

Baldwin, Jan

[TIME-LOSS COMPENSATION \(RCW 51.32.090\)](#)

Attending physician's recommendation against return to work

Where the attending physician advises the worker not to work based on inaccurate information regarding symptoms and limitations and where the worker could engage in reasonably continuous gainful employment without any risks to his health, the worker is not entitled to time-loss compensation benefits. Explaining *In re Charles Hindman*, BIIA Dec., 32,851 (1970).***In re Jan Baldwin*, BIIA Dec., 11 18630 (2013)** [*Editor's Note: The Board's decision was appealed to Cowlitz County Superior Court, No. 13-2-00333-4.*]

Scroll down for order.

1 Decision and Order issued on September 20, 2012, in which the industrial appeals judge reversed
2 and remanded the Department order dated March 25, 2011. Contested issues addressed in this
3 order include whether Mr. Baldwin was entitled to temporary total disability or loss of earning power
4 benefits from February 19, 2011, through March 25, 2011.

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

7 In the Proposed Decision and Order, the industrial appeals judge reversed the March 25,
8 2011 order and remanded the claim to the Department with directions to issue an order in which it
9 required the self-insured employer to pay loss of earning power benefits to Mr. Baldwin from
10 February 19, 2010, through March 25, 2011. We agree with our industrial appeals judge that
11 Mr. Baldwin did not have any condition caused by his industrial injury that restricted his ability to
12 perform reasonably continuous gainful employment during that time frame, and he was not entitled
13 to time-loss compensation benefits. Citing *In re Charles Hindman*, BIIA Dec., 32,851 (1970),
14 however, the industrial appeals judge concluded that Mr. Baldwin did not work during that period of
15 time in reliance on physicians' advise. We have granted review because we are persuaded that the
16 medical advice to not return to Mr. Baldwin's job of injury was based on Mr. Baldwin's unreliable
17 presentation of limitations. His behavior in this regard prevents him from relying on his physician's
18 advice to discontinue working.

19 The Proposed Decision and Order contains a complete and accurate summary of the
20 evidence. We will discuss only those portions that are of particular pertinence to our decision.

21 Mr. Baldwin has worked as a registered nurse since 1995. In August 2004, he sustained a
22 concussion, subdural hematoma, and right eye injury, which resulted in loss of vision in that eye,
23 when he was thrown over the handlebars of his motorcycle during a motor vehicle accident.
24 Mr. Baldwin subsequently developed Post-Traumatic Stress Disorder (PTSD) because of the injury.
25 He returned to his job as a nurse and part-time critical care nurse at Southwest Washington
26 Medical Center (SWMC) three months after the accident.

27 The injury for which this appeal was filed occurred on November 7, 2007, when Mr. Baldwin
28 slipped on a wet floor at SWMC and fell with his left leg twisted behind him. The medical evidence
29 established that the left leg injury resolved without any residual effects shortly after the industrial
30 injury.

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1 Mr. Baldwin maintained that he also struck his head when he fell on November 7, 2007. He
2 was treated at SWMC on that day and was diagnosed with a concussion. A head CT scan did not
3 show any organic brain injury nor was any shown in the subsequent head MRI, EEG or other
4 diagnostic brain studies he underwent. None of the medical experts who testified in this appeal
5 found evidence of a neurological disorder.

6 Mr. Baldwin returned to work at a light-duty job shortly after his industrial injury. After he
7 performed essentially clerical duties for three or four weeks, Mr. Baldwin resumed his usual nursing
8 functions although he contended that he had balance problems and felt nauseous. Mr. Baldwin
9 said that on February 29, 2008, he became nauseous and dizzy; he was unable to maintain his
10 balance and he dropped to the floor. He again obtained emergency room treatment at SWMC.
11 Mr. Baldwin has not worked since that date.

