McBride, Larry

TIME-LOSS COMPENSATION (RCW 51.32.090)

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

RCW 51.32.090(4) establishes an odd-lot doctrine for temporary total disability like that developed through case law for permanent total disability. If a worker is unable to perform light or sedentary work of a general nature, then the burden shifts to the Department or the self-insured employer to prove that there is some special type of work which the worker can perform and which is actually available. ***….In re Larry McBride,* BIIA Dec., 88 0882 (1989)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: LARRY W. MCBRIDE	**)**	**DOCKET NO. 88 0882**
	)	
CLAIM NO. T-071867	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Larry W. McBride, by
The Association of Western Pulp and Paperworkers, per
Gene N. Hain, Secretary/Treasurer

Self-Insured Employer, Grays Harbor Paper Company, by
Hall and Keehn, Attorneys at Law, per
Gary D. Keehn

Department of Labor and Industries, by
The Attorney General, per
Paul Triesch, Assistant

This is an appeal filed by the self-insured employer on March 1, 1988 from an order of the Department of Labor and Industries dated January 25, 1988 which affirmed a prior order of the Department dated December 24, 1987 which stated that time loss compensation on the claim was terminated by the self-insured employer on May 13, 1987, the claimant requested the Department to intercede, and review of further information disclosed the light duty job was not available for the claimant, and ordered the self-insured employer to pay the claimant time loss compensation from May 13, 1987 and to continue such payments until the claimant is released for work by his attending physician. **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 Petition for Review filed by the Department of Labor and Industries and by the claimant to a Proposed Decision and Order issued on January 18, 1989 which found that the claimant was not a temporarily totally disabled worker within the meaning of RCW 51.32.090 between May 13, 1987 and January 25, 1988, and which reversed the Department order dated January 25, 1988, and remanded the claim to the Department "to take appropriate action".

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

The sole issue presented by this appeal is whether the claimant was temporarily totally disabled due to the industrial injury of August 21, 1986 and therefore entitled to time loss

compensation for the period from May 13, 1987 through January 25, 1988. On this issue, we agree with Finding of Fact No. 4 contained in the Proposed Decision and Order, which states:

> "Between May 13, 1987 and January 25, 1988, the residuals of the industrial injury of August 21, 1986 did not render the claimant incapable of performing reasonably continuous gainful employment during that time period."

Likewise, we agree with Conclusion of Law No. 2, which states: "Between May 13, 1987 and January 25, 1988, the claimant was not a temporarily totally disabled worker within the meaning of RCW 51.32.090." However, our Industrial Appeals Judge made this finding and conclusion because he believed that the claimant had been released to available light duty work by his attending physician, pursuant to RCW 51.32.090(4). We disagree with our Industrial Appeals Judge on that specific point, but we do find that the claimant was capable of regular employment on a reasonably continuous basis, without any restrictions insofar as residuals of the August 21, 1986 injury are concerned. He is, therefore, not entitled to time loss compensation.

The Proposed Decision and Order sufficiently sets forth much of the evidence presented related to the industrial injury, the findings and opinions of physicians who have examined the claimant, and information concerning an intervening motor vehicle accident in which the claimant was involved on May 1, 1987, shortly before the period of time for which the self-insured employer challenges the claimant's entitlement to time loss compensation.

The Proposed Decision and Order accurately quotes from a letter which the claimant's attending physician, Dr. Robert Mysliwiec, wrote to the Department of Labor and Industries on October 17, 1987. The letter indicated that Dr. Mysliwiec had, on May 6, 1987, approved a job analysis for the claimant to return to employment with "his previous employer as a cleanup worker, modified to light duty." Mysliwiec Dep. at 29. The letter further indicated that, due to the May 1, 1987 automobile accident, "Mr. McBride stated he was not available for that type of employment" and that the claimant was then "attributing his problems to the car accident". Mysliwiec Dep. at 29.

