

NO. 45828-4-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

MARK W. OSBORN

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES
OF THE STATE WASHINGTON,

Respondent.

BRIEF OF RESPONDENT

ROBERT W. FERGUSON
Attorney General

JAMES P. MILLS
Assistant Attorney General
WSBA No. 36978
Office No. 91040
1250 Pacific Avenue, Suite 105
P.O. Box 2317
Tacoma, WA 98401
(253) 593-5243

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. COUNTERSTATEMENT OF THE ISSUE1

III. COUNTERSTATEMENT OF THE FACTS.....1

 A. The Department Accepted Osborn’s Occupational
 Disease Claim and Provided Treatment and Benefits.....1

 B. Osborn’s Doctors Testified That He Required No Further
 Treatment and That He Could Work With Some
 Limitations3

 C. Dr. Holmes Testified That Osborn Could Work Light
 Duty Positions, Including as a Mail Courier/Delivery
 Driver8

 D. Dr. Smith Placed No Restrictions on Osborn and
 Concluded That He Could Work as a Mail
 Courier/Delivery Driver.....8

 E. The Vocational Counselor Assigned to Osborn’s Claim
 Also Testified That Osborn Could Work as a Mail
 Courier/Delivery Driver.....10

 F. The Board Affirmed the Department’s Decision to Close
 the Claim Because No Further Treatment Was Necessary
 as of February 5, 2010.11

 G. The Superior Court Ruled That Osborn Was Not Entitled
 to Total Temporary Disability Benefits After February 4,
 2010.....12

IV. STANDARD OF REVIEW.....13

V. ARGUMENT15

A.	Osborn Cannot Receive Additional Time Loss Compensation Because Total Temporary Disability Ends When a Worker Reaches Maximum Medical Improvement	15
B.	Substantial Evidence Shows Osborn Was Not In Need Of Further Medical Treatment And Capable of Reasonably Continuous Gainful Employment When the Department Closed His Claim	18
VI.	CONCLUSION	23

TABLE OF AUTHORITIES

Cases

<i>Anderson v. Weyerhaeuser Co.</i> 116 Wn. App. 149, 64 P.3d 669 (2003).....	17
<i>Bonko v. Dep't of Labor & Indus.</i> 2 Wn. App. 22, 466 P.2d 526 (1970)	16, 19
<i>Ehman v. Dep't of Labor & Indus.</i> 33 Wn.2d 584, 206 P.2d 787 (1949).....	14
<i>Ellerman v. Centerpoint Prepress, Inc.</i> 143 Wn.2d 514, 22 P.3d 795 (2001).....	19
<i>Energy Nw. v. Hartje</i> 148 Wn. App. 454, 199 P.3d 1043 (2009).....	19
<i>Fochtman v. Dep't of Labor & Indus.</i> 7 Wn. App. 286, 499 P.2d 255 (1972).....	18
<i>Fox v. Dep't of Ret. Sys.</i> 154 Wn. App. 517, 225 P.3d 1018 (2009).....	14
<i>Franks v. Dep't of Labor & Indus.</i> 35 Wn.2d 763, 215 P.2d 416 (1950).....	17, 23
<i>Guiles v. Dep't of Labor & Indus.</i> 13 Wn.2d 605, 126 P.2d 195 (1942).....	13
<i>Harrison Mem'l Hosp. v. Gagnon</i> 110 Wn. App. 475, 40 P. 3d 1221 (2002).....	13, 14
<i>Herr v. Dep't. of Labor & Indus.</i> 74 Wn. App 632, 875 P.2d 11 (1994).....	16, 18, 19, 20
<i>Hunter v. Bethel School Dist.</i> 71 Wn. App. 501, 859 P.2d 652 (1993).....	16, 17, 23

<i>Hunter v. Dep't of Labor & Indus.</i> 43 Wn.2d 696, 263 P.2d 586 (1953).....	17, 23
<i>Jenkins v. Dep't of Labor & Indus.</i> 85 Wn. App. 7, 931 P.2d 907 (1996).....	13
<i>Korst v. McMahon</i> 136 Wn. App. 202, 148 P.3d 1081 (2006).....	14
<i>Leeper v. Dep't of Labor & Indus.</i> 123 Wn.2d 803, 872 P.2d 507, 515 (1994).....	18
<i>Lightle v. Dep't of Labor & Indus.</i> 68 Wn.2d 507, 413 P.2d 814 (1966).....	13, 20
<i>Matthews v. Dep't of Labor & Indus.</i> 171 Wn. App. 477, 288 P.3d 630 (2012).....	18
<i>Miller v. Dep't of Labor & Indus.</i> 200 Wash. 674, 94 P.2d 764 (1939)	17
<i>Nelson v. Dep't of Labor & Indus.</i> 175 Wn. App. 718, 308 P.3d 686 (2013).....	19
<i>Pend Oreille Mines & Metal Co. v. Dep't of Labor & Indus.</i> 64 Wn.2d 270, 391 P.2d 210 (1964).....	17
<i>Raum v. City of Bellevue</i> 171 Wn. App. 124, 286 P.3d 695 (2012).....	14
<i>Rogers v. Dep't of Labor & Indus.</i> 151 Wn. App. 174, 210 P.3d 355 (2009).....	14
<i>Stone v. Dep't of Labor & Indus.</i> 172 Wn. App. 256, 289 P.3d 720 (2012).....	19
<i>Tomlinson v. Puget Sound Freight Lines Inc.</i> 166 Wn.2d 105, 206 P.3d 657 (2009)	16
<i>Weyerhaeuser Co. v. Farr</i> 70 Wn. App. 759, 855 P.2d 711 (1993).....	19

