ORIGINAL

NO. 44508-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

CAROLYN GIGER (ROBERT E. GIGER, DEC'D),

Appellant,

v.

WASHINGTON STATE
DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

BRIEF OF RESPONDENT DEPARTMENT OF LABOR AND INDUSTRIES

ROBERT W. FERGUSON
Attorney General

KATY DIXON
Assistant Attorney General
WSBA No. 43469
Office Id. No. 91022
Labor and Industries Division
7141 Cleanwater Drive SW
PO Box 40121
Olympia, WA 98504-0121
(360) 586-7767

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I. INTRODUCTION

This is a case arising under the Industrial Insurance Act, Title 51. Carolyn Giger, the widow of worker Robert Giger, seeks disability benefits upon the reopening of his claim. The Department determined that he was able to work at the time that his claim was most recently closed. It is undisputed that he was not looking for work at the time that his claim was closed, and that he did not look for work at any time after his claim was closed. Under well-settled case law, a worker who is able to work at the time that his or her claim is closed, and who makes no attempt to return to work subsequent to claim closure, is ineligible for wage replacement benefits even if the worker's condition subsequently worsens such that the worker is incapable of employment. *See Kaiser Aluminum Chem. Corp. v. Overdorff*, 57 Wn. App 291, 295, 788 P.2d 8 (1990); *Weyerhaeuser Co. v. Farr*, 70 Wn. App. 759, 765, 855 P.2d 711 (1993); *Energy Nw. v. Hartje*, 148 Wn. App. 454, 466, 199 P.3d 1043 (2009). Giger fails to provide any sound basis to distinguish or reverse that legal authority, and therefore, the Department, the Board of Industrial Insurance Appeals (Board), and the superior court each properly determined that Mr. Giger's beneficiary is ineligible for further disability benefits, and this court should affirm.

II. ISSUE

Under *Overdorff*, *Farr*, and *Hartje*, did Giger voluntarily retire and remove himself from the work force such that he is ineligible for further wage replacement benefits as a matter of law, when the Department issued a closing order that determined that Giger was capable of employment at that time and which was upheld on appeal, and when it is undisputed that Giger was not working at the time his claim was closed and that he made no attempt to return to work at any time after his claim was closed?

III. STATEMENT OF THE CASE

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

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

After Mr. Giger stopped working at the Department of Corrections, he continued to receive medical treatment for his back. BR Berselli at 14-16. Mr. Giger's attending physician released Mr. Giger to full-time work with restrictions as of October 1990. BR Berselli at 18. Connie Stewart, the vocational counselor assigned to Mr. Giger's claim, testified that as of January 3, 1989, Mr. Giger was capable of obtaining and performing reasonably continuous gainful employment based on his transferable skills in management and in the field of corrections. BR Stewart at 15-20. The Department granted Mr. Giger a permanent partial disability award and closed his claim on November 8, 1990. BR at 68.

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

Mr. Giger testified that he did not make any attempt to find another job after he stopped working for the Department of Corrections in 1988. BR Giger at 59. Mr. Giger testified that he and his wife took up traveling in recreational vehicles (RVs) as a hobby in the early 1990s. BR Giger at 72. Their practice was to take the RV south every year for three or four months and live in Arizona. BR Giger at 75-76. Mr. Giger and his wife moved from Vancouver, Washington to Leavenworth, Washington in approximately 2007 in order to be nearer to their children and grandchildren. BR Giger at 76.

Mr. Giger applied to reopen his claim in February 1994 because his injury-related conditions had worsened. BR at 68. The Department reopened his claim for authorized medical treatment. BR at 69. The Department closed the claim in June 2010, and Mr. Giger appealed that order, which is the source of the current appeal. BR at 71. On appeal Mr. Giger sought temporary and total disability benefits from February, 14, 1994, through June 9, 2010, and total and permanent disability benefits thereafter. BR at 97.

After taking testimony, the industrial appeals judge reversed the Department's June 2010 closing order, concluding that Mr. Giger was entitled to benefits because he was unable to obtain regular gainful employment due to his industrial injury. BR at 73-74. The Department

petitioned the three-member Board for review of this decision. BR at 20-38. The Board reversed the proposed decision, concluding that Mr. Giger had voluntarily retired as a matter of law, and therefore, he was not entitled to any additional disability benefits, because he withdrew himself from the work force and made no effort to return to it, despite having had the capacity to do so. BR at 6-7.

