

## **Eicher, Todd**

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### **STANDARD OF REVIEW**

#### **Vocational rehabilitation determinations**

Review of Director's decision that a worker is employable, and therefore not eligible for vocational rehabilitation services, is limited to determining whether or not the exercise of the discretionary authority of RCW 51.32.095 has been abused. ...*In re Todd Eicher, BIIA Dec., 88 4477 (1990)* [*Editor's Note: The Board's decision was appealed to superior court under Kitsap County Cause No. 90-2-01106-4.*]; *In re Armando Flores, BIIA Dec., 87 3913 (1989)*

### **VOCATIONAL REHABILITATION**

#### **Cooperation of worker relevant**

In determining whether a worker is likely to benefit from vocational rehabilitation the cooperation of the worker is relevant. Worker who continually fails to appear and cooperate in evaluations designed to assess his physical limitations and need for vocational rehabilitation services is not likely to benefit from such services. ...*In re Todd Eicher, BIIA Dec., 88 4477 (1990)* [*Editor's Note: The Board's decision was appealed to superior court under Kitsap County Cause No. 90-2-01106-4.*]

Scroll down for order.

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

1     **IN RE: TODD V. EICHER**                             )     **DOCKET NO. 88 4477**  
2   )  
3     **CLAIM NO. K-106350**                             )     **DECISION AND ORDER**  
4

5 APPEARANCES:

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7         Claimant, Todd V. Eicher, by  
8         Casey & Casey, per  
9         Carol Casey and Gerald Casey

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11         Employer, State Roofing and Insulation, Inc.,  
12         None

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14         Department of Labor and Industries, by  
15         The Attorney General  
16         Steve LaVergne, Paralegal, and  
17         Thomas L. Anderson, Paul J. Triesch, and Nancy E. Hovis, Assistants  
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19         This is an appeal filed by the claimant, Todd V. Eicher, on November 9, 1988 from a  
20         determination of the Director of the Department of Labor and Industries dated October 26, 1988, which  
21         affirmed a prior determination, dated August 2, 1988, that the claimant would not be provided with  
22         vocational rehabilitation services because the actions of the claimant indicated that he would not likely  
23         benefit from such services. The Director's determination is **AFFIRMED**.  
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**DECISION**

       Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review  
and decision on a timely Petition for Review filed by the Department of Labor and Industries to a  
Proposed Decision and Order issued on September 22, 1989 in which the determination of the  
Director dated October 26, 1988 was reversed and the matter remanded to the Department for  
"reinstatement of action on the merits of this claim, and to take such other action as is in accordance  
with the law and the facts."

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

       The facts presented by this appeal and the evidence presented by the parties are adequately  
set forth in the Proposed Decision and Order, and will only be restated here as necessary to explain  
our decision. In order to determine Mr. Eicher's eligibility for vocational rehabilitation services, at least  
four appointments were scheduled between April and July of 1988 for Mr. Eicher to undergo a physical  
capacities evaluation. Mr. Eicher either cancelled the appointments, failed to appear for the

