

Pinger, Michael

STANDARD OF REVIEW

Time-loss compensation benefits as part of vocational rehabilitation plan

TIME-LOSS COMPENSATION (RCW 51.32.090)

Eligibility while undergoing vocational rehabilitation (RCW 51.32.095(3))

VOCATIONAL REHABILITATION

Eligibility for time-loss compensation distinguished (RCW 51.32.090)

When time-loss compensation benefits are ordered under RCW 51.32.095(3) as part of a vocational rehabilitation plan, the standard of review is abuse of discretion.*In re Michael Pinger, BIIA Dec., 97 2210 (1998)* [*Editor's Note*: The Board's decision was appealed to superior court under Grays Harbor County Cause No. 98-2-01511-6.]

Scroll down for order.

1 Two issues are presented. First, are temporary total disability benefits payable to the
2 claimant under RCW 51.32.095 where, in the exercise of the supervisor's sole discretion, vocational
3 rehabilitation has been determined to be necessary and likely to enable the injured worker to
4 become employable at gainful employment? Second, by what standard is the supervisor's decision
5 to pay temporary total disability benefits reviewed?
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10 Michael Pinger, a 35-year-old heavy equipment mechanic, hurt his neck on May 10, 1993,
11 while in the course of his employment with Weyerhaeuser Company. Mr. Pinger's industrial
12 insurance claim was allowed and benefits provided. On March 20, 1995, approximately two years
13 after the injury, Mr. Pinger's condition was determined to be medically fixed and stable. His claim
14 was closed with an award for permanent partial disability equal to Category 2 of permanent cervical
15 spine impairments.
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22 Seven months after closure, Mr. Pinger filed an application to reopen his claim, stating that
23 his condition had worsened. His aggravation application was favorably received and the claim
24 reopened. On March 6, 1997, the Department issued the order under appeal here, indicating that
25 Mr. Pinger was found eligible for vocational services and that time loss is payable. As an aside, we
26 note that the order failed to provide an effective date or dates for the payment of benefits.
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33 We begin our analysis with consideration of the second issue raised by this appeal. Namely,
34 by what standard is the supervisor's decision to be reviewed in a case in which the supervisor,
35 through the exercise of his or her discretion under RCW 51.32.095(3), has ordered time loss to be
36 payable? We conclude that the correct standard is not a preponderance of the evidence standard.
37 Proof of a worker's employability by a preponderance of the evidence is not sufficient to overcome
38 the supervisor's exercise of discretion under RCW 51.32.095(3).
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1 Appreciation of the above requires an understanding of four elements relating to the
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3 payment of time loss compensation. First, statutory authorization for the payment of time loss
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5 compensation (temporary total disability) is found in both RCW 51.32.090, which in general relates
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7 to medical disability, and in RCW 51.32.095(3), which relates to vocational rehabilitation. Second,
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9 time loss compensation paid under RCW 51.32.095(3) is a vocational cost equivalent in character
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11 to books, tuition, fees and other necessary expenses. Third, the payment and/or denial of time loss
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13 benefits may be reviewed under RCW 51.32.090 or RCW 51.32.095(3), depending on the
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15 circumstances. Fourth, different standards of review will be applied depending on which section of
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17 the Act is being considered.

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19 Addressing the first and second of the above elements, RCW 51.32.095(3) provides
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21 statutory authorization for the payment of time loss compensation as part of an injured worker's
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23 vocational rehabilitation and treats time loss benefits as a cost of vocational rehabilitation. The
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25 section states:

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27 Costs for vocational rehabilitation benefits allowed by the supervisor or
28 supervisor's designee under subsection (1) of this section may include
29 the cost of books, tuition, fees, supplies, equipment, transportation, child
30 or dependent care, and other necessary expenses for any such worker
31 in an amount not to exceed three thousand dollars in any fifty-two week
32 period except as authorized by RCW 51.60.060, and the cost of
33 continuing the temporary total disability compensation under
34 RCW 51.32.090 while the worker is actively and successfully
35 undergoing a formal program of vocational rehabilitation.

