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DIVISION II

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STATE OF WASHINGTON

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Court of Appeal Cause No. 45828-4-11

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

MARK W. OSBORNE, Petitioner or Appellant

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, Respondent

---

PETITION FOR REVIEW

Paul W. Bryan
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WSBA No. 20464

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TABLE OF AUTHORITIES

A. **Identity of Petitioner**

MARK W. OSBORNE asks this court to accept review of the Court of Appeals decision designated in Appendix A of this petition.

B. **Court of Appeals Decision**

The petitioner wants the Division II decision regarding his disability status reviewed. This is found in the Opinion's Section II, Disability Status. The unpublished opinion of the Court of Appeals is dated and filed April 28, 2015. No motion for reconsideration was made.
A copy of the decision is in the Appendix at pages A-1 through 7.

C. **Issues Presented for Review**

Whether or not the petitioner was temporarily totally disabled on November 5, 2015.

D. **Statement of the Case**

1. Procedure

This is a Petition for Review of a decision of the Court of Appeals, Div. II, reviewing a Kitsap County Superior Court decision affirming a Board of Industrial Insurance Appeals Decision and Order of petitioner's appeal of an order by the Department of Labor and Industries closing appellant's claim with a permanent partial disability (PPD).

The Board's Decision and Order remanded petitioner's appeal of the Board's Decision and Order to the Department of Labor and Industries concluding that petitioner was temporarily totally disabled within the meaning of RCW 51.32.090 from October 7, 2009 through February 4th, 2010 and that as of February 5th, 2010, the petitioner was permanently partially disabled within the meaning of RCW 51.32.080. The Court of Appeals and the superior court agreed with the Board of Industrial Insurance Appeals.

2. Facts

Mr. Osborne suffers from multiple occupationally related conditions arising out of about 25 years of driving various types of trucks. His occupational conditions have been diagnosed as bilateral carpal tunnel syndrome, a left shoulder SLAP lesion with internal derangement and tendonitis and bilateral cubital tunnel syndrome. He has undergone four surgeries. The claim was closed with a permanent partial disability award equal to 11 percent of the left arm at the shoulder. Time loss compensation benefits had been previously ended as paid through October 7, 2009, when the department determined Mr. Osborn was no

longer temporarily totally disabled. The February 5th, 2010 order of the Department closing the claim with a permanent partial disability was appealed. Dr. Stump testified that his temporary total disability (TTD) extended through the 5th of February, 2010, The Board, however, ended claimant's temporary total disability on the 4th of February, and found petitioner permanently partially disabled as of the 5th of February and closed the claim. Certified Board Record P.5, lines 4-7.

E. Argument Why Review Should Be Accepted

The petitioner brings this issue because it represents a standard that runs counter to the law and puts a burden on injured workers that was never intended, that is, a finding of permanent partial disability while, in fact, the injured worker is still totally disabled. The idea that the legislature ever intended a permanent partial disability to cover future loss of earning after medical fixity is pure fantasy. If that were in fact the case, there would be no need for permanent total disability at all.

Mr. Osborne's case is an excellent example this long standing disconnect and is ripe for a review.

The recent case, Shafer v. Department of Labor and Industries, 166 Wn.2d 710, 213 P.3d 591 (Wash. 2009), at 717, defines the framework:

> 1. "The IIA [Industrial Insurance Act] aims to provide a speedy remedy and enable injured workers to become gainfully employed. RCW 51.32.095(4)(a). Additionally, the IIA is to be "liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment" RCW 51.12.010"
>
> 2. "A worker suffering a permanent partial disability (PPD) is compensated according to the award schedule set forth in RCW 51.36.010. A "permanent partial disability" is defined as "any anatomic or functional abnormality of loss after maximum medical improvement (MMI) has been achieved" WAC 296-20-19000. "

The PPD award does not contemplate compensation for lack of employability.

The interpretation by the Court below is that the law makes temporary total disability and MMI mutually exclusive. How can this be when a permanent total disability (pension) *requires* both MMI and a lack of employability? The statute says "When the total disability is only temporary, the schedule of payments

contained in RCW 51.32.060 (1) and (2) shall apply, so long as the total disability continues." RCW 51.32.090(1) "As soon as recovery is so complete that the present earning power of the worker, at any kind of work, is restored to that existing at the time of the occurrence of the injury, the payments shall cease." RCW 51.32.090(3)(a).

The WAC § 296-20-01002. Definition states: "Total temporary disability: Full time- loss compensation will be paid when the worker is unable to return to any type of reasonably continuous gainful employment as a direct result of an accepted industrial injury or exposure."

