

FILED

JAN 18 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 30796-4-III

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

THEODORE ERB,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF
WASHINGTON,

Respondent.

**BRIEF OF RESPONDENT
DEPARTMENT OF LABOR AND INDUSTRIES**

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I. INTRODUCTION

This is a substantial evidence case arising from a workers' compensation appeal. Theodore Erb injured his left big toe at work, and his doctor amputated the tip of his toe. Mr. Erb claimed that, as a result of his toe injury and his pre-existing conditions, he was permanently totally disabled as of January 30, 2008, and temporarily totally disabled from October 16, 2007, to January 30, 2008. A Benton County jury disagreed, affirming a decision by the Board of Industrial Insurance Appeals.

Mr. Erb asks this Court to reweigh the evidence in order to determine whether substantial evidence supported the jury's verdict. But well-established standards for substantial evidence review provide that appellate courts do not reweigh the evidence. Here, ample medical and vocational testimony supports the jury's finding that Mr. Erb was not totally disabled, either temporarily or permanently.

Additionally, Mr. Erb argues that the trial court abused its discretion in declining to give his "liberal construction" and "odd lot" instructions. Because it is reversible error to give the former and because the evidence did not support the giving of the latter, there was no error. Finally, the trial court did not err when it instructed the jury on four facts taken verbatim from a Board finding because the finding was not an argumentative finding commenting on Mr. Erb's credibility or character.

II. ISSUES

1. Does substantial evidence support the jury's verdict that Mr. Erb was not permanently totally disabled as of January 30, 2008, and was not temporarily totally disabled from October 16, 2007, to January 30, 2008, where two medical experts testified that Mr. Erb could return to his job of injury without restrictions and where a vocational counselor testified that Mr. Erb could work as a delivery driver and counter clerk?
2. Did the trial court abuse its discretion when it declined to give Mr. Erb's proposed "odd lot" instruction where no evidence supported the giving of the instruction?
3. Did the trial court abuse its discretion when it declined to give Mr. Erb's proposed "liberal construction" where our Supreme Court held in *Hastings v. Department of Labor & Industries*, 24 Wn.2d 1, 163 P.2d 142 (1945), that it is reversible error to instruct the jury on how to construe the Industrial Insurance Act?
4. Did the trial court err when it instructed the jury on four facts taken verbatim from a Board finding where those facts are not argumentative findings that comment on Mr. Erb's credibility or character?

III. STATEMENT OF THE CASE

A. Mr. Erb Had Pre-Existing Limitations Before He Injured His Toe At Work On December 9, 2006

Theodore Erb, who resides in Kennewick, was born in 1952 and earned an associate's degree in air traffic control. BR Erb 14, 16.¹ From the early 1980s until 1993, he worked on production lines for aerospace companies. BR Erb 18. As a production line worker, he developed

¹ The certified appeal board record is cited as "BR." Witness testimony is cited by the witness's name and page number. The parts of the certified appeal board record that consist of discussion between the parties and/or the industrial appeals judge and do not consist of witness testimony are cited as "BR [date] [page number of transcript]."

tendonitis in both shoulders and received steroid injections. BR Erb 19. He also developed carpal tunnel syndrome and had carpal tunnel release surgery on both hands. BR Erb 19. Additionally, he had four surgeries on his right knee. BR Erb 19.

In 1993, Mr. Erb obtained a commercial driver's license (CDL) and began working as a truck driver. BR Erb 20. He tore the meniscus in his left knee at work and had surgery to repair it. BR Erb 30-31. Doctors also informed him that he had osteoarthritis in his knees. BR Erb 31.

In 2002, Mr. Erb's truck hit a patch of black ice, striking a cement barrier at a speed of 55 miles per hour. BR Erb 21. Mr. Erb was diagnosed with posttraumatic stress disorder and was told not to drive in ice, snow, or heavy rain. BR Erb 22. Mr. Erb continued to work until 2004 as a long-haul truck driver. BR Erb 23-24. Then he stopped working and began receiving Social Security disability income. *See* BR Erb 24.

B. On December 9, 2006, Mr. Erb Injured His Left Big Toe At Work And One To Two Centimeters Of His Toe Were Amputated

In 2006, Mr. Erb decided to participate in Social Security's return-to-work program. BR Erb 24-25. The program offered beneficiaries like Mr. Erb the opportunity to work up to full-time employment over the course of one year without losing their disability income. BR Erb 24-25.

As part of this program, Mr. Erb obtained a job with Postal Express, a medication courier. BR Erb 25; BR Gritzka 13. When he applied for the job, he was told that he would work between 20 and 30 hours a week. BR Erb 25.

Mr. Erb started this job about two weeks before his injury on December 9, 2006. BR Erb 26. He delivered “totes” to pharmacies and drove from the Tri-Cities to Yakima to deliver pallets of materials. BR Erb 25. He worked “40 plus” hours in his first week, and he was “approaching 40 plus” hours in his second week. BR Erb 26.

On December 9, 2006, a 500-pound lift gate swung free from Mr. Erb’s truck and fell onto his left foot, fracturing his left big toe and second toe. BR Erb 27; BR Gritzka 13. On December 27, 2006, Dr. Thomas Burgdorff, a Board-certified orthopedic surgeon, amputated one to two centimeters of Mr. Erb’s left big toe. BR Gritzka 15; BR Burgdorff 6-7.

C. Mr. Erb’s Left Toe Fully Healed And Dr. Burgdorff Released Him To His Job Of Injury Without Restrictions

After the surgery, Dr. Burgdorff evaluated Mr. Erb’s progress. *See* BR Burgdorff 7-12. On January 9, 2007, he removed stitches and noted that the wound was “healing up nicely.” BR Burgdorff 8. On January 30, Dr. Burgdorff again observed that the wound was healing nicely. BR Burgdorff 8. Dr. Burgdorff released Mr. Erb to work on February 1

without any physical restrictions on the type of work that Mr. Erb could perform. BR Burgdorff 8-10. At that time, Mr. Erb agreed that he could return to work without restrictions. BR Erb 34.

