Ackley, Bill

PERMANENT TOTAL DISABILITY (RCW 51.08.160)

Option 2 benefits under RCW 51.32.099

VOCATIONAL REHABILITATION

Option 2 benefits under RCW 51.32.099

Selection of Option 2 vocational benefits under RCW 51.32.099 does not preclude a worker from appealing the closing order and proving entitlement to permanent total disability benefits. Selection of Option 2 vocational benefits does not constitute a compromise and release of other benefits. ***….In re Bill Ackley,* BIIA Dec., 09 11392 (2010)** [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under Kitsap County Cause No. 11-2-00103-4. RCW 51.32.099 was amended effective July 22, 2011. The *Ackley* decision is based on the version of RCW 51.32.099 prior to the 2011 amendment. Also see *In re Roxanne L. England*, Dckt. No. 11 23387 (March 5, 2013).]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: BILL D. ACKLEY	)	**DOCKET NO. 09 11392**
	)	
CLAIM NO. W-515857	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Bill D. Ackley, by
Casey & Casey, P.S., per
Gerald L. Casey and Carol L. Casey

Self-Insured Employer, Kitsap County, by
Kitsap County Prosecuting Attorney, per
Deborah A. Boe, Deputy, and by
Slagle Morgan, LLP, per
Richard M. Slagle

Department of Labor & Industries, by
The Office of the Attorney General, per
Steve Vinyard, Assistant

The claimant, Bill D. Ackley, filed an appeal with the Board of Industrial Insurance Appeals on February 5, 2009, from an order of the Department of Labor and Industries dated January 14, 2009. In this order, the Department affirmed the provisions of an order dated August 5, 2008. In the August 5, 2008 order, the Department closed the claim with time-loss compensation benefits as paid through June 17, 2008, and directed the self-insured employer to pay the claimant a permanent partial disability award for Category 4 permanent dorso-lumbar and/or lumbosacral impairments. The Department order is **REVERSED AND REMANDED**.

DECISION

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The self-insured employer, the Department, and the claimant all filed timely Petitions for Review of a Proposed Decision and Order issued on May 3, 2010, in which the industrial appeals judge reversed and remanded the order of the Department dated January 14, 2009. Contested issues in this appeal included finality of the Option 2 order; temporary total disability; permanent total disability; permanent partial disability; and vocational services. In this order, we address only the issues of temporary total disability, permanent total disability, and vocational services. We have reviewed the remaining contested issues and agree with the determination of the industrial appeals judge.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed. The industrial appeals judge wrote in his Proposed Decision and Order that Exhibit 51 was admitted, but the exhibit itself indicated the document had been rejected. We deny any motion to admit Exhibit 51. The exhibit is rejected and is not part of the record we considered in this matter.

Bill D. Ackley was employed as a laborer with the Kitsap County Road Department on September 28, 2004. On that day, he was driving a small pick-up truck and placing cones behind a striping truck. As he turned left, following the striping truck, his truck was struck by an oncoming car on the right rear fender. He hurt his back and was transported to the hospital. Mr. Ackley received conservative care in the form of medication, physical therapy, and epidural injections.

Michael McManus, M.D., treated Mr. Ackley from March 23, 2005, through February 26, 2009. The doctor diagnosed a herniation at L5-S1 with left lower extremity neurological defects following a recognized dermatome. The doctor testified that electrodiagnostic studies performed on November 1, 2005, confirmed chronic mild left side radiculopathy. An MRI dated March 11, 2009, showed the size of the disc protrusion at L5-S1 had decreased from an earlier MRI, perhaps due to disc desiccation. Dr. McManus testified the decrease in the disc bulge would not necessarily result in a corresponding improvement in clinical findings or Mr. Ackley's symptoms.

Dr. McManus identified the following physical findings: (1) antalgic gait favoring the left hip; (2) inability to walk on the left heel and a drift to the left when walking on toes; (3) inability to maintain independent left side heel or toe raises; (4) squatting limited to 60 percent; (5) decreased low back range of motion; (6) absent ankle and knee jerk reflexes; (7) decreased sensation along the S1 dermatome; (8) decreased left large toe extension accompanied by pain; (9) decreased left ankle plantar flexion strength; and (10) low back pain with supine straight-leg raise at 60 degrees.

