Hopkins, Gerald

FRAUD

Burden of proof

Following the 2004 amendments to RCW 51.32.240(5) and the Department rules WAC 296-14-4171 through 296-14-4129, the Department is no longer required to prove common law fraud. **….*In re Gerald Hopkins*, BIIA Dec., 11 14921 (2012)**

Effect of Department's failure to present a prima facie case

When the Department fails to present a prima facie case in a willful misrepresentation case, the correct disposition of the appeal is a reversal of the Department order and not a dismissal of the appeal. **….*In re Gerald Hopkins*, BIIA Dec., 11 14921 (2012)**

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: GERALD E. HOPKINS	)	**DOCKET NO. 11 14921**
	)	
CLAIM NO. AH-31390	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Gerald E. Hopkins, by
Bothwell & Hamill, PLLC, per
Timothy S. Hamill

Employer, Resers Fine Foods, by
None

Department of Labor and Industries, by
The Office of the Attorney General, per
Bryan Ovens, Assistant

The claimant, Gerald E. Hopkins, filed an appeal with the Board of Industrial Insurance Appeals on May 3, 2011, from an order of the Department of Labor and Industries dated April 19, 2011. In this order, the Department affirmed a December 30, 2010 order that stated:

> WHEREAS, the above claimant sustained an injury on 01/15/2008 while engaged in employment subject to the provisions of the Industrial Insurance laws, and
>
> WHEREAS, time-loss compensation benefits were paid upon the claimant's representation that he was not working and/or was unable to work, and
>
> WHEREAS, an investigation reveals that the claimant was employed during the following time periods during which time-loss benefits were obtained by willful misrepresentation, omission, and/or concealment of a material fact from the Department by the claimant;
>
> From 06/01/2009 through 12/31/2009 the claimant earned or had the earning capacity of $7367.96 (based on 2009 state's minimum wage of $8.55 per hour) while working for 'Cravings.' From 06/01/2009 through 12/31/2009 the claimant received time-loss benefits totaling $24,367.90. During this same period, the claimant was entitled to loss of earning power benefits of $17,313.37, resulting in an overpayment of $7054.53 for this period, and
>
> WHEREAS, the investigation further reveals that from 01/01/2010 through 12/23/2010, inclusive, the claimant was a partner in and was working, or performing work-type activity, or capable of working in the business known as 'Cravings' and

> WHEREAS, during the time period 01/01/2010 through 12/23/2010, inclusive, time loss benefits in the amount of $41,231.52 were obtained by willful misrepresentation, omission and/or concealment of a material fact from the Department;
>
> THEREFORE, it is ordered that the claimant, Gerald E. Hopkins, shall refund to the Department of Labor and Industries the overpayment of $48,286.05 plus a 50% penalty of $24,143.02 pursuant to RCW 51.32.240, in a total amount of $72,429.07.
>
> Formal demand is hereby made for repayment in the amount of $72,429.07 on the basis that such payments have been induced by willful misrepresentation.

The Department order is **REVERSED AND REMANDED**.

DECISION

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The Department filed a timely Petition for Review of a March 23, 2012 Proposed Decision and Order, in which the industrial appeals judge reversed the April 19, 2011 Department order and remanded the claim to the Department to find that the payment of time-loss compensation benefits for the period of June 1, 2009, through December 23, 2010, was not induced by willful misrepresentation and no overpayment of benefits occurred. On May 29, 2012, the claimant filed a Response. The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed.

RCW 51.32.240(5): When the Department alleges that a worker has received benefits as a result of willful misrepresentation, the Department is required to "initially introduce all evidence in its case in chief," and bears the ultimate burden of proving willful misrepresentation by clear, cogent, and convincing evidence. RCW 51.32.240(5); RCW 51.52.050(2)(c); *In re Frank L. Hejna*, Dckt. No. 04 24184 (August 28, 2006). At the conclusion of the Department's case in the current appeal, the claimant moved to dismiss for failure to make a prima facie case. CR 41(b)(3); 1/5/12 Tr. at 31. Mr. Hopkins did not rest on his motion, but proceeded to present his evidence. The industrial appeals judge deferred ruling until he had read the record. In the Proposed Decision and Order, the industrial appeals judge granted the motion and reversed the Department order.

