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Case no.: 45316-9-II

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

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JOSEPH H. WOODS

Appellant

v.

DEPARTMENT OF LABOR AND INDUSTRIES  
OF THE STATE OF WASHINGTON

Respondent

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APPELLANT'S AMENDED BRIEF

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**I.**  
**ASSIGNMENTS OF ERROR**

A. Did the Trial Court err in finding that:

“A preponderance of evidence supports the Board’s Findings of Fact. The Court adopts as its Findings of Fact, and incorporates by this reference, the Board’s Findings of Facts Nos. 1 through 6 of the Board’s July 19, 2011 Decision and Order”

And concluding

“The Court adopts as its Conclusions of Law, and incorporates by this reference, the Board’s Conclusions of Law Nos. 1 through 5 of the July 19, 2012 (sic) Decision and Order issued by the Board”

And concluding

“The Board’s July 19, 2011 Decision and Order is correct and is affirmed”

when the Board of Industrial Insurance Appeals refused to honor a stipulation of the parties regarding a remand to address the wage basis for total disability benefit compensation under the claim, when the Board appears to have calculated the

wage basis under the claim using wages paid during a period where the worker was no longer working in the industry which caused the occupational disease, when the Board selected wages upon which to base total disability benefits on without evidence, when the Board selected wages upon which to base total disability benefits on which are less than one-thirtieth the average value of wages Mr. Woods made during his career which caused the occupational disease, and when the Board selected a yearly wage which is to “fairly represent” the worker’s employment pattern at \$825.00 per year when Mr. Woods’ averaged income over the 20 years in the occupation which caused the occupational disease is well over \$30,000.00 per year. (Trial Court Finding of Fact 1.2, Conclusion of Law 2.2, Conclusion of Law 2.4).

B. Did the Trial Court err in concluding

“The Department’s order of October 5, 2009, in which it affirmed an order dated June 26, 2009, and set Mr. Woods’ wages on date of manifestation as \$68.75 per month; the Department’s order dated April 22, 2010, which

affirmed an order dated October 6, 2009, and assessed Mr. Woods an overpayment for time loss compensation he received from May 23, 2007, through September 20, 2007; and finally a Department order dated June 25, 2009, in which the Department determined that it could not reconsider its January 19, 2007 order because the protest to that order was not timely made, are correct and are affirmed”

when there is no evidence Mr. Woods ever had wages of \$68.75 per month, when the evidence demonstrates his earnings are considerably higher than that used to set the wage basis under the claim, when application of RCW 51.08.178 requires a different wage basis, when the parties agreed that review of the wage basis required a remand to the Department of Labor and Industries, when the overpayment is based on an incorrect wage basis, when the “date of manifestation” order has been used in error to bar review of the wage basis under the claim but the Trial Court affirmed the Board which did review the wage basis under the claim, and when the Department order referencing “date of manifestation” has been used in error to collaterally

estop review of the wage basis under the claim. (Trial Court Conclusion of Law 2.5).

C. Did the Trial Court err in finding

“On January 19, 2007, the Department issued a Notice of Decision (“Manifestation Date Order”) reading in relevant part, ‘The date of manifestation has been determined to be 04/13/2005 for compensation purposes because this is the date the disease required medical treatment.’ The Manifestation Order advised Mr. Woods the order would become final in 60 days. A little over two years later, on June 25, 2009, the Department issued a Notice of Decision that it could not reconsider the Manifestation Date Order because Mr. Woods had not timely protested it. The order of January 19, 2007, did not contain any ambiguity as to the content of the order”

And when the Trial Court concluded

“Mr. Woods asserted that the Department’s Manifestation Order was unjust and arbitrary or capricious. Mr. Woods has not advanced any colorable argument that the Manifestation Order was procedurally unfair. The Manifestation Order is final and binding and may not be collaterally attacked on appeal”

when the “manifestation order” does not advise the worker that manifestation refers to a specific wage rate under

the claim for time loss compensation purposes and does not operate to bar review of the time loss wage basis under the claim, when date of manifestation is not the same as a wage basis order but “date of manifestation” has been used in error to establish conclusively a wage basis under the claim precluding review of the wage loss basis order, when the manifestation order was issued after a promise by the Department to issue an order addressing employer liability and the remainder of the manifestation order references employer liability, when the manifestation order may reasonably be interpreted in a number of ways and “date of manifestation” does not fairly or reasonably advise Mr. Woods that his time loss rate is being set conclusively under the claim in a determinative fashion, and when the manifestation order is ambiguous and fundamental fairness does not allow use of the manifestation order to collaterally estop review of the wage basis issues under this claim. (Finding of Fact 1.3, Conclusion of Law 2.3).

