NO. 44560-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DEREK J. YOUNG,

Appellant,

v.

DEPARTMENT OF LABOR & INDUSTRIES OF THE STATE OF WASHINGTON and CMS PAINTING, INC.,

Respondent.

BRIEF OF RESPONDENT DEPARTMENT OF LABOR AND INDUSTRIES

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pm 9/27/13

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I. INTRODUCTION

This is an industrial insurance case arising under RCW Title 51, the Industrial Insurance Act. The Pierce County Superior Court and the Board of Industrial Insurance Appeals (Board) correctly excluded the depositions of three expert witnesses whose testimonies were taken in a civil tort action separate from Young's workers' compensation appeal, and which were taken without notice to the Department of Labor and Industries (Department). Young argues the Board and the superior court erred in excluding those depositions and, apparently in the alternative, contends the superior court's findings are not supported by substantial evidence.

This Court should reject Young's arguments, as none of them have merit. Under Civil Rule (CR) 32, a deposition is not admissible unless the party against whom it is later offered was given proper notice of it.[1] Young contends it was not necessary for him to give the Department notice of the depositions he later sought to use against the Department in his workers' compensation appeal because the Department was the "successor in interest" to the driver in his third party action who struck

[1] Appendix A contains a copy of CR 32. Appendix B contains a copy of the Board's decision. Appendix C contains a copy of the superior court's summary judgment order. Appendix D contains a copy of the superior court's findings of fact, conclusions of law, and judgment.

him. This argument makes no sense as the Department has an adverse interest to the tortfeasor in a third party action. *See* RCW 51.24.030, .060.

Young fails to support his argument, and the clear weight of the legal authority runs against it. Furthermore, Young has failed to show that the superior court's findings lack substantial evidence.

II. COUNTERSTATEMENT OF THE ISSUES

1. Under CR 32, did the Board and the superior court abuse their discretion when they excluded three of the depositions Young submitted for publication when those depositions were taken in a separate action, between separate parties with separate interests, when the Department did not follow the defendant of that tort action in acquiring ownership of property, and when it is uncontroverted that Young failed to give the Department notice of those depositions?

2. Did the Board and the superior court abuse their discretion by excluding Young's proposed depositions as inadmissible hearsay, when the depositions Young took contained out-of-court statements that were offered to prove the truth of the matters they asserted and when the depositions contained numerous statements by the deponents that were offered to support Young's entitlement to industrial insurance benefits rather than for the purpose of making a medical diagnosis or for offering treatment?

3. Has Young established that either the Board or the superior court violated his right to due process when they rejected three of his proposed depositions, when Young failed to comply with CR 32(a) by taking those depositions without notice to the Department, and when, after the Board declined to publish those depositions, the Board gave Young an opportunity to depose his witnesses with notice to the Department, but he declined to do so?

4. Does substantial evidence support the superior court's findings of fact when the findings Young challenges are directly supported by the testimony of at least two medical witnesses?

III. STATEMENT OF THE CASE

A. The Department Found That Young Had No Permanent Impairment

Young was injured in a motor vehicle accident in 2007 while he was in the course of his employment. Clerk Papers (CP) 33. His workers' compensation claim was allowed and benefits were paid. CP 33. The Department closed the claim in 2008 without an award for either permanent partial disability[2] or total and permanent disability.[3] CP 36. Young appealed this decision to the Board. CP 38-39.

B. Young Took the Depositions of Three Experts Without Giving Notice to the Department

The Attorney General's Office filed a notice of appearance on behalf of the Department with the Board in March 2009, and it properly served it on Young's counsel. CP 116. Later, in March 2009, the Board held a conference to schedule hearings, at which Young named "two unidentified medical witnesses and one vocational witness" as his experts. CP 64. The litigation order required perpetuation depositions to be taken by July 27, 2009, and filed by August 10, 2009. CP 64. The litigation order directed each party to send a letter confirming that the party had

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[2] Permanent partial disability is a statutory monetary award for impairment proximately resulting from an industrial injury. *See* RCW 51.32.080.

[3] Permanent total disability is a statutory pension awarded when an industrial injury renders a person totally and permanently unable to obtain or perform gainful employment on a reasonably continuous basis. *See* RCW 51.32.060, .067.

scheduled its witnesses to testify, and to provide that letter to both the Board and the other party. CP 64.

In May 2009, Young filed an affidavit of prejudice, seeking to disqualify the assigned hearings judge. CP 67-69. The Board denied it as untimely under WAC 263-12-091.[4] CP 70. Young filed a petition for a writ of mandamus in Thurston County Superior Court, challenging the validity of WAC 263-12-091 and seeking to remove the assigned hearings judge. CP 72-77. At Young's request, the Board suspended proceedings in his appeal pending the superior court's ruling. CP 81, 86-87. Nonetheless, with notice to the Department, Young took a perpetuation deposition of his chiropractor, Dr. Jay Sweet, in his workers' compensation appeal in June 2009. CP 385-437.

Later in June 2009, Young commenced a separate action in Pierce County Superior Court against the driver who hit him, seeking both economic and non-economic damages. CP 228-31. In response to a letter of inquiry, a copy of the complaint was sent to the Department in February 2010. CP 227. At no time thereafter did the Department appear as a party

[4] WAC 263-12-091 requires that affidavits of prejudice be filed within 30 days of receipt of the notice of assignment of the appeal to the industrial appeals judge or prior to the assigned industrial appeals judge holding any proceedings in the appeal, whichever occurs sooner.

in Young's tort action, nor did it exercise its statutory right to intervene in that action as a lienholder on Young's recovery. *See* RCW 51.24.030(2).

In April 2010, the superior court found "no basis in law or fact to order the Board to reassign Mr. Young's administrative appeal to a different Industrial Appeals Judge" and remanded the matter back to the Board for further hearings. CP 91-93.

One month later, in May 2010, as part of his tort action, and without any notice to the Department or its counsel, Young took depositions of Dr. Patrick Bays and Dawn Jones, OTLR.[5] CP 133-55, 174-88. He also took a second deposition of Dr. Sweet, without any notice to the Department or its counsel. CP 200-14.

In July 2010, the hearings judge held a second scheduling conference in Young's workers' compensation appeal after remand from the superior court. CP 100-02. At that conference, Young identified Dr. Bays, Dr. Sweet, one unidentified physical capacities examiner, and one unidentified vocational witness as his experts. CP 101. Young gave no indication at that conference that he had already taken the depositions of Dr. Bays or Ms. Jones, nor that he had taken a second deposition of Dr. Sweet. CP 100-02.

[5] An OTLR is an occupational therapist.

Following resumption of Young's case before the Board, the Department propounded discovery seeking the identities and opinions of Young's expert witnesses. CP 259-76. Young's answers, sent to the Department August 31, 2010, stated he intended to call Dr. Sweet, Dr. Bays, and Ms. Jones as expert witnesses. CP 263. Again, Young gave no indication in his discovery responses that he had already taken depositions of Dr. Bays or Ms. Jones, or that he had taken a second deposition of Dr. Sweet. CP 259-76.

In September 2010, Young submitted his witness confirmation to the Board. CP 288. To it, he attached the depositions he had taken of Dr. Bays, Ms. Jones, and the second deposition he had taken of Dr. Sweet in connection with his tort case. CP 288. Dr. Sweet's first deposition had been previously filed. CP 23.

The Department did not oppose admission of Dr. Sweet's first deposition, which it was given notice of and which it participated in, but the Department moved to exclude the May 2010 depositions of Dr. Bays, Dr. Sweet, and Ms. Jones as being hearsay and as not meeting the requirements of CR 32. CP 110-19, 289.

A hearing was held on the motion. CP 324-48. At the hearing, Young argued there was sufficient commonality of issues and interests between the defendant driver in his tort action and the Department in his

workers' compensation appeal that the Department was adequately represented by counsel for the driver: "to the degree that there was somebody who was a predecessor in interest of the Attorney General with the same commonalities of interest, that is the equivalent of having a representative from the Attorney General's office there." CP 345. In October 2010, the Board rejected that argument and issued an order excluding the depositions. CP 291-92. At no point thereafter did Young schedule his experts to testify before the Board.

At his hearing on the merits of his appeal in November 2010, Young and two lay witnesses testified. CP 355-74. At the conclusion of their testimony, the hearings judge gave Young the opportunity to file a motion for a continuance before resting his case. CP 376.

Young did not move for a continuance, nor did he make any effort thereafter to call Dr. Bays, Dr. Sweet, or Ms. Jones. As such, Dr. Sweet's first deposition was the only expert opinion in the record that supported Young's appeal. CP 22-34.

While acknowledging that the opinion of an attending physician is entitled to special consideration,[6] the hearings judge issued a proposed decision and order affirming the Department. CP 22-34. Young

[6] *See Hamilton v. Dep't of Labor & Indus.*, 111 Wn.2d 569, 571, 761 P.2d 618 (1998).

petitioned for review. CP 11-15. The Board denied the petition and adopted the proposed decision and order. CP 9.

C. The Superior Court Excluded the Contested Depositions Because They Were Taken Without Notice and Found for the Department

Young appealed to Pierce County Superior Court and moved for summary judgment, arguing his depositions were improperly excluded under CR 32 and that the Board failed to give proper weight to the testimony of his attending medical provider, Dr. Sweet. CP 594-609. The court denied Young's motion for summary judgment, concluding the Department was not a successor in interest to the third party driver and that the Department was entitled to notice and an opportunity to appear and cross-examine Dr. Bays and Ms. Jones. CP 823-25. The court also decided that Young "could have called these witnesses in the Board proceedings to cure the deficiency of notice and opportunity to appear, but chose not to." CP 825. The court thus held "CR 32 does not permit the use of these depositions against the Department in the Board proceedings." CP 825.

The matter proceeded to a bench trial, where Young re-argued both the exclusion of his depositions and that the Board failed to give sufficient consideration to the testimony of his attending medical provider, Dr. Sweet. CP 837-54. The court again affirmed the Board. CP 883-87.

It found "the Board's decision that the reports and deposition transcripts of Patrick Bays, MD and Dawn Jones, OTLR are excluded from the Board's record is affirmed." CP 884. The court went on to note that "Mr. Young did not argue in this court that the second deposition of Dr. Jay Sweet, taken May 13, 2010 should be admitted, and it is not." CP 884.

The court found that "the record reflects that the Board gave appropriate consideration to the testimony of Mr. Young's attending physician, Dr. Sweet" and that Dr. Sweet's testimony "did not provide a preponderance of evidence on which to reverse the Board's decision." CP 884. The court found that Young did not require further treatment, his injury did not precluded him from working, and he had no permanent partial disability. CP 884-85. The court also found that the Department's supervisor had not abused his or her discretion in not providing vocational rehabilitation. CP 886. Young appeals to this Court. CP 888-96.

IV. SUMMARY OF THE ARGUMENT

Young argues that this Court should rule he was entitled to have the Board consider three depositions that he took without giving notice to the Department. He contends the depositions are properly admissible under CR 32 because the Department was the "successor in interest" to the defendant in his tort action. He also suggests that the requirements of

CR 32 should be relaxed because this is a workers' compensation matter rather than a normal civil case. Neither of these arguments have merit.

CR 32 permits the deposition of an expert to be used in subsequent actions between the same parties, their representatives, or successors in interest. A successor in interest is "one who follows another in ownership or control of property." Here, the Department did not "follow" the tort defendant in "ownership or control of property" and therefore, the Department is not the tort defendant's successor in interest. In fact, the Department's interest is adverse to the tortfeasor. As such, neither the Board nor the superior court abused their discretion when they determined that the depositions were properly excluded.

Young's failure to give the Department notice of the depositions in his tort action deprived the Department of the requisite opportunity to prepare or appear for cross-examination of the deponents. While the Industrial Insurance Act is liberally construed in favor of injured workers, the civil rules are not, and in any event, there is no ambiguity as to whether Young complied with the civil rules when he conducted three depositions of expert witnesses without providing the Department with any notice of those depositions. Young plainly did not do so.

Young also argues that the exclusion of those depositions was a violation of his due process rights. This argument is also unsupported, and

lacks merit. Young was given a full and fair opportunity to depose those witnesses again, this time with notice to the Department, and he declined to do so. A litigant who fails to take advantage of a reasonable opportunity to present evidence in support of his or her appeal cannot be heard to complain of a due process violation.

Young also contends, apparently in the alternative, that even if the superior court properly excluded the relevant depositions, its decision should still be overturned because its findings were not supported by substantial evidence. This argument fails as well. The Department presented the testimony of two medical witnesses whose testimony supports the findings of the superior court. Young fails to show that no reasonable person could have entered the findings the superior court made based on the evidence in the record, and instead appears to invite this Court to reweigh the evidence and overturn the superior court's credibility determinations. This Court should decline to do so.

V. STANDARD OF REVIEW

This Court's review of the superior court decision is under the ordinary standard for civil cases. *See* RCW 51.52.140; *Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 180, 210 P.3d 355 (2009). The Court of Appeals reviews the findings of the superior court, not the Board, based

on the record developed at the Board. *See Rogers*, 151 Wn. App. at 179-80; RCW 51.52.115.

