

Killpatrick, Michael

SUSPENSION OF BENEFITS (RCW 51.32.110)

Vocational Benefits (RCW 51.32.099: RCW 51.32.110)

Where the worker interrupted his vocational plan under RCW 51.32.096(5)(c), his cancer diagnosis provided good cause for the interruption under RCW 51.32.110. Claim suspension was therefore improper. ...***In re Michael Killpatrick, BIA Dec., 21 13384 (2023)*** [*Editor's Note: The Board's decision was appealed to superior court under King County Cause No. 22-2-13725-8 KNT. The appeal was dismissed by stipulation.*]

Scroll down for order.

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

IN RE: MICHAEL T. KILLPATRICK) **DOCKET NO. 21 13384**
)
CLAIM NO. W-911594) **DECISION AND ORDER**

Michael T. Killpatrick withdrew from his vocational retraining plan because he was undergoing treatment for prostate cancer, a condition unrelated to his industrial injury. The Department suspended his time-loss compensation benefits for noncooperation with a vocational plan under RCW 51.32.110, on the grounds that there was plan interruption due to the worker's own actions. Our industrial appeals judge reversed the suspension of benefits, finding that there was no plan interruption. We granted review because we conclude that there was plan interruption, but that the worker's cancer diagnosis and treatment constitute good cause for the interruption. The Department order is **REVERSED AND REMANDED** to reinstate the Mr. Killpatrick's entitlement to time-loss compensation benefits effective January 12, 2021.

DISCUSSION

Facts:

Michael T. Killpatrick is a 71-year-old man who spent his career in the aviation industry, primarily as a cargo handler. He earned a high school diploma, has no experience working in an office, and has minimal computer skills. In 2007, he sustained an industrial injury to his low back, and in 2019, began a vocational retraining plan to become an aircraft dispatcher. Under the plan, Loren Forsberg served as his vocational rehabilitation counselor. The plan consisted of a six-month program at Office Careers, followed by three academic quarters at Green River College. The Office Careers component included adult basic education, computer skills, customer service, and dispatch. The Green River College portion included classes in aviation.

In January 2019, Mr. Killpatrick was diagnosed with prostate cancer, which was unrelated to his industrial injury. The cancer required radiation treatment, and in February 2019 he informed Mr. Forsberg of the diagnosis. Despite the diagnosis, Mr. Killpatrick was able to complete the Office Careers portion of the training plan from March through September 2019. In November 2019, he underwent a medical procedure that placed radiation markers on his body, which was required prior to his first radiation session. Mr. Killpatrick started radiation treatment on January 26, 2020, and finished on March 9, 2020. He went five days a week, for a total of 38 treatments. Mr. Killpatrick's doctor recommended a six- to eight-week recovery period following the completion of radiation treatment.

1 In September 2019 (fall quarter), Mr. Killpatrick began the next phase of his retraining plan at
2 Green River College. He enrolled in classes, but ultimately withdrew from them in November 2019,
3 citing the ongoing emotional stress and inability to concentrate caused by his prostate cancer
4 diagnosis. At this point, he had not yet started the radiation treatment, but testified to being under a
5 lot of emotional stress: "Finding out you have cancer. . . it takes an emotional toll on you, and I was
6 not in the right frame of mind to even continue or think about classes at that time."¹
7

8
9
10 In January 2020, Mr. Killpatrick registered for winter quarter classes, but withdrew from them
11 a few days later. He testified, "I was not able to complete it with continued treatment and then
12 recovery time after treatment. I was just too physically fatigued to even attempt to finish. As much
13 as I wanted to, I couldn't."² Mr. Killpatrick last spoke to Mr. Forsberg in early March 2020.
14

