Murray, Lynnette (II)

TIME-LOSS COMPENSATION (RCW 51.32.090)

Provisional time-loss compensation (RCW 51.32.190(3) and RCW 51.32.210)

Provisional time-loss compensation must be paid despite the subsequent rejection of the claim. **….*In re Melvin Oshiro*, BIIA Dec., 67,112 (1985)** [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 85-2-068807.]**; *In re Lynnette Murray* (II), BIIA Dec., 42,296** [dissent] **(1974)** [*Editor's Note*: See later statutory amendment of RCW 51.32.240(2) allowing recovery of provisional time-loss overpayment where claim subsequently rejected.]

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: LYNNETTE A. MURRAY	**)**	**DOCKET NO. 42,296**
	)	
CLAIM NO. S-105979	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Lynnette A. Murray, by
Phillipps & Young, per
Kenneth Phillipps

Employer, Scott Paper Company, by
Bell, Ingram, Johnson & Level, per
Richard V. Johnson

Department of Labor and Industries, by
The Attorney General, per
Richard Roth, Assistant

This is an appeal filed by the self-insured employer, Scott Paper Company, on March 5, 1973, from an order of the Department of Labor and Industries dated February 20, 1973, which directed the employer to pay time-loss compensation to the claimant for the period from July 28, 1972 through November 6, 1972, in accordance with RCW 51.32.190. **SUSTAINED**.

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 by a hearing examiner for this Board on October 26, 1973, in which the order of the Department dated February 20, 1973 was reversed, and the above numbered claim remanded to the Department with direction that the Department set aside and hold for naught the said order.

This appeal raises solely a question of law, namely, whether the self-insured employer is required to pay time-loss compensation to the claimant for the period from July 28 to November 6, 1972, which period was prior to the Department's initial determinative order as to allowance or rejection of this claim. The Department's determinative order was entered on November 13, 1972, rejecting the claim on the ground that claimant's condition pre-existed her alleged injury of July 18, 1972, and was not related thereto.

The record adequately establishes the fact that the claimant was temporarily unable to work during the period from July 28 to November 6, 1972, due to pain and weakness involving her right arm, right shoulder, and neck. Her attending physician diagnosed her condition as a shoulder-hand

syndrome or thoracic outlet syndrome, and he actively treated this condition during the three-plus months here in issue. Due to improvement in the condition, the claimant was able to return to work on November 6, 1972.

We do not have before us in this case the question of whether or not the shoulder-hand syndrome which produced claimant's period of temporary total disability was caused by her alleged industrial injury of July 18, 1972, because no recognizable appeal was timely taken from the Department's rejection order of November 13, 1972, by the claimant or by any other party. Said order, finding no causal relationship between the condition and the July 18, 1972, alleged injury, has thus become final and res judicata.

In spite of this finality, must the employer pay the claimant time-loss compensation for the appropriate period prior to entry of the Department's determinative order, as a matter of law? The Department of course answered this question in the affirmative; the employer urges by this appeal, and the hearing examiner concluded in his proposed order, that such compensation need not legally be paid.

The resolution of this issue depends on the legislative intent embodied in certain 1971 and 1972 amendments to the Act (Sec. 47, Chap. 289, Laws of 1971 ex. sess., as amended by Sec. 25, Chap. 43, Laws of 1972 ex. sess.; and Sec. 26, Chap. 43, Laws of 1972 ex. sess.) which created two new sections in the law, now codified as RCW 51.32.190 and 51.32.210.

In determining the applicability of these new statutory provisions, some further brief recitation of the procedural history of this claim is necessary.

The claimant filed her claim for her shoulder-hand syndrome allegedly due to the industrial injury of July 18, 1972, on August 8, 1972. After some investigation, the self-insured employer on September 15, 1972 notified the claimant and the Department in writing, pursuant to RCW 51.32.190(1), of its denial of the claim and its reasons therefor. The Department, on the basis of information supplied by the employer and presumably further investigation, the exact nature or extent of which is not clearly disclosed by the record, issued its order on November 13, 1972, rejecting the claim on the ground that claimant's condition was not related to the alleged injury. At some time thereafter (exact time not disclosed herein), the claimant contacted the Department and complained that the employer had not paid her time-loss compensation for the period from July 28 to November 6, 1972, when she was off work due to her shoulder-hand syndrome condition, which period was of course prior to the date of the Department's determinative order on the claim. After

reviewing the matter, the Department then entered its order of February 20, 1973, from which the employer filed the instant appeal, directing the employer to pay claimant time-loss compensation "for the period of 7/28/72 through 11/6/72 in accordance with Section 51.32.190 of the Workmen's Compensation Act."