A party seeking to reverse a superior court's finding of fact must meet a difficult standard. A reviewing court is limited to determining whether the superior court's findings are supported by substantial evidence and to determine whether the superior court's conclusions of law follow from its findings of fact. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5-6, 977 P.2d 570 (1999). Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth or the correctness of the order. *Ferry County v. Concerned Friends of Ferry County*, 155 Wn.2d 824, 833, 123 P.3d 102 (2005).

The admissibility of depositions under CR 32 is within the discretion of the trial court. *Sutton v. Shufelberger*, 31 Wn. App. 579, 585, 643 P.2d 920 (1982) (citing *Hammond v. Braden*, 16 Wn. App. 773, 776, 559 P.2d 1357 (1977)). Consequently, this Court reviews a trial court's decision to exclude depositions for abuse of discretion. *Allyn v. Boe*, 87 Wn. App. 722, 738, 943 P.2d 364 (1997). An abuse of discretion occurs when a trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967 (1999). Discretion is abused only where no reasonable

person would take the view adopted by the hearing tribunal. *Jankelson v. Cisel*, 3 Wn. App. 139, 142, 473 P.2d 202 (1970).

VI. ARGUMENT

A. The Superior Court Did Not Abuse Its Discretion When It Excluded Dr. Bays' and Ms. Jones' Depositions Under CR 32, Because the Depositions Were Taken Without Notice to the Department and the Department Is Not the Successor in Interest of the Defendant in That Unrelated Matter

The Board and the superior court each determined that three of the depositions Young offered in this case were not properly admissible based on the fact that they were taken without notice to the Department. CP 291-92, 823-26, 883-87. In order to show that this was error, Young must establish that the Board and the superior court abused their discretion. *See Sutton*, 31 Wn. App. at 585; *Hammond*, 16 Wn. App. at 776. Young argues his depositions were admissible, in spite of the lack of notice to the Department, because under CR 32, depositions are admissible in subsequent actions against successors in interest to the parties against whom the depositions were taken. App's Br. at 11-14. He argues that because the Department had an obligation to compensate him for the same injuries caused by the driver who hit him, the Department was a "successor in interest" to the driver. App's Br. at 14. However, the Department is not a "successor in interest" to the driver who hit Young, because a successor in interest is one who follows another in ownership or

control over property. *See Black's Law Dictionary* 1570 (9th ed. 2009). (An example is when a corporation changes its name but retains the same property. *Id.*) The Department did not "follow" the motorist who injured Young in ownership or control over any property. *See id.* Therefore, Young has failed to show that the Board or the superior court abused their discretion when they rejected three of his depositions based on his failure to comply with CR 32.

1. Under CR 32, Perpetuation Depositions May Only be Used in Subsequent Actions if Notice was Given to the Party Against Whom They are Later Offered

CR 32(a) permits prior depositions to be used only against parties who were "present or represented at the taking of the deposition, or who had reasonable notice thereof." Where the depositions at issue are of health care professionals, CR 32(a)(5)(B) provides further requirements and permits the use of such depositions "if, *before the taking of the deposition*, there has been compliance with discovery requests . . . *and* if the opposing party is afforded an adequate opportunity to prepare, by discovery deposition of the deponent or other means, for cross examination of the deponent." (Emphasis added.)

In this case, it is uncontroverted that Young did not give the Department any notice of three of the depositions he took. The Department entered its notice of appearance in the workers' compensation

appeal in March 2009, well before the depositions were taken. CP 116. No effort was made to give the Department or its counsel the opportunity to appear, much less to prepare for cross-examination of Dr. Bays or Ms. Jones. CP 292.

Under these circumstances, both the Board and the superior court properly found the depositions were not admissible under CR 32. CP 292, 823-26. Young appears to argue that he could not anticipate knowing that the third party depositions would be used in the workers' compensation proceeding, and therefore it was somehow "untenable" to give notice to the Department before the deposition if Young intended to use the depositions in the workers' compensation appeal. *See* App's Br. at 27-28. This argument is belied by the facts. The first scheduling conference in Young's workers' compensation case was in March 2009. CP 64. The depositions were in May 2010. CP 133-55, 174-88, 200-14. If Young anticipated using the depositions of Dr. Bays, Ms. Jones, or the second deposition of Dr. Sweet, it would have been a simple matter to give the requisite notice to the Department's counsel. Because he did not, the Board properly rejected them, and the superior court properly upheld the Board's ruling. *See* CR 32(a).

2. The Department is Not a Successor in Interest to the Third Party Tortfeasor

a. A Successor in Interest Is "One Who Follows Another in Ownership or Control of Property"

In spite of the fact he did not give the Department notice of his depositions, Young argues he was not required to do so because the Department was a "successor in interest" to the third party driver's liability. App's Br. at 13-15. As such, Young argues the Department was adequately represented by counsel for the driver. App's Br. at 13; CP 345. The Board and the superior court properly rejected this argument. CP 292, 823-26.

Young cites *One Pacific Towers Homeowners' Ass'n. v. HAL Real Estate Investments, Inc.*, 148 Wn.2d 319, 327, 61 P.3d 1094 (2002), for the proposition that our Supreme Court has defined "successor in interest" as "the change in legal relations by which one person comes into the enjoyment of or becomes responsible for one or more of the rights or liabilities of another person." App's Br. at 14. The quote Young offers, however, relates to the Court's understanding of the term "succession," rather than "successor in interest." *See One Pacific*, 148 Wn.2d at 327. In any event, Young's reliance on it is misplaced, because neither the Supreme Court's definition of "succession" nor its definition of "successor in interest" supports the conclusion that the Department was the successor in interest to the driver who injured Young.

The Department has a legal duty to provide benefits to workers who are injured in the course of their employment, regardless of whether that worker may also have a separate legal action against a third party who negligently injured him or her. *See* RCW 51.32.010; RCW 51.24.040. The Department's duty to provide benefits to injured workers is a product of the Industrial Insurance Act, rather than a product of civil litigation between Young and the motorist who injured him. *See* RCW 51.04.010.

In *One Pacific,* the Supreme Court determined how one could "succeed to" the special rights of a declarant under the Condominium Act, RCW 64.34.020(13). In doing so, it noted the Court of Appeals had looked to the dictionary definition of the word "succession" as "the change in legal relations by which one person comes into the enjoyment of or becomes responsible for one or more of the rights or liabilities of another person." *One Pacific*, 148 Wn.2d at 327 (citing *Webster's Third New Int'l Dictionary* 2282 (1993)). Because it was concerned about enforcing the consumer protection provisions of the Condominium Act by ensuring that corporate entities that ended up with the rights of that act were also charged with its responsibilities, the Supreme Court affirmed. *One Pacific*, 148 Wn.2d at 327. However, in doing so, the Court expressly noted the difference between a "successor in interest" and a "successor" as used in RCW 64.34.020(13), observing that a successor in

interest is "[o]ne who follows another in ownership or control of property." *One Pacific*, 148 Wn.2d at 327 (citing *Black's Law Dictionary* 1283 (5th ed. 1979)).

Here, Young urges this Court to adopt *One Pacific's* definition of "succession" as establishing the meaning of the phrase "successors in interest" in CR 32. App's Br. at 14. For a number of reasons, this Court should decline to adopt such a tortured reading of CR 32.

First, because the Supreme Court's task in *One Pacific* was to decide the meaning of the phrase "succeeds to" as used in the Condominium Act, *One Pacific* is at best of questionable relevance to this Court's task, which is to determine the scope of the term "successor in interest" as used in CR 32. Moreover, *One Pacific* expressly notes that a "successor in interest" is one who follows another in ownership or control of property, which is not as broad as the Court's definition of "succeeds to". In other words, Young's proposal that this Court adopt *One Pacific's* definition of "succession" – which includes liabilities in addition to rights – as establishing the meaning of the phrase "successors in interest" used in CR 32 is unsupportable as *One Pacific* defines "successor in interest" in a way that is distinguishable from its definition of "successor." *See One Pacific*, 148 Wn.2d at 327.

Furthermore, neither *One Pacific's* definition of "successor in interest" nor its definition of "succession" supports Young's argument that the Department was the successor in interest to the motorist who injured him. *One Pacific* indicates that a successor in interest is one who follows another in ownership or control of property. *Id.* Here, the Department did not "follow" the motorist who injured Young in "ownership or control" over any form of "property."

One Pacific defines "succession" as "the process by which one person comes into the enjoyment of or becomes responsible for one or more of the rights or liabilities of another person." *One Pacific*, 148 Wn.2d at 327. Here, the Department did not become "responsible" for the "liabilities" of the motorist who injured Young. The Department had the responsibility to provide Young with benefits based on the statutory directives of the Industrial Insurance Act, not based on the outcome of Young's lawsuit against the motorist who struck him. *See* RCW 51.32.010; RCW 51.04.010. Indeed, if the defendant in Young's tort action had been found not to be at fault in causing Young's injuries, the Department would remain responsible to provide Young benefits, since the Department may not deny benefits to workers based on considerations of fault. *See Crow v. Boeing Co.*, 129 Wn. App. 318, 323, 118 P.3d 894 (2005) (citing *Folsom v. Burger King*, 135 Wn.2d 658, 664,

958 P.2d 301 (1998)); RCW 51.04.010 ("sure and certain relief for workers, injured in their work, . . . is hereby provided regardless of questions of fault . . . .").

Nor was the Department obligated to pay Young whatever damages were assessed against the tort defendant: the Department is responsible to provide workers with benefits under the Industrial Insurance Act, not to pay workers damages for torts committed by third parties. Moreover, the Department has a statutory lien against the damages that Young receives in his third party tort action to recover benefits it pays him under the Industrial Insurance Act. *See* RCW 51.24.030, .060. Thus, the Department's interest, with regard to the tort action against the driver, was similar to Young's rather than the driver's, as the Department had the right to share in Young's tort recovery, if any.

Indeed, the Department's interest is adverse to the tortfeasor's interest because the Department has a statutory lien in the recovery from the tortfeasor. *See* RCW 51.24.030., 060. The more the recovery from the tortfeasor, the more the Department can potentially obtain. RCW 51.24.060. This statutory lien does not, as Young implies, mean that the Department is the successor in interest to the tortfeasor. *Contra* App's Br. at 15. Young cites no authority that a statutory lien on the recovery from a tortfeaser creates a successor in interest relationship and

this Court should reject his argument on that basis. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (court does not consider unsupported arguments). Given that the Department's interests in the suit are adverse to those of the tortfeasor, it would make no sense to conclude that the Department became the tortfeasor's successor in interest as a result of it receiving a portion of the damages that the tortfeasor was ordered to pay to the plaintiff. The Department did not acquire an interest in the suit between Young and the motorist who injured him as a result of it "following" the motorist in ownership of any form of "property." Rather, the Department had an interest in the suit because the plain language of a statute gives it such an interest in such suits. *See* RCW 51.24.030, .060.

b. The Department's Interests Are Distinct From Those of Either the Worker or the Tortfeasor in a Third Party Action

Young implicitly argues before this Court, as he did before the Board, that the Department's interests were adequately represented by counsel for the driver in his third party tort action, because the driver and the Department had the same interests: establishing that Young was not significantly injured as a result of the car accident. App's Br. at 14; CP 345. As the Board and the superior court found, this argument fails.

The Department has a different interest from the tortfeasor, and it is, as noted above, adverse to the tortfeasor's in the third party action. *See* RCW 51.24.030, .060. As a party in a workers' compensation appeal, the Department's interest is as the trustee of a fund created, established, and maintained for the purpose of providing compensation to workers and their dependents for disabilities proximately caused by industrial accidents or occupational diseases. *Chavez v. Dep't of Labor & Indus.*, 129 Wn. App. 236, 241, 118 P.3d 392 (2005). By contrast, a tort defendant's interest is in contesting liability and limiting damages. While the Department "trusts the civil process," it does not abdicate its statutory responsibilities to tortfeasors. *See* App's Br. at 15. As the Board and the superior court found, the Department was entitled to notice and an opportunity to appear at Young's depositions, which Young did not provide. CP 825.

c. The Issues and Applicable Law in Young's Tort Action Are Not the Same as the Issues and Applicable Law in His Workers' Compensation Appeal

Young argues that because his tort action arose out of the same accident that caused his workplace injury, the issues at stake in his tort action were sufficiently congruent with the issues in his workers' compensation appeal to merit admission of his depositions in the latter.

App's Br. at 13. However, the issues and applicable law involved in his third party tort action were not the same as those involved in his workers' compensation appeal, and therefore, this argument fails.