In early February, Mr. Erb returned to work at Postal Express for two to three days. BR Erb 34. He reported difficulty climbing into the delivery truck due to his left toe injury and his pre-existing right knee condition. *See* BR Erb 35. Mr. Erb asked to work as a relief driver, filling in for sick drivers. *See* BR Erb 35-36. He also asked if his son-in-law could take over his position. *See* BR Erb 34. His employer agreed to both requests. BR Erb 34-36.

On March 13, an x-ray of Mr. Erb's left foot showed that the "fractures [were] pretty well healed." BR Gritzka 16. Dr. Burgdorff did not modify his earlier assessment that Mr. Erb could return to work without restrictions. BR Burgdorff 9-10. In May, Mr. Erb told Dr. Burgdorff that his left foot ached and that it swelled at night. BR Burgdorff 10. Dr. Burgdorff advised exercises and stretching but did not change his assessment that Mr. Erb could work without restrictions. BR Burgdorff 10. At Mr. Erb's last visit on August 2, 2007, Dr. Burgdorff noted that the wounds were "fully healed." BR Burgdorff 10, 12; BR Gritzka 16. According to Dr. Burgdorff, Mr. Erb was capable of reasonably continuous gainful employment. *See* BR Burgdorff 12.

From February to August 2007, Mr. Erb worked up to six days per month as a relief driver. BR Erb 36. Additionally, on Friday nights, he drove a truck from the Tri-Cities to Portland and back. BR Erb 36. One night, as he was crossing the state line, he received a ticket for driving without a CDL. BR Erb 36. He had been unable to renew his CDL because his high blood pressure and weight prevented him from passing the required physical. BR Erb 17. Postal Express removed Mr. Erb from the Portland run because he could not obtain a CDL. BR Erb 36.

Thereafter, Mr. Erb worked for one to one and a half hours in the morning four days a week for a subcontractor of Postal Express. BR Erb 36, 52. He loaded a truck with totes and offloaded trucks with a forklift. BR Erb 36. The subcontractor paid him an average of \$70 per week. BR Erb 52. On October 15, 2007, he was laid off. BR Erb 36-37, 52.

D. Dr. Sims, A Board-Certified Orthopedic Surgeon, Agreed With Dr. Burgdorff That Mr. Erb Could Return To His Job of Injury

On August 20, 2007, Dr. George Sims, a Board-certified orthopedic surgeon, performed an independent medical examination of Mr. Erb. BR Sims 5-6. Dr. Sims took a medical history and learned that Mr. Erb had undergone “several knee surgeries on both knees.” BR Sims 11. He was aware that Mr. Erb had osteoarthritis in his knees. BR Sims

13. Dr. Sims reviewed medical records from after Mr. Erb's December 9, 2006 work injury. BR Sims 6-7, 20.

Dr. Sims's examination of Mr. Erb's lower extremities was normal. BR Sims 13, 20-21. The toe amputation had healed. BR Sims 12. When Dr. Sims touched the area where Mr. Erb reported pain in his left foot, Mr. Erb reported a sensation of numbness up to ankle. BR Sims 12-13. Dr. Sims concluded that a systemic disease, and not the amputation, caused this sensation. BR Sims 13, 20.

Several months later, on May 6, 2008, physical therapist Kirk Holle performed a physical capacities evaluation of Mr. Erb. BR Holle 4, 8. The evaluation found that Mr. Erb could sit for 1 to 1¼ hours at a time and for 4-5 hours in an 8-hour day, stand for 30 to 45 minutes at a time and for 2-3 hours in an 8-hour day, and walk for 10 to 15 minutes at a time or for 1 hour in an 8-hour day. Ex. 1. The evaluation also found that Mr. Erb could alternately sit, stand, and walk for 6 to 8 hours in an 8-hour day. Ex. 1. Based on these findings, Mr. Holle thought that Mr. Erb "could work six to eight hours a day in a job that required light physical demand." BR Holle 21.

Dr. Sims reviewed the physical capacities evaluation. BR Sims 16. He learned from the evaluation that Mr. Erb had a "history of some back pains." BR Sims 11. He concluded that Mr. Erb's pre-existing

conditions—and not the amputation of his left big toe—caused the physical restrictions outlined in Mr. Holle’s evaluation. BR Sims 16-18. Dr. Sims attributed Mr. Erb’s sitting restrictions to his history of back pain. BR Sims 18. Mr. Erb’s standing restrictions were not related to his toe injury and amputation. BR Sims 17. Mr. Erb could not squat or perform other maneuvers on his feet because of osteoarthritis in his knees. BR Sims 13. The amputation did not affect Mr. Erb’s walking or reported balance problems. BR Sims 17-18. As Dr. Sims explained, “He was obviously disabled prior to the injury, and it does not appear that the injury in any way altered his disability.” BR Sims 16-17.

Based on his evaluation and his review of the medical records, Dr. Sims testified that Mr. Erb could return to his job of injury as a driver for Postal Express. BR Sims 15, 18-19, 25. He believed that Mr. Erb was employable from the date of his August 20, 2007 evaluation through January 30, 2008. BR Sims 15.

E. Vocational Consultant Scott Whitmer Concluded That Mr. Erb Could Perform the Job of Delivery Driver And That He Had The Transferrable Skills to Work As A Clerk

On April 23, 2007, a firm owned by Scott Whitmer, a certified vocational rehabilitation counselor, completed a job analysis. BR Whitmer 97-98, 114. The job analysis described the duties and physical requirements of a delivery driver (aka outside deliverer or courier) for

Postal Express for a 32 hour per week work pattern. *See* BR Whitmer 98, 100. Mr. Whitmer testified that he is familiar with the labor market in the Tri-Cities area. BR Whitmer 109.

