

**FILED**

**NOV 20 2012**

**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

---

BRIEF OF APPELLANT

---

Christopher L. Childers  
WSBA No. 34077  
Smart, Connell, Childers & Verhulp P.S.  
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Attorneys for Appellant

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**I. TABLE OF CONTENTS**

I. TABLE OF CONTENTS..... i

II. TABLE OF AUTHORITIES .....iii

III. ASSIGNMENTS OF ERROR ..... 1

IV. BRIEF OVERVIEW ..... 1

V. FACTS .....2

VI. ANALYSIS .....5

    A. The jury’s verdict (a) that Mr. Erb was not temporarily and totally disabled from October 16, 2007 through January 30, 2008; and (b) that he was not a permanently totally disabled worker as of January 30, 2008 is not supported by substantial evidence..... 5

        1. Standard of Review ..... 5

        2. Expert testimony ..... 7

        3. Substantial evidence ..... 12

    B. The trial court err in refusing to include in its charge to the jury Mr. Erb’s proposed jury instructions #12 (odd lot jobs) and #18 (liberal interpretation of statute)? ..... 14

        1. Standard of Review ..... 14

        2. Discussion..... 15

            (i) The trial court erred by refusing to give Plaintiff’s Proposed Instruction #12..... 15

(ii) The trial court erred by refusing to give Plaintiff's Proposed Instruction #18..... 17

C. The trial court improperly include non-material findings of facts from the Board's Order in its charge to the jury, specifically instruction #7, paragraph #7? ..... 19

    1. Standard of Review..... 19

    2. Discussion..... 21

VII. ATTORNEY FEES ..... 24

VIII. CONCLUSION ..... 24

## II. TABLE OF AUTHORITIES

### Cases

<i>Allen v. Dep't of Labor &amp; Indus.</i> , 16 Wn. App. 692, 559 P.2d 572 (1977) .....	16
<i>Anfinson v. FedEx Ground Package Sys., Inc.</i> , 159 Wn. App. 35, 244 P.3d 32 (2010) .....	14, 15, 17
<i>Boeing v. Harker-Lott</i> , 93 Wn. App. 181, 968 P.2d 14 (1998) .....	15
<i>Fochtman v. Dep't of Labor &amp; Indus.</i> , 7 Wn. App. 286, 499 P.2d 255 (1972) .....	7
<i>Gaines v. Dep't of Labor &amp; Indus.</i> , 1 Wn. App. 547, 463 P.2d 269 (1969) .....	18, 20, 22
<i>Gallo v. Dep't of Labor &amp; Indus.</i> , 119 Wn. App. 49, 81 P.3d 869 (2003), <i>aff'd</i> , 155 Wn.2d 470, 120 P.3d 564 (2005) .....	6
<i>Hamilton v. Dep't of Labor &amp; Indus.</i> , 111 Wn.2d 569, 761 P.2d 618 (1988) .....	18
<i>Harrison Mem'l Hosp. v. Gagnon</i> , 110 Wn. App. 475, 40 P.3d 1221 (2002) .....	6
<i>Jenkins v. Dep't of Labor &amp; Indus.</i> , 85 Wn. App. 7, 931 P.2d 907 (1996) .....	20
<i>McClelland v. ITT Rayonier, Inc.</i> 65 Wn. App. 386, 828 P.2d 1138 (1992) .....	6
<i>Morse v. Antonellis</i> , 149 Wn.2d 572, 70 P.3d 125 (2003) .....	7

<i>Ruse v. Dep't of Labor &amp; Indus.</i> , 138 Wn.2d 1, 977 P.2d 570 (1999) .....	6
<i>Stratton v. Dep't of Labor &amp; Indus.</i> , 1 Wn. App. 77, 459 P.2d 651 (1969) .....	20
<i>Wenatchee Sportsmen Ass'n v. Chelan County</i> , 141 Wn.2d 169, 4 P.3d 123 (2000) .....	6
<i>Wendt v. Dep't of Labor &amp; Indus.</i> , 18 Wn. App. 674, 571 P.2d 229 (1977) .....	8, 9, 13
<i>Young v. Dep't of Labor &amp; Indus.</i> , 81 Wn. App. 123, 913 P.2d 402 (1996) .....	4, 16

**Statutes**

RCW 51.52.115.....	19
RCW 51.52.130.....	24

**Rules**

RAP 18.1.....	24
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### **III. ASSIGNMENTS OF ERROR**

(1) Substantial evidence does not support the trial court's judgment on the jury's verdict regarding both temporary total disability and permanent total disability.