Dr. McManus diagnosed L5-S1 posterior lateral desiccation on the left with protrusion and left side L5-S1 radiculopathy, all related to the industrial injury. He imposed the following work restrictions; (1) sitting and standing no more than 20 minutes at a time and sitting no more than 4 hours a day, standing no more than 5 hours per day; (2) driving for no more than 20 minutes at a time, no more than 2 hours per day; (3) only occasional bending, squatting, kneeling, and reaching below the waist; (4) pushing and pulling up to 20 pounds frequently, 30 pounds occasionally, and 40 pounds seldom; (5) lifting and carrying up to 10 pounds frequently, 20 pounds occasionally, and 40 pounds seldom; (6) no ladder climbing; and (7) a break to stretch every 20 minutes. The restrictions are due to loss of strength and sensation in Mr. Ackley's left leg.

Guy Earle, M.D., examined Mr. Ackley on June 22, 2009. Upon examination, Dr. Earle noted that Mr. Ackley had to change position frequently and limped when he walked. Other physical findings were: (1) his left forefoot dropped when he walked on his heels, and his left heel dropped when he walk on his toes; (2) he had a loss of lumbar lordosis; (3) his lumbar range of motion was reduced in all planes; (4) the muscles in his hips and hamstrings were tight; (5) he had significant weakness in his left great toe; and (6) he had diminished sensation to touch along the lateral aspect of the left foot. An MRI showed a tear in the disc at L5-S1, although an MRI dated March 11, 2009, showed less protrusion of the material and a November 11, 2009 MRI indicated the herniated disc had resolved. Dr. Earle diagnosed a low back strain with disc herniation, nerve damage, and radiculopathy on the left. He also felt Mr. Ackley was suffering from mechanical back pain. All of the conditions were related to the September 28, 2004 industrial injury. Dr. Earle agreed with the limitations imposed by Dr. McManus.

The only other medical professionals to testify were Russell Vandenbelt, M.D., a psychiatrist, and Aleksandra Zietak, M.D. The parties presented no evidence Mr. Ackley's ability to work is affected by any mental health issue. There is no need to summarize Dr. Vandenbelt's testimony. Dr. Zietak examined Mr. Ackley on December 2, 2009. Dr. Zietak testified that the only findings were pain and tenderness, and that Mr. Ackley demonstrated pain behavior with en bloc rotation. Dr. Zietak observed Mr. Ackley walking normally at the beginning of the examination, but when he left the examination, he walked with an incomplete toe pickup in his left foot and an exaggerated left-sided limp. Dr. Zietak diagnosed only a lumbar strain related to the industrial injury, which she felt had resolved. She found no need for further treatment, no permanent partial disability, and no reason to impose any restrictions on Mr. Ackley's work activities.

We find the testimony of the attending physician, and Dr. Earle, to be more persuasive than that of Dr. Zietak. In so doing, we accept the limitations imposed by Dr. McManus and apply those limitations in determining the benefits to be awarded to Mr. Ackley.

Mr. Ackley's case was referred to Judith Parker, VRC, for vocational services in 2005. The educational and vocational history compiled by Ms. Parker demonstrated: Mr. Ackley graduated from high school in the late 1960s and attended college for a period of time; he served in the Air Force for 6 years; and following his discharge from the Air Force, he worked primarily operating heavy equipment including running his own backhoe business for 5-6 years. In determining what physical capabilities Mr. Ackley had for work, Ms. Parker relied on the sitting and lifting restrictions imposed by Dr. McManus. Also, because Mr. Ackley had not been released to return to work as a

laborer, she began looking for alternative jobs. Ms. Parker looked at several job possibilities including building inspector; security guard; counter/rental clerk; customer service representative; travel agent; teacher's aide; title researcher; and photo assistant. Based on the information available to her, Ms. Parker concluded Mr. Ackley was not employable unless he was successfully retrained.