Mr. Whitmer reviewed the physical capacities evaluation, the examination reports by Dr. Sims and Dr. Thomas Gritzka, and Dr. Burgdorff's chart notes. BR Whitmer 102-03. Mr. Whitmer concluded that Mr. Erb could perform the job as outlined in the job analysis. BR Whitmer 104-05.

Mr. Whitmer testified that, in his opinion, Mr. Erb was not permanently totally disabled and that he was capable of continuous gainful activity. BR Whitmer 112. He stated that medical data indicated that Mr. Erb could work full time. BR Whitmer 134. He observed that the physical capacities evaluation "suggests that he can work 8 hours a day." BR Whitmer 134; *see also* BR Whitmer 135. He testified that Dr. Sims reviewed and approved the job analysis. BR Whitmer 124, 133. He further noted that Dr. Sims believed that Mr. Erb could work as a delivery driver (aka outside deliverer or courier) without restriction or modification. BR Whitmer 105, 134-35.

Mr. Whitmer also testified that Mr. Erb had transferrable skills that would allow him work in clerking positions such as a counter clerk, room service clerk, toll collector, or routing clerk. BR Whitmer 108. Mr. Erb

could perform these light or sedentary positions despite his physical restrictions. BR Whitmer 108-09. Mr. Whitmer did not perform a labor market survey for these transferrable skills positions. BR Whitmer 110. He testified that, based on his knowledge of the labor market, Mr. Erb would be able to obtain the job of counter clerk in the Tri-Cities labor market. *See* BR Whitmer 129.

F. Mr. Erb Presented The Medical Opinion Of Dr. Thomas Gritzka And The Vocational Opinion Of Mauricio Garza To Support His Claim That He Was Totally Disabled

Dr. Thomas Gritzka, performed a forensic evaluation of Mr. Erb on January 30, 2008. BR Gritzka 10. He testified that Mr. Erb's toe injury was a cause of Mr. Erb's walking and standing restrictions, which were outlined in the physical capacities evaluation. BR Gritzka 30-31, 35. He believed that these restrictions were likely to be permanent. BR Gritzka 35.

Mauricio Garza, a certified vocational counselor, testified that Mr. Erb could not perform the job of injury as described in the job analysis. BR Garza 65-67, 82.² He testified that based on the restrictions in the physical capacities evaluations, there were no transferrable skills jobs that Mr. Erb would be capable of performing on a full-time basis. BR Garza

² Mr. Garza testified at the hearing on January 21, 2009. Additionally, he provided rebuttal testimony in a deposition taken on March 9, 2009. His hearing testimony is cited as "BR Garza [page number]." His deposition testimony is cited as "BR Garza (3/9/09) [page number]."

86, 89-90. Garza contacted several employers in the Tri-Cities area and concluded that there was not a positive labor market for the job of counter clerk. BR Garza (3/9/09) 15.

G. The Board And Superior Court Found That Mr. Erb Was Not Permanently Totally Disabled And That He Was Not Entitled to Time Loss Or Loss Of Earning Power Benefits

On January 30, 2008, the Department closed Mr. Erb's claim with an award for permanent partial disability consistent with 100 percent of amputation value of the left big toe at the interphalangeal joint. BR (1/21/09) 3. Mr. Erb appealed closure of his claim to the Board of Industrial Insurance Appeals, asserting that he was permanently totally disabled as of January 30, 2008 and that he was entitled to time loss compensation or loss of earning power benefits from December 9, 2006 through January 30, 2008. *See* BR (1/21/09) 3.

After considering the testimony, the industrial appeals judge concluded in a proposed decision and order that Mr. Erb was not permanently totally disabled as of January 30, 2008, that he was not entitled to loss of earning power benefits between March 1, 2007 and October 15, 2007, and that he was not temporarily totally disabled (and therefore not entitled to time loss compensation benefits) between October 16, 2007, and January 30, 2008. BR 21.

The judge's finding of fact 8 reads as follows:

At the time of the industrial injury, Mr. Erb was working 40 hours per week, when his expectation was that he would only work 20 to 30 hours per week. His rate of pay was not provided. After amputation of his left great toe, he returned to his job of injury and worked for one week, convincing his employer to give his job to his son-in-law. At his request, Mr. Erb was placed on the on-call list for drivers. Mr. Erb then drove an unspecified number of days as a relief driver. He could not drive any longer after he was ticketed for not having a current CDL license. He then worked part-time, perhaps eight hours per week, for \$70 cash per week. Mr. Erb failed to present testimony that, during the period from March 1, 2007 through January 30, 2008, inclusive, he had a greater than 5 percent reduction in earning power; failing to provide sufficient pre-injury wage or post-injury earning capacity evidence.^[3]

BR 20-21.

Mr. Erb petitioned for review of the judge's decision to the three-member Board. *See* BR 3-6. In his petition for review, Mr. Erb assigned error to the portion of finding of fact 8 which stated that "after amputation of his left great toe, he returned to the job of injury and worked for one week." *See* BR 4. Mr. Erb did not assign error to any other portion of finding of fact 8 that he now challenges in this appeal. *See* BR 4-5; App. Br. 19-23. The Board denied Mr. Erb's petition for review and adopted the proposed decision and order as its final decision and order. BR 1.

³ A worker is entitled to loss of earning power benefits only if the worker's loss of earning power as a result of the injury exceeds five percent. *See* RCW 51.32.090(3)(b).

H. The Superior Court Declined To Give Mr. Erb’s “Odd Lot,” “Liberal Construction,” And Board Finding Instructions

Mr. Erb appealed to superior court. CP 1-2. He asked the court to give the “odd lot” pattern jury instruction, which states:

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

CP 30; 6A Washington Pattern Jury Instruction: Civil 155.07.01 (6th ed. 2012) (WPI). The trial court denied the “odd lot” instruction, stating that the testimony did not support it. 1 RP at 103.⁴

Mr. Erb also asked the trial court to give a “liberal construction” instruction that read:

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

CP 36. The trial court declined to give the instruction, noting that it “appear[ed] . . . to be a clear comment on the evidence.” 2 RP 41.

