IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

HERMAN BATES, Respondent, v. DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, and Defendant, CLARK HEAVY CONSTRUCTION, INC., Appellant.	)	NO. 64161-1-I DIVISION ONE UNPUBLISHED OPINION FILED: October 25, 2010

Lau, J. — Herman Bates was injured while working for Clark Heavy Construction. The Department of Labor and Industries eventually closed his claim without awarding temporary total disability benefits. The Board of Industrial Insurance Appeals (BIIA) affirmed the Department, and Bates appealed that decision to the superior court. Contrary to the BIIA's determination, a jury found that Bates was entitled to temporary total disability benefits. Clark appealed, alleging several

evidentiary and instructional errors. Finding no errors, we affirm.

FACTS

Bates was injured on December 8, 1998 while carrying a door at his job at Clark.[1] He felt an immediate onset of lower back pain and burning. The next day, Bates returned to work, where he was fired for allegedly failing a drug test.

The Department accepted his claim for medical treatment. On March 9, 1999, the Department closed his claim, awarding only medical benefits. Bates's application to reopen the claim because his condition had worsened was denied by the Department on March 13, 2000.[2] Bates requested reconsideration, and the Department reopened his claim for authorized treatment on November 21, 2000. On July 25, 2003, the Department again closed the claim, denying time loss compensation and a permanent partial disability award.[3] On May 13, 2004, upon reconsideration, the Department cancelled the July 25 order and reopened the claim.[4] The Department eventually denied time loss compensation benefits from December 8, 1999, to October 17, 2006, "due to no objective [medical] findings." Bates appealed to the BIIA, which

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[1] Parts of the record refer to Clark as "Atkinson Construction." The parties appear to agree that the two names refer to the same company.

[2] The parties now agree that Bates's condition worsened in the year following the accident.

[3] The Department also denied Bates's "unspecified psychiatric condition" was related to his industrial injury.

[4] The employer, Clark, appealed this decision to the BIIA, but it appears that the Department closed the claim before the BIIA ever issued a decision.

concluded, "Bates was not a temporarily totally disabled worker within the meaning of RCW 51.32.090" and finding,

> Mr. Bates presented substantial, competent evidence. However, the preponderance does not support his appeal . . . . The record indicates many problems which may have been employment obstacles, but on balance, it does not establish that, for the period at issue, Mr. Bates had a temporary total disability proximately caused by the December 8, 1998 industrial injury.

The BIIA also struck the testimony of Al Thaxton,[5] the assistant safety director for heavy construction at Clark, and Dr. John Hamm, a psychiatrist who evaluated Bates.

On appeal to superior court, the court excluded all of Thaxton's and Bates's testimony related to his termination ruling.

> O'Ke[efe] [v. Department of Labor and Industries, 126 Wn. App. 760, 765, 109 P.3d 484 (2005) and other cases are distinguished factually I would add by the fact that there's really no debate about the misconduct by O'Ke[efe] and the retirement by the claimant in the Energy Northwest [v. Hartje, 148 Wn. App. 454, 199 P.3d 1043 (2009)] case.[6] Whereas here, there was solely a testimony that Mr. Bates was fired because of a—a drug test when the results of that lab report etcetera were not actually entered. So clearly the—what you would say is about foundation or substantial nature of the underlying claim is a—a different. So, for those reasons and at this point the Court is denying the motion.

Report of Proceedings (RP) (Feb. 10, 2009) at 68. As to Hamm, the court excluded his testimony because it was "substantially outweighed by the danger of unfair prejudice," had little relevance to the case and was cumulative and superfluous. RP (Feb. 9, 2009) at 21. The jury found the BIIA was incorrect "in its determination that Herman Bates was not temporarily totally disabled from December 8, 1999 through October 17,

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[5] Thaxton's testimony discussed Bates's termination.

[6] Energy Northwest dealt with the issue of voluntary retirement under RCW 51.32.090(8).

2006."

ANALYSIS

Appeal and Review of the BIIA

Under the Industrial Insurance Act, Title 51 RCW, the Department has original and exclusive jurisdiction to make threshold decisions on all claims for industrial insurance benefits. Kingery v. Dep't of Labor & Indus., 132 Wn.2d 162, 169, 937 P.2d 565 (1997). An aggrieved party can review the Department's findings only by appealing to the BIIA. Kingery, 132 Wn.2d at 169. A party appealing to the BIIA must present it with all evidence for de novo review of the Department's decision. RCW 51.52.115. The BIIA reviews the final decision of the Department, and its jurisdiction is only appellate review of the Department's administrative orders. RCW 51.52.050, .060; Hanquet v. Dep't of Labor & Indus., 75 Wn. App. 657, 661–62, 879 P.2d 326 (1994).

