

64161-1

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No. 64161-1

WASHINGTON COURT OF APPEALS, DIVISION I

HERMAN BATES,

Respondent/Plaintiff,

v.

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

Appellant/Defendant

RESPONDENT'S BRIEF

2010 FEB 29 PM 9:53
MARCH 1
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FILED
CLERK OF COURT
DIVISION I
APPELLATE COURT
1000 4th Avenue, N.E.
SEATTLE, WA 98102

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closed his claim. His condition worsened and he applied to reopen his claim. His claim was reopened effective December 8, 1999. In spite of the opinions of his attending doctors that he was unable to perform gainful employment due to his industrial injury, the Department issued an Order on October 17, 2006 denying him temporary total disability benefits (the terms “temporary total disability benefits” and “time-loss compensation” are interchangeable) from December 8, 1999 through October 17, 2006 but leaving the claim open. Mr. Bates appealed the denial of temporary total disability benefits to the Board of Industrial Insurance Appeals. At the Board hearings the parties agreed that the issue on appeal was whether Mr. Bates was temporarily totally disabled between December 8, 1999 and October 17, 2006 as a proximate result of his industrial injury. The Board sustained the Department’s denial of benefits. Mr. Bates appealed to Superior Court. In Superior Court, Employer attempted to introduce an issue not passed on by the Department or the Board, that is whether RCW 51.32.090(4)(a) denies Mr. Bates time-loss compensation. The trial judge declined to put this issue before the jury. At trial the jury reversed the Board and Department and found Mr. Bates temporarily totally disabled and therefore entitled to time loss compensation. Employer appealed to this court from that verdict.

Appellant’s “Introduction” states that Mr. Bates has “occasionally been employed” since his injury. This is patently incorrect. As a part of his

treatment his doctor and physical therapist referred him for participation in a semi-sheltered workshop program where he spent several hours about three days a week sorting pop cans. When he was there enough hours he received a \$15.00 stipend for meals and transportation. Additionally he attempted to work as a telemarketer but failed after a day or two because he couldn't sit for more than about an hour. Other than that, and a failed attempt to go to truck driving school, Mr. Bates has been unable to perform any aspect of gainful employment.

III. COUNTERSTATEMENT OF PROCEDURAL HISTORY

The "Procedural Posture" in appellant's brief is incorrect. The correct important procedural dates and events are as follows:

12-8-98 Date of injury, claim accepted
3-9-98 Department Order closing claim
12-8-99 Claim reopened effective this date
10-17-06 Department Order denying time loss compensation from 12-8-99 through 10-17-06 but leaving claim open

IV. THE ISSUE ON APPEAL TO THE BOARD AND SUPERIOR COURT

At the Board hearings the parties agreed that the issue before the Board was whether Mr. Bates was temporarily totally disabled from December 8, 1999 through October 17, 2006. Only on appeal to Superior Court did Employer attempt to enlarge the issues to include whether Mr. Bates should be denied benefits under RCW 51.32.090(4)(a). The trial judge declined to put this issue before the jury. The only issues which may be

raised in Superior Court are those issues raised before the Board of Industrial Insurance Appeals. RCW 51.52.115

V. RESPONDENT'S ANSWER TO APPELLANT'S FIRST ASSIGNMENT OF ERROR

A. The trial court's evidentiary rulings are reviewed for abuse of discretion

The appellate court will review trial court evidentiary rulings for abuse of discretion. As stated in Lewis v. Simpson Timber Co., 145 Wn.App. 302, 189 P.2d 178 (2008):

“We review the trial court’s evidentiary rulings for an abuse of discretion. The trial court abuses its discretion when its ‘decision is manifestly unreasonable, or exercised on untenable grounds or for untenable reasons’.”
*** The [party challenging the trial court’s ruling] ‘bears the burden of proving that the trial court abused its discretion’.”

