Stephenson, Renee

TIME-LOSS COMPENSATION (RCW 51.32.090)

Voluntary Retirement

When determining whether a worker has voluntarily retired from the workforce, the focus must be on a period prior to the period for which temporary total disability benefits are sought. ***….In re Renee Stephenson,* BIIA Dec., 13 22648 (2014)** [*Editor's Note:* The Board's decision was appealed to superior court under Spokane County Cause No. 14-2-04146-7.]

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: RENEE S. STEPHENSON	**)**	**DOCKET NOS. 13 22648 & 13 22949**
	)	
CLAIM NO. Y-951012	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Renee S. Stephenson, by
Delay, Curran, Thompson, Pontarolo & Walker, P.S., per
Michael J. Walker

Employer, Anesthesia Business Consultants,
None

Department of Labor and Industries, by
The Office of the Attorney General, per
Jacquelyn R. Findley

In Docket No. 13 22648, the claimant, Renee S. Stephenson, filed an appeal with the Board of Industrial Insurance Appeals on October 16, 2013, from an order of the Department of Labor and Industries dated October 16, 2013. In this order, the Department corrected and superseded its earlier order dated August 21, 2013, and denied time-loss compensation benefits from January 10, 2012, through June 11, 2013, because the claimant voluntarily removed herself from gainful employment. The Department order is **AFFIRMED**.

In Docket No. 13 22949, the claimant, Renee S. Stephenson, filed an appeal with the Board of Industrial Insurance Appeals on October 22, 2013, from an order of the Department of Labor and Industries dated October 22, 2013. In this order, the Department denied time-loss compensation benefits from August 10, 2013, through October 17, 2013, because the claimant voluntarily removed herself from the workforce. The Department order is **AFFIRMED**.

INTRODUCTION

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The claimant filed a timely Petition for Review of a Proposed Decision and Order issued on July 17, 2014, in which the industrial appeals judge affirmed the orders of the Department dated October 16, 2013, and October 22, 2013.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed. The issue in each of these consolidated appeals is whether the Department correctly denied time-loss compensation benefits because Ms. Stephenson voluntarily removed herself from the workforce. We agree with our

industrial appeals judge's determination that the Department orders are correct, but we have granted review to clarify the period for determining whether a worker has voluntarily retired.

The evidence presented by the parties is well-summarized in the Proposed Decision and Order, but some recitation will help explain our decision. The industrial injury occurred in September 2004, and the claim was first closed in December 2006. Toward the end of 2007 Ms. Stephenson returned to work as a part-time teacher's assistant for a new employer, the Lutheran Academy of the Master, in what she described as a, "Very minimal paid position."[1] Ms. Stephenson resigned that position on March 11, 2009, and we accept that the resignation was not a planned event and did not represent a formal retirement at the time. However, the only other employment in which she engaged after leaving the Academy comprised babysitting two children, two or three times per week, at the rate of $20 per day, between the fall of 2009 and the winter of 2011. The mother of the children she babysat was a hair stylist, and they would sometimes barter, exchanging haircuts and product for babysitting instead of cash. Ms. Stephenson applied to reopen her claim in November 2010, and that application was denied. She applied again in February 2012, and the Department eventually reopened the claim effective January 10, 2012.

DECISION

Temporary total disability benefits are not available to a worker who has voluntarily retired and is no longer attached to the workforce.[2] By regulation, the Department considers a worker to have retired if two conditions are met: (1) the worker is not receiving income, salary or wages from any gainful employment; and, (2) the worker has provided no evidence to show a bona fide attempt to return to work after retirement.[3] (That regulation also provides that a worker is not voluntarily retired if the industrial injury is a proximate cause for the retirement, but that subsection is not relevant here because no expert testimony was presented on that issue.)

Neither the statute nor the regulation identifies the time period to use for determining whether a worker has voluntarily retired, and we agree with Ms. Stephenson it was error to make the determination she had voluntarily retired by considering whether she received income or wages, or demonstrated a bona fide attempt to return to work, during the same periods for which she seeks time-loss compensation benefits. By alleging that she is entitled to such benefits for those periods, Ms. Stephenson contends that she could not work during those periods. We do not expect a worker

[1] 4/15/14 Tr. at 74.
[2] RCW 51.32.090(10).
[3] WAC 296-14-100.

to demonstrate income or wages during periods for which time-loss compensation benefits are sought.

When determining whether a worker has voluntarily retired from the workforce, the focus must be on some period **prior** to the period for which temporary total disability benefits are sought. The period will vary from case to case because each case will be factually different, and no strict or hard-and-fast rule concerning the length of that period can be articulated. The focus should be on the period beginning when the worker last performed gainful employment and ending on the first date for which benefits are being sought. Under the facts, we are persuaded that the relevant period is from March 11, 2009, when Ms. Stephenson was last gainfully employed, and January 10, 2012, the effective date on which the claim was reopened and the first date for which she is seeking time-loss compensation benefits.

