BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: FRANK L. HEJNA	)	**DOCKET NO. 04 24184**
	)	
CLAIM NO. N-839536	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Frank L. Hejna, by
Williams, Wyckoff & Ostrander, PLLC, per
Wayne L. Williams

Employer, Swanson Bros,
None

Department of Labor and Industries, by
The Office of the Attorney General, per
Penny L. Allen, Assistant

The claimant, Frank L. Hejna, filed an appeal with the Board of Industrial Insurance Appeals on November 12, 2004, from an order of the Department of Labor and Industries dated November 4, 2004. In this order, the Department alleged that the claimant was working or performing work-type activity or capable of working during the period from July 9, 2001 through August 31, 2004, thereby resulting in an overpayment of time loss compensation and vocational benefits to the claimant. The order sought recovery of these benefits, with penalty, on the basis of willful misrepresentation, omission, or concealment. The Department order is **REVERSED AND REMANDED**.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order issued on February 6, 2006, in which our industrial appeals judge reversed and remanded the order of the Department dated November 4, 2004. All contested issues are addressed in this order.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed. We have granted review because we believe that the Department has not proved that Mr. Hejna obtained benefits through willful misrepresentation.

It is undisputed that between July 9, 2001 and June 27, 2003, Mr. Hejna cultivated marijuana at his single-wide trailer in Humptulips, Washington. This endeavor ended on June 27, 2003, when the authorities raided his home. From July 9, 2001 through August 31, 2004, Mr. Hejna

received time loss compensation benefits and vocational rehabilitation benefits from the Department. The Department takes the position that if Mr. Hejna was physically able to cultivate marijuana, then he could have been capable of reasonably continuous gainful employment, and he thus willfully misrepresented his capabilities in order to receive benefits. We have reviewed this record carefully, however, and we do not believe that because Mr. Hejna was able to cultivate marijuana that he would have been capable of reasonably continuous gainful employment, and we thus determine that Mr. Hejna did not willfully misrepresent his capabilities, within the meaning of the statute.

The Department began its case with the testimony of Keith Peterson, a Grays Harbor detective who executed the search warrant on Mr. Hejna's single-wide trailer in Humptulips, Washington. Detective Peterson obtained the warrant based on information obtained from an informant, and when the detective arrived at Mr. Hejna's trailer, he noticed a strong smell of marijuana. Upon entering the single-wide trailer, he saw that the middle bedroom had been converted into a marijuana growing operation. In the bedroom, there were approximately 50 marijuana plants, in various stages of growth. The plants in the bedroom were in five-gallon pots filled with dirt.

Detective Peterson explained that this was a rotational growing operation, which means that there were plants in various stages of growth, with the goal being plants "ripening" or being ready for harvest continuously. In his opinion, Mr. Hejna was experienced at harvesting methodology. There were 37 juvenile plants in an outdoor pump house, as well as a "Hudson Sprayer," a fan, lights, and a heater, which are necessary equipment to cultivate marijuana. The pump house also had lights rigged up on a pulley system so that the lights could be raised and lowered, depending upon the height of the plants.

Detective Peterson explained that with a total of 87 plants, a grower would have to be involved on a daily basis. The plants would need to be watered, at a minimum. When the plants are harvested, Mr. Hejna would have had to cut off the stalks and hang them to dry, remove the pots with soil, dispose of the old soil, wash the pots out with bleach, then replant another crop. Because this was a rotational growing operation, Mr. Hejna would have had to replant each plant two to three times.

In Detective Peterson’s opinion, this much marijuana is far and away in excess of what anyone would need for personal use. Indeed, he found marijuana residue on scales used to weigh items. Thus, Detective Peterson believed that Mr. Hejna was raising the marijuana for distribution.

David Pimentel is the chief criminal deputy at the Grays Harbor Sheriff's Department. He assisted in the raid of Mr. Hejna's home on June 27, 2003, and testified that he made contact with Mr. Hejna that day. Mr. Pimentel testified that Mr. Hejna was completely compliant; he stated he had been growing marijuana for about one and one-half years, that he was the only one involved, and that he sold marijuana only to one person. Mr. Hejna stated that he supplemented his income every two or three months with $2,000 to $2,500 earned from selling marijuana. He stated he would earn about $1,000 for a quarter of a pound, but that he used the vast majority of the marijuana himself. At the time of the raid, Mr. Hejna was driving a Jaguar, a vehicle he had been able to purchase for $500, and a 1964 Chevy Nova in trade.

Douglas Price was a task force commander for the Thurston County Narcotics Task Force in July 2003. He has a great deal of experience with marijuana growing operations, having been to over 300 of them. He did not participate in this drug bust and never saw this growing operation, but he has reviewed the reports and the photographs.

In Mr. Price's opinion, there were so many plants that he could conclude that Mr. Hejna was growing it for more than personal use. Indeed, it appeared that Mr. Hejna was cramming as many marijuana plants into one room as he could.

Mr. Price has weighed a three-gallon pot filled with dry soil, and it weighs about 30 pounds; when three quarters full, it weighs about 20 pounds. The lights Mr. Hejna used in the pump shed weighed about 100 pounds. Because this was a rotational growing operation, it would require constant attention.