There are material differences in the issues presented by Young's tort action and his workers' compensation appeal. CP 292. Young's action against the driver who hit him presented issues typical of a tort action: duty, breach, causation, and damages. *See Reichelt v. Johns-Manville Corp.*, 107 Wn.2d 761, 769, 773 P.2d 530 (1987). Liability of the worker for his or her own injuries (comparative fault) is considered in the tort action. By contrast, the issues in Young's workers' compensation appeal did not include fault, because the workers' compensation system is a no-fault system. *See* RCW 51.04.010; *Folsom*, 135 Wn.2d at 664; *Crow*, 129 Wn. App. at 323. More importantly, however, is the fact that an entirely different body of law applies to workers' compensation benefits than that which applies to civil tort recovery. *See* RCW Title 51.

In contrast to the issues and laws involved in his tort action, the issues in Young's workers' compensation appeal included whether Young's condition, proximately caused by the industrial injury, required further necessary and proper medical treatment under RCW 51.36.010(2)(a) and WAC 296-20-01002, whether he was a temporarily and totally disabled worker under RCW 51.32.090 between September 18,

2008 and December 31, 2008, whether he was entitled to vocational services under RCW 51.32.095, and whether and to what degree, if any, he had sustained permanent partial disability as a result of his industrial injury under RCW 51.32.080. CP 62. None of these issues or statutes were implicated by Young's tort action, and the Board found those differences "profound." CP 292. Indeed Dr. Bays – one of the experts Young deposed in his tort action and whose deposition Young later sought admit in his workers' compensation appeal – testified the disability rating he provided was "not the same scale" as is used for rating injured workers and that his rating had "nothing to do with the L&I categories." CP 153.

3. The Depositions Young Took Are Not Admissible Under CR 32(c)

Young also argues that the depositions that the Board excluded should have been admitted under CR 32(c), because he attempted to use those depositions to rebut the testimony of Dr. Rutberg regarding Dr. Rutberg's testimony as to what information he relied upon in forming opinions regarding Young's medical condition and disability. *See* App's Br. at 16-17. Young's reliance on that rule is misplaced, as the rule does not purport to allow a party to introduce a deposition whenever the deposition contains information that might be useful in rebutting a witness's testimony. *See* CR 32(c). Rather, CR 32(c) states, in relevant part, "At the trial or hearing any party may rebut any relevant evidence

contained in a deposition whether *introduced* by him or by any other party." (Emphasis added.) Thus, CR 32(c) clarifies that *if* a deposition is in fact admitted, any party – including the party who offered the deposition into the record – may present evidence that rebuts the statements that were made in that deposition. However, CR 32(c) does not purport to allow a party to introduce a deposition into the record whenever doing so would be helpful in rebutting a witness's testimony. Since the depositions that Young offered were rejected, CR 32(c) is inapplicable. Moreover, Young did not request to present rebuttal evidence in response to Dr. Rutberg's testimony.

B. The Depositions and Examination Reports of Dr. Bays and Ms. Jones are Inadmissible as Hearsay

Because CR 32 also authorizes the use of depositions "as permitted by the Rules of Evidence," Young argues that given the provision for expert testimony under Rule of Evidence (ER) 702 and ER 803(a)(4)'s hearsay exception for statements made for purposes of medical treatment, "no portions of the rules of evidence prohibit the use of perpetuation depositions of healthcare professionals to be used in latter proceedings." App's Br. at 15. As the superior court decided, this argument lacks merit.

1. Because Young Sought to Offer the Deposition Testimony to Prove the Truth of the Matters Asserted Therein, the Depositions Fit the Core Definition of Hearsay

Like any out-of-court statement, testimony taken by deposition may be admissible where it does not run afoul of the rules of evidence. *See, e.g.*, *Seattle-First Nat. Bank v. Rankin*, 59 Wn.2d 288, 367 P.2d 835 (1962) (previously taken deposition may be used for purposes of impeachment); *Young v. Liddington*, 50 Wn.2d 78, 309 P.2d 761 (1957) (pretrial deposition may be used by adverse party); *Kinsman v. Englander*, 140 Wn. App. 835, 167 P.3d 622 (1977) (deposition of witness admissible where witness became unavailable at trial).

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. ER 801(c). It is not admissible except as provided in the rules of evidence, by other court rules, or by statute. ER 802. Here, there is no dispute the testimony Young sought to introduce was taken in another action before a different tribunal and was offered before the Board to prove the truth of the matters to which the witnesses were testifying.

2. The Limited Exception for Hearsay Regarding Statements for Medical Diagnosis Does Not Apply to the Testimony of Young's Experts

In spite of the fact that the depositions of Dr. Bays and Ms. Jones were hearsay, Young argues they were admissible under ER 803(a)(4),

which excepts statements made "for purposes of medical treatment and diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." App's Br. at 15.

Young's argument fails, because the depositions of Dr. Bays and Ms. Jones do not simply contain statements for the purposes of "medical treatment and diagnosis": they contain assertions of proximate causation and opinions regarding the extent of Young's disability, neither of which fall within the exception for hearsay contained in ER 803(a)(4). Dr. Bays' and Ms. Jones' testimonies were given in depositions for perpetuation in a tort action, not for diagnosing or treating Young. At most, only a tiny portion of their testimonies – that portion which recounted Young's statements used in forming their diagnoses or treatment plans – would be covered by the rule. Wholesale admission of Young's depositions without any opportunity for the Department to prepare, appear, conduct cross-examination, or make and preserve objections for the record, would eviscerate the requirements of CR 32(a)(5)(B), and such an outcome is not supportable under any reasonable interpretation of ER 803(a)(4).

Likewise, neither Dr. Bays' nor Ms. Jones' deposition is admissible under ER 702. By its terms, ER 702 permits qualified experts

to provide testimony in the form of an opinion. It does not purport to carve out an exception to the hearsay rule.

C. Young Fails to Provide Any Authority That a Relaxed Standard Governs the Admissibility of Evidence Before the Board of Industrial Insurance Appeals

In an attempt to bolster his argument that the Board and the superior court abused their discretion by rejecting three of his depositions, Young claims his depositions should have been admitted under a "relaxed standard" that he argues governs the admissibility of evidence before the Board. He offers three bases in support of this position: liberal construction of the Industrial Insurance Act, *Otter v. Dep't of Labor & Indus.*, 11 Wn.2d 51, 118 P.2d 413 (1941), and the Administrative Procedures Act. App's Br. at 10-11. Since none of those authorities support Young's position, this Court should reject his argument.

1. The Civil Rules and the Rules of Evidence Apply to Litigants Before the Board to the Same Extent as in Superior Court

Young argues that the rule of liberally interpreting the Industrial Insurance Act in favor of an injured worker applies not just to the Industrial Insurance Act, but also to all of the civil rules and the rules of evidence that apply to proceedings under the Act. App's Br. at 10-11, 32-34, CP 823-24. He further insists that a liberal interpretation of CR 32,

and of the rules of evidence, mandates inclusion of his depositions in the Board's record and decision. App's Br. at 10-11. This argument fails.

While the Industrial Insurance Act is liberally construed in favor of those who come within its terms, persons claiming rights thereunder are held to strict proof of their right to receive benefits under the Act. *Cyr v. Dep't of Labor & Indus.*, 47 Wn.2d 92, 97, 286 P.2d 1038 (1955) (quoting *Olympia Brewing Co. v. Dep't of Labor & Indus.*, 34 Wn.2d 498, 505, 208 P.2d 1181 (1949)). Furthermore, the rules of civil procedure contain their own guide to interpretation, which is that the rules are to be "construed and administered to secure the just, speedy, and inexpensive determination of every action." CR 1. Determining what is "speedy and inexpensive" for purposes of CR 1 in a particular case is a discretionary decision because it is based on the facts of the particular case. *Amy v. Kmart of Wash.*, 153 Wn. App. 846, 855, 223 P.3d 1247 (2009). To that end, the civil rules provide "procedural safeguards to be narrowly construed in line with this general purpose." *Spokane County v. Specialty Auto & Truck Painting, Inc.*, 153 Wn.2d 238, 245, 103 P.3d 792 (2004). Likewise, the rules of evidence are "construed to secure fairness in administration, elimination of unjustifiable expense and delay, and growth and development of the law to the end that the truth may be ascertained and proceedings justly determined." ER 102.

Applying these standards, the superior court correctly decided that, where Young failed to comply with CR 32 in taking the depositions of his experts, "the general rule that the Industrial Insurance Act should be liberally construed in favor of the worker does not wash away all other parties' rights under the Act, or under the Rules of the Court." CP 825.

In any event, even assuming for the sake of argument that the liberal construction standard applies to the interpretation of CR 32(a), Young's argument would still fail, as the liberal construction rule doctrine cannot be used to overcome the plain language of a statute or rule. *See Harris v. Dep't of Labor & Indus.*, 120 Wn.2d 461, 474, 843 P.2d 1056 (1993). A rule or statute is ambiguous only if it is susceptible to more than one *reasonable* interpretation of it. *Estate of Haselwood v. Bremerton Ice Arena, Inc.*, 166 Wn.2d 489, 498, 210 P.3d 308 (2009). Here, CR 32 cannot be reasonably interpreted in a way that would support Young's contention that the Department was the "successor in interest" to the motorist who struck him.

2. By Its Own Terms, the Administrative Procedures Act Does Not Apply to Proceedings Before the Board

Next, Young contends the Board and the superior court erred in excluding his depositions because "strict rules of trial procedure are not to be applied in claims before the Department of Labor and Industries," and

"cases subject to the Administrative Procedures Act are subject to significantly relaxed rules of evidence." App's Br. at 11. Young argues that, in administrative proceedings, "evidence is admissible if . . . it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs." App's Br. at 11 (citing RCW 34.05.452). These citations do not apply to hearings before the Board.

The Board of Industrial Insurance Appeals is created under RCW 51.52.010. It does not fall under, and its adjudicative proceedings are exempted from, the Administrative Procedures Act, which provides, in pertinent part: "The provisions of RCW 34.05.410 through 34.05.598 shall not apply to adjudicative proceedings of the board of industrial insurance appeals except as provided in RCW 7.68.110 and [RCW] 51.48.131." RCW 34.05.030(2)(a). Since the Administrative Procedures Act does not apply to proceedings before the Board, any relaxation of the rules of evidence under the Administrative Procedures Act is also inapplicable.

For the same reason, Young's citations to *Nisqually Delta Ass'n v. City of DuPont*, 103 Wn.2d 720, 696 P.2d 1222 (1985), and *Pappas v. State Employment Security Department*, 135 Wn. App. 852, 146 P.3d 1208 (2006), give no support to his argument, as each involved matters governed by the Administrative Procedures Act.

3. *Otter* Does Not Mandate Relaxation of Either the Rules Evidence or the Civil Rules Before the Board

Finally, Young cites *Otter*, 11 Wn.2d 51, in arguing that "strict rules of trial procedure in civil actions are not to be applied in claims before the Department of Labor and Industries." App's Br. at 10-11.

However, it must be noted that the passage Young cites to in *Otter* is dicta. The petitioner in *Otter* argued that permitting the respondent to introduce additional evidence after his original hearing violated Rule 4 of the "Rules Governing the Procedure Before the Joint Board." *Otter*, 11 Wn.2d at 55-56. The Supreme Court held that it was not error to permit him to do so because the evidence offered was proper rebuttal testimony under the applicable rules. *Id.* at 56. Since the Court had already concluded the evidence offered was properly admitted under Rule 4, it was unnecessary for it to add, as it did, that "strict rules of trial procedure in civil actions are not to be applied in claims before the Department of Labor and Industries." *Id.* Moreover, unlike *Otter*, which permitted a certain type of evidence based on an existing rule, in this case, no statute or rule allows Young to admit the depositions he sought to admit.

In any event, *Otter* was decided in 1941. The Board of Industrial Insurance Appeals was created in 1949. *See Karniss v. Dep't of Labor & Indus.*, 39 Wn.2d 898, 901, 239 P.2d 555 (1952) (citing Laws of 1949,

ch. 219 § 2). Before the Board's creation, appeals from decisions of the Department of Labor and Industries were heard before a "Joint Board." *Karniss*, 39 Wn.2d at 900; *Otter*, 11 Wn.2d at 53.

Since then, the Industrial Insurance Act was amended to create the Board of Industrial Insurance Appeals which, unlike the "Joint Board" that existed at the time of *Otter*, is an agency that is independent of the Department. *See Karniss*, 39 Wn.2d at 901; *Parks v. Dep't of Labor & Indus.*, 46 Wn.2d 895, 896, 286 P.2d 104 (1955). Pursuant to its rulemaking power under RCW 51.52.020, the Board has adopted rules under which the rules of evidence and the rules of civil procedure apply to actions before it to the same extent as in superior court. WAC 263-12-115(4); WAC 263-12-125. The Board's regulation is consistent with RCW 51.52.140, which provides: "Except as otherwise provided in this chapter, the practice in civil cases *shall* apply to appeals prescribed by this chapter." (Emphasis added.)[7] To the extent *Otter* states "strict rules of trial procedure are not to be applied," it has thus been statutorily abrogated. *See* RCW 51.52.100; WAC 263-12-115(4); WAC 263-12-125.

