

FILED
Court of Appeals
Division II
State of Washington
12/4/2019 2:15 PM

NO. 53085-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

KENNETH LEE,
Appellant,

v.

THE BOEING CO. &
DEP'T OF LABOR AND INDUSTRIES,
Respondents.

RESPONDENT'S BRIEF
THE BOEING CO.

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I. INTRODUCTION

The Respondent (hereinafter “Boeing”) respectfully asks this Court to affirm the unanimous *Verdict* of the 12-person Jury. The Jury meticulously, and with the greatest exercise of patience and duty, reviewed hours of testimony and eight surveillance DVDs. It ruled fully in favor of Boeing with regard to all eight issues with which it was presented relative to this Title 51 RCW case.

The gross inadequacies that compromise the brief submitted by Appellant (hereinafter “Mr. Lee”) renders this Court’s duty to consider any of his assigned errors nonexistent. He utterly failed in his duty to properly identify assignments of error, citations to the record, or legal support. Notwithstanding those technical defects, an avalanche of evidence supported closure of Mr. Lee’s workers’ compensation claim, with an assessment of a staggering \$782,401.51 in benefits and penalties owed *by* Mr. Lee to Boeing and the Department of Labor and Industries (hereinafter “Department”).

That costly judgment was levied after the Jury reached the inescapable conclusion that Mr. Lee willfully misrepresented his physical capabilities in order to wrongfully obtain Title 51 benefits to which he was not entitled. Indeed, he was found to have done so from February 3, 2003 through July 15, 2014 – an astounding 11-year hoax.

Yet, Mr. Lee failed to assign error to that particular determination, and in what could be characterized as a continuing exercise of dishonesty, he also failed to clearly¹ advise this Court of his misdeed. How is one able to argue successfully that one is entitled to *more* benefits, including a “permanent disability,” after that same person has already been found to have wrongfully taken funds to which he was never entitled? Mr. Lee is unable to avoid the harsh results of the *Jury Verdict* based upon all the evidence that supported it.

II. ASSIGNMENT OF ERROR

Boeing assigns no errors. RAP 10.3(b).

III. STATEMENT OF THE CASE

A. The jurisdictional journey of Mr. Lee’s workers’ compensation claim.

Mr. Lee’s workers’ compensation claim² was allowed by the Department. CP 285. The work injury occurred on June 1, 2000. CP 1543. This claim was among four that were filed by Mr. Lee naming Boeing as the liable employer. CP 1553. On March 20, 2015, the Department affirmed an order that both determined that Mr. Lee had willfully

¹ Mr. Lee made only two passing references to the willful misrepresentation findings. Appellant’s Br. at ix (“wrongdoing”); *Id.* at xi (“willful misrepresentation” contained in his statement of the case).

² Mr. Lee’s claim was assigned number W-475261. CP 277-81 (Jurisdictional History of the claim’s progression through the Department of Labor and Industries).

misrepresented his physical condition pursuant to RCW 51.32.240 for the purpose of receiving benefits to which he was not entitled³, and closed the claim with no further benefits. CP 277-81. Mr. Lee was directed to repay Boeing the time-loss benefits wrongfully received, in addition to a fifty percent penalty payable to the Department. CP 279.

Mr. Lee appealed the March 20, 2015 Department order to the Board of Industrial Insurance Appeals (hereinafter “Board”). CP 299-301. Boeing filed a cross-appeal seeking to recover time-loss compensation benefits paid to Mr. Lee for a period extending further back in time⁴ based on willful misrepresentation. CP 290. The appeals were both granted. CP 282, 292.

On April 12, 2017, the Industrial Appeals Judge issued a *Proposed Decision and Order*. CP 133-149. He affirmed closure of Mr. Lee’s claim with no additional benefits and agreed with Boeing that Mr. Lee had deliberately misrepresented his physical condition and unlawfully obtained benefits from February 5, 2003 through July 15, 2014. CP 146-148. Mr. Lee was directed to repay the time-loss benefits with an associated penalty. CP 148.

³ He was found to have wrongfully received benefits from May 20, 2013 through July 15, 2014. CP 279.

⁴ Boeing sought a finding of willful misrepresentation from February 5, 2003 through July 15, 2014. CP 234.

Mr. Lee petitioned the full Board for review of the *Proposed Decision and Order*. CP 71-129. The Board granted review and, on December 11, 2017, issued a final *Decision and Order*. CP 21-31, 61. The *Decision and Order* affirmed claim closure without the additional provision of benefits, but reversed the willful misrepresentation portion of the prior decision and found that Mr. Lee was entitled to time loss from February 5, 2003 through July 15, 2014. CP 26-7. The matter continued to the Pierce County Superior Court upon Mr. Lee's appeal. CP 1.

Because Boeing also filed an appeal with the Pierce County Superior Court, it moved to consolidate both appeals, which was granted. RP (03/23/18) at 6.

Prior to trial, the court also granted Boeing's Motion for Partial Summary Judgment resulting in a determination that Mr. Lee did not suffer any permanent partial disability pursuant to RCW 51.32.080, and did not require mental health treatment pursuant to RCW 51.36.010(2)(a) as a matter of law. RP (09/21/18) at 10; CP 2473-75.

The court next heard and denied Mr. Lee's motion to have the case reassigned to another judge due to Mr. Lee's mistaken belief that The

Honorable Susan K. Serko was a traffic court judge⁵, and on the basis that she made him feel “uncomfortable.” CP 1452-54; RP (10/12/18) at 3.

Days prior to the trial, the parties and Judge Serko reviewed the Certified Appeal Board Record (hereinafter “CABR”), which contained the testimony and exhibits amassed at the Board, during which time objections were renewed by those who preserved them in the record. CP 1461-67; RP (10/22/18) at 35-87; RP (10/23/18) at 99-188. Those that were renewed were ruled upon and the record was redacted accordingly before it was read to the Jury. CP 1468-2469; RP (10/22/18) at 35-87; RP (10/23/18) at 99-188.

B. The compelling substantive evidence.

The Jury heard the testimony of the following Boeing witnesses: Matthew Drake, M.D. (CP 1480-1531); Christopher Koppe (CP 1540-77); Douglas Robinson, M.D. (CP 1578-1633); Paul Nutter, M.D. (CP 1638-88); Aaron Hunt, M.D. (CP 1689-1762); Allison Baldwin (CP 1769-89); Steven Hasady (CP 1792-1821); Steven Starkel (CP 1825-52); Joan Sullivan, M.D. (CP 1857-1915); Michael Poth (CP 1916-61); Jeffrey Purdy (CP 1962-70); and, Matthew Sunby (CP 1971-80). They also

⁵ During that hearing, Judge Serko correctly explained that Title 51 does not provide pain and suffering damages as Mr. Lee had requested \$200 million. RP (09/21/18) at 8; *Tobin v. Dep't of Labor & Indus.*, 169 Wn.2d 396, 406, 239 P.2d 544 (2010).

reviewed highly incriminatory surveillance films. Exhibits 1-8. Mr. Lee presented the testimony of the following witnesses: Thomas Young, D.C., N.D. (CP 1990-2099); Chelsea Lee (CP 2118); Catherine Sigman (CP 2138-40); Emmet Sigman (CP 2160-67); Christal Lee (CP 2168-81); David Condon (CP 2188-99); Brendan Lee (CP 2209-25); Daniel Wanwig, M.D. (CP 2227-69); and Kenneth Lee (CP 2276-2330).

In response to Mr. Lee's presentation of evidence in support of his appeal of the Department's order, Boeing provided additional testimony from Dr. Drake (CP 2338-74), Dr. Sullivan (CP 2383-2442), and Dr. Hunt (CP 2424-67).

1. *Mr. Lee was found to have malingered in regard to a prior claim years before this claim, portending what was yet to come.*

Years ago, prior to the time Mr. Lee even suffered this industrial injury in 2000, Douglas Robinson, M.D., psychiatrist, examined Mr. Lee in 1991 for a different industrial injury claim that involved the low back. CP 1579, 1584, 1589. The physical examination of Mr. Lee at that time documented "multiple findings of presenting complaints that are exaggerated and simulating more impairment than is legitimately present, which led those doctors to conclude that his presentation was willfully distorted." CP 1597. He also observed that the results of two psychiatric MMPI tests proved indicative of malingering. CP 1609. Dr. Robinson

assessed malingering, the intentional misrepresentation of medical or psychiatric complaints to achieve an obvious benefit. CP 1598.

