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COURT OF APPEALS
DIVISION II

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No. 38150-8-II
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON
BY cm
DEPUTY

DIVISION II

TIMOTHY T. WALKER,

Appellant,

v.

GLACIER NORTHWEST, INC.,

Respondent.

APPEAL FROM THE SUPERIOR COURT FOR CLARK COUNTY

THE HONORABLE ROBERT L. HARRIS

BRIEF OF RESPONDENT

GLACIER NORTHWEST, INC.

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INTRODUCTION

This case involves an injured worker who seeks ongoing temporary total disability benefits in spite of the fact he was terminated for cause following his accident and prior to his release to light duty work. Mr. Walker's claim was allowed, all his medical benefits were paid, and he was paid temporary total disability while he remained totally disabled. The only issue before the Court is whether Mr. Walker is entitled to temporary total disability benefits after his attending physician has released the claimant to light duty work. The law says he is not.

The claimant argues he is entitled to ongoing time loss benefits because he was terminated for reasons related to his industrial injury. In reality, his termination was related to his violation of company safety policy, and the fact that he was injured while violating that policy was irrelevant to his termination.

It is well established that individuals on light duty who are terminated for reasons

unrelated to their industrial injuries - i.e., for reasons having nothing to do with their status as injured workers or their pursuit of workers' compensation benefits - are not entitled to time loss benefits. The contemporaneous nature of the claimant's injury and misconduct should not require the employer to choose between continuing to employ him or paying him for not working when he is capable of doing so. The Superior Court correctly held that the claimant is not entitled to ongoing temporary total disability benefits because he was terminated for cause, and but for that termination light duty work would have been available to him within the meaning of RCW 51.32.090(4)(a).

STATEMENT OF THE CASE

I. Statement of the Facts

The petitioner, claimant Timothy Walker, is a 50-year-old Vancouver, Washington, resident who was employed with the respondent, Glacier Northwest, as a ready-mix cement truck driver in 2005. (CABR Hr'g Tr. 6-7, 120, Aug. 22, 2006.).

Mr. Walker had been working for Glacier for about a month when he rolled his truck while driving to a job site in Ridgefield, Washington. (CABR Hr'g Tr. 10.) He was a probationary employee at that time. (CABR Hr'g Tr. 29.) Mr. Walker had been driving that particular truck for about a week, and did not think it was unsafe. (CABR Hr'g Tr. 12.) He had had no problems with the operation of the truck, and specifically had not had problems turning corners. (CABR Hr'g Tr. 14-15.)

While making a right-hand turn at a corner Mr. Walker was familiar with, he felt what he described as a push or a surge, and the truck rolled on its side. (CABR Hr'g Tr. 18-20.) Mr. Walker sustained two broken ribs, a lacerated kidney, and damaged his rotator cuff. (CABR Hr'g Tr. 21.) The claimant was ticketed by the police for driving too fast for the conditions. (CABR Hr'g Tr. 25.)

Glacier Northwest plant supervisor Paul Campbell conducted an investigation of the accident. (CABR Hr'g Tr. 30-31). The

investigation resulted in Mr. Walker's termination for violation of company rules. (CABR Hr'g Tr. 33.) Mr. Campbell testified it was company policy to investigate each rollover accident and that terminating the employment of at-fault drivers was a long-standing company policy. (CABR Hr'g Tr. 33.) He concluded based on his investigation that the accident was caused by Mr. Walker's excessive speed and stated that any time an accident is determined to be due to a driver's error, that driver would be terminated. (CABR Hr'g Tr. 40.) The policy is the same whether the driver is hurt in the accident or not. (CABR Hr'g. Tr. 40-41.)

Randy Ostrander, Patrol Sergeant for the City of Ridgefield, investigated Mr. Walker's accident. (CABR Hr'g Tr. 70-71.) He interviewed three witnesses, examined the scene of the accident and the truck itself, consulted with a state Commercial Enforcement officer, and concluded Mr. Walker was driving too fast. (CABR Hr'g Tr. 71, 80, 90, 93.) His investigation

revealed no mechanical errors with the truck.
(CABR Hr'g Tr. 94.) He ticketed Mr. Walker for
driving too fast. (CABR Hr'g Tr. 95.)

Mark Liefke, Vice President and General
Manager of the Oregon/Southwest Washington
division of Glacier Northwest, had been employed
by the company for 34 years as of August 2006.
(CABR Hr'g Tr. 106-107.) He stated when a ready-
mix truck rollover occurs and the primary cause
of the accident is driver error, the company
terminates the employee. (CABR Hr'g. Tr. 107.)
Drivers whose errors cause accidents are
terminated whether they are injured are not.
(CABR Hr'g Tr. 113-114.) This policy has been in
place since at least 1988; between that date and
the date of hearing, 11 rollover accidents
occurred for which eight drivers were terminated
and three were not. (CABR Hr'g Tr. 112.) Drivers
are not terminated for mechanical failures. (CABR
Hr'g Tr. 112.) Mr. Liefke verified that in
Mr. Walker's case, the accident was investigated
by a Glacier employee as well as an outside firm.

