Sorenson, Del

FRAUD

Burden of proof

To establish fraud, the Department or self-insured employer must establish by clear, cogent and convincing evidence that the worker earned income. In cases involving time-loss compensation or loss of earning benefits, as opposed to pension benefits, the Department or self-insured employer need only show there was a knowing misrepresentation of the specific amount of income from wages or profit from self-employment on which it relied. In each case, however, the Department or self-insured employer must show the recipient's statement supporting payment of benefits was false in some material way. *Citing In re Norman Pixler*, BIIA Dec., 88 1201 (1989). ***….In re Del Sorenson*, BIIA Dec., 89 2697 (1991)** [*Editor's Note*: The Board's decision was appealed to superior court under Spokane County Cause No. 91-2-01355-6.]

SCOPE OF REVIEW

Fraud determinations

In an appeal from an order demanding repayment of fraudulently obtained time-loss benefits, the Board may not consider whether other circumstances warranted repayment, such as those set forth in RCW 51.32.240(1), for "clerical error, mistake of identify, or innocent misrepresentation." ***….In re Del Sorenson*, BIIA Dec., 89 2697 (1991)** [*Editor's Note*: The Board's decision was appealed to superior court under Spokane County Cause No. 91-2-01355-6.]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: DEL SORENSON	**)**	**DOCKET NO. 89 2697**
	)	
CLAIM NO. H-932441	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Del Sorenson, by
Delay, Curran, Thompson & Pontarolo, P.S., per
Robert H. Thompson

Employer, Eastern State Hospital, by
Office of the Attorney General, per
Daniel Judge and Mary Carroll Knox, Assistants

Department of Labor and Industries, by
Office of the Attorney General, per
Jacquelyn R. Findley, Assistant

This is an appeal filed by the claimant on June 26, 1989 from an order of the Department of Labor and Industries dated May 4, 1989 which affirmed an order dated March 17, 1989 which closed the claim with time loss compensation as paid to November 30, 1988, without award for permanent partial disability, and with a formal demand to the claimant for reimbursement of $1,268.08 for the balance of overpayment of time loss compensation and for reimbursement of $2,250.00 for previous award for permanent partial disability. The order of March 17, 1989 also stated that an order of February 8, 1989 for repayment of $30,026.36 due to fraud was still in effect. That order alleged the claimant was gainfully employed or capable of being gainfully employed from January 4, 1986 through November 30, 1988, and demanded reimbursement of time loss compensation in the amount of $20,017.57 which was obtained fraudulently by misrepresentation by the claimant and concealment of employment. The order further imposed a penalty of 50% of the amount and demanded a total amount of $30,026.36 from the claimant. **REVERSED AND REMANDED**.

PROCEDURAL AND EVIDENTIARY MATTERS

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on timely Petitions for Review filed by the claimant, the employer, and the Department of Labor and Industries to a Proposed Decision and Order issued on July 23, 1990 in which the order of the Department dated May 4, 1989 was reversed, and the matter was remanded to the Department of Labor and Industries with directions to issue an order demanding reimbursement of time loss compensation benefits, under the provisions of RCW 51.32.240, for the period February 8, 1988

through the last date of receipt of time loss compensation benefits by the claimant, and to thereupon close the claim.

The employer, Eastern State Hospital, and the Department of Labor and Industries have argued that the provisions of the order of the Department dated February 8, 1989 are not properly before the Board. We have reviewed the jurisdictional facts and conclude, as did our Industrial Appeals Judge, that the provisions of the order of February 8, 1989 are before us.. The order was protested by Mr. Sorenson on February 16, 1989 and subsequently affirmed by an order dated March 17, 1989 which in turn was protested by Mr. Sorenson on April 26, 1989. An intervening order of March 31, 1989, which again affirmed the February 8, 1989 order, is superfluous. The order dated May 4, 1989, from which the present appeal is taken, affirmed the order dated March 17, 1989 which in turn affirmed the February 8, 1989 order. Further reference may be had to the discussion, with which we agree completely, contained in the Proposed Decision and Order from page 2, line 16 through page 5, line 13.

