NO. 91049-9

SUPREME COURT OF THE STATE OF WASHINGTON

CAROLYN A. GIGER, PERSONAL REPRESENTATIVE OF THE ESTATE OF ROBERT E. GIGER, DECEASED,

Petitioner,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

DEPARTMENT OF LABOR & INDUSTRIES ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

A final superior court order found Robert Giger able to work in 1990, but instead of returning to work, he bought an RV and spent his time traveling between Arizona and Washington. When the Department of Labor and Industries or a court finds a worker able to work, but he or she chooses to leave the work force without attempting to find a job, the worker has voluntarily retired. Under case law and RCW 51.32.060(6) and .090(8), such a worker cannot receive wage replacement benefits. Applying these well-settled principles to the facts of this case, the Court of Appeals affirmed the superior court decision finding that Mr. Giger voluntarily retired. Carolyn Giger, Mr. Giger's personal representative, does not argue any basis under RAP 13.4 as to why this Court should accept review of this decision. Instead she reargues that there were material issues of fact. Pet. at 11. But this does not present a reason for review, nor do any of her arguments present a reason to overturn the Court of Appeals decision that because Mr. Giger made no attempt to find work after he was found able to work, he was voluntarily retired.

II. ISSUE

Is Giger precluded from receiving wage replacement benefits when no genuine material issue of fact exists that he was voluntarily retired, because he was found able to work, yet made no subsequent effort to return to the workforce?

III. STATEMENT OF THE CASE

A. The Department Closed Mr. Giger's Claim in 1990 With a Finding That He Could Work

Mr. Giger was employed by the Washington State Department of Corrections as the superintendent of the Larch Corrections Center. BR Giger 11.[1] Mr. Giger slipped on snow and ice and fell in December of 1985. BR Giger 11-14. He experienced pain in his back and left hip and sought medical treatment within a few days of the incident. BR Giger 14. He applied for benefits under the Industrial Insurance Act and his claim was allowed. BR 88. In March 1988, he stopped working for the Department of Corrections, after accruing 30 years of state service. BR Giger 18.

After Mr. Giger stopped working at the Department of Corrections, he continued to receive treatment for his back. BR Berselli 14-16. Mr. Giger's attending physician released Mr. Giger to full-time work with restrictions in October 1990. BR Berselli 18. Connie Stewart, the

[1] The certified appeal board record is cited as "BR" followed by the appropriate page number. Citations to the testimony of a witness will be cited to as "BR" followed by the name of the witness and the page number of the applicable transcript.

vocational counselor assigned to Mr. Giger's claim, testified that as of January 3, 1989, Mr. Giger was capable of obtaining and performing reasonably continuous gainful employment based on his transferable skills in management and in the field of corrections. BR Stewart 15-20. The Department granted Mr. Giger a permanent partial disability award equal to ten percent total bodily impairment and closed his claim on November 8, 1990. BR 68. The Department, therefore, found that Giger was able to work by concluding that he was only partially, not totally, disabled.

Mr. Giger appealed that decision to the Board, contending that he should be found to be *totally* and permanently disabled because of his industrial injury. However, the Board affirmed the Department's order. BR 68. Mr. Giger appealed the Board's decision to Clark County Superior Court. BR Giger 68. The jury found that the Department was correct to close his claim with an award for permanent partial disability to his low-back, and found that Mr. Giger was able to work at that time. BR 68. Mr. Giger did not appeal the jury's decision. BR Giger 68.

B. Mr. Giger Never Sought Employment After His Claim Was Closed

Mr. Giger admitted that he did not make any attempt to find another job after he stopped working for the Department of Corrections in 1988. BR Giger 59. Instead he and his wife took up traveling in RVs as a

hobby in the early 1990s. BR Giger 72. Their practice was to take the RV south every year for three or four months and live in Arizona. BR Giger 75-76. In about 2007, Mr. Giger and his wife moved from Vancouver, Washington to Leavenworth, Washington in order to be nearer to their children and grandchildren. BR Giger 76.

