

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

received
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Washington Law Center

IN RE: JAMES R. BERTHOLF) DOCKET NO. 19 23121
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CLAIM NO. BC-62255) PROPOSED DECISION AND ORDER

Adam E. Torem, Industrial Appeals Judge — On April 14, 2018, the claimant, James Bertholf, injured his back, right hip, and right leg when part of a heavy concrete mold fell over onto him while working as a cement mixer for H2 Precast, Inc., in East Wenatchee, Washington. Following two weeks of hospitalization, Mr. Bertholf moved in with his brother in Omak, Washington, to continue his recovery from the industrial injury. While living in Omak, he also received mental health counseling.

In September 2019, H2 Precast, Inc., offered Mr. Bertholf a light-duty position and the opportunity to return to work in East Wenatchee as a cement patcher. At that time, Mr. Bertholf was still residing in Omak, approximately 100 miles away from East Wenatchee. He declined to return to work. In January 2020, Mr. Bertholf moved from Omak to live near his parents in Orofino, Idaho.

The Department of Labor and Industries (Department or L&I) determined that Mr. Bertholf had been released for work by his medical providers, effective October 9, 2019. In an order dated November 8, 2019, L&I established an overpayment for time-loss compensation paid to Mr. Bertholf from October 9, 2019, through October 17, 2019. Mr. Bertholf appealed, contending that he had not been released for work by his mental health provider. Mr. Bertholf also contested the validity of his employer's light-duty job offer because East Wenatchee was not within a reasonable commuting distance of Omak, his residence at the time of the employer's light-duty job offer.

Although Mr. Bertholf testified that he suffers from post-traumatic stress disorder (PTSD) and is too scared to return to working with concrete forms, his mental health counselor, Cheryl Garman, failed to testify that he was unable to return to work as of October 9, 2019. The Department therefore moved to dismiss Mr. Bertholf's appeal for failure to present a prima facie case regarding his inability to return to work. However, L&I subsequently withdrew its motion and presented its case-in-chief.

The employer, H2 Precast, Inc., appears to have acted in good faith and done everything within its power to allow Mr. Bertholf to return to work in what it believed would be an appropriate light-duty position that would accommodate all of Mr. Bertholf's post-injury physical and mental health needs. However, due only to the injured worker's relocation away from the Wenatchee area, this light-duty job offer was not valid. Therefore, the Department order must be **REVERSED** and

1 **REMANDED** with direction to L&I to reverse its overpayment and reinstate Mr. Bertholf's benefits in
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3 accordance with the facts and the law.

4 **DISCUSSION**

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6 James Bertholf is 36 years old. He graduated from high school in Omak, Washington, and
7 moved to Seattle for work. He subsequently returned to and resided in Omak until late 2016. At that
8 time, he moved to Wenatchee, Washington, to start work for H2 Precast, Inc., as a cement patcher.
9 Mr. Bertholf was promoted several times and was working as a cement mixer and machine operator
10 by early 2018. As part of those duties, he monitored the "recipe" for the concrete and worked with a
11 crew of other employees to pour the mud into forms, some as large as 10 feet by 12 feet.
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14 On April 14, 2018, Mr. Bertholf was called in to work to assist with mixing cement for a large
15 water vault form. He and two other coworkers used a forklift to put the doors on the mold. One of
16 the steel doors fell over onto Mr. Bertholf, crushing his back and legs. His coworkers used a forklift
17 to free him from the heavy form, but Mr. Bertholf could not feel his feet. An ambulance responded to
18 take him to the hospital where he underwent surgery to repair his right leg and right hip. Mr. Bertholf
19 spent nearly two weeks in two different hospitals before he was discharged. Upon leaving the
20 hospital, he was unable to drive or navigate stairs. Therefore, Mr. Bertholf arranged to move out of
21 his one bedroom apartment in Wenatchee and move in with his brother William in Omak.
22 Approximately four months later, he was able to walk again, but only with the use of a cane. It took
23 several more months for Mr. Bertholf to be able to stop using a cane to get around. However, later
24 in 2018 he started to experience panic attacks, nightmares, and trouble sleeping. Mr. Bertholf sought
25 mental health treatment and was diagnosed with post-traumatic stress disorder (PTSD).
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28 H2 Precast offered Mr. Bertholf an opportunity to come back to work as a cement patcher in
29 October 2019. However, he refused because he was unable to commute from Omak to Wenatchee
30 and also believed he was neither physically nor mentally able to return to that work environment.
31 Several months later, Mr. Bertholf moved to Orofino, Idaho, where his parents reside and could help
32 him with living expenses.
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35 Arthur James Bertholf, Jr., is James' father. When he learned of his son's injury in April 2018,
36 he came up to Wenatchee to be with him in the hospital for a few days. James initially moved to
37 Omak so his brother could help care for him while he recovered. Later, in approximately
38 January 2020, James came to live with his parents in Idaho for financial reasons. Arthur believes
39 that his son is a different person since the accident, having lost much of his self-confidence.
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William Dean Bertholf is James' brother. He lives in Omak. He learned of James' industrial injury when his brother called him from the hospital in Wenatchee. At that time, William was pursuing a caregiver's license and it suddenly appeared possible that his brother William might become his first patient. A few weeks later, William and other members of the family helped move James out of his Wenatchee apartment and into William's trailer in Omak. At that time James was in a wheelchair, but soon graduated to a walker and eventually walking with a cane. Although William filled out the DSHS paperwork and applied to become James' paid caregiver, he was unable to complete that process and was never compensated for caring for James as he recovered. Therefore, as James' condition improved William sought out additional employment. By October 2019, William had moved out and James had taken over the trailer residence. William believes that James moved down to Idaho a few months later, between Thanksgiving and Christmas.

