Looker-Noble, Chelsie

PENALTIES (RCW 51.48.017)

Rejected vocational assessment (WAC 296-15-4304)

Under WAC 296-15-4304, when the VDRO rejects a self-insured vocational assessment that the worker is employable, the self-insured employer is not automatically required to reinstate time-loss compensation. **….*In re Chelsie Looker-Noble*, BIIA Dec., 14 17483 (2016)**
[*Editor's Note:* The Board's decision was appealed to superior court under Clark County Cause No. 16-2-00709-4.]

VOCATIONAL REHABILITATION

Time-loss compensation (WAC 296-15-4304)

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: CHELSIE LOOKER-NOBLE	**)**	**DOCKET NO. 14 17483**
	)	
CLAIM NO. SE-29600	**)**	**DECISION AND ORDER**

Chelsie Looker-Noble suffered an injury while in the course of employment for Southwest Washington Health System (Southwest). Southwest terminated Ms. Looker-Noble's time-loss compensation benefits on the basis of medical evidence and a vocational assessment.

Ms. Looker-Noble requested the Department to order Southwest to reinstate time-loss compensation and to pay back time-loss compensation benefits. The Department directed Southwest to pay time-loss compensation benefits from October 11, 2013, through April 16, 2014. Southwest paid the back time-loss compensation as ordered. Ms. Looker-Noble then requested a penalty for the unreasonable delay in payment of benefits against Southwest. The Department denied the request for a penalty.

Our industrial appeals judge found that Southwest unreasonably delayed payment of benefits and directed the Department to grant the request for a penalty. Southwest argues that it had a genuine doubt regarding whether the benefits were payable and that therefore the penalty is improper. We agree with Southwest. The Department order is **AFFIRMED**.

DISCUSSION

In this appeal we are asked to decide if Southwest unreasonably delayed payment of time-loss compensation benefits. The parties stipulated to the facts that comprise the record in this appeal. (*See*, Exhibits 1 through 13.) We set forth the facts relevant to our decision.

On October 18, 2013, the Department informed Ms. Looker-Noble that Southwest provided documentation showing that she was able to return to work as a cashier—a position approved by her attending physician. Ms. Looker-Noble was given notice that she could file a dispute if she disagreed with the determination. On October 30, 2013, Ms. Looker-Noble filed a dispute with the Vocational Dispute Resolution Office (VDRO). Her dispute focused on the fact that the vocational report used an incorrect geographic location for its labor market survey. The vocational assessment used the Longview/Kelso area for the labor market survey instead of the Vancouver/Portland area where Ms. Looker-Noble lives and had worked.

The VDRO responded to the dispute in a letter dated March 18, 2014, from Chris Peerboom, Vocational Services Specialist. (Exhibit 8). Mr. Peerboom indicated in his letter that he could not uphold the vocational determination and referred to the dispute summary that was attached to his

letter. The vocational dispute summary and analysis section states: "Ms. Looker currently lives in a stronger labor market area in the Vancouver, Washington/Portland, Oregon area."

In addition to noting that the vocational determination could not be upheld, the March 18, 2014 Department letter stated that the claim manager would "take further action as appropriate." Finally, the March 18, 2014 Department letter contained the following question and answer: "What about time-loss compensation benefits? The claim manager will reinstate time-loss compensation if appropriate."

On April 3, 2014, Ms. Looker-Noble requested the Department to order Southwest to pay back and ongoing time-loss compensation benefits. On April 16, 2014, the Department directed Southwest to pay time-loss compensation benefits from October 11, 2013, through April 16, 2014. On April 16, 2014 (the date of the time-loss order), Southwest paid the back time-loss compensation benefits as ordered. Ms. Looker-Noble then requested that the Department assess a penalty against Southwest for unreasonable delay in payment of the time-loss compensation benefits. On June 20, 2014, the Department issued the order before us in which it denied Ms. Looker-Noble's request for a penalty.

Resolution of this appeal involves the interplay between RCW 51.48.017, the penalty statute for unreasonable delay, and WAC 296-15-4304, the regulation related to rejection of a vocational assessment report. Whether there has been an unreasonable delay in benefits under RCW 51.48.017 depends on whether there is a demonstrated "genuine doubt from a medical or legal standpoint as to the liability for benefits."[1] Whether the self-insured employer had a genuine doubt if benefits were payable in Ms. Looker-Noble's case depends on the determinations made by the Department in the March 18, 2014 letter and WAC 296-15-4304(4).