After Dr. Robinson reviewed the records related to this 2000 industrial injury claim, he compared Mr. Lee's presentation in relation to the 1990 claim with his presentation in relation to the 2000 claim, and concluded that both claims involved malingering carried out in similar fashion.⁶ CP 1604.

The psychiatric condition of bipolar disorder was also commented upon by Dr. Robinson, who was unable to determine whether Mr. Lee ever had that particular diagnosis after suffering his 2000 injury. CP 1606. In any event, Dr. Robinson confirmed that the 2000 injury would not have caused bipolar disorder. CP 1606. Ultimately, Dr. Robinson concluded that Mr. Lee was consciously misrepresenting his physical capabilities to the medical professionals involved in his claim. CP 1615. Even if Mr. Lee were bipolar, that disorder would not affect the determination that he was malingering, as he would still have been able to do so as part of a conscious ploy⁷. CP1617.

⁶ Dr. Drake drew the same conclusion. CP 1513.

⁷ Both Dr. Sullivan and Dr. Drake also referenced Mr. Lee's conscious "ploy." CP 1521, 2391

2. *After the 2000 injury, Mr. Lee quickly developed an extreme presentation involving non-use of his arms during claim-related medical appointments.*

Paul Nutter, M.D. provided medical care to Mr. Lee from 2003 to 2014. CP 1642. It was he who provided medical certifications for wage replacement benefits (time loss) relative to the claim. CP 1645. Dr. Nutter described Mr. Lee's presentation during clinical appointments; Mr. Lee always held his right arm close to his body or with the right elbow flexed, and complained of an inability to move the arm. CP 1647. By November of 2007, Mr. Lee was protective of both arms and claimed an inability to use either arm. CP 1657. His presentation worsened between 2007 and 2013 such that Mr. Lee claimed to have no use of either arm by 2013. CP 1661-62, 1657.

About mid-way through the administration of this claim, orthopedic surgeon Joan Sullivan, M.D. examined Mr. Lee on July 8, 2008. CP 1866. This innocuous industrial injury was diagnosed by Dr. Sullivan as a right elbow contusion, with a partial avulsion of the biceps tendon, surgically repaired on September 6, 2001. CP 1871-72, 1894.

Yet, seven years later in 2008, Mr. Lee still reported that he had difficulty even moving his right arm, shoulder, and hand. CP 1873. The examination was filled with inconsistencies, and marked pain behavior such as groaning, grimacing, and crying, as well as other non-physiologic

findings. CP 1890, 1894. In short, the examination did not “make any sense” from a medical perspective. CP 1894. Dr. Sullivan concluded that the right elbow injury⁸ had reached maximum medical improvement and Mr. Lee could return to work. CP 1899. In 2008, Dr. Sullivan suggested that Mr. Lee was malingering meaning he was engaging in intentional behavior intended to convey that he was suffering when he was not. CP1897.

In May of 2013, Mr. Lee placed the full purported uselessness of his arms on display when he met with vocational counselor Allison Baldwin to discuss return-to-work assistance. CP 1785. Following their in-person meeting, it was her understanding that Mr. Lee was “unable to move them [his arms] or use them.” CP 1785. He struggled to sign a piece of paper, and he was unable to remove his own wallet from his pants pocket, requiring Ms. Baldwin to uncomfortably both retrieve the wallet and return it to Mr. Lee’s own pocket in order for her to inspect his valid driver’s license. CP 1780, 1782. Based upon the testimony of the medical experts, Ms. Baldwin opined that Mr. Lee was in fact able to work without restrictions from 2003 to March of 2015. CP 1787.

⁸ Dr. Sullivan, Dr. Nutter, and Dr. Drake all concluded Mr. Lee had no left shoulder condition related to the industrial injury. CP 1490-91, 1678, 1880. Drs. Sullivan and Drake also opined that Mr. Lee did not suffer from Complex Regional Pain Syndrome. CP 2346, 2387.

Steven Hasady, occupational therapist, conducted a physical capacities examination of Mr. Lee on August 12, 2013. CP 1797.

Presumably in order to exaggerate his claimed disability, Mr. Lee wore a sling on his left arm and stated he could not move his right arm at all, and could only move his left arm if it were propped up on a table. CP 1799, 1803. Mr. Lee did confess to Mr. Hasady that he did not typically wear a sling when seen by the doctor, but that was only avoided so that he would not be viewed as a “whiner.” CP 1799. Daily activities were purportedly nearly impossible for Mr. Lee to perform so he required assistance to shave, wash his face, scratch his face, or comb his hair. CP 1806. Per Mr. Lee, driving a car was supposedly accomplished without involvement of the use of his arms, but rather, via use of his knees⁹. CP 1806. The evaluation concluded after Mr. Lee requested its discontinuation; he claimed an inability to sit, stand, walk, move his arms, squat, bend, or kneel. CP 1808.

After years of reported worsening, and outlandish claims of total disability involving disuse of both of Mr. Lee’s arms, surveillance was requested by the claims examiner. CP 1549.

⁹ Mr. Lee had made the same preposterous claim that he drove using his knees to Dr. Nutter. CP 1681.

3. *Surveillance was taken of Mr. Lee from 2013-2015, which showed him acting normally, except when he attended claim-related activities such as medical or vocational appointments, at which time he adopted a disabled persona.*

Steven Starkel, a licensed private investigator, carried out surveillance of Mr. Lee on: 05/20/13; 06/12/13; 08/11, 08/12, and 08/13/13. CP 1825-26, 1830; Ex. 1-3. The first activity on May 20, 2013 was at a medical appointment at which Mr. Lee was previously scheduled to be examined. CP1831-32; Ex. 1. Mr. Lee appeared at the appointment walking in a very slow manner, with his right hand held against his body, with a somewhat claw type contortion of the hand. CP 1832; Ex. 1. His son accompanied him. CP 1832; Ex. 1.

After the medical appointment, Mr. Lee and his son drove to an auto repair facility where Mr. Lee's presentation was dramatically different as he was then able to converse, fold his arms, grasp items, gesture with both hands, scratch his head, retrieve car keys from his pocket and twirl them in his left hand, open the car door and assume the driver's position, all while appearing to be in no pain whatsoever. CP 1833, 1835-36, 1841; Ex. 1.

On June 12, 2013, Mr. Lee drove himself to Walmart where he shopped. CP 1843; Ex. 2. The back of his vehicle was opened where

Mr. Lee placed his purchases after he opened the vehicle's door. CP 1844-45; Ex. 2. He then drove himself to the dentist. CP 1845; Ex. 2.

On August 12, 2013, Mr. Lee pumped gas into his car, and then was driven to the physical capacity evaluation by his son¹⁰. CP 1846-48; Ex. 3. When there, Mr. Lee wore a sling on his left arm. CP 1848, Ex. 3. He left the PCE wearing the sling and walked slowly from the building. CP 1849; Ex. 3. His son helpfully assisted him with things like opening the facility's door, and his son drove when they departed. CP 1848-49; Ex. 3.

Mr. Lee drove his vehicle again on August 13, 2013. CP 1850; Ex. 3. He did not wear a sling that day, and appeared to move his arms without difficulty. CP 1851; Ex. 3. He demonstrated the ability to fasten his own seatbelt. CP 1851; Ex. 3.

Michael Poth is also a licensed private investigator who surveilled Mr. Lee on numerous dates: 10/10/13; 10/17/13; 10/18/13; 10/20/13; 10/23/13; 11/07/13; 11/14/13; 11/15/13; 02/25/14; 02/26/14; 02/27/14; 04/30/14; 05/01/14; 05/02/14; 06/01/14; 06/02/14; 06/08/15; and 06/19/15. CP 1920; Ex. 4-8.

¹⁰ This was the PCE carried out by Mr. Hasady. CP 1707.

On October 17, 2013, Mr. Lee was observed driving a truck to a scrap metal yard where he actively tossed scrap metal out of the back of a pickup truck using both arms. CP 1924-25; Ex. 4.

Mr. Poth followed Mr. Lee the next day when Mr. Lee was scheduled to attend a medical appointment associated with his workers' compensation claim. CP 1933. As usual, he arrived at the appointment as the passenger of the car. CP 1933; Ex. 4. He exited holding his right arm tight against his body. CP 1975; Ex. 4. At the conclusion of the appointment, he returned to his car where he again entered as passenger, and he departed with his female companion after she put his seatbelt on for him. CP 1934, 1975; Ex. 4.