(2) The trial court committed reversible error by refusing to include in its charge to the jury two of Mr. Erb's proposed jury instructions.

(3) The trial court improperly included evidentiary and non-material facts in its charge to the jury, specifically instruction #7, paragraph #7.

### **IV. BRIEF OVERVIEW**

Theodore Erb sustained an on-the-job injury and was awarded benefits pursuant to the Industrial Industry Act (IIA), Title 51 RCW. The Department of Labor and Industries (Department) ultimately closed his claim with a permanent partial disability (PPD) award. Mr. Erb appealed that decision to the Board of Industrial Insurance Appeals (Board) contending he was totally disabled. The Board upheld the Department order. After a de novo hearing on the record, a Benton County superior court jury agreed with the

Board decision. In this appeal Mr. Erb argues that the court's instructions to the jury were improper.

## V. FACTS

Mr. Erb is a 57-year old man. (CABR<sup>1</sup> 11; 1/21/09<sup>2</sup> Tr. at 14) In November 2006 he was receiving Social Security Disability (SSD) payments due to a combination of medical conditions. (1/21/09 Tr. at 24-25, 92, 94, 96) These included: (1) carpal tunnel syndrome in both wrists; (2) knee injuries that resulted in 4 surgeries; (3) a head injury; (4) a herniated disc in his back; (5) tendonitis in his shoulder; (6) chronic pain; and (7) Post Traumatic Stress Disorder (PTSD). (CABR 11-12; 1/21/09 at 7, 11-12, 19, 22-24, 30-33)

Because of his desire to participate in the Social Security Administration's return-to-work program Mr. Erb was hired by Postal Express as a delivery truck driver. (CABR 3, 12; 1/21/09 Tr.

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<sup>1</sup> All references to CABR are to the Certified Appeal Board Record.

<sup>2</sup> All references to 1/21/09 Tr. refer to the transcript of the Board hearing that took place on January 21, 2009 in front of the Honorable Thomas W. Merrill, Industrial Appeals Judge. The numbers refer to the page on which the reference can be found.

at 10-11, 24-27, 40, 126-27) Although both parties initially thought that Mr. Erb would work 20-30 hours per week the job turned out to be 40+ hours per week. (CABR 12; 1/21/09 Tr. at 26) Within a few weeks it became apparent that working full-time was extremely physically painful to Mr. Erb. However, because he was highly motivated to stay employed he continued to work full-time. (1/21/09 Tr. at 26-27, 35)

On December 9, 2006 Mr. Erb was injured when a lift gate at the back of a truck he was unloading malfunctioned and slammed down onto his left foot. Several bones were broken. The injury eventually resulted in the amputation of his left great toe. (CABR 3, 12, 1/21/09 Tr. at 26-29) Although he was not able to work during the recovery period, Postal Express continued to pay Mr. Erb full-time wages from December 2006 through February 2007. (1/21/09 Tr. at 43, 63)

Mr. Erb returned to work in February 2007 but it was soon apparent that he was no longer able to physically handle the demands of full-time employment. Due to the pain in his left foot combined with the myriad of pre-existing physical and mental conditions, he was forced to reduce the number of hours worked to

part-time. (1/21/09 Tr. at 101) Eventually he worked only 10 hours per week earning \$70 for one of Postal Express's sub-contractors. (CABR 13) In October 2007 Postal Express terminated his employment. (CABR 3-4, 13, 51-53; 1/21/09 Tr. at 34-37, 44, 51-53, 63) Although he continued to apply for jobs he has been unable to find any type of employment since that time. (CABR 4; 1/21/09 Tr. at 10, 24, 39-40, 46)