(CABR Hr'g. Tr. 108.) No mechanical problems were identified with Mr. Walker's truck. (CABR Hr'g. Tr. 109.)

The parties stipulated to the following facts on August 22, 2006: Mr. Walker was hired by Glacier on July 11, 2005, and injured on August 15, 2005. He was terminated September 20, 2005, and his claim was allowed by Order of September 30, 2005. His treating physician authorized light duty November 28, 2005, and his time loss compensation ceased as of that date. At all times relevant to this case, the claimant has been able to perform the light duty position and the position has been available. (CABR 31-32.)

II. Procedural History

The employer adopts the Superior Court's Finding of Fact Number One:

On September 27, 2005, the Department of Labor and Industries received an Application for Benefits that asserts Timothy T. Walker sustained an industrial injury on August 15, 2005, in the

course of his employment with Glacier Northwest, Inc.

On September 30, 2005, the Department issued an order that allows the claim, and directs the self-insured employer to pay all medical and time-loss compensation benefits as may be indicated in accordance with the industrial insurance laws.

On December 21, 2005, the Department issued an order that determines the claimant had only been released to light duty and light duty is no longer available due to the fact the claimant had been terminated from employment, and directs the self-insured employer to pay time-loss compensation effective November 28, 2005, to the date of this order and continuing until the claimant has been released to full duty. On January 5, 2006, the employer filed with the Department a Protest and Request for Reconsideration of the December 21, 2005, order.

On February 15, 2006, the Department issued an order that affirms the December 21, 2005 order. On February 15, 2006, the employer filed with the Department a Protest and Request for Reconsideration which was forwarded by the Department to the Board of Industrial Insurance Appeals as a direct appeal. The appeal was received at the Board on March 1, 2006. On March 7,

2006, the Board issued an order that grants the appeal, under Docket No. 06 12392, and directs that further proceedings be held.

(Super. Ct. Findings of Fact and Conclusions of Law.) Hearing convened before IAJ Richard Mackey on August 22, 2006, and a decision upholding the Department's Order was issued December 1, 2006.

(CABR 39.) The employer filed a Petition for Review with the Board of Industrial Insurance Appeals on January 18, 2007. (CABR 5-28.) The Board denied that Petition for Review on February 1, 2007. (CABR 1.)

The employer appealed to the Superior Court for Clark County and the case was presented to a jury before the Honorable Robert L. Harris on July 7, 2008. Mr. Walker moved for judgment as a matter of law and Glacier Northwest, Inc., also moved for judgment as a matter of law. Judge Harris heard oral argument from both parties and decided in favor of Glacier Northwest, Inc. The Court entered its Findings of Fact and

Conclusions of Law and Judgment on July 29, 2008.

Mr. Walker appealed to this Court August 7, 2008.

The brief of the appellant, Timothy Walker, was placed in the mail October 30, 2008.

Pursuant to Wash. R. App. P. 10.2(b) and Wash. R. App. P. 18.6(b) and (c), the respondent's 30-day time period began to run on November 2. The respondent, Glacier Northwest, hereby timely files its brief in response.

ARGUMENT

I. Standard of Review

The Appellate Court's review "is limited to determining whether the trial court's findings of fact are supported by substantial evidence and, if so, whether the findings in turn support the conclusions of law." *Willener v. Sweeting*, 107 Wash.2d 388, 393, 730 P.2d 45 (1986).

Substantial evidence is defined as evidence sufficient in quantity "to persuade a fair-minded person of the truth of the declared premise."

Cowiche Canyon Conservancy v. Bosley, 118 Wash.2d 801, 819, 828 P.2d 549 (1992) (internal citations omitted). It is the burden of the appealing party to show that the lower court's findings are not supported by substantial evidence. *Brin v. Stutzman*, 89 Wash.App. 809, 824, 951 P.2d 291 (1998), citing *Nordstrom Credit v. Dep't of Rev.*, 120 Wash.2d 935, 939-40, 845 P.2d 1331 (1993).

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The Superior Court made the following
pertinent Findings of Fact:

3. On July 11, 2005, the claimant was hired by Glacier Northwest, Inc., as a Redi-Mix truck driver. At the time he was hired, Mr. Walker had five years experience as a concrete truck driver from prior employment in the 1980s. As of August 15, 2005, Mr. Walker was still a probationary employee with Glacier Northwest, Inc.; however, he was fully qualified to safely operate the truck he was driving at the time of the accident.