The Board has reviewed the evidentiary rulings in the record of proceedings and the further rulings contained in the Proposed Decision and Order at page 5, line 14 through page 6, line 11. We find no prejudicial error was committed, and the rulings, as supplemented in the Proposed Decision and Order, are hereby affirmed.

DECISION

The issues raised by this appeal are:

> (1) Whether Mr. Sorenson fraudulently induced the Department to pay time loss benefits for the period January 4, 1986 through November 30, 1988;
>
> (2) Whether he was temporarily totally disabled due to his industrial injury for the period December 1, 1988 through March 17, 1989;
>
> (3) Whether his condition causally related to the industrial injury was fixed and stable, as opposed to requiring further treatment on either March 17, 1989 or May 4, 1989; and,
>
> (4) If his related condition was fixed and stable, whether Mr. Sorenson was permanently and totally disabled due to his industrial injury on either March 17, 1989 or May 4, 1989. [1]

[1]Mr. Sorenson's Notice of Appeal clearly identified the issues related to (1) fraud and (4) permanent and total disability. Further time loss compensation (2) and treatment (3) were identified without opposing objection at a conference. See 10/10/89 Tr. at 8-9. The orders of February 8, 1989 and March 17, 1989, as affirmed by the appealed order of May 4, 1989, encompass all of these issues. Legal fixity of condition was first determined by the order of March 17, 1989. In

We find in favor of Mr. Sorenson on the first issue, and in favor of the Department and the employer, Eastern State Hospital, on the remaining issues. Fraud has not been shown. Otherwise, the claim was properly closed with time loss compensation as paid to November 30, 1988. We also note that no evidence was presented related to permanent partial disability or an alleged overpayment of time loss compensation in the amount of $1,268.08. We, therefore, affirm the Department order on these matters.

The parties having the initial burdens on each of these issues have failed to establish their respective prima facie cases. Our disposition of this appeal does not require that we review much background information concerning Mr. Sorenson and his injury claim. Suffice it to say that Mr. Sorenson is 59 years old and sustained this industrial injury to his back in September 1981 while employed by the Department of Social and Health Services at Eastern State Hospital. Mr. Sorenson continued to complain of low back, buttock, and left leg pain while his claim was open. He has received treatment, vocational services, and time loss compensation under the claim.

The Department alleges Mr. Sorenson fraudulently obtained time loss compensation for the period January 4, 1986 through November 30, 1988. The Department's authority to recoup benefits which it has paid due to the fraudulent inducement of the recipient is contained in RCW 51.32.240(4).[2] The Department has the initial burden to introduce its evidence establishing a prima facie case for fraud when an appeal has been taken to this Board from a Department fraud order in a state fund

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order to be entitled to additional time loss compensation benefits to March 17, 1989, Mr. Sorenson would only need to show that his industrial injury precluded him from any gainful employment. He would not be required to demonstrate that treatment was required prior to that date. In re Douglas G. Weston, BIIA Dec., 86 1645 (1987).

[2]

> (4) Whenever any payment of benefits under this title has been induced by fraud the recipient thereof shall repay any such payment together with a penalty of fifty percent of the total of any such payments and the amount of such total sum may be recouped from any future payments due to the recipient on any claim with the state fund or self-insurer against whom the fraud was committed, as the case may be, and the amount of such penalty shall be placed in the supplemental pension fund. Such repayment or recoupment must be demanded or ordered within one year of the discovery of the fraud.

RCW 51.32.240(4).

claim. RCW 51.52.050. We have previously described the standard of proof and elements necessary to a prima facie case for fraud, as stated by our courts:

> In Washington, common law fraud has nine essential elements, all of which must be established by clear, cogent and convincing evidence: 1) representation of an existing fact; 2) its materiality; 3) its falsity; 4) the speaker's knowledge of its falsity or ignorance of its truth; 5) his intent that it should be acted on by the person to whom it is made; 6) ignorance of its falsity on the part of the person to whom it is made; 7) the latter's reliance on the truth of the representation; 8) his right to rely upon it; and 9) his consequent damage.

