NO. 92386-8



**SUPREME COURT**
**OF THE STATE OF WASHINGTON**

PRENTISS B. DAVIS,

Petitioner,

v.

THE BOEING COMPANY,

Respondent.

# THE BOEING COMPANY ANSWER TO PETITION FOR REVIEW

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## II. STATEMENT OF THE CASE

This appeal arises out of an industrial injury sustained by Davis on February 5, 2007 during the course of his employment with the Boeing Company ("Boeing") CP 519. A claim for industrial insurance benefits was allowed and benefits paid pursuant to the industrial insurance act per RCW Title 51. CP 580. On October 12, 2011, the Department of Labor and Industries ("Department") issued an order which stated: time loss compensation benefits are ended as paid through August 1, 2011; treatment is no longer necessary and there is no permanent partial disability; the self-insured Boeing will not pay for medical services or treatment after the date of closure; the self-insured Boeing is not


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responsible for Cerebral Palsy with spasticity, multi-level lumbar degenerative disk disease, and severe crush injury to the left arm, and hand; and closed the claim. CP 575.

Mr. Davis, through his attorney at the time, filed an appeal from the Department order with the Board of Industrial Insurance Appeals ("Board"). CP 570. The Board assigned docket no. 11 23381. CP 577. The case proceeded to administrative hearing, and both parties presented evidence. CP 560-568. Industrial Appeals Judge Harada issued a Proposed Decision and Order ("PD&O") on May 28, 2013 which reversed the October 12, 2011 Department order. CP 560-568. The PD&O stated that: Davis' low back condition was fixed and stable as of October 12, 2011 and that he was not entitled to further treatment; Davis was not a temporary totally disabled worker from August 2, 2011 through October 12, 2011; Davis was not a permanently totally disabled worker as of October 12, 2011; Davis had a permanent partial disability proximately caused by the industrial injury of February 5, 2007, best described as a Category 3, less a pre-existing Category 2, as described under WAC 296-20-280. CP 567-568.



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Boeing filed a Petition for Review from the PD&O. CP 549-554. It was the position of Boeing the industrial injury did not proximately cause a permanent partial impairment greater than Category 1 for lumbar impairment under WAC 296-20-280. CP 549. Boeing also took the position that Davis' lumbar degenerative joint disease, cerebral palsy with spasticity and severe crush injury to the left arm, wrist and hand were not caused or aggravated by the industrial injury. CP 549.

Davis filed a Petition for Review from the PD&O taking the position that the Proposed Decision and Order should be reversed. CP 537. Specifically, Davis' attorney argued the industrial injury prevented Davis from performing reasonably continuous gainful employment from August 2, 2011 through October 12, 2011, and as of October 12, 2011, Davis was totally permanently disabled. CP 539-540.

A Decision and Order was issued by the Board on July 29, 2013, which stated that the Proposed Decision and Order was supported by the preponderance of evidence and was correct as a matter of law. CP 518-520.

Both Boeing and Davis filed appeals from the July 29, 2013 Board order in the Snohomish County Superior Court. CP 777, 522. The appeals were consolidated for trial under docket 13-2-07139-6. CP 527. The


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matter came on regularly for trial on the 1st, 2nd, and 3rd days of April, 2014, before the Honorable David Kurtz. CP 523. The Defendant, Prentiss Davis, represented himself, and the Plaintiff, Boeing, was represented by its attorney, Gary D. Keehn, of Keehn Kunkler, PLLC. CP 523.

A jury was impaneled and sworn to try the case, and evidence in the form of the Certified Appeal Board Record was read to the jury. CP 523. Following the conclusion of the reading of the testimony contained in the Certified Appeal Board Record, the Court instructed the jury, argument of counsel and Mr. Davis were made, and the jury retired to consider its verdict. CP 523-524. Thereafter the jury returned its verdict. CP 524-525. That is, the jury found (1) the Board was correct in deciding that from August 2, 2011 through October 12, 2011, Mr. Davis did not have a "temporary total disability" proximately caused by the industrial injury; (2) the Board was correct in deciding that as of October 12, 2011, Mr. Davis did not have a "permanent total disability" proximately caused by the industrial injury; and (3) the Board was correct in deciding that on October 12, 2011, Mr. Davis' "permanent partial disability" proximately caused by the industrial injury was equal to Category 3, with a preexisting Category 2. A judgment and order based on the jury verdict was signed by Judge Kurtz on April 10, 2014 and filed the same day. CP 523-525.