None of these even suggest that payments ease with MMI.

The court in Hubbard v. Department of Labor & Industries of State of Washington, 992 P.2d 1002, 140 Wn.2d 35 (Wash. 2000) at 43, explained that:

> "Temporary total disability" is a condition that temporarily incapacitates a worker from performing any work at any gainful employment. Oien v. Department of Labor & Indus., 74 Wash.App. 566, 569, 874 P.2d 876 (1994), review denied, 125 Wash.2d 1021, 890 P.2d 463 (1995); Hunter, 71 Wash.App. at 507-08, 859 P.2d 652; Bonko v. Department of Labor & Indus., 2 Wash.App. 22, 25, 466 P.2d 526 (1970). It differs from permanent total disability only in duration of disability, and not in its character. Bonko, 2 Wash.App. at 25, 466 P.2d 526; *see also* RCW 51.08.160....
> "Temporary total disability benefits also terminate when the claimant is able to earn a wage at any kind of reasonably continuous and generally available employment. Hunter, 71 Wash.App. at 507-08, 859 P.2d 652. At this point, the temporarily disabled claimant becomes eligible for reduced time loss compensation, referred to as LEP benefits. RCW 51.32.090(3); Hunter, 71 Wash.App. at 506-07, 859 P.2d 652".

The court in Bonko v. Department of Labor and Industries, 466 P.2d 526, 2 Wn.App. 22 (Wash.App. Div. 3 1970) at 26, states that for payments to cease, there must be an end to total disability in addition to MMI, stating:

> "In the event the workman's earning power at any kind of work is only partially restored to that existing at the time of injury *And* [sic](emphasis added) his condition becomes fixed or static, time loss payments then cease and a permanent partial disability award is made to the workman.

In the petitioner's case, as in many others, the fact that he was at maximum medical improvement (MMI) was used to close his claim, even though he was

still totally disabled. There was no evidence presented referring to the date the Board ended his total disability - February 4th. The preponderance of evidence the Board relied on was that as of the 5th of February, the petitioner was still totally disabled, which is the date of the closing order on appeal and limits the Board's jurisdiction to that date. Yet the Court is allowing a fictitious finding of MMI on the 5th to stand (which in fact happened much earlier) so it can follow faulty interpretations of case law to close the claim. The result of this fiction is that it allows a poor vocational determination to survive a worker's successful appeal leaving a totally disabled worker without the vocational options the IIA provides for.

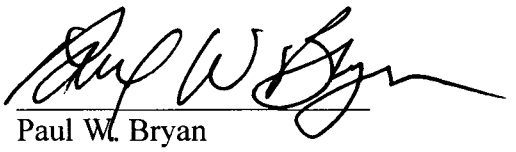
F. **Conclusion**

The purposes of the Industrial Insurance Act, as iterated in *Shaffer*, as well as the integrity of our court decisions regarding temporary disability, a huge issue to an injured worker, would be much better served if the Supreme Court would make a definitive clarification in this case, a case where the issues are clearly on point and the opinions not just dictum.

The petitioner prays the Court to clarify the law, reverse the Court of Appeals, find the petitioner totally temporarily disabled from October 9, 2009 through February 5th, 2010, and remand the claim back to the Department of Labor and Industries for further action consistent with the law and facts. The petitioner also requests Attorney's fees and costs pursuant to RCW 51.52.130.

May 27, 2015

Respectfully submitted,



Paul W. Bryan
Attorney for Petitioner
WSBA # 20464

APPENDIX A

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

MARK W. OSBORN, Appellant v. DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, Respondent.	No. 45828-4-II UNPUBLISHED OPINION

MELNICK, J. — Mark Osborn appeals from the superior court's affirmance of the Board of Industrial Insurance Appeals's (Board's) decision and order closing Osborn's temporary total disability claim. Osborn argues that he had a temporary total disability on February 5, 2010. We disagree and affirm the superior court.

FACTS

Osborn worked as a truck driver for 25 years. As a result, he suffers from bilateral carpal tunnel syndrome, a left shoulder SLAP (superior labrum anterior to posterior) lesion with internal derangement and tendonitis, and bilateral cubital tunnel syndrome. Osborn received benefits from the Department of Labor and Industries (L&I) for these conditions. He also received physical therapy and participated in a "work hardening" program. Administrative Record (AR) (Dr. Mark Holmes) at 10.

