

Flores, Armando

SCOPE OF REVIEW

Vocational rehabilitation determinations

STANDARD OF REVIEW

Vocational rehabilitation determinations

Review of Director's decision that a worker is employable, and therefore not eligible for vocational rehabilitation services, is limited to determining whether or not the exercise of the discretionary authority of RCW 51.32.095 has been abused. ...*In re Armando Flores*, BIIA Dec., 87 3913 (1989)

Scroll down for order.

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

1 **IN RE: ARMANDO FLORES**) **DOCKET NOS. 87 3913 & 88 0109**
2)
3 **CLAIM NO. S-862133**) **DECISION AND ORDER**
4)

5 **APPEARANCES:**

6
7 Claimant, Armando Flores, by
8 Tom G. Cordell
9

10 Self-Insured Employer, Carnation Company, by
11 Rolland, O'Malley & Williams, per
12 Thomas O'Malley and Wayne Williams
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14 These are appeals filed by the claimant. The appeal assigned Docket No. 87 3913 was filed on
15 November 30, 1987 from a letter/decision of the Director of the Department of Labor and Industries
16 dated November 3, 1987 which determined that Mr. Flores was employable in his previous
17 occupation. **AFFIRMED**

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20 The appeal assigned Docket No. 88 0109 was filed on January 12, 1988 from an order of the
21 Department of Labor and Industries dated December 7, 1987 which closed the claim with time-loss
22 compensation as paid to July 21, 1987 and directed the self-insured employer to pay a permanent
23 partial disability award equal to 10% of the amputation value of the left arm at or above the deltoid
24 insertion or by disarticulation at the shoulder. **REVERSED AND REMANDED.**
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28 **DECISION**

29 Pursuant to RCW 51.52.104 and RCW 51.52.106, these matters are before the Board for
30 review and decision on a timely Petition for Review file by the self-insured employer to the Proposed
31 Decisions and Orders issued on December 5, 1988.
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33 The Proposed Decision and Order issued in Docket No. 87 3913 reversed the Director's
34 decision contained in the letter dated November 3, 1987 which determined the claimant was
35 employable in his previous occupation and remanded the claim to the Department with directions to
36 pay time-loss compensation for the period October 9, 1987 through November 3, 1987, to determine
37 that the claimant was not employable in his previous occupation, and to take such further action as
38 appropriate.
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1 The Proposed Decision and Order issued in Docket No. 88 0109 reversed the Department
2 order dated December 7, 1987 and remanded the claim to the Department with directions to pay
3 time-loss compensation for the period October 9, 1987 through December 7, 1987, to provide further
4 treatment and diagnostic evaluation of the claimant's conditions resulting from the industrial injury, and
5 to take such further action as may be appropriate.
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9 The evidentiary ruling on page two of the Proposed Decision and Order commencing at line 9
10 through 14, striking the testimony of Dr. Percy Erdmann regarding hypertension and dizziness of the
11 claimant, is reversed. The testimony remains a part of the record. The Board has reviewed the other
12 evidentiary rulings in the record of proceedings and finds no other prejudicial error was committed and
13 said rulings are hereby affirmed.
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16 These matters were consolidated for hearing. Although the parties agreed to consolidation for
17 the Proposed Decision and Order, the Industrial Appeals Judge issued separate Proposed Decisions
18 and Orders. We now consolidate these appeals for our Decision and Order.
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21 The evidence presented by the parties is adequately set forth in both Proposed Decisions and
22 Orders. We disagree with the Industrial Appeals Judge's analysis and resolution of the issue in the
23 appeal assigned Docket No. 87 3913. Our review of the record indicates that the letter issued by the
24 Director on November 3, 1987 was directed only to the determination of the need for vocational
25 rehabilitation services pursuant to RCW 51.32.095 and was a discretionary act of the Director. Finding
26 no abuse of discretion by the Director, we affirm the Director's determination.
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30 In the appeal assigned Docket No. 88 0109 the Industrial Appeals Judge found that the
31 industrial injury of October 17, 1986 produced disabling conditions of the claimant's neck and both the
32 left and right shoulders and upper extremities. The Industrial Appeals Judge found that these
33 conditions were in need of further medical treatment and remanded the matter to the Department. We
34 agree that the claimant's conditions regarding the left shoulder, left upper extremity, and neck are
35 causally related to the industrial injury of October 17, 1986 and in need of further treatment and that
36 claimant is entitled to time-loss compensation for the period of October 9, 1987 through December 7,
37 1987. We disagree that the industrial injury produced any disabling conditions associated with the
38 claimant's right shoulder or right upper extremity.
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42 The Department issued an employability determination dated August 31, 1987. In doing so the
43 Department determined that the claimant had returned to work and would not be provided vocational
44 rehabilitation services. The claimant protested the employability determination by a letter which was
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1 received by the Department on September 16, 1987. On November 3, 1987 the Director of the
2 Department issued a letter responding to the claimant's dispute letter. The Director determined that
3 the claimant was employable in his previous occupation.
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5 The employability determination and the subsequent dispute resolution, culminating in the
6 Director's letter of November 3, 1987, followed the procedure set forth in RCW 51.32.095 and WAC
7 296-18A-470. RCW 51.32.095 provides that the determination of the need for vocational rehabilitation
8 services rests solely within the discretion of the Director or the Director's designee.
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10 The decision of the Director of the Department of Labor and Industries embodies in his letter of
11 November 3, 1987 is clearly the Director's discretionary act denying Mr. Flores vocational rehabilitation
12 services. No other reasonable interpretation can be drawn from the acts of the parties. Since the
13 letter of November 3, 1987 is limited to the Director's exercise of discretion in denying vocational
14 rehabilitation services, that issue and that issue alone is before us in the appeal assigned Docket No.
15 87 3913. Lenk v. Department of Labor and Industries, 3 Wn. App. 977, 478 P.2d 761 (1970).
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18 Having determined the issue before us in that appeal, we must now examine our scope of
19 review. We have previously stated our authority to review discretionary acts of the Department. In re
20 Gary J. Manley, BIIA Dec., 66,115 (1986). Our review is limited to determining whether or not the
21 exercise of discretionary authority constitutes an abuse of discretion.
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23 ". . . [D]iscretion is a composite of many things, among which are
24 conclusions drawn from objective criteria; it means a sound judgment
25 exercised with regard to what is right under the circumstances and without
26 doing so arbitrarily or capriciously. [citation omitted] Where the decision or
27 order . . . is a matter of discretion, it will not be disturbed on review except
28 on a clear showing of abuse of discretion, that is, discretion manifestly
29 unreasonable, or exercised on untenable grounds, or for untenable
30 reasons. [Citations omitted]"
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33 State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). "An abuse of discretion" also
34 "exists . . . when no reasonable person would take the position adopted by the" decision maker.
35 Griggs v. Averbeck Realty, 92 Wn.2d 576, 584, 599 P.2d 1289 (1979). In addition, there is an abuse
36 of discretion when the reasons for the discretionary decision are not stated. State v. Hampton, 107
37 Wn.2d 403, 728 P.2d 1049 (1986).
38

