

Jamieson, Ronald

BOARD

Equitable powers

In applying the principles of *Rodriguez* (85 Wn.2d 949) and *Ames* (176 Wash. 509) the Board is not exercising equitable powers but is anticipating the relief which would be granted, under the doctrine of stare decisis, upon further appeal to superior court. It is without authority to expand those doctrines to cover cases with dissimilar facts.

...*In re Ronald Jamieson*, BIIA Dec., 62,551 (1983)

Scroll down for order.

**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

1 **IN RE: RONALD E. JAMIESON**) **DOCKET NOS. 62,551, 62,946,62,947, 62,948,**
2) **63,007 & 63,227**
3)
4 **CLAIM NO. H-939866**) **DECISION AND ORDER**
5 _____)

6 **APPEARANCES:**

7
8 Claimant, Ronald E. Jamieson, by
9 Walthew, Warner, Keefe, Arron, Costello and Thompson, per
10 Robert M. Keefe and Thomas Thompson
11

12 Employer, McLean Trucking Company, by
13 William, Lanza, Kastner and Gibbs, per
14 Richard M. Slagle
15

16 Department of Labor and Industries, by
17 The Attorney General, per
18 Meredith Wright Morton and S. Frederick Feller, Assistants
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20 Docket No. 62,551 involves a notice of appeal filed by the employer on July 16, 1982 from
21 an order of the Department of Labor and Industries dated April 5, 1982, which allowed the claim as
22 an industrial injury. Appeal **DISMISSED**.
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24 Docket No. 62,946 involves a notice of appeal filed by the employer on September 16, 1982,
25 from an order of the Department of Labor and Industries dated May 13, 1982, which paid the
26 claimant time-loss compensation on an interlocutory basis for the period from May 17, 1981 through
27 November 1, 1981. Appeal **DISMISSED**.
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29 Docket No. 62,947 involves a notice of appeal filed by the employer on September 16, 1982,
30 from an order of the Department of Labor and Industries dated May 25, 1982 which paid the
31 claimant time-loss compensation for the period from January 1, 1982 through January 31, 1982.
32 **REVERSED AND REMANDED**.
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34 Docket No. 62,948 involves a notice of appeal filed by the employer on September 16, 1982
35 from an order of the Department of Labor and Industries dated July 23, 1982 which paid the
36 claimant time-loss compensation for the period from July 1, 1982 through August 31, 1982.
37 **REVERSED AND REMANDED**.
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39 Docket No. 63,007 involves a notice of appeal filed by the employer on September 16, 1982,
40 from an order of the Department of Labor and Industries dated July 23, 1982 which paid the
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1 claimant time-loss compensation for the period from February 1, 1982 through June 30, 1982.

2 **REVERSED AND REMANDED.**

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4 Docket No. 63,227 involves a notice of appeal filed by the employer on October 20, 1982,
5 from an order of the Department of Labor and Industries dated September 20, 1982, which paid the
6 claimant time-loss compensation for the period from September 1, 1982 through September 15,
7 1982. **REVERSED AND REMANDED.**

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10 **DECISION**

11 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
12 and decision on timely Petitions for Review filed by the employer and the claimant to a Proposed
13 Decision and Order issued on July 22, 1983, in which it was concluded and ordered as follows:

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15 The Department order of April 5, 1982 was not induced by fraud, the notice of appeal
16 received by the Board of Industrial Insurance Appeals on July 16, 1982 was not timely filed, this
17 Board lacked jurisdiction over the parties and subject matter in the appeal in Docket No. 62,551;
18 and this appeal was therefore dismissed;

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20 The appeal filed by the employer on September 16, 1982 and assigned Docket No. 62,946
21 which appealed from an interlocutory order issued by the Department on May 13, 1982, was
22 dismissed;

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24 In Docket No. 62,947 the order of the Department of Labor and Industries dated May 25,
25 1982, which paid the claimant time-loss compensation for the period from January 1, 1982 through
26 January 31, 1982, was reversed;

