

Lake, Robert, Jr.

VOCATIONAL REHABILITATION

Time-loss compensation

A worker receiving vocational plan development services or successfully participating in a vocational plan is automatically entitled to time-loss compensation. An employer who appeals such payment orders can establish the incorrectness of the orders only if it shows the Department abused its discretion in issuing them.***In re Robert Lake Jr., BIA Dec., 19 19796 (2022)*** [*Editor's Note: The Board's decision was appealed to superior court under Thurston County Cause No. 22-2-00924-34.*]

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

1 **IN RE: ROBERT E. LAKE JR.**) **DOCKET NOS. 19 19796, 19 21691, 20 10395,**
2) **20 11290, 20 15395, 20 15396, 20 15397,**
3) **20 15398, 20 17497, 20 17498, 20 20198,**
4) **20 20199, 20 20290, 20 21790, 20 21791,**
5) **20 23197, 20 23198, 20 23290, 20 23899,**
6) **20 23990, 20 23991, 20 23992, 21 10396,**
7) **21 10397, 21 11794, 21 12693, 21 12694,**
8) **21 12695, 21 12696, 21 14897, 21 16895,**
9) **21 16896, 21 16897, 21 16990, 21 16991,**
10) **21 18297, 21 20596, 21 20597 & 21 20690**
11)
12 **CLAIM NO. BC-21771**) **DECISION AND ORDER**

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14 The claimant, Robert Lake, Jr., sustained an industrial injury to his left knee in February 2018
15 while working out of the Aberdeen laborer's union hall for the employer, JR Hayes & Sons, Inc. Under
16 his allowed claim, he received medical treatment, including reconstructive surgery of his knee,
17 time-loss compensation, and vocational benefits.
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20 In the spring of 2019, the Department assigned a vocational counselor to assess Mr. Lake's
21 ability to work. On June 5, 2019, JR Hayes offered Mr. Lake a permanent light-duty job as an Office
22 Assistant to the Safety Director in Maple Valley, Washington. On June 14, 2019, the Department
23 determined this job offer was not valid because it was not within a reasonable commuting distance
24 and informed the employer that Mr. Lake would continue to work with his assigned vocational
25 counselor. Around that time and following, the Department paid time-loss compensation, determined
26 Mr. Lake was eligible for vocational retraining, and approved a vocational retraining plan for the goal
27 of Architectural Drafter.
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29 JR Hayes appealed the Department's order determining the light-duty offer was not valid. The
30 employer also appealed 38 orders issued by the Department paying time-loss compensation benefits;
31 paying for medical services; and paying for vocational services and related costs, for the periods
32 June 8, 2019, through July 19, 2019, and September 28, 2019, through June 18, 2021.¹ JR Hayes
33 contends the orders paying time-loss compensation and vocational benefits were improper because,
34 regardless of the validity of the light-duty job offer, Mr. Lake was able to work in gainful employment
35 on a reasonably continuous basis based on transferrable skills.
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44 ¹ Only two of the orders on appeal paid a combination of vocational and medical services: the order dated March 24,
45 2020, under Docket No. 20 15397, which included payment for medical services rendered by Laddie Anthony Agtarap,
46 M.D., on October 19, 2019; and the order dated April 17, 2020, under Docket No. 20 17498, which included payment for
47 medical services rendered by Dr. Agtarap on October 5, 2019. For brevity, we refer to those 38 orders as paying time-loss
compensation and vocational services benefits.

1 Our industrial appeals judge determined by a preponderance of the evidence that: (1) the
2 employer's light-duty job offer was invalid because it was not within a reasonable commuting
3 distance; and (2) Mr. Lake was capable of gainful employment on a reasonably continuous basis
4 based on his transferrable skills during all periods for which the remaining 38 Department orders paid
5 time-loss compensation, vocational services benefits, and related costs. Our industrial appeals judge
6 reversed and remanded all 39 Department orders on appeal to the Department to determine Mr. Lake
7 was capable of obtaining and performing reasonably continuous gainful employment from June 8,
8 2019, through June 18, 2021, and directed the Department to take such further action as indicated
9 by the law and the facts.

10 The Department filed a timely Petition for Review asking us to change the findings of fact and
11 conclusions of law to be consistent with the Proposed Decision and Order's analysis that the light-duty
12 job offer was not valid, and to apply an abuse of discretion standard of review to the 38 Department
13 orders that paid time-loss compensation and vocational services benefits. Mr. Lake also filed a timely
14 Petition for Review seeking the same relief as the Department with respect to the appeal involving
15 the light-duty job offer. He also asks that the evidence be re-weighed to determine he was **not** able
16 to be gainfully employed on a reasonably continuous basis in transferrable skills positions during the
17 periods for which time-loss compensation and vocational services benefits were paid. In the
18 alternative, Mr. Lake joins in the Department's petition and adopts its contentions regarding
19 application of the abuse of discretion standard of review.

20 We granted review to correct the Findings of Fact and Conclusions of Law to affirm the
21 Department's determination that the permanent light-duty job offer was invalid under
22 RCW 51.32.090(4) because it was not within Mr. Lake's labor market as defined by
23 WAC 296-19A-010(4). The Department order under Docket No. 19 21691 is **AFFIRMED**.

