

Case no.: 44983-8-II

COURT OF APPEALS
DIVISION II OF THE
STATE OF WASHINGTON

KIMBERLEY JOHNS

Appellant

v.

DEPARTMENT OF LABOR AND INDUSTRIES
OF THE STATE OF WASHINGTON

Respondent

APPELLANT'S BRIEF

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I.
INTRODUCTION

Kimberley Johns sustained an on-the-job injury in November 2003. The claim was allowed. Repetitively since 2008 Kimberley Johns requested the Department of Labor and Industries close her claim with a permanent partial disability.

From 2008 to July 2011 the Department found the disability to be a temporary total disability. As of July 2011, the Department found the disability to be a permanent total disability.

By classifying Ms. Johns as totally disabled the Department takes advantage of a social security offset applied against Ms. Johns' total disability benefits (RCW 51.32.220); the effect of the offset is that payment to Ms. Johns for any total disability from the Department is \$0.00. If Ms. Johns is recognized by the Department as having sustained permanent partial disability, the Department cannot impose an offset against PPD and the PPD must be paid in full to Ms. Johns.

In April 2011 Pierce County Superior Court Judge Hickman ordered the Department to address the issue of whether Ms. Johns' industrial injury resulted in permanent disability. In July 2011 the Department issues an order finding Ms. Johns to be permanently totally disabled and "in total offset." (BR 26, Dept. Order 7/1/11). Ms. Johns challenged that decision alleging

"The worker is not totally permanently disabled, does not want to be classified as totally permanently disabled and wants a permanent partial disability award." (BR 28).

On appeal, the Trial Court judge found that as of July 2011 Kimberley Johns did have a permanent partial disability proximately caused by the industrial injury and, at the same time, Kimberley Johns was totally and permanently disabled as a result of the industrial injury combined with other conditions. From that decision, Kimberley Johns has appealed.

(Citations to the Board of Industrial Insurance Appeals record will be designated by "BR").

II.
ASSIGNMENTS OF ERROR

1. Did the Trial Court err in finding

“Based upon the above findings, Kimberley Johns is a totally and permanently disabled worker effective July 1, 2011”

and concluding

“Kimberley Johns was a permanently totally disabled worker as a result of her November 6, 2003 industrial injury within the meaning of RCW 51.08.160, as of July 1, 2011” (Trial Court FOF 1.6 and COL 2.1)

when a prima facie case for total permanent disability under the claim was not made, Kimberley Johns is the only party to challenge the department order and has alleged only permanent partial disability, and Kimberley Johns does not want a total permanent disability classification from the Department.

2. Did the Trial Court err in finding

“As of July 1, 2011, the residuals from the industrial injury of November 6, 2003, were best described by Category 4 of permanent dorsolumbar

impairments WAC 296-20-280” (Trial Court FOF
1.4)

when Category 5 of permanent dorsolumbar impairments best
describes Ms. Johns’ impairment?

III.
STATEMENT OF THE CASE

Kimberley Johns sustained an on-the-job injury in November 2003. The claim was allowed. As a result of the industrial injury Kimberley Johns had two back surgeries and one revision. (BR Johns, p. 4-5).

Kimberley Johns has fibromyalgia. The Department has refused to allow fibromyalgia under the state industrial claim. (BR Johnson, p. 7-8). Dr. Staker, the attending physician, described fibromyalgia as:

“Well, she’s got fibromyalgia, which I don’t know if anybody knows what that is. That hurts everywhere.” (BR Staker, p. 22).

Ms. Johns described it as

“I know how it makes me feel, which is like I have the flu all the time and just general feeling of pain and fatigue constantly”

such that

“I could sleep anywhere anytime for any length of time at the drop of the hat. I am just always so tired. I feel like I am dragging cinder blocks behind me that are tied to my feet all the time”

which affects

“... my entire body. Anywhere I have had a burn, a bruise , any kind of other injuries, if I twisted an ankle, it would attack that. It’s almost as though the fibromyalgia is something inside of me that attacks anything that is weak. I don’t know how to explain it other than if I scratch too hard my – as embarrassing as it is- my underwear in the groin, it actually make me feel I have had the skin rubbed off because of the elastic in my underwear. So I have to change or – how can I put this? I have to cut the elastic off of my underwear so it won’t hurt me.”