In a rotational growing operation on a scale such as this one, Mr. Hejna would be able to produce about five pounds of marijuana four times a year. Marijuana is worth about $3,500 a pound, which means that this operation would generate about $69,000 a year.

Diana Moser, AARNP, is a family nurse practitioner. She operates the Lake Quinault Medical Clinic in Neilton. She provides a full family practice. She began treating Mr. Hejna in 2000, when his orthopedic surgeon retired.

Initially, Nurse Moser would send Mr. Hejna to a licensed physician to obtain prescriptions, but in 2001 the law was changed and her license permitted her to write prescriptions for opioids. Since that time, she has monitored Mr. Hejna and has prescribed Percocet and muscle relaxers.

Mr. Hejna did not tell Nurse Moser about his marijuana cultivation, or the fact that he occasionally "worked" at the Elma Raceway throughout the time she treated him. During this time, she had been signing his time loss certifications. However, in July of 2004 she was contacted by

the Department investigators, who showed her the photographs of Mr. Hejna's marijuana operation. She was also shown pictures of Mr. Hejna's activities at the Elma Racetrack. The investigators also told her what would be involved physically in maintaining such an operation, and she relied on this in her testimony. She was then shown the job analyses for lubrication servicer, cashier, horticultural worker, and nursery helper.

After seeing the photographs and hearing the investigators' assessment of the physical requirements for the marijuana growing operation, Nurse Moser changed her mind about Mr. Hejna's employability. She would have released him to work, effective September 1, 2004, to work as a lubrication servicer. She also reviewed the job analysis for cashier, and believed that he could perform this work as well, although he would need accommodation, such as a stool. This, however, is due to his diabetes (diagnosed in June 2003). Finally, she believed that he could perform the job of horticultural worker, but would have restrictions due to his diabetes and his back condition. This is largely due to the fact that she has restricted him from lifting more than 25 pounds.

The Department then called Mr. Hejna, and while we have serious reservations about his credibility, he was quite candid about his cultivation of marijuana. He testified that he had lived at the residence about six years and that no one was assisting him in the growing operation. Mr. Hejna admitted that he grew marijuana between July 9, 2001 and August 31, 2004, but he testified it was entirely for his own use, although he apparently gave some to his landlord. As to the scales covered in marijuana residue, he stated that those scales were used exclusively for food. As to the Foodsaver plastic storage bags, he testified that they were used to store food as well.

Mr. Hejna asserted that he grew the marijuana to ease his pain and stress. He notes that he subsequently obtained a prescription for medicinal marijuana from a physician (not Nurse Moser). He stated that he never sold the marijuana, and that he never obtained any money through the growing of marijuana during that time. However, he also stated that he used money that he made selling marijuana to support the growing operation, and that he sold small amounts to friends, such as an "eighth" for $40. He admitted that he told the authorities that he sold $2,000 to $2,500 every three months, but said that the statement was a lie, and that he lied to the authorities because they lied to him.

Mr. Hejna explained how he physically managed the growing operation. He would purchase potting soil from Marshall's Farm and Garden, and the assistants there would load his truck for him.

When he got home, he would cut the bag in half and dump half of it into a two wheeled cart, and a garbage can. He would then go in his home, dump it out, and put dirt into pots.

Some of the plants were in one-gallon planters, and others were in three-gallon planters. He had everything set up so that he did not have to bend or stoop. He would sit on an upended five-gallon bucket, and pot or re-pot his plants. To empty out the pots, he would slide them along the floor with his foot, and then dump them into his cart. He would stack the pots in the cart, and then dump them. To harvest, he would put the plant on an upended five-gallon bucket and cut it.

On his busiest day, Mr. Hejna would spend about three hours a day working on the growing operation. However, it was never a straight three hours; it usually took him six to seven hours, as he would need to take breaks throughout. He testified that when he filled out worker verification forms, he did not think of himself has having a job or being employed, and throughout the time he was engaged in growing marijuana he did not think he could work.

Finally, there is evidence that Mr. Hejna volunteered at the Elma Raceway; apparently, he used his truck to push drag racing cars. The testimony in this regard is sparse, except insofar as Mr. Hejna was sponsored by businesses and that he could not get along with the other persons who also did this.

Robert Benn is a vocational rehabilitation counselor who was asked to provide services to Mr. Hejna on June 16, 2004, although he never actually met with Mr. Hejna. Mr. Benn noted that in 1998 and 1999, Mr. Hejna had been retrained to be a lubrication servicer. Mr. Hejna completed the training, but was never offered a job at the place he trained due to personality conflicts.

Mr. Benn, accompanied by a Department of Labor and Industries investigator, Russ Gow, visited Nurse Moser on July 20, 2004 and provided her with the job analyses for lubrication servicer and cashier. Mr. Benn does not believe that Mr. Hejna can perform the jobs of horticulturalist or of nursery helper as he lacks the physical capacities.

