Hindman, Charles

TIME-LOSS COMPENSATION (RCW 51.32.090)

Attending physician's recommendation against return to work

A worker who refrains from engaging in gainful employment on the advice of his attending physician is entitled to time-loss compensation even though the attending physician's advice is later determined to be in error. **….*In re Charles Hindman*, BIIA Dec., 32,851 (1970)** [dissent]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: CHARLES E. HINDMAN	**)**	**DOCKET NO. 32,851**
	)	
CLAIM NO. G-478496	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Charles E. Hindman, by
Hohlbein, Church, Sawyer & VanDerhoef, per
Kenneth D. VanDerhoef, Wesley G. Hohlbein, and James D. Sawyer

Employer, Security Savesco, Inc.,
None

Department of Labor and Industries, by
The Attorney General, per
Edward G. Gough, Assistant

This is an appeal filed by the claimant on April 14, 1969, from an order of the Department of Labor and Industries dated February 21, 1969, which closed this claim with time loss as paid from December 29, 1966 to July 29, 1967. **REVERSED AND REMANDED**.

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 Statement of Exceptions filed by the claimant to a Proposed Decision and Order issued by a hearing examiner for this Board on August 6, 1970, in which the order of the Department dated February 21, 1969 was sustained.

This workman, Charles E. Hindman, sustained an industrial injury on September 29, 1966, while in the employ of Security Savesco, Inc., when he experienced a heart attack described as a myocardial infarction as a consequence of unusual exertion. The claimant was treated by Dr. Stephen B. Nelles, who engages in the general practice of medicine in Seattle, Washington, and continued under the treatment of Dr. Nelles, who was his attending physician at the time this appeal was heard before this Board in June 1969.

On February 21, 1969, the Department issued an order awarding the claimant time loss compensation for total temporary disability for the period December 29, 1966 to July 29, 1967. This appeal follows that order. The issue before the Board is whether the claimant is entitled to receive additional time loss compensation. It is his contention that he remained totally temporarily disabled as a consequence of his industrial injury up to and including the date of the Department's order of

February 21, 1969. There is no issue before the Board on this appeal regarding permanent disability.

It is apparent from the record that the claimant has relied upon his attending physician with respect not only to the treatment for his heart attack, but also with respect to what he could and could not do as a consequence thereof. It is his testimony that he had not returned to work because Dr. Nelles told him he could not go to work, although he did testify that he made some application to the state employment office for employment but none was offered him.

We have the testimony of Dr. Nelles with respect to his treatment of this claimant during the period of time herein involved and his opinion that the claimant was unable to work between July 29, 1967 and February 21, 1969, and his further testimony that the workman had tried to work once, found that he was unable to cope with it, and that he had advised him not to do so on account of pain and breathlessness which he would get on exertion. The doctor further testified on cross-examination that at the time he suggested to the workman that he return to employment, he was of the opinion that he should try it out, but if pain and symptoms were reproduced, he would forbid him to do any further work because of the possibility of extension.

In this connection, it is also pertinent to note that on cross-examination, Dr. Nelles stated that when he was speaking of the workman's inability to engage in employment, this was based on employment as a physical laborer, and that he did not consider the claimant's ability to be employed in any sedentary occupation because he did not think he was qualified for a job like that; however, from a medical standpoint, the workman probably would be able to do sedentary type work if the work offered did not produce emotional upset.

Two very well-qualified and competent doctors testified for the Department of Labor and Industries. Dr. Kenneth M. Soderstrom is board certified in internal medicine, which particularly encompasses the area of medicine with which we are here concerned and has served on a committee of the Washington State Heart Association known as the Stress and Strain Committee, which studied the significance of effort and trauma on heart disease.

We also have the testimony of Dr. Samuel F. Aronson, who likewise is a specialist in internal medicine and whose practice is limited to that of an internist and cardiologist. He is a fellow in the College of Cardiology, with extensive qualifications in that field. Both of these doctors have examined Mr. Hindman. The examination performed by Dr. Soderstrom occurred on December 28, 1966, and that of Dr. Aronson on April 8, 1969. Although there is some minor disagreement among

these doctors with respect to interpretations of the electrocardiograms taken of Mr. Hindman, they are both in agreement that there is no clinical evidence to demonstrate that Mr. Hindman is not able to engage in gainful employment. It is the sense of their testimony that such employment would not be harmful to the workman or likely to further impair his condition. It seems to this Board that in a matter such as this, the opinions of the specialists are entitled to great weight and that the special training and experience of Dr. Aronson and Dr. Sorenson in this field of medicine is such as to make their opinions entitled to greater weight than that of Dr. Nelles, despite the fact that he was the attending physician.