4. When the truck he was driving rolled on its side, Mr. Walker was making a turn from Pioneer onto Reiman Road in southwest Washington, en route to deliver nine-and-a-half cubic yards of concrete to a new housing development on Reiman Road. Mr. Walker was familiar with the turn, and had previously successfully negotiated that turn while driving a truck for Glacier Northwest, Inc. When he made the turn on August 15, 2005, Mr. Walker was driving too fast for the conditions existing at the turn. There were no mechanical defects to the truck Mr. Walker was driving that caused or contributed to the rollover.

5. For at least 20 years, it has been the policy of Glacier Northwest, Inc., to terminate drivers who overturn a cement truck due to driver error.

6. On September 20, 2005, following an investigation of the accident by Glacier Northwest, Inc., that included

examination of the accident scene by a manager experienced in operating concrete trucks, and following mechanical inspection of the truck Mr. Walker had been driving, Mr. Walker was terminated from his employment at Glacier Northwest, Inc., because of his own behavior in causing the rollover of the employer's truck.

8. On November 28, 2005, Mr. Walker was released to perform light-duty work and, that same day, the claimant's time-loss compensation was terminated. A light-duty position has been available at Glacier Northwest, Inc., at all times applicable to this case, and as of November 28, 2005, Mr. Walker had been physically able to perform that light-duty work. However, following his termination of employment on September 20, 2005, Mr. Walker has not been rehired to perform the light-duty work.

Based on its Findings of Fact, the Superior Court made the following conclusion of law:

2. As of November 28, 2005, the claimant, Timothy T. Walker, was able to perform light duty work and such work was available to him but for his termination due to driver error in causing the rollover of the employer's truck. The termination of his employment occurred for reasons wholly unrelated to the industrial injury or receipt of workers' compensation benefits. Therefore, the employer met its obligation under RCW 51.32.090(4) to provide modified work to an injured

worker and Mr. Walker is not entitled to time-loss compensation from November 28, 2005, and continuing until he is capable of returning to full-duty work.

3. The Order of the Department of Labor and Industries dated February 15, 2006, is incorrect and should be reversed, and the matter should be remanded to the Department with instructions to issue a new order that states the Claimant/Defendant, Timothy Walker, is not entitled to time loss compensation effective 11/28/05 as long as he is released for modified or light-duty work or has been returned to full-duty work and to take such further action as is required according to the facts and the law.

In this case, then, Mr. Walker bears the burden of proving that the Superior Court's Findings of Fact are not supported by substantial evidence, or that those Findings of Fact do not support the Superior Court's Conclusions of Law. Mr. Walker cannot satisfy this burden.

II. Claimant's termination occurred for reasons wholly unrelated to the industrial injury.

Mr. Walker argues that his termination was related to his injury. First he implies that the rollover accident, which led to both his injury and his termination was not his fault, and that

it was therefore only a pretext to fire him in retaliation for his workers' compensation claim. (Brief of Appellant 2-5.) Second, he suggests that even if he was at fault for the accident and his termination was justified, he is nevertheless entitled to ongoing time loss benefits because the accident that led to his termination also led to his injuries and thus cannot be "wholly unrelated" to his claim within the meaning of the Industrial Insurance Act. (Brief of Appellant 13.)

The claimant must prove that the Conclusion of Law to which he takes exception¹ is not supported by the lower court's Findings of Fact.

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¹ "The termination of his employment occurred for reasons wholly unrelated to the industrial injury or receipt of workers' compensation benefits. Therefore, the employer met its obligation under RCW 51.32.090(4) to provide modified work to an injured worker and Mr. Walker is not entitled to time-loss compensation from November 28, 2005, and continuing until he is capable of returning to full-duty work." (Super. Ct. Conclusion of Law No. 2.)

Those findings include Finding of Fact Number Six, which states:

On September 20, 2005, following an investigation of the accident by Glacier Northwest, Inc., that included examination of the accident scene by a manager experienced in operating concrete trucks, and following mechanical inspection of the truck Mr. Walker had been driving, Mr. Walker was terminated from his employment at Glacier Northwest, Inc., **because of his own behavior in causing the rollover of the employer's truck.**

(emphasis added). Clearly the Conclusion of Law finding Mr. Walker's termination unrelated to his workers' compensation claim is supported by this Finding of Fact.

- a. **Mr. Walker was at fault for his accident, and was fired for just cause.**
 - i. **Mr. Walker was at fault for his accident.**

Whether the claimant's accident was his fault is a question of fact. The record overwhelmingly supports the employer's finding of fault. Only the claimant's testimony contradicts that finding. Three witnesses, including a

police officer unaffiliated with the employer, testified the accident occurred because Mr. Walker was driving his truck too fast for the conditions. (See Statement of the Facts, *supra*.) The record supports the Superior Court's Finding of Fact that Mr. Walker's error caused his truck to roll.

ii. Mr. Walker was fired for just cause, not in retaliation for his claim.