1 evaluation, or arrived so late that the evaluation could not be performed. Although Mr. Eicher testified  
2 that he experienced transportation and other difficulties in appearing for the scheduled appointments,  
3 he did not advise the Department of his difficulties or request assistance with transportation. The  
4 Director of the Department of Labor and Industries determined that Mr. Eicher would not likely benefit  
5 from vocational services because of his own actions.<sup>1</sup>  
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9 Mr. Eicher argues that this determination was not made pursuant to RCW 51.32.095. Rather,  
10 he argues that the Director's action was in fact a suspension of benefits made pursuant to RCW  
11 51.32.110. He therefore argues that he is entitled to prevail in this appeal if he can demonstrate good  
12 cause, by a preponderance of the evidence, for his failure to appear at the scheduled examinations.  
13 We disagree.  
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16 We do not necessarily subscribe to the Assistant Attorney General's argument that WAC  
17 296-18A-480(4) applies to permit suspension of benefits only after a worker has been found eligible for  
18 vocational services. In fact, the suspension of benefits statute, RCW 51.32.110, does not seem to so  
19 limit its application.  
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23 We also disagree with the Industrial Appeals Judge's contention that, if a worker fails to  
24 cooperate with vocational rehabilitation, the Department has no choice under WAC 296-18A-480(4)  
25 but to suspend benefits. Obviously, under RCW 51.32.110, the Department can choose whether or  
26 not and what sanctions to apply for failure to cooperate.  
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29 Regardless of the interpretation placed on RCW 51.32.110 and WAC 296-18A-480(4),  
30 however, the fact of the matter is that in this case the Department chose not to suspend benefits even  
31 though it might have been justified in doing so. Therein lies the fallacy of the Proposed Decision and  
32 Order's analysis.  
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35 For some reason the Proposed Decision and Order assumed that the Department is  
36 surreptitiously suspending benefits under the guise of making a determination that claimant is  
37 ineligible for vocational rehabilitation services. That characterization is simply not accurate. The  
38 Department has not "suspended" any further action on [this] claim. . . so long as. . . [his]  
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41 <sup>1</sup>The employability determination of August 2, 1988 was not made part of the record. It is  
42 apparently that decision which Mr. Dear referred to in his October 26, 1988 letter when he said: "I  
43 agree with the previous decision." While the precise text of the August 2, 1988 decision is not  
44 before us, the parties agreed to the admission of Exhibit No. 1, which synthesizes that decision as  
45 follows: "Determined you will not be provided with vocational rehabilitation services because your  
46 actions indicate you will not likely benefit from such services."  
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1 noncooperation. . . continues", nor has it "reduce[d], suspend[ed], or den[ied] any compensation for  
2 such period . . . ." RCW 51.32.110. This is eminently clear from the closing paragraph of the  
3 Director's letter which the claimant has appealed, which provides:  
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5           Since your attending physician, Dr. Thayer, reports your condition is  
6 stable, we will proceed with claim closure. Your claims manager will seek  
7 an independent medical evaluation to rate your permanent partial  
8 disability.  
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10 The Department has done nothing more than what it purports to have done. It has looked at all  
11 available information, including the claimant's behavior, to determine whether, in its discretion, Mr.  
12 Eicher should be provided with vocational rehabilitation services.  
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15           In determining whether vocational rehabilitation is both necessary and likely to make the worker  
16 employable at gainful employment, many factors personal to the injured worker must be evaluated.  
17 The injured worker's age, physical limitations, and mental abilities must be considered, as must the  
18 worker's training, education, work history, and transferable skills. Just as important, however, may be  
19 actions of the worker in determining whether the worker is likely to benefit from vocational services. It  
20 is not difficult to conclude that a worker is not likely to benefit from rehabilitation services if the worker  
21 continually fails to appear and cooperate in evaluations designed to assess his physical limitations and  
22 need for vocational rehabilitation services.  
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27           The threshold determination whether vocational rehabilitation services are both necessary and  
28 likely to return a worker to gainful employment is committed to the supervisor's or supervisor's  
29 designee's discretion. RCW 51.32.095. Any dispute from that decision must be filed with the Director.  
30 RCW 51.32.095(6); WAC 296-18A-470. Again, the Director's decision as to whether the claimant is  
31 entitled to vocational services is vested in the Director's sole discretion. It is that discretionary decision  
32 which has been appealed to us.  
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36           In appeals from discretionary acts of the Department, our review is limited to determining  
37 whether the exercise of discretionary authority constitutes an abuse of discretion. In re Gary J.  
38 Manley, BIIA Dec., 66,115 (1986); In re Armando Flores, BIIA Dec., 87 3913 (1989).  
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40           . . . [D]iscretion is a composite of many things, among which are  
41 conclusions drawn from objective criteria; it means a sound judgment  
42 exercised with regard to what is right under the circumstances and without  
43 doing so arbitrarily or capriciously. [citation omitted] Where the decision  
44 or order . . . is a matter of discretion, it will not be disturbed on review  
45 except on a clear showing of abuse of discretion, that is, discretion  
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1 manifestly unreasonable, or exercised on untenable grounds, or for  
2 untenable reasons. [citations omitted]

