

Neil, Kaleo

STANDARD OF REVIEW

Vocational rehabilitation determinations

A decision about whether a worker turned down a return-to-work job offer isn't a vocational decision subject to the abuse of discretion standard of review. The Director's decision to assign a vocational counselor is subject to the abuse of discretion standard of review.***In re Kaleo Neil, Order Vacating Proposed Decision and Order, BIIA Dec., 23 10636 (2024)***

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

1 **IN RE: KALEO C. NEIL**)
2)
3)
4 **CLAIM NO. BH-50340**) **DOCKET NOS. 23 10636, 23 10734, 23 10735 &**
5) **23 10736**
6)
7) **ORDER VACATING PROPOSED DECISION**
8) **AND ORDER AND REMANDING THE APPEALS**
9) **FOR FURTHER PROCEEDINGS**

6 In 2021, Kaleo C. Neil worked for Linen Rental Supply, Inc. (Linen Rental), as a route service
7 manager delivering and retrieving restaurant supplies. While moving anti-fatigue restaurant mats, he
8 slipped and fell. He sustained a labral tear of the left shoulder and a complex tear of his left lateral
9 meniscus in the accident. The Department of Labor and Industries allowed the claim and paid
10 benefits, including time-loss compensation. In September 2022, Linen Rental made a permanent job
11 offer to Mr. Neil for the position of office aide/safety monitor. Mr. Neil did not accept the offer.

12 The Department's staff next issued a letter finding that Mr. Neil was not eligible for vocational
13 services because he didn't accept the job offered by Linen Rental. Mr. Neil disputed this
14 determination. In December 2022, Ariana Ulrich, Vocational Dispute Resolution Office (VDRO)
15 employee and Vocational Services Specialist, issued a letter in which she found Mr. Neil eligible for
16 ongoing vocational services. The employer disputed this determination.

17 On December 28, 2022, the Department's Director, Joel Sacks, issued a letter in which he did
18 the following: (1) reversed a determination by Department staff that Mr. Neil had turned down his
19 employer's offer of a new job, (2) advised that time-loss compensation would be reinstated "as
20 appropriate," and (3) directed that the Department would assign a vocational rehabilitation counselor
21 to assess Mr. Neil's ability to work. In January 2023, the Department also issued three time-loss
22 compensation payment orders paying benefits to Mr. Neil from October 6, 2022, through
23 January 16, 2023. Linen Rental appealed all four Department decisions to this Board.

24 At trial, the Department filed a motion for partial summary judgment concerning the Director's
25 vocational determination letter. In its motion, the Department argued that our standard of review in
26 reviewing the letter was the abuse of discretion and that the Director's decision was not arbitrary or
27 capricious. Our industrial appeals judge granted partial summary judgment to the Department and
28 ultimately held that the Director didn't abuse his discretion when determining that the employer's job
29 offer was invalid and that the Department was entitled to a decision as a matter of law. Our judge
30 affirmed the Director's letter.

1 Our judge found that the proper standard of review of the Director's letter was the abuse of
2 discretion standard of review. Our judge also held that Mr. Neil was temporarily and totally disabled
3 between October 6, 2022, and January 16, 2023, and affirmed all orders. Linen Rental filed a Petition
4 for Review arguing that our judge erroneously granted the Department's motion for partial summary
5 judgement and that Mr. Neil was not entitled to time-loss compensation for the periods of time in
6 question.

7 After careful consideration of the record and the Industrial Insurance Act, we find that the
8 decisions made in the Director's letter in this case are not all subject to an abuse of discretion
9 standard of review. To be sure, the decision to assign a vocational rehabilitation counselor to assess
10 Mr. Neil's ability to work was a vocational benefits determination as contemplated by RCW 51.32.095.
11 But the determination as to the validity of the employer's return-to-work offer must be reviewed on a
12 preponderance of the evidence standard of review. The abuse of discretion standard was improperly
13 applied in this case. To the extent this decision is inconsistent with *In re Peter E. Reeves*¹ and
14 *In re Thomas L. Brantley Jr.*² they are overruled. The Proposed Decision and Order of
15 January 16, 2024, is **VACATED** and this appeal is **REMANDED FOR FURTHER PROCEEDINGS**.

