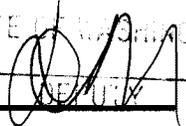


COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY 

NO. 41369-8-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

ELAINE MATTHEWS,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF LABOR AND
INDUSTRIES,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

This is a workers' compensation case. The Industrial Insurance Act authorizes the Department of Labor & Industries (Department) to recoup overpaid benefits based on a worker's innocent or willful misrepresentation and also authorizes an assessment of a penalty for willful misrepresentation. The Department assessed an overpayment and a penalty against Elaine Matthews based on willful misrepresentation, finding that she was receiving time-loss wage replacement benefits while actually working and collecting wages without disclosing the work to the Department. The Board of Industrial Insurance Appeals (Board) reversed the willful misrepresentation penalty but found Ms. Matthews was overpaid benefits, which she must repay to the Department. The superior court affirmed the Board.

The Board may not determine an issue that has not yet passed on by the Department. However, the Board's scope of review is not a matter of subject matter jurisdiction, which turns on the type of controversy, but whether it has the authority to issue a given order in a given case. Although the Board found no *willful* misrepresentation to warrant a penalty, the Board acted within its proper scope of review by concluding Ms. Matthews must repay overpaid benefits to the Department for *innocent* misrepresentation. The Department determined Ms. Matthews

received time-loss benefits to which she was not entitled. She had an opportunity to litigate her benefit eligibility, which was a material issue and one of the elements to be proven by the Department in its willful misrepresentation claim at the Board. Based on the undisputed evidence, the Board properly found she was overpaid benefits to be repaid.

Ms. Matthews does not challenge the sufficiency of the evidence to support the Board's findings, adopted by the superior court. These findings are verities. The Court should affirm the superior court.

II. ISSUES PRESENTED

1. Subject matter jurisdiction is the power to determine the type of controversy, not the authority to issue a given order in a given case. The Department has jurisdiction to determine workers' compensation claims, and the Board conducts a de novo review of the Department's order upon appeal. Does Ms. Matthews raise an issue of subject matter jurisdiction in arguing that the Board determined her workers' compensation benefit eligibility, because the issue had not been determined by the Department?
2. RCW 51.32.240 authorizes recoupment of overpaid benefits in certain circumstances, including innocent misrepresentation, and also authorizes a penalty for willful misrepresentation. The Department assessed an overpayment and a penalty against Ms. Matthews for willful misrepresentation. Did the Board step outside its scope of review in reversing the willful misrepresentation penalty but concluding she was overpaid benefits, which she must repay to the Department?
3. Did Ms. Matthews have an opportunity to litigate the issue of her entitlement to the time-loss benefits she received, when the Department, in the appealed order, determined she was not entitled to the benefits in assessing an overpayment and the willful misrepresentation penalty, and the Department had the burden of

proving that she was not entitled to the benefits in its willful misrepresentation case-in-chief?

4. Should this matter be remanded for further consideration by the Department, when the undisputed evidence shows that the Department mistakenly paid time-loss wage replacement benefits based on Ms. Matthews' representations and omissions for the same time period that Ms. Matthews was gainfully employed?

III. COUNTERSTATEMENT OF THE CASE

A. Ms. Matthews Received Time-loss Benefits While Working and Collecting Wages Without Disclosing Her Work To The Department

Elaine Matthews was injured in May 2006 while working as a licensed practical nurse for Puget Sound Health Care. BR Matthews I 6; BR Matthews II 8-10.¹ She filed a workers' compensation claim and began receiving benefits. BR Matthews II 8-9, 12; BR 6; Finding of Fact (FF) 1.

In the summer of 2007, Ms. Matthews returned to work as a licensed practical nurse. BR Matthews I 9. She testified that she worked for three different employers from July 2007 through January 2008: Avalon Health Care; Bel Air; and Faithful Nurses. BR Matthews I 9; BR 6; FF 2-4. Ms. Matthews applied for work at Avalon Health Care on June 29, 2007, as a licensed practical nurse and indicated in her application she was interested in working full-time. BR Matthews I 12-13, 20. She worked there from

¹ The Certified Appeal Board Record will be cited as "BR" followed by the witness name and page number. Ms. Matthews testified in the Department's case-in-chief and in her case-in-chief. Roman numeral "I" refers to testimony elicited during the Department's case and Roman number "II" refers testimony elicited during Ms. Matthews's case.

July 6, 2007, through August 26, 2007, and was paid \$6075.20. BR Matthews I 16; BR Tyroum 65-66; BR Gruse 42-43; BR Exs. 12, 13. She also received \$4551.04 in time-loss benefits during the time she worked for Avalon Health Care. BR Gruse 53-54; BR Exs. 10, 11, 25.² On or about August 22, 2007, Ms. Matthews applied for work as a licensed practical nurse with Bel Air. BR Matthews I 20; BR Lieurance-Brott 73; Exs.17, 18. She indicated to Bel Air that she would be willing to work full-time. BR Matthews I 20; BR Ex. 17. She worked for Bel Air from September 16, 2007, through October 22, 2007. BR Matthews I 19-20; Exs. 6, 7. She was paid \$4530.16 for her work, including a \$300 bonus. BR Lieurance-Brott 76; BR Gruse 44-46; Exs. 6, 7, 11. She also received \$3238.24 in time-loss benefits during the time she worked for Bel Air. BR Gruse 53-54; Exs. 10, 11, 25. Ms. Matthews next worked at Faithful Nurses as a licensed practical nurse. BR Matthews I 21. She indicated in her application that she could work part-time or full-time. BR Matthews I 21; BR Ex. 20. Ms. Matthews's employer testified she indicated that she was interested in working over the

² At the same time she re-entered the work force, Ms. Matthews became a first-time homeowner. BR Matthews I 10-11. The home purchase initially failed because her employment could not be verified and she had to have a job in order to be approved for a loan. BR Matthews I at 11-12. On July 6, 2007, Avalon Health Care received an inquiry from CTX Mortgage Company to verify Ms. Matthews's employment immediately after she began working there. BR Tyroum 69. She and her husband ultimately purchased a home and executed a deed of trust on the property on July 10, 2007, only four days after she began working at Avalon Health Care. BR Matthews I 15; Ex. 4.

holidays and after that she wanted to work more hours. BR Davison 84. Ms. Matthews worked at Faithful Nurses from November 26, 2007, through January 27, 2008, and was paid \$4774.04. BR Matthews I 22; BR Gruse 46-47; BR Exs. 11, 19. She also received \$4726.08 in time-loss benefits during this period. BR Gruse 53-54; Exs. 10, 11, 25.³

Ms. Matthews testified that she received 12 orders paying time-loss benefits from the Department during the time she was also working. BR Matthews I 40-41; BR Ex. 10. Each payment order she received admonishes:

DO NOT CASH THIS WARRANT IF YOU WERE
RELEASED FOR WORK OR *RETURNED TO ANY TYPE*
OF WORK DURING THE PERIOD PAID BY THE
ORDER OF PAYMENT.