Statutes

RCW 51.32.055(1).....	3, 17
RCW 51.32.090	15
RCW 51.32.090(1).....	15
RCW 51.32.095(1).....	15
RCW 51.32.095(4).....	17
RCW 51.32.099(3)(e)	17
RCW 51.36.010(2)(a)	16
RCW 51.52.050(2)(a)	13
RCW 51.52.115	13
RCW 51.52.140	14

Regulations

WAC 296-19A-020.....	17
WAC 296-20-01002.....	3, 16, 18

I. INTRODUCTION

This is a workers' compensation case governed by the Industrial Insurance Act, RCW Title 51. The trial court found that Mark Osborn was not in need of any further medical treatment as of February 5, 2010 and was entitled to receive permanent partial disability awards as of that date. It also determined that he was not entitled to further total temporary disability benefits as of February 5, 2010. Osborn argues he was temporarily totally disabled on February 5, 2010, based on his doctor's testimony that he could not work. But three other doctors and a vocational expert testified that he was able to work as of February 5, 2010, and agreed that he required no further treatment. Thus, substantial evidence supports that he was not temporarily totally disabled as of February 5, 2010.

II. COUNTERSTATEMENT OF THE ISSUE

Does substantial evidence support determining that Osborn was not temporarily totally disabled as of February 5, 2010, when multiple medical witnesses and the vocational expert testified that he was capable of reasonably continuous gainful employment as of that date, and when the doctors testified he required no further treatment?

III. COUNTERSTATEMENT OF THE FACTS

A. **The Department Accepted Osborn's Occupational Disease Claim and Provided Treatment and Benefits**

Osborn had various jobs driving trucks over a course of several

decades. BR Osborn 7-11.¹ Osborn developed wrist and shoulder conditions. BR Holmes 15, 24. Osborn applied for workers' compensation benefits with the Department of Labor and Industries (Department), which allowed his claim. BR 45. He underwent several surgeries and received wage replacement benefits in the form of total temporary disability benefits (also referred to as "time loss compensation"). BR 44-53; BR Smith 12-13. He then participated in physical therapy and a work hardening program. BR Holmes 10. Osborn had evaluations in 2009 and 2010 to establish his tolerances for a return to work. BR Smith 23; BR Milyard 8. Both evaluations indicated that Osborn was capable of performing light level work for full-time tolerances. BR Stump 30.

The Department then provided a vocational assessment to determine whether he was able to return to work as a truck driver or if he had transferable skills to work in another profession. BR Osborn 24; BR Milyard 23; BR Dillon 44-45. The vocational assessment concluded that, although he could not return to his job of injury, he had transferable skills allowing him to work as a delivery driver. BR Dillon 58. The Department closed the claim on February 5, 2010, with an award for permanent partial

¹ The certified appeal board record will be cited as "BR". Testimony within the certified appeal board record will be cited "BR" followed by the witness name and page number.

disability benefits for his left arm. BR 19. Osborn appealed the closure of his claim to the Board. BR 37.

B. Osborn's Doctors Testified That He Required No Further Treatment and That He Could Work With Some Limitations

At the hearings before the Board, Osborn sought to show that he was entitled to time loss compensation for the time period from October 7, 2009, through February 5, 2010 and sought an increased permanent partial disability. BR Colloquy 3; BR 65.

To show eligibility for total temporary disability (time loss compensation), a worker must show that he or she is incapable of any reasonably continuous gainful employment. *See* WAC 296-20-01002 (definition of "total temporary disability."). If a worker does not need further treatment and his or her condition is fixed and stable (meaning it has reached maximum medical improvement), the claim may be closed. *See* RCW 51.32.055(1); WAC 296-20-01002 (definition of "proper and necessary").² At this point, the Department determines whether someone has a permanent partial disability (meaning someone has a partial disability but is able to work) or is permanently totally disabled (meaning the person is unable to work permanently).

Osborn presented four witnesses: himself; William J. Stump, M.D.;

² "Maximum medical improvement" is equivalent to "fixed and stable." WAC 296-20-01002.