With regard to the job of lubrication servicer, Mr. Benn believes that Mr. Hejna can perform this job. Certainly, Mr. Hejna has the skills to perform this job because he has done it before. With regard to the physical capacities, Mr. Benn testified that this job is in the medium range, and that Mr. Hejna would have to lift and carry up to 25 pounds, and there would be frequent bending and stooping. Although Nurse Moser had reservations about Mr. Hejna being on his feet for extending periods of time, this was due to his diabetes, and not to his low back condition.

With regard to the job of cashier, Mr. Benn noted that Mr. Hejna had trained for this job as well, and thus has the skills to perform it. This, too, is a job requiring physical capacities in the

medium range. Nurse Moser signed off on this job analysis as well, again with reservations because of the need to stand. She believed that Mr. Hejna would need a stool, and Mr. Benn believed that this type of accommodation would be entirely acceptable to any employer.

The Department's final witness was Richard Schneider, M.D., a physician certified as a specialist in psychiatry. Dr. Schneider met with Mr. Hejna on July 7, 2005, at which point he noted that Mr. Hejna was under a lot of stress related to his marijuana growing operation. Other than this, however, Dr. Schneider did not find any evidence of a mental disorder, other than cannabis (marijuana) dependence.

Mr. Hejna told Dr. Schneider that he had been using marijuana since he was twelve years old – at first, his marijuana was recreational, but after the industrial injury, it was to address his chronic pain. Dr. Schneider admitted that indeed, marijuana is a pain modulator. However, Dr. Schneider noted that in order for Mr. Hejna to obtain marijuana, he needed to continue to complain of pain. In other words, his chronic pain complaints are necessary to continue his dependence on marijuana. Thus, Dr. Schneider believes that the correct diagnosis for Mr. Hejna is that of cannabis related disorder, which is a mood disorder marked by loss of motivation, isolation, and irritability.

In his case in chief, Mr. Hejna first called Lawrence Stott, a friend, who testified that he has known Mr. Hejna for the last ten years. Mr. Stott notes that Mr. Hejna seems to be in pain all the time, and Mr. Stott has carried dog food into the house for him. Curiously, Mr. Stott testified that he never saw or smelled any evidence that Mr. Hejna was cultivating marijuana.

Gina Jaeger is a vocational rehabilitation counselor who was asked by Mr. Hejna's attorney to assess Mr. Hejna's vocational possibilities. She noted that Mr. Hejna is now in his mid-forties, and that he had completed the eleventh grade, but that from the fourth grade on, he had been in special education classes. He ultimately obtained a GED. Although he reads at a college level, his scores are otherwise very low. His work history includes work as a gardener, a maintenance worker, a cleaner, a shakeout worker, and as a laborer.

Ms. Jaeger noted that Mr. Hejna had completed the training for both lubrication servicer and for cashier. She also noted that since he could not find work as a lubrication supervisor (due largely to his inability to get along with anyone), he opened his own shop, which he ran for about one and one-half years in 1999 or so.

Mr. Hejna reported to Ms. Jaeger that during the time he cultivated marijuana, he had at any given time, anywhere from 40 to 80 plants. Thus, Ms. Jaeger testified that she tried to familiarize

herself with the physical requirements of growing marijuana. She assumed that the buckets weighed about 20 pounds, noting that he told her he never lifted the three-gallon buckets, but maneuvered them about with a dolly. Further, he told her that he watered the plants about once a week. Ms. Jaeger also noted that Mr. Hejna was able to work as he wished. Based on what she found out, his cultivation of marijuana was not a full-time job.

Ms. Jaeger observed that the jobs for which Mr. Hejna demonstrates skills are those of cashier and service lubricator, which are both jobs for which he lacks the physical capacities. His gardening abilities were noted, but he lacks the physical capabilities to perform the job of horticultural worker. She bases this opinion on the restrictions as set forth by a Dr. M. K. Souri (who did not testify) and of Mr. William M. Linnenkohl. Moreover, she noted that although Nurse Moser signed off on the jobs of cashier and lubricator, Nurse Moser also listed restrictions for those jobs.

Finally, Ms. Jaeger noted that Mr. Hejna lives in a filthy, pest infested single-wide trailer in which rats have chewed through the floor. He would most likely not pass a drug test, and his criminal history includes two felonies, burglary, possession of a firearm, unlawful issuance of bank checks, and two charges of possession of marijuana. Still, even without taking the above into consideration, and without taking into consideration his psychiatric condition, she does not believe Mr. Hejna possesses skills that would permit him to be employable within his physical restrictions.

Alan Javel, M.D., is a physician certified as a specialist in psychiatry. He met with Mr. Hejna on March 8, 2005, at the request of Mr. Hejna’s lawyer. Dr. Javel took a history and reviewed documents, including those setting forth Mr. Hejna’s medical condition. Dr. Javel ultimately diagnosed depression, as well as a pain disorder. In this regard, he disagrees with Dr. Schneider; Dr. Javel does not believe that any of "the blame" falls on Mr. Hejna’s marijuana use. Instead, Dr. Javel relates Mr. Hejna's lack of motivation, low energy, and irritability to pain and depression.