15
16 In late March 2020, the COVID-19 pandemic caused nationwide shutdowns and closures of
17 businesses and educational institutions. Mr. Killpatrick stated that he wanted to complete the
18 program, but couldn't do so because of his cancer diagnosis and treatment. He also believed,
19 mistakenly, that Green River College was not operating during the COVID-19 shutdowns, and
20 expected to hear from Mr. Forsberg with guidance on how to proceed. "I was concerned because I
21 was in the middle of this plan and I was ready to go back and resume classes. But with everything
22 being in lockdown and not hearing from Loren, I had no idea what was going on."³
23

24
25 Mr. Forsberg worked with Mr. Killpatrick to develop the retraining plan for him to become an
26 aircraft dispatcher. Mr. Forsberg recalled that Mr. Killpatrick was enthusiastic and engaged in the
27 Office Careers program and had no difficulty completing it. However, in the fall of 2019, Mr. Killpatrick
28 reported problems relating to his cancer diagnosis and treatment. Mr. Forsberg advised
29 Mr. Killpatrick that interrupting the retraining plan could affect his benefits since the interruption was
30 not claim-related. In April 2020, Mr. Killpatrick had finished radiation treatment, but advised Mr.
31 Forsberg that he wasn't sure if he wanted to continue the program. "And when we parted ways, I
32 asked him to let me know if he had any questions. And if he wanted to resume or get back into the
33 program, to reach out to me."⁴
34

35
36 According to Mr. Forsberg, vocational retraining plans must be completed within 24 months
37 and within the allocated budget. The Department-approved plan was scheduled to run from
38
39

40
41
42
43
44
45 _____
46 ¹ 1/11/22 Tr. at 50.

47 ² 1/11/22 Tr. at 25.

³ 1/11/22 Tr. at 28-29.

⁴ 1/13/22 Tr. at 31.

1 March 2019 through June 2020. Thus, as of June 2020, there was no way for Mr. Killpatrick to have
2 completed his vocational plan as written and approved, since he did not complete any coursework at
3 the college. Mr. Forsberg explained that once the Department approves a plan, it is difficult to modify,
4 requires considerable time and effort, and must be approved by the Department's director. When
5 asked if he could have designed a modified plan, Mr. Forsberg was unsure because it would depend
6 on whether Green River College offered the right classes during the quarters that Mr. Killpatrick could
7 attend.
8

9
10
11 In December 2020, Mr. Forsberg told the Department that Mr. Killpatrick "won't attend and
12 time is up."⁵ On January 12, 2021, the Department issued an order suspending Mr. Killpatrick's
13 time-loss compensation benefits. The order stated:
14

15
16 It is hereby ordered that your right to time-loss compensation be suspended
17 effective 01/12/2021 for failure to comply with your accountability agreement or
18 plan interruption due to worker's own actions as stated in RCW 51.32.099. This
19 action is taken in accordance with RCW 51.32.110 which states in part as follows:
20

21 "If the worker shall refuse or obstruct evaluation or examination for the purpose of
22 vocational rehabilitation or does not cooperate in reasonable efforts at such
23 rehabilitation, the department, with notice to the worker may suspend any further
24 action on any claim of such worker so long as such refusal, obstruction,
25 noncooperation, or practice continues and reduce, suspend or deny any
26 compensation for such period."
27

28 We note that the Department cited the wrong statute, RCW 51.32.099, in its order. RCW 51.32.099
29 governed the vocational rehabilitation pilot program, and expired on June 30, 2016. It was re-codified
30 as RCW 51.32.096, effective July 1, 2016. Consequently, any references in this decision to
31 RCW 51.32.099 should be read as referring to the re-codified RCW 51.32.096.
32

33 **Analysis:**

34
35 RCW 51.32.110(2) governs the suspension of benefits, and provides, in relevant part:

36
37 If the worker refuses to submit to medical examination, or obstructs the same, or, if any
38 injured worker shall persist in unsanitary or injurious practices which tend to imperil or
39 retard his or her recovery, or shall refuse to submit to such medical or surgical treatment
40 as is reasonably essential to his or her recovery or refuse or obstruct evaluation or
41 examination for the purpose of **vocational rehabilitation** or **does not cooperate in**
42 **reasonable efforts at such rehabilitation**, the department or the self-insurer upon
43 approval by the department, with notice to the worker **may suspend any further action**
44 **on any claim** of such worker so long as such refusal, obstruction, noncooperation, or
45 practice continues and reduce, suspend, or deny any compensation for such period:
46

47 ⁵ 1/13/22 at 72.