Mr. Erb received benefits from the Department after the industrial injury. It calculated the benefits based on his being a full-time employee making \$12 per hour, 8 hours per day, and 5 days per week. (CABR 3, 7, 31) The case was closed when the Department awarded him Permanent Partial Disability benefits based on the amputation of his left toe. (CABR 25)

Believing he is eligible for Total Disability benefits, Mr. Erb appealed the Department order. (CP 23-24) In a Proposed Decision and Order (PD&O) the Board upheld the Department decision that Mr. Erb was only eligible for Permanent Partial Disability benefits based solely on the left toe injury. (CP 10-21) Mr. Erb appealed that decision contending that the toe injury, *in combination with* his other physical and mental limitations, left him

unable to be reasonably and continuously employed within the range of his capabilities, training and experience in a job that was generally available on the competitive labor market pursuant to the law set forth in *Young v. Dep't of Labor & Indus.*, 81 Wn. App. 123, 131, 913 P.2d 402 (1996). (CP 3-6) The Board declined to review the decision so the PD&O became the Board's final appealable order. (CP 1) Mr. Erb then appealed the decision to the Benton County Superior Court where it was tried before a 6-person jury. (RP 1-162) The jury upheld the Board decision and the trial court entered judgment on the jury verdict. (CP 101-103) This appeal follows. (CP 104-106)

## VI. ANALYSIS

**A. The jury's verdict (a) that Mr. Erb was not temporarily and totally disabled from October 16, 2007 through January 30, 2008; and (b) that he was not a permanently totally disabled worker as of January 30, 2008 is not supported by substantial evidence.**

### **1. Standard of Review**

Pursuant to RCW 51.52.115, the findings and decision of the Board are prima facie correct, and a party challenging such must support its challenge by a preponderance of the evidence. *Ruse v.*

*Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999). Under this statute, the superior court conducts a de novo review of the Board's decision, relying solely on the certified Board record. *Gallo v. Dep't of Labor & Indus.*, 119 Wn. App. 49, 53, 81 P.3d 869 (2003), *aff'd*, 155 Wn.2d 470, 120 P.3d 564 (2005). Upon review at the superior court, the fact finder may substitute its own findings and decision only if it finds from a preponderance of credible evidence that the Board's findings and resulting decision are incorrect. *McClelland v. ITT Rayonier, Inc.* 65 Wn. App. 386, 390, 828 P.2d 1138 (1992).

The Court of Appeals reviews a trial court's decision on an industrial insurance appeal for "substantial evidence, taking the record in the light most favorable to the party who prevailed in superior court." *Harrison Mem'l Hosp. v. Gagnon*, 110 Wn. App. 475, 485, 40 P.3d 1221 (2002) (footnote omitted). Substantial evidence is that quantum of evidence sufficient to persuade a rational, fair-minded person that the premise is true. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). In reviewing a jury's decision, the appellate court does not "reweigh or rebalance the competing testimony and inferences, or . . . apply anew the burden of persuasion, for doing that would

abridge the right to trial by jury.” *Harrison, supra*. Credibility determinations are for the trier of fact and are not subject to review by the appellate court. *Morse v. Antonellis*, 149 Wn.2d 572, 574, 70 P.3d 125 (2003).

## **2. Expert testimony**

Total disability may be established by vocational testimony based, in part, upon expert medical testimony regarding loss of function and limitation in the ability to work. *Fochtman v. Dep’t of Labor & Indus.*, 7 Wn. App. 286, 295-98, 499 P.2d 255 (1972). As such, the expert medical and vocational testimony in this case is of crucial importance.