Corey Robert Linscott has been the Safety Manager for H2 Precast, Inc., in East Wenatchee since 2018. Mr. Linscott supervised Mr. Bertholf, but was not working on the date of his injury. He heard about the accident by phone and later visited Mr. Bertholf in the hospital, but has had no contact with him since then. Mr. Linscott was not aware that Mr. Bertholf had moved to Omak until he saw a new address on L&I claim paperwork. As early as August 2019, Mr. Linscott started developing a light-duty job offer for Mr. Bertholf as a cement patcher that he believed would allow a return to work and accommodate his post-injury physical restrictions. H2 Precast sent several light-duty job offer letters to Mr. Bertholf, making revised accommodations each time. H2 Precast made modifications to address his PTSD and sent Mr. Bertholf another light-duty job offer on September 19, 2019, but received no response. Mr. Bertholf never returned to work. If Mr. Linscott had been aware of Mr. Bertholf's financial challenges, he believes H2 Precast could have provided help relocating him and bringing him back to work in East Wenatchee.

Medical Evidence

Cheryl Garman, MSW, is a therapist at Okanogan Behavioral Healthcare. She was James Bertholf's mental health counselor in Omak, Washington, for several months at the end of 2019. She treated him for PTSD and helped Mr. Bertholf develop coping skills, including grounding, to overcome his panic attacks and nightmares. However, Ms. Garman explained that it was outside the scope of her treatment to comment on whether Mr. Bertholf's return to the job site where he was injured would provoke further symptoms. Ms. Garman also declined to comment on his ability to return to work at H2 Precast, and explained that she had not provided any such statements to L&I.



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disability.⁴ In typical cases, it is necessary for the injured worker to present medical evidence that during the subject period his condition was not fixed and stable, required further medical treatment, and that he suffered a loss of function which rendered him incapable of gainful employment on a reasonably continuous basis.⁵

Here, Mr. Bertholf contends that H2 Precast, Inc.'s offer of a cement patcher job in Wenatchee was not a valid light-duty job offer under RCW 51.32.090(4). Although the Department's order on appeal does not expressly mention a light-duty job offer, the parties agreed that this was the underlying question presented by Mr. Bertholf's appeal.⁶ Mr. Bertholf specifically contends that H2 Precast's light-duty job offer was not within a reasonable commuting distance of his then-current residence in Omak.

Claimant's counsel confirmed and presented a medical witness, Cheryl Garman. However, when Ms. Garman testified she expressly declined to comment on the core ability to work issue presented by this case. If this were a time-loss eligibility case, dismissal would have been appropriate based on the lack of medical evidence. However, Mr. Bertholf's burden here was to show that the Department order ending time-loss compensation due to a light-duty job offer was wrong.

Light Duty – Reasonable Commuting Distance. RCW 51.32.090(4)(a) encourages employers to find ways to allow injured workers to continue in their jobs while recovering from their injuries. RCW 51.32.090(4)(b) sets out a formal process for employers to make light-duty work available and seek the injured worker's treating physician's review and approval of the specified work duties. The Industrial Insurance Act provides that an injured worker remains eligible for time-loss compensation benefits until he or she is released by his physician for work, including light-duty work with the employer of injury. To constitute a valid light-duty job offer, the offered employment must be within the worker's relevant labor market, which requires the job to be within a reasonable commuting distance.⁷ In the case of *In re Richard Gramelt*, the Board held that a job offer that requires a roundtrip commute of 136 miles with the worker required to pull to the side of the road six times and walk five minutes during the drive because of physical limitations imposed by the industrial injury was not a valid light-duty job offer because it was not within a reasonable commuting

⁴ *Bonko v. Dept. of Labor and Indus.*, 2 Wn. App. 22 (1970).
⁵ See *In re Mark Billings*, BIIA Dec., 70 883 (1986).
⁶ See Litigation Order (February 24, 2020).
⁷ WAC 296-19A-010(4).