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37 (Emphasis added.) The rationale for this section is apparent upon consideration of the practical
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39 needs of the worker. The Legislature recognized that an injured worker who engages in vocational
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41 rehabilitation must have a means of support, understanding that certain workers will, as a causal
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43 result of an industrial injury, experience disability that precludes their return to any work that they
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45 would otherwise qualify for by reason of age, education, training and work experience. These
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47 workers will require vocational rehabilitation services to return to gainful employment. The

1 Legislature included time loss compensation as a cost of vocational rehabilitation, drafting the
2 section in the conjunctive, but specifically excluding time loss benefits from the \$3,000 limitation
3 otherwise imposed on books, fees, supplies and so on.
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7 The Director's statutory authorization for the payment of time loss compensation is found in
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9 RCW 51.32.095(1), which reads, in part:

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11 Where, after evaluation and recommendation . . . and in the sole opinion
12 of the supervisor . . . vocational rehabilitation is both necessary and
13 likely to enable the injured worker to become employable at gainful
14 employment, the supervisor . . . may, in his or her sole discretion, pay . .
15 . or . . . direct the self-insurer to pay the cost as provided in subsection
16 (3) of this section.
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18 The plain meaning of this section compels the conclusion that the Legislature gave the supervisor
19 discretionary authority to order the payment of time loss compensation under RCW 51.32.095
20 regardless of whether medical certification of time loss compensation was otherwise available. The
21 obvious implication is that time loss may be payable under RCW 51.32.090, the medical portion of
22 the statute, as well as under RCW 51.32.095, the vocational portion. By this statement, we do not
23 mean to suggest that the Director has discretionary authority to order the payment of time loss
24 compensation under RCW 51.32.090. To the contrary, time loss compensation paid under
25 RCW 51.32.090 requires, among other things, medical certification of temporary total disability.
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29 It follows that the payment or denial of time loss compensation benefits may be reviewed
30 under RCW 51.32.090 or RCW 51.32.095, depending on the circumstance. Outside of the context
31 of vocational rehabilitation, an issue involving time loss would fall within the purview of
32 RCW 51.32.090. Issues involving time loss compensation within the context of vocational
33 rehabilitation could be reviewed under either RCW 51.32.090 or RCW 51.32.095 with the distinction
34 being the circumstances of the case and the standard of review to be used. This leads us directly
35 to the last of the above four elements.
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1 In reviewing questions of time loss, different standards of review will be used depending on
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3 which section of the Act is being considered. RCW 51.32.090, which is the section requiring
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5 medical certification of temporary total disability, is reviewed on a preponderance of the credible
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7 evidence standard. RCW 51.32.095, which involves an exercise of discretion by the supervisor of
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9 industrial insurance, is reviewed under an abuse of discretion standard.

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11 In *In re Mary Spencer*, BIIA Dec., 90 0264 (1991), the Board discussed the standard by
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13 which a determination concerning vocational services is reviewed:

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15 The initial determination, as to whether vocational rehabilitation services
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17 are necessary and likely to make the worker employable, is committed
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19 to the discretion of the supervisor or the supervisor's designee.
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21 RCW 51.32.095. Furthermore, any dispute from that decision must be
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23 filed with the Director. RCW 51.32.095(6); WAC 296-18A-470. Again,
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25 the Director's decision as to whether or not the claimant is entitled to
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27 vocational services is clearly vested in the Director's sole discretion.
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29 *In re Todd Eicher*, BIIA Dec., 88 4477 (1990).

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31 Our review is limited to determining whether the exercise of
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33 discretionary authority constituted an abuse of discretion. *In re Gary*
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35 *Manley*, BIIA Dec., 66,115 (1986); *In re Armando Flores*, BIIA Dec., 87
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37 3913 (1989).

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39 Under RCW 51.32.095, there is no qualitative distinction between the supervisor's discretionary
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41 decision to provide vocational services and the supervisor's discretionary decision to order the
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43 payment of temporary total disability benefits. In each case the decision is left to the sole discretion
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45 of the supervisor, and in each case the Board's review is limited to determining whether the
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47 exercise of discretionary authority constituted an abuse of discretion. In the present appeal, the
burden is on the employer as the appealing party to prove that the Director's exercise of discretion
was arbitrary or capricious based on the information that was before the Director at the time the
decision was made. The burden is on the employer to show that the evidence then before the
Director was logically unconnected to determining the need for temporary total disability benefits, or
that none of the information before the Director at the time of his decision could support his

