Pixler, Norman

DIMINUTION OF DISABILITY (RCW 51.32.160)

Nothing in the Industrial Insurance Act precludes a worker who is receiving a permanent total disability pension from engaging in employment which is not "gainful." Part-time employment paying less than full-time employment at minimum wage may not be gainful. Therefore, unless medical evidence of diminution of disability is presented or evidence establishes the worker has returned to "gainful" employment, pension benefits cannot be terminated. ***….In re Norman Pixler*, BIIA Dec., 88 1201 (1989)** [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under Spokane County Cause No. 89-2-04666-5.]

FRAUD

Material misrepresentation

If a worker's earnings from employment performed while receiving a permanent total disability pension are not sufficient to warrant either recoupment or termination of pension benefits, then the worker's misrepresentation regarding the employment is not "material" -- one of the nine essential elements of proof of fraud -- and the Department is not entitled to recoup benefits pursuant to the fraud provisions of RCW 51.32.240. ***….In re Norman Pixler*, BIIA Dec., 88 1201 (1989)** [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under Spokane County Cause No. 89-2-04666-5.]

PERMANENT TOTAL DISABILITY (RCW 51.08.160)

Part-time employment

Part-time employment paying less than full-time employment at minimum wage may not be gainful. ***….In re Norman Pixler*, BIIA Dec., 88 1201 (1989)** [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under Spokane County Cause No. 89-2-04666-5.]

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: NORMAN L. PIXLER	)	**DOCKET NO. 88 1201**
	)	
CLAIM NO. H-530019	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Norman L. Pixler, by
The Maxey Law Offices, P.S., per
Dana C. Madsen

Employer, Dishman Firestone Store, Inc., by
None

Department of Labor and Industries, by
The Office of the Attorney General, per
Gary W. McGuire, Paralegal, and Dennis J. Beemer, Assistant

This is an appeal filed by the claimant, Norman L. Pixler, on March 28, 1988 from an order of the Department of Labor and Industries dated February 29, 1988. The order concluded the claimant was gainfully employed or capable of being gainfully employed from April 1, 1985 through July 15, 1987. Therefore it ordered the claimant to refund the overpayment in the amount of $5,092.11 plus a penalty of 50% in the amount of $2,546.05 since benefits were obtained fraudulently by misrepresentation by the claimant and concealment of employment capability from the Department.

The order further held that the claimant's entitlement to pension benefits was cancelled effective July 16, 1987, and that his status was changed from total permanent disability to permanent partial disability equal to 10% total bodily impairment for lumbar spine residuals, less previous award for permanent partial disability and closed the claim. **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 timely Petitions for Review filed by the claimant and the Department of Labor and Industries to a Proposed Decision and Order issued on April 18, 1989. In that Proposed Decision and Order, the Department order dated February 29, 1988 was reversed to the extent that it assessed a 50% penalty based upon RCW 51.32.240 for payment of benefits induced by fraud. The Proposed Decision and Order affirmed all other terms of the February 29, 1988 order except the penalty provision.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed and said rulings are hereby affirmed.

There are two issues presented by this appeal. The first is whether the Department can recoup pension benefits paid to Mr. Pixler for the period of April 1, 1985 through July 15, 1987 as well as a penalty for fraud under the provisions of RCW 51.32.240(4). On this question the Department had the burden of going forward with the evidence. RCW 51.52.050. The Proposed Decision and Order concluded that the Department had failed to prove an essential element of fraud, i.e., intent. The Industrial Appeals Judge apparently relied on RCW 51.32.240(1) and proposed that Mr. Pixler be required to repay benefits for the period of April 1, 1985 through July 15, 1987 without a fraud penalty, presumably on the theory that those payments were induced by Mr. Pixler's "innocent misrepresentation" regarding his employment status. However, even if RCW 51.32.240(1) would permit recoupment in this case, in the absence of fraud that recoupment would be limited to the period of February 29, 1987 through July 15, 1987. For, by the terms of RCW 51.32.240(1) the Department must make claim for recoupment within one year of the date the payment was made. Otherwise, the claim for overpayment is deemed waived.

The second issue raised by this appeal is whether Mr. Pixler's employment during the period of April 5, 1985 through March 21, 1987 for which he received approximately $8,300.00[1] was gainful employment, permitting the Department to terminate his pension benefits as of July 16, 1987 without the necessity of producing medical evidence of diminution of disability. RCW 51.32.160 (1986). On the issue with respect to termination of the pension Mr. Pixler had the burden of going forward with the evidence. RCW 51.52.050. However, as will appear from our discussion below, there is considerable overlap between these two issues.