BR Ex. 10 (emphasis added); BR Gruse 57. Included with each order was a state warrant. BR Matthews I 41; BR Ex. 25. Ms. Matthews received and signed each of those warrants and deposited them into her bank account while she was working at Avalon Health Care, Bel Air, and Faithful Nurses. BR Matthews I 41; BR Matthews II 18; BR Ex. 25; BR Gruse 54.

³ As part of the application process, she was required to provide her prospective employer medical clearance. BR Matthews I at 22; BR Davison at 83. On September 21, 2007, instead of going to her attending physician for industrial insurance, Ms. Matthews met with Rich Gailey, physician's assistant (PA) with Group Health Cooperative. BR Matthews I at 23. As a result of that visit, PA Gailey completed a letter stating that Ms. Matthews was generally healthy and fit for work. BR Ex. 22. The Department was never told that Ms. Matthews received treatment at Group Health Cooperative and did not receive any documentation for that visit. BR Vaughan at 70; BR Gruse at 49.

Through worker verification forms, workers advise the Department both that they are seeking continued benefits and that they have or have not returned to work. BR Gruse 50; BR Ex. 2. The Department mails the forms to workers on the same date as payment orders, and it sent a series of such forms to Ms. Matthews in 2007 and 2008. BR Gruse 50-51. During the course of her claim, Ms. Matthews completed and returned multiple worker verification forms. BR Matthews I 7; BR Gruse 49-50; BR Ex. 2. She last completed a worker verification form in May 2007. BR Matthews I 9. Before she returned to work in July 2007, her worker verification forms came into the Department consistently and regularly. BR Gruse 49-50.

Darryl Vaughan is a Department claims manager who handled Ms. Matthews's claim during the relevant time periods. BR Vaughan 52. During July 2007 through January 2008, he did not receive any information indicating Ms. Matthews had successfully returned to work. BR Gruse 49; BR Vaughan 63. Mr. Vaughan testified that Ms. Matthews did not contact the Department telephonically to advise that she had returned to work for any specific employer for the period of July 2007 through January 2008. BR Vaughan 66.

Michelle Barre, a vocational counselor, provided vocational services to Ms. Matthews from February 2007 to October 2007. BR Matthews I 24; BR Barre 3, 7, 18, 36. During the period of February 2007 through

October 2007, Ms. Barre spoke with Ms. Matthews several times and once met with her in person. BR Barre 7-8. Ms. Barre's understanding about the extent of Ms. Matthews's status was that beyond a one-day orientation with Avalon, Ms. Matthews was unable to work. BR Barre 17. At no time in her discussions with Ms. Barre did Ms. Matthews mention she had actually returned to work. BR Barre 16.

The Department relied on Ms. Matthews's communications in paying her time-loss benefits at issue in this appeal. BR Gruse 55.⁴ The Department first learned that Ms. Matthews was working as a result of a January 2008 cross-match between her employment security quarterly wages and workers' compensation records. BR Gruse 59-60, 71. After an investigation, the Department assessed an overpayment in the amount of \$11,311.32 against Ms. Matthews and demanded she repay the overpaid benefits and a 50 percent willful misrepresentation penalty (\$5,655.66). BR Gruse 42; Ex. 11. Ms. Matthews protested this order, and the Department issued an order affirming the overpayment assessment and penalty. BR 74. Ms. Matthews appealed the overpayment order to the Board. BR 57-58.

⁴ Until the doctor, worker or vocational counselor notifies the Department the worker has returned to gainful employment, the Department is obliged to provide the worker with wage replacement benefits. BR Gruse 56. When a worker receives benefits to which he or she is not entitled, it drives up costs for employer and other workers. BR Gruse 55. Payment of time-loss benefits is the single biggest driver of employer rate increases and experience factors. BR Gruse 55.

B. Board Proceedings

At the Board, the Department presented its case-in-chief to prove overpayment induced by willful misrepresentation. The Department presented the testimony from Ms. Matthews, her spouse, the administrators from the three nursing home facilities she was employed, Michelle Barre (the vocational counselor assigned to the claim), Julian Rodriguez, P.A. (a medical provider on her claim), and Department employees Alan Gruse and Darryl Vaughan. BR 44-50. After the close of evidence, Ms. Matthews moved for dismissal. BR 44. After the dismissal was denied, Ms. Matthews presented her case. BR Matthews II 5-34, BR Korna 34-51; BR Vaughan 51-75. Ms. Matthews elected not to present any vocational or medical testimony, instead presenting only the testimony of herself, her spouse, and Department employee Darryl Vaughan. BR Matthews II 5-34, BR Korna 34-51; BR Vaughan 51-75.

After the hearing, the Board's industrial appeals judge (IAJ) issued a proposed decision, concluding that Ms. Matthews was not sophisticated or deceitful, and therefore the Department failed to demonstrate by clear, cogent, and convincing evidence that her conduct amounted to a *willful* misrepresentation. BR 44-51. However, based on the undisputed evidence, the IAJ found Ms. Matthews received time-loss benefits to which she was not entitled and ordered repayment of the overpaid

benefits. BR 44-51. The IAJ directed the Department to recalculate the amount of the overpayment to reflect Ms. Matthews' earnings of \$6075.20 from Avalon Health Care. BR 44-51. These earnings were higher than the \$4551.04 in earnings at Avalon that the Department cited in its appealed order. BR Gruse 42; BR Ex. 11.

In concluding that the Department may recoup the overpayment, the IAJ did not cite to a specific basis. BR 44-51. However, the proposed decision bifurcated the overpayment analysis. BR 44-51. Only after addressing the issue of whether Ms. Matthews was overpaid benefits, did the IAJ address the penalty issue by inquiring into the willfulness of Ms. Matthews' conduct: "the final question is whether Ms. Matthews willfully misrepresented her work situation to the Department so that they are entitled to the penalty." BR 48-49.

