

Wickstrom, Bryan

MEDICAL EXAMINATIONS

Functional capacities evaluation

The Department has authority under RCW 51.32.095 (to fulfill its duty to assess vocational priorities) and WAC 296-20-01002 (when further information regarding physical capacities is needed or required) to issue an order approving a functional capacities evaluation. RCW 51.36.070, which authorizes medical examinations, is inapplicable to functional capacities evaluations.*In re Bryan Wickstrom, BIA Dec., 21 11055 (2023)*

Scroll down for order.

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

IN RE: BRYAN J. WICKSTROM) **DOCKET NO. 21 11055**
)
CLAIM NO. AZ-19562) **DECISION AND ORDER**

In 2018, Bryan J. Wickstrom developed an occupational disease while working for S & S Tire Services, Inc. The Department of Labor and Industries allowed the claim and provided benefits to Mr. Wickstrom, including medical treatment and time-loss compensation.¹ On January 21, 2021, the Department sent a letter to Mr. Wickstrom informing him that it had approved a functional capacities evaluation (FCE). Mr. Wickstrom filed a protest in response to this letter because he had already completed an FCE in June 2020. On January 28, 2021, the Department issued an order affirming its approval of a second FCE. Mr. Wickstrom appealed.

Mr. Wickstrom argued that the Department abused its discretion by approving a second FCE because it was "unreasonable" to do so when Mr. Wickstrom had already participated in a valid FCE. Mr. Wickstrom also argued that the Department's order was "untenable" because it was not consistent with RCW 51.36.070. Our industrial appeals judge agreed that the Department abused its discretion by failing to consider RCW 51.36.070 in its approval of the FCE and reversed the Department's order.

The Department petitioned for review, arguing that it did not abuse its discretion by approving a second FCE. The Department contends that the second FCE was reasonable due to conflicting opinions regarding Mr. Wickstrom's physical restrictions. It argues that RCW 51.36.070 does not apply to FCEs, thus it was not an abuse of discretion for the Department not to consider or follow it.

We granted review because we agree with the Department. As we held in *In re Jeremy D. Kidder*,² an FCE is not a "medical examination" and it is not subject to the provisions of RCW 51.36.070. It is a vocational evaluation. And the Department didn't abuse its discretion by failing to consider an inapplicable statute. Further, applying the abuse of discretion standard to the factual evidence as a whole, we do not find any other basis to conclude that the Department's decision was manifestly unreasonable or exercised on untenable grounds. The Department order is accordingly **AFFIRMED**.

¹ The briefing and Proposed Decision and Order reference Mr. Wickstrom's claim as an industrial injury. The Department's allowance order indicates that it is an occupational disease claim. We have used "occupational disease" herein to remain consistent with the Department's administration of the claim.

² Dckt. No. 21 16645 (December 27, 2022).

1 **DISCUSSION**

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3 The standard of review in appeals regarding issues of claim administration, not related to the
4 actual adjudication of entitlement to benefits, is abuse of discretion.³ In this appeal, Mr. Wickstrom
5 objects solely to the Department's approval of an FCE. The appeal does not involve nor implicate
6 any substantive decision regarding Ms. Wickstrom's benefits. Our industrial appeals judge applied
7 the correct standard of review but did not cite this particular basis for this standard. We note it here
8 for clarification.
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11 Abuse of discretion occurs when a decision is "manifestly unreasonable, or exercised on
12 untenable grounds, or for untenable reasons" (citation omitted).⁴ Abuse of discretion "exists . . .
13 when no reasonable person would take the position adopted by the decision maker" (citation
14 omitted).⁵
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17 In the Proposed Decision and Order, our industrial appeals judge wrote:

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19 Considering there was no consensus as to whether this FCE was indicative of
20 Mr. Wickstrom's capacities as of the time of the Department's decision, it is entirely
21 plausible that a reasonable person could make the same determination the
22 Department did here. There is nothing in the evidence to show the letter, nor the
23 order affirming it, were manifestly unreasonable.
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25 Applying the abuse of discretion standard to the record, we agree with our judge's holding that
26 the Department did not exceed the realm of reason. The record contains varying opinions from
27 multiple qualified providers, examiners, and forensic experts. A second FCE may not have been
28 absolutely necessary, but it was not arbitrary or lacking factual support. The Department received
29 conflicting information about Mr. Wickstrom's physical condition at the same time that no further
30 treatment was recommended. The vocational counselor had input in the decision to clarify the
31 physical restrictions, and Mr. Wickstrom's own treating doctor disagreed with the results of the first
32 FCE. The Department had a reasonable basis to approve a second FCE.
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37 We disagree with our judge's holding that the Department abused its discretion by approving
38 the FCE because it did not comply with RCW 51.36.070. As our judge noted, RCW 51.36.070 was
39 recently amended. In a Decision and Order issued after our judge completed the order in
40 Mr. Wickstrom's case, we examined the scope of this amended statute. In *In re Jeremy D. Kidder*,⁶
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45 ³ *In re Gail Conelly*, BIA Dec., 97 3849 (1998).