1 decision. As we view the record, the self-insurer has failed to establish that the Director's exercise
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3 of authority constituted an abuse of discretion.
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5 Turning back to the order under appeal, we again note that the Department did not include
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7 the effective date or a specific period for which the self-insured employer was to pay time loss
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9 compensation. We interpret this to be recognition by the Department that, in the context of
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11 vocational rehabilitation, temporary total disability benefits that are paid under RCW 51.32.095(3)
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13 are limited to the period in which "the worker is actively and successfully undergoing a formal
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15 program of vocational rehabilitation." WAC 296-18A-420 defines "formal program" for vocational
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17 rehabilitation purposes as "an approved rehabilitation plan . . . that provides services necessary
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19 and likely to enable the injured worker to be employable at gainful employment."
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21 The March 6, 1997 order merely recites that "time loss is therefore payable" and is not
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23 determinative as to payment of time loss compensation benefits for any particular time. To the
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25 extent that it purports to order payment of time loss compensation benefits pursuant to
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27 RCW 51.32.095(3), for any period prior to the time that Mr. Pinger is "actively and successfully
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29 undergoing a formal program of vocational rehabilitation," it is incorrect.
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31 **FINDINGS OF FACT**

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- 33 1. On May 20, 1993, the Department of Labor and Industries received an
34 application for benefits alleging that the claimant, Michael Pinger, had
35 sustained an industrial injury to his back and neck on May 10, 1993,
36 while in the course of his employment with Weyerhaeuser Company &
37 Subsidiaries (Weyerhaeuser). The claim was allowed and benefits were
38 provided. On March 20, 1995, the Department issued an order that
39 closed the claim.
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41 On October 31, 1995, the claimant filed an application to reopen for
42 aggravation of the condition caused by the industrial injury. On
43 January 16, 1996, the Department issued an order that reopened the
44 claim effective September 2, 1995, for authorized treatment and action
45 as indicated.
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2 On November 15, 1996, the Department issued a letter that stated that
3 the employer had determined that the claimant is employable; that the
4 Department disagrees with the employer's finding; and that the claimant
5 is eligible to receive vocational rehabilitation services to prepare him for
6 gainful employment. The employer received this letter on November 18,
7 1996. On December 6, 1996, the employer filed a protest and request
8 for reconsideration of the Department letter dated November 15, 1996.
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10 On January 18, 1997, the Department issued a letter stating that the
11 Director had reviewed the facts of the case and had decided that
12 vocational services were necessary to assist the claimant in returning to
13 work. On March 6, 1997, the Department issued an order stating that
14 the Director had indicated that the claimant was eligible for vocational
15 services, and that time loss compensation was payable.
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17 On March 21, 1997, the employer filed a Notice of Appeal with the
18 Board of Industrial Insurance Appeals. On April 18, 1997, the Board
19 issued an order extending the time to act on the appeal. On April 30,
20 1997, the Board issued an order granting the appeal, assigning it Docket
21 No. 97 2210, and directing that proceedings be held on the issues
22 raised therein.
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- 24 2. On May 10, 1993, the claimant suffered an industrial injury to his neck
25 while in the course of employment with Weyerhaeuser.
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- 27 3. In a letter dated January 18, 1997, the Director of the Department of
28 Labor and Industries determined that the claimant requires vocational
29 services to assist him in returning to work. On March 6, 1997, the
30 Department issued an order stating that the Director had indicated that
31 the claimant was eligible for vocational services, and that time loss
32 compensation was payable. The employer did not offer into evidence
33 the factual information that was considered by the Director in
34 determining that time loss compensation was payable.
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36 **CONCLUSIONS OF LAW**

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- 38 1. The Board of Industrial Insurance Appeals has jurisdiction over the
39 parties and the subject matter to this appeal.
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- 41 2. The evidentiary record herein does not show that the Director of the
42 Department of Labor and Industries abused his discretion when he
43 determined that time loss compensation was payable.
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- 45 3. The discretionary payment of temporary total disability benefits is a
46 decision that is in accordance with RCW 51.32.095(3).
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4. The order of the Department of Labor and Industries dated March 6, 1997, that stated that the Director had indicated that the claimant was eligible for vocational services, and that time loss is payable, is incorrect and is reversed. This matter is remanded to the Department with instructions to issue an order indicating that the claimant is entitled to vocational services, and to issue a further order regarding payment of time loss compensation benefits once Mr. Pinger is actively and successfully undergoing a formal program of vocational rehabilitation pursuant to RCW 51.32.095(3).

It is so **ORDERED**.

Dated this 12th day of November, 1998.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/ _____
THOMAS E. EGAN Chairperson

/s/ _____
JUDITH E. SCHURKE Member