Dr. Javel noted that as of July 2001, an attending physician, Dr. Robert Mysliwiec, found Mr. Hejna to be totally incapacitated. He also reviewed an independent medical examination done in March 2003, which made diagnoses of lumbar strain, status-post back surgery, failed back syndrome, and marked pain behavior. Dr. Javel believes that Mr. Hejna's psychiatric condition would interfere with any effort to return Mr. Hejna to reasonably continuous gainful employment.

Ray H. Fenner, M.D., is a physician certified as a specialist in orthopedic surgery. Dr. Fenner evaluated Mr. Hejna on March 28, 2003, as a part of an independent medical examination. Dr. Fenner testified that Mr. Hejna sustained his industrial injury while working as a

maintenance repairman when he fell from an object he was standing on. He underwent conservative treatment until April 25, 1996, when Dr. Souri performed surgery for stenosis at L3 through L5, doing a laminectomy at L4 and L5, a partial laminectomy at the lumbar margin of L3, a discectomy at L3-4 and L4-5, and foraminotomies at L3-4 and L4-5 on the left side. Dr. Fenner noted that post-operatively, the symptoms persisted.

On examination, Dr. Fenner noted ample callous formation, which Mr. Hejna attributed to using his Playstation or television remote. Dr. Fenner felt this to be unlikely. Still, the examining physicians believed that Mr. Hejna could not perform the jobs of cashier or lubrication servicer, as they were well beyond Mr. Hejna's demonstrated abilities, and that Mr. Hejna was permanently totally disabled. They also believed that despite Mr. Hejna's pain behavior, their [the doctors'] physical assessment was consistent with Mr. Hejna's description and perception of his own physical limitations. Finally, the physicians believed that Mr. Hejna's condition was consistent with a Category 4 of permanent partial disability.

However, after Dr. Fenner found out about Mr. Hejna's marijuana cultivation, he changed his mind. Given the requirements for taking care of that many marijuana plants (as provided by the Department), Dr. Fenner believed that Mr. Hejna could, indeed, perform the job of lubrication servicer or cashier. Indeed, Dr. Fenner now believes that Mr. Hejna was lying throughout the examination, and questions whether Mr. Hejna injured himself at work at all.

William W. Linnenkohl is a physical therapist who performed a four-hour physical capacities examination on May 10 and 12, 2005. In Mr. Linnenkohl's opinion, Mr. Hejna is not even capable of sedentary activity. He cannot squat, and only on a seldom basis can he kneel, stoop, bend, or crouch. The testing also checks validity, and Mr. Linnenkohl believes that the results are valid. Moreover, given the surgeries performed, Mr. Linnenkohl believes that the results of the PCE are fairly representative.

Mr. Linnenkohl knew about Mr. Hejna's growing operation prior to testing. He testified, though, that he has seen people get around their disabilities by breaking down their work into segments, and doing a little bit at a time. Further, he would surmise that Mr. Hejna was very creative, and that he broke the tasks into segments. Mr. Hejna would not lift the plant, but could push or pull it, and would use mechanical advantages. Mr. Linnenkohl observed that persons with disabilities can be very creative.

On recall, Nurse Moser testified that the PCE performed by Mr. Linnenkohl did not change any of her previous testimony, and discredited it by stating that it was only good for that date. She

admitted, however, that she has treated Mr. Hejna since 2001, and that he has not improved since that time.

Finally, the Department recalled the vocational rehabilitation counselor, Robert Benn. Mr. Benn testified that the PCE gives a snapshot of Mr. Hejna's abilities at that time. In this matter, however, Mr. Benn looked at Mr. Hejna's capabilities over a several year period, during which time Mr. Hejna was actively growing marijuana. If, however, Mr. Benn were to base his opinions strictly on the PCE generated by Mr. Linnenkohl, then there is nothing that Mr. Hejna is capable of doing.

Applicable Statute

The Department cited Mr. Hejna under a recently amended statute, RCW 51.32.240(5), or the willful misrepresentation provision, which was enacted in 2004. The former RCW 51.32.240(5) simply allowed the Department to recoup amounts fraudulently obtained, as well as a 50 percent penalty. However, this meant that the Department had the burden of proving all nine elements of fraud, and by a clear, cogent, and convincing standard. The statutory change eases this burden to some extent.

Laws of 2004, ch. 243, § 9 states, "Section 7 [the willful misrepresentation subsection] of this act applies to willful misrepresentation determinations issued on or after July 1, 2004." Thus, the Department issued an order pursuant to a statute effective July 1, 2004, for acts that occurred prior to July 1, 2004. In this case, Mr. Hejna is alleged to have obtained funds through willful misrepresentation during the period of July 9, 2001 through August 31, 2004 – the bulk of which occurred prior to the effective date of the statute. We note that the subsection became effective June 10, 2004, which means there was a period of time between June 10, 2004 and July 1, 2004, wherein there was no statute permitting recoupment for fraud and the new statute did not take effect.