> 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." Sigman v. Stevens- Norton, Inc., 70 Wn.2d 915, 920, 425 P.2d891 (1967); Martin v. Miller, 24 Wn.App. 306, 308, 600 P.2d 698 (1979).

North Pacific Plywood v. Road Builders, 29 Wn.App. 228, 232-233, 628 P.2d 482 (1981).

[1] This sum includes payments from Mr. Irish, Mr. Turner, Mr. Kaiser, and Ms. Meier, but excludes payments made by Mr. Irish in the sum of approximately $500.00 for car parts.

We turn, then, to the first issue of whether Mr. Pixler fraudulently obtained pension benefits from April 1, 1985 through July 15, 1987. Mr. Pixler injured his low back while in the course of his employment on June 15, 1979. On November 29, 1983, the Department issued an order placing him on the pension rolls effective April 3, 1983. He regularly signed declarations of entitlement (Exhibit No. 6) and received pension benefits.

Several years later, the Department received an anonymous tip that the claimant was working at Dave's Auto Mart in Spokane, Washington. Based on that information, an investigation was commenced on April 15, 1987. Two Department investigators, Chyma Miller-Smith and Randall A. Maruca, performed the investigation. Over the course of six days, they observed Mr. Pixler at Dave's Auto Mart. During the course of their investigation they observed Mr. Pixler working underneath an automobile. They noticed him wearing overalls which were greasy, as were his hands, as if he had just completed some mechanical work.

As a result of the investigators' observations, a Department audit was conducted of Dave's Auto Mart owned by David W. Irish, to determine if Mr. Pixler was being reported as an employee. The audit was performed and copies of 84 checks issued to Mr. Pixler were obtained from Mr. Irish for the period April 5, 1985 through March 21, 1987 (Exhibit 3). These checks totaled approximately $8,611.75, and were issued on an almost weekly basis in varying amounts between $5.00 and $215.00. Half of the checks were in the amount of either $65.00 or $115.00 and 65 were in amounts of $115.00 or less. According to Mr. Irish, claimant averaged about three days of work per week but his hours were quite variable.

Another witness, Jerry M. Turner, paid Mr. Pixler for some auto repair work during this period but could only remember one specific payment in the amount of $50.00. Werner Kaiser also paid Mr. Pixler $50.00 for some auto repair work and Tami Meier paid him $90.00.

In addition to the investigators' observations, Dave Irish, Werner Kaiser, Larry Allen, Jerry Turner and Tami Meier all testified to various incidents where they watched Mr. Pixler tear apart engines, crawl under vehicles, and generally perform all the duties of an auto mechanic. As an example, Mr. Turner said "he [Mr. Pixler] had his coveralls on and his hands were greasy, but he's always had his hands greasy." 12/7/88 Tr. at 33. Mr. Turner went to Mr. Pixler for automotive repair "because Norm was my mechanic." 12/7/88 Tr. at 33.

There is no question that the claimant received the $8,611.75 over the two year period from Dave Irish. Mr. Pixler admits to receiving money from Mr. Irish but says that 90% of the money paid to

him was for automobile parts and the remaining 10% was in repayment of "favors". Mr. Irish disputed this allocation, testifying that probably between $500.00 and $750.00 of the money he paid claimant was for automobile parts. Mr. Pixler did not report these monies to the Internal Revenue Service, Social Security, or the Department of Labor and Industries. His reasoning was he believed he did not make enough money to require reporting. On his behalf, two friends, Jean Leonard and Nathan T. Null, testified that the claimant did not perform actual work on any automobiles but he only assisted.

There is no question the claimant was receiving his pension benefits at the same time he was lying about his employment status on the Declaration of Entitlement forms. He signed those forms, under penalty of perjury, attesting that he was totally disabled, unable to engage in a gainful occupation, and was not receiving any wages or working any hours (Exhibit 6). However, there are 84 checks (Exhibit 3) and several witnesses that say otherwise. We have no trouble concluding that Mr. Pixler intentionally deceived the Department.

However, proof of fraud requires not only that the claimant's misrepresentation to the Department be false and intentional but also that it be material. It is the question of materiality that defeats the Department's fraud claim.