And further

“It’s like having the flu. You know when you have had the flu really bad it’s like, oh my gosh. So I can lift my arms to do it and then if I just brush my hair too hard, it will hurt. “ (BR Johns 6-7).

The fibromyalgia affects her relationship with her daughter:

“She can’t – she feels- she- what she says to me is, ‘I feel like you are an egg. I can’t squeeze you too hard or love on you the way I want to love on you because it hurts all the time.’ She has taken offense of it before she (sic) because she thinks I am just pushing her away and that’s the farthest from the truth.”

This problem of fibromyalgia seems to worsen over time.
(BR Johns, p. 6-8).

Kimberly Johns has depression. The Department has refused to all depression as an accepted condition under the state industrial claim. (BR Johnson, p. 8). Medication for the depression causes drowsiness and weight gain. (BR Johns, p. 10). The depression is an ongoing problem and leaves Ms. Johns

“getting upset very easily, crying and – wanting to sleep and not partaking in a lot of things because she’s so depressed.” (BR McCrory, p. 17-18).

Ms. Johns is 5’3” and 260 pounds. (BR Earle, p. 27)(FOF1.5). Obesity is also not an accepted condition under the state industrial claim. (BR Johnson, p. 9).

Kimberley Johns has heart problems (inappropriate sinus tachycardia). No heart condition has ever been allowed under her state industrial claim. (BR Johnson, p.8). Kimberly Johns has post-traumatic stress disorder. Post-traumatic stress

disorder has never been allowed under the state industrial claim. (BR Johnson, p. 8).

Under the state industrial claim only one condition was ever allowed – lumbosacral neuritis. (BR Johnson, p. 9).

The Trial Court found Ms. Johns has permanent partial disability as a result of the effects of this industrial injury. The Trial Court found Ms. Johns was permanently totally disabled under the industrial injury claim. (FOF 1.4, 1.6).

No witness testified that the industrial injury is a proximate cause of permanent total disability. No witness identified limitations caused by the industrial injury. No witness testified that the industrial injury, combined with pre-existing conditions, was a proximate cause of permanent total disability. No medical testimony even attempted to distinguish the fibromyalgia, depression, heart problems, and PTSD from the effects of the industrial injury as pertains to employability. Ms. Johns applied for social security and was found entitled based primarily on the depression, fibromyalgia, the heart

condition and PTSD, not the back problem. (BR Johns, p. 5-6). No witness offered an opinion of Ms. Johns' employability based on her employment pattern of working only 12 days a month at the time of the industrial injury.

The Trial Court found:

“As of July 1, 2011, Kimberley Johns was 40 years of age; she is five-foot three inches tall and weighs 260 pounds, making it difficult for her to walk; she graduated from high school and received an associate's degree in visual communication; and she suffers from depression, fibromyalgia, inappropriate sinus tachycardia, and post traumatic stress disorder.

Based upon the above findings, Kimberley Johns is a totally and permanently disabled worker effective July 1, 2011.” (FOF 1.5, 1.6).

The Trial Court concluded that the cause of total permanent disability was the industrial injury. (COL 2.1). The Trial Court interpreted the finding of total permanent disability as precluding an award for permanent partial disability.

The finding of total permanent disability means Kimberley Johns continues to receive \$0.00 each month from

the Department of Labor and Industries. Recognition of the permanent partial disability would result in a monetary payment to Ms. Johns by the Department.

IV.
ARGUMENT

THE FINDING OF TOTAL PERMANENT DISABILITY
UNDER THE INDUSTRIAL INJURY CLAIM IS NOT
SUPPORTED BY THE EVIDENCE, WAS NOT RAISED
BY THE CLAIMANT IN HER APPEAL, AND IS NOT AN
APPROPRIATE CLASSIFICATION UNDER THE
FACTS OF THIS CASE.

Total permanent disability is appropriate under a state industrial claim if the industrial injury permanently incapacitates the worker from performing or obtaining gainful work. RCW 51.08.160. The assessment of permanent total disability involves the physical question of industrially caused limitations with accompanying limitations along with the impact the industrial injury has on the worker's ability to obtain

employment in the same work pattern held at the time of the industrial injury. Leeper v. Department of Labor and Industries, 123 Wn.2d 803, 872 P.2d 507 (1994).

