DuBois, Ovide

ATTENDANT SERVICES

A worker is not precluded from receiving attendant care services under RCW 51.32.060(5) [now RCW 51.32.060(3)] even though the worker is receiving discretionary medical care under RCW 51.36.010, so long as the services are not duplicative. ***….In re Ovide DuBois*, BIIA Dec., 34,754 (1970)** [*Editor's Note*: *See also* RCW 51.32.072.]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: OVIDE DuBOIS	**)**	**DOCKET NO. 34,754**
	)	
CLAIM NO. 8002689	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Ovide DuBois, by
Critchlow, Williams, Ryals & Schuster, per
E. B. Critchlow

Employer, General Electric Company,
None

Atomic Energy Commission, by
Clyde T. Fitz, Attorney in the A.E.C. Richland Operations Office
(In attendance: John B. Warner, Authorized Representative)

Department of Labor and Industries, by
The Attorney General, per
Thomas O'Malley, Assistant

This is an appeal filed by the claimant on January 6, 1970 (amended February 16, 1970), from an order of the Department of Labor and Industries dated December 24, 1969, which denied the claimant's application for increased compensation to pay for an attendant in accordance with Section 51.32.060(5) RCW. **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 Department of Labor and Industries to a Proposed Decision and Order issued by a hearing examiner for this Board on September 8, 1970, in which the order of the Department dated December 24, 1969 was reversed and the Department directed to allow the claimant's application for increased compensation to pay for an attendant.

The issue presented by this appeal is whether a permanently totally disable workman who is receiving medical care at the discretion of the Director of the Department of Labor and Industries pursuant to RCW 51.36.010, can qualify for an increased compensation to pay for attendant care in accordance with RCW 51.32.060(5) while being treated at home.

The contentions of the parties are adequately set forth in our hearing examiner's Proposed Decision and Order will not be further set forth herein. There is no dispute regarding the facts in this case because at the conference in Richland, Washington on May 28, 1970, Dr. John T.

Robson, attending physician, was present and, after a conference discussion, it was agreed that the claimant needs an attendant. The issue is a legal determination of statutory limitation.

We have carefully reviewed the statutes pertaining to the issue on this appeal, and we agree with our hearing examiner that the clear legislative intent of the statutes would preclude the increased allowance for an attendant where that service (attendant care) is being provided by a hospital or other medical-attendant type facility, but it would not preclude such allowance where the claimant is at home receiving treatment. There apparently is no Washington Supreme Court decision directly in point on the legal issue raised on this appeal, but the concept of attendant care was before the court in Talbot v. Industrial Insurance Commission, 108 Wash. 231 (1919), and it is clear from the language of the court that increased compensation is appropriate when the services of an attendant are required. We do not believe the legislature intended to deny attendant care compensation under the provisions of RCW 51.32.060(5), except where under the provisions of Ch. RCW 51.36 and 51.40, the same attendant care services were being provided. In the instant case, no attendant care services are being provided by the Department of Labor and Industries. Certainly, a duplication of benefits would not be proper, and we believe the legislative intent expressed in RCW 51.32.060(5) was to prevent duplication of benefits.

We commend the Director of the Department of Labor and Industries for exercising his discretion in authorizing continued treatment for Mr. DuBois. On the present appeal we find that the department is in error in determining the limitations imposed by RCW 51.32.060(5) precluded the allowance of increased compensation for an attendant when no attendant is being otherwise furnished by the Department of Labor and Industries.

FINDINGS OF FACT

After a careful review of the record, the Board finds as follows:

1. The claimant, Ovide DuBois, sustained an industrial injury on July 27, 1956, while in the employ of the General Electric Company at Richlamd, Washington. A report of accident was filed, the claim was allowed, medical treatment was provided, and time loss compensation was paid. procedural steps were taken, and eventually, by an order and judgment of the Superior Court for Thurston County, Washington, the claimant was declared to be permanently and totally disabled and placed on the pension rolls of the Department of Labor and Industries. The Thurston County Superior Court order was entered on June 27, 1966, and on August 2, 1966, the Department entered its order, issued pursuant to the judgment, and placed the claimant on the pension rolls effective December 15, 1961.

2. Ever since December 15, 1961, the claimant has been a permanently and totally disabled workman under the provisions of the Workmen's Compensation Act and on the pension rolls of the Department of Labor and Industries.

3. That the claimant's permanent disability rises from an injury to his spine and the surgery related thereto, causing a permanent paralysis involving his bowels, bladder, and lower extremities. The claimant does not have control of his bladder and bowels, nor any use of his lower extremities, and is confined to a wheelchair. That said conditions arising from his industrial injury render him so physically helpless as to require the services of an attendant.

4. In July 1967, the attending physician, Dr. John T. Robson, recommended to the Director of the Department of Labor and Industries a reopening of the claim for further treatment, including surgery. The director exercised the discretion permitted him by RCW 51.36.010 and reopened the claim for additional treatment.

5. On November 20, 1969, the Department received a letter from the claimant's attorney advising that the claimant needed an attendant and requested the Department to investigate the situation. The Department investigated by writing to several of the claimant's attending physicians, and on December 24, 1969, entered an order reading as follows:

> "WHEREAS an application for increased compensation for an attendant has been filed for and in behalf of Ovide DuBois, who is on the Department's pension roll as a totally permanently disabled workman, and
>
> "WHEREAS it has been determined that Ovide DuBois is not so physically helpless as to require an attendant and further that the pensioner is receiving medical treatment pursuant to Section 51.36 R.C.W. and the fee for an attendant is not payable in such instance (Section 51.32.060(5) R.C.W.), and
>
> "IT IS THEREFORE HEREBY ORDERED that the request for increased compensation for an attendant be and hereby is denied for the above reason."

6. On January 6, 1970, the claimant filed notice of appeal with this Board, and on February 2, 1970,the Board entered an order extending time for acting on the claimant's appeal and directing the filing of an amended notice of appeal. An amended notice of appeal was filed on February 16, 1970, and this Board granted the appeal on February 24, 1970.

7. Appellate proceedings were conducted before the Board of Industrial Insurance Appeals at which time an agreed statement of facts was entered into that the claimant needs an attendant and that the legal interpretation of RCW 51.32.060(5) and RCW 51.36 was at issue. On

September 8, 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.

8. At the time of filing his application for the increased compensation for an attendant on November 20, 1969, the claimant was so physically helpless as to require the services of an attendant, and said condition continued to the time of the hearing of the appeal.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Board concludes as follows:

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

2. The limiting language of RCW 51.32.060(5) was intended by the legislature to prevent duplication of benefits, and does not preclude the Department of Labor and Industries from increasing permanent total disability compensation to provide for the services of an attendant where a permanently totally disabled workman is receiving medical care at the discretion of the Director of the Department of Labor and Industries pursuant to RCW 51.36.010, when no attendant is being furnished as a part of that treatment.

3. The order of the Department of Labor and Industries issued December 24, 1969, is erroneous and must be reversed, and this claim remanded to the Department of Labor and Industries with direction to allow the application for increased compensation for an attendant, effective November 20, 1969.

It is so ORDERED.

Dated this 5th day of November, 1970.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
ROBERT C. WETHERHOLT Chairman

/s/_____
R.H. POWELL Member

/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."