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28 In Docket No. 62,948, the order of the Department of Labor and Industries dated July 23,
29 1982, which paid the claimant time-loss compensation for the period from July 1, 1982 through
30 August 31, 1982 was reversed;

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32 In Docket No. 63,007, the order of the Department of Labor and Industries dated July 23,
33 1982, which paid the claimant time-loss compensation for the period from February 1, 1982 through
34 June 30, 1982, was reversed; and

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36 In Docket No. 63,227, the order of the Department of Labor and Industries dated September
37 20, 1982, which paid the claimant time-loss compensation for the period from September 1, 1982
38 through September 15, 1982, was reversed.

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40 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no
41 prejudicial error was committed and said rulings are hereby affirmed.
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1 The issues raised in the six appeals and the evidence presented therein are adequately set
2 forth in the Proposed Decision and Order. However, we feel that further comment is required.

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4 In Lewis v. Department of Labor and Industries, 46 Wn. 2d 391, 397 (1955), the court pointed
5 out that the burden of proving those facts essential to support the jurisdiction of this Board falls
6 upon the appellant. The employer is the appellant in each of the appeals before us and thus
7 shoulders that burden.
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10 Although not specifically defined within the Title 51 RCW, the active and timely administration
11 of the Act contemplates from time to time the need to issue certain non-binding orders or
12 communiques. Such orders are by nature and design intended to be "interlocutory". See Wiles v.
13 Department of Labor and Industries, 34 Wn. 2d 714 (1949), at pages 721 and 722. In Docket No.
14 62,946, the order issued by the Department on May 13, 1982, in its heading at the top, clearly
15 identified itself as an "interlocutory" order. As was pointed out in Lee v. Jacobs, 81 Wn. 2d 937,
16 941 (1973), the statute requires that a "final" order is required to provide notice in ten point bold-
17 faced type of the time limit on the right of appeal. See RCW 51.52.050. If not appealed to the
18 Board, the terms of such order are binding upon the parties and are entitled to res judicata effect.
19 "Interlocutory" orders, on the other hand, carry no such legal consequences and are intended not to
20 decide or adjudicate issues pertaining to a claim. We conclude that the Department's order dated
21 May 13, 1982 (Docket No. 62,946) was in fact an interlocutory order which would not become final
22 under the provisions of the first paragraph of RCW 51.52.050. Therefore, this Board lacks authority
23 to hear the matter on its merits, and the employer's appeal should be dismissed.
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31 Issues concerning whether the employer filed timely appeals are involved in the three
32 appeals filed under Docket Nos. 62,551, 62,946 and 62,947. The issue is moot as to Docket No.,
33 62,946 for the reason set forth above. In Docket Nos. 62,551 and 62,947 the orders appealed were
34 issued April 5, 1982 and May 25, 1982 respectively, and appeals from these orders were received
35 July 16, 1982 and September 16, 1982. Clearly in these appeals more than sixty days elapsed
36 between the date of communication to the employer and the filing of the employer's notices of
37 appeal therefrom.
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41 Within the framework of Felthouse and Company v. Bresnahan, 145 Wn. 548, 550 (1927),
42 the employer was permitted to present evidence which appears to establish, by a preponderance of
43 the evidence that Mr. Jamieson at the time of his injury was not a "worker" or "employee", of
44 McLean Trucking Company, within the provisions of RCW 51.08.180 and RCW 51.08.185.
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1 The employer urges this Board to hold that the Department in issuing each of the two orders
2 lacked subject matter jurisdiction. Therefore, it argues the application of the doctrine expressed in
3 Wheaton v. Department of Labor and Industries, 40 Wn. 2d 56 (1952), and urges the two orders are
4 void and are subject to attack regardless of the employer's failure to appeal within sixty days. We
5 disagree. In Wheaton the void Department order under attack was not based upon a mixed
6 question of fact and law; it was based solely upon a question of law, with the facts being
7 undisputed. In Abraham v. Department of Labor and Industries, 178 Wn. 160, 162 (1934), the court
8 makes it abundantly clear that the Department order under appeal rested upon a mixed question of
9 fact and law, and determined that the Department could not set aside the prior acceptance of the
10 claim in the absence of fraud or facts akin to fraud.