Ordinarily a statute is not effective retroactively: "It is a fundamental rule in this state that a statute will be presumed to operate prospectively only, and that it will not be held to apply retrospectively in the absence of language clearly indicating such legislative intent." *Ashenbrenner v. Department of Labor & Indus.*, 62 Wn.2d 22 (1963). For this statute, though, there is clear language indicating that the statute is to operate retroactively, since any orders issued on July 1, 2004, will almost certainly concern acts that took place prior to that date. Certainly, there are numerous arguments that could be made relative to whether it is constitutional to penalize someone for acts that were arguably not illegal at the time committed. However, these arguments are for another forum. The Legislature used clear language directing that the statute be used retroactively,

and this Board is constrained to do so, as it cannot address the constitutionality of a statute. *Bare v. Gorton*, 84 Wn.2d 380 (1974). Thus, the new subsection five is the applicable statute.

Burden of Proof

With regard to orders issued under the old statute, the Department was required to prove fraud, and at common law, fraud required proof by clear, cogent, and convincing evidence, as opposed to most other actions brought relative to a Department order, which use the "more probable than not" standard. The Department argues that the correct standard to be used is "more probable than not," but we agree with our industrial appeals judge that the correct standard is that the evidence must be clear, cogent, and convincing.

The previous version of the statute referred to fraud, a common law concept. Because RCW 51.32.240(5) specifically referred to "fraud," courts looked to common law for a definition. As this Board stated in *In re Norman L. Pixler*, BIIA Dec., 88 1201 (1989):

> 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."

Pixler, at 3. (Citations omitted.)

In enacting the "Willful Misrepresentation" statute, the Legislature sought to permit recoupment of payments that were obtained unlawfully, if not criminally. If a statute is in derogation of a common law principle, it is to be construed strictly. If a statute substantially alters a common law principle, the intent to do so must be apparent from an express declaration, legislative history, or the words themselves. *McNeal v. Allen*, 95 Wn.2d 265, 269 (1980). We are certainly aware of the fact that the new RCW 51.32.240(5) is not in derogation of common law, but it does replace a statute that used a common law principle as its basis. Had the Legislature wished to use a different burden of proof, it would have so specified.

Moreover, the basis for the requirement that a fraud case be established by clear, cogent, and convincing evidence is set forth in *Nguyen v. Department of Health*, 144 Wn.2d 516 (2001).

> In contrast to the relatively negligible interest at stake in a civil proceeding which can result only in a money judgment, properly determined by a mere evidentiary preponderance, the intermediate "clear and convincing" standard is typically used in civil cases "involving allegations of fraud or some other *quasi-criminal* wrongdoing by the

> defendant." The standard is appropriate when the individual interests at stake are "'more substantial than mere loss of money.'" [Citation omitted] The United States Supreme Court has deemed a higher level of certainty "necessary to preserve fundamental fairness in a variety of *government-initiated proceedings* that threaten the individual involved with a 'significant deprivation of liberty' or 'stigma.'"

Nguyen, at 527-528.

The Department has filed a response to the claimant's Petition for Review in which it takes the position that the correct burden of proof is the same one used for all other Department orders: a preponderance of the evidence. It argues that the Legislature meant to make it easier for the Department to recoup illegally obtained benefits, and thus should be held to the lesser standard. The latter argument is not well taken; had the Legislature wished to make it that much easier, it would have so stated. In view of *Nguyen*, we believe the correct standard is that of clear, cogent, and convincing evidence.

The recently amended RCW 51.32.240(5) provides as follows:

> (5)(a) Whenever any payment of benefits under this title has been induced by willful misrepresentation 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 willful misrepresentation 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 three years of the discovery of the willful misrepresentation.
>
> (b) For purposes of this subsection (5), it 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.
>
> (c) For purposes of this subsection (5) "willful" means 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.

> (d) For purposes of this subsection (5), failure to disclose a work-type activity must be willful in order for a misrepresentation to have occurred.
>
> (e) For purposes of this subsection (5) 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).

In addition to the above, the Department has also promulgated regulations that define certain terms. WAC 296-14-4122 defines the term "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." WAC 296-14-4123 defines "Work –type activity" as "any activity for which a reasonable person would expect to be compensated or for which a reasonable employer would expect to pay compensation."

However, even though the Department has defined "specific intent," the concept is still problematic. It would appear to require that the Department prove that the claimant knows that he is obtaining benefits to which he is not entitled. While Mr. Hejna knew he was engaging in criminal activity, there is no evidence that he knew he was obtaining time loss compensation benefits to which he was not entitled. It is unclear whether the statute requires proof that the claimant knows that he is obtaining benefits wrongfully, or does it simply require that he know that he is making representations (or omissions) that will lead to obtaining benefits, whether or not he knows it is wrongful.

In this regard, we note that Mr. Hejna is not a sophisticated person; the evidence suggests that he is of limited intelligence, given that he never obtained a high school diploma and was in special education classes from a young age. Thus, if one defines willful misrepresentation as that situation when a person makes statements (or omits information) with a **deliberate** intent to obtain something that the person knows that he is not entitled to, then Mr. Hejna has not made a willful misrepresentation. While Mr. Hejna may or may not have misrepresented his physical capabilities, we are persuaded that he believed he was entitled to time loss compensation benefits.

