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No. 77018-7-7-I

SUPREME COURT OF THE STATE OF WASHINGTON

SUKHJIT AHLUWALIA,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES
OF THE STATE OF WASHINGTON,

Respondent.

PETITION FOR REVIEW

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I. IDENTITY OF THE PETITIONER

COMES NOW the Petitioner, Sukhjit Ahluwalia, Appellant and Plaintiff below, and hereby asks this Court to accept review of the Court of Appeals' decision terminating review.

II. DECISION PRESENTED FOR REVIEW

Under RAP 13.4(b)(1), (4), Mr. Ahluwalia seeks review of *Ahluwalia v. Dep't of Labor & Indus.*, No. 77018-7-I, 2018 Wn. App. LEXIS 2569 (Wn. Ct. App. Nov. 13, 2018). The Court of Appeals, Division I, filed its opinion on November 13, 2018. Reconsideration was denied on January 11, 2019.

III. ISSUE

Whether the Board of Industrial Insurance Appeals erred in denying Mr. Ahluwalia's motion for attorney fees for the Department of Labor and Industries' frivolous defense when the Board found that the Director had abused his discretion when he determined that Mr. Ahluwalia did not have good cause for failing to cooperate with vocational services.

IV. STATEMENT OF THE CASE

a. Procedural History

This case originates under RCW Title 51, the Industrial Insurance Act ("the Act") from an Administrative Law Review appeal from a January 28, 2016 Decision and Order of the Board of Industrial Insurance Appeals ("the Board"). The Board concluded that the Director ("the Director") of the Department of Labor and Industries ("the Department") abused his discretion in finding that Mr. Ahluwalia failed to cooperate with vocational services without good cause. The Board later denied Mr. Ahluwalia's motion for attorney fees under RCW 4.84.185.

Mr. Ahluwalia appealed the denial of fees to Superior Court, asserting that he was entitled to attorney fees where the Board had determined that the Director had abused his discretion. The Superior Court affirmed the Board's decision after briefing and oral argument, denying Mr. Ahluwalia's motion for summary judgment and motion for reconsideration. Judgment was entered on May 18, 2017. CP at 346. Mr. Ahluwalia then appealed to the Court of Appeals, which affirmed the Superior Court and denied reconsideration. This petition for review follows.

b. Statement of Facts

In the Proposed Decision and Order ("PD&O") dated January 28, 2016, the parties stipulated to facts. Clerk's papers at 112-115. Relevant to the background of this case are stipulated facts 1-4:

1. Sukhjit Ahluwalia was born in India on July 9, 1948. He immigrated to the United States in 1976. Mr. Ahluwalia holds a high school diploma, which he earned in 1965 in New Delhi, India. He earned a B.S. in Physics, Chemistry, and Math from DAV College in India in 1969. At some point he attended classes in Computer Programming (Cobol, Basic, Logic) at Seattle Community College but did not complete a degree program. Clerk's Papers at 112.
2. On December 19, 2007 Mr. Ahluwalia was employed at the Pepsi Cola Bottling Plant in Seattle, WA where he worked as a Chemical Laboratory Technician/Syrup Maker/Can Inspector. On December 19, 2007 Mr. Ahluwalia sustained a work-related injury to his low back. CP at 112.
3. Mr. Ahluwalia filed a Report of Accident under Claim No. AB-16601 with the Washington State Department of Labor & Industries. The Department allowed the claim and provided benefits. CP at 112.

4. After undergoing medical treatment that included three surgeries on his low back, Mr. Ahluwalia's attending and treating physicians permanently restricted him from his job of injury and imposed a permanent lifting restriction of 30 pounds. CP at 113.

In the PD&O, the Board made the following Findings of Fact:

1. On June 24, 2015, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History to the Board record solely for jurisdictional purposes. CP at 120.
2. On August 28, 2012, the Department sent Sukhjit Ahluwalia a letter in which it informed him that he was approved for plan development. CP at 120.
3. On February 1, 2013, a retraining plan was completed for Sukhjit Ahluwalia. The retraining plan was sent to Mr. Ahluwalia's legal representative in the due course of mails on February 11, 2013. CP at 120.
4. On March 1, 2013, Sukhjit Ahluwalia, on the advice of and through his counsel, filed a written notice of his intent to decline vocational services. On March 20, 2013, and March 21, 2013, Sukhjit Ahluwalia, through his counsel, provided newly-discovered, demonstrable, and

claim-related medical and vocational evidence supporting his dispute. CP at 120.

5. In Docket No. 15 14067, instead of addressing Sukhjit Ahluwalia's March 1, 2013 dispute by way of a formal order containing dispute or protest notifications, the Department, over the course of two years, required Sukhjit Ahluwalia to meet with the VRC between October 22, 2013 and November 21, 2013, to sign the vocational retraining plan on March 1, 2013, to attend November 12, 2012 and December 12, 2013 vocational meetings, to sign the vocational retraining plan by January 21, 2014 and April 23, 2014, and to meet with vocational services by July 28, 2014. When Sukhjit Ahluwalia declined to participate, the Department determined Sukhjit Ahluwalia failed to cooperate. CP at 120.

6. In Docket No. 15 14265, instead of addressing Sukhjit Ahluwalia's March 1, 2013 dispute by way of a formal order containing dispute or protest notifications, the Department, over the course of two years, required Sukhjit Ahluwalia to meet with the VRC between October 22, 2013 and November 21, 2013, to sign the vocational retraining plan on March 1, 2013, to attend November 12, 2012 and December 12, 2013 vocational meetings, to sign the vocational retraining plan by January 21, 2014 and April 23, 2014, and to meet with vocational services by

July 28, 2014. When Sukhjit Ahluwalia declined to participate, the Department determined Sukhjit Ahluwalia failed to cooperate. CP at 120-21.

7. Sukhjit Ahluwalia failed to meet with the VRC between October 22, 2013, and November 21, 2013. Sukhjit Ahluwalia refused to sign the vocational retraining plan on March 1, 2013. Sukhjit Ahluwalia cancelled his November 13, 2013 and December 12, 2013 vocational meetings. Sukhjit Ahluwalia refused to sign the vocational retraining plan by the January 21, 2014 and April 23, 2014 deadlines. Sukhjit Ahluwalia, with his attorney's office, failed to meet with vocational services by July 28, 2014. CP at 121.

The Board also made the following Conclusions of Law:

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter of these appeals. CP at 121.
2. Sukhjit Ahluwalia's March 1, 2013 written notice of his intent to decline vocational services constituted a dispute to the Department's February 1, 2013 retraining plan, as contemplated by WAC 296-19A-440. CP at 121.

