

NO. 36996-6-11

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION II

**ROGER EWART**

Appellant

vs.

**TUMWATER SCHOOL DISTRICT**

Respondent.

APPELLANT'S BRIEF

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FILED  
COURT OF APPEALS  
DIVISION II  
08 APR 25 AM 10:14  
STATE OF WASHINGTON  
BY DEPUTY

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## TABLE OF AUTHORITIES

### CASES

*Ruse v Department of Labor and Industries* 138 Wn.2d 1, 977 P. 2d 570  
(1990)

*Kingery v Department of Labor and Industries* 132 Wn.2d 162, 937 P. 2d  
565 (1997)

*Shufeldt v Department of Labor and Industries* 57 Wn.2d 758, 359 P. 2d  
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### STATUTES

RCW 51.32.110  
RCW 51.32.090  
RCW 51.32.095  
WAC 296-14-410

### OTHER

*BIIA Decision and Order*, November 28, 2005

## Argument:

1. The Thurston County Superior Court of review (Judge Anne Hirsch presiding) decided this case largely based on an issue (completing/attending all retraining classes) not properly before it and immaterial to those which were, thereby prejudicing appellant's right to a meaningfully fair and impartial review when it reversed the lower board of industrial appeals panel ruling/holding.

2. The standard the Thurston County Superior Court of review (judge Anne Hirsch presiding) opted to use in overturning the lower court's ruling and decision (i.e. Washington State's Board of Industrial Insurance Appeals) was improper/erroneous, undermines the public policy of finality in judicial/administrative proceedings except for good cause shown, and invites endless litigation by applying a standard (51%:49%) so slight as to deny reasonable certainty in the outcome of workman's compensation litigation pursuant to written findings of fact and conclusions of law entered by a court/panel of competent and proper jurisdiction.

3. The reasons for the Thurston County Superior Court of review (judge Anne Hirsch presiding) overturning of the lower court (BIIA) ruling are unclear at best, unstated, or are not articulated in a manner to avoid the

appearance of caprice, prejudice, and denial of a meaningfully proper/lawful standard of review to which appellant is entitled.

4. The trial court (Thurston County Superior Court of review, judge Anne Hirsch presiding) erred by effectively 'punishing' the Appellant twice, ignoring the bar of Double Jeopardy, when it allowed itself to consider arguments referencing Appellant's failure to complete a vocational retraining class in 1999 despite the fact the record made clear Appellant had already been punished/disciplined for said failure at the time and after the Washington State Department of Labor & Industries closed his claim.

5. The trial court (Thurston County Superior Court of review, judge Anne Hirsch presiding) erred in failing to apply the principles of Res Judicata, collateral estoppel, and the theory of latches in reaching its decision. Appellant and Respondent had every opportunity to raise all the issues currently being litigated in a timely manner during the hearings held pursuant to Appellant's successful bid to reopen his injured worker claim finalized by the Thurston County Superior Court order granting Respondent's motion to withdraw its appeal/objection to said reopening entered on 6-16-04.

## **ASSIGNMENT OF ERROR**

Appellant appeals the basis for the ruling of the Thurston County Superior Court in the Judgment and Order filed on October 30, 2007 (Judge Anne Hirsch presiding), wherein Judge Hirsch expressed overriding concern over Appellant's failure to complete a materially insufficient retraining curriculum, which reversed the Board of Industrial Insurance Appeal's Decision and Order granting time loss benefits for the period September 30, 2002 through June 24, 2004. .

## **ISSUES**

1. Did the trial court (judge Anne Hirsch presiding) err in deciding this case by basing its decision on an immaterial issue (i.e. appellant's failure to complete a retraining course) not properly before it.
2. Did the trial court (judge Anne Hirsch presiding) err in the standard it applied in overturning the lower court's (i.e. The 3 judge panel constituting Washington State's Board of Industrial Insurance Appeals) decision upon review.
3. Did the trial court (judge Anne Hirsch presiding) err by not

articulating specific reasons it found for overturning the lower court's decision upon review.