Our industrial appeals judge determined that once the Department rejects a vocational report, reinstating time-loss compensation benefits is essentially automatic. However, WAC 296-15-4304(4) provides:

> (4) If the self-insurer terminated time-loss based on the assessment report's recommendation but the **department concludes the assessment report failed to demonstrate the worker is able to work**, the self-insurer must reinstate time-loss effective the day after the last date paid. (Emphasis ours.)

[1] *See*, *Taylor v. Nalley's Fine Foods*, 119 Wn. App. 919 (2004); *In re Frank Madrid*, BIIA Dec., 86 0224-A (1987).

We disagree with our industrial appeals judge's interpretation of WAC 296-15-4304 when read in conjunction with the March 18, 2014 letter.

Southwest argues that the March 18, 2014 letter did not require the self-insured employer to reinstitute payment of time-loss compensation benefits. We agree.

We note that nowhere in the vocational dispute report/analysis or in the March 18, 2014 letter did the Department state that the employer had failed to demonstrate that the worker is able to work. A fair reading of the March 18, 2014 Department letter reveals that at that time the Department had made no decision on whether time-loss compensation benefits were appropriate. In fact, the letter states that if payment of time-loss compensation benefits is appropriate, the claims manager will reinstate them.

The Southwest's claims manager, Cindy Torsey, interpreted the March 18, 2014 Department letter essentially for what it said: time-loss compensation benefits would be reinstated only if appropriate. The letter did not order Southwest to pay time-loss compensation benefits. This is because the VDRO, although rejecting the vocational assessment, was acknowledging that the Vancouver/Portland area was actually a better labor market area than the Kelso/Longview area.

The March 18, 2014 letter did not indicate there had been a determination made that Ms. Looker-Noble was unable to work. The letter simply was informing both parties that a decision on this issue was pending. Under these circumstances, the self-insured employer has demonstrated genuine doubt from a medical and legal standpoint as to the liability for benefits.

DECISION

In Docket No. 14 17483, the claimant, Chelsie Looker-Noble, filed an appeal with the Board of Industrial Insurance Appeals on June 26, 2014, from an order/letter of the Department of Labor and Industries dated June 20, 2014, in which it denied the claimant's request for a penalty. The appeal before us is from this order. The Department's June 20, 2014 letter/order order is affirmed.

FINDINGS OF FACT

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

2. Chelsie Looker-Noble sustained an industrial injury on October 1, 2011, when she injured her low back while working as a certified nursing assistant for self-insured employer, Southwest Washington Health System.

3. On March 18, 2014, the Department issued a determination in which it rejected the self-insured employer's vocational assessment.

4. The March 18, 2014 determination from Chris Peerboom, vocational services specialist at the Department, indicated that the claims manager would take further action as appropriate and that time-loss compensation benefits would be reinstated if appropriate. The Department did not conclude that the assessment report failed to demonstrate the worker is able to work.

5. As of March 18, 2014, the self-insured employer did not pay time-loss compensation benefits.

6. As of March 18, 2014, the self-insured employer had a genuine doubt that Ms. Looker-Noble was entitled to time-loss compensation benefits.

CONCLUSIONS OF LAW

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

2. The self-insured employer did not unreasonably delay payment of time-loss compensation benefits to Ms. Looker-Noble within the meaning of RCW 51.48.017.

3. The June 20, 2014 Department order is affirmed.

Dated: March 3, 2016.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
DAVID E. THREEDY Chairperson

/s/_____
JACK S. ENG Member

Addendum to Decision and Order
In re Chelsie Looker-Noble
Docket No. 14 17483
Claim No. SE-29600

Appearances

Claimant, Chelsie Looker-Noble, by Busick Hamrick Palmer, PLLC, per Douglas M. Palmer

Self-Insured Employer, Southwest WA Health System, by Law Office of Gress & Clark, LLC, per James L. Gress

Department of Labor and Industries, by The Office of the Attorney General, per James S. Johnson

Petition for Review

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The employer filed a timely Petition for Review of Proposed Decision and Order issued on November 20, 2015, in which the industrial appeals judge reversed and remanded the Department order dated June 20, 2014.

Evidentiary Rulings

This matter has been decided on agreed facts and documents admitted by stipulation of the parties. *See*, Exhibits 1 through 13.