3. Sukhjit Ahluwalia failed to cooperate with vocational services. Sukhjit Ahluwalia had good cause to fail to cooperate with vocational services, within the meaning of RCW 51.32.110. CP at 121.
4. In Docket No. 15 14265, the Department Director abused his discretion in determining that Sukhjit Ahluwalia failed to cooperate with vocational services without good cause.
5. In Docket No. 15 14067, the Department order dated March 9, 2015 is reversed. In Docket No. 15 14265, the Department letter dated February 12, 2015 is reversed. In Docket No. 15 14067 and in Docket No 15 14265, this claim is remanded with instruction to the Department to provide further benefits in accordance with the law and the facts. CP at 121.[1]

No Petition for Review of the PD&O was filed, and on March 16, 2016, the Board issued an Order Adopting the PD&O. CP at 111. Thereafter, Mr. Ahluwalia filed a motion for attorney fees for frivolous defense on April 15, 2016. CP at 55. The Board issued an Order Denying the Motion for Sanctions on June 28, 2016. CP at 106. Mr. Ahluwalia filed a motion for reconsideration on July 8, 2016, which was denied on September 8, 2016. CP at 68, 79.

[1] In the PD&O, Conclusion of Law number 5 is mislabeled Conclusion of Law number 8.

Subsequently, Mr. Ahluwalia appealed to Superior Court on October 3, 2016. CP at 1. Mr. Ahluwalia filed a motion for summary judgment and a trial brief on March 20, 2017. CP at 16, 30. The Department filed a response opposing summary judgment and a trial brief on April 10, 2017. CP at 89. The Honorable Cheryl B. Carey denied the motion for summary judgment on April 28, 2017. CP at 254. Mr. Ahluwalia filed a motion for reconsideration on May 8, 2017. CP at 260. That motion was denied on May 17, 2017. CP at 345. Judgment was entered on May 18, 2017. CP at 346. This appeal follows.

V. ARGUMENT

The Supreme Court should accept review of this matter under RAP 13.4(b)(1) as the petition involves issues of substantial public interest. The Court has repeatedly stated that the underlying policy of the Act is to minimize suffering and economic loss for injured workers and that "all doubts as to the meaning of the Act are to be resolved in favor of the injured worker." *Clauson v. Dep't of Labor & Indus.*, 130 Wn.2d 580, 54, 925 P.2d 624 (1996). The Court of Appeals' decision goes against this policy and affects substantial public interest in the protection of injured workers.

a. Standard of Review

A party aggrieved by an order of the Board may appeal to superior court. RCW 51.52.060. The Superior Court's review of the decision and

order of the Board is de novo but based on the same evidence and testimony received by the Board. RCW 51.52.110. The appealing party has the burden to "establish a prima facie case for the relief sought." RCW 51.52.050. The superior court is empowered to reverse or modify the Board's decision "if it finds from a fair preponderance of credible evidence that the Board's findings and decision are incorrect." *McClelland v. I.T.T. Rayonier,* 65 Wn.App 386, 390, 828 P.2d 1138 (1992); *See also Ravsten v. Dep't of Labor & Indus.,* 108 Wn.2d 143, 146,736 P.2d 265 (1987) (holding that the appellant must "establish that the Board's findings are incorrect by a preponderance of the evidence.").

On appeal from the superior court, the appellate court must ascertain whether there was substantial evidence to support the findings of the trial court. *Groff v. Dep't of Labor & Indus.*, 65 Wn.2d 35, 41, 395 P.2d 633 (1964). "If, in the opinion of the reviewing court, the evidence as to a factual issue is evenly balanced, the finding of the department [now board of industrial insurance appeals] as to that issue must stand; but, if the evidence produced by the party attacking the finding preponderates in any degree, then the finding should be set aside." *McLaren v. Dep't of Labor & Industries.,* 6 Wn.2d 164, 168, 107 P.2d 230 (1940). Questions of law are reviewed de novo. *Romo v. Department of Labor & Indus*., 92 Wn. App. 348, 353, 962 P.2d 844 (1998).

Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. *Kaplan v. N.W. Mut. Life Ins. Co.*, 115 Wn. App. 791, 799, 65 P.3d 16 (2003) (citing CR 56(c)). Review of a denial of a summary judgment motion is de novo, with the Court of Appeals performing the same inquiry as the trial court. *Houk v. Best Dev. & Constr. Co.*, 179 Wn. App. 908, 911, 322 P.3d 29 (2014) (citing *Macias v. Saberhagen Holdings, Inc.*, 175 Wn.2d 402, 407-8, 282 P.3d 1069 (2012)).

Under RAP 9.12, in reviewing an order denying a motion for summary judgment, the appellate court

> will consider only evidence and issues called to the attention of the trial court. The order granting or denying the motion for summary judgment shall designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered. Documents or other evidence called to the attention of the trial court but not designated in the order shall be made a part of the record by supplemental order of the trial court or by stipulation of counsel.

Here, because the parties stipulated to a set of facts before the Board, the issue is a purely legal one: whether Mr. Ahluwalia should be entitled to attorney fees under the frivolous defense statute where the Board

found that the Department abused its discretion in determining that Mr. Ahluwalia did not have good cause for failure to cooperate.

b. The Purpose of the Industrial Insurance Act is to be Liberally Construed in Favor of Injured Workers Such as Mr. Ahluwalia.

The Industrial Insurance Act was established to protect and provide benefits for injured workers. The courts and the Board are emphatically committed to the rule that the Industrial Insurance Act is remedial in nature and the beneficial purpose should be liberally construed in favor of the beneficiaries. *Wilber v. Dep't of Labor & Indus.*, 61 Wn.2d 439, 446, 378 P.2d 684 (1963); *Hastings v. Dep't of Labor & Indus.*, 24 Wn.2d 1, 12 163 P.2d 142 (1945); *Nelson v. Dep't of Labor & Industries*, 9 Wn.2d 621, 628, 115 P.2d 1014 (1941)

RCW 51.04.010 declares "sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault." The Washington Supreme Court has repeatedly stated that "courts, therefore, are to resolve doubts as to the meaning of the IIA in favor of the injured worker." *McIndoe v Dep't of Labor & Industries,* 144 Wn.2d 252, 257, 26 P.3d 903 (2001) (citing *Kilpatrick v. Dep't of Labor & Industries*, 125 Wn.2d 222, 230, 883 P.2d 1370 (1995)); *Clauson v. Dep't of Labor & Indus.,* 130 Wn.2d 580, 584, 925 P.2d 624 (1996).

c. The Superior Court Erred in Denying Mr. Ahluwalia's Summary Judgment Motion when the Department's Defense was Frivolous and Mr. Ahluwalia was Entitled to Reasonable Attorney Fees as a Matter of Law

The Superior Court erred in denying Mr. Ahluwalia's motion for summary judgment where there were no issues of material fact and Mr. Ahluwalia was entitled to reasonable attorney fees as a matter of law. Throughout this proceeding, Mr. Ahluwalia has been attempting to protect his rights and plead for an inexpensive resolution to the Department's disputed retraining plan. As demonstrated by the facts as stipulated, Mr. Ahluwalia's attempts have been frustrated by the Department, causing huge expenses in terms of attorney time. Therefore, Mr. Ahluwalia should be awarded his reasonable attorney fees per RCW 4.84.185, which states:

> In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense. This determination shall be made upon motion by the prevailing party after a voluntary or involuntary order of dismissal, order on summary judgment, final judgment after trial, or other final order terminating the action as to the prevailing party. The judge shall consider all evidence presented at the time of the motion to determine whether the position of the nonprevailing party was frivolous and advanced without reasonable cause. In no event may such motion be filed more than thirty days after entry of the order.

