

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

1 IN RE: DAVID J. DEJONGE ) DOCKET NO. 12 18304  
2 )  
3 CLAIM NO. AA-79960 ) PROPOSED DECISION AND ORDER

4 INDUSTRIAL APPEALS JUDGE:

5 APPEARANCES:

6 Claimant, David J. DeJonge, by  
7 Williams Wyckoff & Ostrander, PLLC, per  
8 Dane D. Ostrander

9 Department of Labor and Industries, by  
10 The Office of the Attorney General, per  
11 Scott A. Douglas, Assistant

12 The claimant, David J. DeJonge, filed an appeal with the Board of Industrial Insurance  
13 Appeals on July 13, 2012. The claimant appeals an order issued by the Department on June 21,  
14 2012. In this order, the Department suspended the claimant's time-loss compensation benefits  
15 effective June 21, 2012, for his alleged failure to comply with his accountability agreement or plan  
16 interruption due to his own actions, as stated in RCW 51.32.099. The Department order is  
17 **REVERSED and REMANDED.**

**PROCEDURAL AND EVIDENTIARY MATTERS**

18 On September 11, 2012, the parties agreed to include the Jurisdictional History as amended  
19 in the Board's record. That history establishes the Board's jurisdiction in this appeal.

20 A hearing was held in this matter on March 18, 2013. The claimant presented the testimony  
21 of himself, and Vocational Rehabilitation Counselor Karin Larson. The Department presented the  
22 testimony of Raymond North, Vocational Expert.

23 The deposition of Daniel M. Brown, M.D., taken February 26, 2013, was published pursuant  
24 to WAC 263-12-117, and all objections and motions made therein are overruled and denied.  
25 Deposition Exhibit No. 1 is renumbered Exhibit No. 3 and admitted.

26 The deposition of Charles M. Regets, M.D., taken March 1, 2013, was published pursuant to  
27 WAC 263-12-117, and all objections and motions made therein are overruled and denied.

28 The deposition of Robert G. R. Lang, M.D., taken March 13, 2013, was published pursuant  
29 to WAC 263-12-117, and all objections and motions made therein are overruled and denied.  
30 Deposition Exhibit No. 4 is renumbered Exhibit No. 4 and admitted.

31 The deposition of George Harper, M.D., taken April 22, 2013, was published pursuant to  
32 WAC 263-12-117, and all objections and motions made therein are overruled and denied



1 claimant's physical ability to travel at the time by car. The claimant's course load required  
2 substantial computer work, and immediately upon enrolling, the claimant requested that Mr. North  
3 procure a laptop for him, as is customary in such training programs, to complete his assignments  
4 from the comfort of his home. The request was denied. The claimant attempted repeatedly to  
5 contact Mr. North, and Mr. North attempted to contact and meet with the claimant. These attempts  
6 resulted largely in miscommunications and frustration for both men.

7 Mr. North enrolled the claimant in a schedule of classes, all of which were inappropriate for  
8 the claimant. Mr. North did not take the claimant's cognitive difficulties, low educational aptitude,  
9 back or bladder conditions into account when he established the claimant's education plan. The  
10 claimant's teachers concluded that he should have instead been enrolled in classes remedial to the  
11 levels he was taking, all of which were also taught at the college. Merely parking and physically  
12 attending classes required that the claimant to exceed his walking and sitting restrictions. The  
13 claimant attempted to receive assistance from Mr. North with his school related challenges, to no  
14 avail. The claimant then sought assistance from the school's Disability Coordination Office, and  
15 was provided with a disabled parking pass, and an ergonomic workstation and chair in some of his  
16 classes. It was not enough.

17 The claimant's challenges with the academic aspects of school were numerous. The  
18 claimant had no computer skills, could not keyboard, and could not save or print from his computer.  
19 Therefore, his assignments, when he was able to produce them, were not properly published to his  
20 teachers. The claimant was recommended by college advisors to drop his classes, so that he was  
21 not carrying failing grades on his transcript. The claimant followed this recommendation, and in late  
22 April 2012 stopped attending his classes, because they exceeded his physical and mental abilities.

23 Ms. Karin Larson is a certified vocational rehabilitation counselor, who met with the claimant,  
24 and reviewed his file at the claimant's counselor's request. Ms. Larson found Mr. North's plan to be  
25 wholly inappropriate for the claimant, based on his cognitive difficulties, Attention Deficit  
26 Hyperactivity Disorder, and physical conditions and limitations, due to both fixed and unfixed  
27 medical issues, all resulting from his fall at work. Ms. Larson opined that the claimant had good  
28 cause for not completing his educational plan. Ms. Larson also opined that even if the claimant had  
29 successfully completed the plan, the claimant would not have been employable in his labor market,  
30 due to his physical restrictions from work related injuries, and the specifics of his labor market.

