McCauley, Ronnie

SUSPENSION OF BENEFITS (RCW 51.32.110)

Retroactive Suspension

The suspension of benefits under the provisions of RCW51.32.110 by the Department or self-insurer, with the Department's approval, may apply to future benefits only. The retroactive suspension of benefits is not permitted. **….*In re Ronnie McCauley*, BIIA Dec., 89 3189 (1991)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: RONNIE H. MCCAULEY	)	**DOCKET NO. 89 3189**
	)	
CLAIM NO. S-633160	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Ronnie H. McCauley, by
Webster, Mrak and Blumberg, per
Richard P. Blumberg and Nalani M. Askov

Self-insured Employer, ITT Rayonier Inc., by
Hall and Keehn, per
Gary D. Keehn, Attorney, and Linda Bauer, Legal Secretary

This is an appeal filed by the claimant on July 31, 1989 from an order of the Department of Labor and Industries dated July 17, 1989 which suspended "further" benefits "effective 10/20/88" for failure of the claimant to submit to medical treatment as recommended. **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 claimant to a Proposed Decision and Order issued on July 26, 1990 in which the order of the Department dated July 17, 1989 was affirmed.

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 issue presented by this appeal and the evidence presented by the parties are adequately set forth in the Proposed Decision and Order.

We disagree, however, with our Industrial Appeals Judge's determination that the order of the Department suspending benefits under RCW 51.32.110 for failure to submit to medical treatment should be sustained. We conclude that the claimant has shown that the recommended surgery is not "reasonably essential to his . . . recovery". He has therefore shown "good cause for refusing to submit to (such) treatment".

Mr. McCauley injured his low back on July 22, 1985. Dr. Ted Wagner, an orthopedic surgeon, examined Mr. McCauley on February 13, 1987 and reviewed the report of the examination of a panel of doctors, who examined Mr. McCauley on or about July 21, 1988. He concluded that the claimant's lumbar nerve root impingement related to the industrial injury of July 22, 1985, was to the left side. He stated patients with such lateral herniations are the most likely to be helped by surgery. He also said

the claimant was relatively young in 1987 (44 years old), the recommended technique (micro discectomy) was a common surgical procedure, and there was only a slight chance of nerve injury or infection and a remote risk of heart attack as possible adverse effects of the surgery. However, he conceded that even if the surgery were successful, the chance that Mr. McCauley would return to mill work "approaches zero". Wagner Dep. at 36. The doctor further testified Mr. McCauley's condition was somewhat better in 1988 than in 1987. He had lost the muscle weakness, and surgery was less appealing. The length of time since the injury made the chance of a good result from surgical intervention deteriorate from 80% to 40%. He found no progressive muscle weakness and no progressive atrophy and he stated Mr. McCauley's pain could go away without surgery. He conceded that claimant's major disability was due to pain complaints. Dr. Wagner also cited a study done by Dr. Alf Nachemson of Goteborg, Sweden, which contained the conclusion that "whether you operate or not on a lumbar disk, at the end of three to five years, the amount of pain the patients experience will be the same in those two groups. . . ." Wagner Dep. at 17. The study did not address the question of whether function would be improved.

Dr. Richard Carter, a psychiatrist, testified Mr. McCauley would be an adequate surgical candidate as there were no psychiatric contraindications.

Dr. James Green, an orthopedist who examined Mr. McCauley on July 21, 1988, testified that he will not improve without surgery. The recommended surgery is reasonable and necessary to maximize recovery. But he also found no muscle weakness and only some decreased sensation on top of the left foot. He found no reflex abnormality and concluded the S1 nerve root was not involved. He further stated that taking pressure off the L5 nerve root (surgical decompression) would not necessarily provide a change in what Mr. McCauley would feel. Without clear findings (which Mr. McCauley does not have) of reflex loss or weakness of muscles, the best results are not necessarily attainable from surgical intervention. Mr. McCauley, according to the doctor, has some functional symptoms which reduce the chance of successful surgery.

From the foregoing, we conclude that by the date of the suspension order, July 17, 1989, Mr. McCauley's condition was probably not best served by a surgical intervention. The procedure was no longer reasonably essential to his recovery, if it ever had been.

Having answered the first test of the statute adversely to the Department order, we do not reach the second test except to say that if the surgery is not reasonably essential to his recovery, Mr. McCauley has good cause for refusing it.

We must address a subsidiary issue which has not been raised by the parties. The Department order of July 17, 1989 suspends further benefits retroactive to October 20, 1988. This is a contradiction in terms. In any event, the statute does not permit retroactive suspension. RCW 51.32.110 provides that "with notice to the worker" the Department, or the self-insurer with the Department's approval, "may suspend any further action on [the] claim . . . so long as such refusal continues and . . . suspend . . . any compensation for such period". (Emphasis added) This language all speaks of prospective, not retroactive, suspension action. According to the parties' stipulation, the self-insured employer's service company representative suspended time loss benefits on or about October 20, 1988 "and so informed the Department. . . ." 6/28/90 Tr. at 32. However, Exhibit No. 1 indicates that it was not until April 7, 1989 that the employer wrote the Department requesting either a claim closure order or an order suspending benefits for failure to undergo surgical treatment. There is no showing that the Department approved the self- insured employer's suspension of benefits prior to October 20, 1988. There is no indication in this record that Mr. McCauley was given notice prior to the suspension of benefits by the self-insured employer that his benefits would be suspended for refusal of surgery. And, rather than suspending further benefits, the July 17, 1989 Department order apparently attempts to approve the self-insured employer's action nine months after the fact. This type of scenario is clearly not what is contemplated by the statutory provisions. For these reasons, as well as the fact that the recommended surgery is not reasonably essential to Mr. McCauley's recovery, the Department order must be reversed.[1]