The foregoing, though, does not excuse Mr. Hejna; we are satisfied that if the Department proves that any reasonable person would know full well that he or she was making a representation that was not true, then one can certainly infer intent. In this situation, it is worthwhile to bear in mind that "specific intent," within the meaning of the Washington Administrative Code, has not been proved except by inference, because we do not believe that Mr. Hejna thought he was wrongfully obtaining benefits.

In evaluating this matter, it is important to understand the time periods involved. The order seeks to recoup benefits paid for the entire period of July 9, 2001 through August 31, 2004. Mr. Hejna's home was raided on June 27, 2003. Thus, for the period of July 9, 2001 through July 27, 2003, Mr. Hejna was growing marijuana. For the period of July 28, 2003 through August 31, 2004, Mr. Hejna was not growing marijuana, and there is no evidence of any type of gainful activity.

Accordingly, for the first period, during which time Mr. Hejna was engaged in growing marijuana, it can be argued that he made two types of willful misrepresentations: (1) that he failed to disclose or concealed the fact that he was engaging in work-type activity; and (2) that he made a material misrepresentation about the true extent of his physical capabilities. After June 27, 2003, up through August 31, 2004, however, he was no longer cultivating marijuana; thus, the only basis for the willful misrepresentation order would be that he concealed his true physical capabilities so that he could wrongfully obtain time loss compensation benefits.

Our industrial appeals judge determined that Mr. Hejna was involved in an active commercial enterprise, undertaken for distribution and profit. He gave great weight to the testimony of Detective Price, and determined that Mr. Hejna was making at least $69,000 per year in marijuana sales. As such, when Mr. Hejna signed and filed "Worker Verification Forms" with the Department, he made a willful misrepresentation when he stated "I have not worked nor was I able to work due to a work-related injury/illness." In so determining, our industrial appeals judge determined that Mr. Hejna was engaging in "work-type activity."

Moreover, our industrial appeals judge determined that Mr. Hejna made a willful misrepresentation because he concealed his true physical capabilities. He determined that the marijuana growing operation would have required physical capabilities such that Mr. Hejna could indeed have worked, had he so desired.

Turning first to the issue of whether Mr. Hejna concealed his physical capabilities, our industrial appeals judge determined that Mr. Hejna was capable of more than he [Mr. Hejna] let on.

It is important, though, to understand what must be proved to show that Mr. Hejna willfully misrepresented his capabilities within the meaning of the statute. Certainly, we believe that Mr. Hejna is probably capable of more than he let on, but proof that he lied about how much he could do is not, by itself, enough to establish willful misrepresentation within the meaning of the statute. In order to show that Mr. Hejna wrongfully obtained time loss compensation benefits, the Department must prove that Mr. Hejna possessed the physical capabilities to be able to work. If he is not able to work, then he is entitled to time loss compensation benefits, and obtaining them is not wrongful. Thus, the Department must prove that Mr. Hejna possessed the physical capabilities to perform reasonably continuous gainful employment, but that he concealed the fact that he was capable and thereby obtained time loss compensation benefits in order to establish willful misrepresentation. We believe that this case fails because although Mr. Hejna is capable of more than he would have us believe, we do not believe that the Department proved that he is capable of reasonably continuous gainful employment.

Detective Peterson and Mr. Price provided the evidence as to what physical capabilities would be required to run Mr. Hejna's growing operation, such as lifting a three-gallon bucket of soil weighing thirty pounds, and lifting the lights used in the shed. This evidence was provided to Nurse Moser and Dr. Fenner. Prior to being told of Mr. Hejna's growing activities, both believed that Mr. Hejna was not capable of reasonably continuous gainful employment. However, both Nurse Moser and Dr. Fenner, when told of Mr. Hejna's activities growing marijuana, changed their minds. It is important, however, to look specifically at what they were told. Both were provided with the opinions of Detective Price as to what Mr. Hejna would have had to do in order to function as a marijuana grower. They were told that Mr. Hejna would have had to lift a three-gallon bucket weighing twenty to twenty-five pounds from floor to waist. Likewise, watering marijuana plants with a two-quart pitcher would, according to Detective Price, involve lifting, bending, and stooping.

Moreover, Dr. Fenner observed callus formation on his hands, which Mr. Hejna attributed to using the television remote. Even though Dr. Fenner had some reservations about Mr. Hejna's explanation for his calluses, the doctor still determined that Mr. Hejna was only suited for sedentary work and would be a candidate for a pension. In addition to this, Mr. Hejna's attending nurse, Nurse Moser, signed certifications that Mr. Hejna was not capable of reasonably continuous gainful employment.

These two practitioners formed their opinions based on Mr. Hejna's concealment of his true physical capabilities (thus the willful misrepresentation). The premise for this determination,

however, is that if Mr. Hejna was doing all the activities involved with growing marijuana, then he was engaging in physical activity. This physical activity is not only in excess of that which Mr. Hejna would have had Nurse Moser and Dr. Fenner believe; it is at a level which would enable Mr. Hejna to engage in reasonably continuous gainful employment.

