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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 307964

Superior Court No. 09-2-02033-4

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

THEODORE ERB, individually,

Appellant

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

STATE OF WASHINGTON,

Respondent

REPLY BRIEF OF APPELLANT

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III. INTRODUCTION

This is Mr. Erb's Reply to the Department's brief. The facts are set forth in the Appellant's brief. As an initial matter, Mr. Erb purposely did not appeal the issue of loss of earning power benefits and made no such request for this court's review. Accordingly, the Department's argument is without merit. Resp. Br. 15.

Mr. Erb further replies to the Department's brief and argues that the jury's verdict was not supported by substantial evidence and that substantial evidence supports the finding that Mr. Erb was permanently and totally disabled.

Alternatively, Mr. Erb replies that the trial court erred by not including Proposed Jury Instruction #12 – the “odd lot” instruction; Proposed Jury Instruction #18 – the “liberal construction” instruction and that the trial court erred by informing the jury of non-material, prejudicial Board findings in Jury Instruction #7.

IV. ARGUMENT

- A. The jury's failure to find Mr. Erb permanently and totally disabled was not supported by substantial evidence. Substantial evidence supports finding Mr. Erb permanently and totally disabled when considering the effects of his industrial injury in combination with his pre-existing medical conditions.***

Mr. Erb continues to maintain that substantial evidence in the record supports the conclusion that it is his pre-existing medical conditions,¹ *in combination with* the residual effects of the industrial injury that has left him unable to perform *or obtain*, on a reasonably continuous basis, gainful employment within the range of his capabilities, training, education and experience, which leaves him totally disabled. Although it agrees Mr. Erb had pre-existing medical limitations prior to the industrial injury the Department attempts to frame the issue on appeal as: the mere fact Mr. Erb injured his foot could not have caused his total disability. There is no evidence in the record that he was able to obtain work with the myriad of medical problems that plague him. The only evidence of his ability to obtain work came from Mr. Garza who opined he would not be successful. This is also borne out by Mr. Erb's own testimony whereby he explained the jobs for which he applied and was rejected.

¹ These include: (a) carpal tunnel syndrome in both wrists; (b) knee injuries that have resulted in 4 different surgeries on both knees; (c) a head injury; (d) a herniated disk in his back; (e) tendonitis in one shoulder; (f) chronic pain; and (g) Post Traumatic Stress Disorder.

The Department points to the testimony of 3 of its witnesses as proof of substantial evidence. However that reliance is misplaced.

Dr. Sims, testified that during his Independent Medical Examination (IME) he reviewed the medical records related *solely* to Mr. Erb's on-the-job foot injury, thus examined only his lower extremities. Although Dr. Sims knew of the knee surgeries he admitted that he did not receive or review any medical records prior to the date of the on-the-job injury. Sims Dep. 7, 11, 20-21 As a result, he had extremely limited knowledge of Mr. Erb's medical conditions that pre-dated the industrial injury. Accordingly, Dr Sims was not in a position to evaluate how Mr. Erb's foot injury, in combination with the pre-existing medical conditions, affected his ability to perform or obtain gainful employment.

The same is true of Dr. Burgdorff, Mr. Erb's treating physician solely for the foot injury. Although Dr. Burgdorff was aware of Mr. Erb's prior knee surgeries he also had not reviewed any medical records that weren't related to the on-the-job injury. As such, his opinion regarding Mr. Erb's physical condition and ability to be gainfully employed are based on incomplete medical

knowledge. The Department states that “Dr. Burgdorff released Mr. Erb on February 1 without any physical restrictions on the type of work that Mr. Erb could do.” Resp. Br. at 4-5 However, Dr. Burgdorff later testified that during a May 2007 examination he advised Mr. Erb to pay attention to the level of pain in his left foot because Dr. Burgdorff did not “want him [Mr. Erb] making it hurt . . .” Burgdorff Dep. 5, 10, 13, 15 Mr. Erb testified that he was unable to do the job of injury because it was too painful to use his left foot getting in and out of the delivery truck and his “right knee is so bad.” 1/21/09 Tr. at 33-35 Mr. Erb’s testimony presents the only evidence regarding the effects of the foot injury in combination with his pre-existing conditions and how that effected his ability to perform the job of injury.