In so doing, the industrial appeals judge held the Department to the nine-element common law fraud standard that applied prior to the 2004 amendment of RCW 51.32.240. As we have previously held, under the 2004 amendments to RCW 51.32.240, the Department is no longer required to prove common law fraud. *In re Vincent Reames*, Dckt. No. 07 11270 (July 21, 2008), at

5. Instead, the Department is required to prove the elements set forth in RCW 51.32.240(5) and fleshed out by the Department's rules, WAC 296-14-4121 through 296-14-4129.

Under RCW 51.32.240(5)(b):

> [I]t is willful misrepresentation for a person to obtain payments or other benefits under this title in an amount greater than that to which the person otherwise would be entitled. Willful misrepresentation includes:
>
> (i) Willful false statement; or
>
> (ii) Willful misrepresentation, omission, or concealment of any material fact.

Under RCW 51.32.240(5)(c) "willful" is defined as "a conscious or deliberate false statement, misrepresentation, omission, or concealment of a material fact with the specific intent of obtaining, continuing, or increasing benefits under this title." WAC 296-14-4122 defines "specific intent" as "the commission of an act or the omission of information with the knowledge that such an act or omission will lead to wrongfully obtaining benefits."

Under RCW 51.32.240(5)(d), the "failure to disclose a work-type activity must be willful in order for a misrepresentation to have occurred." Under RCW 51.32.240(5)(e):

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

CR 41(b)(3): With respect to the claimant's motion to dismiss at the conclusion of the Department's case, Mr. Hopkins was not required to rest on his motion. CR 41(b)(3); *In re David Gerlach*, BIIA Dec., 85 2156 (1986), at 6. In response to the Department's case-in-chief, he presented his own testimony and that of his girlfriend, Diane Garner. However, in addressing the motion to dismiss, the industrial appeals judge considered only the Department's evidence, not the claimant's. In addition, on a motion to dismiss, the evidence is considered in the light most favorable to the non-moving party, accepting that party's evidence as true. *Nelson Construction Company v. Port of Bremerton*, 20 Wn. App. 321 (June 5, 1978); *In re David A. Pattison*, Dckt. No. 00 14057 (July 27, 2001). It is not clear from the Proposed Decision and Order whether the industrial appeals judge applied that standard.

We also note that CR 41(b)(3) provides as follows: "After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief." The current appeal does not fit neatly into the language of CR 41(b)(3), which allows for the dismissal of a plaintiff's case if the plaintiff has failed to make the requisite prima facie showing. Here, the claimant has appealed a Department order, but the Department has the burden of going forward and the burden of proof. If we were to follow the literal language of the rule, granting the motion to dismiss would mean that the claimant's appeal would be dismissed and the Department order would stand.

We have previously addressed a similar situation in an appeal arising under the Washington Industrial Safety and Health Act (WISHA). As in willful misrepresentation cases, the Department bears the burden of proof in WISHA appeals. In *In Re Erection Company, Inc.*, Dckt. No. 02 W0078 (May 3, 2004), the Board vacated certain WISHA violations in response to the company's motion to dismiss for failure to make a prima facie case. The industrial appeals judge correctly used the same type of approach here, reversing the Department order based on his determination that the Department had failed to make a prima facie case.

Facts: With this legal framework in mind, we turn to a review of the facts, many of which are not in dispute. Mr. Hopkins sustained an industrial injury to his right elbow on January 15, 2008. He was paid time-loss compensation benefits for two periods that are at issue here--June 1, 2009, through December 31, 2009, and January 1, 2010, through December 23, 2010.

In December 2009, the Department was preparing to make a determination that Mr. Hopkins was employable. As part of that process, Mr. Hopkins' case was referred to Michelle L. Bishop, a Department vocational services specialist, at Work Source. Ms. Bishop was assigned to assist Mr. Hopkins in developing a resume, doing some job matching, and helping him with labor market research. She called him on his cell phone in December 2009, and he answered by saying "Cravings." When Ms. Bishop asked Mr. Hopkins if he was working, he said he was not. He told Ms. Bishop that Cravings was his girlfriend, Diane Garner's, business, and that he assisted sometimes when she needed help. In his testimony, Mr. Hopkins explained that Ms. Garner had just come back from Spokane after her daughter had undergone surgery and he had offered to take

the phone for the day to help her. He had forwarded her phone to his cell and he was in the Work Source parking lot, just coming out after looking for a job, when Ms. Bishop called.