1 PROVIDED, That (a) the department or the self-insurer **shall not suspend any further**
2 **action on any claim of a worker or reduce, suspend, or deny any compensation**
3 **if a worker has good cause for refusing to submit to** or to obstruct any examination,
4 evaluation, treatment or **practice requested by the department** or required under this
5 section and (b) the department may not assess a no-show fee against the worker if the
6 worker gives at least five business days' notice of the worker's intent not to attend the
7 examination.⁶

8
9 Our significant decision *In re Dennis Staudinger*⁷ discussed the interplay between RCW 51.32.110
10 and RCW 51.32.096(5) in the context of noncooperation with a vocational training plan.

11 While both statutes discuss grounds for suspension of benefits, it is only under the
12 authority of RCW 51.32.110(2) that benefits may be suspended. RCW 51.32.099(5)
13 incorporates the suspension provisions of RCW 51.32.110(2). RCW 51.32.110 includes
14 grounds for suspension of benefits arising from problems within the vocational process;
15 RCW 51.32.099 provides more specific statements as to those grounds. The latter
16 grounds are within the new vocational rehabilitation pilot program currently in effect.
17

18 In *Staudinger*, we held that we must first analyze the facts under RCW 51.32.099(5)(c) before
19 determining whether the worker has good cause under RCW 51.32.110 for failing to cooperate with
20 the vocational plan.⁸ In *Staudinger*, we never reached the issue of good cause because we
21 concluded that the worsening of the worker's accepted condition was beyond the worker's control
22 within the meaning of RCW 51.32.096(5)(b), and on that basis, reversed the suspension of benefits.
23

24 Given the *Staudinger* holding, whether the Department correctly suspended benefits for
25 vocational plan interruption requires a four-step inquiry under RCW 51.32.096(5) and
26 RCW 51.32.110(2):
27

- 28 (1) Was there vocational plan interruption within the meaning of RCW 51.32.096(5)(a)?
- 29 (2) Was plan interruption beyond the worker's control under RCW 51.32.096(5)(b)?
- 30 (3) Was plan interruption the result of the worker's actions under RCW 51.32.096(5)(c)?
- 31 (4) Did the worker demonstrate good cause for plan interruption, per RCW 51.32.096(5)(c)
32 and RCW 51.32.110?

33
34
35
36
37 1. Plan Interruption: RCW 51.32.096(5)(a)

38 RCW 51.32.096(5)(a) defines plan interruption as follows:

39 "Vocational plan interruption" for the purposes of this section means an occurrence
40 which disrupts the plan to the extent the employability goal is no longer attainable.
41 "Vocational plan interruption" does not include institutionally scheduled breaks in
42 educational programs, occasional absence due to illness, or modifications to the plan
43
44

45 _____
46 ⁶ Emphasis added.

47 ⁷ BIIA Dec., 12 15477 (2013).

⁸ See also *Timothy R. Kelly*, Dckt. No. 11 21191 (November 28, 2012).

1 which will allow it to be completed within the cost and time provisions of subsection
2 (3)(d) and (e) of this section.

3
4 The statute does not specify when to evaluate whether the employability goal is no longer attainable.
5 But the Department made that determination as of January 12, 2021 (the date of the order under
6 appeal). Nor does the statute explain the meaning of the phrase "employability goal is no longer
7 attainable." However, *In re Ramona Nuno*⁹ provides guidance. In that case, the Department
8 suspended the worker's benefits after she failed every course related to her becoming employable in
9 medical support. We found that the worker's employability goal was no longer attainable because
10 she "failed to pass required courses necessary to complete her vocational plan within the allotted
11 time." Thus, we assessed the employability goal within the confines of the approved vocational plan
12 and its time limits. Mr. Killpatrick started his vocational plan on March 18, 2019, which means he
13 needed to complete it by March 18, 2021 to stay within the 24-month statutory time limit. As of
14 January 12, 2021, there were only two months left for him to complete three academic quarters worth
15 of coursework. Obviously, it would have been impossible for him to complete the vocational plan by
16 March 18, 2021.