The Department next challenges Mr. Erb’s recitation of the facts as they relate to the vocational experts’ testimonies. While the Department’s vocational expert (in direct conflict with Mr. Erb’s expert) testified that Mr. Erb was qualified for general work, there was *no testimony* that Mr. Erb was able to *obtain* such work. The proper standard from the pattern jury instructions states that a worker is totally disabled if he is unable to perform or obtain regular

gainful employment. *Leeper v. Dep't of Labor & Indus.*, 123 Wn.2d 803, 872 P.2d 507 (1994).

The opinion in *Graham [v. Weyerhaeuser Co.]*, 71 Wn. App. 55, 856 P.2d 717 (1993) rests on an incorrect assumption: the general *availability* of light or sedentary jobs in the labor market implies a *particular* injured worker can obtain such a job. This assumption disregards the vocational evidence unique to an individual claimant. By equating the availability of general work with the ability to obtain it, the Court of Appeals in *Graham* presumes the very question the trier of fact must answer – can this claimant obtain work in the competitive labor market. Our cases require the trier of fact to judge in each case whether a particular individual is totally disabled, especially where medical evidence of the injured worker's ability to perform work may conflict with vocational evidence of the worker's inability to obtain work because of the workplace injury.

Id. at 818. Mr. Erb's vocational expert testified that not only was Mr. Erb medically unable to work at general or special work, by necessity that fact revealed that he was unable to obtain such work.

Mr. Erb is confident the facts were fairly represented in his Appellant's brief. He takes issue with two statements the Department made in its recitation of facts that are important to the resolution of this case. In discussing Dr. Burgdorff's decision not to place any work restrictions on Mr. Erb the Department states: "At that time, Mr. Erb agreed that he could return to work without

restrictions.” Resp. Br. at 5 A careful reading of the citation set forth by the Department reveals Mr. Erb desperately wanted to return to work and therefore decided to give it a try, convincing Dr. Burgdorff to allow him to work without restriction. It took only 2 days for him to realize he had been too optimistic. 1/21/09 Tr. at 35 Next, the Department states that “Dr. Burgdorff did not modify his earlier assessment that Mr. Erb could return to work without restrictions.” Resp. Br. at 5 As stated above this is not true. A restriction was placed on Mr. Erb’s ability to work – he was not to use it to the point of pain. Burgdorff Dep. at 10

B. The trial court erred by failing to include Proposed Jury Instruction #12.

Jury instruction #12² (the odd lot instruction) should have been included in the trial court’s charge to the jury because it is a correct statement of the law, was not misleading and allowed Mr. Erb to argue his theory of the case to the jury. *See Anfinson v. FedEx Ground Package Sys. Inc.*, 159 Wn. App. 35, 44, 244 P.2d 32 (2010) (Citation omitted.) The court’s failure to allow the instruction constitutes an abuse of discretion as it was based on the

² CP 30

erroneous decision that the evidence did not support the giving of the instruction.

Substantial evidence, through the testimonies of Mr. Erb, Dr. Gritzka and Mr. Garza, reveal that Mr. Erb was not physically able to perform or obtain work generally available in his labor market. As noted above, the Department's vocational expert failed to give any testimony regarding Mr. Erb's ability to obtain work given his physical limitations. In fact, the expert admitted that neither he nor anyone in his office had ever even met Mr. Erb. 1/21/09 Tr. at 114 That same expert admitted he failed to perform a labor market survey for the positions he deemed Mr. Erb capable of being employed. 1/21/09 Tr. at 128-20, 134 Accordingly, the Department's statement that Mr. Whitmer testified that ". . . Mr. Erb could obtain a counter clerk position *in the Tri-Cities labor market*" is not a true recitation of the facts of the case. Resp. Br. at 26.

