

Hardy, Deborah

BURDEN OF PROOF

Employer Appeal

When the employer is the appealing party, RCW 51.52.050 and WAC 263 12-115(2)(a) and (c) charge the employer with proceeding initially with evidence sufficient to establish a prima facie case for the relief sought. If no motion to dismiss for failure to present a prima facie case is made, or the motion is made and initially denied or a ruling is deferred, then we must consider all the evidence presented, not just the evidence presented by the party with the burden of going forward. In this case, no one made a motion to dismiss for failure to present a prima facie case, so we consider the entire record, and we hold that the employer made a prima facie case. Here, the burden of persuasion shifted to the worker and/or Department to prove that the worker did not voluntarily retire, which they were unable to do.*In re ~~Deborah Hardy~~*, BIIA Dec., **23 19203 (2025)** [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under Benton County Cause No. 25-2-01799-03.]

Scroll down for order.

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

IN RE: DEBORAH S. HARDY

**DOCKET NOS. 23 19203, 23 19306,
23 19801, 23 23507 & 23 26701**

Claim Nos: BG-78261 & BG-78265

DECISION AND ORDER

Deborah Hardy worked as a payroll clerk for Baker Produce, Inc., and had worked there for about six years before she filed two claims, one for a November 2021 industrial injury to her shoulder (Claim No. BG-78261), and the other for a November 2021 occupational disease affecting her right arm (Claim No. BG-78265). Ms. Hardy hurt her shoulder while moving a box of checks. She noticed tingling in two fingers after that injury and assumed it was due to her shoulder injury. However, her doctor told her the tingling was due to her ulnar nerve, so a second claim was filed on her behalf for an occupational disease. The Department of Labor and Industries allowed both claims. The conditions under both claims were surgically repaired and her tingling improved in the short term.

These appeals involve three orders issued by the Department. Under Claim No. BG-78265, the May 10, 2023 order closed the claim with time-loss compensation as paid through January 8, 2023. Both parties appealed. Under Claim No. BG-78261, the May 15, 2023 order recalculated Ms. Hardy's wage rate and made a partial payment (an increase) of time-loss compensation previously paid from August 19, 2022, through October 23, 2022. Baker Produce appealed. Also, under Claim No. BG-78261, a September 15, 2023 order awarded partial payment for time-loss compensation previously paid from April 11, 2022, through February 28, 2023. Both parties appealed. The partial payment included healthcare benefits that had been omitted in prior orders.

After a hearing, our industrial appeals judge affirmed all three Department orders. Baker Produce petitioned for review. After careful consideration of the record and the law, we hold that Ms. Hardy voluntarily retired in March 2022 and was ineligible for time-loss compensation benefits. The Department incorrectly awarded payments for time-loss compensation in the orders on appeal. Accordingly, the Department's May 10, 2023, May 15, 2023, and September 15, 2023 orders are **REVERSED AND REMANDED**.

DISCUSSION

Baker Produce presented the testimony of a vocational rehabilitation counselor, a human resources representative from Baker Produce's parent company, and two former colleagues of Ms. Hardy. The testimony from Baker Produce employees confirm Ms. Hardy

1 submitted retirement paperwork, informed her coworkers she intended to retire, and
2 completed her retirement from Baker Produce in March 2022. Vocational counselor Mary
3 Elizabeth Mason testified she worked with Ms. Hardy on her claim beginning in Fall 2022. At
4 the time of Ms. Hardy's referral for vocational recovery, early Fall 2022, Ms. Mason believed
5 that Ms. Hardy was not independently seeking work but was getting ready to do so.
6 Ms. Hardy told her that she had contemplated retirement until she saw the cost of health
7 insurance. She told Ms. Mason that she had filled out paperwork with the employer of injury
8 to retire. Ms. Mason's closing report indicates Ms. Hardy did not file the retirement
9 paperwork. This was Ms. Mason's misunderstanding. Ms. Mason believed that Ms. Hardy
10 had not retired and was going to continue looking for work elsewhere. While Ms. Mason said
11 Baker Produce had initially indicated Ms. Hardy could return to work there, the position was
12 no longer available by the time Ms. Hardy had been fully released to work.