[7] No provision exists in the Industrial Insurance Act overriding the requirements of CR 32(a) with regard to the taking and filing of perpetuation depositions.

4. The Superior Court Properly Applied the Civil Rules

Young argues the superior court "misapplied the Civil Rules" by focusing exclusively on CR 30, rather than on CR 32. App's Br. at 11. However, nothing in the record supports Young's contention that the superior court relied on CR 30 rather than CR 32 in concluding the Board properly rejected his depositions.

The superior court's judgment excluding Dr. Bays' and Ms. Jones' depositions from the record makes no reference to CR 30. CP 884. Neither does the order on summary judgment. CP 823-26. Since Young did not give notice to the Department as required by CR 32, the record supports the superior court's decision to exclude his depositions.

5. The Substantive Admissibility of Deposition Testimony Is Governed by CR 32, Not the Washington Administrative Code

Young argues the Board and the superior court failed to consider the requirements of WAC 263-12-117 before excluding his depositions. App's Br. at 20. He also argues the exclusion of his depositions was contrary to WAC 263-12-115. App's Br. at 18. Because neither WAC 263-12-115 nor WAC 263-12-117 governs to the substantive admissibility of deposition testimony, this argument fails.

Deposition testimony before the Board is not admissible unless taken "according to the statutes and rules relating to the superior courts of

this state." RCW 51.52.100. The use of depositions in court proceedings is governed by CR 32, and the admissibility of the testimony therein is subject to the rules of evidence. WAC 263-12-115(4). By contrast, the Board's decision as to whether to permit the presentation of evidence by deposition *at all* is governed by WAC 263-12-117, which allows industrial appeals judges to "permit or require the perpetuation of testimony by deposition, subject to WAC 263-12-115."[8]

For its part, WAC 263-12-115 governs the order of presentation of evidence before the Board; it does not provide a substantive right to present certain types of evidence. Young appears to argue that WAC 263-12-115 only allows the Board to exclude irrelevant or unduly repetitious evidence. App. Br. at 18. But, as he concedes, WAC 263-12-115 expressly applies the "rules of evidence applicable in the superior court" to proceedings before the Board. *See* App. Br. at 18. It does not restrict the Board's ability to exclude testimony offered in violation of the rules of evidence or the civil rules. *See* WAC 263-12-115(4). Moreover, nothing in WAC 263-12-115 or WAC 263-12-117 suggests a party may take a perpetuation deposition of an expert witness without giving notice to the

[8] The hearings judge permitted perpetuation depositions both at the initial scheduling of Young's case in March 2009 and at the second scheduling conference in 2010. CP 62-65, 100-02. That Young did not comply with CR 32 in taking his depositions was the basis of the Board and the superior court's proper determination they should be excluded. CP 291-92, 823-26.

adverse party. Thus, neither rule supports Young's suggestion that he was not required to give the Department notice of those depositions.

D. Because Young Was Given a Full and Fair Opportunity to Present His Evidence and Chose Not to Call His Witnesses, He Fails to Establish a Violation of Procedural Due Process

Young argues the exclusion of his depositions violated procedural due process. App's Br. at 22. Because he was given an opportunity to be heard and chose not to avail himself of it, Young's argument lacks merit.

1. Young Was Given a Number of Opportunities to Call Dr. Bays and Ms. Jones and Chose Not to Call Them

Young argues that the exclusion of Dr. Bays' and Ms. Jones' depositions negatively impacted his ability to obtain additional benefits. App's Br. at 22-24. He argues the exclusion of his depositions amounted to a violation of procedural due process. App's Br. at 22 (citing *Buffelen Woodworking Co. v. Cook*, 28 Wn. App. 501, 505, 625 P.2d 703 (1981)).

The fundamental requirement of due process is "the *opportunity* to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) (internal quotation omitted) (emphasis added). In this case, Young's workers' compensation appeal was initially scheduled before the Board on March 16, 2009. CP 63-65. The litigation order required Young's perpetuation depositions to be taken by July 27, 2009, and filed by

August 10, 2009. CP 64. Although proceedings in his appeal were stayed at his request, Young took the deposition of Dr. Sweet, in June 2009 with notice to the Department and in compliance with the Board's scheduling order. CP 81, 86-87, 385. At no time between March 16, 2009, and July 27, 2009, did Young schedule the deposition of Dr. Bays or Ms. Jones, despite identifying "two medical experts and one unidentified vocational expert" at scheduling. CP 64.

The Board ruled that Dr. Bays' and Ms. Jones' depositions taken in May 2010 were inadmissible under CR 32 on October 12, 2010. CP 292. Young's hearing on the merits of his appeal did not occur until over a month later. CP 351-77. At no time between the Board's ruling excluding Dr. Bays' and Ms. Jones' depositions and his hearing did Young schedule Dr. Bays or Ms. Jones to testify, nor did he make any effort to schedule their depositions with the Department.

At his hearing on November 22, 2010, Young was again offered an opportunity to seek a continuance and take the depositions of Dr. Bays and Ms. Jones with proper notice to the Department. CP 376. Again, Young chose not to, opting instead to rest his case and preserve his exceptions to the Board's decision to exclude Dr. Bays' and Ms. Jones' depositions. CP 376. Young did not ask for rebuttal testimony following presentation

of the Department's case, opting instead to file a post-hearing motion to admit Dr. Bays' deposition and exam report. CP 298-300.

On these facts, it cannot be held Young was denied a full and fair opportunity to present the totality of his evidence. Young had ample time both before and after the Board excluded Dr. Bays' and Ms. Jones' depositions to call them as witnesses, and Young failed to do so. The superior court's finding that Young "could have called these witnesses in the Board proceedings to cure the deficiency of notice and opportunity to appear, but chose not to" is amply supported by the record. CP 825.

Young cites *State ex rel. Puget Sound Navigation Co. v. Department of Transportation*, 33 Wn.2d 448, 206 P.2d 456 (1949), and *Robles v. Dep't of Labor & Indus.*, 48 Wn. App. 490, 739 P.2d 727 (1987), as examples of cases in which the failure of the hearing tribunal to afford a litigant a full and fair opportunity to present evidence was held to have risen to the level of a violation of due process. App's Br. at 23. However, unlike the litigants in *Puget Sound Navigation* and *Robles*, who were afforded *no* opportunity to introduce evidence, the record here reflects Young had *several* opportunities to call Dr. Bays and Ms. Jones and he declined to avail himself of those opportunities. Young provides no authority for the notion that a worker's due process right extends to the

right to depose witnesses without giving notice to other parties. Thus, excluding his depositions did not deny him due process.

2. The Exclusion of Young's Depositions Was an Evidentiary Ruling, Not a Sanction

Young argues the Board and the superior court abused their discretion by imposing the harshest sanction available – the exclusion of his experts' depositions – in the absence of willful and deliberate wrongdoing on his part. App's Br. at 24 (citing *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997)). This argument confuses sanctions imposed under CR 37 with evidentiary rulings, and overlooks the multitude of opportunities Young was given to cure the deficiency of notice that resulted in the exclusion of his depositions.

In *Burnet*, the trial court issued an order limiting discovery on an issue and excluding the testimony of expert witnesses under CR 37(b)(2) for a party's failure to comply with an order respecting discovery under CR 26(f). *Burnet*, 131 Wn.2d at 493-94. The Supreme Court held that, because the trial court did not consider a less severe sanction, it was an abuse of discretion to exclude the testimony of the plaintiff's experts without a showing the plaintiff had "willfully disregarded an order of the trial court." *Id.* at 497-98.

Unlike the trial court in *Burnet*, in this case the Board and the superior court did not *preclude* the testimony of Young's experts as a sanction under CR 37. CP 292, 823-26. Rather, the Board *excluded* their depositions because Young failed to provide the Department with proper notice of them required under the civil rules.[9] CP 292. Likewise, the superior court excluded the depositions on a finding that they were not taken in compliance with CR 32 and were hearsay. CP 823-25.

Young offers a number of examples of remedies the trial court "could have" employed to cure the notice deficiency of his depositions short of exclusion and argues that in the absence of any consideration of a lesser "sanction" it was error to exclude his depositions. App's Br. at 21-22. However, Young's discussion of sanctions is irrelevant because the exclusion of his depositions was not a "sanction" but an evidentiary ruling. CP 292, 823-26. In any event, while Supreme Court reversed in *Burnet* because the trial court failed to consider a less harsh sanction, in this case, the hearings judge offered Young an opportunity to cure his deficiency by seeking a continuance and scheduling new depositions with proper notice to the Department. CP 376. The superior court expressly recognized this

[9] Young asserts it is "unclear whether the BIIA was issuing a sanction against Young for failing to have the Department present at the third party depositions." App's Br. at 25. No reference is made in the Board or the superior court's record to CR 37, nor does anything in the record suggest the exclusion of Young's depositions was a "sanction." To the contrary, the Board and the superior court made it plain the exclusion of Dr. Bays' and Ms. Jones' depositions was an evidentiary ruling. CP 292, 823-26.

in its order when it found Young "could have called these witnesses in the Board proceedings to cure the deficiency of notice and opportunity to appear, but chose not to . . . ." CP 825. Given Young's obstinacy in failing to take advantage of that opportunity, the exclusion of his depositions was not an abuse of discretion.

E. Substantial Evidence Supports the Superior Court's Decision to Affirm the Board

Young admits – as he must – that this Court's review is limited to determining whether substantial evidence supports the superior court's findings. App's Br. at 10. Nonetheless, Young invites this Court to reweigh the evidence by arguing that his expert was more persuasive than the Department's experts. *See* App's Br. at 29-32. But this Court's review is limited to determining whether substantial evidence supports the superior court's findings. *See Ruse*, 138 Wn.2d at 5; *Rogers*, 151 Wn. App. at 180. In doing so, this Court does not reweigh the evidence, or apply anew the burden of persuasion. *See Harrison Memorial Hosp. v. Gagnon*, 110 Wn. App 475, 485, 40 P.3d 1221 (2002). Thus, to prevail, Young must show that no reasonable trier of fact could have made the findings that the superior court made in this case. *See William Dickson Co. v. Puget Sound Air Pollution Control Agency*, 81 Wn. App. 403, 411, 914 P.2d 750 (1996) (substantial evidence is evidence in sufficient

quantum to persuade a fair minded person that a finding is true). Because he fails to demonstrate that no reasonable trier of fact could have found as the superior court did, Young's argument in this regard fails.

1. Substantial Evidence Supports the Superior Court's Finding That Young Does Not Require Further Treatment for the Effects of His Industrial Injury

The superior court's finding of fact 1.4(A) found that "Young's condition, proximately caused by the industrial injury had reached maximum medical improvement, and he did not require further proper and necessary medical treatment." CP 884. Young argues the superior court erred in finding he was not entitled to further treatment because he claims the evidence he presented was more persuasive than the evidence the Department presented. App's Br. at 29. However, he does not show the superior court's finding lacked substantial evidence to support it.

An injured worker is entitled to proper and necessary medical treatment until he or she reaches maximum medical improvement. RCW 51.36.010; WAC 296-20-01002 (section defining proper and necessary). Maximum medical improvement occurs when no fundamental or marked change in the accepted condition can be expected, with or without treatment. *Tomlinson v. Puget Sound Freight Lines, Inc.*, 166 Wn.2d 105, 113, 206 P.3d 657 (2009) (quoting WAC 296-20-01002 (section defining of proper and necessary)).

In this case, the Department's evidence consisted of the testimony of Dr. L. David Rutberg, a board-certified neurologist, and Dr. John R. Logan, a chiropractor. CP 439-508, 510-87. Drs. Rutberg and Logan examined Young as part of joint panel examination on June 26, 2008. CP 449, 519. As part of that examination, they reviewed Young's medical records, interviewed Young, and conducted physical examinations. CP 451-62, 520, 523. They also reviewed an MRI of Young's spine that demonstrated a small disc protrusion at the L5-S1 level that showed no sign of encroachment on any neurological structures. CP 463, 529-30.

Based on their examinations and review of Young's records, Dr. Rutberg and Dr. Logan diagnosed Young as having suffered a neck sprain and a lumbosacral sprain as a result of his industrial injury. CP 463-64; CP 531-32. After obtaining additional neurophysiological testing results, both Dr. Rutberg and Dr. Logan opined these industrially-related conditions had resolved and that no further treatment was likely to be curative. CP 465, 533. A reasonable trier of fact could conclude, from this testimony, that Young's condition had reached maximum medical improvement and that he did not require further medical treatment. Thus, the superior court's finding is supported by substantial evidence.

2. Substantial Evidence Supports the Superior Court's Finding That Young Was Not Temporarily Totally Disabled

The superior court's finding of fact 1.4(B) found that Young's injury did not render him incapable of obtaining and performing gainful employment between September 18, 2008, and December 31, 2008. CP 884. Young argues the superior court erred in finding he was not temporarily totally disabled between these dates. App's Br. at 29-32. Because substantial evidence supports the superior court, this Court should uphold its finding.