Ms. Matthews petitioned the three-member Board for review, arguing that the question of whether the Department may recoup overpayment outside of the willful misrepresentation provisions of subsection five of RCW 51.32.240 had not been addressed in the Department order on appeal, and therefore the question was outside the scope of the Board's review authority. BR 14-25. The Department also petitioned the Board to review the IAJ's conclusion that Ms. Matthews did not engage in willful misrepresentation. BR 27-36. The Board granted

review but issued a decision consistent with the IAJ's determinations on both the willful misrepresentation and overpayment issues. BR 1-2.

C. Court Proceedings

Ms. Matthews appealed to Pierce County Superior Court, where the case was tried to the bench. The superior court affirmed the Board, adopting the Board's findings of fact and conclusions of law. CP at 56-58. This appeal follows.⁵

IV. STANDARD OF REVIEW

The Industrial Insurance Act, RCW Title 51, governs the administrative decision making and judicial review procedures in a workers' compensation case. See RCW 51.52.100, .110, .115; *Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-80, 210 P.3d 355 (2009). A workers' compensation case involves two state agencies: the Department and the Board. The Department is a "front-line" agency that administers claims in an ex parte manner, whereas the Board, as a "quasi-judicial" agency, conducts an evidentiary hearing when a party aggrieved

⁵ The Department may appeal the Board decision only on the questions of law. RCW 51.52.110. Thus, the Department did not appeal the Board's factual findings on the willful misrepresentation issue.

by a Department decision appeals. *Kaiser Aluminum & Chem. Corp. v. Dep't of Labor & Indus.*, 121 Wn.2d 776, 780-81, 854 P.2d 611 (1993).

The Board replaced the Department's internal joint board in 1949 as an independent agency to conduct a "full and complete" hearing, consider evidence gathered at the Board, and make "findings of fact and an order." *Karlen v. Dep't of Labor & Indus.*, 41 Wn.2d 301, 303-04, 249 P.2d 364 (1952). The Board's role is appellate in the sense its review "is limited to those issues which the Department previously decided." *Hanquet v. Dep't of Labor & Indus.*, 75 Wn. App. 657, 661, 879 P.2d 326 (1994) (citation omitted). However, the Board hearing is "not a review" in the sense "the matter comes on for hearing completely de novo." Ivan C. Rutledge, *A New Tribunal in Washington*, 26 Wash. L. Rev. 196, 205 (1951).

At the Board, the Department had the burden of proceeding with the evidence to establish that Ms. Matthews engaged in willful misrepresentation resulting in overpayment by clear, convincing, and cogent evidence. *In re Frank Hejna*, BIIA Dec. 04 24184, 2006 WL 3520132, *8-9 (2006); RCW 51.32.240(5).⁶ Generally, a claimant has "the burden of proceeding with the evidence to establish a prima facie case

⁶ No appellate court has addressed the issue of whether the clear, convincing, and cogent evidence standard applies to willful misrepresentation after the 2004 revisions to RCW 51.32.240(5).

for the relief sought in such appeal.” RCW 51.52.050(2)(a). One seeking benefits under the Act “must prove his claim by competent evidence.” *Lightle v. Dep’t of Labor & Indus.*, 68 Wn.2d 507, 510, 413 P.2d 814 (1966). However, in the instant case, the Department proceeded first and had the initial burden because it alleged willful misrepresentation.

At the superior court, the Board’s “findings and decisions” were “prima facie correct,” and Ms. Matthews had the burden of proving otherwise. *Ravsten v. Dep’t of Labor & Indus.*, 108 Wn.2d 143, 146, 736 P.2d 265 (1987); RCW 51.52.115.

The trial court found that the Board correctly ordered the Department to issue a further order determining Ms. Matthews’s overpayment based on a modifying the earnings attributed to one of her employers during the time period and eliminating the 50 percent penalty for willful misrepresentation. CP at 56-58.

This Court reviews the superior court decision “as in other civil cases.” RCW 51.52.140; *Rogers*, 151 Wn. App. at 180 (our review in workers’ compensation cases is akin to our review of any other superior court trial judgment). This Court’s review of the superior court decision is limited to examining the record to see if substantial evidence supports the findings made after the trial court’s de novo review, and if the court’s

conclusions of law flow from the findings. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999). Here the findings are unchallenged and are verities on appeal. *Willoughby v. Dep't of Labor & Indus.*, 147 Wn.2d 725, 733 n.6, 57 P.3d 611 (2002).

This Court reviews de novo questions of law. *Stuckey v. Dep't of Labor & Indus.*, 129 Wn.2d 289, 295, 916 P.2d 399 (1996). Scope of review is a question of law reviewed de novo. *Hanquet*, 75 Wn. App. at 663.

V. ARGUMENT

A. **The Board's Scope Of Review Is Not A Matter Of Subject Matter Jurisdiction, Which Turns On The Type Of Controversy, But Whether The Board Lacks The Authority To Issue A Given Order**

Ms. Matthews argues the Board lacked subject matter jurisdiction to address whether she was a temporarily and totally disabled worker eligible for the time-loss benefits she received during the relevant time periods. Appellant's Br. at 9. She argues the Board had subject matter jurisdiction only to address overpayment induced by willful misrepresentation, because that was the sole basis of the Department order

on appeal. Appellant's Br. at 9-10. However, subject matter jurisdiction is not at issue here.

The parties agree the Board's scope of review is limited to the issues first decided by the Department. *See Hanquet*, 75 Wn. App. at 661. However, Ms. Matthews is incorrect in arguing that the Board exceeded its *jurisdiction* by addressing whether the benefits resulted from innocent misrepresentation. Appellant's Br. at 13. Ms. Matthews confuses subject matter jurisdiction with authority to enter a given order in a given case.⁷ A court or agency does not lack subject matter jurisdiction solely because it may lack authority to enter a given order. *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 539, 886 P.2d 189 (1994). Instead, subject matter jurisdiction is the power to decide the "type of controversy," and the "type" means "the general category without regard to the facts of the particular case." *Dougherty v. Dep't of Labor & Indus.*, 150 Wn.2d 310, 317, 76 P.3d 1183 (2003) (citing Robert J. Martineau, *Subject Matter Jurisdiction as New Issue on Appeal: Reining in an Unruly Horse*, 1988 BYU L. Rev. 1, 26-27 (1988)).