4. Did the trial court's consideration of and acting upon appellant's one-time history of failure to complete a retraining curriculum constitute Double Jeopardy in this instance for an act for which he had already been disciplined/punished.

5. Did the trial court err in considering an issue (failure to complete a retraining curriculum) barred by the theory of laches, collateral estoppel, and res judicata arising from the judicial resolution of Appellant's reopening his claim in 2000 effective 8-28-02 pursuant to the Respondent's (Tumwater School District) withdrawal of objection/appeal to the same granted by Thurston County Superior Court in 6-16-04.

#### **STATEMENT OF THE CASE**

January 11, 1996, while employed by Tumwater School District, Mr. Ewart and in the normal course of his employment, injured his left knee while attempting to erect an extension ladder on a steep side hill. CP 3, 1. 22-25

A medical doctor examined the Appellant and recommended an award equivalent to 28 percent permanent partial disability. On May 18, 2000 the Department (i.e. Washington's Dept. of Labor & Industries) closed the claim with a permanent partial disability award reduced to 7 percent or the amputation value of the left leg above the knee. The self insured employer (the Tumwater School District) protested that award to Washington's Board of Industrial Appeals on June 16, 2000. On July 14, 2000 the Department (L&I) issued an Order granting 14 percent partial disability, less 2 percent for a pre-existing condition. CP 4, l. 1-11

On March 28, 2001, the appellant filed a Notice of Appeal with the Board of Industrial Insurance Appeals, hereafter referred to as the Board, from the February 6, 2001 Department order. On April 27, 2001, the Board granted the appeal. On March 27, 2002, the Board issued a Proposed Decision and Order that dismissed the appellant's appeal for failure to present evidence when due. On April 2, 2002 the appellant filed a Petition for Review and on April 22, 2002 The board issued an Order that denied the appellant's Petition for Review. CP 4, l. 12-17

May 22, 2002, the appellant appealed to the Thurston County Superior Court and on August 23, 2002, his appeal was dismissed with prejudice. CP 4, l. 18-19

May 16, 2001 during the pendency of his appeal, an application to re-open

the claim for the Appellant was filed. The Department received the dismissal of the superior court appeal on August 28, 2002. On November 26, 2002, the Department extended the time period for responding to the application to re-open the claim to January 24, 2003. On December 9, 2002, the appellant filed a Notice of Appeal with the Board from the November 26, Department Order. On January 8, 2003, the Board granted the appeal. CP 4, l. 20-25

On January 24, 2003, the Department denied the appellant's application to re-open the claim. On February 4, 2003, the appellant filed a Notice of Appeal with the Board from the January 24, 2003 Department order. On February 20, 2003, the Board granted the appeal. December 8, 2003, the Board issued a Proposed Decision and Order that affirmed the November 26, 2002 Department Order and reversed the January 24, 2003 Department order and remanded to the Department to re-open the claim. The self-insured employer filed an appeal to Superior Court for Thurston County on March 8, 2004. On May 25, 2004, the self-insured employer filed a Notice of Withdrawal of Appeal. On June 16, 2004 the Superior Court entered an Order Granting Plaintiff's Withdrawal of Appeal. CP 5, l. 1-11

February 20, 2004 the Department issued a ministerial order in which it reopened the claim effective September 30, 2002, for authorized treatment

and action as indicated. On June 25, 2004, the Department issued an order in which it directed the self-insured employer to pay time loss compensation for the period of September 30, 2002 through June 20, 2004, and on-going as certified by the attending physician. CP 5, l. 12-16

On July 2, 2004, the self insured employer filed a Notice of Appeal with the Board from the June 25, 2004 Department order. On July 20, 2004, the Board granted the appeal. CP 5, l. 17-19