Mr. Ackley had expressed an interest in attending the Robert Allen program to begin a career in real estate investment. Ms. Parker investigated this possibility, but determined that the program was not an appropriate retraining program because it was too expensive and the program was not Department-approved or offered by a Department-approved provider. She also concluded the job associated with the Robert Allen program would constitute self-employment. Based on these factors, Ms. Parker felt it unlikely the Department would approve such a program. After reviewing career-interest testing results for Mr. Ackley, Ms. Parker began the process for developing a plan to train Mr. Ackley to be graphic designer.

As 2007 was ending, Ms. Parker became aware of the pending change in laws pertaining to vocational rehabilitation, including Option 2 benefits. This is the first opportunity we have had to review an appeal involving Option 2 vocational benefits. Option 2 vocational benefits are part of a pilot program instituted by the Legislature under RCW 51.32.099. The statute explains the purpose of the program:

> (1)(a) The legislature intends to create improved vocational outcomes for Washington state injured workers and employers through legislative and regulatory change under a pilot program for the period of January 1, 2008, through June 30, 2013. This pilot vocational system is intended to allow opportunities for eligible workers to participate in meaningful retraining in high-demand occupations, improve successful return to work and achieve positive outcomes for workers, reduce the incidence of repeat vocational services, increase accountability and responsibility, and improve cost predictability.

The program provides an opportunity for injured workers to opt out of the vocational plan approved by the Department.

> (b) Option 2: The worker declines further vocational services under the claim and receives an amount equal to six months of temporary total disability compensation under RCW 51.32.090. The award is payable in biweekly payments in accordance with the schedule of temporary total disability payments, until such award is paid in full. These payments shall not include interest on the unpaid balance. However, upon application by the worker, and at the discretion of the department, the compensation may be converted to a lump sum payment. The vocational costs defined in subsection (3)(d) of this section shall remain available to the worker, upon application to the department or self-insurer, for a period of five years. The vocational costs shall, if expended, be available for programs or courses at any accredited or licensed

> institution or program from a list of those approved by the department for tuition, books, fees, supplies, equipment, and tools, without department or self-insurer oversight. The department shall issue an order as provided in RCW 51.52.050 confirming the option 2 election, setting a payment schedule, and terminating temporary total disability benefits. The department shall thereafter close the claim.

RCW 51.32.099(4)(b). If the worker opts out of the vocational plan by selecting Option 2, the worker receives six months worth of time-loss compensation benefits, paid every two weeks in most cases. The worker also is eligible for an amount certain to be used for retraining by Department-approved providers. Once the worker elects Option 2, the Department is to issue an order confirming the Option 2 election, and close the claim.

Ms. Parker explained the changes and the Option 2 benefits to Mr. Ackley. On April 3, 2008, the Department approved a training plan in graphic design for Mr. Ackley. The plan called for Mr. Ackley to attend Pierce College, which is approximately 39 miles from his home. Mr. Ackley elected Option 2 benefits on April 14, 2008. Ms. Parker was present when he signed the form. At the time, Mr. Ackley said he wanted to pursue his interest in real estate investment.

Mr. Ackley recalled working with a vocational counselor. He testified that when he signed the Option 2 agreement in 2008, he did not understand his claim would be closed and his benefits terminated. Mr. Ackley took two computer courses in 2009, but found attending class difficult because of the time spent sitting. He testified he would still like to pursue a career in photography and computers, but feels it would be too painful to sit in class.

The claimant presented the testimony of John Berg, VRC. Mr. Berg did not find it realistic to think that any retraining program would make Mr. Ackley employable. Mr. Berg felt that a job in graphic design would require more education and experience than Mr. Ackley could obtain with his worker's compensation benefits. The plan also required Mr. Ackley to maintain a 2.0 grade point average. In his prior college experience, Mr. Ackley was only able to achieve a 1.5. Mr. Berg was concerned Mr. Ackley did not have the academic ability to complete the training. In addition, Mr. Ackley believed that all of the jobs identified in the labor market survey were in Tacoma or Seattle. Mr. Ackley lives in Kitsap County. His commute to those jobs would require him to sit longer than the limitations imposed by Dr. McManus. Finally, Mr. Berg voiced his opinion that re-employment was not a realistic possibility given Mr. Ackley's age. By the time he completed the training plan, Mr. Ackley would have been over 60 years old.