However, this matter cannot be disposed of, in our view, wholly on the basis of the competence of medical witnesses. There is here another consideration, which is most material. This injured workman has restrained from engaging in gainful employment upon the advice of his physician, who was treating him for an industrial injury under the auspices of the Department of Labor and Industries. It is fair to state that he has not engaged in gainful employment, whether he was physically capable of it or not, upon the advice of his attending physician. It is axiomatic that a workman who has sustained a heart attack looks to his attending physician for advice in this matter, and in normal circumstances it would be foolhardy for him to ignore such advice. An injured workman is required and expected to follow the advice of his physician and may have his compensation suspended if he engages in any injurious practices which tend to impair or retard his recovery. Mr. Hindman is a lay person who could not be expected to know whether the advice of his doctor to restrain form employment was based upon valid medical considerations or not. Had he engaged in gainful employment, contrary to the advice of his doctor, and sustained resulting impairment and disability therefrom, his actions would have subjected him to valid criticism. A workman who engages in activity which he might not reasonably be expected to do with his disability, or against the directions of his doctor, would find that such increased disability is not compensable. McDougle v. Department of Labor and Industries, 64 Wn. 2d 640 (1964), and Scott Paper Co. v. Department of Labor and Industries, 73 Wn. 2d 840 (1968).

It is therefore our determination that the workman, Charles E. Hindman, was totally temporarily disabled between July 29, 1967 and February 21, 1969, and is entitled to receive compensation therefor. The fact that the disability might have been iatrogenic in nature does not serve to deny the workman these benefits.

FINDINGS OF FACT

After a careful review of the entire record, the Board finds:

1. On October 18, 1966, the claimant, Charles E. Hindman, filed a report of injury occurring on September 29, 1966, while he was employed by the Security Savesco Company. The claim was accepted for a left chest wall muscle strain only, and the Department of Labor and Industries denied responsibility for a vascular and cardiac condition by an order issued on January 20, 1967, which closed the claim with no award for permanent partial disability. The claimant appealed from that order on March 21, 1967, and following hearings on the appeal, the Board issued an order on January 21, 1969, reversing the Department's order of January 20, 1967, which had denied responsibility for the claimant's heart attack.

2. On February 21, 1969, the Department issued an order awarding time loss compensation to the claimant for the period December 29, 1966 to July 29, 1967. The claimant appealed from that order on April 14, 1969, and on May 9, 1969, the Board granted the appeal.

3. Appellate proceedings were conducted before the Board of Industrial Insurance Appeals, and on August 6, 1970, a hearing examiner for this Board entered a Proposed Decision and Order in connection with this appeal. Thereafter, within the period of time provided by law, exceptions were filed and the case referred to the Board for review as provided by RCW 51.52.106.

4. On September 29, 1966, the injured workman came under the care of Dr. Stephen Barrett Nelles, who remained his attending physician throughout all times pertinent to this appeal. During the period from July 29, 1967 to February 21, 1969, it was Dr. Nelles' opinion that because of his heart condition, the workman should not engage in gainful employment. This medical advice was imparted to the claimant, and in conformity with the advice of his physician, the claimant did not engage in gainful employment during this period.

5. During the period July 29, 1967 to February 21, 1969, the claimant properly did not engage in gainful employment on the advice is his attending physician.

CONCLUSIONS OF LAW

1. The Board has jurisdiction of the parties and the subject matter of this appeal.

2. The workman was totally temporarily disabled as a consequence of his September 29, 1966 ndustrial injury during the period July 29, 1967 to February 21, 1969.

3. The Department of Labor and Industries should be directed to reopen this claim and to award the claimant time loss compensation for the period July 29, 1967 to February 21, 1969.

It is so ORDERED.
Dated this 30th Day of October, 1970.

BOARD OF INDUSTRIAL INSURANCE APPEALS
/s/
ROBERT C. WETHERHOLT Chairman
/s/
R.H. POWELL Member

DISSENTING OPINION

I dissent because I do not find that there is substantial medical evidence in the record which would persuade me to join in reversing the Department in this claim.

It appears logical to me in a medical question of this nature to accept the testimony of the heart specialists over that of a general practitioner on the basis of their greater experience, training and more convincing explanations they gave of claimant's condition.

There is insufficient medical evidence, in my opinion, to establish that claimant was unable to work during the relevant period.

Dated this 30th day of October, 1970.

BOARD OF INDUSTRIAL INSURANCE APPEALS
/s/
R.M. GILMORE Member

Revised Code of Washington, Section 51.52.120(2) provides:

> "If, on appeal to the board, the order, decision or award of the department is reversed or modified and additional relief is granted to a workman or beneficiary, or in cases where a party other than the workman or beneficiary is the appealing party and the workman's or beneficiary's right to relief is sustained by the board, the board shall fix a reasonable fee for the services of his attorney in proceedings before the board if written application therefor is made by the attorney, workman or beneficiary. In fixing the amount of such attorney's fee, the board shall take into consideration the fee allowed, if any, by the director, for services before the department, and the board may review the fee fixed by said director. Any attorney's fee set by the department or the board may be reviewed by the superior court upon application of such attorney. Where the board, pursuant to this section, fixes the attorney's fee, it shall be unlawful for an attorney to charge or receive any fee for services before the board in excess of that fee fixed by the board. Any person who violates any provision of this section shall be guilty of a misdemeanor."