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No. ~~64141-1~~

WASHINGTON COURT OF APPEALS, DIVISION 1

HERMAN BATES,

Respondent/Plaintiff,

v.

**DEPARTMENT OF LABOR AND INDUSTRIES OF
THE STATE OF WASHINGTON AND CLARK
HEAVY CONSTRUCTION, INC.,**

Appellant/Defendant

APPELLANT'S BRIEF

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INTRODUCTION

The defendant in this Industrial Insurance case appeals a King County Superior Court decision entitling plaintiff to temporary total disability benefits from December 8, 1999 through October 17, 2006. Plaintiff was terminated for failing a drug test and has occasionally been employed. The trial court excluded key evidence and improperly shifted the burden of proof to the defendants.

Plaintiff contends he is entitled to ongoing temporary disability benefits. However, it is well established that injured workers who are terminated by the employer at injury are not entitled to such benefits. Central to the determination of entitlement to temporary total disability benefits is plaintiff's employment status with the defendant. The trial court misapplied the legal standard surrounding post-injury termination and subsequent entitlement to time loss benefits and as such, the employer was deprived the opportunity to present evidence probative of the issue. In addition, the court erred in precluding the defendant from submitting a corresponding jury instruction on this issue.

Likewise, a workers' ability to work depends on all physical and mental conditions that interfere with a return to work. Again, the trial

court abused its discretion and precluded defendant from presenting evidence probative of plaintiff's ability to work.

Finally, the judge gave a jury instruction pertinent to permanent disability when the issue in the present case is temporary disability. The jury instruction included the incorrect legal standard on temporary disability. Submission of the instruction changed the standard, misled the jury, and prejudiced the employer

ASSIGNMENTS OF ERROR

A. First Assignment of Error

The trial court erred in refusing to admit testimony regarding plaintiff's post-injury termination.

B. Second Assignment of Error

The trial court erred in refusing to submit Defendant's Proposed Jury Instruction No. 14 and corresponding Defendant's Proposed Special Verdict Form Question 2 to the jury.

C. Third Assignment of Error

The trial court erred in submitting Plaintiff's Proposed Instruction No. 11 to the jury.

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D. Fourth Assignment of Error

The trial court erred in excluding the testimony John Hamm, MD.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**A. Issues Raised By the First Assignment of Error**

Before the Board of Industrial Appeals, defendant presented the testimony of Al Thaxton and portions of plaintiff's testimony regarding post-injury termination. Mr. Thaxton handled the workers' compensation issues for defendant at the time plaintiff was injured. He testified that defendant had a post-injury drug testing policy in place at the time of injury and that there was a light duty job policy to accommodate injured workers. Mr. Thaxton testified plaintiff was terminated after the injury due to testing positive for cocaine. His testimony was excluded in its entirety.

Likewise, the court excluded portions of plaintiff's testimony establishing he was terminated for failing a post-injury drug screening. Did the trial court err by excluding the testimony of Al Thaxton and portions of plaintiff's testimony surrounding post-injury termination?

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B. Issues Raised By the Second Assignment of Error

Defendant's Proposed Jury Instruction No. 14 reads: "A worker who is terminated for reasons unrelated to the industrial injury does not have a right to reinstatement of temporary total disability benefits." Likewise, Defendant's Proposed Special Verdict Form Question 2 corresponds with the aforementioned proposed jury instruction and reads: "Was Mr. Bates terminated from his employment with Clark Heavy Construction for reasons unrelated to the injury?" Under certain circumstances, a injured-worker is not entitled to receive temporary total disability benefits when he has been terminated for reasons unrelated to the injury. Because these instructions were refused, the jury did not have the opportunity to consider all applicable laws. Did the court err in refusing Defendant's Proposed Jury Instruction No. 14 and Defendant's Proposed Special Verdict Form Question 2?

C. Issues Raised By the Third Assignment of Error

Plaintiff's Proposed Jury Instruction No. 11 reads: "If, as a result of the industrial injury, a worker is able to perform only odd jobs or special work not generally available, then the worker is totally temporarily

disabled, unless the employer proves by a preponderance of evidence that odd jobs or special work that he or she can perform is available to the worker on a reasonably continuous basis.” The jury instruction is based on Washington Pattern Instruction 155.07.01. Plaintiff modified the instruction to include the term “temporarily” while the title of the instruction reads “Permanent Total Disability” and therefore relates to such. Permanent Total Disability and Temporary Total Disability under Title 51 are distinct concepts involving different inquiries. The issue was not whether plaintiff was permanently totally disabled, but rather whether plaintiff was entitled to temporary total disability benefits. Did the court err in offering Jury Instruction No. 11?

D. Issues Raised By the Fourth Assignment of Error

Before the Board of Industrial Insurance Appeals, defendant presented the testimony of Dr. John Hamm. Dr. Hamm is a psychiatrist who testified regarding plaintiff’s ability to work from a psychological standpoint and other causative factors in plaintiff’s mental health condition that impacted his ability to return to gainful employment. The psychiatric conditions are not covered under the workers’ compensation claim. Entitlement to temporary total disability benefits depends on whether

plaintiff could return to gainful employment. Did the court err in refusing to admit the testimony of Dr. John Hamm?

STATEMENT OF THE CASE

Herman Bates (“plaintiff”) sustained an industrial injury on December 8, 1998, while carrying a car door. February 9, 2009 RP 104, 105. He experienced a sudden onset of low back pain and sought medical treatment. Feb. 9, 2009 RP 105.

A. Procedural Posture

Mr. Bates’ industrial injury was allowed and medical treatment authorized. CP 60. The claim closed on March 9, 1999 with medical benefits only. CP 60. On November 21, 2000, the Department of Labor and Industries reopened the claim for authorized treatment and closed the claim July 25, 2003. CP 60. Plaintiff was awarded no permanent partial impairment, and time loss compensation was denied from February 2000 through the date of the order based on the lack of objective findings. CP 61. In its closing order, the Department segregated and denied a claim for a psychiatric condition as unrelated to the March 1998 injury. CP 61. Plaintiff protested the order, and on May 13, 2004, the Department

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cancelled its July 25, 2003 order and held the claim open for authorized treatment. CP 61.