A worker is temporarily and totally disabled when his or her industrial injury temporarily incapacitates him or her from obtaining or performing work at any gainful occupation. *Bonko v. Dep't of Labor & Indus.*, 2 Wn. App. 22, 25, 466 P.2d 526 (1970) (citing RCW 51.32.090). Temporary total disability terminates as soon as the worker's condition has become fixed and stable or as soon as the worker is able to obtain and perform any kind of work on a reasonably continuous basis. *Hunter v. Bethel Sch. Dist.*, 71 Wn. App. 501, 507, 859 P.2d 652 (1993).[10]

Here, both Dr. Rutberg and Dr. Logan testified Young was fixed and stable and had no restrictions on his ability to work between

[10] "Fixed and stable" is another way to say reached "maximum medical improvement." WAC 296-20-01002 (section defining proper and necessary).

September and December 2008. CP 469, 584. Dr. Logan testified Young could return to the work he was doing at the time of his injury. CP 584. A reasonable trier of fact could conclude, based on this testimony, that Young was capable of obtaining and performing gainful employment during the relevant period of time on a reasonably consistent basis.

3. Substantial Evidence Supports the Superior Court's Finding that the Department Did Not Abuse its Discretion in Denying Young Vocational Services

The superior court's findings of fact 1.4(C) and 1.4(D) found that Young did not present evidence that the Department abused its discretion by denying him vocational rehabilitation. CP 885. Young argues the superior court erred in finding he was not entitled to vocational services. App's Br. at 29-32. Because substantial evidence supports the findings of the superior court, this Court should uphold them.

Vocational rehabilitation services may be provided when, in the sole discretion of the supervisor of industrial insurance (or his or her designee), such services are both necessary and likely to make the worker employable. RCW 51.32.095; *Anderson v. Weyerhaeuser Co.*, 116 Wn. App. 149, 155, 64 P.3d 669 (2003). A worker is unemployable when he or she is unable, as a result of his or her industrial injury, to obtain or perform reasonably continuous gainful employment that is suitable to his

or her qualifications and training. *Leeper v. Dep't of Labor & Indus.*, 123 Wn.2d 803, 817, 872 P.2d 507 (1994).

Here, Dr. Rutberg and Dr. Logan testified Young was capable of working without any restrictions related to his injury. CP 469, 584. It follows from their testimony that Young was capable of working without receiving any form of vocational assistance. Furthermore, as the superior court found, Young presented no evidence to support the conclusion that the Department abused its discretion when it denied him vocational assistance. CP 885. Thus, substantial evidence supports the superior court's finding that the Department did not abuse its discretion when it denied Young vocational services. This Court should uphold that finding.

4. Substantial Evidence Supports the Superior Court's Finding that Young's Permanent Impairment Best Corresponds to Category 1 Under WAC 296-20-280

The superior court's finding of fact 1.4(E) found that Young's residual impairment, proximately caused by his industrial injury, is best described as Category 1 under WAC 296-20-280's description of categories for permanent dorso-lumbar and lumbosacral impairments. CP 885. Young argues the superior court erred in entering this finding because he claims the testimony of Dr. Sweet was more persuasive than the testimony of the Department's experts and because he claims the Department's experts failed to consider his muscle spasms in arriving at

their disability rating. App's Br. at 31. However, Young fails to show that substantial evidence does not support the superior court's finding.

Permanent partial disability is a loss of bodily function to any part of the body, proximately caused by the industrial injury, after maximum medical improvement is achieved. RCW 51.08.150; WAC 296-20-19000; *Cayce v. Dep't of Labor & Indus.*, 2 Wn. App. 315, 467 P.2d 879 (1970). The extent of such impairment must be established by medical testimony. *Page v. Dep't of Labor & Indus.*, 52 Wn.2d 706, 328 P.2d 663 (1958).

In this case, Dr. Logan testified he was familiar with the system for rating permanent impairment in workers' compensation cases. CP 534-35. He testified he typically uses the Department's worksheet for rating dorso-lumbar and lumbosacral impairment in rating workers' permanent partial disability. CP 535-36. Dr. Logan detailed his computations concerning Young using the worksheet and testified he rated Young's permanent impairment at a Category 1 level in accordance with WAC 296-20-280. CP 536-39. Category 1 is non-compensable. *See* WAC 296-20-680(3).

Likewise, based on his examination, his review of Young's medical records, and his review of an additional neurophysiological test he requested to assist him in making his determination, Dr. Rutberg testified Young's permanent partial impairment most closely approximated Category 1 under WAC 296-20-280. CP 466-67.

A reasonable trier of fact could find, based on Dr. Logan and Dr. Rutberg's testimony, that Young's condition was best described as a Category 1, as defined by WAC 296-20-280, a category rating that equates with a worker having not suffered a permanent partial disability as a result of an injury. Therefore, the superior court's finding that Young was not permanently partially disabled was supported by substantial evidence.

Young contends it was error for Dr. Logan and Dr. Rutberg to not consider or apply WAC 296-20-270 in rating him because he asserts Dr. Logan and Dr. Rutberg failed to consider his muscle spasms in arriving at their rating and because WAC 296-20-270 "provides that muscle spasms shall be considered in selecting a category of impairment." *See* App's Br. at 32. WAC 296-20-270(1)(a) states that "muscle spasm . . . shall be considered in selecting the appropriate category, *only insofar as productive of low back impairment.* (Emphasis added.) Young presented no evidence the hypertonicity Drs. Logan and Rutberg observed met this standard. Moreover, the superior court specifically discounted Dr. Sweet's testimony about spasms in finding of fact 1.3 and that finding is supported by substantial evidence. CP 885. Notably, Young has not assigned error to this finding and it is a verity on appeal. *See Dep't of Labor & Indus. v. Allen*, 100 Wn. App. 526, 530, 997 P.2d 977 (2000).

F. Even If This Court Were to Remand to the Superior Court With Directions to Admit Young's Depositions, Young Would Not Be Entitled to Fees

Young argues he should be awarded attorney fees under RCW 51.52.130 "for all levels of appeal." App's Br. at 34-35. Since the record supports affirmation of the Board and the superior court, this Court should affirm and deny Young's request for fees. However, even if this Court were to remand with directions to accept Young's depositions, under RCW 51.52.130, Young would still not be entitled to an award of fees for work before the Board, and any award for his work before this Court and the superior court would be contingent upon him actually receiving additional industrial insurance benefits as a result of his appeal.

RCW 51.52.130 provides, in pertinent part:

> If in a worker or beneficiary appeal the decision of the board is reversed or modified *and if the accident fund or medical aid fund is affected by the litigation*, or if in an appeal by the department or employer the worker or beneficiary's right to relief is sustained . . . the attorney's fee fixed by the court, *for services before the court only*, and the fees of medical and other witnesses and the costs shall be payable out of the administrative fund of the department.

(Emphasis added.) Thus, under RCW 51.52.130, Young can only get attorney fees and litigation expenses if he appeals a decision of the Board to the courts and, as a result of the appeal, the Board's decision is reversed *and* the accident fund or medical aid fund is affected by the litigation.

RCW 51.52.130; *see also Pearson v. Dep't of Labor & Indus.*, 164 Wn. App. 426, 445, 262 P.3d 837 (2011). Furthermore, his award would be limited to an award for his work before the courts, and would not include an award for his work before the Board. *See Piper v. Dep't of Labor & Indus.*, 120 Wn. App. 886, 889, 86 P.3d 1231 (2004) (citing *Borstein v. Dep't of Labor & Indus.*, 49 Wn.2d 674, 306 P.2d 228 (1957)).

VII. CONCLUSION

The Department asks this Court to affirm the decision of the superior court that affirmed the decisions of the Board and the Department

RESPECTFULLY SUBMITTED this 17th day of September, 2013.

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No. 44560-3-II

COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON

DEREK YOUNG,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

DECLARATION OF MAILING

DATED at Tumwater, Washington:

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I mailed the Respondent's Brief with attached Appendices and this Declaration of Mailing to counsel for all parties on the record by depositing a postage prepaid envelope in the U.S. mail addressed as follows:

Ron Meyers
Ron Meyers & Associates PLLC
8765 Tallon Lane NE Suite A
Lacey, WA 98516

DATED this 27 day of September, 2013.

ZELMA HAMMER
Legal Assistant 2

RULE 32
USE OF DEPOSITIONS IN COURT PROCEEDINGS

(a) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the Rules of Evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness or for any purpose permitted by the Rules of Evidence.

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (A) that the witness is dead; or (B) that the witness resides out of the county and more than 20 miles from the place of trial, unless it appears that the absence of the witness was procured by the party offering the deposition or unless the witness is an out-of-state expert subject to subsection (a)(5)(A) of this rule; or (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or (D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

(5) The deposition of an expert witness may be used as follows:

(A) The discovery deposition of an opposing partys rule 26(b)(5) expert witness, who resides outside the state of Washington, may be used if reasonable notice before the trial date is provided to all parties and any party against whom the deposition is intended to be used is given a reasonable opportunity to depose the expert again.

(B) The deposition of a health care professional, even though available to testify at trial, taken with the expressly stated purpose of preserving the deponents testimony for trial, may be used if, before the taking of the deposition, there has been compliance with discovery requests made pursuant to rules 26(b)(5)(A)(i), 33, 34, and 35 (as applicable) and if the opposing party is afforded an adequate opportunity to prepare, by discovery deposition of the deponent or other means, for cross examination of the deponent.

Substitution of parties pursuant to rule 25 does not affect the right to use depositions previously taken; and, when an action has been brought in any court of the United States or of any state and another action

involving the same issues and subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor. A deposition previously taken may also be used as permitted by the Rules of Evidence.

(b) Objections to Admissibility. Subject to the provisions of rule 28(b) and subsection (d)(3) of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(c) Effect of Taking or Using Depositions. A party does not make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by an adverse party of a deposition under subsection (a)(2) of this rule. At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party.

(d) Effect of Errors and Irregularities in Depositions.

(1) As to Notice. All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(2) As to Disqualification of Officer. Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(3) As to Taking of Deposition.

(A) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(C) Objections to the form of written questions submitted under rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within 5 days after service of the last questions authorized.

(4) As to Completion and Return of Deposition. Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, endorsed, transmitted, filed, or otherwise dealt with by the officer under rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

BEFORE TH BOARD OF INDUSTRIAL INSURA E APPEALS
STATE OF WASHINGTON

IN RE: DEREK J. YOUNG	DOCKET NO. 09 10315
CLAIM NO. AF-30725	PROPOSED DECISION AND ORDER

INDUSTRIAL APPEALS JUDGE: Wayne B. Lucia

APPEARANCES:

Claimant, Derek Young, by
Ron Meyers & Associates, PLLC, per
Ron Meyers and L Zoe Wild

Employer, CMS Painting, Inc ,
None

Department of Labor and Industries, by
The Office of the Attorney General, per
Leslie V. Johnson, Assistant

The claimant, Derek J Young, filed an appeal with the Board of Industrial Insurance Appeals on January 12, 2009, from an order of the Department of Labor and Industries dated December 31, 2008 In this order, the Department affirmed a prior order dated September 19, 2008, that ended time-loss compensation benefits as paid through September 17, 2008, and closed the claim without provision for further medical treatment or disability award The Department order is **AFFIRMED**

ISSUES

The following issues are presented on appeal:

(1) Whether the claimant's condition, proximately caused by his June 27, 2007 industrial injury, required further proper and necessary medical treatment.

(2) Whether the claimant was a totally and temporarily disabled worker, due to the residual impairment proximately caused by the industrial injury, during the period between September 18, 2008, and December 31, 2008, inclusive

(3) Whether the Department was obligated to provide the clamant with vocational services

(4) What degree of permanent partial disability best describes the claimant's residual impairment, proximately caused by the June 27, 2007 industrial injury?

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PROCEDURAL AND EVIDENTIARY MATTERS

On February 17, 2009, the parties agreed to include the Jurisdictional History, as amended, in the Board's record That history establishes the Board's jurisdiction in this appeal

During a July 14, 2010 scheduling conference, witness confirmation dates were assigned to the parties When the claimant's confirmation arrived, the letter advised the parties Claimant intended to submit the depositions of Dr Patrick Bays, Dr. Jay Sweet, and Dawn Jones, taken May 10, 2010, May 13, 2010, and May 27, 2010, respectively. Those depositions had been taken by Mr. Young in connection with a third-party liability action in Superior Court. The Department was not given notice of those depositions, nor was it present when they were taken When the three depositions were sent to the Board, they were sealed as unread Within the same frame of time, the Department filed a motion to exclude the three depositions on September 21, 2010 Claimant responded in writing, filed October 8, 2010, and a hearing on the Department's motion was held October 12, 2010. At the hearing, Claimant made an oral motion, asking the undersigned presiding judge to recuse himself from the proceedings Claimant's motion was denied; Department's motion was granted See Interlocutory Order dated October 12, 2010

During the October 12, 2010 hearing, the claimant made an oral motion to strike cumulative evidence offered by the Department Having subsequently reviewed the evidence presented by the Department, Claimant's oral motion is denied

Later, on December 10, 2010, Claimant filed a motion asking for the medical examination report by Dr. Bays and his deposition to be admitted as exhibits. The Department filed its response December 15, 2010 Claimant's motion is denied ER 703 permits a testifying expert to relate facts or other information relied upon in forming an opinion. Information relied upon, although used to help an expert form an opinion, is not, in and of itself, admissible on that basis alone A report written by an examining physician is a hearsay document and is inadmissible absent suitable foundation or a specific exception to the hearsay rule Similarly, the deposition of Dr. Bays is indistinguishable from his report in terms of its admissibility because the Department was alleged to have relied upon Dr. Bays' work and testimony Claimant's motion is denied.