13 Ms. Hardy testified she retired in March 2022. After her insurance coverage lapsed,
14 however, she obtained quotes for coverage, which she could not afford. She began looking
15 for full-time work with benefits online in April 2022, and she submitted a resume. She never
16 received any requests to interview. She estimated she looked for work for four months and
17 applied to eight bookkeeping jobs. After receiving no responses for interviews, she stopped
18 looking for work. At the time of her testimony in June 2024, Ms. Hardy testified her intent
19 going forward was to do nothing and use Medicare once she became eligible. Her husband,
20 John Hardy, confirmed his wife intended to retire in March 2022 but changed her mind once
21 she realized healthcare was so expensive. He was aware she applied for jobs with full-time
22 benefits, but said she had not worked since she stopped working for Baker Produce in
23 March 2022.

24 For medical evidence, Ms. Hardy presented the testimony of Christopher
25 Kontogianis, M.D., her treating orthopedic surgeon. He began treating Ms. Hardy after her
26 November 30, 2021 injury and last saw her on February 24, 2023, to close her second claim.
27 He treated her for cubital tunnel syndrome of the right arm to address numbness and tingling
28 in her pinky finger, which involved a surgical release of the ulnar nerve. Post-surgery,
29 Ms. Hardy did very well. He imposed work restrictions that limited lifting and repetitive
30 activities, but released her to work without restrictions under one claim on January 9, 2023.
31 Dr. Kontogianis did not testify to any permanent partial disability arising from the claim-related
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1 conditions, or about Ms. Hardy's ability to work during the period of time-loss compensation
2 on appeal.
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4 The Department presented the testimony of Elizabeth Holloman, a claims consultant
5 supervisor for the Department, who reviewed Ms. Hardy's file. Ms. Holloman testified about
6 the May 15, 2023 order on appeal. In that order, the Department affirmed an order dated
7 April 6, 2023, that recalculated a time-loss compensation period that had been paid without
8 healthcare benefits. It was recalculated to add the employer's contribution of \$510.92 a
9 month for those benefits. Ms. Holloman reviewed that decision and determined the order
10 was correct.
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14 The next recalculation Ms. Holloman reviewed related to an order dated July 17, 2023,
15 that was affirmed by an order dated September 15, 2023. The order adjusted time-loss
16 compensation from April 11, 2022, to February 28, 2023, and this decision has been
17 appealed under Docket Nos. 23 26701 and 23 23507. Ms. Holloman testified that Ms. Hardy
18 had indicated she is not employable and her doctor had imposed light-duty work restrictions
19 that ended on January 8, 2023, for Claim No. BG-78265 and February 28, 2023, for Claim
20 No. BG-78261. On the issue of retirement, Ms. Holloman testified it was clear to her that
21 Ms. Hardy had stopped working for Baker Produce in March 2022 but that she later
22 discovered she could not afford health care and intended to return to the workforce once she
23 was able to do so. Based on the communications from Ms. Hardy, Ms. Holloman thought
24 that Ms. Hardy had not retired and was still looking for work that provided healthcare benefits.
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31 **Burden of Proof & Prima Facie Case**

32 Where the employer is the appealing party, RCW 51.52.050 and
33 WAC 263 12-115(2)(a) and (c) charge the employer with proceeding initially with evidence
34 sufficient to establish a prima facie case for the relief sought.¹ If no motion to dismiss for
35 failure to present a prima facie case is made, or the motion is made and initially denied or a
36 ruling is deferred, then we must consider all the evidence presented, not just the evidence
37 presented by the party with the burden of going forward.² As no party made a motion to
38 dismiss for failure to present a prima facie case, we consider the entire record when
39 determining whether Baker Produce met its initial burden.
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46 ¹ *In re Michael Hansen*, BIIA Dec., 95 4568 (1996).