1 distance.⁸ The Board has made similar rulings in cases where claimants would have to drive
2 sufficient distances such that they would have to take breaks to stop and stretch to relieve discomfort
3 or numbness.⁹

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6 Here, Mr. Bertholf moved from Wenatchee, where he was injured, to Omak, where his brother
7 could help care for him as he recovered. Mr. Bertholf remained in Omak for more than a year and
8 was receiving ongoing psychiatric treatment there when H2 Precast started developing a plan to bring
9 him back to work in a light-duty position. When H2 Precast sent Mr. Bertholf the light-duty offer that
10 is the subject of this appeal, Mr. Bertholf was living in Omak, not in Wenatchee. In accordance with
11 several previous Board rulings, I must find that Mr. Bertholf's labor market at the time of the light-duty
12 job offer was Omak and not Wenatchee.¹⁰ The Board has also held that injured workers are not
13 required to return to their former labor market in order to accept a job offer.¹¹ From Omak, Mr. Bertholf
14 would have had to endure at least a 90-120 minute drive each way in order to accept H2 Precast's
15 light-duty job offer. This is much longer than his previous trip to work when he lived in Wenatchee
16 and, under the Board's interpretation of WAC 296-19A-010(4), is not a reasonable commuting
17 distance.

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20 H2 Precast's light-duty job offer was reasonably calculated to make it easy for Mr. Bertholf to
21 return to work as a cement patcher. Mr. Linscott is to be commended for the detailed efforts he made
22 to develop a plan to welcome his injured employee back to the H2 Precast team. However, due to
23 circumstances outside the employer's control, Mr. Bertholf needed assistance to recover from his
24 injuries and made the decision to relocate in order to make it possible for his brother to help him. The
25 change in geography and resultant commuting distance essentially invalidated any light-duty job offer
26 from an employer in East Wenatchee.

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29 Mr. Bertholf's subsequent relocation to Orofino, Idaho, is not analyzed or questioned in this
30 opinion because that move took place after the light-duty job offer was rejected.

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42 ⁸ *In re Richard Gramelt*, BIA Dec., 09 21619 (2011).

43 ⁹ See *In re Darren P. Bowen*, Dckt. No. 11 22328 (March 7, 2013) [200 mile one-way commute]; see also *In re*
44 *Donald R. Skewis*, Dckt. No. 11 12825 (August 23, 2012) [67 mile commute with at least one stop to stretch and move
45 around].

46 ¹⁰ See *In re Robert D. LaFleur*, Dckt. No. 08 17525 (October 6, 2009); *In re Steven M. Laing*, Dckt No. 08 12843
(May 20, 2009); and *In re Jolee N. Hart*, Dckt. No. 08 11048 (September 30, 2009).

47 ¹¹ *In re Jeffrey R. Taylor*, Dckt. No. 11 10317 (March 18, 2012).



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DECISION

In Docket No. 19 23121, the claimant, James R. Bertholf, filed an appeal with the Board of Industrial Insurance Appeals on November 13, 2019. The claimant appeals a Department order dated November 8, 2019. In this order, the Department assessed a time-loss compensation overpayment in the amount of \$545.58 for benefits paid from October 9, 2019, through October 17, 2019, because Mr. Bertholf had been released for work effective October 9, 2019. The November 8, 2019 Department order is reversed and remanded with direction to the Department to reverse its overpayment and reinstate Mr. Bertholf's benefits in accordance with the facts and the law.

FINDINGS OF FACT

1. On January 28, 2020, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History in the Board record solely for jurisdictional purposes.
2. The claimant, James Bertholf, sustained an industrial injury on April 14, 2018, while in the course of his employment with H2 Precast, Inc., in Wenatchee, Washington, when a concrete form fell over onto him injuring his back, right hip, and right leg. As a result, Mr. Bertholf was hospitalized for approximately two weeks and spent several months recovering.
3. James Bertholf is a 36-year-old man with a high school education. He has experience as a cement patcher, a cement mixer, and a machine operator.
4. Following his industrial injury, Mr. Bertholf moved from Wenatchee, Washington, to Omak, Washington, so that his brother, William Bertholf, could assist in his recovery.
5. Mr. Bertholf is scared to return to work at H2 Precast, Inc., and has developed post-traumatic stress disorder (PTSD) as a result of his injury.
6. On September 19, 2019, H2 Precast, Inc., sent a letter to Mr. Bertholf containing a physician-approved light-duty job offer with a report date of October 9, 2019.
7. Mr. Bertholf did not accept the light-duty job offer and did not report to work.
8. H2 Precast, Inc.'s, location in Wenatchee, Washington, is not within a reasonable commuting distance of Omak, Washington.

CONCLUSIONS OF LAW

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

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2. The claimant, James Bertholf, remained a temporarily totally disabled worker within the meaning of RCW 51.32.090 from October 9, 2019, through October 17, 2019.
 3. The employer's light-duty job offer was not valid under RCW 51.32.090(4) and WAC 296-19A-010(4).
 4. The Department order dated November 8, 2019, is reversed and remanded with direction to the Department to reverse its overpayment and reinstate Mr. Bertholf's time-loss compensation benefits in accordance with the facts and the law.

Dated: September 24, 2020



ADAM E. TOREM
Industrial Appeals Judge
Board of Industrial Insurance Appeals