TIME-LOSS COMPENSATION (RCW 51.32.090)

Eligibility while attending medical evaluation

A physical capacities evaluation conducted relative to a medical condition is considered a medical evaluation for purposes of RCW 51.32.110, which allows for reimbursement of lost wages while attending a medical evaluation. ***In re Linda Robinovitch, BIIA Dec., 01 24949 (2003)***

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The claimant, Linda L. Robinovitch, filed an appeal with the Board of Industrial Insurance Appeals on December 31, 2001, from an order of the Department of Labor and Industries dated November 2, 2001. The order affirmed Remittance Advice No. 268193 dated June 12, 2001. The Department order is **REVERSED AND REMANDED**.

**DECISION**

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order issued on February 3, 2003, in which the order of the Department dated November 2, 2001, was affirmed.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed. We have granted review, however, because we believe that Ms. Robinovitch should be reimbursed her lost wages for the 8 hours she spent participating in a physical capacities evaluation pursuant to RCW 51.32.110(4)(a)(i).

The facts are simple and were stipulated. Ms. Robinovitch's claim was allowed as an occupational disease; her attending physician was Steven Fuhs, M.D. In May 2001, Dr. Fuhs requested that a physical capacities evaluation (PCE) be done, in order to determine Ms. Robinovitch's ability to work. The Department authorized this PCE. The Department had assigned a vocational counselor to Ms. Robinovitch, Jessica Yates, who is a Department vocational...
consultant. Ms. Yates scheduled the PCE, and Ms. Robinovitch attended it. As a result of her attendance at the PCE, Ms. Robinovitch lost 8 hours of work, and submitted an expense voucher seeking reimbursement. The Department denied payment for the lost wages, stating that "time lost from work is payable only when an examination is requested by the Department." This order/remittance advice is the subject matter of this appeal.

It is certainly axiomatic that the Department can pay time loss compensation only by specific grant of authority. There are three situations in which time loss is payable. The first, RCW 51.32.090, payment for total temporary disability, is not applicable in this situation. The second, found in RCW 51.32.095(3)(a), permits the Department to pay temporary total disability benefits "while the worker is actively and successfully undergoing a formal program of vocational rehabilitation." Nowhere in this stipulation is there any indication that the PCE was done as part of a formal program. In In re David Potts, BIIA Dec., 88 3822 & 88 3115 (1989), this Board observed that RCW 51.32.095(3) contemplates payment of time loss compensation only when the injured worker is under an "approved rehabilitation plan," not during the period of time the plan is being developed. There is nothing in this stipulation that so states or even permits such an inference.

Finally, the third source of authority to pay for lost wages is in RCW 51.32.110, the pertinent sections of which are set forth below:

(1) 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.

(2) 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, non cooperation, or practice continues, and reduce, suspend, or deny any compensation for such period: . . .
If the medical examination required by this section causes the worker to be absent from his or her work without pay:

(i) In the case of a worker insured by the department, the worker shall be paid compensation out of the accident fund in an amount equal to his or her usual wages for the time lost from work while attending the medical examination: or . . . .

The claimant argues that this was an examination requested by the Department, and further that this is a "medical examination" within the meaning of the statute.

With regard to the first issue, we believe that this PCE was indeed requested by the Department. While the request came initially from Dr. Fuhs, the Department not only authorized the PCE, the Department-assigned vocational counselor arranged the PCE. Moreover, had Ms. Robinovitch failed to attend the PCE, she would have risked suspension of benefits for non-cooperation.

However, that is not the end of the inquiry. RCW 51.32.110(4)(a) requires that this be a "medical examination." Nowhere in the regulations or the statute is this term defined. We are mindful, however, of the mandate to construe the provisions of the Industrial Insurance Act liberally, in favor of the worker. In view of this mandate, we do not believe a physician must perform the examination in order that it may be deemed a "medical examination" within the meaning of the statute. Indeed, we believe that it is sufficient that the examination be undertaken for medical purposes. In this situation, Ms. Robinovitch's physician requested this PCE to determine Ms. Robinovitch's physical capabilities relative to her medical condition. It is exactly this type of examination contemplated by RCW 51.32.110(1). Accordingly, Ms. Robinovitch should be compensated for time she spent away from her work, pursuant to RCW 51.32.110(1)(a)(i).

**FINDINGS OF FACT**

1. On July 6, 1995, the Department of Labor and Industries received an application for benefits filed on behalf of the claimant, Linda L. Robinovitch, alleging that she sustained an occupational disease arising naturally and proximately out of her employment with the University of Washington. The claim was subsequently allowed, and on November 2, 2001, the Department issued an order affirming Remittance Advice No. 268193 dated June 12, 2001, that denied the claimant's payment for time loss compensation for May 16, 2001. On December 31, 2001, the Board of Industrial Insurance Appeals received a Notice of Appeal filed
on behalf of the claimant. On February 7, 2002, the Board of Industrial Insurance Appeals issued an order granting the appeal and assigning Docket No. 01 24949.

2. Dr. Fuhs, the claimant's attending physician, requested a physical capacities evaluation to be performed on the claimant, Linda L. Robinovitch, which was authorized by the Department of Labor and Industries. Jessica R. Yates, the claimant's vocational counselor, arranged for and scheduled a physical capacities evaluation for May 16, 2001, and the claimant attended on that day.

3. Due to the claimant's attendance at the physical capacities evaluation of May 16, 2001, she missed 8 hours of work for which she submitted a voucher to the Department of Labor and Industries.

4. The Department of Labor and Industries requested the claimant to attend the physical capacities evaluation on May 16, 2001.

5. The physical capacities evaluation was done for medical purposes in order to determine the claimant's physical restrictions relative to her medical condition.

CONCLUSIONS OF LAW

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

2. Linda L. Robinovitch was not a totally and temporarily disabled worker within the meaning of RCW 51.32.090 on May 16, 2001.

3. Linda L. Robinovitch was not in a qualified vocational rehabilitation plan within the meaning of RCW 51.32.095 on May 16, 2001.

4. Linda L. Robinovitch attended a medical examination at the request of the Department of Labor and Industries on May 16, 2001, within the meaning of RCW 51.32.110.

5. The order of the Department of Labor and Industries dated November 2, 2001, is incorrect and is reversed. This matter is remanded to the Department with direction to issue a further order reimbursing the claimant in an amount equal to her usual wages for the time she lost
from work while attending the physical capacities evaluation on May 16, 2001, pursuant to RCW 51.32.110(a)(i).

It is so ORDERED.
Dated this 28th day of April, 2003.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/
THOMAS E. EGAN        Chairperson

/s/
FRANK E. FENNERTY, JR. Member