Potts, David

BOARD

Summary judgment

The Board has the authority to resolve appeals, in whole or in part, by summary judgment. RCW 51.52.140; WAC 263-12-125; CR 56. ***….In re David Potts,* BIIA Dec., 88 3822 (1989)**

TIME-LOSS COMPENSATION (RCW 51.32.090)

Certification by vocational rehabilitation counselor

A vocational rehabilitation counselor's certification of a worker's inability to work will support payment of time-loss compensation under RCW 51.32.090. ***….In re David Potts,* BIIA Dec., 88 3822 (1989)**

Eligibility while undergoing vocational rehabilitation (RCW 51.32.095(3))

A worker cannot, as a matter of law, receive time-loss compensation benefits under RCW 51.32.095(3) unless he is undergoing a formal program of vocational rehabilitation. ***….In re David Potts,* BIIA Dec., 88 3822 (1989)**

VOCATIONAL REHABILITATION

Time-loss compensation (RCW 51.32.095(3))

A worker cannot, as a matter of law, receive time-loss compensation benefits under RCW 51.32.095(3) unless he is undergoing a formal program of vocational rehabilitation. ***….In re David Potts,* BIIA Dec., 88 3822 (1989)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: DAVID H. POTTS	)	**DOCKET NOS. 88 3822 & 88 3115**
	)	
	)	**ORDER SETTING ASIDE PROPOSED**
	)	**DECISION AND ORDER, GRANTING PARTIAL**
	)	**SUMMARY JUDGMENT, AND REMANDING**
CLAIM NO. J-731446	)	**APPEALS TO THE HEARING PROCESS**

APPEARANCES:

Claimant, David H. Potts, by
Webster, Mrak & Blumberg, per
Richard Blumberg

Employer, Colt Construction Co., by
Riddell, Williams, Bullitt & Walkinshaw, per
Joseph E. Shickich and Gary L. Baker

Department of Labor and Industries, by
The Attorney General, per
Larry Watters, Assistant

An appeal was filed by the employer on October 17, 1988 from an order of the Department of Labor and Industries dated September 7, 1988 which paid time loss compensation in two semi-monthly payments beginning August 25, 1988. This appeal was assigned Docket No. 88 3115. The employer also filed an appeal on December 14, 1988 from an order of the Department of Labor and Industries dated October 13, 1988 which paid time loss compensation in four semi-monthly payments beginning September 25, 1988. This appeal was assigned Docket No. 88 3822. The Proposed Decision and Order is **VACATED**, Partial Summary Judgment is **GRANTED**, and the appeals are **REMANDED TO THE HEARING PROCESS.**

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, these matters are before the Board for review and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order issued on May 26, 1989 in which the orders of the Department dated September 7, 1988 and October 13, 1988 were reversed and this matter remanded to the Department of Labor and Industries to deny the claimant, David H. Potts, time loss compensation for the periods August 25, 1988 through September 24, 1988, inclusive, and September 25, 1988 through November 24, 1988, inclusive.

The issues presented are (1) whether summary judgment motions are appropriate in appeals before the Board of Industrial Insurance Appeals, and (2) if summary judgment motions can be heard, whether it was appropriate to grant such a motion in these appeals?

RCW 51.52.140 states: "Except as otherwise provided in this chapter, the practice in civil cases shall apply to appeals prescribed in this chapter." WAC 263-12-125 similarly provides: "Insofar as applicable, and not in conflict with these rules, the statutes and rules regarding procedures in civil cases in the superior courts of this state shall be followed ...." CR 56 sets forth the rules applicable to summary judgment. Mr. Potts argues that the Board has no authority to decide appeals without a hearing, and summary judgment denies claimants their right to a hearing. In support of his position, Mr. Potts cites RCW 51.52.102 and Watt v. Weyerhaeuser, 18 Wn.App 731, 573 P.2d 1320 (1977). We disagree with this position. This Board does have the authority to grant relief without hearing or by summary disposition. RCW 51.52.080 permits the Board to deny an appeal and confirm the Department's decision without hearing if the notice of appeal raises no issues of fact and the Board finds that the Department properly and lawfully decided all matters raised by the appeal. RCW 51.52.095(2) specifically states that the limitations which prohibit a mediation judge from writing the Proposed Decision and Order, "shall not prevent an industrial appeals judge from issuing a proposed decision and order responsive to a motion for summary disposition or similar motion." We find nothing in the Industrial Insurance Laws which would prohibit this agency from granting summary judgment.

Nor do we read the Court of Appeals decision in Watt v. Weyerhaeuser to prohibit this agency from granting summary judgment. In Watt, the Board dismissed the claimant's appeal following Mr. Watt's failure to appear at the initial pre-hearing conference and his failure to comply with deadlines related to pre-hearing proceedings. The court stated that the Board could dismiss a previously accepted appeal only as authorized by the Industrial Insurance Act. Watt, at 736. The court, citing RCW 51.52.102, stated that the statute "permits the Board to dismiss an appeal when an appealing party, who has the burden of going forward with the evidence, fails to appear at hearing or appears but presents no evidence." Watt, at 737. Since Mr. Watt's appeal had never been set for formal hearing, the Board was without authority to dismiss the appeal.