The Department issued an order October 17, 2006, denying time loss compensation benefits from December 8, 1999 through October 17, 2006 due to the absence of objective medical findings. CP 61. Plaintiff timely filed a Notice of Appeal, and the Board of Industrial Insurance Appeals granted the appeal December 15, 2006. CP 61. The issue before the Board was whether plaintiff was totally temporarily disabled from December 8, 1999 to October 17, 2006. CP 63.

The parties presented their respective cases before Industrial Appeals Judge Carol Molchior through lay testimony and medical expert perpetuation depositions. CP 67-71. Plaintiff submitted the testimony of Peter Buckley, MD, Kelly McCullough, MD, and Arlene Scott. Feb. 9, 2009 RP 130-164; Feb. 10, 2009 RP 13-55. Plaintiff also testified on his own behalf. Feb. 9, 2009 RP 103-130. The employer rested its case upon the publication of testimony from Jean Millican, MD, William Boettcher, MD, Scott Linder, MD, John Hamm, MD, Michael Richards, VRC, and Al Thaxton. Feb. 10, 2009 RP 70-193.

The Industrial Appeals Judge, in her April 2, 2008 Proposed Decision and Order, sustained plaintiff's objection to the testimony of Dr. John Hamm and Al Thaxton. CP 67, 68. No explanation was provided for the ruling. CP 67, 68. The Superior Court upheld the Board's evidentiary ruling. Feb. 9, 2009 RP 21; Feb. 10, 2009 RP 68.

The Board found plaintiff not temporarily totally disabled during the relevant time periods and plaintiff appealed to Superior Court. CP 1-2, 73. A twelve-member King County Superior Court jury reversed the Board, finding plaintiff unable to perform gainful employment from December 8, 1999 through October 17, 2006. CP 193.

B. Testimony of Plaintiff

Plaintiff injured his lower back December 8, 1998, while carrying a door in the course of his employment with Atkinson Construction (Clark Heavy Construction). Feb 9, 2009 RP 104, 105. He returned to work after the injury and shortly thereafter, plaintiff was terminated for failing a pre-screening drug test. Feb. 9, 2009 RP 106, 127, CP 45-47.

Plaintiff returned to work for a period of four years after the injury. Feb. 9, 2009 RP 111. He worked three days a week in a maintenance capacity at Harborview Hospital, picking up garbage and sorting recycling.

Feb. 9, 2009 RP 111. He was eventually terminated for insubordination and a monetary discrepancy. Feb. 9, 2009 RP 123. He was also employed as a telemarketer for approximately two days. Feb. 9, 2009 RP 112.

C. Testimony of Al Thaxton

Mr. Thaxton handled the workers' compensation issues for Clark Heavy Construction during the time Mr. Bates was injured. CP 120. The employer had a drug testing policy in place at the time of the injury. CP 121. In addition, there was a light-duty job policy to accommodate injured workers. CP 121. Mr. Thaxton reviewed his records from December 1998 and testified plaintiff was terminated on or about December 9, 1998 for testing positive for cocaine. CP 122, 123.

D. Testimony of John Hamm, MD

Board-certified psychiatrist John Hamm, MD, evaluated plaintiff on May 9, 2005 and again on September 25, 2006. CP 82, 84. He took a general medical history, reviewed prior medical records, and performed a psychiatric interview. CP 86. Plaintiff reported prior alcoholism, hallucinations, schizophrenia, and bipolar disorders. CP 87. Dr. Hamm inquired into plaintiff's perceived level of functioning and diagnosed psychotic disorder with elements of schizophrenia, mood disorder, and

paranoia. CP 87-101. Dr. Hamm did not relate any mental health conditions to the industrial injury. CP 102.

Dr. Hamm concluded plaintiff's mental illness assisted in explaining problems with unemployment and that solely considering the injury alone, there was nothing preventing plaintiff from engaging in continuous work. CP 106, 107.

SUMMARY OF ARGUMENT

The defendant raises four assignments of error. First, the defendant challenges the trial court exclusion of all testimony surrounding plaintiff's post-injury termination. The second assignment of error directly relates to the exclusion of such testimony in that it was an error to refuse admission of jury instructions on applicable law surrounding post-injury termination and its impact on temporary disability benefits.

The trial court noted an injured worker is not entitled to temporary disability benefits when he has been terminated for cause. The trial court nevertheless excluded testimony relevant to that issue noting that "the results of that lab report etcetera were not actually entered." Feb. 10, 2009 RP 68. Thus, the court excluded portions of plaintiff's testimony and Al Thaxton's testimony entirely.

The trial court's ruling was in error. It was undisputed plaintiff returned to work after his injury and was subsequently terminated. Even assuming evidentiary problems with Al Thaxton's testimony, plaintiff himself admitted he returned to work and was later fired. Under these circumstances, the law only requires the defendant establish there was a post-injury termination. The drug test results are immaterial. Therefore, the ruling does not withstand legal scrutiny.

Likewise, the second assignment of error directly correlates with the trial courts ruling on the termination. Such jury instruction and special verdict form questions were intended to apprise the jury of all applicable law that conformed to the facts of this case.

Both plaintiff and Al Thaxton testified that plaintiff was terminated post-injury after a brief return to work. In addition, at the time of termination no temporary disability benefits were currently due and prior to the trial court judgement, no temporary disability benefits were ever paid. By refusing to submit the proposed jury instruction and special verdict question concerning the applicable law relating to an injured worker's termination, the defendant was deprived the opportunity to present all legal theories of its case.

The defendant's third assignment of error surrounds the trial court's submission of Jury Instruction No. 11. The instruction was submitted by plaintiff and pulled from Washington Pattern Instruction 155.07.01. The instruction read as follows: "If, as a result of an industrial injury, a worker is able to perform only odd jobs or special work not generally available, then the worker is totally disabled, unless the employer shows that odd jobs or special work which he or she can perform is available to the worker on a reasonably continuous basis." The instruction is known as the "odd lot doctrine" and pertains to cases involving Permanent Total Disability.

