

Morse, Peter

VOCATIONAL REHABILITATION

Termination of vocational plan

The Department lacks authority to terminate a worker's vocational plan and end time(-loss compensation benefits solely on the basis that the worker is employable where the worker is actually and successfully participating in his approved vocational plan. ...*In re Peter Morse*, BHA Dec., 13 25365 (2015)

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

IN RE: PETER L. MORSE) **DOCKET NO. 13 25365**
)
CLAIM NO. Y-364167) **DECISION AND ORDER**

APPEARANCES:

Claimant, Peter L. Morse, by
Beemer & Mumma, P.S., per
Brian L. Ernst

Employer, Ken Spilker Masonry Co.,
None

Retrospective Rating Group, Associated General Contractors Retro #10636,
None

Department of Labor and Industries, by
The Office of the Attorney General, per
Lynn M. Mounsey

The claimant, Peter L. Morse, filed an appeal with the Board of Industrial Insurance Appeals on November 20, 2013, from an order of the Department of Labor and Industries dated September 23, 2013. In this order, the Department affirmed its order dated June 25, 2013, in which it ended time-loss compensation benefits on June 24, 2013, because the worker could work. The Department order is **REVERSED AND REMANDED**.

INTRODUCTION

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The claimant filed a timely Petition for Review of a Proposed Decision and Order issued on January 7, 2015, in which the industrial appeals judge affirmed the Department order dated September 23, 2013. Contested issues addressed in this order include continuation of Mr. Morse's vocational plan and reinstatement of time-loss compensation benefits.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed.

The evidence presented by the parties is well set forth in the Proposed Decision and Order, but a brief recitation of the facts will help explain our decision that it was incorrect for Department to terminate the vocational plan and end time-loss compensation benefits because Mr. Morse was employable while he was actively and successfully participating in his vocational plan.

1 Mr. Morse injured his right knee during the course of his employment in 2002. The injury
2 resulted in several surgeries including a total knee replacement and subsequent revision.
3 Mr. Morse worked as a brick mason after graduating from high school in 1981, and is limited by the
4 effects of the injury to sedentary employment. He was earlier found to be in need of vocational
5 services but selected Option 2 in 2009. The claim was reopened in 2011, and Mr. Morse was again
6 found eligible for vocational services. He signed an accountability agreement, which detailed
7 expectations regarding progress and attendance, among other factors. By signing the agreement,
8 Mr. Morse acknowledged that his failure to abide by the agreed expectations would cause
9 suspension of vocational benefits under RCW 51.32.110.
10

11 A vocational plan was developed for the position of user support analyst. Mr. Morse was to
12 attend computer classes for approximately 19 months, from November 2012 until June 2014. The
13 record suggests that Mr. Morse was not overly motivated and was deemed by his vocational
14 counselors to be a high maintenance individual. However, he was regularly attending and
15 successfully passing his classes until he had trouble with two courses in June 2013, seven months
16 into the plan.
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18 A meeting to discuss the problems was held, probably on June 10, 2013, or June 11, 2013,
19 between Mr. Morse, his vocational counselor Sky Reynolds (who did not testify in this appeal,) and
20 someone from the school. Mr. Morse was told that he had to work harder and put in more time.
21 Exactly what Mr. Morse said in response is somewhat in dispute; he is the only person who
22 attended the meeting who testified in this appeal. His counselor's supervisor, Leslie Weaver,
23 thought from her discussions with Ms. Reynolds that Mr. Morse was not willing to work any harder
24 and refused to do so. According to Mr. Morse, he didn't refuse but conceded that he might have
25 said that he wouldn't spend more time in class. Ms. Weaver conceded that she never spoke to
26 Mr. Morse after the meeting or sought his perspective on what had happened at the meeting.
27 Mr. Morse continued to attend classes, but Ms. Weaver, based on her understanding that
28 Mr. Morse had violated his accountability agreement by refusing to fully participate, contacted the
29 claims manager, who directed her to take steps to determine Mr. Morse's employability based on
30 the courses he had already completed. Based on his training and a new labor market survey
31 completed on June 29, 2013, Mr. Morse was found to be employable in an entry-level help desk
32 position. The Department terminated the vocational plan and ended time-loss compensation
33 benefits on June 24, 2013, because Mr. Morse could work.
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DECISION

The Department did not have the authority to terminate the vocational plan and end time-loss compensation benefits solely on the basis of Mr. Morse's employability while he was actively and successfully participating in his approved plan. Mr. Morse's vocational plan is governed by RCW 51.32.099, in which the Legislature directed the Department to implement a vocational rehabilitation pilot program and articulated as one of its goals that eligible workers, "participate in meaningful retraining in high-demand occupations"¹ The statute imposes certain responsibilities on injured workers who participate in an approved vocational plan. All vocational plans under the program must contain an accountability agreement signed by the worker specifying such factors as the attendance, progress, and performance expected of the worker.² If a worker fails to abide by the accountability agreement or disrupts the plan to the extent the employability goal is no longer attainable, benefits are to be suspended under RCW 51.32.110.³

Besides imposing obligations on the worker, the statutory scheme also confers certain rights to the worker. RCW 51.32.099(3)(e) provides that the worker **shall** receive temporary total disability compensation while actively and successfully participating in a vocational plan (emphasis added). Once Mr. Morse began an approved vocational plan, the Department had to continue paying those benefits if he was actively and successfully participating in his vocational plan. It was error for Department to terminate the vocational plan and end time-loss compensation benefits because Mr. Morse was employable while he was actively and successfully participating in his vocational plan.