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

IV. SUMMARY OF THE ARGUMENT

Mr. Giger's claim was closed in 1990, with a finding that he was able to work at that time. His claim reopened in 1994, and his widow, Carolyn Giger (Giger), seeks wage replacement benefits from the time his claim was reopened and onwards, including an award of permanent and total disability benefits. However, the Department, the Board, and the superior court each properly concluded that Mr. Giger voluntarily retired and removed himself from the work force and that, therefore, Giger is ineligible for any additional wage replacement benefits.

"Voluntary retirement" is a legal term of art in workers' compensation law. In the workers' compensation context, voluntary retirement does not simply refer to the decision of a worker to cease working for the employer of injury. Rather, as *Overdorff*, *Farr*, and *Hartje* explain, under the Industrial Insurance Act, a voluntarily retired worker is one who voluntarily detaches himself or herself from the work force and who ceases to engage in any form of employment related activity despite having the ability to work in some fashion at that time. *See Overdorff*, 57 Wn. App. at 295; *Farr*, 70 Wn. App at 765; *Hartje* 148 Wn. App. at 466.

Furthermore, Mr. Giger never attempted to return to work at any time on or after the date that his claim was closed, and therefore, he never terminated his status as a voluntarily retired worker. If a worker who voluntarily retires never attempts to return to work following his or her voluntary retirement, then the worker is ineligible for any further disability benefits as a matter of law, even if the worker's condition subsequently worsens such that the claimant could not work even if he or she wished to do so. This is because, once a worker has removed himself or herself from the workforce, the worker has no wages to replace, and therefore, is ineligible for wage replacement benefits whether he or she has the capacity to work or not.

There are only three facts that are material to Mr. Giger's appeal, and none of them is disputed. First, the Department closed Mr. Giger's claim in 1990. In that order, which was upheld on appeal, the Department found that Mr. Giger was not permanently and totally disabled, and was thus capable of working. Second, Mr. Giger was not attached to the work force at a time when he was capable of working in 1990. Third, Mr. Giger made no attempt to return to the work force at any time on or after the date his claim was closed in 1990. Based on this undisputed evidence, a court could not, as a matter of law, reach any conclusion other than that Mr. Giger was voluntarily retired as of 1990.

Giger argues that Mr. Giger did not voluntarily retire because it was not "reasonable" for him to look for any further employment as of the date that his claim was closed. However, under the case law, the issue is whether the worker was *capable* of employment at the time that he or she ceased engaging in any form of employment-related activity, not whether it was *reasonable* for the worker to decide to withdraw from the work force.

Giger also argues, in effect, that Mr. Giger should not be held to have voluntarily retired because, at some point after his claim was closed, his condition worsened and he became unable to work. However, the case law establishes that a worker who voluntarily retires is not eligible for

further disability benefits *even if* the worker's condition subsequently worsens and the worker becomes incapable of employment.

As Giger fails to demonstrate that the Board, the Department, and the superior court erred when they decided that Mr. Giger voluntarily retired, the Department asks that this court affirm.

V. STANDARD OF REVIEW

The first step in seeking review of the Department's decision to deny benefits is an appeal to the Board. RCW 51.52.060. As the appealing party, Giger bore the burden of proof to prove by a preponderance of the evidence that the Department's order was incorrect. *See* RCW 51.52.050; *Guiles v. Dep't of Labor & Indus.*, 13 Wn.2d 605, 610, 126 P.2d 195 (1942). One seeking benefits under the Industrial Insurance Act "must prove his claim by competent evidence." *Lightle v. Dep't of Labor & Indus.*, 68 Wn.2d 507, 510, 413 P.2d 814 (1966).

Decisions of the Board may be appealed to superior court. RCW 51.52.110. The superior court reviews the Board's decisions de novo, but without any evidence or testimony other than that included in the Board's record. RCW 51.52.115; *Grimes v. Lakeside Indus.*, 78 Wn. App. 554, 560, 897 P.2d 431 (1995). On review to the superior court, the Board's decision is prima facie correct and the burden of proof is on

the party challenging the decision. RCW 51.52.115; *McClelland v. ITT Rayonier, Inc.*, 65 Wn. App. 386, 390, 828 P.2d 1138 (1992).