The judge inappropriately altered the instruction to fit the issue in this case by adding the word "temporarily" before the word "disabled." Both in practice and legal theory, determining issues of temporary total disability and permanent total disability are different inquiries. Because the issues before the Board of Industrial Insurance appeals was plaintiff's entitlement to temporary total disability, the evidence was not developed to address whether plaintiff could only work odd jobs or special work. The burden shifting structure and legal standard outlined in the pattern instruction does not pertain to temporary total disability. Adding the word

“temporarily” changed the meaning of the instruction, misled the jury, and prejudiced the employer. Thus, admitting the instruction was in error.

The defendant’s fourth assignment challenges the trial court’s decision to exclude the testimony of Dr. John Hamm. Dr. Hamm testified to plaintiff’s non-industrially related psychological conditions and the impact it had on plaintiff’s ability to work. He was the only psychiatrist to testify about the psychological interference with the ability to work. A question as to why plaintiff was unable to perform gainful employment during the relevant time period is part and parcel to determining whether such inability to perform gainful employment is causally related to the industrial injury. Excluding such testimony was in error.

ARGUMENT

A. First Assignment of Error: The trial court erred in refusing to admit testimony regarding plaintiff’s post-injury termination.

1. Standard of Review: The admission or exclusion of expert and lay testimony is reviewed for abuse of discretion.

The first assignment of error challenges the trial court’s exclusion of testimony surrounding plaintiff’s post-injury employment termination. Specifically, the trial court excluded Al Thaxton’s testimony in its entirety and portions of plaintiff’s own testimony surrounding post-injury

termination. A trial court's evidentiary rulings are reviewed for abuse of discretion. *City of Spokane v. Neff*, 152 Wn.2d 85, 91, 93 P.3d 153 (2004).

2. The trial court erroneously applied the law surrounding post-injury termination and its impact on entitlement to temporary total disability benefits.

Under RCW 51.32.090(4)(a), an injured worker's entitlement to temporary total disability benefits ends when the worker returns to work with the employer at injury in a capacity he is physically able to perform:

Whenever the employer of injury requests that a worker who is entitled to temporary total disability under this chapter be certified by a physician or licensed advanced registered nurse practitioner as able to perform available work other than his or her usual work, the employer shall furnish to the physician or licensed advanced registered nurse practitioner, with a copy to the worker, a statement describing the work available with the employer of injury in terms that will enable the physician or licensed advanced registered nurse practitioner to relate the physical activities of the job to the worker's disability. The physician or licensed advanced registered nurse practitioner shall then determine whether the worker is physically able to perform the work described. The worker's temporary total disability payments shall continue until the worker is released by his or her physician or licensed advanced registered nurse

practitioner for the work, and begins the work with the employer of injury. If the work thereafter comes to an end before the worker's recovery is sufficient in the judgment of his or her physician or licensed advanced registered nurse practitioner to permit him or her to return to his or her usual job, or to perform other available work offered by the employer of injury, the worker's temporary total disability payments shall be resumed. Should the available work described, once undertaken by the worker, impede his or her recovery to the extent that in the judgment of his or her physician or licensed advanced registered nurse practitioner he or she should not continue to work, the worker's temporary total disability payments shall be resumed when the worker ceases such work.

RCW 51.32.090(4)(a).

A worker who is terminated from employment after sustaining an industrial injury does not have a right to reinstatement of temporary total disability benefits. RCW 51.32.090(4)(a); *Glacier Northwest v. Walker*, 151 Wn. App. 389, 212 P.3d 587 (2009); *O'Keefe v. Dep't of Labor and Indus.*, 126 Wn. App. 760, 109 P.3d 484 (2005).¹

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¹ *O'Keefe* and *Walker* were both decided by the Court of Appeals of Washington, Division 2. The only time Division 1 has addressed this issue is in the unpublished decision of *Sarausad v. Dep't of Labor & Indus.*, 145 Wn. App. 1027 (2008).

The *O'Keefe* decision held that the plaintiff was not entitled to temporary total disability benefits after he returned to work with the employer at injury and was subsequently terminated for cause. *O'Keefe*, 126 Wn. App. 760. In *O'Keefe*, the plaintiff stipulated that his physician would certify him physically capable of performing the light duty job, and the defendant's construction manager testified that plaintiff's job would have remained available to him but for his attendance and other problems. *Id.* at 766. Therefore, the Court held the work did not come to an end as contemplated by RCW 51.32.090(4)(a), but rather the plaintiff stopped performing the work because the defendant had fired him. *Id.*

The *O'Keefe* decision established that requiring an employer to resume paying time loss to an employee who has been terminated is "an absurd and unjust result." *Id.* at 766, citing *Flanigan v. Dep't of Labor & Indus.*, 123 Wn.2d 418, 426, 869 P.2d 14 (1994). The Court noted, "An employer is not required to tolerate behavior from an injured worker that it would not tolerate from an employee who was not injured, nor does an employer exercise its right to have a satisfactory work force at the cost of replacing wages for an employee who would be earning the wage, but for his or her own behavior." 126 Wn. App. at 767, citing *In re Jennifer*

Soesbe, BIIA Dec. No. 02 19030 (2003).² If a terminated worker could continue receiving benefits, claimant “could have reinstated his TTD benefits at any time by performing poorly and thereby forcing [the employer] to fire him,” which would not have been in accordance with the legislature’s intentions. *Id.* at 768. Therefore, the court determined the plaintiff not entitled to resumption of temporary total disability benefits.

Likewise, the *Walker* Court determined an employer may stop paying time-loss benefits after termination, but only after the employee begins work with the employer of injury. *Walker*, 151 Wn. App. 393. In *Walker*, the Court found the plaintiff entitled to temporary total disability benefits, despite the fact he was terminated for cause. *Id.* at 392. The Court distinguished *O’Keefe* by noting the worker in *O’Keefe* had begun work with the employer at injury. *Id.* at 395. Second, though the Court highlighted the fact the firing and the termination of benefits had a logical

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² The Board of Industrial Insurance Appeals publishes its significant decisions pursuant to RCW 51.52.160. These decision are non-binding; however, they are persuasive authority for this court. *Weyerhaeuser Co. V. Tri*, 117 Wn.2d 128, 138 P.2d 629 (1991).

relationship to each other as they both occurred at the same time, it did not appear determinative in the outcome of the decision.³

The decisions in *O'Keefe* and *Walker*⁴ establish that a worker is not entitled to resumption of temporary disability benefits when he returns to work with the employer at injury and is subsequently terminated.