17
18 Our industrial appeals judge found that there was no plan interruption because as of
19 June 2020, there was enough time and money left for Mr. Killpatrick to complete the plan. At that
20 point, Mr. Killpatrick had nine months to complete the remaining three academic quarters of his
21 program, which, on its face, appears to be feasible. However, this would have required plan
22 modification. Mr. Forsberg credibly testified that whether or not the training plan could be
23 successfully completed depended entirely on whether the college offered the right classes during the
24 remaining three quarters, and whether the director of the Department approved plan modification.
25 There is no evidence as to whether Green River College offered the requisite classes necessary to
26 complete the aviation dispatcher program in the remaining time left. Nor do we know if the director
27 would have approved the modification request. Thus, there is insufficient basis to conclude that plan
28 modification would have resulted in successful plan completion within the 24-month time limit.

29
30 Based on the above circumstances, we conclude that there was vocational plan interruption
31 within the meaning of RCW 51.32.096(5)(a).

32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47

⁹ Dckt. No. 12 19101 (March 17, 2014).

1 2. Beyond the Worker's Control: RCW 51.32.096(5)(b)

2
3 Once plan interruption has been established, the second inquiry is to determine if it was
4 beyond the worker's control. RCW 51.32.096(5)(b) provides:

5
6 When a vocational plan interruption is beyond the control of the worker, the department
7 or self-insurer must recommence plan development. If necessary to complete
8 vocational services, the cost and duration of the plan may include credit for that
9 expended prior to the interruption. A vocational plan interruption is considered outside
10 the control of the worker when it is due to the closure of the accredited institution, when
11 it is due to a death in the worker's immediate family, or when documented changes in
12 the worker's accepted medical conditions prevent further participation in the vocational
13 plan.

14 The last sentence of the statute describes situations that are considered beyond the worker's control,
15 but it does not expressly state that these situations are exhaustive. Mr. Killpatrick argues that getting
16 cancer was beyond his control. While certainly no one chooses to get cancer, the phrase "beyond
17 the control of the worker" has a specific meaning within the context of RCW 51.32.096(5)(b).
18 *Expressio unius est exclusio alterius* is a principle of statutory construction that means the expression
19 of one thing is the exclusion of the other. If a statute specifically designates things to which it refers,
20 there is an inference that all omissions were intentional.¹⁰ Non-industrially related conditions, such
21 as Mr. Killpatrick's prostate cancer, are not included in the last sentence of RCW 51.32.096(5)(b),
22 and the legislature's omission should be interpreted as intentional. Indeed, we adopted this viewpoint
23 in *In re Devon Law*.¹¹

24
25 Here, the vocational plan interruption was not outside the control of the worker as
26 defined by RCW 51.32.096. RCW 51.32.096(5)(b) specifies three scenarios that take
27 plan interruption beyond the worker's control: (1) closure of the accredited institution;
28 (2) death in the worker's immediate family; and (3) documented changes to the worker's
29 accepted medical condition that prevent further participation in the vocational plan.
30 None of those reasons apply to Mr. Law. Everett Community College did not close, no
31 member of Mr. Law's immediate family died, and there is no evidence that his accepted
32 medical conditions prevented participation in the vocational program. Therefore, we
33 agree with our judge that the plan interruption was not outside the control of the worker.

34
35 In Mr. Law's case, we did not consider that any other situations might be deemed outside the worker's
36 control, beyond the three scenarios listed in the statute.

