

Billings, Mark

TIME-LOSS COMPENSATION (RCW 51.32.090)

No presumption of continued eligibility

Determinations that the worker was temporarily totally disabled for periods immediately prior and subsequent to the period for which time-loss compensation is claimed create no presumption that the worker was temporarily totally disabled during the interim period.

...*In re Mark Billings*, BIA Dec., 70 883 (1986)

Scroll down for order.

1 no claim for time loss compensation or loss of earning power benefits for the period January 24, 1979
2 through October 27, 1980.
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4 The claimant testified to his physical limitations and the job requirements of the various jobs he
5 has held. He believed that because of his disability he could not have performed any of those jobs at
6 an efficient level during the period October 1980 to February 1984. He further testified that his
7 condition during that period was the same as it was during earlier periods of time during which he
8 received time loss compensation. The claimant also presented the testimony of George Billings, his
9 father, who as president and manager of Northwest Drywall Supply was also familiar with the job
10 requirements of the types of positions his son has held. He testified that to his knowledge his son was
11 not employed during the period 1980 to 1984. He also described his personal observations of his
12 son's restricted use of his right leg.
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18 The claimant did not present any medical evidence in support of his claim for benefits, and after
19 presenting the above lay testimony indicated that he did not intend to present further evidence.
20 Satisfied that the claimant had failed to establish a prima facie case, the Department chose not to
21 present any evidence.
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24 To establish a permanent inability to perform gainful employment, the claimant must present
25 medical testimony, Weinheimer v. Department Labor and Industries, 8 Wn 2d. 14 (1941); Johnson v.
26 Department of Labor and Industries, 45 Wn 2d. 71 (1954); or vocational testimony based upon proven
27 and assumed medical facts of loss of function. Fochtman v. Department of Labor and Industries, 7
28 Wn. App. 286 (1972); Spring v. Department of Labor and Industries, 96 Wn 2d. 914 (1982). Time loss
29 compensation and loss of earning power benefits are for temporary disability. They are payable
30 during periods in which a claimant's condition is not fixed and requires medical treatment. Hunter v.
31 Department of Labor and Industries, 43 Wn. 2d 696 (1953); Franks v. Department of Labor and
32 Industries, 35 Wn. 2d 763 (1959). The proof required to establish temporary total disability and the
33 right to time loss compensation is essentially the same as that required to establish permanent total
34 disability. The primary difference relates to the duration of the disability. Bonko v. Department of
35 Labor and Industries, 2 Wn App. 22 (1970). A right to loss of earning power benefits requires a
36 showing of a loss of function resulting in a reduced earning capacity of at least 5% below the earning
37 capacity existing prior to the injury. RCW 51.32.090(3).
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45 The claimant contends that notwithstanding the fact he has failed to present either medical or
46 vocational evidence in support of his claim, he has nevertheless established a prima facie case. He
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1 maintains that the following facts raise an inference that he was entitled to time loss compensation or
2 loss of earning power benefits during the disputed period of time: (1) he had a disability of
3 approximately 40% of the amputation value of his right leg at the knee, (2) he suffered from a partial
4 amputation of his right arm, (3) his education is limited, (4) his work experience has been largely
5 limited to heavy employment, (5) his symptoms during the disputed period were substantially the same
6 as during the periods the Department had determined that he was temporarily totally disabled, (6) Dr.
7 Hubbard has always been his attending physician and was the physician who certified time loss prior
8 and subsequent to the period in question, and (7) Dr. Hubbard was scheduled to testify for the
9 Department but his testimony was cancelled by the Department.
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15 It is not at all clear that all of the aforementioned alleged facts have been established by the
16 record. Yet, even assuming that such facts have been established, we do not think that they raise an
17 inference that the claimant was either temporarily totally disabled or sustained a loss of earning power
18 during the period October 28, 1980 to February 13, 1984. Indeed, if any inference can be drawn from
19 this list of facts, it would be that Dr. Hubbard was prepared to testify that during the disputed period the
20 claimant's condition was fixed and stable and/or that the claimant was capable of gainful employment,
21 and that the Department's denial of time loss compensation for that period was therefore proper.
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25 The claimant places great emphasis on the Department orders paying time loss compensation
26 prior to October 1980 and subsequent to February 1984. He is correct in noting that the final
27 Department orders awarding time loss compensation during those periods carry a res judicata effect.
28 His error lies in the extent of res judicata effect he would ascribe to those orders. An award of time
29 loss for a particular period, which becomes final, precludes relitigation of the issue of eligibility for time
30 loss during that particular period. Time loss is by definition, however, temporary. There is no
31 presumption that a temporary disability will continue into the future or that it has existed for a period
32 into the past. A presumption of continued disability does exist in cases in which a worker has been
33 determined permanently and totally disabled. See Department of Labor and Industries v. Moser, 35
34 Wn App. 204 (1983); See also Malland v. Retirement Systems, 103 Wn 2d. 484, 488 (1985). No such
35 legal presumption can arise, however, where the determination is limited to a finding of temporary
36 disability for a particular period of time.
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43 To establish his eligibility for time loss compensation or loss of earning power benefits between
44 October 1980 and February 1984 it was necessary for the claimant to present medical evidence that
45 during such period his condition was not fixed and required medical treatment, and that he suffered a
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1 loss of function which either rendered him incapable of gainful employment on a reasonably
2 continuous basis or left him with only a partially restored earning capacity. Such testimony could have
3 been substituted for, in part, by the testimony of a vocational expert. The claimant, however, chose
4 not to present either medical or vocational testimony, and has therefore failed to establish a prima
5 facie case for the relief sought.
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9 The claimant cites Bitzan v. Parisi, 88 Wn 2d. 116 (1977) for the proposition that medical
10 testimony is not required to establish an inability to work. Bitzan, however, involved a common law
11 action for personal injuries and was not a case concerned with eligibility for time loss compensation or
12 loss of earning power benefits under RCW 51. Furthermore, the plaintiff in Bitzan had indeed
13 presented medical testimony that his physical condition precluded him from engaging in his usual
14 occupation.
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18 The claimant has also brought to the Board's attention its Decision and Order of April 15, 1980,
19 in the case of In Re: Roger Morrison, Claim No. H-108288, Docket No. 53,482. The Morrison case
20 stated that where the Department has closed a claim without an award for permanent partial disability
21 and that determination is final, it is res judicata that the worker had no disability as a result of the
22 industrial injury giving rise to that claim. We find nothing in Morrison which supports the relief
23 requested by the claimant here, or which is inconsistent with our decision in this case.
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27 The case presented by the claimant here, while legally interesting, is wholly inadequate to
28 support his claim for relief. Legal arguments predicated on the scope of the principle of res judicata
29 may provide stimulating mental fodder, but they are no substitute for hard medical evidence. We trust
30 that the just result has been reached in this case, and that the absence of any medical evidence in the
31 record supporting the claimant's contention is an indication that such evidence does not, in fact, exist.
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34 After consideration of the Proposed Decision and Order and the Petition for Review filed
35 thereto, and a careful review of the entire record before us, we are persuaded that the Proposed
36 Decision and Order is supported by the preponderance of the evidence and is correct as a matter of
37 law.
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40 FINDINGS OF FACT

