Rose, Carol

TIME-LOSS COMPENSATION (RCW 51.32.090)

Certification for available light work (RCW 51.32.090(4))

The employer cannot benefit from the provisions of RCW 51.32.090(4) where it did not provide the attending physician with a statement describing the available work in terms that would enable him to relate the physical activities of the job to the worker's disability and where the attending physician did not communicate his release to the worker. **….*In re Carol Rose*, BIIA Dec., 49,894 (1978)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: CAROL D ROSE	**)**	**DOCKET NO. 49,894**
	)	
CLAIM NO. S-185872	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Carol D. Rose, by
Springer, Norman and Workman, per
Richard L. Norman

Employer, Champion International Corp., by
Detels, Draper and Marinkovich, per
J. Richard Crockett

This is an appeal filed by Champion International Corp., a self-insured employer under the Industrial Insurance Act, on April 13, 1977, from an order of the Department of Labor and Industries dated February 16, 1977, which affirmed a prior order requiring the self-insured employer to pay time-loss compensation to the claimant for the period April 6, 1976, through June 15, 1976. **SUSTAINED**.

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 Petition for Review filed by the employer to a Proposed Decision and Order issued by hearing examiner for this Board on February 2, 1987, in which the order of the Department dated February 16, 1977, was sustained.

The Board has reviewed the evidentiary rulings of the hearing examiner and finds that no prejudicial error was committed and said rulings are hereby affirmed.

This is an appeal by the self-insured employer from an order of the Department of Labor and Industries providing for the payment of time-loss compensating to the claimant for the period April 6, 1976 to June 15, 1976, because of a right wrist injury sustained on February 26, 1976. It is the employer's contention that is released from paying such time-loss compensation by the provisions of RCW 51.32.090(4), for the reason that the claimant was offered a job by the employer that she could perform, her physician had already certified that her disability did not prevent her from doing the job, but that she refused to accept it.

Our hearing examiner determined that the employer was not released from the payment of time-loss compensation for this period by reason of the statute in question, on three grounds: (1) Dr. Larry Hull, the only doctor testifying before the Board in this appeal, did not ever communicate a

physician's "release" as provided by RCW 51.32.090(4), hereinafter called the "statute"; (2) The doctor was not given a complete description of the duty requirements of the job, could not sensibly relate "the physical activities of the job to the workman's disability" as required by the statute, and therefore she was not properly "certified" for the job; and (3) the statute is inoperative because it contemplates that the claimant be "entitled" to time- loss compensation at the time of "certification," and this record shows that the claimant was working for the employer, and receiving a full salary, up to April 5, 1976, which was the day she was offered the job. It should be noted that all of the other activities by the employer to obtain certification of the worker, and all the contacts with the doctor, also took place on, or prior to, April 5, 1976.

The Board is inclined to the view, first, that the "certification" of ability to work should operate in concert with the "release" for said work. Provisions of the statute apply if "the workman is released by his physician for said work." The facts in this case show that an agent for the employer telephoned Dr. Hull on a Friday, a few days before the job was "offered" to claimant, and described the job over the phone. He received an opinion by the doctor, also over the phone, that the claimant should be able to perform the job. The claimant was not contacted by the doctor concerning this conversation and did not learn of it until the following Monday from agents of the employer. Based on these facts, the employer states that the claimant was properly "certified" and "released" as provided by the statute. We agree with our hearing examiner that the employer did not adequately comply with the statute.

Next, we agree with the hearing examiner that the employer did not provide the doctor with a statement describing the available work in terms that would enable the doctor to relate the physical activities of said job to the worker's disability. Exhibit one, which contains all of the information that Dr. Hull would admit he received before he expressed his opinion that the claimant could perform the job, is quoted in full as follows:

> "Dear Dr. Hull:
>
> Per my telephone conversation with your office today we have implemented a light-duty work order for the above patient/employee.
>
> The nature of the light duty assignment involves the tallying of product and marking various tally sheets with a pencil. The tasks require no physical effort other than writing or making marks on a form.
>
> We appreciate your working with us in giving Mrs. Rose the opportunity to maintain her income source at its present level while recovering from her injury."