A frivolous action is one that cannot be supported by any

rational argument of the law or facts. *Rhinehart v. Seattle Times*, 59 Wn. App. 332, 341, 798 P.2d 155 (1990). The trial court has discretion to award attorney fees for a frivolous lawsuit; the court's decision will not be disturbed absent a clear showing of abuse. *Timson v. Pierce County Fire Dist. No 15*, 136 Wn. App. 376, 386, 149 P.3d 427 (2006). The statute's purpose is to discourage frivolous lawsuits and compensate the targets of such lawsuits for their fees and costs incurred in defending meritless cases. *Id.*

In *Anderson v. Weyerhaeuser Co.*, the appellant, Mr. Anderson, was referred to vocational services by the respondent self-insured employer after Mr. Anderson was unable to return to work. 116 Wn. App. 149, 152, 64 P.3d 669 (2003). The Department first found Mr. Anderson eligible for vocational services, but later found him ineligible because he did not participate in plan development, keep appointments, or develop a suitable alterative plan with a vocational counselor. *Id.* The Board determined that Mr. Anderson was properly terminated from vocational services under RCW 51.32.095. *Id.* The Court of Appeals reversed, holding that Mr. Anderson's vocational services benefits could only be terminated under RCW 51.32.110. *Id.* at 158. The court reasoned that while both statutes dealt with vocational benefits, once an injured worker is found eligible for vocational services, the Department must use RCW

51.32.110 to terminate an injured worker as it grants the injured worker procedural protections. *Id.* at 157. The Department is entitled to exercise discretion under RCW 51.32.095 to grant a worker eligibility for vocational services, but once a worker is found eligible, he or she is entitled to procedural protections should the Department decide to terminate the worker from those services. *Id.* at 157-158.

The primary purpose of vocational rehabilitation services is to enable injured workers to become employable at gainful employment. RCW 51.32.095(1). Under WAC 296-19A-040, all vocational rehabilitation services must be preauthorized, and the Department may make referrals for early intervention, ability to work assessment, plan development, plan implementation, forensic services, or stand-alone job analysis. WAC 296-19A-040 further states that "each referral is a *separate authorization* for vocational rehabilitation services" (emphasis added).

WAC 296-19A-030(2)(v) provides that one of the Department's responsibilities regarding vocational rehabilitation includes notifying all parties of an eligibility determination for plan development services in writing; the Department must also advise the employer that it has 15 days to make a valid return-to-work offer. Per WAC 296-19A-440(1), a finding that an injured worker is eligible for vocational rehabilitation services may be disputed. Lastly, WAC 296-19A-450 states that a written dispute must

be received by the Department within 15 calendar days of receipt of the notification to the worker or the employer.

As stated in *Anderson v. Weyerhaeuser*, an injured worker is entitled to the protections under RCW 51.32.110 should the Department choose terminate the worker from vocational services. Here, the Department failed to include the required dispute language in its October 23, 2013 letter, which constituted a new referral and approval for plan development. Failure to include such language rendered the October 23, 2013 letter legally deficient.

The Department's October 23, 2013 determination that Mr. Ahluwalia was approved for plan development failed to properly notify all parties of their right to dispute the determination within 15 days of the receipt of the notification letter as required by law. As a result of this failure, Mr. Ahluwalia submitted letters to the Department on November 1, 2013 and November 12, 2013, seeking a newly written vocational services determination with the required dispute or protest language included. The Department indicated in their November 15, 2013 letter that the October 23, 2013 written notification was an extension of the prior referral for plan development on August 28, 2012, and that Mr. Ahluwalia was not entitled to multiple written notifications of eligibility for services. However, because each referral is a separate authorization, the

Department's failure to include the dispute language was in direct contradiction to the requirements of WAC 296-19A-040, 296-19A-030, 296-19A-440, and 296-19A-450.

The terms of the Department's October 23, 2013 letter stated nothing in regards to an extension of a prior referral. Instead, the terms of that letter stated that Mr. Ahluwalia had been approved for plan development. This letter was clearly a new referral for plan development services. Since this letter did not include the 15 day dispute language for Mr. Ahluwalia and the employer, the letter was legally deficient. Thus, the Department's position that Mr. Ahluwalia did not comply with vocational services cannot be supported by any rational argument on the law or facts, and was therefore frivolous.

Additionally, as found by the Board, instead of addressing Mr. Ahluwalia's March 1, 2013 dispute by way of a formal order containing dispute or protest notification, the Department, over the course of two years, required Mr. Ahluwalia to meet with the VCR between October 22, 2013, and November 13, 2013, to sign the vocational retraining plan on March 1, 2013, to attend vocational meetings on November 13, 2013 and December 12, 2013, to sign the vocational retraining plan by January 21, 2014 and April 23, 2014, and to meet with vocational services by July 28, 2014. When Mr. Ahluwalia declined to participate, the Department

determined that he had failed to cooperate. Here, all Mr. Ahluwalia was attempting to do was exercise his right to due process. The Department attempted to force him to comply with the disputed retraining plan, and then found him non-cooperative for refusing to participate in the disputed plan.

The Board found it manifestly unreasonable for the Department to force Mr. Ahluwalia to participate in a vocational program he reasonably believed to be obsolete or forgo the pension to which he was entitled. CP at 119. Furthermore, the Board found that the Director abused his discretion in failing to require his staff to issue a disputable or appealable order prior to forcing Mr. Ahluwalia to proceed with the disputed plan. CP at 120. In order to show an abuse of discretion, the Director's decision must have been manifestly unreasonable, exercised on untenable grounds or for untenable reasons, or a position that no reasonable person would take. *See In re Armando Flores,* BIIA Dec., 87 3913 (1998). The decision must have been arbitrary or capricious based on the information before the Director. *In re Mary Spencer,* BIIA Dec., 90 0264 (1991). An action is not arbitrary and capricious, however, when exercised honestly and upon due consideration, though it may be felt that a different conclusion might have been reached. *Id.* The Department's failure to include the dispute language in its October 23, 2013 letter rendered it legally deficient, and the

Director's abuse of discretion in failing to require his staff to issue a disputable or appealable order prior to forcing Mr. Ahluwalia to proceed with the disputed plan cannot be supported by law or facts. The Department's actions were thus frivolous. Because there is no genuine dispute as to any material fact and Mr. Ahluwalia is entitled to a judgment as a matter of law, he should be awarded his reasonable attorney fees.

d. The Frivolous Defense Statute is the Proper Remedy to Discourage this Type of Conduct by the Department

The Board has imposed fees against the Department under the frivolous defense statute in the past. *See, e.g., In re Shimangus Gaim*, BIIA Dec. 00 14616 (2002), *In re Robynhawk Freebyrd-Brown,* BIIA Dec. 02 10758 (2003) (The Department chose to rely on untenable legal theory for its motion to dismiss). In this instance, Mr. Ahluwalia was simply trying to protect his rights as an injured worker. There is no other remedy that would properly discourage the Department from engaging in such frivolous conduct. Otherwise, injured workers risk incurring significant fees defending their rights under Title 51 when the Department acts in such a manner. Awarding Mr. Ahluwalia his fees advances important policy considerations, particularly in light of the sweeping purpose of Title 51.