Although Mr. Price testified as to the lifting activities that would be involved, this was contradicted by the testimony of Mr. Hejna. In so stating, we are well aware that Mr. Hejna has provided ample evidence to believe that his testimony is, at best, suspect. However, we are cognizant of the fact that, by anyone's reckoning, Mr. Hejna has a truly bad back. He has had two back surgeries, both of which were extensive. Before Dr. Fenner found out about Mr. Hejna's marijuana cultivation, he believed Mr. Hejna to be a candidate for a pension, in spite of the fact that there were calluses on Mr. Hejna's hands. Dr. Fenner believed that there was an objective basis for Mr. Hejna's complaints of pain and disability.

Finally, there is Mr. Hejna's testimony. He testified as to how he accomplished the requisite activities for his growing operation. He stated that he did not have to bend, stoop, or crouch, but would put a five-gallon bucket in front of him and sit. He would not lift the plants, but would slide them along the floor with his foot. He used a two wheeled cart to load and carry the buckets. He did not have to attend to the plants every day, but would water them once a week or so, and would use a two-quart pitcher to accomplish this. On the busiest day, he would spend about three hours working on his growing operation, but it was never three straight hours. He would need to take frequent breaks, and it would take him six or seven hours to accomplish the tasks.

Given Mr. Hejna's back condition, and in view of the surgeries that he had, we believe that his representations of what he did for his growing operation are more likely than the suppositions of Mr. Price and Mr. Gow. Both Nurse Moser and Dr. Fenner based their opinions as to whether Mr. Hejna was capable of reasonably continuous gainful employment based on the information Mr. Price and Mr. Gow supplied. Under the circumstances, we attach less weight to their opinions of whether Mr. Hejna was capable of reasonably continuous gainful employment. As we noted above, it is likely that Mr. Hejna certainly could do more than he let on, but does this rise to the level of performing the job of lubrication servicer or cashier for eight hours a day? We do not believe that it does, and that the Department's case fails because Mr. Hejna was, indeed, entitled to time loss compensation benefits.

Moreover, taking Nurse Moser and Dr. Fenner's testimony as a whole, when they found out that Mr. Hejna had been cultivating marijuana, they both seem to have reacted quite strongly.

Indeed, on redirect examination Dr. Fenner noted that although Mr. Hejna had had the surgeries, he now questioned whether Mr. Hejna had even sustained an on-the-job injury. Prior to being told of the growing operation, Dr. Fenner and his colleagues believed that their physical assessment concurred with Mr. Hejna's description or perception of his physical limitations; after being told of the growing operation, Dr. Fenner questioned whether there had even been an industrial injury and determined that Mr. Hejna could work.

Moreover, Nurse Moser was dispensing opioids and time loss certifications until she found out about the growing operation. Still, she had no compunction in signing Exhibit No. 23 on May 31, 2005, stating that she did not believe Mr. Hejna could work now or in the future. Exhibit No. 23 is a document she signed at the behest of Mr. Hejna, and it states that Mr. Hejna has "severe lower back degenerative disc disease with right hip/leg pain. Unable to walk for any distance." It also states that this disability renders him unable to pursue any type of gainful employment, and that this is permanent. She then testified that Mr. Hejna asked her to sign it so he could avoid some kind of tax. It is hard to understand why Nurse Moser would testify that Mr. Hejna was able to work, but also sign such a document. We question whether Dr. Fenner and Nurse Moser base their opinions more on their dismay at Mr. Hejna's criminal activity than on his actual physical capabilities.

The last issue, then, is whether, regardless of physical requirements, Mr. Hejna was engaging in "work-type" activities when he grew marijuana. Certainly, Mr. Hejna concealed the fact that he was engaged in a marijuana growing operation from anyone involved in the workers' compensation system (or anyone else). The question then becomes whether the growing operation is a "work-type activity" within the meaning of the statute and the regulation. If, indeed, this is a "work-type activity," then there can be no question but that Mr. Hejna concealed a material fact in order to obtain benefits. We do not believe that the Department proved that Mr. Hejna engaged in work type activity by clear, cogent, and convincing evidence, nor do we believe that criminal activity constitutes work-type activity.

There was considerable testimony taken in this matter concerning Mr. Hejna's growing operation; however, the bulk of it came from government witnesses testifying as experts. These experts testified as to the income they believed such an operation would generate. We are well aware of the fact that Mr. Hejna testified that he did not sell much of his crop. He testified that the scales were used to weigh out food, even though there was marijuana residue on them. As we

have noted before, Mr. Hejna's testimony is so riddled with inconsistencies and admitted falsehoods that we cannot attach much credibility.

