

NO. 45928-1-II

COURT OF APPEALS,  
DIVISION II  
OF THE STATE OF WASHINGTON

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BRUCE BUTSON, *APPELLANT/PLAINTIFF*

v.

DEPARTMENT OF LABOR AND INDUSTRIES  
OF THE STATE OF WASHINGTON, *RESPONDENT/DEFENDANT*.

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REPLY BRIEF OF APPELLANT

COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY   
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BUSICK HAMRICK PALMER PLLC  
STEVEN L. BUSICK  
Attorneys for Appellant/Plaintiff

By Steven L. Busick, WSBA #1643  
Busick Hamrick, PLLC  
PO Box 1385  
Vancouver, WA 98666  
360-696-0228

**TABLE OF CONTENTS**

Table of Contents ..... i

Table of Authorities ..... ii

I. Statement of the Case ..... 1

II. Argument..... 3

III. Conclusion..... 7

**TABLE OF AUTHORITIES**

**CASES**

*S. Kitsap Sch. Dist. v. Zimmerman*, 181 Wn. App. 357, 324 P.3d 813 (2014) ..... 5

**TABLE OF STATUTES**

RCW 51.32.099..... 3, 4, 5, 6  
RCW 51.32.110..... 3, 4, 5  
RCW 51.52.160..... 4

**OTHER AUTHORITIES**

In re Dennis Staudinger, BIIA Dec., 12 15477 (2013)..... 4

### **Statement of the Case**

At the bottom of page 5, the Brief of Respondent states that no doctor excused Mr. Butson from attending class. As stated in the Brief of Appellant, Mr. Butson was spending five to six hours a day typing on his computer carrying eighteen hours a week winter quarter in 2010 at Clark College, but the typing was getting too much for his thumb and wrist. Spring quarter 2010, Mr. Butson signed up for eighteen hours a week as well, but he could not keep up with classes and continue with his thumb and wrist the way they were. Mr. Butson talked to his teachers and they suggested he withdraw from his classes to avoid receiving failing grades, which would limit his ability to re-enroll at Clark College. When he was able to get in to see Dr. Rabie in May 2010, Dr. Rabie limited Mr. Butson to two hours a day typing. That may not have been a formal excuse, but there was no way that he could have continued with classes at Clark College with his thumb and wrist.

Dr. Won testified that Mr. Butson could continue with his vocational plan, but that was not until December of 2010 when the Department initially closed his claim, not as of spring quarter 2010. Dr. Won testified from page 20, line 2, through page 21, line 2, as follows:

Q. And did you restrict Mr. Butson as of December 2, 2010, as far as activities are concerned?

A. Yes.

Q. What were those?

A. Continue the restrictions that Dr. Fleiss said but just do the vocational training for 12 credits per quarter.

Q. And did you indicate that he needed to restart his vocational retraining?

A. Yes.

Q. And did you indicate that he was – you were still recommending he obtain the paraffin baths?

A. Yes.

Q. And did you note at that time any ability as far as his being able to return to work or other activities?

A. I said, Need to restart the vocational training.

Q. Did you indicate any reference to compensation on that date of December 2, 2010?

A. I said that patient needs to get retroactive compensation from June 3, '10 to present. He said he's not getting any compensation.

As of January 25, 2011, when the Department affirmed the closure of his claim, Dr. Won was recommending that Mr. Butson be allowed to recommence his vocational rehabilitation program at Clark College with reduced credit hours, twelve hours instead of eighteen, and he would be employable if he completed the plan.

## **Argument**

There is an error in the Brief of Appellant at the top of page 15. The first line repeats the last line on page 14, for which I apologize.

Rather than consider whether there was a vocational plan interruption pursuant to RCW 51.32.099(5), the Department on June 4, 2010, suspended vocational benefits for failure to cooperate with vocational services. (See appendix A-1 to Brief of Appellant). As indicated by the Notice of Decision being addressed to Mr. Butson, he did not have an attorney at that time. RCW 51.32.099(5)(a) defines vocational plan interruption as an occurrence which disrupts the plan to the extent that the employability goal is no longer attainable.

Pursuant to RCW 51.32.099(5)(b), when a vocational plan interruption is beyond the control of the worker, the department shall recommence plan development. Vocational plan interruption is considered outside the control of the worker when documented changes in the worker's accepted medical condition prevent further participation in the vocational plan. Since the vocational plan interruption was due to documented changes in Mr. Butson's accepted medical condition preventing Mr. Butson from further participation in the vocational plan, whether there was good cause for failure to participate pursuant to RCW 51.32.110(2), should not have been

considered. The Department should have first considered whether documented changes in Mr. Butson's accepted medical condition prevented him from participating in his vocational plan.

