# Palodichuk, Christine

### **STANDARD OF REVIEW**

Vocational rehabilitation vs. time-loss compensation

## **VOCATIONAL REHABILITATION**

#### Eligibility for time-loss compensation distinguished (RCW 51.32.090)

Review of Director's decision that a worker is "employable," and therefore not eligible for vocational rehabilitation services, is limited to whether or not the discretionary authority of RCW 51.32.095 has been abused. However, review of a determination that a worker is "employable," and therefore not eligible for time-loss compensation under RCW 51.32.090, is de novo, subject only to a "preponderance of the evidence" standard of review. *...In re Christine Palodichuk*, **BIIA Dec.**, **90 0252 (1990)** 

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

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IN RE: CHRISTINE B. PALODICHUK

### CLAIM NO. L-603511

#### DOCKET NO. 90 0252

#### ORDER DENYING APPEAL AND DIRECTING THE DEPARTMENT TO ISSUE FURTHER ORDER

An appeal was filed by the claimant, on January 12, 1990, from an order of the Department of Labor and Industries dated December 27, 1989. The order holds an order dated December 1, 1989 in abeyance pending review and such further action as may be indicated. The order dated December 1, 1989, issued by the Claims Manager, had affirmed a letter dated October 23, 1989. The letter dated October 23, 1989 was a letter signed by Dorette A. Markham for Joseph A. Dear, Director of the Department of Labor and Industries, responding to the claimant's dispute of the determination made regarding her "ability to work." In the letter it was determined that vocational rehabilitation services were not necessary in returning the claimant to work, since it was felt she was qualified to work as a membership solicitor, receptionist and business sales agent.

In her notice of appeal the claimant requests that she be paid time loss benefits from September 1, 1989, and until such time as she is found to be able to return to her previous occupation.

From a review of the Department record in this matter it appears that by a <u>letter</u> dated September 5, 1989 the Claims Manager advised the claimant that it had been determined that she was able to work and that time loss benefits would therefore end September 1, 1989. The claimant was advised that if she disagreed with that determination she could file a "dispute", within 15 days, with the Office of Rehabilitation Services. By an <u>order</u> dated September 5, 1989 the Department terminated time-loss compensation with payment for the period August 20, 1989 through September 1, 1989. The order provided that any protest or request for reconsideration must be made with the Department within 60 days. The order provided that if a request for reconsideration was filed, a further appealable order would be entered.

Thereafter, by a letter dated September 19, 1989 (received at the Department on September 22, 1989) the claimant advised the Department that she disagreed with the determination "regarding my condition for returning to employment." She reports that her doctors have not released her for work. She states that she is "disputing the end of 'time loss benefits' that ended on 9/01/89" and asks that she "receive time loss benefits until I get a proper evaluation and a full release from my doctors." In response to this letter a Rehabilitation Reviewer with the Office of Rehabilitation Services advised

the claimant that her "dispute" had been accepted for review. Thereafter, Ms. Markham's letter of October 23, 1989 was entered in response to this "dispute".

On November 13, 1989, the Department received a letter from the claimant's attorney. The attorney expresses disagreement with the "Dispute Summary" which accompanied Ms. Markham's letter of October 23, 1989, and asks the Department to "institute retroactive time loss benefits immediately." The attorney asks that if the Department does not intend to do so then to please enter a determinative order so that an appeal can be taken to the Board. It was apparently in response to this letter that the Department entered the order of December 1, 1989 which affirmed the letter dated October 23, 1989.

On December 8, 1989 the Board received the claimant's notice of appeal of the order dated December 1, 1989 (Docket No. 89 5561). After the Department entered the order of December 27, 1989 holding the order of December 1, 1989 in abeyance, we entered our December 29, 1989 order Returning Case to Department for Further Action, denying the appeal without prejudice to the right of any party to appeal from any further order of the Department.

On January 10, 1990 the Department entered an order declaring the order of December 1, 1989 null and void. This order apparently reflects the position of the Department that a Claims Manager has no authority to review a vocational rehabilitation services determination of the Director. However, it does not appear that any further order has been entered by the Department concerning the termination of time-loss compensation on September 1, 1989.