C. The Department Rejected Mr. Giger's Claim for Wage Replacement Benefits, and the Board, Superior Court, and Court of Appeals Agreed

Mr. Giger applied to reopen his claim in February 1994 because his injury-related conditions had worsened. BR 68. The Department reopened his claim and he received authorized medical treatment. BR 69. The Department closed the claim in June 2010, and Mr. Giger appealed that order, which is the source of the current appeal. BR 71. On appeal Mr. Giger sought temporary and total disability benefits (time-loss compensation) from 1994 through 2010, and total and then permanent disability benefits (a pension). BR 97.

The industrial appeals judge reversed the Department's June 2010 closing order, concluding that Mr. Giger was entitled to benefits because he was unable to obtain regular gainful employment due to his industrial injury. BR 73-74. The Department petitioned the three-member Board for review of this decision. BR 20-38. The Board reversed the proposed decision, concluding that Mr. Giger had voluntarily retired as a matter of

law, and therefore, he was not entitled to any additional disability benefits, because he withdrew himself from the work force and made no effort to return to it, despite having had the capacity to do so. BR 6-7.

Mr. Giger appealed from the Board's decision to Clark County Superior Court. The superior court granted the Department's motion for summary judgment, affirming the decision of the Board. CP 61-64. Mr. Giger is now deceased. CP 59-60. In January 2013, Mr. Giger's widow, Carolyn Giger was substituted as petitioner, and she appealed from the judgment of the superior court. CP 59-60.

The Court of Appeals affirmed, concluding that when Mr. Giger's claim was closed in 1990 with a permanent partial disability award, that this was a finding that he was capable of reasonable continuous gainful employment. *Giger v. Dep't of Labor & Indus.*, No. 44508-5-II at 3. (Sept. 3, 2014) (hereinafter "slip op."). After the claim was closed, he did not attempt to reenter the work force. Because he did not do this, as a matter of law he was voluntarily retired when the claim was reopened and he was not entitled to wage replacement benefits. Slip op. at 5. Giger now seeks review.

IV. REASONS WHY REVIEW SHOULD BE DENIED

Giger presents no reason warranting Supreme Court review. The voluntary retirement issues involved here are well settled by case law. *See*

Kaiser Aluminum Chem. Corp. v. Overdorff, 57 Wn. App 291, 295, 788 P.2d 8 (1990); *Weyerhaeuser Co. v. Farr*, 70 Wn. App. 759, 765, 855 P.2d 711 (1993); *Energy Nw. v. Hartje*, 148 Wn. App. 454, 466, 199 P.3d 1043 (2009). The Legislature has decided that if a worker voluntarily leaves the work force, he or she may not receive wage replacement benefits. RCW 51.32.060 and .090. Giger seeks only a ruling that there were material issues of fact, but does not argue that there is any basis for review and does not contest that *Farr*, *Overdorff*, and *Hartje* state the correct rule of law. Pet. 11, 20. The Court of Appeals rejected the argument that there were any relevant material issues of fact, and since Giger has not articulated a reason under RAP 13.4 to review this case, this Court should decline review.

A. Giger States No Ground Under RAP 13.4(b) for Review and None Exists

The petition currently before the Court does not present valid grounds for review as required by RAP 13.4(b). Under RAP 13.4(b), a petition for discretionary review will be accepted only (1) if the decision of the Court of Appeals is in conflict with a decision of the Supreme Court, (2) if the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals, (3) if a significant question of law under the Constitution of the State of Washington or of the United

States is involved, or (4) if the petition involves an issue of substantial public interest that should be determined by the Supreme Court. Giger does not argue that any of these provisions apply, and indeed none apply. This case involves a very particular factual situation to which the Court of Appeals applied established law to conclude that Giger had voluntarily retired from the work force. As such, review should be denied.

B. Consistent With *Farr*, *Overdorff*, and *Hartje*, the Court of Appeals Correctly Held That Giger Was Retired as a Matter of Law When He Was Found Able to Work, but Made No Effort To Return to the Work Force

Because there was a final and binding legal determination that Giger could work in 1990, and Giger acknowledged that he never sought employment after that date, the Court of Appeals correctly decided that he was voluntarily retired under *Overdorff*, *Farr*, and *Hartje* as a matter of law.

