

COCKEY
2011 MAY 19 10:09:13
COURT OF APPEALS
II

No. 45828-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MARK W. OSBORN,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES
OF THE
STATE OF WASHINGTON,

Respondent

BRIEF OF APPELLANT
REVISED

APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
FOR KITSAP COUNTY

THE HONORABLE
ANNA M. LAURIE, PRESIDING

LAW OFFICE OF PAUL W. BRYAN, PLLC
PO Box 229
Kinston, WA 98346
(360) 698-9393
By: PAUL W. BRYAN
Attorney for Appellant
WSBA No. 20464

TABLE OF CONTENTS

A. Assignments of Error 4

B. Statement of the Case 5

C. Argument 8

 I. Temporary Total Disability . . . 9

 II. Permanent Partial Disability . . 11

D. Conclusion 12

E. Request for Attorney's Fees

 Pursuant to RCW 51.52.130 17

TABLE OF AUTHORITIES

A. Table of Cases

Washington Cases

Hubbard v. Department of Labor & Industries of
State of Washington, 992 P.2d 1002, 140 Wn.2d 35
(Wash. 2000) 9, 10, 12, 16

Bonko v. Department of Labor and Industries, 466
P.2d 526, 2 Wn.App. 22 (Wash.App. Div. 3 1970). 10

C. Statutes

RCW 51.32.090 9

RCW 51.52.130 17

A. ASSIGNMENT OF ERROR

1. Trial Court Finding of Fact 1.2. The trial court erred in incorporating the Board's Findings of Fact Number 4 from the Decision and Order which found appellant temporarily totally disabled from October 7, 2009, through February 4th, 2010. CP 60-65, BIIA Administrative Record, p. 7.

2. Trial Court Conclusion of Law 2.2 and 2.3. The trial court erred in incorporating from the Board's Decision and Order, dated May 31, 2011, Conclusions of Law numbers 5 and 6, finding appellant permanently partially disabled on February 5th, 2010. CP 60-65, BIIA Administrative Record p.8.

Issues Pertaining to Assignments of Error

Appellant was in fact temporarily totally disabled from October 7, 2009 through February 5th, 2010{emphasis added}. By law, this precludes a finding of permanent partial disability on February 5th, 2010. There is nothing in the

record to support temporary total disability ending February 4th, 2010, as the Court concluded.

B. STATEMENT OF THE CASE

This is an appeal of a superior court administrative review affirming the appeal of a Board of Industrial Insurance Appeals Decision and Order, BIIA Administrative Record, p.2, of appellant's appeal of an order by the Department of Labor and Industries closing appellant's claim with a permanent partial disability. BIIA Administrative Record, p.37.

The Board's Decision and Order reversed and remanded Mr. Osborn's (appellant) claim back to the Department of Labor and Industries concluding that Mr. Osborn was temporarily totally disabled within the meaning of RCW 51.32.090 from October 7, 2009 through February 4th[emphasis added], 2010 and that as of February 5th, 2010, Mr. Osborn was permanently partially disabled within the meaning of RCW 51.32.080. BIIA Administrative Record, p.8. The superior court agreed with the Board of

Industrial Insurance Appeals. The appellant disagrees.

The issue on appeal to superior court and here, is whether or not the Board was correct in ending Mr. Osborn's status as a temporarily totally disabled worker within the meaning of RCW 51.32.080 on February 4th, 2010 and finding him permanently partially disabled on the 5th of February, 2015.

Mr. Osborne suffers from multiple occupationally related conditions arising out of about 25 years of driving various types of trucks. His occupational conditions have been diagnosed as bilateral carpal tunnel syndrome, a left shoulder SLAP lesion with internal derangement and tendonitis and bilateral cubital tunnel syndrome. He has undergone four surgeries. The claim was closed with a permanent partial disability award equal to 11 percent of the left arm at the shoulder. Time loss compensation benefits had been previously ended as paid

through October 7, 2009, BIIA Administrative Record, Jurisdictional History p.52, when the department determined Mr. Osborn was able to work, that is, no longer temporarily totally disabled. The Department Order dated February 5th, 2010, closing the claim, BIIA Administrative Record, Jurisdictional History p.53, with a permanent partial disability was appealed. BIIA Administrative Record, p.37.

Dr. Stump, and orthopedic surgeon, testified by perpetuation deposition, that Mr. Osborn's temporary total disability (TTD) extended through the 5th of February, 2010, BIIA Administrative Record, Deposition of William Stump, M.D. p.16, line 7, not the 4th. The evidence shows the claimant temporarily totally disabled through the October 5th, 2010.

The Board, for no stated reason, chose to end claimant's temporary total disability on the 4th, a day early, for convenience presumably, but without any factual support, to allow for a PPD

and claim closure. Certified Board Record P.5, lines 4-7. BIIA Administrative Record, p. 8.