It seems to us that the Department, through its various letters to the claimant, has confused the issue of "employability," as it relates to eligibility for vocational rehabilitation services, with the issue of "employability" as it relates to eligibility for time-loss compensation. Understandably so, this confusion is perpetuated in the letters filed by the claimant and her attorney.

Pursuant to RCW 51.32.095, determinations concerning a worker's eligibility for vocational rehabilitation are vested in the discretion of the supervisor of industrial insurance, or his or her designee. The further review of vocational rehabilitation determinations by the Director of the Department, through the dispute process of WAC 296-18A-470, is also discretionary. RCW 51.32.095(6). Thus, if the supervisor or the Director determines that a worker is not eligible for vocational rehabilitation because he or she is "employable," our scope of review of such a determination is limited to whether or not the exercise of the discretionary authority of RCW 51.32.095 has been abused. <u>See In re Armando Flores</u>, Dckt. No. 87 3913 (July 6, 1989). As a practical matter,

a worker would find it difficult to establish such abuse since a finding of abuse of discretion essentially requires a showing that "no reasonable person would take the position adopted by" the decision maker. <u>Flores</u>, at 5, quoting from <u>Griggs v. Averbeck Realty</u>, 92 Wn.2d 576, 584 (1979).

As we pointed out in <u>Flores</u>, however, the provision of time-loss compensation is not a matter within the discretion of the supervisor or the Director, and our scope of review of a determination concerning a worker's eligibility for time-loss compensation is de novo, subject only to a "preponderance of the evidence" standard of review. As a result, we may well defer to the Director's determination that a worker is "employable" (and therefore not eligible for vocational rehabilitation services) but yet find that a worker is "not employable" and therefore entitled to temporary total disability benefits. That is precisely the action we took in <u>Flores</u>.

The mistaken impression amongst certain Department personnel seems to be that a determination of "employability" in connection with an assessment for vocational rehabilitation services constitutes a determination which applies to the worker's eligibility for time-loss compensation as well. While we do not intend to prevent Department personnel from simply "lumping" the two separate issues together, they would be well advised to recognize that the deference given to Department determinations involving the provision of vocational rehabilitation services under RCW 51.32.095 <u>does not</u> and <u>will not</u> extend to our evaluation of a worker's eligibility for time-loss compensation under RCW 51.32.090. Perhaps more importantly, Claims Managers and Disability Adjudicators need to understand that a finding of "employability" necessarily involves two separate and legally distinct determinations -- a denial of vocational services under RCW 51.32.095 <u>and</u> a denial of further time-loss compensation under RCW 51.32.090.

The confusion of Department personnel with respect to these two separate issues is evident in this case. For, while the Department has responded to the letters of the claimant and her attorney, it did so only with respect to the vocational rehabilitation services "employability" determination. Although it must be said that the claimant has timely protested the September 5, 1989 order terminating time-loss compensation, there is no indication that the Department has reconsidered <u>that</u> decision and entered a further order with respect to the propriety of terminating time-loss compensation on September 1, 1989. The time for entering such further order has expired. <u>See</u> RCW 51.52.060 (fifth proviso).

The order dated December 27, 1989, is not a final order of the Department. Further, the claimant has not indicated in her notice of appeal that she is aggrieved by the decision of the Director

not to provide her with vocational rehabilitation services. Eligibility for vocational rehabilitation services, to our minds, is the <u>only</u> issue addressed by the letter of October 23, 1989 and the orders of December 1 and December 27, 1989. Her appeal is therefore denied. However, the Department is hereby directed to reconsider its September 5, 1989 order terminating time-loss compensation and to <u>forthwith</u> enter a further appealable order addressing the claimant's continued eligibility for time loss compensation subsequent to September 1, 1989. The denial of this appeal is without prejudice to the right of any party to appeal from such further order, or any other order of the Department.

It is so ORDERED.

Dated this 1<sup>st</sup> day of February, 1990.

#### BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/\_\_\_\_ SARA T. HARMON

CHAIRPERSON

/s/\_\_\_\_\_ FRANK E. FENNERTY, JR.

Member

/s/

PHILLIP T. BORK

Member