Richardson, Aaron

TIME-LOSS COMPENSATION (RCW 51.32.090)

Certification for available light work (RCW 51.32.090(4))

A training program offered by the employer's retro group at a resource center for several employers is a valid light-duty job. **….*In re Aaron Richardson,* BIIA Dec., 15 17069 (2017)**
[*Editor's Note: Affirmed, Richardson v. Department of Labor & Indus.*, 6 Wn. App. 2d 896 (2018), review denied, 193 Wn.2d 1009 (2019).]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: AARON E. RICHARDSON	**)**	**DOCKET NO. 15 17069**
	)	
CLAIM NO. AV-16762	**)**	**DECISION AND ORDER**

Aaron E. Richardson was injured while working for Conco and Conco Pumping. While trying to move a large hanging panel his back popped. After a period of treatment, the Department of Labor and Industries terminated his time-loss compensation benefits because Conco offered Mr. Richardson light-duty transitional work. The industrial appeals judge reversed the Department order and directed the Department to reinstate time-loss compensation benefits as of June 22, 2015, because the light-duty transitional work did not constitute work and the job offer was not valid. In their Petitions for Review, the employer and the Department argue that the transitional job offer was valid and constituted work. We agree and **AFFIRM** the Department order under appeal.

DISCUSSION

Mr. Richardson, a journeyman carpenter, injured his low back during the course of his employment for Conco on February 18, 2014, while working as a foreman. He received treatment, including two surgeries and physical therapy. He was unable to work and time-loss compensation benefits were paid. Mr. Richardson's attending physician released Mr. Richardson to participate in temporary transitional light-duty work that consisted of receiving training at the Light Duty Resource Center, which is owned and operated by Safety Educators, an outside party with whom the employer contracts to provide training to its workers.

The Resource Center is funded by members of the retrospective rating group. It provides training to non-injured workers of member employers and provides temporary transitional light-duty training for injured workers of member employers, many of whom do not have light-duty positions available. The Resource Center can accommodate an injured worker for a year or perhaps longer.

Mr. Richardson received a letter offering him the temporary light-duty job that his physician had approved. The job was to begin on June 21, 2015, and Mr. Richardson was to be paid his regular wages plus benefits while he participated in the program. The letter was sent with Conco's permission by the retro group, which also acts as Conco's third-party administrator. Initially, Mr. Richardson was to conduct a comprehensive review of the DOSH construction safety standards. When that review was completed, other training activities may have included preparation for a commercial driver's license or training for certification in such skills as CPR, first aid, and flagging.

Mr. Richardson may also have received additional training reviewing Conco's safety manuals and blueprints. Mr. Richardson attended the Resource Center for one day and did not return.

RCW 51.32.090(4), the transitional light-duty work statute, encourages employers to maintain the employment of their injured workers, and provides incentives for employers who offer temporary transitional work to their workers who are entitled to time-loss compensation benefits. The offer must be with the employer of injury and the work must be available and different than the injured worker's usual duties. A written statement describing the work must be provided to the worker and the physician or licensed advanced registered nurse practitioner, and time-loss compensation benefits are to continue until the physician or advanced registered nurse practitioner certifies that the worker is physically able to perform the work and the worker begins the work with the employer of injury. That subsection of the statute also identifies situations, not relevant here, under which time-loss compensation benefits that were ended as provided by the statute are to resume.

In the present case, Mr. Richardson contends that this job offer was not valid under RCW 51.32.090(4)(b) because the job that he was offered does not constitute work; because the job offer came from the employer's retro group and not the employer, as required by the statute; and because, during the training program, there was no employment relationship between Mr. Richardson and Conco. We disagree with each of these assertions.

First, we are satisfied that the training program here constituted work within the meaning of the statute. The evidence before us fully demonstrates that a knowledge of the relevant safety standards is required of all workers and plainly supports finding that both the worker and the employer can benefit from such training that involves a thorough review of the safety standards that pertain to the construction industry.

