

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.

1 addressed the question of permanent partial disability, he contends the further examination was
2 unnecessary. Second, he contends the Department failed to exercise its independent judgment and
3 failed to maintain fairness in its claims administration by allowing the employer to select the physician
4 who was to perform the further examination. The selected physician, claimant's counsel contends,
5 was expected to prepare an examination report that was unfavorable to Mr. Edwards, thereby
6 "stacking the deck" against him.
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10 As a beginning point, we observe that the Department's decision to suspend benefits pursuant
11 to RCW 51.32.110 is like any other Department decision awarding or denying benefits. On an appeal
12 to the Board from a Department order suspending benefits, the claimant must show, by a
13 preponderance of the evidence, that the Department order is incorrect. Olympia Brewing Co. v. Dep't
14 of Labor & Indus., 34 Wn.2d 498 (1949).
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17 RCW 51.32.110 reads, in relevant part:
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19 Any worker entitled to receive any benefits or claiming such under this title
20 shall, if requested by the department or self-insurer, submit himself or
21 herself for medical examination, at a time and from time to time, at a place
22 reasonably convenient for the worker and as may be provided by the rules
23 of the department. If the worker refuses to submit to medical examination,
24 or obstructs the same, or, if any injured worker shall persist in unsanitary
25 or injurious practices which tend to imperil or retard his or her recovery, or
26 shall refuse to submit to such medical or surgical treatment as is
27 reasonably essential to his or her recovery or refuse or obstruct evaluation
28 or examination for the purpose of vocational rehabilitation or does not
29 cooperate in reasonable efforts at such rehabilitation, the department or
30 the self-insurer upon approval by the department, with notice to the worker
31 may suspend any further action on any claim of such worker so long as
32 such refusal, obstruction, noncooperation, or practice continues and
33 reduce, suspend, or deny any compensation for such period: Provided,
34 That the department or the self-insurer shall not suspend any further
35 action on any claim of a worker or reduce, suspend, or deny any
36 compensation if a worker has good cause for refusing to submit to or to
37 obstruct any examination, evaluation, treatment or practice requested by
38 the department or required under this section. (Emphasis added)
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41 The issue thus becomes whether Mr. Edwards has proven by a preponderance of the
42 evidence that he had good cause for failing to submit to the medical examination.
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44 Whether good cause exists in a given case will depend on a variety of factors that require
45 balancing from one instance to the next. Among those factors that may be considered are the
46 claimant's physical capacities, sophistication, circumstances of employment, family responsibilities,
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1 proven ability or inability to travel, medical treatment and other relevant concerns, not the least of
2 which is the expectation of a fair and independent medical evaluation.
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4 Balanced against this are the interests of the Department and its statutory responsibility to act
5 in attempting to resolve disputes at the first-step administrative level. This may include the need to
6 resolve conflicting medical documentation, the location of willing and qualified physicians, the length of
7 time before a physician is available to perform an examination, and the comparative expense of such.
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9 Neither of the above lists of factors are exhaustive.
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11 In the case at hand, it must be kept in mind that it was Mr. Edwards who caused this matter to
12 be brought back before the Department for further consideration and resolution. Mr. Edwards filed a
13 protest with the Department from an order of February 16, 1990 which had directed: 1) closure of the
14 claim; and 2) payment of a permanent partial disability award by the self-insured employer, for an
15 impairment consistent with Category 4 of permanent lumbosacral impairments. Following receipt of
