

James, David

ATTORNEY FEES AND COSTS

*** Presumption in RCW 51.32.185**

When a determination involving the presumption established in RCW 51.32.185 is appealed to the Board and the final decision allows the claim for benefits, the Board shall order that all reasonable costs of the appeal, including attorney fees and witness fees, be paid to the firefighter, fire investigator, or law enforcement officer, or his or her beneficiary by the opposing party. In determining the attorney's fee in such cases, there must be a nexus between the work and the appeal. The Board will use the date of the Department's order as the trigger date for starting the attorney's fee time attributable to the appeal. The Board will not order attorney's fees for work performed before the date of the Department order on appeal.*In re David James, Order Awarding Attorney Fees and Costs, BIA Dec., 23 18856 (2023)*

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

1 **IN RE: DAVID L. JAMES**) **DOCKET NOS. 23 15393, 23 18856, 23 18857 &**
2) **23 18858**
3)
4) **ORDER DENYING AND GRANTING IN PART**
5) **MOTIONS FOR RECONSIDERATION OF**
6) **ORDER AWARDING ATTORNEY FEES AND**
7 **CLAIM NO. SM-12603**) **COSTS**
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10 Firefighter David James, through his attorney Douglas Palmer, requested an award of attorney
11 fees and costs per RCW 51.32.185(9)(a). Docket. No. 23 15393 is Mr. James's appeal of a
12 March 1, 2022 Department Order that directed the payment of loss of earning power benefits for the
13 period June 30, 2019, through September 30, 2019. Docket Nos. 23 18856 and 23 18857 are
14 appeals filed by the City of Vancouver from orders directing Vancouver to pay time-loss
15 compensation and loss of earning power benefits. Docket. No. 23 18858 was a protest filed by
16 Vancouver from an order that directed payment of loss of earning power benefits, which was denied
17 on the basis that it was not a final Department order. On November 29, 2023, we issued an Order
18 Awarding Attorney Fees and Costs requiring Vancouver to pay Mr. James \$9,590 in attorney fees
19 and costs.
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22 Mr. James filed a motion for reconsideration of the Order Awarding Attorney Fees and Costs
23 and the City of Vancouver responded and filed its own request for reconsideration. Mr. James wants
24 additional time considered for the attorney fee: time expended prior to the issuance of the Department
25 order that led to the initial appeal. The employer reasserts its arguments concerning the times in
26 which Mr. James's attorney activities can be attributed to the appeal as well as objecting to the costs.
27 For the reasons explained below, we relieve the employer of the obligation to pay costs but otherwise
28 maintain the attorney fees as ordered.
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DISCUSSION

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31 In our November 29, 2023 order we used the date of the first Department order relevant to
32 Mr. James's appeal, November 5, 2021, as the trigger for starting the attorney fee time attributable
33 to the appeal. Mr. James disagrees with application of this standard to the facts of this case. He
34 agrees that the existence of the order that gave rise to the appeal established sufficient nexus, but
35 because the order was only issued because of Mr. James's request for intervention, the time
36 expended in prompting the Department to issue the order should be included in the attorney fee
37 computation. He argues that he created a sufficient nexus between these activities and the appeal
38 by requesting the Department to issue the order that ultimately prompted the appeal, an activity that
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1 was required to compel the Department to issue the order. Mr. James argues that several entries in
2 his accounting of time from May and July of 2021 should be included in the attorney fee award.
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4 Although there is logic to this argument, we are confined by the *Christiansen*¹ prohibition of
5 attributing an attorney fee to activities before the Department. That prohibition prevents the type of
6 analysis recommended by Mr. James. We decline the invitation to perform the analysis of which
7 activities may have prompted the Department to issue the order from which the appeal was taken.
8 We continue to use the date of the Department's issuance of the relevant order that eventually
9 prompted the appeal as the line of demarcation for awarding attorney fees.
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12 Part of Mr. James's argument is that because we allowed costs incurred for a time prior to the
13 Department order, we logically should allow the attorney time associated with those costs. We were
14 mistaken to award the costs without acknowledging they were incurred before the Department issued
15 the order. We acknowledge that the employer had objected to costs. Although not specifically
16 objecting to the reasonableness of the costs, embedded in its general objections to awarding any
17 attorney fees prior to the time the appeal was filed, the employer stated a general objection to
18 "attorney costs."
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23 The costs were incurred prior to the Department order. We decline to deviate from the rule
24 not allowing compensation of attorney time before the Department issued the relevant order.
25 Similarly, we will not allow the costs, however reasonable, if incurred prior to the issuance of the order
26 appealed. We grant the employer's motion to the extent it objects to the costs and remove the costs
27 of \$540 from the award of attorney fees and costs.
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31 In addition to its renewed objection to an award of costs, the employer also moved for
32 reconsideration of the fee amount and moved to strike exhibits attached to Mr. James's response to
33 the employer's motion for reconsideration. The employer again argues that the *Christiansen*
34 prohibition on awarding attorney fees for work performed before the Department prevents an award
35 of fees prior to the May 8, 2023 appeal filed by Mr. James, rather than the order dated
36 November 5, 2021. The employer essentially asserts an interpretation of "work performed before the
37 Board" as excluding any work prior to the filing of a notice of appeal. This restrictive interpretation is
38 not required by the *Christiansen* decision. The court did not specifically define "work performed
39 before the Board." We adhere to our holding that any work after the Department issues the order
40 with content that is ultimately appealed can and should be considered "work before the Board."
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47 ¹ *Christiansen v. Dep't of Labor & Indus.*, 26 Wn. App. 2d 560, 568 (2023).