B. The trial court properly struck the testimony of Al Thaxton

Al Thaxton, who had been assistant safety director for Employer in 1998, testified that Mr. Bates failed a drug test and was fired on the day after his industrial injury. In response to Mr. Bates objection, the Industrial Appeals Judge, the Board of Industrial Insurance Appeals and the trial judge all struck his entire testimony.

The testimony of Al Thaxton concerned events at the time of Mr. Bates’ injury, December 8, 1998. The issue in Superior Court was whether Mr. Bates was able to work beginning December 8, 1999, a year later. It is agreed that Mr. Bates condition became worse during this year, CP 180, so

Mr. Thaxton's testimony was not relevant to the issue in this case.

Additionally, Mr. Thaxton testified about a drug test, which testimony was without proper foundation, irrelevant and prejudicial to Mr. Bates. The trial court correctly struck Al Thaxton's testimony.

C. The trial court properly struck portions of Mr. Bates' testimony

Those portions of Mr. Bates' testimony which were struck by the trial court were concerned with the events surrounding Mr. Bates' employment the day after his injury. That testimony was prejudicial to Mr. Bates and irrelevant to the question of whether the admitted worsening of Mr. Bates' condition caused him to be unable to work a year after his injury.

VI. RESPONDENT'S ANSWER TO APPELLANT'S SECOND
ASSIGNMENT OF ERROR

A. Appellant did not preserve any objection to instructions given or refused by the trial court

CR 51(f), attached hereto as Appendix 2, is very specific in its requirements for preserving objections to instructions. After the court prepares its proposed instructions, counsel must state his objections on the record, specifying the number and specific part of the instruction to which he is objecting. Counsel's objections to the proposed instruction must mediate the specific parts objected to. CR 51(f); Falk v. Keene Corp., 113 Wn.2d 645, 782 P.2d 974 (1989). Mere general objections are insufficient.

Couch v. Mine Safety Appliances, 107 Wn.2d 232, 728 P.2d585 (1986). The purpose of requiring that exceptions be sufficiently definite is to apprise the trial judge of the points of law or questions of fact in dispute so that mistakes may be corrected. Falk, supra. Any instruction to which no proper objection is taken becomes the law of the case. Caruso v. Local Union 690, 107 Wn.2d 524, 730 P.2d 1299 (1987). Wright v. City of Kennewick, 62 Wn.2d 163, 381 P.2d 620 (1983). If specific exception is not made, an appellate court will deny review of the objection. Bitzan v. Parisi, 88 Wn.2d 116, 558 P.2d 775 (1977). Counsel must insure that his or her objections are made a part of the record and memorialized before the court reporter. Goehle v. Fred Hutchinson Cancer Research Ctr., 100 Wn.App. 616, 1 P.3d 579 (2000).

On the second day of trial an informal discussion of instructions took place between the trial judge and counsel. Employer withdrew the second question on his proposed special verdict form and agreed to the form of verdict proposed by Mr. Bates. RP196-197. Employer then stated that he had an additional instruction to propose, which he would submit late that day or the next. RP209.

Following discussion of other instructions not involved in this appeal, the judge stated when he would have the court's instruction to counsel:

“Judge Bradshaw: Okay. Well what I plan to do but the goal will obviously to have the Court’s final set for you at nine am, Thursday. I’ll rate the language we talked about or anything else you think we need to know. * * * ...anything you think we need to know send it my way tomorrow and again we’ll have the final set for you. * * * ...you’ll have the final set but I don’t want to pretend that – that that is set in stone. So if there’s an obvious omission or there you think exists, you know, we would still have time. I’d rather be safe than sorry in other words. RP226

* * *

Mr. Bates’ attorney: So there can be some subsequent discussion rather than just mechanically taking [exceptions]?

Judge Bradshaw: Sure particularly if there’s a clear oversight that’s been made.” RP226

Two days later, the court handed down to counsel the court’s instructions, assembled and numbered. There were no exceptions taken to the court’s instructions given or the court’s refusal to give a proposed instruction. The court’s instructions became the law of the case.

B. Employer failed to raise the issue of RCW 51.32.090(4)(a) at the Department or Board and is precluded from raising it on appeal to superior court or the court of appeals.