Any party that disagrees with a BIIA decision can appeal to the superior court. RCW 51.52.110. The superior court has the authority to review only those matters presented first to the Board and preserved in the Board's record for review. Lenk v. Dep't of Labor & Indus., 3 Wn. App. 977, 982, 478 P.2d 761 (1970). The superior court may not consider evidence outside the record and presented for the first time on appeal unless the party seeking to introduce the evidence can show "irregularities" in the procedure before the Board. RCW 51.52.115. When a party appeals a Board decision, the superior court conducts a trial de novo, though one based solely on the evidence presented to the Board. Grimes v. Lakeside Indus., 78 Wn. App. 554, 560, 897 P.2d 431 (1995); RCW 51.52.115. The superior court is the trial court, and it "is entitled to independently resolve questions relating to the admission of evidence." Ruff

v. Dep't of Labor & Indus., 107 Wn. App. 289, 295, 28 P.3d 1 (2001).

In all court proceedings under Title 51 RCW, the findings and decisions of the BIIA are prima facie correct and the burden of proof is on the party challenging them. RCW 51.52.115. A party attacking the decision must support its challenge by a preponderance of the evidence. Ravsten v. Dep't of Labor & Indus., 108 Wn.2d 143, 146, 736 P.2d 265 (1987). On review, "[t]he superior court may substitute its own findings and decision for the Board's if it finds 'from a fair preponderance of credible evidence,' that the Board's findings and decision are incorrect." McClelland v. ITT Rayonier, Inc., 65 Wn. App. 386, 390, 828 P.2d 1138 (1992) (quoting Weatherspoon v. Dep't of Labor & Indus., 55 Wn. App. 439, 440, 777 P.2d 1084 (1989)).

Exclusion of Bates's and Thaxton's Testimony

Clark first argues that the superior court erred in excluding the testimony of Thaxton and Bates concerning Bates's termination for drug use. Specifically, Clark argues that the testimony was necessary for it to argue that Bates was not entitled to temporary total disability (TTD)[7] benefits because he had been dismissed for a reason unrelated to his injury before he started receiving benefits. Bates counters that the issue was not raised before the BIIA and that the superior court's decision was therefore proper. We review rulings on the admissibility of evidence for an abuse of

[7] A worker who is temporarily totally disabled is entitled to TTD benefits until "recovery is so complete 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" or when the claim is closed. RCW 51.32.090(3)(a); Hubbard v. Dep't of Labor & Indus., 140 Wn.2d 35, 42, 992 P.2d 1002 (2000).

discretion. Burnside v. Simpson Paper Co., 123 Wn.2d 93, 107, 864 P.2d 937 (1994).

Clark relies on RCW 51.32.090(4)(a), O'Keefe, 126 Wn. App. at 765, and Glacier Northwest, Inc. v. Walker, 151 Wn. App. 389, 212 P.3d 587 (2009). "RCW 51.32.090(4)(a) applies when a worker receiving TTD benefits returns to work at a modified job[8] he is physically able to perform." O'Keefe, 126 Wn. App. at 765. If an employer creates such a light-duty job and the employee's doctor releases the employee to perform the work, the Department may end the employee's TTD benefits.

> If the [light-duty job] thereafter comes to an end before the worker's recovery is sufficient in the judgment of his or her physician . . . to permit him or her to return to his or her usual job, or to perform other available work offered by the employer of injury, the worker's temporary total disability payments shall be resumed.

RCW 51.32.090(4)(a).

In O'Keefe, employer Woodinville Lumber created a light-duty job that was approved by O'Keefe's physician. O'Keefe, 126 Wn. App. at 762. Once he had returned to his job, O'Keefe frequently missed work, made inappropriate comments, and was twice seen sleeping in his truck. O'Keefe, 126 Wn. App. at 762–63. Woodinville fired O'Keefe, and the Department ended his TTD benefits. O'Keefe, 126 Wn. App. at 763. O'Keefe appealed that decision and the BIIA's subsequent affirmance, arguing that he was entitled to reinstatement of TTD benefits because "his work came to an end when Woodinville fired him." O'Keefe, 126 Wn. App. at 765. Division Two of this court disagreed, holding, "The work did not come to an end within the meaning of RCW 51.32.090(4)(a). O'Keefe stopped performing it because

[8] The parties refer to such work as "light-duty work."