C. ARGUMENT

The appellant brings this issue to the court of appeals not only because of the error, but because it represents a standard of administrative practice that runs counter to the law and puts a burden on injured workers that was never intended, that is, allowing a permanent partial disability while the injured worker is still totally disabled.

Permanent partial disability covers a *partial* loss of earning after medical fixity, but where a worker prevails in showing a continued total disability, e.g. no restoration of earning power, a determination of permanent partial disability is inappropriate until such a full restoration of earning power is shown to prove the claimant is able to work.

II. TEMPORARY TOTAL DISABILITY

RCW 51.32.090(1) states that: "When the total disability is only temporary, the schedule of payments contained in RCW 51.32.060 (1) and (2) shall apply, so long as the total disability continues." RCW 51.32.060(3)(a) states "As soon as recovery is so complete that the present earning power of the worker, at any kind of work, is restored to that existing at the time of the occurrence of the injury, the payments shall cease".

The WAC § 296-20-01002. Definition states:

"Total temporary disability: Full time-loss compensation will be paid when the worker is unable to return to any type of reasonably continuous gainful employment as a direct result of an accepted industrial injury or exposure."

The court in Hubbard v. Department of Labor & Industries of State of Washington, 992 P.2d 1002, 140 Wn.2d 35 (Wash. 2000) at 43, explained that:

is a "Temporary total disability" condition that temporarily

incapacitates a worker from performing any work at any gainful employment. Oien v. Department of Labor & Indus., 74 Wash.App. 566, 569, 874 P.2d 876 (1994), review denied, 125 Wash.2d 1021, 890 P.2d 463 (1995); Hunter, 71 Wash.App. at 507-08, 859 P.2d 652; Bonko v. Department of Labor & Indus., 2 Wash.App. 22, 25, 466 P.2d 526 (1970). It differs from permanent total disability only in duration of disability, and not in its character. Bonko, 2 Wash.App. at 25, 466 P.2d 526; see also RCW 51.08.160...

"Temporary total disability benefits also terminate when the claimant is able to earn a wage at any kind of reasonably continuous and generally available employment. Hunter, 71 Wash.App. at 507-08, 859 P.2d 652. At this point, the temporarily disabled claimant becomes eligible for reduced time loss compensation, referred to as LEP benefits. RCW 51.32.090(3); Hunter, 71 Wash.App. at 506-07, 859 P.2d 652".

The court in Bonko v. Department of Labor and Industries, 466 P.2d 526, 2 Wn.App. 22 (Wash.App. Div. 3 1970) at 26, clarifies the appellant's position, stating:

"In the event the workman's earning power at any kind of work is only partially restored to that existing at the time of injury And [sic](emphasis added) his condition becomes fixed or static, time loss payments then cease and a permanent partial disability award is made to the workman.

No evidence was presented to show any restoration of Mr. Osborn's earning power effective on October 5th, 2010. The only testimony regarding the time period at issue is from Dr. Stump, who testified that as of June 1, 2010 claimant was not, on a more probable than not basis, able to function on a full-time basis. BIIA Administrative Record, Deposition of William Stump, M.D. p.16 - 18.

II. PERMANENT PARTIAL DISABILITY

Justice Tallmadge, in his concurrence in Hubbard explained the relationship between temporary total disability and permanent partial disability as follows:

"We believe that permanent partial disability contemplates future lost earning power. In Franks, the court stated, "In the case of permanent partial disability, the Legislature has taken loss of earning power into consideration by prescribing, in dollars, the compensation to be paid for certain specified disabilities." 35 Wash.2d at 774, 215 P.2d 416. Thus, contrary to Davis' assertion, the permanent partial disability statute is not unrelated to temporary disability

and time loss compensation. Moreover, in Hunter v. Department of Labor & Indus., 43 Wash.2d 696, 701, 263 P.2d 586 (1953), the court held that compensation for time-loss payments for temporary disability would be inconsistent with simultaneously being classified as permanently disabled and accepting a permanent disability award. Because a claimant cannot be simultaneously permanently partially disabled and temporary totally disabled, we believe that the statutes must be read harmoniously: Temporary total disability compensates for lost income until the extent of disability is fixed; once the condition is fixed, permanent partial disability compensates the claimant for future lost earning capacity measured by a percentage loss of bodily function. Davis, 82 Wash.App. at 273-74, 917 P.2d 586."

Hubbard v. Department of Labor & Industries of State of Washington, 992 P.2d 1002, 140 Wn.2d 35 (Wash. 2000) at 46-47.

That is future loss of earning power, after the permanent partial disability, not current total disability.