39 It is the claimant's burden in the appeal assigned Docket No. 87 3913 to show that the
40 Director abused his discretion in denying him vocational rehabilitation services. The claimant has
41 failed to produce any evidence directed to this issue. Since there is no evidence contained in the
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1 record to establish that the Director abused his discretion, the Director's determination of November 3,
2 1987 must be affirmed.
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4 Our determination that the Director did not abuse his discretion in denying Mr. Flores
5 vocational rehabilitation services is not dispositive of the issues raised in claimant's appeal from the
6 Department order of December 7, 1987, Docket No. 88 0109. In that appeal, our scope of review is
7 not limited to the question of whether the Director abused his discretion. In that appeal we must
8 undertake a full de novo review. If the claimant proves his entitlement to benefits in Docket No. 88
9 0109 by a preponderance of the evidence, he must prevail.
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11 The questions before us in Docket No. 88 0109 are:
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- 13 1. What conditions are causally related to claimant's industrial injury of
14 October 17, 1986?
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- 16 2. Were claimant's conditions causally related to the industrial injury of
17 October 17, 1986 fixed and stable or in need of further treatment as of
18 December 7, 1987?
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- 20 3. If they were fixed, what was the extent of claimant's permanent disability
21 as of December 7, 1987? And
22
- 23 4. Was claimant totally temporarily disabled from October 9, 1987 to
24 December 7, 1987?
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26 The Industrial Appeals Judge accorded the testimony of Dr. Percy Erdmann and Dr. Lee H.
27 Turk special consideration as attending physicians, and was persuaded that the conditions involving
28 the right shoulder and right upper extremity, as well as the claimant's left shoulder condition, left carpal
29 tunnel syndrome and neck strain, were causally related to the industrial injury. He also found that the
30 claimant was temporarily and totally disabled from October 9, 1987 through December 7, 1987. We
31 agree that the claimant's left shoulder, left carpal tunnel syndrome and neck conditions are causally
32 related to the industrial injury and are in need of further diagnostic treatment, and that these conditions
33 precluded the claimant from employment from October 9, 1987 through December 7, 1987. However,
34 the medical evidence leads us to conclude that the right shoulder and right upper extremity conditions
35 are not associated with the industrial injury.
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37 On October 17, 1986 Mr. Flores sustained the industrial injury when he was attempting to free
38 a jammed conveyor belt by using a three foot pipe wrench above his head. Dr. Erdmann, the
39 claimant's attending physician for a number of years preceding the industrial injury, examined Mr.
40 Flores on October 20, 1986, three days after the industrial injury, and took a history of the industrial
41 injury. The history which he received indicated only that the claimant had injured his left shoulder and
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1 left arm. The contemporaneous lay testimony also focused exclusively on left-sided complaints at the
2 time of injury.
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4 Dr. Erdmann did not treat the claimant for the industrial injury. He referred him to Dr. Louis W.
5 Field, who examined the claimant on October 20, 1986 and ultimately performed the surgery to
6 reattach a ruptured biceps muscle in the claimant's left arm. Dr. Field first recorded a reference to
7 right shoulder pain in April 1987. He offered no diagnosis concerning the claimant's right shoulder and
8 right upper extremity.
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11 Dr. Donald A. Smith, who examined the claimant on one occasion in July of 1988, also failed
12 to address the causal relationship of the right shoulder and right upper extremity to the industrial injury.
13 He did causally relate the left-sided conditions and a neck strain to the industrial injury.
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16 Dr. David W. Anderson, who performed an examination of the claimant as part of a panel on
17 October 1, 1987, was of the opinion that the claimant's right shoulder and neck complaints were
18 consistent with degenerative wear and tear changes and not related to the industrial injury of October
19 17, 1986.
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22 Thus, if the claimant is to succeed in establishing the causal relationship of the conditions of
23 the right shoulder and right upper extremity to the industrial injury, he must do so on the strength of the
24 testimony of Dr. Lee Harris Turk. Dr. Turk's testimony, however, is insufficient to support the
25 claimant's burden in this regard.
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28 Dr. Turk first saw the claimant approximately one year following the industrial injury. He
29 related right shoulder and right upper extremity conditions to the industrial injury, but his diagnoses of
30 the claimant's conditions were couched in terms of "Possible right carpal tunnel syndrome. Possible
31 right rotator cuff tear, or possible internal derangement of the right shoulder." Tr. 8/23/88 at 17.
32 Furthermore, he did not explain the mechanics of how the industrial injury could have cause "possible"
33 right shoulder and right upper extremity conditions. In light of the overwhelming medical evidence that
34 there is no connection between Mr. Flores' right-sided complaints and the industrial injury, we do not
35 find Dr. Turk's testimony to the contrary persuasive.
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40 After consideration of the Proposed Decision and Order issued in the appeal assigned
41 Docket No. 87 3913, and the Petition for Review filed thereto and a careful review of the entire
42 record before us, we are persuaded that the Director did not abuse his discretion and that the
43 Director's letter dated November 3, 1987 should be affirmed.
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1 After consideration of the Proposed Decision and Order issued in the appeal assigned Docket
2 No. 88 0109, and the Petition for Review filed thereto and a careful review of the entire record before
3 us, we are persuaded that the Department order dated December 7, 1987 which closed the claim with
4 time-loss compensation as paid to July 21, 1987 and awarded a permanent partial disability award
5 equal to 10% of the amputation value of the left arm at or above the deltoid insertion or by
6 disarticulation at the shoulder, is incorrect and should be reversed and the claim remanded to the
7 Department for further treatment and payment of time-loss compensation.
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12 FINDINGS OF FACT