Glacier Northwest did not fire Mr. Walker in retaliation for his workers' compensation claim or for reasons related to his disabling injuries, and therefore did not violate the Industrial Insurance Act when it terminated him.

The Industrial Insurance Act, Revised Code of Washington, Section 51, states:

No employer may discharge or in any manner discriminate against any employee because such employee has filed or communicated to the employer an intent to file a claim for compensation or exercises any rights provided under this title. However, ***nothing in this section prevents an employer from taking any action against a worker for other reasons including, but not***

limited to, the worker's failure to observe health or safety standards adopted by the employer, or the frequency or nature of the worker's job-related accidents.

RCW 51.48.025(1) (emphasis added).

The "employee who alleges wrongful discharge in violation of public policy has the burden of proving his dismissal violates a clear mandate of public policy." *Wilmot v. Kaiser Aluminum and Chemical Corp.*, 118 Wash.2d 46, 67, 821 P.2d 18 (1991). The employee must prove that a "stated public policy" has been violated. *Id.* Once he has "demonstrated that his discharge may have been motivated by reasons that contravene a clear mandate of public policy, the burden shifts to the employer to prove that the dismissal was for reasons other than those alleged by the employee." *Id.* at 67-68, citing *Thompson v. St. Regis Paper Co.*, 102 Wash.2d 219, 232-33, 685 P.2d 1081 (1984).

In order to make a prima facie case for retaliatory discharge under RCW 51.48.025(1), the employee must show three things: (1) the employee

exercised his or her statutory right to pursue workers' compensation benefits under Industrial Insurance Act, or communicated his or her intent to pursue such benefits to the employer; (2) that the employee was discharged; and (3) "that there is a causal connection between the exercise of the legal right and the discharge, *i.e.*, that the employer's motivation for the discharge was the employee's exercise of or intent to exercise the statutory rights." *Id.* at 68-69, *citing Love, Retaliatory Discharge for Filing a Workers' Compensation Claim: The Development of a Modern Tort Action*, 37 *Hastings L.J.* 551, 566-67 (1986); *Gonzalez v. Prestress Eng'g Corp.*, 194 *Il.App.3d* 819, 141 *Ill.Dec.* 606, 51 *N.E.2d* 793 (1990). The employee satisfies this burden when he proves by a preponderance of the evidence that "retaliation was a substantial or important factor motivating the discharge." *Id.* at 71.

If the employee satisfies his or her burden, the employer must "articulate a legitimate nonpretextual nonretaliatory reason for the

discharge." *Id.* at 70. "The employer must produce relevant admissible evidence of another motivation, but need not do so by the preponderance of evidence necessary to sustain the burden of persuasion because the employer does not have that burden." *Id.*, citing *Baldwin v. Sisters of Providence in Wash., Inc.*, 112 Wash.2d 127, 136, 769 P.2d 298 (1989).

Mr. Walker cannot satisfy his burden here. Although he can prove he sought workers' compensation benefits and was then terminated, thereby satisfying the first two elements laid out in *Wilmot*, he cannot show the termination was motivated by his exercise of his workers' compensation rights. *Id.* at 68-69.

Glacier Northwest's termination of Mr. Walker was rightful if it occurred because he "failed to observe health or safety standards adopted by the employer." RCW 51.48.025(1). Clearly in this case Mr. Walker's termination was due to his failure to observe safety standards. The facts establish that Mr. Walker's accident

occurred because he was driving too fast for the conditions. This caused his accident, and violated the employer's safety standards. The only evidence offered to the contrary is Mr. Walker's assertion that he was not driving too quickly. (*E.g.*, CABR Hr'g Tr. 19, 136.) His testimony does not outweigh that of the police officer and two managers presented by the employer.

Moreover, two Glacier Northwest employees testified that it was longstanding company policy to terminate drivers whose errors caused accidents. Mr. Liefke stated the policy had been in effect since at least 1988. (CABR Hr'g Tr. at 112.) He also made clear that whether a driver is injured in an accident is irrelevant, and stated that drivers who were not injured (and therefore who did not pursue workers' compensation benefits) were terminated for their involvement in accidents for which they were at fault. Mr. Walker's termination would have occurred whether he was injured or not, and

whether he sought workers' compensation benefits or not. It was unrelated to his accident and not retaliatory.²

iii. Even if Mr. Walker's termination was unjust, the remedy is not time loss benefits.

Mr. Walker has two remedies at his disposal if he feels his termination was unjustified. He can file a complaint with the Director of the Department of Labor and Industries, or he can file a civil suit for wrongful termination.

