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SUPREME COURT OF THE STATE OF WASHINGTON

MARK W. OSBORN,

Petitioner,

v.

DEPARTMENT OF LABOR & INDUSTRIES OF THE STATE OF
WASHINGTON,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Substantial evidence supports finding that Mark Osborn was no longer temporarily totally disabled based on three doctors' testimony that he could work as of February 5, 2010. The Court of Appeals applied well-settled law to the facts of this case and determined that the Department of Labor & Industries properly stopped payment of temporary total disability benefits (time loss compensation). Osborn does not cite any RAP 13.4 standards to justify review and indeed none exist. He appears to be arguing that he should get temporary total disability benefits for one additional day—February 5, 2010—even though his condition is fixed and stable. As any such result would conflict with the statutory scheme for time loss compensation, and this Court's long-standing precedent to the contrary, this Court should deny review. *See, e.g., Hunter v. Dep't of Labor & Indus.*, 43 Wn.2d 696, 699-700, 263 P.2d 586 (1953).

II. COUNTERSTATEMENT OF THE ISSUES

Review is not warranted in this case, but if review were accepted, the issues presented would be:

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

III. COUNTERSTATEMENT OF THE CASE

A. **Several Doctors Testified That Osborn Needed No Further Treatment and That He Could Work With Some Limitations**

After Osborn developed occupational wrist and shoulder conditions, Osborn received workers' compensation benefits from the Department. BR 45; BR Holmes 15, 24.¹ He received treatment, vocational services, and temporary total disability benefits. BR 44-53; BR Smith 12-13; BR Dillon 44-49. The Department terminated his temporary total disability benefits on October 7, 2009, and then closed the claim on February 5, 2010, with an award for permanent partial disability benefits for Osborn's left arm. BR 19. Osborn appealed the closure of his claim to the Board of Industrial Insurance Appeals. BR 37.

At the hearings before the Board, Osborn sought to show that he was entitled to temporary total disability for the time period from October 7, 2009, through February 5, 2010, and sought an increased permanent partial disability. BR Colloquy 3; BR 65. A worker is eligible for temporary total disability (time loss compensation) while he is receiving medical treatment for his industrial injury. *See* RCW 51.36.010(2)(a). To show eligibility for temporary total disability, a worker must show that he or she

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

is incapable of any reasonably continuous gainful employment. *See* WAC 296-20-01002 (definition of “temporary total disability.”). If a worker does not need further treatment, his or her condition is fixed and stable (meaning it has reached maximum medical improvement). *See* RCW 51.32.055(1); WAC 296-20-01002 (definition of “proper and necessary”).² Once a condition is fixed and stable, the worker’s condition is no longer temporary and the Department establishes the worker’s permanent impairment, if any, and closes the claim. *See* RCW 51.32.055.

Osborn’s witness, Dr. William Stump, testified that “it was unlikely that additional surgery for [his wrist] would result in any improvement.” BR Stump 9. Dr. Stump testified that, with regard to his neurological conditions, Osborn was medically fixed and stable and had reached maximum medical improvement as of February 5, 2010. BR Stump 10. He deferred to the other providers “with respect to any orthopedic opinions.” BR Stump 19. Dr. Stump approved various jobs for Osborn to work at, but only on a part-time basis, at least initially. BR Stump 15-16.

Osborn’s other medical witness, Dr. Patrick Bays, concluded that Osborn’s shoulder and wrist conditions were fixed and stable as of his May 3, 2008 examination and that no further diagnostic or therapeutic in-

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

tervention was warranted. BR Bays 9. He approved various jobs that Osborn could work at. BR Bays 17, 26. No vocational witness testified on Osborn's behalf to say that he could not perform or obtain reasonably continuous gainful employment.

The Department's witnesses both agreed that Osborn was fixed and stable as of February 2005, required no further treatment, and could work. Dr. Mark Holmes, a neurologist, testified that Osborn was not in need of any further treatment as of February 2010. BR Holmes 24-25, 27. Dr. Holmes found that Osborn was capable of performing reasonably continuous gainful light-duty employment from October 2009 through February 2010, so long as he avoided repetitive overhead activities. BR Holmes 25-26.