11 In Farrell v. Score, 67 Wn. 2d 957, 958 (1966), the court numerically lists the nine elements
12 which must be established to prove fraud. In Beckendorf v. Beckendorf, 76 Wn. 2d 457, 462
13 (1969), the court restates the requirement that proof of fraud must be by evidence which is clear,
14 cogent and convincing. The claimant submitted to the Department a document (Exhibit No. 11)
15 with the signature of a "Christian Diachuk" bearing the descriptive position title, "Operations
16 Manager Pacesetter, Division of McLean trucking". The weight of evidence shows the document
17 was altered after it left Mr. Diachuk's hands by the addition of the descriptive title (Exhibits 13 and
18 14). However, we conclude the record does not show in a clear, cogent and convincing manner
19 that the Department's determination of the employer-employee relationship was founded upon the
20 inferences raised by the forged addition of the title below the name of Mr. Diachuk.

21 The employer urges this Board to eliminate the barrier of timeliness and to accept
22 jurisdiction, based upon equitable principles such as those set forth in Rodriguez and Ames (both
23 cited and analyzed in the Proposed Decision and Order). Unlike a court which possesses inherent
24 authority, the Board is a strict creature of statute and has no power to do equity. Tacoma v. Civil
25 Service Board of Tacoma, 6 Wn. App. 600, 606 (1972). The Board has only those powers
26 specifically granted to it by the legislation which created it. We are compelled logically to apply the
27 law as established in Rodriguez and Ames, but we are without authority to expand the doctrine to
28 disseminate facts. This Board applies the law of those cases not because we hold equitable power.
29 Rather, it is because this Board is anticipating the relief which would be granted under the principle
30 of stare decisis upon further appeal to the superior court.

1 Relative to Docket No. 62,551, involving the Department order issued April 5, 1982, which
2 allowed the claim as an industrial injury, we conclude that the order must be affirmed. The appeal
3 by the employer was not timely filed with this Board, the issuance of the order by the Department
4 was not materially influenced by the claimant's alteration of Mr. Diachuk's letter (exhibit 11). Even
5 though the determination of the employer-employee relationship may be factually erroneous, it was
6 not induced by fraud or something of like nature. Rather the erroneous determination appears
7 more plausibly to be the result of the employer's own benign neglect.
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11 Using the yardsticks supplied by Farrell and Beckendorf, we reach the conclusion the
12 Department was fraudulently induced by Mr. Jamieson to award temporary total disability benefits
13 from May 17, 1981 through November 1, 1981 and January 1, 1982 through April 28, 1982. We
14 conclude that this active deception voids every final notice which ordered the payment of such
15 compensation for any portion of those periods. The department orders issued on May 25, 1982 (in
16 Docket No. 62,947) and on July 23, 1982 (in Docket No. 63,007) are, therefore, void. Had this
17 Board jurisdiction over the "interlocutory" order of May 13, 1982 (Docket No. 62,946) we would
18 similarly order repayment of the benefits paid by that order (May 17, 1981 - November 1, 1981).
19 However, we do add to our comments that since the awarding of that compensation was paid on an
20 interlocutory basis, the Department possesses the authority, given the fact of fraudulent inducement
21 to pay, to make demand upon Mr. Jamieson for its repayment.
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24 Based on the above discussion, the claim will be remanded to the Department with direction
25 to issue an order making demand upon the claimant for restitution of the amounts paid as
26 temporary total disability by virtue of the orders of May 25, 1982 and July 23, 1982, and to take
27 such further action as is indicated and in accord with law.
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30 We have carefully studied the testimony of the three physicians who testified on behalf of the
31 employer and the Department, along with all of the evidence relative to the periods of employment
32 and the nature of the work performed by claimant subsequent to the industrial injury. We conclude
33 that the claimant has failed to show, by a preponderance of the evidence, that he was temporarily
34 totally disabled between January 1, 1982 and September 15, 1982, inclusive. Parenthetically we
35 note that in Ehman v. Department of Labor and Industries, 33 Wn. 2d 584, 595 (1949), the court's
36 recognition that the Industrial Insurance Act is to be liberally construed in favor of injured workers.
37 Yet, the rule of liberal construction does not apply to questions of fact, i.e., those who claim benefits
38 under the Act must establish by competent evidence their right to receive them.
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1 It follows that the Department is entitled to be reimbursed for the time-loss compensation
2 payments it made to the claimant in its orders dated July 23, 1982 (involving Docket No. 62,948)
3 and September 20, 1982 (involving Docket No. 63,227). Those orders will be reversed and the
4 Department will be directed to hold them for naught, and make demand upon Mr. Jamieson for
5 reimbursement of the amounts paid.
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8 The proposed findings, conclusions and order are hereby stricken and replaced by those that
9 follow:
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11 **FINDINGS OF FACT**