In re Norman L. Pixler, BIIA Dec., 88 1201 (1989) citing Sigman v. Stevens-Norton, Inc., 70 Wn.2d 915, 920, 425 P.2d 891 (1967); and, Martin v. Miller, 24 Wn.App. 306, 308, 600 P.2d 698 (1979).

There is no doubt in the present case that, related to the period of alleged fraud, Mr. Sorenson submitted time loss certification cards on which he represented to the Department that he had last worked on September 17, 1981 and had not returned to work, including self- employment. The physician's section of these cards also indicated that Mr. Sorenson was still in need of treatment and did not have medical release to return to work. Exhibit No. 2. Neither are we here so much concerned with elements such as (4) Mr. Sorenson's knowledge, (5) his intent, (6) the Department's ignorance, or its (7) reliance or (8) its right to rely upon a representation. Rather, we believe this case turns upon the sufficiency of the Department's and employer's evidence to establish the elements of (2) materiality, (3) falsity and (9) damage. These latter three elements will often, as they do in the present circumstances, overlap in industrial insurance cases where the Department or a self-insurer alleges that time loss compensation benefits were fraudulently induced by the recipient.

In Pixler, supra, the Board majority held that the second element of fraud, materiality, necessary to the Department's case under RCW 51.32.240(4) is not adequately established in a pension benefits case if the worker's earnings from employment performed while receiving the pension are not sufficient to warrant either recoupment or termination of the pension benefits. The majority held that Mr. Pixler, although engaged in part-time employment, was not gainfully employed within the meaning of statutory provisions controlling termination of pension benefits. See, RCW 51.08.160 and RCW 51.32.160. In short, the fact of employment is not necessarily material in a pension benefit fraud case; the critical determining factor is whether the employment is properly deemed gainful.

The Department distinguishes Pixler, which involved pension benefits, from the present case where time loss compensation benefits were received while Mr. Sorenson's claim was open. Where

full time loss compensation benefits are received by a worker, the receipt of any amount of income by the worker would contribute towards the making of a case for fraud. Pension benefits such as in Pixler are either all or none; while time loss compensation under the aegis of an open claim pursuant to RCW 51.32.090 may be either full or partial (commonly referred to as "loss of earning power"). See RCW 51.32.090(3). Thus, in a case for fraud related to receipt of benefits under RCW 51.32.090, the Department or self-insurer would need only show there was knowing misrepresentation of the specific amount of income from wages or profit from self-employment upon which the Department properly relied, resulting in higher periodic monthly benefits having been paid as compared to the proper rate, had honest representation been made.

Despite this noted distinction, however, the underlying rationale of Pixler with regard to benefit fraud cases holds true in time loss compensation or loss of earning power compensation cases as well as in pension cases. That is, the mere showing that a worker was at a place of employment or engaged in a job task is not necessarily material. The Department or self-insurer alleging fraud must establish by clear, cogent, and convincing evidence that the worker was earning income. It is only the amount of income which distinguishes fraud in full or partial time loss cases under RCW 51.32.090 from pension cases under RCW 51.32.060. Apart from this and the duration of disability, the character of permanent total disability and temporary total disability is the same. Bonko v. Dep't of Labor & Indus., 2 Wn.App. 22, 25-26, 466 P.2d 526 (1970).

We have noted that Pixler focused on the second element of fraud, materiality, and also that this is often interrelated with the third element, falsity, and the ninth, damage. We summarize, then, one rule in common between pension fraud cases such as Pixler and time loss or loss of earning power fraud cases such as the present: The Department or self-insurer must show that the benefit recipient's statement was false in some material way, so that the Department or self-insurer was damaged by having been induced to make periodic benefits to which the recipient was not properly entitled at all or which were greater than the entitlement.

