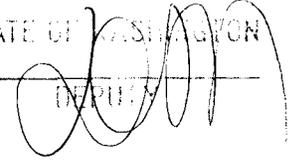


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STATE OF WASHINGTON
BY _____



No. 41369-8-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

ELAINE MATTHEWS,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF
THE STATE OF WASHINGTON,

Respondent,

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

Comes now the appellant, Elaine Matthews, Plaintiff below, by and through her attorney of record, Tara Jayne Reck of the Law Offices of David B. Vail and Jennifer Cross-Euteneier & Associates, and hereby offers this Brief in support of her appeal.

This case originates from an Administrative Law Review (ALR) appeal from a Decision and Order of the Board of Industrial Insurance Appeals (Board) dated November 9, 2009 in which the Board found that Elaine Matthews *did not engage in willful misrepresentation* for the period(s) at issue but concluded that she was “overpaid time-loss compensation benefits which must be reimbursed to the Department of Labor and Industries.” She appealed that decision to Superior Court asserting that the Board exceeded its jurisdiction by adjudicating temporary total disability when the Department had not previously passed on that issue and the sole question under appeal was whether she engaged in willful misrepresentation.

Superior Court affirmed the Board’s decision after considering briefing and oral argument on the limited subject of whether the Board exceeded its jurisdiction when it concluded that between July 6, 2007 and

August 26, 2007; September 16, 2007 and October 22, 2007; and November 28, 2007 through January 20, 2008, Elaine Matthews was overpaid time-loss compensation benefits which must be reimbursed to the Department of Labor and Industries; and remanded the matter to the Department with direction to issue a further order determining the overpayment.

This decision must not stand. The Board and Superior Court exceeded their jurisdictional authority in entering findings and conclusions regarding whether Elaine Matthews was a temporarily-totally disabled worker because the Department never passed upon this particular issue. The Department issued *only* an order finding that Elaine Matthews' engaged in willful misrepresentation. Therefore, it was the willful misrepresentation determination alone that was before the Board and Superior Court. This decision must be reversed and this matter remanded, not to Superior Court or the Board, but to the Department level so that the Department can exercise its original jurisdiction to pass upon temporary total disability and Elaine Matthews' entitlement to time-loss compensation benefits for the periods at issue.

II. ASSIGNMENTS OF ERROR

A. SUPERIOR COURT AND THE BOARD ERRED IN ASSERTING JURISDICTION OVER THE SUBJECT MATTER OF THIS APPEAL.

1. Because the Department issued an order only as to the subject of willful misrepresentation, it has not passed on Elaine Matthews' entitlement to time-loss compensation benefits and retains original jurisdiction over this issue.
2. It is error for any other jurisdictional entity, whether it be the Board or Superior Court to rule on Elaine Matthews' entitlement to time-loss compensation benefits when the Department has not previously passed upon that subject.

B. SUPERIOR COURT AND THE BOARD ERRED IN CONCLUDING THAT ELAINE MATTHEWS WAS OVERPAID TIME LOSS COMENSATION BECAUSE THE EVIDENCE PRESENTED WAS ONLY REGARDING THE ISSUE OF WILLFUL MISREPRESENTATION AND NOT TEMPRARY TOTAL DISABILITY.

1. In the hearings which took place at the Board level, the Department had the burden of proving by clear, cogent and convincing evidence that Elaine Matthews engaged in willful misrepresentation and Elaine Matthews successfully presented evidence rebutting the Department's case.
2. Were Elaine Matthews to protest and/or appeal a Department order denying time loss compensation on the basis that she was not a temporarily and totally disabled

worker, she would have the burden of proving by a preponderance of the evidence that she was temporarily and totally disabled for the time period(s) at issue.

3. Because the Department issued an order that Elaine Matthews was overpaid time-loss compensation and assessed her with a fifty percent penalty for willful misrepresentation, instead of issuing an order denying time loss compensation on the basis that she was not a temporarily and totally disabled worker, Elaine Matthews never had the burden of proving, nor was she given the opportunity to present a *prima facie* case of temporary total disability.
4. Because the sole issue raised by the Department's issuance of a willful misrepresentation order was whether Elaine Matthews engaged in willful misrepresentation, jurisdiction over the overpayment is limited to willful misrepresentation alone and does not extend to temporary total disability.