Although the Department and the Board play different adjudicative roles, often described as "original" and "appellate," they both have the

⁷ Courts have often confused the term "subject matter jurisdiction" with authority "to rule in a particular manner," and this "has led to improvident and inconsistent use of the term." *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 539, 886 P.2d 189 (1994) (citation omitted).

power to decide whether Ms. Matthews was eligible for the benefits she received, a type of controversy frequently decided in workers' compensation cases.⁸

B. The Board Properly Determined Ms. Matthews' Eligibility For The Benefits She Received, Because It Was A Material Issue And Element To Be Proven By The Department At The Board

The Department may recoup overpaid time-loss benefits under RCW 51.32.240. This statute is recognized as providing the Department with "broad recoupment powers," *Weyerhaeuser Co. v. Bradshaw*, 82 Wn. App. 277, 282, 918 P.2d 933 (1996), to allow the Department in its role as the trustee to industrial insurance funds to ensure that only qualified persons receive or retain benefits due under law. The Department has the right to order repayment of any benefits "*made because of clerical error, mistake of identity, innocent misrepresentation by or on behalf of the recipient mistakenly acted upon, or any other circumstance of similar nature.*" RCW 51.32.240(1)(a) (emphasis added). A claim for repayment must be made within one year for clerical error, mistake of identity, or innocent misrepresentation. RCW 51.32.240(1)(a). The Department also has the ability to levy penalties on the overpayment if the benefits were received as the result of willful misrepresentation. RCW 51.32.240(5).

⁸ The Board has recognized the distinction between subject matter jurisdiction and scope of review as discussed in *Marley. In re Orena A. Houle*, BIIA Dec. 00 11628, 2001 WL 395827, *3 (2001).

Contrary to Ms. Matthews' claim, the Board did not step outside of its scope of review in this case when it addressed Ms. Matthews's eligibility for the time-loss benefits she received. The Department issued an overpayment order addressing benefits Ms. Matthews received but to which the Department believed she was not entitled. BR at 53. The order put her on notice that the Department overpaid her time-loss compensation benefits and demanded repayment. Because the Department believed the overpayment was induced by Ms. Matthews's willful misrepresentation, rather than just her innocent misrepresentation, it also included a 50 percent penalty. The order itself refers generally to RCW 51.32.240, not specifically to RCW 51.32.240(5) or any other subsection of the overpayment statute.

The question of whether an overpayment is made by innocent misrepresentation is subsumed into the question of whether willful misrepresentation has occurred because a willful misrepresentation overpayment order necessarily requires the Department to determine that the worker was not entitled to the time-loss compensation in the first place. *See infra* Part V.C.1.

The following language in WAC 296-14-4121(2) shows that the Department considers willful misrepresentation penalty only after considering innocent misrepresentation: "The assessment of the fifty

percent penalty does not apply to those instances where the misrepresentation is not willful, as defined above.”⁹ The Department considered whether Ms. Matthews’s misrepresentation was innocent or resulted from willful misrepresentation and concluded that there was sufficient evidence to show that she had the specific intent necessary to impose a willful misrepresentation penalty.

Ms. Matthews relies on *Lenk v. Dep’t of Labor & Indus.*, 3 Wn. App. 977, 982, 478 P.2d 761 (1970), for the general proposition that the Board did not have authority to issue an order regarding an overpayment of benefits for any reason other than willful misrepresentation, because the Department did not pass on her entitlement to all the benefits she received on any other grounds. Appellant’s Br. at 7-9. However, *Lenk* does not support Ms. Matthews. While *Lenk* states that the Board’s authority to

⁹ WAC 296-14-4121 provides the following example:

For example, a worker receives wages at the time of injury of \$10.25 per hour, but he inadvertently indicates on the report of industrial injury or occupational disease that his pay is \$10.75 per hour. The state fund employer fails to submit a completed report form and the time-loss compensation benefit rate is based on wages of \$10.75 per hour. When this information is provided to the employer, worker, and medical provider by legal order, no interested party submits a protest within the statutory time frame, but further investigation later reveals the misinformation. An overpayment determination under RCW 51.32.240(1) may be appropriate upon discovery of the correct hourly pay rate, but the worker has not engaged in willful misrepresentation with specific intent to obtain benefits to which he would have otherwise not been entitled.

issue an order is limited to those issues passed on by the Department, the *Lenk* Court found in that case that the Board did not exceed its authority when it determined the claimant's arthritic condition was not causally related to the industrial exposure to creosote. *Lenk*, 3 Wn. App. at 981, 986.

In order to determine whether the Board had authority to address the causation of Lenk's arthritic condition rather than confining its consideration to dermatitis, the Court looked to the language of the two orders, the medical evidence the Department considered, the language of the worker's notice of appeal, and the fact that the claim was filed "after the polyarthritis or generalized arthritic condition was apparent and the dermatitis had completely subsided." *Id.* at 984-85. In its analysis, the *Lenk* Court also recognized that the Board's scope of review should not be read so narrowly as to encourage piecemeal litigation. *Id.* at 986.¹⁰

¹⁰ Ms. Matthews also cites *Brakus v. Dep't of Labor & Indus.*, 48 Wn.2d 218, 221, 292 P.2d 865 (1956). Appellant's Br. at 13-14. This case stands for the proposition that the Department cannot appeal from its own order. In *Brakus*, the worker was awarded a certain amount for a permanent for permanent partial disability, but appealed the award, claiming he was entitled to a greater amount. *Brakus*, 48 Wn.2d at 219. The Board found that the worker had not established any disability and reversed. *Id.* The Court reversed the Board and held that the Board's authority was limited to the issue of whether there was *greater* PPD because the Department could not appeal and argue that there was no disability when RCW 51.52.060 provides the Department exclusive mechanism for correcting an order absent a showing of "fraud or something of like nature, which equity recognizes as sufficient to vacate a judgment, as intervened." *Id.* at 222-23 (citing *Abraham v. Dep't of Labor & Indus.*, 178 Wash. 160, 163, 34 P.2d 458