Patrick Bays, D.O.; and, Megan Milyard, OTR/L. BR 3. He did not present the testimony of a vocational counselor to address his employability.

Dr. Stump, a neurologist, testified that during his physical examination of Osborn on August 29, 2008, he found that Osborn exhibited full shoulder and elbow motion. BR Stump 22. Osborn exhibited good general strength in his arms, with only mild weakness in the ulnar distribution of both hands, somewhat greater on the left than the right. BR Stump 23-24. Osborn's senses and reflexes were also normal. BR Stump 24.

Dr. Stump last saw Osborn in November 2009. BR Stump 19. In that visit, Dr. Stump noted that Osborn continued to experience subjective symptoms in his upper extremities after two to three hours of work, but Dr. Stump did not discuss with Osborn the type work activities in which he was engaged. BR Stump 36-37. Dr. Stump testified that "by November, [Osborn] had an emotional element." BR Stump 42. That is, he may have exaggerated his pain complaints or conditions at that time. BR Stump 42.

Dr. Stump believed that Osborn's "surgeries had not been effective in altering his subjective or objective complaints" and that "it was unlikely that additional surgery for [his wrist] would result in any improvement."

BR Stump 9. Dr. Stump did not provide any opinion regarding Osborn's shoulders because he felt the problems were primarily orthopedic, not neurological. BR Stump 9. Dr. Stump did note that Osborn's surgeon, Dr. Bliss "didn't feel that there was [sic] other treatments that he could offer him for his shoulder." BR Stump 9. Dr. Stump testified that, with regard to his neurological conditions, Osborn was medically fixed and stable and had reached maximum medical improvement as of February 5, 2010. BR Stump 10. Dr. Stump reviewed an independent medical examination from Dr. Smith and Dr. Holmes. BR Stump 35. Dr. Stump concurred with Dr. Smith and Dr. Holmes, and noted that he would defer to them with regard to Osborn's shoulder problems. BR Stump 35-36. In other words, there was no further medical treatment to be offered Osborn for his occupationally related conditions. BR Stump 9-10.

Dr. Stump agreed that the 2009 and 2010 evaluations showed that Osborne could do light work. BR Stump 36. Although on direct examination Dr. Stump opined that Osborn could perform light duty work if he was not required to sit for more than an hour at a time, Dr. Stump later clarified that this restriction was not drawn from the evaluations and that the sitting restriction was not a result of Osborn's occupational diseases. BR Stump 13, 34. He added that restriction when he filled out the form because "[Osborn] just reported that he found it uncomfortable to

sit more than an hour.” BR Stump 13. He agreed that there were no objective findings to support Osborn’s reported inability to sit for more than one hour. BR Stump 34. Dr. Stump did not place any restrictions on Osborn’s ability to drive, but rather, merely recommended that when Osborn returned to work he should begin working four hours a day, and then increase the number of hours in order to allow for conditioning and assessment over time. BR Stump 13-14, 39. Dr. Stump found that Osborn was capable of performing the job of construction estimator (so long as he began working part-time), mail courier driver (so long as he sat for only four hours per day, for one hour at a time), and cashier service advisor (so long as he began working part-time). BR Stump 15-16.

Osborn’s second medical witness, Dr. Bays, an orthopedic surgeon, performed an independent medical examination on May 3, 2008. BR Bays 6. Dr. Bays’ examination showed no signs of atrophy, normal strength, normal reflexes, and normal sensations. BR Bays 15-16. On the basis of the medical records he reviewed, as well as his own physical examination, Dr. Bays concluded that Osborn’s shoulder and wrist conditions were fixed and stable as of his May 3, 2008 examination and that no further diagnostic or therapeutic intervention was warranted. BR Bays 9. Dr. Bays’ opinion had not changed as of the time of his testimony on November 1, 2010 and he provided a rating for permanent impairment.

BR Bays 11, 14.

Dr. Bays reviewed six job analyses, including cashier 2, janitor, engine mechanic, environmental control technician, dump truck driver, and plan reviewer and technician. BR Bays 17. Although Dr. Bays indicated that he was “not sure that [Osborn] would be capable of driving as an occupation or a job,” he concluded that Osborn “was capable of gainful employment on a reasonably continuous basis” and “advocate[d] the implementation of permanent restrictions” to accommodate his return to work. BR Bays 17, 26.