We agree with our industrial appeals judge that the babysitting provided by Ms. Stephenson, on such a part-time and intermittent basis, and for which she earned perhaps the equivalent of $40 to $60 dollars per week, did not constitute gainful employment. No evidence of the actual amount earned was presented, but we note that Ms. Stephenson testified that the amount was so small she didn't think she needed to report it as income, suggesting that Ms. Stephenson did not consider it to be gainful employment. Ms. Stephenson did not receive income, salary or wages from any gainful employment between March 11, 2009, and January 10, 2012. Under the facts, we are satisfied this thirty-four month period supports finding that the first condition of the regulation is satisfied.

We also agree with our industrial appeals judge that Ms. Stephenson has not demonstrated a bona fide attempt to return to work after she resigned her position with the Lutheran Academy. Ms. Stephenson did not produce a résumé, or a copy of any applications for employment she submitted, or a copy of any rejection letters she received. She did not document one job for which she had applied or one help-wanted ad to which she had responded. Ms. Stephenson could not produce a list of the potential employers she had contacted, and testified that she didn't even know if she had such a list. These actions do not reflect a bona fide effort to obtain gainful employment.

Ms. Stephenson testified that she never intended to retire, and she may have intended someday to return to gainful employment, and may return to gainful employment in the future. But that is not enough to entitle her to benefits. She voluntarily left the workforce on March 11, 2009, and presented no evidence of a genuine or sincere effort to return to gainful employment afterward. Both conditions of the regulation have been met, and we agree with the Department that time-loss

compensation benefits are not payable for the periods at issue because Ms. Stephenson was retired and no longer attached to the workforce.

Finally, we reject Ms. Stephenson's arguments that because the Department paid time-loss compensation benefits after reopening the claim under orders that have become final and binding, either the Department should be estopped from asserting that the worker has voluntarily retired during any subsequent period, or the Department should be considered to have waived the issue of voluntary retirement absent new evidence of voluntary retirement, an issue over which the Department would have the burden of proof. As explained by our industrial appeals judge, the payment of time-loss compensation benefits for a period of time before or after a period for which such benefits are claimed creates no presumption that the benefits are payable.[4]

FINDINGS OF FACT

1. On January 6, 2014, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History in the Board record solely for jurisdictional purposes.

2. Renee S. Stephenson sustained an industrial injury on September 14, 2004, when she caught a falling filing cabinet and injured her left hand, left wrist, left arm, left shoulder, and neck.

3. Ms. Stephenson's claim was closed on December 15, 2006, with an award for permanent partial disability equal to 12 percent of the amputation value of the left arm at or above the deltoid insertion or by disarticulation at the shoulder, and an award consistent with that described by Category 2 of the categories of permanent cervical and cervico-dorsal impairments, WAC 296-20-240.

4. In July 2006, Ms. Stephenson's voluntarily left her employment with the employer of injury, Anesthesia Business Consultants.

5. Between the last quarter of 2007 and March 2009, Ms. Stephenson worked part-time for Lutheran Academy of the Master. Ms. Stephenson voluntarily resigned her employment with the Lutheran Academy on March 11, 2009.

6. Between 2009 and 2011, Ms. Stephenson provided child care on an intermittent and part-time basis out of her home.

7. Ms. Stephenson's workers' compensation claim was reopened by the Department effective January 10, 2012.

8. Ms. Stephenson did not receive income, salary, or wages from any gainful employment after March 11, 2009, when she voluntarily resigned her part-time employment with the Lutheran Academy, and

[4] *In re Mark Billings*, BIIA Dec., 70,883(1986).

January 10, 2012, the date on which her claim was reopened and the first date for which she seeks time-loss compensation benefits.

9. Ms. Stephenson did not provide evidence to show a bona fide attempt to return to work between March 11, 2009, and January 10, 2012.

10. The industrial injury was not a proximate cause of Ms. Stephenson's voluntary retirement from the workforce.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter in these appeals.

2. Between March 11, 2009, and January 10, 2012, Ms. Stephenson was voluntarily retired and no longer attached to the workforce within the meaning of RCW 51.32.090(10) and WAC 296-14-100(1).

3. RCW 51.32.090(10) bars Ms. Stephenson from receiving time-loss compensation benefits from January 10, 2012, through June 11, 2013, and from August 10, 2013, through October 17, 2013, because she voluntarily retired and removed herself from the workforce.

4. The Department orders dated October 16, 2013, and October 22, 2013, are correct and are affirmed.

Dated: October 15, 2014.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
DAVID E. THREEDY Chairperson

/s/_____
JACK S. ENG Member