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D. Did the Trial Court err in finding

“On June 26, 2009, the Department issued a Notice of Decision (“Wage Rate Order”) setting Mr. Woods’ wage rate for time loss compensation purposes. Mr. Woods’ monthly wage was calculated to \$68.75, ‘based on reported income for the twelve month period from 04/01/2005 to 3/31/2006 of \$825.00.’ The wages Mr. Woods earned on the date of manifestation dictates the amount of the wage rate the Department uses to calculate wage replacement benefits”

when the Trial Court’s decision that “date of manifestation” wages dictate the wage rate is contrary to the decision of the Board of Industrial Insurance Appeals (which decision the Trial Court adopted), when the Trial Court failed to fairly apply RCW 51.08.178 to set wages or honor the parties’ Stipulation as to that issue, when the Department of Labor and Industries determined “wages” under RCW 51.08.178(2) which requires consideration of “all employment in any twelve successive calendar months preceding the injury which fairly represent the claimant’s employment pattern” yet no review of whether \$825.00 a year “fairly” represents the worker’s

employment pattern has been permitted, when the Trial Court erroneously applied the “date of manifestation” order to bar consideration of the wage basis issues raised in the appeal from the June 26, 2009 Department order, when the monthly wage was calculated incorrectly and without support of any evidence, and when the wages Mr. Woods earned on the date of manifestation do not and have never dictated the wage rate the Department uses to calculate time loss benefits under RCW 51.08.178. (Finding of Fact 1.4).

E: Did the Trial Court err in finding

“On October 6, 2009, the Department issued a Notice of Decision (“Overpayment Order”) assessing an overpayment against Mr. Woods based on a change in his gross wages. No evidence was presented by Mr. Woods to challenge the amount of the overpayment the Department assessed in its October 6, 2009 ‘Overpayment Order’”

when there was no overpayment, the overpayment order is based upon an incorrect assumption that the worker cannot challenge the wage basis order, when the overpayment order is

based upon an incorrect conclusion that the date of manifestation order of January 19, 2007 determines a time loss rate under a claim, when the Trial Court refused to honor the parties stipulation that the evidence of the wage basis which affects an overpayment would be presented before the Department of Labor and Industries on remand, and when evidence of the wage basis is contained in the Social Security exhibit which was not addressed by the Trial Court or the Board of Industrial Insurance Appeals. (Trial Court Finding of Fact 145).

Fr Did the Trial Court err in concluding

“The January 19, 2007 order is a final and binding determination as to the time loss rate under Claim No. AC38143”

when the Department order of January 19, 2007 is not final and binding as to the wage basis under the claim which is used to set the time loss rate, when the January 19, 2007 Department order does not preclude application of RCW 51.08.178, when the January 19, 2007 Department order is

silent to the wage rate and does not advise the worker that a time loss rate is being affected under the claim, and when fundamental fairness precludes application of the January 19, 2007 Department order as a final and binding determination of time loss under the claim. (Trial Court Conclusion of Law 2.6).

### **EVIDENCE**

This is a worker's compensation case. Evidence was presented before the Board of Industrial Insurance Appeals in the form of a Stipulation of Facts which consists of twenty-one exhibits and a stipulation of the parties' understanding that "if the Department Order of January 19, 2007 is not a binding determination as to the time loss rate under this claim, that then and in that instance this matter would be remanded to the Department to use the earlier date and prior earnings to establish the time loss rate and onset date." (Proposed Stipulation of Facts and Understanding of the Parties, BR 86 – 87).

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The exhibits will be referenced by exhibit number and page number stamp from the Board of Industrial Appeals found in the lower right-hand corner of each document. The Board page number will be preceded by "BR" (a reference to "Board record").

## **II. STATEMENT OF THE CASE**

Joseph Woods had a solid work history in heavy construction. From 1977 to March 2003 he worked heavy construction with no gap in earnings. His earnings are listed in the social security printout, Exhibit 21-3. He stopped heavy construction effective March 2003 at age 55; for the first three months of 2003, he earned \$12,549. In 2002, at age 54, he earned \$47,578. In 2001, at age 53, he earned \$58,656. In 2000, at age 52, \$54,197. In 1999, at age 51, \$51,157. The year prior, 1998, he earned \$51,980. Age 49, \$46,719. Age 48, \$46,493. Age 47, \$47,428. Age 46, \$43,988. Age 45, \$51,608. (BR 86-87, Ex. 21-3).

A claim was filed for an occupational disease (bilateral tears in his shoulders) related to his employment in heavy construction. The Department found Mr. Woods' "wages" to be \$68.75 per month. Temporary total disability is paid at 65% of that value, or \$44.68 per month for any period that the occupational disease caused inability to work. (BR 86-87, Ex. 15, Ex. 19).

Around 1984 symptoms began in both of Mr. Woods' shoulders. (BR 86-87, Ex. 5). He continued employment in heavy construction until March 2003. His doctor diagnosed bilateral rotator cuff syndrome with tears "after years of heavy construction work." (BR 86-87, Ex. 1). Mr. Woods reported the shoulder problems as related to "years of hammering, sawing and heavy lifting." He listed his last heavy construction employer as Drury Construction. (BR 86-87, Ex. 1). Mr. Woods left Drury Construction in March 2003. At the time he left heavy construction his hourly earnings were \$28.40. (BR 86-87, Ex. 2).

