

## **Denison, Loren**

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### **ATTENDING PHYSICIAN**

#### **Selection (RCW 51.36.010)**

A worker's choice of physician is appropriately limited to one "conveniently located" within a proximate geographical area. ...*In re Loren Denison, BIIA Dec., 91 5619 (1993)* [Editor's Note: The Board's decision was appealed to superior court under Stevens County Cause No. 93-2-0066-7.]

### **SCOPE OF REVIEW**

#### **Time-loss compensation**

### **SOCIAL SECURITY DISABILITY OFFSET (RCW 51.32.220)**

#### **Computation**

In a worker's appeal regarding the calculation of the rate of time-loss compensation benefits and social security offset, where the record indicated both calculations needed to be corrected but would result in lower payments to the injured worker, those benefits may properly be reduced since the calculations are ministerial and the Department cannot ignore the facts established in the appeal. (*Distinguishing Brakus v. Department of Labor & Indus.*, 48 Wn.2d 218 (1956)). ...*In re Loren Denison, BIIA Dec., 91 5619 (1993)* [Editor's Note: The Board's decision was appealed to superior court under Stevens County Cause No. 93-2-0066-7.]

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

1     **IN RE: LOREN H. DENISON**                     )     **DOCKET NOS. 91 5619, 91 5918 & 92 1022**  
2   )  
3     **CLAIM NO. S-345169**                             )     **DECISION AND ORDER**  
4

5 APPEARANCES:

6  
7             Claimant, Loren H. Denison, by  
8             Casey & Casey, P.S., per  
9             Gerald L. Casey and Carol L. Casey

10  
11            Self-Insured Employer, Boise Cascade Corporation, by  
12            Powell & Morris, P.S., per  
13            Larry J. Kuznetz

14            Three appeals were filed by the claimant, Loren H. Denison, from three orders issued by the  
15 Department of Labor and Industries under this claim. The appeals were consolidated for all purposes.

16            Docket No. 91 5619: This is an appeal filed by the claimant on October 17, 1991 from an  
17 order of the Department dated October 10, 1991 which adhered to the provisions of a September 9,  
18 1991 order that declared an offset for receipt of social security benefits and that set time loss  
19 compensation rates of \$321.40 effective January 1, 1988 and \$489.15 effective January 1, 1991. The  
20 Department order is **REVERSED**.

21            Docket No. 91 5918: This is an appeal filed by the claimant on November 1, 1991 from an  
22 order of the Department dated October 24, 1991 which directed that the claimant select an attending  
23 physician in an appropriate geographic locale and denied his request to have John Richardson, M.D.,  
24 be his attending physician. The Department order is **AFFIRMED**.

25            Docket No. 92 1022: This is an appeal filed by the claimant on February 26, 1992 from an  
26 order of the Department dated February 18, 1992 which denied the claimant's request for the  
27 assessment of a penalty against the self-insured employer for an unreasonable delay in paying  
28 benefits. The Department order is **AFFIRMED**.

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31   )     **DECISION**  
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33            Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review  
34 and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order  
35 issued on October 30, 1992. The Proposed Decision and Order reversed the Department order dated  
36 October 10, 1991, and affirmed the Department orders dated October 24, 1991 and February 18,  
37 1992.  
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1 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no  
2 prejudicial error was committed and said rulings are hereby affirmed.  
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4 With regard to Docket No. 91 5918 concerning the selection of an attending physician and  
5 Docket No. 92 1022 concerning the requested penalty assessment, we agree with the reasoning and  
6 decisions of the Proposed Decision and Order. With regard to Docket No. 91 5619, we also agree  
7 that the claim must be remanded to the Department for a correction of its October 10, 1991 order  
8 setting the time loss compensation rate effective July 1, 1988. However, we will not restrict the  
9 Department's review as indicated in Conclusion of Law No. 4 of the Proposed Decision and Order.  
10 That conclusion requires the Department to correct the rates of time loss compensation, but directs the  
11 Department to restate the other language of the September 9, 1991 order. The record reveals a  
12 number of facts that may affect the computations of social security offset and time loss compensation.  
13 We will not order the Department to ignore facts affecting these computations even though they may  
14 result in lower time loss payments to Mr. Denison.  
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21 In order to explain our decision we will provide a brief description of the claim history.