24 We also granted review to apply the abuse of discretion standard of review to the remaining
25 38 Department orders appealed by JR Hayes, which paid time-loss compensation and vocational
26 services benefits. Those benefits were paid during periods when Mr. Lake was either in vocational
27 plan development or actively and successfully participating in his approved vocational plan. We find
28 JR Hayes failed to demonstrate an abuse of discretion in the payment of those benefits. Even if all
29 the material evidence presented at hearing--most, if not all, of which was developed after the
30 Department determined Mr. Lake eligible for vocational services--were considered, JR Hayes still
31 failed to demonstrate an abuse of discretion in the payment of the time-loss compensation, vocational
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1 services benefits, and related costs for the periods at issue. Accordingly, the 38 other Department
2 orders on appeal are also **AFFIRMED**.

4 **DISCUSSION**

5 Mr. Lake graduated high school in 1985. From 1985 to 1997, he worked as a deckhand on a
6 commercial fish processing boat. In 2009, long before his 2018 injury while employed by JR Hayes,
7 Mr. Lake sustained an industrial injury with a different employer that resulted in a 2010 right knee
8 ACL tear and reconstructive surgery. He returned to work without restrictions following the surgery.
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10 From 1997 to 2013, Mr. Lake accepted jobs through the out-of-work list from Union Local 252
11 Laborer's Union in Aberdeen, Washington. He worked as a millwright, welder, concrete finisher,
12 laborer, grade checker, and pipe layer. He was assigned to the Aberdeen Satellite Office, which
13 dispatched union members like him to Grays Harbor County, North Pacific County, South Jefferson
14 County, Mason County, and out to the east Thurston County line. There were no ramifications for
15 turning down jobs offered outside the Aberdeen Satellite dispatch area. The furthest Mr. Lake
16 commuted during those seven years was to Long Beach, Washington, a two-hour commute for only
17 six or seven months, and he never traveled out of state.
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19 From 2013 to 2017, Mr. Lake worked as the field representative and business agent for Union
20 Local 252 out of the Aberdeen satellite office, covering the same geographic area within which he
21 had accepted union jobs between 1997-2013. His position necessitated that he cover other satellite
22 offices, but mostly did not require him to travel. The majority of his travel during 2013-2017 was
23 within a 50-mile radius of the Aberdeen union office. He once traveled to Tigard, Oregon, during this
24 time.
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26 In 2017, Mr. Lake left his union business agent position and returned to accepting jobs through
27 the union's out-of-work list. His plan was to do that work indefinitely. Unfortunately, on his first job,
28 on his first day, he was dispatched to JR Hayes in Lacey, Washington, and sustained his left knee
29 injury. The date of his injury was February 19, 2018.
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31 After he underwent left knee surgery by Laddie A. Agtarap, M.D., in May 2018, Mr. Lake
32 participated in a functional capacities evaluation (FCE) performed by William W. Linnenkohl, M.P.T.,
33 on February 26, 2019. Mr. Linnenkohl found Mr. Lake was capable of working full-time, but was
34 restricted to: never kneeling or crawling; bending/stooping limited to three hours per day; standing up
35 to 1.3 hours per day; walking up to one hour per day, and alternate standing/walking up to 2.3 hours
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1 per day.² Mr. Linnenkohl opined that Mr. Lake did not have the physical capacities to work at his job
2 of injury as a pipe layer/pipefitter, nor as an industrial truck operator or carpenter. He also opined
3 that Mr. Lake could not perform a job that required: standing up to 5.3 hours a day; kneeling 48
4 minutes a day; or walking up to 2.6 hours a day. Mr. Linnenkohl also restricted Mr. Lake from sitting
5 for more than two hours at one time. Dr. Agtarap concurred with Mr. Linnenkohl's conclusions, and
6 the parties stipulated that Dr. Agtarap viewed the restrictions on Mr. Lake as permanent as of
7 February 26, 2019.
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11 On June 5, 2019, JR Hayes offered Mr. Lake a permanent light-duty job as an Office Assistant
12 to the Safety Director. The job required Mr. Lake to commute daily from his home in
13 Aberdeen, Washington, to Maple Valley, Washington--a distance of 114 miles each way, or 228 miles
14 round-trip. This commute would take from two to two-and-a-half hours one-way, or four to five hours
15 roundtrip, on top of an eight-hour workday. In an eight-hour workday, the job required standing
16 66 percent of the time; squatting or kneeling up to 10 percent of the time; and walking up to 33 percent
17 of the time. The Department issued an order on July 24, 2019, which affirmed its June 14, 2019
18 letter, determining that JR Hayes' permanent light-duty job offer was not valid because it was not
19 within a reasonable commuting distance. The letter also informed JR Hayes that Mr. Lake would
20 continue to work with his assigned vocational counselor to assess his ability to work. JR Hayes made
21 no other job offers to Mr. Lake after its June 5, 2019 offer.
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28 Subsequently, the Department approved a vocational plan for Mr. Lake. Mr. Lake then actively
29 and successfully participated in the plan for retraining as an Architectural Drafter with courses at
30 South Puget Sound Community College, earning mostly A-grades.
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32 JR Hayes appealed the Department's order determining that the permanent light-duty job offer
33 was not valid, along with 38 other Department orders paying time-loss compensation, paying for
34 vocational/medical services, and paying related costs while Mr. Lake was either participating in
35 vocational plan development or actively engaged in the approved vocational plan for his retraining.
36 In these consolidated dockets, JR Hayes has not appealed the Department's determination that Mr.
37 Lake was eligible for vocational retraining.
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² Ex. 1; Linnenkohl Dep. at 16-19.