After Mr. Woods left heavy construction he worked sporadically for Emel Tree Service. He had no injury with Emel's and there is no allegation from any source that Emel's Tree Service caused or contributed to the shoulder problems. (BR 86-87, Ex. 6). There is no claim from any source that the Emel's employment in any way is a cause of temporary total disability. The Department did not communicate any Department orders to Emel's Tree Service.

A worker has two years from the date a physician advises, in writing, that worker has an occupational disease in which to file a worker's compensation occupational disease claim. Mr. Woods sought medical help, was told by his doctor that the shoulder problems were an occupational disease, and the claim was filed. The claim was timely filed pursuant to RCW 51.28.055.

Mr. Woods filed his claim for occupational disease related to heavy construction in 2006. In 2006 Mr. Woods was not employed in heavy construction and had last worked heavy

construction in March 2003. In 2006 Mr. Woods was working very sporadically for Emel's Tree Service, earning a total of \$1,275 in 2006. In 2005 Mr. Woods had earned a total of \$945 (for Emel's Tree Service). (BR 86-87, Ex. 21-3, Ex. 1, Ex. 2).

When the claim was filed the Department wrote to Mr. Woods (who did not then have an attorney) that the condition could be an occupational disease but more information was needed "to decide which employer(s) may be responsible." (BR 86-87, Ex. 4). The Department obtained additional information and on January 3, 2007 the Department issued an order which allowed the claim as an "occupational condition or disease diagnosed as bilateral rotator cuff syndrome" and advised Mr. Woods that "The department has not yet determined employer liability for this claim. A further Order will be issued establishing chargeable employers and percentage of liability." (BR 86-87, Ex. 8). (emphasis added).

The next piece of communication between the Department and Mr. Woods (still without an attorney) is the

Department order of January 19, 2007. The January 19, 2007

Department order reads as follows:

“This claim was allowed by order dated 01/03/2007, for the condition or disease diagnosed as bilateral rotator cuff syndrome. The date of manifestation has been determined to be 04/13/2006 for compensation purposes because this is the date the disease required medical treatment. The cost of this claim will be charged to the claims experience of the employers listed below in the percentages shown:

There are no chargeable employers for this claim.

This claim has been assigned to the employers above, and its claim costs will be used to set premium rates. If this is not your worker, you must notify the Department in writing within sixty days from the date this order is communicated to you.” (BR 86-87, Ex. 9).

The January 19, 2007 Department order is on appeal.

After the Department attempted to close the claim, Mr. Woods obtained an attorney. Calculation of temporary total disability benefits (time-loss) was questioned. (BR 86-87, Ex. 11, 12, 13). On June 26, 2009 the Department issued an order identifying the worker’s wage under the claim used to calculate

time loss. His wage was calculated by the Department as follows:

“The wage for the job of injury is based on reported income for the twelve-month period from 04/01/2005 to 03/31/2006 of \$825.00 equaling \$68.75 per month.

Additional wage for the job of injury include:

Health Care Benefits	NONE per month
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Housing/Board/Fuel	NONE per month
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Worker’s total gross wage is \$68.75 per month.

Worker’s marital status eligibility on the date of this order is married with 0 children.” (BR 86-87, Ex. 15).

This June 26, 2009 Department order was protested. On August 10, 2009 the Department affirmed its June 26, 2009 Department order. (BR 86-87, Ex. 17). On October 5, 2009 the Department again affirmed its June 26, 2009 order. (BR 86-87, Ex. 18). The worker appealed the October 5, 2009 order. (BR 34-35). The Board of Industrial Insurance Appeals affirmed the

proposed decision of the Industrial Appeals Judge. (BR 2-6). The IAJ found the January 19, 2007 order collaterally estopped any challenge of the “date of manifestation” for purposes of establishing the onset date under the claim. (BR 26-27). The IAJ found “Mr. Woods has not introduced evidence that the Department’s (sic) incorrectly calculated benefits, established an overpayment, determined family status, or excluded additional sources of compensation. Further, Mr. Woods has not presented other legal arguments to challenge these Department orders; therefore, the October 5, 2009, and April 22, 2010 orders are correct and are affirmed.” (BR 27). No reference was made to the parties’ agreement that if the 1/19/07 order was not a binding determination as to the time loss rate (as opposed to a date of manifestation) then the matter would be remanded to the Department by agreement. The October 5, 2009 wage order and April 22, 2010 overpayment orders are on appeal.

Before the Board of Industrial Insurance Appeals the parties entered into a written stipulation that:

“if the Department Order of January 19, 2007 is not a binding determination as to the time loss rate under this claim, that then and in that instance this matter would be remanded to the Department” to adjudicate the wage basis under the claim. (BR 86, “Proposed Stipulation of Facts and Understanding of the Parties”).

After the Department issued the January 19, 2007 order, the Department paid time loss under the claim. Time loss was paid by the Department in an interlocutory (non-determinative) order of December 4, 2007 which stated:

“The time loss compensation rate is based on the following:

Date of Manifestation: 04/13/06  
Marital Status: Married  
Number of children: 0

Monthly wage from all employment on 04/13/06:  
\$1165.”