Claimant's evidence in this appeal was presented through the November 22, 2010, hearing testimony of Brian L. Boatright, Wendell D. Crawford, and Derek J. Young, as well as by the June 4, 2009 deposition of Dr. Jay Sweet (DC). In Dr. Sweet's deposition, which was published in accord with WAC 263-12-117, the objection on page 33, line 3, is sustained; all other objections and

motions made during his deposition are overruled or are denied Dr Sweet, after reviewing his deposition, wrote the answer on page 34, line 8, should be changed from "no" to "yes."

The Department's case was offered through the depositions of Dr L David Rutberg, taken November 23, 2010, and Dr John R. Logan, obtained December 6, 2010. In Dr. Rutberg's deposition, the objections and/or motions made on page 34, line 3, page 35, line 7, page 59, line 2, and page 61, line 22, are sustained or granted, all other objections and motions made are overruled or are denied. Regarding Dr Logan's deposition, the objections and/or motions made on page 21, line 24, page 57, line 18, page 66, line 19, page 68, line 15, and page 72, line 14, are sustained or granted; the testimony on page 72, lines 9 through 13, is stricken from the record on appeal, all other objections and motions made during his deposition are overruled or are denied

Dr. Logan reserved signature, but the copy filed with the Board lacked his signature. His deposition was filed with the Board December 20, 2010, and no party has made a timely objection concerning irregularity. The lack of Dr Logan's signature is deemed cured per CR 32(d)(4). Both depositions taken on behalf of the Department were published as provided by WAC 263-12-117

The following exhibits were dealt with:

1 Deposition Exhibit No. 1 from Dr Sweet's deposition is a MRI report from South Sound Radiology regarding imaging obtained December 14, 2007 The report is rejected as Exhibit No 1 on the basis of hearsay

2. Deposition Exhibit No 2 from Dr Sweet's deposition is a MRI report from South Sound Radiology regarding imaging obtained September 10, 2007 The report is rejected as Exhibit No 2 on the basis of hearsay

3. Deposition Exhibit No. 3 from Dr Sweet's deposition is an annotated copy of WAC 296-20-280 It is admitted as Exhibit No 3. The Department objected to the underlining annotations as misleading, however, those markings were, in all probability, made by Dr. Sweet on the day of his deposition *See* Sweet Dep at 28.

4 Deposition Exhibit No 1 from Dr. Logan's deposition is a copy of a doctor's worksheet form for rating back impairments. The form, which was not completed, is produced by the Department. The item was not offered and is identified as Exhibit No 4

EVIDENCE

Derek J Young, who was 30 years of age at the time of his November 2010 testimony, said he completed the eleventh grade, he later obtained a GED, and became enrolled in a Union apprenticeship program to become a commercial painter. The claimant sustained a June 27, 2007 industrial injury when the motor vehicle he was in was struck from behind by another driver. He was working for CMS Painting, Inc , at the time of the injury.

After the injury, Mr Young worked for Todd Robinson Painting as an apprentice painter That employment lasted about five months, and eventually, Mr Young stopped working as a painter because, "I was having problems with my back and neck while working " 11/22/10 Tr at 17 When asked what caused the neck and back complaints, Claimant said, "Just bending, twisting, climbing up and down ladders, reaching, looking back up and painting ceilings, it all bothered me" 11/22/10 Tr at 17.

Claimant said everything he tries to do bothers him and he has a steady pinch in his low back at belt level that is always there Mr Young also related having depression in the past, but was doing well up to the time of this injury. Afterward, the depression returned, "It was pretty bad." 11/22/10 Tr at 22

Mr Young said he was not able to work as a painter. In addition, the following dialog took place:

> Q. Are there any jobs or things that you have done before you were with CMS that you think you could do today in your current condition physically and mentally?
>
> A Not the jobs I have done It was usually warehouse work, landscaping, or painting.
>
> Q Are those all physical jobs.
>
> A. Yes.

11/22/10 Tr. at 24.

Mr. Brian L Boatwright is the claimant's brother, he knew about Mr Young's industrial injury Prior to June 27, 2007, he and the claimant would socialize about twice each week Activities included fishing, golfing, snowboarding, snowmobile riding, and quad riding Mr. Young did not have any apparent difficulties with those activities before this injury After June 2007, Mr. Boatwright said he and his brother saw each other almost daily They have gone fishing once and their other customary activities have stopped because Mr. Young is in pain. Mr. Boatwright said whenever his brother does something physical, "he walks around like he is old afterwards" 11/22/10 Tr. at 10

Mr. Wendell D. Crawford and Mr. Young lived together before and after the industrial injury. At the time of his testimony, Mr. Crawford saw the claimant on about a weekly basis. Before June 27, 2007, the witness described Mr. Young as someone who could, and did, engage in active pursuits such as snowmobile riding, quad riding, fishing, all without evident physical difficulty. After

the injury Mr Young stopped those activities Mr Crawford described the claimant as not doing well because of his back and neck pain, and said, "Walks like an old lady . . " 11/22/10 Tr. at 15

Dr Jay Sweet is a chiropractor who began treating Mr Young for this industrial injury July 2, 2007 From the intake interview, the witness said the claimant was involved in a rear-end automobile collision on Interstate 5, from which he was taken to an emergency room with complaints of headache pain along with neck, thoracic, and low back pain. Dr Sweet said Mr Young did not have any prior history of cervical, thoracic, or lumbar injury

Dr Sweet's initial examination noted decreased cervical range of motion, pain during cervical orthopedic tests, lessened lumbar range of motion, and pain during muscle and lumbar orthopedic testing. Cervical and lumbar x-rays showed a mild left tilt at C2, a less than normal cervical lordosis, some mild scoliosis curve at C5, malpositioning of the vertebrae at T12-L3. No fractures were identified by the x-rays Dr. Sweet made the following diagnoses.

> Cervical sprain strain was one of them, 847 0, I believe, that's lumbosacral sprain strain, and then there's pelvic, cervical, lumbar, thoracic joint dysfunction, subluxation, and cervicogenic headache.

Sweet Dep at 15 He opined these conditions were caused by the industrial injury

Dr Sweet began treating Mr. Young with chiropractic adjustments on a three times per week basis Because the claimant's condition was not progressing at a satisfactory rate, Dr. Sweet referred Mr. Young to an orthopedic surgeon MRIs were obtained.

A September 10, 2007 thoracic MRI identified a 2 mm protrusion of the disc at T6-7. About the cause of the defect, Dr. Sweet said, "In the absence of any other traumatic things in his history, it most likely is related to the accident " Sweet Dep at 20. A lumbar MRI, obtained December 14, 2007, showed a small annular fissure at L4-5, degenerative disc disease at the same level, and a small protrusion at L5-S1 with mild spinal canal narrowing When asked whether the degenerative disc disease with small annular fissure was caused by the industrial injury, Dr. Sweet said, "I'm not sure I can give you a straight-up answer on just that portion " Sweet Dep. at 25.

Dr Sweet said he last saw Mr. Young December 5, 2008, because the Department had requested an examination At that examination, Dr. Sweet concluded the claimant's cervical, thoracic, and lumbar spine areas were restricted, he found some tenderness over the left scapula, some muscle spasm, and the claimant was tender to palpation over the area of L4, L5, S1. Dr Sweet did not render an opinion that Mr Young's industrial injury condition required further medical treatment.

Dr. Sweet was asked about permanent partial disability. He said he has administered independent medical examinations in the past, but has always declined to give an impairment rating when asked to do so During his testimony Dr. Sweet was showed a copy of *WAC 296-20-280* (Exhibit No 3), and was asked which of the portions of the written code he agreed with. He adopted portions of Category 2, 3, and 4 as consistent with Mr Young's condition.

Regarding employment ability, Dr Sweet said the claimant was taken off work through August 6, 2007, he attempted to return to employment as a painter, but was medically removed from work in October 2007 Dr Sweet's records show the claimant medically restricted from working until February 22, 2008 "And that's the last one that I show in these records " Sweet Dep at 31. About resuming painting employment, Dr Sweet said, "I guess, I'd say to date it doesn't appear that he's going to be able to return to that " Sweet Dep at 32 The witness was not aware of the claimant's employment and educational background

During cross-examination, Dr Sweet acknowledged the following factors relating to his final examination of Mr Young. no sensory or reflex loss, no evidence of laminectomy or discectomy; no significant loss of motion, no atrophy, MRI defects are tiny or mild; cervical disc space was normal, the claimant's sacrum was normal, and Mr. Young's sacroiliac joints were normal.

Dr. L. David Rutberg, a neurosurgeon certified by his peers in that specialty, testified to having examined Mr. Young on June 26, 2008, at the Department's request. At that time, the claimant described an aching low back and muscle pain at the mid-thoracic level on the right side The muscle pain was reported as occurring once or twice each week.

As part of his examination, Dr Rutberg reviewed medical records relating to Mr Young's injury. A January 22, 2008 note from South Sound Neurosurgery reflected MRI findings of a small disc protrusion at L5-S1, mild canal narrowing, degenerative disc disease at L4-5 with a small annular fissure. Physical therapy was prescribed and was followed by flexion and extension x-ray imaging to find out if Mr Young had any instability in his spine. After the course of physical therapy, x-rays were taken March 17, 2008 Those films showed an absence of deformity, instability, or neural compression

After the examination, Dr Rutberg obtained an additional diagnostic work-up to determine if Mr. Young had any radicular abnormalities. August 28, 2008 electrodiagnostic testing by Dr. Kevin Casserta showed the claimant to be normal, having no peripheral or radicular abnormalities.

Dr. Rutberg's examination was unremarkable. Mr. Young's gait was normal, he was able to walk on his heels and toes, strength was normal, and there was no atrophy. The claimant's

coordination was normal, he did not have any hand, neck, or head tremors, deep tendon reflexes were brisk and symmetrical, straight-leg raise testing was normal The claimant did not have any indications of system pathology, cervical ranges of motion were normal, as were his lumbar ranges, but with some lumbar discomfort expressed. Dr. Rutberg described the examination as straightforward and normal He diagnosed Mr Young as having sprains to his sacrum, lumbo-sacral, and cervical spine areas, each of which was related to the industrial injury

Dr Rutberg opined Mr Young did not require further medical treatment. "We did not feel that any further therapeutic intervention was recommended And in particular no additional chiropractic or physical therapy or massage therapy beyond the date of the examination, June 26, 2008." Rutberg Dep. at 26

Dr Rutberg rated Mr Young as Category 1, per WAC 296-20-280 He explained the basis of the rating.

> Well, that was based on his examination, which showed no problem with sensation, strength, reflexes, range of motion and had also the MRI results, adding up the columns [Department Disability Worksheet], determining the Category I, that it came out to a total of four, divided by four, which gave us one. Which essentially is no impairment; that's what it comes down to.

Rutberg Dep. at 28. The Department has provided a worksheet for disability rating. Dr Rutberg described it as "a very logical worksheet that you fill out, add up the columns, and then divide, and it does give you the appropriate cagegory" Rutberg Dep at 28 The witness compared the worksheet with WAC 296-20-280 and found them consistent with each other.

Dr Rutberg opined Mr Young could work without restrictions He said the claimant's pain reports do not have an organic basis and diagnostic studies have not indicated any physical problem.

Dr John R Logan, a chiropractor, examined Mr Young on June 26, 2008, in a panel format with Dr Rutberg. Treatment records did not indicate anything outstanding; Claimant was given chiropractic treatment, physical therapy, and massage therapy Mr Young said those treatments did not significantly change his symptoms

From the examination, Dr. Logan noted Mr. Young has mild scapular winging and some hypertonicity to his mid to low thoracic muscle group, particularly on the right The witness said the findings are not indicative of injury and are often seen in those who do some form of manual labor. Range of motion testing results was within the range of normal

> To abbreviate this a little bit, there were really no significant positive tests elicited specific to the lower back, and note that this is - - this was administratively accepted, I believe, for lumbar strain And that was through a rather complement of orthopedic signs and tests performed both sitting, lying on his back, and on his stomach, none of which provoked any significant either provocation of symptoms or increase in symptoms
>
> . .
>
> All testing done was essentially negative

Logan Dep. at 19. Dr Logan said at the time of his examination Mr Young was still getting chiropractic treatment on a twice per week basis.