22 Mr. Denison appealed the November 23, 1988 denial by the Department of his application to  
23 reopen his claim. On July 19, 1991, the Superior Court issued a judgment that remanded the claim to  
24 the Department for action consistent with the jury verdict. The jury had answered the following  
25 question in the affirmative, "Between May 9, 1986 and April 25, 1989, did the worsening of the  
26 Plaintiff's condition proximately caused by his February 4, 1980 industrial injury result in a need for  
27 treatment?" Exhibit 1. Following the judgment, the employer appealed to the Court of Appeals and an  
28 order staying the implementation of the judgment pending the appeal was entered on September 5,  
29 1991. Exhibit 2. However, the judgment was not stayed, "insofar as plaintiff's entitlement to current  
30 benefits . . . after July 19, 1991." The Department issued an order on September 9, 1991 which set  
31 Mr. Denison's time loss rate and the amount of social security offset.  
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37 The fifth paragraph of the September 9, 1991 order set an incorrect time loss rate of \$321.40  
38 effective January 1, 1988. The employer conceded that this figure was wrong and Rex Garrett of the  
39 Department of Labor and Industries stated that the time loss rate should be \$408.84. Because of this  
40 error, the October 10, 1991 order must be reversed and the claim remanded to the Department.  
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43 Conclusion of Law No. 4 of the Proposed Decision and Order states that the Department is to  
44 issue an order correcting the time loss rate in the fifth paragraph and to restate the September 9, 1991  
45 order, "exactly as it is in all other respects." In support of this restriction, the decision cited Brakus v.  
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1 Dep't of Labor & Indus., 48 Wn.2d 218 (1956) and In re Zotyk Dejneka, BIIA Dec., 51,408 (1979).

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3 Those cases involved situations where an injured worker appealed an award of permanent partial  
4 disability seeking a greater award. At the conclusion of the evidence in each case, it was apparent  
5 that there was insufficient medical proof to support the amount of disability actually awarded. In  
6 Brakus, the court held, as follows:  
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9 [E]ven though the workman appealing from the closing order fails to  
10 establish his right to any award for permanent partial disability, the board  
11 does not have the power or authority to reverse or set aside the order of  
12 the department allowing a certain percentage for permanent partial  
13 disability.  
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15 Brakus, at 219-220. The court recognized that the issues on appeal to the Board are limited to those  
16 raised in the notice of appeal, and that the Department has original and exclusive jurisdiction. In  
17 Dejneka, the Board followed Brakus and did not reduce an award made under the category system for  
18 unspecified permanent partial disability. Generally, these cases stand for the proposition that a worker  
19 shouldn't be worse off by appealing a Department or self-insured order than if no appeal had been  
20 brought at all.  
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24 In this matter, only Mr. Denison appealed and, among the other issues previously noted, he  
25 raised the question of the correct computation of his time loss rate. His notice of appeal includes the  
26 following grounds: "The order in question is unintelligible and incapable of being understood;" and  
27 "Additionally, there are other errors in fact and in law as will be shown at trial." Notice of Appeal at 2.  
28 Thus, the calculation of Mr. Denison's social security offset and his rates of time loss compensation  
29 were put in issue. Mr. Denison testified that he had earned more money in 1980 than that determined  
30 by the Department and the Social Security Administration. If correct, this could increase his time loss  
31 rate. He also explained that the Social Security Administration and the Department mistakenly  
32 believed that his dependents resided in a separate household. In addition, Mr. Denison stated that he  
33 includes a foster child and grandchild as his dependents. These last two facts may affect his time loss  
34 compensation rate. We do not believe that such matters must be ignored by the Department in  
35 recalculating the correct social security offset and rates of time loss compensation.  
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39 Once eligibility for temporary total disability is found, the calculation of time loss compensation  
40 is a ministerial function based upon the wages and number of authorized dependents of the injured  
41 worker. RCW 51.08.178 and RCW 51.32.010. Similarly, the calculation of the amount of offset taken  
42 by the Department involves the application of a formula to the time loss compensation an injured  
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1 worker would otherwise receive. These two calculations follow a disability determination and do not  
2 involve judgment of the extent of permanent disability a worker has incurred based upon a review of  
3 medical evidence.  
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6 In Brakus, the court was concerned with the reduction of a permanent partial disability award  
7 after the Board's review of evidence in a claimant appeal. Here, Mr. Denison raised the issue, the  
8 parties admit that calculation errors were made, and no evidence is being weighed at the Board.  
9 Thus, Brakus can be distinguished and the Board is able to remand the matter to the Department  
10 without restriction. To do otherwise would require the Department to ignore facts and we would also  
11 add, applicable law, which are essential to an accurate calculation of the time loss benefits to which  
12 Mr. Denison is entitled. The facts may indicate an increase or a decrease in the claimant's time loss  
13 benefits. Regardless, the Department must be allowed to perform its statutory duty of properly  
14 calculating time loss benefits and the appropriate social security offset.  
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17 In In re Velma McCann, Dckt. No. 91 3909 (January 6, 1993), the Board approved the remand  
18 of a social security offset matter to the Department for a recalculation of the offset in accordance with  
19 the guidance on such calculations provided by Herzog v. Dep't of Labor & Indus., 40 Wn. App. 20  
20 (1985). We approved the remand even though it likely would result in reduced benefits for Ms.  
21 McCann because we believe we could not ignore the important factual matters bearing on those  
22 calculations, nor could we ignore the clear guidance of the Court of Appeals as expressed in Herzog.  
23 Our decision here is consistent with the resolution of the appeal in McCann. It should be remembered  
24 that the parties have the right to appeal future orders issued by the Department which set time loss  
25 rates and social security offset.  
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28 As stated above, we approve of our industrial appeals judge's decision in the other two appeals  
29 concerning the choice of attending physician and the request for a penalty assessment. We will only  
30 make a few comments on each of those issues here. Under Docket No. 91 5918, Mr. Denison  
31 appealed from an order which essentially denied his request to have Dr. John Richardson as his  
32 attending physician and instructed him to select a physician within an appropriate area. RCW  
33 51.36.010 states in part,  
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Upon the occurrence of any injury to a worker entitled to compensation under the provisions of this title, he or she shall receive proper and necessary medical and surgical services at the hands of a physician of his or her own choice, if conveniently located . . . .