1 **Validity of June 5, 2019 Permanent Light-Duty Job Offer**

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3 To be considered a valid light-duty job offer within the meaning of RCW 51.32.090(4), the
4 offered position must be within the worker's relevant labor market and within a reasonable commuting
5 distance.³ Generally, the worker's relevant labor market is the geographic area where the worker
6 was last gainfully employed and must be consistent with the injured worker's physical and mental
7 capacities.⁴ In our Significant Decision, *In re Richard Gramelt*⁵ we held a roundtrip commute of
8 136 miles, or 68 miles one-way was not a reasonable commute distance, calling it "beyond the
9 bounds of common sense, extreme, and excessive."⁶ While Mr. Lake would not have had to pull off
10 the road three times each way due to sitting limitations like those that restricted Mr. Gramelt, his
11 commute would have been almost 50 miles more than Mr. Gramelt's each way, at 114 miles one-way
12 or 228 miles round trip—totaling four to five hours on top of an eight-hour workday. While Mr. Lake
13 did travel occasionally in his job of injury through the union, he rarely traveled beyond the 50-mile
14 radius from the union hall in Aberdeen. Prior to his industrial injury, Mr. Lake had no regular
15 commutes that were anything close to approaching the lengthy distance of the offered light-duty
16 position. Mr. Lake's commute for the job offered by JR Hayes would have been unreasonable and
17 beyond the bounds of common sense. Consequently, it was not a valid light duty job offer.

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19 Additionally, the offered job was not a valid light-duty offer because it exceeded Mr. Lake's
20 permanent physical restrictions. Mr. Lake is restricted from any kneeling, but the job required
21 kneeling up to 10 percent of the workday. Mr. Lake is restricted to standing no more than 1.3 hours
22 per day, but the job required standing 66 percent of the workday. Finally, Mr. Lake is limited to
23 walking no more than one hour per workday, but the job required walking up to 33 percent of the
24 workday.

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26 **The Department's 38 Other Orders Paying Time-Loss Compensation Benefits and**
27 **Paying for Vocational Services and Related Costs**

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29 The 38 other Department orders that JR Hayes appealed did not pay Mr. Lake time-loss
30 compensation, vocational services, or related costs based on medical disability. Rather, Mr. Lake
31 received the benefits as provided for in those orders exclusively while he was either in vocational
32 plan development or actively and successfully participating in an approved vocational plan. The
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45 ³ *In re Richard Gramelt*, BIIA Dec., 09 21629 (2011).

46 ⁴ WAC 296-19A-010(4).

47 ⁵ BIIA Dec., 09 21629 (2011).

⁶ *Gramelt* at 10.

1 Department's June 14, 2019 letter determining JR Hayes' light-duty job offer invalid makes that point
2 abundantly clear. In relevant part, with emphasis added, it states: "The job offer set to start
3 06/17/2019 is not valid because it is not within a reasonable commuting distance. **Your injured
4 worker will continue to work with the vocational counselor who will assess his ability to work.**"
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7 RCW 51.32.095 vests sole discretion in whether to provide vocational retraining benefits to an
8 injured worker with the Director of the Department or his or her designee. In Mr. Lake's case, the
9 Department clearly decided to provide him with those benefits. While JR Hayes did not challenge
10 that vocational decision in these appeals, that decision in any event could only be reviewed under an
11 abuse of discretion standard.⁷ A worker receiving vocational plan development services or actively
12 and successfully participating in a vocational plan is automatically entitled to time-loss compensation
13 and to payment for related costs in the latter instance.⁸ Consequently, JR Hayes can only establish
14 the incorrectness of the Department's 38 payment orders if it can show the Department abused its
15 discretion in issuing them.
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19 An abuse of discretion can only be shown if the challenging party establishes the decision at
20 issue was "arbitrary and capricious."⁹ A decision is arbitrary and capricious only if no reasonable
21 person could have made the decision based on the information that was before them at the time.¹⁰
22 If a reasonable person could have decided to either grant or deny the discretionary relief based on
23 the information available at the time, the decision must be upheld.¹¹ Significantly, abuse of discretion
24 by the Department's Director can only be shown based on the information available to him or her at
25 the time of the decision, and may not be based on new evidence that came to light only afterwards.¹²
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29 At hearing, JR Hayes failed to make a showing of the evidence the Director considered in
30 determining that Mr. Lake was eligible for vocational benefits. For this reason alone, it has failed to
31 show that the Director abused his or her discretion in making those determinations. In considering
32 whether the Director abused his or her discretion in this case, it would be improper to consider most,
33 if not all, of the vocational evidence presented by the parties at hearing; the evidence was developed
34 after the Department made its vocational determinations. That said, assuming we could properly
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42 ⁷ *In re Todd Eicher*, BIIA Dec., 88 4477 (1990).

43 ⁸ *In re Rogelio Robles*, BIIA Dec., 14 21084 (2015); RCW 51.32.096(3)(e); 51.32.095(5)(a).

44 ⁹ *ITT Rayonier v. Dalman*, 122 Wn.2d 801, 809-10 (1993); *State Rel. Carroll v. Junker*, 79 Wn.2d 12, 26 (1971),
45 *superseded on other grounds, as recognized by Seattle Times Co. v. Benton Co.*, 99 Wn.2d 251 (1983).

46 ¹⁰ *Junker*.

47 ¹¹ *Junker*; *In re Mary Spencer*, BIIA Dec., 90 0264 (1991).

¹² *See, ITT Rayonier v. Dalman*, at 809-10.