December 16, 2005, the self-insured employer filed a Notice of Appeal with Thurston County Superior Court from the Department order of June 25, 2004. On October 30, 2007, the Thurston Superior Court of review/appeal reversed and remanded to the Department its June 25, 2004 order with directions to issue an order denying time loss benefits for the period September 30, 2002 through June 24, 2004, which is the subject of this appeal. CP 6, l. 16-20

#### **ARGUMENT SUMMARY PER RAP 10.3(a)(6)**

Ewart appeals the Thurston Superior Court of review judgment of October 30, 2007 that reversed the BIIA Decision and Order which granted Mr. Ewart time loss for the period of September 30, 2002 through June 24,

2004. Mr. Ewart alleges that the Thurston Superior Court of review erred in its analysis and ruling when it considered vocational counselor testimony discounted by the BIIA in their November 28, 2005 Decision and Order for lack of consistency and materiality. Mr. Ewart further alleges that the Thurston Superior Court of review acted erroneously when it ruled to reverse the BIIA decision and order for each and all of the following reasons:

#### ARGUMENTS

1. The Thurston County Superior Court of review (Judge Anne Hirsch presiding) decided this case largely based on an issue (completing/attending all retraining classes) not properly before it and immaterial to those which were, thereby prejudicing appealant's right to a meaningfully fair and impartial review when it reversed the lower board of industrial appeals panel ruling/holding.

The Court said:

I guess I am a little bit confused about the issue of what his abilities were and his choice to not finish that training class. Because he did not finish, no matter which way you think about it, it is just speculation about whether he would or would not have been able to be employable in another field. He was given this opportunity. He was paid during he took the class. He took the class for a year. He was an average student, and then he just stopped. That is a little troubling for the court. *Memorandum of Authorities 2007*, CP 11, 119-23.

Later, the Thurston Superior Court of review appeared to base its opinion on the issue when it said:

When you come right down to it, the issue in my mind again is not the disability, but the issue of choice that was made not to complete the training and the retraining that was offered.

When I review the record, I am convinced on a more-probable-than-not basis that the decision should be reversed, and I am going to reverse it and adopt the proposed findings of the school district. CP 12, l. 2-6.

This determination of whether Mr. Ewart chose not to complete the CAD training could only be pivotal if the trial court were applying RCW 51.32.110(2) which provides the sole means for “punishing” an injured worker for failing to comply with vocational rehabilitation efforts, and only does so after a procedure has been followed at the Department of Labor and Industries. CP 12, l. 7-11

Before the non-cooperation issue could come before the Court, the self-insured employer would have to comply with the provisions of WAC 296-14-410. Then the school district could only, suspend or deny compensation “upon approval by the “Department” RCW 51. 32. 110(2).

The order of approval could then be appealed to the Board Industrial Insurance Appeal (hereafter Board). However none of this happened in this case.

This case does not involve a Department order or a Board decision applying or refusing to apply RCW 51. 32. 110(2). The Board decision, in

this case, did not even mention RCW 51.32.110. The Board's decision was based on RCW 51.32.090. CP 12, 1. 21-24, CP 13, 1. 1-5

The Court improperly considered or passed on issues that were not before the Board Ruse v Department of Labor and Industries 138 Wn.2d 1, 977 P.2d 570 (1990), Kingery v Department of Labor and Industries 132 Wn.2d 162, 937 P.2d 565, reconsideration denied (1997). Shufeldt v Department of Labor and Industries 57 Wn.2d 758, 359 P.2d 495 (1961). CP 13, 1. 6-10

The Court's confusion regarding the immateriality of the issue is quite understandable given the school district has, in effect, invited error with the arguments that Mr. Ewart had "squandered" his training. The District also argues Appellant had made "a conscious decision not to complete the course." The District argued Mr. Ewart did not want psychiatric treatment. All of these arguments were directed to non-cooperation under the provisions of RCW 51.32.110(2), not the standard of RCW 51.32.090. CP 13, 1. 11-17