Surveillance was conducted on November 14, 2013 because Mr. Lee was known to have a medical appointment on that date as well¹¹. CP 1935-36. Mr. Lee departed as the driver of his vehicle on route to the appointment, but pulled over to switch positions in the car with his daughter before arriving at the medical facility. CP 1936; Ex. 5.

A similar switch was performed on February 26, 2014 after Mr. Lee left his home as the driver, stopped and made purchases at a convenience store, and then fastened his seatbelt and drove to Bethel High

¹¹ This was the examination performed by Aaron Hunt, M.D. CP 1696.

School where he awaited the dismissal of his son. CP 1937-39; Ex. 6.

While he waited, he fed himself the food he had purchased as he sat in the car. CP 1939; Ex. 6. After his son had joined him in the car, Mr. Lee pulled the car over onto a dead end road, and when the car emerged from that road, Mr. Lee's son was driving the vehicle, not Mr. Lee. CP 1939; Ex. 6. They drove to a medical appointment. CP 1940; Ex. 6.

Mr. Lee drove himself to the post office on February 27, 2014. CP 1944; Ex. 6. He was later seen at his property having an animated conversation with other people during which he gestured expansively with his arms. CP 1946; Ex. 6.

Another trip to Bethel High School was undertaken by Mr. Lee via motor vehicle on April 30, 2014. CP 1947-48; Ex. 7. He was also observed the following day, May 1, 2014, because he had a pre-arranged medical appointment. CP 1948. Mr. Lee left his home as the driver of his vehicle, though his daughter accompanied him as passenger. CP 1949; Ex. 7. Before he arrived at the appointment, he pulled over and by the time he arrived at the medical appointment, his daughter was driving. CP 1949-50; Ex. 7. Upon arrival at the medical facility, Mr. Lee held his right arm tight to his body and his daughter opened the door for him. CP 1950; Ex. 7. She also helped him get back in the car and fastened his seatbelt for him when it was time to leave. CP 1951; Ex. 7. After that, they went to a gas

station at which time Mr. Lee opened and closed his own car door when he paid for the gas. CP 1952; Ex. 7.

On June 19, 2015, Mr. Lee and a younger male arrived at a medical facility at 8909 Gravelly Lake Drive Southwest in Lakewood¹². CP 1956; Ex. 8. When they left the office, Mr. Lee was driving but exhibited “pain behavior” requiring his son to turn on the car with the key, and shift the car for Mr. Lee as they exited the parking lot. CP 1956-57; Ex. 8. Mr. Lee later left his residence that day as the driver of his vehicle, with his daughter, and they drove and shopped at two stores. CP 1957-58; Ex. 8. At this time of the day, he was able to open his car door, reach across his body with his right arm and apply his seatbelt, start the vehicle with the key, and shift the car as well as steer it. CP 1958-59; Ex. 8.

In general, Mr. Poth observed that Mr. Lee presented himself distinctively different at medical appointments versus other activities. CP 1960.

Perhaps one of the most disturbing aspects of Mr. Lee’s subterfuge was his utilization of his own children to effectuate his deception as he was captured on surveillance leaving his home to attend a medical appointment related to his claim on three occasions, *as the driver of his*

¹² This is the business address of Thomas Young, N.D., D.C., who testified on behalf of Mr. Lee. CP 1990.

vehicle, only to pull the vehicle over so he could switch places with one of his children before reaching the ultimate destination. CP 1936, 1939, 1949-50, 1967, 1976; Ex. 5-7. Once he arrived at the clinic on all three occasions, he assumed his “disabled posture,” as aptly described by Dr. Drake. CP 1505.

4. *The medical doctors, most of whom had already identified malingering, concluded that Mr. Lee had willfully and intentionally misrepresented his physical capabilities after they reviewed the surveillance films.*

In 2014 longtime attending provider, Dr. Nutter watched surveillance taken of Mr. Lee. CP 1662. The first-hand information conveyed to Dr. Nutter via those films was nothing less than shocking. CP 1663. The doctor saw Mr. Lee “moving his arms the way I actually thought he should be moving them, but, you know, I had never seen him do that.” CP 1663. Any possibility that Mr. Lee truly, though wrongly, believed that he was simply incapable of moving his arms, in the words of Dr. Nutter, “went out the window right there.” CP 1663. Based upon the physical capabilities demonstrated in the videos, Dr. Nutter opined that Mr. Lee was fully capable of working full time without restrictions from the first time he treated him in 2003, and that his medical condition had reached maximum medical improvement. CP 1664, 1669, 1677.

The use of Mr. Lee's son to aid in his scheme did not go unnoticed by Dr. Nutter who had come to know Mr. Lee's son over the years. CP 1665. The dichotomy between his normal presentations in clear view of his son during activities of daily living presented a stark, and upsetting contrast to his almost zombie-like presentations at medical appointments. CP 1665. "[T]he lesson that teaches a kid is to me – was, you know, wrong." CP 1665.

Yet, the act continued when Dr. Nutter saw Mr. Lee again on July 16, 2014 to discuss the surveillance. CP 1670-71. Mr. Lee's first defense when confronted by the videos was to deny that it was he depicted on the tapes. CP 1672. When Dr. Nutter rejected that explanation, Mr. Lee fainted. CP 1672. Upon regaining his wits, Mr. Lee rolled onto his stomach and in another demonstration of his true arm strength, put both hands flat on the ground, *and pushed himself up* into a kneeling position. CP 1672. He thereafter returned to a standing position with his arms folded, but as his daze cleared, he immediately resumed his standard, disabled posture with his arms pinned to his sides. CP 1673.

After reviewing the tangible results of Mr. Lee's shameful behavior, Dr. Nutter concluded that Mr. Lee's presentation in his clinic over the past 11 years had been nothing more than "an act." CP 1676. He opined that Mr. Lee willfully and intentionally misrepresented his physical

capabilities during the time that he treated him, and confirmed that he would not have certified time loss had he known Mr. Lee's true capabilities. CP 1676-78. In turn, the claims examiner who issued the time-loss payments to Mr. Lee from 2003 to 2014 had relied on Dr. Nutter's faulty time-loss certifications during the administration of this claim. CP 1562. Dr. Nutter was sadly convinced in his heart that Mr. Lee had lied to him all of those years. CP 1688.

Following her 2008 examination of Mr. Lee, Dr. Sullivan's suspicions that Mr. Lee was malingering crystalized after she viewed the surveillance. CP 1902. She opined that Mr. Lee consciously and deliberately portrayed phony disability when seen by medical providers with the intent to obtain benefits, including medical treatment and time-loss compensation. CP 1907. She concluded that Mr. Lee was able to work without restrictions from September of 2002 through March 20, 2015. CP 1906. His industrial injury had reached maximum medical improvement long ago, anywhere from six months to a year after his 2001 surgery, and he did not require any medications including narcotics. CP 1901, 2401-03.

Aaron Hunt, M.D., psychiatrist, examined Mr. Lee on November 14, 2013. CP 1690, 1696. The interview process was described by Dr. Hunt as "not a normal interview," and Mr. Lee's presentation was

“bizarre.” CP 1707, 1710. During the interview, Mr. Lee refused to directly answer questions about his symptoms. CP 1707.

Following his examination, Dr. Hunt was unable to diagnosis any mental health disorder related to the June 1, 2000 industrial injury claim, and found no disability or work restrictions. CP 1724-25.

After the examination, Dr. Hunt reviewed updated medical treatment records and the surveillance footage. CP 1726-37. Based on that, Dr. Hunt concluded that Mr. Lee volitionally exaggerated or misreported his symptoms for purposes of secondary gain. CP 1737. The behaviors depicted on the videos represented clear evidence of volitional misrepresentation by demonstrating an altered, disabled persona when Mr. Lee was seen for claim-related purposes. CP 1740. Critically, such behavior was *not* demonstrated when claimant was attending a dentist appointment, interacting with other people outside the sphere of his claim, or actively engaged in physical activity at the scrap yard. CP 1740. Mr. Lee was malingering. CP 1737.

Thus, Dr. Hunt determined that Mr. Lee willfully and knowingly misrepresented his physical capabilities and restrictions in relation to his claim. CP 1747-48. From a mental health perspective, Mr. Lee was able to work from February 5, 2003 forward. CP 1756. Though bipolar disorder was historically noted in the medical records, Dr. Hunt determined it

would not be related to the industrial injury claim. CP1745. It was “irrelevant” to the claim. CP 1754.