It is not entirely clear exactly when this phone call occurred, but it appears to have been on or about December 8, 2009. The Jurisdictional History shows that time-loss compensation benefits were terminated by a December 23, 2009 Department order. On that same date, the Department issued a vocational determination saying Mr. Hopkins was able to work. The claimant challenged those determinations and time-loss compensation benefits were reinstated on March 10, 2010, retroactive to December 23, 2009. A year later, in a December 28, 2010 letter, the Department notified Mr. Hopkins that he was employable and that time-loss compensation benefits were being terminated.

In the meantime, Ms. Bishop's phone call triggered a Department investigation, which resulted in the order under appeal, as well as a premium assessment against Cravings. In its December 30, 2010 order, the Department determined that:

> From 06/01/2009 through 12/31/2009 the claimant earned or had the earning capacity of $7367.96 (based on 2009 state's minimum wage of $8.55 per hour) while working for 'Cravings.' From 06/01/2009 through 12/31/2009 the claimant received time-loss benefits totaling $24,367.90. During this same period, the claimant was entitled to loss of earning power benefits of $17,313.37, resulting in an overpayment of $7054.53 for this period.

For the period of January 1, 2010, through December 23, 2010, the Department determined that Mr. Hopkins "was a partner in and was working, or performing work-type activity, or capable of working in the business known as Cravings" and that he had obtained $41,231.52 in time-loss compensation by "willful misrepresentation, omission and/or concealment of a material fact from the Department." The Department assessed an "overpayment of $48,286.05 plus a 50% penalty of $24,143.02 pursuant to RCW 51.32.240, in a total amount of $72,429.07."

Reynaldo Gomez, a Department investigator, took Ms. Garner's and Mr. Hopkins' recorded statements on January 27, 2010, and March 11, 2010. Those statements were presented as part of the Department's case-in-chief. Exhibit Nos. 1 and 2. Ms. Garner and Mr. Hopkins also testified on the claimant's behalf. The statements and the testimony present a consistent picture.

Ms. Garner and Mr. Hopkins described their relationship as boyfriend/girlfriend or fiancés. Ms. Garner explained that she was the owner of Cravings, a business she started in February 2009, but the company never really got off the ground. The business took calls from people who paid her to pick up and deliver take-out orders from various restaurants. For each

delivery, Cravings was paid $7.00. The first delivery was made in June 2009. Business was very sporadic. Ms. Garner might get a call and then go a week or more before receiving one or two calls. In her Notice of Appeal from the premium assessment filed with the Board on February 12, 2010, Ms. Garner indicated the company had only made $498 in profit. She testified that that amount did not cover her expenses.

After she started the business, Ms. Garner continued to work full time as a nurse, working the day shift. According to both Ms. Garner and Mr. Hopkins, Cravings received calls and made deliveries almost exclusively in the evenings. Ms. Garner could not recall ever having received a call during the day.

Ms. Garner and Mr. Hopkins had separate homes but were together daily, and had seven children between them, so they were very busy. In addition, one of Ms. Garner's daughters had undergone three heart surgeries. Ms. Garner confirmed that, on the day Ms. Bishop called Mr. Hopkins, he had forwarded her phone to his cell phone to help her out. According to Ms. Garner, Mr. Hopkins would help out from time to time, which was easy because there was so little business. At most, he made 10 to 12 deliveries for Cravings in 2009, and received no compensation for doing so. Mr. Hopkins described the effects of the industrial injury on his right elbow function and explained how he would take his children along to assist when he made a delivery. Any money he received on a delivery he turned over to Ms. Garner. He received nothing from Ms. Garner to pay for expenses like gas.

In about January 2010, Ms. Garner changed the company to a partnership with Mr. Hopkins, because she was led to believe that was the right way to do it. But shortly after that, in February 2010, she shut Cravings down completely because the business was not getting any calls, she did not want to do anything wrong; and another company had started providing the same service. As far as Ms. Garner could recall, there were only two deliveries in 2010. Mr. Hopkins testified that, after he received the call from Ms. Bishop, he never made any more deliveries. He said he was not interested in a partnership because the company was "sucking up money" and "[m]ade no profit." 1/5/12 Tr. at 63. He said he could not work as a delivery driver because of his right elbow condition.

