Edwards, Bob

SUSPENSION OF BENEFITS (RCW 51.32.110)

Good cause

The factors used to determine whether a worker had good cause to refuse to undergo examination include the worker's physical capacities, sophistication, circumstances of employment, family responsibilities, proven ability or inability to travel, medical treatment and other relevant concerns, including the expectation of a fair and independent medical examination balanced against the need to resolve conflicting medical documentation, the location of willing and qualified physician, the length of time before a physician is available to perform an examination, and the comparative expense of such. **….*In re Bob Edwards*, BIIA Dec., 90 6072 (1992)**

Refusal to attend medical examination

Where the worker's refusal to attend a medical examination is based only upon the worker's unfounded presumption that the physician would be biased, the worker did not demonstrate good cause for the failure to attend the examination. **….*In re Bob Edwards*, BIIA Dec., 90 6072 (1992)**

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: BOB C. EDWARDS	**)**	**DOCKET NO. 90 6072**
	)	
CLAIM NO. S-500837	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Bob C. Edwards, by
Springer, Norman & Workman, per
Leonard F. Workman

Self-insured Employer, Weyerhaeuser Company, by
Roberts, Reinisch, Mackenzie, Healy & Wilson, per
Steven R. Reinisch and Craig A. Staples

This is an appeal filed by the claimant, Bob C. Edwards, on November 16, 1990 with the Department of Labor and Industries, which was forwarded to the Board of Industrial Insurance Appeals on December 11, 1990. The appeal is from an order of the Department dated September 17, 1990 which suspended claimant's right to compensation for failure to submit to a medical examination. **AFFIRMED**.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.51.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the self-insured employer to a Proposed Decision and Order issued on November 15, 1991 in which the order of the Department dated September 17, 1990 was reversed and the matter remanded to the Department with instructions to issue an order directing the self-insured employer to provide Mr. Edwards "that compensation to which he is entitled, effective September 17, 1990."

We disagree with the result reached by the Proposed Decision and Order, and affirm the Department order of September 17, 1990.

We have reviewed the evidentiary rulings as stated in the Proposed Decision and Order and find that no prejudicial error was committed and said rulings are hereby affirmed.

The issue presented by this appeal is whether the Department was correct when it issued an order suspending compensation in Mr. Edwards' claim pursuant to RCW 51.32.110 because of Mr. Edwards' failure to submit to a medical examination. Mr. Edwards complained that it was neither fair nor reasonable for him to attend the examination as the Department had requested. First, because the Department and the employer had medical documentation from earlier examinations that

addressed the question of permanent partial disability, he contends the further examination was unnecessary. Second, he contends the Department failed to exercise its independent judgment and failed to maintain fairness in its claims administration by allowing the employer to select the physician who was to perform the further examination. The selected physician, claimant's counsel contends, was expected to prepare an examination report that was unfavorable to Mr. Edwards, thereby "stacking the deck" against him.

As a beginning point, we observe that the Department's decision to suspend benefits pursuant to RCW 51.32.110 is like any other Department decision awarding or denying benefits. On an appeal to the Board from a Department order suspending benefits, the claimant must show, by a preponderance of the evidence, that the Department order is incorrect. Olympia Brewing Co. v. Dep't of Labor & Indus., 34 Wn.2d 498 (1949).

RCW 51.32.110 reads, in relevant part:

> Any worker entitled to receive any benefits or claiming such under this title shall, if requested by the department or self-insurer, submit himself or herself for medical examination, at a time and from time to time, at a place reasonably convenient for the worker and as may be provided by the rules of the department. If the worker refuses to submit to medical examination, or obstructs the same, or, if any injured worker shall persist in unsanitary or injurious practices which tend to imperil or retard his or her recovery, or shall refuse to submit to such medical or surgical treatment as is reasonably essential to his or her recovery or refuse or obstruct evaluation or examination for the purpose of vocational rehabilitation or does not cooperate in reasonable efforts at such rehabilitation, the department or the self-insurer upon approval by the department, with notice to the worker may suspend any further action on any claim of such worker so long as such refusal, obstruction, noncooperation, or practice continues and reduce, suspend, or deny any compensation for such period: Provided, That the department or the self-insurer shall not suspend any further action on any claim of a worker or reduce, suspend, or deny any compensation if a worker has good cause for refusing to submit to or to obstruct any examination, evaluation, treatment or practice requested by the department or required under this section. (Emphasis added)

The issue thus becomes whether Mr. Edwards has proven by a preponderance of the evidence that he had good cause for failing to submit to the medical examination.

