

No. 298566

COURT OF APPEALS, DIVISION III  
STATE OF WASHINGTON



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STATE OF WASHINGTON,

Respondent,

vs.

CHRISTOPHER A. L. KOKER,

Appellant.

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APPELLANT'S REPLY BRIEF

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ARGUMENT:

1. To Establish that an Injured Worker Committed Theft of L & I Time Loss Benefits, the State Must Prove that the Worker Actually Received Payments in Excess of the Benefits the Worker was Legally Entitled to Receive Under the Industrial Insurance Act.

The State argues that Koker committed second degree theft of the L & I benefits because his alleged acts of deception “resulted in his receipt of benefits, time-loss compensation, from L & I that he would not have otherwise been entitled to.” Brief of Respondent, p. 17. The State fails, however, to support that claim with any explanation as to what “time-loss compensation” is, when an injured worker is entitled to receive time loss compensation, or how the amount of payment for time loss benefits is determined. Absent that information, it is impossible to know whether Koker actually received any benefits he was not legally entitled to receive or, if he did, what portion of the payments he received represents benefits over and above that to which he was legally entitled.

In order determine whether an injured worker has received benefits that he or she was not entitled to receive, it is necessary to understand how Washington’s worker’s compensation statute operates. Like most states, Washington has abolished all tort claims against an employer for workplace injuries, except in very limited circumstances, and replaced the worker’s right to sue with a statutory scheme of compensation. *Tobin v. Dept. of L & I*, 169 Wn.2d 396, 400, 239 P.3d 544 (2010). The compromise reached by the legislature in enacting Washington’s Industrial Insurance Act provides limited liability to employers for workplace injuries, but requires employers to pay on some claims for which there would be no common law liability. *Dennis v. Dept. of L & I*, 109

Wn.2d 467, 469-70, 745 P.2d 1295 (1987). The worker is deprived of any right to sue his or her employer and, in most cases, receives less than he or she would have received in court in a civil action (there is no compensation for general damages such as pain and suffering). In exchange, the worker is provided with a statutory right to benefits without having to litigate either liability or damages. *Id.* Because the Industrial Insurance Act is remedial in nature, it is to be liberally construed for the purpose of providing coverage to all employees injured in their employment, with doubts being resolved in favor of the worker. *Id.*, at 400.

“Time loss” benefits are benefits paid to an injured worker for a temporary total disability as defined under RCW 51.32.090. *Energy Northwest v. Hartje*, 148 Wn.App. 45, 463, 199 P.2d 1043 (2009). A temporary total disability is a condition that temporarily incapacitates a worker from performing any work or gainful employment. *Id.* An injured worker who is temporarily totally disabled is entitled to payments pursuant to a schedule established under RCW 51.32.060. RCW 51.32.090. The worker’s right to receive time loss benefits continues until such time as the worker has completely recovered from his or her injury so that “the present earning power of the worker, at any kind of work, is restored to that existing at the time of the occurrence of the injury.” RCW 51.32.090(3)(a)

If the earning power of the injured worker is only partially restored, the payment of benefits continues at a proportion of “the actual difference between the worker’s present wages and earning power at the time of injury,” and may not be less than “the proportion to which the worker’s new earning power bears to the old.” RCW 51.32.090(3)(a)(i) and (ii). Payments for time loss benefits cease altogether only when

the loss of earning power is no more than five percent of the worker's wages at the time of injury. RCW 51.32.090(3)(b).

Under this statutory scheme, the amount of time loss benefits payable to an injured worker who has recovered from a temporary total disability depends upon the extent of the recovery and the actual wages earned by the recovered worker or the worker's restored earning power. Thus, to establish that an injured worker with a temporary total disability later became ineligible to receive any time loss benefits, the State would need to show that the worker had returned to work and was earning wages of at least 95% of the wages earned at the time of injury or that the worker's earning power had been restored to 95% of his or her previous earning power. If the extent of recovery is less than 95%, the State would have to establish the ratio between present wages or present earning power as compared to the worker's previous wages in order to determine what portion of the benefits paid were in excess of that to which the injured worker was legally entitled.