VI. CONCLUSION

Mr. Ahluwalia respectfully requests that the Court reverse the superior court's denial of the summary judgment motion and find, as a matter of law, that Mr. Ahluwalia is entitled to attorney fees under the frivolous defense statute.

Dated this 11th day of February, 2018.

Respectfully submitted,

VAIL, CROSS-EUTENEIER and ASSOCIATES

By: ______________________

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APPENDIX

Ahluwalia v. Dep't of Labor & Indus., No. 77018-7-I, 2018 Wn. App. LEXIS 2569 (Wn. Ct. App. Nov. 13, 2018) .... Exhibit 1

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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

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STATE OF WASHINGTON
2018 NOV 13 AM 11:23

SUKHJIT AHLUWALIA, Appellant, v. DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, Respondent.	No. 77018-7-I DIVISION ONE UNPUBLISHED OPINION FILED: November 13, 2018

LEACH, J. — RCW 4.84.185 allows a prevailing party in a civil action to collect attorney fees from a nonprevailing party as a sanction for advancing a frivolous defense. Injured worker Sukhjit Ahluwalia appeals the trial court's decision affirming a Board of Industrial Insurance Appeals (Board) order denying Ahluwalia's request for attorney fees against the Department of Labor and Industries (Department). Although the industrial appeals judge found the Department's legal theory to be unpersuasive, the trial court upheld the Board's conclusion that the Department's defense was not frivolous. We agree and affirm.[1]

EXHIBIT 1

[1] RCW 4.84.185 applies to "any civil action." Both parties assume the statute applies in this industrial insurance case. Because we conclude that the Department's defense was not frivolous, we do not reach the question of whether the statute applies.

FACTS

In December 2007, Ahluwalia injured his back while working. He filed an industrial injury claim with the Department. The Department allowed his claim and provided benefits. After undergoing multiple back surgeries, Ahluwalia's doctors permanently restricted him from his job of injury.

RCW 51.32.095 authorizes the Department to provide vocational rehabilitation services when those services are "both necessary and likely to enable the injured worker to become employable at gainful employment." On August 28, 2012, the Department approved Ahluwalia for vocational plan development. The Department told Ahluwalia the procedure for disputing the decision. Ahluwalia did not dispute it, and the Department started plan development.

A vocational counselor determined that Ahluwalia had no transferable skills and no opportunity to return to work with his employer. Ahluwalia then met with his vocational counselor to explore retraining programs. Ahluwalia identified medical secretary as his primary goal. He planned to attend a two-year training program at Renton Vocational Technical School. After Ahluwalia successfully completed a pain management program, his doctor approved a job analysis for medical secretary without restrictions.

On February 11, 2013, the Department sent Ahluwalia's legal representative a completed retraining plan. Ahluwalia asked for more time to review the plan. On March 1, 2013, Ahluwalia told the Department he was declining vocational services. He also declined to agree to the retraining plan. The Department sent Ahluwalia a

noncooperation letter. It asked him to explain his decision and warned him that if he did not participate in vocational services, the Department would suspend his benefits. Ahluwalia, through his legal representative, responded that he had good cause for rejecting the proposed retraining plan because he would be 67 years old at the time of completion and would not likely find gainful employment. Ahluwalia's response included documents showing that his current vocational rehabilitation goals were unreasonable. Ahluwalia's legal representative recommended that he be referred for pension benefits. The Vocational Dispute Resolution Office (VDRO) declined to accept Ahluwalia's letter as a dispute.

From March 20, 2013, through November 14, 2014, the Department approved a number of extensions of time for him to sign the retraining plan and attempted to involve Ahluwalia in the vocational rehabilitation process. Ahluwalia continued to decline participation. On April 22, 2013, the Department suspended Ahluwalia's benefits for failure to cooperate and notified him that the suspension would remain in effect until he cooperated or the Department closed the claim. Then, the Department issued several orders finding that Ahluwalia was not cooperative with vocational training but placed these orders in abeyance or resumed jurisdiction of Ahluwalia's appeals of these orders.

On October 23, 2013, the Department notified Ahluwalia that he had been approved for plan development and set a deadline of January 21, 2014, to finalize the plan. The Department did not tell him how to dispute this decision. The Department later extended the plan development deadline several more times, eventually extending the deadline to November 12, 2014.

Ahluwalia continued to assert that the Department was legally required to issue a new plan development decision that included instructions for disputing the decision. On November 15, 2013, the Department informed Ahluwalia he was not entitled to a new formal notification as he had already agreed to participate in plan development and was not allowed to waive vocational services. The letter stated that the October 23, 2013, notification extended the August 28, 2012, referral for plan development. Ahluwalia appealed this decision. On October 8, 2014, the Department affirmed its determination that Ahluwalia was not entitled to a new plan development decision. Ahluwalia appealed, and on March 9, 2015, the Department affirmed its October 8, 2014, decision. Ahluwalia appealed this decision to the Board.

On November 18, 2014, after Ahluwalia's vocational counselor submitted a report stating that Ahluwalia was not able to benefit from services due to noncooperation, the Department terminated Ahluwalia from vocational services due to circumstances unrelated to his workplace injury. Ahluwalia protested this decision to the VDRO. On February 12, 2015, the Department again declined to refer Ahluwalia for services, noting his failure to cooperate. Ahluwalia appealed this decision to the Board.

The Board consolidated the two appeals. The parties agreed to proceed on stipulated facts and briefing. The industrial appeals judge concluded that Ahluwalia had failed to cooperate with vocational services but that he had good cause "given the narrow circumstances presented in these appeals." The industrial appeals judge reasoned that the Department's decision forced Ahluwalia to make a "Hobb[e]sian choice" of participating in a vocational program that he believed was obsolete or, if he

lost on appeal, to lose his pension. So the judge reversed the Department's March 9, 2015, decision and remanded to the Department to provide further benefits "in accordance with the law and the facts." The judge also reversed the Department's February 12, 2015, determination, finding that the Department abused its discretion by not issuing a disputable order before forcing Ahluwalia to proceed with the disputed plan. The Department did not file a petition for review, and the Board adopted the judge's proposed decision and order.

Ahluwalia then asked for attorney fees pursuant to RCW 4.84.185 as a sanction against the Department for advancing a frivolous defense. The Board denied this request. The Board reasoned that although the industrial insurance judge found the Department's legal theory unpersuasive and that the Department abused its discretion by not issuing a disputable order, Ahluwalia had not shown that the Department's position was untenable. The Board also noted that the industrial insurance judge upheld the Board's determination that Ahluwalia had not cooperated with vocational services. After the Board denied Ahluwalia's motion for reconsideration, Ahluwalia appealed to superior court. The parties stipulated that the issue could be resolved by summary judgment without need for further proceedings.