12 Brian Harwood, M.D., is a specialist in internal medicine who has treated Mr. Baldwin since
13 June 20, 2006. He initially examined Mr. Baldwin in connection with his November 7, 2007
14 industrial injury eight days after Mr. Baldwin fell at work. Dr. Harwood also treated Mr. Baldwin on
15 December 4, 2007, December 20, 2007, and January 3, 2008, when Dr. Harwood released
16 Mr. Baldwin to return to work as a critical care nurse. Mr. Baldwin did not complain of any cognitive
17 problems, and Dr. Harwood did not take notice of any such problems during those contacts.

18 Mr. Baldwin first told Dr. Harwood that he suffered from photophobia, or sensitivity to light,
19 headaches, and cognitive and balance problems on March 7, 2008. Mr. Baldwin attributed the
20 problems to his industrial injury and said the symptoms had gotten worse over time and made it
21 difficult for him to work.

22 Dr. Harwood acknowledged that he was not an expert regarding head injuries. He accepted
23 as true Mr. Baldwin's statements of his inability to function. On June 12, 2008, based on a report
24 authored by Jack M. Litman, Ph.D., dated April 22, 2008, Dr. Harwood advised Mr. Baldwin to stop
25 working as a critical care nurse.

26 Marlene E. Dietrich, M.D., a neurologist, began treating Mr. Baldwin on October 8, 2009,
27 regarding his complaints of balance difficulties, fatigue, depression, memory loss and dizziness.
28 On an intermittent basis through April 17, 2012, Dr. Dietrich subsequently examined Mr. Baldwin.
29 During that time, she noted that Mr. Baldwin had a wide-based gait and demonstrated balance
30 problems as he performed Romberg tests. Dr. Dietrich did not make any objective medical findings
31 that supported her conclusions that Mr. Baldwin sustained a traumatic brain injury on November 7,
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1 2007, that shortly thereafter rendered him unable to work as a critical care nurse or in any non-
2 sedentary job. On June 29, 2010, Dr. Dietrich declared that Mr. Baldwin could not work in any
3 nursing job that required good balance and cognition. She maintained that Mr. Baldwin was so
4 limited in February and March 2011.

5 Dr. Dietrich was aware that concussions result in immediate acute symptoms that improve
6 over time while Mr. Baldwin's asserted symptoms had their onset some time after he was hurt at
7 SWMC and increased over time. She acknowledged that her diagnosis was based largely on
8 Mr. Baldwin's subjective reports of symptoms and she conceded: "I did have some suspicions that
9 some days he wasn't really doing as badly as he seemed, partly based on maybe prior exams or
10 the DVD's I had seen and so on, but it's something very difficult to prove or disprove." Dietrich
11 Dep. at 114. For those reasons, Dr. Dietrich said, a diagnosis of post-concussive cognitive
12 dysfunction was best made by specialists in administering and interpreting neuropsychological
13 tests.

14 Especially because Mr. Baldwin did not sustain any organic brain injury that could be
15 documented by objective medical tools such as MRI, CT or EEG tests, we agree with Dr. Dietrich
16 that an assessment of the neuropsychological tests that specialists administered to Mr. Baldwin is
17 critical to our determination. We will discuss the neuropsychological tests in the chronological order
18 in which they took place.

19 Jack M. Litman, Ph.D., is a psychologist who evaluated Mr. Baldwin on April 22, 2008, and
20 August 11, 2010. During the April 2008 assessment, Mr. Baldwin complained of balance problems
21 and photophobia. Dr. Litman was aware that Mr. Baldwin already carried a diagnosis of PTSD
22 caused by his motorcycle accident.

23 Dr. Litman administered Wechsler Adult Intelligence Scale (WAIS) to Mr. Baldwin and
24 Wechsler Memory Scale tests, as well as two personality inventories. Mr. Baldwin's IQ measured
25 at 115. His memory scores were in the low to average range, which Dr. Litman considered
26 validation of Mr. Baldwin's complaints of forgetfulness. The personality inventories reflected the
27 presence of depression with a somatic focus. Dr. Litman diagnosed Mr. Baldwin as suffering from a
28 cognitive disorder proximately caused by the claimant's industrial injury.