D. CONCLUSION

The Board and the Superior Court agree that the Department Order finding Mr. Osborn no longer temporarily totally disabled and able to work as

of October 6, 2009, incorrect. The Superior Court's error in affirming the Board's Findings of Facts and Conclusions of law is this:

1. The Board ordered time loss to be paid through February 4th, 2010, while the appellant actually pleaded and proved temporary total disability through February 5th, 2010 (the date of the last appealable order which sets the last date of the Board's scope of review). The Board determined, for no stated reason and n support from the record, that appellant ceased to be totally permanently disabled on February 4th, 2010 and became permanently partially disabled on the 5th.

2. Appellant's position is that this procedure is contrary to facts and the statute. If the Board had found Mr. Osborn not temporarily totally disabled, then a finding of permanent partial disability and claim closure would be appropriate - but it did not. One cannot be both temporarily totally disabled and permanently

partially disabled at the same time, therefore, because the appellant proved temporary total disability to February 5, 2010, the Board had no authority to end his total temporary disability status a day early so it could close his claim with a PPD. The scope of the Board's review ended February 5th, the day of the order under appeal and the date the evidence of total disability was presented.

The proper result is to find appellant temporarily totally disabled through February 5th, 2010, which conforms with the evidence as well as the issue as pleaded, BIIA Administrative Record, p.21, lines 12-15, and remand back to the Department to pay time loss and take whatever actions it deemed appropriate under the law and facts.

This issue is important because this procedure is not unique to this case. The practice of cutting off a day of total disability on a successful appeal to erroneously allow a PPD

adverse impact on injured workers and was not contemplated by the statute. It allows the Department to make a faulty work ability assessment with no recourse for the worker (if he or she cannot prove a pension) and no incentive for the Department to do better. The only risk to the Department is that if the worker appeals, they may be ordered to pay whatever little additional time loss that has accrued up to the date before closing, as in this case, and still be allowed to close with a PPD. This benefits the Department at the expense of the injured worker. The Department should be required to reevaluate the injured worker to see if his total disability can be rehabilitated, or if it is indeed permanent. The Department's counsel responds that a claimant must bring an appeal for a total permanent disability in such a circumstance, sort of an all or nothing scenario. This is not a viable option for a worker who is not permanently totally disabled.

If the lower ruling stands, Mr. Osborn, like an unknown number of other claimants in similar situations, will be stuck with a PPD and a closed claim based on a fictional finding, while still unable to work. The Department needs to be ordered to take another look at the injured worker and reassess the disability.

In the absence of clear legislative intent regarding an aggravation claimant's entitlement to benefits, we look to the underlying purpose of the Act, which is to ensure against loss of wage-earning capacity and to provide "sure and certain relief" to injured workers regardless of fault. *Dennis v. Department of Labor & Indus.*, 109 Wash.2d 467, 470, 745 P.2d 1295 (1987); *Hunter v. Bethel Sch. Dist. & Educ. Serv. Dist. No. 121*, 71 Wash.App. 501, 507, 859 P.2d 652 (1993); RCW 51.04.010. To these ends, the guiding principle in construing provisions of the Act is that it is remedial in nature and is to be liberally construed to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker. *Clauson*, 130 Wash.2d at 584, 925 P.2d 624; *Dennis*, 109 Wash.2d at 470, 745 P.2d 1295; RCW 51.12.010.

Hubbard v. Department of Labor & Industries of State of Washington, 992 P.2d 1002, 140 Wn.2d 35 (Wash. 2000) at 41.

Appellant requests the Court to reverse the Superior Court's ruling and remand back for an order stating from October 7, 2009 through February 5, 2010, Mr. Osborne was temporarily and totally disabled and the claim remains open for further action consistent with the law and facts.

**E. REQUEST
FOR ATTORNEY'S FEES UNDER
RCW 51.52.130**

Appellant further requests that the respondent be ordered to pay reasonable attorney's fees and expenses to the appellant pursuant to RCW 51.52.130.

Respectfully submitted this 16th day of May,
2014.



Paul W. Bryan, W6BA# 20464
Attorney for Appellant

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

PROOF OF SERVICE

I hereby declare under the penalty of perjury of the laws of the State of Washington that I served a copy of the enclosed *Brief of Appellant - Revised* in Appeal No. 45828-4-II on all parties or their counsel of record on the date below as follows:

Via US Mail:

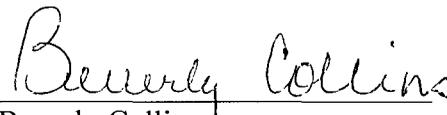
David C. Ponzoha, Clerk
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402

EX-100
STATE OF WASHINGTON
2014 MAY 19 AM 9:10
COURT OF APPEALS
DIVISION II

Via US Mail:

James Mills, AAG
Office of the Attorney General
1250 Pacific Avenue, Suite 105
P.O. Box 2317
Tacoma, WA 98401

Dated this 16th day of May, 2014.


Beverly Collins,
Assistant to Paul W. Bryan