1 Dr. Daniel M. Brown is an urologist, certified by his peers. Dr. Brown first saw the claimant  
2 on March 31, 2011. Thereafter he diagnosed the claimant with NGB, related to his work accident.  
3 Dr. Brown opined that the claimant's NGB related symptoms include: urinary frequency, nocturia,  
4 fatigue and difficulty concentrating, inability to empty his bladder, mental stress and anguish, and  
5 sleep deprivation. Dr. Brown next saw the claimant in July 2012, after the Department accepted the  
6 NGB condition on June 8, 2012. Dr. Brown opined with medical certainty that at the time  
7 Mr. DeJonge was attempting to attend classes pursuant to his educational plan, the claimant's NGB  
8 needed treatment and was unstable.

9 Dr. Charles Regets, psychologist, performed neurological tests on the claimant. Dr. Regets  
10 is also a certified vocational counselor. Dr. Regets opined that the claimant suffers from stress,  
11 anxiety and concentration difficulties as the result of his NGB. He opined further that the claimant  
12 suffers from moderate to severe cognitive challenges which made the training program  
13 unsuccessful at its onset. All of Dr. Regets's opinions were made with a reasonable degree of  
14 medical certainty.

15 Robert Lang, MD, is a neurologist, certified by his peers. He examined and treated the  
16 claimant for his lumbar condition, caused by his 18-foot fall at work. Dr. Lang has an active surgical  
17 practice. He diagnosed the claimant with L3-4 disc protrusion with radiculopathy, causally  
18 connected to his fall. On January 10, 2012, Dr. Lang placed significant restrictions on the  
19 claimant's ability to sit, stand, and carry weight. Dr. Lang's opinions were all made with reasonable  
20 medical certainty. The training program promoted by Mr. North exceeded the restrictions  
21 established by Dr. Lang. Mr. North did not take into account the claimant's lumbar condition in any  
22 way in creating his education plan.

23 Dr. George Harper is an orthopedic surgeon, who examined the claimant at the request of  
24 the Department on January 16, 2010. Despite all evidence supporting a contrary finding,  
25 Dr. Harper opined that the claimant's lumbar changes were 100 percent related to conditions other  
26 than, and unrelated to his 18-foot fall at work. Dr. Harper's opinion was internally and externally  
27 inconsistent, incredible, and unworthy of belief.

1 DISCUSSION

2 **Suspension of Benefits due to Noncooperation**

3 In a suspension of benefits case, the injured worker has the burden of proof. *In re Gail*  
4 *Hanson*, BIIA Dec., 04 14071 (2005). The Department's authority to suspend benefits is found in  
5 RCW 51.32.110, which provides in relevant part:

6 If the worker . . . does not cooperate in reasonable efforts at such  
7 [vocational] rehabilitation, the department . . . may suspend any further  
8 action on any claim of such worker **so long as such refusal,**  
9 **obstruction, noncooperation, or practice continues** and reduce,  
10 suspend, or deny any compensation for such period:

11 PROVIDED, That the department or the self-insurer shall not suspend  
12 any further action on any claim of a worker or reduce, suspend, or deny  
13 any compensation **if a worker has good cause** for refusing to submit to  
14 or to obstruct any examination, evaluation, treatment or practice  
15 requested by the department or required under this section.

16 RCW 51.32.110(2) (Emphasis added.)

17 Pursuant to its statutory authority, the Department adopted administrative rules for the  
18 suspension of benefits for noncooperation. WAC 296-14-410(2) defines noncooperation as:

19 [B]ehavior by the worker (or worker's representative) **which obstructs and/or**  
20 **delays** the department or self-insurer from reaching a timely resolution of the  
21 claim.

22 2(a) Noncooperation can include any one of the following:

- 23 (i) Not attending or cooperating with medical examinations or vocational  
24 evaluations requested by the department or self-insurer.
- 25 (ii) Failure to keep scheduled appointments or evaluations with attending  
26 physician or vocational counselor.
- 27 (iii) Engaging in unsanitary or harmful actions that jeopardize or slow  
28 recovery.
- 29 (iv) Not accepting medical and/or surgical treatment that is considered  
30 reasonably essential for recovery from the industrial injury or  
31 occupational disease.

32 (Emphasis added.)

33 In *In re John Galen*, BIIA Dec., 03 18491 (2004), the Board addressed the issue of whether  
34 the Department correctly suspended an injured worker's benefits for failure to quit smoking, making  
35 him ineligible for a recommended surgery. The Board began its analysis by reviewing the above  
36 definition of noncooperation found in WAC 296-14-410(2), "[n]oncooperation is, by definition,  
37 behavior that obstructs or delays the administration of the claim." The Board then expanded on the

1 definition in the rule, "[t]he behavior is deliberate and calculated to obstruct. Behavior that is not  
2 designed or intended to obstruct or delay is not noncooperation." *Galen* at 5.

3 The Board also reiterated that because of the extreme financial stress that an injured worker  
4 and his or her family can suffer when there is a suspension of benefits, "orders suspending benefits  
5 should not be issued without a careful review of the facts and without giving the worker an  
6 opportunity to address the alleged noncooperation." *Galen* at 4 (quoting *In re Johan Petry*, BIIA  
7 Dec., 92 0389 (1993)). Ultimately, the Board determined in *Galen* that Mr. Galen's failure to end his  
8 addiction did not constitute noncooperation because he did not refuse treatment or deliberately fail  
9 to comply with the step he needed to take before he could undergo the proper surgery.

