

Munk, Elvina

SUSPENSION OF BENEFITS (RCW 51.32.110)

Refusal to attend medical examination

Where a worker has been directed by the Department to appear before a psychiatrist to assist in the administrative adjudication of the claim, the worker is not entitled to have an attorney present and a refusal to attend without an attorney justifies the suspension of benefits. *Tietjen* (13 Wn. App. 86), authorizing the attendance of a party's attorney at a CR 35 examination, is inapplicable to examinations under RCW 51.32.110. ...***In re Elvina Munk*, BIIA Dec., 58,847 (1982)** [dissent]

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

1 **IN RE: ELVINA M. MUNK**) **DOCKET NO. 58,847**
2)
3 **CLAIM NO. G-962185**) **DECISION AND ORDER**
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5 **APPEARANCES:**

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7 Claimant, Elvina M. Munk, by
8 Delay, Curran & Boling, per
9 Robert H. Thompson, Jr.

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11 Employer, Lakeland Village, by
12 Steven Brooks, Field Safety Officer

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14 Department of Labor and Industries, by
15 The Attorney General, per
16 Larry J. Kuznetz, Assistant
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18 This is an appeal filed by the claimant on February 23, 1981 from an order of the Department
19 of Labor and Industries dated February 10, 1981, which suspended claimant's right to further
20 compensation under this claim. **AFFIRMED.**

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22) **DECISION**
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24 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
25 and decision on a timely Petition for Review filed by the Department of Labor and Industries to a
26 Proposed Decision and Order issued on December 30, 1981, in which the order of the Department
27 dated February 10, 1981 was reversed and remanded to the Department with direction to reinstate
28 claimant's benefits under the claim and to take such other and further action as is necessary or
29 required by law.

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31 The Board has reviewed the evidentiary rulings in the appeal record and finds that no
32 prejudicial error was committed and said rulings are hereby affirmed.

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34 Claimant, by her appeal from the Department's order of February 10, 1981, raises the
35 question of whether the Department was correct in suspending her rights to further benefits under
36 this claim because of her insistence on the presence of her attorney at the psychiatric examination
37 arranged by the Department. In their arguments regarding the resolution of this issue, the parties
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1 have directed our attention to the case of Tietjen v. Dept. of Labor & Industries, 13 Wn. App. 86
2 (1975), which includes dicta authorizing the attendance of a party's attorney at an examination
3 ordered pursuant to CR 35. While the language in the Tietjen case may state a widely held position
4 allowing an attorney's presence during an examination conducted in an adversarial setting, it clearly
5 does not apply to examinations conducted by the Department of Labor and Industries in a setting
6 designed for administrative adjudication. The Department's gathering of information pursuant to its
7 statutorily authorized duties in administering the Workers' Compensation Act is not the type of
8 adversarial proceeding undertaken in an examination pursuant to CR 35 and not the type of
9 situation contemplated by the court in its discussion in the Tietjen case.

10 We believe that the claimant's insistence upon the presence of her attorney at the psychiatric
11 examination scheduled by the Department was an obstruction of the medical examination provided
12 for by RCW 51.32.110. In view of the claimant's obstruction of the medical examination, the
13 Department's suspension of benefits by its order of February 10, 1981 is appropriate. The
14 testimony of the medical experts called by the Department of Labor and Industries was uniformly to
15 the effect that the presence of someone other than the physicians performing the examination and
16 the person being examined would substantially frustrate the ability of the physicians to perform a
17 proper examination. This testimony has convinced us that the claimant's insistence upon the
18 presence of her attorney at a psychiatric examination would frustrate the purposes of this
19 examination and be an obstruction justifying suspension of the claim pursuant to RCW 51.32.110.

20 It is also arguable that under the holding of Olympia Brewing Co. v. Dept. of Labor &
21 Industries, 34 Wn. 2d 498 (1949), the claimant has the burden of establishing by a preponderance
22 of the evidence that the Department's order suspending benefits was incorrect. Perusal of the
23 record convinces us that the claimant has not established by a preponderance of the evidence that
24 her insistence upon the presence of her attorney at a psychiatric examination was not an
25 obstruction of the examination.

26 Under any analysis of the issue presented by this appeal, the Department is entitled to an
27 examination under the provisions of RCW 51.32.110 with only the examiner or the examiners and
28 the claimant present. The Department's order suspending benefits is correct and must be affirmed.

