

Lopez, Luis

SUSPENSION OF BENEFITS (RCW 51.32.110)

Failure to comply (WAC 296-14-410)

A self-insured employer complied with WAC 296-14-410 when it forwarded notification of examination, plane ticket, and meal check to a worker's attorney where the worker had earlier directed the employer to forward all of his mail to the attorney's office. Because the employer failed to request in writing an explanation for the refusal to attend an examination before suspension of benefits, neither the Department nor the self-insured employer complied with the regulation. ...*In re Luis Lopez, BHA Dec., 91 3608 (1992)*

Scroll down for order.

**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

1 **IN RE: LUIS E. LOPEZ**)
2)
3 **CLAIM NO. T-478605**)
4)
 DOCKET NO. 91 3608
 DECISION AND ORDER

5 APPEARANCES:

6
7 Claimant, Luis E. Lopez, by
8 Charles H. Barr, Attorney

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10 Self-Insured Employer, IBP, Inc., by
11 Rolland, O'Malley, Williams & Wycoff, P.S., per
12 Wayne L. Williams and James Rolland

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14 This is an appeal filed by the claimant, Luis E. Lopez, on July 3, 1991 from an order of the
15 Department of Labor and Industries dated May 30, 1991 which affirmed a prior order of
16 March 12, 1991, that ordered further action and benefits to which the claimant may be entitled be
17 suspended effective February 28, 1991 pursuant to RCW 51.32.110, for failure to attend or cooperate
18 with a medical examination. **REVERSED AND REMANDED.**

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22 **PROCEDURAL AND EVIDENTIARY MATTERS**

23 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
24 and decision on timely Petitions for Review filed by both the claimant, Luis E. Lopez, and the
25 employer, IBP, Inc., to a Proposed Decision and Order issued on July 30, 1992 in which the order of
26 the Department dated May 30, 1991 was reversed and "remanded to the Department with direction to
27 supply benefits effective February 28, 1990 (sic) as required or authorized by the law."

28 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no
29 prejudicial error was committed and said rulings are hereby affirmed.

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33 **DECISION**

34 The issue before the Board is whether the Department correctly suspended action on the claim
35 effective February 28, 1991 pursuant to RCW 51.32.110 for the claimant's failure or refusal to attend a
36 medical examination. Review has been granted to revise and correct the proposed findings and
37 conclusions, and to discuss some of the parties' contentions further, but not to affect the proposed
38 resolution of rescinding the suspense order.

1 The Proposed Decision and Order fairly discusses the events leading up to the suspense order,
2 and they will not be repeated. Primarily, since August, 1990, the self-insured employer made several
3 attempts to schedule examinations which were not accomplished because adequate and timely notice
4 of these examinations was not provided to the claimant.
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7 However, we are satisfied that the self-insured employer complied with the fourteen day notice
8 requirement of WAC 296-14-410 for the scheduled examination of March 18, 1991. Prior to making
9 the arrangements for this examination, the employer's service representative telephoned the
10 claimant's attorney of record to find out where the claimant was currently residing so that notice could
11 be sent directly to the claimant as required by the WAC, and also to find out how to make the travel
12 arrangements, i.e., the starting city for an airline ticket. When that information was not forthcoming
13 and the employer was informed by Mr. Barr's office that all mail was to go through his office, the
14 employer was effectively released by the claimant from that portion of the regulation requiring the self-
15 insured employer to mail notification of the examination directly to the worker and the worker's
16 representative. The employer then notified the claimant's attorney of the examination, provided a
17 plane ticket from Los Angeles (based on prior information from Mr. Barr that his client was in southern
18 California) to Seattle and return, and a meal check. This was accompanied by the employer's
19 assurances that there would be a translator to meet Mr. Lopez at the airport, accompany him to the
20 doctor's examination, and take him back to the airport. This notification, plane ticket, and meal check
21 were mailed to Mr. Barr on February 11, 1991, over a month before the scheduled examination. As
22 indicated earlier, the employer gave proper notification of the examination well within the requirements
23 of WAC 296-14-410.
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26 Mr. Barr's letter sent to the Department on February 28, 1991, advising that his client would not
27 attend the examination scheduled for March 18, 1991, and that Mr. Lopez had found it necessary to
28 return to his parent's home in Mexico, was forwarded to the employer who then cancelled the
29 examination. The Department also, based on this letter, entered its initial suspense order on
30 March 12, 1991. This record is in conflict as to whether or not Mr. Barr offered on behalf of his client a
31 sufficient explanation for non-attendance. The burden of proof on this issue, of course, rests with the
32 claimant. The appeal, however, must be resolved without actually reaching the good cause issue.
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1 WAC 296-14-410 further provides that before issuance of an order reducing, suspending or
2 denying benefits, the Department or self-insured employer must request in writing, from the worker or
3 worker's representative the reason for the refusal, obstruction, or non-cooperation. This regulation is
4 obviously designed to give the worker an opportunity to explain his actions or inactions so that an
5 evaluation can be made by the Department as to whether the worker had good cause for the refusal or
6 failure to cooperate. If the worker fails to respond to this written inquiry within thirty days after its
7 issuance, the Department can then issue the order suspending benefits.

