

Petry, Johan

SCOPE OF REVIEW

Suspension of benefits

In an appeal from the Department's suspension of a worker's benefits where the Department failed to comply with WAC 296-14-410, the Board reached the merits of whether the worker had good cause for not attending a scheduled examination and concluded it was probable that the worker did not receive prior notice of the examination. *...In re Johan Petry, BIIA Dec., 92 0389 (1993)*

SUSPENSION OF BENEFITS (RCW 51.32.110)

Failure to comply (WAC 296-14-410)

Where the Department suspended worker's benefits without first requesting written explanation of why worker failed to attend scheduled examination, it failed to comply with WAC 296-14-410. *...In re Johan Petry, BIIA Dec., 92 0389 (1993)*

Scroll down for order.

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

1 **IN RE: JOHAN M. PETRY**) **DOCKET NO. 92 0389**
2)
3 **CLAIM NO. N-059349**) **DECISION AND ORDER**
4

5 APPEARANCES:

6
7 Claimant, Johan M. Petry, by
8 Michael F. Pozzi, Attorney
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10 Employer, TIC Northwest, by
11 Randy Evenson, Safety Director
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13 Department of Labor and Industries, by
14 Office of the Attorney General, per
15 Loretta A. Vosk, Assistant, and Debbie Goncalves, Paralegal
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17 This is an appeal filed by the claimant, Johan M. Petry, on January 17, 1992 from an order of
18 the Department of Labor and Industries dated January 2, 1992 which suspended the claimant's right to
19 compensation benefits for failure to submit to a medical examination. The Department order is
20 **REVERSED.**
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22) **DECISION**
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24 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
25 and decision on a timely Petition for Review filed by the claimant on June 7, 1993 to a Proposed
26 Decision and Order issued on April 21, 1993 in which the order of the Department dated January 2,
27 1992 was affirmed.
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29 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no
30 prejudicial error was committed and said rulings are hereby affirmed.
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32 Mr. Petry admits that he did not attend the October 25, 1991 medical examination in Seattle,
33 Washington. He contends that he should not have had his benefits suspended because he was not
34 asked to explain why he did not attend the examination as required by Department rule. Mr. Petry also
35 contends that he had good cause for not attending since he was not given prior notice of the
36 examination and it was not reasonably convenient to his residence, at that time, in North Carolina.¹
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38 The January 2, 1992 Department order stated, in part:
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46 ¹ It should be noted that, while this appeal was before the Board, the Department lifted the suspension of
47 benefits effective June 23, 1992 after the claimant agreed to attend a medical examination.

1 WHEREAS, a medical examination was scheduled for October 25, 1991,
2 to obtain additional medical information concerning the further paying of
3 benefits and the claimant failed to attend;
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5 THEREFORE, it is hereby ordered that your right to further compensation
6 be suspended effective January 2, 1992, for failure to submit to a medical
7 examination. This action is taken in accordance with RCW 51.32.110. . . .