Megan Milyard, OTR/L, an occupational therapist also testified on Osborn’s behalf. BR Milyard 6-7, 9. Milyard is not a medical doctor and she has not had training as a vocational counselor.³ BR Milyard 36. She did an evaluation in June 2010 at Osborn’s attorney’s request focusing on Osborn’s upper extremities and addressing job analyses created by the vocational counselor. BR Milyard 7, 30-31. Milyard reviewed job analyses for mail courier driver and service writer and did not think he could do these jobs. BR Milyard 16-17. Despite her opinions at the time

³ Vocational counselors assess a worker’s employability based on medical information, including any restrictions, and surveys of the local labor market. BR Dillon 44-45. They “confirm with employers that [they] contact if the physical demands are congruent with the approved job analysis, and also if the injured worker that [they’re] meeting with, if their qualifications would meet at least minimum hiring requirements with that employer.” BR Dillon 45.

of the her evaluation, Milyard declined to offer any opinion about Osborn's ability to work during the time between October 7, 2009, and February 5, 2010—the time period at issue in this appeal—because she did not see him until June 1, 2010, and giving an opinion during that time “would be speculating.” BR Milyard 18.

C. Dr. Holmes Testified That Osborn Could Work Light Duty Positions, Including as a Mail Courier/Delivery Driver

Dr. Mark D. Holmes, M.D., a neurologist, examined Osborn in June 2008 and July 2009, performing two different independent medical examinations. BR Holmes 9. After examining Osborn and reviewing Osborn's records, Dr. Holmes testified that Osborn was not in need of any further treatment or any additional work hardening as of February 2010. BR Holmes 24-25, 27. Dr. Holmes found that Osborn was capable of performing reasonably continuous gainful light-duty employment between October 2009 and February 2010, so long as he avoided repetitive overhead activities. BR Holmes 25-26. After reviewing the job analysis for mail courier/delivery driver position, Dr. Holmes found that Osborn was capable of performing that job on a reasonably continuous basis. BR Holmes 26-27.

D. Dr. Smith Placed No Restrictions on Osborn and Concluded That He Could Work as a Mail Courier/Delivery Driver

Dr. David Smith, M.D., an orthopedic surgeon employed with

Group Health Cooperative, performed the independent medical examination with Dr. Holmes in July, 2009. BR Smith 9. He and Dr. Holmes performed separate physical examinations of Osborn, but reviewed the same medical history. BR Smith 10. Dr. Smith concluded that his examination was basically normal except for the very mild loss of range of motion, subjective pain in his shoulder, and residual numbness in his hands. BR Smith 20.

Dr. Smith concluded that Osborn's condition was fixed and stable and that he was not in need of any further treatment. BR Smith 23. Having concluded that he had reached maximum medical improvement, Dr. Smith opined that Osborn had permanent partial impairment for his left shoulder and both wrists. BR Smith 21-22. Dr. Smith also concluded, based upon his own examination and his review of Osborn's medical records, that Osborn was capable of performing gainful employment on a reasonably continuous basis between October 7, 2009, and February 5, 2010. BR Smith 20.

Dr. Smith did not place any restrictions on Osborn's ability to work, because he did not believe that there were any activities that he should avoid. BR Smith 20. Dr. Smith found that Osborn could perform the job duties of mail courier/delivery driver without any restrictions on a reasonably continuous gainful basis because there was no significant risk

of injury or objective exacerbation of his current problems. BR Smith 20.

E. The Vocational Counselor Assigned to Osborn's Claim Also Testified That Osborn Could Work as a Mail Courier/Delivery Driver

Margaret Dillon, M.A., a vocational rehabilitation counselor, performed an ability-to-work assessment to assess whether Osborn could find employment given his restrictions. BR Dillon 44-45. She interviewed Osborn, contacted his employer to see if there was a return to work option, contacted his doctor for current medical restrictions, sent job analyses to his doctor for review, reviewed his work history, and reviewed medical records, including the medical reports of all the experts that testified in this case and the 2009 physical capacity evaluation. BR Dillon 45-49. Based on the medical information that she reviewed and her understanding of his work history based on the interview and work history, Dillon concluded that Osborn could work as a light delivery driver on a reasonably continuous gainful basis from a physical standpoint. BR Dillon 58. In September of 2008, Dillon conducted a labor market survey for the mail courier/delivery driver position, in which she contacted 12 different employers and found that between them there were 32 full-time delivery driver jobs available in the labor market. BR Dillon 64-65. Based on the conclusions of his physical ability to the job and the labor market survey, Dillon found him employable in the mail courier/delivery

driver job through February of 2010. BR Dillon 68.

At the time of Dillon's evaluation, the Milyard's 2010 evaluation was yet not available, but Dillon considered it when she testified. BR Dillon 52. According to Dillon, the 2010 evaluation failed to simulate the physical demands of a light delivery driver. BR Dillon 66. Dillon concluded that it was not helpful in determining whether Osborn could perform the duties of a delivery driver. BR Dillon 66-67. Dillon also concluded that the restrictions related to reaching and grasping testified to by Milyard were not specific enough to address the delivery driver/mail courier position. BR Dillon 67. Accordingly, the information provided by the 2010 evaluation did not change her opinion. BR Dillon 67.