Ms. Weaver appears to have thought Mr. Morse had decided not to use his best efforts and had violated his accountability agreement. If he had, the action would have been to suspend benefits under RCW 51.32.110. We note that RCW 51.32.110 requires that a worker be notified of the intention to suspend benefits and permits a worker to show good cause for the action taken.⁴ If the Department considered that Mr. Morse had violated his accountability agreement, or had disrupted the plan to the extent the employability goal was no longer attainable, he should have been given notice; an opportunity to show good cause for any violation; and the potential to cure

¹ RCW 51.32.099(1)(a).

² RCW 51.32.099(3)(a).

³ RCW 51.32.099(3)(a); RCW 51.32.099(5)(c).

⁴ See *In re Dennis Staudinger*, BIIA Dec., 12 15477 (2013).

1 the violation and have any suspension lifted.⁵ Instead, his vocational plan and time-loss
2 compensation benefits were summarily terminated.

3
4 We assume that it must have been clear at the inception of the plan, at least to the
5 vocational experts if not Mr. Morse, that Mr. Morse could be found employable for an entry-level
6 help desk position after seven months of schooling. But the parties agreed to a 19-month plan for
7 the position of user support analyst, presumably a better paying job, and in accord with the
8 Legislature's goal of providing meaningful retraining in high-demand occupations.

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10 If the Department could take the action it took here, the initial vocational plan would be
11 meaningless, and would allow the potential for bait-and-switch operations in which a worker agrees
12 to a meaningful vocational retraining plan of up to two years in duration and in good faith abides by
13 the mandatory accountability agreement, only to be told after a few months he or she is employable
14 in some job that does not require as much training, or pay as much, as the original goal. It also has
15 the potential to put injured workers at the mercy of claims managers or vocational counselors who
16 could end vocational plans and terminate time-loss compensation benefits without providing the
17 worker with any notions of basic fairness.

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19 Based the record, we cannot determine if the original employability goal remains attainable,
20 and therefore whether a vocational plan interruption has occurred.⁶ The plan was not interrupted
21 due to the worker's actions because Mr. Morse was actively and successfully participating in his
22 plan when the Department terminated it. Mr. Morse is entitled to the continuation of his vocational
23 plan if possible. On remand, the Department shall reinstate Mr. Morse's time-loss compensation
24 benefits, and take further action under the facts of this appeal.

25 **FINDINGS OF FACT**

- 26
27 1. On April 15, 2014, an industrial appeals judge certified that the parties
28 agreed to include the Jurisdictional History in the Board record solely for
29 jurisdictional purposes.
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31 2. Peter L. Morse sustained an industrial injury on May 7, 2002, when he
32 injured his right knee after jumping off an embankment and some
33 scaffolding. The injury required several surgeries including total right
34 knee replacement surgery on March 3, 2008, and a subsequent
35 revision.
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46 ⁵ See, RCW 51.32.110(2); *Anderson v. Weyerhaeuser*, 116 Wn. App. 149 (2003).

47 ⁶ See, RCW 51.32.099(5).

- 1 3. Mr. Morse was born on April 15, 1963, and graduated from high school
2 in 1981. Prior to the industrial injury of May 7, 2002, Mr. Morse worked
3 primarily as a brick mason. Due to the limitations proximately caused by
4 the industrial injury, Mr. Morse cannot return to his job of injury as a
5 brick mason and is limited to performing work of a sedentary or
6 semi-sedentary nature
7
8 4. The Department found Mr. Morse eligible for vocational services in
9 2012, and he signed an accountability agreement on September 18,
10 2012. A vocational plan was developed for the position of user support
11 analyst, and Mr. Morse was to attend computer classes for
12 approximately 19 months, from November 2012 until June 2014.
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14 5. As of June 25, 2013, Mr. Morse was actively and successfully
15 participating in his vocational plan.
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17 6. On June 25, 2013, the Department terminated Mr. Morse's vocational
18 plan and ended time-loss compensation benefits solely because
19 Mr. Morse was employable, without having suspended benefits for a
20 failure to abide by the accountability agreement or for a plan interruption
21 due to the worker's own actions.

22 **CONCLUSIONS OF LAW**

- 23 1. The Board of Industrial Insurance Appeals has jurisdiction over the
24 parties to and the subject matter of this appeal.
25
26 2. Under RCW 51.32.099(3)(e), Mr. Morse may receive temporary total
27 disability compensation under RCW 51.32.090 from June 25, 2013,
28 through September 23, 2013.
29
30 3. The Department order dated September 23, 2013, is incorrect and is
31 reversed. This matter is remanded to the Department with direction to
32 reinstate the claimant's time-loss compensation benefits effective
33 June 25, 2013, and thereafter take further action.

34 Dated: April 8, 2015.

35 BOARD OF INDUSTRIAL INSURANCE APPEALS

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38 /s/
39 DAVID E. THREEDY Chairperson

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42 /s/
43 FRANK E. FENNERTY, JR. Member
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