III. ISSUES

- A. Whether Superior Court or the Board of Industrial Insurance Appeals had jurisdiction to pass upon temporary total disability

and assess Elaine Matthews with an overpayment of time loss compensation on that basis, when the only issue under appeal as raised by the Department's order was whether Elaine Matthews engaged in willful misrepresentation?

IV. STATEMENT OF THE CASE

A. FACTUAL AND PROCEDURAL HISTORY

1. Claim number Y-711391:

On May 24, 2006, Elaine Matthews filed an application for benefits under the Industrial Insurance Act (Act) when she injured her back, and the back of her head while working for Puget Sound Health. ("Certified Appeal Board Record" herein after "CABR" at p. 71). The Department allowed Elaine Mathews' claim on June 2, 2006, and assigned it claim number Y-711391. (CABR at p. 71). Thereafter the Department administered her claim and provided benefits in accordance with the law and facts of her particular case. (CABR at pp. 71-74).

However, on June 30, 2008 the Department issued an order assessing Ms. Matthews with an overpayment of \$11,311.32 plus a fifty percent penalty on the basis that she engaged in willful misrepresentation. (CABR at p. 74). Elaine Matthew protested and requested reconsideration of all adverse orders to include the willful misrepresentation order. (CABR at p.

74). On July 22, 2008 the Department issued an order affirming the June 30, 2008 order. (CABR at p. 74). As a result, Elaine Matthews filed a notice of appeal with the Board. (CABR at p. 74). On October 1, 2008, the Board granted the appeal and the matter was assigned docket number 08 18410. (CABR at p. 74).

2. Procedure Before the Board:

Generally when an injured worker appeals an order of the Department, he or she has the burden of proving entitlement to benefits by a preponderance of the evidence. However, in willful misrepresentation cases, the Department has the burden of proving by clear, cogent and convincing evidence that the willful misrepresentation order is correct. Here, the parties appeared for a scheduling conference on February 20, 2009. (CABR at p. 80). The Department's case was scheduled to begin May 11, 2009 and Elaine Matthews' case was scheduled to begin May 27, 2009. (CABR at p. 81). At the conclusion of the Department's case in chief, Elaine Matthews filed a Motion for a Judgment as a Matter of Law. (CABR at p. 151). This motion was denied. (CABR at p. 44). As a result, she proceeded with her case in chief.

The witnesses who testified at the request of the Department of Labor and Industries were: 1) Elaine Matthews, the claimant; 2) Buffy Tyroum, a

nursing home administrator: 3) Lexy K. Liurance-Brott, a nursing home administrator; 4) Venus Davidson, a nursing home administrator; 5) Michelle Barre, the vocational rehabilitation counselor assigned to Elaine Matthews' claim; 6) Julian Rodriguez, a physician's assistant who treated Elaine Matthews under her claim; and 5) Alan Gruse, the "fraud" adjudicator at the Department who issued the willful misrepresentation order under appeal. The witnesses who testified at the request of the claimant were: 1) Elaine Matthews, the claimant; 2) Daniel Korma, her husband; and 3) Darryl Vaughan, the Department claims manager for Elaine Matthews' claim.

On July 17, 2009, Industrial Appeals Judge (IAJ) Craig Stewart issued a proposed decision and order reversing the Department's willful misrepresentation order, finding that Elaine Matthews did not engage in willful misrepresentation during the time period at issue, but assessing her with an overpayment in the amount of \$11,311.32. (CABR at pp. 50-51). Both the Department and Elaine Matthews submitted Petitions for Review to the Board. (CABR at p. 14 and p. 27). In its Petition for Review the Department argued the IAJ erred in finding that Ms. Matthews did not engage in willful misrepresentation while Elaine Matthews argued in her Petition for Review the IAJ exceeded his jurisdiction in addressing temporary total disability and in assessing her with an overpayment on

that basis. The Board granted review and issued a decision and order on November 9, 2009. (CABR at pp. 2-4).

In its decision and order the Board found that Elaine Matthews ***did not engage in willful misrepresentation for the period at issue*** but concluded that she was “overpaid time-loss compensation benefits which must be reimbursed to the Department of Labor and Industries.” (CABR at pp. 3-4). Accordingly, Elaine Matthews filed an appeal of the Board’s decision in Superior Court.

