

## **Thompson, O.C.**

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### **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) unless the attending physician certifies the worker's ability to do available light work. A forensic examiner's certification will not suffice. ...*In re O.C. Thompson*, BIIA Dec., 60,203 (1983)

Scroll down for order.

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

1     **IN RE: O. C. THOMPSON**                     )     **DOCKET NO. 60,203**  
2   )  
3     **CLAIM NO. S-350808**                     )     **DECISION AND ORDER**  
4

5 **APPEARANCES:**

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7         Claimant, O. C. Thompson, by  
8         DeFunis & Balint, per Marco DeFunis

9  
10        Employer, Olympic Stain, by Davis  
11        Wright, Todd, Riese and Jones, per  
12        Stephen M. Rummage and Curman M. Sebree

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14        This is an appeal filed on July 27, 1981 by the self-insured employer, Olympic Stain, from an  
15 order of the Department of Labor and Industries dated July 9, 1981. The order appealed from  
16 adhered to the provisions of a prior Department order which directed the employer to pay time-loss  
17 compensation effective January 20, 1981 to date and continuing until the claimant is released for  
18 regular work and a light duty job has been provided. The Department order is **AFFIRMED**.

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21                     **PROCEDURAL STATUS AND EVIDENTIARY RULINGS**

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23        Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review  
24 and decision on a timely Petition for Review filed by the claimant, O. C. Thompson, to a Proposed  
25 Decision and Order issued on November 5, 1982, in which the Department order dated July 9, 1981  
26 was reversed, and the claim remanded with direction to make a final determination of the claimant's  
27 ability to perform the available work offered by the employer.

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29        The Board has reviewed the evidentiary rulings in the record of proceedings and the  
30 Proposed Decision and Order issued November 5, 1982, and finds that no prejudicial error was  
31 committed. Said rulings are hereby affirmed.

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33                     **ISSUES**

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36        (1) As of January 20, 1981, was the claimant entitled to temporary total  
37 disability compensation?  
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39        (2) If so, did the Department order dated July 9, 1981 make a reasonable  
40 determination whether the employer is released from paying the  
41 claimant time-loss compensation benefits by the provisions of RCW  
42 51.32.090(4)?  
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44        (3) Assuming affirmative answers to issues (1) and (2), is the Department  
45 order issued July 9, 1981 correct?  
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**DECISION**

Considering the evidence in this matter, we find it established that on January 5, 1980, Mr. O. C. Thompson injured his back while lifting a box of full paint cans at the self-insured employer's plant. Since the injury, Mr. Thompson has experienced significant disabling pain, which has been treated conservatively by his attending chiropractor, Kay Saito. In April, 1980, the employer requested that Mr. Thompson be certified by Dr. Saito as able to perform work other than his usual work, and furnished Dr. Saito with a statement describing the available work in terms that would enable Dr. Saito to relate the physical activities of the job to Mr. Thompson's ability (Exhibit No. 3). On April 21, 1980, Dr. Saito released the claimant for the job of "advertising general". On May 23, 1980, Dr. Saito released the claimant for the much more difficult "thinner and finisher" job. On June 28, 1980, Dr. Saito released the claimant for all gainful employment.

Between the date of the industrial injury and the end of June, 1980, Mr. Thompson was demoted from a machine operator to a "boxer", the latter job requiring more lifting than the former. The claimant continued his employment with Olympic Stain until June, 1980, when he returned to Dr. Saito with complaints of increased back pain. Dr. Saito determined that as of December 8, 1980, Mr. Thompson was incapable of performing any gainful labor on a reasonable continuous basis, and notified the employer of his opinion. Dr. Saito retained the opinion that the claimant could not continuously perform gainful labor, specifically including the "advertising general" and the "thinner and finisher" jobs as of May 12, 1981, approximately 16 days before the Department issued the determinative order to which its July 9, 1981 order adhered.

Agents of the employer sought a second opinion as to the claimant's ability to perform the work the employer had offered him, and on January 26, 1981, a panel of medical doctors including an orthopedist and a neurologist conducted a thorough examination of the claimant. The panel included Gary Logan Forster, who related the panel's opinion that as of January 26, 1981, the claimant was unable to perform the special work offered by the employer, and unable to perform any other work generally available in the competitive labor market. Dr. Joel C. Konikow, M.D., stated his opinion that as of July 10, 1981, the claimant could not perform the "advertising general" or "thinner and finisher" jobs. Drs. Kirk Anderson and J. Harold Brown countered with their opinions that claimant Thompson was fully capable of at least "light duty" employment as of December, 1980.

1           Apparently relying upon the opinion of Dr. Anderson, the employer terminated the claimant's  
2 time-loss compensation as of January 20, 1981, and again offered him a position as "advertising  
3 general" in January, 1981. Claimant Thompson refused the position within a few days after it was  
4 offered to him, and requested the Department to intercede on his behalf and direct the employer to  
5 resume payment of time-loss compensation benefits. On May 28, 1981, the Department directed  
6 resumption of time-loss compensation benefits effective January 20, 1981. By an order issued July  
7 9, 1981, the Department adhered to its May 28, 1981 determinations. Thereupon the employer  
8 appealed.

9           The record establishes that the claimant was entitled to temporary total disability  
10 compensation as of January 20, 1981. The opinion of the claimant's treating chiropractor (who is  
11 by Department rule entitled to make such an assessment; WAC 296-20-01002) certified that the  
12 claimant was unable to return to any type of reasonably continuous gainful employment as a direct  
13 result of the accepted industrial injury, and Dr. Saito's opinion was fully corroborated by the panel of  
14 physicians who examined Mr. Thompson on January 26, 1981. It follows that the claimant is  
15 entitled to temporary total disability compensation effective January 20, 1981, unless the employer  
16 is released from paying such compensation by the provisions of RCW 51.32.090(4).

