NO. 95172-1

**SUPREME COURT OF THE STATE OF WASHINGTON**

BRANDON FOSTER,

Petitioner,

v.

FRITO LAY, INC.,

Respondent.

# DEPARTMENT OF LABOR AND INDUSTRIES' ANSWER TO FOSTER'S PETITION FOR REVIEW

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## I. INTRODUCTION

This case involves the routine application of well-accepted worker's' compensation principles. This Court has long recognized that the Industrial Insurance Act puts the burden on workers to prove that they are permanently unable to (1) obtain or (2) perform work, not on employers to prove that their workers are employable. The only exception is in "odd lot" cases, in which the worker has proved that the worker cannot obtain or perform any sort of generally available work, which shifts the burden to the employer to prove that some sort of special work is available to the worker. But Foster concedes that the odd lot doctrine does not apply here, which means that he bore the burden of proof.

Without support, Foster argues that once he presented evidence indicating that he could not perform work, the burden shifted to his employer to prove both that he could obtain work and that he could perform it, but no authority supports this notion. While this Court has recognized that a worker can prove permanent total disability either by proving that the worker cannot obtain work or that the worker cannot perform it, this Court has never suggested that presenting evidence regarding one of these issues shifts the burden of proof to the employer on the other. And since Frito Lay presented evidence that Foster was capable of performing gainful employment and Foster did not prove that he could

not obtain such work, substantial evidence supported the superior court's finding, and the Court of Appeals properly affirmed.

Foster fails to show either a conflict in appellate case law or an issue of substantial public interest and this Court should deny his request for further review.

## II. ISSUE PRESENTED

Discretionary review is not merited, but if review were granted, this issue would be presented:

> Injured workers typically bear the burden of proving that they are incapable of either (1) performing or (2) obtaining gainful employment to receive pension benefits. Foster presented evidence that he could not perform gainful employment but did not present evidence that he could not obtain gainful employment. Does substantial evidence support that he is not permanently totally disabled?

## III. STATEMENT OF THE CASE

The Department joins in Frito Lay's statement of the case except to highlight essential facts. *See* Ans. 1-7.

Foster sustained an industrial injury to his eye. AR Shults at 11. He now seeks a pension. A worker may receive a pension if the worker is permanently totally disabled. RCW 51.32.060. To prove permanent total disability, a worker may show that the worker cannot either (1) perform or (2) obtain any gainful employment. *See Leeper v. Dep't of Labor & Indus.*, 123 Wn.2d 803, 810-14, 872 P.2d 507 (1994).

William Baer, MD, testified that, even considering his workplace injury, Foster could perform six jobs without any restrictions: construction laborer (Ex. 2), bulk order picker/restocker (Ex. 4), maintenance mechanic (Ex. 5), material handler belt picker (Ex. 6), and pallet jack order filler (Ex. 8). AR Baer 27-28. He expressly testified that Foster's double vision did not impair his ability to perform any of those jobs. AR Baer 32-35.

Todd Martin, a vocational counselor, testified that Foster had the transferable skills to work in these jobs. AR 11/6/14 at 34. He reviewed eight job analyses—a written job description—and agreed that Foster had the transferable skills to perform all of those jobs except for the job described in exhibit 5, maintenance mechanic. AR 11/6/14 at 34. Martin agreed that whether Foster could actually perform any of those jobs (aside from the maintenance mechanic job) was essentially a medical question. AR 11/6/14 at 35. Martin was not asked, and did not offer an opinion about whether Foster could obtain any jobs if it was determined that he could perform one or more of them.

## IV. ARGUMENT

Foster's petition for review should be denied as it fails to establish any basis for this Court's review. RAP 13.4(b) sets out four bases for seeking this Court's review. Foster makes no attempt to tie his arguments to any of those four standards, but broadly appears to contend either that

the opinion conflicts with one of this Court's decisions or that the case raises an issue of substantial public interest warranting this Court's review. *See* Pet. 9-20. But he establishes neither: the Court of Appeals followed this Court's decisions, and this case involves little beyond applying well-established principles regarding the substantial evidence standard to the record and as such it does not present an issue of substantial public interest.

At bottom, Foster's argument is that once he presented evidence that he was unable to perform gainful employment, the burden of proof shifted to Frito Lay to affirmatively establish that Foster can both obtain and perform gainful employment. Pet. 1-2. But this novel theory has no support in the case law and is contrary to the decisions of this Court, which put the burden of proof on Foster, not Frito Lay. The petition establishes no basis for this Court's review and it should be denied.