Under *Farr*, *Overdorff*, and *Hartje*, a worker who voluntarily retires is ineligible for further wage replacement benefits. *See Overdorff*, 57 Wn. App. at 296-97; *Farr*, 70 Wn. App. at 763; *Hartje*, 148 Wn. App. at 466. In *Overdorff*, the claimant took advantage of an early retirement program offered by his employer. *Overdorff*, 57 Wn. App. at 292 n.1. After that date, Overdorff made no further attempts at working, despite being physically capable of doing so. *Id.* at 296. Overdorff protested the

order closing his claim, contending that his condition had worsened at some point after he retired such that he had become unable to work. *Id.* The court concluded that the worker had voluntarily retired when he removed himself from the work force, and that he was ineligible for further wage replacement benefits. *Overdorff*, 57 Wn. App. at 295. Since Overdorff was capable of returning to work but chose not to, he had no expectation of wages.[2]

In *Farr*, the court concluded that the bar to receipt of temporary total disability benefits discussed in *Overdorff* applied to permanent total disability benefits as well. The claimant was working as a tree faller for Weyerhaeuser when he suffered an industrial injury. *Farr*, 70 Wn. App. at 760. Farr's claim closed in October of 1978 with a permanent *partial* disability award. *Id.* at 761. Farr took an early retirement and stopped working for Weyerhaeuser in 1980. *See id.* Farr neither worked nor looked for work at any time after his claim was closed. *Id.* at 766.

In 1985, Farr sought to reopen his workers' compensation claim. *Id.* at 761. The Department reopened his claim and then later closed his

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[2] In 1986, the Legislature amended RCW 51.32.060(6) and .090(8), to specifically preclude permanent and temporary total disability benefits to voluntarily retired workers. Laws of 1986, ch. 59, §3. RCW 51.32.090(10) states that benefits will not be paid "if the supervisor of industrial insurance determines that the worker is voluntarily retired and no longer attached to the workforce." But because the injury in Giger pre-dates these statutes, they do not apply. However, the analysis is the same under the statute or the case law. *See Farr*, 70 Wn. App. at 763.

claim with an additional award for permanent partial disability. *Id.* Farr appealed the Department order, arguing that he was entitled to pension benefits because he had become permanently totally disabled as a result of an aggravation of his condition following claim closure. *Id.* The *Farr* Court held that, under *Overdorff*, the worker had voluntarily retired as a matter of law, and that he was, therefore, ineligible for further wage replacement benefits, even assuming he had become unable to work as of the time that his claim was reopened. *Id.* at 765.

Because he was capable of working when Farr decided to leave the work force and not return, he had no expectation of wages and no right to benefits. Farr, like Mr. Giger, argued that his injury played a role in his decision to retire, and that, therefore, it could not be said that he had voluntarily retired. *Farr*, 70 Wn. App. at 765. However, the *Farr* Court rejected this argument, reasoning that the relevant issue is not whether Farr's injury played a role in his decision to stop working for Weyerhaeuser, but whether his injury caused him to remove himself from the general work force, and to cease engaging in any form of employment-related activity. *Farr*, 70 Wn. App. at 765-66. Therefore, res judicata established that Farr was capable of at least some form of gainful employment as of the date that his claim was closed. *Farr*, 70 Wn. App.

at 766. Mr. Giger is like Farr in that he left work able to work and did not attempt to re-enter the workforce.

In *Hartje*, the Court of Appeals adhered to the rule in *Overdorff* and *Farr*, holding that the worker's voluntary retirement before the reopening of her claim precluded her from being entitled to any further time-loss compensation as a matter of law. *Hartje*, 148 Wn. App. at 466-68. Hartje's injury occurred after RCW 51.32.090(8) was specifically amended to preclude time-loss benefits to voluntarily retired workers. *See id.* at 466. In *Hartje*, her claim for a work place injury was closed with an award for permanent partial disability for her back, with a finding that she was able to work as of June 1997. *Hartje*, 148 Wn. App. at 459.

The Department reopened Hartje's claim in 1999 and she sought wage replacement benefits. *Id.* at 460. The Court of Appeals held that she had voluntarily retired, based on the fact that it was res judicata that she could work as of the date her claim was closed in 1997, and on the fact that she had made no attempts to find work after 1997. *Farr*, 70 Wn. App. at 765-66. Like Mr. Giger, Hartje argued that she had not voluntarily retired, contending that she was not capable of employment as of the date her claim was closed. *Hartje*, 148 Wn. App. at 468. However, the *Hartje* Court concluded that res judicata precluded her from making this argument. *Id.* at 469.