Woodinville fired him for misconduct." O'Keefe, 126 Wn. App. at 766.

Relying on O'Keefe, Clark argues that the superior court abused its discretion in not allowing Bates's and Thaxton's testimony because it was relevant to whether Bates was entitled to TTD benefits under RCW 51.32.090(4)(a). But Clark never raised RCW 51.32.090(4)(a), O'Keefe, or the light-duty doctrine before the BIIA. A party may not raise and "the superior court may not consider a question that was not properly before the board." Hanquet, 75 Wn. App. at 663; see also O'Keefe, 126 Wn. App. at 764; RCW 51.52.115. At the superior court, Bates specifically argued the testimony should be excluded because it was not raised below. And Bates correctly notes that because the issue was not raised at the BIIA, he was precluded from introducing evidence to dispute Clark's characterization of events.

Furthermore O'Keefe is distinguishable. That case dealt with an employer who had satisfied the statutory prerequisites to light-duty employment: (1) it had created a light-duty job, (2) it had provided a physician with a description of that job, and (3) the physician had released O'Keefe to do the job. Here, Clark points to Thaxton's testimony to support its theory that Bates is not entitled to TTD benefits because he was terminated.

> Q. Could you briefly just give us an idea of what your duties were in terms of being the assistant safety director and issues with the drug testing policy and light-duty and workers' comp. and that kind of thing.
>
> A. I did workman's comp. Anybody that was injured I reviewed the injury and this type of thing, worked with the insurance company on it.
>
> . . . . If a person they were hired [sic], they had to have a drug screen before they were hired. . . .
>
> Q. Did Atkinson have some sort of a light-duty policy back in 1998 for people who needed accommodations because of job injuries?
>
> A. Yes, we did.

But Thaxton's testimony does not establish that it had created a light-duty job for Bates, provided his physician with a description of that job, or that the physician had released Bates to perform the job. And, as the superior court noted,[9] O'Keefe is distinguishable because the parties there did not contest that O'Keefe was terminated because of his misconduct. Here, by contrast, Thaxton claimed Bates was terminated for drug use, but the employer did not produce properly authenticated drug test results, and Bates maintained that he did not remember ever failing a drug test. O'Keefe is inapposite.

Absent a properly raised RCW 51.32.090(4)(a) issue, Thaxton's and Bates's testimony was irrelevant and prejudicial. Relevant testimony is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. According to the BIIA, the issue before it was "whether Mr. Bates was totally temporarily disabled from December 8, 1999 to October 17, 2006." While Bates's and Thaxton's testimony was probative of the reason Bates was fired, that fact was not material to any issue properly before the BIIA. Bates's and Thaxton's testimony was

[9] The court ruled, "The O'Ke[efe] and other cases are distinguished factually I would add by the fact that there's really no debate about the misconduct by O'Ke[efe] and the retirement by the claimant in the Energy Northwest case. Whereas here, there was solely a testimony that Mr. Bates was fired because of a—a drug test when the results of that lab report etcetera were not actually entered. So clearly the—what you would say is about foundation or substantial nature of the underlying claim is a—a different. So, for those reasons and at this point the Court is denying the motion." RP (Feb. 10, 2009) at 68.

Bates also maintains that the court properly excluded the testimony based on a lack of foundation. But the court's ruling appears to be premised on the factual differences in O'Keefe rather than a lack of foundation.

irrelevant because Clark failed to raise RCW 51.32.090(4)(a). See Hedlund v. White, 67 Wn. App. 409, 836 P.2d 250 (1992) (plaintiff's evidence of emotional distress irrelevant because complaint sought compensation only for property damage.) Accordingly, Bates's termination—absent an approved light-duty posting—was not relevant to whether he was totally temporarily disabled from December 8, 1999, to October 17, 2006. The superior court did not abuse its discretion.

Clark maintains that by introducing Thaxton's and Bates's testimony on termination before the BIIA, it properly raised the issue before the Board. But the BIIA's decision is confined to the issue of whether the evidence showed Bates was totally temporarily disabled from December 8, 1999, to October 17, 2006. There is no discussion about light-duty employment or termination. And when Bates's counsel objected before the BIIA to Clark's cross-examination questions about termination, Clark did not counter that the questions were relevant to RCW 51.32.090(4)(a). Furthermore, Clark provides no authority for its proposition that merely introducing evidence relevant to a statutory section at the BIIA is sufficient to preserve the issue on appeal. The principle is well established that "the superior court may not consider a question that was not properly before the board." Hanquet, 75 Wn. App. at 663. Adopting Clark's position would create an exception that would swallow the rule.[10]