Mr. Ewart's failure to complete the CAD program could have significance/relevancy, in this case, if the court had determined that, notwithstanding his failure to complete the CAD course, he can, in fact, meaningfully perform the CAD Drafting position. CP 13, 1. 18-20

However, not even the self-insured employer argues Mr. Ewart was capable of obtaining and performing a CAD Drafting position on a

reasonably continuous basis, during the period of time from September 30, 2002 through June 24, 2004. CP 14, I. 1-3

To determine Mr. Ewart was employable as a CAD drafter, the Thurston Superior Court of review would have to reject Mr. Berg's testimony that there are already:

... too many people laid off from the Boeing Company that have flooded the job market that have considerable years of experience and software skills. *Memorandum of Authorities 2007*, CP 14. 6-7.

... I don't believe without at least a two degree, and a well developed portfolio a person would ever be competitive in a relatively small industry like CAD draft. *Memorandum of Authorities 2007*, CP 14, I. 9-10.

The CAD Training took place from September 21, 1998 through December 10, 1999. The Decision and Order of the Board, in case at hand, took judicial notice of the Findings of Fact and Conclusions of Law contained in the in the Boards prior, December 8, 2003, Proposed Decision and Order. CP 14, I. 11-14

The Board said in its Decision and Order:

As a result of Mr. Ewart's failure to complete his vocational plan the department determined that he was ineligible for further vocational services and closed the claim on May 18, 2000. After various protests, the claim was ultimately closed on February 6, 2001, with a permanent partial disability award equal to 14 percent of the amputation value pf the left leg above the knee joint with a short thigh stump, less 2 percent for the pre-existing condition.

Mr. Ewart then filed an application to reopen, which the department denied. That denial was reversed at the Board level, as a result of the appeals in Docket Nos. 02 22835 and 03 11141,

which we have discussed above. The Department then issued a February 20, 2004 ministerial order, wherein it reopened the claim effective September 30, 2002. On June 25, 2004, the Department issued the order which is the subject of this appeal, and in which directed payment of past due time-loss compensation for the period September 30, 2002 through June 24, 2004. (Emphasis added) *Memorandum of Authorities 2007*, CP 14, l. 15-24, CP 15, l. 1-2.

As we can see from this decision, Mr. Ewart was “punished” for his failure to complete the CAD drafting course when his case was closed on May, 18, 2000 and this was affirmed on February 6, 2001. However, that is all irrelevant in this case. CP 15, l. 3-5

The question in this case, is whether Mr. Ewart was able to obtain and perform reasonably continuous gainful employment in the competitive labor market from September 30, 2002 through June 24, 2004. This is the time period several years after the CAD drafting fiasco, after Mr. Ewart claim was closed, and while he was spending years fighting to get his claim reopened. CP 15, l. 5-10

The only facts about that prior time (1998 and 1999) which are, significant in this case, are that in 1998 Mr. Ewart was approved for a vocational rehabilitation plan. In order for that to have happened, the supervision of Industrial Insurance had to have found that the vocational rehabilitation plan was necessary to enable Mr. Ewart employable at “gainful employment.” (RCW 51. 32. 095(1) CP 15, l. 11-14

The Board of Industrial Insurance Appeals in their analyses of the case

when referring to Ms. West's testimony stated:

The fact that Ms. West developed an inappropriate vocational retraining plan affects the weight we accord her opinion on Mr. Ewart's employability during the time loss compensation period. Furthermore, in finding Mr. Ewart eligible for retraining, the highest and most expensive priority under RCW 51.32.095, Ms. West acknowledged that she was required to first eliminate all of the lower priorities that require no retraining. That means that by recommending retaining, she eliminated the feasibility of employment in such jobs as a security guard, van driver, or small item assembler. (Emphasis added) *Memorandum of Authorities 2007*, CP 16, I. 9-14.