⁴ The verbatim report of proceedings consists of two volumes. The first volume, which reports proceedings from February 27 and February 28, 2012, is cited as “1 RP.” The second volume, which reports proceedings from February 28, 2012, is cited as “2 RP.”

Finally, in accordance with WPI 155.02, Mr. Erb and the Department each offered an instruction listing the Board's findings. *See* CP 24, 52. The Department's proposed instruction repeated finding of fact 8 verbatim. *Compare* CP 52 (fourth full paragraph) *with* BR 20-21. Mr. Erb's proposed instruction included only the following portion of finding of fact 8:

Mr. Erb failed to present testimony that, during the period from March 1, 2007 through January 30, 2008, inclusive, he had a greater than 5 percent reduction in earning power; failing to provide sufficient pre-injury wage or post-injury earning capacity evidence.

Compare CP 24 (paragraph five) *with* BR 20-21.

Mr. Erb took exception to the Department's proposed instruction, asserting that the Board's finding was not supported by substantial evidence. 2 RP 9. He stated that it included "factual recitations that are not borne out in the record" and "a lot of non-essential potentially prejudicial factual statements – excuse me not correct factual statements that are not borne out in the record." 2 RP 9. The trial court rejected this argument and instructed the jury on finding of fact 8 in accordance with the Department's proposed instruction. 2 RP 11-12; CP 77.

The jury returned a verdict, stating that the Board's decision was correct in its entirety. CP 92. Mr. Erb appeals. CP 104-06.

IV. SUMMARY OF THE ARGUMENT

Substantial evidence supports the jury's finding that Mr. Erb was not permanently totally disabled as of January 30, 2008 or temporarily totally disabled from October 16, 2007, to January 30, 2008.⁵ Dr. Burgdorff testified that he released Mr. Erb to his job of injury without restrictions in February 2007 and never modified this release. BR Burgdorff 8-12. Dr. Sims testified that Mr. Erb could return to the job of injury and was employable from the time of his August 20, 2007 examination through January 30, 2008. BR Sims 15, 19. Mr. Whitmer testified that the medical data indicated that Mr. Erb could work full time, that Mr. Erb had the transferrable skills and physical abilities to work in clerking positions, and that Mr. Erb could obtain a job of counter clerk in the Tri-Cities area. BR Whitmer 108, 129, 134.

Additionally, the trial court properly instructed the jury. The trial court did not abuse its discretion when it declined to give Mr. Erb's

⁵ In this appeal, Mr. Erb does not assign error to the jury's verdict that the Board was correct when it decided that he was not entitled to loss of earning power benefits between March 1, 2007, and October 15, 2007. See App. Br. 1 (assigning error to the jury's verdict on temporary and permanent total disability); App. Br. 5 (arguing that substantial evidence does not support the jury's verdict on temporary total disability between October 16, 2007 through January 30, 2008 and on permanent total disability as of January 30, 2008); CP 92. Nor does he argue anywhere in his brief that he is entitled to loss of earning power benefits during this period. Accordingly, this Court should not address the issue of loss of earning power. See *McKee v. Am. Home Products, Corp.*, 113 Wn.2d 701, 705, 782 P.2d 1045 (1989) (appellate courts do not consider issues on appeal that are not raised by an assignment of error or supported by argument); see also RAP 10.3(a)(4).

proposed “odd lot” instruction because the evidence did not support giving the instruction. The trial court also did not abuse its discretion when it declined to give Mr. Erb’s proposed “liberal construction” instruction because giving such an instruction is reversible error. Finally, the trial court did not err when it instructed the jury on four facts taken verbatim from a Board finding because the finding was not an argumentative finding commenting on Mr. Erb’s credibility or character.

V. STANDARD OF REVIEW

The ordinary standard of civil review applies to the review of the trial court’s decision in a workers’ compensation appeal. RCW 51.52.140 (“Appeal shall lie from the judgment of the superior court as in other civil cases.”); *see Rogers v. Dep’t of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d 355 (2009). This Court limits its review to “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 flow from the findings.” *Ruse v. Dep’t of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999) (quoting *Young v. Dep’t of Labor & Indus.*, 81 Wn. App. 123, 128, 913 P.2d 402 (1996)). “Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise.” *Bering v. Share*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986).

When undertaking substantial evidence review, the appellate court does not reweigh the evidence or re-balance the competing testimony presented to the factfinder. *Fox v. Dep't of Ret. Sys.*, 154 Wn. App. 517, 527, 225 P.3d 1018 (2009); *Harrison Mem'l Hosp. v. Gagnon*, 110 Wn. App. 475, 485, 40 P.3d 1221 (2002). Rather, the appellate court views the evidence and all reasonable inferences from the evidence in the light most favorable to the prevailing party. *Korst v. McMahon*, 136 Wn. App. 202, 206, 148 P.3d 1081 (2006); *Gagnon*, 110 Wn. App. at 485. "Where there is substantial evidence, we will not substitute our judgment for that of the trial court even though we might have resolved a factual dispute differently." *Korst*, 136 Wn. App. at 206.

The appellate court reviews a trial court's refusal to give a proposed instruction for abuse of discretion. *Boeing Co. v. Harker-Lott*, 93 Wn. App. 181, 186, 968 P.2d 14 (1998). A trial court abuses its discretion only if its decision was manifestly unreasonable, or its discretion was exercised on untenable grounds, or for untenable reasons. *Harker-Lott*, 93 Wn. App. at 186. An erroneous instruction requires reversal only if it is prejudicial, that is, only if the error affects or presumptively affects the trial's outcome. *Williams v. Virginia Mason Med. Ctr.*, 75 Wn. App. 582, 587, 880 P.2d 539 (1994).