- 12 1. On October 28, 1981, the Department of Labor and Industries received
13 an accident report in which it was alleged that the claimant, Ronald E.
14 Jamieson, had sustained an industrial injury on May 16, 1981, at or near
15 Mission, South Dakota, while in the course of his employment with
16 McLean Trucking Company. The Department assigned the claim
17 number H-939866. On November 17, 1981, the Department issued an
18 order rejecting the claim on the ground that the claimant was not a
19 worker under the provisions of the Industrial Insurance Act. On
20 December 30, 1981, the claimant filed with the Department a letter
21 protesting the order of November 17, 1981. On February 1, 1982, the
22 Department issued an order holding in abeyance its prior order dated
23 November 17, 1981, pending further investigation. On April 5, 1982, the
24 Department issued an order allowing the claim as an industrial injury.
25 On July 16, 1982, McLean Trucking Company filed a notice of appeal
26 with the Board of Industrial Insurance Appeals from the Department
27 order dated April 5, 1982. On July 29, 1982, this Board issued an order
28 granting the employer's appeal subject to proof of timeliness, assigned it
29 Docket No. 62,551, and ordered that proceedings be held on the issues
30 raised therein. On September 16, 1982, McLean Trucking Company
31 filed with the Board a motion to amend its notice of appeal to explicitly
32 include each and every order entered by the Department in Claim No.
33 H-939866. Also, on September 16, 1982, the employer filed with this
34 Board its amended notice of appeal challenging each order issued by
35 the Department under Claim No. H-939866 on the grounds of lack of
36 jurisdiction in the Department and that claimant was not temporarily and
37 totally disabled by the incident of May 16, 1981.
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- 39 2. In addition to the jurisdictional facts set forth above, on May 13, 1982,
40 the Department issued an order, characterized in its heading as
41 interlocutory in nature, paying to claimant time-loss compensation for
42 the period from May 17, 1981 through November 1, 1981, inclusive. On
43 September 16, 1982, the employer filed a notice of appeal with the
44 Board from the order issued by the Department on May 13, 1982. On
45 September 27, 1982, the Board issued an order granting the appeal
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1 subject to proof of timeliness, assigned it Docket No. 62,946, and
2 directed that proceedings be held on the issues raised therein.

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4 3. In addition to the jurisdictional facts set forth above, on May 25, 1982,
5 the Department issued a further order paying to the claimant time-loss
6 compensation for the period from January 1, 1982 through January 31,
7 1982, inclusive. On September 16, 1982, the employer filed a notice of
8 appeal with the Board from that Department order dated May 25, 1982.
9 On September 27, 1982, the Board issued an order granting the appeal
10 subject to proof of timeliness, assigned it Docket No. 62,947, and
11 directed that proceedings be held on the issues raised therein.