In 2008 and 2009, Osborn received several medical evaluations. Dr. William Stump found that Osborn exhibited full shoulder and elbow motion, good general strength, and normal senses and reflexes. Dr. David Smith found that Osborn's condition was "basically normal except for very mild loss of motion and only one pain in his shoulder," as well as "residual numbness in his

hands." AR (Smith) at 20. Dr. Patrick Bays opined that Osborn was "capable of gainful employment on a reasonably continuous basis," albeit with "permanent restrictions." AR (Bays) at 17. Dr. Mark Holmes agreed that Osborn was able to work. All four doctors agreed that Osborn's condition had become fixed and stable: further treatment would not be helpful.

In January 2010, L&I closed Osborn's claim and provided him with a permanent partial disability award. Osborn protested the closure of his claim, but L&I affirmed its order on February 5, 2010.

Osborn appealed L&I's decision to the Board. He presented the testimony of occupational therapist Megan Milyard, who found that Osborn's conditions impaired both his manual dexterity and his ability to carry out repetitive movements. As such, Milyard opined that Osborn could not work as a light delivery driver or a service writer without modifications to his job duties. Vocational rehabilitation counselor Margaret Dillon testified to the contrary. Dillon opined that Osborn could work as a light delivery driver because the job did not involve heavy grasping and releasing.

Osborn also presented the testimony of Dr. Stump, who opined that Osborn could not work on a full-time basis between October 7, 2009, and February 5, 2010. However, Dr. Smith testified to the contrary and opined that Osborn was capable of gainful employment during the same time period. Dr. Holmes also testified and stated that he believed Osborn could work during that time period, so long as he avoided "repetitive overhead work." AR (Holmes) at 26.

Based on the testimony presented, the Board reversed and remanded L&I's order.[1] In relevant part, the Board found that:

> 4. During the period of October 7, 2009,[2] through February 4, 2010, Mr. Osborn's occupational disease conditions precluded him from obtaining or performing reasonably continuous gainful employment in the competitive labor market in light of his age, education, and work experience.
>
> 5. As of February 5, 2010, all of Mr. Osborn's occupational disease conditions were medically fixed and stable and none of them required further proper and necessary medical treatment.

AR at 7. The Board then concluded that Osborn was temporarily totally disabled, within the meaning of RCW 51.32.090, between October 7, 2009, and February 4, 2010. The Board also concluded that Osborn was permanently partially disabled within the meaning of RCW 51.32.080, as of February 5, 2010.

Osborn appealed to the Kitsap County Superior Court, which ruled that a preponderance of the evidence supported the Board's findings of fact. The superior court adopted and incorporated by reference the Board's findings of fact and conclusions of law. The superior court entered an additional conclusion of law that Osborn was "not entitled to temporary total disability benefits as of and after the date of [L&I's] closing order of February 5, 2010." Clerk's Papers (CP) at 61. Osborn appeals from the superior court's order affirming the Board. Although Osborn raised several issues below, Osborn's assignments of error before us involve only his disability status on a single day—February 5, 2010.

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[1] The Board reversed L&I's valuation of Osborn's permanent partial disability award, increasing the award in Osborn's favor. That part of the Board's decision is unrelated to this appeal.

[2] The Board uses this date because L&I terminated Osborn's time-loss compensation benefits effective October 6. This decision is not at issue in this appeal.

ANALYSIS

I. STANDARD OF REVIEW

"Washington's Industrial Insurance Act [IIA] includes judicial review provisions that are specific to workers' compensation determinations." *Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179, 210 P.3d 355 (2009). Under the IIA an "[a]ppeal shall lie from the judgment of the superior court as in other civil cases," i.e., we review the superior court's decision rather than the Board's decision.[3] RCW 51.52.140; *Rogers*, 151 Wn. App. at 180. Accordingly, we review the superior court's decision following a bench trial in a workers' compensation case by asking whether substantial evidence supports the superior court's challenged findings of fact and whether the findings support its conclusions of law. *Rogers*, 151 Wn. App. at 180. "Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the matter asserted." *Robinson v. Dep't of Labor & Indus.*, 181 Wn. App. 415, 425, 326 P.3d 744, *review denied*, __ Wn.2d __, 337 P.3d 325 (2014).

In carrying out this review, we view the record in the light most favorable to the party who prevailed in superior court and do not reweigh or rebalance the competing testimony and inferences, or apply anew the burden of persuasion. *Harrison Mem'l Hosp. v. Gagnon*, 110 Wn. App. 475, 485, 40 P.3d 1221 (2002). In this case, we view the evidence in the light most favorable to L&I.

II. DISABILITY STATUS

Osborn argues that he was temporarily totally disabled on February 5, 2010. We disagree and hold that substantial evidence supported the superior court's finding that as of February 5,

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[3] The IIA's review scheme results in a different role for us than is typical from appeals of administrative decisions under the Administrative Procedure Act, chapter 34.05 RCW, where we sit in the same position as the superior courts. *Rogers*, 151 Wn. App. at 180.