Prior to June 11, 1986 a worker's return even to full-time gainful employment was not sufficient, in the absence of medical evidence of diminution of disability, to warrant either termination of the pension or recoupment of prior pension benefits. Dept. of Labor & Indus. v. Moser, 35 Wn.App. 204, 665 P.2d 926 (1983). The applicable statute, RCW 51.32.160, was amended by Laws of 1986, ch. 59, § 4, p. 42 effective June 11, 1986. What has come to be known as the Moser amendment provides as follows:

> "If a worker receiving a pension for total disability returns to gainful employment for wages, the director may suspend or terminate the rate of compensation established for the disability without producing medical evidence that shows that a diminution of the disability has occurred."

Under this provision, the Department cannot terminate Mr. Pixler's pension or recoup previous pension payments unless he has returned to gainful employment.[2] If Mr. Pixler was not in fact gainfully

[2] We note that the Department order on appeal uses the terminology "was gainfully employed or capable of being gainfully employed". (Emphasis added) The Proposed Decision and Order also fails to distinguish between the two. However, this is not the standard applied under RCW 51.32.160. The Department may dispense with medical proof of diminution of disability only if the worker has actually returned to gainful employment.

employed between April 5, 1985 through March 21, 1987,[3] then the receipt of approximately $8,300.00 in wages over that two year period is immaterial.

Put another way, would the Department have been justified in terminating Mr. Pixler's pension if he had not lied and instead had truthfully filled out each document contained in Exhibit No. 6? Can the Department terminate pension benefits if a worker returns to employment and over a two year period earns approximately $8,300.00? Is such employment gainful employment within the meaning of RCW 51.08.160 and RCW 51.32.160? Unlike the Industrial Appeals Judge, and within the context of this case, we think not.

There is no case law directly on point defining the term "gainful employment" or "gainful occupation," but a few cases touch on this question at least peripherally. The appellate court in Allen v. Dept. of Labor & Indus., 16 Wn.App. 692, 694, 559 P.2d 572 (1977) indicated that under the odd lot doctrine the trier of fact must evaluate the worker's ability to command regular income as a result of his personal labor. Construing RCW 51.08.160, the Court of Appeals in Nash v. Dept. of Labor & Indus., 1 Wn.App. 705, 462 P.2d 988 (1969) implied that an odd job in special work not generally available cannot be considered a "gainful occupation" unless the Department or the employer shows that such a particular job is available, and that even then, to qualify as gainful employment, there must be "a reasonable degree of occupational continuity." Nash, at 709.

In Kuhnle v. Dept. of Labor & Indus., 12 Wn.2d 191, 120 P.2d 1003 (1942) the Supreme Court approved Foglesong v. Modern Brotherhood of America, 121 Mo.App. 548, 97 S.W. 240, which held that "a farmer who could direct the work to be done on his farm and could perform some light labor himself, but was disabled from carrying on, other than partially, the occupation of farmer and equally disabled from carrying on any gainful occupation" was totally disabled. Kuhnle, at 200 (Emphasis added).

In Fochtman v. Dept. of Labor & Indus., 7 Wn.App. 286, 499 P.2d 255 (1972), the Court of Appeals, relying on Kuhnle, reiterated the principle that "sporadic" work and irregular employment do not qualify as gainful employment. The court there stated:

> "A workman may be found to be totally disabled, in spite of sporadic earnings, if his physical disability caused by the injury, is such as to disqualify him from regular employment in the labor market."

[3] We note too that the Department order demands repayment for the period of April 1,1985 through July 15, 1987 even though the proof of claimant's actual employment covers he period of April 5, 1985 through March 21, 1987.

Fochtman, at 294 (Emphasis added.)

These cases do not state an absolute rule that part-time employment, as a matter of law, cannot be considered gainful employment. Nor do we. However, we feel quite comfortable in saying that Mr. Pixler's part-time employment as an auto mechanic grossing approximately $8,300.00 for 84 pay periods over a two year period is not gainful employment within the meaning of either RCW 51.32.160 or 51.08.160.[4] This is clearly not equivalent even to full-time employment at minimum wage.