After *Lenk*, the Court addressed the Board's scope of review in *Hanquet*. *Hanquet* does not support Ms. Matthews's arguments either. *Hanquet* involved a claim denial based on the "sole proprietor or partner" coverage exemption, but the Board affirmed by applying a separate "private home" exemption, a "highly fact-specific" issue neither party litigated. *Hanquet*, 75 Wn. App. at 661-63. The Court concluded that the Board erred in reaching the issue not passed on by the Department, and the error was prejudicial. *Id.* at 662-63. The Court reasoned that the Board divided two to one on the nature of a structure for a "private home," and if the claimant had been aware of the issue, "he might have been able to present additional evidence or argument bearing on the question and the outcome may well have been different." *Id.*

Unlike the situation in *Hanquet*, which involved a completely separate basis for coverage exclusion, which neither party litigated, the issues of whether an overpayment resulted from innocent or willful misrepresentation have a complete overlap of evidence and were litigated in this case. The only difference between innocent and willful misrepresentation is that to impose a penalty for the latter, the Department must show by clear, cogent, and convincing evidence that claimant had the

(1934). *Brakus* predates the mechanisms provided for recoupment in RCW 51.32.240. Given its analysis, the holding likely does not extend to the recoupment mechanisms created by the legislature in RCW 51.32.240.

specific intent to misrepresent her entitlement to benefits. Also, no medical evidence was necessary to address whether Ms. Matthews was capable of reasonable continuous gainful employment during the relevant time periods, because the undisputed evidence was that she actually worked during those periods. She cannot claim she was entitled to time-loss wage replacement benefits for the same time periods she was actually working and collecting wages. RCW 51.32.090(3)(a); *Bonko v. Dep't of Labor & Indus.*, 2 Wn. App. 22, 25, 466 P.2d 526 (1970).

The *Bonko* Court specifically addressed the double-recovery to which Ms. Matthews suggests she may be entitled to on remand to the Department:

Plaintiff takes the position that, under [RCW 51.32.090], as long as he is undergoing treatment for the effects of his original injury, and is unable to return to his former type of employment then he is temporarily totally disabled and entitled to time loss compensation. Plaintiff contends the trial court's finding that he was able to work at some other type of employment does not effect his classification as temporarily totally disabled and that he is entitled to full time loss payment. We are unable to agree with this position. Under plaintiff's interpretation, he might be able to engage in a different occupation, earning as much or more than his former type of employment, and still receive full time loss compensation so long as he was under treatment for the original injury. We do not believe the legislature intended this result.

Bonko, 2 Wn. App. at 25.

If Ms. Matthews earned at least 5 percent less than her job of injury during the time periods she was working, she would be entitled to loss of earning power benefits for those time periods. RCW 51.32.090(3)(b). In fact, the Department order on appeal stated that she was entitled to loss of earning power benefits of \$1204.04 for the last time period she worked. BR 53. The evidence of LEP entitlement was further adduced at hearing. BR 47.

Moreover, Ms. Matthews's notice of appeal requested relief she now argues the Board lacked power to grant: "acceptance of denied conditions, reopening of claim, further treatment, *time-loss benefits . . .*." BR 58 (emphasis added). As in *Lenk*, the scope of review includes those issues raised in the notice of appeal. *Lenk*, 3 Wn. App. at 984-85.

C. Ms. Matthews Had An Opportunity To Address The Issue Of Overpayment Due To Innocent Misrepresentation

Ms. Matthews claims she did not have an opportunity to present evidence on the issue of overpayment due to innocent misrepresentation, claiming she lacked notice of this issue at the Board. Appellant's Br. at 16. However, Ms. Matthew was put on notice by the Department's overpayment assessment order, which demanded repayment of benefits she received while working and collecting wages, as well as a penalty for willful misrepresentation. BR 53-54. She had ample opportunity to

present evidence at the Board hearings that she was entitled to time-loss compensation because of inability to work and she decided not to do so.

1. Willful misrepresentation subsumes the elements of innocent misrepresentation

The overpayment statute, RCW 51.32.240, authorizes recoupment of overpaid benefits in certain circumstances and a penalty for willful misrepresentation. Subsection (5) sets forth three elements of willful misrepresentation: (1) a willful false statement, or willful misrepresentation, omission, or concealment of any material fact; (2) the claimant's specific intent that the act, omission, or statement will result in obtaining, continuing, or increasing benefits; and, (3) actual receipt by the claimant of benefits as a result of his or her actions, omissions, or statements to which the claimant would not otherwise be entitled. RCW 51.32.240(5).¹¹

Subsection (1) provides for recoupment of overpaid benefits within one year of the payment, when the payment was "made because of clerical error, mistake of identity, innocent misrepresentation by or on behalf of the recipient mistakenly acted upon, or any other circumstance of similar nature." RCW 51.32.240(1)(a).

¹¹ The Department bears the burden of proving the above elements: "[I]n an appeal from an order of the department that alleges willful misrepresentation, the department or self-insured employer shall initially introduce all evidence in its case in chief." RCW 51.52.050.

The elements for *innocent* misrepresentation are the same as *willful* misrepresentation, except that the latter requires specific intent to conceal a material fact. The third element of willful misrepresentation specifically requires the Department to show that the claimant had actual receipt of benefits . . . “*to which the claimant would not otherwise be entitled.*” RCW 51.32.240(5)(b) (emphasis added). In other words, entitlement to benefits is a core issue raised by both willful and innocent misrepresentation. Ms. Matthews offers no good explanation why she lacked an opportunity or incentive to present evidence on this issue at the time of the Board hearing. In fact, it was undisputed that she actually worked and received wages while receiving time-loss benefits and failed to disclose the work to the Department. Thus, the undisputed evidence compels a conclusion that she received benefits to which she would not otherwise be entitled.

2. The difference in the burden of proof for willful and innocent misrepresentation is immaterial, where the Department proved overpayment due to innocent (but not willful) misrepresentation, and Ms. Matthews had an opportunity to rebut the Department’s evidence

Ms. Matthews argues that the heightened burden of proof that the Department must meet to impose a willful misrepresentation penalty deprived her of the ability to put on her case about the entitlement of time-loss compensation. She suggests she has not been “afforded the full

protection of the Act,” because “the Board and Superior Court have attempted to divest her of the right to present a prima facie case for temporary total disability and entitlement to time-loss compensation on that basis.” Appellant’s Br. 12-13.