A careful review of the record demonstrates that the jury verdict was based in large part on incomplete expert medical testimony as it relates to Mr. Erb’s ability to be gainfully employed. The Department’s medical experts and Mr. Erb’s treating physician all erroneously testified *solely* on the effects of the left foot injury as it related to Mr. Erb’s ability to be gainfully employed. As will be seen below only one medical expert considered Mr. Erb’s ability to work based not only on the industrial injury but the effects of that injury *in combination* with the many pre-existing medical conditions

he faced on a daily basis as required by *Wendt v. Dep't of Labor & Indus.*, 18 Wn. App. 674, 682-83, 571 P.2d 229 (1977).

Dr. Sims, an orthopedic surgeon, performed an Independent Medical Exam (IME) for the Department. He testified that he reviewed the medical records supplied by the Department that were solely related to Mr. Erb's foot injury. Through his conversation with Mr. Erb the doctor learned there had been prior knee surgeries and some back pain. However, on cross-examination Dr. Sims stated that he wasn't provided with Mr. Erb's prior medical records that documented significant pre-existing medical conditions. Instead, Dr. Sims' exam focused solely on Mr. Erb's lower extremities where he found sensory changes in the left foot and noted the left toe was hypersensitive and painful. Dr. Sims also documented changes in Mr. Erb's gait but opined the changes were due to the knee problems. However, Dr. Sims failed to examine any other part of Mr. Erb's body. With this limited information Dr. Sims opined that Mr. Erb could go back to the job of injury. Dr. Sims was the only medical provider that approved Mr. Erb going back to work, even though at the time of his original report he had not reviewed any job analysis. Dr. Sims approved working at only 32 hours per week, with no work restrictions regarding standing and

walking. 1/21/09 Tr. at 124-125. Again, this determination was made based solely on the toe amputation. Sims Dep. at 6-7, 9-21. As such, his medical opinion does not pass the legal test set forth by the *Wendt* court.

Dr. Burgdorff, another orthopedic surgeon, was Mr. Erb's treating physician for the foot injury and performed the amputation of the left toe. Dr. Burgdorff knew that Mr. Erb had previously had knee surgeries but had no knowledge of any type of physical or mental disability. Dr. Burgdorff had no real understanding of the job Mr. Erb was performing at the time of the industrial injury other than he was a truck driver. (1/21/09 Tr. at 126) As such, he did not place any restrictions on Mr. Erb's desire to get back to work after the industrial injury. Dr. Burgdorff released Mr. Erb to work part-time at the job of injury at Mr. Erb's insistence but did not want Mr. Erb to use the foot to the point of pain. It is essential to note that Dr. Burgdorff was not treating anything but the immediate aftermath of the industrial injury to Mr. Erb's left foot. Once there was nothing more orthopedically that could be done for Mr. Erb's foot, the treatment with Dr. Burgdorff ended. (Burgdorff Dep. at 5-10, 12-13, 15; 1/21/09 Tr. at 34) On cross-examination Dr. Burgdorff admitted that it was important for medical personnel to review all medical

records regarding an injured worker's pre-existing conditions in addition to the industrially related conditions prior to giving an opinion on that worker's employability. (Burgdorff Dep. at 12-15) This is an interesting statement considering he did not do so in Mr. Erb's case.

Only Dr. Gritzka, an orthopedist who performed a second IME, completed a full-body musculoskeletal examination on Mr. Erb. Additionally, Dr. Gritzka took the time to review previous medical records so he was quite familiar with Mr. Erb's medical restrictions. This made Dr. Gritzka the best witness to give a comprehensive medical opinion of Mr. Erb's ability to be continuously and gainfully employed. Dr. Gritzka documented Mr. Erb's change in gait, which he determined was caused in part by the foot injury. Dr. Gritzka opined the change in gait was affecting Mr. Erb's pre-existing knee and back problems. Additionally, Dr. Gritzka found that Mr. Erb's amputated toe was hypersensitive at the stump making it difficult to wear shoes. Dr. Gritzka testified that he agreed with the standing and walking restrictions<sup>3</sup> documented by Kirk Holle, the physical therapist that performed a Physical

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<sup>3</sup> These restrictions included standing for only  $\frac{1}{2}$  to  $\frac{3}{4}$  of an hour for a total of 2-3 hours in an 8-hour day as well as a walking restriction of  $\frac{1}{6}^{\text{th}}$  to  $\frac{1}{4}$  of an hour for a total of 1 hour in an 8-hour day.