The Court of Appeals reviews the superior court's decision in a workers' compensation case under the ordinary standard of civil review. RCW 51.52.140 ("Appeal shall lie from the judgment of the superior court as in other civil cases."); *McClelland*, 65 Wn. App. at 390. Issues of law are reviewed de novo. RCW 51.52.115; *Romo v. Dep't of Labor & Indus.*, 92 Wn. App. 348, 353, 962 P.2d 844 (1998). A reviewing court may substitute its judgment for that of the Department and the Board, but great weight should be afforded to those agencies' interpretation of the Industrial Insurance Act. *Dep't of Labor & Indus. v. Allen*, 100 Wn. App. 526, 530, 997 P.2d 977 (2000); *Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 138, 814 P.2d 629 (1991).

On review of a summary judgment order, the appellate court's inquiry is the same as the superior court's. *Romo*, 92 Wn. App. at 353. Summary judgment is appropriate when no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Romo*, 92 Wn. App. at 353-54. A motion for summary judgment should be granted only if, from all the evidence, reasonable persons could reach but one conclusion. *McClelland*, 65 Wn. App. at 390.

VI. ARGUMENT

A. The Industrial Insurance Act Bars Workers Who Have Voluntarily Retired From Receiving Wage Replacement Benefits

The superior court concluded that Mr. Giger was voluntarily retired at all times relevant to this appeal, and that he was, therefore, ineligible for further wage replacement benefits. CP at 61-64. Based on the undisputed facts in this case, this conclusion was correct under established case law. *See Overdorff*, 57 Wn. App. at 295; *Farr*, 70 Wn. App. at 763-64; *Hartje*, 148 Wn. App. at 466. Because Mr. Giger's claim was closed with an award of permanent partial disability, which is an implicit finding that he was able to work, and because he was not working as of the date that his claim was closed and he never made an attempt to return to work, he was voluntarily retired under the terms of the Industrial Insurance Act.

1. Overview Of Disability Benefit Statutes

In order to put the issues raised by this appeal in the proper perspective, it is helpful to briefly review the forms of disability benefits that are available under the Industrial Insurance Act.

Temporary total disability benefits, also referred to as time-loss compensation, are wage replacement benefits provided to injured workers who are unable to work for a finite period of time due to the residuals of

an industrial injury. RCW 51.32.090; *Lightle*, 68 Wn.2d at 510. The purpose of time-loss compensation is to provide injured workers temporary financial support until they are able to rejoin the work force. *Overdorff*, 57 Wn. App. at 296.

The Industrial Insurance Act contemplates that a worker who is temporarily totally disabled will either recover the capacity to work or reach a static, impaired condition. *See Franks v. Dep't of Labor & Indus.*, 35 Wn.2d 763, 766, 215 P.2d 416 (1950). When a worker's condition becomes fixed, the worker's claim is closed either with an award of permanent total disability, or an award of permanent partial disability, or, if the worker has neither form of permanent impairment, with no award. *See Hubbard v. Dep't of Labor & Indus.*, 140 Wn.2d 35, 37 n.1, 992 P.2d 1002 (2000).

Permanent *total* disability benefits, also known as pension benefits, are payable to workers who are determined to be permanently incapable of obtaining and performing reasonably continuous gainful employment as the result of an industrial injury. RCW 51.08.160; *Young v. Dep't of Labor & Indus.*, 81 Wn. App. 123, 130-131, 913 P.2d 402 (1996). Permanent *partial* disability benefits are paid to workers who have suffered a permanent loss of function as a result of an injury, but who are nonetheless capable of engaging in some form of employment. *See*

Williams v. Virginia Mason Med. Ctr., 75 Wn. App. 582, 586-87, 880 P.2d 539 (1994).

Both temporary total disability benefits and permanent total disability benefits are wage replacement benefits. *See Williams*, 75 Wn. App. at 586-87; *See also Overdorff*, 57 Wn. App. at 296. Permanent partial disability benefits, however, are not wage replacement benefits. *See Williams*, 75 Wn. App. at 586-87.

Both RCW 51.32.090, the statute governing temporary total disability benefits, and RCW 51.32.060, the statute governing permanent total disability benefits, expressly provide that a worker who voluntarily retires and withdraws from the work force is ineligible for those forms of benefits. *See also* WAC 296-14-100. However, those provisions were added to those statutes in 1986, and Mr. Giger's industrial injury occurred in 1985. Therefore, those statutory provisions are not directly applicable to his appeal. *Overdorff*, 57 Wn. App. at 294; *see also Ashenbrenner v. Dep't of Labor and Indus.*, 62 Wn.2d 22, 27, 380 P.2d 730 (1963) (observing that, in workers' compensation actions, the law in effect at the time of the injury applies).

