

Howe, Jeff

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 was not payable for the period prior to the filing of the claim where the worker delayed filing the accident report until after he had returned to work, the employer contested the claim promptly, and the claim was ultimately rejected.*In re Jeff Howe*, BIIA Dec., 67,308 (1985)

Scroll down for order.

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

1 **IN RE: JEFF LEE HOWE**)
2)
3 **CLAIM NO. S-625032**)
4)
 DOCKET NO. 67,308
 DECISION AND ORDER

5 APPEARANCES:

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7 Claimant, Jeff Lee Howe, Pro se
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9 Employer, Twin City Foods, Inc., by
10 Gavin, Robinson, Kendrick, Redman and Mays, Inc., P.S., per
11 J. Thomas Carrato and Steven Woods
12
13 Department of Labor and Industries, by
14 The Attorney General, per
15 Laurie F. Connelly and Lani-Kai Swanhart, Assistants

16 This is an appeal filed by the self-insured employer on March 23, 1984 from an order of the
17 Department of Labor and Industries dated March 12, 1984, which adhered to an order dated January
18 25, 1984, rejecting the claim and ordering that time-loss compensation be paid to the claimant "as
19 medically certified up to the date of this order." **REVERSED AND REMANDED.**

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22 **DECISION**

23 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
24 and decision on a timely Petition for Review filed by the employer to a Proposed Decision and Order
25 issued on February 6, 1985, in which the order of the Department dated March 12, 1984 was affirmed.

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27 The chronological facts in this matter were stipulated by the parties, and are not in dispute.

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29 The claimant allegedly sustained an injury on October 21, 1983 while employed by Twin City
30 Foods. He was off work until November 10, 1983, as of which date his doctor certified his ability to
31 return to work. He actually returned to work on November 14, 1983 and on that date filled out and
32 filed with the self-insured employer an accident report alleging his injury to be industrially related. On
33 November 17, 1983 the employer sent the accident report, a copy of the doctor's progress notes, and
34 the doctor's letter report of November 9, 1983, along with a request for denial of the claim (SIF # 4) to
35 the Department, where it was received on November 21, 1983. Two months later, on January 25,
36 1984, the Department issued an order rejecting the claim for the reason that there was no proof of a
37 specific injury at a definite time and place in the course of employment. That order also directed the
38 self-insured employer to pay the claimant time-loss compensation for the 19 days (October 22 through
39 November 9, 1983) he was off work due to the condition allegedly industrially related.
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1 Mr. Howe did not appeal the Department order rejecting his claim, and sixty days after the
2 issuance of that order it became res judicata that no industrial injury had occurred, and therefore none
3 of the benefits of the Industrial Insurance Act were due to the claimant. Given the foregoing facts, the
4 issue presented by this appeal may be stated as follows:
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7 "Is a self-insured employer required to pay time-loss compensation on a
8 provisional basis where the employee does not file an accident report and
9 notice of claim until after returning to work, the employer timely files a
10 request for denial of the claim supported by sufficient accompanying
11 information upon which to base a denial, and the claim is subsequently
12 rejected by the Department of Labor and Industries for the reason that
13 there was no industrial injury?"
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15 Our holding in this case is limited to that specific issue.

16 It is well established that the right to benefits under the Industrial Insurance Act requires at least
17 a prima facie showing of a work-related injury or condition. Under the statutory provisions of RCW
18 51.32.060 and RCW 51.32.090, a claimant is entitled to temporary total disability payments when the
19 supervisor of industrial insurance has determined that such disability results from an industrial injury.
20 Provisional time-loss compensation, however, is not predicated upon the eventual validity of the
21 underlying claim, but upon the failure to adjudicate the claim within 14 days after "notice of claim." The
22 purpose, of course, in requiring such compensation is to enforce expeditious initial adjudication of
23 contested claims where the claimant is temporarily disabled and without wages. The statutory
24 requirement that provisional time-loss compensation be paid must be evaluated separately from the
25 question of a claimant's ultimate "rightful entitlement" to benefits under the Act.
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32 This statutory requirement is contained in RCW 51.32.190. Sections pertinent to this question
33 are:
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- 35 "(1) If the self-insurer denies a claim for compensation, written notice of such
36 denial, clearly informing the claimant of the reasons therefor and that the
37 director will rule on the matter shall be mailed or given to the claimant and
38 the director within thirty days after the self-insurer has notice of the claim.
- 39 (2) Until such time as the Department has entered an order in a disputed case
40 acceptance of compensation by the claimant shall not be considered a
41 binding determination of his or her rights under this title. Likewise the
42 payment of compensation shall not be considered a binding determination
43 of the obligations of the self-insurer as to future compensation payments.
- 44 (3) Where temporary disability compensation is payable, the first payment
45 thereof shall be made within fourteen days after notice of claim and shall
46 continue at regular semimonthly or biweekly intervals.
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1 (4) If, after the payment of compensation without an award, the self-insurer
2 elects to controvert the right to compensation, the payment of
3 compensation shall not be considered a binding determination of the
4 obligations of the self-insurer as to future compensation payments. The
5 acceptance of compensation by the worker or his or her beneficiaries shall
6 not be considered a binding determination of their rights under this title."

