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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY

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No. 38150-8-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON

DIVISION II

TIMOTHY T. WALKER,

Appellant,

v.

GLACIER NORTHWEST, INC.,

Respondent.

APPEAL FROM THE SUPERIOR COURT FOR CLARK COUNTY

THE HONORABLE ROBERT L. HARRIS

REPLY BRIEF OF APPELLANT

TIMOTHY T. WALKER

LAW OFFICES OF STEVEN L.
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pm 12/18/08

TABLE OF AUTHORITIES

Cases

O’Keefe v. Labor & Indus., 126 Wn. App. 760,
109 P.3d 484 (2005) 2

Wilmot v. Kaiser Aluminum & Chemical Corp.,
118 Wn.2d 46, 821 P.2d 18 (1991) 2

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In re Larry W. McBride, BIIA Dec. 88 0992 (1989). 5

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Other Decisions of BIIA

In re Jeffrey W. Pedersen, Dckt. No. 06 18967 (2007). 5

Respondent's Brief has an **Introduction** section pursuant to RAP 10.3(3). Rather than a concise statement, the introduction contains a page-and-a-half of argument and should be stricken pursuant to RAP 10.7. There is no issue as to whether Glacier Northwest, Inc., could terminate Tim Walker for cause or as an at will employee. The only issue on this appeal is whether that termination denied him time loss benefits under RCW 51.32.090(4)(a).

In the **Argument** section, respondent initially argues that there is substantial evidence to support the Superior Court ruling reversing the Board of Industrial Insurance Appeals. But, the only issue is whether RCW 51.32.090(4)(a) can as a matter of law be applied to deny time loss benefits to an injured worker terminated for cause or otherwise. The answer is no. Whether time Walker was appropriately terminated for cause is not an issue on this appeal.

Commencing at page 16 of the Brief of Respondent, RCW 51.48.025 is cited. This statute covers filing a complaint for discrimination with the Department of Labor and Industries, whether an employee has been injured or not. The statute is under the Penal Section of Title 51 and has nothing to do with time loss benefits payable to an injured worker,

and when those benefits can be terminated. Tim Walker is not maintaining here that he has a claim for retaliatory discharge, or that RCW 51.48.025 even applies.

Commencing at page 23 of Respondent's Brief, Glacier Northwest mis-characterizes Tim Walker's claim. Pursuant to RCW 51.32.090(4)(a), an injured worker who is released to light duty work continues to be temporarily totally disabled unless the employer offers him light duty work within the doctor's restrictions. It does not matter that the injured worker has been previously terminated. The employer can still offer him light duty work, and, if he refuses, his time loss benefits terminate.

Commencing at page 24 of Respondent's Brief, *Wilmot v. Kaiser Aluminum & Chemical Corp.*, 118 Wn.2d 46, 821 P.2d 18 (1991), has to do with maintaining a separate action for damages against an employer for wrongful discharge, not the receipt of time loss benefits under RCW 51.32.090(4)(a). Tim Walker is not asking the Court to make an exception to any rule established by *Wilmot*. *Wilmot*, 118 Wn.2d 75.

Discussing *O'Keefe v. Dep't. of Labor and Indus.*, 126 Wn. App. 760, 109 P.3d 484 (2005), at page 26 of Respondent's Brief, the case is distinguishable in that there an employer released to light duty work, where the employer provided light duty work, was terminated for disciplinary

reasons wholly unrelated to the industrial injury that arose after the employee was working light duty.

The factual situation in *O'Keefe* did not violate the principle in RCW 51.12.010 that the Worker Compensation Act is to be liberally construed in favor of the injured worker. Here, there would be a violation where the denial of time loss benefits related to the industrial injury itself, or the facts surrounding the industrial injury. Disciplinary reasons that occur after the worker returns to work do not relate to the industrial injury itself.

If 8 out of 11 employees of Glacier Northwest, Inc., were terminated for accidents determined to be their fault, as stated at page 5 of Respondent's Brief, and each of those employees were injured as a result of the accident, Glacier's policy on termination certainly lends itself to discrimination against injured workers who are then released to light duty work under RCW 51.32.090(4)(a).

At page 28, Glacier argues that Tim Walker's economic loss arose from violation of safety standards mandated by his employer, not from his injury. But, if you are going to liberally construe the Worker Compensation Act, how can you distinguish his injuries from the industrial injury. They are one in the same. At page 29, the trial court would be

instructing the jury, not the attorneys, as to the law pursuant to WPI 155.05 that the worker is entitled to compensation regardless of fault.