On April 18, 2017, the superior court affirmed the Board's decision denying Ahluwalia's attorney fees request, finding that the Department's defense was not frivolous or untenable. The superior court later denied Ahluwalia's motion for reconsideration. Ahluwalia appealed.

ANALYSIS

Ahluwalia contends that the superior court should have granted his request for attorney fees. RCW 4.84.185 authorizes a court to award reasonable attorney fees against a nonprevailing party for advancing an action or defense that is frivolous and without reasonable cause. "An appeal is frivolous if there are no debatable issues on which reasonable minds can differ and is so totally devoid of merit that there was no reasonable possibility of reversal."[2] The action must be frivolous in its entirety to support a fee award to the prevailing party.[3] We review a trial court's decision to award or deny attorney fees under RCW 4.84.185 for abuse of discretion.[4] "A court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds."[5]

Ahluwalia points to the industrial insurance judge's finding that it was manifestly unreasonable for the Department to force him to choose between participating in a vocational program that he reasonably believed was obsolete or, if he lost on appeal, to lose his pension. The industrial insurance judge also found that the Department abused its discretion in failing to require its staff to issue a disputable or appealable order before compelling Ahluwalia to proceed with the disputed plan. Ahluwalia contends that the

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[2] Dave Johnson Ins., Inc. v. Wright, 167 Wn. App. 758, 787, 275 P.3d 339 (2012).

[3] Biggs v. Vail, 119 Wn.2d 129, 136, 830 P.2d 350 (1992).

[4] Hanna v. Margitan, 193 Wn. App. 596, 612, 373 P.3d 300 (2016).

[5] Protect the Peninsula's Future v. City of Port Angeles, 175 Wn. App. 201, 218, 304 P.3d 914 (2013).

Department's defense was frivolous because it cannot be supported by any rational argument on the law or facts.

The Department's theory of defense was that it acted reasonably in finding Ahluwalia noncooperative and suspending his benefits because he stopped participating in plan services after failing to dispute the plan within 15 days of the August 28, 2012, notice of plan commencement. The Department argued that Ahluwalia remained in the plan development phase throughout this procedurally complex process until the Department terminated services for failure to cooperate. The Department contended that the October 23, 2013, plan development approval letter merely continued the Department's earlier approval of Ahluwalia's eligibility for vocational services. It was not a new formal referral requiring a letter containing protest language. In addition, the Department's March 6, 2013, order closing vocational services did not mandate a new formal referral because the Department later issued a superseding order specifying that services were suspended. The Department thus contends that it was not frivolous to argue that Ahluwalia failed to show good cause for failing to cooperate because his dispute was untimely and he had no right to self-initiate a disruption to the vocational process.

Although the industrial insurance judge ruled in Ahluwalia's favor based on this case's narrow circumstances, we disagree that the Department had no basis for defending its decision to suspend benefits after Ahluwalia stopped participating in the

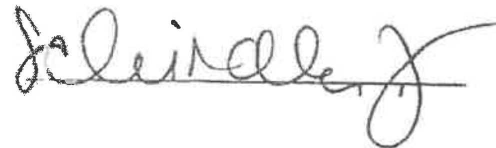
vocational plan development process.[6] The Department's theory of defense hinged primarily on its assertion that Ahluwalia remained in the plan development phase throughout the proceedings. Given the convoluted procedural posture in this case, it was not unreasonable for the Department to assert this defense while seeking clarity from the industrial appeals judge.

The Department's litigation defense is not frivolous merely because the Board rejects it.[7] Also, Washington's Industrial Insurance Act[8] does not provide for an award of attorney fees at the Board level to contest the Department's discretionary decisions. Prevailing claimants may not use RCW 4.84.185 to shift their litigation expenses to the Department.

The trial court did not abuse its discretion by denying Ahluwalia's request for attorney fees against the Department for advancing a frivolous defense.

Affirmed.

WE CONCUR:



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[6] We also note that the industrial insurance judge agreed with the Department's conclusion that Ahluwalia had not cooperated with services. Thus, the entirety of the Department's defense cannot be deemed frivolous.

[7] See Mass. Mut. Life Ins. Co. v. Dep't of Labor & Indus., 51 Wn. App. 159, 165-66, 752 P.2d 381 (1988) (affirming trial court's decision to reject prevailing party's motion for fees for a frivolous appeal).

[8] Title 51 RCW.

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

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CASE #: 77018-7-I
Sukhjit Ahluwalia, Appellant v. Department of Labor and Industries, Respondent
King County No. 16-2-24233-4 KNT

Counsel:

Enclosed please find a copy of the Order Denying Motion for Reconsideration entered in the above case.

Within 30 days after the order is filed, the opinion of the Court of Appeals will become final unless, in accordance with RAP 13.4, counsel files a petition for review in this court. The content of a petition should contain a "direct and concise statement of the reason why review should be accepted under one or more of the tests established in [RAP 13.4](b), with argument." RAP 13.4(c)(7).

In the event a petition for review is filed, opposing counsel may file with the Clerk of the Supreme Court an answer to the petition within 30 days after the petition is served.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

HW
LV
Sunday
2-10-19 (2-11-19)
2-8-19
1-30-19

khn

Enclosure

EXHIBIT 2

c: The Hon. Cheryl Carey
Reporter of Decisions

RECEIVED
JAN 11 2019
Vail-Cross & Associates

FILED
1/11/2019
Court of Appeals
Division I
State of Washington

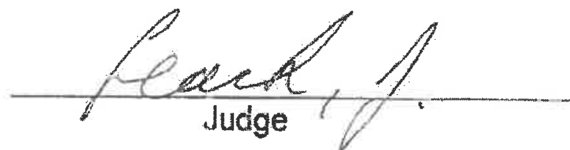
IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

SUKHJIT AHLUWALIA, Appellant, v. DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, Respondent.	No. 77018-7-I ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, Sukhjit Ahluwalia, having filed a motion for reconsideration herein, and the hearing panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

FOR THE COURT:



Judge

RCW 4.84.185

Prevailing party to receive expenses for opposing frivolous action or defense.

In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense. This determination shall be made upon motion by the prevailing party after a voluntary or involuntary order of dismissal, order on summary judgment, final judgment after trial, or other final order terminating the action as to the prevailing party. The judge shall consider all evidence presented at the time of the motion to determine whether the position of the nonprevailing party was frivolous and advanced without reasonable cause. In no event may such motion be filed more than thirty days after entry of the order.

The provisions of this section apply unless otherwise specifically provided by statute.

[1991 c 70 § 1; 1987 c 212 § 201; 1983 c 127 § 1.]

NOTES:

Administrative law, frivolous petitions for judicial review: RCW ***34.05.598****.*

EXHIBIT 3

RCW 51.32.095

Vocational rehabilitation services—Benefits—Priorities—Allowable costs—Performance criteria.