The only issue raised at the Board hearings was whether Mr. Bates was temporarily totally disabled from December 8, 1999 to October 17, 2006
Certified Appeal Board Record (hereafter CABR) 4, 15, 18, 35, 45, 75.

RCW 51.52.115 states:

“Upon appeals to the superior court only such issues of law or fact may be raised as were properly included in the notice of appeal to the board, or in the complete record of the proceeding before the board”.

In both O’Keefe v. Dept of Labor & Ind v. Dept of Labor & Ind., 126 Wn.App. 760, 109 P.3d 484 (2005) and Glacier Northwest v. Walker, 151

Wn.App. 389, 212 P.3d 587 (2009), cases relied on by Employer, the employer there exhausted its administrative remedies before seeking superior court review. In the present case, Employer failed to raise this issue before the Board and it may not raise it for the first time on appeal.

C. Employer's Proposed Instruction No. 14 is an incorrect statement of law

Employer's proposed instruction No. 14, CP 222, would preclude any injured worker from ever receiving time-loss benefits if he or she had been terminated for any reason.

Employer relies on RCW 51.52.090(4)(a), attached hereto as Appendix 1, O'Keefe, , *supra*, and Glacier, *supra*, None of these support Employer's position.

RCW 51.52.090(4)(a) addresses a very specific situation, which is quite different from the facts in the present case. Under this statute, if an employer requests a certain medical practitioner to certify that the worker is able to perform a certain job other than his or her usual job and if the medical practitioner reviews the physical requirements of the job and the physical abilities of the worker and determines that the worker is able to perform that job then, when the worker actually begins that job, time-loss benefits may be terminated. None of this applies to Mr. Bates' situation.

O'Keefe, *supra*, does not support Employer's position. That case involved a situation where all of the steps required by the statute were

fulfilled and O'Keefe returned to work. However, after O'Keefe missed many hours of work, made inappropriate comments to his employer's clients and slept in his truck he was terminated for disciplinary reasons occurring after his return to work. In that specific situation the court ruled he was not entitled to a resumption of time-loss compensation.

In Glacier, supra, the employer sought to establish that its liability for time-loss compensation had terminated under RCW 51.52.090(4)(a) because the modified work was available "but for" the firing for cause. Division II of the Court of Appeals disagreed holding that "RCW 51.52.090(4) does not apply because it requires the employee to begin the modified work before time-loss benefits cease.

Employer's proposed instruction No. 14, CP222, would preclude any injured worker from ever receiving temporary total disability benefits if he or she had been terminated for any reason.

Employer relies on RCW 51.52.090(4)(a), O'Keefe, supra, and Glacier, supra. None of these support Employer's position.

VII. RESPONDENT'S ANSWER TO APPELLANT'S THIRD ASSIGNMENT OF ERROR

A. Appellant has not preserved the right to challenge any instruction, given or refused

As pointed out under the second assignment of error, page 5 above,

Employer has not preserved its right to challenge any instruction.

Additionally, Employer stated to the trial judge that he had no objection to plaintiff's proposed instruction no. 9, CP 154, which became court's instruction no. 10. CP182; RP211.

In considering Plaintiff's Proposed Instruction No. 10, CP 155, the following exchange took place between defense counsel and the court:

"Judge Bradshaw: So the -- the proposed Plaintiff's 10 that is agreed to?
Employer's attorney: ...my concern with it is the portion that says unless the employer proves by a preponderance of evidence, I'm okay with a -- the preponderance of evidence being the standard. I -- I recognize that for permanent total disability the standard is that the employer has the burden of proving that the employer has the burden of proving that the odd jobs are [or?] special work is reasonably available on a continuous basis. I'm not aware of case law one way or the other that indicates that the employer specifically has that burden. That burden is mentioned in the Energy Services case we mentioned today but it's silent as to who has the burden. And in -- in this context of -- of divorce decision being presumed correct and the worker having the burden I'm not sure that it shows." RP 212-213

This instruction became Court's Instruction No. 11. CP 183. This exchange does not satisfy the requirements of CR 51(f), Appendix 2 hereto, or the case law recited above at page 6. In any case, when the court handed down to counsel the Court's Instructions assembled and numbered, Employer voiced no objection whatsoever. These instructions have become the law of the case.