Glacier states at page 33 that Tim Walker argues that he must be permitted to begin work before his time loss benefits can be terminated. The option is solely up to Glacier as to whether they choose to bring the employee back to light duty work, or have the time loss benefits continue. Many employers decided not to do so whether the injured worker has been terminated or not. At page 34, if Glacier brought Tim Walker back to light duty, he would not be driving a concrete mixer truck, and this would not be an absurd or fundamentally unjust result as Glacier argues. Also at page 34, the Board of Industrial Insurance Appeals decided employer's appeal by adopting the Proposed Decision and Order, and the PD&O becomes the Board's decision.

As to the argument at page 36, it is not the intent of the legislature to allow an injured worker performing light duty work and then terminated for cause for reasons wholly unrelated to the injury to be allowed to resume time loss benefits, as discussed by the Board in *In re Jennifer Soesbe*, BIIA Dec. 02 19030 (2003). That is not the situation here, where Tim Walker was terminated for reasons related to his industrial injury. Also, Notes on Use, *Significant Decisions, 2004 Update, Board of*

Industrial Insurance Appeals, provides that decisions issued by the Board which have not been identified as significant, should not be cited as significant. *In re Jeffrey W. Pedersen*, Dckt. 06 18967 (2007), is inappropriately being cited by Glacier as a significant decision.

In any event, termination for failure to pass a urinalysis following an industrial injury is not related to the industrial injury and comports with public policy not to allow illicit drugs to be in the workplace to avoid injuries to the worker or others by workers under the influence. If Tim Walker had a positive urinalysis under *In re Jeffrey W. Pedersen*, he would not have been entitled to time loss benefits pursuant to RCW 51.32.090(4)(a), but that is not the situation here.

Again at page 38, it is argued to distinguish between workers injured and terminated from workers who are injured and then terminated for disciplinary reasons that occur after the employee returns to work light duty, would be absurd. The difference is the reasons for termination occur after the employer returns to work, whether he was injured or not, and is an important distinction to make.

Respondent's last argument commencing at page 40 is that even though the Board found that light duty had not been made available to Tim Walker as required by RCW 51.32.090(4)(a), he was not precluded from

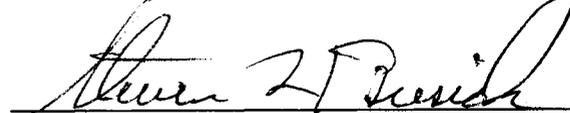
reasonably continuous gainful employment. *In re Larry W. McBride*, BIIA Dec. 88 0882 (1989) raises a different issue not within the stipulation of the parties and not related to RCW 51.32.090(4)(a). The Board states in the Certified Appeal Board Record at page 37, line 16:

The parties have not litigated, and the employer has not presented a prima facie case, on the broader issue of whether Mr. Walker was temporarily precluded by the residuals of his industrial injury from performing other than light-duty (essentially odd lot) employment during the period in issue. Accordingly, that broader issue is not decided here.

The issue here should be limited to the stipulation of the parties before the Board.

DATED this 17th day of December, 2008.

LAW OFFICES OF STEVEN L. BUSICK

A handwritten signature in cursive script, appearing to read "Steven L. Busick", written over a horizontal line.

Steven L. Busick, WSBA #1643
Attorney for Appellant

COURT OF APPEALS
DIVISION II

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WASHINGTON STATE COURT OF APPEALS
DIVISION TWO

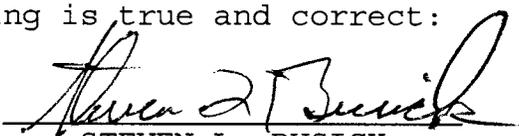
TIMOTHY T. WALKER)	
)	
Appellant,)	NO. 38150-8-II
)	
v.)	PROOF OF MAILING
)	
GLACIER NORTHWEST, INC.,)	
)	
Respondent.)	
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The undersigned states that on Thursday, the 18th of December, 2008, I deposited in the United States Mail, with proper postage prepaid, Brief of Appellant, addressed to Ronald W. Atwood, Attorney at Law, at the following address:

RONALD W. ATWOOD, P.C.
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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct:

December 18, 2008 Vancouver, WA


STEVEN L. BUSICK