1 consider that evidence, it would not help JR Hayes. In its totality, it simply shows the existence of
2 differing expert vocational opinions on which reasonable minds could disagree to give more weight.
3 The evidence does not support a determination that no reasonable person would have provided the
4 vocational benefits. In short, JR Hayes has not shown that the Director abused his or her discretion
5 in providing Mr. Lake vocational plan development services and then placing him into a vocational
6 plan. In failing to make this showing, the employer has thus failed to show that the Department's
7 38 orders paying time-loss benefits and paying for vocational services and related costs are in error.
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12 **DECISION**

- 13 1. In Docket No. 19 19796, the employer, JR Hayes & Sons, Inc. (JR Hayes), filed an appeal with
14 the Board of Industrial Insurance Appeals on July 22, 2019, from an order of the Department
15 of Labor and Industries dated July 22, 2019. In this order, the Department affirmed its order
16 dated June 21, 2019, paying time-loss compensation from June 8, 2019, through June 21,
17 2019. This order is correct and is affirmed.
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- 19 2. In Docket No. 19 21691, the employer, JR Hayes, filed an appeal with the Board of Industrial
20 Insurance Appeals on August 22, 2019, from an order of the Department of Labor and
21 Industries dated July 24, 2019. In this order, the Department affirmed its letter determination
22 dated June 14, 2019, that communicated the job offer set to start June 17, 2019, but
23 determined the offer was not valid because the offered position was not within a reasonable
24 commuting distance. This order is correct and is affirmed.
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- 26 3. In Docket No. 20 10395, the employer, JR Hayes, filed an appeal with the Board of Industrial
27 Insurance Appeals on January 9, 2020, from an order of the Department of Labor and
28 Industries dated December 24, 2019. In this order, the Department affirmed Remittance
29 Advice Nos. 117083 and 123911 dated September 10, 2019, and September 24, 2019, that
30 paid \$364.90 and \$513.92 for vocational rehabilitation services reported on September 7 and
31 September 21, 2019. This order is correct and is affirmed.
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- 33 4. In Docket No. 20 11290, the employer, JR Hayes, filed an appeal with the Board of Industrial
34 Insurance Appeals on January 27, 2020, from an order of the Department of Labor and
35 Industries dated January 27, 2020. In this order, the Department affirmed its orders dated
36 October 10, October 25, November 7, November 22, December 6, December 20, 2019,
37 January 3, and January 17, 2020. The Department orders dated October 10, October 25,
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1 November 7, November 22, December 6, December 20, 2019, January 3 and
2 January 17, 2020, paid time-loss compensation benefits from September 28, 2019, through
3 January 17, 2020. This order is correct and is affirmed.
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6 5. In Docket No. 20 15395, the employer, JR Hayes, filed an appeal with the Board of Industrial
7 Insurance Appeals on April 20, 2020, from a Department order dated March 17, 2020. The
8 Department order affirmed Remittance Advice Nos. 143995, 150745, 157317, 170808,
9 177228 dated November 5, November 19, December 3, and December 31, 2019, as well as
10 January 14, 2020, that paid for vocational services on November 2, 2019,
11 November 16, 2019, November 28, 2019, December 28, 2019, and January 11, 2020. This
12 order is correct and is affirmed.
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17 6. In Docket No. 20 15396, the employer, JR Hayes, filed an appeal with the Board of Industrial
18 Insurance Appeals on April 20, 2020, from a Department order dated March 18, 2020. The
19 Department order affirmed its payment orders dated January 31, February 13, and
20 February 28, 2020, based on the invalidity of a light-duty job offer. The Department orders
21 dated January 31, February 13, and February 28, 2020, paid time-loss compensation from
22 January 18, 2020, through February 28, 2020. This order is correct and is affirmed.
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26 7. In Docket No. 20 15397, the employer, JR Hayes, filed an appeal with the Board of Industrial
27 Insurance Appeals on April 20, 2020, from a Department order dated March 24, 2020. The
28 Department order affirmed Remittance Advice Nos. 130740 and 137418 dated October 8 and
29 October 22, 2019, that paid \$884.64 for vocational services and for medical services provided
30 by Dr. Laddie A. Agtarap on October 19, 2019. This order is correct and is affirmed.
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34 8. In Docket No. 20 15398, the employer, JR Hayes, filed an appeal with the Board of Industrial
35 Insurance Appeals on April 20, 2020, from a Department order dated March 26, 2020. The
36 Department order affirmed Remittance Advice Nos. 183701, 190528, 197760, and 204856
37 dated January 28, February 11, February 25, and March 10, 2020, that paid for vocational
38 services provided on January 25, February 8, February 22, and March 7, 2020. This order is
39 correct and is affirmed.
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44 9. In Docket No. 20 17497, the employer, JR Hayes, filed an appeal with the Board of Industrial
45 Insurance Appeals on May 21, 2020, from an order of the Department of Labor and Industries
46 dated April 7, 2020. In this order, the Department affirmed Remittance Advice No. 211996
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1 dated March 24, 2020 that paid for vocational services on March 21, 2020. This order is
2 correct and is affirmed.
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5 10. In Docket No. 20 17498, the employer, JR Hayes, filed an appeal with the Board of Industrial
6 Insurance Appeals on May 21, 2020, from an order of the Department of Labor and Industries
7 dated April 17, 2020. In this order, the Department corrected and superseded its order dated
8 March 3, 2020, and it affirmed Remittance advice Nos. 127705 for medical services provided
9 by Dr. Laddie A. Agtarap on October 5, 2019, and 130740 that paid for vocational services;
10 both dated October 8, 2019. This order is correct and is affirmed.
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14 11. In Docket No. 20 20198, the employer, JR Hayes, filed an appeal with the Board of Industrial
15 Insurance Appeals on July 16, 2020, from an order of the Department of Labor and Industries
16 dated July 14, 2020. In this order, the Department affirmed Remittance Advice Nos. 218490,
17 224125, 231010, and 233099 dated April 7, April 21, and May 19, 2020, that paid for vocational
18 services provided on April 4, April 18, and May 16, 2020. This order is correct and is affirmed.
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22 12. In Docket No. 20 20199, the employer, JR Hayes, filed an appeal with the Board of Industrial
23 Insurance Appeals on July 16, 2020, from an order of the Department of Labor and Industries
24 dated July 15, 2020. In this order, the Department affirmed its orders dated March 27, April 10,
25 April 24, May 8, and May 21, 2020, that set the time-loss compensation rate and paid time-loss
26 compensation benefits from March 14, 2020, through May 22, 2020. This order is correct and
27 is affirmed.
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31 13. In Docket No. 20 20290, the employer, JR Hayes, filed an appeal with the Board of Industrial
32 Insurance Appeals on July 16, 2020, from an order of the Department of Labor and Industries
33 dated July 16, 2020. In this order, the Department affirmed its orders dated June 5, June 19,
34 and July 2, 2020, that set the time-loss compensation rate and paid time-loss compensation
35 benefits from May 23, 2020, through July 3, 2020. This order is correct and is affirmed.
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39 14. In Docket No. 20 21790, the employer, JR Hayes, filed an appeal with the Board of Industrial
40 Insurance Appeals on August 26, 2020, from an order of the Department of Labor and