As part of his examination, Dr Logan reviewed lumbar and thoracic MRI films. He said the radiologist's report was consistent with the imaging reviewed There was a small protrusion at L5-S1 without significant canal or nerve opening obstruction Speaking to the significance of those findings, Dr Logan said

> Well, it's all a matter of correlating the testing that we do, the facts that we just went over, and comparing that to the patient's symptomatic presentation and also to the diagnostic studies, in this case, the MRI studies The significance of the L5-S1 level citing a small disc protrusion, we would not -- we would of course be concerned as to whether that's provoking any symptoms, either local or radicular, into the leg. But the testing was -- the testing across the board was negative for anything like that. And I note the testing performed by Dr. Rutberg neurologically was entirely within normal limits as well.
>
> So in this case, the findings from the lumbar and thoracic MRI studies were not considered what we call clinically significant.

Logan Dep. at 21 A post-examination EMG and nerve conduction study did not show significant disc involvement sufficient to produce lower extremity radiculopathy.

Dr Logan diagnosed Mr. Young as having neck and lumbo-sacral sprains along with dislocation of the sacrum related to the industrial injury The witness opined each of those conditions was resolved, that Mr Young had reached maximum medical improvement, and further treatment was not warranted. He said, "We didn't feel that there were any further measures that would have an net effect on the symptomatic picture and there were really not enough objective findings to justify recommending further treatment or evaluation." Logan Dep at 24. Dr. Logan said further chiropractic would not be curative.

Dr Logan does disability ratings, and did so for his examination of Mr Young He used the Department disability worksheet; it has four columns, each of which is scored with an average then

obtained Dr. Logan described the first column as relating to weakness, atrophy, or EMG abnormalities, as there were no examination findings relating to those features, a score of 1 was recorded. The remaining columns reflect the amount of reflex loss (no loss identified and scored 1), imaging abnormalities consistent with clinical findings (scored 1), and sensory loss, decreased range of motion, guarding, and positive straight-leg raise testing (none found, score of 1 entered). The total score, 4, divided by the number of columns, 4, gives an average score of 1 Dr. Logan said the score means Category 1 in terms of the Mr Young's disability rating He said, overall, the claimant is Category 1.

Dr. Logan said Mr Young does not have any restrictions affecting his work and there was no reason to think the claimant could not resume working. He also said the scapular winging and hypertonicity were unrelated to the industrial injury.

DECISION

The claimant, as the appealing party, has the burden to prove by preponderance the order under appeal is incorrect. RCW 51 52.050; WAC 263-12-115 Mr Young did not satisfy his burden of proof in this appeal.

Claimant has appealed an order closing his claim, and thereby determining "the totality of the claimant's entitlement to all benefits of whatever form, as of the date of claim closure." *In re Randy Jundul*, BIIA Dec , 98 21118 (1999), at 3. Mr. Young, through this appeal, seeks further medical treatment, time-loss compensation (TLC) benefits, vocational rehabilitation, and alternatively, a permanent partial disability award.

The purpose of the Industrial Insurance Act is to give "sure and certain relief" to injured workers RCW 51 04 010. The worker so injured "shall receive proper and necessary medical and surgical services . . " RCW 51 36.010. Those services must be reflective of accepted standards of good practice and be either curative or rehabilitative. WAC 296-20-01002 Curative means a permanent change that eliminates or lessens the clinical effects of an accepted condition, while rehabilitative means the worker can regain functional activity. WAC 296-20-01002. The opinions of attending physicians are to be given special consideration. *Hamilton v. Department of Labor & Indus* , 111 Wn 2d 569 (1988). The deference given to the attending physician, Dr. Sweet in this instance, may be overcome when facts and circumstances show the opinion is incorrect.

Dr. Sweet did not provide an opinion about whether Mr Young's industrial injury condition required further proper and necessary medical treatment. Drs. Rutberg and Logan, however, each unequivocally said the claimant's industrial injury condition had resolved, he had reached maximum

medical improvement, and further treatment was not warranted. As Dr. Logan observed, more chiropractic would not be curative in Mr Young's case I find the claimant's condition, proximately caused by the industrial injury, did not require further proper and necessary medical treatment, as contemplated by RCW 51.36 010.

Mr. Young seeks TLC benefits for the period between September 18, 2008, and December 31, 2008, inclusive. TLC benefits are authorized under RCW 51.32 090 when the injured worker is totally and temporarily disabled and is thereby unable to perform work at any gainful occupation Gainful employment means full-time work *See Herr v Department of Labor & Indus*, 74 Wn App 632, (1994); *Williams v. Virginia Mason Medical Center*, 75 Wn. App 582, (1994) Any analysis of a worker's ability to work must take into account his age, education, work experience, and pre-existing disabling conditions

Dr Sweet was able to testify Mr. Young was medically restricted through February 22, 2008, or about seven months prior to the beginning of the TLC period at issue in this appeal He also opined the claimant would not be able to return to painting. *See* Sweet Dep at 32. This opinion is markedly contrasted with the views of Drs Rutberg and Logan, each of whom said Mr Young did not have any restrictions affecting his ability to work because of the industrial injury. Recall, Dr Sweet did not opine further treatment was indicated here. Drs Rutberg and Logan, however, each testified more treatment, including chiropractic, was not required by the residuals of the claimant's industrial injury. Those witnesses said he had reached medical fixity as of the date of their examinations, June 26, 2008.

Respecting eligibility for TCL benefits, the legal test under Mr Young's circumstances is whether he was unable to work at any gainful employment on a reasonably continuous basis The claimant testified he did not believe he could work at any of the jobs he had thus far. This assertion, absent expert testimony, falls short of the proof standard required of Mr. Young. The claimant, through his evidence, did not show he was unable to work at any occupation during the period between September 18, 2008, and December 31, 2008 I find the residual impairment, proximately caused by the industrial injury, when considered in conjunction with the claimant's age, education, work experience, and pre-existing disabling conditions, did not preclude him from obtaining and performing reasonably continuous, gainful employment in the competitive labor market, during the period between September 18, 2008, and December 31, 2008, inclusive. Mr Young was not a totally and temporarily disabled worker, within the meaning of RCW 51.32.090

The Department's supervisor, or his or her designee, has the discretion whether or not to provide vocational rehabilitation.

> One of the primary purposes of this title is to enable the injured worker to become employable at gainful employment. To this end, the department or self-insurers shall utilize the services of individuals and organizations, public or private, whose experience, training, and interests in vocational rehabilitation and retraining qualify them to lend expert assistance to the supervisor of industrial insurance in such programs of vocational rehabilitation as may be reasonable to make the worker employable consistent with his or her physical and mental status Where, after evaluation and recommendation by such individuals or organizations and prior to final evaluation of the worker's permanent disability and in the sole opinion of the supervisor or supervisor's designee, whether or not medical treatment has been concluded, vocational rehabilitation is both necessary and likely to enable the injured worker to become employable at gainful employment, **the supervisor or supervisor's designee may, in his or her sole discretion**, pay or, if the employer is a self-insurer, direct the self-insurer to pay the cost as provided in subsection (3) of this section or RCW 51.32 099, as appropriate. An injured worker may not participate in vocational rehabilitation under this section or RCW 51 32 099 if such participation would result in a payment of benefits as described in RCW 51 32 240(5), and any benefits so paid shall be recovered according to the terms of that section.

RCW 51.32.095(1) (Emphasis added.) Claimant's burden of proof for the issue of entitlement to vocational services follows the abuse of discretion standard

> It is thus implicit that, in reviewing a discretionary administrative decision to determine whether or not it was arbitrary or capricious and thus an abuse of discretion, the appellate body must review the same, or at least substantially similar, factual information as was before the administrative decision-maker.

In re Mary Spencer, BIIA Dec , 90 0264 (1991), at 6

Mr Young did not present any evidence relating to entitlement to vocational services Any factual information which may have been used by an administrative decision-maker respecting vocational services was absent from the record in this appeal The claimant did not demonstrate the Department was obligated to provide him with vocation services in this appeal

The remaining appeal issue is what degree of permanent, partial disability best describes Mr. Young's residual impairment that was proximately caused by the industrial injury? Claimant's expert witness, Dr. Sweet, said he always declines to give impairment ratings when asked. He did not provide a specific disability rating for Mr. Young, instead, Claimant's counsel showed him a copy of WAC 296-20-280 and asked the witness to underline the parts he agreed with. The

annotated version of the code provision is Exhibit 3 Dr Sweet underlined parts of Category 2, 3, and 4; however, he did not testify to a particular rating of Mr. Young's disability

Drs. Rutberg and Logan used the Department disability rating worksheet, applied the facts about Mr. Young's condition, and determined he was a Category 1, within the meaning of WAC 296-20-280. Category 1 is "No objective clinical findings Subjective complaints and/or sensory losses may be present or absent" WAC 296-20-280(1) The physicians who examined Mr Young described their examinations as essentially normal, objective indicia of a residual condition or symptom was absent. It is worth noting the impairment categories greater than 1 each require objective clinical findings. Drs Rutberg and Logan each credibly explained their reasons for assessing Mr Young as a Category 1 for permanent dorso-lumbar and lumbosacral impairments I find the claimant's residual impairment, proximately caused by the industrial injury, is best described as Category 1, as delineated in WAC 296-20-280.

The claimant has not presented sufficient proof to prevail on any of the issues raised on appeal The Department order dated December 31, 2008, is necessarily affirmed.

FINDINGS OF FACT

1. On August 28, 2007, the Department of Labor and Industries received an Application for Benefits alleging a June 27, 2007 industrial injury to Derek Young, while in the course of his employment The claim was accepted and benefits were provided On September 19, 2008, the Department issued an order which ended time-loss compensation benefits as paid through September 17, 2008, and closed the claim without provision for treatment or a permanent partial disability award. On November 17, 2008, the claimant filed a Notice of Appeal to the September 19, 2008 order with the Board of Industrial Insurance Appeals. On November 19, 2008, the Department reassumed jurisdiction over the September 19, 2008 order, and on December 31, 2008, it issued an order affirming the September 19, 2008 order. On January 12, 2009, the claimant filed a Notice of Appeal to the December 31, 2008 order with the Board. On January 20, 2009, the Board issued an Order Granting Appeal, assigned it Docket No. 09 10315, and agreed to conduct a hearing on the appeal

2 On June 27, 2007, Derek Young sustained an industrial injury, while in the course of his employment as a painter for CMS Painting, Inc , when a vehicle he was riding in was stuck from behind by another motor vehicle, causing an injury to the claimant's back

3 Derek Young's industrial injury to his back was diagnosed as strains.

4. As of June 26, 2008, Derek Young's condition, proximately caused by his industrial injury, had reached maximum medical improvement, and he did not require further proper and necessary medical treatment

5. During the period between September 18, 2008, and December 31, 2008, inclusive, the residual impairment, proximately caused by the industrial injury, did not preclude Derek Young from obtaining and performing reasonably continuous, gainful employment in the competitive labor market, when considered in conjunction with his age, education, work experience, and pre-existing disabling conditions

6 The evidence presented by Derek Young did not describe the facts the Department's supervisor, or his or her designee, used to determine the Department would not provide him with vocational rehabilitation.

7 Derek Young did not show, through his evidence, that the Department's supervisor, or his or her designee, committed an abuse of discretion when the Department did not provide him with vocational rehabilitation.

8. As of December 31, 2008, Derek Young's residual impairment, proximately caused by his industrial injury, is best described as Category 1 of WAC 296-20-280 for categories for permanent dorso-lumbar and lumbosacral impairments

CONCLUSIONS OF LAW

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

2 As of June 26, 2008, Derek Young's industrial injury condition did not require further proper and necessary medical treatment, within the meaning of RCW 51.36 010.

3 During the period between September 18, 2008, and December 31, 2008, inclusive, Derek Young was not a totally and temporarily disabled worker, as contemplated by RCW 51.32.090.

4 Derek Young did not prove the Department's supervisor, or his or her designee, abused his or her discretion when the Department did not provide vocational rehabilitation, as provided by RCW 51 32 095.

5. Derek Young's residual impairment, proximately caused by his industrial injury, is best described as Category 1 for categories for permanent dorso-lumbar and lumbosacral impairments, per RCW 51.32 080 and WAC 296-20-280.

6. The Department order dated December 31, 2008, is correct and is affirmed

DATED FEB 16 2011.

WAYNE B. LUCIA
Industrial Appeals Judge
Board of Industrial Insurance Appeals

RTIFICATE OF SERVICE BY M. ,

I certify that on this day I served the attached Order to the parties of this proceeding and their attorneys or authorized representatives, as listed below. A true copy thereof was delivered to Consolidated Mail Services for placement in the United States Postal Service, postage prepaid.

