

64161-1

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No. 64161-1

WASHINGTON COURT OF APPEALS, DIVISION 1

HERMAN BATES,

Respondent/Plaintiff,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF
THE STATE OF WASHINGTON AND CLARK
HEAVY CONSTRUCTION, INC.,

Appellant/Defendant

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

In response to Appellant's Brief, plaintiff maintains he is entitled to temporary disability benefits without consideration of his post-injury termination. He rests primarily on the assertion that defendant failed to both raise the issue of post-injury termination before the Board of Industrial Insurance Appeals and failed to object to instructions given or refused by the trial court. Both the failure to preserve and his interpretation of the law lack merit. Central to plaintiff's entitlement to temporary total disability benefits is plaintiff's employment status with the defendant.

II. REPLY TO ASSIGNMENTS OF ERROR

A. Reply to First Assignment of Error

Mr. Thaxton's testimony surrounding plaintiff's post-injury termination directly impacts entitlement to time loss compensation. Plaintiff accurately points out that the issue before the court is whether he is entitled to time loss from December 8, 1999 through October 17, 2006. However, plaintiff suggests that because Mr. Thaxton's testimony surrounds the termination approximately

one year prior, the testimony bears no significance to the ultimate issue in this matter. Plaintiff's position, in addition to lacking legal support, is not logically sound.

The issue for trial is entitlement to time loss compensation. An employee's termination after an industrial injury terminates his right to benefits. Both the *O'Keefe* and *Walker* courts determined that a worker who is terminated from employment after sustaining an industrial injury does not have a right to reinstatement of temporary total disability benefits. RCW 51.32.090(4)(a); *Glacier Northwest v. Walker*, 151 Wn. App. 389, 212 P.3d 587 (2009); *O'Keefe v. Dep't of Labor and Indus.*, 126 Wn. App. 760, 109 P.3d 484 (2005). Though plaintiff attempts to draw a distinction based on the fact he was terminated a year before he claimed time loss compensation, the courts do not consider that distinction. An injured worker is precluded from receiving time loss benefits after he is terminated for cause. In this case, Mr. Thaxton's testimony is relevant given the time loss period at issue is after plaintiff's termination.

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In addition, plaintiff objects to the admission of Mr. Thaxton's testimony on the basis it lacks proper foundation. However, no such objection was made before the Board of Industrial Insurance Appeals. Before the Board, plaintiff made several objections to Mr. Thaxton's testimony. Specifically, he stated:

I will object to this testimony on the basis that it's irrelevant and immaterial to the question of time loss from December 1999 to October of 2006. That it is incompetent in that Mr. Thaxton is not an expert in this area, that it is hearsay, and it is prejudicial to the claimant's case. Other objections I will reserve until later at this time.

CP 118, 119.

No other objections were made during the course of Mr. Thaxton's testimony. Therefore, plaintiff is precluded from raising foundation issues before the trial court or this court.

B. Reply to Second Assignment of Error

Plaintiff erroneously contends Defendant failed to preserve its objections to the instructions given or refused by the trial court. Likewise, he claims the issue of entitlement to time loss post-termination was not properly raised before the Board of Industrial

Insurance Appeals. The parties engaged in extensive discussion surrounding the current status of the law. In addition, because of the procedural nuances before the Board, the mere offer of Al Thaxton's testimony preserved the post-injury termination issue.

1. Defendant properly objected to the trial court's refusal to submit Defendant's Proposed Jury Instruction No. 14 and corresponding Defendant's Proposed Special Verdict Form Question 2.

The purpose of rules regarding objecting to jury instructions is to assure that the trial court is sufficiently apprised of any alleged error in the instructions and inform the trial judge of the points of law involved so that the court is afforded an opportunity to correct any mistakes before they are made. *Blaney v. International Ass'n of Machinists and Aerospace Workers*, 114 Wn. App. 80, 55 P.3d 1208 (2002); *Kjellman v. Richards*, 82 Wn.2d 766, 514 P.2d 134 (1973). Moreover, Civil Rule 46 provides that formal exceptions to ruling are unnecessary. CR 46. It is sufficient that a party makes known to the court the action which he desires the court to take and the grounds therefore. *Id.* The parties extensive discussion regarding

the submission of Defendant's Proposed Jury Instruction No. 14, corresponding Defendant's Proposed Special Verdict Form Question 2, and the legal support surrounding its interpretation is sufficient to apprise the judge of the points of law involved. Thus, the exception taken to the trial court's ruling on the proposed instruction is adequate to preserve the issue before this court.