Therefore, the defendant is allowed to present evidence probative of such legal standard and raise the issue before the jury.

3. Misapplication of the law erroneously led to the exclusion of Al Thaxton's testimony surrounding plaintiff's post-injury termination.

The testimony of Al Thaxton directly relates to the issue at trial and therefore should have been admitted into evidence.

Mr. Thaxton's testimony pertains to the factual circumstances surrounding plaintiff's post-injury termination with Clark Heavy Construction. The issue for trial was whether plaintiff was entitled to

³ The plaintiff in *Walker* was injured after he negligently rolled a truck at work and was terminated for such conduct as it violated the employer's long-standing safety policy. *Walker*, 151 Wn. App. 391.

⁴ Significant Board decisions also support the inability of an injured worker to recover time loss benefits when he or she is terminated from employment. See *In re Jennifer Soesbe*, BIIA Dec. No. 02 19030 (2003); *In re Chad Thomas*, BIIA Dec. No. 00 10091 (2001).

temporary total disability benefits. Plaintiff's termination post-injury termination directly impacts his right to such benefits. Therefore, evidence regarding the same is admissible as directly relevant.

Mr. Thaxton testified regarding the employer's light-duty and drug-testing policies and stated in relevant part:

- Q. Could you briefly just give us an idea of what your duties were in terms of being the assistant safety director and issues with the drug testing policy and light duty and workers' comp. and that kind of thing.
- A. I did workman's comp. Anybody that was injured I reviewed the injury and this type of thing, worked with the insurance company on it . . . If a person they were hired [*sic*], they had to have a drug screen before they were hired.
- Q. Did Atkinson have some sort of a light-duty policy back in 1998 for people who needed accommodations because of job injuries?
- A. Yes, we did.

CP 120, 121.

Moreover, Mr. Thaxton provided first-hand knowledge, based on the employer's business records, regarding the reason for plaintiff's termination with the employer.

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Q. According to the company records was he [Herman Bates] terminated on or about December 9 of 1998 for failure of the drug test?

A. Yes.

CP 122, 123.

Mr. Thaxton testified regarding light-duty employment policies and the reason for plaintiff's termination. The refusal to allow such testimony deprives the employer of the ability to completely present its case and ignores well-established legal precedent regarding entitlement to time loss compensation.

In addition, the legal relevance of plaintiff's termination far outweighs any cognizable argument of unfair prejudice as the former is dispositive as a matter of law. Likewise, although plaintiff contends Mr. Thaxton's testimony is hearsay, he is testifying to first-hand knowledge based on both the recorded recollection and business record exceptions to hearsay. Even if the Court concludes the foundation for such testimony surrounding the drug test and reasons for failure were not proper or based on hearsay, the testimony should still be admitted for the sole purpose of establishing that plaintiff was terminated after the injury.

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4. Misapplication of the law erroneously led to the exclusion of plaintiff's testimony surrounding his post-injury termination.

In addition to Al Thaxton, plaintiff established he was terminated after he had returned to work with Clark Heavy Construction. Plaintiff testified that the day after the injury, he returned to employment with Clark Heavy Construction. Plaintiff stated the following:

- Q. How were you that evening then?
A. Well, that evening it was so bad. I had told my bosses and I came back to work and we did another – we finished bringing the door down.
Q. The next day or the same day?
A. The next day, yeah.

Feb. 9, 2009 RP 106.

Although the plaintiff returned to work prior to termination, the jury never had the opportunity to consider whether claimant's return to work, in any capacity, precluded entitlement to temporary disability after his termination. The testimony unequivocally establishes plaintiff returned to work in a position he was physically capable of performing. There is no evidence to suggest he was restricted from working or restricted to light duty. In fact, plaintiff was never restricted from working and subsequently never entitled to temporary total disability benefits during the course of

this claim.⁵ His claim was originally closed as a medical only claim.⁶ It was only after his claim was reopened that claimant contends entitlement to temporary disability benefits. By the time the claim was reopened, plaintiff had already returned to work and was terminated. The defendant should have been provided the opportunity to present the testimony regarding the return to work and termination.

In addition to Mr. Thaxton providing unrefuted testimony surrounding the reasons for plaintiff's termination, plaintiff admitted to being terminated from Clark Heavy Construction. The judge erroneously excluded this party admission. Therefore, plaintiff alone provides enough evidence to establish he was terminated after the injury by stating the following:

- Q. Mr. Bates, you said that you went back to work the day after this injury correct?
- A. Yes.
- Q. Actually, you had been terminated for violating company policy hadn't you?

⁵ While his claim was open, he was never entitled to time loss compensation, as he was never restricted from working as a result of the industrial injury.

⁶ A "medical only" claim is an allowed claim where time loss benefits are not due.

- A. When I was injured they called me a couple of days after and said that “We made a mistake. He wasn’t supposed to work that day.” Or I wasn’t supposed to be on their job.
- Q. Were you terminated from Atkinson [Clark Heavy] Construction because you violated company policy?
- A. That’s that they said.

CP 45, 46.

The Industrial Appeals Judge allowed the testimony over the objection of plaintiff’s counsel; however, it was excluded at trial. The employer should have been permitted to present plaintiff’s testimony as it is probative to whether (1) he returned to work after his injury; and (2) whether he was terminated after the injury.

It is undisputed plaintiff was injured, returned to work the day after his injury, and was subsequently terminated. While plaintiff may contest the reasons for the termination, his testimony, along with Al Thaxton’s, establishes plaintiff was in fact terminated after his injury.⁷ It is undisputed the event occurred independent of plaintiff’s injury. Such is

⁷ It is immaterial that the court find plaintiff was terminated for failing a drug test. The focus is on the un rebutted testimony establishing that the basis for the termination arose at the onset of plaintiff’s employment with Clark Construction, approximately four days prior to the injury, and was unrelated to the injury.

the case in *O'Keefe*, where the worker was injured, returned to work, and was terminated for misconduct.