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Davis petitioned for direct review of the trial court's order by the Washington Supreme Court. CP 7-11. On February 4, 2015, the Washington Supreme Court issued an order transferring the matter to Division One of the Court of Appeals. On March 19, 2015, the Court of Appeals issued a letter to the parties advising the case had been transferred to the Court of Appeals and assigned Case No. 73103-1-I. The case was set before Judges Dwyer, Lau and Schindler for consideration without oral argument on September 21, 2015. On September 28, 2015, the Court of Appeals affirmed the Snohomish County Superior Court judgment and order.

David now petitions for discretionary review of the Court of Appeals September 28, 2015 decision by the Washington Supreme Court.

## III. ARGUMENT

### 1. The Supreme Court should deny Davis's petition for discretionary review because Davis seeks relief beyond the jurisdiction the Supreme Court

The Industrial Insurance Act provides an exclusive remedy for injured workers. Except as provided in RCW 51.52.110, all original jurisdiction of the courts of this state for workers' injuries is abolished by the Industrial Insurance Act. RCW 51.52.110. *Spokane v. Dep't of Labor & Indus.*, 34 Wn.App 581 (1983). Original jurisdiction over matters arising



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under the Industrial Insurance Act resides with the Department of Labor and Industries. *Lenk v. Dep't of Labor & Indus.*, 3 Wn. App. 977, 982, 985, 478 P.2d 761 (1970); *Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 171, 937 P.2d 565(1997) (the Act provides that both the Board and the superior court serve a purely appellate function.). The Department of Labor and Industries "administers the Industrial Insurance Act and acts as the trustee of the funds collected pursuant to the Act. It is the Department's duty to determine what benefits are to be provided to a worker under the Industrial Insurance Act and to issue all orders relating to claims under the Act." WPI 155.04

The Superior Court's jurisdiction over matters arising under the Industrial Insurance Act is limited by the terms of the Act. RCW 51.04.010; RCW 51.52.110 and .115. The Superior Court is an appellate court with respect to appeals from the Board and is bound by the same constraints as apply to all appellate courts. *Boeing Co. v. Heidy*, 147 Wn.2d 78, 87, 51 P.3d 793 (2002). Superior Court review of a Decision and Order of the Board of Industrial Insurance Appeals was de novo on the Certified Appeal Board Record. Review was limited to those issues encompassed by the appeal to the Board, or properly included in its proceedings, and the evidence presented to the Board. RCW 51.52.115; *Shufeldt v. Dep't of*



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*Labor & Indus.*, 57 Wn.2d 758, 760, 359 P.2d 495 (1961); *Sepich v. Dep't of Labor & Indus.*, 75 Wn.2d 312, 316, 450 P.2d 940 (1969) ("The trial court is not permitted to receive evidence or testimony other than, or in addition to, that offered before the Board or included in the record filed by the Board.").

Davis raises several issues outside of the workers' compensation claim and that cannot be adjudicated by the Department, Board, or the Superior Court. Those issues include: whether Boeing reclassified the Petitioner's job; whether the reclassification was illegal; whether there has been a violation of local, state, or federal law or the U.S. Constitution; whether Davis was forced to perform certain activities as a result of his job; whether Davis was denied income or benefits; and whether Davis has been subjected to employment discrimination.

The Department was limited to determining what workers' compensation benefits Davis was entitled under the Industrial Insurance Act. The Board was limited to a review of the Department's decision. The Superior Court was limited to review of the Board's decision. Davis' petition asks for relief beyond the issues raised in the industrial insurance litigation.



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This case was limited to determining benefits in a workers' compensation claim; none of the aforementioned issues are within the Supreme Court's scope of review.

**2. The Supreme Court should deny Davis's petition for discretionary review because Davis does not raise issues that merit discretionary review**

Mr. Davis is seeking review of the Court of Appeals decision, which terminated review. Pursuant to RAP 12.3, a "decision terminating review" is:

> An opinion, order, or judgment of the appellate court or ruling of a commissioner or clerk of an appellate judge if it:
> (1) Is filed after review is accepted by the appellate court filing the decision; and
> (2) Terminates review unconditionally; and
> (3) Is (i) a decision on the merits or (ii) a decision by the judges dismissing review or (iii) a ruling by a commissioner or clerk dismissing review, or (iv) an order refusing the modify a ruling by the commissioner or clerk dismissing review.