3. Superior Court Action:

The Board’s decision was then appealed to the Pierce County Superior Court and was assigned to Department Twelve, the Honorable Judge Stephanie A. Arend. (“Clerk’s papers” herein after “CP” at p. 1) Both parties provided trial briefs and presented oral argument. Having considered the briefing and argument, on October 2, 2010 the Court entered a judgment and order affirming the Board’s decision regarding temporary total disability and the overpayment of time-loss compensation to Elaine Matthews. As a result, Elaine Matthews has appealed to the Washington State Court of Appeals, Division Two.

V. ARGUMENT

The issue being presented is very simple: Whether the Board of Industrial Insurance Appeals and Superior Court exceeded their jurisdiction in concluding:

(1) That between July 6, 2007 and August 26, 2007; September 16, 2007 and October 22, 2007; and November 28, 2007 through January 20, 2008, Ms. Matthews was overpaid time-loss compensation benefits which must be reimbursed to the Department of Labor and Industries; and

(2) Remanded the matter to the Department with direction to issue a further order determining the overpayment;

When the *sole* issue on appeal to the Board was whether the Department was correct when it determined the claimant willfully misrepresented her inability to work and in ordering a refund of \$11,311.32, plus a fifty percent penalty?

The answer is equally simple. Both the Board and Superior Court exceeded their jurisdictional authority in entering findings and conclusions regarding Elaine Matthews' entitlement to time-loss compensation on the basis that she was not a temporarily and totally disabled worker, because the Department never passed upon these issues. The Department *only*

issued an order finding that Elaine Matthews engaged in willful misrepresentation. It was that determination alone that was before the Board and Superior Court.

The Industrial Insurance Act (Act) was established to protect and provide benefits *for injured workers*, not employers or the Department. It has been held for many years that the courts and the Board are committed to the rule that the Act is remedial in nature and the beneficial purpose should be liberally construed in favor of the beneficiaries. *Wilber v. Department of Labor and Industries*, 61 Wn.2d 439, 446 (1963); *Hastings v. Department of Labor and Industries*, 24 Wn.2d 1; *Nelson v. Department of Labor and Industries*, 9, Wn.2d 621; and *Hilding v. Department of Labor and Industries*, 162 Wash. 168. In fact, the Act was specifically created to minimize the suffering of injured workers, both physically and financially. RCW 51.04.010.

Reading the Act in a light most favorable to Elaine Matthews, the injured worker, in conjunction with the purpose behind the Act, it was improper for the Board or Superior Court to pass upon temporary total disability and entitlement to benefits flowing therefrom. The only issue that should have been passed upon by the Board or Superior Court was whether Elaine Matthews engaged in willful misrepresentation and should be subject to the fifty percent penalty plus overpayment imposed.

A. STANDARD OF REVIEW

Jurisdiction of the Superior Court on review of a decision of the Board is appellate only, and it can only decide matters decided by the administrative tribunal. *Shufeldt v. Department of Labor and Industries*, 57 Wash.2d 758, 359 P.2d 495 (1961). Review by the Court of Appeals is limited to an examination of the record to see whether substantial evidence supports the findings made after the Superior Court's de novo review and whether the Court's conclusions of law flow from the findings. *Rogers v. Department of Labor and Industries*, 151 Wash.App. 174, 210 P.3d 355 (2009).

Relief from a decision of the Board is proper when it has erroneously interpreted or applied the law, the order is not supported by substantial evidence, or it is arbitrary or capricious. *Mt. Baker Roofing, Inc. v. Washington State Dept. of Labor and Industries*, 146 Wash.App. 429, 191 P.3d 65 (2008), amended on reconsideration.

The Department is charged with administering the Workers' Compensation Act (Act), so the Court of Appeals affords substantial weight to the Department's interpretation of the Act but the Court of Appeals may nonetheless substitute its judgment for the Department's

because its review of the Act is de novo. *McIndoe v. Department of Labor and Industries of State of Wash.*, 100 Wash.App. 64, 995 P.2d 616 (2000), review granted 141 Wash.2d 1025, 11 P.3d 826, affirmed 144 Wash.2d 252, 26 P.3d 903.