We note that Ms. Parker did not explain how Mr. Ackley could be expected to commute 40 miles to school given his severe limitations in driving and sitting, even though she stated she based her recommendations on those limitations. She also did not explain how Mr. Ackley would

be able to commute to Tacoma or Seattle when he was limited to sitting and/or driving only 20 minutes at a time. Ms. Parker's failure to explain how the training plan could be accomplished given Mr. Ackley's limitations is one of the reasons we find Mr. Berg's testimony to be more persuasive.

For reasons explained below, we are convinced Mr. Ackley is permanently totally disabled and entitled to benefits consistent with that status. We are doubtful that it was the Legislature's intention to have workers elect Option 2 and then be placed on a pension for permanent total disability. There is nothing in the statute, however, that directs the Department to treat an Option 2 election as a compromise and release, or as a specific waiver of any other benefits. Furthermore, there is nothing in the statute that indicates a worker is not eligible for pension benefits after selecting Option 2. If the statute were to operate in that fashion, we believe the statute should explicitly state that the Option 2 selection is an irrevocable decision that precludes an award for permanent total disability. The statute should specifically state that a worker cannot appeal the order closing the claim and assert entitlement to benefits as a totally and permanently disabled worker. In addition, if the statute were intended to operate as a form of compromise and release, the paperwork provided by the Department should have completely and clearly informed the worker of the consequences, as well as the benefits, of selecting Option 2.

With regard to the issue of the Option 2 order having become final and binding, we do not think the finality of that order prohibits the action we take here. In our view, the finality of that order simply prevents Mr. Ackley from reverting to the vocational plan established by the Department for retraining as a graphic designer.

We also recognize that one of the purposes of the statute was to improve vocational outcomes. The Department identified statements from the legislative hearings related to the enactment of this statute that suggest another goal was to reduce the number of pensions. We do not believe, however, that a general goal of improving vocational outcomes, or even a more specific goal of reducing pensions should be construed to operate against awarding a pension to any particular individual. We do not understand the purpose statement to mean that any worker who chooses Option 2 necessarily should be precluded from receiving benefits for permanent total disability. We can envision other circumstances in which a worker who selected Option 2 might be eligible for pension benefits. For example, a worker who selected Option 2, but then reopened the claim for aggravation, might receive a pension at the point of claim closure.

Although we understand the arguments put forth by the Department and the self-insured employer supporting the denial of pension benefits, we find the statute to be ambiguous in this respect. We note that any ambiguity in the statute must be liberally construed in favor of providing benefits to the injured worker. RCW 51.12.010.

We also believe that this is an unusual case. In most circumstances, a worker would not receive pension benefits after selecting Option 2. The result in this case really depends on the facts before us. Based on the evidence in this case, we are not convinced that the Department had established a viable retraining plan for Mr. Ackley. There were not enough training benefits available for Mr. Ackley to complete all of the coursework required to become employable in the field. The plan required Mr. Ackley to attend college at Pierce College, 40 miles from his home. Mr. Ackley was not able to drive or sit for more than 20 minutes, but his commute to school would take longer than that. Mr. Ackley would have been required to maintain a 2.0 grade point average. His prior experience with college, in which he earned a 1.5 grade point average, caused him some concern about being able to meet the Department's expectations. In addition, the labor market survey for the position for which Mr. Ackley would be trained located positions in Tacoma and Seattle, but not within 20 minutes driving distance of Mr. Ackley's home. Given Mr. Ackley's severe sitting and driving restrictions, it was not reasonable to expect him to be able to work in Tacoma or Seattle.