Jury instructions are sufficient when they allow a party to argue his or her theory of the case, are not misleading, and, when read as a whole, properly inform the jury of the applicable law. *Leeper v. Dep't of Labor & Indus.*, 123 Wn.2d 803, 809, 872 P.2d 507 (1994). A requested instruction should not be given unless there is substantial evidence to support it. *Klein v. R.D. Werner Co.*, 98 Wn.2d 316, 318, 654 P.2d 94 (1982).

VI. ARGUMENT

A. **Substantial Evidence Supports The Jury's Finding That Mr. Erb Was Not Permanently Totally Disabled As Of January 30, 2008, And Was Not Temporarily Totally Disabled Between October 16, 2007, And January 30, 2008**

Mr. Erb contends that substantial evidence did not support the jury's verdict that he was permanently totally disabled as of January 30, 2008, and temporarily totally disabled from October 16, 2007, through January 30, 2008. App. Br. 5. This argument fails.

A worker is permanently totally disabled when a condition proximately caused by work "permanently incapacitat[es] the worker from performing any work at any gainful occupation." RCW 51.08.160; *see also* WAC 296-20-01002. The appropriate measure of disability requires a study of the whole person—weaknesses and strengths, age, education, training and experience, reaction to the injury, loss of function, and other

factors relevant to whether the worker is, as a result of the injury, disqualified from employment generally available in the labor market. *Leeper*, 123 Wn.2d at 814-15. If a person is impaired by a physical condition that pre-existed the occurrence of an industrial injury or occupational disease, and later is prevented from returning to gainful employment because of the added or combined effects of the later occurring industrial injury or occupational disease, the worker is entitled to compensation as a permanently totally disabled worker. *See Wendt v. Dep't of Labor & Indus.*, 18 Wn. App. 674, 682, 571 P.2d 229 (1977). The trier of fact must determine from all relevant evidence whether an injury has left the worker totally disabled. *Leeper*, 123 Wn.2d at 815.

A worker is temporarily totally disabled when a work-related condition temporarily incapacitates a worker from performing any work at any gainful employment. *Hubbard v. Dep't of Labor & Indus.*, 140 Wn.2d 35, 43, 992 P.2d 1002 (2000). "Temporary total disability" differs from "permanent total disability" only in duration of disability, and not in its character. *Hubbard*, 140 Wn.2d at 43.

- 1. Two Board-Certified Orthopedic Surgeons Testified That Mr. Erb Could Return To His Job Of Injury Without Restrictions**

Here, substantial evidence supports the jury's findings that Mr. Erb was not permanently totally disabled as of January 30, 2008, and was not temporarily and totally disabled between October 16, 2007, and January 30, 2008. *See* BR 21. Two Board-certified orthopedic surgeons, Dr. Burgdorff and Dr. Sims, testified that Mr. Erb could return to his job of injury without restrictions. *See* BR Burgdorff 9-10, 12; BR Sims 15, 19.

Dr. Burgdorff released Mr. Erb to his job of injury without restrictions in February 2007 after his toe had healed. BR Burgdorff 8, 15. Following his examinations of Mr. Erb in March 2007 and May 2007, Dr. Burgdorff did not modify his earlier assessment that Mr. Erb could return to work. BR Burgdorff 9-10. When he last saw Mr. Erb on August 2, 2007, Dr. Burgdorff believed that Mr. Erb could be involved in some type of reasonably continuous gainful employment. BR Burgdorff 12.

Dr. Sims stated that, based on his August 20, 2007 evaluation and review of the medical records, he believed that Mr. Erb could return to the job of injury. BR Sims 15, 19. He testified that Mr. Erb would have been employable on some basis from the time of his examination through January 30, 2008. BR Sims 15.

Moreover, contrary to Mr. Erb's assertion that only Dr. Gritzka considered his pre-existing conditions in assessing his ability to work, substantial evidence supports the fact that Dr. Sims and Dr. Burgdorff did

so as well. *See* App. Br. 7. Both knew about Mr. Erb's previous knee surgeries. BR Burgdorff 15; BR Sims 11. Dr. Sims knew that Mr. Erb had osteoarthritis in his knees and a history of back pain. BR Sims 11, 13, 18. And Dr. Sims explained in his testimony that Mr. Erb's standing, walking, and sitting restrictions were caused by his pre-existing conditions, not by his work injury to his toe. BR Sims 16-18. Dr. Sims testified that Mr. Sims was "obviously disabled prior to the injury" and that the injury to his toe did not "alter[] his disability" in any way. BR Sims 16-17.

2. Mr. Whitmer's Vocational Testimony Provided Additional Evidence That Mr. Erb Could Work

Mr. Whitmer testified that, in his opinion, Mr. Erb was not permanently totally disabled. BR Whitmer 112. He stated that medical data indicated that Mr. Erb could work full time. BR Whitmer 134. He observed that the physical capacities evaluation "suggests that he can work 8 hours a day." BR Whitmer 134; *see also* BR Whitmer 135. He testified that Dr. Sims reviewed and approved the job analysis. BR Whitmer 124, 133. He further noted that Dr. Sims believed that Mr. Erb could work as an outside deliverer without restriction or modification. BR Whitmer 105, 134-35.

Mr. Whitmer also testified that Mr. Erb had transferrable skills that would allow him work as a counter clerk, room service clerk, toll collector, or routing clerk. BR Whitmer 108. Mr. Erb could perform these light or sedentary positions despite his physical restrictions. BR Whitmer 108-09. Mr. Whitmer testified that, based on his knowledge of the labor market, Mr. Erb would be able to obtain the job of counter clerk in the Tri-Cities labor market. *See* BR Whitmer 129.