Mr. Hopkins explained that he would often ride along with Ms. Garner just because they were a couple and it was "quality time," "time to get away from the kids, you know, get some fresh

air and just drive." 1/5/12 Tr. at 58. He said that his and Ms. Garner's kids both helped out at times.

One of the things the Department relies on to establish Mr. Hopkins' involvement with the business is the fact that there was a Craig's List posting for Cravings that used Mr. Hopkins' phone number. Ms. Garner explained that Mr. Hopkins had done that by mistake and she was upset, because the number was supposed to be her home number, which was also the number she used for the company.

Mr. Hopkins used Ms. Garner's car, and was making payments on it, after wrecking his own on April 27, 2009. According to Ms. Garner, sometimes he would have advertisements for Cravings on the car, sometimes not. Mr. Hopkins was more definitive, saying that, unless he knew Ms. Garner was going to be seeing the car, he did not put the signs on the car because of the way they looked.

The only Worker Verification Form offered into evidence by the Department was one that was signed on December 24, 2009, and applied to the period of January 1, 2009, through December 24, 2009. Mr. Hopkins signed his name under penalty of perjury. The form contained the following "Worker's Statement": "Due to my work-related injury/illness, I didn't work, and I wasn't able to work from 1-1-09 to present. This means you didn't perform any type of work—paid or unpaid—such as volunteer work, self-employment, COPES or CHORE Services."

The Department did not offer any Worker Verification Forms for the period after December 24, 2009, but in his testimony Mr. Hopkins said he regularly filled out these forms. Likewise, in his March 11, 2010 recorded statement, Mr. Hopkins was asked if he had signed Worker Verification Forms dated each month, from April 29, 2009, through December 24, 2009, and one dated April 2, 2010. He answered in the affirmative. When asked if he had read the certification under penalty of perjury, he responded: "Yes, I did not volunteer, nor did I work, nor did I get any money from helping out!!!"

During his testimony, Mr. Hopkins was asked why he had not reported his activities with Cravings. He responded: "Because I wasn't doing any kind of work that I felt that was needed to be reported. I wasn't making any financial gain. I would have been—in my eyes I was basically doing what any other man would have done for his girlfriend or his wife, and I didn't make no money." 1/5/12 Tr. at 59. He said he "was helping her out. I was engaged. I was her fiancé. I just didn't—I wasn't making no money. I was barely just drive the car. They did most of the footwork, and out of

the 10 times, that is all I ever done, you know, and most of those were with my kid." 1/5/12 Tr. at 73. He felt he had been truthful on the Department forms. He did not believe he had done anything wrong, and maintained he was not capable of reasonably continuous gainful employment in 2009.

Analysis: The Department was required to prove that Mr. Hopkins induced payment of time-loss compensation benefits for the period of June 1, 2009, through December 23, 2010, by willful misrepresentation, omission, or concealment of a material fact, with the "specific intent of obtaining, continuing, or increasing benefits." 51.32.240(5)(c). WAC 296-14-4122 provides the following example of a situation that would not satisfy the specific intent requirement:

> An injured worker's wife is hired to manage the mobile home park where they live. Wages were paid to her for the management duties. The injured worker would occasionally answer the telephone when his wife was not available and he opened and closed the park gates each morning. He did not engage in the maintenance work of the park, provide tours of the park to prospective customers or perform any other park management duties. The worker did not report this activity to the department, his physician or his vocational counselor. The worker's omission of information is not considered "willful misrepresentation" with "specific intent" to receive benefits to which he would not be otherwise entitled.