1 The employer's objection to exhibits pertain to the health care providers' responses to
2 Mr. James's request for opinions relevant to wage replacement benefits. If we grant the employer's
3 request to exclude costs, then the striking of the exhibits is meaningless. In addition, they are not
4 offered for the truth of the matters asserted in the reports, but merely as evidence that reports were
5 received. We deny the motion to strike.
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8 Mr. James also requests additional compensation for time spent in preparing and responding
9 to the motions. We deny this request.
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11 **ORDER**

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13 We deny Mr. James's motion to increase the attorney fees and grant the employer's motion
14 regarding costs, but otherwise the award for attorney fee remains unchanged, with no additional fee
15 awarded due to the filing of the motion for reconsideration. The total award for attorney fees is
16 \$9,050.
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18 **FINDINGS OF FACT**

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20 1. The Department issued orders on the 5th, 8th, and 9th of November of
21 2021. Combined, the orders directed payment of time-loss compensation
22 for the period June 30, 2019, through December 31, 2019; loss of earning
23 power benefits for January 1, 2020, through January 31, 2020; and
24 time-loss compensation from February 1, 2020, and continuing.
25 Vancouver protested the three orders and the Department, through an
26 order dated January 11, 2022, changed the benefits due for June 30, 2019,
27 through September 30, 2019, from time-loss compensation to loss of
28 earning power benefits. In separate orders, the Department also required
29 Vancouver to pay time-loss compensation for the period October 1, 2019,
30 through November 9, 2021. Mr. James appealed the order dated
31 March 11, 2022, which directed payment of loss of earning power benefits,
32 rather than time-loss compensation. After Mr. James's appeal, the
33 Department reassumed and issued an order on May 16, 2023, that
34 recharacterized the payments owed as time-loss compensation.
35 Vancouver appealed the loss of earning power and time-loss
36 compensation orders dated January 13, 2022, and January 14, 2022, and
37 then dismissed the appeals on August 2, 2023.
38
- 39 2. Douglas Palmer represented Mr. James in these appeals.
- 40 3. Mr. Palmer spent 18.1 hours in activities that were reasonable for reviewing
41 and preparing for these appeals. Based on the accounting provided it was
42 reasonable to expend this number of hours of work on the representation
43 of Mr. James in the appeals.
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- 45 4. Mr. James did not incur any costs subsequent to the issuance of the
46 relevant Department order of November 5, 2021.
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- 1 5. Mr. Palmer's reasonable rate of compensation in this appeal is \$500 an
2 hour for attorney time.

3 **CONCLUSIONS OF LAW**

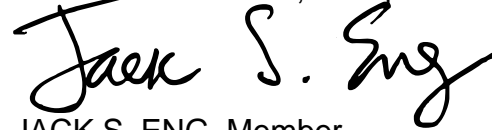
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5 1. These appeals involve the presumption contained in RCW 51.32.185 and
6 the final orders allowed Mr. James's claim for wage replacement benefits
7 due to inability to work caused by occupationally related PTSD.
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9 2. Under 51.32.185(9)(a) the City of Vancouver must pay all reasonable
10 costs, including attorney fees because the final orders allowed the claim
11 for benefits.
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13 3. The City of Vancouver is ordered to pay reasonable costs and attorney
14 fees in the amount of \$9,050. This amount must be paid within 30 days
15 after the City of Vancouver receives this order.

16 Dated: January 31, 2024.

17 BOARD OF INDUSTRIAL INSURANCE APPEALS

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19 HOLLY A. KESSLER, Chairperson

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21 JACK S. ENG, Member