Lastly, Dr. Drake examined Mr. Lee on January 30, 2016. CP 1484. As with prior medical encounters with Mr. Lee, this examination was also described as nothing less than “very bizarre.” CP 1502. Mr. Lee claimed an inability to remove his own clothing in preparation for the physical examination and asked Dr. Drake to disrobe him (he declined). CP 1495. Mr. Lee described global bilateral upper extremity dysfunction, but also provided evasive and strange answers when asked about the specifics of his symptoms, and the exam ultimately reached a point at which Mr. Lee broke down in tears. CP 1489, 1492. At the conclusion of the examination, Dr. Drake diagnosed an injury-related right elbow contusion, with a subsequent right elbow distal tendon repair surgery¹³. CP1501.

After the examination, Dr. Drake reviewed the surveillance footage, which revealed “a completely different person than what I had seen during my IME.” CP 1502-03. That other Mr. Lee was able to move normally, using both hands to drive a car. CP 1502. He was also able to function at a scrap yard throwing pieces of metal, folding his arms,

¹³ Dr. Drake did not believe the surgery was related to the work-related injury. CP 1502.

demonstrating range of motion of his right elbow. CP 1502-03. The conclusion that emerged was that there was one Mr. Lee who was functioning, and a second Mr. Lee who had a disabled person's persona. CP 1503. The disabled persona was displayed when visiting medical appointments. CP 1519. Surveillance taken in February of 2014 demonstrated Mr. Lee moving from a "normal person to disabled person to normal person all in the span of a day," with the abnormal portion of the day only present at a claim-related medical appointment. CP 1505.

Dr. Drake opined that the injury-related right elbow contusion reached maximum medical improvement by the fall of 2000. CP 1509. Dr. Drake further opined that Mr. Lee was malingering; meaning he was intentionally giving the impression of a medical problem for the purpose of secondary gain. CP 1510. He intentionally and willfully misrepresented his physical capabilities to medical treatment providers in order to deceive them. CP 1520. In reality, Mr. Lee had been able to perform reasonably continuous gainful employment without restrictions since 2003. CP 1520.

5. The medical witnesses whose testimony was presented by Mr. Lee lacked all credibility because they had not reviewed all of the surveillance videos unlike all other medical witnesses.

Chiropractor and Naturopathic Doctor, Dr. Thomas Young began to treat Mr. Lee only after Dr. Nutter dismissed Mr. Lee from his practice. CP 1990-91. He was the only doctor to diagnose a media [sic] nerve

entrapment related to the elbow¹⁴, but Dr. Sullivan disputed that opinion explaining that the only nerve present in the area at which Mr. Lee's surgery was performed is the posterior interosseous nerve, which has no sensory component. CP 1995, 2391. If that nerve is damaged a person loses the ability to extend his fingers, or extend his wrist, a problem that Mr. Lee "certainly" did not have. CP 2392. Dr. Drake detected no nerve injury either. CP 2343.

Disturbingly, Dr. Young was shown only portions of the surveillance videos¹⁵ hand-selected by Mr. Lee, and the doctor did not recall seeing Mr. Lee: driving, holding a cell phone, carrying keys, wearing a sling, switching places in the car with his children when driving, eating food with his hands, crossing his arms, and/or gesturing while speaking with people. CP 2053-56. Though he knew that Mr. Lee had treated with Dr. Nutter, when asked whether he was aware that Dr. Nutter had signed a statement stating that Mr. Lee's presentations to him over a span of 11 years was nothing more than an act, he exclaimed, "Oh, my, no, I wasn't aware of that." CP 2082.

¹⁴ Though he admitted that an MRI of the right elbow that he ordered, taken on September 30, 2014, showed the median nerve to be unremarkable. CP 2063-65.

¹⁵ He was uncertain of the dates of the DVDs he reviewed. CP 2074-75.

Psychiatrist Daniel Wanwig, M.D. testified that he treated Mr. Lee for about 10 years. CP 2228. During each and every year from 2006 through 2014, Dr. Wanwig repeatedly documented in his chart notes that Mr. Lee's mental health condition was stable, and *not* a barrier to work. CP 2243-55. In 2014, he signed a statement in which he explained that Mr. Lee suffered from bipolar disorder that was *not* caused by the 2000 industrial injury as that particular mental disorder is not caused by an event such as an industrial injury. CP 2256.

6. *Upon presentation of the CABR to the Jury, they were excused to deliberate and returned the Verdict.*

Upon conclusion of the presentation of the evidence to the Jury, jury instructions were reviewed with Judge Serko and the parties. RP (11/01/18) at 8-19; CP 2539-69 (agreed set). The jury instructions were finalized for presentation. *Id.* at 19. At the conclusion of that process, Judge Serko specifically asked Mr. Lee whether he had anything to add to the jury instructions in terms of concerns or revisions, or anything else, and he responded with a simple, "No." *Id.*

In addition to Boeing and the Department, Mr. Lee submitted what he termed proposed jury instructions; however, Judge Serko denied

Mr. Lee's proposed instructions because they were deemed legal argument. *Id.* at 8¹⁶.

The Jury returned a unanimous *Verdict* with regard to each question asked of it, fully favorable to Boeing¹⁷, upon which the *Judgment and Order* was based. App.¹⁸ CP 2598-2600. Lastly, Mr. Lee appealed the *Jury Verdict* to the Court of Appeals, Division II.

IV. ARGUMENT

A. Legal Standards applicable to Title 51 appeals.

It is difficult to state concisely the applicable standards of review in this matter given Mr. Lee's confusing and vague grievances and lack of support for them. RAP 10.3(a)(6). The standards of review are provided based upon the differing, potential errors raised by Mr. Lee.

As a general matter, Title 51 RCW governs judicial review of workers' compensation cases. *Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179, 210 P.3d 355 (2009). The superior court conducts a de novo review of the Board's decision, relying exclusively on the Board's

¹⁶ Judge Serko explained as follows: "I now have had a chance to look at it in-depth. This is not a jury instruction. Jury instructions take the form that counsel have submitted. They're very, very specific; they don't have citations. This, to me, appears to be argument and perhaps briefing that potentially could support proposed jury instructions, but it is not a jury instruction." *Id.* at 8.

¹⁷ The *Jury Verdict* essentially reinstated the findings and conclusions contained in the *Proposed Decision and Order* of the Board originally issued by Judge Hansen. CP 146-48, 2598-2600; App.

¹⁸ The *Jury Verdict* has been indexed as CP 2598-2600.

certified record. RCW 51.52.115¹⁹; *McCaulley v. Dep't of Labor & Indus.*, 5 Wn. App. 2d 304, 312, 424 P.3d 221 (2018). The jury's verdict in Title 51 trials have the same force and effect as actions in law. RCW 51.52.115.

The Court of Appeals reviews the superior court's decision, not the Board's order. *City of Bellevue v. Raum*, 171 Wn. App. 124, 139, 286 P.3d 695 (2012); RCW 51.52.140. The jury's verdict should not be disturbed if, when reviewed in the light most favorable to the prevailing party, it is supported by substantial evidence. *Bennett v. Dep't of Labor & Indus.*, 95 W.2d 531, 534, 627 P.2d 104 (1981).

The party alleging willful misrepresentation bears the burden of proof and is required to present all its evidence in its case-in-chief first, based on the clear, cogent, and convincing standard. RCW 51.32.240(5); RCW 51.52.050(2)(c). Clear, cogent, and convincing evidence is a higher degree of proof than preponderance of the evidence. *Holmes v. Raffo*, 60 Wn.2d 421, 426, 374 P.2d 536 (1962). It reaches the level of highly probable, but this does not mean that the evidence must be convincing beyond a reasonable doubt. *In re Sego*, 82 Wn.2d 736, 739, 513 P.2d 831 (1973).

¹⁹ Hence, the 09/26/18 Statement of Dr. Wanwig appended to Mr. Lee's Appellant's Brief cannot be made part of the record based on statute and based on RAP 10.3(a)(8). Appellant Br. at i, ex. 4. It should be struck.

As Mr. Lee stated, the provisions of Title 51 are to be liberally construed in favor of “those who come within its terms,” but those who claim rights under the Act are held to strict proof of their right to entitlement of benefits. *Hastings v. Dep’t of Labor & Indus.*, 24 Wn.2d 1, 12, 163 P.2d 142 (1945) (citations omitted). To be clear, liberal construction does not apply to facts, but to the interpretation of the statute. *Ehman v. Dep’t of Labor & Indus.*, 33 Wn.2d 584, 595, 206 P.2d 787 (1949).