However, Ms. Matthews cannot complain that the Department, not she, had to prove all elements of willful misrepresentation, which subsumed the elements of innocent misrepresentation. She had an opportunity to present any evidence to rebut the Department’s case-in-chief on the issue of whether she received benefits to which she was not entitled. Nothing prevented her from showing that she was in fact entitled to time-loss compensation and thus defeating the third element for willful misrepresentation. Ms. Matthews decided not to offer evidence on this issue and, having done so, may not now seek a second bite at the apple.

Moreover, the Board hears willful misrepresentation cases simultaneously with appeals addressing other issues. *See, e.g., In re Albert McKee*, BIIA Dec. 94 2077, 1996 WL 153530 (1996). In the *McKee* case, the Department had the burden by clear, cogent, and convincing evidence to proceed on the willful misrepresentation issue, and the worker was required to rebut the finding that he was not totally permanently disabled. *Id.* at *2-3.

The Board has also specifically addressed innocent misrepresentation when a willful misrepresentation penalty was not appropriate and remanded the matter to the Department to issue a ministerial recoupment order under innocent misrepresentation. *See e.g., In re Daniel T. Stagner*, BIIA Dckt., 85 2514, 1988 WL 236613 at *2 (1988); *In re Donald E. Mott*, BIIA Dckt., 01 11553, 2002 WL 1400040 (2002).

In the *Stagner* case, the Department issued a willful misrepresentation order seeking recoupment of time loss compensation along with a fifty percent penalty for a period that the claimant actually engaged in self-employment “driving a truck, operating a winch, and a chainsaw, and loading and selling logs for firewood and fence posts.” *In re Daniel T. Stagner*, 1988 WL 236613 at *2. Like the instant case, the Board found that the overpayment resulted from innocent misrepresentation rather than willful misrepresentation and remanded the matter to Department “to compute the amount of overpayment that should be reimbursed to the self-insured employer, pursuant to RCW 51.32.240(1), without any penalty for fraud, . . .”

Likewise, in the *Mott* case, the Board ordered repayment despite finding that the Department had not shown that the worker engaged in willful misrepresentation. *In re Donald E. Mott*, 2002 WL 1400040 at *2.

Mr. Mott reported he was married when he was not legally married and accordingly he received a higher time-loss compensation rate than he was entitled to based on his incorrect marital status. *Id.* Persuaded that Mr. Mott believed that Washington was a common law marriage, the Board concluded that Mr. Mott lacked specific intent necessary for the Department to impose a willful misrepresentation penalty. *Id.* The Board nonetheless “remanded [the matter] to the Department with instructions to calculate the amount of overpayment resulting from the claimant’s misrepresentation of his marital status for a period not to exceed one year preceding [the date of the order on appeal], and demand repayment pursuant to RCW 51.32.240(1).” *Id.* at *3.

Contrary to these decisions, the Board has indicated on one occasion that it would not expand its scope of review in willful misrepresentation to include innocent misrepresentation. *In re Del Sorenson*, BIIA Dec. 89 2697, 1991 WL 87430 (1991).¹² While the decision is *dicta* because Board did not need to address the scope issue in

¹² Without much analysis the Board indicated: “Having failed to establish its case for fraud as stated in its order, neither the Department nor this Board may turn to consider in this appeal the possibility that some other circumstance existed, such as contained in RCW 51.32.240(1), to partially justify [its overpayment order.] In any event, there is simply a lack of satisfactory evidence in this record of mistake or innocent misrepresentation or circumstance of a similar nature, which would justify even a partial recoupment of compensation for the period covered in the [overpayment order].” *In re Del Sorenson*, 1991 WL 87430 at *7.

that case given the evidence, the facts of *Sorenson* are also different than the instant case because there was no evidence that Mr. Sorenson actually was receiving wages while simultaneously claiming time loss compensation. *Id.* at *7. Unlike Mr. Sorenson, the Board had specific evidence of exactly when Ms. Matthews worked and the wages she earned. BR 3.

Ms. Matthews further confuses the situation by citing the work-type activity willful regulation to support her position. WAC 296-14-4123. The regulation provides an example of volunteer work and does not apply to the facts here. *See* WAC 296-14-4123 (For example, a worker who is receiving wage replacement benefits volunteers two hours each day for a recognized charity greeting customers and operating the cash register.). It is undisputed that Ms. Matthews was not only capable of working during the time in question but actually worked and received wages. Unlike the example in the regulation, Ms. Matthews was not a volunteer, and she did not tell the Department she was working.

Finding that a lower standard of proof is met by meeting the higher standard is common in civil litigation. Washington courts have consistently held that a prior criminal conviction may preclude a future litigation on the same issues between the same parties. *See, e.g., Seattle-First Nat'l Bank v. Cannon*, 26 Wn. App. 922, 926-29, 615 P.2d 1316

(1980). In *Cannon*, the court found that the criminal conviction for conspiracy and aiding and abetting embezzlement could be used as conclusive evidence of the embezzlement by the defendants in a subsequent civil suit, under the doctrine of collateral estoppel. *Cannon*, 26 Wn. App. at 928-29. The application of collateral estoppel demonstrates that there is no unfairness in precluding relitigation of the same issue, when the prior adjudication was based on a higher burden or proof. See *Hadley v. Maxwell*, 144 Wn.2d 306, 315, 27 P.3d 600 (2001) (Collateral estoppel is, in the end, an equitable doctrine that will not be applied mechanically to work an injustice.). There was no unfairness in having the Department, not Ms. Matthews, prove the element of willful misrepresentation, which subsumed the elements of innocent misrepresentation.

D. Ms. Matthews Seeks A Remand To The Department That Would Serve No Purpose Because She Cannot Claim Entitlement To Time-Loss Benefits She Received While Working And Collecting Wages

A remand on the innocent misrepresentation issue would not serve any purpose, because Ms. Matthews can present no evidence that would show her entitlement to time-loss compensation benefits during the time periods she was working and receiving wages. She suggests she could have presented evidence that she was totally and temporarily disabled

during the time periods in question but worked in spite of some legal “inability to work” construct. However, it is illogical to claim that she is entitled to time-loss benefits due to physical impairment when she *actually* received wages by working.