29 Donna Wicher, Ph.D., is a clinical psychologist who has broad experience in conducting
30 neuropsychologist evaluations. She examined Mr. Baldwin in November and December 2008.
31 Mr. Baldwin complained of reading difficulties, distorted hearing, short-term memory, and
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1 concentration problems in addition to symptoms usually associated with the PTSD that
2 Mr. Baldwin's motorcycle accident caused.

3 Dr. Wicher administered some of the same tests that Dr. Litman had given to Mr. Baldwin,
4 including the Wechsler IQ and memory tests. Mr. Baldwin's WAIS score was 98, which was
5 17 points lower than Dr. Litman's test measured and was a result Dr. Wicher considered to be very
6 unusual. As compared to the test which Dr. Litman administered, Mr. Baldwin also had a worse
7 score on the memory test compared to the test which Dr. Litman had the claimant take.

8 The tests that Dr. Wicher administered included multiple components that measured
9 Mr. Baldwin's motivation, that is, how much effort he put forth during the neuropsychological tests.
10 She was critical of Dr. Litman's April 2008 evaluation because he gave only one test to explore
11 whether Mr. Baldwin was malingering. Dr. Wicher considered motivational testing important,
12 especially in situations in which an individual has something to gain by giving poor effort. For that
13 reason, she said: "I used multiple measures, and I used them not only at the beginning of the
14 evaluation but also during the process or course of the evaluation." Wicher Dep. at 77. The
15 motivation components of Dr. Wicher's tests led her to conclude that the claimant's scores on the
16 neuropsychologist tests that she administered were not reliable because Mr. Baldwin did not put
17 forth good effort during the tests.

18 Dr. Wicher also questioned Mr. Baldwin's presentation as a disabled person for other
19 reasons. She said:

20 What struck me about the information that was made available through
21 the videotaping was that there were discrepancies noted by examining
22 physicians in terms of his gait and balance compared with when he was
23 seen in physical examinations as opposed to, for example, on the golf
24 course, that raised questions about whether he might be presenting
25 himself in a distorted fashion during medical examinations, just as the
26 test results from my evaluation suggested that he might be presenting
27 himself in a distorted fashion cognitively and emotionally.

28 Wicher Dep. at 71, 72.

29 Dr. Wicher diagnosed Mr. Baldwin as having dysthymia and dissociative personality
30 features that were not caused by the claimant's injury at SWMC. She did not completely rule out
31 the possibility that Mr. Baldwin had a cognitive disorder but if so, she said, the condition was
32 proximately caused by Mr. Baldwin's 2004 motorcycle accident, not his industrial injury.

In part based on Dr. Wicher's critique of his initial evaluation, Dr. Litman tested Mr. Baldwin
again on August 11, 2010. Mr. Baldwin scored 94 on the IQ test the psychologist administered and

1 his memory scores were also worse than during Dr. Litman's first evaluation. Dr. Litman suggested
2 the reason might have been that Mr. Baldwin was tired of taking tests and simply did not give the
3 same effort he gave in April 2008. Dr. Litman administered three malingering tests. The first
4 indicated that Mr. Baldwin was malingering. Regarding the other two tests, Dr. Litman said it was
5 "difficult to say" that Mr. Baldwin was malingering. 5/10/12 Tr. at 12. The psychologist reached the
6 same diagnoses he made in 2008.

7 In December 2010, four months after Dr. Litman's second evaluation, Laurence
8 Binder, Ph.D., a neuropsychologist, examined Mr. Baldwin. Neuropsychologists assess individuals'
9 cognitive abilities and emotions.

10 Dr. Binder testified that none of the tests he asked Mr. Baldwin to take produced valid
11 results. On the WAIS, Mr. Baldwin scored 61, which Dr. Binder characterized as "terribly abnormal"
12 (Binder Dep. at 54), so low Dr. Binder said, that he would have deemed the claimant to be severely
13 disabled if they had been accurate and he would not have let Mr. Baldwin drive home. Mr. Baldwin
14 utterly failed all three of the motivational tests he took. Dr. Binder averred that: "Mr. Baldwin is
15 malingering on a more probable than not basis." Binder Dep. at 77.