B. The trial court's instructions on temporary total disability are correct statements of law

Court's Instructions No. 10 and 11, CP182-183, are the WPI Pattern Instructions on total disability, modified by substituting the word "temporary" for "permanent" in both instructions. The WPI instructions were never intended to be comprehensive, 2A Wash. Practice, Appendix E, Sec. 4, and must be supplemented and modified in every case to fit the facts of the case and the applicable law.

WPI 155.07, the total disability instruction, is a correct statement of law. Washington Irrigation and Development Co. v. Sherman, 106 Wn.2d 685, 724 P.2d 997 (1986) (analyzing an earlier but substantially identical WPI instruction). Inclusion of the language "or obtain" was specifically upheld in Leeper v. Dept. of Labor & Ind., 123 Wn.2d 803, 872 P.2d 507 (1994).

WPI 155.07.01, the "special work" instruction is taken from Allen v. Dept. of Labor & Ind., 16 Wash. App. 692, 559 P.2d 572 (1977). It is error to refuse a "special work" instruction where the evidence warrants it. Wendt v. Dept. of Labor & Ind., 18 Wn.App. 674, 571 P.2d 220(1977; Kuhnle v. Dept of Labor & Ind., 12 Wn.2d 198, 120 P.2d 103 (1942).

"Temporary total disability" is a condition that temporarily incapacitates a worker from performing any work at any gainful occupation and differs

from permanent total disability only in duration of disability and not in its character. Hubbard v. Dept. of Labor & Ind., 140 Wn.2d 35, 992 P.2d 1002 (2000); Herr v. Dept. of Labor & Ind., 74 Wn.App. 632, 875 P.2d 11(1984)

Because permanent and temporary disability differ only in duration and not in character, Court's Instructions Nos. 10 and 11 were correct statements of law.

VIII. RESPONDENT'S ANSWER TO APPELLANT'S FOURTH ASSIGNMENT OF ERROR

A. The trial court's evidentiary rulings are reviewed for abuse of discretion

As noted above at page 4, the appellate court will review trial court evidentiary rulings for abuse of discretion.

B. The trial court properly struck the testimony of Dr. Hamm

John Hamm, M.D., psychiatrist examined Mr. Bates twice for Employer and testified over Mr. Bates' objection. The Industrial Appeals Judge and the Board of Industrial Insurance Appeals and the trial judge all struck his entire testimony. Mr. Bates had waived any claim of psychiatric disability related to his industrial injury. CABR Hamm dep. p. 5; CABR October 26, 2007 Hearing p. 15. Nonetheless, Employer anticipated Dr. Hamm's testimony would be relevant in that it would show that the reason Mr. Bates couldn't work was due to his unrelated psychiatric condition. CABR October 26, 2007 hearing p. 15. However, Dr. Hamm did not testify that Mr.

Bates' inability to work was due to his mental condition:

“Q: Would the mental status explain his history of unemployment?

A: I think his mental illness could explain problems if he had problems with unemployment, intrapersonal problems with unemployment *** I don't have enough data, you know, about any employment situation he has been in regarding any problems he might have. CABRHamm dep p. 32; emphasis added.

Evidence of causal connection must go beyond speculation and conjecture and must show that causal connection is probable rather than possible. Vanderhoff v. Fitzgerald, 72 Wn.2d 103, 431 P.2d 969 (1967)

Dr. Hamm did state that Mr. Bates' psychiatric disorder was in remission and stabilized and his alcoholism in remission at the times Dr. Hamm examined him. CABR Hamm dep. p. 27.

Therefore Dr Hamm's testimony is irrelevant to the question of whether Mr. Bates was unable to work as a proximate result of his industrial injury.