We reject the notion that such training, including studying safety regulations or working toward certifications in certain skills, is somehow not meaningful or respectful work. This job offer was in keeping with the legislative goal that employers maintain an employment relationship with their injured workers who are receiving time-loss compensation benefits. Further, absolutely nothing in the record before us supports finding that this training program was in fact punishment for having been injured or that the training was provided in anything other than a meaningful and respectful work environment. We note that Mr. Richardson was to be paid his regular wage plus benefits while he participated in the program.

Robert Walsh, a former carpenter who now works as a safety manager, testified to the benefits he realized from similar training that he received as an injured worker at the Resource Center. Because Mr. Richardson did not return after the first day, it is unknown what other specific training activities would have been available to him after he completed the review of the safety regulations. But we are satisfied that this training program constituted work within the meaning of the statute.

We are also persuaded that the job offer came from Conco, Mr. Richardson's employer of injury, and that Conco maintained its employment relationship with Mr. Richardson while he participated in the training program. The letter itself may have been conveyed to Mr. Richardson by Conco's agent, but the evidence in the record plainly shows that Conco was to be responsible for paying Mr. Richardson his usual wages with full benefits during the training program, and that Conco controlled the curriculum decisions regarding the training, and controlled all personnel policies, such as what constituted an excused absence from the program.

Our decision is also consistent with the Department's Interim Policy 5.15, which provides that the transitional work offered must have some relationship to the employment at the time of the injury. According to that Interim Policy, any work performed at an employer's training facilities is "determined" to have a relationship to the employment. We agree with the employer and the Department that there is no meaningful distinction between training performed at an employer's own training facility and training provided at an outside facility owned and operated by an independent third party. The evidence reflects that many smaller employers don't have their own training facilities, and the use of facilities such as the Resource Center permit them to provide training to their workers beyond what they themselves could provide. And as noted by the Department, it is common for employers in many industries to send their workers for training at facilities owned and operated by independent third parties, a practice in which this Board frequently engages, and which does not terminate the parties' employment relationship. The transitional job offer in question here was with Conco, and the work would have maintained the employment relationship between Mr. Richardson and Conco.

DECISION

In Docket No. 15 17069, the claimant, Aaron E. Richardson, filed an appeal with the Board of Industrial Insurance Appeals on June 25, 2015, from an order of the Department of Labor and Industries dated June 23, 2015. In this order, the Department ended time-loss compensation benefits as paid through June 21, 2015, because the worker returned to work. This order is correct and is affirmed.

FINDINGS OF FACT

1. On September 16, 2015, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History in the Board record solely for jurisdictional purposes.

2. Aaron E. Richardson sustained an industrial injury on February 18, 2014, when he was working for Conco inside an elevator core. He tried to move a large hanging panel and his back popped. Mr. Richardson's claim was allowed. The injury resulted in treatment, including two surgeries and physical therapy, and time-loss compensation benefits were paid.

3. Conco, through its retrospective rating group, offered Mr. Richardson a transitional or light-duty job that was to begin on June 21, 2015. His work hours were to be 6:30 a.m. to 2:30 p.m., Monday through Friday, and the work was to be performed at a facility operated by Safety Educators in Tacoma, Washington. Mr. Richardson was to be paid his full salary with benefits while he participated in the training program.

4. The transitional work consisted of training, and a job analysis describing the physical activities had been provided to Mr. Richardson and his attending physician, who was provided with the information necessary to evaluate Mr. Richardson's ability to perform the work, and who agreed that Mr. Richardson could perform the physical activities required of the light-duty job.

5. Mr. Richardson's transitional work initially involved a comprehensive review of the DOSH safety regulations applicable to the construction industry. Following that review, other training programs may have included training for certification in CPR, first aid, and flagging, test preparation for a commercial driver's license, or reviewing the employer's safety manuals and blueprints. Mr. Richardson performed the work for one day and did not return.

6. The transitional job offer came from Conco, and constituted work with Conco, the employer of injury. The transitional work would have maintained the employment relationship between Mr. Richardson and Conco.