In this case, even though plaintiff was not working in a light duty capacity, he did return to work with the employer at injury in a position for which he was physically capable. It was only the short duration between the time plaintiff worked for the employer and the drug screening that precluded plaintiff from continuing work. At the time of termination, plaintiff did not have any work restrictions. Moreover, Mr. Thaxton testified the employer has a policy of offering light-duty work to injured workers.

The testimony establishes plaintiff returned to work the day after the injury and was subsequently terminated. Thus, the portion of plaintiff's testimony surrounding post-injury termination should have admitted as probative to the relevant issues at trial. As a result of the trial court's ruling, the defendant was deprived of the ability to invoke the provisions surrounding entitlement to time loss benefits after termination.

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5. Even if evidentiary issues with Al Thaxton's testimony precluded its admission, the trial court abused its discretion in excluding portions of plaintiff's testimony relating to his post-injury termination.

The trial court provided little by way of explanation for its exclusion of the testimony surrounding post-injury termination. The trial court noted evidence surrounding plaintiff's termination was based "on a drug test when the results of that lab report etcetera were not actually entered." Feb. 10, 2009 RP 68. Thus, it appears the decision was made based on hearsay and foundation considerations under the Washington Rules of Evidence. However, the employer is not required to establish the basis and circumstances surrounding the termination. The case law and statutory requirements regarding cessation of time loss after termination only require that an injured worker be terminated.

In determining entitlement to temporary disability benefits, it is immaterial and beyond the scope of the Board of Industrial Insurance Appeals to determine whether that termination was wrongful or for reasons wholly unrelated to the injury. While a court may identify the proffered basis for termination, it should not evaluate discriminatory intent. The *O'Keefe* court did not determine the issue of whether termination was related to the injury. In fact, the Court acknowledges the

plaintiff's argument that the employer's reasons for termination are "immaterial" by noting the plaintiff sought reinstatement of temporary disability benefits under the Industrial Insurance Act, not damages in a civil tort action for wrongful termination.

Thus, the court accepts the proffered basis for termination as true and the outcome should hinge on whether the plaintiff returned to work with the employer at injury.

Moreover, plaintiff has alternative remedies outside the industrial insurance context if he feels his termination was unjustified. He can file a complaint with the Director of the Department of Labor and Industries, or file a civil suit for wrongful termination.

RCW 51.48.025 states:

(2) Any employee who believes that he or she has been discharged or otherwise discriminated against by an employer in violation of this section may file a complaint with the director alleging discrimination within ninety days of the date of the alleged violation. Upon receipt of such complaint, the director shall cause an investigation to be made as the director deems appropriate. Within ninety days of the receipt of a complaint filed under this section, the director shall notify the complainant of his or her determination. If upon such investigation, it is determined that this

section has been violated, the director shall bring an action in the superior court of the county in which the violation is alleged to have occurred.

(3) If the director determines that this section has not been violated, the employee may institute the action on his or her own behalf.

(4) In any action brought under this section, the superior court shall have jurisdiction, for cause shown, to restrain violations of subsection (1) of this section and to order all appropriate relief including rehiring or reinstatement of the employee with back pay.

In *Wilmot v. Kaiser Aluminum and Chem. Corp.*, 118, Wn.2d 46, 821 P.2d 18 (1991), the Court held an individual had a private and separate cause of action for retaliatory discharge outside the remedy provided in the Industrial Insurance Act. *Id.* at 53. The Court stated, “Despite the statute’s placement in RCW Title 51, the exclusivity provisions of the Industrial Insurance Act do not, as to retaliatory discharge or discrimination for pursuit of benefits under the [Industrial Appeals Act], abolish superior court jurisdiction over causes of action arising from such conduct.” *Id.* at 57. Rather than pursue such appropriate remedies, plaintiff seeks reinstatement of time loss benefits. Thus, the issue is whether plaintiff’s

termination, regardless of reason, rendered him ineligible to accept available employment and negated any entitlement to time loss benefits.

Though the trial court expressed concerns regarding the admissibility of Al Thaxton's testimony regarding the drug test results, no such concern exists regarding the undisputed fact that plaintiff was terminated from the employer at injury. The trial court attempted to distinguish this case factually from *O'Keefe* by focusing on the reasons for the termination. The court noted that in *O'Keefe*, there was no debate about the misconduct of the injured worker that led to termination. However, the same is true here where plaintiff admitted he was terminated and did not deny failing the drug test. The exclusion of plaintiff's testimony has no evidentiary or legal basis given the holdings of *O'Keefe* and *Walker*. Therefore, the court applied the wrong legal standard in excluding this testimony.

B. Second Assignment of Error: The trial court erred in refusing to submit Defendant's Proposed Jury Instruction No. 14 and corresponding Defendant's Proposed Special Verdict Form Question 2 to the jury.

The second assignment of error challenges the trial court's exclusion of the corresponding jury instruction and special verdict form question that relates to evidence surrounding plaintiff's post-injury

termination. The Court of Appeals reviews a trial court's refusal to give a jury instruction based on a rule of law *de novo*. *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). Jury instructions are sufficient when they allow counsel to argue their theories of the case, do not mislead the jury, and properly inform the jury of the law to be applied. *Thompson v. King Feed & Nutrition Serv. Inc.*, 153 Wn.2d 447, 453, 105 P.3d 378 (2005).

A worker who is terminated from employment after sustaining an industrial injury does not have a right to reinstatement of temporary total disability benefits. RCW 51.32.090(4)(a); *Glacier Northwest v. Walker*, 151 Wn. App. 389, 212 P.3d 587 (2009); *O'Keefe v. Dep't of Labor and Indus.*, 126 Wn. App. 760, 109 P.3d 484 (2005). Both parties presented testimony relevant to this issue.⁸ As such, defendant submitted Proposed Jury Instruction No. 14 that reads the following: "A worker who is terminated for reasons unrelated to the industrial injury does not have a right to reinstatement of temporary total disability benefits."

