APPEALABLE ORDERS

Temporary orders

The worker is allowed to litigate entitlement to time-loss compensation after the Department changes an order closing the claim and terminating time-loss from final to "temporary." The Department cannot isolate a decision to terminate time-loss compensation from Board review by characterizing it as a temporary decision. ...In re Tony Perry, BIIA Dec., 03 19142 (2004) [Editor's Note: The Board's decision was appealed to superior court under Kitsap County Cause No. 05-2-0140-3.]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS STATE OF WASHINGTON

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IN RE: TONY T. PERRY

DOCKET NO. 03 19142

CLAIM NO. Y-392626

ORDER VACATING PROPOSED DECISION AND ORDER AND REMANDING THE APPEAL FOR FURTHER PROCEEDINGS

APPEARANCES:

Claimant, Tony T. Perry, by Casey & Casey, P.S., per Gerald L. Casey and Carol L. Casey

Employer, Peninsula Services, Inc., by Integrated Claims Management

Department of Labor and Industries, by The Office of the Attorney General, per Helen B. Fraychineaud, Assistant

The claimant, Tony T. Perry, filed an appeal with the Board of Industrial Insurance Appeals on September 9, 2003, from an order of the Department of Labor and Industries dated August 29, 2003. In this order, the Department changed its prior orders dated May 27, 2003 and May 30, 2003 from final to temporary, and ordered the claim to remain open for medical treatment and benefits as appropriate. The appeal is **REMANDED FOR FURTHER PROCEEDINGS**.

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 April 28, 2004, in which the industrial appeals judge affirmed the order of the Department dated August 29, 2003.

The claimant submitted a motion for summary judgment and the Department submitted a motion for partial summary judgment. Our industrial appeals judge granted the Department's motion, and found no issues of material fact. We disagree with the proposed decision, and conclude that this appeal should not be decided by summary judgment. We conclude that Mr. Perry can reach the issue of his right to time loss compensation. The Proposed Decision and Order is vacated, and the appeal is returned to our hearings judge with direction to provide the parties a hearing on the issue of entitlement to time loss compensation after May 15, 2003.

To understand the posture of this appeal, the following history is necessary. The Department issued an order on May 27, 2003, in which it terminated time loss compensation with

payment for the period of May 13, 2003 through May 15, 2003. A deduction was taken for an overpayment and the claim was kept open. On May 30, 2003, the Department issued an order in which it closed the claim with time loss as paid through May 15, 2003. On June 9, 2003, the claimant appealed the May 30, 2003 claim closure order to the Board. Likewise, on June 13, 2003, the claimant protested to the Department from the orders of May 27, 2003 and May 30, 2003. In accord with *In re Santos* Alonzo, BIIA Dec., 56,833 (1981), the Board denied the claimant's June 9, 2003 appeal because of the protests to the Department. On July 24, 2003, the Department issued an order in which it affirmed both the May 27, 2003 order terminating time loss and the May 30, 2003 order closing the claim.

On August 4, 2003, the claimant appealed to the Board from the July 24, 2003 order. On August 28, 2003, the Department reassumed jurisdiction of the claim in response to the claimant's appeal to the Board. On August 29, 2003, the Department issued an order in which it stated that it had changed the orders of May 27, 2003 and May 30, 2003, from final to temporary orders, and ordered the claim to remain open for authorized medical treatment and benefits. On September 5, 2003, the Board returned the claimant's appeal from the July 24, 2003 order to the Department. On September 9, 2003, the claimant appealed to the Board from the August 29, 2003 order. It is from that appeal that both parties seek summary judgment.

The claimant argues that the Department should not be allowed to isolate from review the issue of entitlement to time loss compensation by calling its prior determinative order "temporary." Under these circumstances we agree. We have previously held in *In re Louise Favaloro*, BIIA Dec., 90 5892 (1990), that the Department cannot insulate a decision **to terminate time loss compensation** from Board review by simply characterizing it as "interlocutory." That is precisely what the Department has attempted to accomplish in the August 29, 2003 order when it 'modified' the order of May 27, 2003 by labeling it "temporary" instead of final. We must assume that the Department was seeking to avoid piecemeal litigation when it issued the order of August 29, 2003. The Department took action on the appeal from the May 30, 2003 claim closure order, but sought to delay the decision about the termination of time loss benefits by calling it temporary. However, the Department cannot prevent the claimant from having the Board review the termination of time loss by calling the determination "temporary," even if the Department couples the action with the determination to keep the claim open. By calling "temporary" the determination to terminate time loss, the Department is effectively maintaining the termination of benefits and yet preventing review of that specific action, in spite of the claimant's effort to have the decision reviewed by the Board.

Under these circumstances, and only with regard to the issue of time loss, we will treat the Department's order as an order affirming the May 27, 2003 order and allow the claimant to litigate that issue under this docket, if the claimant so chooses.

Because time loss compensation is meant to be a wage replacement, and the Industrial Insurance Act was meant to provide injured workers with sure and certain relief, we conclude that the Department action in the August 29, 2003 order is tantamount to affirming the termination of time loss compensation since that termination remains in effect when the Department calls its order "temporary." By appealing that order to the Board, the claimant is contending that the termination of time loss on May 15, 2003, should not have occurred. The claimant is entitled to have that issue resolved at hearing before the Board.

The Proposed Decision and Order of April 28, 2004, is vacated. This appeal is remanded to the hearings process, pursuant to WAC 263-12-145(4), for further proceedings as indicated by this order, and with direction to allow the parties to present evidence on whether the Department correctly terminated Mr. Perry's time loss compensation effective May 15, 2003. The parties are advised that this order is not a final Decision and Order of the Board within the meaning of RCW 51.52.110. At the conclusion of further proceedings, the industrial appeals judge shall, unless the matter is dismissed or resolved by an Order on Agreement of Parties, enter a Proposed Decision and Order containing findings and conclusions as to each contested issue of fact and law, based upon the entire record, and consistent with this order. Any party aggrieved by such Proposed Decision and Order may petition the Board for review of such further Proposed Decision and Order, pursuant to RCW 51.52.104.

It is so ORDERED.

Dated this 21st day of July, 2004.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/____ THOMAS E. EGAN

Chairperson

/s/____

FRANK E. FENNERTY, JR.

Member

/s/_____ CALHOUN DICKINSON Member