The notice of June 4, 2010, suspended vocational services, but not time loss benefits, and Mr. Butson was not foreclosed from seeking time loss benefits from June 4, 2010, through January 25, 2011. On June 1, 2010, Michelle Stuedli, the vocational counselor assigned by the Department, reviewed a copy of the chart note from Dr. Rabie, Mr. Butson's physician, dated May 27, 2010, stating that Mr. Butson was restricted from typing to two hours a day. The Department was on notice that Mr. Butson was unable to participate in vocational plan, or at least should have made further inquiry before issuing the order of June 4, 2010.

Pursuant to RCW 51.52.160, the Board of Industrial Insurance Appeals has recently designated *In re Dennis Staudinger*, BIIA Dec., 12 15477 (2013) a significant decision. This is the first case in which the Board has had an opportunity to address the interplay between RCW 51.32.110 and RCW 51.32.099. There, the Board held that RCW 51.32.110 lists grounds for suspension of benefits arising from issue with the vocational process, but RCW 51.32.099 provides more specific statements as to those grounds. So, in a vocational suspension situation, the Board should first analyze the facts

under RCW 51.32.099. If cause for suspension is shown pursuant to RCW 51.32.099, only then should the Department move to the good cause defense provisions of RCW 51.32.110. According to RCW 51.32.099(5)(b), documented changes in the worker's accepted medical condition prevent further participation in the vocational plan. That circumstance by definition results in the vocational plan interruption for reasons beyond the control of the worker, and good cause pursuant to RCW 51.32.110(2) should not then be considered by the Board.

An appellate court reviews the Board's interpretation of a statute *de novo* under the error of law standard, which allows an appellate court to substitute its own interpretation of statutes and regulations within its area of expertise. In this context, the appellate court gives substantial weight to the Board's interpretations within its area of expertise, and will uphold the Board's interpretation if it reflects a plausible construction of the language of the statute, and is not contrary to legislative intent. *S. Kitsap Sch. Dist. v. Zimmerman*, 181 Wn. App. 357, 324 P.3d 813 (2014). Mr. Butson maintains that the meaning of RCW 51.32.099 is plain on its face, and the Court of Appeals should follow the Board's interpretation of RCW 51.32.099(5)(b) and 51.32.110(2). *S. Kitsap Sch. Dist. v. Zimmerman*, 181 at page 363.

Whether or not there have been documented changes in the worker's accepted medical condition is a question of fact which needs to be decided by the trier of fact. The issue was first presented to the Board in claimant's Post Hearing Brief filed with the Board by mail on July 2, 2012, before the Proposed Decision and Order was issued by the industrial appeals judge on October 12, 2012. (CABR, pages 83-86, and pages 28-45). That issue was again presented to the Board in Claimant's Reply to the Department's Post Hearing Brief filed by mail on August 8, 2012 (CABR, pages 94-96). Bruce Butson filed the appeal to the Board with the Department on February 17, 2011, which was not transmitted to the Board until August 16, 2011, and counsel did not appear for Mr. Butson until March 5, 2012 (CABR, Pages 47, 51 and 65).

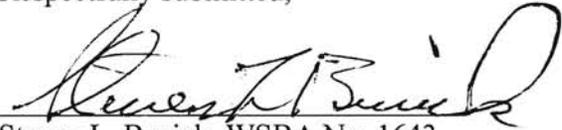
An issue of fact remains as of January 25, 2011, the date the Department last acted upon Mr. Butson's claim, as to whether there is a documented change in his accepted medical condition that prevented participation in the vocational plan between June 4, 2010, and January 25, 2011. If so, pursuant to RCW 51.32.099(5)(b), the vocational plan by law should have been recommenced as of January 25, 2012.

### Conclusion

The trial court erred in dismissing Bruce Butson's appeal from the decision of the Board of Industrial Insurance Appeals following the reading of the record to the jury of his witnesses without considering the Department's witnesses, and there are issues of fact remaining as to whether there are documented changes in Mr. Butson's accepted medical condition that prevented him from participation in his vocational plan, and whether he could return to work between June 4, 2010, and January 25, 2014 on a reasonably continuous basis.

Dated October 6, 2014

Respectfully submitted,



Steven L. Busick, WSBA No. 1643  
Attorney for Nathan M. Cooper,  
Appellant/Plaintiff

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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

Bruce E. Butson, )  
Appellant, )  
v. )  
Department of Labor and Industries, )  
Respondent. )

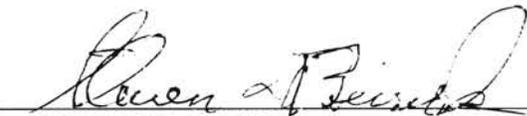
Court of Appeals Case No. 45928-1-II  
Clark County Case No. 13-2-00113-0  
PROOF OF SERVICE

The undersigned states that on Monday, the 6<sup>th</sup> day of October, 2014, I deposited in the United States Mail, with proper postage prepaid, Reply Brief of Appellant, dated October 6, 2014, addressed as follows:

Kaylynn What, Assistant Attorney General  
Attorney General of Washington  
800 Fifth Avenue, Suite 2000  
Seattle, WA 98104-3188

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct:

October 6, 2014, Vancouver, WA

  
STEVEN L. BUSICK