F. The Board Affirmed the Department's Decision to Close the Claim Because No Further Treatment Was Necessary as of February 5, 2010.

Following hearings at the Board, the industrial appeals judge issued a proposed order to reverse and remand the Department's order with instructions to the Department to pay additional permanent partial disability benefits and close the claim without further time loss compensation. BR 19-33. Osborn petitioned for review asking for further time loss compensation and contesting claim closure. BR 12.

The Board granted review. BR 11. The Board agreed with Osborn regarding time loss compensation, finding that from October 7, 2009,

through February 4, 2010, Osborn's occupational diseases rendered him totally temporarily disabled. BR 7-8, 11 (FF 4, CL 2). However, the Board disagreed with Osborn regarding closure of the claim, finding that Osborn's condition was fixed and stable as of February 5, 2010, and that he did not need further proper and necessary medical treatment and therefore ordered claim closure. BR 7-8 (FF 5, CL 4). Neither Osborn nor the Department challenged the permanent impairment ratings before the Board. BR 3. Therefore, the Board left untouched the proposed order's finding that Osborn had increased permanent partial impairments ratings. BR 7-8 (FF 6, CL 4). Osborn appealed to Kitsap County Superior Court. CP 1.

G. The Superior Court Ruled That Osborn Was Not Entitled to Total Temporary Disability Benefits After February 4, 2010

The superior court affirmed the Board order, adopting its findings of fact and conclusions of law. CP 49; FF 1.2; CL 2.2. The superior court concluded that Osborn "is not entitled temporary total disability benefits as of and after the date of the Department's closing order of February 5, 2010." CL 2.2. Osborn moved for reconsideration and it was denied. CP 55, 58. This appeal follows.

IV. STANDARD OF REVIEW

When Osborn appealed the Department's decision to the Board, he had the burden of showing, by a preponderance of the evidence, that the Department's order was incorrect. RCW 51.52.050(2)(a) (appellant's burden to present prima facie case for relief); *Guiles v. Dep't of Labor & Indus.*, 13 Wn.2d 605, 610, 126 P.2d 195 (1942) (proof of every element must be by a preponderance). A claimant must provide strict proof of each element of his or her claim for benefits under the Act. *Lightle v. Dep't of Labor & Indus.*, 68 Wn.2d 507, 510-11, 413 P.2d 814 (1966); *Jenkins v. Dep't of Labor & Indus.*, 85 Wn. App. 7, 14, 931 P.2d 907 (1996).

On appeal to superior court, the Board's decision is prima facie correct and the burden of proof is on the party challenging the decision. RCW 51.52.115; *Harrison Mem'l Hosp. v. Gagnon*, 110 Wn. App. 475, 483, 40 P. 3d 1221 (2002). The superior court reviews the Board decision de novo on the evidence in the certified appeal board record. RCW 51.52.115. The superior court may substitute its own findings and decision if it finds, from a fair preponderance of the evidence, that the Board's findings and decision are incorrect. *Gagnon*, 110 Wn. App. at 483.

In an industrial insurance case, it is the decision of the superior

court that the appellate court reviews, not the Board decision. *See Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-80, 210 P.3d 355 (2009). The court reviews the superior court's decision under the ordinary standard of civil review. RCW 51.52.140 ("Appeal shall lie from the judgment of the superior court as in other civil cases."); *see Rogers*, 151 Wn. App. at 179-81.

This Court's review of the superior court decision is limited to examining the record to see if substantial evidence supports the findings made after the superior court's de novo review, and if the court's conclusions of law flow from the findings. *Raum v. City of Bellevue*, 171 Wn. App. 124, 139-40, 286 P.3d 695 (2012). When undertaking substantial evidence review, the appellate court does not reweigh the evidence or re-balance the competing testimony presented to the fact finder. *Fox v. Dep't of Ret. Sys.*, 154 Wn. App. 517, 527, 225 P.3d 1018 (2009); *Gagnon*, 110 Wn. App. at 485. Rather, the appellate court views the evidence and all reasonable inferences from the evidence in the light most favorable to the prevailing party. *Korst v. McMahon*, 136 Wn. App. 202, 206, 148 P.3d 1081 (2006); *Gagnon*, 110 Wn. App. at 485. Although the court construes ambiguous terms in the Industrial Insurance Act liberally, liberal construction "does not apply to questions of fact."

Ehman v. Dep't of Labor & Indus., 33 Wn.2d 584, 595, 206 P.2d 787 (1949).

V. ARGUMENT

This case is about one day of time loss compensation. Osborn's claim of relief rests on his contention that no evidence showed that he could work on February 5, 2010. App. Br. 11. He asks that this Court rely on the testimony of one of his witnesses, Dr. Stump, who said he could not work on February 5th. App. Br. 7. But this ignores the testimony of Dr. Smith, Dr. Holmes, and Dr. Bays, who all said he could work and did not require further treatment. This Court does not reweigh the evidence on appeal. Substantial evidence supports the superior court's decision, and this Court should affirm.