Under the statute, after a training plan had been approved by the Department, Mr. Ackley had to either accept the Department's plan, in which he had no confidence, or select Option 2. Mr. Ackley did not have the benefit of legal counsel when faced with the choice. He likely did not realize that he perhaps needed to question the validity of the training plan approved by the Department. He testified he was not aware that selecting Option 2 would operate to close his claim and terminate his medical benefits. It appears Mr. Ackley did not make a fully informed choice for Option 2 benefits.

Even if Mr. Ackley fully understood the consequences of selecting Option 2, Mr. Ackley's physical condition is a barrier to both retraining and becoming employable. His limitations are such that we are convinced he cannot work on a reasonably continuous basis in gainful employment. He is able to sit and stand only 20 minutes at a time, which would impact his ability to work, and his ability to get to work unless he were able to find employment very close to his residence. Based on those limitations, we are convinced Mr. Ackley is permanently totally disabled and our industrial appeals judge's decision directing the Department to award him pension benefits is correct.

The parties advanced several arguments in their respective Petitions for Review in this case. We have considered those arguments carefully, but do not find it necessary to address each argument in this decision. We believe it is sufficient to say that had the Legislature intended the Option 2 election to operate as a compromise and release precluding the award of pension benefits, the statute would have said so explicitly. We simply cannot construe the statute to abrogate a right to appeal an order closing the claim or limit the issues in such an appeal absent specific direction by the Legislature to do so. We reverse and remand with direction to the Department to find Mr. Ackley permanently totally disabled and place him on the pension rolls. With regard to any payments made to Mr. Ackley or to any educational institution pursuant to Mr. Ackley's Option 2 selection, we leave the matter with the Department to determine the appropriate disposition of those benefits.

FINDINGS OF FACT

1. The claimant, Bill D. Ackley, was injured on September 28, 2004, while working for the self-insured employer, Kitsap County. The Application for Benefits in Claim No. W-515857 was filed with the Department on September 30, 2004, and on November 2, 2004, the Department entered an order in which it allowed the claim.

   On April 24, 2008, the Department entered an order in which it ended time-loss compensation benefits effective April 24, 2008, and determined that the claimant had elected not to participate in an approved vocational training plan. On August 5, 2008, the Department entered an order in which it closed the claim with Category 4 permanent dorso-lumbar and/or lumbosacral impairments, and with time-loss compensation benefits as paid through June 17, 2008. The claimant filed a Protest and Request for Reconsideration with the Department on October 1, 2008, directed to the August 5, 2008 order, and on January 14, 2009, the Department entered an order in which it affirmed the provisions of the August 5, 2008 order. The claimant filed an appeal with this Board on February 5, 2009, to the order dated January 14, 2009. The appeal was assigned Docket No. 09 11392, and was granted by an order of the Board dated March 16, 2009. These proceedings followed.

2. The claimant, Bill D. Ackley, was injured on September 28, 2004, while in the course of his employment with the self-insured employer Kitsap County, when a county truck he was driving was struck by another vehicle on the right rear fender. The truck lacked doors, and the collision threw Mr. Ackley toward the open door; he was restrained from being thrown out of the truck by his seatbelt. The accident caused severe back pain. Mr. Ackley was transported to the hospital, and he was subsequently released and was cared for by his personal physician. As a result of the September 28, 2004 industrial injury, Mr. Ackley sustained posterior lateral disc

desiccation on the left side at L5-S1, chronic left side L5-S1 radiculopathy, and nerve damage.

3. As of January 14, 2009, Mr. Ackley's low back conditions, proximately caused by the September 28, 2004 industrial injury, had reached maximum medical improvement, and were not in need of further treatment.