12 4. In addition to the jurisdictional facts set forth above, on July 23, 1982,
13 the Department issued a further order paying the claimant time-loss
14 compensation for the period from July 1, 1982 through August 31, 1982,
15 inclusive. On September 16, 1982, the employer filed a notice of appeal
16 with the Board from that Department order dated July 23, 1982. On
17 September 27, 1982, the Board issued an order granting the appeal,
18 assigned it Docket No. 62,948, and directed that proceedings be held on
19 the issues raised therein.

20 5. In addition to the jurisdictional facts set forth above, on July 23, 1982,
21 the Department issued a further order paying to the claimant time-loss
22 compensation for the period from February 1, 1982 through June 30,
23 1982, inclusive. On September 16, 1982, the employer filed a notice of
24 appeal with the Board from that order of the Department dated July 23,
25 1982. On September 27, 1982, the Board issued an order granting the
26 appeal, assigned it Docket No. 63,007, and directed that proceedings be
27 held on the issues raised therein.

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29 6. In addition to the jurisdictional facts set forth above, on September 20,
30 1982, the Department issued a further order paying to the claimant time-
31 loss compensation for the period from September 1, 1982 through
32 September 15, 1982, inclusive. On October 20, 1982, the employer filed
33 with the Board a notice of appeal from that Department order dated
34 September 20, 1982. On November 9, 1982, the Board issued an order
35 granting the appeal, assigned it Docket No. 63,227, and directed that
36 proceedings be held on the issues raised therein.

37 7. On May 16, 1981, while in the course of his employment for McLean
38 Trucking Company, the claimant, Ronald E. Jamieson, injured his left
39 leg in or near Mission, South Dakota when the road bed upon which he
40 was driving gave way beneath his truck. As a result of the industrial
41 injury of May 16, 1981, the claimant, by history, had two conditions
42 described as a hematoma and cellulitis.

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44 8. Prior to May 16, 1981, the claimant who is approximately forty-five years
45 of age, had many years of previous working experience in the trucking
46 industry at various positions including dispatcher, truck driver, and
47 terminal manager.

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9. Between January 1, 1982 and September 15, 1982, inclusive, the claimant was not temporarily and totally prevented from performing a gainful occupation on a reasonably continuous basis by any condition causally related to his industrial injury of May 16, 1981, when considered with the factors of his age and previous vocational experience.
 10. In Docket No. 62,551, the employer's notice of appeal filed with this Board on July 16, 1982, from that order issued by the Department on April 5, 1982 which allowed the claim, was filed more than sixty days after communication of that order to the employer.
 11. In Docket No. 62,947, the notice of appeal filed with this Board by the employer on September 16, 1982 from that order of the Department dated May 25, 1982, was filed more than sixty days after the communication of said order to the employer.
 12. In issuing its order dated April 5, 1982 (in Docket No. 62,551), the Department did not rely upon the erroneous and forged addition of the title "Operations Manager, Pace Setter Division of McLean Trucking" beneath the name of Christian Diachuk on a document which had previously been submitted to the Department by the claimant, Ronald E. Jamieson.
 13. On May 3, 1982, the Department received the claimant's affidavit which represented that during the inclusive period from May 16, 1981 to April 28, 1982, the claimant was unable to engage in a normal gainful occupation because of his industrial injury of May 16, 1981. The affidavit purported to represent an existing fact which was material to the claim. The affidavit was false. The claimant was aware of its falsity at the time he executed the affidavit and submitted it to the Department. The claimant intended that the affidavit should be acted upon by the Department to whom it was submitted. The Department was ignorant of the falsity of the affidavit. The Department relied upon the truth of the representation contained in the affidavit. The Department did in fact rely upon the truth of the representation, and had a right to rely upon it, in the absence of the receipt of any information from McLean Trucking Company. The Department was damaged by the payment to the claimant of time-loss compensation from its trust funds for the period from May 17, 1981 through April 28, 1982, inclusive.
 14. The Department order dated May 13, 1982, paying time-loss compensation to claimant for the period between May 17, 1981 through November 1, 1981, inclusive, specifically stated in its heading that the order was interlocutory, rather than final, in nature.