47 ² *In re Jerry L. Gibbs*, Dckt. No. 11 14052 (October 8, 2012).

1 At hearing, Baker Produce assumed the initial burden to prove the Department's
2 orders were incorrect. In March 2022, Ms. Hardy retired from Baker Produce at age 61, a
3 few months shy of her 62nd birthday. Baker Produce contends Ms. Hardy voluntarily retired
4 in March 2022, making her ineligible for time-loss compensation after that time. When Baker
5 Produce presented a prima facie case that Ms. Hardy retired, the burden then shifted to
6 Ms. Hardy to prove she was temporarily totally disabled under one or both claims for the
7 periods addressed by the orders on appeal.³ The Department can assume that burden if it
8 chooses.
9

10 **Voluntary Retirement**

11 Baker Produce contends Ms. Hardy was not entitled to the time-loss compensation
12 she received because she voluntarily retired prior to the timeframe for which these benefits
13 were paid. In response, Ms. Hardy contends she changed her mind about retirement and
14 made bona fide attempts to seek employment beginning in April 2022. Accordingly, she
15 argues she was not voluntarily retired for the periods during which time-loss compensation
16 was paid.
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18 Voluntary retirement is addressed in RCW 51.32.090(10) and WAC 296-14-100.
19 RCW 51.32.090(1) provides that "If the supervisor of industrial insurance determines that the
20 worker is voluntarily retired and is no longer attached to the workforce, benefits shall not be
21 paid under this section." WAC 296-14-100 provides the definition of voluntary retirement:
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23 (1) **What is voluntarily retired?** The worker is considered voluntarily
24 retired if both of the following conditions are met:

25 (a) The worker is not receiving income, salary or wages from any gainful
26 employment; and

27 (b) The worker has provided no evidence to show a bonafide attempt to
28 return to work after retirement.

29 Time-loss compensation is not paid to workers who voluntarily retired from
30 the work force.

31 (c) Payment of union dues or medical or life insurance premiums does not
32 constitute attachment to the work force.

33 (2) **When is a worker determined not to be voluntarily retired?** A worker
34 is not voluntarily retired when the industrial injury or occupational disease is
35 a proximate cause for the retirement.
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37 (Emphasis in original.)
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46 ³ *Olympia Brewing Co. v. Dep't of Labor & Indus.*, 34 Wn.2d 498 (1949), *overruled on other grounds, Windust v.*
47 *Dep't of Labor & Indus.*, 52 Wn.2d 33 (1958); *In re Christine Guttromson*, BIIA Dec., 55,804 (1981).

1 A worker is not voluntarily retired, however, when the industrial injury or occupational
2 disease is a proximate cause for the retirement.⁴ No medical evidence was presented to
3 establish Ms. Hardy's retirement was caused by either her industrial injury or occupational
4 disease.
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7 In January 2022, Ms. Hardy notified her employer that she would retire in March 2022.
8 Prior to leaving Baker Produce, she never informed its parent company's director of HR that
9 she had changed her mind. There was no paperwork available to memorialize the retirement
10 process. Indeed, Ms. Hardy testified both that she had intended to retire, but changed her
11 mind due to the cost of health insurance, and that she had in fact retired.⁵ The testimony of
12 Ms. Hardy and Mr. Hardy confirm subsection (a) is met—she was not receiving income or
13 wages. Once subsection (a) is met, we look to determine whether she *voluntarily* retired,
14 and consistent with subsection (b), whether she made a "bonafide attempt to return to work
15 after retirement." The available evidence to answer this question is limited. Ms. Hardy
16 estimated she looked for work for approximately four months but stopped her job search in
17 August 2022 and intended to do no further search.
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23 Multiple witnesses testified to confirm Ms. Hardy intended to return to work after her
24 retirement once she learned the cost of health insurance. Unfortunately, not even Ms. Hardy
25 herself provided any further evidence to prove she made any bona fide attempt to return to
26 work. She turned down the assistance of a vocational counselor and applied online for only
27 eight jobs--approximately two a month of her search. After careful consideration, we hold
28 that eight online applications with no interviews, and without further efforts, doesn't show
29 Ms. Hardy engaged in a bona fide effort to go back to work. Two applications a month does
30 not constitute a bona fide attempt to return to work. An intent to return to the work force after
31 voluntary departure from the work force does not, by itself, constitute a bona fide attempt.⁶
32 A perfunctory online employment search cannot negate a voluntary retirement. We hold that
33 Ms. Hardy was voluntarily retired consistent with WAC 296-14-100 and Baker Produce
34 established a prima facie case that the Department orders on appeal are incorrect because
35 no time-loss compensation can be paid once a worker retires.
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46 ⁴ WAC 296-14-100(2).