4. As of January 14, 2009, Mr. Ackley was a 58-year-old man. He had graduated from high school and attended, but not graduated from, college. He served for six years in the United States Air Force, and after leaving military service worked exclusively in heavy labor, working in construction, landscaping, truck driving, and heavy equipment operation. From April 25, 2008, through January 14, 2009, and as of January 14, 2009, due to the residuals of the September 28, 2004 industrial injury, Mr. Ackley was limited to sitting and standing for 20 minutes per hour, with total sitting of four hours per day and total standing of five hours per day; driving for 20 minutes at a time, for a total of two hours per day; bending, squatting, kneeling, reaching below the waist only occasionally; pushing and pulling up to 40 pounds seldom, up to 30 pounds occasionally, and up to 20 pounds frequently; lifting and carrying up to 40 pounds seldom, up to 20 pounds occasionally, and up to 10 pounds frequently; no ladder climbing; and he needed a one-minute stretch break every 20 minutes. As of January 14, 2009, Mr. Ackley had no transferable skills that would allow him to perform jobs within his limitations.

5. Between April 25, 2008, and January 13, 2009, inclusive, and considering the disabilities and physical limitations proximately caused by the industrial injury of September 28, 2004, Mr. Ackley was unable to perform reasonably continuous work at a gainful occupation, in light of his age, education, work experience, disabilities.

6. As of January 14, 2009, when considering the disabilities and physical limitations proximately caused by the industrial injury of September 28, 2004, Mr. Ackley was unable to perform reasonably continuous work at a gainful occupation, in light of his age, education, work experience and work history.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of this appeal.

2. Between April 28, 2005, and January 14, 2009, the claimant, Bill D. Ackley, was a temporarily totally disabled worker within the meaning of the Industrial Insurance Act and RCW 51.32.090.

4. As of January 14, 2009, and pursuant to RCW 51.36.010, Mr. Ackley's posterior lateral disc desiccation on the left side at L5-S1, and chronic left side L5 and S1 radiculopathy had reached maximum medical improvement, and he is not entitled to further proper and necessary medical treatment for those conditions.

5. As of January 14, 2009, Mr. Ackley was a permanently totally disabled worker within the meaning of the Industrial Insurance Act, and RCW 51.08.160.

6. The order of the Department of Labor and Industries dated January 14, 2009, in which it closed the claim with a permanent partial disability award for Category 4 of WAC 296-20-280 for permanent dorso-lumbar and/or lumbosacral impairments, and with time-loss compensation benefits as paid through June 17, 2008, is incorrect and is reversed. This claim is remanded to the Department to: (1) pay Mr. Ackley time-loss compensation benefits from April 25, 2008 through January 13, 2009; (2) find Mr. Ackley a permanently totally disabled worker effective January 14, 2009; and (3) take such other and further action as is proper and necessary under the facts and the law.

DATED: August 19, 2010.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
DAVID E. THREEDY Chairperson

/s/_____
FRANK E. FENNERTY, JR. Member

DISSENT

I respectfully dissent. The stated purpose of RCW 51.32.099 is to increase employability while decreasing pension rates. To that end, the legislature instituted this pilot program whereby an injured worker can elect Option 2 benefits to pursue training in a field of interest to the worker. The premise behind the pilot program is that if the worker has more input into selecting the training program, and has a broader range of options available, the worker will succeed with retraining and become employable. In exchange for that freedom of choice, and the opportunity to receive training without Department oversight, the worker waives any of the other benefits available to other workers who elect to pursue vocational training under the Department plan. The statute operates as a form of compromise and release.

In this case, Mr. Ackley was presented with a training program designed to prepare him for employment as a graphics designer. He decided to accept Option 2 to pursue a career in real estate investment. He now seeks to be relieved from the consequences of what transpired to be a

poor choice when viewed with the benefit of hindsight. The statute should not operate to relieve workers from poor choices, when those choices were made voluntarily and with full explanation. Ms. Parker clearly explained the program to Mr. Ackley. He knew that he was rejecting the training plan in favor of a career path of his own choosing. Unfortunately, his career path was not realistic when he chose it and has become more unrealistic in light of the current economic downturn. Nevertheless, it was Mr. Ackley's informed choice and he should be bound by it.

The Department order in which it closed the claim with permanent partial disability benefits should be affirmed. The Department acted in accordance with the statute, which mandates closing the claim upon a worker's decision to elect Option 2. There simply is no provision in the statute for the selection to be voided and other benefits provided.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
LARRY DITTMAN Member