Capabilities Examination (PCE) on Mr. Erb at the Department's request. (Holle Dep. Ex. 1) Dr. Gritzka testified that both the standing and walking restrictions were proximately caused by the industrial injury and were permanent. (Gritzka Dep. at 8-12, 19-32, 35, 39-40; 1/21/09 Tr. at 82)

Dr. Gritzka was the only physician that rendered his professional decision based on a thorough history of Mr. Erb's prior and current medical conditions as they related to the effects of the industrial injury. In contrast, neither Dr. Sims nor Dr. Burgdorff did more than examine Mr. Erb's lower extremities prior to finding him employable.

The record contains competing testimony from the vocational experts regarding Mr. Erb's ability to be gainfully employed. Mr. Garza testified for Mr. Erb and Mr. Whitmer testified for the Department. (1/21/09 Tr. at 82-83, 85-90, 94-96; 103-105, 108-109, 111-112, 125, 127-128; Garza Dep. at 5-25) Based on his review of the medical testimony as well as his own interviews and research into the local job market, taking into consideration the residuals of the industrial injury as well as Mr. Erb's age, training, education, physical capabilities and experience, Mr. Garza determined that Mr. Erb was unable to obtain or maintain

reasonably continuous, gainful employment from the date he was terminated by Postal Express on October 15, 2007 to the date the Department closed his claim on January 30, 2008 and from that point on into the future. 1/20/09 Tr. at 89-90.

Mr. Whitmer, the Department expert, testified otherwise. (1/21/09 Tr. at 98, 102-105, 108, 112) However, as noted above, Mr. Whitmer reached his conclusion based on the incomplete medical records and, incredibly, had not even completed a market survey for current jobs that existed in Mr. Erb's labor market! Even if one were to assume that medically and legally sufficient proof existed that Mr. Erb was physically able to withstand the demands of a job there was *no* proof that an suitable job existed within a 40 mile radius of his home, which is the industry standard for a "labor market." (1/21/09 Tr. at 109-110, 128-129, 134) This is not substantial evidence as Mr. Garza's rebuttal testimony easily refuted the evidence on which Mr. Whitmer relied. (Garza Dep. at 5-18, 20, 23-25).

### **3. Substantial evidence**

In order to be found totally disabled (temporarily or permanently) it must be shown that a worker is unable to perform or

obtain regular, gainful employment within the range of their capabilities, training, education and experience. *Wendt*, 18 Wn. App. at 682-83. In addition, it requires consideration of the *residuals* of the worker's industrial injury, age and any *pre-existing* physical or mental restrictions. *Id.* Mr. Erb met this standard through the testimony of Dr. Gritkza whose medical examination of Mr. Erb included a complete medical history review and thorough musculoskeletal examination and Mr. Garza who based his vocational opinion on the only complete and legally sufficient medical information available.

The facts are clear that Mr. Erb is a 57-year old man with limited training and work experience – mainly as an assembly line worker and truck driver. He earned his GED but has no college education. He was hired at Postal Express even though he had many prior physical and mental disabilities. The industrial injury left him with chronic pain in his left foot. It also changed his gait, which led to worsening problems with his knees and back. He has documented sitting, standing and walking restrictions. The only labor market survey conducted in Mr. Erb's labor market show no jobs are available for a person with his skills and medical restrictions and limitations.

Jury instruction #10 (CP 81) informed the jury that there may be more than one proximate cause that results in a disability. The law requires only that the industrial injury be a proximate cause of the disability. It does not need to be the sole cause. The testimonies of Dr. Gritzka and Mr. Garza provide the only substantial evidence that the industrial injury, in combination with the other factors set forth above, was a proximate cause of Mr. Erb's temporary and total disability from October 16, 2007 to January 30, 2008 and his permanent and total disability as of January 30, 2008. Accordingly, the jury's verdict to the contrary could not supported by substantial evidence.