47 ⁵ 6/26/24 Tr. at 51-52.

⁶ *Energy Northwest v. Hartje*, 148 Wn. App. 454 (2009).

1 Labor and Industries dated May 10, 2023. In this order, the Department affirmed its
2 May 3, 2023 order closing Claim No. BG-78265 with time-loss compensation ended as paid
3 through January 8, 2023. This order is incorrect and is reversed. The matter is remanded
4 to the Department with instruction to close the claim effective May 10, 2023, with time-loss
5 compensation as paid through April 28, 2022.
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8 In Docket No. 23 19801, the claimant, Deborah S. Hardy, filed a protest with the
9 Department of Labor and Industries on May 17, 2023. The Department forwarded it to the
10 Board of Industrial Insurance Appeals as an appeal. The claimant appeals a Department
11 order dated May 10, 2023. In this order, the Department affirmed its May 3, 2023 order
12 closing Claim No. BG-78265 with time-loss compensation ended as paid through January 8,
13 2023. This order is incorrect and is reversed. The matter is remanded to the Department
14 with instruction to close the claim effective May 10, 2023, with time-loss compensation as
15 paid through April 28, 2022.
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20 In Docket No. 23 23507, the employer, Baker Produce, Inc., filed an appeal with the
21 Board of Industrial Insurance Appeals on September 15, 2023, from an order of the
22 Department of Labor and Industries dated September 15, 2023. In this order, the Department
23 affirmed its July 17, 2023 order making partial payment for time-loss compensation for the
24 period of April 11, 2022, through February 28, 2023, under Claim No. BG-78261. This order
25 is incorrect and is reversed. The matter is remanded to the Department with instruction to
26 deny partial payment for recalculated time-loss compensation for the period of April 11, 2022,
27 through February 28, 2023, under Claim No. BG-78261, and to take further action as
28 appropriate under the law and facts.
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34 In Docket No. 23 26701, the claimant, Deborah S. Hardy, filed a protest with the
35 Department of Labor and Industries on November 8, 2023. The Department forwarded it to
36 the Board of Industrial Insurance Appeals as an appeal. The claimant appeals a Department
37 order dated September 15, 2023. In this order, the Department affirmed its July 17, 2023
38 order making partial payment for time-loss compensation for the period of April 11, 2022,
39 through February 28, 2023, under Claim No. BG-78261. This order is incorrect and is
40 reversed. The matter is remanded to the Department with instruction to deny partial payment
41 for recalculated time-loss compensation for the period of April 11, 2022, through
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1 February 28, 2023, under Claim No. BG-78261, and to take further action as appropriate
2 under the law and facts.
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4 **FINDINGS OF FACT**