Osborn's conditions were medically fixed and stable, which in turn supports its conclusion that Osborn was not temporarily totally disabled on February 5.

RCW 51.32.090(1) provides for continuing payments when a worker has a "total disability [that] is only temporary." A "[t]emporary total disability" is a condition that "*temporarily* incapacitates a worker from performing any work at any gainful employment." *Hubbard v. Dep't of Labor & Indus.*, 140 Wn.2d 35, 43, 992 P.2d 1002 (2000) (emphasis added). If a claimant's condition has stabilized so that it cannot be improved with further treatment, the condition is "fixed" for purposes of closing the temporary total disability claim and determining the permanent disability award, if any. *Pybus Steel Co. v. Dep't of Labor & Indus.*, 12 Wn. App. 436, 438-39, 530 P.2d 350 (1975); *see also Franks v. Dep't of Labor & Indus.*, 35 Wn.2d 763, 766-67, 215 P.2d 416 (1950). Accordingly, temporary total disability ends "as soon as the claimant's condition has become fixed and stable *or* as soon as the claimant is able to perform any kind of work." *Hunter v. Bethel Sch. Dist.*, 71 Wn. App. 501, 507, 859 P.2d 652 (1993) (emphasis added); *see also Shafer v. Dep't of Labor & Indus.*, 166 Wn.2d 710, 716-17, 213 P.3d 591 (2009); *Franks*, 35 Wn.2d at 766-67.

Here, the superior court found that Osborn's conditions were "medically fixed and stable" as of February 5, 2010. CP at 61 (adopting the Board's findings from AR at 7). Substantial evidence supports this finding.

A condition is fixed and stable when "maximum medical improvement" occurs, meaning "no fundamental or marked change in an accepted condition can be expected, with or without treatment." WAC 296-20-01002. All of the doctors who testified agreed that Osborn had reached maximum medical improvement by February 2010. As early as 2008, Osborn's doctors found that further treatment would not have had any benefit. Osborn provided no evidence to the contrary.

We hold that substantial evidence supported the superior court's finding that Osborn's condition was fixed and stable as of February 5, 2010. We also hold that this finding supports the superior court's conclusion that Osborn's temporary total disability status ended on February 4. *See Hunter*, 71 Wn. App. at 507.

Osborn argues that the superior court erred by ending Osborn's temporary total disability status on February 4 because no evidence was presented to show any restoration of his earning power. But the superior court was not required to find that Osborn's earning power was restored in order to end his temporary total disability status. Temporary total disability ends as soon as one of two conditions occurs: when the claimant is able to perform any kind of work *or* when the claimant's condition has become fixed and stable. *Hunter*, 71 Wn. App. at 507. Because Osborn's condition was fixed and stable as of February 5, the superior court could conclude that his temporary total disability status ended irrespective of whether he was capable of gainful employment.[4]

Substantial evidence shows that by February 5, 2010, Osborn's condition was fixed and stable. The superior court's finding that Osborn's condition was fixed and stable on February 5 alone supports its conclusion that Osborn was not temporarily totally disabled on that date. Therefore, the superior court did not err.

[4] We also disagree with Osborn's allegation that no evidence was presented to show any restoration of his earning power. Although the Board and superior court did not make the superfluous finding that Osborn was capable of gainful employment, the record did contain substantial evidence showing that Osborn was capable of performing some kind of work on February 5, 2010. Dr. Smith and Dr. Holmes, as well as Osborn's rehabilitation counselor, testified that Osborn could perform light work during the period between October 2009 and February 2010.

III. ATTORNEY FEES

Osborn requests reasonable attorney fees under RCW 51.52.130. The statute provides for attorney fees in the event that the Board's "decision and order is reversed or modified and additional relief is granted to a worker or beneficiary." RCW 51.52.130(1). Because we affirm the superior court's affirmance of the Board's decision and order, we decline Osborn's request for fees.

We affirm the superior court.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Melnick, J.

Melnick, J.

We concur:

Maxa, P.J.

Maxa, P.J.

Lee, J.

Lee, J.

CERTIFICATE OF SERVICE

I hereby declare under the penalty of perjury of the laws of the State of Washington that I served a copy of the attached **PETITION FOR REVIEW** in Appeal No. 45828-4-II on all parties or their counsel of record on the date below as follows:

Via US Mail:

James Mills, AAG
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Dated this 28th day of May, 2015.

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