Nothing in our Industrial Insurance Act precludes a worker from returning to employment after he is placed on the pension rolls, so long as that employment is not "gainful". The Department in fact recognizes this. Sandra Sue Torstenson, a disability claims adjudicator for the Department, testified as follows on the question of what constitutes gainful employment:

> Q. How do you define gainful?
>
> A. Generally, we define gainful as being an occupation which is minimum wage and the occupation is more than a temporary or short- termed job.
>
> Q. So, if a person is making less than a minimum wage and is only working in a temporary position, might it be true that he does not have to report that income to you?
>
> A. Well, it should still be reported. The whole basis for the questions on this form where it asks: When did you start the employment? What's the nature? What's the wage per day? How many hours per week? What's the average earning per week? Those are all designed to help us determine whether or not this is in fact gainful employment. How temporary is it? How long term is it? That's the purpose for all those questions. It should still be reported.
>
> Q. And then if income less than a minimum wage or temporary work is reported, do you know how the Department handles this? Does this reduce his pension payments?
>
> A. It would depend on the circumstances of the case. If we felt that -- say, a person went back to work for three days, we're not going to take a person off the pension for that. There is no black and white. They have to work

[4] The evidence does not disclose Mr. Pixler's wages at the time of injury. If Mr. Pixler had been regularly employed in the same capacity, earning similar wages both before the industrial injury and after he was placed on a pension, then arguably his employment between April 5, 1985 and March 21, 1987 could be considered gainful. However, there is no evidence in the record to support such a conclusion. The burden on this Issue is on the Department insofar as it goes to the heart of whether Mr. Pixler's misrepresentations were material. Even with respect to the second issue, i.e., termination of the pension under RCW 51.32.160, claimant can rely on an unrebutted prima facie case showing that he did not return to gainful employment.

"X" number of hours in a given time frame. Black and white to determine what is temporary and isn't. It's a common sense, case by case determination.

Q. So for a situation where somebody is making less than a minimum wage and they'd only be working part-time, there's no set amount which would result in the person's pension being terminated?

A. No.

Q. The amount can vary and it can vary from person to person, right?

A. It can vary, yes. And in making such a determination, we do have legal advisors available to us if we feel we need some additional advice on the definition itself. The main point here in Mr. Pixler's case is he indicated he was earning nothing.

Torstenson Dep. at 19-20. Thus, even under the Department's own definition, we fail to see how Mr. Pixler's employment can be termed gainful. As a result, even if Mr. Pixler had notified the Department of his employment, his earnings were not sufficient to warrant either recoupment or termination of the pension. That being the case, Mr. Pixler's misrepresentation regarding his employment status cannot be considered material.

If the Department feels a worker is no longer permanently totally disabled because he is capable of gainful employment even though he has not in fact returned to gainful employment, it is incumbent on the Department to produce medical evidence of diminution of disability in order to reduce the worker's award. RCW 51.32.160 (1986). There is no such evidence in this case. The Department order must therefore be reversed in its entirety. Until and unless there is medical evidence of diminution of disability, or evidence of Mr. Pixler's actual return to gainful employment, Mr. Pixler must continue to receive pension benefits.

FINDINGS OF FACT

1. On June 25, 1979, a report of accident was received by the Department of Labor and Industries alleging an industrial injury occurring to the claimant on June 15, 1979 during his employment with Dishman Firestone Store, Inc. On July 23, 1979, the Department allowed the claim and awarded time loss compensation for the period commencing July 16, 1979. On June 2, 1980, the Department issued an order terminating time loss compensation as paid to May 31, 1980 with no further award for time loss compensation or permanent partial disability, and the claim was closed.

   On June 12, 1980, the Department received a protest and request for reconsideration filed on behalf of the claimant. On July 19, 1980, the Department issued an order placing in abeyance the prior order issued June 2, 1980.

On February 17, 1981, an application to reopen the claim on the basis of aggravation of condition was received. On February 23, 1981, the Department issued an order denying the application to reopen the claim and providing that the claim was to remain closed pursuant to provisions of the prior order issued June 2, 1980.

On July 17, 1981, a letter or report was received by the Department from a Dr. Shanks concerning the claimant which was treated by the Department as an application to reopen the claim on the basis of aggravation of condition. On August 18, 1981, the Department issued an order setting aside and holding for naught the prior order issued June 2, 1980, and providing that the claim remain open for treatment and action as indicated. On October 30, 1981, the Department issued an order awarding time loss compensation for the period commencing October 17, 1981. On April 12, 1983, the Department issued an order closing the claim with a permanent partial disability award equal to 25% as compared to total bodily impairment paid at 100% of monetary value, less deduction for previous award, and with time loss compensation as paid. On April 25, 1983, a protest and request for reconsideration filed on behalf of the claimant was received. On May 3, 1983, the Department issued an order holding in abeyance the prior order issued April 12, 1983.