The Court of Appeals September 28, 2015 decision is a decision terminating review and was a decision on the merits. Pursuant to RAP 13.4(a)(1), a party may seek discretionary review by the Supreme Court of a Court of Appeals decision terminating review. The Supreme Court has discretion when deciding whether to accept Mr. Davis' petition for review. A petition for review will be accepted by the Supreme Court only as outlined in RAP 13.4(b). To wit,


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(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
(2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
(3) If a significant question of law under the Constitution of the State of Washington or the United States is involved; or
(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court

It is the employer's position the case on appeal does not fit within the parameters on RAP 13.4(b). The decision of the Court of Appeals is not in conflict with a decision of the Supreme Court or a decision of the Court of Appeals. A significant question of law under the Constitution of the State of Washington or the United States is not involved. Claimant's petition for review also does not involve an issue of substantial public interest that should be determined by the Supreme Court. Our courts consider certain factors in determining the degree of public interest involved "the public or private nature of the question presented, the desirability of an authoritative determination for the future guidance of public officers, and the likelihood of future recurrence of this question." *Sorenson v. City of Bellingham,* 80 Wn. 2d 547, 558, 496 P.2d 512 (1972) (quoting *People ex rel. Wallace v. Labrenz*, 411 Ill. 618, 622, 104 N.E.2d 769 (1952)). None of these apply. Because the appeal does not fall within any of the categories meriting discretionary review, Davis' petition for review should be denied.



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### 3. The Supreme Court should deny Davis's petition for discretionary review because there has been no error of law; the jury instructions are correct statements of law; and the jury instructions are supported by the evidence contained in Certified Appeal Board Record

The Supreme Court should deny Davis's petition for discretionary review because there has been no error of law. Davis argues the jury instructions were improper because he was unaware of the definition of permanent partial disability; he was unaware the definition was presented to the jury; he is unable to locate the definition of permanent partial disability and categories of impairment; the jury instructions are misleading; and the impairment ratings were incorrect. However, pursuant to Rule CrR 6.15(a), Boeing proposed jury instructions were served and filed when the case was called for trial by serving one copy upon Davis, by filing the original with the clerk, and by delivering an original to the trial judge. Davis did not submit any instructions.

Copies of Court's instructions were given to both sides. RP 40. The Court instructed the parties to "scrutinize all the instructions carefully." RP 36. The court went into recess to give the parties time to carefully review the instruction. RP 40. After the recess, the Court invited comments. RP 40. Specifically, the Court addressed Davis directly and invited general comments about the Court's proposed instructions. RP 45.



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After working with the parties, the Superior Court made modifications to instruction number 11. The Superior Court also made modifications to the special verdict form, which also helped clarify instruction number 10. RP 3-4 9:53am. The Court afforded Davis an opportunity to object to the Court's instructions before instructing the jury pursuant to Rule CrR 6.15(c). The Court invited comments from Davis. Davis had none. The Court also asked whether Davis had any exceptions either to instructions given or not given, and Davis said, "No. I accept as it is." Davis took no exceptions to jury instructions. As such, Davis may not now object to certain instructions. As noted by the Court of Appeals in its decision:

> Jury instructions cannot be challenged for the first time on appeal. *Simpson Timber Co. v. Wentworth,* 96 Wn. App. 731, 740, 981 P.2d 878 (1999); *accord Couch v. Mine Safety Appliances Co.,* 107 Wn. 2d 232, 244-45, 728 P.2d 585 (1986). The same applies to special verdict forms. *Raum v. City of Bellevue,* 171 Wn. App. 124, 144-145, 286 P.3d 695 (2012).

The Supreme Court should deny Davis's petition for discretionary review because even if an exception was taken, the jury instructions are correct statements of law. Instruction No. 13 (CP 101), defining Permanent Total Disability, is taken from WPI 155.07. WPI 155.07 is a correct statement of law as supported by RCW 51.08.160, which defines



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permanent total disability as "loss of both legs, or arms, or one leg and one arm, total loss of eyesight, paralysis or other condition permanently incapacitating the worker from performing any work at any gainful occupation.

WPI 155.07 is also a correct statement of law as supported by case law. See *Allen v. Dep't of Labor and Indus.*, 30 Wn.App. 693, 638 P.2d 104 (1981) (When a worker does not have any of the disabilities described by statute but claims permanent and total disability, the question becomes whether the worker is permanently incapacitated "from performing any work at any gainful occupation" as a result of the injury). *Kuhnle v. Dep't of Labor and Indus.*, 12 Wn.2d 191, 120 P.2d 1003 (1942) (The worker may still be able to perform minor tasks even if the worker is permanently incapacitated from performing any work at any gainful occupation. The purpose of the statute is to insure against loss of wage earning capacity.) Also see *Spring v. Dep't of Labor and Indus.*, 96 Wn.2d 914, 640 P.2d 1 (1982); *Nash v. Dep't of Labor and Indus.*, 1 Wn.App. 705, 462 P.2d 988 (1969); *Leeper v. Dep't of Labor and Indus.*, 123 Wn.2d 803, 872 P.2d 507 (1994) ("or obtain" is properly included in the instruction.)