16 Mr. Edwards' timely protest sent on April 17, 1990, the Department issued a further order on May 8,
17 1990, placing its February 16, 1990 closing order in abeyance. Thereafter on May 16, 1990, Mr.
18 Edwards' attorney sent him for a new medical examination. The result of this examination was the
19 opinion that Mr. Edwards' condition was worse than determined by the Department's closing order.
20 The doctor conducting the examination reported that Mr. Edwards' impairment was a Category 5 of
21 permanent lumbosacral impairments, and that there were additional findings which were not present at
22 the panel examination performed on August 29, 1989. That earlier examination had been performed
23 at the employer's request, and had formed part of the basis for the closing order of February 16, 1990.
24 A copy of this medical report was sent to the Department and the employer on May 22, 1990. The
25 Department's attempt to gather further information to attempt to resolve the protest and the apparent
26 discrepancy in the disability rating by a further medical examination scheduled for August 6, 1990, was
27 done pursuant to the statutory authority of RCW 51.32.110 and 51.32.055(2)(3) and (4).
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37 Although the further examination may have ultimately inured to the benefit of the employer, in
38 the event of possible adversarial litigation before this Board, we are not prepared to conclude that Mr.
39 Edwards has shown good cause for refusing to attend by virtue of that possibility alone. Assuming
40 that the physician selected for the further examination was unbiased, the Department's right to direct a
41 further medical examination exists independently of any consideration as to which party, be it the
42 claimant or the employer, might possibly "benefit" in possible later full-scale litigation. In this light, it
43 should be noted that the Department was in a non-adversarial position in relation to the employer and
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1 the claimant when it requested the further examination. Given that reasonable medical minds could,
2 and did, disagree as to the extent of Mr. Edwards' permanent partial disability as it was then outlined in
3 the medical records, the Department's effort to obtain more information was reasonable and was done
4 in a setting designed for efficient administrative adjudication absent the trappings of adversarial
5 litigation. Indeed, the Department has the duty to determine the extent of a worker's permanent partial
6 disability when it appears a claim is ready for closure, as was the case here (RCW 51.32.055); and it
7 has the authority to attempt to resolve disputes over such an issue at its administrative level, as the
8 claimant had requested the Department to do. There remains the underlying question as to whether
9 Mr. Edwards would have good cause to object to the Department's choice of physician. As a general
10 rule, when the Department or the self-insured employer schedules an examination under authority of
11 RCW 51.32.110 or 51.32.055, it should be conscious of the requirement to choose a physician who
12 can be both fair and independent. We would certainly not say as a matter of law or policy that the
13 Department may send a claimant to a medical examiner who has demonstrated a pattern of prejudice
14 against injured workers. Here, however, there is absolutely no evidence that the physician selected,
15 Dr. Thomas Rosenbaum, was such a physician. Claimant's counsel simply jumped to that conclusion
16 and believed, unfounded by any apparent knowledge shown by this record, that the employer was
17 attempting to "stack the deck" in support of a Category 4 disability rating. The answers to this
18 assumption are several: (1) It was not solely the employer's choice to have another examination;
19 rather, the Department wanted and requested it. (2) Counsel did not object to the particular physician
20 scheduled -- Dr. Rosenbaum -- on grounds he was biased or prejudiced against injured workers. The
21 objection was simply to any examination whatsoever. (3) Counsel admits that, if the case were to get
22 before this Board on the merits of the proper impairment rating category, the employer would then
23 have the right to a Rule 35 examination by a physician of the employer's sole choice. We conclude
24 that simply suspicion, unfounded by any evidence, of a biased or pre-judged medical examination
25 report, does not prove good cause for refusing to attend the statutorily-authorized medical examination
26 scheduled for August 6, 1990.