- 13 1. Docket No. 87 3913: On November 3, 1986 an accident report was
14 received from the claimant alleging an industrial injury to his shoulder on
15 October 17, 1986 while he was in the employ of the Carnation Company,
16 a self-insured employer. On November 24, 1986 the Department issued
17 an order allowing the claim. On August 31, 1987 the Department issued
18 an employability determination which determined that the claimant had
19 returned to work and would not be provided vocational rehabilitation
20 services. On September 16, 1987 the Department received a dispute from
21 the claimant to the employability determination dated August 31, 1987. On
22 November 3, 1987 the Director of the Department of Labor and Industries
23 issued a letter to the claimant denying the claimant vocational rehabilitation
24 services. On November 30, 1987 the claimant filed a notice of appeal with
25 the Board of Industrial Insurance Appeals from the Director's letter of
26 November 3, 1987. On December 11, 1987 the Board issued an order
27 granting the appeal and assigning Docket No. 87 3913 and ordering that
28 further proceedings be held in the matter.
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- 30 2. Docket No. 88 0109: On November 3, 1986 a report of an accident was
31 received from the claimant alleging an industrial injury to his shoulder on
32 October 17, 1986 while in the employ of the Carnation Company. On
33 November 24, 1986 the Department issued an order allowing the claim.
34 On December 7, 1987 the Department issued an order closing the claim
35 with time-loss compensation as paid to July 21, 1987 and awarding a
36 permanent partial disability award equal to 10% of the amputation value of
37 the left arm at or above the deltoid insertion or by disarticulation at the
38 shoulder. On January 12, 1988 a notice of appeal was filed with the Board
39 of Industrial Insurance Appeals by the claimant from the Department order
40 of December 7, 1987. On January 25, 1988 the Board granted the
41 appeal, assigned Docket No. 88 0109, and ordered that further
42 proceedings be held in the matter.
- 43 3. On October 17, 1986, while in the course of employment with the
44 Carnation Company, claimant suffered an industrial injury to the cervical
45 area of his spine, his left shoulder, and his left upper extremity.
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- 1 4. As of December 7, 1987 claimant's conditions causally related to the
2 industrial injury were diagnosed as a rupture of the left biceps tendon, left
3 carpal tunnel syndrome and cervical sprain. As of December 7, 1987
4 claimant's conditions causally related to the industrial injury of October 17,
5 1986 were not fixed and were in need of further diagnostic measures and
6 medical treatment.
- 7 5. As of December 7, 1987 the claimant also suffered from conditions
8 involving his right shoulder and right upper extremity which were not
9 causally related to the industrial injury of October 17, 1986.
- 10 6. From October 9, 1987 through December 7, 1987 the claimant was
11 unable to engage in any form of gainful employment as a result of the
12 residuals of the industrial injury of October 17, 1986.
- 13 7. The Director of the Department of Labor and Industries did not abuse his
14 discretion in denying vocational rehabilitation services to the claimant on
15 November 3, 1987.