The Department argues the court properly refused to include the odd lot instruction because its theory of the case was "that Mr. Erb could perform general work-and not special work or odd jobs . . ." Resp. Br. at 25. This completely ignores the fact that Mr. Erb's theory of the case is that he is totally disabled because the

industrial injury, in combination with his pre-existing medical conditions prevents him from performing or obtaining any type of work, general or special. The jury was entitled to hear both theories.

In the *Leeper* decision the Department raised the same argument as does the Department in this case. Thus, *Leeper* is instructive to the resolution of this issue. Here, as in *Leeper*, “[t]he Department’s argument confuses the burden of proof with the admissibility of evidence.” *Leeper*, 123 Wn.2d at 815-16. Once Mr. Erb presented his evidence regarding his total disability, the odd lot doctrine shifted the burden of persuasion to the Department.

The doctrine does not, however, limit the evidence which a claimant may use to prove total disability. Many, if not most workers’ compensation cases begin with claimants testifying they could not return to their former job. The inability to obtain work because of a workplace injury is relevant evidence at all stages of a disability hearing. *Id.*

The Department speculates that even if the trial court abused its discretion in failing to give the jury the odd lot instruction it was not prejudicial to Mr. Erb. In so doing it relies on the *Graham* case cited above. It must be pointed out that the holding in *Graham* was overruled in part in *Leeper, supra*, and much of the

Leeper opinion relates to the odd lot instruction. That said, an error in court proceedings is prejudicial if it affects the outcome of the trial. *Stiley v. Block*, 130 Wn.2d 486, 498-99, 925 P.2d 194 (1996) (citation omitted). The jury found Mr. Erb was not totally disabled. As such, it cannot be said that the lack of the odd lot jury instruction was not prejudicial to him.

C. Mr. Erb withdraws his argument that the trial court erred by failing to include Proposed Jury Instruction #18.

The Department asserts that the trial court properly refused to give Mr. Erb's proposed jury instruction # 18³ regarding liberal construction of the Industrial Insurance Act citing *Hastings v. Dep't of Labor & Indus.*, 24 Wn.2d 1, 163 P.2d 142 (1945). Resp. Br. at 27-27 The *Hastings* court stated: "The matter of liberal or narrow construction does not apply to matters of fact, but is limited to questions of law." *Id.* at 13. Because jury instructions in worker's compensation cases shall "advise the jury of the exact findings of the board on each material issue . . ." ⁴ Mr. Erb defers to the trial court's decision to decline to give this proposed instruction.

³ CP 36

⁴ RCW 51.52.115

D. The trial court erred by including non-material, prejudicial Board findings in Jury Instruction #7 and this error is properly preserved for appeal⁵

1. Preservation of Error (Resp. Br. at 29).

The Department next claims that Mr. Erb did not preserve for appeal the contention that the trial court's jury instruction #7 was improper for including non-material facts that were prejudicial to his credibility or character. Resp. Br. at 28 In so doing it relies on RCW 51.52.104 and *Allan v. Dep't of Labor & Indus.*, 66 Wn. App. 415, 422, 832 P.2d 489 (1992). *Allan* is distinguishable.

The *Allan* court determined Ms. Allan did not preserve an issue for appeal because she failed to note it with specificity in her petition for review to the Board as required by the statute. However, and contrary to the facts before this court, the issue on appeal in *Allan* was the exact same issue heard and considered by the Department and Board below. In contrast, Mr. Erb *did* file a Petition for Review and *did* assign error to the Board's Finding of Fact #8 (which became jury instruction #7). However the issue at the Board level was not the appropriateness of jury instructions.