[10] The Department also argues that the superior court erred in refusing to give its proposed instruction 14 and its related special verdict question 2, based on RCW 51.32.090(4)(a), O'Keefe, and Walker. But as the Department correctly acknowledges, "Without evidence to establish plaintiff's termination, . . . Instruction No. 14 and Special Verdict Form No. 2 would have no evidentiary basis." Reply Br. of Appellant, at 6. Because we conclude that the superior court properly exercised its discretion in excluding Bates's and Thaxton's testimony, we find no error in refusing to give

Temporary Total Disability Jury Instruction

Clark next argues that the court's instructions 10 and 11—both definitional instructions related to "Temporary Total Disability"—were misleading and incorrect statements of the law. Specifically, Clark argues that the court improperly modified a jury instruction for "Total Disability" by adding the word "Temporary." Instructions are sufficient if they correctly state the law, are not misleading, and permit the parties to argue their respective theories of the case. Codd v. Stevens Pass, Inc., 45 Wn. App. 393, 396, 725 P.2d 1008 (1986)). "The test for determining whether jury instructions are misleading is not a matter of semantics, but whether the jury was misled as to its function and responsibilities under the law." Adams v. Dep't of Labor & Indus., 74 Wn. App. 626, 631, 875 P.2d 8 (1994). We review jury instructions for errors of law de novo. Hue v. Farmboy Spray Co., 127 Wn.2d 67, 92, 896 P.2d 682 (1995). An instruction's erroneous statement of the applicable law is reversible error only where it prejudices a party. Hue, 127 Wn.2d at 92.

"Permanent total disability" is defined by RCW 51.08.160 as "loss of both legs, or arms, or one leg and one arm, total loss of eyesight, paralysis or other condition permanently incapacitating the worker from performing any work at any gainful occupation." (Emphasis added.) "Temporary total disability" is not defined by statute, but means "a condition that temporarily incapacitates a worker from performing any

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instruction 14 and special verdict question 2.

work at any gainful employment." Hubbard v. Dep't of Labor & Indus., 140 Wn.2d 35, 43, 992 P.2d 1002 (2000); Adams, 74 Wn. App. at 630. Temporary total disability "differs from permanent total disability only in duration of disability, and not in its character." Hubbard, 140 Wn.2d at 43.

Clark argues that the superior court's addition of the word "temporary" to the pattern instruction entitled "Permanent Total Disability" "misinformed [the jury] on the applicable legal standard." Br. of Appellant, at 32. The court instructed the jury,

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

(Emphasis added.) This instruction differs from Washington Pattern Instruction (WPI) 155.07 only by its addition of the word "temporary." It mirrors the language of Hubbard, which defines "temporary total disability" as "a condition that temporarily incapacitates a worker from performing any work at any gainful employment." Hubbard, 140 Wn.2d at 43. And Clark recognizes that "[t]he instruction is similar to Defendant's Instruction 12 that quoted verbatim Washington Administrative Code 296-20-01002." Br. of Appellant at 220.

Furthermore, Clark has failed to demonstrate prejudice from the amended instruction given that our Supreme Court has held that temporary total disability "differs

from permanent total disability only in duration of disability, and not in its character" and where there is no pattern instruction for temporary total disability. Hubbard, 140 Wn.2d at 43. Error is not prejudicial unless it affects or presumptively affects the outcome of the trial. Thomas v. French, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983). Indeed, even the pattern instruction entitled "Permanent Total Disability" indicates that the instruction may be used for both temporary and permanent total disability. The text of the pattern instruction references only "total disability" not "permanent total disability" except where it states, "Total disability is permanent when it is reasonably probable to continue for the foreseeable future." WPI 155.07. In that sense, WPI 155.07 is more properly described as a definition for "total disability," which can be adapted by a party for either permanent or temporary total disability.

Clark also challenges instruction 11 on largely identical grounds. That instruction 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 temporarily disabled, unless the employer 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.

(Emphasis added.) As with instruction 10, this instruction correctly states the law. It differs from the WPI only by the addition of the word "temporary." Because permanent and temporary total disability differ only in duration and not in character, the addition of the word "temporary" does not make the instruction misleading.[11]

[11] Clark also argues that instruction 11 improperly shifted the burden of proof by stating that employer must show 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

Hamm's Testimony

Clark next contends that the superior court abused its discretion by excluding Hamm's testimony. Specifically, Clark argues, "Dr. Hamm's testimony provided medical evidence on plaintiff's ability to work from a psychological standpoint, and therefore failing to allow his testimony did not allow the jury to consider all relevant aspects of plaintiff's ability to work." Reply Br. of Appellant at 18. Bates counters that the testimony was irrelevant and prejudicial. We agree.