RCW 51.48.025 states

(2) Any employee who believes that he or she has been discharged or otherwise discriminated against by an employer in violation of this section may file a complaint with the director alleging discrimination within ninety days of the date of the alleged violation. Upon receipt of such complaint, the director shall cause an investigation to be made as the director deems appropriate. Within ninety days of the receipt

² Thus, the claimant's assertion that the employer argues Mr. Walker's "termination is wholly unrelated to the industrial injury although the termination is the result of the injury," is incorrect. (Brief of Appellant at 16.) The termination is the result of the claimant's safety violation, not his injury.

of a complaint filed under this section, the director shall notify the complainant of his or her determination. If upon such investigation, it is determined that this section has been violated, the director shall bring an action in the superior court of the county in which the violation is alleged to have occurred.

(3) If the director determines that this section has not been violated, the employee may institute the action on his or her own behalf.

(4) In any action brought under this section, the superior court shall have jurisdiction, for cause shown, to restrain violations of subsection (1) of this section and to order all appropriate relief including rehiring or reinstatement of the employee with back pay.

In *Wilmot*, the Court held an individual had a private and separate cause of action for retaliatory discharge outside the ambit of the remedy provided for in the Industrial Insurance Act. 118 Wash.2d at 53. The Court reasoned, "Despite the statute's placement in RCW Title 51, the exclusivity provisions of the Industrial Insurance Act do not, as to retaliatory discharge

or discrimination for pursuit of benefits under the IIA, abolish superior court jurisdiction over causes of action arising from such conduct." *Id.* at 57.

Rather than pursue either of these options, the claimant seeks reinstatement of time loss benefits. Rather than state outright that he believes he was wrongfully terminated, the claimant makes circumspect allusions to the facts surrounding his accident, implying his termination was wrongful but not stating it. Presumably, this is because the claimant knows the facts prevent him from bringing a successful civil suit. His insinuations have no bearing on the matter before this Court and serve only to obscure the real issue: whether Mr. Walker's violation of company policy and subsequent termination rendered him ineligible to accept an available light duty position, discharging the employer's obligation to pay time loss benefits upon his medical release to light duty work.

Mr. Walker was not denied any of the benefits to which he was entitled under the Industrial Insurance Act. His claim was allowed and his medical expenses paid for by the employer. He received temporary total disability while he was, in fact, totally disabled. He is no longer totally disabled. He is not entitled to temporary total disability benefits.

- b. Mr. Walker's termination was wholly unrelated to his industrial injury for the purposes of the Industrial Insurance Act.**

The claimant himself concedes he "was terminated for being at fault for the vehicle accident that resulted in his injury." (Brief of Appellant at 10.) His argument is that his termination was nevertheless "related" to his injury because both his termination and his injury resulted from his misconduct. The claimant is simply wrong.

In *Wilmot*, the Court stated unequivocally, "an employee may be injured on the job, file a workers' compensation claim, and then be

discharged without resulting liability to the employer if the reason for the discharge was the fact that the employee failed to observe health and safety standards, even though that failure resulted in the work-related injury for which the benefits claim was filed." 118 Wash.2d at 75. The example given in *Wilmot* is precisely the situation here. Mr. Walker was fired for his failure to observe health and safety standards. His termination should not result in liability to the employer.

Clearly the claimant acknowledges this on some level, as he has asked the court to "make an exception or rule that a termination related to the incident resulting in the injury is not a termination wholly unrelated to the injury." (Brief of Appellant at 16.) He argues this would be appropriate because the Industrial Insurance Act "shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries occurring in the course of employment." (Brief of Appellant at

13; RCW 51.12.010.) He argues the purpose of the IIA would be defeated if the claimant's time loss benefits were not reinstated, and states this application conforms with the plain meaning of the language in the statute. (Brief of Appellant at 12-13.)

This Court has held, however, that the "plain meaning" of RCW 51.32.090(4)(a) does not require an employer to pay time loss benefits or reemploy an employee whose behavior violates company standards. *O'Keefe v. Dep't of Labor & Indus.*, 126 Wash.App. 760, 766, 109 P.3d 484 (2005). Mr. O'Keefe also argued that the IIA's provision that it should be liberally construed in favor of the worker meant he was entitled to reinstatement of time loss benefits when his light duty "came to an end" (because he was fired) before he was released to full duty. This argument was "flawed," however: "The work did not come to an end within the meaning of RCW 51.32.090(4)(a). O'Keefe stopped performing it because [the employer] fired him for misconduct."

Id. To hold otherwise would have contravened the legislature's intent and led to absurd results.

Id. at 767-768.

The claimant fails to distinguish his argument from that of O'Keefe; his assertion that the trial court's holding violates the purpose of the IIA is conclusory and unsupported by case law.³ Mr. Walker's refusal to acknowledge the distinction between his injury and his at-fault accident does not render the two indistinguishable. His assertion that his injury and his accident are one and the same is fallacious and unpersuasive. Claimant's injury and his termination are two distinct consequences resulting from one root cause: his at-fault accident.

