

Ukbagergis, Tesfai

PERMANENT TOTAL DISABILITY (RCW 51.08.160)

*** Vocational rehabilitation determinations**

The worker filed an appeal from a Department order that closed the claim with a permanent partial disability award. The worker was seeking an industrial insurance pension. The Board found on the evidence that the worker was unemployable without formal vocational retraining. Held: After the Department has determined that the worker is not permanently totally disabled, the worker's "occupational retraining prognosis" is no longer a factor in determining whether the worker is permanently totally disabled. The worker's burden doesn't include proving that they wouldn't be employable even if retrained. His burden was to prove that due to the industrial injury, he is permanently unable to obtain and perform any gainful employment on a reasonable continuous basis, in consideration of his age, education, and transferable skills.*In re Tesfai Ukbagergis*, BIIA Dec., 09 20737 (2011)

Scroll down for order.

1 various jobs, including selling insurance and office machines. In 1990 he fled Ethiopia and, after
2 11 months in a camp in Kenya, arrived in the United States. From 1991 until 2000, Mr. Ukbagergis
3 lived in Spokane. He began taking English classes and worked for a few months as a dishwasher.
4 He then started work as a nursing aide, and became a certified nursing assistant.

5 Mr. Ukbagergis moved to Seattle in 2000, and for about three months worked at a gas
6 station mini market performing cleaning duties but did not work the cash register. He then returned
7 to working as a nursing aide, and he has performed no other occupation since that time.
8 Mr. Ukbagergis injured his neck in a car accident in August of 2003. After a few months he
9 returned to work, but stopped due to neck pain. His employer had no light-duty work, and he did
10 not work until January of 2006, when he began working as a certified nursing assistant at St. Anne
11 Nursing and Rehab Center.

12 On September 5, 2006, during the course of his employment, Mr. Ukbagergis was helping to
13 lift a heavy patient when the patient fell on him. He began to suffer pain in his upper and lower
14 back, and pain in his left knee. He received treatment, including treatment for pain management,
15 and had reached maximum medical improvement by the end of June of 2008. It is clear that
16 Mr. Ukbagergis has suffered a permanent but mild loss of function due to the industrial injury, and it
17 is undisputed that he has the physical capacity to perform sedentary and light work. However, it is
18 the vocational testimony that persuades us that without retraining, Mr. Ukbagergis does not have
19 the ability to obtain or perform gainful employment.

20 As early as February of 2007, Mr. Ukbagergis underwent a vocational assessment by
21 Gabrielle Dryden, a vocational rehabilitation counselor. Based on the medical restrictions imposed
22 on Mr. Ukbagergis, Ms. Dryden determined that Mr. Ukbagergis was precluded from returning to his
23 job as a certified nursing assistant, and that there were no other return to work options with his
24 employer at the time of the injury. Ms. Dryden testified that she then generated job descriptions for
25 two positions: parking lot attendant and production assembler. In her opinion, Mr. Ukbagergis was
26 not able to perform either job without retraining. Specifically, with regard to the parking lot
27 attendant position, she testified that Mr. Ukbagergis would require training to obtain skills in
28 cashiering and using credit card machines. She also thought that he would require additional
29 English language classes because he had been out of the workforce for some time. Concerning
30 the production assembler position, she estimated that Mr. Ukbagergis would require a training
31 program of perhaps nine to twelve months.

1 However, Mr. Ukbagergis was unable to participate in vocational services at that time
2 because of subsequent, unrelated medical conditions, primarily a gastrointestinal condition.
3 Ms. Dryden, who was then an intern, submitted a closing report with a code designating that
4 vocational services should be closed because the worker was unable to benefit due to unaccepted
5 conditions that arose after the industrial injury. She testified that today she would have used a code
6 that designated a temporary closure of vocational services, and then would have reevaluated the
7 worker's situation. In any event, it appears that the Department never reassessed Mr. Ukbagergis'
8 employability. In Ms. Dryden's opinion, Mr. Ukbagergis was not employable when she closed
9 vocational services in October of 2008, and it remained her opinion that he was not employable
10 when the claim was closed in the absence of further vocational assistance.

11 Two other vocational experts testified in this appeal: Merrill Cohen, who evaluated
12 Mr. Ukbagergis at the request of his attorney, and Barbara Berndt, who reviewed records and
13 testified at the request of the Department. Both of these experts agreed that Mr. Ukbagergis would
14 require some type of retraining in order to be employable. Ms. Cohen testified that in order to
15 become employable Mr. Ukbagergis, in addition to needing help with preparing a résumé and
16 developing job seeking skills, would require a formal on-the-job-training program. She noted that
17 Mr. Ukbagergis has no training or experience as a parking lot attendant or a cashier, and no
18 experience or training in fast-paced customer service positions. It is Ms. Cohen's opinion that
19 because Mr. Ukbagergis does not have a background that matches the skill set required for the
20 position of parking lot attendant, he has no chance of being selected for an interview or hired
21 without formal retraining.