Mr. Lee, who represents himself, is held to the same standard as an attorney, and is bound by the same rules of procedure and substantive law. *Westberg v. All-Purpose Structures, Inc.*, 86 Wn. App. 405, 411, 936 P.2d 1175 (1997)(citation omitted). Appellants, including pro se parties, must provide argument in support of the issues presented for review, with citations to legal authority and references to the record. RAP 10.3(a)(6). This means Mr. Lee was required to provide references to pages and parts of the record²⁰. RAP 10.4(f).

A party’s failure to address an issue or his failure to provide reasoned argument renders his appeal undeserving of appellate court consideration. *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d

²⁰ Mr. Lee mostly cited to “CP” and “RP” without any page numbers. See Appellant’s Br. at iii.

290 (1998); *Foster v. Gilliam*, 165 Wn. App. 33, 56, 268 P.3d 945, 956 (2011). If a party fails to adhere to these requirements, the court and opposing counsel are unable to review efficiently and expeditiously the accuracy of the factual statements and legal authority, as has occurred in regard to this matter. *Hurlbert v. Gordon*, 64 Wn. App. 386, 400, 824 P.2d 1238 (1992).

B. Mr. Lee's assignments of errors lack the necessary legal and factual support to compel the Court's consideration.

A party must perform the work necessary to earn the privilege of appellate review. Mr. Lee failed to do so. All of Mr. Lee's Assignments of Error lacked exactness, relevant citations to the record, and relevant legal authority. Though he offered a smattering of legal citations²¹, they are not correlated with either errors, issues or testimony and his disconnected thoughts conveyed via the written word simply meander.

Nonetheless, responses to the errors identified by Mr. Lee, though vague and difficult to comprehend, are addressed below.

Assignment of Error A (Appellant's Br. at ii & ix). Mr. Lee generally objected to the lower court's "denied redactions" relative to the testimony contained in the CABR. The only citation supplied by Mr. Lee related to

²¹ Reference to a "major contributing cause" is not the correct legal standard under Title 51. His references to *Tammy L. Foster* and *Brown v. A-Dec, Inc.* are misplaced and not relevant. Appellant Br. at v.

colloquy offered during Dr. Drake's testimony. Those two lines were redacted and were not read to the Jury. CP 1296 (pre-redaction), 2369 (post-redaction). Any other alleged erroneous redactions were not identified in violation of RAP 10.3(a)(6) and cannot be reviewed²².

Assignment of Error B (Appellant's Br., pgs. ii & ix). Mr. Lee assigned error to an alleged failure to timely serve him with unidentified legal documents. He asserted that a cautionary instruction about that issue was offered by Judge Serko, without the benefit of a citation to the record. Regardless, Mr. Lee utterly failed to identify any specific incident of late service, or offer any explanation as to why he was prejudiced. As with all other arguments, there was no citation to the record regarding alleged late service. Without any identification of an alleged violation of a rule or an instance of improper or belated service upon Mr. Lee, his contention simply cannot be examined. RAP 10.3(a)(6).

Assignment of Error C (Appellant's Br., Pgs. ii; iii; & ix²³). Mr. Lee assigned error to the superior court's caution that the parties must only read testimony from the CABR. The Judge's statement in that regard was a correct recitation of the law. RCW 51.52.115. Mr. Lee also complained

²² It is also not clear of what consequence it would be if Ms. Greer wrongly identified the city from which Dr. Drake testified, whether it be in the Middle East or Washington, D.C. Appellant Br. at ii. There is no citation to the record in any regard.

²³ See also "Argument H." Appellant's Br. at iii.

that the Department and Boeing “put in exhibits that were denied in the lower courts²⁴.” Appellant Br. at ix. No specific information was provided by Mr. Lee as required by RAP 10.3(g). Curiously, he seemed to object to the admission of one of his own exhibits. It is not clear which exhibit or why he would object to its admission²⁵. *See* CP 2532-33.

Mr. Lee failed to confirm that any substantial right was violated by admission of an exhibit and he failed to cite the point at which he objected to the admission of any exhibit on the record. ER 103. Furthermore, he failed to identify the exhibit as required by RAP 10.4(c). Such carelessness failed to establish not only Mr. Lee’s right to review, but it also failed to support a theory that the superior court abused its discretion in terms of admitting an exhibit – the applicable standard of review. *Hizey v. Carpenter*, 119 Wn.2d 251, 268, 830 P.2d 646 (1992). Ultimately, it was within Mr. Lee’s control to seek the admission of any of his own exhibits, or decline to do so. Without any identification of a wrongfully admitted exhibit, his contention cannot be considered. RAP 10.3(a)(6).

²⁴ Presumably, Mr. Lee intended to refer to the Board rather than “lower courts.”

²⁵ Exhibits 1-10 were admitted as there were no objections. RP (10/23/18) at 194-95. Mr. Lee did not offer Exhibit 11. *Id.* at 196. Boeing did not renew its objection to Exhibit 12. *Id.* at 197. Mr. Lee did not offer Exhibits 13 and 14. *Id.* at 200-01. Exhibit 15 was admitted over Boeing’s objection, though with redaction. *Id.* at 203-04. Boeing’s objection to Exhibit 16 was sustained. *Id.* at 204-05.

Assignment of Error D (Appellant's Br., Pg. x). Mr. Lee assigned error in general terms to the superior court's refusal to utilize his "jury instructions." The "jury instructions" offered by Mr. Lee did not actually constitute true instructions; rather, he offered legal argument. RP (11/01/18) at 8, 10; CP 2534-38.

A party must state with specificity the nature of his objection to the court's refusal of any jury instruction per CR 51(f), so that the trial court is able to understand the nature of the objection thereby allowing its thoughtful consideration and a possible revised ruling. *Millies v. LandAmerica Transnation*, 185 Wn.2d 302, 310-11, 372 P.3d 111 (2016). A trial court only abuses its discretion when rejecting a party's jury instruction if its decision was manifestly unreasonable, or if its discretion was exercised on untenable grounds or for untenable reasons. *Boeing Co. v. Harker-Lott*, 93 Wn. App. 181, 186, 968 P.2d 14 (1998).

Here too, it is of critical significance that Mr. Lee failed to cite to his objection on the record as required by CR 51(f). Indeed, when specifically asked by Judge Serko, Mr. Lee stated that he had no comments about those instructions. He simply did not preserve this issue for appellate review. RAP 10.3(g).

Notwithstanding that error, jury instructions must adequately state the law, not mislead the jury, and allow the parties to argue their theories

of the case. *Boeing Co. v. Key*, 101 Wn. App. 629, 633, 5 P.3d 16 (2000). The superior court utilized appropriate jury instructions that correctly outlined the law and allowed the parties to argue their theories of the case.

Additional “arguments” were ambiguously provided by Mr. Lee. Though they were not clearly labeled as errors, or supported by references to the record or law, Boeing addresses the following *potential* errors raised by Mr. Lee.

“Argument E.”²⁶ Mr. Lee claimed the Department and Boeing wrongly changed dates and words in the CABR. There is only one citation to testimony supplied for review (CP 647²⁷). At that page, a typographical error was corrected. The court reporter documented the date “February 5, 2013” instead of “February 5, 2003.” CP 1755. The year was corrected via redaction. That same date was correctly referenced further down on the same page, as well as the page after that. CP 1756. Failure to correct a typographical error would only serve to wrongly confuse the hard working Jury.

In fact, the testimony was carefully and painstakingly redacted in order to ensure a smooth delivery to the Jury, with redactions made to

²⁶ Appellant’s Br. at ii.

²⁷ Appellant Br. at ii (Mr. Lee erroneously referenced November 1, 2014, instead of 2016).

reflect the rulings on the parties' objections. RP (10/22/18) at 35-87; RP (10/23/18) at 99-188. For instance, a redaction was made following a sustained hearsay objection during Dr. Hunt's testimony. CP 593-594 (pre-redaction) versus CP 1701-1702 (post-redaction). In addition, superfluous language such as "okay," or false starts to questions were redacted. An example of this type of redaction is illustrated at CP 593 (pre-redaction) versus CP 1701(post-redaction). Typographical errors were corrected. An example of this type of redaction is seen at CP 766 (pre-redaction) versus CP 1867 (post-redaction). Review of the record was laborious, but carefully accomplished with all involved in the process wishing to ensure an accurate and smooth delivery to the Jury. RP (10/22/18) at 35-87; RP (10/23/18) at 99-188.