16 In view of the significant discrepancies in the neuropsychological tests Mr. Baldwin took at
17 the requests of Drs. Litman, Wicher, and Binder, and the distinctions between Mr. Baldwin's
18 declared inability to function and the activities he demonstrated he could perform when he was
19 videotaped, we find ourselves in agreement with Dr. Binder.

20 Our industrial appeals judge relied on our significant decision *In re Charles Hindman*, BIIA
21 Dec., 32,851 (1970) in determining that Mr. Baldwin was entitled to loss of earning power benefits
22 for the period February 19, 2010, through March 25, 2011. In *Hindman* we held that time-loss
23 compensation benefits can be continued when an attending physician erroneously restricts a
24 worker from returning to work. We reasoned that the worker could not be expected to know
25 whether the advice of the doctor was based on valid medical considerations or not. Based on our
26 holding in *Hindman* we have approved the payment of time-loss compensation benefits in situations
27 where the worker's attending physician certifies eligibility for time-loss compensation benefits and
28 then later determines in hindsight that the certification was in error. *In re Betty J. Macomber*, Dckt.
29 No. 00 11890 (August 7, 2001); *In re Cecilia A. Scott*, Dckt No. 05 16135 (March 19, 2007), and *In*
30 *re Stephanie J. Miller*, Dckt No. 10 21042 (April 17, 2012).

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1 However, we have not always approved payment of time-loss compensation or loss of
2 earning power benefits based on an attending physician's restrictions from work. We have declined
3 to apply the holding in *Hindman* where on the facts of the case we found that the worker appeared
4 to have "minimized her pre-existing problems and maximized the symptoms she attributed to a
5 relatively minor industrial injury," and in doing so obtained the attending physician's opinion
6 supporting the payment of time-loss compensation benefits. *In re Sarah R. Wilson*, Dckt
7 Nos. 08 13073 & 08 13177 (June 9, 2009), at 7. We have also distinguished *Hindman* from cases
8 where the worker chose to discontinue a light-duty job, stating that the "focus in *Hindman* was on
9 the claimant's risk of further injury had he returned to employment against the advice of his doctor."
10 *In re Teresa H. Terrien*, Dckt No. 10 17216 (February 14, 2012), at 7.

11 Our holding in *Hindman* is based on reasonable advice by the physician supported by
12 accurate information supplied by the worker to the attending physician. *Hindman* does not
13 contemplate a situation where the worker provides his attending physician with inaccurate
14 information regarding symptoms and limitations. Nor is our holding in *Hindman* meant to prevent a
15 worker from performing work when there is no risk of further injury to the worker.

16 In the present appeal it is apparent that Mr. Baldwin exaggerated his symptoms and physical
17 limitation in order to have his attending physician advise him not to work. It is also apparent from
18 the record that throughout the time that Mr. Baldwin was off work on the advice of his attending
19 physician, he could have engaged in reasonably continuous employment without any risk to his
20 health. On these facts we decline to apply *Hindman* and find that Mr. Baldwin was capable of
21 reasonably continuous gainful employment from February 19, 2010, through March 25, 2011, and
22 that he is not entitled to time-loss compensation or loss of earning power benefits for that period.

23 The March 25, 2011 order of the Department of Labor and Industries is incorrect. It is
24 reversed and this matter is remanded to the Department with directions to issue an order in which it
25 determines that Mr. Baldwin was not entitled to time-loss compensation or loss of earning power
26 benefits from February 19, 2010, through March 25, 2011, and to take such other and further action
27 as the law and the facts dictate.