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42 The Board enters the following Findings of Fact:

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44 1. On February 26, 1976, the Department of Labor and Industries received a
45 report of accident filed on behalf of the claimant Mark A. Billings alleging
46 an industrial injury to have occurred on February 17, 1976 while in the
47 course of his employment with Northwest Drywall Supply. The claim was

1 allowed and treatment provided and on September 8, 1977 the
2 Department issued an order closing the claim with a permanent partial
3 disability award equal to 15% of the amputation value of the right leg at or
4 above the knee joint with a functional stump.
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6 On February 28, 1978 the claimant filed an application to reopen his claim
7 for aggravation of condition. On March 16, 1978 the Department issued
8 an order reopening the claim effective February 20, 1978. On February
9 20, 1979 the Department issued an order closing the claim with time loss
10 compensation as paid and awarding a permanent partial disability equal to
11 30% of the amputation value of the right leg at or above the knee with a
12 functional stump, less prior awards. On March 13, 1979 a Protest and
13 Request for Reconsideration was filed on behalf of the claimant. On
14 March 21, 1979 the Department issued an order closing the claim with
15 time loss compensation as paid and awarding the claimant a permanent
16 partial disability equal to 40% of the amputation value of the right leg at or
17 above the knee joint with a functional stump, less prior awards. On May
18 16, 1979 the Department received an application to reopen the claim for
19 aggravation of condition. On May 22, 1979 the Department issued an
20 order modifying the March 21, 1979 order from final to interlocutory and
21 holding the claim to remain open for authorized treatment and such other
22 action as may be indicated.