In the present case, the Department has alleged "the claimant was gainfully employed, or capable of being gainfully employed" during the period in question. Order of February 8, 1989. We have reviewed the entire record in this case and, upon this record, must conclude that the Department and the employer have not presented clear, cogent, and convincing evidence, as they must, that Mr. Sorenson was either gainfully employed or capable of gainful employment during the period in

question.[3] We are limited by economy to a summary of the nature of the evidence presented. Otherwise, the showing of a nullity, such as the lack of a sufficient quantum of proof, would inevitably require an unwarranted recitation of virtually every piece of evidence presented.

Mr. Sorenson, at least for the benefit of his friend Theodore Gaze, if not for his own benefit, attempted to establish a barbershop business in the City of Walla Walla and worked at this project throughout the period in question. Mr. Gaze financially backed the project and Mr. Sorenson tended to all of the operational/managerial aspects. Mr. Sorenson arranged for leasing of premises, and obtained and made expenditures for equipment, supplies, and advertising. Mr. Sorenson has a barber's license which dated back many years and also arranged for other barbers to be present in the shop during most all of its period of operation. The contracts with these barbers called for a flat fee for chair leasing, but the actual practice was for the business, Tieton Street Barber Shop, to take 40% of gross receipts instead. The shop was open mostly five days a week and Mr. Sorenson was observed to be physically present in the shop a substantial period of the time. He was also observed on occasion to be cutting hair himself as well as attending to the managerial tasks which we have mentioned, including record keeping.

None of the witnesses, however, ventured any estimate whatsoever as to the number of haircuts Mr. Sorenson completed in any day, week, or other period. The record is devoid of any information from which a trier of fact could infer that his total of haircuts was limited to, for instance, as few as five or hundreds over a more than two year period of time. This is true even though several witnesses were called, such as a fellow barber, who might have shed some light on this matter. One barber did indicate that he himself earned a maximum of $100 to $125 a week in the shop for a very brief period. However, upon cross- examination, the barber admitted that he and Mr. Sorenson had parted ways on bad terms and also that he had not shown any income himself on tax returns for the relevant period.

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[3] . . . [T]he words "clear, cogent and convincing" mean something morethan a mere preponderance of the evidence . . . . "clear, cogent and convincing" proof is a higher degree of proof than a "preponderance of the evidence" ....

Holmes v. Raffo, 60 Wn.2d 421, 426, 374 P.2d 536 (1962). "This is the equivalent of saying that the ultimate fact in issue must be shown by evidence to be 'highly probable.' " (Emphasis supplied) In re Sego, 82 Wn.2d 736, 739, 513 P.2d 831 (1973).

The Department's investigator had obtained records of the bank account which was maintained by Mr. Sorenson as both a personal account and the business account of the Tieton Street Barber Shop. Some of these records were provided to the Department's counsel and others were misplaced. In any event, the only portion of these records presented were copies of canceled checks showing expenditures from the account for business purposes such as rent, advertising and supplies. No information at all was presented to show, for instance, the total flow of money through the account or even the amount of cash deposited or something suggestive of a maximum amount expended for business purposes. In contrast, Mr. Sorenson and Mr. Gaze both testified that the barbershop did not turn any profit and operated at a loss during the entire period and eventually went out of business. For example, tax returns were submitted showing gross receipts of the barbershop in 1986 as $6,400. However, Mr. Gaze testified that a net loss resulted after expenses were deducted. Mr. Sorenson did not receive any remuneration, ongoing or otherwise, for his attempts to establish and manage the business.

We recognize that much of the barbershop's business was on a cash basis and that the opportunity for concealing either business income or income to Mr. Sorenson was present. Nevertheless, given only evidence of the nature which we have just described, it cannot be said that the Department has presented clear, cogent, and convincing evidence, or evidence which makes it "highly probable," that Mr. Sorenson received income from his efforts.

Mr. Sorenson and Mr. Gaze both explained that they were long-time friends and that Mr. Gaze was interested in trying to establish a business in Walla Walla, while at the same time providing Mr. Sorenson an opportunity to avoid the frustration of doing nothing useful while he was otherwise incapacitated from gainful employment. In fact, Mr. Sorenson's vocational counselor, Dr. Amy Ramm, was at least in part aware of Mr. Sorenson's involvement with the barbershop. At the same time, Dr. Ramm stated her opinion that Mr. Sorenson did not have the physical capability and the transferable skills necessary to successfully compete in the barbershop business.

Mr. Sorenson painted a picture of himself as having the goal of earning a living as a barber and having alerted the Department to this, but failing to earn any income through his efforts. We must conclude, on this limited record, that Mr. Sorenson's and Mr. Gaze's explanations regarding the reasons for, and financial shortcomings of, this business are at least as plausible as the inference which the Department and employer ask that we draw from only highly circumstantial evidence. No

evidence was presented which makes it "highly probable" that Mr. Sorenson was earning any income.[4]

Neither do we find in the evidence any high probability that Mr. Sorenson was capable of gainful employment even if not actually gainfully employed. The Department's contract vocational counselor, Dr. Ramm, believed that Mr. Sorenson was not capable of gainful employment during this period. The only medical evidence presented was in the form of time loss certification cards signed by a physician who stated that Mr. Sorenson was not released for return to work. The Department did present the testimony of a physical therapist, Douglas Morton, who had evaluated Mr. Sorenson during the period in question. He provided a pre-work conditioning or work hardening program to Mr. Sorenson. Mr. Morton questioned whether Mr. Sorenson had put forth his fullest effort to accurately reflect full physical capabilities. However, Mr. Morton's testimony fell far short of suggesting that Mr. Sorenson was capable of gainful employment.

In fact, Mr. Morton remained of the opinion that Mr. Sorenson lacked the physical strength or endurance to work. " ... (T)here's nothing in my evaluations over the period of time that I saw him (sic) indicated that he was capable of working. I never observed that." 1/31/90 Tr. at 44. No medical or other vocational witnesses were called to testify. The evidence thus falls short of establishing any case for fraud due to misrepresentation of capability. We further note that, even had the Department shown Mr. Sorenson was most likely capable of working, his own physician certified him as not released for work on the time loss certification cards. This would have negated the fourth element necessary to a fraud case, Mr. Sorenson's own knowledge of falsity.

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[4]It is not our task to suggest proper litigation strategy. Nevertheless, due to our finding that the evidence is insufficient, we ought in fairness to at least suggest what kind of evidence might have been useful towards establishing a prima facie case in a difficult case such as this. We have already implied our curiosity as to why no witness was asked to estimate the total number of haircuts observed to have been provided by Mr. Sorenson. We have likewise noted that the investigator did not provide, for whatever reason, all of the information obtained from the bank account. We might also find it useful to have the opinion of an expert such as an economist or an accountant in a case such as this. As the evidence stands, the Department's own investigator openly admitted that the evidence which she gathered did not show that Mr. Sorenson made any income from this business. In the final analysis, the Department presented no more substantial evidence at hearing than that gathered by the investigator herself. We do not view ourselves as having any inherent expertise in barbershop business practices and/or profits. We cannot elevate to the level of probability, let alone high probability, the mere innuendo or possibility that Mr. Sorenson earned some income.

Finally, the Proposed Decision and Order would allow the Department to recoup time loss compensation benefits from February 8, 1988 forward even though its case for fraud had not been made. The Proposed Decision and Order found that the Department's payment of time loss compensation was "a mistake based on an incomplete understanding of Mr. Sorenson's condition." Proposed Decision and Order at 17. This finding is in obvious reference to the provisions of RCW 51.32.240(1) allowing recoupment "[w]henever any payment of benefits under this title is made because of clerical error, mistake of identity, innocent misrepresentation ... or any other circumstances of a similar nature, all not induced by fraud ...."

The Department's order of February 8, 1989 does not allege recoupment was being made for any of the reasons stated in RCW 51.32.240(1) which clearly excludes fraud. The exclusion of fraud from subsection (1) is a clear indication to us that matters such as mistake or innocent misrepresentation cannot be treated as if they are simply merged with, or inherent in, a Department order alleging fraud. "The questions the board may consider and decide are fixed by the order from which the appeal was taken (citations omitted) as limited by the issues raised by the notice of appeal." Lenk v. Dep't of Labor & Indus., 3 Wn. App. 977, 982, 478 P.2d 761 (1970). " . . . [A]lthough the evidence before the board might take a wide range, the board cannot enlarge the lawful scope of the proceedings, which is limited strictly to the issues raised by the notice of appeal . . . ." Brakus v. Dep't of Labor & Indus., 48 Wn.2d 218, 220, 292 P.2d 865 (1956). See also, In re Zotyk Dejneka, BIIA Dec., 51,408 (1979). Having failed to establish its case for fraud as stated in its order, neither the Department nor this Board may turn to consider in this appeal the possibility that some other circumstance existed, such as contained in RCW 51.32.240(1), to partially justify the February 8, 1989 order. In any event, there is simply a lack of satisfactory evidence in this record of mistake or innocent misrepresentation or circumstance of a similar nature which would justify even a partial recoupment of compensation for the period covered in the order of February 8, 1989.

We find also that Mr. Sorenson's claims for additional time loss compensation after November 30, 1988, further treatment, and pension fail because he has not established a prima facie case on any of these issues. As previously indicated, the only colorable medical evidence presented in this case was in the form of time loss compensation cards signed by Mr. Sorenson's physician, Dr. William Ashby. The last of these was signed November 29, 1988, which is two days prior to the further period of time loss compensation in question. Dr. Ashby responded "never" to the form question "If not released, when do you anticipate release to work?" Exhibit No. 2. On this same card, Dr. Ashby

indicated his date of most recent treatment was November 23, 1988, that the condition was not stable and that he anticipated permanent impairment would result.

We recognize that the Department itself might voluntarily choose to rely upon such time loss certification cards as sufficient to justify its payment of time loss compensation benefits, or even to provide continued treatment, in particular cases. Nevertheless, this does not mean that presentation of such cards to this Board as documentary evidence meets the minimal requirements for establishing a prima facie case for further treatment or time loss compensation. The certification cards contained in Exhibit No. 2, including the one above referenced, are totally lacking in any statement that the worker's disability or need for further treatment is related to the industrial injury at issue here. For this reason alone, we refuse to consider such cards to establish a prima facie case for either further treatment or further time loss benefits.

Further, in the present case, evidence was presented that Mr. Sorenson was involved in a moped accident in June 1984, at which time he at least fractured his right clavicle and some ribs. He has other physical problems as well, including a bladder condition and some type of cancer which he identified himself. In the present case, this provides all the more reason why it is inappropriate to infer that statements on time loss certification cards, without further explanation, relate to the industrial injury. Likewise, there is nothing on the face of the time loss certification card which should necessarily cause us to believe that Mr. Sorenson remained disabled from work beyond November 29, 1988, on which date the card was signed. We can only read the physician's stated opinion that Mr. Sorenson would "never" be released for work as an opinion held at the time when the statement was made on November 29 or when treatment was provided on November 23, 1988. There is nothing to inform us that Dr. Ashby continued to hold that opinion beyond the date on which he expressed the opinion.

Finally, the parties entered into a stipulation, Exhibit No. 19, that if called to testify, Dr. Ashby would state that as of the last time he examined Mr. Sorenson on November 23, 1988, Mr. Sorenson was not permanently and totally disabled. We cannot reasonably take this statement at anything other than its face value. In short, on November 23, 1988, for <u>whatever</u> reason, Dr. Ashby did not view Mr. Sorenson as permanently and totally disabled. It would be sheer speculation to conclude that the stipulation is a reference to lack of fixity of condition, just as it would be sheer speculation to consider it a statement that Mr. Sorenson is not entitled to further time loss compensation benefits. At most, the stipulation adds ambiguity to this case. It does not contribute to a prima facie case for further time loss

compensation after November 30, 1988, or for further treatment after March 17 or May 4, 1989, and certainly not for a pension.

Neither does Dr. Ramm's testimony suffice to support further time loss compensation or a pension. Her opinions in this regard are not based upon any medical findings of substance contained anywhere in the record, as they must be. Fochtman v. Dep't of Labor & Indus., 7 Wn.App. 286, 499 P.2d 255 (1972). Neither were any questions asked of her from which we could reasonably infer that she believed her own opinions were founded upon physical restrictions related to the industrial injury at issue before us. Mr. Sorenson has not established a prima facie case for further treatment, further time loss compensation, or pension.

In so holding, we adopt from the Proposed Decision and Order Findings of Fact Nos. 1 through 4, inclusive, and Conclusion of Law No. 1. In addition, we make the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

5. As of May 4, 1989, Mr. Sorenson's condition causally related to his industrial injury was not permanently partially disabling.

6. As of May 4, 1989, Mr. Sorenson's condition causally related to the industrial injury of September 17, 1981 did not render him incapable of engaging in reasonably continuous gainful employment when considering his age, education, skills, and work history.

7. During the period December 1, 1988 through May 4, 1989, inclusive, Mr. Sorenson was not incapable of any gainful employment, nor did he suffer a loss of earning power, due to the effects of his industrial injury of September 17, 1981.

8. During the period January 4, 1986 through November 30, 1988, Mr. Sorenson received time loss compensation benefits under this claim from the Department of Labor and Industries in the amount of $20,017.57. Mr. Sorenson did not induce the Department to pay these benefits by representation of any fact which he knew to be false and which representation was at the same time material to a determination of whether or not he received any income from gainful employment or was capable of gainful employment during the period in question. Mr. Sorenson was neither gainfully employed nor was he capable of gainful employment from January 4, 1986 through November 30, 1988, inclusive.

CONCLUSIONS OF LAW

2. The order dated March 31, 1989 is duplicative of a prior order and is of no effect.

3. As of May 4, 1989, Mr. Sorenson was not a permanently and totally disabled worker within the meaning of RCW 51.08.160 and 51.32.060. As of that date Mr. Sorenson did not suffer permanent partial disability within the meaning of RCW 51.32.080.

4. As of May 4, 1989, Mr. Sorenson was not in need of further treatment within the meaning of RCW 51.36.010.

5. During the period December 1, 1988 through May 4, 1989, Mr. Sorenson was not a temporarily totally disabled worker, nor did he suffer partial loss of earning power, within the meaning of RCW 51.32.090.

6. Mr. Sorenson did not fraudulently induce the Department to pay time loss compensation benefits within the meaning of RCW 51.32.240(4) related to the period January 4, 1986 through November 30, 1988.

7. The order of the Department of Labor and Industries dated May 4, 1989, which affirmed an order dated March 17, 1989 which closed the claim with time loss compensation as paid to November 30, 1988, without award for permanent partial disability, and with a formal demand for reimbursement of $1,268.08 for the balance of overpayment of time loss compensation and for reimbursement of $2,250.00 for previous award for permanent partial disability, and which stated the order of February 8, 1989 for repayment of $30,026.36 due to fraud was still in effect, is incorrect and is reversed. This matter is remanded to the Department with directions to issue an order closing the claim with time loss compensation as paid to November 30, 1988, without award for permanent partial disability, setting aside the order dated February 8, 1989, and making a demand for reimbursement of time loss compensation overpayment in the amount of $1,268.08 and reimbursement of previously paid permanent partial disability award in the amount of $2,250.00.

It is so **ORDERED**.

Dated this 27th day of February, 1991.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
SARA T. HARMON Chairperson

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

/s/_____
PHILLIP T. BORK Member