In the Trial Court's (Thurston County Superior Court, judge Anne Hirsch presiding) response to Appellant's motion for reconsideration, it deftly opined it was not rendering its decision based on admittedly 'confusing' remarks made from the bench, but based ON THE RECORD. Nevertheless, the Trial Court continued to express doubts and reservations with respect to the Appellant and the validity of the merits supporting his position in the context of the very remarks being disavowed as contributing to the Trial Court's decision overturning the lower BIIA ruling.

No clear written reasoning other than the Trial Court disagreed more than not (51% vs. 49%) with the BIIA ruling was entered. The Trial Court accepted the Respondent attorney's (Ms. Lazaldi) invitation to use the 'preponderance of evidence' standard in arriving at its decision despite requirements to give deference to the lower tribunal as well as a heavy presumption of it having been correct in reaching its decision.

2. The standard the Thurston County Superior Court of review (judge Anne Hirsch presiding) opted to use in overturning the lower court's ruling and decision (i.e. Washington State's Board of Industrial Insurance Appeals or BIIA) was improper/erroneous, undermines the public policy

of finality in judicial/administrative proceedings except for good cause shown, and invites endless litigation by applying a standard (51%:49%) so slight as to deny reasonable certainty in the outcome of workman's compensation litigation pursuant to written findings of fact and conclusions of law entered by a court/panel of competent and proper jurisdiction.

Judicial economy and the Public interest dictate a degree of finality in rulings rendered pursuant to open and fair litigation. Moreover, the BIIA panel consisted of 3 experienced Administrative Law judges with a great deal of expertise regarding workman's compensation claims and appeals. While even experienced justices sometimes error, the public, the parties, and the court system itself deserves to know precisely what those errors are/were and not having mere/bare conflicting opinion, no matter how slight, served as a substitute. Such a substitution violated Appellant's right to a fair trial or hearing as well as Due Process upon review.

3. The reasons for the Thurston County Superior Court of review (judge Anne Hirsch presiding) overturning of the lower court (BIIA) ruling are unclear at best, unstated, or are not articulated in a manner to avoid the appearance of caprice, prejudice, and denial of a meaningfully proper/lawful standard of review to which appellant is entitled. The appearance of doing substantial justice by all the parties must be adhered to as well as actual substantial justice. Without such required articulation, no meaningful review of the Trial Court's decision can be had based on the record upon review or appeal. Failure to articulate specific reasons for

entering a decision effectively denies the parties a meaningful opportunity to review based on the record because the record has been short changed and left vacant.

4. Appellant was denied workman's compensation benefits and had his claim closed ostensibly for his alleged failure to complete vocational rehabilitation classes in 1999. Despite the hardship such sanctions imposed on the Appellant, the trial court (Thurston County Superior Court of review, judge Anne Hirsch presiding) erred by effectively 'punishing' the Appellant twice, ignoring the bar of Double Jeopardy, when it allowed itself to consider arguments referrencing Appellant's failure to complete a vocational retraining class in 1999 despite the fact the record made clear Appellant had already been punished/disciplined for said failure at the time and after the Washington State Department of Labor & Industries closed his claim. Moreover, any alleged failure on the Appellant's part resulting in the sanctions imposed against him were not properly before the Trial Court in this instance. By reaching so far into the past regarding an issue already thoroughly litigated and adjudicated, the Trial Court effectively violated Appellant's constitutional (both State and Federal) right to avoid Double Jeopardy, i.e. punished twice for the same 'offense'.

5. The trial court (Thurston County Superior Court of review, judge Anne Hirsch presiding) erred in failing to apply the principles of Res Judicata, collateral estoppel, and the theory of latches in reaching its decision. Appellant and Respondent had every opportunity to raise all the issues currently being litigated in a timely manner during the hearings held pursuant to Appellant's successful bid to reopen his injured worker claim finalized by the Thurston County Superior Court order granting Respondent's motion to withdraw its appeal/objection to said reopening entered on 6-16-04.