The total time loss paid was \$3,551.05 and was based on the figures contained in the 12/4/07 order. (BR 86-87, Ex. 10).

When the Department issued the June 26, 2009 order (which changed the wages from \$1,165 per month down to \$68.70 per month), this led to a Departmental claim of “overpayment”. In an October 6, 2009 Department order the Department claimed the \$3,551.05 paid in time loss benefits was excessive and Mr. Woods was ordered to pay the Department \$2,542.62 or risk “a lien or attachment against your real or personal property... or referral to a collection agency.” (BR 86-87, Ex. 19).

There are three Department orders on appeal. The Department order of January 19, 2007 (affirmed by Department order June 25, 2009) is the “date of manifestation” order; the Department order of June 26, 2009 is the wage order (affirmed by Department order October 5, 2009); and the Department order of October 6, 2009 (affirmed by Department order April 22, 2010) is the overpayment order.

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**III.**  
**GENERAL PRINCIPLES**

An occupational disease may cause an inability to work. When that happens, the Department must compute temporary total disability benefits (time-loss). Time loss for a married worker is based on 65% of the worker's "wages". RCW 51.32.060(1)(a); RCW 51.32.090.

A worker's "wages" for purposes of setting the time-loss rate is derived from RCW 51.08.178. RCW 51.08.178 defines "wages" as follows:

"(1) For the purposes of this title, the monthly wages the worker was receiving from all employment at the time of injury shall be the basis upon which compensation is computed unless otherwise provided specifically in the statute concerned. In cases where the worker's wages are not fixed by the month, they shall be determined by multiplying the daily wage the worker was receiving at the time of the injury:

- (a) By five, if the worker was normally employed one day a week;
- (b) By nine, if the worker was normally employed two days a week;

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- (c) By thirteen, if the worker was normally employed three days a week;
- (d) By eighteen, if the worker was normally employed four days a week;
- (e) By twenty-two, if the worker was normally employed five days a week;
- (f) By thirty, if the worker was normally employed seven days a week.

The term "wages" shall include the reasonable value of board, housing, fuel, or other consideration of like nature received from the employer as part of the contract of hire, but shall not include overtime pay except in cases under subsection (2) of this section. However, tips shall also be considered wages only to the extent such tips are reported to the employer for federal income tax purposes. The daily wage shall be the hourly wage multiplied by the number of hours the worker is normally employed. The number of hours the worker is normally employed shall be determined by the department in a fair and reasonable manner, which may include averaging the number of hours worked per day.

(2) In cases where (a) the worker's employment is exclusively seasonal in nature or (b) the worker's current employment or his or her relation to his or her employment is essentially part-time or intermittent, the monthly wage shall be determined by dividing by twelve the total wages earned, including overtime, from all employment in any twelve successive calendar months preceding the

injury which fairly represent the claimant's employment pattern.

(3) If, within the twelve months immediately preceding the injury, the worker has received from the employer at the time of injury a bonus as part of the contract of hire, the average monthly value of such bonus shall be included in determining the worker's monthly wages.

(4) In cases where a wage has not been fixed or cannot be reasonably and fairly determined, the monthly wage shall be computed on the basis of the usual wage paid other employees engaged in like or similar occupations where the wages are fixed.”

RCW 51.08.178.

The interpretation of “wages” should be that interpretation which best advances the legislative purpose of Title 51. Gallo v. Dept. of Labor & Indus., 119 Wn.App. 49, 54, 81 P.3d 869 (2003), rev. granted. The “overarching objective” or purpose of Title 51 has, for years, been legislatively identified by RCW 51.12.010. That purpose “is to reduce to a minimum ‘the suffering and economic loss arising from injuries and/or death occurring in the course of

employment.” Gallo, supra, at 57, quoting from Cockle v. Dept. of Labor and Indus., 142 Wn.2d 801, 822, 16 P.3d 583 (2001). Implementing the purpose of Title 51 requires a wage basis which reflects the injured worker’s actual ‘lost earning capacity.’ Gallo, supra, at 57, quoting from Double D Hop Ranch v. Sanchez, 133 Wn.2d 793, 798, 947 P.2d 727 (1997).

In construing “wages” to be used to set time-loss under a claim:

“(w)e should remain mindful that the Industrial Insurance Act is remedial in nature and should be liberally construed, with doubts resolved in favor of the worker.” Double D Hop Ranch, at 798.

A phrase used in the Department order of January 19, 2007 is “date of manifestation”. A thorough search of the statutory definition of “wages” does not reveal the phrase “date of manifestation.” RCW 51.08.178. The statutory definition of “occupational disease” does not include the phrase “date of manifestation.” RCW 51.08.140; RCW 51.08.142. A recent discussion of “date of manifestation” is found in Harry v. Buse

Timber & Sales, Inc., 166 Wn.2d 1, 201 P.3d 1011 (2009), a case involving a claim filed for permanent partial disability benefits for occupational hearing loss. In Harry, the Court addressed the question of whether PPD should be based on the date (or dates) the worker sustained the injurious exposures, or should the PPD be based on the point where the worker retired.

a The Harry Court held:

e “RCW 51.16.040 requires that occupational diseases are compensable ‘in the same manner’ as injuries. Compensating occupational hearing loss according to the date of last injurious exposure better fulfills this statutory mandate. “ Harry at 16.

h “Date of manifestation” is sometimes used in an occupational disease claim to establish the date of the PPD schedule. As the Harry case demonstrates, “date of manifestation” is not always used as a defining point in occupational disease claims. “Date of manifestation” is often used as the occupational disease claim equivalent of “date of injury.”