(1) One of the primary purposes of this title is to enable the injured worker to become employable at gainful employment. To this end, the department or self-insurers must utilize the services of individuals and organizations, public or private, whose experience, training, and interests in vocational rehabilitation and retraining qualify them to lend expert assistance to the supervisor of industrial insurance in such programs of vocational rehabilitation as may be reasonable to make the worker employable consistent with his or her physical and mental status. Where, after evaluation and recommendation by such individuals or organizations and prior to final evaluation of the worker's permanent disability and in the sole opinion of the supervisor or supervisor's designee, whether or not medical treatment has been concluded, vocational rehabilitation is both necessary and likely to enable the injured worker to become employable at gainful employment, the supervisor or supervisor's designee may, in his or her sole discretion, pay or, if the employer is a self-insurer, direct the self-insurer to pay the cost as provided in subsection (5) of this section or RCW **51.32.099**, as appropriate. An injured worker may not participate in vocational rehabilitation under this section or RCW **51.32.099** if such participation would result in a payment of benefits as described in RCW **51.32.240**(5), and any benefits so paid must be recovered according to the terms of that section.

(2) Vocational rehabilitation services may be provided to an injured worker when in the sole discretion of the supervisor or the supervisor's designee vocational rehabilitation is both necessary and likely to make the worker employable at gainful employment. In determining whether to provide vocational services and at what level, the following list must be used, in order of priority with the highest priority given to returning a worker to employment:

(a) Return to the previous job with the same employer;

(b) Modification of the previous job with the same employer including transitional return to work;

(c) A new job with the same employer in keeping with any limitations or restrictions;

(d) Modification of a new job with the same employer including transitional return to work;

(e) Modification of the previous job with a new employer;

(f) A new job with a new employer or self-employment based upon transferable skills;

(g) Modification of a new job with a new employer;

(h) A new job with a new employer or self-employment involving on-the-job training;

(i) Short-term retraining.

(3) Notwithstanding subsection (2) of this section, vocational services may be provided to an injured worker who has suffered the loss or complete use of both legs, or arms, or one leg and one arm, or total eyesight when, in the sole discretion of the supervisor or the supervisor's designee, these services will either substantially improve the worker's quality of life or substantially improve the worker's ability to function in an employment setting, regardless of whether or not these services are either necessary or reasonably likely to make the worker employable at any gainful employment. Vocational services must be completed prior to the commencement of the worker's entitlement to benefits under RCW **51.32.060**. However, workers who are eligible for vocational services under this subsection are not eligible for option 2 benefits, as provided in RCW **51.32.099**(4) and **51.32.096**.

(4) To encourage the employment of individuals who have suffered an injury or occupational disease resulting in permanent disability which may be a substantial obstacle to employment, the supervisor or supervisor's designee, in his or her sole discretion, may provide assistance including job placement services for eligible injured workers who are receiving vocational services under the return-to-work priorities listed in subsection (2)(b) through (i) of this section, except for self-employment, and to employers that employ them. The assistance listed in (a) through (f) of this subsection is only available in cases where the worker is employed:

(a) Reduction or elimination of premiums or assessments owed by employers for such workers;

EXHIBIT 4

(b) Reduction or elimination of charges against the employers in the event of further injury to such workers in their employ;

(c) Reimbursement of the injured worker's wages for light duty or transitional work consistent with the limitations in RCW **51.32.090**(4)(c);

(d) Reimbursement for the costs of clothing that is necessary to allow the worker to perform the offered work consistent with the limitations in RCW **51.32.090**(4)(e);

(e) Reimbursement for the costs of tools or equipment to allow the worker to perform the work consistent with the limitations in RCW **51.32.090**(4)(f);

(f) A one-time payment equal to the lesser of ten percent of the worker's wages including commissions and bonuses paid or ten thousand dollars for continuous employment without reduction in base wages for at least twelve months. The twelve months begin the first date of employment and the one-time payment is available at the sole discretion of the supervisor of industrial insurance;

(g) The benefits described in this section are available to a state fund employer without regard to whether the worker was employed by the state fund employer at the time of injury. The benefits are available to a self-insured employer only in cases where the worker was employed by a state fund employer at the time of injury or occupational disease manifestation;

(h) The benefits described in (a) through (f) of this subsection (4) are only available in instances where a vocational rehabilitation professional and the injured worker's health care provider have confirmed that the worker has returned to work that is consistent with the worker's limitations and physical restrictions.

(5)(a) Except as provided in (b) of this subsection, costs for vocational rehabilitation benefits allowed by the supervisor or supervisor's designee under subsection (1) of this section may include the cost of books, tuition, fees, supplies, equipment, transportation, child or dependent care, and other necessary expenses for any such worker in an amount not to exceed three thousand dollars in any fifty-two week period, and the cost of continuing the temporary total disability compensation under RCW **51.32.090** while the worker is actively and successfully undergoing a formal program of vocational rehabilitation.

(b) Beginning with vocational rehabilitation plans approved on or after July 1, 1999, through December 31, 2007, costs for vocational rehabilitation benefits allowed by the supervisor or supervisor's designee under subsection (1) of this section may include the cost of books, tuition, fees, supplies, equipment, child or dependent care, and other necessary expenses for any such worker in an amount not to exceed four thousand dollars in any fifty-two week period, and the cost of transportation and continuing the temporary total disability compensation under RCW **51.32.090** while the worker is actively and successfully undergoing a formal program of vocational rehabilitation.

(c) The expenses allowed under (a) or (b) of this subsection may include training fees for on-the-job training and the cost of furnishing tools and other equipment necessary for self-employment or reemployment. However, compensation or payment of retraining with job placement expenses under (a) or (b) of this subsection may not be authorized for a period of more than fifty-two weeks, except that such period may, in the sole discretion of the supervisor after his or her review, be extended for an additional fifty-two weeks or portion thereof by written order of the supervisor.

(d) In cases where the worker is required to reside away from his or her customary residence, the reasonable cost of board and lodging must also be paid.

(e) Costs paid under this subsection must be chargeable to the employer's cost experience or must be paid by the self-insurer as the case may be.

(6) In addition to the vocational rehabilitation expenditures provided for under subsection (5) of this section and RCW **51.32.099**, an additional five thousand dollars may, upon authorization of the supervisor or the supervisor's designee, be expended for: (a) Accommodations for an injured worker that are medically necessary for the worker to participate in an approved retraining plan; and (b) accommodations necessary to perform the essential functions of an occupation in which an injured worker is seeking employment, consistent with the retraining plan or the recommendations of a vocational evaluation. The injured worker's attending physician or licensed advanced registered nurse

practitioner must verify the necessity of the modifications or accommodations. The total expenditures authorized in this subsection and the expenditures authorized under RCW **51.32.250** may not exceed five thousand dollars.

(7)(a) When the department has approved a vocational plan for a worker prior to January 1, 2008, regardless of whether the worker has begun participating in the approved plan, costs for vocational rehabilitation benefits allowed by the supervisor or supervisor's designee under subsection (1) of this section are limited to those provided under subsections (5) and (6) of this section.

(b) For vocational plans approved for a worker between January 1, 2008, through July 31, 2015, total vocational costs allowed by the supervisor or supervisor's designee under subsection (1) of this section is limited to those provided under the pilot program established in RCW **51.32.099**, and vocational rehabilitation services must conform to the requirements in RCW **51.32.099**.