A. **Osborn Cannot Receive Additional Time Loss Compensation Because Total Temporary Disability Ends When a Worker Reaches Maximum Medical Improvement**

Osborn was not temporarily totally disabled on February 5, 2010, because his conditions required no further treatment and he was capable of employment. A worker is entitled to time loss compensation while the worker is temporarily totally disabled as a result of an injury or occupational disease. RCW 51.32.090. Time loss compensation is payable while the worker is undergoing treatment, though the worker must have medical evidence supporting a determination of total temporary

disability. RCW 51.32.090(1). Under the statutory scheme for time loss compensation, the need for continuing treatment and time loss compensation are intertwined. See RCW 51.36.010(2)(a) (“Upon an occurrence of any injury to a worker *entitled to compensation* under the provisions of this title, he or she shall receive proper and necessary medical and surgical services” (emphasis added)). Accordingly, total temporary disability terminates as soon as the worker’s condition is medically fixed and stable or as soon as the worker is able to perform any kind of work. *Hunter v. Bethel School Dist.*, 71 Wn. App. 501, 507, 859 P.2d 652 (1993). Total temporary disability also does not continue merely because the worker is unable to return to the same employment as when injured. See *id.* at 506-07. An ability to perform work of a general nature precludes a finding of total disability. *Herr v. Dep’t. of Labor & Indus.*, 74 Wn. App 632, 636, 875 P.2d 11 (1994).⁴

Maximum medical improvement occurs when no fundamental or marked change in an accepted condition can be expected, with or without treatment. WAC 296-20-01002; see also *Tomlinson v. Puget Sound*

⁴ Osborn asserts that *Bonko v. Department of Labor & Industries*, 2 Wn. App. 22, 466 P.2d 526 (1970)), “clarifies the appellant’s position.” App. Br. 10-11. *Bonko* does not aid Osborn because the facts are inapposite. In *Bonko*, the worker was still receiving treatment for his condition rather than fixed and stable as Osborn indisputably was during the relevant time period for this appeal and the court actually found the claimant ineligible for time loss compensation. *Id.* at 24. As *Bonko* recognized, “the second sentence of RCW 51.32.090(3) is a recognition the workman, while being treated for a temporary total disability, may be physically able to return to some kind of work during his recovery and before his condition becomes fixed and static.” *Id.* at 26.

Freight Lines, Inc., 166 Wn.2d 105, 111, 206 P.3d 657 (2009). When a worker's condition reaches a fixed state from which full recovery is not expected, the condition is considered to be a permanent one and the worker is no longer eligible for temporary total disability. *Franks v. Dep't of Labor & Indus.*, 35 Wn.2d 763, 766, 215 P.2d 416 (1950). When a worker's condition becomes fixed, the Department also determines the appropriate permanent disability award, partial or total, if any, and closes the claim. See RCW 51.32.055(1); see also *Pend Oreille Mines & Metal Co. v. Dep't of Labor & Indus.*, 64 Wn.2d 270, 272, 391 P.2d 210 (1964); see also *Miller v. Dep't of Labor & Indus.*, 200 Wash. 674, 681, 94 P.2d 764 (1939).⁵

Under well-established case law, workers cannot simultaneously be classified as permanently partially disabled and temporarily disabled; and, they cannot receive both permanent partial disability compensation and time loss compensation or treatment for the same periods of time. See *Hunter*, 71 Wn. App. at 506; *Hunter v. Dep't of Labor & Indus.*, 43 Wn.2d 696, 700, 263 P.2d 586 (1953); *Franks*, 35 Wn.2d at 767.

⁵ The only exception to the general rule that the worker may not receive time loss compensation after the worker has reached maximum medical improvement is if the worker is participating in vocational services, which is not the case here. RCW 51.32.095(4); RCW 51.32.099(3)(e). The Department has sole discretion to determine whether vocational rehabilitation is "necessary and likely to make the worker employable at gainful employment" and therefore its decision is reviewed only for an abuse of discretion. RCW 51.32.095(1); WAC 296-19A-020; see *Anderson v. Weyerhaeuser Co.*, 116 Wn. App. 149, 155, 64 P.3d 669 (2003). Osborn did not challenge denial of vocational services below nor has he argued it in his opening brief. BR 12.

In order to receive time loss benefits, Osborn must prove he is unable to perform or obtain work as a result of his industrial injury. *See Leeper v. Dep't of Labor & Indus.*, 123 Wn.2d 803, 817, 872 P.2d 507, 515 (1994); *Fochtman v. Dep't of Labor & Indus.*, 7 Wn. App. 286, 294, 499 P.2d 255 (1972); *Herr*, 74 Wn. App. at 635.⁶ To prove total disability, a worker must show that he or she is incapable of performing any reasonably continuous gainful employment:

[A] prima facie case of total disability may be established by medical testimony as to severe limitations imposed on claimant's ability to work coupled with lay testimony concerning his age, education, training and experience and the testimony of an employment or vocational expert as to whether he is able to maintain gainful employment in the labor market with a reasonable degree of certainty.