16 **DISCUSSION**

17 The Department's motion for partial summary judgment was predicated on the assertion that
18 there were no genuine issues of material fact concerning the Director's decision. Specifically, the
19 Department argued that the Director's decision was not arbitrary or capricious and that the
20 appropriate standard of review was "abuse of discretion." We hold that the Director's decision that
21 Mr. Neil didn't refuse a valid job offer was not a vocational benefits determination, but was a
22 determination as to the validity of a return-to-work offer. The correct standard of review regarding
23 whether a worker has refused a valid job offer is a preponderance of the evidence. To the extent
24 *In re Peter E. Reeves*³ and *In re Thomas L. Brantley Jr.*⁴ are inconsistent with this decision, those
25 decisions are overruled.

26 Because the parties argued the summary judgment motion and presented evidence within the
27 parameters of an "abuse of discretion" standard, and our judge applied this incorrect standard, the
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¹ Dckt. No. 17 17978 (May 14, 2018).

31 ² Dckt No. 21 13186 (December 7, 2022).

32 ³ Dckt. No. 17 17978 (May 14, 2018).

⁴ Dckt No. 21 13186 (December 7, 2022).

1 parties are entitled to an opportunity to supplement the record. We cannot conclude that the
2 Department's partial summary judgment motion was properly decided.

3 In light of the fact that the parties approached the Director's decision from an "abuse of
4 discretion" angle, there can be no doubt that the results of this motion colored and affected how the
5 Department and the employer presented their respective cases-in-chief on the issue of Mr. Neil's
6 entitlement to time-loss compensation. Further proceedings are necessary to allow the Department
7 an opportunity to decide whether a new motion should be filed using the correct standard of review
8 and to afford the parties an opportunity to consider our holding here and present additional evidence
9 and/or testimony if deemed necessary.

10 **ORDER**

11 These appeals are remanded to the hearings process, as provided by WAC 263-12-145(5),
12 for further proceedings as indicated by this order. Unless the matter is settled or dismissed, the
13 industrial appeals judge will issue a new Proposed Decision and Order. The new order will contain
14 findings and conclusions as to each contested issue of fact and law. Any party aggrieved by the new
15 Proposed Decision and Order may petition the Board for review, as provided by RCW 51.52.104.
16 This order vacating is not a final decision and order of the Board within the meaning of
17 RCW 51.52.110.

18 Dated: July 19, 2024.

19 BOARD OF INDUSTRIAL INSURANCE APPEALS

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23 ISABEL A. M. COLE, Member

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**Addendum to Order
In re Kaleo C. Neil
Docket Nos. 23 10636, 23 10734, 23 10735 & 23 10736
Claim No. BH-50340**

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Appearances

Claimant, Kaleo C. Neil, Self-Represented

Employer, Linen Rental Supply, Inc., by Employer Solutions Law, per Alicia A. McDonnell

Department of Labor and Industries, by Office of the Attorney General, per Wendy Barcelona

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Department Order(s) Under Appeal

1. In Docket No. 23 10636, the employer, Linen Rental Supply, Inc., filed an appeal with the Board of Industrial Insurance Appeals on January 23, 2023, from a vocational determination letter issued by the Director on December 28, 2022.
2. In Docket No. 23 10734, the employer, Linen Rental Supply, Inc., filed an appeal with the Board of Industrial Insurance Appeals on January 25, 2023, from an order of the Department of Labor and Industries dated January 6, 2023. In this order, the Department affirmed as correct time-loss compensation payment orders dated December 9, 2022 (October 6, 2022, through December 8, 2022), and December 22, 2022 (December 9, 2022, through December 22, 2022).
3. In Docket No. 23 10735, the employer, Linen Rental Supply, Inc., filed an appeal with the Board of Industrial Insurance Appeals on January 25, 2023, from an order of the Department of Labor and Industries dated January 19, 2023. In this order, the Department affirmed as correct a time-loss compensation payment order dated January 5, 2023, which paid time-loss compensation from December 23, 2022, through January 5, 2023.
4. In Docket No. 23 10736, the employer, Linen Rental Supply, Inc., filed an appeal with the Board of Industrial Insurance Appeals on January 25, 2023, from an order of the Department of Labor and Industries dated January 20, 2023. In this order, the Department affirmed as correct a time-loss compensation payment order dated January 18, 2023, which paid time-loss compensation from January 6, 2023, through January 16, 2023. This order also indicated that time-loss compensation was ended as paid through January 16, 2023, because Mr. Neil was released to work.

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 Proposed Decision and Order issued on January 16, 2024.