**B. The trial court err in refusing to include in its charge to the jury Mr. Erb's proposed jury instructions #12 (odd lot jobs) and #18 (liberal interpretation of statute)?**

**1. Standard of Review**

Jury instructions, as a whole, are reviewed de novo. *Anfinson v. FedEx Ground Package Sys., Inc.*, 159 Wn. App. 35, 44, 244 P.3d 32 (2010) (Citation omitted.) Any instruction that includes an erroneous statement of the applicable law is reversible

error if a party is prejudiced by that instruction. “An error is prejudicial if it affects the outcome of the trial.” *Id.*

In contrast, the trial court's decision as to whether or not to give a particular instruction to the jury is reviewed for abuse of discretion. *Anfinson, supra* at 44. The abuse of discretion standard also applies to questions about the number and specific wording of instructions. *Id.* (Citations omitted.) A court's refusal to give a proposed instruction is an abuse of discretion only if it was manifestly unreasonable, based on untenable grounds, or for untenable reasons. *Boeing v. Harker-Lott*, 93 Wn. App. 181, 186, 968 P.2d 14 (1998).

## **2. Discussion**

### ***(i) The trial court erred by refusing to give Plaintiff's Proposed Instruction #12.***

The first error concerns the trial court's refusal to use Mr. Erb's proposed instruction #12, which states:

If, as a result of an industrial injury, a worker is able to perform only odd jobs or special work not generally available, then the worker is totally disabled, unless the Department proves by a preponderance of the evidence that odd jobs or special work that he or she

can perform is available to the worker on a reasonably continuous basis. CP 30.

This is a correct statement of the law. See *Young*, 81, Wn. App. at 131 (citations omitted); *Allen v. Dep't of Labor & Indus.*, 16 Wn. App. 692, 559 P.2d 572 (1977).

Mr. Erb argued for inclusion of this "odd lot" jury instruction maintaining that he met his burden of proof by a preponderance of the evidence that he was not capable of performing generally available work of any nature within his labor market. This was demonstrated above through the testimonies of Dr. Gritzka and Mr. Garza. (RP 2 at 33-35) Once this burden of proof was accomplished the burden shifted to the Department to prove special work existed and was available to Mr. Erb in his local labor market, making the odd lot instruction appropriate. Although the Court originally reserved ruling on this instruction it later refused to include it in the charge to the jury, ruling the testimony did not support the giving of the instruction. (RP 2 at 37; RP<sup>4</sup> at 103)

Without proposed jury instruction #12, Mr. Erb was unable to argue his theory of the case. The jury was not informed about the

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<sup>4</sup> This record contains two volumes of Reports of Proceedings. The first volume contains jury selection, the court's ruling on 2 jury instructions as well as opening and closing statements. It is designated as RP. The second volume contains the arguments on jury instructions and for ease of reference is designated RP 2.

odd lot doctrine, a vital and just tenet of workers compensation law. Accordingly, it was unable to properly apply the facts of the case to the relevant law. Jury instructions are only sufficient if they permit each party to argue their theory of the case, are not misleading, and when read as a whole accurately inform the jury of the applicable law. *Anfinson*, 159 Wn. App. at 44. (Citations omitted.) All three of these factors are present under the facts of this case. The court's refusal to charge the jury with proposed jury instruction #12 was an abuse of discretion as it was based on untenable grounds i.e. that the evidence did not support the giving of the instruction.

***(ii) The trial court erred by refusing to give Plaintiff's Proposed Instruction #18.***

Next, Mr. Erb contends the trial court improperly refused to give his proposed instruction #18, which states:

The Industrial Insurance Act was enacted to provide sure and certain relief to workers injured in their employment. It is to be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries occurring in the work place. *It is a remedial statute that should be interpreted liberally* to achieve its purpose of providing benefits to the injured worker, and *all doubts should be resolved in favor of the injured worker in order to achieve that purpose.* (CP 36) (Emphasis added.)