B. THE ACT WAS CREATED TO PROTECT AND PROVIDE BENEFITS FOR INJURED WORKERS AND THEIR BENEFICIARIES.

The Act was established to protect and provide benefits for injured workers. It must be emphasized that it has been held for many years that the courts and the Board are committed to the rule that the Act is remedial in nature and the beneficial purpose should be liberally construed in favor of the beneficiaries. *Wilber v. Department of Labor and Industries*, 61 Wn.2d 439, 446 (1963); *Hastings v. Department of Labor and Industries*, 24 Wn.2d 1; *Nelson v. Department of Labor and Industries*, 9, Wn.2d 621; and *Hilding v. Department of Labor and Industries*, 162 Wash. 168. Furthermore, as noted by the Washington Supreme Court in *Clauson v. Department of Labor and Industries*, 130 Wn. 2d 580 (1996) it is mandated that **any doubt** as to the meaning of the workers' compensation law be resolved in favor of the worker. *Id.*, at 586.

Elaine Matthews has not been afforded the full protection of the Act; in fact, the Board and Superior Court have attempted to divest her of

her right to present a prima facie case for temporary total disability and entitlement to time-loss compensation on that basis. The correctness of the Department's willful misrepresentation determination alone, was before the Board and Superior Court. Their decision to enter findings and conclusions regarding temporary total disability and entitlement to time-loss compensation on that basis must be reversed and this matter remanded to the Department level so it can exercise its original jurisdiction to pass upon temporary total disability and Elaine Matthews' entitlement to time-loss compensation benefits for the periods at issue.

C. JURISDICTION IN THIS APPEAL WAS LIMITED TO THE ISSUE OF WILLFUL MISREPRESENTATION BECAUSE THAT IS THE ONLY ISSUE PREVIOUSLY PASSED UPON BY THE DEPARTMENT OF LABOR AND INDUSTRIES.

The Board and Superior Court's scope of review is limited to those issues which the Department previously decided. *Lenk v. Department of Labor & Indus.*, 3 Wash.App. 977, 982, 478 P.2d 761 1970) (“[I]f a question is not passed upon by the Department, it cannot be reviewed either by the board or the superior court.”). There is “no warrant in the statutory enumeration of the Board's powers, past or present, for the contention that the Board can, on its own motion, change the issues brought before it by a notice of appeal and enlarge the scope of the

proceedings.” *Brakus v. Department of Labor & Indus.*, 48 Wash.2d 218, 223, 292 P.2d 865 (1956).

The scope of review in this case was limited to:

“Was the Department of Labor and Industries correct when it determined the claimant willfully misrepresented her inability to work and in ordering a refund of \$11,311.32, plus a 50 percent penalty?” (CABR at p. 45)

More specifically, the Department’s original June 30, 2008, willful misrepresentation order, admitted and contained in the CABR as Exhibit number 11, states in pertinent part:

“THEREFORE, it is ordered that the claimant, Elaine Matthews, shall refund the Department of Labor and industries the overpayment of \$11,311.32 plus a 50% penalty of \$5,655.66 pursuant to RCW 51.32.240, in a total amount of \$16,966.98.

Formal demand is hereby made for repayment in the amount of \$16,966.98 on the basis that such payments have been induced by willful misrepresentation.”

Seven subsections are contained under RCW 51.32.240. **Only** section five (5) addresses willful misrepresentation and the fifty percent penalty.

Specifically, RCW 51.32.240(5) states:

(5)(a) Whenever any payment of benefits under this title has been induced by willful misrepresentation the recipient thereof shall repay any such payment together with a penalty of fifty percent of the total of any such payments and the amount of such total sum may be recouped from any future payments due to the recipient on any claim with the state fund or self-insurer against whom the willful misrepresentation was committed, as the case may be, and the amount

of such penalty shall be placed in the supplemental pension fund. Such repayment or recoupment must be demanded or ordered within three years of the discovery of the willful misrepresentation.

(b) For purposes of this subsection (5), it is willful misrepresentation for a person to obtain payments or other benefits under this title in an amount greater than that to which the person otherwise would be entitled. Willful misrepresentation includes:

(i) Willful false statement; or

(ii) Willful misrepresentation, omission, or concealment of any material fact.