1. Ms. Matthews cannot claim wage replacement benefits for periods that she was gainfully employed

Ms. Matthews cites no case law for the proposition that someone can be working and receive time loss compensation benefits. Indeed case law does not support this proposition if the worker is involved in gainful employment.

In *Kuhnle v. Dep’t of Labor & Indus.*, 12 Wn.2d 191, 200, 120 P.2d 1003 (1942), the Supreme Court approved *Foglesong v. Modern Broth. of America*, 97 S.W. 240 (Mo. Ct. App. 1906), which held that “a farmer who could direct the work to be done on his farm and could perform some light labor himself, but was disabled from carrying on, other than partially, the occupation of farmer and equally disabled from carrying on any gainful occupation” was totally disabled. In *Fochtman v. Dep’t of Labor & Indus.*, 7 Wn. App. 286, 292, 499 P.2d 255 (1972), the court, relying on *Kuhnle*, reiterated the principle that sporadic work and irregular employment do not qualify as gainful employment for the purposes of denying total permanent disability (pension) benefits. The court stated:

“A workman may be found to be totally disabled, in spite of sporadic earnings, if his physical disability caused by the injury, is such as to disqualify him from regular employment in the labor market.” *Fochtman*, Wn. App. at 294 (emphasis added). Incidental and sporadic earnings are not the issue here. Ms. Matthews worked during three different time periods that comprised a month, a month and half, and a two months time periods. BR Matthews I 16, 19-20, 22.¹³ The Department only demanded repayment of the time loss benefits for these discrete time periods. BR 53-54.

Loss of earning power benefits is the exclusive means to allow a worker to receive benefits commensurate with their work pattern. *Bonko*, 2 Wn. App. at 26. Loss of earning power is paid if the worker has a five percent earning power. RCW 51.32.090(3); *see Bonko*, 2 Wn. App. at 26 (the second sentence of RCW 51.32.090(3) is recognition that the workman, while being treated for a temporary total disability, may be physically able to return to some kind of work during his recovery and before his condition become fixed and static. During that period the workman shall be paid time loss compensation in proportion that the new earning power shall bear to the old). Under the Department’s recoupment

¹³ To prove entitlement for total temporary disability benefits, Ms. Matthews would have to prove that she was incapable of performing or obtaining reasonably continuous gainful employment. *Fochtman*, 7 Wn. App. at 292.

order, Ms. Matthews was given credit for her loss of earning power in the amount \$1204.44 for the third overpayment period with her overpayment reduced accordingly. BR 53-54.

Even if the Board and superior court erred by addressing the issue of Ms. Matthews' entitlement to the time loss benefits at issue, the error was harmless. This is because the remand that Ms. Matthews requests would not have any practical effect on the ultimate outcome of this case, where the undisputed facts demonstrate she was not entitled to the benefits as a matter of law. *Hizey v. Carpenter*, 119 Wn.2d 251, 269-70, 830 P.2d 646 (1992) (harmless error analysis applied to asserted instructional error); *see also State v. McDonald*, 40 Wn. App. 743, 748 n.2, 700 P.2d 327 (1985) (no remand ordered for hearing on reliability of eyewitness identification because remand would be pointless in light of indisputable facts in case demonstrating unreliability); *State v. Duarte*, 4 Wn. App. 825, 828, 484 P.2d 1156 (1971) (no remand ordered to superior court to enter findings of fact because remand would be pointless in light of the agreed statement of facts and single issue in the case).

Ms. Matthews presents no reason for a remand to the Department. Thus, the Court should affirm the superior court judgment.

2. **The undisputed evidence supports the superior court finding that Ms. Matthews received an overpayment through innocent misrepresentation when the Department mistakenly paid time-loss compensation in reliance on Ms. Matthews' representations and omissions**

Ms. Matthews did not challenge any specific findings of fact at the Board level and she did not do so on appeal to superior court. BR 14-25. Accordingly, Ms. Matthews cannot challenge these factual findings. *See* RCW 51.52.104 (Such petition for review shall set forth in detail the grounds therefore and the party or parties filing the same shall be deemed to have waived all objections or irregularities not specifically set forth therein); *Allan v. Dep't of Labor & Indus.*, 66 Wn. App. 415, 422, 832 P.2d 489 (1992) (objections not raised in petition for review are waived); *Willoughby*, 147 Wn.2d at 733 n.6 (unchallenged findings are verities on appeal).

The Board made the following pertinent findings of fact based on the evidence presented:

2. Between July 6, 2007 and August 26, 2007, Ms. Matthews was employed by Avalon Healthcare Center and received gross pay of \$6075.20. Also during this time period, Ms. Matthews received time-loss compensation benefits in the amount of \$4551.04.
3. Between September 16, 2007 and October 22, 2007, Ms. Matthews was employed by Bel-Air Rehab and Specialty Care Center and received gross pay of \$4530.16.

Also during this time period, Ms. Matthews received time-loss compensation benefits in the amount of \$3,238.24.

4. Between November 28, 2007 and January 20, 2008, Ms. Matthews was employed by Faithful Nurses and received gross pay of \$4774.07. Also during this time period, Ms. Matthews received time-loss compensation benefits in the amount of \$4726.08.

5. Between July 6, 2007 and January 20, 2008, Ms. Matthews did not make a deliberate false statement or misrepresentation, omit, or conceal any material fact with the intent to obtain time-loss compensation benefits to which she was not entitled.

BR 3.

The Department has the right to order repayment of any benefits “made because of clerical error, mistake of identity, innocent misrepresentation by or on behalf of the recipient mistakenly acted upon, or any other circumstance of similar nature.” RCW 51.32.240(1)(a). Substantial evidence supports that the Department mistakenly paid time-loss compensation for the time periods between July 6, 2007, and August 26, 2007, September 16, 2007, and October 22, 2007, and November 28, 2007, through January 20, 2008, to Ms. Matthews because she failed to disclose that she was working at the same time now.

The undisputed evidence shows that the Department did not know that Ms. Matthews worked for the three different employers and issued the time-loss compensation checks in reliance on the mistaken belief that she

was not working in *any* capacity. Darryl Vaughan, is the Department claims manager who handled Ms. Matthews's claim, during all of 2007 and through the first quarter of 2008. BR Vaughan 52. During July 2007 through January 2008, he did not receive any communication indicating she had successfully returned to work. BR Gruse 49; BR Vaughan 63. None of the medical or vocational reports provided to the Department included that information. BR Vaughan 64-65. Indeed, she did not disclose her employment status to either her treating physician's assistant or the vocational counselor. BR Barre 16-18; BR Rodriguez 9. Based upon his review of his Department records and his familiarity with the claim, Mr. Vaughan testified that Ms. Matthews did not contact the Department telephonically to advise that she had returned to work for any specific employer for the period of July 2007 through January 2008. BR Vaughan 66.