The Trial Court found Kimberley Johns was significantly overweight which affected her ability to walk, and suffered from depression, fibromyalgia, inappropriate sinus tachycardia along with post-traumatic stress disorder. It was only by including the non-industrially caused conditions that the Trial Court concluded Ms. Johns was unable to work. No work restrictions caused by the industrial injury were identified. The Trial Court did recognize permanent partial disability; PPD does not equate to an effect on employability. RCW 51.08.150.

Conditions which arise after an industrial injury cannot be combined with the effects of an industrial injury to reach a total permanent disability conclusion. Conditions which pre-exist an industrial injury but are not a pre-existing source of limitation or restriction cannot be combined with the effects of the industrial injury to reach a total permanent disability

conclusion. WAC 296-19A-010. No evidence suggests that Ms. Johns had any pre-existing condition which was a source of limitation prior to the industrial injury.

It is undisputed that the fibromyalgia arose after this industrial injury. It is undisputed that the depression arose after this industrial injury. The evidence addressing Ms. Johns' weight relates the weight to the depression medications. There was no evidence of limitation prior to the industrial injury from either the heart condition or the PTSD.

Two medical witnesses testified. Dr. Earle testified at the request of the claimant. Dr. Staker testified at the request of the Department.

Dr. Earle found Ms. Johns was not employable. He did not causally link that opinion to the industrial injury nor did he identify any physical restrictions caused by the industrial injury. (BR Earle, p. 25). Further, Dr. Earle offered an opinion on Ms. Johns' general employability at the Department's request based on his assumption that he was addressing Ms. Johns' ability to

participate in full-time employment. (BR Earle, p. 30). Ms. Johns worked only 12 days a month at the time of her industrial injury. (BR 37, Dept. Order 1/21/04). Dr. Earle offered no opinion on Ms. Johns' employability on a part-time basis. When addressing employability under the Act the issue is whether the worker is able to return to the same work pattern at the time of the industrial injury, here, part-time work. WAC 296-19A-070; RCW 51.32.090. It is error to take a worker employed in part-time employment, then claim total disability because the worker cannot participate in full-time employment.

Dr. Staker is the treating physician under the claim. He found:

“The combination of the pain and her weight, she’s a pretty immobile lady, and I made statements before, pretty much since I’ve been seeing her, that the lady’s not employable. Now whose fault is that, I don’t know. That’s for you guys to figure out.” (BR Staker, p. 11).

Dr. Staker was never asked if the industrial injury was a cause of her inability to work. Like Dr. Earle, Dr. Staker was

not asked what, if any, physical restrictions Ms. Johns might have as a result of the industrial injury. Like Dr. Earle, Dr. Staker was not asked to address Ms. Johns' employability based on her limited work pattern at the time of the industrial injury.

The Worker's Compensation Act is not a general insurance program. An individual may be unable to work and may have an industrial injury but that does not mean the industrial injury is the cause of the total disability. There must be evidence that the worker cannot work in the same pattern at the time of her industrial injury and evidence which proximately links that total disability to the industrial injury.

There is no such evidence here. The finding and conclusion of the Trial Court which directs total disability under this claim is not supported by evidence and should be reversed.

Ms. Johns has no right to relief for her injury through any mechanism other than Title 51. Our Legislature found the common law remedy for those injured on the job to be "slow

and inadequate” and, in its place, Title 51 was intended to deliver “sure and certain relief” on behalf of Ms. Johns and her daughter. RCW 51.04.010.

Title 51 has long been recognized as remedial legislation to be interpreted in a fashion most advantageous to the injured worker. In 1971 the Legislature codified that principle at RCW 51.12.010:

“This title shall 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.”
(partial recitation)

There has been prior litigation in this case. In Pierce County Superior Court cause 10 2 14202 4 the court made clear that Ms. Johns has ample reason to question the manner in which this claim has been administered. The earlier Findings of Fact provide:

“For a period which begins as of at least March 15, 2008, Kimberley Johns has been requesting that the Department of Labor and Industries close her claim. Since at least March 15, 2008 Kimberley Johns has requested that the Department assess

permanent partial disability under the claim.”
(FOF 6).