The record establishes that the tallying job did require physical effort other than writing or making marks on a form, and furthermore, shows that the work was to be performed in an unheated working area and that the claimant had very great difficulty working, with her fractured arm, in such a cold environment. The doctor acknowledged that a person with a fracture is more sensitive to cold than one without. As stated above, the Board agrees with our hearing examiner that the letter sent to Dr. Hull recited above, does not provide the doctor with sufficient information to properly relate the physical activities of the job to the worker's disability, as required by the statute.

One argument which was not mentioned by either the hearing examiner of the employer is that, separate and apart from the statute in question, the self-insured employer could have prevailed if he had presented persuasive evidence to the effect that the claimant was able to work during the time in question. The employer would not have to show "certification" or "release" providing the medical testimony definitely established ability to do regular obtainable work. However, the testimony by Dr. Hull, is not sufficiently clear to establish that the claimant was able to work after April 5, 1976. The doctor did in fact certify that claimant was temporarily totally disabled between April 6, 1976 and June 15, 1976 (exhibit 6), and therefore entitled to time-loss compensation payments, even though, at one point, he testified that there was some work that the claimant could do. Taking his testimony in its entirety, we believe that Dr. Hull did not believe there was much that a woman with her arm in a cast could do to earn a living, although the cast was removed around the end of May 1976.

In sum, we are satisfied that claimant was entitled to time-loss compensation during the period in question; and the Department's order of February 16, 1977, directing payment thereof, was correct.

FINDINGS

The Board hereby adopts the hearing examiner's proposed findings Nos. 1 and 2; and adds further findings as follows:

3. At the time of the industrial injury on February 26, 1976, the claimant was employed as a fishtail saw operator for the employer, and continued at that job to, and including, April 5, 1976, during which time she received her full salary.

4. On April 2, 1976, an agent of the employer phoned the claimant's doctor and described the duties of a job that the employer contemplated offering to the claimant. The contents of the telephone conversation

were later put into a letter from the employer's agent to the doctor as follows:

> "Per my telephone conversation with your office today we have implemented a light-duty work order for the above patient/employee.
>
> The nature of the light duty assignment involves the tallying of product and marking various tally sheets with a pencil. The task requires no physical effort other than writing or making marks on a form.
>
> We appreciate your working with us in giving Mrs. Rose the opportunity to maintain her income source at her present level while recovering from her injury."

The above-described tallying job, if it had been accepted by the claimant, would have required her to work in an unheated area and to use a clipboard, a pencil, and a stopwatch, without aid of a table or desk.

5. On April 5, 1976, the claimant's right arm was in a cast, with her arm held in a bent position, which extended to four inches above her elbow and distally to cover her fingers. The claimant was unable to use her right arm for any purpose.

6. If the claimant had accepted the tallying job, the cold, in which she would be required to work, would have caused an aggravation of the pain in her injured arm to such an extent that she probably would not have been able to effectively perform her duties.

7. At no time did the above-mentioned doctor notify the claimant that she was physically able to perform the work as a tallyer, or that he was releasing her for said work.

8. The claimant turned down the offer of a job as tallyer on April 5, 1976, for the reason that she did not feel that she would be able to perform it.

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

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

2. Between April 6, 1976, and June 15, 1976, the claimant was temporarily totally disabled within the meaning of the Industrial Insurance Act, due to the February 26, 1976 industrial injury.

3. The claimant was not "certified" by a physician as able to perform available work other than her usual work, or "released" by her physician for said work, within the meaning of RCW 51.32.090(4).

4. The order of the Department of Labor and Industries dated February 16, 1977, directing Champion International Corporation to pay the claimant

time-loss compensation for the period April 6, 1976 through June 15, 1976, is correct and should be sustained.

It is so ORDERED.

Dated this 4th day of April, 1978.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
PHILLIP T BORK Chairman

/s/_____
SAM KINVILLE Member

/s/_____
WILLIAM C JACOBS Member