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Collateral estoppel bars re-litigation of issues of ultimate fact that have been determined by a final judgment. Collateral estoppel requires:

- 1) The identical issue must have been decided in the prior adjudication,
- 2) The prior adjudication resulted in a final judgment on the merits,
- 3) The doctrine is asserted against the same party or a party in privity with the same party to the prior adjudication, and
- 4) Precluding re-litigation of the issue will not work an injustice.

Delbert Williams v. Leone & Keeble, Inc., 171 Wn.2d 726, 254 P.3d 818 (2011).

#### **IV. ARGUMENT**

THE DEPARTMENT ORDER OF JANUARY 19, 2007 IS NOT A “WAGE ORDER”. THE TRIAL COURT ERRED IN FINDING THE JANUARY 19, 2007 DEPARTMENT ORDER SET THE WAGE BASIS FOR PURPOSES OF TIME LOSS BENEFITS UNDER THE CLAIM.

The Trial Court concluded that the January 19, 2007 Department order “is a final and binding determination as to the

time loss rate under Claim No. AC38143”, and found “The wages Mr. Woods earned on the Date of Manifestation dictates the amount of the wage rate the Department uses to calculate wage replacement benefits.” (COL 2.6 and FOF 1.4). The Trial Court found that the January 19, 2007 Department order collaterally estops Mr. Woods from challenging the wage order and the overpayment order.

Since at least 1990 the Board of Industrial Insurance Appeals has identified what is needed in a Department order which will have determinative consequences in setting wages for purposes of establishing total disability under a claim.

In In re: Louise J. Scheeler, BIIA Docket 89 0609 (1990) the Department argued that department orders paying time loss compensation benefits to the injured worker covering June 1983 through November 1987 were res judicata as to the rate of compensation because those orders were issued in a determinative format. A determinative format contains language set forth at RCW 51.52.050(2). The orders set forth

the net time loss payment and period of payment in each order but did not identify the numerical figures upon which time loss was computed. The Board held:

“The orders paying time loss compensation failed to detail or explain how the rate was calculated. It is our determination that the Department is not precluded from later recalculating the rate of compensation based on new information as to the gross monthly wage at the time of injury.”

The Board went on to state what was needed to provide finality to a Department order addressing “wages” establishing total disability under a claim. The Board held

“A number of our prior decisions clearly express our refusal to construe orders of the Department as having finally decided issues which are not specifically addressed or which are addressed in an ambiguous way: In re: Daniel A. Gilbertson, Docket No. 89 2865 (November 7, 1990); In re: Gary G. Johnson, BIIA Dec., 86 3681 (1987)...

The record of proceedings contains no reference to any Department order which clearly apprises Ms. Scheeler of the underlying basis of the time loss rate until the order of April 7, 1988 (which was timely protested) which apprises her of the rate to be paid commencing as of November 21, 1987 based on a gross monthly wage of \$1,071.30, and the order under appeal dated February 16, 1989

which affirmed a January 4, 1989 order which indicates that the retroactive time loss compensation would be paid based on a monthly wage of \$938.00. These were the first instances of the Department ever informing the claimant as to the underlying basis for the rate of time loss compensation. Thus, the claimant is not precluded by the principle of res judicata from challenging the rate of time loss compensation for the period of June 25, 1983 through November 20, 1987.

Our decision in this regard is consistent with our adherence to fundamental fairness when we are asked to determine whether the principle of res judicata applies. Unless prior orders of the Department have apprised the parties in clear and unmistakable terms that the present controversy has already been finally adjudicated, no res judicata effect will be applied. . . .”

In In re: Lucian R. Saltz, BIIA Dec. 92 4309 and 92 4310

(1993) the Department paid temporary total disability benefits under a claim by way of Department orders which became final. Payment of the temporary total disability benefits were identified in the Department orders along with the total amount of payment made. However, those orders did not advise the worker of the “wage basis” upon which time loss was being based. Again, the Board held “the order is not res judicata on

the question of rate of time loss compensation paid for those periods.”

In 1996 the issue of exactly what is required in Department orders to become “res judicata” for purposes of wage basis computation was addressed. In In re: Tex D. Prewitt, BIIA Docket 95 2064 (1996) the worker was injured in July 1990, the claim was allowed and closed five years later. Upon claim closure the worker raised the issue of whether time loss had been paid properly (the correct wage basis). The Department argued that an earlier 1990 order established the rate and was now res judicata. The order the Department relied upon stated

“It is hereby ordered that this claim be allowed and the claimant be entitled to benefits in accordance with the industrial insurance laws. Rate of time loss compensation is based on married plus one dependent child and wages at the time of injury or exposure of \$1,145.17 per month.”  
(emphasis added).