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40 After consideration of the Proposed Decision and Order, the Petition for Review filed thereto by
41 the employer, the claimant's Response to Employer's Petition for Review, and a careful review of the
42 entire record before us, we have determined that the Department order dated September 17, 1990
43 was correct and must be affirmed.
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1 Finally, even in light of this determination, we are compelled to comment on the waste of time
2 and effort this matter has caused for all parties, and for this Board. In actuality, no useful purpose was
3 served by the Department's September 17, 1990 order suspending claimant's "right to compensation."
4 No temporary disability compensation is involved here. The record shows that Mr. Edwards returned
5 to work on March 16, 1989, and has been apparently working steadily since then. The only
6 compensation involved is his award for permanent partial disability. The Category 4 lumbosacral
7 impairment award made by the initial closing order of February 16, 1990 was of course not protested
8 or challenged by the employer since it was based on medical evaluations obtained and submitted by
9 the employer, and was presumably paid to Mr. Edwards in early 1990. If it was not, it certainly should
10 have been.

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12 Following claimant's protest of that order, and the Department's action in holding it in abeyance
13 on May 8, 1990, the claim has remained in an open (though effectively "inactive") status ever since.
14 Even as of now -- mid-1992 -- there is still no closing or terminal date with reference to which
15 claimant's extent of permanent partial disability is to be determined! The Proposed Decision and
16 Order purported to provide Mr. Edwards "that compensation to which he is entitled, effective
17 September 17, 1990." This, too, accomplishes nothing, since there obviously was no compensation to
18 which he was at that time "entitled"-- certainly no permanent partial disability award in addition to the
19 Category 4 impairment he had already been awarded. September 17, 1990 was obviously not a claim
20 closure date. The Department will now, in mid-1992, have to again consider and determine the extent
21 of claimant's permanent partial disability. No doubt this will entail further orthopedic and/or neurologic
22 evaluations of his back condition, since the examinations and evaluations done by Dr. Sears in August
23 1989 and by Dr. Dimant in May 1990 are now "stale" and of quite marginal relevance to a claim-
24 closing date still yet to be determined in the future -- the relatively near future, we hope, in light of the
25 two years of "limbo" in which this claim has languished.

36 **FINDINGS OF FACT**

- 37 1. On September 9, 1982 Bob C. Edwards filed an application for benefits
38 alleging the occurrence of an industrial injury to his low back on August
39 15, 1982, during the course of his employment with the self-insured
40 employer, Weyerhaeuser.
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42 On February 5, 1985 the Department issued an order allowing the claim
43 for the injury sustained on August 15, 1982.
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45 On February 16, 1990 the Department issued an order closing the claim
46 with time-loss compensation as paid to March 16, 1989, and with an
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1 award for permanent partial disability consistent with Category 4 of the
2 categories for permanent lumbosacral impairment. The award for back
3 impairment was paid at 75% of its monetary value.

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5 On April 17, 1990 the claimant filed a protest and request for
6 reconsideration with the Department from its order dated February 16,
7 1990. On May 8, 1990 the Department issued an order placing the
8 February 16, 1990 order in abeyance pending further consideration.

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

- 17 2. As of late May 1990, the Department had medical reports and opinions
18 from Dr. Stephen Sears dated August 29, 1989, and from Dr. E. E.
19 Hummel dated September 25, 1989, indicating that Mr. Edwards' low back
20 permanent partial disability was best described by Category 4 of WAC
21 296-20-280. The Department also had a report and opinion from Dr.
22 Stevens Dimant dated May 16, 1990, indicating that Mr. Edwards' low
23 back disability was best described by Category 5 of WAC 296-20-280.
- 24 3. In early July 1990, the Department of Labor and Industries, through its
25 claims consultant, Barbara Ferry, requested that the self-insured employer
26 schedule a further medical examination so as to obtain further information
27 to attempt to resolve the extent of Mr. Edwards' low back permanent
28 partial disability.
- 29 4. At the Department's request, the self-insured employer scheduled a
30 further examination for Mr. Edwards, to be conducted by Dr. Thomas
31 Rosenbaum on August 6, 1990.
- 32 5. Mr. Edwards, through letters from his counsel dated July 5 and July 30,
33 1990, refused to submit to further examination by Dr. Rosenbaum, and did
34 not attend the examination scheduled for August 6, 1990 with Dr.
35 Rosenbaum.
- 36 6. Mr. Edwards failed to show good cause for refusing to submit to an
37 additional examination when the Department had conflicting medical
38 documentation in its file as to the extent of Mr. Edwards' permanent partial
39 disability in his low back resulting from the injury herein.

40 **CONCLUSIONS OF LAW**

- 41 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties
42 and the subject matter to this appeal.
- 43 2. The claimant, Bob C. Edwards, failed to show good cause, within the
44 meaning of RCW 51.32.110, for refusing to submit to further medical
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1 examination as properly requested by the Department pursuant to that
2 statute and pursuant to RCW 51.32.055(2)(3) and (4).

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

7 It is so **ORDERED**.

8 Dated this 4th day of June, 1992.
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10 BOARD OF INDUSTRIAL INSURANCE APPEALS

11
12 /s/ _____
13 S. FREDERICK FELLER Chairperson
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16 /s/ _____
17 PHILLIP T. BORK Member
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