3. The Board implicitly concluded that the overpayment did not result from adjudicator error

While Ms. Matthews has never raised the issue of whether her time-loss compensation was received as result of adjudicator error rather than innocent misrepresentation, the Board implicitly considered whether it was adjudicator error when it concluded that Ms. Matthews should repay the time-loss compensation benefits.

RCW 51.32.240(1) limits the Department's ability to collect the overpayment resulting from an adjudicator error to the 60-day appeal process: "the department may only assess an overpayment of benefits because of adjudicator error when the order upon which the overpayment is based is not yet final as provided in RCW 51.52.050 and 51.52.060." RCW 51.32.240(1). Adjudicator error includes the failure to consider information in the claim file, failure to secure adequate information, or an error in judgment. RCW 51.32.240(2)(b). Adjudicator error includes an error that involved the use of "judgment in reaching the determination." *In re Flora Lacy*, BIIA Dec., 08 21768, 2009 WL 6268495, *3 (2009). The undisputed evidence adduced during hearing shows that the Department did not have information available to it showing that Ms. Matthews was working and it did not make an adjudicator error. See *supra* Part IV.D.2.

4. Neither law nor sound public policy favors Ms. Matthews obtaining a double recovery by retaining benefits to which she was not entitled under the Industrial Insurance Act

The court's analysis of entitlement to benefits under the Industrial Insurance Act is normally driven by recognition that the Act is to be "liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in

the course of employment.” RCW 51.32.240. However, the courts only apply liberal construction under RCW 51.12.010 to questions of statutory interpretation, not to questions of fact. *Hastings v. Dep’t of Labor & Indus.*, 24 Wn.2d 1, 13, 163 P.2d 142 (1954) (liberal construction “does not apply to matters of fact, but is limited to question of law”); *Jenkins v. Dep’t of Labor & Indus.*, 85 Wn. App. 7, 14, 931 P.2d 907 (1996) (Liberal construction also does not alter proof requirements.). Liberal construction does not cure the lack of sufficiently persuasive evidence.

Liberal construction also does not warrant unnecessary litigation. “Even a liberal view of the Industrial Insurance Act does not require a repetitive departmental determination.” *Callihan v. Dep’t of Labor & Indus.*, 10 Wn. App. 153, 157, 516 P.2d 1073 (1973) (Board has power to recognize a clerical error in a Department order).

Ms. Matthews asks this court to apply liberal construction in order to allow her to keep her windfall. Liberal construction, however, does not apply to further a double recovery. *See Frost v. Dep’t of Labor & Indus.*, 90 Wn. App. 627, 637, 954 P.2d 1340 (1998). Contrary to the position she now takes, she did not ask the trial court to remand this matter to take further evidence; she asked the court to “reverse that portion of the Board’s decision and order which assesses Ms. Matthews with an overpayment and requires repayment of the overpaid amount to the

Department.” CP at 16.¹⁴ Moreover, if the Board’s order is found void, it is inevitable that Ms. Matthews will challenge the subsequent Department order and argue that the Department may not issue an overpayment because the overpayment was not issued within the one year period for recoupment set out in the statute. “[T]he Department . . . must make claim for such repayment or recoupment within one year of the making of any such payment or it will be deemed any claim therefore has been waived.” RCW 51.32.240(1)(a). In the present case, the Department made the demand for repayment within one year and should not be deemed to have waived repayment. While the Department believes that its initial demand in the June 30, 2008 order tolls the one-year waiver requirement regardless of whether this matter is remanded, it is skeptical that claimant would not challenge the issuance of an overpayment order on jurisdictional grounds on remand.¹⁵

The record below is unequivocal—Ms. Matthews was gainfully employed and received earnings from work while contemporaneously

¹⁴ Only in oral argument did counsel begin to take a contrary approach: “We need to watch out for things like double dipping, especially in times of economic crisis that we’re having; however, the Department needs to issue that order, and Ms. Matthews needs to have her right to either protest or appeal that order, and overpayment on the basis or time-loss compensation.” RP at 6.

¹⁵ The Court of Appeals has previously concluded that the identical language contained in the previous version RCW 51.32.240(5) indicated that the time limitations were not meant to be jurisdictional. *Weyerhaeuser Co. v. Bradshaw*, 82 Wn. App. 277, 282-83, 918 P.2d 933 (1996).

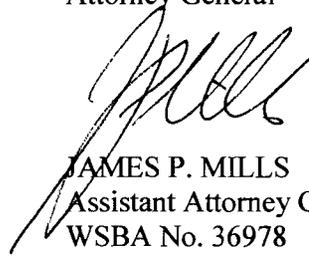
receiving time-loss benefits. She received a windfall and was unjustly enriched. Recoupment of overpaid time-loss benefits as provided in the Board's order precludes a double recovery and is consistent with the purpose of and policies underlying the Industrial Insurance Act.

VI. CONCLUSION

The Department requests that this Court affirm the Superior Court decision affirming the decision of the Board.

RESPECTFULLY SUBMITTED this 17th day of August, 2011.

ROBERT M. MCKENNA
Attorney General

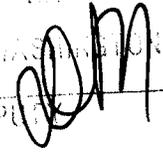


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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY  DEPUTY

No. 41369-8-II

**COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON**

ELAINE MATTHEWS,

Appellant,

v.

DEPARTMENT OF LABOR AND
INDUSTRIES OF THE STATE OF
WASHINGTON,

Respondent.

DECLARATION OF
MAILING

DATED at Tacoma, Washington:

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I mailed the Department's Brief to counsel for all parties on the record by depositing a postage prepaid envelope in the U.S. mail addressed as follows:

Tara Reck
David B. Vail & Jennifer Cross-Euteneier & Assoc.
PO Box 5707
Tacoma, WA 98415-0707

DATED this 17th day of August, 2011.


TRACY LANE-PATTON
Legal Assistant