10 In Mr. DeJonge's case, there were a number of things that caused him to miss his classes  
11 beginning in April 2012. Mr. DeJonge needed to stop multiple times during his commute to school  
12 to attempt to urinate due to his NGB. He also needed to leave class multiple times for the same  
13 reason. Mr. DeJonge's back pain limited where he could park and comfortably walk to class, and  
14 also limited his sitting ability in class. Mr. DeJonge needed a laptop, but the Department refused to  
15 provide him with one. In addition, all of his classes exceeded his cognitive abilities and skills.

16 Under *In re Galen*, an injured worker's actions are not "noncooperative" unless the behavior  
17 is deliberate and calculated to obstruct. The record fails to show any deliberate or calculated effort  
18 on the claimant's part to fail at school. He complied with the plan to the best of his abilities. In  
19 addition, his wife continued to keep in contact with Mr. North by email, informing him that he  
20 needed a laptop and was having problems with his back and bladder.

21 Even if Mr. DeJonge was noncooperative, the Department order suspending benefits can be  
22 reversed if Mr. DeJonge proves there is "good cause" for his actions that the Department has  
23 determined are noncooperative. *In re Gail Hanson*, BIIA Dec., 04 14071 (2005);  
24 RCW 51.32.110(2). The Board has previously held that proof of good cause is case specific.  
25 *Hanson* at 3. For example, in *In re Joey A. Hancock*, Dckt. Nos. 09 24841 & 09 24842 (January 24,  
26 2011), the Board held that Mr. Hancock had good cause for failure to cooperate with vocational  
27 services because of his major depression, which was proximately caused, in part, by his industrial  
28 injury, which prevented him from cooperating.

29 Similar to Mr. Hancock, the claimant suffered from continuing back and bladder issues  
30 requiring treatment. These conditions were not fixed and stable at the time of the plan, and  
31 Mr. North knew it. In conclusion, I find that Mr. DeJonge had good cause for failing to attend  
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1 classes during spring term 2012. Therefore, the Department order suspending his time-loss  
2 compensation benefits is reversed and remanded to the Department to pay time-loss compensation  
3 benefits.

4 In addition, as long as the rehabilitation order is in effect, and the worker is in compliance  
5 with the terms of the retraining agreement, time-loss compensation as authorized by  
6 RCW 51.32.095(3) is due. *In re Judith F. Evans*, Docket. Nos. 07 23750 & 07 25848  
7 (March 5, 2009). As of June 21, 2012, Mr. DeJonge was entitled to time-loss compensation as a  
8 benefit of vocational rehabilitation services pursuant to RCW 51.32.095, therefore the Department  
9 is also ordered to pay Mr. DeJonge time-loss compensation benefits for the period at issue.

10 **FINDINGS OF FACT**

- 11 1. On September 11, 2012, an industrial appeals judge certified that the  
12 parties agreed to include the Jurisdictional History in the Board record,  
13 as amended, solely for jurisdictional purposes.
- 14 2. On October 13, 2006, David J. DeJonge was working for a construction  
15 company as a construction laborer, when he fell 18 feet from a ladder,  
16 sustaining multiple hernias, left shoulder injuries, testicular issues, low  
17 back pain with radiculopathy and neurogenic bladder condition, for  
18 which he had surgery.
- 19 3. On June 8, 2012, the Department accepted the claimant's neurogenic  
20 bladder (NGB) condition as part of Mr. DeJonge 's claim.
- 21 4. In 2011, the Department determined that Mr. DeJonge could not return  
22 to the workforce without retraining. As a result, the Department  
23 approved a vocational retraining plan for Mr. DeJonge with a goal of  
24 becoming a Construction Project Manager and obtaining a two-year  
25 Associate degree. Mr. DeJonge began the plan at the start of spring  
26 term 2012.
- 27 5. On or about April 2012, Mr. DeJonge was unable to attend classes as a  
28 result of his industrial injury due to his low back condition, NGB which  
29 had been temporarily aggravated, as well as preexisting cognitive  
30 challenges, and Attention Deficit Hyperactivity Disorder (ADHD).

31 **CONCLUSIONS OF LAW**

- 32 1. The Board of Industrial Insurance Appeals has jurisdiction over the  
parties and subject matter in this appeal.
2. David J. DeJonge had good cause within the meaning of  
RCW 51.32.110 for failing to continue with his vocational retraining plan.

- 1 3. The Department order dated June 21, 2012, is incorrect and is reversed.  
2 This matter is remanded to the Department with directions to reinstate  
3 Mr. DeJonge's time-loss compensation benefits effective June 21, 2012.

4 Dated: JUN 26 2013

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7 **BRENDA M. BONO**  
8 Industrial Appeals Judge  
9 Board of Industrial Insurance Appeals  
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