"Argument I."²⁸ Mr. Lee objected to the consolidation of his appeal in the superior court with the appeal filed by Boeing. The superior court correctly consolidated the appeals pursuant to CR 42(a), which permits a court to consolidate matters that involve common questions of law or fact. Because Title 51 superior court appeals are based on the testimony and evidence contained in the CABR, both Boeing's appeal and Mr. Lee's appeal were based on the same facts. Not only would empaneling two separate juries have resulted in unwarranted substantial costs to the court,

the parties, and the numerous jurors, but also the failure to consolidate the appeals could have resulted in inconsistent determinations between different juries. The superior court's ruling constituted the only reasonable course of action under the circumstances. Thus, Mr. Lee has not established an abuse of discretion or that he was prejudiced by that decision. *Angelo v. Angelo*, 142 Wn. App. 622, 639, 185 P.3d 1096 (2008).

"Argument J."²⁹ Mr. Lee alleged Judge Serko had a "conflict of interest" involving Dr. Nutter³⁰. No such allegation was raised when Mr. Lee moved to change venue. RP (10/12/18) at 3-6. Mr. Lee has failed to cite to any mention of an alleged conflict of interest, and the oral argument regarding his requested change of venue, fails to establish that he raised any such concern.

In short, Mr. Lee did not provide any basis for disqualification of Judge Serko based on CJC 2. A party who has reason to believe that a judge's impartiality might reasonably be questioned "must act promptly to request recusal and 'cannot wait until he has received an adverse ruling

²⁸ Appellant's Br. at iii.

²⁹ Appellant's Br. at iii.

³⁰ Under Arguments, Mr. Lee stated: "Judge Susan K Serko had a conflict of interest in my case. Judge Serko had just been involved in the ruling of DR. [sic] Paul Nutter who was my personal physician from 2003 to July 15th, 2014. I motioned to disqualify her as my cases judge on 10-12-2018 and she refused to step down. (CP)." Appellant's Br. at iii.

and then move for disqualification.’ ” *In re Swenson*, 158 Wn. App. 812, 818-19, 244 P.3d 959 (2010) (quoting *State v. Carlson*, 66 Wn. App. 909, 917, 833 P.2d 463 (1991)). Discovery of a possible grounds for recusal must be carried out with due diligence and if thought to be found, promptly acted upon. *Sherman v. State*, 128 Wn.2d 164, 205 n. 15, 905 P.2d 355 (1995). With regard to establishing all of these requirements, Mr. Lee woefully failed. He did not identify any grounds for disqualification of Judge Serko. It is abundantly clear that he only now raises this issue because he is unhappy with the Jury’s *Verdict*.

“Argument K & L.³¹” Mr. Lee was dissatisfied by the manner in which the parties were designated in the caption of the pleadings at superior court. Appeals under Title 51 adhere to the rules of civil practice. RCW 51.52.140. When the appeals filed by Boeing and Mr. Lee were correctly consolidated at superior court, the caption contained on subsequent pleadings reflected that ruling by reducing the case number to one, and relegating the Department and Mr. Lee to the position of defendants³². Boeing was designated as the plaintiff, which is appropriate given the fact that it bore the initial burden of proof with regard to the issue of willful misrepresentation. RCW 51.52.050(2)(c). One would think the designation

³¹ Appellant’s Br., Page iii.

of Mr. Lee as a defendant would appeal to his sense of injustice.

Regardless, he provides no legal authority in support of his position that the caption was incorrect, or that if it were, it somehow harmed him. RAP 10.3(a)(6).

In connection with this complaint, Mr. Lee incredulously claimed that he did not know whether the Department was “for or against him in this case.” Appellant’s Br. at ix. First, Mr. Lee need only have read the Department’s March 20, 2015 order in which he was found to have committed willful misrepresentation in order to ascertain whether the Department was “for or against him.” He must have done so because he filed an appeal regarding that order with the Board. Second, more immediate proof that Mr. Lee was not, *and is not now*, confused as to whether the Department’s position is adverse to his own is contained in his own Appellant’s Brief where he clearly admitted on a different page that “[t]he AAG Lucretia Greer has always been on Boeing [sic] side from the beginning.” Appellant’s Br. at xi. He is not confused by the caption.

Mr. Lee also stated in the conclusion of his brief that he would like a new trial, but failed to explain why or how he might be entitled to such

³² The Department did not appeal the determination of the Board; RCW 51.52.140 limits the circumstances under which the Department may do so.

an extreme form of relief. In order to obtain a new trial, the party seeking it must establish an error that materially affected his substantial rights, as set forth in CR 59(a). Judge Serko rightly denied a new trial, and in doing so, she did not abuse her discretion. *Aluminum Co. of America v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 537, 998 P.2d 856 (2000). If this were an issue Mr. Lee intended to address, there is no basis to disturb the ruling of Judge Serko as she correctly noted that he had given “*no reason*” for the relief requested. RP (11/30/18) at 329, 332.

A final meritless contention was raised in the body of his Appellant’s Brief wherein he offered unsupported speculation that Dr. Nutter was under some type of “duress” or was “manipulated” by the court or counsel.³³ Again, Mr. Lee provided no reference to evidence (only “court issues”) to support these baseless allegations. RAP 10.3(a)(6). Any such notions of bias could and should have been explored by Mr. Lee during his cross-examination of Dr. Nutter. Yet, he only asked one question of the doctor (CP 1687), wholly failing to ask any questions

³³ Under ‘Issues’, Mr. Lee stated: “At issue was Dr. Paul Nutter under duress or being manipulated by the court, Boeing Co. by attorney, Jennifer Kramer and the L&I AAG, Lucretia Greer. Did Dr. Paul Nutter have a stake in the outcome of the case. The reason I bring this up is that Dr. Nutter had some personal issues and could have affected his mental state. (Court issues).” Appellant’s Br. at x.

pertinent to theories of duress and/or manipulation. There is no basis to address this contention now.

C. Mr. Lee did not seek review of the sufficiency of the evidence, but even if this Court elects to review the Jury's determinations, it must affirm them because they were based on the substantial evidence.

Again, if it were Mr. Lee's intention to assign error to the Jury's ultimate determinations, he flagrantly failed to do so. For the sake of clarity with regard to review of the Jury's *Verdict*, this Court does not place itself in the role of the jury.

Our function is to review for sufficient or substantial evidence, taking the record in the light most favorable to the party who prevailed in superior court. ***We are not to reweigh or rebalance the competing testimony and inferences, or to apply anew the burden of persuasion, for doing that would abridge the right to trial by jury.*** (emphasis added).

Harrison Mem'l Hosp. v. Gagnon, 110 Wn. App. 475, 485, 40 P.3d 1221 (2002). Evidence need only be substantial, meaning it is "sufficient to persuade a fair-minded, rational person of the truth of the matter." *R & G Probst v. Dep't of Labor & Indus.*, 121 Wn. App. 288, 293, 88 P.3d 413 (2004).

The greatest weakness of Mr. Lee's appeal is his wholesale avoidance of the willful misrepresentation issue. His entire appeal is doomed by the fact that the Jury found he had fraudulently received benefits for more than an 11-year period, and he failed to assign error to

that determination. He committed the Industrial Insurance Act's equivalent of civil fraud, and did so in the sum of \$521,601.01. His credibility with regard to all other issues is obliterated by that fraud determination, as is the reliability of his expert witnesses who failed to consider his deceit and instead relied upon Mr. Lee's untrustworthy account of his ailments. He cannot prove entitlement to any other benefit unless he proves the Jury was wrong about willful misrepresentation. For obvious reasons, he simply ignored the issue.

The evidence that supported willful misrepresentation was overwhelmingly incriminatory. Private investigators observed Mr. Lee during a two-year period from May of 2013 through June of 2015 and documented his activities via Exhibits 1-8. An unmistakable and unsettling pattern of deceit emerged; Mr. Lee pretended he was unable to move or use his arms when carrying out any activities related to his workers' compensation claim, but was able to use them in normal fashion when carrying out all other activities of daily living. The bulk of the investigation was carried out over 23 days during 2013. That period of time represented merely six percent of the entire year, but revealed three separate incidents of "driver switching." This behavior proved intent.

The surveillance video footage confirmed what Dr. Nutter always thought should be the case: Mr. Lee was able to:

- Drive, shift, and steer a vehicle with is arms, not his knees;
- Fold his arms in front of him while deep in conversation;
- Easily grasp items in his hands;
- Uninhibitedly and with animation gesture with both arms;
- Perform simple motions like scratching his head;
- Retrieve car keys from his pocket, and twirl them on a finger;
- Open and close car doors without assistance;
- Reach across his body and fasten his own seatbelt;
- Place groceries in his car;
- Pump gas into his car;
- Eat and drink normally, using his hands to lift items to his mouth;
- Drive himself to the dentist;
- Toss scrap metal out of the back of a pickup truck, using both arms.