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[1]Effective October 13, 1990, a new Department WAC details the procedures to be followed in suspending benefits. It provides, in pertinent part:

> The department or self-insurer, upon approval of the department, may reduce, suspend, or deny benefits by any of the following means so long as the refusal, obstruction, delay, or noncooperation continues without good cause: Reduce current or future time-loss compensation by the amount of the charge incurred by the department or self-insurer for any examination, evaluation, or treatment which the worker fails to attend; reduce, suspend, or deny time-loss compensation in whole or in part; or suspend or deny medical benefits.
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> . . . .
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> Prior to the issuance of an order reducing, suspending or denying benefits, the department or self-insurer must request, in writing, from the worker or worker's representative the reason for the refusal, obstruction, delay, or noncooperation.
>
> If the department determines no good cause exists, or if the worker fails to respond to the department's request for the reason for the refusal, obstruction, delay or noncooperation, within thirty days after the letter is issued the department will issue an order reducing, suspending, or denying benefits.

WAC 296-14-410 (Emphasis added).

While this WAC is not applicable to this claim, it certainly sets forth a reasonable interpretation of the controlling statutory language, and prescribes procedures which must be followed prior to issuance of an order notifying the worker of suspension of further benefits.

The only question before us in this appeal is whether or not Mr. McCauley's benefits were properly suspended for refusal to undergo medical treatment. It may well be that, in the absence of surgery, Mr. McCauley's industrially related condition is fixed and his claim may well be ready for closure. On remand, that issue can be addressed and determinative Department action taken accordingly.

After consideration of the Proposed Decision and Order and the Petition for Review filed thereto, and a careful review of the entire record before us, we make the following:

FINDINGS OF FACT

1. On August 27, 1985 the Department of Labor and Industries received a report of accident from the claimant, Ronnie H. McCauley, alleging that he sustained an industrial injury on July 22, 1985 while he was working for ITT Rayonier Inc., a self-insured employer. The claim was allowed and benefits provided.

   On July 17, 1989 the Department issued an order suspending the right to further compensation effective October 20, 1988 for failure to submit to medical treatment as recommended. On July 31, 1989 the claimant filed a notice of appeal with the Board of Industrial Insurance Appeals. On August 14, 1989 the Board issued an order granting the appeal, assigning Docket No. 89 3189 to the appeal, and directing that hearings be held on the issues raised by the appeal.

2. On July 22, 1985 Ronnie McCauley experienced back pain when pushing a cart containing a heavy load of wood veneer while he was working for ITT Rayonier Inc. He returned to work in May, 1986. After working two or three months, he slid, caught himself and felt greater pain than previously. He has not worked since that episode.

3. On February 13, 1987 Mr. McCauley's condition resulting from his injury of July 22, 1985, with subsequent exacerbation, was diagnosed as disc herniations at L4-5 and L5-S1 with L5 nerve root irritation; surgery was recommended. The recommended procedure was micro discectomy, involving a small hole, with less scar tissue and less bone removal than prior techniques; the risk of complications was remote. The procedure was usual for orthopedic surgeons.

4. By letter dated October 12, 1987 the employer authorized the surgery recommended on February 13, 1987.

5. On December 11, 1987 the estimate of successful surgery for Mr. McCauley's back was at the level of 80% with the level of possible infections and nerve damage at 1%.

6. In April, 1988 Mr. McCauley informed the employer that he declined to undergo surgery on his back.

7. On October 20, 1988 the self-insured employer suspended claimant's time loss benefits for failure to undergo surgery.

8. On April 7, 1989 the self-insured employer requested the Department to either close the claim or enter an order suspending claimant's benefits for refusal to undergo surgery.

9. On July 17, 1989 the Department suspended further benefits retroactive to October 20, 1988 because of claimant's refusal to undergo surgery.

10. On July 17, 1989 the likelihood of improvement in Mr. McCauley's condition by recommended back surgery was at the level of about 40%.

11. By July 17, 1989 Mr. McCauley did not have detectable muscle weakness nor reflex abnormality nor progressive muscle atrophy due to the residuals of his industrial injury. He did have some functional symptoms which would not be helped by surgery.

12. Medical testimony indicates Mr. McCauley's pain could remit without surgery.

13. On July 17, 1989, Mr. McCauley's condition resulting from the residuals of his injury of July 22, 1985 and the subsequent exacerbations of that injury would probably not be improved by surgical intervention.

CONCLUSIONS OF LAW

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

2. As of July 17, 1989 the surgical treatment known as micro discectomy was not reasonably essential to Mr. McCauley's recovery, within the aegis of the provisions of RCW 51.32.110.

3. Under RCW 51.32.110, the self-insured employer was not permitted to suspend Mr. McCauley's benefits without prior Department approval, nor was the Department permitted to suspend benefits retroactively.

4. The order of the Department of Labor and Industries dated July 17, 1989 which suspended benefits retroactive to October 20, 1988 for failure to submit to medical treatment as recommended, is incorrect and is reversed and the claim remanded to the Department with directions to require such benefits for Mr. McCauley as are in accord with this order and as may be appropriate pursuant to the facts and the law.

It is so ORDERED.

Dated this 31st day of January, 1991.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
SARA T. HARMON Chairperson

/s/_____
FRANK E. FENNERTY, JR. Member

/s/_____
PHILLIP T. BORK Member