Respondent had a duty to act in a reasonably expeditious manner to raise at an early date those issues which might bar Appellant's eligibility for workman's compensation benefits under the common law theory of latches. This was not done. Currently the Respondent argues the Appellant has the ability to continuously and gainfully work at some other occupation than the one he was engaged in at the time of his compensable injury. The time to have raised such an objection to awarding Appellant workman's compensation benefits was at the time Appellant's claim was first opening circa 1996. No argument has been raised by Respondent that Appellant has since gained new talents or marketable work skills. On the contrary, the record shows the Respondent

and its findings found Appellant to be so egregiously in need of retraining and wanting of job skills that would accommodate his injury that it paid for vocational retraining classes on Appellant's behalf--the most expensive and restrictive of all remedies at its disposal if and only if Appellant qualified for such an expenditure of public funds. The official decision that Appellant did indeed qualify was made and today the Respondent is second guessing its own verdict in that respect, arguing Appellant now had the ability to find some lesser kind of employment whereas previously it found he could not and therefore qualified for vocational retraining.

Because of a number of issues including Appellant's desire to undergo surgery to improve or at least diminish the restrictions imposed by his injury, he failed to complete a final project in a vocational curriculum ill suited to him and unlikely to provide him meaningful/lasting relief from being effectively unemployable. These circumstances became moot when the Dept. of L&I closed Appellant's claim and the Appellant failed to provide proper service upon all the parties in a timely manner when the litigation reached the Superior Court stage of review/appeal. Appellant's claim now remained closed. All the reasons the Respondent might have had to challenge Appellant's claim to being unemployable and partially permanently disabled became moot in the process except for the fact that

any objections to his eligibility during this time frame could have and should have (under the law) been raised, but either were not and/or are now being rehashed in this forum.

The well established principle of Res Judicata serving as a bar to further litigation on the same issues between the same parties includes not only those issues actually raised in previously finalized litigation but those issues that SHOULD and COULD have been raised given the circumstances and facts discoverable at that time. Allegations of Appellant's employability in a less gainful occupation is such an issue. Collateral Estoppel serves as a similar bar for most of the same reasons. Public policy and meaningful judicial economy as well as the duty to do substantial justice by all the parties can tolerate nothing less.

Finally the common law theory of laches and equitable estoppel serve as a bar to litigating Appellant's employability at this time. No evidence has been offered to substantiate any improvement in Appellant's condition since the time he was sanctioned for failure to complete his vocational retraining classes. On the contrary, the Appellant has his claim reopened effective September, 2002, after the Respondent moved to withdraw any objection to said reopening. Any plausible objection to reopening

Appellant's claim (including his employability) that existed at the time imposed a duty upon the Respondent to raise such issue then and not wait until much later to effectively attempt another 'bite at the apple' denied to them under such a bar.

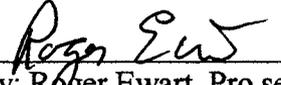
Equity, laches, and collateral estoppel all conspire to deny and serve as a bar to Respondent's arguments today to deny Appellant the relief he seeks based on issues that were already litigated or easily should have been.

#### CONCLUSION

The Thurston Superior Court of review erred when it ruled that Roger Ewart was not temporarily totally disabled within the meaning RCW 51.32.090. We ask this Court (Division II) to consider this case without giving any weight to the question of why Mr. Ewart did not complete the CAD Training program and to focus entirely on whether, considering the whole man, Mr. Ewart could or could not obtain and perform reasonably continuous gainful employment from September 30, 2002 through June 24, 2004.

Dated this 24 day of April, 2008.

Respectfully Submitted,

  
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CERTIFICATE OF SERVICE

On this day, I caused a true and correct copy of the document; APPELLANT'S BRIEF to be served upon the person(s) listed below at their respective address and/or fax number as follows:

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