46 ⁴ *River House Development Inc. v. Integrus Architecture, P.S.*, 167 Wn. App. 221 (2012).

47 ⁵ *In re Armando Flores*, BIA Dec., 87 3913 (1989).

⁶ Dckt. No. 21 16645 (December 27, 2022).

1 we held that RCW 51.36.070 does not apply to FCEs. As we held in *Jeremy Kidder*, FCEs aren't
2 RCW 51.36.070 examinations. The Department had no obligation to consider RCW 51.36.070, and
3 in fact it was correct not to consider it when arranging an FCE.
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5 The Department had authority under RCW 51.32.095 (in order to fulfill its duty to assess
6 vocational priorities) and WAC 296-20-01002 (when further information regarding physical capacities
7 is needed or required) to issue an order approving an FCE. The conflicting opinions as to
8 Mr. Wickstrom's physical capacities reasonably supported the Department's decision to clarify the
9 restrictions with a second FCE. The Department did not err by disregarding RCW 51.36.070. We
10 affirm the Department's order.
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12 **DECISION**

13 In Docket No. 21 11055, the claimant, Bryan J. Wickstrom, filed an appeal with the Board of
14 Industrial Insurance Appeals on January 28, 2021, from an order of the Department of Labor and
15 Industries dated January 28, 2021. In this order, the Department affirmed a letter approving a
16 functional capacities evaluation. This order is correct and is affirmed.
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18 **FINDINGS OF FACT**

- 19 1. On June 7, 2021, an industrial appeals judge certified that the parties
20 agreed to include the Jurisdictional History in the Board record solely for
21 jurisdictional purposes.
- 22 2. Bryan J. Wickstrom developed an occupational disease on
23 March 16, 2018, when he sought treatment and was diagnosed with an
24 umbilical hernia.
- 25 3. On January 21, 2021, a claims manager for the Department of Labor and
26 Industries issued a letter approving a functional capacities evaluation
27 (FCE) for Mr. Wickstrom. On January 28, 2021, the claims manager
28 issued an order affirming the decision to approve an FCE for
29 Mr. Wickstrom.
- 30 4. In January 2020, Mr. Wickstrom attended two independent medical
31 evaluations (IME) arranged by the Department. Both IME examiners
32 concluded that Mr. Wickstrom was able to return to work at his job of
33 injury. Mr. Wickstrom attended an FCE that was arranged by his attorney
34 on June 24, 2020. The FCE examiner concluded that Mr. Wickstrom had
35 physical restrictions precluding him from working at the job of injury or as
36 a tow truck driver. In September 2020, the Department's medical director
37 approved and concurred with the June FCE report. Also in
38 September 2020, Mr. Wickstrom's employer submitted a forensic report
39 that disputed the June FCE's methodology and findings. In October 2020,
40 the Department's medical director reviewed the June FCE again, as well
41 as the forensic report, and again concluded that the June FCE results
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1 were valid. In November 2020, the June FCE report was provided to
2 Mr. Wickstrom's attending physician who noted his disagreement with the
3 physical capacities recorded by the June FCE examiner and made
4 changes to the lifting weight restrictions.
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- 6 5. The Department's decision to approve a second FCE was based on
7 conflicting medical opinions regarding Mr. Wickstrom's physical
8 restrictions. The records and opinions obtained by the Department prior
9 to January 28, 2021, reasonably support the Department's decision to
10 clarify Mr. Wickstrom's physical restrictions with a second FCE in order to
11 complete a vocational assessment and assist in the management of his
12 claim.

13 **CONCLUSIONS OF LAW**

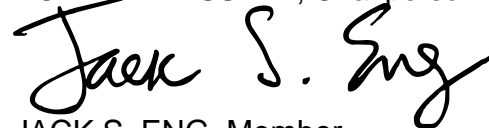
- 14 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties
15 and subject matter in this appeal.
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17 2. The standard of review in this appeal is an abuse of discretion.
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19 3. RCW 51.36.070 does not apply to functional capacity evaluations by a
20 physical therapist.
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22 4. The Department did not abuse its discretion by approving a functional
23 capacities evaluation on January 28, 2021.
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25 5. The Department order dated January 28, 2021, is affirmed.

26 Dated: March 3, 2023.

27 BOARD OF INDUSTRIAL INSURANCE APPEALS

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31 JACK S. ENG, Member
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Addendum to Decision and Order
In re Bryan J. Wickstrom
Docket No. 21 11055
Claim No. AZ-19562

Appearances

Claimant, Bryan J. Wickstrom, by Carson Law Practice, per David W. Carson

Employer, S & S Tire Service, Inc. (did not appear)

Retrospective Rating Group, WA Retail Association - Automotive #10595, by Brigitte LE Vie, Lay Representative (did not appear)

Department of Labor and Industries, by Office of the Attorney General, per Oscar E. Chaves

Petition for Review

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The Department filed a timely Petition for Review of a Proposed Decision and Order issued on November 14, 2022, in which the industrial appeals judge reversed and remanded the Department order dated January 28, 2021.

Evidentiary Rulings

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