37
38 Applying the reasoning set forth in the *Law* decision, we conclude that plan interruption was
39 **not** beyond Mr. Killpatrick's control within the meaning of RCW 51.32.096(5)(b), cancer diagnosis
40

41
42
43
44
45
46 ¹⁰ *State v. Roadhs*, 71 Wn.2d 705 (1967); *Washington Natural Gas Co. v. Public Utility Dist. No. 1*, 77 Wn.2d 94, 98
47 (1969); *State v. Swanson*, 1156 Wn. App. 67 (2003); *In re Dorsey Hursh*, BIIA Dec., 90 6802 (1991).

¹¹ Dckt. No. 19 27392 (December 29, 2020).

1 notwithstanding. None of the three scenarios listed in the statute apply here: Green River College
2 did not close; no one in Mr. Killpatrick's immediate family died; and his industrially accepted conditions
3 did not worsen such that he could no longer participate in his vocational plan.
4

5
6 3. Worker's Own Actions: RCW 51.32.096(5)(c)

7 The third inquiry is whether plan interruption was the "result of the worker's actions" under
8 RCW 51.32.096(5)(c). Despite similar language, the phrase "result of the worker's actions" has a
9 different meaning than "beyond the worker's control," and the two phrases are governed by different
10 subsections of the statute. RCW 51.32.096(5)(c) provides:
11

12
13 When a vocational plan interruption is the result of the worker's actions, the worker's
14 entitlement to benefits must be suspended in accordance with RCW 51.32.110,
15 including the opportunity for the worker to demonstrate good cause. If plan development
16 or implementation is recommenced, the cost and duration of the plan may not include
17 credit for that expended prior to the interruption. A vocational plan interruption is
18 considered a result of the worker's actions when it is due to the failure to meet
19 attendance expectations set by the training or educational institution, failure to achieve
20 passing grades or acceptable performance review, unaccepted or postinjury conditions
21 that prevent further participation in the vocational plan, or the worker's failure to abide
22 by the accountability agreement in subsection (3)(a) of this section.
23

24 The statute makes clear that once something is deemed the "result of the worker's actions," benefits
25 **must** be suspended, absent a showing of good cause. The last sentence of RCW 51.32.096(5)(c)
26 makes clear that non-industrially related conditions that prevent a worker's participation in the
27 vocational plan are considered the "result of the worker's own actions."
28

29 Undisputedly, Mr. Killpatrick failed to meet attendance expectations by withdrawing from his
30 courses. Also, undisputedly his cancer diagnosis is not an industrially related condition. The cancer
31 and the emotional distress it caused Mr. Killpatrick before and during treatment prevented him from
32 participating in his classes and caused him to withdraw from school during the fall 2019 and winter
33 2020 quarters, and to not register for the spring 2020 quarter. Therefore, we must conclude that plan
34 interruption was the "result of the worker's actions" under RCW 51.32.096(5)(c), and benefit
35 suspension is mandatory, unless the worker can show good cause.
36
37

38
39
40 4. Good Cause: RCW 51.32.110

41 Once it is determined that (1) there was plan interruption, (2) not beyond the worker's control,
42 and (3) which resulted from the worker's actions, the worker must establish good cause to avoid the
43 suspension of benefits. RCW 51.32.110, the benefit suspension statute, provides in relevant part:
44

45 If the worker . . . shall . . . refuse or obstruct evaluation or examination for the purpose
46 of vocational rehabilitation or **does not cooperate** in reasonable efforts at such
47

1 rehabilitation, the department or the self-insurer upon approval by the department, with
2 notice to the worker may suspend any further action on any claim of such worker **so**
3 **long as such refusal, obstruction, noncooperation, or practice continues** and
4 reduce, suspend, or deny any compensation for such period: PROVIDED, That (a) the
5 department or the self-insurer **shall not suspend** any further action on any claim of a
6 worker or reduce, suspend, or deny any compensation **if a worker has good cause**
7 for refusing to submit to or to obstruct any examination, evaluation, treatment or practice
8 requested by the department. . . .¹²