Defendant submitted Proposed Jury Instruction No. 14 and Proposed Special Verdict Form Question 2 that both surrounded the issue of whether plaintiff was entitled to time loss despite being terminated from employment. The legal standard upon which the instructions are based is taken directly from the *O'Keefe* and *Walker* cases while the substantial evidence in support of proposing the instruction is based upon the testimony of Al Thaxton and plaintiff. On March 9, 2010, the trial court excluded the testimony of Al Thaxton. Feb. 9, 2009 RP 78-80. As such, portions of plaintiff's testimony surrounding the termination were excluded. Feb. 9, 2009 RP 80. The interconnectedness of the testimony and jury

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instructions rendered the ruling on whether to admit the issue of post-injury termination an all or none proposition.

MR. MADOLE: Then the -- the other test of their -- section in Mr. Bates testimony that was either going to rise or fall with this will be stricken as well I take it.

JUDGE BRADSHAW: Yes.

Id.

Without evidence to establish plaintiff's termination, Defendant's Proposed Instruction No. 14 and Special Verdict Form No. 2 would have no evidentiary basis. Thus, defendant immediately raised the proposed jury instructions and special verdict form that corresponded with such testimony. Defendant stated in relevant part:

MR. BALASUBRAMANI: We have a limited record here so we're not going to get into obviously things that nobody's been testifying to but there's, you know, our proposed jury instructions include the jury instructions on the issue of the reason for the termination and Counsel has said several times that, you know, it's a year later that the -- the termination doesn't -- isn't relevant but I'm not aware of any case law or statutory authority for the proposition. And so its -- its -- its not termed I don't think in affirmative defense in the case law but it's essentially an affirmative defense that -- that if no reference is made we're being precluded from raising.

Feb. 9, 2009 RP 82-83.

Defendant went on to describe how his ruling was relevant with respect to the proffered jury instructions.

MR. BALASUBRAMANI: Well I was just going to make the comment that I -- I can't sit here and tell you it's a quote but I'm fairly certain that our proposed jury instruction No. 14, "A worker who's terminated for reasons unrelated to the industrial injury does not have the right to reinstatement of temporary total disability benefits." I'm -- I'm fairly certain that's a quote from this 2005 appellate court decision. And I have it here.

Feb. 9, 2009 RP 84.

Defendant then introduced the *O'Keefe* case to the trial court and the parties engaged in an extensive legal discussion regarding the applicability and impact of an injured worker's entitlement to time loss compensation when he has been terminated from employment. *See* Feb. 9, 2009 RP 84-87. The discussion continued into the next day. *See* Feb. 10, 2009 RP 56-68. Although the discussion resulted in the trial court excluding the testimony of Al Thaxton and portions of plaintiff's testimony, because such evidence was excluded from the record, it no longer made sense to submit the jury instructions to the jury. In essence, the ruling was

much more broad than simply excluding testimony; it impacted the applicability of defendant's proposed jury instructions. The ruling, initially brought about by the defendant's motion to admit the testimony of Al Thaxton, was expanded to include the broader issue of whether the trial court would place the issue of plaintiff's post-injury termination before the jury. The ruling therefore addressed both the excluded testimony and the jury instructions upon which it was based. Issues were brought to the attention of the court by defendant. In fact, defendant raised this issue again prior to the trial court's submission of instructions to the jury by the following exchange:

JUDGE BRADSHAW: Please (inaudible). No problem. All right, so I have the -- the joint list and thank you again for that. So our Bailiff is -- will be compiling that. One quick question I have of course is about a verdict form and a statement of the findings below. I'd like to ask Respondent why a special verdict form would be necessitated?

MR. BALASUBRAMANI: The -- (inaudible) find my verdict form. I think the difference in the verdict forms was just a added --

JUDGE BRADSHAW: Because of the multiple questions or?

MR. BALASUBRAMANI: (Inaudible) the multiple questions --

JUDGE BRADSHAW: Okay.

MR. BALASUBRAMANI: -- and the termination issue which I assume isn't going to be presented to the jury at this point.

JUDGE BRADSHAW: So with the rulings as they currently stand would you be withdrawing Question 2?

MR. BALASUBRAMANI: Yes.

Feb. 10, 2009 RP 194-195.

Although plaintiff accurately asserts defendant withdrew the proposed special verdict form, defendant did so only under the trial court's ruling to exclude all testimony surrounding plaintiff's post-injury termination. Plaintiff's argument would require as party to specifically state it objects to a ruling, despite having entertained the argument at length with the court. Such odd exchanges are not required to preserve issues before this court. *See* Civil Rule 46. The trial court was clearly apprised of defendant's exception by the extensive discussion of *O'Keefe* and its impact on the ability to present the defendant's theory of the case. This Court has previously held that trial counsel has preserved the issue if the argument is made that a proposed instruction is unsupported by the law. *Blaney, 114 Wm. App. at 85 (2002)*. Therefore, the trial court's refusal to submit

defendant's proposed instructions were properly objected to and preserved.