- 5 1. On August 2, 2023, October 3, 2023, and June 26, 2024, an industrial
6 appeals judge certified that the parties agreed to include the
7 Jurisdictional Histories in the Board record solely for jurisdictional
8 purposes.
9
- 10 2. Deborah Hardy sustained an industrial injury on November 3, 2021,
11 when she moved a box of checks and injured her right shoulder,
12 elbow, and fingers. The Department of Labor and Industries allowed
13 her claim under Claim No. BG-78261.
- 14 3. Ms. Hardy filed a second claim regarding her right elbow and pinkie
15 and ring fingers of her right hand. The Department allowed this
16 occupational disease claim and assigned it Claim No. BG-78265.
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- 18 4. Ms. Hardy was working for Baker Produce, Inc., when she sustained
19 her industrial injury and when her occupational disease arose.
- 20 5. Ms. Hardy was 64 years old when she provided her testimony. She
21 is married, has two children, and completed about two years of
22 college, focusing on accounting. Most of her work experience has
23 been clerical and office work.
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- 25 6. Ms. Hardy voluntarily retired and was no longer attached to the work
26 force beginning in early March 2022. She later changed her mind
27 about continuing with retirement and made eight online employment
28 applications. The job search wasn't bona fide.
- 29 7. Ms. Hardy was able to perform and obtain gainful employment on a
30 reasonably continuous basis from April 11, 2022, through
31 February 28, 2023.
- 32 8. As of May 10, 2023, Ms. Hardy's conditions proximately caused by
33 her industrial injury or occupational disease were fixed and stable and
34 did not need further proper and necessary treatment.
- 35 9. As of May 10, 2023, Deborah Hardy did not have a permanent partial
36 disability caused by her industrial injury or occupational disease.
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38 **CONCLUSIONS OF LAW**

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- 40 1. The Board of Industrial Insurance Appeals has jurisdiction over the
41 parties and subject matter in these appeals.
- 42 2. Deborah Hardy's conditions proximately caused by her industrial
43 injury and occupational disease were fixed and stable as of May 10,
44 2023, and she is not entitled to further treatment under claim no.
45 BG-78265. RCW 51.36.010.
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3. The Department order dated May 10, 2023, is incorrect and is reversed. This matter is remanded to the Department to deny treatment and close the claim with time-loss compensation as paid through April 28, 2022, with no award for permanent partial disability.
4. Ms. Hardy was not a temporarily totally disabled worker within the meaning of RCW 51.32.090 from April 11, 2022, through February 28, 2023.
5. On May 10, 2023, Ms. Hardy did not have a permanent partial disability, within the meaning of RCW 51.32.080, proximately caused by the industrial injury or occupational disease.
6. The Department order dated May 15, 2023, is incorrect and is reversed. The matter is remanded to the Department to deny time-loss compensation for the period from August 19, 2022, through October 23, 2022.
7. The Department order dated September 15, 2023, is incorrect and reversed. The matter is remanded to the Department to deny partial payment of adjusted benefits for previously paid time-loss compensation for the period from August 19, 2022, through October 23, 2022, and to take further action as appropriate under the law and facts.

Dated: July 23, 2025.

BOARD OF INDUSTRIAL INSURANCE APPEALS



HOLLY A. KESSLER, Chairperson



ROBERT A. BATTLES, Member

DISSENT

Ms. Hardy did originally intend to retire because she and her sisters were taking turns caring for their ill mother. But before her health insurance ran out, she asked how much it would cost to stay on it and the amount she was told, \$1,200, was more than she could afford. That was the end of her intent to retire. Her retirement started on March 6, 2022. On April 25, 2022, she sent the Department a secure message saying she had intended to retire, but decided not to and she couldn't go to work until released by her doctor. Her retirement lasted 50 days. She then began looking for work. But she was looking for work in her field of accounting. She needed a job that paid benefits because she couldn't afford to go without

1 the health insurance. And she didn't have extensive knowledge of programs like Excel. For
2 her job at Baker, she mostly used a calculator.
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4 The majority finds Ms. Hardy did not make a "bona fide" attempt to find work as
5 required under WAC 296-14-100. Ms. Hardy searched for jobs for four months. She said
6 she only applied to the ones for which she was qualified. She applied for eight jobs. That
7 isn't a great number of jobs. But how many full-time bookkeeping jobs with benefits are
8 available in the area of Kennewick, Washington? Especially bookkeeping jobs that don't
9 require a degree or the use of Excel, or for which the bookkeeper is mostly just required to
10 use a calculator?
11