7. The transitional job offer was for work that was available and different than Mr. Richardson's usual duties. The work had a relationship to Mr. Richardson's employment at the time of the injury and provided a meaningful and respectful work environment.

CONCLUSIONS OF LAW

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

2. Conco's light-duty job offer to Mr. Richardson constituted a valid offer of transitional work within the meaning of RCW 51.32.090(4).

3. The order of the Department dated June 23, 2015, is correct and is affirmed.

Dated: January 11, 2017.

BOARD OF INDUSTRIAL INSURANCE APPEALS

LINDA L. WILLIAMS, Chairperson

JACK S. ENG, Member

DISSENT

Review should be denied. I agree with our industrial appeals judge that the "job" offered to Mr. Richardson did not constitute work within the meaning of the statute. The offer was also invalid because it did not come from his employer of injury, and because the "work" to be performed was not with the employer of injury.

According to the Department's interim policy concerning transitional job offers, the work offered must have "some relationship to the employment at the time of injury" and "should provide a meaningful and respectful work environment." Neither condition was met here.

Mr. Richardson, a journeyman carpenter, has never really worked anything but construction. In his 15 years or so of such work he had never before attended any training classes, and he had completed his GED only recently. The "job" offered to Mr. Richardson required him to sit in a classroom, from 6:00 a.m. until 2:30 p.m., and read a binder of **all** the safety regulations pertaining to the construction industry. Of course many of those regulations he was expected to study had

absolutely nothing to do with his duties as a carpenter and vertical foreman, and it is a sham to suggest that meaningful training was the goal of this program.

If not outright punishment for having been injured and in need of time-loss compensation benefits, this training for the sake of training was disrespectful of Mr. Richardson and in no way a meaningful or productive use of his time. And although the employer contends that abundant training opportunities were to be made available to him, no one ever discussed or informed him about any of them.

The offer is also invalid because it did not come from Mr. Richardson's employer of injury, Conco, and was not for work with the employer of injury. Both of these conditions are required by the statute. As Mr. Richardson argues, RCW 51.32.090(4) very clearly refers to offers from the employer of injury, and here the job offer came from AGC Retro, Conco's retrospective rating group. This Board has consistently held that a retro group is a separate entity from an employer within the retro group.[1] An offer by a retro group is not an offer by the employer of injury as required by the statute.

Further, the statute repeatedly refers to the transitional job as work with "the employer of injury."[2] Here, Mr. Richardson's job was to be performed with the Resource Center, not Conco. It was the employees of the Resource Center who took attendance, provided the training materials to Mr. Richardson, determined break and lunch periods, and supervised Mr. Richardson. No one from Conco was even on site.

Our judge correctly determined that the job offer here did not provide a meaningful or respectful work environment, and therefore did not constitute work. That decision is correct and I would affirm it.

January 11, 2017.

BOARD OF INDUSTRIAL INSURANCE APPEALS

FRANK E. FENNERTY, JR., Member

[1] See, *In re David Tapia-Fuentes,* BIIA Dec., 06 15128 (2007).
[2] RCW 51.32.090(4)(b).

Addendum to Decision and Order
In re Aaron E. Richardson
Docket No. 15 17069
Claim No. AV-16762

Appearances

Claimant, Aaron E. Richardson, by Small, Snell, Weiss & Comfort, P.S., per Richard E. Weiss

Employer, Conco & Conco Pumping, by Pratt Day & Stratton PLLC, per Gibby M. Stratton

Retrospective Rating Group, Associated General Contractors Retro #10636, by Pratt Day & Stratton, PLLC, per Gibby M. Stratton

Department of Labor and Industries, by The Office of the Attorney General, per Lionel Greaves IV

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 and Department filed timely Petitions for Review of a Proposed Decision and Order issued on August 24, 2016, in which the industrial appeals judge reversed and remanded the Department order dated June 23, 2015. On October 26, 2016, the claimant filed a Response to the Petitions for Review.