3. Mr. Erb Applies The Incorrect Standard Of Review To Argue That Substantial Evidence Does Not Support The Jury's Verdict

Mr. Erb argues that substantial evidence does not support the jury's verdict on permanent and temporary total disability because the verdict "was based in large part on incomplete expert medical testimony as it relates to Mr. Erb's ability to be gainfully employed." App. Br. 7. Specifically, he argues that Dr. Gritzka's opinion on employability was the most persuasive of any of the doctors because (1) he "completed a full-body musculoskeletal examination" whereas Dr. Burgdorff and Dr. Sims examined only Mr. Erb's lower extremities, and (2) he conducted a more extensive review of Mr. Erb's medical records, making him "the best witness to give a comprehensive medical opinion" as to Mr. Erb's employability. App. Br. 8-11. Similarly, Mr. Erb argues that Mr. Garza's opinion on employability was more persuasive than Mr. Whitmer's

because Mr. Whitmer based his conclusion on “incomplete medical records” and did not conduct a labor market survey. App. Br. 11-12.

The problem with these arguments is that they ignore the correct standard of review. Mr. Erb asks this Court to reweigh the evidence and to find that the evidence that he presented to the jury in the form of Dr. Gritzka’s and Mr. Garza’s testimony was more convincing. But, at this stage, this Court cannot reweigh the evidence, re-balance the testimony, or substitute its own judgment for that of the trial court. *Fox*, 154 Wn. App. at 527; *Korst*, 136 Wn. App. at 206; *Gagnon*, 110 Wn. App. at 485.

The jury rejected Mr. Erb’s arguments that his witnesses’ testimony was more credible than the testimony of the Department’s witnesses. On appeal, substantial evidence supports the jury’s verdict that Mr. Erb was not totally disabled based on the ample testimony that Mr. Erb could engage in reasonably continuous gainful employment.

B. The Trial Court Did Not Abuse Its Discretion When It Declined to Give An “Odd Lot” Instruction Because There Was No Evidence That Mr. Erb Could Perform Or Obtain A Job Not Generally Available On The Labor Market

Mr. Erb contends that the trial court abused its discretion when it declined to give his “odd lot” instruction. App. Br. 15. He asserts that its omission meant that he was unable to argue his theory of the case. App. Br. 16. These arguments fail.

Under the “odd lot” doctrine, if an accident leaves a worker in such a condition that he or she can no longer follow his or her previous occupation or any other similar occupation, and is fitted *only* to perform “odd jobs” or special work, not generally available, the Department (or the employer) has the burden to show that there is special work that the worker can in fact obtain. *Spring v. Dep't of Labor & Indus.*, 96 Wn.2d 914, 919, 640 P.2d 1 (1982) (citing *Kunhle v. Dep't of Labor & Indus.*, 12 Wn.2d 191, 198-99, 120 P.2d 1003 (1942)). The Department (or employer) has this burden because the odd lot doctrine operates like an affirmative defense—it precludes a finding of total disability even though the worker may have proved that he or she cannot perform general work. *Graham v. Weyerhaeuser Co.*, 71 Wn. App. 55, 63, 856 P.2d 717 (1993), *overruled on other grounds by Leeper*, 123 Wn.2d at 817-18.

Whether work is general or special depends on whether the work is generally available on the competitive labor market. *Graham*, 71 Wn. App. at 60. Special work is work that is not generally available on the competitive labor market. *Graham*, 71 Wn. App. at 60; *see also Adams v. Dep't of Labor & Indus.*, 128 Wn.2d 224, 235 n.4, 905 P.2d 1220 (1995) (approving of *Graham's* distinction between “special work” and more continuous or gainful work).

1. The Trial Court Correctly Declined To Give Mr. Erb's Proposed "Odd Lot" Instruction Because There Was No Evidence to Support Giving The Instruction

In this case, because the Department's theory was that Mr. Erb could perform general work—and not special work or odd jobs—there was no evidence to support giving the “odd lot” instruction. *Graham* is particularly instructive. There, a vocational counselor hired by the worker testified that the worker was disabled from performing all jobs generally available on the competitive labor market in the area in which he lived. *Graham*, 71 Wn. App. at 68. The vocational counselor hired by the employer disagreed, testifying that the worker was not disabled from performing certain jobs, and also testifying that those jobs were generally available in the competitive labor market in the area in which the worker lived. *Graham*, 71 Wn. App. at 68. Because there was no evidence that the worker could perform or obtain a job not generally available on the labor market, there was no evidence to support giving the “odd lot” instruction. *See Graham*, 71 Wn. App. at 68. Accordingly, the court did not err in declining to give the instruction. *Graham*, 71 Wn. App. at 68.

This is precisely the scenario that occurred here. Mr. Garza testified that Mr. Erb was disabled from performing the job of injury, and he testified that there were no transferrable skills jobs that he could perform on a full-time basis in the competitive labor market. BR Garza

82, 86. Mr. Whitmer disagreed, testifying that Mr. Erb was not disabled from performing his job of injury, that Mr. Erb could perform several transferrable skills jobs (including counter clerk), and that Mr. Erb could obtain a counter clerk position in the Tri-Cities labor market. BR Whitmer 104-05, 108, 129, 134-35. Neither Mr. Whitmer nor Mr. Garza testified that Mr. Erb could perform or obtain a job *not* generally available on the labor market, i.e. special work or an odd job. Accordingly, the trial court did not abuse its discretion in declining to give the instruction.

2. Even If The Omission Of The “Odd Lot” Instruction Was Error, It Did Not Prejudice Mr. Erb

Even if trial court abused its discretion in declining to instruct on the odd lot doctrine, the error would not warrant reversal. Instructional error warrants reversal only if prejudicial. *Graham*, 71 Wn. App. at 68. The odd lot doctrine provides “an additional way for a worker to lose” in a case in which the worker claims permanent total disability and has proven inability to perform general work. *Graham*, 71 Wn. App. at 68. As such, the omission of the odd lot instruction did not prejudice Mr. Erb. *See Graham*, 71 Wn. App. at 68.