However, looking at the evidence as a whole we are persuaded that while Mr. Hejna indeed may have sold some of his crop, he did not generate significant amounts of money. Had Mr. Hejna generated any sum of money from the sale of his goods, it is unclear what happened to it. We note that the authorities found no money when the search warrant was executed. His home was a rat and bug infested single-wide in a very rural area; thus, he certainly did not invest in his home. There is evidence that rats have chewed through the floor. There is no evidence of expenditures on appliances or the like. His vehicles are old. He was able to obtain opiates through his claim, and it is unlikely that he spent the money on drugs. Many of Mr. Hejna's providers, who had frequent contact with him, testified, and none of them testified to signs of drug use (not even the marijuana use).

Thus, while Mr. Hejna's testimony is entitled to little credibility, other evidence would corroborate it. Mr. Hejna testified that he sold very little of his product, and based on the foregoing, we would so determine. Under such circumstances, then, is this "activity for which a reasonable person would expect to be compensated?" Although he probably made some small amount of money off of marijuana sales, we believe it was de minimus.

Even were we to assume that Mr. Hejna made $69,000 a year, we do not believe that engaging in criminal activity, however lucrative, is "work-type activity." In this regard, it is important to note that the issue of physical capabilities does not enter into this analysis; this analysis centers only around whether Mr. Hejna engaged in a business "for which a reasonable person would expect to be compensated" (WAC 296-14-4123). This regulation pointedly does not include any reference to physical capabilities; the only issue is whether someone would be willing to compensate the worker for the activity.

The reason that workers who obtain time loss compensation benefits are penalized when they are, indeed, able to engage in work-type activities is quite simply because they could have worked. If the only employment that a worker can perform is criminal, then how can it be said that he is able to engage in reasonably continuous gainful employment? Certainly, the thought of a claimant making a lot of money at a criminal endeavor while receiving time loss compensation benefits is galling, at best. Recall, though, in this matter that Mr. Hejna's profits, if indeed there were any, were taken away in the assets forfeiture proceeding. If there were any ill-gotten gains, they were disgorged when he forfeited his assets pursuant to law.

In conclusion, we do not believe that the Department has proved that Mr. Hejna obtained benefits to which he was not entitled by clear, cogent, and convincing evidence, and the Department order of November 4, 2004, should be reversed, and this matter remanded to the Department with direction to issue an order determining that the claimant, Mr. Hejna, did not obtain benefits for the period of July 9, 2001 through August 31, 2004, through willful misrepresentation.

FINDINGS OF FACT

1. On June 16, 1993, the claimant, Frank L. Hejna, filed an Application for Benefits with the Department of Labor and Industries, in which he alleged he sustained an industrial injury to his back on June 9, 1993, while working within the scope of his employment with Swanson Bros.

   After the payment of certain benefits, the Department issued an order dated September 14, 2000, in which it closed the claim with an award for permanent partial disability described as Category 3, permanent dorso-lumbar and/or lumbosacral impairments.

   On July 25, 2001, the claimant filed an application to reopen his claim, which the Department granted by order dated February 7, 2002. In this order, the Department order reopened the claim effective July 9, 2001.

   After the payment of certain benefits, the Department issued an order dated November 4, 2004, in which it alleged that the claimant had induced benefits by willful misrepresentation, and ordering repayment of same with penalties, as prescribed by RCW 51.32.240, in the total amount of $88,747.60.

   On November 12, 2004, the claimant filed his appeal with the Board of Industrial Insurance Appeals from the Department order dated November 4, 2004. On December 12, 2004, the Board granted the claimant's appeal and directed that proceedings be held on the issues raised by the Notice of Appeal.

2. On June 9, 1993, the claimant was working within the scope of his employment with Swanson Bros, when he fell off an object that he was standing on and suffered a low back sprain. The claimant then had low back surgery consisting of surgery for stenosis at L3 through L-5, a laminectomy at L4-5, partial laminectomy at the lumbar margin of L3, discectomy at L3-4 and L4-5, and foraminotomies at L3-4 and L4-5 on the left side.

3. From July 9, 2001 through June 27, 2003, the claimant engaged in the cultivation of marijuana.

4. From July 9, 2001 through August 31, 2004, the claimant was not capable of reasonably continuous gainful employment, given his age, transferable skills, and the sequelae of his industrially-related condition and surgeries.

5. From July 9, 2001 through August 31, 2004, the claimant was entitled to vocational rehabilitation services.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of this appeal.

2. This action is governed by RCW 51.32.240(5) as amended by Laws of 2004, ch. 243, § 9 Sec. 7, the willful misrepresentation statute.

3. The Department of Labor and Industries' burden of proof is proof by clear, cogent, and convincing evidence.

4. From July 9, 2001 through August 31, 2004, the claimant was temporarily totally disabled within the meaning of RCW 51.32.090.

5. From July 9, 2001 through June 27, 2003, the claimant did not engage in a work-type activity within the meaning of RCW 51.32.240(5) and WAC 296-14-4123.

6. The Department order dated November 4, 2004, is incorrect and is reversed. This matter is remanded to the Department with instructions to issue a further order in which it determines that the claimant did not wrongfully obtain benefits, including vocational rehabilitation services, through willful misrepresentation for the period of July 9, 2001 through August 31, 2004.

It is so **ORDERED**.

Dated this 28th day of August, 2006.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

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