For reasons hereafter expressed, we are convinced that the Department's order is correct and should be sustained, on the basis of what we understand to be the basic legislative intent of the two new statutory sections. RCW 51.32.190 relates to prompt action on new claims and payment of temporary disability compensation in self-insured cases, and RCW 51.32.210 relates to prompt action on new claims and payment of temporary disability compensation in Department-insured cases.

RCW 51.32.190, as pertinent to this case, provides:

> "(1) If the self-insurer denies a claim for compensation, written notice of such denial, clearly informing the claimant of the reasons therefor and that the director will rule on the matter shall be mailed or given to the claimant and the director within seven days after the self-insurer has notice of the claim.
>
> (2) Until such time as the department has entered an order in a disputed case acceptance of compensation by the claimant shall not be considered a binding determination of his rights under this title. Likewise the payment or compensation shall not be considered a binding determination of the obligations of the self-insurer as to future compensation payments.
>
> (3) Upon making the first payment of income benefits, and upon stopping or changing of such benefits except where a determination of the permanent disability has been made as elsewhere provided in this title, the self-insurer shall immediately notify the director in accordance with a form to be prescribed by the director that the payment of income benefits has begun or has been stopped or changed. Where temporary disability compensation is payable, the first payment thereof shall be made within fourteen days after notice of claim and shall continue at regular semimonthly or biweekly intervals.
>
> (4) If, after the payment of compensation without an award, the self-insurer elects to controvert the right to compensation, the payment of compensation shall not be considered a binding determination of the obligations of the self-insurer as to future compensation payments. The acceptance of compensation by the workman or his beneficiaries shall not be considered a binding determination of their rights under this title.
>
> (5) The director (a) may, upon his own initiative at any time in a case in which payments are being made without an award, and (b) shall, upon

> receipt of information from any person claiming to be entitled to compensation, from the self-insurer, or otherwise that the right to compensation is controverted, or that payment of compensation has been opposed, stopped or changed, whether or not claim has been filed, promptly make such inquiry as circumstances require, cause such medical examinations to be made, hold such hearings, require the submission of further information, make such orders, decisions or awards, and take such further action as he considers will properly determine the matter and protect the rights of all parties." (Emphasis supplied)
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> RCW 51.32.210 provides:
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> "Claims of injured workmen of employers who have secured the payment of compensation by insuring with the department shall be promptly acted upon by the department. Where temporary disability compensation is payable, the first payment thereof shall be mailed within fourteen days after receipt of the claim at the department's offices in Olympia and shall continue at regular semimonthly intervals. The payment of this or any other benefits under this title, prior to the entry of an order by the department in accordance with RCW 51.52.050 as now or hereafter amended, shall be not considered a binding determination of the obligations of the department under this title. The acceptance of compensation by the workman or his beneficiaries prior to such order shall likewise not be considered a binding determination of their rights under this title." (Emphasis supplied)

Clearly, the overriding object of these statutes is to promote prompt determinative initial action as to allowance or rejection of claims, on all claims filed by workmen under the law -- prompt action by both the self-insurer and the Department in self-insured cases, and prompt Departmental action in Department-insured cases. Especially is prompt action important in the cases where temporary total disability is involved. Thus, to make the objective effective, the "14-day law" was adopted, to require commencement of payment of time-loss compensation within that period of time after notice of the claim.