³ Claimant cites *Dep't of Labor & Indus. v. Granger*, 159 Wash.2d 752, 153 P.3d 839 (2007) in support of this argument as well. We agree with the employee that it is necessary to "look to the Act and its purpose in order to construe" the meaning of the statute. We do not agree that violation of safety policy – itself an issue addressed at length in RCW 49.17 – is in any way comparable to "the rules of the union trust fund and its conditions of benefit eligibility." (Brief of Appellant at 14.)

In this case, Mr. Walker has stipulated he is capable of working a light duty position. (CABR at 32.) Because he is capable of gainful employment, he is not entitled to time loss benefits. *O'Keefe*, 126 Wash.App. at 768 ("Because *O'Keefe* is capable of gainful employment (the light duty job), he is not entitled to TTD benefits.") Mr. Walker's "economic loss" arises not from his injuries, but from his failure to observe the safety standards mandated by his employer. RCW 51.12.010.

In fact, the claimant received extensive "economic" benefits, as required by the Industrial Insurance Act. *Id.* He has no outstanding medical bills. He was paid time loss while he was totally disabled. These are the benefits the IIA mandates. If the worker is permanently disabled such that he can no longer earn the wages he earned while working for Glacier as a result of his industrial injuries, he may be entitled to Loss of Earning Power (LEP) benefits under RCW 51.32.090(3). That is not the

question before this Court, however. Temporary total disability benefits are not a remedy to which the claimant is entitled.

Although the Board's decisions are not binding on this Court, it has noted they are persuasive authority. *O'Keefe*, 126 Wash.App. at 766, citing *Weyerhaeuser v. Tri*, 117 Wash.2d 128, 138, 814 P.2d 629 (1991). A number of Board decisions have applied the analysis from *O'Keefe* to situations similar to this one; likewise, the *O'Keefe* opinion was informed by the Board's prior decisions. 126 Wash.App. at 766-767.

The claimant references Washington Pattern Instruction 155.05, which allows an attorney to instruct a jury that a worker is entitled to compensation under the Industrial Insurance Act regardless of fault or negligence. (Brief of Appellant at 15.) This instruction does not further Mr. Walker's argument. He received the benefits to which he was entitled, including medical care and temporary total disability payments. See *In re Jennifer Soesbe*, BIIA Sig.

Dec. 02 19030, 3 (2003) ("If a terminated worker becomes unable to perform any gainful employment or if she can work but has decreased earning power, she is entitled to receive the benefits indicated by law.") Now that he is capable of working, he is no longer entitled to temporary total disability benefits, because he is not totally disabled. *O'Keefe*, 126 Wash.App. at 768; accord *In re Larry W. McBride*, BIIA Sig. Dec. 88 0882, 7 (1989); *In re Carol D. Rose*, BIIA Sig. Dec. 49894, 4 (1978). He may or may not be entitled to other benefits; that issue is not before this Court. The employer complied with its obligation under the Industrial Insurance Act and owes the claimant no additional temporary total disability benefits because he is not temporarily totally disabled. *Id.*, citing *Hubbard v. Dep't of Labor & Indus.*, 140 Wash.2d 35, 43, 992 P.2d 1002 (2000) ("Temporary total disability . . . differs from permanent total disability in duration, not character.")

III. Claimant is not entitled to time loss benefits under RCW 51.32.090(4)(a) because he was terminated for cause, and but for his termination light duty work was available.

- a. RCW 51.32.090(4) does not require an employer to allow an employee terminated for cause to reenter the workplace for the purpose of commencing a light duty position before that termination can take effect and time loss payments can cease.

Under RCW 51.32.090(4)(a), an injured worker's entitlement to time loss benefits ends when he is released to light duty work upon the approval of his treating physician:

Whenever the employer of injury requests that a worker who is entitled to temporary total disability under this chapter be certified by a physician or licensed advanced registered nurse practitioner as able to perform available work other than his or her usual work, the employer shall furnish to the physician or licensed advanced registered nurse practitioner, with a copy to the worker, a statement describing the work available with the employer of injury in terms that will enable the physician or licensed advanced registered nurse practitioner to relate the physical activities of the job to the worker's disability. The

physician or licensed advanced registered nurse practitioner shall then determine whether the worker is physically able to perform the work described. The worker's temporary total disability payments shall continue until the worker is released by his or her physician or licensed advanced registered nurse practitioner for the work, and begins the work with the employer of injury. If the work thereafter comes to an end before the worker's recovery is sufficient in the judgment of his or her physician or licensed advanced registered nurse practitioner to permit him or her to return to his or her usual job, or to perform other available work offered by the employer of injury, the worker's temporary total disability payments shall be resumed. Should the available work described, once undertaken by the worker, impede his or her recovery to the extent that in the judgment of his or her physician or licensed advanced registered nurse practitioner he or she should not continue to work, the worker's temporary total disability payments shall be resumed when the worker ceases such work.

RCW 51.32.090(4)(a).