However, the irrelevant, prejudicial material in his testimony is massive.

It includes the following;

1. a family history of psychiatric problems
2. mother had history of psychiatric hospitalization and alcoholism
3. all five of his siblings had some diagnosis of psychiatric disorder and alcoholism... some diagnose as schizophrenia and some bipolar, all hasda a history of alcoholism
4. he was an alcoholic and drinking heavily in the past
5. he had psychiatric problems in the past, heard voices, angry, felt sensation of things crawling on him
6. he was homeless for a while in the past
7. he was receiving Social Security benefits and public assistance
8. he was angry at Asians

9. his son had mental problems
10. he had some elements of paranoia
11. he was arrested for domestic violence
12. her had psychotic hallucinations

CABR Hamm dep. p. 13. 1. 11 through p. 20, 1.12

The rulings of the Industrial Appeals Judge, the Board of Industrial Insurance Appeals and the trial judge striking Dr, Hamm' testimony were correct. The trial judge did not abuse his discretion.

IX. REQUEST FOR REASONABLE ATTORNEY FEES AND COSTS

Pursuant to RAP 18.1(a), if Herman Bates prevails on appeal he should be awarded reasonable attorney fees and costs on appeal and in the trial court. RCW 51.52.130 requires the court to award reasonable attorney fees and costs to an injured worker who successfully defends his right to benefits on appeal:

“If, on appeal to the superior court or appellate court from the decision and order of the board, said decision and order is reversed or modified and additional relief is granted to a worker or beneficiary... a reasonable fee for the services of the worker's or beneficiary's attorney shall be fixed by the court...”

If Herman Bate prevails here, he requests reasonable attorney fees and costs.

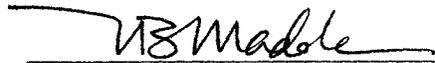
X. CONCLUSION

Appellant has not made an effective challenge to the trial court's instructions given or refused. Appellant has not properly brought the issue of

RCW 51.52.090(4)(a) before the trial court or the Court of Appeals. In any case, the trial court properly applied the law on all points appellant contests. Herman Bates requests reasonable attorney fees and costs in amounts to be determined by post-trial motion.

Dated this 1st day of March, 2010.

Respectfully submitted,



Tracy B. Madole, WSBA #1295
Attorney for Respondent

RCW 51.32.090

Temporary total disability -- Partial restoration of earning power -- Return to available work -- When employer continues wages -- Limitations.

* * *

(4)(a) 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.

(b) Once the worker returns to work under the terms of this subsection (4), he or she shall not be assigned by the employer to work other than the available work described without the worker's written consent, or without prior review and approval by the worker's physician or licensed advanced registered nurse practitioner.

RULE CR 51
INSTRUCTIONS TO JURY AND DELIBERATION

* * *

(f) Objections to Instruction. Before instructing the jury, the court shall supply counsel with copies of its proposed instructions which shall be numbered. Counsel shall then be afforded an opportunity in the absence of the jury to make objections to the giving of any instruction and to the refusal to give a requested instruction. The objector shall state distinctly the matter to which he objects and the grounds of his objection, specifying the number, paragraph or particular part of the instruction to be given or refused and to which objection is made.

(g) Instructing the Jury and Argument. After counsel have completed their objections and the court has made any modifications deemed appropriate, the court shall then provide each counsel with a copy of the instructions in their final form.

CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2010 I filed the original and one copy of the foregoing Respondent's Brief with the Court of Appeals, Division I, 600 University Street, Seattle WA 98101-4170.

I further certify that I served the foregoing Respondent's Brief on attorneys of record and other parties by mailing to said persons a true copy thereof, certified by me as such, addressed to said persons at their last known address and deposited in the united States mail in Seattle,

Washington on today's date, with postage thereon prepaid, as follows:

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Dated this 1st day of March, 2010.



Tracy B. Madole, WSBA #1295
Attorney for Respondent

CERTIFICATE OF SERVICE