Whether good cause exists in a given case will depend on a variety of factors that require balancing from one instance to the next. Among those factors that may be considered are the claimant's physical capacities, sophistication, circumstances of employment, family responsibilities,

proven ability or inability to travel, medical treatment and other relevant concerns, not the least of which is the expectation of a fair and independent medical evaluation.

Balanced against this are the interests of the Department and its statutory responsibility to act in attempting to resolve disputes at the first-step administrative level. This may include the need to resolve conflicting medical documentation, the location of willing and qualified physicians, the length of time before a physician is available to perform an examination, and the comparative expense of such. Neither of the above lists of factors are exhaustive.

In the case at hand, it must be kept in mind that it was Mr. Edwards who caused this matter to be brought back before the Department for further consideration and resolution. Mr. Edwards filed a protest with the Department from an order of February 16, 1990 which had directed: 1) closure of the claim; and 2) payment of a permanent partial disability award by the self-insured employer, for an impairment consistent with Category 4 of permanent lumbosacral impairments. Following receipt of Mr. Edwards' timely protest sent on April 17, 1990, the Department issued a further order on May 8, 1990, placing its February 16, 1990 closing order in abeyance. Thereafter on May 16, 1990, Mr. Edwards' attorney sent him for a new medical examination. The result of this examination was the opinion that Mr. Edwards' condition was worse than determined by the Department's closing order. The doctor conducting the examination reported that Mr. Edwards' impairment was a Category 5 of permanent lumbosacral impairments, and that there were additional findings which were not present at the panel examination performed on August 29, 1989. That earlier examination had been performed at the employer's request, and had formed part of the basis for the closing order of February 16, 1990. A copy of this medical report was sent to the Department and the employer on May 22, 1990. The Department's attempt to gather further information to attempt to resolve the protest and the apparent discrepancy in the disability rating by a further medical examination scheduled for August 6, 1990, was done pursuant to the statutory authority of RCW 51.32.110 and 51.32.055(2)(3) and (4).

Although the further examination may have ultimately inured to the benefit of the employer, in the event of possible adversarial litigation before this Board, we are not prepared to conclude that Mr. Edwards has shown good cause for refusing to attend by virtue of that possibility alone. Assuming that the physician selected for the further examination was unbiased, the Department's right to direct a further medical examination exists independently of any consideration as to which party, be it the claimant or the employer, might possibly "benefit" in possible later full-scale litigation. In this light, it should be noted that the Department was in a non-adversarial position in relation to the employer and

the claimant when it requested the further examination. Given that reasonable medical minds could, and did, disagree as to the extent of Mr. Edwards' permanent partial disability as it was then outlined in the medical records, the Department's effort to obtain more information was reasonable and was done in a setting designed for efficient administrative adjudication absent the trappings of adversarial litigation. Indeed, the Department has the duty to determine the extent of a worker's permanent partial disability when it appears a claim is ready for closure, as was the case here (RCW 51.32.055); and it has the authority to attempt to resolve disputes over such an issue at its administrative level, as the claimant had requested the Department to do. There remains the underlying question as to whether Mr. Edwards would have good cause to object to the Department's choice of physician. As a general rule, when the Department or the self-insured employer schedules an examination under authority of RCW 51.32.110 or 51.32.055, it should be conscious of the requirement to choose a physician who can be both fair and independent. We would certainly not say as a matter of law or policy that the Department may send a claimant to a medical examiner who has demonstrated a pattern of prejudice against injured workers. Here, however, there is absolutely no evidence that the physician selected, Dr. Thomas Rosenbaum, was such a physician. Claimant's counsel simply jumped to that conclusion and believed, unfounded by any apparent knowledge shown by this record, that the employer was attempting to "stack the deck" in support of a Category 4 disability rating. The answers to this assumption are several: (1) It was not solely the employer's choice to have another examination; rather, the Department wanted and requested it. (2) Counsel did not object to the particular physician scheduled -- Dr. Rosenbaum -- on grounds he was biased or prejudiced against injured workers. The objection was simply to any examination whatsoever. (3) Counsel admits that, if the case were to get before this Board on the merits of the proper impairment rating category, the employer would then have the right to a Rule 35 examination by a physician of the employer's sole choice. We conclude that simply suspicion, unfounded by any evidence, of a biased or pre-judged medical examination report, does not prove good cause for refusing to attend the statutorily-authorized medical examination scheduled for August 6, 1990.

After consideration of the Proposed Decision and Order, the Petition for Review filed thereto by the employer, the claimant's Response to Employer's Petition for Review, and a careful review of the entire record before us, we have determined that the Department order dated September 17, 1990 was correct and must be affirmed.

