

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, BIA Dec., 89 3189 (1991)*

Scroll down for order.

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

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

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

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

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47 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.

1 We must address a subsidiary issue which has not been raised by the parties. The Department
2 order of July 17, 1989 suspends further benefits retroactive to October 20, 1988. This is a
3 contradiction in terms. In any event, the statute does not permit retroactive suspension. RCW
4 51.32.110 provides that "with notice to the worker" the Department, or the self-insurer with the
5 Department's approval, "may suspend any further action on [the] claim . . . so long as such refusal
6 continues and . . . suspend . . . any compensation for such period". (Emphasis added) This language
7 all speaks of prospective, not retroactive, suspension action. According to the parties' stipulation, the
8 self-insured employer's service company representative suspended time loss benefits on or about
9 October 20, 1988 "and so informed the Department. . . ." 6/28/90 Tr. at 32. However, Exhibit No. 1
10 indicates that it was not until April 7, 1989 that the employer wrote the Department requesting either a
11 claim closure order or an order suspending benefits for failure to undergo surgical treatment. There is
12 no showing that the Department approved the self- insured employer's suspension of benefits prior to
13 October 20, 1988. There is no indication in this record that Mr. McCauley was given notice prior to the
14 suspension of benefits by the self-insured employer that his benefits would be suspended for refusal of
15 surgery. And, rather than suspending further benefits, the July 17, 1989 Department order apparently
16 attempts to approve the self-insured employer's action nine months after the fact. This type of
17 scenario is clearly not what is contemplated by the statutory provisions. For these reasons, as well as
18 the fact that the recommended surgery is not reasonably essential to Mr. McCauley's recovery, the
19 Department order must be reversed.¹

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¹Effective 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.F

. . . .F

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,

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2 The only question before us in this appeal is whether or not Mr. McCauley's benefits were
3 properly suspended for refusal to undergo medical treatment. It may well be that, in the absence of
4 surgery, Mr. McCauley's industrially related condition is fixed and his claim may well be ready for
5 closure. On remand, that issue can be addressed and determinative Department action taken
6 accordingly.
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10 After consideration of the Proposed Decision and Order and the Petition for Review filed
11 thereto, and a careful review of the entire record before us, we make the following:
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13 **FINDINGS OF FACT**
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- 15 1. On August 27, 1985 the Department of Labor and Industries received a
16 report of accident from the claimant, Ronnie H. McCauley, alleging that he
17 sustained an industrial injury on July 22, 1985 while he was working for
18 ITT Rayonier Inc., a self-insured employer. The claim was allowed and
19 benefits provided.
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21 On July 17, 1989 the Department issued an order suspending the right to
22 further compensation effective October 20, 1988 for failure to submit to
23 medical treatment as recommended. On July 31, 1989 the claimant filed a
24 notice of appeal with the Board of Industrial Insurance Appeals. On
25 August 14, 1989 the Board issued an order granting the appeal, assigning
26 Docket No. 89 3189 to the appeal, and directing that hearings be held on
27 the issues raised by the appeal.

- 28 2. On July 22, 1985 Ronnie McCauley experienced back pain when pushing
29 a cart containing a heavy load of wood veneer while he was working for
30 ITT Rayonier Inc. He returned to work in May, 1986. After working two or
31 three months, he slid, caught himself and felt greater pain than previously.
32 He has not worked since that episode.
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35 obstruction, delay, or noncooperation.F
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37 If the department determines no good cause exists, or if the worker
38 fails to respond to the department's request for the reason for the
39 refusal, obstruction, delay or noncooperation, within thirty days after
40 the letter is issued the department will issue an order reducing,
41 suspending, or denying benefits.
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43 WAC 296-14-410 (Emphasis added).

44 While this WAC is not applicable to this claim, it certainly sets forth a reasonable interpretation
45 of the controlling statutory language, and prescribes procedures which must be followed prior
46 to issuance of an order notifying the worker of suspension of further benefits.
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- 1 3. On February 13, 1987 Mr. McCauley's condition resulting from his injury of
2 July 22, 1985, with subsequent exacerbation, was diagnosed as disc
3 herniations at L4-5 and L5-S1 with L5 nerve root irritation; surgery was
4 recommended. The recommended procedure was micro discectomy,
5 involving a small hole, with less scar tissue and less bone removal than
6 prior techniques; the risk of complications was remote. The procedure
7 was usual for orthopedic surgeons.
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- 9 4. By letter dated October 12, 1987 the employer authorized the surgery
10 recommended on February 13, 1987.
- 11 5. On December 11, 1987 the estimate of successful surgery for Mr.
12 McCauley's back was at the level of 80% with the level of possible
13 infections and nerve damage at 1%.
- 14 6. In April, 1988 Mr. McCauley informed the employer that he declined to
15 undergo surgery on his back.
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- 17 7. On October 20, 1988 the self-insured employer suspended claimant's time
18 loss benefits for failure to undergo surgery.
- 19 8. On April 7, 1989 the self-insured employer requested the Department to
20 either close the claim or enter an order suspending claimant's benefits for
21 refusal to undergo surgery.
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- 23 9. On July 17, 1989 the Department suspended further benefits retroactive to
24 October 20, 1988 because of claimant's refusal to undergo surgery.
- 25 10. On July 17, 1989 the likelihood of improvement in Mr. McCauley's
26 condition by recommended back surgery was at the level of about 40%.
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- 28 11. By July 17, 1989 Mr. McCauley did not have detectable muscle weakness
29 nor reflex abnormality nor progressive muscle atrophy due to the residuals
30 of his industrial injury. He did have some functional symptoms which
31 would not be helped by surgery.
- 32 12. Medical testimony indicates Mr. McCauley's pain could remit without
33 surgery.
- 34 13. On July 17, 1989, Mr. McCauley's condition resulting from the residuals of
35 his injury of July 22, 1985 and the subsequent exacerbations of that injury
36 would probably not be improved by surgical intervention.
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CONCLUSIONS OF LAW

- 39 1. The Board of Industrial Insurance Appeals has jurisdiction of the parties
40 and the subject matter of this appeal.
- 41 2. As of July 17, 1989 the surgical treatment known as micro discectomy was
42 not reasonably essential to Mr. McCauley's recovery, within the aegis of
43 the provisions of RCW 51.32.110.
- 44 3. Under RCW 51.32.110, the self-insured employer was not permitted to
45 suspend Mr. McCauley's benefits without prior Department approval, nor
46 was the Department permitted to suspend benefits retroactively.
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1 4. The order of the Department of Labor and Industries dated July 17, 1989
2 which suspended benefits retroactive to October 20, 1988 for failure to
3 submit to medical treatment as recommended, is incorrect and is reversed
4 and the claim remanded to the Department with directions to require such
5 benefits for Mr. McCauley as are in accord with this order and as may be
6 appropriate pursuant to the facts and the law.
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8 It is so ORDERED.

9 Dated this 31st day of January, 1991.
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11 BOARD OF INDUSTRIAL INSURANCE APPEALS
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14 /s/
15 _____
16 SARA T. HARMON Chairperson
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19 /s/
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21 FRANK E. FENNERTY, JR. Member
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24 /s/
25 _____
26 PHILLIP T. BORK Member
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