Nevertheless, the courts have held that, even for claims arising from injuries prior to 1986, the Industrial Insurance Act bars workers who

have voluntarily retired from receiving wage replacement benefits. *Overdorff*, 57 Wn. App. at 296-97; *Farr*, 70 Wn. App. at 763.

2. Under *Farr*, *Overdorff*, And *Hartje*, A Worker Who Withdraws From The Work Force And Who Makes No Attempt To Find Employment Voluntarily Retires And Becomes Ineligible For Further Wage Replacement Benefits

Under *Farr*, *Overdorff*, and *Hartje*, a worker who voluntarily retires is ineligible for further wage replacement benefits. *See Overdorff*, 57 Wn. App. at 296-97; *Farr*, 70 Wn. App. at 763; *Hartje*, 148 Wn. App. at 466. Because Mr. Giger's case is indistinguishable from those cases, Giger may not receive the relief she seeks in this appeal.

In *Overdorff*, the claimant suffered a hernia as a result of an industrial injury. *Overdorff*, 57 Wn. App. at 292. The industrial injury occurred on February 2, 1983, but Overdorff continued to work until he quit his position with his employer of injury on February 28, 1983, taking advantage of an early retirement program offered by his employer. *Id.* at 292 n.1. After that date, Overdorff made no further attempts at working, despite being capable of doing so. *Id.* at 296. He received treatment for the injury until 1986, when the Department closed his claim. *Id.* at 292. Overdorff protested the closing order, contending that his condition had worsened at some point after he retired and that he had become unable to work. *Id.* The court concluded that the worker had voluntarily retired

when he removed himself from the work force on February 28, 1983, and that he was, therefore, ineligible for further wage replacement benefits. *Overdorff*, 57 Wn. App. at 295.

In *Farr*, the claimant was working as a tree faller for Weyerhaeuser when he suffered an industrial injury in 1976. *Farr*, 70 Wn. App. at 760. Farr's claim closed in October of 1978 with a permanent partial disability award. *Id.* at 761. Farr took an early retirement and stopped working for Weyerhaeuser in 1980, allegedly at the recommendation of his supervisor. *See id.* Farr neither worked nor looked for work at any time after his claim was closed. *Id.* at 766.

In 1985, Farr filed an aggravation application. *Id.* at 761. The Department reopened his claim and then later closed his claim with an additional award for permanent partial disability. *Id.* Farr appealed the Department order, arguing that he was entitled to pension benefits because he had become permanently totally disabled as a result of an aggravation of his condition following claim closure. *Id.* The *Farr* court held that, under *Overdorff*, the worker had voluntarily retired as a matter of law, and that he was, therefore, ineligible for further wage replacement benefits, even assuming he had become unable to work as of the time that his claim was reopened. *Id.* at 765.

Farr argued that his injury played a role in his decision to retire, and that, therefore, it could not be said that he had voluntarily retired. *Farr*, 70 Wn. App. at 765. However, the *Farr* court rejected this argument, reasoning that the relevant issue is not whether Farr's injury played a role in his decision to stop working for Weyerhaeuser, but whether his injury caused him to remove himself from the general work force, and to cease engaging in any form of employment-related activity. *Farr*, 70 Wn. App. at 765-66. Furthermore, the court ruled that since Farr's claim had been closed with a final order that granted him an award of permanent *partial* disability, it was res judicata that his disability at the time his claim was closed was only partial, not total. *Id.* at 766. Therefore, res judicata established that Farr was capable of at least some form of gainful employment as of the date that his claim was closed. *Id.* Since it was undisputed that Farr had not made any attempt to find any work of any kind at any time after his claim was closed, the inescapable conclusion was that he had voluntarily retired and that he was, therefore, ineligible for either time-loss compensation or pension benefits. *See id.*

The *Overdorff* and *Farr* decisions establish that a worker is voluntarily retired if (1) the worker stopped working at a point in time when he or she was capable of working and (2) the worker made no effort to find employment at any time after he or she withdrew from the work

force. *See Overdorff*, 57 Wn. App. 295-96; *Farr*, 70 Wn. App. at 763-67. The fact that a worker was capable of employment at the time that the worker withdrew from the labor market can be established either through evidence that the claimant was able to work at the time of withdrawal from the labor market, or it can be established under the doctrine of res judicata if the worker's claim was closed with an award of permanent partial disability and that decision has become final and legally binding. *Farr*, 70 Wn. App. at 765-66.