17           RCW 51.32.090(4) provides:

18           "Whenever an employer requests that a worker who is entitled to  
19 temporary total disability under this chapter be certified by a physician  
20 as able to perform available work other than his or her usual work, the  
21 employer shall furnish to the physician, with a copy to the worker, a  
22 statement describing the available work in terms that will enable the  
23 physician to relate the physical activities of the job to the worker's  
24 disability. The physician shall then determine whether the worker is  
25 physically able to perform the work described. If the worker is released  
26 by his or her physician for said work, and the work there-after comes to  
27 an end before the worker's recovery is sufficient in the judgment of his or  
28 her physician to permit him or her to return to his or her usual job, or to  
29 perform other available work, the worker's temporary total disability  
30 payments shall be resumed. Should the available work described, once  
31 undertaken by the worker, impede his or her recovery to the extent that  
32 in the judgment of his or her physician he or she should not continue to  
33 work, the worker's temporary total disability payments shall be resumed  
34 when the worker ceases such work.

35           Once the worker returns to work under the terms of this subsection, he  
36 or she shall not be assigned by the employer to work other than the  
37 available work described without the worker's written consent, or without  
38 prior review and approval by the worker's physician.

1 In the event of any dispute as to the worker's ability to perform the  
2 available work offered by the employer, the Department shall make the  
3 final determination." (Emphasis ours).  
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5 Implicit in the statute is that unless the worker's doctor releases him or her for the work described,  
6 temporary total disability payments must be continued (or resumed, as the case may be). As noted  
7 previously, both Dr. Saito and Dr. Forster certified that because of the accepted industrial injury  
8 claimant Thompson could perform no type of reasonable continuous gainful employment as of  
9 January 20, 1981, specifically including the "advertising general" and "thinner and finisher" jobs  
10 which the employer had offered him. Accordingly, because the claimant's doctor has not certified  
11 him as "able to perform work other than his . . . usual work", the provisions of RCW 51.32.090(4)  
12 cannot benefit the employer. We are satisfied that the claimant was entitled to time-loss  
13 compensation during the period in question, and the Department's order of July 9, 1981, directing  
14 payment thereof "until the claimant is released for regular work . . ." was correct.  
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20 Based upon the foregoing, and after a careful review of the entire record, the proposed  
21 findings, conclusions and order are hereby stricken. In their place, we hereby enter the following:  
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23 **FINDINGS OF FACT**  
24

- 25 1. On January 5, 1980, while in the course of his employment with Olympic  
26 Stain, a self-insured employer under the Industrial Insurance Act,  
27 claimant O. C. Thompson injured his back. A report of that accident was  
28 filed on March 28, 1980. The claim was accepted by the Department by  
29 order issued July 23, 1980, treatment and time-loss compensation were  
30 provided, and on May 28, 1981, the Department issued its order  
31 requiring the employer to pay time-loss compensation from January 20,  
32 1981 to date and continuing until the time the claimant is released for  
33 work and a light-duty job is provided. On June 25, 1981, the employer  
34 filed a protest for reconsideration, and on July 9, 1981, the Department  
35 issued its order adhering to the provisions of its May 28, 1981 order. A  
36 notice of appeal from that order was filed on behalf of the self-insured  
37 employer on July 27, 1981, and on August 15, 1981, this Board issued  
38 its order granting the appeal and directed that proceedings be held on  
39 the issues raised by the appeal.
- 40 2. As of April 21, 1980, as a direct result of the industrial injury of January  
41 5, 1980, the claimant was able to perform only light work other than his  
42 usual work. The claimant's attending physician certified that as of April  
43 21, 1980, the claimant was able to perform the position of "advertising  
44 general" which the employer then offered the claimant. As of June 28,  
45 1980, the claimant was certified as able to perform all gainful  
46 employment on a reasonably continuous basis.  
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- 1 3. As of January 20, 1981, the residuals from the claimant's industrial injury  
2 of January 5, 1980, had worsened due to his attempts to return to work,  
3 and as of that date he was temporarily incapacitated from performing  
4 any work at any gainful occupation, including the "advertising general"  
5 position made available to him by the employer.  
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7 4. As of May 28, 1981 and July 9, 1981, as a direct result of the industrial  
8 injury of January 5, 1980, O. C. Thompson was temporarily incapacitated  
9 from performing any work at any gainful occupation, including the  
10 "advertising general" position made available to him by Olympic Stain.

11 **CONCLUSIONS OF LAW**

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

- 13  
14 1. The Board of Industrial Insurance Appeals has jurisdiction of the parties  
15 and the subject matter of this appeal.  
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17 2. Between January 20, 1981 and July 9, 1981, the claimant was  
18 temporarily totally disabled within the meaning of the Industrial  
19 Insurance Act, due to the January 5, 1980 industrial injury.  
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21 3. Between January 20, 1981 and July 9, 1981, the claimant was not  
22 "certified" by a physician as able to perform available work other than  
23 his usual work, or "released" by his physician for said work, within the  
24 meaning of RCW 51.32.090(4).  
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26 4. The order of the Department of Labor and Industries dated July 9, 1981,  
27 directing Olympic Stain to pay the claimant time-loss compensation from  
28 January 20, 1981 to date and continuing until he is released for regular  
29 work and a light duty job has been provided, is correct and should be  
30 affirmed.

31 It is so ORDERED.

32 Dated this 9th day of February, 1983.

33 BOARD OF INDUSTRIAL INSURANCE APPEALS

34  
35 /s/  
36 MICHAEL L. HALL Chairman

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38 /s/  
39 FRANK E. FENNERTY, JR. Member