On November 29, 1983, the Department issued an order providing that the claimant's injury had reached a fixed state and that claimant was totally and permanently disabled and placed on the pension rolls effective April 3, 1983; $6,042.31 of the previously paid permanent partial disability award was charged against the pension reserve, with monthly payments reduced accordingly, and medical treatment was terminated the date the claimant was placed on the pension rolls. On November 29, 1983, the Department also issued an order finding that second injury fund relief was not applicable to this case.

On March 15, 1984, the Department issued an order reducing monthly benefits because of social security offset with a new monthly rate effective March 16, 1984 of $0.00. On May 7, 1984, a protest and request for reconsideration filed on behalf of the claimant was received. On June 2, 1984, the Department issued an order correcting and superseding the prior order issued March 15, 1984 providing that monthly benefits were reduced for social security offset and that the new monthly rate effective March 16, 1984 was $166.92; a further determined underpayment for prior awards during the period March 16 through June 15, 1984, inclusive, was paid.

On February 29, 1988, the Department issued an order that the claimant had been placed on the pension rolls effective April 3, 1983, and received compensation based on signed declarations of entitlement to benefits which declared that the claimant had not returned to work and was unable to perform work that investigation revealed for the period April 1, 1985 through July 15, 1987, claimant was gainfully employed or capable of

being gainfully employed, thereby resulting in an overpayment in benefits in the amount of $5,092.11, for which refund to the Department of Labor and Industries, in addition to a penalty of 50%, was demanded; claimant's entitlement to pension benefits was cancelled effective July 16, 1987, claimant's status changed from total and permanent disability to permanent partial disability and the claim was closed with a permanent partial disability award equal to 10% as compared to total bodily impairment for lumbar spine residuals, less previous awards for permanent partial disability.

On March 28, 1988, claimant filed a notice of appeal with the Board of Industrial Insurance Appeals from the order issued February 29, 1988. On April 21, 1988, the Board issued an order granting the appeal, assigning Docket No. 88 1201, and directing that proceedings be held.

2. On June 15, 1979, during the course of employment with Dishman Firestone Store, Inc., the claimant sustained an industrial injury to his lower back.

3. Effective April 3, 1983, by order of the Department of Labor and Industries, the claimant was placed on the pension rolls as a totally and permanently disabled worker.

4. Between April 5, 1985 and March 21, 1987 Mr. Pixler was employed part-time by Dave's Auto Mart and sporadically by Jerry Turner, Werner Kaiser, and Tami Meier. He received 84 checks from Mr. Irish during this period, varying in amounts from $5.00 to $215.00. The total amount of the checks from Mr. Irish was $8,611.75. Of that, approximately $500.00 to $750.00 was paid to Mr. Pixler for automobile parts. In addition Mr. Pixler received $50.00 from Mr. Turner, $90.00 from Ms. Meier and $50.00 from Mr. Kaiser for automobile repair work. The total amount of wages Mr. Pixler received for auto mechanic work during this period was approximately $8,300.00.

5. Between April 5, 1985 and March 21, 1987 Mr. Pixler represented to the Department of Labor and Industries in declarations of entitlement to benefits that he was totally disabled and unable to engage in a gainful occupation. At the same time, though specifically asked on the forms, he failed to advise the Department that he was employed, nor did he advise the Department of the number of hours he was working or the wages he was earning.

CONCLUSIONS OF LAW

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

2. The claimant did not return to gainful employment after being placed on the pension rolls within the meaning of RCW 51.32.160 (1986). Therefore the Department cannot terminate his pension in the absence of medical

evidence of diminution of disability nor can the Department recoup pension benefits paid pursuant to RCW 51.32.240(1).

3. Claimant's misrepresentation to the Department regarding his employment status was not material, i.e., even if he had advised the Department of his earnings between April 5, 1985 and March 21, 1987 the Department could not have terminated his pension pursuant to RCW 51.32.160 (1986).

4. Because claimant's misrepresentation to the Department regarding his employment status between April 5, 1985 and March 21, 1987 was not a misrepresentation of a material fact the Department is not entitled to recoupment under the fraud provisions of RCW 51.32.240(4) nor is the Department entitled to a 50% penalty payment.