Fochtman, 7 Wn. App. at 298; *Matthews v. Dep't of Labor & Indus.*, 171 Wn. App. 477, 494-95, 288 P.3d 630 (2012), *review denied*, 176 Wash. 2d 1026 (2013); WAC 296-20-01002. Because substantial evidence supports that Osborn's condition as fixed and stable as of February 5, 2010, and that he could perform and obtain reasonably continuous gainful employment as of that date, he is not entitled to total temporary disability as of February 5, 2010, and his claim was properly closed.

B. Substantial Evidence Shows Osborn Was Not In Need Of Further Medical Treatment And Capable of Reasonably

⁶ The same standard is used for cases involving permanent total disability and temporary total disability as the only difference is the duration. *Herr*, 74 Wn. App. at 635.

Continuous Gainful Employment When the Department Closed His Claim

The superior court rejected Osborn's argument that he was totally disabled as of February 5, 2010. CP 52-53, 61; BR 6-8. It found he was fixed and stable as of February 5, 2010, concluded he should receive permanent partial disability benefits as of that date, and determined he was not entitled to totally temporarily disabled benefits as of February 5, 2010. CP 61; BR 6-8.⁷ Substantial evidence supports these determinations because the testimony of multiple medical witnesses supported that he was fixed and stable and that he was capable of reasonably continuous gainful employment.

Because Osborn could engage in work as a mail courier driver, he was not temporarily totally disabled, even though he could not return to his job of injury. A worker is not temporarily totally disabled if he or she may engage in *any* gainful employment—not just the ability to engage in

⁷ Although the Board and superior court did not make a specific finding that Osborn was capable of reasonably continuous gainful employment as of February 5, 2010, it is typical for Board to order claim closure without such a specific finding because permanent partial disability awards and total disability are mutually exclusive. See *Stone v. Dep't of Labor & Indus.*, 172 Wn. App. 256, 265-66, 289 P.3d 720 (2012); see also *Nelson v. Dep't of Labor & Indus.*, 175 Wn. App. 718, 726-27, 308 P.3d 686 (2013). The determination that he was permanently partially disabled as of February 5, 2010, is a determination that he can work. See *Energy Nw. v. Hartje*, 148 Wn. App. 454, 469, 199 P.3d 1043 (2009); *Weyerhaeuser Co. v. Farr*, 70 Wn. App. 759, 766, 855 P.2d 711 (1993). In any case, the absence of a finding of fact in favor of the party with the burden of proof about a disputed issue is the equivalent of a finding against that party on that issue. *Ellerman v. Centerpoint Prepress, Inc.*, 143 Wn.2d 514, 524, 22 P.3d 795 (2001).

former work. *Bonko*, 2 Wn. App. at 25-26; *Herr*, 74 Wn. App. at 636. It was Osborn's burden to establish that he was not capable of *any* reasonably continuous gainful employment on February 5, 2010. *Herr*, 74 Wn. App. at 636; *see also Lightle*, 68 Wn.2d at 510. Osborn wrongly argues that "the Board, for no stated reason, chose to end claimant's total temporary disability on the 4th, a day early, for convenience presumably, but without any factual support, to allow for a PPD and claim closure." App. Br. 8. Likewise, Osborn incorrectly asserts that "[n]o evidence was presented to show any restoration of Mr. Osborn's earning power effective on [February 5, 2010]." App. Br. 11. Here, it is the decision of the superior court that this Court reviews, not the Board's, but Osborn is also simply incorrect that there is no factual support that he was capable of reasonably continuous gainful employment on February 5, 2010. Indeed, although this Court does not reweigh the evidence in a substantial evidence case such as this, the weight of the evidence shows that Osborn was capable of reasonably continuous gainful employment on February 5, 2010, when the Department closed his claim.

Both of the medical witnesses the Department presented supported Osborn's ability to return to work on February 5, 2010. Dr. Smith testified that Osborn's examination was basically normal except for the very mild

⁸ Osborn refers to October 5, 2010, but the Department presumes he intends to refer to February 5, 2010, because that is the legally significant date here.

loss of range of motion, subjective pain in his shoulder, and residual numbness in his hands. BR Smith 20. Accordingly, he placed *no* restrictions on Osborn's ability to work. BR Smith 20.