And

“In 2008 multiple requests on behalf of the claimant were filed with the Department of Labor and Industries requesting that Ms. Johns’ claim be closed and a permanent partial disability assessment made by the Department.” (FOF 7).

And

“In 2009 up to the date of the order under appeal, multiple requests were made on behalf of Kimberley Johns requesting that her claim be closed and permanent partial disability assessment be made by the Department.” (FOF 8).

And

“The Plaintiff contends there is evidence indicating that Ms. Johns has a permanent partial disability causally related to the industrial injury.”

And

“Kimberley Johns has made multiple requests of the Department for a determination of permanent disability.” (FOF 13, 14).

In Superior Court Cause 10 2 14202 4 the Department argued that a vocational assessment of Kimberley Johns was not yet done and until that was complete the only designation

possible was “temporary total disability”. There was no active treatment nor was any vocational activity ongoing. Instead, a Departmental designation of temporary total disability meant Ms. Johns received \$0.00 on a monthly basis since 2006 from the Department and she had been precluded from challenging the years of time-loss orders based on a series of Board of Industrial Insurance Appeals Decisions which concluded a worker could not raise a question of permanent impairment if the Department’s orders addressed only “temporary” total disability. In re Ann Boyle, BIIA Dec. 93 3740 (1991); In re Betty Connor, BIIA Dec. 91 0634 (1992). By designating the disability as “temporary” for years the Department had precluded Ms. Johns from obtaining review of the question of PPD. Finally in 2011 the Superior Court concluded with respect to Ms. Johns:

“The Department of Labor and Industries has a statutory obligation under the facts of this case to make a final determination as to whether Ms. Johns has sustained permanent total disability or permanent partial disability causally related to the

effects of this industrial injury.” (Conclusion of Law 2).

The Court provided the Department 90 days to finish any alleged vocational assessment, then issue the order addressing the permanency of Ms. Johns’ condition.

On July 1, 2011 the Department issued the order which is the subject of the appeal in this litigation. The order provides

“This worker is totally and permanently disabled and is placed on pension effective 06/29/2011.

Medical treatment will not be covered after the effective pension date.

The worker is in total offset due to her receipt of benefits from Social Security.” (BR 26).

Only Kimberley Johns challenged the Department order of July 1, 2011. Kimberley Johns’ appeal alleged the following:

“The claimant appeals from the order above referenced on the grounds that it is unjust and erroneous. The worker is not totally permanently disabled, does not want to be classified as totally permanently disabled and wants a permanent partial disability award. The Department refuses to pay any benefits under the pension whereas the

worker is entitled to benefits and a permanent partial disability award.” (BR 26, Notice of Appeal).

Once the Department issues an order, any party dissatisfied with that order may appeal to the Board of Industrial Insurance Appeals. RCW 51.52.060. The notice of appeal

“shall set forth in full detail the grounds upon which the person appealing considers such order, decision, or award is unjust or unlawful, and shall include every issue to be considered by the board”

And

“The worker, beneficiary, employer or other person shall be deemed to have waived all objections or irregularities concerning the matter on which such an appeal is taken other than those specifically set forth in such notice of appeal or appearing in the records of the department.” RCW 51.32.070. (partial recitation).

Once Ms. Johns appealed the July 2011 order and alleged she wanted only the permanent partial disability classification, the Department had an opportunity to reassume jurisdiction over the case if it so chose. The Department did not reassume jurisdiction. RCW 51.52.060(3).

The Board of Industrial Insurance Appeals is authorized to hold conferences and limit the scope of issues on appeal. RCW 51.52.095. A conference held August 31, 2011 before the Board resulted in an Interlocutory Order Establishing Litigation Schedule where the relief requested as was identified as:

“Claimant seeks an award for permanent partial disability in lieu of a pension.” (BR 48).

An Amended Interlocutory Order issued on September 6, 2011 again identified the issue as “Claimant seeks an award for permanent partial disability in lieu of a pension.” No party objected to the issue.

The only party challenging the Department order has been Ms. Johns and she has consistently limited the issue to permanent partial disability proximately caused by the industrial injury. PPD is the relief sought. PPD was the sole relief pled. The issue was consistently limited to the PPD issue. The relief sought cannot and should not be expanded.