Dr. David Smith, an orthopedist, concluded that Osborn's condition was fixed and stable and that he was not in need of any further treatment. BR Smith 23. Dr. Smith also concluded that Osborn was capable of performing gainful employment on a reasonably continuous basis from October 7, 2009, to February 5, 2010. BR Smith 20.

Margaret Dillon, the vocational rehabilitation counselor, testified that Osborn could find employment given his restrictions and she testified he could work. BR Dillon, 57-58, 67- 68.

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

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

The Board granted review. BR 11. The Board agreed with Osborn regarding time loss compensation, finding that from October 7, 2009, through February 4, 2010, Osborn's occupational diseases rendered him temporarily totally disabled. BR 7-8, 11 (FF 4, CL 2). However, the Board disagreed with Osborn regarding closure of the claim, finding that Osborn's condition was fixed and stable as of February 5, 2010, and that he did not need further proper and necessary medical treatment and therefore ordered claim closure. BR 7-8 (FF 5, CL 4). Neither Osborn nor the Department challenged the permanent impairment ratings before the Board. BR 3. Therefore, the Board left untouched the proposed order's finding that Osborn had increased permanent partial impairments ratings. BR 7-8 (FF 6, CL 4). Osborn appealed to Kitsap County Superior Court, which affirmed and adopted the Board's findings and conclusions. CP 1;

FF 1.2, CL 2.2.

C. The Court of Appeals Concluded That Substantial Evidence Supported Osborn Was Not a Temporarily Totally Disabled Worker on February 5, 2010

At the Court of Appeals, Osborn sought one day of time loss compensation for February 5, 2010. In an unpublished decision, the Court of Appeals affirmed the superior court, concluding that substantial evidence supported the trial court's conclusion that Osborn had reached maximum medical improvement on February 5, 2010, and that his temporary total disability status ended on February 4, 2010. *Osborn v. Dep't of Labor & Indus.* No. 45828-4-II (April 28, 2015) (slip op.).

IV. REASONS WHY REVIEW SHOULD BE DENIED

Osborn cites no reasons under RAP 13.4 for this Court to take review, and none exists under two well-established workers' compensation principles. First, a worker who can work is not entitled to temporary total disability benefits. RCW 51.32.090. Second, when a worker can no longer benefit from treatment and his or her condition becomes fixed (maximum medical improvement), the worker is no longer eligible for temporary total disability benefits. *See Franks v. Dep't of Labor & Indus.*, 35 Wn.2d 763, 766, 215 P.2d 416 (1950).

This Court's review of the superior court decision is limited to examining the record to see if substantial evidence supports the findings

made after the trial court's de novo review, and if the court's conclusions of law flow from the findings. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999). Because all of the medical experts agreed that he was not in need of further medical treatment, and three of the four medical experts believed he could work, substantial evidence supports that Osborn was not temporarily totally disabled on February 5, 2010.

Osborn advances three principle arguments: (1) that the relevant workers' compensation authority does not provide that temporary total disability benefits cease when a worker is fixed and stable (maximum medical improvement) (Pet 4-5); (2) that there should not have been a finding of permanent partial disability because he still had total disability and the permanent partial disability award did not compensate for lack of employability (Pet. 4), and (3) that the preponderance of the evidence was that he was still totally disabled on February 5, 2015. Pet. 6. Besides not providing any reason for review under RAP 13.4, none of these arguments have any merit in view of the substantial evidence by medical and vocational witnesses that he was no longer totally disabled on February 5, 2010.

A. Review Need Not Be Granted to Consider the Well-Established Principle That Temporary Total Disability Benefits Cease When a Worker Requires No Further Treatment and Can Work

Under the unambiguous statutory scheme, Osborn is not entitled to further temporary total disability benefits because medical and vocational witnesses found him able to work. Under RCW 51.32.090(1), a worker may receive temporary total disability benefits until the earning power of the worker is restored, at which point “the payments shall cease.” A worker may only receive temporary total disability benefits if “he or she is incapable of any reasonably continuous gainful employment.” *See* WAC 296-20-01002. Here, three medical witnesses testified that he was capable of reasonably continuous gainful employment. BR Bays 17, 26; BR Holmes 25-26; BR Smith 20. Because he was capable of working as of February 5, 2015, he was no longer eligible for temporary total disability benefits. RCW 51.32.090(1); WAC 296-20-01002.