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⁸ Defendant directs the court to the First Assignment of Error and arguments pertaining thereto for a complete discussion of the legal foundation for presenting testimony surrounding the post-termination issue.

Likewise, defendant submitted Proposed Special Verdict Form Question 2 that reads: “Was Mr. Bates terminated from his employment with Clark Heavy Construction for reasons unrelated to the injury?” Refusing Defendant’s Proposed Jury Instructions and Special Verdict Form Question concerning the applicable law relating to an injured workers’ termination for reasons unrelated to the injury deprived the employer the opportunity to present all theories of its case and did not inform the jury of all laws to be applied. Thus the employer was prejudiced and the trial court’s refusal is reversible error.

C. Third Assignment of Error: The trial court erred in offering Jury Instruction No. 11.

1. Standard of Review: Jury Instruction Errors Are Reviewed *De Novo*.

The third assignment of error challenges the trial court’s Instruction No. 11 as this pattern instruction relates to permanent total disability, not temporary disability. Jury instructions based on a rule of law are reviewed *de novo* and an instruction that contains an erroneous statement of the applicable law is reversible error where it prejudices a party. *Walker*, 136 Wn.2d at 771-72. Jury instructions are sufficient when they allow counsel to argue their theories of the case, do not mislead the jury, and properly

inform the jury of the law to be applied. *Thompson*, 153 Wn.2d at 453. A party objecting to a jury instruction has an affirmative obligation to offer a correct statement of the law on the issue. *Crossen v. Skagit County*, 100 Wash.2d 355, 361, 669 P.2d 1244 (1983). The court erred in submitting Instruction No. 11 as the issue before the court was not one of permanent total disability and submitting such instruction erroneously shifted the burden of proof to the employer.

The judge submitted to the Jury Instruction 10. CR 182. The instruction was taken verbatim from Plaintiff's Instruction 9. The instruction was plaintiff's modification to Washington Pattern Instruction 155.07 that read:

“Temporary total disability is an impairment of mind or body that renders a worker unable to perform or obtain a gainful occupation with a reasonable degree of success and continuity. It is the loss of all reasonable wage-earning capacity.

A worker is temporarily totally disabled if unable to perform or obtain regular gainful employment within the range of the workers' capabilities, training, education, and experience. A worker is not temporarily totally disabled solely because of inability to return to the worker's former occupation.

However, temporary total disability does not mean that the worker must have become physically or mentally helpless.”

CP 154; 182.

The instruction is similar to Defendant's Instruction 12 that quoted verbatim Washington Administrative Code 296-20-01002:

“A worker may receive ‘Temporary Total Disability’ benefits when the worker is unable to return to any type of reasonably continuous gainful employment as a direct result of the injury.”

CP 220.

The confusion created in Instruction No. 10 and the addition of Instruction No. 11 resulted in the jury being misinformed on the applicable legal standard and impermissibly shifted the burden of proof to the employer. Instruction No. 11 presented to jury:

“If, as a result of an industrial injury, a worker is able to perform only odd jobs or special work not generally available, then the worker is totally temporarily disabled, unless the employer proves by a preponderance of the evidence that odd jobs or special work that he or she can perform is available to the worker on a reasonably continuous basis.”

CP 183 (emphasis added). Defendant objected to this instruction at trial.

2. Permanent Versus Temporary Disability

The Industrial Insurance Act draws a distinction between the terms temporary and permanent total disability. “Temporary total disability” is a condition temporarily incapacitating an injured worker from performing

work at any gainful occupation. RCW 51.32.090; *Bonko v. Dep't of Labor & Indus.*, 2 Wn. App. 22, 466 P.2d 526 (1970). "Permanent total disability" means 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.

RCW 51.08.160. For total disability to be permanent, it is necessary that the physical condition arising from the injury be fixed, lasting, and stable. *Hiatt v. Dep't of Labor & Indus.*, 48 Wn.2d 843, 297 P.2d 244 (1956). As such, a total disability should not be declared unless it is clear the affliction will not yield to treatment and the worker will never be able to return to any gainful occupation. *See Wilson v. Dep't of Labor & Indus.*, 6 Wn. App. 902, 496 P.2d 551 (1972).

An individual who is temporarily unable to perform reasonably continuous gainful employment due to an industrial injury is entitled to temporary disability benefits. If the worker has earned wages during any period in which temporary disability benefits are due, the employer is required to calculate loss of earning power benefits. RCW 51.32.090. Loss of earning power takes into consideration all post-injury work at earnings less than at the time of injury, to provide wage replacement. Determining

whether an injured worker is entitled to loss of earning power benefits does not require that any “odd jobs or special work” be reasonably continuous. It only requires “present earning power is only partially restored.” RCW 51.32.090(3)(a). Thus, when a worker engages in even odd jobs or special work, such earnings are considered partially restored and loss of earning power is due and payable. Presumably the injured worker, if only capable of odd jobs or special work will receive some combination of temporary total disability and loss of earning power benefits.

For example, in *Robert W. Doughty*, BIIA Dec., 07 18427 (2009)⁹ the examiner paid the injured worker both time loss compensation (temporary total disability) or loss of earning power depending on when and injured earned post-injury wages and the amounts of such post-injury wages. Though the issue in the case was delay in payments, the Board decision illustrates the different types of temporary disability benefits that may be paid over the course of time an injured worker is unable to return to gainful employment. The Board noted that the injured worker was paid as follows:

⁹ The employer does not cite this non-significant Board decision as persuasive authority, but rather solely as an example of how time loss compensation (temporary total disability) and loss of earning power benefits intersect and are administered.

“November 23, 2004, through November 26, 2004	TLC
December 1, 2004, through December 6, 2004	TLC
December 13, 2004, through February 20, 2005	LEP
March 7, 2005, through April 3, 2005	LEP
April 8, 2005, through June 30, 2005	TLC
July 2, 2005, through September 7, 2005	TLC
September 28, 2005, through October 28, 2005	LEP
October 29, 2005, through February 13, 2006	TLC
August 9, 2007, through December 2, 2007	TLC
February 7, 2008, through March 10, 2008	TLC”

Id. at 2. The reference to TLC means the worker was paid temporary total disability while the reference to LEP means the worker was earning some wages but was entitled to loss of earning power benefits.