Instruction No. 14 (CP 102), defining Permanent Partial Disability with categories of impairment, is based on WPI 155.08. WPI 155.08 is a



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correct statement of law as supported by RCW 51.32.080, outlining compensation values for permanent partial disabilities as specified therein and WAC 296-20-220. WAC 296-20-19000 defined permanent partial disability as "any anatomic or functional abnormality or loss after maximum medical improvement has been achieved."

WPI 155.08 is also a correct statement of law as supported by case law. Permanent partial disability contemplates the worker's loss of bodily function whereas permanent total disability contemplates loss of earning capacity as a result of the industrial injury or exposure. See *Franks v. Dep't of Labor and Indus.*, 35 Wn.2d 763, 215 P.2d 416 (1950); *Fochtman v. Dep't of Labor and Indus.*, 7 Wn.App. 286, 499 P.2d 255 (1972); *Cayce v. Dep't of Labor and Indus.*, 2 Wn.App. 315, 467 P.2d 879 (1970); *Brannan v. Dep't of Labor and Indus.*, 104 Wn.2d 55, 700 P.2d 1139 (1985), and *Vliet v. Dep't of Labor and Indus.*, 30 Wn.App. 709, 638 P.2d 112 (1981) (upholding regulations establishing categorical rating system.) Furthermore, WPI 155.08 advises to insert applicable WAC categories of impairment. Instruction No. 14 sets out verbatim the categories of permanent dorso-lumbar and lumbosacral impairments per WAC 296-20-280 (1)-(3)



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The Supreme Court should deny Davis's petition for discretionary review because the jury instructions are supported by the evidence contained in Certified Appeal Board Record. Davis contends the instructions regarding the permanent partial disability and category ratings are incorrect. However, Dr. Stump performed an independent medical examination (IME) on July 5, 2011. CP 731. An IME is defined as an "objective medical-legal examination requested . . . to establish medical findings, opinions, and conclusions about a worker's physical condition." WAC 296-23-302. Dr. Stump opined "the industrial injury did not result in any impairment to the lumbar spine. Although he did have impairment, it would be based on his degenerative disc disease, which predated and was not affected by the injury under review." CP 744-745.

At the request of Davis's attorney, Dr. Braun performed an IME on July 9, 2012. CP 694. Dr. Braun opined Davis's permanent partial disability was equal to a Category III less a pre-existing Category II and explained how he arrived at that rating using a form produced by the Department titled, "Doctor's Worksheet for Rating Dorso-Lumbar & Lumbo-Sacral Impairment." CP 702-704. Dr. Daly also performed an IME on March 19, 2010 and March 10, 2011. CP 758. Dr. Daly opined "his



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impairment in the lower back remained. . . a pre-existent Category 2, but a Category 1 referable to the alleged twisting episode." CP 769.

Dr. Stump, Dr. Braun, and Dr. Daly provided testimony regarding Davis's permanent partial impairment and the extent of his impairment pursuant to the categorical rating. The medical testimony provides sufficient evidence to support the instructions.

## IV. CONCLUSION

Davis does not raise issues that merit discretionary review. In addition, Davis's petition for discretionary review raises several issues outside the Superior Court's actions and judgment. This case was limited to determining benefits in a workers' compensation claim; none of the issues outside of worker compensation benefits are within the Supreme Court's scope of review.

There has been no error of law in this matter. The Boeing Company submitted jury instructions to the trial court. Davis did not submit any instructions. Copies of instructions were given to both sides. The parties were given ample time to review the jury instructions. The court invited comments and worked with the parties on the jury instructions. The court ultimately made modifications to address the parties' concerns. Davis was given the opportunity to object to the jury



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instructions. He took no exceptions and may not now object to certain instructions.

Finally, the jury instructions are correct statements of law as supported by the case law, statutes and pattern jury instructions. The jury instructions are supported by the credible evidence contained in Certified Appeal Board Record as evidenced by the testimony of Dr. Stump, Dr. Daly and Dr. Braun. For all these reasons, Davis's petition for discretionary review should be denied.

RESPECTFULLY SUBMITTED THIS

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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|---|---|---|
| Prentiss B. Davis | ) | |
| | ) | Snohomish County Superior |
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| | ) | |
| | ) | Supreme Court No. 92386-8 |
| | ) | |
| | ) | Certificate of Service |
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| | ) | |
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Attached please find the Respondent's Answer to Petition for Review regarding Prentiss Davis v. The Boeing Company, Cause No. 92386-8 for filing. Thank you for your consideration.

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