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4 State ex rel Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). "An abuse of discretion" also  
5 "exists . . . when no reasonable person would take the position adopted by the" decision maker.  
6 Griggs v. Averbeck Realty, 92 Wn.2d 576, 584, 599 P.2d 1289 (1979). In addition, an abuse of  
7 discretion exists when the reasons for the discretionary decision are not stated. State v. Hampton,  
8 107 Wn.2d 403, 728 P.2d1049, (1986).  
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11 Applying these tests, we find no abuse of discretion here. In fact, we completely agree that the  
12 actions of an injured worker may, in a particular case, be the most important factor in determining  
13 whether a worker is likely to benefit from vocational rehabilitation services. Having found no abuse of  
14 discretion, we must affirm the determination of the Director.  
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17 After consideration of the Proposed Decision and Order, the Department's Petition for Review  
18 filed thereto, and a careful review of the entire record before us, we hereby enter the following  
19 Findings of Fact and Conclusions of Law.  
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### 22 **FINDINGS OF FACT**

23  
24 1. On December 22, 1986, the Department of Labor and Industries received  
25 an accident report from the claimant, Todd V. Eicher, describing the  
26 occurrence of an industrial injury to the claimant on November 28, 1986,  
27 during the course of his employment with State Roofing and Insulation,  
28 Inc. On January 5, 1987, the Department issued a determinative order  
29 paying time loss compensation.

30 On August 2, 1988, the Department issued an employability determination  
31 which stated that the claimant would not be provided with vocational  
32 rehabilitation services because his action indicated that he would not likely  
33 benefit from such services. On August 25, 1988, the claimant filed a  
34 protest and request for reconsideration of the Department determination of  
35 August 2, 1988. On October 26, 1988, the Director issued a determination  
36 affirming the determination of August 2, 1988.  
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38 On November 9, 1988, the Board of Industrial Insurance Appeals received  
39 a notice of appeal from the claimant from the determination of the Director  
40 dated October 26, 1988; Docket No. 88 4477 was assigned. On  
41 December 7, 1988, the Board issued an order granting the appeal and  
42 directing that proceedings be held on the issues raised thereby.  
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44 2. On December 22, 1986, Todd V. Eicher was injured when he fell from a  
45 roof while in the course of his employment with State Roofing and  
46 Insulation, Inc.  
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3. Between April and July of 1988, at least four appointments were scheduled for the claimant to undergo a physical capacities evaluation. The claimant did not attend any of the scheduled evaluations on time, having either cancelled the appointments, failed to appear for the evaluations, or arrived so late that the evaluations could not take place.

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**CONCLUSIONS OF LAW**

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1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and the subject matter of this appeal.
  2. The Director of the Department of Labor and Industries did not commit an abuse of discretion in determining that the claimant would not likely benefit from vocational rehabilitation services because of the claimant's own actions. RCW 51.32.095.
  3. The decision by the Director of the Department of Labor and Industries dated October 26, 1988 which determined, pursuant to RCW 51.32.095, that vocational rehabilitation services would not be provided to the claimant because his actions indicate that he will not likely benefit from such services, was not an abuse of discretion and is hereby affirmed.

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It is so ORDERED.

Dated this 23<sup>rd</sup> day of April, 1990.

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BOARD OF INDUSTRIAL INSURANCE APPEALS

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/s/ \_\_\_\_\_  
SARA T. HARMON Chairperson

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/s/ \_\_\_\_\_  
PHILLIP T. BORK Member