12 Ms. Hardy was still not released unrestricted by her doctor at the time she was
13 searching for work in April through August 2022. Dr. Kontogianis did not release her to full
14 duty until January 2023. If Ms. Hardy had been released it is likely she would still be working
15 at Baker because her job was still available when she realized she couldn't retire. But by the
16 time she was released by the doctor, the job had been filled.
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18 The majority refers to Ms. Hardy's attempt to find work as a "perfunctory" online
19 search. Perfunctory means with minimum effort. Ms. Hardy did online searches, which is
20 what almost everyone does in a job search these days. When she found something for which
21 she was qualified, she sent a resume. She did this for four months. She received no requests
22 for interviews. The majority notes the fact that Ms. Hardy had no interviews as if this was
23 somehow evidence of her lack of diligence. But Ms. Hardy has no control over how many
24 interview requests she got. Anyone who is familiar with the current state of job searches has
25 heard myriad stories of people sending out dozens of applications and never getting an
26 interview request.
27

28 When asked why she stopped looking for work she said it was because she was
29 getting no responses, and she hadn't made any further attempts because she felt like it was
30 a waste of time because she hadn't gotten any responses in the first four months and figured
31 she wasn't going to get any after that. She also talks about no one wanting to hire her
32 because of her age, lack of degree, and the fact that she doesn't know Excel.
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34 Ms. Hardy made a bona fide attempt to find work shortly after she realized she could
35 not afford to retire. She should receive time-loss compensation for the time period between
36 when she attempted to return to work and the time she was released to work with no
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restrictions by her doctor. I believe the Department and the industrial appeals judge got it right, therefore, I dissent.

Dated: July 23, 2025.

BOARD OF INDUSTRIAL INSURANCE APPEALS



ISABEL A. M. COLE, Member

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

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IN RE: DEBORAH S. HARDY

DOCKET NOS. 23 19203, 23 19306, 23 19801,
23 23507 & 23 26701

ORDER GRANTING DEPARTMENT'S
MOTION TO CORRECT DECISION AND
ORDER, AND ISSUING ERRATA

CLAIM NOS: BG-78261 & BG-78265

The Department of Labor and Industries filed a CR 60 motion in which it asks us to correct our Decision and Order dated July 23, 2025. Specifically, the Department asks us to change the dates in Conclusion of Law Nos. 6 and 7 to reflect the correct time period in which we determined the claimant, Deborah Hardy, was not entitled to time-loss compensation benefits. We acknowledged the Department's motion by letter to all parties on September 2, 2025. We offered all parties the opportunity to respond to the motion by September 16, 2025. No party responded or objected to the Department's motion. Having determined that the Decision and Order contains two errors, and that the Department's motion may be granted by this tribunal pursuant to RAP 7.2(e), the motion is **GRANTED**.

As corrected below, our Decision and Order is the final order of the Board in these appeals.

ERRATA SHEET

The Decision and Order issued on July 23, 2025, contains two errors, which are corrected as indicated below.

Conclusion of Law No. 6 is changed to:

6. The Department order dated May 15, 2023, is incorrect and is reversed. The matter is remanded to the Department to deny time-loss compensation for the period from August 19, 2022, through February 28, 2023.

Conclusion of Law No. 7 is changed to:

7. The Department order dated September 15, 2023, is incorrect and reversed. The matter is remanded to the Department to deny partial payment of adjusted benefits for previously paid time-loss compensation for the period from August 19, 2022, through February 28, 2023, and to take further action as appropriate under the law and facts.

Dated: October 22, 2025.

BOARD OF INDUSTRIAL INSURANCE APPEALS



HOLLY A. KESSLER, Chairperson



ROBERT A. BATTLES, Member