C. The Trial Court Did Not Abuse Its Discretion When It Declined To Give A “Liberal Construction” Instruction Because Doing So Would Have Been Reversible Error

Mr. Erb contends that the trial court abused its discretion when it declined to give his “liberal construction” instruction to the jury. App. Br. 17-19. This argument fails because instructing a jury as to how to construe the Industrial Insurance Act is reversible error.

In *Hastings*, the trial court instructed the jury as follows:

You are instructed that the Workmens’ Compensation Act of the State of Washington *should be liberally applied* in favor of its beneficiaries, the injured workmen. It is a humane law and founded on sound public policy and is the result of lawful, painstaking and humane considerations, and its beneficent provisions *should not be limited or curtailed by narrow construction*.

Hastings, 24 Wn.2d at 12 (emphases added). The Supreme Court held that this instruction was “prejudicially erroneous” because it is the duty of a court, not of a jury, to construe statutes. *Hastings*, 24 Wn.2d at 12-13.

As the court explained:

The matter of liberal or narrow construction does not apply to matters of fact, but is limited to questions of law. The court, in its instructions to the jury, is required to give a liberal interpretation of the workmen’s compensation act, but the jury is confined to a determination of the facts of the case from the evidence presented, in accordance with the court’s instructions as to the law.

Hastings, 24 Wn.2d at 13. Accordingly, the court held that giving the instruction was reversible error because “the jury was directed to *apply* the act ‘liberally’ and was cautioned against a narrow construction thereof.” *Hastings*, 24 Wn.2d at 13 (alteration in original). Such an instruction

improperly invests the jury “with a power that only the court should exercise.” *Hastings*, 24 Wn.2d at 13.

Mr. Erb’s proposed instruction is likewise improper. It instructs the jury to construe and interpret the act “liberally,” contrary to the *Hastings* court’s admonishment that statutory construction and interpretation fall within the court’s province. *See* CP 36. Accordingly, the trial court did not abuse its discretion by declining to provide this instruction.

D. Mr. Erb Did Not Preserve Any Alleged Error With Regard to Jury Instruction 7 And, Even If He Did, The Instruction Was Proper Because It Did Not Include Evidentiary Or Argumentative Findings That Commented On Mr. Erb’s Credibility Or Character

Mr. Erb asserts that the trial court erred when it included four “non-material facts” from the Board’s finding of fact 8 in jury instruction 7. App. Br. 19; *see* BR 20-21. Specifically, he contends that the trial court should have omitted the following four facts from jury instruction 7: (1) Mr. Erb expected to work 20-30 hours a week at Postal Express, (2) his rate of pay was not provided, (3) Mr. Erb convinced his employer to give the job to his son-in-law, and (4) Mr. Erb could not drive after being ticketed for not having a current CDL license. App. Br. 21-23.

1. Mr. Erb Did Not Preserve This Alleged Error Because He Did Not Assign Error To These Facts In His Petition For Review To The Board

At the superior court, Mr. Erb objected to including the complete finding on the ground that it was not supported by substantial evidence and contained non-essential facts. 2 RP 9. This Court should decline to consider Mr. Erb's claims regarding the finding because Mr. Erb did not preserve this alleged error in his petition to review to the Board.

RCW 51.52.104 requires a party to set forth objections in a petition for review or waive them: "Such petition for review shall set forth in detail the grounds therefor and the party or parties filing the same shall be deemed to have waived all objections or irregularities not specifically set forth therein." *See Allan v. Dep't of Labor & Indus.*, 66 Wn. App. 415, 422, 832 P.2d 489 (1992). Mr. Erb's petition for review to the Board did not challenge the inclusion of these four facts in finding of fact 8. *See* BR 4-5. He did not argue to the Board that these findings were not supported by substantial evidence or contained non-essential facts. Raising this issue to the Board at the petition for review stage would have allowed the Board to correct any purported errors.

The legislature has specifically provided that all claims of error must be raised at the Board level. RCW 51.52.104. Mr. Erb did not do so.

Accordingly, this Court should decline to address Mr. Erb's newly raised claim.

2. The Inclusion Of These Facts Was Proper Because They Are Not Evidentiary Or Argumentative Findings That Comment On Mr. Erb's Credibility Or Character

In the alternative, this Court should reject Mr. Erb's argument because it has no merit. Unlike the findings discussed in *Gaines v. Department of Labor & Industries*, 1 Wn. App. 547, 463 P.2d 269 (1969) and *Stratton v. Department of Labor & Industries*, 7 Wn. App. 652, 501 P.2d 1072 (1972), none of the four facts that Mr. Erb challenges were evidentiary or argumentative findings that commented on his credibility or character. Therefore, the inclusion of these four facts did not impede the jury's de novo review of the Board's decision.

In a workers' compensation case, the superior court reviews the decision of the Board of Industrial Insurance Appeals de novo on the certified appeal board record. RCW 51.52.115; *Elliott v. Dep't of Labor & Indus.*, 151 Wn. App. 442, 445, 213 P.3d 44 (2009). In jury cases, "the court shall by instruction advise the jury of the exact findings of the board on each material issue before the court." RCW 51.52.115. Only findings of ultimate facts should be permitted, not evidentiary or argumentative findings. *Jenkins v. Dep't of Labor & Indus.*, 85 Wn. App. 7, 11, 931 P.2d

907 (1996). There must be substantial evidence to support a finding before it can be treated as such. *Gaines*, 1 Wn. App. at 550-51.