(c) For purposes of this subsection (5), “willful” means a conscious or deliberate false statement, misrepresentation, omission, or concealment of a material fact with the specific intent of obtaining, continuing, or increasing benefits under this title.

(d) For purposes of this subsection (5), failure to disclose a work-type activity must be willful in order for a misrepresentation to have occurred.

(e) For purposes of this subsection (5), a material fact is one which would result in additional, increased, or continued benefits, including but not limited to facts about physical restrictions, or work-type activities which either result in wages or income or would be reasonably expected to do so. Wages or income include the receipt of any goods or services. For a work-type activity to be reasonably expected to result in wages or income, a pattern of repeated activity must exist. For those activities that would reasonably be expected to result in wages or produce income, but for which actual wage or income information cannot be reasonably determined, the department shall impute wages pursuant to RCW 51.08.178(4).

Elaine Matthews was charged with willful misrepresentation *only*. At no point in time is there any indication that the Department considered and/or passed upon whether she was a temporarily and totally disabled worker. In issuing the willful misrepresentation order and demanding repayment

with the fifty percent penalty, at no point in time did the Department ever cite any other reason under RCW 51.08.178 for the adjudicative action it was taking OTHER than willful misrepresentation. The Department order under appeal addresses willful misrepresentation **not an overpayment of benefits for any other reason, including temporary total disability.** Hearings were held on the issue of willful misrepresentation placing the burden on the Department to proceed with its case in chief and to prove the validity of its order by clear, cogent and convincing evidence. Following the Department's case, Elaine Matthews presented her case in chief to rebut the Department's presentation of a *prima facie* case that the willful misrepresentation order issued was correct. She did not have an opportunity to present evidence regarding temporary total disability and entitlement to time-loss compensation on that basis; the entire focus of proceedings was centered on the issue of willful misrepresentation **only.**

D. THE BURDEN OF PROVING WILLFUL MISREPRESENTATION IS DIFFERENT FROM THE BURDEN OF PROVING ENTITLEMENT TO TIME LOSS COMPENSATION.

1. Burden of proving willful misrepresentation:

In 2004 the legislature changed the former "fraud" statute under RCW 51.32.240 and enacted the "willful misrepresentation" statute under RCW 51.21.240 (5) cited above. Specific terms within RCW

51.32.240(5) are further clarified under WAC 296-14-4121, WAC 296-14-4122, and WAC 296-14-4123.

WAC 296-14-4121 states:

296-14-4121. What does the term 'willful misrepresentation' mean with regard to the receipt of workers' compensation benefits?

This term is found in RCW 51.32.240(5) which provides a fifty percent penalty, in addition to any overpayment, whenever any payment of benefits has been induced by "willful misrepresentation." The law goes on to state that it is willful misrepresentation for a person to obtain payments or other benefits in an amount greater than that to which he or she would have otherwise been entitled. Willful misrepresentation includes making a willful false statement or the willful misrepresentation, omission, or concealment of any material fact.

(1) Willful means a conscious or deliberate false statement, misrepresentation, omission, or concealment of a material fact with the specific intent of obtaining, continuing, or increasing workers' compensation benefits. Failure to disclose a work-type activity must be willful in order for a misrepresentation to have occurred.

(2) The assessment of the fifty percent penalty does not apply to those instances where the misrepresentation is not willful, as defined above. For example, a worker receives wages at the time of injury of \$10.25 per hour, but he inadvertently indicates on the report of industrial injury or occupational disease that his pay is \$10.75 per hour. The state fund employer fails to submit a completed report form and the time-loss compensation benefit rate is based on wages of \$10.75 per hour. When this information is provided to the employer, worker, and medical provider by legal order, no interested party submits a protest within the statutory time frame, but further investigation later reveals the misinformation. An overpayment determination under RCW 51.32.240(1) may be appropriate upon discovery of the correct hourly pay rate, but the worker has not engaged in willful misrepresentation with specific intent to obtain benefits to which

he would have otherwise not been entitled.

WAC 296-14-4122 states in pertinent part:

296-14-4122. For purposes of determining willful misrepresentation, what does the term 'specific intent' mean?