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CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Board enters the following conclusions:

1. The Department order of April 5, 1982, was not induced by fraud; no appeal was brought within sixty days of the communication of that Department order to the employer. Therefore, the Board lacks jurisdiction over the subject matter of the employer's appeal, filed on July 16, 1982 in Docket No. 62,551.
2. Under the provisions of RCW 51.52.050 and RCW 51.52.060, the order issued by the Department on May 13, 1982 was interlocutory rather than final in nature. Therefore, the Board lacks jurisdiction over the subject matter of the appeal filed by the employer on September 16, 1982 in Docket No. 62,946.
3. This Board has jurisdiction of the parties and the subject matter in the four appeals docketed under numbers 62,947, 62,948, 63,007 and 63,227.
4. Within the contemplation of the Industrial Insurance Act the claimant was not temporarily totally disabled, as a result of his industrial injury of May 16, 1981, during the inclusive period from January 1, 1982 to September 15, 1982, nor any portion thereof.
5. The actions of Ronald E. Jamieson in inducing the Department to pay him time-loss compensation for the inclusive period from January 1, 1982 through April 28, 1982, constituted fraud.
6. In Docket No. 62,947, the Department's order dated May 25, 1982, which paid time-loss compensation to the claimant for the inclusive period from January 1, 1982 through January 31, 1982, is null and void based upon fraud in inducement.
7. In Docket No. 63,007, the Department order dated July 23, 1982, which paid time-loss compensation to the claimant for the inclusive period from February 1, 1982 through June 30, 1982 is null and void, based in part on fraud in inducement.
8. In Docket No. 62,948, the Department's order dated July 23, 1982, incorrectly paid time-loss compensation to the claimant for the inclusive period from July 1, 1982 through August 31, 1982 as the claimant was not temporarily totally disabled during that period.
9. In Docket No. 63,227, the Department's order dated September 20, 1982, incorrectly paid time-loss compensation to the claimant for the inclusive period from September 1, 1982 through September 15, 1982 as the claimant was not temporarily totally disabled during that period.

1 **ORDER**

2 It is hereby ORDERED that the two appeals filed with this Board by McLean Trucking
3 Company on July 16, 1982 and September 16, 1982, in Docket Nos. 62,551 and 62,946, shall be,
4 and hereby are dismissed for want of jurisdiction over the subject matter.
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7 It is further ORDERED that the orders of the Department of Labor and Industries dated May
8 25, 1982 and July 23, 1982 (Docket Nos. 62,947 and 63,007) are hereby declared void, and the
9 Department is directed to seek repayment of the amounts paid as temporary total disability for the
10 period January 1, 1982 through April 28, 1982, together with a penalty therefor as required by RCW
11 51.32.240(3) due to fraud in the inducement. Also relating to the order of July 23, 1982 (Docket No.
12 63,007), the Department is directed to seek repayment of the amounts paid as temporary total
13 disability pursuant to RCW 51.32.240(2) for the period April 29, 1982 through June 30, 1982 due to
14 erroneous adjudication.
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19 It is further ORDERED that the orders of July 23, 1982 and September 20, 1982 (Docket No.
20 62,948 and 63, 227) are reversed with direction to the Department to seek repayment of the
21 amounts paid as temporary total disability by virtue of those orders for the period July 1, 1982
22 through September 15, 1982.
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25 Dated this 20th day of October, 1983.

26 BOARD OF INDUSTRIAL INSURANCE APPEALS

27 /s/
28 MICHAEL L. HALL Chairman
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30 /s/
31 FRANK E. FENNERTY, JR. Member
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33 /s/
34 PHILLIP T. BORK Member
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