, 2007, the claimant is entitled to a decision as a matter of law
29 as contemplated by CR 56.
- 30 3. With regard to benefits for the period of August 12, 2007, through
31 August 21, 2007, the self-insured employer is entitled to a decision as a
32 matter of law as contemplated by CR 56.
4. The self-insured employer's payment of time-loss compensation benefits
for the period April 27, 2007, through August 21, 2007, was due to
adjudicator error.
5. The Department and the self-insured employer are not entitled to recoup
the overpayment of time-loss compensation benefits for the period from
April 27, 2007, through August 11, 2007, inclusive, pursuant to
RCW 51.32.240(1)(b) and/or RCW 51.32.240(4).

- 1 6. The Department and the self-insured employer were entitled to recoup
2 the overpayment of time-loss compensation benefits for the period of
3 August 12, 2007, through August 21, 2007, inclusive, under
4 RCW 51.32.240(1)(b) and RCW 51.32.240(4).
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6 7. The order of the Department of Labor and Industries dated January 18,
7 2008, is incorrect and is reversed. This matter is remanded to the
8 Department to issue an order directing the claimant to repay time-loss
9 compensation benefits for the period of August 12, 2007, through
10 August 21, 2007, only.

11 Dated: May 11, 2009.

12 BOARD OF INDUSTRIAL INSURANCE APPEALS

13 /s/
14 THOMAS E. EGAN Chairperson

15 /s/
16 FRANK E. FENNERTY, JR. Member