It is not disputed that Koker's injury resulted in a temporary total disability or that he underwent a total of six back surgeries related to that injury. It is also not disputed that Koker was receiving time loss benefits prior April 24, 2006, and the State does not contend that he was not entitled to receive those benefits as a result a temporary total disability. Thus, in order to establish that Koker received benefits after April 24, 2006, that he was not legally entitled to receive, the State needed to prove either that he had fully recovered or that he recovered to the point where his actual wages or earning power entitled him only to some portion of the benefits he had been receiving prior to that date. No such proof was offered at trial.

2. The State Failed to Present Any Evidence that Koker Received Any Payments that Exceeded the Time Loss Benefits he Was Entitled to Receive by \$250.00 or More.

In support of its claim that Koker received time loss benefits that he was not entitled to receive, the State cites the following portions of the record: RP 66; RP 68; RP 96-97; RP 603; RP 713; and RP 809. Brief of Respondent. pp. 17, 19. None of the cited portions of the record actually supports that claim. Instead, those portions of the record establish only that time loss compensation is considered to be “wage replacement” by the Department of L & I and that the initial determination of time loss benefits is based upon a certification from the worker’s doctor that he or she is unable to work, the amount of wages the worker was earning, and other factors.

In apparent acknowledgment that the record contains no testimony or other evidence establishing that Koker was not entitled to receive time loss benefits in any amount after April 24, 2005, the State argues that the jury could infer from the fact that the Department characterizes time loss benefits as “wage replacement” that Koker was not entitled to such benefits “if and when he returned to work.” Brief of Respondent, pp. 18-19. That argument fails for two reasons. First, no evidence was presented at trial to establish that Koker’s alleged activities qualified as a “return to work” under the Industrial Insurance Act. Second, even if Koker had returned to work, no evidence was presented to establish that he was either earning at least 95% of his previous wage or that he had regained 95% of his previous earning power based on what he had been earning at the time of his injury.

No testimony or evidence was presented to establish that Koker was actually earning any wages from his activities or that he was capable of earning any particular wage. The doctors who examined Koker at the request of the State testified only that they would have released Koker for some types of work, but not others. RP 258-59; RP 260-61; RP 268-70, 417-18. No testimony was presented regarding what wages Koker could be expected to earn at those jobs. The same doctors also testified that they would not have changed Koker's impairment rating. RP 264-65. However, no evidence was presented to explain how Koker's impairment rating related to his earning power or how that rating would affect his right to receive time loss benefits. Thus, there was a complete lack of evidence from which the a trier of fact could conclude what amount of time loss benefits Koker was entitled to receive, if any, after April 24, 2006.

Even if it is assumed that the State presented sufficient testimony to establish that Koker had recovered from his injuries to some extent and that he had misrepresented his condition to the Department, it is clear that the State failed to present any evidence of the extent of that recovery or his current earning power as compared to his wages at the time of his injury. Thus, there was simply no evidence from which the jury could have determined what portion, if any, of the payments made to Koker during the applicable time period constituted time loss benefits over and above that which he was legally entitled to receive under the Industrial Insurance Act. As a result, the jury was left to speculate as to what effect Koker's alleged recovery would have had on his right to receive time loss benefits or, alternatively, simply assume that he because he was capable of doing some work, he was not entitled to receive any time loss benefits at all, contrary to the clear language of the Act.

To make up for the absence of evidence on that issue, the State attempts to shift the burden of proof to Koker by arguing that no witness at trial, either for the State or the defense, testified that he was entitled to receive some portion of the time loss benefits paid to him. Brief of Responded, pp. 13, 19-20. Of course, it is also true that no witness testified that Koker was not entitled to any part of those benefits. The burden of presenting that evidence rested with the State throughout the trial. In failing to present such evidence, the State failed to prove an essential element of the crimes charged, i.e., that as to each count, Koker wrongfully obtained property of another in an amount greater than \$250.00.