9
10 Alaska Airlines argues that non-industrially related conditions are "expressly prohibited as a
11 reason for noncooperation under RCW 51.32.096(5)(c), and cannot constitute good cause.¹³ We
12 disagree. First, RCW 51.32.096(5)(c) does not mention "noncooperation." That term is found in
13 RCW 51.32.110(2), the benefit suspension statute. Second, while we agree that non-industrially
14 related conditions are considered the "worker's own actions" under RCW 51.32.096(5)(c), that does
15 not automatically mean that they can never constitute good cause under RCW 51.32.110. Nowhere
16 does RCW 51.32.096(5) or RCW 51.32.110 say that good cause excludes non-industrially related
17 conditions. Rather, they are two separate steps in the four-part inquiry, and the employer's contention
18 conflates them into a single element.

19
20 Moreover, our *Devon Law* decision establishes the incorrectness of Alaska Airlines'
21 interpretation. That case involved a worker whose 13-year-old son had serious physical and mental
22 health challenges, including a suicide attempt. The worker had to drive his son to and from numerous
23 medical appointments as a result of his conditions. The worker was "constantly worried about his
24 son and . . . needed to be present for his son's initial appointments" and "was unable to concentrate
25 or fully engage in classes because of his son's medical problems." As a result of transporting his son
26 to and from appointments, the worker was unable to meet attendance and other course expectations,
27 and he failed his classes. Although the son's medical condition was a non-industrially related
28 condition, we nevertheless found good cause.

29
30 Mr. Law was presented with a Hobbesian choice—fulfill his program requirements or
31 provide medical care for his son. Both required an enormous time commitment. . . . It
32 is also clear that Mr. Law's obligations increased as his son required more medical care,
33 culminating in an attempted suicide. Had Mr. Law not fully engaged in the care, it's
34 possible the suicide would have been successful. Such a result would have rendered
35 the plan interruption beyond the worker's control and his benefits would not have been
36 suspended. We cannot in good conscience reach a different conclusion because the
37 suicide was unsuccessful. Based on a preponderance of the evidence, we find Mr. Law

46 ¹² Emphasis added.
47 ¹³ Employer's Petition for Review at 7.

1 had good cause for interrupting the vocational plan during winter and spring quarters of
2 2019. Therefore, his benefits should not have been suspended for noncooperation.¹⁴

3
4 Our *Law* decision makes clear that a non-industrially related condition **can** constitute good cause
5 under certain circumstances.

6
7 The facts surrounding Mr. Killpatrick's plan interruption are analogous to those in *Law*, but are
8 even more compelling. Instead of the worker's son who needed ongoing medical care, here, it was
9 the worker himself. Like Mr. Law, Mr. Killpatrick was presented with a Hobbesian choice (that is, the
10 illusion that multiple choices are available, when in reality, there is no choice at all): undergo cancer
11 treatment (presumably, in order to stay alive), or attend classes at Green River College to fulfill his
12 vocational plan. Like Mr. Law, Mr. Killpatrick's emotional stress from his cancer diagnosis and
13 treatment prevented him from focusing on his classes. He testified, "[f]inding out you have cancer. . .
14 it takes an emotional toll on you, and I was not in the right frame of mind to even continue or think
15 about classes at that time."¹⁵ We determine that Mr. Killpatrick's cancer diagnosis and treatment
16 constitute good cause for plan interruption under RCW 51.32.110.

17
18 Moreover, given RCW 51.32.110's reference to "noncooperation," we also consider whether
19 Mr. Killpatrick engaged in it. WAC 296-14-410 defines noncooperation as follows:

- 20
21
22
23
24
25 (2) **What does noncooperative mean?** Noncooperation is behavior by the worker (or
26 worker's representative) which obstructs and/or delays the department or
27 self-insurer from reaching a timely resolution of the claim.
28 (a) Noncooperation can include any one of the following:
29 (i) Not attending or cooperating with medical examinations or vocational evaluations
30 requested by the department or self-insurer.
31 (ii) Failure to keep scheduled appointments or evaluations with attending physician
32 or vocational counselor.