CONCLUSIONS OF LAW

- 19 1. Docket No. 87 3913: The Board of Industrial Insurance Appeals has
20 jurisdiction over the parties and the subject matter of this appeal.
- 21 2. The decision by the Director of the Department of Labor and Industries
22 issued on November 3, 1987 by letter to the claimant which determined
23 that the claimant was not eligible to receive vocational rehabilitation
24 services pursuant to RCW 51.32.095 was not an abuse of discretion and
25 is hereby affirmed.
- 26 3. Docket No. 88 0109: The Board of Industrial Insurance Appeals has
27 jurisdiction over the parties and subject matter of this appeal.
- 28 4. As of December 7, 1987 and as a result of the industrial injury, the
29 claimant was in need of further treatment and diagnostic evaluation for the
30 conditions causally related to the industrial injury within the meaning of
31 Chapter 51.36 RCW.
- 32 5. The claimant was totally and temporarily disabled from October 9, 1987 to
33 December 7, 1987 and entitled to time-loss compensation for that period
34 within the meaning of RCW 51.32.090.
- 35 6. The order of the Department of Labor and Industries dated December 7,
36 1987 which closed the claim with time-loss compensation as paid to July
37 21, 1987 and awarded a permanent partial disability award equal to 10%
38 of the amputation value of the left arm at or above the deltoid insertion or
39 by disarticulation at the shoulder, is incorrect and is reversed and the claim
40 is remanded to the Department of Labor and Industries with direction to
41 enter an order requiring the self-insured employer to pay time-loss
42 compensation for the period October 9, 1987 through December 7, 1987,
43 and to provide further treatment and diagnostic evaluation for the
44 claimant's neck, left upper extremity and left shoulder conditions causally
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1 related to the industrial injury of October 17, 1986 and to take such further
2 action as may be appropriate under the facts and the law.

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4 It is so ORDERED.

5 Dated this 6th day of July, 1989.

6 BOARD OF INDUSTRIAL INSURANCE APPEALS
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10 /s/
11 SARA T. HARMON Chairperson

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13 /s/
14 FRANK E. FENNERTY, JR. Member

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17 /s/
18 PHILLIP T. BORK Member
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