1 WAC 296-20-065 reserves the right for the Department or self-insurer to require a worker to choose a  
2 different attending doctor under various conditions including, "(1) When more conveniently located  
3 doctors, qualified to provide the necessary treatment, are available." Here, Mr. Denison lives north of  
4 Spokane, 440 miles away from Dr. Richardson who practices in Bremerton. It cannot be seriously  
5 argued that, under the language of RCW 51.36.010, Dr. Richardson is "conveniently located" to act as  
6 Mr. Denison's attending physician. Dr. Richardson recognized that he could best function as a  
7 consultant. While the statute protects an injured worker's right to choose an attending physician, it  
8 does not allow a worker to make a choice which unnecessarily limits access to the physician. The  
9 employer's selection of orthopedic surgeon Joel Cleary, M.D., was appropriate. There is no serious  
10 allegation that Dr. Cleary will not provide unbiased, professional care to Mr. Denison. The  
11 Department's order is correct.  
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18 The claimant also seeks a penalty assessment against Boise Cascade Corporation under RCW  
19 51.48.017 alleging that the employer should have paid benefits between July 19, 1991, after the  
20 judgment was entered, and November 18, 1991, when provisional time loss began following an  
21 examination by Dr. Cleary. We again agree with the reasoning of our industrial appeals judge, found  
22 at pages 12 and 13 of the Proposed Decision and Order. Mr. Denison presented no evidence that he  
23 was temporarily totally disabled between July 19, 1991 and November 18, 1991. He also did not  
24 present evidence of medical bills he incurred during that period, although some bills were referred to  
25 generally by Dr. Richardson and by Randy Moser, the employer's claims administrator. However, Mr.  
26 Denison did not meet his burden of proving that any such bills were for proper and necessary medical  
27 treatment under the standard of RCW 51.36.010. It is arguable that bills for such treatment should be  
28 payable even for treatment prescribed by a medical care provider who was not an approved attending  
29 physician. Yet, we cannot reach this question since Mr. Denison provided no evidence of bills or of  
30 the propriety and necessity for any treatment. Since the claimant did not prove he was entitled to any  
31 unpaid benefits, the Department was correct in not assessing a penalty for a delay in providing such  
32 benefits.  
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40 In summary, we reverse the October 24, 1991 order and remand the claim to the Department  
41 for recomputation of social security offset and rates of time loss compensation. From the October 30,  
42 1992 Proposed Decision and Order, the Board adopts Findings of Fact Nos. 1, 3, 5, and 6. Proposed  
43 Findings of Fact Nos. 5 and 6 are renumbered Findings of Fact Nos. 4 and 5, respectively. We adopt  
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1 proposed Conclusions of Law Nos. 1, 2, 3, 5, and 6. The Board enters the following Finding of Fact  
2 and Conclusion of Law:  
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4 **FINDINGS OF FACT**

- 5  
6 2. The time loss rate effective January 1, 1988 stated in the fifth paragraph of  
7 the October 10, 1991 order, is incorrect.

8 **CONCLUSIONS OF LAW**

- 9  
10 4. The order of the Department of Labor and Industries dated October 10,  
11 1991 which affirmed the order of September 9, 1991 that calculated the  
12 offset to be taken due to the claimant's receipt of social security benefits  
13 and which determined the rates of his time loss compensation, is incorrect  
14 and is hereby reversed. The claim is remanded to the Department of  
15 Labor and Industries to recalculate the social security offset and the rates  
16 of his time loss compensation.

17 It is so ORDERED.

18 Dated this 11th day of February, 1993.

19  
20 BOARD OF INDUSTRIAL INSURANCE APPEALS

21  
22  
23 /s/  
24 S. FREDERICK FELLER Chairperson

25  
26  
27 /s/  
28 PHILLIP T. BORK Member