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

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

APPEARANCES:

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

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

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 employer to a Proposed Decision and Order
issued on February 6, 1985, in which the order of the Department dated March 12, 1984 was affirmed.

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

The claimant allegedly sustained an injury on October 21, 1983 while employed by Twin City
Foods. He was off work until November 10, 1983, as of which date his doctor certified his ability to
return to work. He actually returned to work on November 14, 1983 and on that date filled out and
filed with the self-insured employer an accident report alleging his injury to be industrially related. On
November 17, 1983 the employer sent the accident report, a copy of the doctor's progress notes, and
the doctor's letter report of November 9, 1983, along with a request for denial of the claim (SIF # 4) to
the Department, where it was received on November 21, 1983. Two months later, on January 25,
1984, the Department issued an order rejecting the claim for the reason that there was no proof of a
specific injury at a definite time and place in the course of employment. That order also directed the
self-insured employer to pay the claimant time-loss compensation for the 19 days (October 22 through
November 9, 1983) he was off work due to the condition allegedly industrially related.
Mr. Howe did not appeal the Department order rejecting his claim, and sixty days after the issuance of that order it became res judicata that no industrial injury had occurred, and therefore none of the benefits of the Industrial Insurance Act were due to the claimant. Given the foregoing facts, the issue presented by this appeal may be stated as follows:

"Is a self-insured employer required to pay time-loss compensation on a provisional basis where the employee does not file an accident report and notice of claim until after returning to work, the employer timely files a request for denial of the claim supported by sufficient accompanying information upon which to base a denial, and the claim is subsequently rejected by the Department of Labor and Industries for the reason that there was no industrial injury?"

Our holding in this case is limited to that specific issue.

It is well established that the right to benefits under the Industrial Insurance Act requires at least a prima facie showing of a work-related injury or condition. Under the statutory provisions of RCW 51.32.060 and RCW 51.32.090, a claimant is entitled to temporary total disability payments when the supervisor of industrial insurance has determined that such disability results from an industrial injury. Provisional time-loss compensation, however, is not predicated upon the eventual validity of the underlying claim, but upon the failure to adjudicate the claim within 14 days after "notice of claim." The purpose, of course, in requiring such compensation is to enforce expeditious initial adjudication of contested claims where the claimant is temporarily disabled and without wages. The statutory requirement that provisional time-loss compensation be paid must be evaluated separately from the question of a claimant's ultimate "rightful entitlement" to benefits under the Act.

This statutory requirement is contained in RCW 51.32.190. Sections pertinent to this question are:

"(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 thirty 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 or her rights under this title. Likewise the payment of compensation shall not be considered a binding determination of the obligations of the self-insurer as to future compensation payments.

(3) 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."
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 worker or his or her beneficiaries shall not be considered a binding determination of their rights under this title."

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

"Claims of injured workers 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 same language is contained with respect to lack of binding determinations as to obligations and rights, as is contained in RCW 51.32.190)".

There are no rules promulgated by the Department respecting the payment of time-loss compensation except those contained in WAC 296-15, the self-insurance rules and regulations. WAC 296-15-070(2) reiterates the statutory 30-day requirement as to a self-insurer's notice of denial of a claim, and requires the self-insurer to send to the Department with such notice all the information upon which the denial is based.

The clear intent of RCW 51.32.210 must be to require the Department to make a prompt determination of eligibility under the Act. If the Department does not make such a determination within 14 days following receipt of the claim, it stands to reason that the claimant should not be penalized by the Department's inability to promptly adjudicate the claim, and time-loss compensation should be paid to the claimant in order to avoid financial hardship. In effect, a failure of the Department to act within 14 days is a "provisional" determination that total disability (medically supported, of course) did follow from the claimed injury.

RCW 51.32.190 requires a notification to the employee and the Department, with supporting documentation to the Department, if a denial of claim is made by a self-insured employer. The 14-day requirement in Subsection (3) of this section obviously puts the same burden upon the employer as upon the Department to promptly act upon a claim made by an employee. Clearly, the same result of delayed action by a self-insured employer (whether as a result of time consumed in investigation or mere failure to promptly act) should likewise result in the payment of time-loss compensation after the 14-day period on a "provisional" basis. Once started, the time-loss compensation should continue until such time as the Department issues its determinative order of allowance or rejection. See the
prior decisions of this Board in Lynnette A. Murray, Docket No. 42,296 (1974), and Sandra L. Walster, Docket No. 43,049 (1973).

The question was before us again in Melvin Oshiro, Docket No. 67,112 (1985). There, we pointed out that the delay by the Department in adjudicating a denial requested by a self-insured employer was due in substantial measure to the employer's own claim service representative. In Oshiro, the employer's request for denial did not even reach the Department within 14 days of the employer's notice of claim; furthermore, it was not accompanied by any report or records of the attending physician. Such records were not received by the Department until three and one-half months after the claim had been filed with the employer. We held, in Oshiro, that the self-insured employer was responsible for paying provisional time-loss compensation until a determinative order on allowance or rejection was issued by the Department.