2. Defendant properly raised the issue of whether plaintiff was entitled to time loss compensation post-termination before the Board.

Plaintiff inaccurately claims the defendant failed to raise "the issue of RCW 51.32.090(4)(a) at the Department or Board." Plaintiff mischaracterizes the issue as an RCW 51.32.090(4)(a) issue. Rather, RCW 51.32.090(4)(a) provides the statutory authority for the proposition that an injured worker who is terminated post-injury is not entitled to further time loss compensation. *See also Glacier Northwest v. Walker*, 151 Wn. App. 389 (2009); *O'Keefe v. Dep't of Labor and Indus.*, 126 Wn. App. 760 (2005). The issue is whether plaintiff is entitled to time loss compensation during a relevant period of time. Several factual issues impact plaintiff's entitlement to time loss, including whether he was terminated from employment after the injury. The evidence surrounding the termination is part and parcel to deciding whether plaintiff can receive time loss benefits. While various legal and factual bases can impact plaintiff's

time loss compensation, the issue of whether plaintiff is entitled to temporary total disability benefits remains the same.

From a procedural standpoint, at a hearing before the Board of Industrial Insurance Appeals, neither party provides opening or closing statements. Thus, there are no extensive discussion of what the parties intend to establish other than what could be potentially presented under the agreed upon issues. The parties frame the issues to be litigated by the content of the Department of Labor and Industries Order, the Notice of Appeal, and subsequent conferences. *See* WAC 263-12-050; WAC 263-12-090; WAC 263-12-095. As this matter was born out of plaintiff's appeal of the Department Order and the Board Decision and Order, the legal significance of plaintiff's post-injury termination was never pleaded. CP 1, 2, 60-62. However, the issue necessarily included all facts that impact entitlement to time loss compensation. Thus, the defendant introduced the testimony of Al Thaxton to establish plaintiff had been terminated after the injury. Moreover, plaintiff testified surrounding the factual nature of the post-injury termination. The

sole fact that defendant presented substantial evidence on the issue of post-injury termination, establishes the issue was raised at the Board level.

Even if one assumes the issue was not raised before the Department or the Board, defendant would be free then to request the Department issue an order determining claimant is not entitled to time loss compensation from December 8, 1999 through October 17, 2006 due to being terminated from his employment after the injury. However, simply adding the additional language surrounding plaintiff's post-injury termination does change the issue. Whether plaintiff was terminated and precluded from receiving benefits during this period does not render whether he is entitled to time loss an entirely new issue. The parties would be precluded by principals of *res judicata* from re-litigating this issue as the trial court already decided plaintiff's entitlement to time loss during this period, regardless of whether the Board or trial court allowed defendant to present all theories of its case. Introducing evidence on the issue of post-injury termination before the Board of Industrial Insurance

Appeals adequately preserved such issue so that it may be entertained on appeal.

3. A worker who is terminated from employment after sustaining an industrial injury does not have a right to reinstatement of temporary total disability benefits.

Defendant's Proposed Instruction No. 14 accurately reflects the holdings from *O'Keefe* and *Walker*. Though plaintiff acknowledges certain circumstances under which time loss benefits may be terminated, he maintains RCW 51.32.090(4)(a), *O'Keefe*, and *Walker* are factually distinguishable from this case.

Plaintiff asserts the *O'Keefe* holding is inapplicable as *O'Keefe* involved a situation whereby the injured worker returned to work after the injury, and engaged in several acts worthy of termination such as sleeping in his truck and making inappropriate comments to the employer's clients. Though the injured worker's acts in *O'Keefe* are certainly reprehensible, the nature of the misconduct is irrelevant.

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Likewise, plaintiff attempts to distinguish the facts of this case from the holdings from *O'Keefe* and *Walker* on the basis that termination of time loss under RCW 51.32.090(4)(a) requires the injured worker to begin employment with the employer at injury. The testimony of both claimant and Al Thaxton support a finding that plaintiff did return to work after the injury. Thus, the applicability of the *O'Keefe* and *Walker* holdings cannot be denied given the evidence presented in this case.

C. Reply to Third Assignment of Error

1. Defendant properly took exception to Instruction No. 11.

On the second day of trial, the parties engaged in a discussion with the trial court judge over the applicability of plaintiff's proposed instruction. The following exchange, also quoted by plaintiff in response, establishes defendant's exception to the instruction and adequately apprised the court of such exception.

JUDGE BRADSHAW: So the -- the proposed Plaintiff's 10 that is agreed to?