Finally, even in light of this determination, we are compelled to comment on the waste of time and effort this matter has caused for all parties, and for this Board. In actuality, no useful purpose was served by the Department's September 17, 1990 order suspending claimant's "right to compensation." No temporary disability compensation is involved here. The record shows that Mr. Edwards returned to work on March 16, 1989, and has been apparently working steadily since then. The only compensation involved is his award for permanent partial disability. The Category 4 lumbosacral impairment award made by the initial closing order of February 16, 1990 was of course not protested or challenged by the employer since it was based on medical evaluations obtained and submitted by the employer, and was presumably paid to Mr. Edwards in early 1990. If it was not, it certainly should have been.

Following claimant's protest of that order, and the Department's action in holding it in abeyance on May 8, 1990, the claim has remained in an open (though effectively "inactive") status ever since. Even as of now -- mid-1992 -- there is still no closing or terminal date with reference to which claimant's extent of permanent partial disability is to be determined! The Proposed Decision and Order purported to provide Mr. Edwards "that compensation to which he is entitled, effective September 17, 1990." This, too, accomplishes nothing, since there obviously was no compensation to which he was at that time "entitled"-- certainly no permanent partial disability award in addition to the Category 4 impairment he had already been awarded. September 17, 1990 was obviously not a claim closure date. The Department will now, in mid-1992, have to again consider and determine the extent of claimant's permanent partial disability. No doubt this will entail further orthopedic and/or neurologic evaluations of his back condition, since the examinations and evaluations done by Dr. Sears in August 1989 and by Dr. Dimant in May 1990 are now "stale" and of quite marginal relevance to a claim-closing date still yet to be determined in the future -- the relatively near future, we hope, in light of the two years of "limbo" in which this claim has languished.

FINDINGS OF FACT

1. On September 9, 1982 Bob C. Edwards filed an application for benefits alleging the occurrence of an industrial injury to his low back on August 15, 1982, during the course of his employment with the self-insured employer, Weyerhaeuser.

   On February 5, 1985 the Department issued an order allowing the claim for the injury sustained on August 15, 1982.

   On February 16, 1990 the Department issued an order closing the claim with time-loss compensation as paid to March 16, 1989, and with an

award for permanent partial disability consistent with Category 4 of the categories for permanent lumbosacral impairment. The award for back impairment was paid at 75% of its monetary value.

On April 17, 1990 the claimant filed a protest and request for reconsideration with the Department from its order dated February 16, 1990. On May 8, 1990 the Department issued an order placing the February 16, 1990 order in abeyance pending further consideration.

On September 17, 1990 the Department issued an order suspending the claimant's right to compensation for failure to submit to a medical examination. On September 20, 1990 the claimant received the September 17, 1990 order. On November 16, 1990 the claimant filed a protest and request for reconsideration with the Department, which was forwarded to the Board as a direct appeal on December 11, 1990. On January 10, 1991 the Board issued its order granting the appeal.

2. As of late May 1990, the Department had medical reports and opinions from Dr. Stephen Sears dated August 29, 1989, and from Dr. E. E. Hummel dated September 25, 1989, indicating that Mr. Edwards' low back permanent partial disability was best described by Category 4 of WAC 296-20-280. The Department also had a report and opinion from Dr. Stevens Dimant dated May 16, 1990, indicating that Mr. Edwards' low back disability was best described by Category 5 of WAC 296-20-280.

3. In early July 1990, the Department of Labor and Industries, through its claims consultant, Barbara Ferry, requested that the self-insured employer schedule a further medical examination so as to obtain further information to attempt to resolve the extent of Mr. Edwards' low back permanent partial disability.

4. At the Department's request, the self-insured employer scheduled a further examination for Mr. Edwards, to be conducted by Dr. Thomas Rosenbaum on August 6, 1990.

5. Mr. Edwards, through letters from his counsel dated July 5 and July 30, 1990, refused to submit to further examination by Dr. Rosenbaum, and did not attend the examination scheduled for August 6, 1990 with Dr. Rosenbaum.

6. Mr. Edwards failed to show good cause for refusing to submit to an additional examination when the Department had conflicting medical documentation in its file as to the extent of Mr. Edwards' permanent partial disability in his low back resulting from the injury herein.

CONCLUSIONS OF LAW

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

2. The claimant, Bob C. Edwards, failed to show good cause, within the meaning of RCW 51.32.110, for refusing to submit to further medical

examination as properly requested by the Department pursuant to that statute and pursuant to RCW 51.32.055(2)(3) and (4).

3. The Department order of September 17, 1990, which suspended Mr. Edwards' right to compensation for his failure to submit to further medical examination, was legally correct and must be affirmed.

It is so **ORDERED**.

Dated this 4th day of June, 1992.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
S. FREDERICK FELLER Chairperson

/s/_____
PHILLIP T. BORK Member