5. The order of the Department of Labor and Industries dated February 29, 1988 which concluded that the claimant was gainfully employed or capable of being gainfully employed from April 1, 1985 through July 15, 1987 and ordered the claimant to refund an overpayment in the amount of $5,092.11 plus a penalty of 50% since the payments were induced by fraud, and held that the claimant's entitlement to pension benefits was cancelled effective July 16, 1987 and that his status was changed from total permanent disability to permanent partial disability equal to 10% as compared with total bodily impairment for lumbar spine residuals, less previous awards for permanent partial disability and closed the claim, is incorrect. That order is reversed and the claim remanded to the Department of Labor and Industries with directions to continue paying Mr. Pixler pension benefits until and unless the requirements of RCW 51.32.160 and RCW 51.32.240 are met.

It is so ORDERED.

Dated this 7th day of November, 1989.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
SARA T. HARMON Chairperson

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

DISSENT

There is no quarrel on my part with the Board majority's descripton of the two basic issues presented by this case. Nor do I disagree with their summarization of the factual evidence, so far as it

goes. I, too, have no trouble concluding that Mr. Pixler intentionally deceived the Department about his employment status during the period in question. See pg. 6, 11. 1-6, of the majority decision.

We part company, however, when the majority goes on to hold that Mr. Pixler's intentionally deceitful misrepresentations do not prove fraud because they are immaterial. Why are they immaterial? Because, says the majority, even if he had properly notified the Department of his employment situation, this would not be sufficient to warrant recoupment or termination of the pension because his earnings did not rise to the level of "gainful" employment, within the meaning of the Moser amendment to RCW 51.32.160 enacted in 1986. I disagree.

The majority admits there is no case law directly on point defining "gainful employment" or "gainful occupation," but cites some phrases from the series of cases establishing the odd lot doctrine -- Kuhnle, Nash, Fochtman, Allen -- as peripherally dealing with the question, e.g., ability to command regular income; reasonable degree of occupational continuity; more than "sporadic" earnings. Even by these indications of some regularity or continuity of work--and assuming they even apply to the Moser amendment -- I am convinced that this claimant was gainfully employed.

His auto mechanic's work at Dave Irish's Auto Mart, as evidenced by pay-checks on almost a weekly basis from April 1985 through March 1987, and by Mr. Irish's testimony, averaged close to three days per week during that entire period. This is not simply "sporadic" work. While it was part-time in the sense of not covering a full five days per week, it certainly can be characterized as "regular" part-time work. Did it have a reasonable degree of continuity? It certainly did for two full years; and the record is quite clear to me that it would have continued indefinitely had not the whistle blown in April 1987, bringing on the Department's investigator and auditor, and Mr. Pixler's admission that he'd better not continue "until this thing blows over."

There is another aspect to Mr. Pixler's work activities, apart from his mechanic's work for Dave's Auto Mart and for a couple other people where there was a "paper trail" of his work in the form of cancelled checks. This has to do with a number of motor overhauls, transmission changes, and other rebuilding jobs for certain acquaintances where the recompense for the work was cash, or a used vehicle or salvagable auto parts for Mr. Pixler's use. The witnesses testified that he did the real work on these occasions, performing all the general duties of an auto mechanic. Mr. Pixler did not deny that these various overhaul jobs occurred or that he received vehicles or auto parts in exchange. However, he insisted that he was only "assisting" or "advising" or "giving his knowledge" to other persons inexperienced in auto mechanics, and it was those persons who really did the mechanical

work while he watched. I think his testimony on this score is simply incredible. I am persuaded that he performed those jobs for cash, or for other valuable machinery or vehicles on a bartering basis. These activities, too, thus constitute gainful employment, although of course the exact value of the "compensation" he received for the services cannot be accurately measured based on the evidence herein.

Based on all the foregoing, I am convinced that the claimant had returned to "gainful employment for wages" within the intent of the 1986 amendment to RCW 51.32.160. Indeed, he had returned to his normal or usual occupation which he engaged in prior to his industrial injury, namely, an auto mechanic. It was clearly situations like this that induced the Legislature to pass the 1986 amendment, authorizing termination of pension status and avoidance of the effect of the Moser decision.

Having returned to gainful employment, Mr. Pixler's intentionally false misrepresentation of that fact was material, and all elements of fraud have been proven.

I would affirm the Department's order of February 29, 1988, in all respects.

Dated this 7th day of November, 1989.

/s/_____
PHILLIP T. BORK Member