

## **Smith, Robin**

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### **LOSS OF EARNING POWER (RCW 51.32.090(3))**

#### **Termination from modified position**

Where the worker was working a modified light-duty part-time job with the employer and was terminated for cause, because the modified job would not have restored the worker's earning power to that existing at the time of the industrial injury, it was error for the Department not to pay loss of earning power benefits. ....*In re Robin Smith, BIA Dec., 12 15815 (2013)* [Editor's Note: The Board's decision was appealed to Cowlitz County Superior Court, No. 13-2-01152-3.]

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

1 **IN RE: ROBIN L. SMITH** ) **DOCKET NO. 12 15815**  
2 **CLAIM NO. AN-21664** ) **DECISION AND ORDER**  
3 \_\_\_\_\_)

4 **APPEARANCES:**

5 Claimant, Robin L. Smith, by  
6 Crandall, O'Neill, Imboden & Styve, P.S., per  
7 Tom O'Neill

8 Employer, Cardinal Glass Industries, Inc., by  
9 WA Employers Group Retro, per  
10 Wendy LeClair

11 Department of Labor and Industries, by  
12 The Office of the Attorney General, per  
13 Leslie V. Johnson, Senior Counsel

14 The claimant, Robin L. Smith, filed an appeal with the Board of Industrial Insurance Appeals  
15 on May 21, 2012, from an order of the Department of Labor and Industries dated May 11, 2012. In  
16 this order, the Department affirmed the provisions of the order dated May 7, 2012, in which it  
17 denied time-loss compensation benefits from April 13, 2012, through May 4, 2012, because the  
18 worker was released to work and terminated by the employer for cause. The Department order is  
19 **REVERSED AND REMANDED.**

**DECISION**

20 As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for  
21 review and decision. The claimant filed a timely Petition for Review of a Proposed Decision and  
22 Order issued on May 31, 2013, in which the industrial appeals judge affirmed the Department order  
23 dated May 11, 2012. On July 15, 2013, the Department filed a response to the claimant's Petition  
24 for Review.

25 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that  
26 no prejudicial error was committed. The rulings are affirmed.

27 The issue presented by this appeal and the evidence presented by the parties are  
28 adequately set forth in the Proposed Decision and Order. We agree with our industrial appeals  
29 judge's determination that Ms. Smith was terminated for cause from her modified, light-duty job.  
30 But that modified job was limited to four hours a day and would not have restored to Ms. Smith, who  
31 was working 12-hour shifts at the time of the industrial injury, the earning power existing at the time  
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1 of the injury. It was therefore error for the Department not to pay loss of earning power benefits for  
2 the period at issue.

3 It appears that the parties initially anticipated that Ms. Smith would work her regular schedule  
4 when she began the temporary position with her employer, Cardinal Glass. In the letter to  
5 Ms. Smith from the employer dated April 4, 2012, it was stated that beginning on April 13, 2012,  
6 she would work her regular A Shift rotation, and that for 30 days she would be paid her regular  
7 wage while working this temporary job. Ex. No. 2. This appears to have been based on the Activity  
8 Prescription Form (APF) completed by physician assistant Devin Hanson, PAC, Ms. Smith's  
9 treating provider, on March 3, 2012. At that time, Mr. Hanson limited Ms. Smith to no use of the  
10 right arm, and provided that she was not to wear clothing or equipment on the right arm, but he did  
11 not limit the number of hours a day that she could work. Ex. No. 6.

12 Unfortunately, Mr. Hanson considered Ms. Smith's progress to be slower than expected, and  
13 in an APF completed on April 10, 2012, he limited her to working only four hours a day, in addition  
14 to not using the right arm or wearing clothing or equipment on that arm. Ex. No. 4. Accordingly, the  
15 Employee Job Assignment Agreement that Ms. Smith signed when she reported for the modified  
16 job on April 13, 2012, provided that her shifts would be limited to four hours in duration. Ex. No. 3.

17 David Davies is a Human Resource/Safety Officer at Cardinal Glass and one of the authors  
18 of the letter to Ms. Smith dated April 4, 2012, which stated that she would be paid her regular wage  
19 while working the modified position. Mr. Davies testified that at the time of the industrial injury,  
20 Ms. Smith worked an A shift, which entailed working two week days and two week nights, and that  
21 each shift was 12 hours long. He also stated that although the contents of the April 4, 2012 letter  
22 were not changed after Ms. Smith had been limited to working four hours a day, she would not have  
23 been paid for 12 hours of work while working only four hours a day, but would have been paid only  
24 for the hours she worked.