The Board noted that this order contained the information necessary for calculation of Mr. Prewitt’s time loss

compensation, it had advised Mr. Prewitt in clear and unmistakable terms that time loss compensation was being set based upon specifically identified wages, and the order was res judicata on that issue.

King v. Dept. of Labor & Indus., 12 Wn.App. 1, 528 P.2d 271 (1974) is an example of what our Courts have required in a worker's compensation context for claim or issue preclusion to stand. In King a final finding of fact read:

“This court finds, however, that plaintiff's psychiatric disability as contended by him resulting from this industrial injury does not carry sufficient weight to overcome the board's decisions that the plaintiff did not suffer any permanent partial disability from a psychiatric standpoint as a proximate result of his industrial injury of October 15, 1962.”

The Department argued this finding operated to reject a psychiatric condition under the claim. The Court disagreed, holding:

“Fundamental fairness requires that to constitute such a specific rejection of plaintiff's psychiatric condition a claimant must be clearly advised that any relationship between his psychiatric problems

and his injury is finally determined. . . . In the absence of a clear and unmistakable final finding that a condition is neither caused by nor aggravated by an industrial injury, a workman should not be precluded from thereafter litigating the causal relationship between the injury and his condition.”

A “wage order” does not simply state a date of injury or a date of manifestation. The simple recitation of an injury or manifestation does not advise any party in clear and unmistakable terms what the basis for time loss compensation will be under the claim. A “date of manifestation” does not tell Mr. Woods that the Department will decide “wages” under RCW 51.08.178(1), (2), or (3), or (4) and if subsection (2) is applied, the “date of manifestation” most certainly does not provide the worker any idea which “twelve successive calendar months preceding the injury” the Department will choose as “fairly” representing the worker’s employment pattern. There is no identity of issues between the “date of manifestation” order and a “wage” order.

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The intent of Title 51 is that industrial injuries and occupational diseases will result in the same benefits. RCW 51.16.040; RCW 51.32.180. Had this been an industrial injury claim and a Department order of 1/19/07 clearly and unambiguously announced that the “date of injury” was 4/13/06, that alone, does not identify what “wages” under RCW 51.08.178 will be used for time loss compensation. The effect of the Trial Court’s determination is to read out of existence RCW 51.08.178 as applies to occupational disease cases!

“If” the “date of manifestation” order is binding, it is not a binding or final determination on the wage issue. The Department based wages on RCW 51.08.178(2) which provides

“(2) In cases where (a) the worker’s employment is exclusively seasonal in nature or (b) the worker’s current employment or his or her relation to his or her employment is essentially part-time or intermittent, the monthly wage shall be determined by dividing by twelve the total wages earned, including overtime, from all employment in any twelve successive calendar months preceding the injury which fairly represent the claimant’s employment pattern.” (emphasis added).

The “date of manifestation” order provides no information concerning which of the 51.08.178 subsections the Department will use. It contains no information as to how the Department will characterize Mr. Woods’ employment (exclusively seasonal, part-time, intermittent). It contains no information identifying what twelve successive calendar month period will be used. It contains no information even hinting at what “date of manifestation” means in the context of a wage period that fairly represents Mr. Woods’ employment pattern. There is no identity of issues between the 1/19/07 “date of manifestation” order and the October 5, 2009 (affirm 6/26/09 order) Department “wage” order. An established date of injury/manifestation does not magically do away with RCW 51.08.178 or an aggrieved parties’ right to challenge a computation under RCW 51.08.178. The Trial Court’s determination was incorrect.

The parties stipulated that “if the Department order of January 19, 2007 is not a binding determination as to the time

loss rate under this claim” then the matter would be remanded to the Department to set a time loss wage basis. (Parties’ Stipulation, BR 86). The appropriate relief as to the time loss rate is a remand to the Department based on the parties’ agreement. Pursuant to CR 2, the stipulation is binding on both parties. The parties did not offer a full evidentiary record on the wage issue before the Board of Industrial Insurance Appeals. A remand is appropriate for receipt of evidence to address more fully the wage issue.

THE JANUARY 19, 2007 DEPARTMENT ORDER IS NOT A  
FINAL DETERMINATION OF THE DATE OF  
MANIFESTATION FOR TIME LOSS COMPENSATION  
UNDER THE CLAIM.

A Department order which is to be provided res judicata (or collateral estoppel) status cannot be ambiguous or confusing. An ambiguous or inconsistent judgment should never be the basis for an estoppel by judgment. Wash. Prac., Sec. 387 (2<sup>nd</sup> Ed.) p. 417, where Orland states

“And where, because of the ambiguity or indefiniteness of the verdict or judgment, the

Appellate Court cannot say that the issue was determined in the prior action, collateral estoppel will not be applied as to that issue. This is supported by Hamm v. Camerota, 48 Wn.2d 34, 290 P.2d 713 (1955); Rufener v. Scott, 46 Wn.2d 240, 280 P.2d 253 (1955); Braley Motor Co. v. Northwest Cas. Co., 184 Wash. 47, 49 P2d 911 (1935).”