MR. BALASUBRAMANI: It -- the -- my -- my concern with it is the portion that says unless the employer proves by

preponderance of evidence, I'm okay with a -- the preponderance of evidence being the standard. I -- I recognize that for permanent total disability the standard is that the employer has the burden of proving that the odd jobs are special work is reasonably available on a continuous basis. I'm not aware of case law one way or the other that indicates that the employer specifically has that burden. That burden is mentioned in the Energy Services case we mentioned today but it's silent as to who has the burden. And in -- in this context of -- of divorce decision being found presumed correct and the worker having the burden I'm not sure that it shows.

JUDGE BRADSHAW: Is there case law in point that says the --

MR. MADOLE: Yeah.

JUDGE BRADSHAW: -- the burden shifts?

MR. MADOLE: It's supported by case law. I didn't -- it's a WPI I didn't bother to put the citations. It's probably addressed in the Washington Practice under this one on the notes about if the Court would like some further authority on this I can do it but it hadn't occurred to me that this would be a problem.

MR. BALASUBRAMANI: And again, the WPI relates to permanent total disability not temporary total disability.

JUDGE BRADSHAW: Okay, next.

Feb. 10, 2009, RP 212-213.

Moreover, Civil Rule 46 provides that formal exceptions to ruling are unnecessary. CR 46. It is sufficient that a party makes known to the court the action which he desires the court to take and the grounds therefore. *Id.* The parties aforementioned discussion

regarding the jury instructions applicability is sufficient for defendant to raise the issue before this court.

2. Jury Instruction No. 11 is an incorrect statement of law.

Plaintiff modified WPI 155.07 to pertain to the issue of temporary disability. However, such instruction is only appropriate in cases of permanent total disability. Re-framing the instruction from permanent to temporary disability required the employer to prove odd jobs or special work was reasonably continuous. While defendant agrees with plaintiff that WPI 155.07, the permanent total disability, instruction, is a correct statement of law, changing the context from permanent to temporary disability misstates the law and inappropriately shifts the burden to the employer.

Even though temporary total disability may differ from permanent total disability in duration, not character, the burden shifting scheme provided in the instruction is only applicable in a permanent total disability context. In a temporary total disability context, plaintiff still has the burden to prove entitlement to such

benefits. When a worker's condition is permanent, the ability to perform only odd jobs or special work therefore becomes relevant to whether the worker is able to perform reasonably continuous gainful employment. The jury was effectively required to place the burden of proof on the said employer earlier rather than require the plaintiff to maintain the burden of proof. Thus, whether permanent and temporary are mere terms of duration, the burden of proof within each context is markedly different. Therefore, it was an error to submit Instruction No. 11.

D. Reply to Fourth Assignment of Error

The testimony of Dr. John Hamm was inappropriately excluded from the record. Dr. Hamm's testimony provided medical evidence on plaintiff's ability to work from a psychological standpoint, and therefore failing to allow his testimony did not allow the jury to consider all relevant aspects of plaintiff's ability to work.

Plaintiff quotes portions of Dr. Hamm's testimony in his response brief, alleging such statements consist of speculation and conjecture. As such, plaintiff suggests that striking such testimony

from the record was appropriate. However, plaintiff focuses his argument on the weight of Dr. Hamm's testimony as opposed to whether it was an error to exclude the entire testimony. Whether an experts opinion is persuasive enough to establish a causal connection is something the fact finder must determine. Simply because a party does not believe an opinion is sufficient to establish a legal premise, does not warrant the exclusion of the testimony. Evidentiary rulings are not and should not be made on the basis of the persuasive value of the opinion. An inquiry into *why* plaintiff was unable to perform continuous gainful employment is a material fact at issue, and it was an error to exclude such testimony.

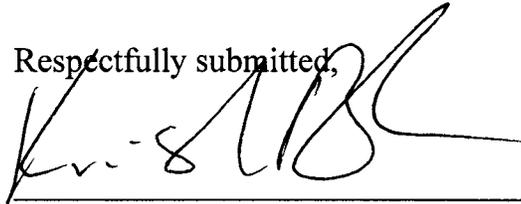
III. CONCLUSION

The evidence established plaintiff was injured, returned to work, and was subsequently terminated. As a result, he is not entitled to temporary disability benefits. The defendant presented testimony to this effect at the Board as well as evidence surrounding the psychiatric component of his inability to obtain employment. However, the defendant was precluded from presenting such

evidence and denied the opportunity to present its theory of the case under the established law. The defendant respectfully requests this court reverse the judgement and remand the case for a new trial.

DATED: March 30, 2010

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Krishna Balasubramani', written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2010, I filed the original and one copy of Appellant's Reply Brief by first class mail on the following :

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