41 Industries dated August 18, 2020. In this order, the Department affirmed its orders dated
42 July 17 and July 31, 2020, that set the time-loss compensation rate and paid time-loss
43 compensation benefits from July 4, 2020, through July 31, 2020. This order is correct and is
44 affirmed.
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- 1 15. In Docket No. 20 21791, the employer, JR Hayes, filed an appeal with the Board of Industrial
2 Insurance Appeals on August 26, 2020, from an order of the Department of Labor and
3 Industries dated August 25, 2020. In this order, the Department affirmed Remittance Advice
4 Nos. 255533 and 260804 dated July 14 and July 28, 2020, that paid for vocational services
5 provided on July 11, 2020, and July 25, 2020. This order is correct and is affirmed.
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- 8 16. In Docket No. 20 23197, the employer, JR Hayes, filed an appeal with the Board of Industrial
9 Insurance Appeals on October 5, 2020, from a Department order dated August 27, 2020. The
10 Department order affirmed Remittance Advice Nos. 244903 and 250361 dated June 16 and
11 June 30, 2020, that paid for vocational services provided on June 13, 2020, and
12 June 27, 2020. This order is correct and is affirmed.
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- 15 17. In Docket No. 20 23198, the employer, JR Hayes, filed an appeal with the Board of Industrial
16 Insurance Appeals on October 5, 2020, from a Department order dated September 2, 2020.
17 The Department order affirmed its order dated August 14, 2020, that set the time-loss
18 compensation rate and paid time-loss compensation benefits from August 1, 2020, through
19 August 14, 2020. This order is correct and is affirmed.
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- 22 18. In Docket No. 20 23290, the employer, JR Hayes, filed an appeal with the Board of Industrial
23 Insurance Appeals on October 5, 2020, from a Department order dated September 11, 2020.
24 The Department order set the time-loss compensation rate and paid time-loss compensation
25 benefits from August 29, 2020, through September 11, 2020. This order is correct and is
26 affirmed.
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- 29 19. In Docket No. 20 23899, the employer, JR Hayes, filed an appeal with the Board of Industrial
30 Insurance Appeals on October 20, 2020, from an order of the Department of Labor and
31 Industries dated September 28, 2020. In this order, the Department affirmed Remittance
32 Advice Nos. 266398 and 272095 dated August 11 and 25, 2020, that provided vocational
33 services on August 8 and 22, 2020. This order is correct and is affirmed.
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- 36 20. In Docket No. 20 23990, the employer, JR Hayes, filed an appeal with the Board of Industrial
37 Insurance Appeals on October 20, 2020, from an order of the Department of Labor and
38 Industries dated September 29, 2020. In this order, the Department affirmed its orders dated
39 August 28 and September 11, 2020, that set the time-loss compensation rate and paid
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1 time-loss compensation benefits from August 15, 2020, through September 11, 2020. This
2 order is correct and is affirmed.
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5 21. In Docket No. 20 23991, the employer, JR Hayes, filed an appeal with the Board of Industrial
6 Insurance Appeals on October 20, 2020, from an order of the Department of Labor and
7 Industries dated October 13, 2020. In this order, the Department affirmed a Remittance Advice
8 No. 277570 dated September 9, 2020, that paid for vocational services on September 5, 2020.
9 This order is correct and is affirmed.
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12 22. In Docket No. 20 23992, the employer, JR Hayes, filed an appeal with the Board of Industrial
13 Insurance Appeals on October 20, 2020, from an order of the Department of Labor and
14 Industries dated October 14, 2020. In this order, the Department affirmed its order dated
15 September 25, 2020, that set the time-loss compensation rate and paid time-loss
16 compensation from September 12, 2020, through September 25, 2020. This order is correct
17 and is affirmed.
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20 23. In Docket No. 21 10396, the employer, JR Hayes, filed an appeal with the Board of Industrial
21 Insurance Appeals on January 15, 2021, from an order of the Department of Labor and
22 Industries dated November 10, 2020. In this order, the Department affirmed a Remittance
23 Advice No. 288806 dated October 6, 2020, that paid for vocational services on October 3,
24 2020. This order is correct and is affirmed.
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27 24. In Docket No. 21 10397, the employer, JR Hayes, filed an appeal with the Board of Industrial
28 Insurance Appeals on January 15, 2021, from an order of the Department of Labor and
29 Industries dated November 12, 2020. In this order, the Department affirmed its orders dated
30 October 8 and October 23, 2020, that set the time-loss compensation rate and paid time-loss
31 compensation benefits from October 10, 2020, through October 23, 2020. This order is correct
32 and is affirmed.
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35 25. In Docket No. 21 11794, the employer, JR Hayes, filed an appeal with the Board of Industrial
36 Insurance Appeals on February 18, 2021, from an order of the Department of Labor and
37 Industries dated January 7, 2021. In this order, the Department affirmed its orders dated
38 November 6, November 20, and December 4, 2020, that set the time-loss compensation rate
39 and paid time-loss compensation benefits from October 24, 2020, through December 4, 2020.
40 This order is correct and is affirmed.
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26. In Docket No. 21 12693, the employer, JR Hayes, filed an appeal with the Board of Industrial Insurance Appeals on March 11, 2021, from an order of the Department of Labor and Industries dated March 1, 2021. In this order, the Department affirmed its orders dated December 18, 2020, January 4, January 14, January 29, and February 12, 2021, that set the time-loss compensation rate and paid time-loss compensation benefits from December 5, 2020, through February 12, 2021. This order is correct and is affirmed.
 27. In Docket No. 21 12694, the employer, JR Hayes filed an appeal with the Board of Industrial Insurance Appeals on March 11, 2021, from an order of the Department of Labor and Industries dated March 3, 2021. In this order, the Department corrected and superseded its order dated January 8, 2021, and affirmed Remittance Advice Nos. dated November 3, 2020, November 17, 2020, and December 1, 2020. This order is correct and is affirmed.
 28. In Docket No. 21 12695, the employer, JR Hayes, filed an appeal with the Board of Industrial Insurance Appeals on March 11, 2021, from an order of the Department of Labor and Industries dated March 5, 2021. In this order, the Department affirmed Remittance Advice Nos. 317041, 327731, 333219, and 338901 dated December 15, 2020, January 12, 2021, January 26, 2021, and February 9, 2021, that paid for vocational services through February 6, 2021. This order is correct and is affirmed.
 29. In Docket No. 21 12696, the employer, JR Hayes, filed an appeal with the Board of Industrial Insurance Appeals on March 11, 2021, from an order of the Department of Labor and Industries dated March 11, 2021. In this order, the Department affirmed its order dated February 26, 2021, that set the time-loss compensation rate and paid time-loss compensation benefits from February 13, 2021, through February 26, 2021. This order is correct and is affirmed.
 30. In Docket No. 21 14897, the employer, JR Hayes, filed an appeal with the Board of Industrial Insurance Appeals on May 4, 2021, from a Department order dated March 18, 2021. The Department order affirmed Remittance Advice Nos. 341108 and 349960 dated February 23 and March 9, 2021, that paid for college and vocational services. This order is correct and is affirmed.
 31. In Docket No. 21 16895, the employer, JR Hayes, filed an appeal with the Board of Industrial Insurance Appeals on June 22, 2021, from an order of the Department of Labor and Industries