In *Gaines*, the trial court refused to instruct the jury of a Board finding that stated that the worker, in his testimony before the Board and in his medical examinations, had “purposefully misrepresented his physical conditions, his physical limitations, and the extent of his pain, to such an extent as to discredit his subjective complaints, except as the same were born out by objective findings of the doctors.” *Gaines*, 1 Wn. App. at 548. The court observed that instructing on a “subordinate finding on the credibility of witnesses testifying before the board could effectively and adversely deprive a claimant of an opportunity to re-examine such evidence in any meaningful way.” *Gaines*, 1 Wn. App. at 551. The court held, therefore, that the trial court did not err in refusing to instruct the jury on this finding because doing so “could have had the effect of utterly destroying the plaintiff’s credibility, making recovery improbable.” *Gaines*, 1 Wn. App. at 551.

In *Stratton*, the trial court included the following Board finding in its instructions:

On or about April 29, 1964, the claimant suffered from a psychiatric disorder which was causally related to his industrial injury and was diagnosed as anxiety neurosis with conversion symptoms. *Associated with this psychiatric disorder is a demonstrated lack of motivation in the*

claimant to seek out and maintain gainful employment, coupled with a strong tendency and desire to realize a monetary gain from his injury.

Stratton, 7 Wn. App. at 654 (emphasis added). The court observed that the second sentence was not based on any evidence in the record but, rather, was simply “an opinion of the Board that Stratton won’t look for work and has a strong desire to make money from his injury.” *Stratton*, 7 Wn. App. at 654. As such, it was “highly prejudicial and improper” because it was “a comment upon [the worker’s] character and an argument as to why he should not be awarded his pension.” *Stratton*, 7 Wn. App. at 654. The court reversed for a new trial. *Stratton*, 7 Wn. App. at 656.

Unlike the findings in *Gaines* and *Stratton*, none of the four facts that Mr. Erb challenges are argumentative findings that attack Mr. Erb’s credibility or character. Rather, with the exception of the finding that Mr. Erb’s rate of pay was not provided,⁶ each fact was derived from Mr. Erb’s own testimony. See BR Erb 25 (Postal Express told Mr. Erb that he would work between 20-30 hours a week when he applied for the job); BR Erb 34 (Mr. Erb told his son-in-law that he had talked to his employer and could get him to take over Mr. Erb’s job); BR Erb 36 (Mr. Erb was

⁶ The Department agrees with Mr. Erb that there is evidence in the record about Mr. Erb’s rate of pay at the time of injury. The report of injury that he filed with the Department listed \$12 per hour as his rate of pay. BR Whitmer 115. But, as explained in this section, the inclusion of this finding did not prejudice him with regard to the issues that he raises on appeal. In any event, he had the opportunity to raise this issue at the Board and did not do so, waiving this argument.

ticketed for not having a CDL and could not drive the Portland run for the company after that).

Mr. Erb speculates that these four facts have the potential to “discredit [his] veracity” and “cast him in an unfavorable light.” App. Br. 23. Thus, Mr. Erb argues that a jury could infer that he was “not willing to work,” was “not an honest person,” and “was uncooperative in the underlying Department investigation.” App. Br. 22-23. It is far from clear that the jury would draw any such negative inferences from these facts, but if it did, it would be because Mr. Erb himself testified to these facts, not because the Board opined on his character or credibility. This is a far cry from an instruction that tells the jury that the Board found that a worker “purposefully misrepresented” his physical condition, “lack[ed] . . . motivation” or “had a desire to realize a monetary gain from his injury.” *See Stratton*, 7 Wn. App. at 654; *Gaines*, 1 Wn. App. at 584.

Even assuming that the trial court should have excluded these four facts from jury instruction 7, and even acknowledging that there was evidence of Mr. Erb’s rate of pay at the time of injury in the record, Mr. Erb cannot demonstrate prejudice. *See Williams*, 75 Wn. App. at 587. These were not argumentative or inflammatory findings by the Board on Mr. Erb’s credibility and character. Additionally, the rate of pay at the

time of injury is not relevant to a determination of total disability, the only substantive issue that Mr. Erb raises on appeal.

E. Mr. Erb Is Not Entitled To Attorney Fees

Mr. Erb asks for attorney fees, citing RCW 51.32.130. App. Br. 24. That statute provides for attorney fees for a worker who prevails in court. RCW 51.52.130(1). However, the attorney fees are payable from the Department only if (1) the Board decision is “reversed or modified” and (2) the result of the litigation affected the Department’s “accident fund or medical aid fund”:

If in a worker . . . appeal the decision and order of the board is reversed or modified *and if the accident fund or medical aid fund is affected by the litigation . . .* the attorney’s fee fixed by the court, *for services before the court only*, and the fees of medical and other witnesses and the costs shall be payable out of the administrative fund of the department.

RCW 51.52.130(1) (emphasis added); *Tobin v. Dep’t of Labor & Indus.*, 169 Wn.2d 396, 406, 239 P.3d 544 (2010).

Because Mr. Erb should not prevail in this appeal, he is not entitled to attorney fees.

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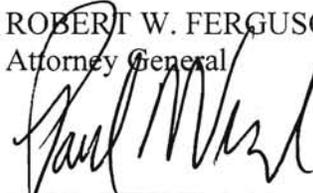
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VII. CONCLUSION

For the foregoing reasons, the Department requests that this Court affirm the superior court judgment.

RESPECTFULLY SUBMITTED this 16th day of January, 2013.

ROBERT W. FERGUSON
Attorney General

A handwritten signature in black ink, appearing to read "Paul Weideman", is written over the printed name and title of the Assistant Attorney General.

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No. 30796-4-III

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

THEODORE S. ERB,

Appellant,

v.

DEPARTMENT OF LABOR AND
INDUSTRIES OF THE STATE OF
WASHINGTON,

Respondent.

DECLARATION OF
MAILING

DATED at Seattle, Washington:

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I sent via U.S. Mail the Brief of Respondent and Declaration of Mailing to counsel for all parties on the record as follows:

Renee Townsley, Clerk/Administrator *(original and copy)*
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DATED this 16th day of January, 2013.


SHARA WUSSTIG
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