FINDINGS OF FACT

- 28 1. On October 26, 2011, an industrial appeals judge certified that the
29 parties agreed to include the Amended Jurisdictional History in the
30 Board record solely for jurisdictional purposes.
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- 1 2. Mr. Baldwin was born on April 14, 1956. He obtained a GED and a
2 degree in nursing. He has worked as a registered nurse, including in
3 critical care situations, since 2000.
- 4 3. In August 2004, Mr. Baldwin suffered a brain injury and multiple other
5 injuries when during a motor vehicle accident he was thrown over the
6 handlebars of the motorcycle he was riding. The accident proximately
7 caused Mr. Baldwin to lose the vision in his right eye; sustain difficulties
8 with his balance; and develop headaches; mild chronic depression; and
9 post-traumatic stress disorder. Mr. Baldwin was able to return to his
10 usual job as a registered nurse and part-time critical care nurse three
11 months after the accident.
- 12 4. On November 7, 2007, Mr. Baldwin slipped on a wet floor during the
13 course of his employment as a registered nurse at Southwest
14 Washington Medical Center and fell with his left leg twisted under him
15 and struck his head on the floor.
- 16 5. Mr. Baldwin's industrial injury proximately caused him to sustain a left
17 knee strain, which resolved within six weeks of the injury event.
- 18 6. Mr. Baldwin's industrial injury did not proximately cause him to suffer
19 from any cognitive disorder.
- 20 7. Mr. Baldwin returned to his usual job as a registered nurse several
21 weeks after his industrial injury, and he continued in that employment
22 until February 29, 2008.
- 23 8. On June 12, 2008, Brian Harwood, M.D., told Mr. Baldwin he should not
24 return to employment as a critical care nurse.
- 25 9. On June 29, 2010, Marlene E. Dietrich, M.D., told Mr. Baldwin to no
26 longer work in any nursing job that required good balance and cognitive
27 abilities.
- 28 10. Mr. Baldwin did not engage in any gainful occupation from February 19,
29 2010, through March 25, 2011.
- 30 11. From February 19, 2010, through March 25, 2011, Mr. Baldwin's
31 November 7, 2007 industrial injury did not proximately cause any
32 disabling condition that restricted his ability to obtain or perform a form
of gainful occupation.
12. Mr. Baldwin's lack of gainful employment from February 19, 2010,
through March 25, 2011, was not based on reliance on the
recommendations of Drs. Dietrich and Harwood.
13. From February 19, 2010, through March 25, 2011, Mr. Baldwin did not
suffer any loss of earning power or capacity as the result of any
condition proximately caused by his November 7, 2007 industrial injury.

1 14. From February 19, 2010, through March 25, 2011, Mr. Baldwin was
2 capable of obtaining and performing a form of gainful occupation in the
3 competitive labor market on a reasonably continuous basis.

4 **CONCLUSIONS OF LAW**

- 5 1. Based on the record, the Board of Industrial Insurance Appeals has
6 jurisdiction over the parties to and the subject matter of this appeal.
7 2. From February 19, 2010, through March 25, 2011, Mr. Baldwin was not
8 temporarily, totally disabled, as that term is used in RCW 51.32.090, as
9 the result of any condition proximately caused by his November 7, 2007
10 industrial injury.
11 3. From February 19, 2010, through March 25, 2011, Mr. Baldwin did not
12 suffer any loss of earning power, as that term is used in
13 RCW 51.32.090(3) as the result of any condition proximately caused by
14 his November 7, 2007 industrial injury.
15 4. The order of the Department of Labor and Industries dated March 25,
16 2011, is incorrect and is reversed. This matter is remanded to the
17 Department with directions to issue an order in which it determines that
18 from February 19, 2010, through March 25, 2011, Mr. Baldwin was not
19 temporarily, totally disabled and did not suffer any loss of earning power
20 as the result of any condition proximately caused by his November 7,
21 2007 industrial injury, and to thereafter take further action.

22 Dated: February 11, 2013.

23 BOARD OF INDUSTRIAL INSURANCE APPEALS

24 /s/
25 DAVID E. THREEEDY Chairperson

26 /s/
27 JACK S. ENG Member