CL1

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AG1

LESLIE V JOHNSON, AAG
OFFICE OF THE ATTORNEY GENERAL
PO BOX 40121
OLYMPIA, WA 98504-0121

Dated at Olympia, Washington 2/16/2011
BOARD OF INDUSTRIAL INSURANCE APPEALS

By: _____
J. SCOTT TIMMONS
Executive Secretary

In re: DEREK YOUNG
Docket No 09 10315

26

The Honorable Thomas J. Felnagle
Hearing Date: 2/10/2012
Hearing Time: 9:00 AM
Hearing Location: Dept 15

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

DEREK J. YOUNG,

Petitioner,

v.

DEPARTMENT OF LABOR AND INDUSTRIES AND CMS PAINTING, INC.,

Respondents.

NO. 11-2-08147-3

~~[PROPOSED]~~ 407
ORDER DENYING PETITIONER'S MOTION FOR SUMMARY JUDGMENT

This matter came on regularly before the Honorable Thomas J. Felnagle, a judge of the above entitled court, for hearing on December 2, 2011 on the Petitioner's (Mr. Young's) motion for summary judgment and motion to strike the Department's response brief.

I. RELIEF REQUESTED

1.1 Relief Requested By Mr. Young.

Mr. Young asked the court to reverse the Board of Industrial Insurance Appeals (Board) decisions which excluded the deposition testimony and medical report of Dr. Patrick Bays and the deposition testimony of Dawn Jones, Occupational Therapist (OTLA). The Board excluded these depositions from consideration because they were taken in a third party personal injury lawsuit associated with the car accident which was also the basis of Mr. Young's industrial insurance claim. The Department was not given notice or an opportunity to be present for the depositions. Mr. Young argued that they were admissible under CR 32 because the Department was a successor in interest to the third party tortfeasor, and zealously represented by the cross-examination of the third party's attorney. Mr. Young also argued that the rule of liberal interpretation of the Industrial Insurance Act in favor of an injured worker applied not just to the terms of the Act, but also to all of the Court and Evidence Rules applied to proceedings under

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the Act, and that a liberal interpretation of CR 32, and of the Rules of Evidence, would mandate inclusion of the depositions in the Board's record and decision. Mr. Young moved to have Dr. Bay's examination report admitted, arguing that the Department's witness, Dr. Rutberg, testified on cross-examination that he had read the report.

Mr. Young also moved to have the Department's response brief stricken, and to have his motion for summary judgment granted as unopposed, based on the Department's citation to the Certified Appeal Board Record submitted to the court by the Board of Industrial Insurance Appeals, rather than to a copy of that record attached to a declaration by counsel of record for the Department. This motion/argument was abandoned by Mr. Young at hearing on the motion for summary judgment.

II. HEARING

The court heard the oral argument of counsel for Mr. Young, Ken Gorton of Ron Meyers & Associates PLLC, and counsel for the Department, Leslie V. Johnson, Senior Counsel. The court considered the following material:

2.1 Mr. Young's motion for summary judgment with attached medical examination report of Dr. Patrick Bays, deposition transcript of Dr. Bays, examination report of Dawn Jones, OTLA; deposition transcript of Ms. Jones, and copy of the Board's October 12, 2010 Interlocutory Order Granting the Department's Motion to Exclude and Denying Claimant's Motion to Recuse.

2.2 The Department's response to Mr. Young's motion for summary and those portions of the Certified Appeal Board Record referenced in the Department's response;

2.3 The court also had available for its review the complete record of proceedings that is the subject of this appeal, made at the Board of Industrial Insurance Appeals under BIIA Docket No. 09 10315, and certified to Pierce County Superior Court May 11, 2011.

2.4 Mr. Young's reply brief, and motion to strike the Department's response brief.

III. COURT'S DECISION

Based on the argument of counsel and the evidence presented, the Court determines:

3.1 The Court has jurisdiction over the parties to, and the subject matter of, Mr. Young's appeal.

3.2 There are no material facts in dispute regarding whether the reports and deposition transcripts of Dr. Bays and Dawn Jones OTLR are admissible in the proceedings

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before the Board of Industrial Insurance Appeals. The Department is entitled to judgment as a matter of law affirming the Board's decision that the reports and deposition transcripts are excluded as inadmissible in the Board proceedings.

3.3 The general rule that the Industrial Insurance Act should be liberally construed in favor of the worker does not wash away all other parties' rights under the Act, or under the Rules of the Court. The Department is not a successor in interest to the third party tortfeasor in the associated personal injury lawsuit. The third party attorney did not represent the Department in the depositions of Dr. Bays and Dawn Jones. The Department was entitled to notice and an opportunity to appear and cross-examine Dr. Bays and Ms. Jones. Mr. Young could have called these witnesses in the Board proceedings to cure the deficiency of notice and opportunity to appear, but chose not to, CR 32 does not permit the use of these depositions against the Department in the Board proceedings.

3.4 No adequate foundation was laid for Dr. Rutberg's reliance on Dr. Bay's examination report in the formation of Dr. Rutberg's opinions. Dr. Bays' examination report was properly excluded from evidence at the Board.

3.5 There was no foundation laid for the admission of Dawn Jones' examination, absent admission of her deposition.

IV. ORDER

Based on the foregoing determination, IT IS ORDERED:

4.1 Mr. Young's motion for summary judgment is denied. The Board's October 12, 2010 Interlocutory Order Granting the Department's Motion to Exclude the deposition transcripts of Dr. Bays and Dawn Thomas is affirmed.

4.2 Dawn Jones' and Dr. Bays' examination reports are also excluded from the record as inadmissible hearsay.

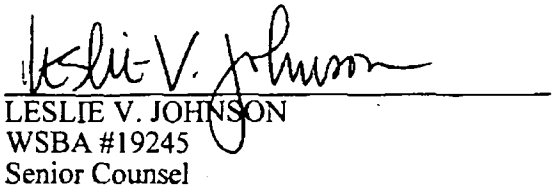
DATED this 10th day of February, 2012.

FILED
DEPT. 15
IN OPEN COURT
FEB 10 2012
BY DEPUTY

THOMAS J. FELNAGLE, JUDGE

JUDGE THOMAS FELNAGLE
DEPT. 15

Presented by:
ROBERT M. MCKENNA
Attorney General



LESLIE V. JOHNSON
WSBA #19245
Senior Counsel

Copy received,
approved as to form and
notice of presentation waived:

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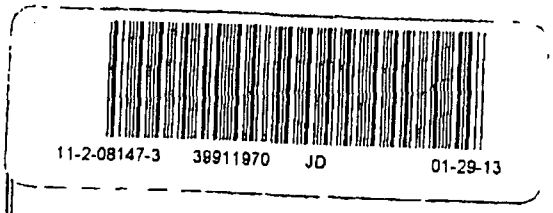

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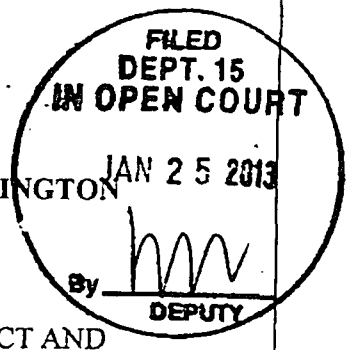
The Honorable Thomas Felnagle
Hearing Date: 1/25/2013
Hearing Time: 9:00 a.m.
Hearing Location: Dept 15



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

DEREK J. YOUNG,

Plaintiff,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON,

Defendant.

NO. 11-2-08147-3

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT

JUDGMENT SUMMARY (RCW 4.64.030)

1. Judgment Creditor:	State of Washington Department of Labor and Industries
2. Judgment Debtor:	Derek J. Young
3. Principal Amount of Judgment:	- 0 -
4. Interest to Date of Judgment:	- 0 -
5. Statutory Attorney Fees:	$200
6. Costs:	$985.25
7. Other Recovery Amounts:	$0

8. Principal Judgment Amount shall bear interest at 0% per annum.

9. Attorney Fees, Costs and Other Recovery Amounts shall bear Interest at 12% per annum.

10. Attorney for Judgment Creditor:	Attorney General of Washington per Leslie V. Johnson, Senior Counsel
11. Attorney for Judgment Debtor:	Ron Meyers and Associates

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This matter came on regularly before the Honorable Thomas J. Felnagle, in open court on the 6th day of July, 2012. The Plaintiff, Derek J. Young, was represented by his counsel, Ron Myers and Associates, per Tim Friedman, Attorney; the Defendant, Department of Labor and Industries (Department), was represented by its counsel, Robert M. McKenna, Attorney General, per Leslie V. Johnson, Senior Counsel. The court, having considered the evidence, presented in the form of the Certified Appeal Board Record, having read all memoranda submitted, having heard the arguments of counsel and being fully advised as to the premises, now makes enters this Judgment and the Findings of Fact, Conclusions of Law and Order.

I. FINDINGS OF FACT

1.1 This matter comes before the court on a timely appeal of a March 24, 2011 Order of the Board of Industrial Insurance Appeals (Board)

1.2 This court has previously ruled on the admissibility of depositions taken in a third party matter which Mr. Young attempted to admit to the Board record in this workers compensation appeal. The Board's decision that the reports and deposition transcripts of Patrick Bays, M.D. and Dawn Jones, OTLR are excluded from the Board's record is affirmed. Mr. Young did not argue in this court that the second deposition of Dr. Jay Sweet, taken May 13, 2010 should be admitted, and it is not.

1.3 The record reflects that the Board gave appropriate consideration to the testimony of Mr. Young's attending physician, Dr. Sweet. Dr. Sweet testified that he did not usually do disability ratings for his patients, did not offer a specific rating of Mr. Young's permanent partial disability, and stated that he had no further curative treatment to recommend for Mr. Young. His testimony ~~regarding~~ findings of spasm and reduced range of motion did not provide a preponderance of evidence on which to reverse the Board's decision. 287 ~~and~~ including but not limited to

1.4 The preponderance of the evidence supports the Board of Industrial Insurance Appeals' Findings of Fact that:

A. As of June 26, 2008, Derek Young's condition, proximately caused by the industrial injury had reached maximum medical improvement, and he did not require further proper and necessary medical treatment.

B. During the period between September 18, 2008 and December 31, 2008, inclusive, the residual impairment proximately caused by the industrial injury, did not preclude Derek Young from obtaining and performing reasonably continuous, gainful employment in the competitive labor market, when considered in conjunction with his age, education, work experience and pre-existing disabling conditions.

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C. The evidence presented by Derek Young did not describe the facts that the Department's Supervisor, or his or her designee, used to determine the Department would not provide him with vocational rehabilitation.

D. Derek Young did not show, through his evidence, that the Department's supervisor, or his or her designee, committed an abuse of discretion when the Department did not provide him with vocational rehabilitation.

E. As of December 31, 2008, Derek Young's residual impairment, proximately caused by his industrial injury, is best described as Category 1 of WAC 296-20-280 for categories for permanent dorso-lumbar and lumbosacral impairments.

Based upon the foregoing Findings of Fact, the court now makes the following:

II. CONCLUSIONS OF LAW

2.1 This court has jurisdiction over the subject matter and the parties to this appeal.

2.2 As of June 26, 2008, Derek Young's industrial injury condition did not require further proper and necessary medical treatment, within the meaning of RCW 51.36.010.

2.3 During the period between September 18, 2008 and December 31, 2008, inclusive, Derek Young was not a totally and temporarily disabled worker, as contemplated by RCW 51.32.090.

2.4 Based on the record, the Department's supervisor, or his or her designee, did not abuse his or her discretion when the Department did not provide vocational rehabilitation, as provided by RCW 51.32.095.

2.5 Derek Young's residual impairment, proximately caused by his industrial injury, is best described as Category 1 for categories for permanent dorso-lumbar and lumbosacral impairments, per RCW 51.32.080 and WAC 296-20-280.

2.6 The Board order dated March 24, 2011, which affirmed the Department Order dated December 31, 2008, is correct and should be affirmed.

2.7 As the prevailing party, the Department is entitled to statutory attorneys' fees, costs and post judgment interest pursuant to RCW 4.84.010, RCW 4.84.030 and RCW 51.52.140.

Based on the foregoing Findings of Fact and Conclusions of Law the Court enters judgment as follows:

III. JUDGMENT

Based upon the Findings of Fact and the Conclusions of Law, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the March 21, 2011 Board Order Denying Petition for Review and adopting the Proposed Decision and Order of February 16, 2011,

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which affirmed the Department Order dated December 31, 2008, which in turn affirmed a Department Order dated September 19, 2008, which closed Mr. Young's claim effective September 19, 2008, time loss as paid, with no further medical treatment and no permanent partial disability award is correct and the same is hereby affirmed. The Department is entitled to statutory attorney fees and costs, and post judgment interest as provided by RCW 4.84.010, 4.84.030 and RCW 51.52.140.

DATED this 25th day of January, 2013.

THOMAS J. FELNAGLE
Judge

Presented by:
ROBERT FERGUSON
Attorney General

LESLIE V. JOHNSON, WSBA #19245
Senior Counsel
Attorneys for Defendant

FILED
DEPT. 15
IN OPEN COURT
JAN 25 2013
By DEPUTY

Copy received,
Approved as to form

Attorney for Plaintiff 37983