Like the claimants in *Overdorff*, *Farr*, and *Hartje*, Mr. Giger removed himself from the work force and ceased all employment-related activity at a time when he was capable of obtaining and performing some form of gainful employment. Giger argues that it still remains a question of fact whether "[Mr. Giger] retir[ed] as a proximate cause of the industrial injury." Pet. at 11. But, as in *Farr* and *Hartje*, Mr. Giger's claim was closed through a binding order that effectively determined that he *was* capable of employment, and it is now res judicata that the injury did not preclude him from working. As in *Farr* and *Hartje*, Giger voluntarily removed himself from the work force, regardless of whether his condition subsequently worsened to the point that he became incapable of employment. *See Farr*, 70 Wn. App at 766; *Hartje*, 148 Wn. App. at 467. The Court of Appeals correctly applied these cases and no need exists to revisit that application of law to fact.

C. Giger's Arguments That a Material Issue of Fact Exists Have No Merit

1. Giger Is Ineligible for Benefits When He Withdrew From the Workforce and Did Not Return, Irrespective of Any Subsequent Worsening of His Condition

Mr. Giger made the decision in 1990 not to return to the work force when he was able to work. He argues that there are issues of fact as to whether it was reasonable for him to return to work in 1992 when he had his car accidents. Pet. at 15. But he had the opportunity to return to

work before 1992, too, and did not do so. In *Farr,* the worker's condition worsened after claim closure, but because the worker did not attempt to return to work, he was voluntarily retired. *Farr*, 70 Wn. App at 766.

Contrary to Giger's arguments, the "consequential conditions doctrine" and the principle that an industrial injury need only be "a proximate cause" for a condition do not change the result in this case. Pet. at 16, 18-19 (citing *Dep't of Labor & Indus. v. Shirley*, 171 Wn. App. 870, 288 P.3d 390 (2012)). He argues that under these principles, there is an issue of fact as to whether the residuals of the medical treatment that Mr. Giger received for his industrial injury rendered him incapable of employment at some time between 1992 and 1994. Pet. at 16. However, under *Overdorff*, *Farr*, and *Hartje*, a worker who voluntarily retires is ineligible for wage replacement benefits regardless of whether the worker's disability worsens and the worker subsequently becomes incapable of working. *See Farr*, 70 Wn. App. at 766. The Department does not dispute that if the medical treatment that Mr. Giger received for the effects of his injury caused his disability to become aggravated, that the effects of that treatment are considered residuals of the injury itself. However, it is immaterial whether Mr. Giger's condition worsened, subsequent to the date he voluntarily retired, as a direct result of the injury

or as a result of treatment he received for the effects of his injury, as, either way, he is ineligible for benefits.

2. The Department, Board, and Superior Court Found Giger Able To Work By Closing His Claim With a Finding of Permanent *Partial* Disability

Key to the analysis here is that it is now res judicata that Mr. Giger was able to work because he was found to be only permanently *partially* disabled. *See Williams v. Virginia Mason Med. Ctr.*, 75 Wn. App. 582, 586-87, 880 P.2d 539 (1994). Giger cites *White v. Department of Labor & Industries*, 48 Wn.2d 413, 414, 293 P.2d 764 (1956), to argue that the 1990 Department order that closed Mr. Giger's claim with a finding of permanent partial disability has no res judicata effect with respect to Mr. Giger's ability to work after his claim was reopened in 1994. *See* Pet. at 14-15, 19. In *White*, the Court ruled that an unappealed Department order closing a claim was res judicata with respect to the worker's injuries at the time of the closure, but had no res judicata effect with respect to any subsequent aggravation of his condition. *White*, 48 Wn.2d at 414-15. However, this is fully consistent with the reasoning in *Farr* and *Hartje* where the courts held that res judicata only applied to the worker's condition at the time of claim closure. *See Farr*, 70 Wn. App. at 766; *Hartje*, 148 Wn. App. at 467. A finding of ability to work, coupled with a

failure to return to work, together mean that a worker is voluntarily retired and ineligible for benefits. *See Farr*, 70 Wn. App. at 766.