The record is devoid of any evidence that light duty work as a cleanup worker was in fact offered to the claimant. To the contrary, Jack Miller, who was head of the light duty work program for Grays Harbor Paper Company, testified that the claimant was never considered for the light duty work program. From his testimony it can also be inferred that even if the claimant had been considered, he likely would not have been eligible, due to the limited availability of such work at the company, the claimant's lower seniority status, and the fact that his attending physician had not limited the release to

light duty work to a four week period, with the expectation that the claimant would be able to return to regular work thereafter.

The statutory subsection relating to potential capacity of a claimant for light duty work, during a period of otherwise being entitled to compensation for temporary total disability, reads as follows:

> (4) Whenever an employer requests that a worker who is entitled to temporary total disability under this chapter be certified by a physician as able to perform available work other than his or her usual work, the employer shall furnish to the physician, with a copy to the worker, a statement describing the available work in terms that will enable the physician to relate the physical activities of the job to the worker's disability. The physician shall then determine whether the worker is physically able to perform the work described. If the worker is released by his or her physician for said work, and the work thereafter comes to an end before the worker's recovery is sufficient in the judgment of his or her physician to permit him or her to return to his or her usual job, or to perform other available work, the worker's temporary total disability payments shall be resumed. Should the available work described, once undertaken by the worker, impede his or her recovery to the extent that in the judgment of his or her physician, he or she should not continue to work, the worker's temporary total disability payments shall be resumed when the worker ceases such work.
>
> Once the worker returns to work under the terms of this subsection, he or she shall not be assigned by the employer to work other than the available work described without the worker's written consent, or without prior review and approval by the worker's physician.
>
> In the event of any dispute as to the worker's ability to perform the available work offered by the employer, the department shall make the final determination.

RCW 51.32.090(4) (Emphasis supplied). Laws of 1975, 1st Ex.Sess., ch. 235, § 1, p. 762.

By enacting subsection 4, the legislature essentially carved out an odd lot doctrine for temporary total disability, much like the odd lot doctrine already enunciated in case law for permanent total disability. Kuhnle v. Department of Labor & Indus., 12 Wn.2d 191, 120 P.2d 1003 (1942). In Kuhnle, the court stated:

> [I]f an accident leaves the workman in such a condition that he can no longer follow his previous occupation or any other similar occupation, and is fitted only to perform "odd jobs" or special work, not generally available, the burden is on the department to show that there is special work that he can in fact obtain.

Kuhnle, at 198-199. In Spring v. Department of Labor & Indus., 96 Wn.2d 914, 640 P.2d 1 (1982), the Supreme Court held that once a worker had proved an inability to do light or sedentary work of a general nature, the burden shifted to the employer "to prove that odd lot or special work of a non-general nature was available to" the claimant. Spring, at 919.

Subsection 4 of RCW 51.32.090 establishes quite similar requirements in the temporary total disability situation. If a claimant is "entitled to temporary total disability", i.e., unable to perform light or sedentary work of a general nature, then the burden shifts to the department or self-insured employer to prove that there is some special kind of work which the claimant can perform and which is actually available to him.

The light duty work subsection does not leave room for any other interpretation than that the light duty work for which a worker is certified by his physician must be actually available and offered to the worker by the employer, as a prerequisite to the termination of time loss compensation payments to an otherwise temporarily totally disabled claimant. We have, in the past, viewed this subsection as requiring strict adherence by the employer to its other terms prior to the employer or Department taking advantage of this subsection to terminate time loss compensation. See, e.g., In re Larry Washington, BIIA Dec. 65,450 (1984) (Alternative job must be offered within the worker's capabilities); In re O.C. Thompson, BIIA Dec. 60,203 (1983) (Attending physician certification required, forensic examiner's certification inadequate); and, In re Carol Rose, BIIA Dec. 49,894 (1978) (Work description provided the attending physician must be adequate for proper evaluation and release must be communicated to the worker.)