Issues of res judicata (or collateral estoppel) come up with some regularity in worker’s compensation matters. In Henderson v. Bardahl, 72 Wn.2d 109, 431 P.2d 961 (1967) the court refused to apply the doctrine of collateral estoppel when the issues were not identical stating:

“It is axiomatic that for collateral estoppel by judgment to be applicable, that the facts or issues claimed to be conclusive on the parties in the second action were actually and necessarily litigated and determined in the prior action. Ira v. Columbia Food Co., 226 ORE 566, 360 P.2d 622, 86 A.L.R. 2d 1378 (1961); the Evergreen v. Nunan, 141 F.2d 927 (2<sup>nd</sup> Cir. 1944), 152 A.L.R. 1187.”

The 1/19/07 Department order states “The date of manifestation has been determined to be 04/13/2006 for compensation purposes because this is the date the disease

required medical treatment.” What does this mean to the typical recipient of a Department order? The language refers to compensation beginning 4/13/2006 under the claim. A reasonable person may interpret the sentence in a number of ways – all equally reasonable. The sentence is ambiguous and too indefinite to have claim or issue preclusion effect.

“Date of manifestation” is a term of art. It is not a term of art that an injured worker would or should know, it is not a term of art that the injured worker can look up in statute; it is a term of art used by judges and lawyers with a number of nuances. If a term of art is to be afforded res judicata status, then finality should only extend to what that term of art actually means. “Date of manifestation” relates only to the onset of the occupational disease. It is not a determination of what “wages” may be used for purposes of total disability under a claim. The use of the phrase “for compensation purposes” only opens more doors for potential meaning. Is that compensation for the doctor? Compensation for the injured worker? Compensation

for the Department in setting a premium to an employer? If it is compensation to a worker, does that mean the disease was manifest as of 4/13/06 so the worker is to receive money (compensation) as of 4/13/06? Does that mean medical bills are compensated based on a schedule from 4/13/06? Does that mean the worker's wages on 4/13/06 will be used for time loss?

In Henderson the Court cited to a decision which refused to apply res judicata if doing so would work an injustice. The decision, Beverly Beach Properties, Inc. v. Nelson, 68 So.2d 604, 607, 41 A.L.R. 2<sup>nd</sup> 1071 (1953), refused to apply res judicata when doing so would work an injustice. The Court noted that "the primary purpose for which our courts were created is to administer justice." It is grossly unfair to pretend that \$780 per year or \$68.75 per month fairly represents Mr. Woods' employment pattern. That \$68.75 per month isn't even based on his employment in the construction trade. As the Supreme Court noted in Henderson v. Bardahl, "It is generally recognized that the doctrine of res judicata (and this applies to

that branch known as collateral estoppel by judgment) is not to be applied so rigidly as to defeat the ends of justice, or to work an injustice. Dicarlo v. Angeloni, 3 Cal.2d 225, 44 P.2d 562, 99 A.L.R. 990 (1935); see 30 Am.Jur. Judgments, Sec. 325.”

The circumstances under which the order of January 19, 2007 was issued do not permit application of res judicata to the wage issue. On July 18, 2006 the Department wrote to Mr. Woods requesting he provide information to allow the Department to identify which employer or employers may be responsible. (Ex. 4). On the same day the Department wrote to the medical provider (with a copy sent to Mr. Woods) asking the medical provider for objective findings why the condition was the result “of work at Drury”. (Ex. 5).

The first order was issued on January 3, 2007. (Ex. 8). The January 3, 2007 order allowed the claim for the shoulders but warned “The department has not yet determined employer liability for this claim. A further Order will be issued establishing chargeable employers and percentage of liability.”

(Ex. 8). The very next activity under the claim is the order of January 19, 2007 (Ex. 9). In the context of having been told that the Department would issue an order establishing chargeable employers and percentage of liability, the January 19, 2007 order identifies the date of manifestation. “Date of manifestation” and “compensation” in that order must be put in context of the Department’s promise that it would establish chargeable employers and percents of liability – promises that relate to compensation of monies to be paid by an employer under the claim, and then addressed in the body of that order to non-existent employers!.

The 1/19/07 order does not have the certainty needed for res judicata or collateral estoppel purposes as to “date of manifestation”.

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REGARDLESS OF WHETHER THE ORDER OF JANUARY 17, 2007 IS CONCLUSIVE AS TO THE "DATE OF MANIFESTATION" THE WAGE ORDER AND OVERPAYMENT ORDER ARE TO BE REVERSED.