(8) The department must establish criteria to monitor the quality and effectiveness of rehabilitation services provided by the individuals and organizations. The state fund must make referrals for vocational rehabilitation services based on these performance criteria.

(9) The department must engage in, where feasible and cost-effective, a cooperative program with the state employment security department to provide job placement services under this section including participation by the department as a partner with WorkSource and with the private vocational rehabilitation community to refer workers to these vocational professionals for job search and job placement assistance. As a partner, the department must place vocational professional full-time employees at selected WorkSource locations who will work with employers to market the benefits of on-the-job training programs and preferred worker financial incentives as described in RCW **51.32.095**(4). For the purposes of this subsection, "WorkSource" means the established state system that administers the federal workforce investment act of 1998.

(10) The benefits in this section, RCW **51.32.099**, and **51.32.096** must be provided for the injured workers of self-insured employers. Self-insurers must report both benefits provided and benefits denied in the manner prescribed by the department by rule adopted under chapter **34.05** RCW. The director may, in his or her sole discretion and upon his or her own initiative or at any time that a dispute arises under this section, RCW **51.32.099**, or **51.32.096**, promptly make such inquiries as circumstances require and take such other action as he or she considers will properly determine the matter and protect the rights of the parties.

(11) Except as otherwise provided, the benefits provided for in this section, RCW **51.32.099**, and **51.32.096** are available to any otherwise eligible worker regardless of the date of industrial injury. However, claims may not be reopened solely for vocational rehabilitation purposes.

[**2018 c 22 § 13.** Prior: **2015 c 137 § 2; 2013 c 331 § 1; 2011 c 291 § 1;** (2007 c 72 § 1 expired June 30, 2016); **2004 c 65 § 10; 1999 c 110 § 1;** prior: **1996 c 151 § 1; 1996 c 59 § 1; 1988 c 161 § 9; 1985 c 339 § 2; 1983 c 70 § 2; 1982 c 63 § 11; 1980 c 14 § 10;** prior: **1977 ex.s. c 350 § 48; 1977 ex.s. c 323 § 16; 1972 ex.s. c 43 § 23; 1971 ex.s. c 289 § 12.**]

NOTES:

Explanatory statement—2018 c 22: See note following RCW **1.20.051**.

Application—2015 c 137 §§ 1, 2, and 6: See note following RCW **51.16.120**.

Rules—2015 c 137: See note following RCW **51.32.096**.

Effective date—2013 c 331: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [May 21, 2013]." [**2013 c 331 § 8.**]

Implementation—Effective date—Expiration date—2007 c 72: See notes following RCW **51.32.099**.

Report to legislature—Effective date—Severability—2004 c 65: See notes following RCW **51.04.030**.

Effective date—1999 c 110 § 1: "Section 1 of this act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect July 1, 1999." [**1999 c 110 § 3.**]

Legislative finding—1985 c 339: "The legislature finds that the vocational rehabilitation program created by chapter 63, Laws of 1982, has failed to assist injured workers to return to suitable gainful employment without undue loss of time from work and has increased costs of industrial insurance for employers and employees alike. The legislature further finds that the administrative structure established within the industrial insurance division of the department of labor and industries to develop and oversee the provision of vocational rehabilitation services has not provided efficient delivery of vocational rehabilitation services. The legislature finds that restructuring the state's vocational rehabilitation program under the department of labor and industries is necessary." [**1985 c 339 § 1.**]

Severability—1985 c 339: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [**1985 c 339 § 6.**]

Severability—1983 c 70: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [**1983 c 70 § 5.**]

Effective dates—Implementation—1982 c 63: "Section 4 of this act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect immediately [March 26, 1982]. All other sections of this act shall take effect on January 1, 1983. The director of the department of labor and industries is authorized to immediately take such steps as are necessary to insure that this act is implemented on its effective dates." [**1982 c 63 § 26.**]

Severability—Effective date—1977 ex.s. c 323: See notes following RCW **51.04.040**.

WAC 296-19A-040

What vocational rehabilitation services require authorization?

All vocational rehabilitation services must be preauthorized. For state fund claims, the department may make one or more of the following type of referrals: Early intervention; ability to work assessment ("AWA" or "assessment"); plan development; plan implementation; forensic services; or stand alone job analysis. Each referral is a separate authorization for vocational rehabilitation services. Option 2 vocational services are considered authorized for state fund and self-insured claims once the department accepts the worker's election of Option 2. However, the services can only be provided upon request from the worker to the vocational provider.

[Statutory Authority: RCW **51.04.020**, **51.04.030** and 2015 c 137. WSR 17-19-089, § 296-19A-040, filed 9/19/17, effective 10/20/17. Statutory Authority: RCW **51.04.020**, **51.04.030**, **51.32.095**, **51.32.099** and **51.32.0991** (2007 c 72). WSR 08-06-058, § 296-19A-040, filed 2/29/08, effective 3/31/08. Statutory Authority: RCW **51.04.020**, **51.04.030**, **51.32.095**, **51.36.100**, **51.36.110**. WSR 03-11-009, § 296-19A-040, filed 5/12/03, effective 2/1/04; WSR 00-18-078, § 296-19A-040, filed 9/1/00, effective 6/1/01.]

EXHIBIT 5

WAC 296-19A-030

What are the responsibilities of the parties?

The attending health care provider, department, self-insured employer, employer, worker and vocational rehabilitation provider have the following responsibilities in assisting the worker to become employable at gainful employment:

(1) **Attending health care provider.** The attending health care provider must:

(a) Maintain open communication with the worker's assigned vocational rehabilitation provider and the referral source.

(b) Respond to any request for information which is necessary to evaluate a worker's:

(i) Ability to work;

(ii) Need for vocational services; and

(iii) Ability to participate in a vocational retraining plan.

(c) Do all that is possible to expedite the vocational rehabilitation process, including making an estimate of the physical or mental capacities that affect the worker's employability. If unable to provide an estimate, refer the worker for the appropriate consultation or evaluation.

(2) **Department.**

(a) **State fund claims.** For state fund claims, the department must:

(i) Obtain medical information required to initiate vocational rehabilitation services before a referral is made to a vocational rehabilitation provider.

(ii) Notify the chargeable employer(s), if any, at the time any referrals are made to a vocational rehabilitation provider.

(iii) Provide the vocational rehabilitation provider with access to all reports and any other relevant documentation generated during prior vocational rehabilitation services including plans that have been provided on any claim.

(iv) Review the assessment report and determine whether the worker is eligible for vocational rehabilitation plan development services.

(v) Notify all parties of the eligibility determination in writing. When the worker is eligible for plan development services, the notification letter must advise that the chargeable employer(s), if any, has fifteen calendar days from the date of the letter to make a valid return to work offer. However, should the employer attempt to make a valid return-to-work offer within the fifteen calendar days, the department may grant up to ten additional calendar days to modify the offer if it does not meet all of the requirements for approval.

(vi) Assign plan development services to the vocational rehabilitation provider that completed the assessment report unless the department decides the provider cannot complete the required report.

(vii) Review the submitted vocational rehabilitation plan within fifteen days of receipt at the department, and determine whether to approve or deny the plan.