33 We addressed noncooperation in *In re John Galen*:¹⁶ "Noncooperation is, by definition,
34 behavior that obstructs or delays the administration of the claim. The behavior is deliberate and
35 calculated to obstruct. Behavior that is not designed or intended to obstruct or delay is not
36 noncooperation." We have generally been reticent to find good cause for vocational plan
37
38
39
40
41
42
43
44

45
46 ¹⁴ *In re Devon Law*, BIIA Dckt. No. 19 27392 (December 29, 2020).
47 ¹⁵ 1/11/22 Tr. at 50.
¹⁶ BIIA Dec., 03 18491 (2004).

1 interruption.¹⁷ However, *In re Ramona Nuno*¹⁸ is a decision in which we made such a finding. It
2 involved an injured worker with limited English proficiency and a sixth-grade education. The
3 vocational retraining plan required the worker to obtain a GED and to take courses at her local
4 community college. She attended community college for five quarters, but was placed on academic
5 suspension due to failing grades. Although we found that there was plan interruption due to the
6 worker's own actions, we applied the definition of noncooperation set forth in *Galen*, and determined
7 that the worker was **not** noncooperative.
8
9

10
11 Although Ms. Nuno put forth her best efforts, she did not have the capability of
12 completing the vocational rehabilitation plan developed for her. Ms. Nuno tried to
13 succeed, but failed; thus, her ostensible actions resulting in the failure of her vocational
14 retraining plan were not a willful refusal but simply the inevitable actions a woman with
15 a sixth-grade education obtained in Mexico, with a limited ability to read and write the
16 English language.
17

18 Applying the *Nuno* and *Galen* holdings to the instant case, it is clear that Mr. Killpatrick did not
19 engage in noncooperation. He did not deliberately obstruct or delay his vocational plan by getting
20 cancer and needing to treat it with 38 rounds of radiation, becoming emotionally distressed by it, and
21 then needing several weeks of recovery time. His conduct was not deliberate or calculated to
22 obstruct. Although his radiation treatment didn't actually start until January 2020, he was undergoing
23 treatment in the fall of 2019 in preparation for the radiation, including attaching special markers onto
24 his body. We find it reasonable that Mr. Killpatrick could not focus on schoolwork in the fall of 2019
25 due to the emotional distress caused by his cancer diagnosis and the prospect of intense radiation
26 treatment. That he did not engage in noncooperation is a further circumstance supporting our
27 conclusion that his plan interruption was based on good cause.
28
29
30
31
32

33 DECISION

34 In Docket No. 21 13384, the claimant, Michael T. Killpatrick, filed an appeal with the Board of
35 Industrial Insurance Appeals on March 5, 2021, from an order of the Department of Labor and
36 Industries dated January 12, 2021. In this order, the Department suspended the claimant's time-loss
37 compensation benefits for noncooperation with a vocational plan under RCW 51.32.110, on the
38 grounds that there was plan interruption due to the worker's own actions. This order is incorrect, and
39
40
41
42
43

44 ¹⁷ See, *In re Dennis Staudinger*, BIIA Dec., 12 15477 (2013); *In re Vladimir I. Tischenko*, Dckt. No. 11 21603 (March 18,
45 2013); *In re Kenneth R. Wells*, Dckt. No. 13 15410 (August 21, 2014); *In re Timothy R. Kelly*, Dckt. No. 11 21191
46 (November 28, 2012); *In re Christopher B. Rodriguez*, Dckt. No. 16 17236 (June 19, 2018); *In re Tallen L. Seaman*, Dckt.
47 No. 14 15314 (December 18, 2015); *In re Joseph D. Day*, Dckt. No. 13 10344 (May 15, 2014).

¹⁸ Dckt. No. 12 19101 (March 17, 2014).