Furthermore, when this 14-day requirement is considered in conjunction with all the other language in these statutes, it is clear that, if in fact there is temporary total disability due to a physical condition allegedly industrially caused, compensation for it must be paid, until a determinative initial order is entered by the Department. This, in our opinion, is the obvious intent of these statutes when viewed in their entirety. If the intent were otherwise, there would be no need for the portions of the statutes providing that payment by the self-insurer or the Department, as the case may be, and acceptance by the claimant of such compensation, prior to the entry of a

determinative order, is not a "binding determination" of their respective rights and obligations under the Act. Clearly such payments are contemplated, or the statute would not have to provide for their non-binding nature. The "binding determination" on allowance or rejection of the claim must be a determinative order entered by the Department which complies with the requirements for a "final" order as set forth in RCW 51.52.050. Thus, until said determinative order on allowance or rejection is entered, the Department or self-insurer, as the case may be, must comply with the "14-day" provision and pay time-loss compensation to the claimant for whatever period prior to said order that he is in fact temporarily totally disabled due to the condition for which the claim was filed. Once such a determinative order is entered, of course, whether it is to allow or to reject, which then is challenged by way of an appeal by the employer or the claimant, as the case may be, there is no requirement to continue any payments while the issue of allowance is being litigated to a final conclusion before this Board or the courts.

The reason for this new kind of statutory requirement appears to be a very practical one, namely, that when a workman is rendered temporarily unable to work because of a physical condition caused, or alleged to be caused, by his employment, there is usually an urgent economic need for prompt payment of temporary disability compensation as wage replacement. The lawmakers have apparently decided that this social need outweighs the wisdom of the previous practice that under no circumstances would any compensation be paid until a determinative administrative decision was made that liability existed. That practice would produce economic hardship for a claimant while awaiting the Department's administrative decision on whether or not to accept the claim.

A consequence of this new statutory approach to forcing prompt administrative determinations on allowance or rejection of claims is that in a few cases the claimant will have received some time-loss compensation where it is later finally determined, by administrative or judicial decision, that the claim should be rejected and no benefits payable. The instant case is an example of this possible result. However, this very consequence points up the effectiveness of the statute in achieving its purpose, i.e., it should cause all people involved in administering the system to see to it that the Department's initial determinative order on allowance or rejection is entered promptly -- within 14 days whenever possible.

This whole question of possible erroneous "pre-payment" of compensation in some cases can easily be rendered completely moot in any case -- namely, by adhering to the expressed

legislative intent that the Department's determinative order as to claim allowance or rejection be issued promptly, by assuring that the same is issued within 14 days after receipt of the claim. In view of the substantial investigative staffs and information-gathering facilities possessed both by self-insurers and by the Department, it clearly cannot be said that 14 days is an unreasonable period of time within which to expect such a determination.

These observations negate the arguments which might be made that compensation might have to be paid in some cases for a disability which is immediately obvious as being unrelated to a person's employment, or might have to be paid for a long time for a disability which is finally adjudicated to be non-industrial. These situations simply will not happen. Of course, it is recognized that occasional claims will raise more complex problems, so that the initial investigative period in some claims will exceed 14 days. As to such cases, the legislature has simply said that the economic burden of any delayed initial determination be placed on the workmen's compensation system, rather than on the temporarily disabled claimant or other social welfare or insurance program.

In the instant case, a period of three months transpired between notice of claim and the Department's determinative rejection order. Our record does not disclose the reasons for this delay. However, it would appear that all necessary information was available to be investigated and obtained in the 14 days following claimant's filing of her claim on August 8, 1972. Indeed, the Legislature has declared that a self-insurer must give written notice of its denial of a claim, with reasons therefor, within seven days after notice of it (RCW 51.32.190(1)), thus indicating that seven days is deemed to be sufficient time for a self-insurer to gather all its information on whether or not an injury did occur. The whole controversy raised by this particular appeal would not have arisen if there had been an expeditious gathering of the available information immediately after August 8, 1972, so that the employer's notice of denial could have been issued by August 15 rather than September 15, and the Department's determinative order could have been entered by August 22 rather than November 13.

As support for our legal conclusion, we need look no further than to our neighboring state of Oregon. The Oregon workmen's compensation law, in ORS Sec. 656.262, has provisions very similar to our applicable statutory sections; including requirements for prompt payments of compensation (subsection 2 of ORS 656.262) until denial of the claim is formally made (per subsection 6); the requirement for paying compensation within 14 days after notice of the claim and

at least biweekly thereafter (subsection 4); and the provision that "merely paying or providing compensation shall not be considered acceptance of a claim or an admission of liability." (Subsection 7).