In *Hartje*, the Court of Appeals adhered to the rule in *Overdorff* and *Farr*, holding that the worker's voluntary retirement before the reopening of her claim precluded her from being entitled to any further time-loss compensation as a matter of law. *Hartje*, 148 Wn. App. at 466-68. The case involved application of RCW 51.32.090(8), which precludes time-loss benefits to voluntarily retired workers who are no longer attached to the force. *See id.* at 466.[2] In *Hartje*, the worker suffered a back injury. *Id.* at 459. The Department closed Hartje's claim in June 1997, with an award for permanent partial disability. *Id.* Hartje appealed this decision, but the Board affirmed it, expressly finding that the worker was able to work as of June 1997, and that she was not entitled to

[2] As noted above, this statute does not apply here. However, the reasoning in *Hartje* applies as it was applying general principles of voluntary retirement and res judicata, and relied upon *Overdorff* and *Farr*. *See Hartje*, 148 Wn. App at 466-68.

temporary and total disability benefits for a period from October 2, 1996, through June 24, 1997. *Hartje*, 148 Wn. App. at 459.

Hartje applied to reopen her claim in 1999, and this was granted. *Id.* at 460. The Department directed the self-insured employer to pay Hartje time-loss compensation from 1999 through 2004. *Id.* The employer appealed that decision, and the case ultimately reached the Court of Appeals.

The employer made several arguments to the Court of Appeals in support of its contention that Hartje was ineligible for time-loss compensation, all of which relied, at least in part, on the fact that the Board had affirmed the Department's decision to close Hartje's claim with a permanent partial disability award. *Id.* at 463-69. First, the employer argued that since the Board had ruled that Hartje was not entitled to any further time-loss compensation as of the date that her claim was closed, then the doctrines of res judicata, issue preclusion, and the "law of the case" doctrine each precluded Hartje from receiving any further time-loss compensation as of the date her claim was reopened. *Id.* at 463-66. The court rejected each of these arguments, noting that the fact that the Board affirmed the Department's 1997 closing order merely established that Hartje could work *as of 1997*, but it had no res judicata effect as to

whether Hartje was capable of employment as of 1999 or thereafter. *Hartje*, 148 Wn. App. at 463-66.

Second, the employer argued that Hartje had voluntarily retired, based on the fact that it was res judicata that she could work as of the date her claim was closed in 1997, and based on the fact that it was undisputed that she was not working as of 1997 and that she had made no attempts to find work after 1997. *Hartje*, 148 Wn. App. at 466-69. The court accepted this argument. *Id.* It concluded, as the *Farr* court had, that since Hartje's claim was closed with an award of permanent partial disability, it followed that her impairment was not total as of that date, and therefore, it was res judicata that she was able to work on a gainful basis at that time. *Id.*; *Farr*, 70 Wn. App. at 765-66. The claimant argued that she had not voluntarily retired, contending that she was not capable of employment as of the date her claim was closed. *Hartje*, 148 Wn. App. at 468. However, the *Hartje* court concluded that res judicata precluded her from making this argument. *Id.* at 469.

Like the claimants in *Overdorff*, *Farr*, and *Hartje*, Mr. Giger removed himself from the work force and ceased all employment-related activity at a time when he was capable of obtaining and performing some form of gainful employment. In particular, as in *Farr* and *Hartje*, Mr. Giger's claim was closed through a legally binding order that

effectively determined that he was capable of employment, and, as in those cases, it is undisputed that he did not attempt to return to work at any time after it was determined that he was capable of employment. Since Mr. Giger never attempted to return to work after having voluntarily removed himself from the work force, he is ineligible for benefits as a matter of law regardless of whether his condition subsequently worsened to the point that he became incapable of employment. *See Farr*, 70 Wn. App at 766.

B. Giger Fails To Establish That Mr. Giger Did Not Voluntarily Retire

Giger does not dispute that the Department closed Mr. Giger's claim in 1990 with an order that found him to only be permanently and *partially* disabled, nor does she dispute that that closing order is final and legally binding, nor does she dispute that Mr. Giger did not make any attempt to find employment at any time after the 1990 closing order was issued. *See* Brief of Appellant (Br. Appellant) at 4, 12-13. Giger nonetheless argues that Mr. Giger did not voluntarily retire, but none of her contentions in that regard have merit. *See* Br. Appellant at 12-20.