In the instant case the facts differ from those of the three cases previously cited. In this case the self-insured employer had provided the Department, within seven days, a notice and request for denial and the accompanying information upon which such request was based. The ultimate order of the Department rejecting the claim was based upon this information. The employer had carefully adhered to all of the requirements contained in the law and the rules, both as to timeliness of action, and the proper material provided to the Department.

It should further be noted that in the instant case the claimant did not file his application for benefits until after he had returned to work, almost a month after the date of his alleged injury. The Department's Workers' Compensation Manual at page C-22 states: "Where a determination of claim allowance or rejection cannot be immediately made (normally because insufficient time is available to substantiate either action), the Department or the self-insured employer is required to make provisional payments of time-loss compensation where medically certified disability is present." It continues, "... Where a claim is filed a significant period time (more than one month as a rule) after the onset of disability, provisional payments will normally not be made retroactively for this period unless the claim is ultimately accepted."

The clear intent of "provisional" time-loss compensation is to prevent undue financial hardship to a claimant, while he is temporarily without income. The economic burden of any delay in adjudicating the eligibility of a claimant should fall upon the workers' compensation system and not upon the claimant; and we have so held in interpreting the intent of RCW 51.32.190 and 51.32.210 in our previously-cited cases. However, where the injured worker has returned to work before filing his
application for benefits, this consideration is of much less importance, since the worker does not have
a continued loss of earning power. If a claim is ultimately allowed under these circumstances, the
claimant will retroactively receive the time-loss compensation to which he is entitled for the time of
disability. If the Department ultimately issues an order rejecting the claim (based upon a self-insured
employer's timely request for denial, accompanied by sufficient information upon which to reject the
claim) the claimant should not then be entitled to the "windfall" of receiving time-loss compensation for
what has been determined to be a non-industrial injury.

It has been suggested that self-insured employers would use RCW 51.32.190 to deny claims for
specious reasons, thereby avoiding the payment of time-loss compensation to injured employees.
This, of course, cannot happen since a request for denial must be accompanied by sufficient
information upon which to base a denial of the claim before the Department can adjudicate the
question. Failure to provide such information results in the "provisional" allowance of the claim, and
the institution of time-loss compensation after 14 days. Furthermore, if the request for rejection is filed
for a specious reason the self-insured employer becomes liable for a 25% penalty, in addition to
having to pay the time-loss compensation to which an injured employee was entitled.

In summary, we have held in previous cases that a self-insured employer is required to act upon
claims promptly, and where prompt action is not taken for any reason, to pay time-loss compensation
on a provisional basis to prevent financial hardship to the claimant. We hold, in the instant case, that
where an application for benefits is filed after the claimant has returned to work, and the self-insured
employer files a timely request for denial of the claim, accompanied by all information necessary to
support the request, and the Department ultimately rejects the claim based upon that information and
such rejection becomes final, the self-insured employer is not required to pay time-loss compensation.

**FINDINGS OF FACT**

1. On November 14, 1983 the self-insured employer, Twin City Foods, received a report of accident and notice of claim from the claimant, Jeff Lee Howe, alleging an injury occurring on October 21, 1983 while in the employ of said employer. On November 17, 1983 the self-insured employer sent a notice of denial of claim to the Department, accompanied by the accident report, and copies of all information and reports from the claimant's doctor. This material was received by the Department on November 21, 1983. On January 25, 1984 the Department issued an order rejecting the claim for the reasons that there was no proof of an injury at a definite time and place in the course of employment, that the claimant's condition was not the result of an industrial injury as defined by the industrial insurance laws, and that the claimant's condition was not an
occupational disease as contemplated by RCW 51.08.140. It also ordered that time-loss compensation be paid to the claimant as medically certified up to the date of the order. The claimant filed a protest on February 6, 1984. On March 12, 1984 the Department issued an order adhering to the order of January 25, 1984. On March 23, 1984 the self-insured employer filed a notice of appeal with the Board of Industrial Insurance Appeals. On April 17, 1984 the Board issued an order granting the appeal.

2. The claimant was released by his attending physician on November 9, 1983, to return to work on November 10, 1983, but did not actually return to work until November 14, 1983, on which date he filed his notice of claim with the employer.

3. Within 14 days of the date of receiving notice of the claimant's application for benefits, the self-insured employer provided to the Department of Labor and Industries a notice of denial of the claim, and all information upon which the notice and request for denial was based; and the Department's subsequent claim rejection was based upon such information.

**CONCLUSIONS OF LAW**

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

2. The claimant, Jeff Lee Howe, did not sustain an industrial injury on October 21, 1983, within the purview of the Workers' Compensation Act, and the Department's rejection of this claim became final.

3. The order of the Department dated March 12, 1984, adhering to the order of January 25, 1984, is incorrect in ordering that time-loss compensation be paid as medically certified up to the date of the order.

**ORDER**

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

It is so ORDERED.

Dated this 16th day of September, 1985.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/  
MICHAEL L. HALL  Chairperson

/s/  
PHILLIP T. BORK  Member