He was also ineligible for temporary benefits because his conditions did not need further treatment. If a worker does not need further treatment, his or her condition is fixed and stable, meaning he or she is at maximum medical improvement. *See* RCW 51.32.055(1); WAC 296-20-01002 (definition of “proper and necessary”). When a worker’s condition becomes fixed, the Department determines the appropriate permanent disa-

bility award, partial or total, if any, and closes the claim. *See* RCW 51.32.055(1); *Miller v. Dep't of Labor & Indus.*, 200 Wash. 674, 681, 94 P.2d 764 (1939). This Court has held that when a worker's condition reaches a fixed state from which full recovery is not expected, the condition is considered to be a permanent one and the worker is no longer eligible for temporary total disability. *Hunter*, 43 Wn.2d at 699-700; *Franks*, 35 Wn.2d at 766; *see also Hunter v. Bethel School Dist.*, 71 Wn. App. 501, 507, 859 P.2d 652 (1993). Contrary to Osborn's assertions, it is a long-standing principle that temporary total disability benefits cease when a worker's condition becomes fixed.

Osborn believes that he still had total disability and therefore should receive benefits because permanent partial disability does not compensate loss of employability. Pet. 4. He is correct that permanent partial disability does not compensate for lack of employability. But he is simply wrong that he was totally disabled. He did not argue below that he was totally permanently disabled, which would be the only way he could continue to receive benefits after he was fixed and stable.

Permanent total disability is defined as the "loss of both legs, or arms, or one leg and one arm, total loss of eyesight, paralysis *or other condition permanently incapacitating the worker from performing any work at any gainful occupation.*" RCW 51.08.160 (emphasis added). If a

worker remains disabled when he has reached maximum medical improvement then the worker is eligible for permanent total disability benefits, but he or she must establish that he is unable to perform or obtain reasonably continuous gainful employment. *Leeper v. Dep't of Labor & Indus.*, 123 Wn.2d 803, 813, 872 P.2d 507 (1994); *see Spring v. Dep't of Labor & Indus.*, 96 Wn.2d 914, 919, 640 P.2d 1 (1982); *see also Kuhnle v. Dep't of Labor & Indus.*, 12 Wn.2d 191, 193, 120 P.2d 1003 (1942). Osborn has not done so. Well-established legal authority supports that because he could work and required no further treatment, he is not entitled to total disability benefits.

B. Substantial Evidence Supports That Osborn Can Work as of February 5, 2010

Turning the substantial evidence standard on its head, Osborn also argues that the preponderance of the evidence relied on by the Board showed that he was still totally disabled on the date of the closing order. Pet. 6. Under the correct standard of review—viewing the evidence in the light most favorable to the Department—he was not totally disabled on February 5, 2010. He relies on Dr. Stump's testimony that his temporary total disability extended through February 5, 2010. Pet. 4. But three other medical witnesses testified that he was able to work as of February 5,

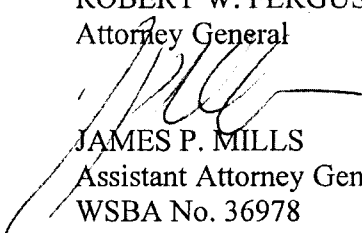
2010. An invitation to reweigh the evidence does not merit Supreme Court review.

V. CONCLUSION

This case presents routine workers' compensation issues. The Court of Appeals decided that substantial evidence supports finding that Osborn was not temporarily totally disabled. No reason exists to revisit this determination, especially given that Osborn claims no ground for review under RAP 13.4. Osborn can work and accordingly is not entitled to temporary total disability benefits. Furthermore, the Court of Appeals decision is consistent with *Hunter* and other cases in holding that because his condition is fixed and stable, he cannot receive temporary total disability benefits. This Court should deny review.

RESPECTFULLY SUBMITTED this 21st day of July, 2015.

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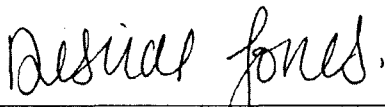
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