Generally a claimant must begin his light duty work before his time loss can be terminated; at that point he would resume collecting regular

paychecks rather than time loss benefits.

However, if an employee has been terminated for cause, the employer should not be required to allow him to physically return to the work site to begin work before terminating his employment and time loss benefits.

The statutory language quoted above does not address claimants who are terminated for cause before or during their light duty employment and thus does not provide a bright line rule for its administration in cases like this one. The statute states "temporary total disability payments shall continue until the worker is released by his or her physician or licensed advanced registered nurse practitioner for the work, **and begins the work** with the employer of injury." RCW 51.32.090(4)(a) (emphasis added). Claimant argues that he must be permitted to begin work with the employer before his time loss may be terminated. In the case of an employee terminated for cause after his injury and before he is released to light duty, however, enforcing

the "begins the work" provision of the statute would lead to absurd and unjust results. *Id.*

At the outset, it should be noted that the practical result of applying the statute as the Proposed Decision and Order would require is absurd. See *Flanigan v. Dep't of Labor & Indus.*, 123 Wash.2d 418, 426, 869 P.2d 14 (1994) (The Court does "not interpret statutes to reach absurd and fundamentally unjust results.") It makes absolutely no sense to require an employer to invite a terminated employee back to work simply because he was injured simultaneous to the conduct leading to his termination. Applying this rule the way the claimant urges would require the employer to allow an incompetent, insubordinate, or otherwise unwelcome worker onto the premises, require it to assign him a duty, and allow him to commence that duty before dismissing the employee for conduct he or she exhibited weeks, months, or even years prior. This type of hoop jumping is clearly patently ridiculous, not to mention the fact that taking

such an action would expose the employer to additional liability and possibly put other workers in danger. Neither the statute nor the case law applying it can be read to require an actual physical return to work before an injured and ill-behaving employee's employment (and thus time loss) can be terminated. To do so would lead inevitably to "absurd and fundamentally unjust results." *Id.*

The *O'Keefe* decision established that requiring an employer to resume paying time loss to an employee terminated for cause unrelated to his industrial injury is "an absurd and unjust result." 126 Wash.App at 766, *citing Flanigan*, 123 Wash.2d at 426. The *O'Keefe* Court noted "An employer is not required to tolerate behavior from an injured worker that it would not tolerate from an employee who was not injured, nor does an employer exercise its right to have a satisfactory work force at the cost of replacing wages for an employee who would be earning the wage, but for his or her own behavior." 126

Wash.App. at 767, *citing Soesbe*, BIIA No. 02 19030. It further pointed out that the claimant "could have reinstated his TTD benefits at any time by performing poorly and thereby forcing [the employer] to fire him," which would not have been in accordance with the legislature's intentions. *Id.* at 768. It held, therefore, that light duty work does not "come to an end within the meaning of RCW 51.32.090(4)(a)" when an employee is fired, rather, the employee simply ceases performing that work. *Id.* at 766.

The Board of Industrial Insurance Appeals has held that the analysis developed in *O'Keefe* also applies to cases in which the claimant does not actually resume light duty work due to disciplinary termination. The Board recently addressed this exact issue in *In re Jeffrey W. Pedersen*, BIIA Dec. 06 18967 (2007). In *Pedersen*, the claimant was also a cement truck driver fired for cause following an on-the-job injury. *Id.* at 1. Claimant was released to a light duty job several months later, but by that

time his employment had been terminated for his refusal to take a mandatory post-accident drug test. *Id.* The Board held that in such a circumstance, Mr. Pedersen was not entitled to time loss payments for the time period during which he could have been working light duty but for his termination. *Id.* at 2. "In both cases, work with the employer of injury was available to the injured worker. Only the worker's actions unrelated to the injury prevented the worker from taking the job." *Id.*, citing *In re Chad Thomas*, BIIA Sig. Dec. 00 10091, (2001) (holding that termination from light duty position for behavior that would not be tolerated in other staff members did not require resumption of time loss benefits.); see also *Soesbe*, BIIA Sig. Dec. 02 19030 (holding that when modified work ends for disciplinary reasons unrelated to the claimant's injury, the modified duty is "available" within the meaning of RCW 51.32.090(4)(a).)

The claimant differentiates between situations in which the employee is terminated

for bad behavior after returning to light duty and situations in which the employee is terminated beforehand. The cited cases may be distinguishable factually, but they are not distinguishable legally. Distinguishing between the two situations creates a disparity of treatment between (1) workers who are injured and then terminated for reasons unconnected to the injury before they have recovered sufficiently to perform light duty, and (2) workers who are injured and terminated for reasons unconnected to the injury after they are released for and are performing light duty. The former are treated more favorably than the latter, without any justification. The former group benefits from their bad behavior while the latter group does not. This distinction impermissibly leads to absurd and unjust results. *Flanigan*, 123 Wash.2d at 426.