This is a correct statement of the law. See *Gaines v. Dep't of Labor & Indus.*, 1 Wn. App. 547, 552, 463 P.2d 269 (1969). It also permits Mr. Erb to argue his theory of the case and is not misleading.

The court refused to give this instruction stating it was “. . . a clear comment on the evidence.” (RP 2 at 41) An instruction that does no more than accurately state the law that relates to an issue does not constitute an impermissible comment on the evidence by the trial judge. *Hamilton v. Dep't of Labor & Indus.*, 111 Wn.2d 569, 571, 761 P.2d 618 (1988). An impermissible comment on the evidence is one that conveys to the jury a judge's personal attitudes toward the merits of the case or allows the jury to infer from what the judge said or did not say that the judge personally believed or disbelieved the particular testimony in question. *Id.*

Instruction #18 is a correct recitation of the law and in no way constitutes a comment on the evidence. Without it the jury has an incomplete knowledge and ability to fairly apply the facts of this case to the applicable law in reaching its verdict. It is informed that

the Board decision is presumed correct<sup>5</sup> but is not told that, if applicable, the Act is to be liberally construed in order to provide sure and certain relief to workers injured in their employment. By giving this instruction the judge in no way is revealing his personal attitude toward the outcome of the case. Because Jury Instruction #18 is not an impermissible comment on the evidence the court based its refusal to give the instruction on untenable grounds it is an abuse of the court's discretion.

**C. The trial court improperly include non-material findings of facts from the Board's Order in its charge to the jury, specifically instruction #7, paragraph #7?**

**1. Standard of Review**

The next issue is whether the trial court impermissibly included non-material facts in jury instruction #7, specifically paragraph #7. (CP 77-78) "In cases 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." RCW 51.52.115. The key phrase is *material issue*.

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<sup>5</sup> See jury instruction # 9 (CP 80)

“A written statement characterized as a finding by the board does not necessarily make it one.” *Gaines*, 1 Wn. App. at 550. Before a statement can be considered a finding there must be substantial evidence in to the record to support it. *Id.* at 550-551. (Citation omitted.) To protect the integrity of the jury’s duty to review Board findings and to make a decision based on a de novo review, “the superior court is not required to advise the jury of a board finding unless the finding is on a ‘material issue’ before the court.” *Id.* at 551 (citing, *Stratton v. Dep’t of Labor & Indus.*, 1 Wn. App. 77, 459 P.2d 651 (1969)).

Examples of findings of material facts include: (1) the identity of the claimant and employer at the job of injury; (2) the claimant’s status as an employee under the IIA; (3) the nature of the accident and injury; (4) the nature and extent of disability caused by the industrial injury; and (5) the causal relationship between the injury and the disability. Also included are any other ultimate facts upon which the existence or nonexistence affects the outcome of the case. *Jenkins v. Dep’t of Labor & Indus.*, 85 Wn. App. 7, 11, 931 P.2d 907 (1996) (citing *Gaines*, 1 Wn. App. at 552). Evidentiary or argumentative findings (also known as subordinate findings) by the Board are not permitted. *Id.* This is because the detailed or

argumentative nature of such may substantially detract from the claimant's ability to obtain a true de novo review of the evidence presented to the Board. *Id.*

## **2. Discussion**

Because there are several errors in jury instruction #7 paragraph 7 Mr. Erb will address them one at a time. The first error involves the following statement:

At the time of the industrial injury Mr. Erb was working 40 hours per week, when his expectation was that he would only work 20-30 hours per week. *His rate of pay was not provided.* (CP 77) (Emphasis added.)