The facts in the current case are similar to the Department's own example of a situation that should not be construed as willful misrepresentation. Like the injured worker in the Department's example, Mr. Hopkins appears to have been doing what people do—help friends and family out when they need it, with no expectation of receiving any compensation in return. He made 10 to 12 takeout deliveries in 2009, with the assistance of one of his children. He collected $7.00 per delivery, which he gave to Ms. Garner. He used a car for which he provided gas and on which he was making payments. He neither expected nor received any compensation. We conclude that these were not "work-type activities which either result in wages or income or would be reasonably expected to do so." RCW 51.32.240(5)(e). Because Mr. Hopkins was not engaged in work-type activities, his failure to apprise the Department that he helped his girlfriend on occasion was not a conscious or deliberate concealment of a material fact under RCW 51.32.240(5)(e).

Furthermore, as the Board said in *Hejna*, the Department's definition of specific intent "would appear to require that the Department prove . . . the claimant knows . . . he is obtaining benefits to which he is not entitled." *Hejna*, at 27. There is no such evidence here. To the contrary, Mr. Gomez described Ms. Garner and Mr. Hopkins as cooperative and forthcoming during their recorded statements, not the way people who are trying to hide something would likely behave.

Both expressed disbelief that a boyfriend helping his girlfriend out and receiving nothing in return should have to report that activity to the Department.

In addition, with respect to any time-loss compensation benefits paid after the phone call between Ms. Bishop and Mr. Hopkins, the Department's case is especially weak. At that point, the Department was aware of Mr. Hopkins' activities. Soon thereafter, on January 27, 2010, and March 11, 2010, Mr. Gomez took Ms. Garner's and Mr. Hopkins' recorded statements. At that point, the Department had even more information, yet still chose to reinstate time-loss compensation benefits on March 10, 2010, retroactive to December 23, 2009. There is no basis for finding that any of the payments covering the period from December 23, 2009, on, were induced by any misrepresentation or omission on Mr. Hopkins' part.

It is also difficult to understand how purported work for Cravings could be an issue with respect to any of the time-loss compensation benefits received for 2010. The company made only two deliveries that year, and shut down in February. Furthermore, Mr. Hopkins testified he had not helped out after the phone call in December 2009, from Ms. Bishop.

Viewing the evidence in the light most favorable to the Department and giving the Department every benefit of the doubt, it is possible that the Department made a bare prima facie showing of willful misrepresentation with respect to some of the time-loss compensation benefits received prior to the December 2009 phone call between Ms. Bishop and Mr. Hopkins. At that point, however, the Department was put on notice that Mr. Hopkins was helping his girlfriend with her business at times. Any payment of time-loss compensation benefits thereafter could not have been induced by the Department's lack of knowledge regarding those activities.

Even if the Department made a bare prima facie case for the period prior to the December 2009 phone call, which is doubtful, it has not proved the statutory elements of willful misrepresentation by clear, cogent, and convincing evidence with respect to any of the time-loss compensation benefits at issue here. The Department failed to prove that Mr. Hopkins was engaged in work-type activities or that he had the requisite intent or that he concealed a material fact. The Department order must therefore be reversed.

FINDINGS OF FACT

1. On July 11, 2011, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History in the Board record solely for jurisdictional purposes.

2. Gerald E. Hopkins received time-loss compensation benefits in the amount of $65,599.42 for the period of June 1, 2009, through December 23, 2010.

3. The Department of Labor and Industries seeks repayment of $48,286.05 in time-loss compensation benefits paid to Gerald E. Hopkins for the period of June 1, 2009, through December 23, 2010, as well as a 50 percent penalty in the amount of $24,143.02.

4. The Department's payment of time-loss compensation benefits for the period of June 1, 2009, through December 23, 2010, was not induced by any willful misrepresentation, omission, or concealment of a material fact by Mr. Hopkins.

CONCLUSIONS OF LAW

1. Based on the record, the Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of this appeal.

2. The Department of Labor Industries' payment of time-loss compensation benefits for the period of June 1, 2009, through December 23, 2010, was not induced by willful misrepresentation, on the part of the claimant, within the meaning of RCW 51.32.240(5).

3. The April 19, 2011 Department order is incorrect and is reversed. This matter is remanded to the Department to find that the payment of time-loss compensation benefits for the period of June 1, 2009, through December 23, 2010, was not induced by willful misrepresentation and no overpayment of time-loss compensation benefits occurred for that period.

DATED: June 5, 2012.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
DAVID E. THREEDY Chairperson

/s/_____
FRANK E. FENNERTY, JR. Member

/s/_____
JACK S. ENG Member