22 In Ms. Cohen's opinion, Mr. Ukbagergis would have required a formal program under the
23 auspices of the Department, in which an employer agrees to compensate and provide training to
24 the worker, evaluate the worker's performance, and communicate with the vocational counselor; in
25 exchange, some training funds are used to reimburse the employer for some of the expenses. It is
26 also her opinion that Mr. Ukbagergis would require a formal retraining plan in order to be
27 employable as a production assembler. In fact, Ms. Cohen testified that she could not identify any
28 job that Mr. Ukbagergis was capable of performing, based upon his age, education, experience,
29 preexisting physical and mental limitations, and his physical limitations caused at least in part by his
30 industrial injury.

31 The Department argues that the evidence supports finding that jobs in the light to sedentary
32 category are generally available where minimal on-the-job training is readily provided by employers.

1 We disagree. Barbara Berendt, a vocational rehabilitation counselor who reviewed relevant records
2 at the request of the Department, testified that with on-the-job training, Mr. Ukbagergis could be
3 employable as a parking lot attendant or a small parts assembler. However, she agreed during
4 direct examination that an advantage to an employer is that ". . . the Department of Labor and
5 Industries would pay his wages, so to speak, during the training . . ." This is the very type of formal
6 training program recommended by Ms. Cohen and Ms. Dryden.

7 Similarly, with regard to the small parts assembly position, Ms. Berndt testified that on-the-
8 job training could work, but that facilities also provide such training. She stated that where the
9 training took place, ". . . depends on where the vocational counselor and he could determine that
10 would be feasible." The involvement of a vocational counselor is a clear reference to a formal
11 vocational retraining program, and not some minimal level of training readily provided by
12 employers. In our view, it is the opinion of each of the vocational counselors who testified that
13 Mr. Ukbagergis is unemployable without formal vocational retraining.

14 We agree with the Department that, with retraining, Mr. Ukbagergis likely would be
15 employable. The question before us, however, is whether he is employable absent any retraining.
16 The Department, citing *Pacific Car and Foundry Co. v. Coby*, 5 Wn. App. 547 (1971), argues that
17 the worker's "occupational retraining prognosis" must be considered in assessing total disability.
18 However, *Coby* involved an appeal by the employer from an order of the Department that had
19 classified the worker as permanently totally disabled; certainly a worker's "occupational retraining
20 prognosis" would be a factor considered by the Department in assessing whether a worker is totally
21 disabled, because the Department has the authority to provide vocational services to injured
22 workers who require and likely would benefit from such services. However, after the Department
23 has determined that the worker is not totally disabled and that determination has been appealed to
24 this Board, the worker's "occupational retraining prognosis" is no longer a factor in determining
25 whether the worker is totally disabled.

26 Mr. Ukbagergis' burden here did not include proving that he would not be employable even if
27 retrained. His burden was to prove that due to the industrial injury he is permanently unable to
28 obtain and perform any type of gainful employment on a reasonably continuous basis, in
29 consideration of his age, education and transferrable skills. *Leeper v. Department of Labor &*
30 *Indus.*, 123 Wn.2d. 803 (1994). In this he has prevailed. The court in *Leeper* made clear that the
31 measure of total disability is not merely the extent of physical impairment or loss of bodily function,
32 but rather the effect of the injury on the worker's ability to perform and obtain a job. Although

1 Mr. Ukbagergis has the physical ability to work at a sedentary or light level, because of the
2 industrial injury he has lost the ability, without some vocational retraining, to obtain or perform any
3 type of gainful employment on a reasonably continuous basis.

4 After consideration of the Proposed Decision and Order, the Petition for Review filed thereto,
5 the Department's Response to Claimant's Petition for Review, and a careful review of the entire
6 record before us, we are persuaded that, due to the industrial injury of September 5, 2006,
7 Mr. Ukbagergis is a permanently totally disabled worker.

8 **FINDINGS OF FACT**

- 9 1. On October 9, 2006, the claimant, Tesfai G. Ukbagergis, filed an
10 Application for Benefits with the Department of Labor and Industries in
11 which he alleged that he was injured on September 5, 2006, while in the
12 course of employment with Saint Anne Nursing and Rehab Center. On
13 October 30, 2006, the Department issued an order in which it allowed
the claim. On November 1, 2006, the employer filed a Protest and
Request for Reconsideration.

14 On November 2, 2006, the Department issued an order in which it
15 reconsidered its order of October 30, 2006. On July 10, 2007, the
16 Department issued an order in which it stated: "Department is not
17 responsible for the condition diagnosed as abdominal pain with nausea
18 and vomiting determined by medical evidence to be unrelated to the
19 industrial injury for which this claim was filed. Because abdominal pain
with nausea and vomiting is retarding the claimant's recovery from
accepted industrial injury, treatment will be allowed on temporary basis."