Clearly, then, actual commencement of light duty work cannot be a necessary precursor to cessation of time loss where a claimant has been

terminated for cause. The statute should not be interpreted to grant a windfall to injured employees who have been terminated for cause and who, *but for their own misconduct*, would have been returned to modified work. Here, although Mr. Walker did not actually begin light duty, the requirements of RCW 51.32.090(4)(a) were met when the employer made light duty work available and the claimant was released to perform it. But for Mr. Walker's safety violation and subsequent termination, commencement of an appropriate light duty position would have occurred on November 28, 2005. This is sufficient to discharge employer's time loss obligation.

- b. Once an employee is capable of performing light duty work, his entitlement to temporary total disability benefits ceases regardless of whether he begins a proffered light duty job or not.**

Even if the Court determines that the employer did not comply with RCW 51.32.090(4) because Mr. Walker did not actually start his light duty position, Claimant *still* is not

entitled to time loss as of November 28, 2005. Temporary total disability payments are only owed so long as a claimant is actually *totally* disabled. As of the date Claimant was capable of working light duty, he was not entitled to time loss.

In *O'Keefe*, the court noted that temporary total disability "differs from permanent total disability in duration, not character." 126 Wash.App. at 768. In other words, an employee must be *totally* disabled, either temporarily or permanently, to receive total disability benefits. When an employee is not *totally* disabled, he or she cannot, by definition, be entitled to total disability benefits.

The Board has stated unequivocally that "RCW 51.32.090(4) can only apply if the claimant is unable to perform light or sedentary work of a general nature." *McBride*, BIIA Sig. Dec. 88 0882 at 7. In that case, even though the Board found that light duty had not been made available to the claimant as required under the statute, its

inquiry did not end there. *Id.* Since Claimant "was not precluded from reasonably continuous regular employment" during the time in question, he was not entitled to time loss benefits. *Id.* The Board thus stated that, on remand, the Department was to "issue a new order stating that, although light duty was not made available, the claimant was capable of reasonably continuous regular gainful employment, and ordering termination of time loss compensation payments" as of the date claimant was cleared for light duty. *Id.* at 12.

In *O'Keefe*, the Court agreed: "Because *O'Keefe* is capable of gainful employment (the light duty job), he is not entitled to TTD benefits." 126 Wash.App. at 768.

Thus, the applicable standard of law here is whether the claimant is "capable of gainful employment." *Id.* The parties have stipulated that Mr. Walker has, at all times relevant to this case, been capable of performing the light duty job available to him at Glacier but for his

termination for violating company policy. (CABR 32.) He is therefore "capable of gainful employment" for the purposes of this inquiry. *O'Keefe*, 126 Wash.App. at 768. No other issue is before this Court. The claimant has not argued that he is incapable of performing "light or sedentary work of a general nature." *McBride*, BIIA Sig. Dec. 88 0882 at 7. He is not totally disabled. He is therefore not entitled to temporary total disability benefits.

CONCLUSION

The trial court's Findings of Fact are supported by substantial evidence. That evidence supports its Conclusions of Law. For the foregoing reasons, the employer, Glacier Northwest, Inc., respectfully requests this Court affirm the Order of the Superior Court holding that the claimant/appellant is not entitled to reinstatement of temporary total disability benefits.

DATED this 1st day of December 2008.

RONALD W. ATWOOD, P.C.



RONALD W. ATWOOD, WSB No. 19622
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Attorneys for Employer,
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CERTIFICATE OF SERVICE BY MAIL

I, Allison Dion, hereby declare and state:

I am over the age of eighteen years, employed in the City of Portland, County of Multnomah, State of Oregon, and not a party to this action. My business address is Ronald W. Atwood, 200 Oregon Trail Building, 333 SW Fifth Avenue, Portland, OR 97204.

On December 1, 2008, I served the original **BRIEF OF RESPONDENT** on the parties by placing the original in a sealed envelope with postage prepaid in the United States Post Office at Portland, Oregon, addressed as follows:

Mr. David C. Ponzoha
Court Clerk
Washington State Court of Appeals
Division Two
950 Broadway, Suite 300
Tacoma, WA 98402

I further certify that I have made service of a true copy of the **BRIEF OF RESPONDENT** by placing a copy in the United States Post Office at Portland, Oregon on the 1st day of December 2008, with postage prepaid, addressed to:

Mr. Steven L. Busick
Attorney at Law
1915 Washington Street
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Vancouver, WA 98666-1385

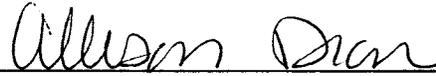
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I declare under penalty of perjury that the foregoing
is true and correct.

EXECUTED December 1, 2008 at Portland, Oregon.

RONALD W. ATWOOD PC



Allison Dion
Certified Legal Assistant