3. Evidence that an Injured Worker Provided False Information on a Worker Verification Form is Not by Itself Sufficient to Establish a Theft of Benefits.

RCW 51.32.240(5)(a) provides that where the payment of L & I benefits has been induced by “willful misrepresentation” the recipient shall repay the benefits received with a penalty of fifty percent. The statute further states that “it is willful misrepresentation to obtain payments or other benefits under this title in an amount greater than that to which the person otherwise would be entitled.” RCW 51.32.240(5)(b). Thus, even under the Industrial Insurance Act, the Department must show that an injured worker has received benefits “greater than the amount to which the person would otherwise be entitled” before the Department is entitled to a repayment.

Here, the State essentially contends that it need not make any such showing in order to convict a person of theft for receiving L & I benefits. In circular fashion, the State argues that, under its own rules an injured worker “must certify that he/she is not

working and is not capable of working” in order to receive benefits and then concludes that any misrepresentation by an injured worker of the worker’s employment status or physical capabilities automatically disqualifies the worker from receiving any benefits at all. Brief of Respondent, pp. 1 -2; 17-18.

But, the Department does not set the legal standard for determining when an injured worker is entitled to receive benefits. Those standards are established by the Industrial Insurance Act. The Department’s internal rules serve only to implement and apply the standards established by the Legislature. Thus, whether an injured worker is legally entitled to receive benefits must always be determined by reference to the statute and not merely to the Department’s rules.

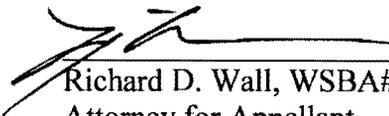
If the State’s position here is accepted, it would create an untenable conflict between the Industrial Insurance Act and Washington’s theft statute. An injured worker who was alleged to have made some misrepresentation to the Department in connection with receiving worker’s compensation benefits could be convicted of having stolen from the Department when, at the same time, the alleged misrepresentation would not result in the Department having a right to repayment under RCW 51.32.240 because the misrepresentation did not result in any payment of benefits “in an amount greater than that to which the person otherwise would be entitled.” Thus convicted, the injured worker would be required to pay back to the Department in the form of restitution the same benefits that the Department was legally required to pay to the injured worker under the Industrial Insurance Act. The Legislature obviously would not have intended such an absurd result.

Injured workers who receive worker's compensation under the Industrial Insurance Act should not have to do so under threat that they may be subject to criminal prosecution any time the Department determines that they may have exaggerated their injuries or disability in some way, unless it is also shown that they did so in order to obtain payments they knew they were not legally entitled to receive. To make such a showing, the State must be required to establish at a minimum that the injured worker in fact received payments in an amount greater than what the worker had a legal right to receive under the Industrial Insurance Act. Otherwise, the use of Washington's theft statutes to pursue criminal charges against injured workers will undermine the remedial intent of the Act and will likely have a chilling effect that could discourage workers from seeking or accepting worker's compensation benefits in the first instance. This Court should not permit the State to use criminal prosecution under the theft statutes to undermine the purposes and intent of the Industrial Insurance Act.

CONCLUSION:

For the foregoing reasons, this Court should reverse Mr. Koker's convictions and remand to the Superior Court with directions to dismiss all charges for lack of evidence to support the verdicts.

Respectfully submitted this 20 day of March, 2012.

  
Richard D. Wall, WSBA#16581  
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that on this date the foregoing was caused to be served on the following person(s) in the manner indicated:

Susan Sackett Danpullo, AAG  
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By: US Mail

Christopher Koker  
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By: US Mail

Dated this 2 day of March, 2012.

A handwritten signature in cursive script that reads "Sandi Duke". The signature is written in black ink and is positioned above a horizontal line.