First, Giger contends that there is an issue of material fact as to whether Mr. Giger's withdrawal from the work force was proximately caused by his industrial injury. Br. Appellant at 12-13. However, as *Farr*

and *Hartje* explain, when there is a final and binding Department order that closed a worker's claim with a permanent and partial disability award, it is res judicata that the worker was capable of working as of the date that the claim was closed. *Farr*, 70 Wn. App at 766; *Hartje*, 148 Wn. App. at 469. Therefore, such a claimant is voluntarily retired if the claimant was not working as of the time that the claim was closed and the claimant made no further attempts to find employment after that point. *Farr*, 70 Wn. App. at 765-66; *Hartje*, 148 Wn. App. at 468. In other words, where there is a final and binding closing order that determined that the claimant was able to work at that time, and where it is undisputed that the claimant was not working at that time and that the worker made no attempt to find employment at any time after that order was issued, there cannot, as a matter of law, be an issue of material fact as to whether the worker voluntarily retired. *Farr*, 70 Wn. App. at 765-66.

In this case, as in *Farr* and *Hartje*, there is a final and binding closing order that determined that the claimant was able to work as of the date of that order, and it is undisputed that Mr. Giger made no attempt to find employment after that order was issued. BR Giger at 59. Therefore, as in those cases, there is not an issue of material fact as to whether Mr. Giger's voluntary retirement was proximately caused by his injury. *See* BR Giger at 59.

Indeed, the claimants in *Farr* and *Hartje* made arguments essentially identical to the one Giger makes here: namely, that they had not voluntarily retired because their injuries proximately caused them to retire. *Farr*, 70 Wn. App. at 765-66; *Hartje*, 148 Wn. App. at 468. *Farr* and *Hartje* rejected those arguments for the reasons noted above, and, as Mr. Giger's case is indistinguishable from theirs, Giger has failed to establish that there is a genuine dispute as to an issue of material fact with regard to the cause of Mr. Giger's removal from the work force. *Farr*, 70 Wn. App. at 765-66; *Hartje*, 148 Wn. App. at 468.

Second, Giger suggests that *Hartje* supports the proposition that if a claimant is capable of employment and elects not to work, but the claimant's decision to abstain from further employment is "reasonable", then the claimant is not voluntarily retired and remains eligible for wage replacement benefits. Br. Appellant at 14-15. Giger claims, further, that it was reasonable for Mr. Giger to not attempt to return to work when his claim was closed in 1990 because he had an appeal pending from that closing order until 1992, and it allegedly would have "negated his appeal" had he attempted to return to work while his appeal was pending. Br. Appellant at 15. This argument fails.

First, nothing in *Hartje* supports Giger's claim that if it is "reasonable" for a claimant to abstain from employment despite being

capable of working, that this precludes a finding that the claimant voluntarily retired. *See Hartje*, 148 Wn. App. at 466-69. On the contrary, *Hartje* shows that the key issue when deciding if a claimant voluntarily retired is whether the claimant was *capable* of working at the time that he or she withdrew from the labor market. *See Hartje*, 148 Wn. App. at 466-69. It in no way suggests that if it was "reasonable" for a claimant to abstain from employment for reasons unrelated to the effects of the industrial injury itself, that this is relevant in any way to the question of whether the worker had voluntarily retired. *See id.*

Second, Giger fails to support her assertion that if Mr. Giger had attempted to return to work in 1992 that this would have somehow "negated" his appeal from the Department's 1990 closing order without any supporting citation to authority. *See* Br. Appellant at 15. The court should therefore not consider this assertion. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). Regardless, Giger's suggestion that returning to work would have "negated" the appeal is incorrect, as it has been held that if a worker returns to work while an appeal from a closing order is pending this does not necessarily preclude the worker from receiving a pension, if the medical evidence establishes that the worker was not reasonably capable of sustaining whatever employment the worker was engaged in while the

appeal was pending. *See Adams v. Dep't of Labor & Indus.*, 128 Wn.2d 224, 230-33, 905 P.2d 1220 (1995). Mr. Giger could have worked while his appeal from the 1990 closing order was pending without negating his appeal. *See id.*