1 dated April 22, 2021. In this order, the Department affirmed its orders dated March 12 and
2 March 26, 2021, that paid time-loss compensation benefits from February 27, 2021, through
3 March 26, 2021. This order is correct and is affirmed.
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6 32. In Docket No. 21 16896, the employer, JR Hayes, filed an appeal with the Board of Industrial
7 Insurance Appeals on June 22, 2021, from an order of the Department of Labor and Industries
8 dated April 23, 2021. In this order, the Department paid time-loss compensation benefits from
9 April 10, 2021, through April 23, 2021. This order is correct and is affirmed.
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12 33. In Docket No. 21 16897, the employer, JR Hayes, filed an appeal with the Board of Industrial
13 Insurance Appeals on June 22, 2021, from an order of the Department of Labor and Industries
14 dated April 26, 2021. In this order, the Department affirmed its order dated April 9, 2021, that
15 paid time-loss compensation benefits from March 27, 2021, through April 9, 2021. This order
16 is correct and is affirmed.
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20 34. In Docket No. 21 16990, the employer, JR Hayes, filed an appeal with the Board of Industrial
21 Insurance Appeals on June 22, 2021, from an order of the Department of Labor and Industries
22 dated June 7, 2021. In this order, the Department affirmed remittance advices that paid for
23 vocational services on March 23, 2021, and April 6, 2021. This order is correct and is affirmed.
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27 35. In Docket No. 21 16991, the employer, JR Hayes filed an appeal with the Board of Industrial
28 Insurance Appeals on June 22, 2021, from an order of the Department of Labor and Industries
29 dated June 21, 2021. In this order, the Department affirmed its orders dated May 7 and
30 May 21, 2021, that paid time-loss compensation benefits from April 24, 2021, through
31 May 21, 2021. This order is correct and is affirmed.
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35 36. In Docket No. 21 18297, the employer, J R Hayes, filed an appeal with the Board of Industrial
36 Insurance Appeals on July 21, 2021, from a Department order dated June 25, 2021, that
37 affirmed its orders dated June 4, 2021, and June 18, 2021, that paid time-loss compensation
38 benefits from May 22, 2021, through June 18, 2021. This order is correct and is affirmed.
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41 37. In Docket No. 21 20596, the employer, JR Hayes, filed an appeal with the Board of Industrial
42 Insurance Appeals on September 14, 2021, from an order of the Department of Labor and
43 Industries dated September 8, 2021. In this order, the Department paid time-loss
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1 compensation benefits from June 22, 2019, through July 5, 2019. This order is correct and is
2 affirmed.
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5 38. In Docket No. 21 20597, the employer, JR Hayes, filed an appeal with the Board of Industrial
6 Insurance Appeals on September 14, 2021, from an order of the Department of Labor and
7 Industries dated September 9, 2021. In this order, the Department paid time-loss
8 compensation benefits from July 6, 2019, through July 19, 2019. This order is correct and is
9 affirmed.
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12 39. In Docket No. 21 20690, the employer, JR Hayes, filed an appeal with the Board of Industrial
13 Insurance Appeals on September 16, 2021, from an order of the Department of Labor and
14 Industries dated September 16, 2021. In this order, the Department affirmed its order dated
15 March 13, 2020, that paid time-loss compensation benefits from February 29, 2020, through
16 March 13, 2020. This order is correct and is affirmed.
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20 **FINDINGS OF FACT**