23 On October 28, 1980 the Department issued an order closing the claim
24 with time loss compensation as paid to March 27, 1979 inclusive. On
25 March 24, 1981 the Department received an application to reopen the
26 claim for aggravation of condition. On March 30, 1981 the Department
27 issued an order denying the application to reopen holding the claim to
28 remain closed pursuant to the provisions of the order dated October 28,
29 1980.
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31 On February 23, 1984 the Department received an application to reopen
32 the claim for aggravation of condition. On April 2, 1984 the Department
33 issued an order holding the claim reopened effective February 13, 1984
34 for authorized treatment and action as indicated. On April 30, 1984 the
35 Department received a Protest and Request for Reconsideration alleging
36 that the claimant had not received the closing order of October 28, 1980
37 and was unaware that the claim had been closed. On May 18, 1984 the
38 Department issued an order holding the claim to remain open pursuant to
39 the provisions of the prior order dated April 2, 1984. On June 7, 1984 the
40 Department received a Protest and Request for Reconsideration filed on
41 behalf of the claimant alleging that the claimant had not received any
42 orders closing the claim. On July 2, 1984 the Department issued an order
43 affirming the provisions of the prior order dated May 18, 1984. On August
44 29, 1984 the Board of Industrial Insurance Appeals received a Notice of
45 Appeal filed on behalf of the claimant appealing the Department order
46 dated July 2, 1984. On September 6, 1984 the Board issued an order
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1 granting appeal assigning it Docket No. 68,577 and directing that
2 proceedings be held.

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4 On April 26, 1985 a Proposed Decision and Order was entered concluding
5 that the Board did not have jurisdiction over the subject matter of the
6 appeal for reason that the Department orders dated October 28, 1980 and
7 March 30, 1981 were not communicated to the claimant and that
8 subsequent Protests and Request for Reconsideration filed by the
9 claimant contesting the closure of the claim rendered the Department
10 orders dated October 28, 1980 and March 30, 1981 interlocutory and not
11 final orders. On June 4, 1985 the Board issued an order denying Petition
12 for Review and adopting the Proposed Decision and Order entered April
13 26, 1985.

14 On June 17, 1985 the Department issued an order providing that in as
15 much as an application had been made for temporary total disability for
16 the period October 28, 1980 to but not including February 13, 1984 and
17 whereas a review of the file failed to disclose medical evidence to support
18 payment of time loss compensation, time loss compensation would be
19 denied for the period October 28, 1980 through February 12, 1984. A
20 Notice of Appeal was filed on behalf of the claimant on June 24, 1985 and
21 on July 8, 1985 the Board issued an order granting the appeal assigning it
22 Docket No. 70,883 and directing that proceedings be held.

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24 2. On February 17, 1976, Mark A. Billings injured his right knee while he was
25 working for Northwest Drywall Supply when he slipped on steps leading
26 from the office.
- 27 3. From approximately February 24, 1978 to January 23, 1979 the
28 Department paid time loss compensation to the claimant.
- 29 4. For the period February 13, 1984 to January 15, 1986 the Department has
30 paid time loss compensation to the claimant.
- 31 5. The record of these proceedings contains no medical evidence, or
32 vocational evidence based upon proven and assumed medical facts of
33 loss of function, which would indicate that the claimant was either
34 temporarily totally disabled or sustained a loss of earning power for any
35 period between October 28, 1980 and February 13, 1984.

36 **CONCLUSIONS OF LAW**

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39 The Board makes the following Conclusions of Law:

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41 1. The Board has jurisdiction of the parties and the subject matter of this
42 appeal.
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44 2. The order of the Department of Labor and Industries dated June 17, 1985
45 which provided that there was no medical evidence to support payment of
46 time loss compensation claimed for the period October 28, 1980 to but not
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1 including February 13, 1984, and thereby denying the payment of time
2 loss compensation for the period October 28, 1980 through February 12,
3 1984, is correct and should be affirmed.
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5 It is so ORDERED.
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7 Dated this 30th day of July, 1986.
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9 BOARD OF INDUSTRIAL INSURANCE APPEALS
10

11 /s/ _____
12 GARY B. WIGGS Chairperson
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14 /s/ _____
15 FRANK E. FENNERTY, JR. Member
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17 /s/ _____
18 PHILLIP T. BORK Member
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