1 is **REVERSED** and **REMANDED** to the Department to reinstate the claimant's time-loss
2 compensation benefits effective January 12, 2021.
3

4 **FINDINGS OF FACT**

- 5 1. On May 19, 2021, an industrial appeals judge certified that the parties
6 agreed to include the Jurisdictional History in the Board record solely for
7 jurisdictional purposes.
8
- 9 2. Michael T. Killpatrick is 71-years old and has a high school diploma. His
10 work history consists primarily of working as a cargo handler in the airlines
11 industry.
12
- 13 3. On December 20, 2007, Mr. Killpatrick sustained an industrial injury to his
14 low back while working as a cargo handler for Alaska Airlines.
- 15 4. In January 2019, Mr. Killpatrick was diagnosed with prostate cancer,
16 which required radiation treatment five days a week, for a total of
17 38 sessions. The prostate cancer was unrelated to his industrial injury.
18 In November 2019, Mr. Killpatrick underwent a medical procedure in
19 which radiation markers were placed on his body. He started radiation
20 treatment on January 26, 2020, and finished on March 9, 2020.
21 Mr. Killpatrick's physician recommended a recovery period of six to eight
22 weeks following the completion of radiation treatment.
- 23 5. The Department approved a vocational retraining plan for Mr. Killpatrick
24 to become employable as an aircraft dispatcher. The approved plan was
25 scheduled to run from March 18, 2019, to June 15, 2020, including a
26 six-month online program at Office Careers, followed by three academic
27 quarters at Green River College.
28
- 29 6. Mr. Killpatrick successfully completed the first phase of the vocational
30 plan at Office Careers from March to September 2019. He was unable to
31 complete the second phase of the vocational plan at Green River College
32 from fall quarter 2019 through spring quarter 2020 as a result of his cancer
33 diagnosis and treatment.
- 34 7. The Department suspended Mr. Killpatrick's time-loss compensation
35 benefits, effective January 12, 2021, for failure to comply with the
36 accountability agreement or plan interruption due to the worker's own
37 actions.
38

39 **CONCLUSIONS OF LAW**

- 40 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties
41 and subject matter in this appeal.
42
- 43 2. There was vocational plan interruption within the meaning of
44 RCW 51.32.096(5)(a).
- 45 3. Vocational plan interruption was not beyond Mr. Killpatrick's control within
46 the meaning of RCW 51.32.096(5)(b).
47

- 1
2
3
4
5
6
7
8
9
10
11
12
13
4. Vocational plan interruption was the result of Mr. Killpatrick's actions within the meaning of RCW 51.32.096(5)(c).
 5. Mr. Killpatrick's prostate cancer diagnosis and treatment constitute good cause for plan interruption and/or failure to comply with the Department's accountability agreement under RCW 51.32.110.
 6. Mr. Killpatrick did not engage in noncooperation within the meaning of RCW 51.32.110 and WAC 296-14-410.
 7. The Department order dated January 12, 2021, is incorrect, and is reversed. This matter is remanded to the Department to reinstate Mr. Killpatrick's time-loss compensation benefits effective January 12, 2021.

14 Dated: July 26, 2022.

15
16
17 BOARD OF INDUSTRIAL INSURANCE APPEALS

18 

19 HOLLY A. KESSLER, Chairperson

20
21
22 

23 ISABEL A. M. COLE, Member
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47

**Addendum to Decision and Order
In re Michael T. Killpatrick
Docket No. 21 13384
Claim No. W-911594**

Appearances

Claimant, Michael T. Killpatrick, by Wallace & Whitford Law, PLLC, per Dorian D.N. Whitford
Self-Insured Employer, Alaska Airlines, Inc., by Bauer Moynihan & Johnson, LLP, per
Mark K. Conley

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 employer filed a timely Petition for Review of a Proposed Decision and Order issued on April 14, 2022, in which the industrial appeals judge reversed and remanded the Department order dated January 12, 2021. The claimant filed a response to the employer's Petition for Review on June 30, 2022.