The Department wage order of June 26, 2009 sets Mr. Woods' income during his years of heavy construction at \$68.75 per month. There is no period of time where Mr. Woods was employed in heavy construction earning less than \$1,000.00 per month. Not a shred of evidence supports the Department order of June 26, 2009. The "job of injury" referenced in the June 26, 2009 wage order presumably refers to the work which caused the shoulder tears. The accident report filed by the employer is for heavy construction (Drury Construction), not Emel's Tree Service. The medical information confirms long years in heavy construction as a cause of the shoulder problems and the medical report specifically noted that Emel's Tree Service employment was injury-free for Mr. Woods. (Ex. 5, 6). No Department order was ever sent to Emel's as an "employer" under the claim. The

“job of injury” referenced in the June 26, 2009 order is heavy construction. Mr. Woods wasn’t even employed in heavy construction from 4/05 to 3/06 – the period identified in the June 26, 2009 order from which the Department took “heavy construction” job of injury wages.

If the stipulation of the parties is to be honored, the matter is to be remanded back to the Department. If the stipulation is not binding then the social security printout demonstrates all wages from 1977 to March 2003 (the period expressly identified as involved in heavy construction). During Mr. Woods’ employment in heavy construction his earnings from 1977 to 2002 average (without factoring in inflation or any other adjustment) \$32,268.53 per year or \$3,022.37 a month. A fair representation of his employment pattern is not \$68.75 per month.

/s/

/s/

/s/

**IV.**  
**ATTORNEY'S FEES/COSTS**

RCW 51.52.130 provides:

“If, on appeal to the superior or appellate court from the decision and order of the board, said decision and order is reversed or modified and additional relief is granted to a worker or beneficiary, . . . a reasonable fee for the services of the worker’s or beneficiary’s attorney shall be fixed by the court. . . . If in a worker or beneficiary appeal the decision and order of the board is reversed or modified and if the accident fund or medical aid fund is affected by the litigation . . . the attorney’s fees fixed by the court, for services before the court only, and the fees of medical and other witnesses and the costs shall be payable out of the administrative fund of the department.” (partial recitation).

The Appellant requests attorney’s fees and costs in the event the Board decision is reversed or modified (the Trial Court adopted the Board’s decision) and additional relief is granted. In such an instance the Appellant will submit an affidavit of attorney’s fees and costs for approval.

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V.  
**CONCLUSION**

The 1/19/07 Department order has been held to be final and binding for purposes of establishing Mr. Woods' wage basis under the claim. The Appellant requests a finding that the 1/19/07 Department order is not final or binding for purposes of establishing Mr. Woods' wage basis.

If the 1/19/07 Department order is determinative, the Appellant requests this Court find that the 1/19/07 order does not preclude or collaterally estop a review of the wage order (June 26, 2009, affirmed by the October 5, 2009 order) or the overpayment order (October 6, 2009, affirmed by the April 22, 2010 order). The relief stipulated to by the parties is a remand

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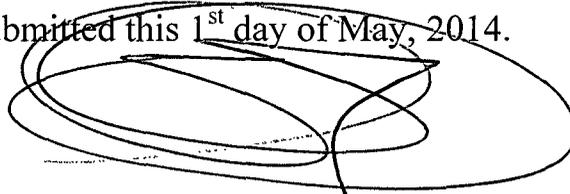
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back to the Department to adjudicate the wage basis and overpayment orders.

Respectfully submitted this 1<sup>st</sup> day of May, 2014.

A handwritten signature in black ink, consisting of several overlapping loops and a long vertical stroke extending downwards.

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Carol L. Casey, WSBA #18283  
Attorney for Appellant

NO. 45316-9-II

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

JOSEPH H. WOODS

Plaintiff

vs.

DEPARTMENT OF LABOR AND INDUSTRIES FOR THE  
STATE OF WASHINGTON

Defendant

**PROOF OF SERVICE**

STATE OF WASHINGTON )  
 ) ss  
COUNTY OF KITSAP )

The undersigned, being first duly sworn upon oath, deposes and states: I am a paralegal to the Law Firm of Casey & Casey, P.S., attorneys for Plaintiff herein; that on May 1, 2014, I deposited in the United States mail at the United States Post Office in Port Orchard, Washington, certified postage fully prepaid, an envelope addressed and containing original/copies of **APPELLANT'S AMENDED BRIEF** to the following entities:

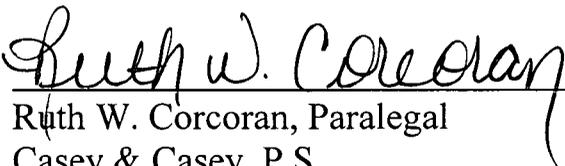
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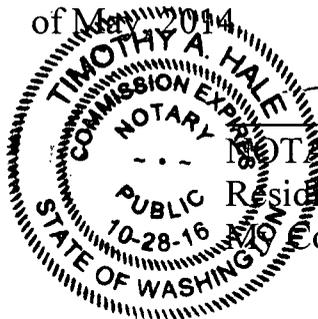
Original: David Ponzoha  
Clerk/Administrator  
Court of Appeals, Division II  
950 Broadway, Room 300  
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Ruth W. Corcoran, Paralegal  
Casey & Casey, P.S.

SUBSCRIBED AND SWORN to before me this 1<sup>st</sup> day  
of May 2014



  
TIMOTHY A. HALE  
NOTARY PUBLIC for the State of Washington  
Residing at: Tacoma  
Commission Expires: 10/28/16