Not only was the Jury able to review the compelling surveillance footage and testimony of the investigators, but it also listened to the testimony of Dr. Nutter, Dr. Sullivan, Dr. Robinson, Dr. Hunt, and Dr. Drake, all of whom provided expert opinions that Mr. Lee had intentionally and willfully misrepresented his true condition and capabilities.

Mr. Lee provided no citations, argument, or information refuting the Jury's determination about willful misrepresentation. . RAP 10.3(a)(6). The two personas of Mr. Lee captured via video, coupled with the sound medical testimony, easily met the clear, cogent, and convincing standard. RCW 51.32.240(5); WAC 296-14-4121(1).

All other jury determinations flowed in a logical progression based upon the finding of willful misrepresentation. The Jury appropriately determined that Mr. Lee was able to engage in reasonably continuous,

gainful employment, without restrictions, from February 5, 2003 through March 20, 2015.

The medical testimony established that the June 1, 2000 injury caused only a right elbow contusion and partial right biceps tear. Despite Mr. Lee's presentation of extreme disability involving both arms, no additional physical conditions were related to the mild right elbow injury. The industrial injury did not cause a left upper extremity condition (CP 1678) or reflex sympathetic dystrophy.³⁴ Furthermore, the testimony of psychiatrists Dr. Robinson and Dr. Hunt established that there were no mental health conditions, including bipolar disorder, related to the industrial injury, a conclusion with which Dr. Wanwig had agreed for eight years while he treated Mr. Lee.

Finally, substantial evidence established that Mr. Lee's industrially-related conditions had reached maximum medical improvement³⁵ well before March 20, 2015. Dr. Drake testified that the conditions reached maximum medical improvement by the fall of 2000, while Dr. Sullivan concluded that the conditions had reached maximum

³⁴ Reflex sympathetic dystrophy (RSD) is currently known as Complex Regional Pain Syndrome (CRPS). CP 1891, 2355, 2405.

³⁵ Maximum medical improvement: An industrially-related condition has reached maximum medical improvement when no fundamental or marked change in an accepted condition can be expected, with or without treatment. WAC 296-20-01002. Maximum medical improvement is equivalent to "fixed and stable."

medical improvement within six months to a year after the 2001 surgery. Dr. Nutter agreed that the conditions had reached maximum medical improvement. CP 1669. Mr. Lee was not entitled to any further treatment.

Based upon the Mr. Lee's failure to present any medical testimony that he had suffered a permanent partial disability, or that he required mental health treatment, related to his workers' compensation claim, the superior court properly granted partial summary judgment. Mr. Lee did not assign error to the partial summary judgment ruling.

Nonetheless, when this Court reviews summary judgment determinations it carries out the same inquiry as the trial court pursuant to CR 56. *Highline School Dist. v. Port of Seattle*, 87 Wn.2d 6, 548 P.2d 1085 (1976). Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). Mr. Lee failed to present any medical testimony regarding additional proper and necessary mental health treatment, or permanent partial disability related to any physical or mental health conditions³⁶. Accordingly, no other conclusion could be reached by the court with

³⁶ Mr. Lee's reference to *Miller v. Dep't of Labor & Indus.*, 200 Wash. 674, 94 P.2d 764 (1939) on page v of his Appellant's Brief is not applicable because *Miller's* "lighting up doctrine" applies to awards for permanent partial disability. *Miller*, at 681. He failed to offer any evidence that he suffered any permanent partial disability.

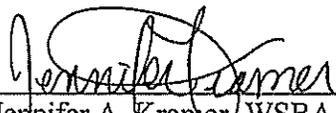
regard to those two issues; the outcome does not change based on review of the same record by this Court should it elect to undertake one.

Ultimately, Mr. Lee's conniving misuse of Title 51 constitutes a shocking betrayal. Mr. Lee's actions affected not just Boeing, but also the State of Washington, medical doctors who squandered their precious time for a person undeserving of it, and Mr. Lee's own children who were most likely indoctrinated by Mr. Lee and made the unwitting participants in his hoax. Mr. Lee wronged the citizens of this State as they rely on the preservation of Title 51 resources for use by only those who are entitled to its promised sure and certain relief. The Jury properly decided this matter and this fiasco must now come to an end³⁷.

V. CONCLUSION

For the reasons outlined above, Boeing respectfully asks this Court to affirm the *Verdict* and *Judgment* of the Jury.

Respectfully submitted,


Jennifer A. Kramer / WSBA 25226
Attorney for Boeing Co.

³⁷ The *Judgment and Order* is contained in the appendix. Though it was requested in Clerk's Papers, we do not yet have an index.

ORIGINAL



STATE OF WASHINGTON
PIERCE COUNTY SUPERIOR COURT

THE BOEING COMPANY,
Plaintiff,
v.
KENNETH LEE and
THE DEPARTMENT OF LABOR AND
INDUSTRIES OF THE STATE OF
WASHINGTON,
Defendant.

NO. 18-2-04583-1
VERDICT

We, the jury, answer the questions submitted by the court as follows:

QUESTION 1: Was the Board of Industrial Insurance Appeals correct in deciding that Mr. Lee did not obtain time-loss compensation benefits by way of willful misrepresentation, omission, and/or concealment of a material fact from the self-insured employer, The Boeing Company?

ANSWER: NO (Write "yes" or "no")

If "yes" proceed to Question 2. If you answer "no", please check the time period(s) for which the Board was in error.

- a. _____ May 20, 2013 through July 15, 2014.
- b. / February 5, 2003 through July 15, 2014.

QUESTION 2: Was the Board of Industrial Insurance Appeals correct in deciding that the June 1, 2000 industrial injury did not proximately cause reflex sympathetic dystrophy?

ANSWER: Yes (Write "yes" or "no")

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QUESTION 3: Was the Board of Industrial Insurance Appeals correct in deciding that the June 1, 2000 industrial injury did not proximately cause a left shoulder condition?

ANSWER: Yes (Write "yes" or "no")

QUESTION 4: Was the Board of Industrial Insurance Appeals correct in deciding that the June 1, 2000 industrial injury did not proximately cause any mental health condition?

ANSWER: Yes (Write "yes" or "no")

QUESTION 5: Was the Board of Industrial Insurance Appeals correct in deciding that Mr. Lee was unable to work due to medications prescribed for the conditions proximately caused by the June 1, 2000 industrial injury from February 5, 2003 through July 15, 2014?

ANSWER: No (Write "yes" or "no")

QUESTION 6: Was the Board of Industrial Insurance Appeals correct in deciding that Mr. Lee was unable to perform or obtain gainful employment on a reasonably continuous basis from February 5, 2003, through July 15, 2014, due to the residuals of the June 1, 2000 industrial injury and taking into account his age, education, work history, and pre-existing conditions?

ANSWER: No (Write "yes" or "no")

QUESTION 7: Was the Board of Industrial Insurance Appeals correct in deciding that as of March 20, 2015, Mr. Lee's physical conditions proximately caused by the June 1, 2000 industrial injury were fixed and stable and did not need any further necessary and proper treatment?

ANSWER: Yes (Write "yes" or "no")

VERDICT

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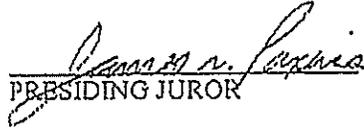
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QUESTION 8: Was the Board of Industrial Insurance Appeals correct in deciding that Mr. Lee was able to perform and obtain gainful employment on a reasonably continuous basis from July 16, 2014, through March 20, 2015, and thereafter?

ANSWER: Yes (Write "yes" or "no")

Please sign the Verdict Form and return it to the Judicial Assistant.


PRESIDING JUROR

VERDICT



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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE COUNTY

THE BOEING COMPANY)
)
)
 Plaintiff,)
)
 v.)
)
 KENNETH LEE AND THE)
 DEPARTMENT OF LABOR)
 AND INDUSTRIES)
)
 Defendants.)