⁵ CP 77-78

In essence the Department's argument is that the non-material facts issue should not be reviewed because Mr. Erb failed to anticipate that his case at the Board level would ultimately be appealed to the superior court such that a jury instruction limiting non-material facts would be necessary. This assertion leads to an absurd result. Here, the issue on review by the Board was not and could not possibly have been the superior court's instructions to the jury.

RCW 51.52.115 states that in cases like this that are tried to a jury the court's instructions must "advise the jury of the exact findings of the board *on each material issue* before the court." Logically then, there would be no reason to add the last phrase had the legislature not anticipated that Board findings might at times contain non-material facts. Case law distinguishes between Board findings that are material or subordinate facts. *Jenkins v. Dep't of Labor & Indus.*, 85 Wn. App. 7, 11, 931 P.2d 907 (1996) (citation omitted). Only material facts are to be included in the court's charge to the jury. *Gaines v. Dep't of Labor & Indus.*, 1 Wn. App. 547, 552, 463 P.2d 269 (1969).

As noted in *Homemakers Upjohn v. Russel*, 33 Wn. App. 777, 685 P.2d 27 (1983), “[t]he spirit and intent of the law should prevail over the letter of the law.” *Id.* at 780 (citation omitted). Mr. Erb’s assignment of error to the IIAJ’s Finding of Fact #8 should be found sufficient to preserve the issue for appeal under the specific facts of this case.

2. Standard of Review

The Department purports to set forth the standard of review for the sufficiency of jury instructions when it cites *Leeper*,⁶ for the proposition that jury instructions are sufficient when they allow a party to argue their theory of the case, are not misleading, and when read as a whole properly inform the jury of the applicable law. Resp. Br. 18. Its recitation of the law is correct as far as it goes. However, as stated above and imperative to this court’s analysis, the Department left out the vital statutory language regarding the inclusion of only material facts from the Board’s findings. It is improper and prejudicial to include non-material issues in jury instructions especially when they have the potential to impugn Mr. Erb’s character and/or credibility.

⁶ *Leeper v. Dep’t of Labor & Indus.*, 123 Wn.2d 803, 872 P.2d 507 (1994).

3. Merits of the Issue

The Department maintains the inclusion of the disputed findings was proper in that they were not evidentiary or argumentative thus did not comment on Mr. Erb's credibility or character. Resp. Br. at 30 Mr. Erb disagrees.

The Department argues it doesn't matter if these facts come in since they are statements that came from Mr. Erb's own testimony. However, that is not the test of appropriateness. The fact that Mr. Erb expected to work 20-30 hours per week is not germane to the issue of total disability. It is a non-material fact and should not have been included in the jury instructions. The Department concedes the rate of pay information was provided, thus the instruction was flawed. It is also non-material that Mr. Erb convinced his employer to give his job to his son-in-law, or that he could not drive a commercial truck after he was ticketed for not having his CDL any longer. Mr. Erb reiterates his arguments from his Appellant's brief that the statements had the potential to cast his character and credibility in an unfavorable light.

In *Jenkins*, supra, the court set forth specific examples of material facts. *Jenkins*, 85 Wn. App. at 11. Here, the disputed

non-material facts do not fall within those examples and their inclusion was prejudicial to Mr. Erb. "An error is prejudicial if it affects the outcome of the trial." *Anfinson v. FedEx Ground Package Sys. Inc.*, 159 Wn. App. 35, 44, 244 P.2d 32 (2010) (citation omitted). The court committed reversible error by including them in its charge to the jury.

V. CONCLUSION

Taking into consideration the arguments set forth in the Appellant's brief and this Reply brief, Mr. Erb respectfully requests this court reverse the judgment of the trial court or grant a new trial and, if warranted, award attorney fees.

Respectfully submitted this 15th day of February, 2013.



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DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on February 15th, 2013, I caused service of the foregoing Reply Brief of Appellant on each and every attorney of record herein:

VIA U.S. Mail

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