We are mindful of Division I's decision in Bayliner Marine Corp. vs. Perrigoue, 40 Wn. App. 110 (1985). In that case, a letter from the claimant's attending physician acknowledged a "possibility" that the claimant would be unable to do even light duty work, but encouraged a "trial" of light duty employment. The Court of Appeals found such a release was sufficient to meet the attending physician certification requirements of the light duty work subsection. However, we not understand the court in Bayliner to have taken a less strict view of the statutory requirements than we do. Rather, the court simply pointed out that such a release or certification for a "trial" of light duty work was consistent with the terms of the statute which provides that if the light duty work impedes recovery to the extent that the attending physician believes the work should not be continued, temporary total disability payments will be resumed. Such a holding in no way lessens the requirement that an employer adhere to each of the requirements of the light duty subsection.

In the present case, the light duty work apparently considered by the claimant's attending physician simply was not made available to the claimant per the requirements of RCW 51.32.090(4). Thus, the employer may not take advantage of this subsection in order to terminate time loss compensation. However, that does not end our inquiry in this case. For RCW 51.32.090(4) can only apply if the claimant is unable to perform light or sedentary work of a general nature.

In the present appeal, we find that the overwhelming preponderance of the evidence presented establishes that the claimant was not precluded from reasonably continuous regular employment between May 13, 1987 and January 25, 1988. He was, therefore, not entitled to time loss compensation benefits for this period.

The claimant was first seen by his attending physician, Robert Mysliwiec, D.O., in September, 1986. Dr. Mysliwiec diagnosed simply a mid-thoracic sprain/strain soft tissue injury from the industrial injury of August 21, 1986. Although the restrictions contained in the physical capacities evaluation which Dr. Mysliwiec completed might, at first look, seem to preclude the claimant from reasonably continuous gainful regular employment, Dr. Mysliwiec acknowledged that the physical capacities evaluation was in large part based upon subjective complaints which the claimant provided himself and upon what the claimant said he was able to do.

In our review of the medical testimony in this case, the only objective medical finding referenced anywhere was that of a spasm involving a ligament. Dr. Mysliwiec testified there had been no muscle damage, no nerve damage, only normal neurological and EMG examinations, normal x-rays, normal CT scans, and a pain pattern which was more diffuse than usual for this type of injury.

Dr. Mysliwiec also indicated that Mr. McBride had abnormal responses to injections which he would have expected to numb and eliminate pain, but which, according to the claimant, made the pain worse. He also indicated that the claimant generally exhibited an unusual type of pain behavior. We also note that during the hearing of November 23, 1988 Mr. McBride testified he had been using a cane regularly since approximately two weeks after his industrial injury of August 21, 1986. Nevertheless, Dr. Mysliwiec testified that he could not recall the claimant using a cane and had not recorded any objective finding to explain why the claimant would need to use a cane. Dr. Mysliwiec also testified regarding the contents of a letter which he authored which indicated that the claimant's prolonged course and persistent severity of symptoms were unexplainable, that there were no objective findings to elucidate his problems, that he had seen multiple doctors, and that there was objective inconsistency on examination. Further, very near the beginning of the period for which the

employer challenges the claimant's eligibility for time loss compensation, the claimant informed Dr. Mysliwiec that he himself attributed his problems to a May 1, 1987 motor vehicle accident rather than tis industrial injury.

Dr. Charles Morrow, an orthopedic surgeon certified in his specialty, examined the claimant on August 27, 1987, and Dr. Price Chenault, also an orthopedic surgeon, examined the claimant on September 22, 1987. Neither of these specialists could find any objective reasons for the claimant's unusual reports of diffuse pain up and down the spine and into his extremities. Each also reported what were considered to be inconsistent findings on supine and seated straight leg raising testing, as well as responses to sensation testing which were not anatomically consistent. Dr. Morrow testified that a differential diagnosis for the claimant should include a consideration of malingering. He could not find an objective basis upon which to place any restrictions upon the claimant's ability to engage in regular and continuous gainful employment. Dr. Chenault testified he would not place any restrictions on the claimant other than from deconditioning, and felt that it was very difficult to do a meaningful physical capacities evaluation on the claimant because of his abnormal pain behavior.