Dr. Smith also concluded, based upon his own examination and his review of Osborn's medical records, that Osborn was capable of performing gainful employment on a reasonably continuous basis between October 7, 2009, and February 5, 2010. BR Smith 20. Dr. Smith found that Osborn could perform the job duties of mail courier driver without any formal restrictions on a reasonably continuous gainful basis because there was no significant risk of injury or objective exacerbation of his current problems based on his examination findings. BR Smith 20.

According to Dr. Holmes, Osborn was capable of full-time light-duty employment from October 2009 through February 2010, so long as he avoided repetitive overhead activities. BR Holmes 25-26. This overhead restriction did not prevent Dr. Holmes from approving the mail courier driver position for Osborn. BR Holmes 26-27.

Dillon, the only vocational rehabilitation counselor who testified, assessed whether Osborn could find employment given his restrictions. BR Dillon 44-45. Based on the medical information that she reviewed and his work history, Dillon concluded that Osborn could work as a light delivery driver. BR Dillon 58. Dillon conducted a labor market survey

for the delivery driver/mail courier position and established that the position was available. BR Dillon 64-65. Based on the conclusions of his physical ability to the job and the labor market survey, Dillon found Osborn employable in the delivery driver job through February of 2010. BR Dillon 68.

Ignoring the substantial evidence standard on review, Osborn asks this Court to rely on Dr. Stump's opinion in a vacuum and infer from Dr. Stump's testimony that he was not capable of reasonably continuous gainful employment on February 5, 2010, rather than view the evidence here in the light most favorable to the Department. However, even Dr. Stump agreed both the 2009 and 2010 physical capacity evaluations showed that Osborn could do light work. BR Stump 36. Osborn's other expert witnesses do not aide him: Milyard, the occupational therapist, declined to offer an opinion about Osborn's ability to work during the time from October 7, 2009, through February 5, 2010, and his only other medical witness, Dr. Bays, confirmed that that Osborn "was capable of gainful employment on a reasonably continuous basis" and "advocate[d] the implementation of permanent restrictions" to accommodate his return to work. BR Milyard 18; BR Bays 17, 26.

Substantial evidence supports claim closure because both Dr. Smith and Dr. Holmes testified that Osborn did not require further

treatment as of February 2010 and that his condition was fixed and stable.
BR Holmes 25-26; BR Smith 20.

The result in this case complied with the well-established case law that workers cannot be simultaneously classified as permanently partially disabled and temporarily disabled and reflects the substantial evidence that Osborn was not totally temporarily disabled as of February 5, 2010. *See Hunter*, 71 Wn. App. at 506; *Hunter*, 43 Wn.2d at 700; *Franks*, 35 Wn.2d at 767. Alleging there was a “fictional finding” about the one day in question, Osborn claims some sort of widespread problem of “cutting off a day of total disability on a successful appeal to erroneously allow a PPD.” App. Br. 15, 14. There is no such problem. Osborn simply did not prove that he was totally disabled on February 5, 2010.

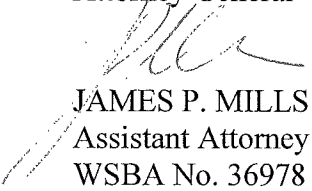
VI. CONCLUSION

Substantial evidence supports finding that Osborn’s condition was fixed and stabled as of February 5, 2010, and that he was capable of reasonable continuous gainful employment as of that date.

Accordingly, the Department requests that this Court affirm the Superior Court decision.

RESPECTFULLY SUBMITTED this 9th day of July, 2014.

ROBERT W. FERGUSON
Attorney General



JAMES P. MILLS
Assistant Attorney General
WSBA No. 36978
1250 Pacific Avenue, Suite 105
PO Box 2317
Tacoma, WA 98401
(253) 593-5243

PROOF OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, hereby certifies the document to which this proof of service is attached, Brief of Respondent, was delivered as follows:

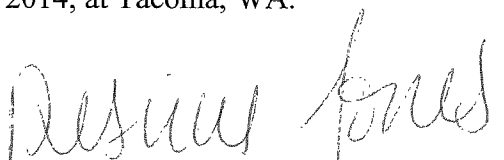
Original via Electronic Service:

David C. Ponzoha, Clerk
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402

Electronic Service:

Paul W. Bryan
Law Offices of Paul W. Bryan, LLC
PO Box 229
Kingston, WA 98346
LNILegal@gmail.com

DATED this 7th day of July, 2014, at Tacoma, WA.



DESIRAE JONES, Legal Assistant

WASHINGTON STATE ATTORNEY GENERAL

July 09, 2014 - 1:51 PM

Transmittal Letter

Document Uploaded: 458284-Respondent's Brief.pdf

Case Name: Osborn v. DLI

Court of Appeals Case Number: 45828-4

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Desirae M Jones - Email: desiraej@atg.wa.gov

A copy of this document has been emailed to the following addresses:

LNILegal@gmail.com
desiraej@atg.wa.gov
jamesm7@atg.wa.gov