- 21
- 22 1. On August 30, 2021 and October 8, 2021, an industrial appeals judge
23 certified that the parties agreed to include the Jurisdictional History in the
24 Board record solely for jurisdictional purposes.
 - 25 2. Robert E. Lake sustained an industrial injury to his left knee on
26 February 19, 2018, while in the course of his employment with
27 JR Hayes & Sons, Inc., when he fell into a ditch while carrying pipe.
28 Under his claim, he underwent reconstructive surgery and participated in
29 physical therapy for his left knee.
 - 30 3. Mr. Lake is 53 years old and a high school graduate. His work history is
31 essentially that of a construction laborer.

32
33 From 1985-1997, Mr. Lake worked as a deckhand on a commercial fish
34 processing boat. From 1997-2013, Mr. Lake accepted jobs through the
35 out-of-work list from Union Local 252 Laborer's Union in Aberdeen,
36 Washington. During the period 1997-2013, he worked as a millwright,
37 welder, concrete finisher, laborer, grade checker, and pipe layer.
38 Throughout 1997-2013, he was assigned to the Aberdeen Satellite Office
39 which dispatched union members like him to Grays Harbor County, North
40 Pacific County, South Jefferson County, Mason County, and out to the
41 east Thurston County line. There were no ramifications for turning down
42 jobs offered outside the Aberdeen Satellite dispatch area.

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44 The furthest Mr. Lake commuted during 1997-2013 was to Long Beach,
45 Washington, a two-hour commute of 72 miles one-way, which he did for
46 only six or seven months. Mr. Lake never traveled out of state.
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1 From 2013-2017, Mr. Lake worked as the field representative and
2 business agent for Union Local 252 out of the Aberdeen satellite office
3 covering the same geographic area for which he accepted jobs out of the
4 same union during 1997-2013. This position included having to cover for
5 other satellite offices, but this mostly did not require any travel. The
6 majority of his travel during 2013-2017 was within a 50-mile radius of the
7 Aberdeen union office. He once traveled to Tigard, Oregon, during this
8 time.

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10 In 2017, Mr. Lake left the union business agent position and returned to
11 accepting jobs through the laborer's union out-of-work list. On his first
12 job, he was dispatched to JR Hayes, where he sustained the February 19,
13 2018 industrial injury on his first day. His plan was to return to the
14 laborer's union out of work list upon completing the job for JR Hayes,
15 which was in Lacey, Washington.

- 16 4. As of February 26, 2019, Mr. Lake has the following permanent physical
17 restrictions proximately caused by his February 19, 2018 industrial injury:
18 never kneeling or crawling; bending/stooping limited to three hours a day;
19 standing up to 1.3 hours a day; walking for up to one hour a day, and
20 alternate standing/walking up to 2.3 hours a day; and sitting no more than
21 2 hours at one time.
- 22 5. As of February 19, 2018, Mr. Lake has been unable to work as a
23 construction laborer, his job of injury, due to conditions proximately
24 caused by the industrial injury of February 19, 2018.
- 25 6. On June 5, 2019, JR Hayes offered Mr. Lake a permanent light-duty
26 position titled Office Assistant to the Safety Director, which would have
27 required Mr. Lake to commute daily from his residence in
28 Aberdeen, Washington to Maple Valley, Washington, a distance of
29 114 miles each way, or 228 miles round-trip. This commute would take
30 from two to two-and-a-half hours one-way, or four to five hours roundtrip
31 for an eight-hour workday. The commute required by the position was not
32 reasonable.
- 33 7. The permanent light-duty job offered by JR Hayes required standing
34 66 percent of the day, squatting or kneeling up to 10 percent of the day,
35 and walking up to 33 percent of the day. These physical requirements of
36 the job exceeded Mr. Lake's permanent restrictions.
- 37 8. JR Hayes' June 5, 2019 light-duty job offer was not in Mr. Lake's labor
38 market in either its geographic location or its physical demands. The
39 employer made no other job offers to Mr. Lake after the June 5, 2019
40 offer.
- 41 9. On some unspecified date before JR Hayes offered Mr. Lake the
42 light-duty position, the Department began providing Mr. Lake with
43 vocational services, including vocational plan development. The services
44 resulted in a vocational retraining plan for Mr. Lake to obtain the
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1 qualifications to become an Architectural Drafter through course-work at
2 South Puget Sound Community College. The Department approved the
3 plan and Mr. Lake has actively and successfully participated in it, earning
4 mostly A-grades.