18-2-04583-1
JUDGMENT AND ORDER

JUDGMENT SUMMARY

- 1. Judgment Creditor (1): The Boeing Company
c/o Jennifer A. Kramer, Attorney
15395 SE 30th Place
Bellevue, WA 98007-6537
- 2. Judgment Creditor (2): Department of Labor and Industries
c/o Lucretia R. Greer, AAG
P.O. Box 2317
Tacoma, WA 98401-2317

Reinisch Wilson Weiler P.C.
15395 SE 30th Place, Suite 320
Bellevue, WA 98007
Telephone (206) 622-7940
Fax (206) 622-6982

- 1 3. Judgment Debtor: Kenneth Lee
2 29226 8th Avenue East
3 Roy, WA 98580
4 4. Principal Amount of Judgment: \$521,601.01, payable to The Boeing
5 Company (Creditor 1); and,
6 \$260,800.50, payable to the Department of
7 Labor and Industries (Creditor 2).
8 5. Interest per Annum: 12%

9 **JUDGMENT**

10 Prior to trial, the Court determined via summary judgment, as a matter of law
11 that: As of March 20, 2015, Mr. Lee had no mental health condition related to the
12 industrial injury that required further proper and necessary treatment per RCW
13 51.36.010; and, as of March 20, 2015, Mr. Lee did not have any mental or physical
14 permanent partial disability within the meaning of RCW 51.32.080 proximately caused
15 by the industrial injury. Judgment regarding these issues was entered on September 21,
16 2018.

17 This matter came on regularly for jury trial commencing on October 22, 2018
18 before the Honorable Susan K. Serko, a judge of the above-entitled court. The plaintiff,
19 The Boeing Company, was represented by its attorney Jennifer A. Kramer of Reinisch
20 Wilson Weier, P.C.; the defendant, The Department of Labor and Industries, was
21 represented by its attorney Lucretia F. Greer, Assistant Attorney General; and, the
22 Defendant Kenneth Lee, represented himself.
23

24 The 12 person jury was impaneled and sworn to try the case and the Certified
25

1 Appeal Board Record of the Board of Industrial Insurance Appeals was read to the jury.
2 The Court instructed the jury, arguments of the parties were made, and the jury retired to
3 consider its verdict. Thereafter, on November 2, 2018, the jury returned as its verdict the
4 following responses to the eight questions for consideration:
5

6 QUESTION 1: Was the Board of Industrial Insurance Appeals correct in deciding that
7 Mr. Lee did not obtain time-loss compensation benefits by way of willful
8 misrepresentation, omission, and/or concealment of a material fact from the self-insured
9 employer, The Boeing Company?

10 ANSWER: No

11 If you answer "no", please check the time period(s) for which the Board was in error.

12 ANSWER:

13 a. May 20, 2013 through July 15, 2014.

14 b. February 5, 2003 through July 15, 2014 X

15 QUESTION 2: Was the Board of Industrial Insurance Appeals correct in deciding that
16 the June 1, 2000 industrial injury did not proximately cause reflex sympathetic
17 dystrophy.
18

19 ANSWER: Yes

20 QUESTION 3: Was the Board of Industrial Insurance Appeals correct in deciding that
21 the June 1, 2000 industrial injury did not proximately cause a left shoulder condition.
22

23 ANSWER: Yes

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Page 3 - JUDGMENT AND ORDER

Reinisch Wilson Weier P.C.
15397 SE 30th Place, Suite 220
Bellevue, WA 98007
Telephone (206) 622-7910
Fax (206) 622-5722

1 QUESTION 4: Was the Board of Industrial Insurance Appeals correct in deciding that
2 the June 1, 2000 industrial injury did not proximately cause any mental health condition.

3 ANSWER: Yes

4 QUESTION 5: Was the Board of Industrial Insurance Appeals correct in deciding that
5 Mr. Lee was unable to work due to medications prescribed for the conditions proximately
6 caused by the June 1, 2000 industrial injury from February 5, 2003 through July 15,
7 2014.
8

9 ANSWER: No

10 QUESTION 6: Was the Board of Industrial Insurance Appeals correct in deciding that
11 Mr. Lee was unable to perform or obtain gainful employment on a reasonably continuous
12 basis from February 5, 2003 through July 15, 2014, due to the residuals of the June 1,
13 2000 industrial injury and taking into account his age, education, work history, and pre-
14 existing conditions.
15

16 ANSWER: No

17 QUESTION 7: Was the Board of Industrial Insurance Appeals correct in deciding that as
18 of March 20, 2015, Mr. Lee's physical conditions proximately caused by the June 1,
19 2000 industrial injury were fixed and stable and did not need any further necessary and
20 proper treatment.
21

22 ANSWER: Yes

23 QUESTION 8: Was the Board of Industrial Insurance Appeals correct in deciding that
24
25

1 Mr. Lee was able to perform and obtain gainful employment on a reasonably continuous
2 basis from July 16, 2014 through March 20, 2015, and thereafter.

3 ANSWER: Yes

4
5 ORDER

6 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the December
7 11, 2017 Decision and Order of the Board of Industrial Insurance Appeals is affirmed in
8 part, and reversed in part.

9 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the
10 Department of Labor and Industries issue an order finding that the payment of time-loss
11 compensation benefits from February 5, 2003 through July 15, 2014 was induced by
12 willful misrepresentation; to demand that Mr. Lee repay Boeing in the amount of
13 \$521,601.01 for time loss paid during that period, plus a 50 percent penalty in the amount
14 of \$260,800.50 to the Department of Labor and Industries; to deny time-loss
15 compensation benefits from July 15, 2014 through March 20, 2105; and to close the
16 claim with no award for permanent partial disability.
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1 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the amounts
2 stated herein above bear interest in principal at the rate of 12% per annum.

3 DONE IN OPEN COURT this 21 day of December, 2018.

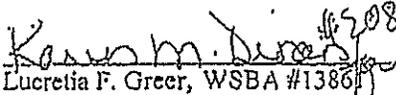
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Hon. Susan K. Serko

Presented by:

8 WSB#19694
9 
10 Jennifer A. Kraimer, WSB#25226
11 Attorney for Plaintiff/Boeing

Copy received:
Approved as to form and content;

13 #50863
14 
15 Lucretia F. Greer, WSB#13861
16 Attorney for Defendant/Department
Of Labor and Industries

17 Did not appear
18 Kenneth Lee
19 Pro Se Defendant



REINISCH WILSON WEIER

December 04, 2019 - 2:15 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53085-6
Appellate Court Case Title: Boeing Co & Dept of Labor and Industries, Respondents v. Kenneth Lee, Appellant
Superior Court Case Number: 18-2-04583-1

The following documents have been uploaded:

- 530856_Affidavit_Declaration_20191204141444D2231987_2325.pdf
This File Contains:
Affidavit/Declaration - Service
The Original File Name was Lee Declaration of Service.pdf
- 530856_Briefs_20191204141444D2231987_9986.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Lee Respondent's Brief.pdf

A copy of the uploaded files will be sent to:

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Portland, OR, 97223
Phone: (503) 245-1846

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State of Washington
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No. 53085-6-II

COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON

KENNETH LEE)	
)	
Appellant,)	
)	
v.)	DECLARATION
)	OF SERVICE
THE BOEING CO. &)	
DEP'T OF LABOR AND INDUSTRIES,)	
)	
Respondents.)	
_____)	

I declare under penalty of perjury under the laws of the State of Washington that on the date stated below I caused the documents referenced below to be served in the manners indicated below on the following:

- DOCUMENTS:
1. Respondent's Brief; and,
 2. This Declaration of Service.

ORIGINALS TO:

Derek Byrne, Court Administrator
Washington State Court of Appeals
Division II
950 Broadway Ste. 300
Tacoma, WA 98402-4454

Electronically via Appellate Court E-filing Portal

COPIES TO:

James Mills
Assistant Attorney General
Office of the Attorney General
P.O. Box 2317
Tacoma, WA 98401

Electronically via Appellate Court E-filing Portal

Kenneth Lee
29226 8th Avenue East
Roy, WA 98580

Via First Class mail and CERTIFIED MAIL / RETURN RECEIPT
REQUESTED, CERTIFIED NO. 7018 0360 0000 8370 6964

Dated this 4th day of December 2019.

Marie R. Maestas

MARIE R. MAESTAS, Secretary to
JENNIFER A. KRAMER, WSBA No. 25226
Reinisch Wilson Weier, P.C.
Attorney for Respondent The Boeing Company

REINISCH WILSON WEIER

December 04, 2019 - 2:15 PM

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The Original File Name was Lee Declaration of Service.pdf
- 530856_Briefs_20191204141444D2231987_9986.pdf
This File Contains:
Briefs - Respondents
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