As indicated in the Proposed Decision and Order, Dr. Chenault's assessment of the claimant's capabilities can be related back to early May, 1987 in that he stated his opinion that the claimant's condition related to the industrial injury had not materially worsened since the automobile accident May 1, 1987. We further note that Dr. Mysliwiec testified that his evaluation of December 21, 1987 was similar to his evaluation in May, 1987 and that throughout the entire period of May, 1987 to January, 1988, the claimant did not have a neurological deficit which would explain his alleged problems.

In summary, our review of the evidence in this case does not disclose credible testimony which would support the imposition of any significant restrictions upon the claimant's capacity to engage in reasonably continuous gainful employment at regular work during the period of May 13, 1987 through January 25, 1988. To the contrary, the overwhelming preponderance of the evidence convinces us that the claimant did not suffer from any physical incapacities due to the industrial injury which would preclude his employment at regular work during this period. Our belief in this regard is further supported by the testimony of John Berg, a vocational rehabilitation counselor registered with the Department of Labor and Industries, who testified that considering the claimant's transferable skills, along with either Dr. Mysliwiec's, Dr. Chenault's or Dr. Morrow's physical capacities evaluations, the claimant was capable of reasonably continuous gainful employment.

The claimant was not, then, a temporarily totally disabled worker within the meaning of RCW 51.32.090 during the period May 13, 1987 through January 25, 1988, and was not entitled to time loss compensation. In so deciding, we make the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. On September 15, 1986, the claimant filed an accident report with the Department of Labor and Industries alleging the occurrence of an industrial injury on August 21, 1986 while in the course of his employment with Grays Harbor Paper Company. On October 23, 1987 the Department issued an order allowing the claim. On December 24, 1987, the Department issued an order stating that time loss compensation was terminated on May 13, 1987, and ordering the self-insured employer to pay time loss compensation to the claimant from May 13, 1987 and to continue providing such compensation until the claimant was released for work by his attending physician. On January 12, 1988, the employer filed a protest and request for reconsideration. On January 25, 1988 the Department issued an order affirming the order of December 24, 1987. On March 1, 1988, the employer filed a notice of appeal with the Board of Industrial Insurance Appeals. On March 9, 1988, the Board issued an order granting the appeal.

2. On August 21, 1986, the claimant was injured in the course of his employment while he was lifting boxes from the floor up over his head and onto pallets, which precipitated an onset of pain in his lower and middle back.

3. As a result of this injury, the claimant sustained a mid-thoracic strain/sprain soft tissue injury.

4. On May 6, 1987, the claimant's attending physician certified the claimant as being able to perform the work described in a light duty job analysis submitted to the attending physician by the employer. However, the light duty work described in the job analysis was not made available to the claimant by the employer.

5. Between May 13, 1987 and January 25, 1988, the claimant, due to the industrial injury of August 21, 1986, did not suffer from any significant physical restrictions which would preclude him from performing reasonably continuous gainful employment in the regular, general labor market.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and the subject matter to this appeal.

2. During the period May 13, 1987 through January 25, 1988, the claimant was not a temporarily totally disabled worker within the meaning of RCW 51.32.090, even though the specific provisions of RCW 51.32.090(4)

would not have precluded the claimant from receiving temporary total disability benefits had he been otherwise temporarily totally disabled.

3. The order of the Department dated January 25, 1988, which adhered to the order dated December 24, 1987, which stated that the light duty work was not made available to the claimant and which ordered the employer to pay time loss compensation to the claimant from May 13, 1987 until such time as the claimant was released for work by his attending physician, is partially incorrect and is reversed. The Department is directed to issue a new order stating that, although light duty work was not made available, the claimant was capable of reasonably continuous regular gainful employment, and ordering termination of time loss compensation payments as of May 13, 1987.

It is so ORDERED.

Dated this 24th day of July, 1989.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
SARA T. HARMON Chairperson

/s/_____
PHILLIP T. BORK Member