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11 In this case, the record does not support a conclusion that the Department or the self-insured
12 employer requested in writing from the claimant or the claimant's representative, the reasons for Mr.
13 Lopez' not attending the scheduled March 18, 1991 medical examination, as required by WAC 296-
14 14-410. In fact, the chronology of events clearly indicated otherwise. In its Petition for Review, the
15 employer argues that there was constructive compliance with the spirit of the regulation by sending Mr.
16 Barr a copy of the letter that was sent to the Department on March 8, 1991, requesting suspension of
17 the claim. We do not agree such a letter constitutes a written request to Mr. Lopez' representative for
18 the claimant's reasons for not attending the scheduled examination. The letter, Exhibit No. 5, requests
19 that Mr. Barr return the airline tickets and travel advance to the employer, and then requests Mr.
20 Pickett, the Department claims consultant, to place the claim in suspense -- which Mr. Pickett did, four
21 days later. We suspect from a comment in the employer's letter that perhaps Mr. Lopez felt the
22 examination should have been in Los Angeles rather than Seattle. However, an attempt in writing by
23 the Department or self-insured employer to get a written explanation as to the claimant's reasons for
24 not attending the scheduled examination needed to be accomplished prior to suspending benefits.
25 That is the clear requirement of the regulation. Had such been done, it may have avoided the
26 necessity of this litigation.

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36 The employer further contends in the Petition for Review that there was constructive
37 compliance with this portion of the regulation because during the sixty-day appeal period from the
38 suspense order, the claimant had every opportunity to explain in writing any good cause reasons for
39 not attending the scheduled examination. This argument is not well founded primarily because the
40 regulation clearly requires that this inquiry be made prior to the issuance of the suspense order. Had
41 the Department or the self-insured employer made the necessary written inquiry of the claimant's
42 representative and learned that Mr. Lopez' reason for not attending the March 18, 1991 examination
43 was because he could not, or did not want to, come to Seattle, then the Department needed to
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1 evaluate whether, under all of the facts particular to the history of this claim, that reason constituted
2 good cause. From the chronology here, obviously such a written inquiry was not made between the
3 time of Mr. Barr's letter of February 28, 1991, and the Department's suspension order entered twelve
4 days later. The regulation is obviously designed to allow the claimant the opportunity to explain in
5 writing so the Department can fully evaluate, before the fact, whether a suspension order is called for.
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8 We therefore find that the suspension was improper in that neither the Department nor the
9 employer complied with the requirements of WAC 296-14-410 before issuing the suspense order. We
10 will remand the matter to the Department with instructions to rescind and set aside the orders of May
11 30, 1991 and March 12, 1991 that suspended further action effective February 28, 1991. See also, In
12 re Willie Dunn, Dckt. No. 91 0602 (July 16, 1992).
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16 We note that, at the time of claimant's testimony given at a hearing in Olympia on
17 April 21, 1992, he testified that he returned from Mexico to California on March 1, 1992. Furthermore,
18 the employer's service representative testified at hearing on May 8, 1992, that a medical examination
19 of Mr. Lopez was in fact carried out on April 28, 1992 (apparently while he was here, in the state of
20 Washington). It is to be hoped that this examination may now lead to resolution of the issues still to be
21 decided, i.e., the need for treatment, payment of past-incurred medical bills, right to time loss
22 compensation, if any, and extent of any possible permanent disability.
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27 After consideration of the Proposed Decision and Order, the Petitions for Review from both the
28 self-insured employer and the claimant, and the entire record before us, we hereby make the following
29 findings and conclusions:
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31 **FINDINGS OF FACT**