The decision in Watt is not applicable in this case. This case does not involve a dismissal of the claimant's appeal without being given an opportunity to present evidence. On the contrary, by agreement of the parties the summary judgment motion was set for hearing on May 17, 1989. 4/17/89

Tr. at 13. Mr. Potts cannot argue he did not have an opportunity to present appropriate affidavits or other documents in response to the summary judgment motion.

Now, we turn to the question of whether it was appropriate to grant summary judgment in these appeals. The following is a summary, in chronological order, of the events involved in the summary judgment motion:

Date	Event
4/11/89	Employer serves summary judgment motion with the Board.
4/17/89	Industrial Appeals Judge sets hearing on employer's summary judgment motion for 5/17/89 with the agreement of the parties.
5/1/89	Employer files affidavit and supporting documentation.
5/16/89	Claimant serves and files Memorandum in response to summary judgment motion. No opposing affidavits or other documentation are filed.
5/17/89	Hearing on summary judgment motion. Employer files additional affidavit and documentation in support of its motion.
5/25/89	Claimant files and serves affidavit in opposition to the motion.
5/26/89	PD & O issued granting summary judgment in favor of employer.

The purpose of CR 56 is to permit the court to pierce the formal allegations of fact in pleadings and grant relief by summary judgment when it is determined by uncontroverted facts, set forth in affidavits, depositions, admissions or answers to interrogatories, that there are no genuine issues of material fact. Preston v. Duncan, 55 Wn.2d 678, 349 P.2d 605 (1960); CR 56(c). "A material fact is one upon which the outcome of the litigation depends, in whole or in part." Barrie v. Host of Am., Inc., 94 Wn.2d 640, 642, 618 P.2d 96 (1980). The burden is upon the party moving for summary judgment to show that there is no issue of material fact. All reasonable inferences must be resolved against the moving party, and the motion should be granted only if reasonable people could reach but one conclusion. Hash v. Children's Orthopedic Hospital, 110 Wn.2d 912, 915, 757 P.2d 507 (1988).

Regardless of whether the non-moving party has submitted affidavits or other evidence in opposition to the motion, if the moving party does not sustain its burden, summary judgment should not be granted. Hash, at 915. "Only after the moving party has met its burden of producing factual evidence showing that it is entitled to judgment as a matter of law does the burden shift to the non-moving party to set forth facts showing that there is a genuine issue of material fact." Hash, at 915.

The legal issue raised by the summary judgment motion is whether Mr. Potts is entitled to time loss compensation under the provisions of RCW 51.32.095(3) from August 25, 1988 through November 24, 1988. RCW 51.32.095(3) allows the supervisor of industrial insurance, in his discretion, to include as part of vocational rehabilitation benefits, continuing temporary total disability benefits "while the worker is actively and successfully undergoing a formal program of vocational rehabilitation." The employer argues that during the period of time relevant to these appeals, Mr. Potts was not undergoing a "formal program" of vocational rehabilitation and therefore was not entitled to time loss compensation under RCW 51.32.095(3).

WAC 296-18A-420(3) defines "formal program" for vocational rehabilitation purposes as "an approved rehabilitation plan ... that provides services necessary and likely to enable the injured worker to be employed at gainful employment." Based on the plain reading of this regulation as well as a careful review of the statute, the employer's position appears correct.

In support of the employer's motion, excerpts from the April 5, 1989 deposition of Barbara Hammer were submitted. Ms. Hammer is a vocational rehabilitation counselor with the Department of Labor and Industries. Ms. Hammer performed an employability assessment of Mr. Potts and asked that his case be referred to her for plan development. According to her deposition, the rehabilitation consultant at the Department referred the case to her for plan development on December 4, 1987. However, according to Ms. Hammer, from December, 1987 through April, 1989, no plan development took place. Even considering all evidence presented concerning the summary judgment motion, regardless of whether it was timely filed, Mr. Potts was not under an approved rehabilitation plan during this period. Only minimal efforts towards plan development had taken place.