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6 10. The Department issued 38 orders paying time-loss compensation,
7 vocational services benefits, and related costs, which JR Hayes has
8 appealed here. During all periods covered by the orders, Mr. Lake was
9 involved in either vocational plan development or actively and
10 successfully participating in his approved vocational retraining plan.
11
12 11. JR Hayes did not offer into evidence the factual information that was
13 considered by the Director of the Department in determining that Mr. Lake
14 was eligible for vocational services. Instead, JR Hayes presented
15 evidence it developed after the Director's determination.

16 **CONCLUSIONS OF LAW**

- 17 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties
18 and subject matter in these appeals.
19
20 2. JR Hayes' June 5, 2019 permanent light-duty job offer to Mr. Lake for the
21 position of Office Assistant to the Safety Director, located in
22 Maple Valley, Washington, was not valid within the meaning of
23 RCW 51.32.090(4), because it was not located within Mr. Lake's labor
24 market as that term is defined within WAC 296-19A-010(4).
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26 3. Under Docket No. 19 21691, the Department order dated July 24, 2019,
27 is correct and is affirmed.
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29 4. JR Hayes has not shown that the Director of the Department of Labor and
30 Industries abused his or her discretion in determining that time-loss
31 compensation, vocational benefits, and related costs were payable to
32 Mr. Lake for the periods from June 8, 2019, through July 19, 2019, and
33 from September 28, 2019, through June 18, 2021. Consequently, the
34 payments were properly made to Mr. Lake while he was in vocational plan
35 development or actively and successfully participating in a vocational plan
36 in accordance with *In re Rogelio Robles*, BIIA Dec., 14 21084 (2015);
37 RCW 51.32.096(3)(e); and 51.32.095(5)(a).
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- 5. The 38 Department orders at issue in the 38 other dockets consolidated in these appeals, that paid time-loss compensation, vocational benefits, and related costs to Mr. Lake for the periods from June 8, 2019, through July 19, 2019, and from September 28, 2019, through June 18, 2021, are correct and are affirmed.

Dated: March 23, 2022.

BOARD OF INDUSTRIAL INSURANCE APPEALS



MARK JAFFE, Acting Chairperson



ISABEL A. M. COLE, Member

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1 **Addendum to Decision and Order**

2 **In re Robert E. Lake Jr.**

3 **Docket Nos. 19 19796, 19 21691, 20 10395, 20 11290, 20 15395, 20 15396, 20 15397, 20 15398,**
4 **20 17497, 20 17498, 20 20198, 20 20199, 20 20290, 20 21790, 20 21791, 20 23197, 20 23198,**
5 **20 23290, 20 23899, 20 23990, 20 23991, 20 23992, 21 10396, 21 10397, 21 11794, 21 12693,**
6 **21 12694, 21 12695, 21 12696, 21 14897, 21 16895, 21 16896, 21 16897, 21 16990, 21 16991,**
7 **21 18297, 21 20596, 21 20597 & 21 20690**

8 **Claim No. BC-21771**

9
10 **Appearances**

11 Claimant, Robert E. Lake Jr., by Putnam Lieb Potvin, per Laura A. Fedorko

12 Employer, J R Hayes & Sons, Inc., by Pratt, Day & Stratton, PLLC, per Gibby M. Stratton

13 Retrospective Rating Group, AGC Group Retro #10636, by Pratt, Day & Stratton, PLLC, per
14 Gibby M. Stratton

15 Department of Labor and Industries, by Office of the Attorney General, per Ryan A. Houser
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19 **Petition for Review**

20 As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
21 and decision. The Department and Mr. Lake filed timely Petitions for Review of a Proposed Decision
22 and Order issued on October 25, 2021, in which the industrial appeals judge reversed and remanded
23 the orders of the Department dated July 22, 2019, July 24, 2019, December 24, 2019,
24 January 27, 2020, March 17, 2020, March 18, 2020, March 24, 2020, March 26, 2020, April 7, 2020,
25 April 17, 2020, July 14, 2020, July 15, 2020, July 16, 2020, August 18, 2020, August 25, 2020,
26 August 27, 2020, September 2, 2020, September 1, 2020, September 28, 2020,
27 September 29, 2020, October 13, 2020, October 14, 2020, November 10, 2020, November 12, 2020,
28 January 7, 2021, March 1, 2021, March 3, 2021, March 5, 2021, March 11, 2021, March 18, 2021,
29 April 22, 2021, April 23, 2021, April 26, 2021, June 7, 2021, June 21, 2021, June 25, 2021,
30 September 8, 2021, September 9, 2021, and September 16, 2021.
31

32 JR Hayes & Sons, Inc. filed a response to the Petitions for Review on February 14, 2022.
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34 **Evidentiary Rulings**

35 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no
36 prejudicial error was committed. The rulings are affirmed.
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