Likewise, in this case because it is undisputed plaintiff earned wages post-injury, the employer is obligated to calculate loss of earning power. The fact such employment is not available and a reasonably continuous basis has no relevance in a worker’s entitlement to such benefits. Instruction No. 11 precludes defendant from calculating loss of earning power as it requires the jury to find claimant temporarily totally disabled once the employer fails to prove odd jobs exist on a continuous basis. Submitting this instruction was an reversible error.

In addition, Instruction No. 10 and Instruction No. 11 are inconsistent as one finding necessarily precludes the other. Instruction No. 10 states that temporary total disability “is a loss of all reasonable

wage-earning capacity.” CP 182. However, Instruction No. 11, states that a worker is temporarily totally disabled if he can perform odd jobs that are not generally available. CP 183. While Instruction No. 10 precludes any wage earning capacity for a finding of temporary total disability, Instruction No. 11 only requires temporary total disability equal the ability to perform odd jobs not generally available. By requiring such an additional level of proof, and precluding an employer from determining loss of earning power, the jury instruction directly contradicts RCW 51.32.090. Therefore, the instruction misapplies a legal standard, confuses the distinction between “temporary total disability” and “permanent total disability,” and ignores loss of earning power in context.

3. Washington Pattern Jury Instruction 155.07.01

Instruction No. 11 is based on Washington Pattern Jury Instruction 155.07.01, but plaintiff modified the instruction to add the term “temporarily.” Such addition is a misleading and incorrect statement of the law. The instruction is applicable in cases involving Permanent Total Disability. *See* 6A Washington Practice: Washington Pattern Jury Instructions: Civil 155.07.01 (5th ed. 2005). Not surprising, the Court of Appeals and Supreme Court have only addressed the odd lot jury

instruction in the context of permanent total disability cases. *See e.g.* *Spring v. Dep't of Labor & Indus.*, 96 Wn.2d 914, 640 P.2d 1 (1982); *Kuhnle v. Dep't of Labor & Indus.*, 12 Wn.2d 191, 120 P.2d 1003 (1942); The instruction only applies in permanent total disability cases.

WPI 155.07.01 is known as the “odd lot” doctrine and is to be used in conjunction with “WPI 155.07, Permanent Total Disability, if there is an issue whether the injury restricts the worker to odd jobs or to special work not generally available.” WPI 155.07.01; *Allen v. Dep't of Labor & Indus.*, 16 Wn. App. 692, 559 P.2d 572 (1977). WPI 155.07 reads the following:

“Total disability is an impairment of mind or body which renders a worker unable to perform or obtain a gainful occupation with a reasonable degree of success and continuity. It is the loss of all reasonable wage earning capacity. A worker is totally disabled if unable to perform or obtain regular gainful employment within the range of his or her capabilities, training, education and experience. A worker is not totally disabled solely because of inability to return to his or her former occupation. However, total disability does not mean that the worker must have become physically or mentally helpless. Total disability is permanent when it is reasonably probable to continue for the foreseeable future.”

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This instruction is to be used “in permanent total disability cases when there is an issue whether the industrial injury . . . has rendered the worker permanently totally disabled. Use WPI 155.07.01, Permanent Total Disability - Special Work, with this instruction if there is an issue whether the injury restricts the worker to odd jobs or to special work not generally available.” WPI 155.07. The issue for trial was not whether plaintiff was permanently total disabled or restricted to odd jobs or special work, nor did the evidence conform to such issue. Consequently, the jury was never presented with the issue of permanent total disability. “Temporary” and “permanent” are terms of art under the Act and should therefore not be assigned the same meaning.

When a worker’s condition is permanent, the ability to perform only odd jobs or special work therefore becomes relevant to whether the worker is able to perform reasonably continuous gainful employment. If an injured worker is only capable of performing odd jobs or special work, such work should be reasonably continuous. Without such work existing on a reasonably and continuous basis, the worker does not have ability to perform gainful employment. Instruction No. 11 acknowledges that a workers’ physical condition may never allow for light or sedentary work,

and only provide the capability to perform odd jobs within such limited physical capacity. However, the instruction provides the employer the opportunity to present evidence that such odd jobs or special work exists on a full time basis thus, allowing an injured worker to be employable. This burden shifting scheme was born out of a permanent total disability cases and makes sense only in such context. The provision of the “odd lot” instruction misled the jury and prejudiced the employer.

Due to the erroneous instruction, the jury was instructed to consider whether these were odd or special jobs and whether the employer proved that such work was available. This instruction incorrectly shifted the burden of proof to the employer.

4. Inappropriate Burden Shifting

The trial court, by submitting Instruction No. 11 to the jury, necessarily excluded Defendant’s Proposed Instruction No. 20. The proposed instruction reads:

“A worker is voluntarily retired if both of the following conditions are met:

- (a) The worker is not receiving income, salary or wages from any gainful employment; and
- (b) The worker has provided no evidence to show a bonafide attempt to return to work after retirement.

Time loss compensation is not paid to worker who voluntarily retired from the work force.”

CP 229.

In refusing this instruction and submitting Instruction No. 11, the court erroneously placed the burden of proof on the employer to establish that odd jobs or special work was reasonably continuous. However, plaintiff has the burden to prove entitlement to time loss compensation. Part and parcel to this burden is the requirement plaintiff present evidence that he has not voluntarily retired. *Energy Northwest v. Hartje*, 148 Wn. App. 454, 199 P.3d 1043 (2009). The jury was effectively required to place the burden of proof on the defendant rather than require the plaintiff to maintain the burden of proof.