Giger also argues that there is an issue of fact as to whether the residuals of the medical treatment that Mr. Giger received for his industrial injury rendered him incapable of employment at some time between 1992 and 1994. Br. Appellant at 15-16. However, under *Overdorff*, *Farr*, and *Hartje*, a worker who voluntarily retires is ineligible for wage replacement benefits regardless of whether the worker's disability worsens and the worker subsequently becomes incapable of working. *See Farr*, 70 Wn. App. at 766. The Department does not dispute that if the medical treatment that Mr. Giger received for the effects of his injury caused his disability to become aggravated, that the effects of that treatment are considered residuals of the injury itself. However, it is immaterial whether Mr. Giger's condition worsened, subsequent to the date he voluntarily retired, as a *direct* result of the injury or as a result of *treatment he received* for the effects of his injury, as, either way, he is ineligible for benefits because he voluntarily retired and never attempted to return to work after having done so. *See id.*

Similarly, Giger cites *White v. Dep't of Labor & Indus.*, 48 Wn.2d 413, 414, 293 P.2d 764 (1956), in support of her argument that the 1990 Department order that closed Mr. Giger's claim with a finding of permanent partial disability has no res judicata effect with respect to Mr. Giger's ability to work after his claim was reopened in 1994. *See* Br. Appellant at 13-14, 19-20. In *White*, the court ruled that an unappealed Department order closing a claim was res judicata with respect to the worker's injuries at the time of the closure, but had no res judicata effect with respect to any subsequent aggravation of his condition. *White*, 48 Wn.2d at 414-15. This is fully consistent with the reasoning in *Overdorff*, *Farr*, and *Hartje*. The *Farr* and *Hartje* courts held it was res judicata that the workers were able to work when their claims were closed with permanent partial disability. *See Farr*, 70 Wn. App. at 766; *Hartje*, 148 Wn. App. at 467. When a prior determination that a claimant is able to work is coupled with a failure to attempt to return to work afterwards, that worker is voluntarily retired as a matter of law, irrespective of any subsequent aggravation of his condition. *Farr*, 70 Wn. App. at 766.

Next, Giger cites *Department of Labor & Industries v. Shirley* for the proposition that Mr. Giger's industrial injury was at least a proximate cause of his withdrawal from the workforce in 1988, and therefore, it

cannot be said that there is an "intervening cause" of his inability to work. Br. Appellant at 19 (citing *Dep't of Labor & Indus. v. Shirley*, 171 Wn. App. 870, 288 P.3d 390 (2012)). However, the issue in this case is whether Mr. Giger voluntarily retired, not whether there is an intervening cause of his inability to work. *Shirley* contains no discussion of the legal doctrine of voluntary retirement, and it did not purport to overrule *Farr*, *Overdorff*, or *Hartje*. *See Shirley*, 288 P.3d at 397-98. As *Shirley* did not, even in dicta, address the doctrine of voluntary retirement, it provides no support for Giger's arguments here. *See id.*

Giger also appears to suggest that the Department is contending that the fact that Mr. Giger received retirement benefits from his employer precludes him from receiving disability benefits from the Department. *See* Br. Appellant at 17-18. This is incorrect. The Department's argument is based on the doctrine of voluntary retirement, which is well-established under the case law, and which is not based on the theory that it would be a double recovery for a worker to receive both retirement benefits and wage replacement benefits. *See Overdorff*, 57 Wn. App. at 296. Rather, it is based on the rationale that a worker who voluntarily removes himself or herself from the work force is not eligible for wage replacement benefits, because there are no wages to replace. *See id.* Indeed, it is immaterial, when deciding whether a worker voluntarily retired or not, whether the

worker is receiving retirement benefits from his or her former employer. Rather, a worker has voluntarily retired if the worker withdrew from the general work force at a time when the claimant was capable of some form of employment. *See Overdorff*, 57 Wn. App. at 296.

Finally, Giger suggests that the Department should be "estopped" to argue that Mr. Giger voluntarily retired, because the Department paid Mr. Giger some time-loss compensation from 1988 through 1990, but he retired from the Department of Corrections in 1988. Br. Appellant at 18. This argument fails as well.