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3 **FINDINGS OF FACT**

4 Based on a careful review of the entire record, this Board makes the following findings of
5 fact:

- 6 1. On October 21, 1976 the claimant, Elvina M. Munk, filed an accident
7 report alleging that she had suffered an industrial injury on October 7,
8 1976 during the course of her employment with Lakeland Village. On
9 February 10, 1981 the Department of Labor and Industries issued an
10 order suspending claimant's right to further compensation for failure to
11 submit to a medical examination pursuant to the terms of RCW
12 51.32.110. On February 23, 1981 claimant filed a notice of appeal from
13 the Department's order of February 10, 1981. On March 12, 1981 the
14 Board issued an order granting the appeal and proceedings were held
15 thereafter.
- 16 2. Claimant, on two separate occasions, was directed by the Department
17 of Labor and Industries to appear for psychiatric examination by
18 physicians selected by the Department, and on each occasion
19 conditioned her attendance at the examination on the presence of her
20 attorney.
- 21 3. Claimant's insistence upon the presence of her attorney constitutes a
22 significant obstruction to the psychiatric examination and has the effect
23 of preventing the Department of Labor and Industries from securing a
24 valid psychiatric examination and evaluation. The presence of the
25 claimant's attorney at a psychiatric examination impedes the
26 development of a trust relationship between the doctor and the claimant,
27 impedes verbal and non-verbal communication, militates against the
28 claimant's candor, and distracts both medical examiner and patient.
29 Presence of the claimant's attorney makes it virtually impossible for a
30 psychiatrist to conduct a satisfactory evaluation.

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32 **CONCLUSIONS OF LAW**

33 Based upon the foregoing findings of fact, this Board makes the following conclusions of law:

- 34 1. The Board of Industrial Insurance Appeals has jurisdiction of the parties
35 and the subject matter to this appeal.
- 36 2. Claimant's insistence upon the presence of her attorney at psychiatric
37 examinations directed by the Department of Labor and Industries
38 pursuant to RCW 51.32.110 constitutes a refusal to submit to a medical
39 examination or obstruction of a medical examination.
- 40 3. The Department of Labor and Industries acted correctly in suspending
41 claimant's benefits under the Workers' Compensation Act pursuant to
42 the provisions of RCW 51.32.110, in that her insistence upon the
43 presence of her attorney at a psychiatric examination constituted an
44 obstruction of the examination or a refusal to submit to said
45 examination.
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1 4. The order of the Department of Labor and Industries dated February 10,
2 1981, which suspended benefits under this claim, is correct and will be
3 affirmed.
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5 It is so ORDERED.

6 Dated this 1st day of March, 1982.

7 BOARD OF INDUSTRIAL INSURANCE APPEALS

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10 /s/
11 MICHAEL L. HALL Chairman

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13 /s/
14 PHILLIP T. BORK Member

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16 **DISSENTING OPINION**

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18 The majority's facile dismissal of the applicability of the holding in the Tietjen case is based
19 on their opinion that the examinations performed at the request of the Department of Labor and
20 Industries in an administrative setting are not adversarial in nature. Whatever adjective is applied in
21 describing the procedures, it is true that the claimant's rights will be adjudicated by the Department
22 on the basis of the examination performed and the examiner will be presented as a witness before
23 this Board if the claimant appeals the Department's decision. This appears to me to be just the
24 type of situation where the presence of the claimant's legal representative would be justified by the
25 holding in the Tietjen case in order to protect her rights under the claim and in regards to further
26 proceedings such as an appeal.
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31 In addition, the majority does not mention any rule or regulation adopted by the Department
32 as provided for in RCW 51.32.110 stating who may or may not be present at a medical examination
33 undertaken by the Department pursuant to this statute. The Department of Labor and Industries
34 should not be allowed to compel the claimant to appear for a psychiatric examination under threat
35 of suspension of benefits when it has not adopted a clear rule or policy prohibiting the attendance of
36 the claimant's attorney.
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40 At the time the claimant was ordered to appear for a psychiatric examination, RCW 51.32.110
41 contained in addition to the language relied upon by the majority in sustaining the Department the
42 following provision:
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44 "That the department or the self-insurer shall not suspend any further
45 action on any claim of a worker or reduce, suspend or deny any
46 compensation if a worker has good cause for refusing to submit to or to
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1 obstruct any examination, evaluation, or practice requested by the
2 department or required under this section."
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4 The testimony of claimant and her lay witness, Mr. Robert Staeheli, establishes that the claimant
5 had a valid and legitimate concern regarding the accuracy and correctness of reporting of
6 examinations performed by physicians on behalf of the Department of Labor and Industries. This
7 concern on the part of the claimant clearly establishes good cause for refusing to submit to an
8 examination except under circumstances where claimant has more than her own word to rely on in
9 establishing the accuracy of the recording and reporting of a psychiatric examination. Presence of
10 the claimant's attorney, while it may in some respects inhibit the examination of the claimant, would
11 insure accuracy in recording and reporting of the examination. Claimant has established good
12 cause for conditioning her psychiatric examination on the presence of her attorney.
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18 I support the entire Proposed Decision and Order of the industrial appeals judge, reversing the
19 Department's order suspending claimant's rights to further compensation under this claim. In
20 addition, the Department should be directed to allow the presence of claimant's attorney at any
21 future examinations scheduled regarding administration of this claim if this is her desire.
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24 Dated this 1st day of March, 1982.

25 /s/
26 FRANK E. FENNERTY, JR. Member
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