In *Hartje*, the court established that a worker who has voluntarily retired is not entitled to time loss compensation as the worker “lacks the requisite adverse economic impact, *i.e.*, lost wages or income, to warrant the award of time loss benefits.” *Hartje*, 148 Wn. App. 466, *citing Kaiser Aluminum & Chem Corp. v. Overdorff*, 57 Wn. App. 291, 296, 799 P.2d 8 (1990). The worker is voluntarily retired if (1) he is not receiving income, salary or wages from any gainful employment; and (2) has provided no evidence to show a bonafide attempt to return to work after retirement. The

procedural posture of *Hartje* and the issues for trial are indistinguishable from the facts in this case. In *Hartje* the worker's claim was closed with permanent partial disability. The claim was later reopened and she pursued temporary total disability. The Court noted the finding at closure established she was able to work at the time of closure. The burden was on Ms. Hartje to show she made bonafide attempts to return to regular work. Similarly, the March 9, 1999 closure of the claim with only medical benefits establishes plaintiff was able to work as of that date. The burden is on plaintiff to establish he made bonafide attempts to return to regular work. There is undisputed evidence that plaintiff performed some work during the period when his claim was reopened. Instead of requiring plaintiff to show he made continued attempts to return to work and mitigate his damages, the judge shifted the burden to the employer to show that regular work was available. The submission of Instruction No. 11, and the exclusion of Defendant's Instruction No. 20, gave the jury an incorrect statement of the law and shifted the burden of proof to the employer and is reversible error.

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D. Fourth Assignment of Error: The trial court erred in excluding the testimony John Hamm, MD.

The defendant challenges the trial court's decision to exclude the testimony of Dr. John Hamm. A trial court's evidentiary rulings are reviewed for abuse of discretion. *Neff*, 152 Wn.2d at 91, 93.

An inability to return to employment must be a direct result of the accepted industrial injury. WAC 296-20-01002. An expert opinion must be based on full knowledge of all material facts. *Sayler v. Dep't of Labor & Indus.*, 69 Wn.2d 893, 896, 421 P.2d 362 (1966). Plaintiff's claim was allowed but his psychiatric condition was segregated as unrelated. CP 61. Dr. Hamm's testimony provided medical evidence on plaintiff's ability to work from a psychological standpoint, and therefore failing to allow his testimony did not allow the jury to consider all relevant aspects of plaintiff's ability to work.

Whether plaintiff is entitled to time loss compensation is in part, a medical question. *Leeper v. Dep't of Labor & Indus.*, 123 Wn.2d 803, 872 P.2d 507 (1994). An individual can only obtain such benefits if the inability to work is related to the industrial injury. WAC 296-20-01002. The many potentially causative medical factors in an injured workers'

inability to work render relevant for consideration both plaintiff's and employer's medical experts. Dr. Hamm's testimony concerns the psychiatric interference with plaintiff's ability to work. Because plaintiff's psychiatric disposition and preexisting mental health conditions may affect his ability to return to regular gainful employment, testimony pertaining to said conditions should be allowed as logically and legally relevant.

Plaintiff alleges the testimony is irrelevant and prejudicial. However, moving to exclude the testimony of Dr. Hamm might be persuasive if it were immaterial why plaintiff was unlikely to engage in reasonably continuous gainful employment. But such argument overlooks the necessary causal relationship between the industrial injury and the finding of temporary total disability. A plaintiff seeking to establish total disability must prove that such disability was a result of the industrial injury. *See Leeper*, 123 Wn.2d 803. Moreover, while plaintiff argues for the exclusion of Dr. Hamm's testimony, plaintiff opened the door by inquiring into the nature of Dr. Hamm's evaluation. *See CP 30*. Plaintiff therefore cannot argue for its exclusion from the record.

Likewise, testimony surrounding plaintiff's psychiatric interference was admitted. Drs. Millican and Boettcher both record an unspecified

psychiatric condition and pain behavior. Feb. 10, 2009 RP 77; Feb. 12, 2009 RP 118, 138. Even plaintiff's witnesses testified regarding psychiatric relevance as Dr. McCollough concluded the psychiatric condition was "a major factor" with claimant's perceived inability to return to work. Feb. 10, 2009 RP 49. Plaintiff's inquiry into his mental health condition and impact on the ability to work opened the door to present the testimony of Dr. Hamm. Admitting Drs. McCollough, Millican, and Boettcher's testimony, while excluding the testimony of Dr. Hamm is internally inconsistent and manifestly unreasonable. Though several experts testified Dr. Hamm was the only psychiatrist whose testimony was presented. The trial court's decision has no basis and must be reversed.

Moreover, there are several jury instructions that reference plaintiff's preexisting psychiatric condition. Jury Instruction No. 8 specifies plaintiff's psychiatric condition was neither caused nor aggravated by the injury. CP 180. That instruction reads:

"The following have been determined to be correct as a matter of law and are not for your reconsideration at this time:

1. Mr. Bate's physical condition proximately caused by his industrial injury of December 8, 1999 worsened between March 13, 1999 when the Department closed his claim, and

- December 8, 1999, when the Department reopened his claim.
2. His pre-existing condition diagnosed as unspecified psychiatric disorder was neither caused by, nor worsened by his industrial injury of December 8, 1998.”

CP 180.

Likewise, Instruction No. 9 outlines plaintiff’s challenge to the Board finding that the injury did not preclude plaintiff from performing reasonably continuous gainful employment, when considered in conjunction with his age, education, work history, and preexisting disabilities. CP 181. That instruction reads:

“Herman Bates claims that the findings and decision of the Board are incorrect in that:

1. Herman Bates contends that he is temporarily totally disabled from December 8, 1999 through October 17, 2006 as a proximate result of his industrial injury of December 8, 1998.
2. Clark Heavy Construction contends the December 8, 1999 injury did not preclude Mr. Bates from obtaining or performing reasonably continuous, gainful employment in the competitive labor market, when considered in conjunction with his age, education, work history, and pre-existing disabilities.”

CP 181.

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It is prejudicial error to require the jury to consider preexisting disabilities, yet exclude directly relevant testimony. An inquiry into *why* plaintiff was unable to perform continuous gainful employment is a material fact at issue, and the court should admit such testimony.

CONCLUSION

The trial court erred in excluding evidence regarding plaintiff's termination and shifted the burden of proof to the employer. The judgement should be reversed and the case remanded for a new trial.

DATED: January 25, 2010

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2010, I filed the original and one copy of Appellant's Brief by first class mail on the following :

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