25 The evidence establishes that the modified position that was made available to Ms. Smith,  
26 and from which she was terminated for cause, would not have restored her earning power to that  
27 existing at the time of the industrial injury. She is therefore entitled to loss of earning power  
28 benefits as provided by RCW 51.32.090(3). We have previously held that that statute does not  
29 require that an injured worker actually work in order to receive loss of earning power benefits to  
30 which the worker would otherwise be entitled. *In re Karl Bean*, BIIA Dec., 04 19814 (2006). Here,  
31 the only basis for reducing Ms. Smith's temporary total disability benefits was the modified,  
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1 light-duty position made available to her, and that position would not have fully restored her earning  
2 capacity.

3 **FINDINGS OF FACT**

- 4 1. On August 27, 2012, an industrial appeals judge certified that the parties  
5 agreed to include the Jurisdictional History in the Board record solely for  
6 jurisdictional purposes.
- 7 2. Robin L. Smith was born on March 15, 1957, and was employed as a  
8 lab technician for Cardinal Glass working a regular shift of 12 hours a  
9 day at the time of her October 12, 2011 industrial injury.
- 10 3. On October 12, 2011, Robin L. Smith was injured when she fell and hurt  
11 her right arm and shoulder in the course of her employment with  
12 Cardinal Glass. Ms. Smith had treatment, including surgery.
- 13 4. On March 5, 2012, Ms. Smith received a certification for the medical use  
14 of marijuana, and subsequently engaged in the medical use of  
15 marijuana by inhaling cannabis.
- 16 5. On April 4, 2012, Cardinal Glass sent a light-duty job offer to Robin L.  
17 Smith. The light-duty job offer approved by Ms. Smith's attending  
18 provider limited her to not using her right arm, not wearing clothing or  
19 equipment on her right arm, and working only four hours a day.
- 20 6. On April 13, 2012, Ms. Smith reported for work and had urinalysis  
21 testing. Ms. Smith tested positive for marijuana use. Ms. Smith's  
22 employment was terminated for cause for violation of the employer's  
23 drug policy.
- 24 7. There is no evidence that the modified, light-duty job that Ms. Smith was  
25 performing at the time she was terminated on April 13, 2012, came to an  
26 end.
- 27 8. Ms. Smith's termination from employment was for disciplinary reasons,  
28 and was unrelated to the industrial injury or her receipt of workers'  
29 compensation benefits or her assignment to a modified, light-duty  
30 assignment. The employer likely would have terminated any other  
31 employee under circumstances similar to those involving Ms. Smith.
- 32 9. Ms. Smith's inability to work at the part-time job made available to her by  
Cardinal Glass was due to her termination by the company, which was  
the result of her positive drug test in accordance with established  
company policy.
10. The modified position that was made available to Ms. Smith was a  
part-time position, consisting of working limited shifts of four hours a  
day. That position would not have restored her earning power to that  
existing at the time of the industrial injury, and Ms. Smith's earning  
capacity was reduced by greater than 5 percent beginning

1 April 13, 2012, through May 4, 2012, due to conditions proximately  
2 caused by the industrial injury.

3 **CONCLUSIONS OF LAW**

- 4 1. The Board of Industrial Insurance Appeals has jurisdiction over the  
5 parties and subject matter in this appeal.  
6 2. In April 2012, the employer made a light-duty, part-time position  
7 available to Robin L. Smith pursuant to RCW 51.32.090(4), to work  
8 modified duty limited to shifts of four hours, for 30 days beginning  
9 April 13, 2012.  
10 3. During the period of April 13, 2012, through May 4, 2012, Robin L. Smith  
11 was capable of working no more than four hours a day only at a  
12 modified, light-duty job that had been specifically made available to her  
13 by her employer, Cardinal Glass, pursuant to RCW 51.32.090(4).  
14 4. Robin L. Smith's termination from employment for disciplinary reasons  
15 on April 13, 2012, did not cause the modified, light-duty job to end within  
16 the meaning of RCW 51.32.090(4).  
17 5. Robin L. Smith's modified, light-duty work came to an end due to her  
18 own actions and she was not entitled to full time-loss compensation  
19 benefits after April 13, 2012, but was entitled to loss of earning power  
20 benefits for the period beginning April 13, 2012, through May 4, 2012,  
21 due to conditions proximately caused by the industrial injury as provided  
22 by RCW 51.32.090(3).  
23 6. The Department order dated May 11, 2012, is incorrect and is reversed.  
24 This matter is remanded to the Department with direction to calculate  
25 and pay the claimant loss of earning power benefits beginning April 13,  
26 2012, through May 4, 2012.

27 Dated: August 19, 2013.

28 BOARD OF INDUSTRIAL INSURANCE APPEALS

29 /s/ \_\_\_\_\_  
30 DAVID E. THREEDY Chairperson

31 /s/ \_\_\_\_\_  
32 JACK S. ENG Member