In Brakus v. Dept. of Labor & Indus., 48 Wn.2d 218, 292 P.2d 865 (1956) the scope of the Board's authority to expand issues was addressed in the context of the worker's compensation system. In Brakus the Department issued an order finding the worker entitled to benefits. The worker appealed, alleging greater benefits. The evidence did not show the worker entitled even to the level of benefits found by the Department. The Board expanded to scope of appeal beyond what the notice of appeal alleged. The Court reviewed the law applicable to Title 51:

“although the evidence before the board may take a wide range, the board cannot enlarge the lawful scope of the proceedings which is limited strictly to the issues raised by the notice of appeal (or application for rehearing before the joint board). Karlson v. Dept. of Labor & Indus., (1946), 26 Wn.2d 310, 332, 173 P.2d 1001. See, also, Nagel v. Dept. of Labor & Indus., (1937), 189 Wash. 631, 640, 66 P.2d 318.”

The Court went on to address the Department's argument that expanding a worker's notice of appeal should be permitting, holding:

“This contention ignores the sections of the statute we have heretofore quoted stating that the notice of appeal ‘shall include every issue to be considered by the board. . . .’ and that the hearing before the board is to decide the issues raised by that notice. The trial de novo is on the issues properly before the board, and the findings and decisions of the board are prima facie correct if they concern matters which are within the issues presented. . . . We find no warrant in the statutory enumeration of the board’s powers, past or present, for the contention that the board can, on its own motion, change the issues brought before it by a notice of appeal and enlarge the scope of the proceedings.” Brakus at 223.

Ms. Johns does not and has never alleged total permanent disability. The sole issue is the extent of permanent partial disability. She has every right to identify the issue and cannot be compelled to accept an erroneous classification by the Department.

Expanding the appeal is contrary to Title 51. Ms. Johns alone appealed and raised the question of whether the industrial injury caused permanent partial disability. All evidence supports her right to relief on this issue. She proved her case

and has a right to the benefit of the Act – permanent partial disability.

In Peterson v. Dept. of Labor & Indus., 22 Wn.2d 647, 157 P.2d 298 (1945) the Department issued an order finding the worker permanently totally disabled. The worker appealing alleging permanent partial disability. As the Department argues in Johns, the Department argued in Peterson that a pension was the greatest benefit available and could not be “decreased” to a permanent partial disability. The Supreme Court held:

“A workman has a right to all the benefits of the Worker’s Compensation Act, and he cannot be compelled to accept an erroneous classification of his disabilities because that classification gives him the greatest benefit for which could be paid for a single accident. It is also true that, in the end, he might receive less compensation if he were to accept the department’s classification of permanent total disability.”

Ms. Johns does not want the erroneous classification of permanently totally disabled as a result of her industrial injury. The Act is designed so as not to be a cause of financial harm. The Act is to be interpreted to reduce any economic impact Ms.

Johns' loss of function has. Title 51 provides she "shall" receive compensation for her permanent partial disability. RCW 51.32.080. The evidence demonstrates PPD. The notice of appeal from the Department order limited the issue to PPD. And Ms. Johns does not want a permanent total designation from the Department.

The Trial Court erred in finding and concluding that Ms. Johns was permanently totally disabled.

KIMBERLEY JOHNS' CONDITION IS BEST
CHARACTERIZED AS A CATEGORY 5 PERMANENT
PARTIAL DISABILITY

The Trial Court Characterized Ms. Johns' industrial injury as causing a Category 4 PPD. The evidence shows the proper characterization is a Category 5. The Categories read as follows:

"This and subsequent categories include: The presence or absence of reflex and/or sensory losses; the presence or absence of pain locally and/or radiating into an extremity or extremities; the presence or absence of a laminectomy or discectomy with normally expected residuals.

(4) Mild low back impairment, with mild continuous or moderate intermittent objective clinical findings of such impairment, with mild but significant x-ray findings and with mild but significant motor loss objectively demonstrated by atrophy and weakness of a specific muscle or muscle group.

(5) Moderate low back impairment, with moderate continuous or marked intermittent objective clinical findings of such impairment, with moderate x-ray findings and with mild but significant motor loss objectively demonstrated by atrophy and weakness of a specific muscle or muscle group.”