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8 In addition, RCW 51.32.210 applies to state fund claims, and it provides:

9 "Claims of injured workers of employers who have secured the payment of
10 compensation by insuring with the Department shall be promptly acted
11 upon by the Department. Where temporary disability compensation is
12 payable, the first payment thereof shall be mailed within fourteen days
13 after receipt of the claim at the Department's offices in Olympia and shall
14 continue at regular semimonthly intervals. (The same language is
15 contained with respect to lack of binding determinations as to obligations
16 and rights, as is contained in RCW 51.32.190)".
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18 There are no rules promulgated by the Department respecting the payment of time-loss compensation
19 except those contained in WAC 296-15, the self-insurance rules and regulations. WAC 296-15-070(2)
20 reiterates the statutory 30-day requirement as to a self-insurer's notice of denial of a claim, and
21 requires the self-insurer to send to the Department with such notice all the information upon which the
22 denial is based.
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25 The clear intent of RCW 51.32.210 must be to require the Department to make a prompt
26 determination of eligibility under the Act. If the Department does not make such a determination within
27 14 days following receipt of the claim, it stands to reason that the claimant should not be penalized by
28 the Department's inability to promptly adjudicate the claim, and time-loss compensation should be paid
29 to the claimant in order to avoid financial hardship. In effect, a failure of the Department to act within
30 14 days is a "provisional" determination that total disability (medically supported, of course) did follow
31 from the claimed injury.
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36 RCW 51.32.190 requires a notification to the employee and the Department, with supporting
37 documentation to the Department, if a denial of claim is made by a self-insured employer. The 14-day
38 requirement in Subsection (3) of this section obviously puts the same burden upon the employer as
39 upon the Department to promptly act upon a claim made by an employee. Clearly, the same result of
40 delayed action by a self-insured employer (whether as a result of time consumed in investigation or
41 mere failure to promptly act) should likewise result in the payment of time-loss compensation after the
42 14-day period on a "provisional" basis. Once started, the time-loss compensation should continue
43 until such time as the Department issues its determinative order of allowance or rejection. See the
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1 prior decisions of this Board in Lynnette A. Murray, Docket No. 42,296 (1974), and Sandra L. Walster,
2 Docket No. 43,049 (1973).
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4 The question was before us again in Melvin Oshiro, Docket No. 67,112 (1985). There, we
5 pointed out that the delay by the Department in adjudicating a denial requested by a self-insured
6 employer was due in substantial measure to the employer's own claim service representative. In
7 Oshiro, the employer's request for denial did not even reach the Department within 14 days of the
8 employer's notice of claim; furthermore, it was not accompanied by any report or records of the
9 attending physician. Such records were not received by the Department until three and one-half
10 months after the claim had been filed with the employer. We held, in Oshiro, that the self-insured
11 employer was responsible for paying provisional time-loss compensation until a determinative order on
12 allowance or rejection was issued by the Department.
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18 In the instant case the facts differ from those of the three cases previously cited. In this case the
19 self-insured employer had provided the Department, within seven days, a notice and request for denial
20 and the accompanying information upon which such request was based. The ultimate order of the
21 Department rejecting the claim was based upon this information. The employer had carefully adhered
22 to all of the requirements contained in the law and the rules, both as to timeliness of action, and the
23 proper material provided to the Department.
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27 It should further be noted that in the instant case the claimant did not file his application for
28 benefits until after he had returned to work, almost a month after the date of his alleged injury. The
29 Department's Workers' Compensation Manual at page C-22 states: "Where a determination of claim
30 allowance or rejection cannot be immediately made (normally because insufficient time is available to
31 substantiate either action), the Department or the self-insured employer is required to make
32 provisional payments of time-loss compensation where medically certified disability is present." It
33 continues, ". . . Where a claim is filed a significant period time (more than one month as a rule) after
34 the onset of disability, provisional payments will normally not be made retroactively for this period
35 unless the claim is ultimately accepted."
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40 The clear intent of "provisional" time-loss compensation is to prevent undue financial hardship to
41 a claimant, while he is temporarily without income. The economic burden of any delay in adjudicating
42 the eligibility of a claimant should fall upon the workers' compensation system and not upon the
43 claimant; and we have so held in interpreting the intent of RCW 51.32.190 and 51.32.210 in our
44 previously-cited cases. However, where the injured worker has returned to work before filing his
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1 application for benefits, this consideration is of much less importance, since the worker does not have
2 a continued loss of earning power. If a claim is ultimately allowed under these circumstances, the
3 claimant will retroactively receive the time-loss compensation to which he is entitled for the time of
4 disability. If the Department ultimately issues an order rejecting the claim (based upon a self-insured
5 employer's timely request for denial, accompanied by sufficient information upon which to reject the
6 claim) the claimant should not then be entitled to the "windfall" of receiving time-loss compensation for
7 what has been determined to be a non-industrial injury.
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11 It has been suggested that self-insured employers would use RCW 51.32.190 to deny claims for
12 specious reasons, thereby avoiding the payment of time-loss compensation to injured employees.
13 This, of course, cannot happen since a request for denial must be accompanied by sufficient
14 information upon which to base a denial of the claim before the Department can adjudicate the
15 question. Failure to provide such information results in the "provisional" allowance of the claim, and
16 the institution of time-loss compensation after 14 days. Furthermore, if the request for rejection is filed
17 for a specious reason the self-insured employer becomes liable for a 25% penalty, in addition to
18 having to pay the time-loss compensation to which an injured employee was entitled.
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22 In summary, we have held in previous cases that a self-insured employer is required to act upon
23 claims promptly, and where prompt action is not taken for any reason, to pay time-loss compensation
24 on a provisional basis to prevent financial hardship to the claimant. We hold, in the instant case, that
25 where an application for benefits is filed after the claimant has returned to work, and the self-insured
26 employer files a timely request for denial of the claim, accompanied by all information necessary to
27 support the request, and the Department ultimately rejects the claim based upon that information and
28 such rejection becomes final, the self-insured employer is not required to pay time-loss compensation.
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34 **FINDINGS OF FACT**