RCW 51.32.095(3) generally limits both the payment of compensation and the payment for retraining to a period of not more than 52 weeks. It appears the intent of the statute is for time loss compensation benefits paid under RCW 51.32.095(3) to cover the time the injured worker is under an "approved rehabilitation plan", not during the period of time the plan is being developed. If time loss

compensation is paid under the provisions of RCW 51.32.095(3) while a rehabilitation plan is being developed, an injured worker with an approved rehabilitation plan for 52 weeks of schooling could have a substantially shorter period of time loss compensation benefits available depending on how long it took to develop the plan. We do not believe that to be the intent of the statute. Therefore, we agree with the ruling of the Industrial Appeals Judge which granted summary judgment on the issue of Mr. Potts' entitlement to time loss compensation under the provisions of RCW 51.32.095(3). However, the resolution of that issue does not dispose of these appeals. We also do not believe the legislature intended that a worker cannot be provided with time loss compensation benefits during the period of time a vocational rehabilitation plan is being developed. There still remains the question, then, of whether Mr. Potts was entitled to time loss compensation benefits under the provisions of RCW 51.32.090.

In the Proposed Decision and Order, the Industrial Appeals Judge stated, as an uncontroverted fact, that "[t]he authority to pay Mr. Potts time loss compensation for the period August 25, 1988 through November 24, 1988 was RCW 51.32.095(3)." PD & O, at 5. We disagree. The two Department orders under appeal state: "Future disability cards need to be signed by your vocational counselor as there appears to be no further medical treatment." The orders make no specific reference to RCW 51.32.095(3).

Time loss compensation benefits are generally paid under the provisions of RCW 51.32.090. That statute provides: "When the total disability is only temporary", time loss compensation benefits shall be paid "so long as the total disability continues." The fact that Mr. Potts' condition was medically fixed, but not legally fixed, does not preclude him from being classified as temporarily totally disabled. See, In re Douglas Weston, BIIA Dec., 86 1645 (1987).

A qualified vocational counselor can testify as to an injured worker's employability, based on medical testimony of loss of function and limitations imposed by the industrial injury in a case where the issue is total permanent disability. Fochtman v. Dept. of Labor & Indus., 7 Wn.App 286, 499 P.2d 255 (1972). Since a qualified vocational counselor can give an opinion on employability in a total permanent disability case, we believe a qualified vocational counselor can give an opinion on employability in a temporary total disability case. "[T]emporary total disability and permanent total disability differ only in the duration of the disability, and not in its character." Bonko v. Dept. of Labor & Indus., 2 Wn.App 22, 25, 466 P.2d 526 (1970). Therefore, the mere fact that the Department required

Mr. Potts' rehabilitation counselor to sign his time loss cards does not preclude him from receiving time loss benefits under the provisions of RCW 51.32.090.

In addition, in making the determination that an injured worker qualifies for vocational services, the Supervisor of Industrial Insurance must be satisfied that the injured worker is unemployable at gainful employment without vocational assistance. It follows, then, that if as a result of his industrial injury an injured worker is determined to be incapable of gainful employment without vocational assistance, he would be entitled to time loss compensation under RCW 51.32.090 until his rehabilitation plan has been approved and he would then qualify for benefits under RCW 51.32.095(3).

While we have determined as a matter of law that Mr. Potts was not entitled to time loss compensation benefits under RCW 51.32.095(3) for the periods of time at issue, a genuine issue of material fact still remains. Was Mr. Potts temporarily totally disabled between August 25, 1988 and November 24, 1988 as a result of the residuals of his industrial injury of April 11, 1986? "In ruling on the [summary judgment] motion, a court's function is to determine whether a genuine issue of material fact exists; it is not to resolve an existing factual issue." Barrie v. Host of Am., Inc., 94 Wn.2d 640, 642, 618 P.2d 96 (1981).

Therefore, after consideration of the Proposed Decision and Order and the Petition for Review filed thereto, the Reply to Petition for Review and the Response to that Reply, and a careful review of the entire record before us, we are persuaded that the Proposed Decision and Order which grants the employer's motion for summary judgment and remands these matters to the Department with directions to deny Mr. Potts time loss compensation for the period August 25, 1988 through November 24, 1988 is incorrect. We grant a partial summary judgment on the employer's motion and find that the claimant is not entitled to time loss compensation under the provisions of RCW 51.32.095(3), but remand these appeals to the hearing process to determine whether Mr. Potts is entitled to time loss compensation under the provisions of RCW 51.32.090. Specifically, the remaining issue in these appeals is whether Mr. Potts was incapable of gainful employment on a reasonably continuous basis, for the period August 25, 1988 through November 24, 1988, as a proximate result of the April 11, 1986 industrial injury.

The parties are advised that this order is not a final decision and order of the Board within the meaning of RCW 51.52.110. At the conclusion of the proceedings the Industrial Appeals Judge shall, unless the matter is dismissed or resolved by an Order on Agreement of Parties, enter a Proposed Decision and Order containing findings and conclusions as to each contested issue of fact and law,

consistent with this decision. Any party aggrieved by such Proposed Decision and Order may petition the Board for review of such further Proposed Decision and Order, pursuant to RCW 51.52.104.

It is so ORDERED

Dated this 21st day of November, 1989.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/
SARA T. HARMON Chairperson

/s/
FRANK E. FENNERTY, JR. Member

/s/
PHILLIP T. BORK Member