First, it is true that at the time of the industrial injury Mr. Erb was working 40 hours per week. That is a material fact and an issue at the Department and Board hearings. However, whether he thought he would work only 20-30 hours per week is a subordinate issue and immaterial to the resolution of Mr. Erb's issues on appeal. This is not an ultimate fact that had any impact on the outcome of the case and its inclusion was in error.

Next, it is a blatantly false statement to say that Mr. Erb's rate of pay was not provided. There is no evidence in the record to support this statement. It was provided and known to the Department at the time it began to pay him benefits for the on-the-job injury commencing on December 28 2006. (CABR 10, 31) Mr. Erb was even forthcoming when he admitted that toward the end of his employment with Postal Express he worked for a subcontractor for \$70 per week. (1/21/09 Tr. at 52) The rate of pay statement did not belong in the court's instruction because it is not factually accurate and could have had the effect of "utterly destroying" Mr. Erb's credibility, "making recovery improbable." *See Gaines*, 1 Wn. App. at 551. The jury may well have inferred from that statement that Mr. Erb was not cooperative in the underlying Department investigation. The only material fact that should have been included is the sentence: "At the time of the industrial injury Mr. Erb was working 40 hours per week[.] Inclusion of the rest of the finding undermines Mr. Erb's ability to obtain a true de novo review of the Board record.

The next immaterial statements are also found in paragraph 7 of jury instruction # 7:

After amputation of his left great toe, he returned to his job of injury and worked for one week, *convincing his employer to give his job to his son-in-law.*

*. . . He could not drive any longer after he was ticketed for not having a current CDL license. (CP 77)(Emphasis added.)*

Each of the italicized statements is immaterial and had the potential to impede the jury's de novo review. These subordinate findings in no way assist the jury in determining the ultimate issue, which was whether or not Mr. Erb is totally disabled. They also have the potential to discredit Mr. Erb's veracity and cast him in an unfavorable light. A jury could infer that he was not willing to work at the job supplied by the employer, which is false, or that he was not an honest person of which there is no evidence. Because these two statements do not supply information related to the identity of Mr. Erb, the employer, the nature of the accident or resulting disability nor the relationship between the injury and the disability, the court committed reversible error when it included this subordinate Board finding in its instructions to the jury.

The court's errors in Jury Instruction #7, paragraph 7 was prejudicial. It committed reversible error when it included these statements in its charge to the jury.

## VII. ATTORNEY FEES

If successful in his appeal, Mr. Erb requests attorney fees pursuant to RAP 18.1, RCW 51.52.130<sup>6</sup> and *Brand v. Dep't of Labor and Indus.*, 139 Wn.2d 659, 989 P.2d 1111 (1999). In deciding an attorney fee request this court is to look to both the statutory scheme and the historically liberal interpretation of the Industrial Insurance Act in favor of the injured worker. Additionally, it is vital to recognize that the purpose behind the statutory attorney fees award is to ensure adequate representation for the injured worker who is forced to appeal from Department rulings in order to obtain compensation due on their claim. *Id.* at 667-70.

## VIII. CONCLUSION

Substantial evidence does not support the trial court's judgment on the jury's verdict regarding both temporary total disability and permanent total disability. Mr. Erb has set forth good

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<sup>6</sup> The relevant portion of RCW 51.52.130(1) 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."

faith arguments that show the trial court erred in failing to include in its charge to the jury two of Mr. Erb's proposed jury instructions and by including non-material facts in jury instruction #7. For these reasons, Mr. Erb respectfully requests that the trial court decision be overruled and the case be remanded for a new trial.

Respectfully submitted this 16<sup>th</sup> day of November, 2012

A handwritten signature in black ink, appearing to read "C. Childers", written over a horizontal line.

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DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on November 14<sup>th</sup>, 2012, I caused service of the foregoing Appellant's Brief on each and every attorney of record herein:

VIA U.S. Mail

THE COURT OF APPEALS (Original plus 1 copy)  
Of the State of Washington Division III  
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A handwritten signature in black ink, appearing to read "Allison Dewald", is written over a horizontal line.

Allison Dewald  
Legal Assistant  
Christopher L. Childers