- 35 1. On November 14, 1983 the self-insured employer, Twin City Foods,
36 received a report of accident and notice of claim from the claimant, Jeff
37 Lee Howe, alleging an injury occurring on October 21, 1983 while in the
38 employ of said employer. On November 17, 1983 the self-insured
39 employer sent a notice of denial of claim to the Department, accompanied
40 by the accident report, and copies of all information and reports from the
41 claimant's doctor. This material was received by the Department on
42 November 21, 1983. On January 25, 1984 the Department issued an
43 order rejecting the claim for the reasons that there was no proof of an
44 injury at a definite time and place in the course of employment, that the
45 claimant's condition was not the result of an industrial injury as defined by
46 the industrial insurance laws, and that the claimant's condition was not an
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1 occupational disease as contemplated by RCW 51.08.140. It also ordered
2 that time-loss compensation be paid to the claimant as medically certified
3 up to the date of the order. The claimant filed a protest on February 6,
4 1984. On March 12, 1984 the Department issued an order adhering to the
5 order of January 25, 1984. On March 23, 1984 the self-insured employer
6 filed a notice of appeal with the Board of Industrial Insurance Appeals. On
7 April 17, 1984 the Board issued an order granting the appeal.
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- 10 2. The claimant was released by his attending physician on November 9,
11 1983, to return to work on November 10, 1983, but did not actually return
12 to work until November 14, 1983, on which date he filed his notice of claim
13 with the employer.
- 14 3. Within 14 days of the date of receiving notice of the claimant's application
15 for benefits, the self-insured employer provided to the Department of
16 Labor and Industries a notice of denial of the claim, and all information
17 upon which the notice and request for denial was based; and the
18 Department's subsequent claim rejection was based upon such
19 information.

20 CONCLUSIONS OF LAW

- 21 1. The Board of Industrial Insurance Appeals has jurisdiction of the subject
22 matter and the parties to this appeal.
- 23 2. The claimant, Jeff Lee Howe, did not sustain an industrial injury on
24 October 21, 1983, within the purview of the Workers' Compensation Act,
25 and the Department's rejection of this claim became final.
- 26 3. The order of the Department dated March 12, 1984, adhering to the order
27 of January 25, 1984, is incorrect in ordering that time-loss compensation
28 be paid as medically certified up to the date of the order.
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30 ORDER

31 Now, therefore, it is hereby ORDERED that the order of the Department of Labor and Industries
32 dated March 12, 1984 is reversed in part, and this matter is remanded to the Department with
33 instructions to set aside that portion of the order of March 12, 1984 requiring the self-insured employer
34 to pay time-loss compensation to the claimant under this claim.
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36 It is so ORDERED.

37 Dated this 16th day of September, 1985.

38 BOARD OF INDUSTRIAL INSURANCE APPEALS

39 /s/ _____
40 MICHAEL L. HALL Chairperson

41 /s/ _____
42 PHILLIP T. BORK Member