8 When an injured worker's benefits are suspended, the worker and his or her family can suffer
9 extreme financial stress. Suspensions may also prevent an injured worker from receiving necessary
10 medical treatment, thereby endangering the worker's health. Thus, orders suspending benefits should
11 not be issued without a careful review of the facts and without giving the worker an opportunity to
12 address the alleged noncooperation. In 1990, the Department of Labor and Industries enacted WAC
13 296-14-410 which addresses these concerns and which states, in part:
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17 Prior to the issuance of an order reducing, suspending or denying benefits,
18 the department or self-insurer must request, in writing, from the worker or
19 worker's representative the reason for the refusal, obstruction, delay or
20 noncooperation.
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22 The record does not show that the Department asked Mr. Petry to explain in writing why he did not
23 attend the October 25, 1991 examination. If it had, Mr. Petry could have stated that he did not get the
24 notice of examination before the date of examination, that he was living in North Carolina rather than
25 in Idaho, and that he could not travel by air. The Department sent him a letter dated October 8, 1991
26 in which it stated that it would suspend his benefits if he did not attend the October 25th examination.
27 This letter does not meet the requirements of the Department's rule of written requests for
28 explanations of apparent noncooperation prior to suspensions, since it was sent before the
29 examination. Furthermore, Mr. Petry testified that he did not get the October 8, 1991 letter. The
30 Department did not comply with WAC 296-14-410 since Mr. Petry was not given the opportunity to
31 explain why he did not attend the October 25, 1991 examination prior to issuing the suspension order.
32 As a result, the January 2, 1992 order must be reversed.
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39 Since the Department has already decided to suspend Mr. Petry's right to compensation for
40 not attending the medical examination, we will not simply remand this matter for the purpose of making
41 the Department request, in writing, an explanation for Mr. Petry's failure to attend the October 25, 1991
42 examination. Both parties presented evidence on the issue of whether Mr. Petry's failure to attend the
43 medical examination constitutes a failure to cooperate or, in the alternative, whether he had good
44 cause for not submitting to the examination. Piecemeal litigation should be avoided in industrial
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1 insurance appeals. Lenk v. Dep't of Labor & Indus., 3 Wn. App. 977(1970), and Beels v. Dep't of
2 Labor & Indus., 178 Wash. 301 (1934). Therefore, we will also determine whether the Department
3 was correct in deciding that Mr. Petry failed to cooperate.
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6 RCW 51.32.110 prohibits a suspension of benefits if a worker has good cause for not
7 submitting to an examination. Mr. Petry explained that he did not get notice of the October 25, 1991
8 examination set in Seattle, Washington. Exhibit No. 1. The notice was sent to Lewiston, Idaho,
9 although Mr. Petry moved to North Carolina that same month. Apparently, the Department was aware
10 of Mr. Petry's North Carolina connection. In a September 28, 1991 letter to Ron McClelland of the
11 Department, Mr. Petry advised that he was hitchhiking back to "N.C." and that he could be contacted
12 there. Exhibit No. 5. Several months earlier, in a letter dated April 27, 1991, Mr. Petry had given a
13 Winston Salem, North Carolina address as his winter residence. Exhibit No. 7. The Department
14 presented testimony that notices sent to Idaho had not been returned so they assumed that
15 Department communications were being received by Mr. Petry. However, the true question is whether
16 Mr. Petry received notice of the examination prior to its scheduled date of October 25, 1991. We find it
17 probable that Mr. Petry did not receive prior notice of the examination in light of the claimant's
18 uncontroverted, direct testimony that he was hitchhiking to North Carolina in October 1991. He may
19 have been generally aware that the Department intended to set an examination in Seattle, Washington
20 for him, but the record does not show he was advised of a specific day, time, and place. It obviously
21 follows that Mr. Petry had good cause for not attending an examination that he did not know had been
22 scheduled.
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26 RCW 51.32.110 requires that a medical examination be set at a place reasonably convenient
27 for the worker. It is possible that under some circumstances Seattle, Washington would be found
28 reasonably convenient to Lewiston, Idaho. However, it is difficult to find Seattle reasonably convenient
29 to North Carolina, especially based on this record, indicating that Mr. Petry does not travel by airplane.
30 We must conclude Mr. Petry would have had good cause for not attending the Seattle, Washington
31 examination location as he was in North Carolina even if he had received prior, sufficient notice.
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1 In conclusion, the Department did not follow its rule and allow the claimant to explain why he
2 did not attend the October 25, 1991 medical examination prior to issuing the suspension order.
3 Furthermore, Mr. Petry had good cause for not attending the examination due to location and lack of
4 notice. Thus, the Department should not have suspended his right to compensation between January
5 2, 1992 and June 23, 1992. We, therefore, enter the following findings of fact and conclusions of law.
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9 **FINDINGS OF FACT**

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11 1. On March 18, 1991, the claimant filed an application for benefits with the
12 Department of Labor and Industries for an injury he incurred on March 9,
13 1991 while working for TIC Northwest. On January 2, 1992, the
14 Department issued an order suspending his right to further compensation
15 for failure to submit to a medical examination. The claimant filed an
16 appeal with the Board of Industrial Insurance Appeals on January 17,
17 1992. The Board issued an order granting the appeal on February 6,
18 1992 and assigned Docket No. 92 0389.
- 19 2. The Department of Labor and Industries scheduled a medical examination
20 for Mr. Petry on October 25, 1991 in Seattle, Washington. On September
21 27, 1991, it mailed a notice of this examination to the claimant at an
22 address in Lewiston, Idaho. Prior to October 25, 1991, Mr. Petry moved
23 his residence from Lewiston, Idaho to Winston Salem, North Carolina. He
24 travelled to North Carolina during October 1991 by hitchhiking. Mr. Petry
25 did not receive the September 27, 1991 notice or other specific notice of
26 the October 25, 1991 medical examination before that date.
- 27 3. Prior to issuing its January 2, 1992 order suspending the claimant's right to
28 compensation, the Department of Labor and Industries did not write to Mr.
29 Petry and ask him why he had not attended the October 25, 1991 medical
30 examination.
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32 **CONCLUSIONS OF LAW**

- 33 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties
34 and the subject matter to this appeal.
- 35 2. The Department of Labor and Industries did not comply with WAC 296-14-
36 410 which requires that the Department request, in writing, why a worker
37 did not cooperate prior to issuing an order reducing, suspending, or
38 denying benefits.
- 39 3. Pursuant to RCW 51.32.110, Mr. Petry had good cause for not submitting
40 to the October 25, 1991 medical examination in Seattle, Washington, and
41 his right to compensation should not have been suspended.
- 42 4. The order of the Department of Labor and Industries dated January 2,
43 1992 which suspended the claimant's right to further compensation
44 effective January 2, 1992 for failure to submit to a medical examination is
45 incorrect and is hereby reversed. The claim is remanded to the
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1 Department to issue an order reinstating the claimant's right to
2 compensation effective January 2, 1992 and to provide any other benefits
3 to which he may have been entitled under the Industrial Insurance Act
4 from January 2, 1992, forward.

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6 It is so ORDERED.

7 Dated this 21st day of July, 1993.
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9 BOARD OF INDUSTRIAL INSURANCE APPEALS

10
11 /s/
12 S. FREDERICK FELLER Chairperson

13
14 /s/
15 FRANK E. FENNERTY, JR. Member

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17 /s/
18 ROBERT L. McCALLISTER Member
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