We are not aware of any decision by the Oregon appellate courts in which the question here before us was squarely presented. However, the case of Logan v. Boise Cascade Corp., 5 Or. App. 636, 485 P.2d 441, (1971) is significant. Although the exact holding in that case was concerned with whether or not a statute of limitations operated as a bar to the claim, the Court did observe that initial payment of compensation did not, in view of the provisions of ORS 656.262(7), prevent the employer from later contesting the claim on its merits. This language is certainly pertinent to the instant case, where the question of final rejection of the claim has been laid to rest, in spite of the statutorily-required payment of some time-loss compensation.

There are actually no contested factual matters in the instant appeal, and the pertinent facts and procedural history of the case have been heretofore set out. Reiteration of those matters in the form of formal findings of fact is therefore unnecessary. RCW 51.52.106.

The Board concludes from the facts, as a matter of law, that the Department's order of February 20, 1973, in Claim No. S-105979, directing the self-insured employer, Scott Paper Company, to pay the claimant time-loss compensation for the period from July 28, 1972 through November 6, 1972, is correct. Said order should be sustained.

It is so ORDERED.

Dated this 6th day of November, 1974.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
PHILLIP T. BORK Chairman

/s/_____
SAM KINVILLE Member

DISSENTING OPINION

The claimant in this case is an employee of Scott paper Company; Scott Paper Company being a self-insurer under the appropriate provisions of the Act. The record before us indicates that the employee-claimant filed a claim of industrial injury on August 8, 1972, the date of alleged injury being July 18, 1972. On September 15, 1972, the employer denied the claim. It is observed that the first paragraph of RCW 51.32.190 requires the self-insurer to rule upon such a matter within

seven days after the self-insurer has notice of the claim and this requirement of the statute was not complied with.

On November 13, 1972, the Department issued an order rejecting the claim on the ground that claimant's condition was not related to this alleged injury. That order was not appealed from by any party, and has become final.

On February 20, 1973, the Department issued an order directing the employer to pay time-loss compensation to the claimant for the period from July 28, 1972 through November 6, 1972, in accordance with RCW 51.32.190. The employer filed the instant appeal from said Department order.

The majority of the Board has elected to sustain the Department's order on the ground that the provisions of RCW 51.32.190 require the employer to pay time-loss in a situation of this nature. The final sentence of RCW 51.32.190(3) reads as follows:

> " . . . Where temporary disability compensation is payable, the first payment thereof shall be made within fourteen days after notice of claim and shall continue at regular semimonthly or biweekly intervals."

In the opinion of the majority, the intent of the provisions of RCW 51.32.190 make it mandatory to pay time-loss, if in fact there is temporary total disability due to a physical condition allegedly industrially caused, until the entry of a determinative initial order as to whether or not there was an insured injury under the Act.

I disagree with this view. It is observed that the portion of the statute quoted above reads "Where temporary disability compensation is payable", and to my mind these words connote a situation where a true injury under the Act has occurred and further there has been evidence of temporary total disability due to that eligible injury. In the case before us, we have a factual pattern where the Department of Labor and Industries has actually rejected the claim but nevertheless has directed the employer to pay time loss for a time interval prior to the time that the Department issued its final order rejecting the claim.

To me, it is patently incongruous that the Department would on the one hand reject the claim and on the other hand direct a self-insured employer to pay time-loss compensation for a condition which was determined not to be a compensable injury under the Act. In this particular case, there is not, and legally cannot be, a determination that there was an injury covered by the Act, and thus the employee cannot be properly classified as temporarily and totally disabled due to the incident

complained of. I refer to Franks v. Department of Labor & Industries, 35 Wn.2d 763, and Stampas v. Department of Labor & Industries, 38 Wn.2d 48.

In my opinion, the action of the Department in this case requiring the employer to pay time loss regardless of whether or not there was an injury under the Act amounts to a violation of that portion of the 14th Amendment to the Constitution of the United States which provides in part that "nor shall any state deprive any person of life, liberty or property without due process of law."

I would reverse and set aside the Department's order of February 20, 1973. Thus, I am unable to concur in the Board's majority opinion, and I hereby dissent therefrom.

Dated this 6th day of November, 1974.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
R.M. GILMORE Member