First, Giger fails to cite any legal authority supporting the proposition that the Department's payment of benefits for one period of time estops it from denying benefits for a subsequent time period. *See* Br. Appellant at 18. The court should therefore not consider this argument. *See Cowiche Canyon Conservancy*, 118 Wn.2d at 809. Here, the Department paid Mr. Giger time-loss compensation for periods of time after April 1988 and up to October 1990, and it then closed his claim in November 1990. BR at 89-90. There is no inconsistency between the Department's finding that Mr. Giger was unable to work from April 1988 through October 1990 and its finding that he was capable of employment as of November 1990.

Second, Giger's argument appears to confuse Mr. Giger's retirement from the Department of Corrections, which occurred in 1988, with his voluntary retirement under the Industrial Insurance Act as defined by *Overdorff*, *Farr*, and *Hartje*, which occurred in 1990. While Mr. Giger elected to retire from the Department of Corrections on March 31, 1988, he was not "voluntarily retired", as defined by *Overdorff*, *Farr*, and *Hartje*, until 1990, because it was not until 1990 that either the Department or a medical expert had determined that Mr. Giger was *capable* of working. BR at 90. A worker has only voluntarily retired if the worker has ceased to work or look for employment at a point in time when the claimant is capable of engaging in some form of employment. *See Farr*, 70 Wn. App at 766. Since, as of March 31, 1988, the Department had not received evidence that Mr. Giger was capable of working, the Department could not have properly concluded that he was voluntarily retired at that time, and therefore, it was proper for the Department to pay Mr. Giger time-loss compensation until it determined that he was capable of gainful employment.

Indeed, like Mr. Giger, the claimant in *Hartje* received time-loss compensation benefits for two months *after* she was terminated from her job and *before* the Department closed her claim with an award for permanent partial disability. *Hartje*, 148 Wn. App. at 468.

Notwithstanding her receipt of time-loss compensation for a period of time after she was terminated by her employer, the Court of Appeals held that Hartje was voluntarily retired as a matter of law. *Id.* at 469.

C. Precluding Workers Who Have Voluntarily Retired From Receiving Wage Replacement Benefits Reflects The Intention Of The Industrial Insurance Act: To Provide Financial Support To Injured Workers Who Want To Work, But Cannot, Due To An Industrial Injury

The ultimate goal of time-loss compensation is to provide injured workers with temporary financial support while they recover from the effects of an industrial injury, and those benefits should last until such time as they are able to return to work, or are found permanently incapable of any gainful employment. *Hartje*, 148 Wn. App. at 469. As the court in *Overdorff* noted, this goal cannot be realized "when a worker voluntarily removes himself from the active labor force and opts, *despite the presence of sufficient physical capacities*, to decline further employment activity." *Overdorrf*, 57 Wn. App. at 296. A worker who has withdrawn from the work force has no expectation of wages. *Id.* As such, that worker lacks the requisite adverse economic impact to warrant the award of time-loss compensation or a pension. *Id.*

Mr. Giger never sought employment of any kind after he left state service in 1988, and, more to the point, he never sought employment of any kind between 1990 (when his claim was closed) and 2010 (when the

Department issued the order that is the source of the current appeal). Instead, he bought an RV and began to travel to Arizona with his wife for the winter. While Mr. Giger was certainly free to make this choice, he removed himself from the labor market by doing so and therefore, he terminated his eligibility for further wage replacement benefits. Under *Overdorff*, *Farr*, and *Hartje*, Mr. Giger is voluntarily retired as a matter of law and is ineligible for either time-loss compensation or pension benefits. There is no dispute of any material fact on this issue, and judgment as a matter in law in favor of the Department was therefore appropriate.

VII. CONCLUSION

For the reasons discussed above, the Department asks that this court affirm the decision of the superior court.

RESPECTFULLY SUBMITTED this 26th day of July, 2013.

ROBERT W. FERGUSON
Attorney General

KATY DIXON
Assistant Attorney General
WSBA No. 43469
Office Id. No. 91022
Labor and Industries Division
7141 Cleanwater Drive SW
PO Box 40121
Olympia, WA 98504
(360) 586-7767

NO. 44508-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

CAROLYN A. GIGER,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

DECLARATION OF SERVICE

ORIGINAL

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I mailed the Department's Brief of Respondent and this Declaration of Service to all parties on record as follows:

Via First Class U.S. Mail, Postage Prepaid, to:

Steven Busick
Busick Hamrick PLLC
PO Box 1385
Vancouver, WA 98666-1385

DATED this 26th day of July, 2013 at Tumwater, WA.

AUTUMN MARSHALL
Legal Assistant 2
(360) 586-7737