Giger also suggests that the Department should be "estopped" from arguing that Mr. Giger voluntarily retired, because the Department paid Mr. Giger time-loss compensation from 1988 through 1990, after he retired from the Department of Corrections in 1988. Pet. at 18. This argument fails as well because it confuses Mr. Giger's retirement from the Department of Corrections with his withdrawal from the general work force. First, Giger fails to cite any legal authority supporting the proposition that the Department's payment of benefits for one period of time estops it from denying benefits for a subsequent time period. The Court should therefore not consider this argument. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (court does not consider arguments without citation to record or authority). Here, the Department paid Mr. Giger time-loss compensation from April 1988 through October 1990, before closing his claim in November 1990. BR 89-90. There is no inconsistency between the Department's finding that Mr. Giger was unable to work from April 1988 through October 1990 and its finding that he was capable of employment as of November 1990, based on the Department's receipt of additional medical information related to his ability to work.

Second, Giger's argument appears to confuse Mr. Giger's retirement from the Department of Corrections, which occurred in 1988, with his voluntary retirement under the Industrial Insurance Act as defined by *Overdorff*, *Farr*, and *Hartje*, which occurred in 1990. While Mr. Giger elected to retire from the Department of Corrections on March 31, 1988, he was not "voluntarily retired," as defined by *Overdorff*, *Farr*, and *Hartje*, until 1990, because it was not until 1990 that either the Department or a medical expert had determined that Mr. Giger was *capable* of working. BR 90. Since, as of March 31, 1988, the Department had not received evidence that Mr. Giger was capable of working, the Department could not have properly concluded that he was voluntarily retired at that time, and therefore, it was proper for the Department to pay Mr. Giger time-loss compensation until it determined that he was capable of gainful employment.

Indeed, like Mr. Giger, the claimant in *Hartje* received time-loss compensation benefits for two months *after* she was terminated from her job and *before* the Department closed her claim with an award for permanent partial disability. *Hartje*, 148 Wn. App. at 468. Notwithstanding her receipt of time-loss compensation for a period of time after she was terminated by her employer, the Court of Appeals held that Hartje was voluntarily retired as a matter of law. *Id.* at 469. Giger has

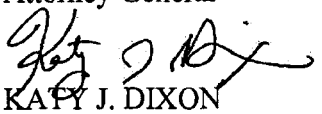
presented no meaningful argument that distinguishes her case from *Hartje* and none exists.

V. CONCLUSION

The Court of Appeals correctly applied the well-accepted principle that when a worker voluntary retires, he or she cannot receive wage replacement benefits because the worker is no longer attached to the work force. Giger argues that a material issue of fact remains, but such a claim not only does not rise to the standards of RAP 13.4 to grant review, it has no merit. This Court should deny review.

RESPECTFULLY SUBMITTED this _23rd____ day of January, 2015.

ROBERT W. FERGUSON
Attorney General



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NO. 91049-9

SUPREME COURT OF THE STATE OF WASHINGTON

CAROLYN A. GIGER, PERSONAL REPRESENTATIVE OF THE ESTATE OF ROBERT E. GIGER, DECEASED, Petitioner, v. DEPARTMENT OF LABOR AND INDUSTRIES FO THE STATE OF WASHINGTON, Respondent.	CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, certifies that on January 23, 2015, she caused to be served the Department of Labor & Industries Answer to Petition for Review and this Certificate of Service in the below described manner:

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Signed this 23rd day of January, 2015, in Seattle, Washington by:

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Subject: RE: 91049-9; Carolyn Giger for Robert Giger, Dec'd v. DLI

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From: Clark, Jennifer (ATG) [mailto:JenniferC5@ATG.WA.GOV]
Sent: Friday, January 23, 2015 11:59 AM
To: OFFICE RECEPTIONIST, CLERK
Cc: Dixon, Katy J. (ATG)
Subject: 91049-9; Carolyn Giger for Robert Giger, Dec'd v. DLI

RE: ***Carolyn A. Giger, Personal Representative of the Estate of Robert E. Giger, Deceased v. DLI***
Case Number: 91049-9

Dear Mr. Carpenter,

Please file the Department's Answer to Petition for Review in the above referenced matter.

Sincerely,

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