We review rulings on the admissibility of evidence for an abuse of discretion. Burnside, 123 Wn.2d at 107. The superior court excluded Hamm's testimony, ruling that the testimony had little relevance and was outweighed by the risk of unfair prejudice.

> I believe that the testimony is substantially outweighed by the danger of unfair prejudice. The plaintiff's counsel has gone through a litany of other items that seem to be part in parcel to Doctor Hamm's [proffered] testimony that has little relation to the case and if they do -- do run a chance of unfair prejudice [that] get into prior criminal actions, racist remarks, certain -- I'll use the word confessions that the plaintiff uses.

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continuous basis." But this language is taken directly from WPI 155.07.01. And Clark has provided no authority establishing that this instruction improperly allocates the burden of proof.

In an apparently related argument, Clark maintains that by giving instruction 11 and refusing defendant's proposed instruction 20 on voluntary retirement, the court improperly shifted the burden of proof to establish Bates did not voluntarily retire. "A worker is considered 'voluntary retired' [and thus not eligible for TTD benefits] if '[(1) t]he worker is not receiving income, salary or wages from any gainful employment; and [(2) t]he worker has provided no evidence to show a bonafide [sic] attempt to return to work after retirement.'" Energy Northwest v. Hartje, 148 Wn. App. 454, 466, 199 P.3d 1043 (2009) (quoting WAC 296-14-100(1)). But as noted above, instruction 11 is an accurate statement of the law. Furthermore, there is no indication that Clark raised voluntary retirement at the BIIA, which confined its decision to the issue of "whether Mr. Bates was totally temporarily disabled from December 8, 1999 to October 17, 2006."

RP (Feb. 9, 2009) at 21 (emphasis added). The court properly excluded the testimony both on relevance and prejudice grounds.[12] First, as to relevance, Hamm did not testify that Bates's psychological problems affected his ability to work.

> Q: Would the mental status explain his history of unemployment?
> A: I think his mental illness could explain problems if he had problems with unemployment, intrapersonal problems with unemployment, because of the nature of his psychotic thinking and being paranoid at times. And also, he seems to be—he's not a real reliable historian in terms of how his mental illness has affected his functioning. He isolates himself. When he's with people he has some difficulties from time to time.
> I don't have enough data, you know, about any employment situation he has been in regarding any problems he might have.

Certified Appeal Board Record, Hamm Deposition, at 32 (emphasis added). And Bates had waived any claim of psychiatric disability related to his injury. The testimony was therefore irrelevant to the issue before the BIIA and the superior court—whether Bates was temporarily totally disabled from December 8, 1999, to October 17, 2006.

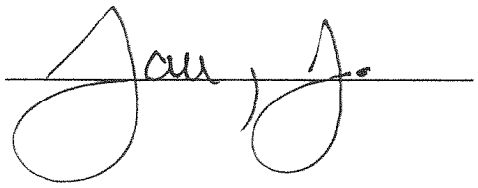
Even if the evidence were relevant, the superior court properly excluded it on prejudice grounds. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." ER 403. Here, Clark has not established that Hamm's testimony was probative on the issue of whether Bates was totally temporarily disabled because Hamm did not testify to any causal relationship between his psychiatric condition and his ability to work. By contrast, the potential for unfair prejudice was significant. The potentially prejudicial testimony contained the following information:

[12] The court also noted that the testimony was "[]cumulative and superfluous." RP (Feb. 9, 2009) at 21.

1. Bates's family had a history of psychiatric problems.
2. Bates's mother had a history of psychiatric hospitalization and alcoholism
3. All of Bates's siblings had some diagnosis of mental illness and alcoholism.
4. Bates was an alcoholic and drank heavily.
5. Bates had psychiatric problems in the past, heard voices telling him to fight, and felt the sensation of things crawling on him.
6. Bates was homeless for a period.
7. Bates received Social Security benefits and public assistance.
8. Bates was angry at Asians.
9. Bates's son had mental problems.
10. Bates had some elements of paranoia.
11. Bates was arrested for domestic violence.
12. Bates had psychotic hallucinations.

Absent testimony establishing a causal connection between this prejudicial testimony and Bates's ability to work, its probative value was outweighed by the potential for unfair prejudice. The superior court properly exercised its discretion in excluding the testimony.

For the reasons discussed above, we affirm.



WE CONCUR: