

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

1 IN RE: NEIL W. DERLINE) DOCKET NO. 13 14103
2)
3 CLAIM NO. Y-711158) PROPOSED DECISION AND ORDER

4
5 INDUSTRIAL APPEALS JUDGE: Tom M. Kalenius

6
7 APPEARANCES:

8
9 Claimant, Neil W. Derline, by
10 Williams, Wyckoff & Ostrander, PLLC, per
11 Douglas P. Wyckoff

12
13 Employer, Pete Muller Logging & Construction,
14 None

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16 Department of Labor and Industries, by
17 The Office of the Attorney General, per
18 W. Martin Newman, Assistant

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20 The claimant, Neil W. Derline, filed a protest with the Department of Labor and Industries on
21 March 25, 2013. The Department forwarded it to the Board of Industrial Insurance Appeals as an
22 appeal. The claimant appeals a Department order dated March 5, 2013. In this order, the
23 Department affirmed a Department order dated February 4, 2013, that assessed an overpayment in
24 the amount of \$40,202.56 plus a 50 percent penalty of \$20,101.28 for a total overpayment of
25 \$60,303.84 induced by willful misrepresentation, omission and concealment of capacity for gainful
26 employment on a reasonably continuous basis. The Department order is **REVERSED AND**
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30 **REMANDED.**

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32 **PROCEDURAL AND EVIDENTIARY MATTERS**

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34 On September 24, 2013, and November 18, 2013, the parties agreed to include the
35 Jurisdictional History, as amended, in the Board's record. That history establishes the Board's
36 jurisdiction in this appeal.

37
38 **PRELIMINARY MATTERS**

39
40 The depositions of Daniel L. Hughes, taken on December 4, 2013, Heather Kroll M.D., taken
41 on December 5, 2013, and Robert B. Worth, M.D., taken on December 19, 2013, were published
42 on receipt. All objections are overruled. All motions are denied. Dr. Worth's Deposition Exhibit No. 1
43 is renumbered Exhibit No. 35 and is rejected. Deposition Exhibit No. 2 was admitted as Exhibit
44 No. 25 on November 18, 2013, and it is renumbered as Exhibit No. 36 and rejected as duplicative.
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1 Exhibit No. 17, a job analysis of a crew chief position was withdrawn and Exhibit No. 14, a
2 book, were not offered after being marked. Subsequent exhibits were offered and testimony
3 referenced the subsequent exhibit numbers. To match the testimony to the exhibit number, the
4 exhibits were not renumbered after Exhibit No. 14, and later Exhibit No. 17, were withdrawn.
5 11/18/13 Tr. at 18 and 12/3/13 Tr. at 19. The motion to strike the testimony at lines 11 and 12 at
6 page 136 is granted. 11/15/13 Tr.

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9 All interlocutory orders are affirmed.

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11 **ISSUE**

12 Did the claimant obtain funds through willful misrepresentation during
13 the period of June 25, 2011, through September 26, 2012?

14
15 **EVIDENCE**

16 Lee Ann Matson and Allison Bracket, Worker's Compensation Adjudicators employed by the
17 Department, explained the investigation of Mr. Derline. Both denied that the prior audit of a racing
18 team for which Mr. Derline volunteered was focused on Mr. Derline's alleged full-time employment.
19 Ms. Bracket agreed that there was no proof that Mr. Derline had any income between June 25,
20 2011, and September 26, 2012.

21 Steven Fretts and Robert R. Wilson, former police officers and current surveillance
22 investigators with the Department, described Mr. Derline's volunteer activities as a crew chief for
23 Jessica Dana Racing LLC (JDR).

24 Neil Derline, Troy Dana and Jessica Dana recounted Mr. Derline's tenure as crew chief of
25 the JDR team that included Bryan Rolland and Shane Turner.

26 F. Wayne Lieb, Mr. Derline's former attorney and a sponsor of the JDR team, testified that
27 Mr. Derline was surprised he should have written on the worker's verification forms that he did
28 some volunteer activities for JDR.

29 Michael Barrett summarized Mr. Derline's work history as a mechanic and activities as a
30 crew chief. Richard Ewing, an automotive machinist, explained the dynotuning business allegedly
31 promoted by Mr. Derline. Shane Turner, Mr. Derline's son-in-law described the limitations
32 Mr. Derline demonstrated while performing normal daily activities.

33 Dr. Edward Dagher determined Mr. Derline's conditions proximately caused by the industrial
34 injury of December 29, 2003, did not prevent him from gainful employment between June 25, 2011,
35 and September 26, 2012. Exhibit No. 32. With the presentation of Dr. Dagher, the Department
36 rested on November 19, 2013.

1 The medical testimony of Drs. Knoll and Worth and the testimony of Daniel Hughes, a
2 physical therapist, detailed Mr. Derline's physical conditions and limitations that rendered him
3 incapable of gainful employment on a reasonably continuous basis between June 25, 2011, and
4 September 26, 2012.
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7 From the evidence, the following chronology emerged:

8 Neil Derline's History

9
10 Mr. Derline was born on May 20, 1955. Mr. Derline completed high school and a two year
11 mechanical training course in 1976. He made his living as a mechanic before driving a logging truck
12 for nine years. He was injured in a motor vehicle accident on December 29, 2003. Mr. Derline
13 denied prior neck or back problems but had unrelated high blood pressure, thyroid disorder, a
14 hernia repair and appendectomy.
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17 Industrial Injury

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19 On December 29, 2003, Mr. Derline suffered an industrial injury while driving a logging truck,
20 that slid into a guard rail, injuring his neck and low back. Mr. Derline did not work after the
21 December 29, 2003 injury and walked hunched over.
22

23 Mr. Derline was treated with epidural injections through May 2007, physical therapy between
24 August 2010 and March 2011, and lumbar MRIs were performed in 2004, 2006, 2009, and 2013.

25
26 The 2004 MRI depicted minor lumbar disk bulges from L3 through S1 (L3-4, L4-5, and
27 L5-S1). The imaging studies demonstrated moderate to severe cervical stenosis. 11/18/13 Tr.
28 at 138.
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30
31 The 2013 MRI depicted significant degenerative disc disease, including worsening stenosis
32 of the lumbar facet joints since the 2009 MRI. The degenerative changes included disc bulges and
33 protrusion. The lumbar stenosis had narrowed the nerve canal, which was further constricted by
34 Mr. Derline's hunchback posture when he walked or stood upright.
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37 Mr. Derline's activities as a crew chief

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39 Troy Dana, a real estate broker, sponsored the dream of his high school age daughter,
40 Jessica, to be a race car driver. First, she competed in go karts and then drove a super stock race
41 car in South Sound circle track races beginning in 2010. Mr. Dana was inexperienced in racing and
42 solicited Mr. Derline to volunteer his guidance and experience but not his mechanical efforts.
43 Mr. Derline disclosed to Mr. Dana that he had injured his back in a logging truck injury. Mr. Dana
44 acknowledged that Mr. Derline disclosed his physical limitations. Mr. Dana limited Mr. Derline to the
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1 symbolic title of crew chief. Jessica Dana testified that Mr. Derline was barked at by the owner and
2 crew if he attempted physical labor.
3

4 Mr. Derline testified that oil, spark plug, valve and tire changes were performed by the crew,
5 including Bryan Rolland and Shane Turner. Mr. Rolland, a mechanic, was the car chief. Mr. Turner
6 is Mr. Derline's son-in-law and volunteered on the JDR crew during race days. Mr. Turner is a
7 full-time carpenter. Mr. Rolland and Mr. Turner were not compensated by JDR. Both described race
8 days as hectic, "like a hornet's nest". 12/2/13 Tr. at 136.
9

10 Mr. Barrett testified that if a racing team wins, then the winnings cover, at most, one-third of
11 their expenses. Mr. Ewing testified that race teams are not paid.
12

13 Mr. Dana denied compensating Mr. Derline for his volunteer activities between June 25,
14 2011, and September 26, 2012. Mr. Dana described Mr. Derline as a close personal friend who
15 ultimately cost Mr. Dana one hundred thousand dollars through errors in judgment purchasing
16 unnecessary parts. Mr. Dana testified that no one was being paid. 12/2/13 Tr. at 16, 78-79.
17
18

19 Mr. Derline performed the following eight activities while as crew chief between June 25,
20 2011, and September 26, 2012.
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22
23 **1. Repairing Car Body**
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25 On July 9, 2011, Mr. Derline loosened nuts with an 1 1/8 inch open-end wrench and twisted
26 the trailing arm. Mr. Derline testified that he went under the car to turn the trailing arm a few times.
27 Mr. Derline worked on the car for a couple hours to reset the rear end of the car. Mr. Derline
28 installed lasers to check the alignment. Mr. Derline also adjusted the car frame by screwing a
29 coil-over adjuster down, as depicted in Exhibit No. 13. On September 10, 2012, Mr. Wilson
30 observed Mr. Derline work for 20 to 30 minutes.
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34 **2. Replacing Oil Pan and Bending Shifter**
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36 Mr. Derline removed the oil pan by crawling under the car, removing the bolts holding the
37 pan in place and reinstalled a new pan by tightening the bolts on September 10, 2011.
38

39 Mr. Derline removed the shifter by using a 9/16 open-end wrench and ratchet to loosen two
40 nuts and bolts. Mr. Derline transferred the shifter from the driver's compartment to a work bench.
41 One mechanic held the shifter while another heated it with a torch and bent the shifter. The shifter
42 was reinstalled.
43

44 **3. Transporting Racing Engines and Tools**
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46 Mr. Derline transported damaged engines from Tumwater to Elma and an engine from Elma
47 to Tumwater. Mr. Derline explained that the engines were lifted into the back of a pickup truck in
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1 Tumwater by Mr. Dana and then Mr. Derline drove the pickup truck. Mr. Ewing removed the engine
2 with a lift in Elma. Mr. Derline transported tools from Elma to Tumwater.

3
4 **4. Packing Wheel Bearings and Inserting Hood Pins**

5 Mr. Derline packed wheel bearings by molding the grease with his hands into the 2-inch
6 diameter tray. He stuck the hood pins in the racecar as depicted in Exhibit No. 13.

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8 **5. Adjusting Engine during Race Days**

9
10 On April 21 and September 10, 2012, surveillance videos depicted Mr. Derline under the
11 hood of the car, adjusting the engine.

12
13 Mr. Barrett, a former employer of Mr. Derline and a competing crew chief, testified crew
14 chiefs only ordered parts, such as tires and shocks and did not perform the mechanical work.
15 Mr. Barrett reviewed the photos of Mr. Derline taken in April and September 2012 at the racetrack
16 and testified they were consistent with Mr. Derline's posture while performing normal daily activities.

17
18 Mr. Barrett described Mr. Derline as a hunchback. Mr. Barrett testified that Mr. Derline
19 frequently sat in a lawn chair during race days. Mr. Barrett saw Mr. Derline hold a wrench in his
20 hand once when Mr. Derline was under the rear of the JDR car in September 2012, but Mr. Derline
21 rarely performed mechanical work.

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24 **6. Replacing Rear Axle**

25 Mr. Dana described the race day drama that unfolded when NASCAR representatives and
26 Discovery channel production crews evaluated Jessica Dana at the racetrack in September 2012.
27 Mr. Dana testified that the JDR car broke an axle, jeopardizing Ms. Dana's chances to perform.
28 Mr. Derline repaired the broken axle with a long handled screwdriver while the crew lifted and held
29 the axle in position.

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32 **7. Spotter**

33 Mr. Dana testified that Mr. Derline was only listening to the race day conversation between
34 the spotter and the driver, if there was a problem with the race car. At those times, Mr. Derline was
35 positioned to view the course and wore a headset to hear the spotter and driver.

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38 **8. Promoting Jessica Dana Racing**

39 After the 2011 season, Mr. Derline traveled to inspect a race car for Mr. Dana. Mr. Derline
40 overnighted and inspected the car in the same manner as he inspected the JDR car in June 2011.
41 In 2012, Mr. Derline traveled to California promoting Ms. Dana's skills as a driver. Mr. Dana testified
42 that Mr. Derline was unable to walk through the airport without wheelchair assistance.

1 Mr. Derline appeared as crew chief prominently on the car door and at public appearances,
2 particularly at an automotive parts distributor, Giro's Garage in Tacoma.
3

4 **Dr. Robert Bruce Worth**

5 Dr. Worth, a family practitioner, first met Mr. Derline before the industrial injury because
6 Dr. Worth was building a sports car and Mr. Derline tuned the sports car.
7

8 Dr. Worth first treated Mr. Derline's back, neck, shoulder, and left eye on March 22, 2004,
9 and examined Mr. Derline six times during the relevant period from June 25, 2011, through
10 September 26, 2012. (June 30, 2011, August 29, 2011, October 31, 2011, December 30, 2011,
11 April 11, 2012, and May 30, 2012.).
12

13 Dr. Worth certified, in writing, that Mr. Derline was entitled to time-loss compensation during
14 the relevant period. Dr. Worth did not believe Mr. Derline misrepresented his capacities.
15

16 **Drs. Kroll and Dagher**

17 Drs. Kroll and Dagher are certified in their specialties of physical medicine and rehabilitation.
18

19 Dr. Kroll treated Mr. Derline when he was admitted to the Rehabilitation Institute of
20 Washington in August 2010. Mr. Derline was in the main treatment program for 20 days between
21 November 22, 2010, and December 21, 2010. A discharge report was dated January 21, 2011.
22 March 14, 2011, was the end of his treatment follow up and the date of maximum medical
23 improvement. Dr. Kroll examined Mr. Derline again on August 12, 2013.
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28 Mr. Derline's primary complaint continued to be low back pain radiating into the lower
29 extremities. Mr. Derline complained of leg weakness with prolonged walking, numbness in the right
30 thigh with prolonged standing, head and neck pain. He was comfortable sitting and very
31 uncomfortable standing.
32

33 Dr. Kroll testified Mr. Derline's lumbar extension was severely restricted. Dr. Kroll testified
34 Mr. Derline's trunk was shifted to the right impairing Mr. Derline's gait as he maintained a flexed
35 posture through the trunk. Dr. Kroll administered objective clinical tests to the toes and testified the
36 tests indicated spinal cord dysfunction.
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40 In August 2013, Mr. Derline lacked 20 degrees of hip extension and knee extension on the
41 right and 15 on the left. On discharge on January 21, 2011, his hip extension was zero so he had
42 lost 20 degrees of hip and knee extension.
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44 Dr. Kroll testified the degenerative disc disease in the lumbar spine with stenosis, was
45 particularly symptomatic when Mr. Derline attempted standing and walking because of his restricted
46 hip and knee extension.
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1 Dr. Kroll presented an objective basis for restricted extension due to stenosis and nerve
2 compromise. The stenosis was evident on MRI.
3

4 Dr. Kroll described Mr. Derline's constantly flexed forward posture as very characteristic of
5 lumbar spinal stenosis that Mr. Derline compensated for by bending forward. Dr. Kroll noted
6 Mr. Derline walking stooped forward, standing and leaning on a car, and when he was under the
7 car using small tools or with his hands on the engine, he was flexed forward.
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10 Dr. Dagher examined Mr. Derline a single time on September 10, 2012, after Mr. Fretts and
11 Ms. Matson met with Dr. Dagher. Mr. Fretts testified that Dr. Dagher allowed the investigators a
12 short time, no more than fifteen minutes, to view the video and 45 photographs taken by Mr. Fretts.
13 Mr. Fretts began to show Dr. Dagher the video and testified Dr. Dagher did not view the entire video
14 but reviewed only 6 to 10 photographs briefly.
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17 Dr. Dagher testified that he met with Mr. Fretts and Ms. Matson for 55 minutes, viewing
18 videotapes, photographs, and discussing Mr. Derline.
19

20 Dr. Kroll reviewed the MRI of April 2013. Dr. Kroll testified that Mr. Derline continued to have
21 significant degenerative disc disease and facet degeneration, that had worsened since the 2009
22 study. There was evidence of degenerative changes such as disc desiccation, bulging, protrusions,
23 and stenosis.
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26 Dr. Dagher observed Mr. Derline lean to the right with his right hand in his pocket as he left
27 the exam room but denied Mr. Derline demonstrated that leaning posture in the exam room during
28 his evaluation. Dr. Dagher testified there was no medical basis for physical restrictions and he did
29 not find abnormalities during his evaluation. 11/18/13 Tr. at 157.
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31

32 Dr. Dagher diagnosed cervical and thoracic strains and a lumbar sprain, proximately caused
33 by the industrial injury of December 29, 2003.
34

35 Dr. Kroll testified that Mr. Derline's lack of lumbar extension and forward flexed posture was
36 consistent with the objective findings on MRI, particularly the lumbar stenosis. Dr. Kroll diagnosed
37 cervical and lumbar strains, spondylosis, and significant degenerative changes in the lumbar and
38 cervical spine related to the industrial injury.
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41 Dr. Kroll rated the extent of Mr. Derline's permanent partial impairments. Cervical
42 impairments equaled Category 3 and lumbosacral impairments were Category 2.
43

44 Dr. Dagher rated Mr. Derline's cervical and thoracic spine permanent impairments as equal
45 to Category 1 (No ratable impairment.) Lumbosacral impairments were equal to Category 1.
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1 Dr. Dagher concluded there was no medical evidence of a permanent change to Mr. Derline's
2 preexisting arthritic conditions in his cervical, thoracic, and lumbar spine.
3

4 **Daniel Hughes**

5 Daniel Hughes earned his doctorate in physical therapy. Dr. Hughes performed a physical
6 capacity evaluation of Mr. Derline on August 6, 2013. Mr. Derline presented a history of limitations
7 in performing normal daily activities due to his low back conditions. He was required to shift
8 positions frequently, use a sit/stand option and typically reclined throughout the day.
9

10 Mr. Derline told Dr. Hughes that he volunteered to help a teenage race car driver. Mr. Derline
11 enjoyed racing despite the increase in symptoms when he volunteered. Mr. Derline explained to
12 Dr. Hughes that the increase in pain was better than the depression he experienced in the absence
13 of activity. Mr. Derline felt better when he volunteered to help the teenage racer. Mr. Derline
14 presented a history to Dr. Hughes of depression and explained that racing was a positive outlet to
15 combat depression. Mr. Derline was a long-term racecar enthusiast and volunteered with the
16 understanding that others would perform the physical demands and Mr. Derline would help on race
17 day. Dr. Hughes did not have an idea of Mr. Derline's activities outside his role as crew chief and
18 assumed there was some percentage of performing mechanical repair and maintenance work.
19 Dr. Hughes discussed with Mr. Derline possible ways of volunteering with less pain, requiring fewer
20 days to recover.
21

22 Dr. Hughes reviewed the surveillance videos, Dr. Worth's progress notes, and four specific
23 physical capacity evaluations: PINN PCE dated October 2009, Olympia Physical Therapy's PCE in
24 July 2006, Apple Physical Therapy's PCE in 2005, and progress notes and discharge summary of
25 Dr. Kroll in 2011.
26

27 During the PCE performed by Dr. Hughes on August 6, 2013, Mr. Derline walked with
28 decreased trunk rotation, affecting his gait. His posture was forward with a significant decrease in
29 lumbar lordosis. His left pelvic bone was higher than the right. Tenderness was palpated throughout
30 Mr. Derline's mid and low back and both hips. Lumbar flexion was 23 degrees; extension was
31 measured to 4 degrees; right lateral flexion to 15 degrees; and left lateral flexion to 17 degrees.
32

33 Mr. Derline could lift and carry 6 pounds from floor to waist, 9 pounds from waist to shoulder,
34 and 5 pounds from shoulder to overhead. He could lift and carry 8 pounds for 50 feet. Increased
35 low back pain was the main limiting factor.
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37 Mr. Derline could sit for up to 30 minutes at a time in an ergonomic chair, for up to 4 hours a
38 day in an 8-hour day. Standing and walking was limited to up to 15 minutes at a time and up to
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1 2 hours, in an 8-hour day. Squatting was on a seldom basis, due to his low back pain and lower
2 extremity weakness. Kneeling and crawling were limited to a seldom basis, mainly due to the
3 difficulty getting into and out of the kneeling and crawling positions.
4

5 Bending, twisting, and stooping were limited to a seldom basis. Stair climbing was restricted
6 to one flight and with the use of a handrail and never carrying any two-handed objects while on
7 stairs. Ladder climbing was to be avoided due to lumbar pain and leg numbness. Overhead
8 reaching was restricted to an occasional basis because it was accompanied by extension in the low
9 back, resulting in more significant pain. Fine finger manipulation and use of hand controls was
10 unrestricted. Foot controls were limited to low compression demands, but not restricting
11 Mr. Derline's ability to drive vehicles.
12

13 Dr. Hughes administered formal consistency testing by testing grip at five different positions
14 with three repetitive trials. The results were charted and demonstrated a bell-shaped curve,
15 consistent with full effort and Mr. Derline's age group. Dr. Hughes measured consistent effort by
16 varying the measurement of range of motion during different body mechanics.
17

18 Dr. Hughes concluded Mr. Derline had significant limits due to his low back and legs.
19 Mr. Derline was limited to sedentary work.
20

21 Dr. Hughes compared the results of the August 6, 2013 PCE with those PCEs performed in
22 2005 (Apple Physical Therapy), July 2006, (Olympia Physical Therapy), and October 2009,(PINN).
23 Dr. Hughes testified that significant limitations were also measured in the prior PCEs and the 2013
24 PCE portrayed a slow progressive decline in his ability levels.
25

26 Dr. Hughes testified that his 2013 evaluation was consistent with the progress notes and
27 discharge summary of Dr. Kroll in 2011. Mr. Derline lifted 13 pounds at the start of the conditioning
28 program with Dr. Kroll. Dr. Hughes testified Mr. Derline's limited lifting capacity was in the sedentary
29 category. Dr. Hughes relied on the records that reflected an increase in Mr. Derline's ability to lift to
30 28 pounds, and to 30 pounds on a seldom to occasional basis. Dr. Kroll testified that an occasional
31 lifting ability was closer to 23 pounds.
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33 Dr. Hughes testified Mr. Derline did not misrepresent his capacities between June 25, 2011,
34 and September 26, 2012, because body positioning was consistent with his biomechanical
35 conditions, as depicted on diagnostic tests and the physical capacities evaluation.
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37 Alleged Willful Misrepresentation
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39 Allison Bracket, the speaking agent of the Department in this appeal, issued an order dated
40 February 4, 2013, that assessed the overpayment against Mr. Derline as induced by willful
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1 misrepresentation, omission, and concealment of capacity for gainful employment on a reasonably
2 continuous basis. Following the protest by Dr. Worth, Exhibit No. 25, the Department affirmed the
3 order dated February 4, 2013.
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5 The common language of the worker verification forms instructed Mr. Derline, in writing, to
6 complete the forms "so we can consider paying time loss benefits. If you can't work due to your
7 workplace injury or disease AND your employer is not paying your full wages: 1) Fill out this form.
8 2) Sign and date it. 3) Mail it to the address above within 14 days."
9

10 On October 10, 2012, Mr. Fretts and Ms. Matson met with Mr. Derline and his former
11 attorney, Mr. Lieb.
12

13 Mr. Lieb represented Mr. Derline since 2004 or 2005. Mr. Lieb knew Mr. Derline was
14 performing volunteer activities and primarily providing his experience and guidance, not mechanical
15 efforts. Mr. Lieb's firm sponsored Jessica Dana Racing as one of many community groups and
16 activities. Mr. Lieb learned more and more over time and testified it was a continuum of knowledge
17 over several years.
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22 Mr. Lieb met with Mr. Derline before the meeting called by the Department in October 2012.
23 Mr. Lieb inquired specifically of Mr. Derline regarding volunteer activities that were within his
24 physical abilities. Mr. Lieb testified that Mr. Derline was not doing anything beyond his physical
25 restrictions.
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28 Mr. Lieb reviewed a series of worker verification forms from June 9, 2011, through
29 October 10, 2012, and concluded they inquired of volunteer work, not activities. Mr. Lieb advised
30 Mr. Derline that a better practice was to handwrite on the work verification forms or time-loss
31 notification forms. Mr. Lieb handwrote on Exhibit No. 27, the form dated October 10, 2012.
32
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34 Mr. Lieb testified that time-loss compensation checks were received by his firm on behalf of
35 Mr. Derline. Mr. Lieb testified his firm received the payment orders with warrants and processed the
36 payment, taking a 10 percent fee or \$114 per check and then sent the funds to Mr. Derline without
37 sending all of the payment order or time-loss verification forms signed by Dr. Worth. Mr. Lieb
38 testified that Mr. Derline was not advised to read the forms before signing and was not purposefully
39 hiding his activities.
40
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43 DECISION

44 RCW 51.32.240(5): When the Department alleges that a worker has received benefits as a
45 result of willful misrepresentation, the Department is required to "initially introduce all evidence in its
46 case in chief," and bears the ultimate burden of proving willful misrepresentation by clear, cogent,
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1 and convincing evidence. RCW 51.32.240(5); RCW 51.52.050(2)(c); *In re Frank L. Hejna*, Dckt.
2 No. 04 24184 (August 28, 2006).
3

4 The Department is required to prove the elements set forth in RCW 51.32.240(5) and fleshed
5 out by the Department's rules, WAC 296-14-4121 through 296-14-4129.
6

7 Under RCW 51.32.240(5)(b):

8 [I]t is willful misrepresentation for a person to obtain payments or other
9 benefits under this title in an amount greater than that to which the
10 person otherwise would be entitled. Willful misrepresentation includes:

11 (i) Willful false statement; or

12 (ii) Willful misrepresentation, omission, or concealment of any
13 material fact.
14

15 Under RCW 51.32.240(5)(c) "willful" is defined as "a conscious or deliberate false statement,
16 misrepresentation, omission, or concealment of a material fact with the specific intent of obtaining,
17 continuing, or increasing benefits under this title." WAC 296-14-4122 defines "specific intent" as
18 "the commission of an act or the omission of information with the knowledge that such an act or
19 omission will lead to wrongfully obtaining benefits."
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21

22 Under RCW 51.32.240(5)(d), the "failure to disclose a work-type activity must be willful in
23 order for a misrepresentation to have occurred."
24

25 Under RCW 51.32.240(5)(e),

26 [A] material fact is one which would result in additional, increased, or
27 continued benefits, including but not limited to facts about physical
28 restrictions, or work-type activities which either result in wages or
29 income or would be reasonably expected to do so. Wages or income
30 include the receipt of any goods or services. For a work-type activity to
31 be reasonably expected to result in wages or income, a pattern of
32 repeated activity must exist. For those activities that would reasonably
33 be expected to result in wages or produce income, but for which actual
34 wage or income information cannot be reasonably determined, the
35 department shall impute wages pursuant to RCW 51.08.178(4).
36
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38 The Department order dated February 4, 2013, assessed an overpayment against
39 Mr. Derline in the amount of \$40,202.56 plus a 50 percent penalty of \$20,101.28 for a total
40 overpayment of \$60,303.84, induced by willful misrepresentation, omission, and concealment of
41 capacity for gainful employment on a reasonably continuous basis as a mechanic and crew chief
42 from June 25, 2011, through September 26, 2012.
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1 The surveillance videos taken by Mr. Fretts and Mr. Wilson did not depict the entirety of
2 Mr. Derline's activities because he was not visible to be photographed at all times. Mr. Fretts did not
3 record Mr. Derline reclining in a truck or when he was out of sight.
4

5 Dr. Kroll was persuasive in her analysis that the surveillance failed to show Mr. Derline's
6 activities between the short clips of Mr. Derline walking in a hunched posture. Dr. Kroll was
7 persuasive that the video and photos were consistent with the objective findings of worsened hip
8 contractures and the worsened degenerative lumbar changes, particularly stenosis.
9

10 One of the things the Department relies on to establish that Mr. Derline failed to disclose a
11 work-type activity and/or concealed a material fact was that Mr. Derline did not disclose to
12 Dr. Dagher his activities with JDR. However, Dr. Dagher did not meet Mr. Derline until September
13 2012.
14

15 On August 5, 2010, Mr. Derline disclosed to Dr. Kroll that his prior recreation included
16 participating in car racing as a crew member and crew chief. Dr. Worth noted the specific disclosure
17 by Mr. Derline that:
18

19 Currently, he may still go to the car races, but he cannot actually do the
20 mechanic activity he did previously.
21

22 Kroll Dep. at 42.
23

24 Mr. Derline had retained Mr. Lieb's law firm and so the name and address to which time-loss
25 compensation was paid was that of Putnam and Lieb. The only statement inserted into the form
26 was the date of injury and either a date or "present." Mr. Derline signed the forms, under penalty of
27 perjury, that the information contained was correct, and acknowledged he was subject to civil and
28 criminal penalties if the information was incorrect. The Worker Verification Forms cautioned against
29 engaging in paid, unpaid, self-employment, or volunteer work.
30

31 The final Worker Verification Forms dated October 10, 2012, contained the handwriting: "I do
32 some volunteer activities with Jessica Dana Racing." Mr. Lieb testified that Mr. Derline was
33 surprised that he must write on the form because he was not hiding his volunteer activities.
34

35 The Department failed to present clear, cogent, and convincing evidence that Mr. Derline
36 concealed a material fact.
37

38 The evidence regarding Mr. Derline's appearing in videos for D&D Dyno established that
39 Mr. Derline had no involvement with the business and no hand in distributing the video. Mr. Ewing
40 rented one half of a commercial/residential duplex from Mr. Derline beginning as early as 2010.
41 Mr. Derline's pulling of levers on four occasions without compensation was not willful
42

1 misrepresentation of material facts regarding work-type activities. 12/3/13 Tr. at 46-48. The
2 reimbursement of utilities was not compensation for work-type activity. The evidence was not clear,
3 cogent, or convincing that Mr. Derline had knowledge that such an act or omission, if one occurred,
4 which it did not, led to wrongfully obtaining benefits.
5

6
7 Mr. Derline established that he received no compensation during the relevant time period
8 due to his crew chief activities. The evidence was not clear, cogent, or convincing that Mr. Derline
9 made willful misrepresentations, within the meaning of RCW 51.32.240 between June 25, 2011,
10 and September 26, 2012.
11

12
13 The Department failed to prove, by clear, cogent, and convincing evidence that Mr. Derline
14 was engaged in work-type activities or he had the requisite intent or that he concealed a material
15 fact. The evidence in the record was that of Mr. Derline performing a hobby not a profession for
16 which he was not compensated. Mr. Derline did not fail to disclose a work-type activity or conceal a
17 material fact and so there was no willful misrepresentation within the meaning of RCW 51.32.240.
18

19
20 The Department order dated March 5, 2013, that affirmed a Department order dated
21 February 4, 2013, was incorrect and should be remanded to the Department to find that the
22 payment of time-loss compensation benefits for the period between June 25, 2011, and
23 September 26, 2012, was not induced by willful misrepresentation and no overpayment of benefits
24 occurred.
25
26

27 FINDINGS OF FACT

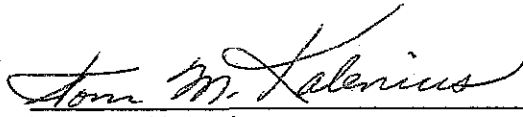
- 28 1. On September 24, 2013, and November 18, 2013, an industrial appeals
29 judge certified that the parties agreed to include the Jurisdictional
30 History in the Board record solely for jurisdictional purposes.
31
- 32 2. During the period of June 25, 2011, through September 26, 2012,
33 Mr. Derline received time-loss compensation in the amount of
34 \$40,202.56. On March 5, 2013, the Department issued an order that
35 affirmed a Department order dated February 4, 2013, that assessed an
36 overpayment of the \$40,202.56 as well as a 50 percent penalty for willful
37 misrepresentation for a total amount of \$60,303.84.
38
- 39 3. During the period of June 25, 2011, through September 26, 2012,
40 Mr. Derline performed volunteer activities with Jessica Dana Racing
41 while receiving time-loss compensation benefits. Mr. Derline received no
42 compensation, disclosed his activities as early as August 2010 to his
43 rehabilitation physician, and did not conceal his volunteer activities.
44
- 45 4. During the period of June 25, 2011, through September 26, 2012,
46 Mr. Derline's failure to report his periodic volunteering to the Department
47 of Labor and Industries on Worker Verification Forms was not willful
48 misrepresentations of material fact regarding work-type activities.

- 1 5. Mr. Derline did not intend to wrongfully obtain or induce continued
2 payment of time-loss compensation benefits by failing to disclose his
3 volunteer activities in the statements filed during the period of June 25,
4 2011, through September 26, 2012.
- 5 6. During the period of June 25, 2011, through September 26, 2012,
6 Mr. Derline did not conceal his capacities.

7
8 **CONCLUSIONS OF LAW**

- 9 1. The Board of Industrial Insurance Appeals has jurisdiction over the
10 parties and subject matter of this appeal.
- 11 2. The Department of Labor & Industries' payment of time-loss
12 compensation for the period of June 25, 2011, through September 26,
13 2012, was not induced by willful misrepresentation, on the part of the
14 claimant, within the meaning of RCW 51.32.240(5)(a).
- 15 3. The Department order dated March 5, 2013, is incorrect and is reversed.
16 This matter is remanded to the Department to find that the payment of
17 time-loss compensation benefits was not induced by willful
18 misrepresentation.
19

20
21 DATED: MAR 05 2014
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25 _____
26 Tom M. Kalenius
27 Industrial Appeals Judge
28 Board of Industrial Insurance Appeals
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