"Specific intent" means the commission of an act or the omission of information with the knowledge that such an act or omission will lead to wrongfully obtaining benefits. For example, a worker who completes a document knowingly misrepresenting that he/she is unable to perform work or work-type activities has committed an act. Submitting this document to the department or self-insurer in order to wrongfully receive workers' compensation benefits under Title 51 RCW represents specific intent.

WAC 296-14-4123 states in pertinent part:

296-14-4123. What is meant by 'work-type activity'?

(1) Work-type activity means any activity for which a reasonable person would expect to be compensated or for which a reasonable employer would expect to pay compensation.

(2) Work-type activity does not mean exploration of a job for a short period of time to determine whether the worker can do the job so long as:

(a) The worker does not receive wages, income, or anything of value; and

(b) The worker or his/her family has no financial interest in or benefits from the worker's job exploration.

Activity done intermittently or as a hobby that does not generate income will not generally rise to the level of repeated work-type activity.

Prior to the willful misrepresentation amendment of RCW 51.32.240(5) the Department had the burden of proving all of the nine elements of “fraud” in order to recoup the cost of benefits paid, plus a penalty. However, with the 2004 amendment, that burden has changed somewhat, and the Department now has the burden of proving willful misrepresentation by clear, cogent and convincing evidence. *In re Frank Hejna*, Dckt. No. 04 24184 (August 28, 2006).

This burden is further defined by Washington Civil Pattern Jury Instructions, 160.02. The instruction states:

A party who alleges [willful misrepresentation] has the burden of proving it by clear, cogent, and convincing evidence.

When it is said that a proposition must be proved by clear, cogent, and convincing evidence, it means that the proposition must be proved by evidence that carries greater weight and is more convincing than a preponderance of evidence. However, it does not mean that the proposition must be proved by evidence that is convincing beyond a reasonable doubt.

A “preponderance of the evidence” means that you must be persuaded, considering all the evidence in the case, that a proposition is more probably true than not true. “Preponderance of the evidence” is defined here solely to aid you in understanding the meaning of “clear, cogent, and convincing.”

When the Department issues an order alleging willful misrepresentation and demanding repayment thereof plus a fifty percent penalty, it is the Department’s burden to prove by clear, cogent and convincing evidence

that the injured worker engaged in willful misrepresentation. Here the burden was on the Department to prove Ms. Matthews' engaged in willful misrepresentation; the burden was not on Ms. Matthews' to prove entitlement to time-loss compensation benefits.

2. Burden of proving temporary total disability.

To present a *prima facie* case for entitlement to time-loss compensation on the basis that he/she is a temporarily and totally disabled worker, a party "must present substantial evidence; evidence of a character which, if un-rebutted or un-contradicted, would convince an unprejudiced, thinking mind of the truth of the issues on appeal." *Omeitt v. Department of Labor & Indus.*, 21 Wn.2d 684 (1944). In order for a claimant like Elaine Matthews to present a *prima facie* case for entitlement to time-loss compensation on the basis that she is temporarily and totally disabled, she must present medical testimony, *Weinheimer v. Department Labor and Industries*, 8 Wn 2d. 14 (1941); *Johnson v. Department of Labor and Industries*, 45 Wn 2d. 71 (1954); and/or vocational testimony based upon proven and assumed medical facts of loss of function. *Fochtman v. Department of Labor and Industries*, 7 Wn. App. 286 (1972); *Spring v. Department of Labor and Industries*, 96 Wn 2d. 914 (1982). Time-loss compensation benefits are awarded in cases where the injured worker is found to be temporarily and totally disabled and the benefits are payable

during periods in which a claimant's condition is not fixed and stable and requires medical treatment. *Hunter v. Department of Labor and Industries*, 43 Wn. 2d 696 (1953); *Franks v. Department of Labor and Industries*, 35 Wn. 2d 763 (1959).

The proof required to establish temporary total disability and entitlement to time-loss compensation is essentially the same as what is required to establish permanent total disability. The primary difference relates to the duration of the disability. *Bonko v. Department of Labor and Industries*, 2 Wn App. 22 (1970). A right to loss of earning power benefits requires a showing of a loss of function resulting in a reduced earning capacity of at least 5% below the earning capacity existing prior to the injury. RCW 51.32.090(3). *In re Mark A. Billings*, Dckt. No. 70 883 (July 30, 1986).