In 2005 Ms. Johns had a disc removal surgery (discectomy) followed by a surgical fusion. She did not have “normally expected residuals” and in April 2006 a repeat fusion was done. (BR Earle, pp. 8-9). Ms. Johns’ condition is best characterized as a moderate low back impairment.

She has a decrease in her lumbar lordosis, back spasms, tenderness, decrease in range of motion, a dermatome loss at the L5-S1 level on the right, a dermatome loss at the L4 level on the left, stenosis with weakness on exam in an L4 distribution, and her core strength has decreased all as a

proximate result of the effects of the industrial injury. X-ray findings show unstable spondylolisthesis and stenosis. (BR Earle, pp. 9-10, 14-15, 16, 19-22).

A Category 4 impairment is a “mild” low back impairment. Category 5 impairment is a “moderate” low back impairment. There is no indication that the Trial Court weighed the extent of permanent partial disability in any meaningful way. Indeed, the Trial Court adopted the findings from the Board without modification (except for the finding on treatment). Category 5 is applicable to those who have had a fusion – Ms. Johns has had two as a result of this industrial injury.

In describing a Category 4 Dr. Staker used “the Washington State guidelines worksheet” which is not published and apparently involves assessing PPD by using a column system which is much simpler than a physician having to apply the Category system. The worksheet “re-describes” the Categories so that “a two-level spinal fusion is going to kick her

to a Category 4 automatically basically” (BR Staker, pp. 13-15). The worksheet is not part of the Administrative Code, does not represent a rule adopted by the Department designed to implement the Code, and is not statutorily permitted. RCW 51.32.080 requires the Department to “enact rules having the force of law” to classify permanent partial disability for “unscheduled” PPD. (A “scheduled or unspecified PPD is one listed by the Legislature in RCW 51.32.020(1). An unscheduled PPD are these described in the Category system, WAC 296-20-19020, WAC 296-20-19010).

» A back PPD is rated using only the category system. WAC 296-20-19020(2). The WAC does not permit rating using any other system for the low back. The WAC category system was designed by the Department to comply with the Department’s “duty to enact rules classifying unspecified disability in light of statutory references to nationally recognized standards or guides for determining various bodily impairments.” WAC 296-20-200(3).

Using the Category system applicable to a low back, the PPD is a Category 5. It is the Category 5 which best represents the impairment proximately caused by the industrial injury. A Category 4 may be reached when using someone's unpublished version of a worksheet, but that is an invalid method of rating a back impairment in Washington State.

The Trial Court erred in finding the appropriate category limited to a 4 by using a worksheet. Ms. Johns' disability is best described as a Category 5 under WAC 296-20-280.

V.
CONCLUSION

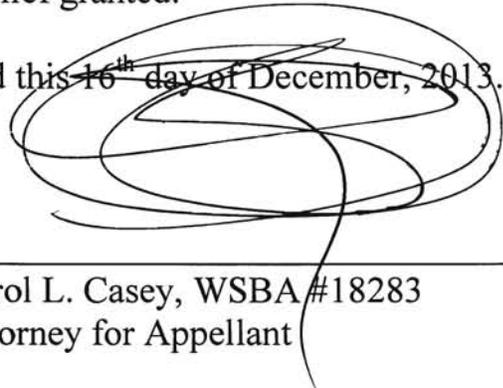
The Trial Court decision should be reversed. Ms. Johns is not permanently disabled as July 2011. Ms. Johns sustained a permanent partial disability of the low back.

V.
ATTORNEY'S FEES

RCW 51.52.130(1) provides attorney's fees and costs are to be paid by the Department if the decision under appeal is reversed or modified and additional relief granted. The

Appellant requests attorney's fees and costs under this section, to be fixed by the Court, if the decision of the Board is reversed or modified and additional relief granted.

Respectfully submitted this ~~16th~~ day of December, 2013.

A large, circular, handwritten signature in black ink, appearing to be "Carol L. Casey". The signature is written over the date and extends downwards across the horizontal line.

Carol L. Casey, WSBA #18283
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COPY TO: Kaylynn What, AAG
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Ruth W. Corcoran
Ruth W. Corcoran, Paralegal
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SUBSCRIBED AND SWORN to before me
on December 16, 2013.



Timothy A. Hale

NOTARY PUBLIC for the State of WA
Residing at: Tacoma
My Commission Expires: 10/28/16