20 On August 22, 2007, the claimant filed a Protest and Request for
21 Reconsideration. On October 19, 2007, the Department issued an order
22 in which it corrected and superseded its order of July 10, 2007, and took
23 responsibility for the condition diagnosed as abdominal pain with nausea
and vomiting. On November 2, 2007, the employer filed a Protest and
Request for Reconsideration.

24 On December 12, 2007, the Department issued an order corrected and
25 superseded its October 19, 2007 order. The Department determined it
26 was not responsible for the condition diagnosed as helicobacter pylori.
27 On December 13, 2007, the Department issued an order in which it
corrected and superseded its October 19, 2007 order, and took
responsibility for the condition diagnosed as gastric ulcer. On
28 September 18, 2008, The Department issued an order in which it denied
29 responsibility for a condition diagnosed as somatoform disorder. On
30 October 27, 2008, the Department issued an order in which it accepted
responsibility for the condition diagnosed as spondylosis.

31 On October 28, 2008, the Department issued an order in which it denied
32 responsibility for the condition diagnosed as asthma. On October 29,
2008, the Department issued an order in which it denied responsibility

1 for the condition diagnosed as atrophic gastritis. On March 24, 2009,
2 the Department issued an order in which it awarded time loss
3 compensation benefits effective March 22, 2009.

4 On October 16, 2009, the Department issued an order in which it closed
5 the claim with a permanent partial disability award equivalent to
6 Category 2 for permanent dorsal-lumbar and/or lumbosacral
7 impairments. On October 20, 2009 the claimant filed a Notice of Appeal
8 with the Board of Industrial Insurance Appeals. On October 29, 2009,
9 the Board issued an order granting the appeal under Docket
10 No. 09 20737, and agreed to hear the appeal.

- 11 2. On September 5, 2006, while in the course of his employment as a
12 Certified Nursing Assistant for Saint Anne Nursing & Rehab Center,
13 Tesfai Ukbagergis suffered an injury when he was attempting to move a
14 very large patient and the patient fell on him, resulting in an onset of
15 pain and the need for medical treatment.
- 16 3. Tesfai G. Ukbagergis' industrial injury proximately caused conditions
17 diagnosed as cervical, thoracic, and lumbar strain injury; severe spinal
18 stenosis at L4-L5; moderate spinal stenosis at L3-L4; slight spinal
19 stenosis at L2-L3; mild spinal stenosis at L5-S1; significant diffuse
20 bulging of the disc at L4-L5; spondylosis; focal protrusion of the disc at
21 L3-L4; and, gastric ulcer and abdominal pain with nausea and vomiting.
- 22 4. As of October 16, 2009, all of the conditions, proximately caused by the
23 industrial injury of September 5, 2006, had reached maximum medical
24 improvement and had resulted in permanent impairment best described
25 by Category 2 of the categories of permanent dorso-lumbar and
26 lumbosacral impairments, WAC 296-20-280.
- 27 5. Tesfai G. Ukbagergis was born in Eritrea on January 20, 1949, and was
28 therefore 60 years old on the date of the order on appeal. He moved to
29 Ethiopia when he was approximately nine years old. He graduated from
30 high school and had various jobs; he sold insurance and for about
31 17 years he sold office machines. In 1990 he fled Ethiopia and, after
32 11 months in a camp in Kenya, arrived in the United States. He lived in
Spokane, Washington for about nine years before moving to Seattle,
Washington in 2000. He worked for a short time as a dishwasher and
performing cleaning duties, but has worked almost exclusively as a
certified nursing assistant, which is classified as a medium physical
demand position.
6. Between March 23, 2009 and October 15, 2009, inclusive, and as of
October 16, 2009, Mr. Ukbagergis had the physical capacity to work at a
light or sedentary level only.
7. Between March 23 2009 and October 15, 2009, inclusive, and as of
October 16, 2009, Tesfai Ukbagergis was not capable of obtaining or
performing reasonably continuous gainful employment in the competitive
labor market, taking into consideration the residuals proximately caused
by the industrial injury of September 5, 2006, his age, education, work
history, and transferrable skills.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of this appeal.
2. Between March 23, 2009 and October 15, 2009, inclusive, Tesfai Ukbagergis was a temporarily totally disabled worker within the meaning of RCW 51.32.090.
3. As of October 16, 2009, Tesfai Ukbagergis was a permanently totally disabled worker within the meaning of RCW 51.08.160.
4. The order of the Department dated October 16, 2009, is incorrect and is reversed. The claim is remanded to the Department with direction to pay the claimant time loss compensation benefits for the period from March 23, 2009, through October 15, 2009, inclusive, to declare Tesfai Ukbagergis a permanently totally disabled worker effective October 16, 2009, and to take such other and further action as may be indicated or required by the law and the facts.

Dated: April 21, 2011.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/
DAVID E. THREEEDY Chairperson

/s/
FRANK E. FENNERTY, JR. Member