Furthermore, showing temporary total disability and entitlement to time-loss compensation benefits has a different burden of proof than willful misrepresentation. The Washington Pattern Jury Instructions, Civil illustrate this point. Washington Civil Pattern Jury Instruction 155.03 "Burden of Proof" states:

The findings and decision of the Board of Industrial Insurance Appeals are presumed correct. This presumption is rebuttable, and it is for you to determine whether it is rebutted by the evidence.

The burden of proof is on (name of appellant) to establish by a preponderance of the evidence that the decision is incorrect.

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a preponderance of the evidence, or the expression "if you find" is used, it means that you must be persuaded, considering all the evidence in the case [bearing on the question], that the proposition on which that party has the burden of proof is more probably true than not true.

Washington Civil Pattern Jury Instruction 155.07 addresses total disability:

Total disability is an impairment of mind or body that renders a worker unable to perform or obtain a gainful occupation with a reasonable degree of success and continuity. It is the loss of all reasonable wage-earning capacity.

A worker is totally disabled if unable to perform or obtain regular gainful employment within the range of the worker's capabilities, training, education, and experience. A worker is not totally disabled solely because of inability to return to the worker's former occupation. However, total disability does not mean that the worker must have become physically or mentally helpless.

Total disability is permanent when it is reasonably probable to continue for the foreseeable future.

Therefore, if an injured worker appeals a decision of the Department denying entitlement to specific benefits, such as time-loss compensation benefits, the burden is placed upon the injured worker to persuade the Trier of Fact, considering all the evidence bearing on the question at issue, that the proposition on which that party has the burden of proof is more probably true than not true. In this case, if the

Department had issued an order denying time-loss compensation to Elaine Matthews on the basis that she was not a temporarily and totally disabled worker, she would have the burden of proving by a preponderance of the evidence, through the presentation of medical and/or vocational testimony, that she was temporarily and totally disabled for the time periods at issue.

Because the burden of proof required for proving temporary total disability is different, and because the elements themselves are different from those required to show willful misrepresentation, it was error for the Board or Superior Court to enter findings and conclusions regarding Elaine Matthews' entitlement to time-loss compensation. The Department order under appeal alleges willful misrepresentation and issue under appeal was limited to an appeal of that willful misrepresentation order; it did not extend to temporary total disability. Applying a temporary total disability analysis to deny time-loss compensation benefits and assess an overpayment is inappropriate and this decision must be reversed. This matter must be remanded to the Department level so that the Department can exercise its original jurisdiction to pass upon temporary total disability and Elaine Matthews' entitlement to time-loss compensation benefits for the periods at issue.

VI. CONCLUSION

In conclusion, Superior Court and the Board lacked jurisdictional authority to pass upon Elaine Matthews' entitlement to time-loss compensation on the basis of whether she was a temporarily and totally disabled worker. The only issue under appeal and over which Superior Court and the Board had jurisdiction was the Department's assertion that Elaine Matthews engaged in willful misrepresentation. Because Superior Court and the Board entered findings and conclusions regarding both willful misrepresentation and temporary total disability, the decision with respect to temporary total disability and overpayment of time-loss compensation benefits on that basis must be reversed. This matter must be *remanded to the Department level* so that the Department can exercise its original jurisdiction to pass upon temporary total disability and Elaine Matthews' entitlement to time-loss compensation benefits for the periods at issue. A remand to either the Board or Superior Court would serve no useful purpose as the department retains original

jurisdiction regarding whether Elaine Matthews is temporarily and totally disabled and entitled to time-loss compensation benefits for the period(s) at issue.

Dated this 17 day of May, 2011.

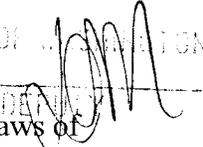
Respectfully submitted,
VAIL-CROSS & ASSOCIATES

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CERTIFICATE OF MAILING

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SIGNED at Tacoma, Washington.

STATE OF WASHINGTON
BY 

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, hereby certifies that on the 17th day of May, 2011, the document to which this certificate is attached, Appellant's Opening Brief, was placed in the U.S. Mail, postage prepaid, and addressed to Respondent's counsel as follows:

James Mills
Assistant Attorney General
P.O. Box 2317
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DATED this 17th day of May, 2011.


LYNN M. VENEGAS, Secretary