(viii) Notify all parties of plan approval or denial in writing. Should the department fail to send a notification letter within fifteen calendar days of the date the report is received by the department, the plan is considered approved.

When a plan is approved, the notification must advise the worker that he or she can elect Option 2 at any point within the following time period:

- Beginning with the date of plan approval or the department's determination that a disputed plan is valid; and
- Ending the fifteenth day after completion of the first academic quarter or three months' training.

However, the department may approve an election submitted in writing within twenty-five days of the completion of the first academic quarter or three months' training if the worker provides a written explanation of why he or she was unable to submit the election of Option 2 benefits within fifteen days.

(b) **Self-insured claims.** For self-insured claims, the department must:

EXHIBIT 6

(i) Review the assessment report and determine whether the worker is eligible for vocational rehabilitation plan development services.

(ii) Notify all parties of the eligibility determination in writing.

When the worker is eligible for plan development services, the notification letter must advise the employer it has fifteen calendar days from the date of the letter to make a valid return to work offer; and

(iii) Review the submitted vocational rehabilitation plan within fifteen days of receipt at the department, and determine whether to approve or deny the plan.

(iv) Notify all parties of plan approval or denial in writing. Should the department fail to send a notification letter within fifteen calendar days of the date the report is received by the department, the plan is considered approved.

When a plan is approved, the notification letter must advise the worker that he or she can elect Option 2 at any point within the following time period:

• Beginning with the date of plan approval or the department's determination that a disputed plan is valid; and

• Ending the fifteenth day after completion of the first academic quarter or three months' training.

However, the department may approve an election submitted in writing within twenty-five days of the completion of the first academic quarter or three months' training if the worker provides a written explanation of why he or she was unable to submit the election of Option 2 benefits within fifteen days.

(3) **Employer.** The employer must:

(a) Assist the vocational rehabilitation provider in any way necessary to collect data regarding the worker's gainful employment at the time of the injury.

(b) Assist the vocational rehabilitation provider and attending health care provider to determine whether a job could be made available for employment of the worker.

(4) **Worker.** The worker must fully participate and cooperate in all aspects of their vocational services including determination of physical capacities, development of vocational goals, and implementation of the rehabilitation process. Examples include but are not limited to:

• Providing accurate and complete information regarding his or her work history and educational background.

• Attending all scheduled appointments.

• Cooperating with return to work efforts when it is determined return to work opportunities exist.

• Actively participating and cooperating in selecting a job goal when it is determined retraining is necessary.

(5) **Vocational rehabilitation provider.** In assisting the worker to become employable at gainful employment, the vocational rehabilitation provider must:

(a) Follow the priorities in RCW **51.32.095** and the requirements in this chapter. The highest priority is returning a worker to employment.

(b) For state fund claims, immediately inform the department orally if the worker:

(i) Returns to work;

(ii) Is released for work without restrictions;

(iii) Returns to work and is unsuccessful; or

(iv) Fails to cooperate.

Note: Written notification and documentation must follow oral notification within two working days.

(c) Identify all vocational rehabilitation counselors and interns who provided services in each reporting period.

(d) Provide copies of reports and attachments submitted to the referral source to the employer (if different than the referral source) and the worker or the worker's representative when requested.

(e) Prior to a determination of eligibility, work with the employer, if necessary, to develop job analyses for work the employer is offering or has available and provide other assistance necessary to facilitate return to work with the employer.

(f) When providing plan development services, the vocational rehabilitation provider should, whenever possible and appropriate, focus on identifying goals and occupations that are considered high

demand in the workforce. High demand occupations, as determined by the employment security department, means the number of job openings in the labor market for the occupation or with the required skill set exceeds the supply of qualified workers.

(g) Should the employer choose to make a valid return to work offer within fifteen calendar days of the date of the notification letter approving plan development services, the vocational rehabilitation provider may provide assistance necessary to facilitate return to work with the employer. The department may approve up to an additional ten days for an employer to modify a job offer if it does not meet all of the requirements. When this occurs, the vocational rehabilitation provider may assist the employer in making the necessary modifications.

[Statutory Authority: RCW **51.04.020**, **51.04.030**, and 2015 c 137. WSR 16-03-060, § 296-19A-030, filed 1/19/16, effective 2/19/16. Statutory Authority: Chapter **51.32** RCW. WSR 11-23-070, § 296-19A-030, filed 11/15/11, effective 12/16/11. Statutory Authority: RCW **51.04.020**, **51.04.030**, **51.32.095**, **51.32.099** and **51.32.0991** (2007 c 72). WSR 08-06-058, § 296-19A-030, filed 2/29/08, effective 3/31/08. Statutory Authority: RCW **51.04.020**, **51.04.030**, **51.32.095**, **51.36.100**, **51.36.110**. WSR 03-11-009, § 296-19A-030, filed 5/12/03, effective 2/1/04; WSR 00-18-078, § 296-19A-030, filed 9/1/00, effective 6/1/01.]

WAC 296-19A-440

What elements of a vocational determination may be disputed?

(1) A finding that an industrially injured or ill worker is eligible for vocational rehabilitation services, or a finding that he or she is ineligible for vocational rehabilitation services, may be disputed.

(2) An approved vocational rehabilitation plan may also be disputed.

(3) An approved plan modification may also be disputed.

(4) A previously approved vocational rehabilitation plan may not be disputed through a plan modification dispute process.

[Statutory Authority: RCW **51.04.020**, **51.04.030**, **51.32.095**, **51.36.100**, **51.36.110**. WSR 03-11-009, § 296-19A-440, filed 5/12/03, effective 2/1/04; WSR 00-18-078, § 296-19A-440, filed 9/1/00, effective 6/1/01.]

EXHIBIT 7

WAC 296-19A-450

What are the time frames for filing a dispute of a vocational determination with the department?

The department must receive the written dispute within fifteen calendar days of receipt of notification to the worker or employer. The dispute must explain the reason(s) for the disagreement with the determination. The department may accept the dispute if it is not received within the fifteen-day period if there is a demonstrated good cause for the delay.

[Statutory Authority: RCW **51.04.020**, **51.04.030**, **51.32.095**, **51.36.100**, **51.36.110**. WSR 00-18-078, § 296-19A-450, filed 9/1/00, effective 6/1/01.]

EXHIBIT 8

CERTIFICATE OF MAILING

SIGNED at Tacoma, Washington.

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, hereby certifies that on the 11th day of February, 2019, the document to which this certificate is attached, Petition For Review, was placed in the U.S. Mail, postage prepaid, and addressed to Respondent's counsel as follows:

Pat L. DeMarco
Assistant Attorney General
PO Box 2317
Tacoma, WA 98401

James P. Mills
Assistant Attorney General
PO Box 2317
Tacoma, WA 98401

DATED this 11th day of February, 2019.

LYNN M. VENEGAS, Secretary

VAIL CROSS AND ASSOCIATES

February 11, 2019 - 9:26 AM

Transmittal Information

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Appellate Court Case Title:	Sukhjit Ahluwalia, Appellant v. Department of Labor and Industries, Respondent
Superior Court Case Number:	16-2-24232-4

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