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- 33 1. On June 25, 1990, the self insured employer, IBP Inc., received an
34 application for industrial insurance benefits from the claimant, Luis E.
35 Lopez. On August 17, 1990, the self insured employer entered an order
36 closing the claim with medical benefits only as provided. On October 1,
37 1990, the claimant's attorney of record protested from the August 17, 1990
38 order.

39 On December 26, 1990 the Department held in abeyance the self-insured
40 employer order of August 17, 1990. On March 12, 1991 the Department
41 entered an order which suspended further action and benefits effective
42 February 28, 1991 for alleged failure of the worker to attend or cooperate
43 with a medical examination under authority of RCW 51.32.110. On May
44 13, 1991 the claimant's attorney protested from the order of March 12,
45 1991 on behalf of the claimant. On May 30, 1991, the Department
46 entered an order affirming the order of March 12, 1991. On July 3, 1991,
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1 the claimant filed a notice of appeal with the Board from the Department
2 order of May 30, 1991, and on August 15, 1991, the Board entered an
3 order granting the appeal and assigning it Docket No. 91 3608.

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5 2. The self-insured employer's service company asked Mr. Lopez's
6 representative for an address where Mr. Lopez was living. By failing to
7 provide Mr. Lopez's address to the employer, the claimant constructively
8 agreed that notice of any examination need only be sent to the claimant's
9 representative pursuant to WAC 296-14-410.
- 10 3. On February 11, 1991, the self-insured employer's service company
11 mailed a notice to the claimant advising him of a medical examination
12 scheduled for March 18, 1991 in Seattle, Washington. Plane tickets, meal
13 reimbursement, and information that a Spanish translator would be
14 present, were included in the notice which was mailed to the claimant's
15 attorney of record, Charles Barr. On February 28, 1991 Mr. Barr sent a
16 letter to the Department indicating that his client would not be attending
17 the examination scheduled for March 18, 1991 in Seattle, Washington.
18 The examination was therefore cancelled, and by letter dated
19 March 8, 1991, the self-insured's service representative requested the
20 Department to suspend further action on the claim. The Department did
21 so by its order of March 12, 1991.
- 22 4. Prior to issuing the order of March 12, 1991 suspending further action on
23 the claim, neither the Department nor the self-insured employer requested
24 in writing, from the claimant or the claimant's attorney, the reasons for his
25 refusal to attend the medical examination scheduled for March 18, 1991.

26 **CONCLUSIONS OF LAW**

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28 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties
29 to and the subject matter of this appeal.
- 30 2. The notice of February 11, 1991 sent to the claimant's representative
31 advising the claimant of a medical examination scheduled for
32 March 18, 1991 met the notice requirements of WAC 296-14-410.
- 33 3. The self-insured employer's and the Department's failure to request in
34 writing the reasons for Mr. Lopez's refusal to attend the scheduled March
35 18, 1991 examination does not comply with WAC 296-14-410, which
36 requires such a written request prior to the issuance of an order
37 suspending benefits.
- 38 4. The order of the Department of Labor and Industries dated May 30, 1991
39 which affirmed the order of March 12, 1991 that ordered further action and
40 benefits the claimant may be entitled to be suspended effective February
41 28, 1991 pursuant to RCW 51.32.110 for failure or refusal to attend or
42 cooperate with a medical examination, is incorrect and is reversed and the
43 claim remanded to the Department and the self-insured employer with
44 direction to rescind and set aside the orders of March 12, 1991 and
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1 May 30, 1991, and thereafter take such further action in the claim as may
2 be indicated by the facts and authorized by law.

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4 It is so **ORDERED**.

5 Dated this 17th day of December, 1992.
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8 BOARD OF INDUSTRIAL INSURANCE APPEALS
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10
11 /s/
12 S. FREDERICK FELLER Chairperson
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14
15 /s/
16 FRANK E. FENNERTY, JR. Member
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19 /s/
20 PHILLIP T. BORK Member
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