### A. The Court of Appeals Decision Followed Well-Established Principles and Did Not Conflict with the Case Law

The Court of Appeals applied this Court's decisions that workers bear the burden of showing if they are entitled to permanent total disability benefits. Workers who have appealed a decision of the Department generally bear the burden of proving their entitlement to benefits except in

a very limited set of circumstances, none of which is present here.[1] *See* RCW 51.52.050, .115; *Harris v. Dep't of Labor & Indus.*, 120 Wn.2d 461, 474, 843 P.2d 1045 (1993); *Olympia Brewing Co. v. Dep't of Labor & Indus.*, 34 Wn.2d 498, 505-06, 208 P.2d 1181 (1949). With regard to claims that a worker is permanently and totally disabled, workers bear the burden of proof in all but one circumstance: "odd lot" cases. *See Ames v. Dep't of Labor & Indus.*, 193 Wash. App. 215, 220, 74 P.2d 1027 (1938) (holding that burden of proof was on worker seeking finding of permanent total disability); *Leeper*, 123 Wn.2d at 814-15 (recognizing that burden shifts from worker to employer if worker proves to be incapable of performing work of a general nature); *Kuhnle v. Dep't of Labor & Indus.*, 12 Wn.2d 191, 198-200, 120 P.2d 1003 (1942) (adopting odd lot doctrine and explaining that it means that burden of proof shifts to employer if worker establishes that worker cannot obtain any generally available light or sedentary work).

Under the odd lot doctrine, when workers prove that they are incapable of obtaining or performing any employment that generally exists

[1] The burden of proof is on the Department or a self-insured employer (1) when the Department alleges willful misrepresentation (RCW 51.52.050(2)(c)), (2) when the Department rejects a claim because it finds that the worker was committing a felony at the time of the injury (*Dep't of Labor & Indus. v. Rowley*, 185 Wn.2d 186, 378 P.3d 139 (2016)), (3) when firefighters allege certain types of occupational diseases (RCW 51.32.185). None of those situations exists here.

in the labor market, and when the Department or the employer respond there is specialized work not generally available to workers but is available to this particular worker, the Department or employer must prove that the job is actually available to the worker. *Leeper*, 123 Wn.2d at 814-15. But here, no party alleges that Foster is capable only of odd-lot work: Foster claims he is not capable of any sort of employment including specialized work, while Frito Lay asserts that Foster is capable of generally available employment. Pet. 16, Ans. 16-19. Indeed, Foster expressly disclaims reliance on the odd lot doctrine. Pet. 11. Foster wrongly argues that the Court of Appeals opinion created a "false dichotomy" when it distinguished between generally available work and special work. *See* Pet. 9-10. But the dichotomy is not a false one: it goes to the heart of the odd lot doctrine. The odd lot doctrine only applies if a worker establishes that the worker is incapable of obtaining or performing any generally available work and is at best capable of performing special work not generally available. *Leeper*, 123 Wn.2d at 814-15. A court cannot determine if the doctrine applies without distinguishing between general work and special work.

Because the odd lot doctrine does not apply here, Foster had to prove one of two things: (1) that he is incapable of performing gainful employment or (2) that he is incapable of obtaining it. *Leeper*, 123 Wn.2d

at 814-15. Foster argues that by presenting evidence that he could not perform work, he shifted the burden on the employer to present evidence both that he could both obtain and perform such work. Pet. 16. But none of the cases Foster cites, including *Leeper*, suggests that the burden of proof shifts to the employer in anything other than an odd lot case. *Contra* Pet. at 15-19.

*Leeper* recognizes that workers bear the burden of proving that they are permanently and totally disabled and clarifies that workers can meet this burden by proving that they are unable to obtain work as well as by showing that they are unable to perform it. *Leeper*, 123 Wn.2d at 810, 815. But contrary to Foster's suggestion, it provides no support for the idea that the burden of proof shifts to the employer once the worker presents any evidence supporting a permanent disability claim. Pet. 10-14. The only burden shifting that *Leeper* mentions is the burden shifting associated with the odd lot doctrine, which the parties agree does not apply here. *Leeper*, 123 Wn.2d at 814-15. *Leeper* provides no support for the view that Frito Lay had the burden of proof.

Foster cites to *Spivey v. City of Bellevue*, 187 Wn.2d 716, 731-32, 389 P.3d 504 (2017), which discusses the "Thayer" theory regarding how presumptions operate. Pet. 15-16. The Thayer theory only applies to rebuttable presumptions, not to a party's basic burden of proof, and the

Thayer theory is immaterial here because the outcome of this case does not depend on a rebuttable presumption but on what burden a worker bears when seeking a finding of permanent total disability. *See Spivey*, 187 Wn.2d at 731-32.[2]

This Court has long held that workers bear the burden of proving their entitlement to benefits, including permanent total disability benefits, except in odd lot cases. *See Leeper*, 123 Wn.2d at 814-15; *Harris*, 120 Wn.2d at 474; *Ames*, 193 Wash. App. at 220. Not only does Foster show no conflict, Foster's argument that the burden of proof shifted to Frito Lay is contrary to well-established case law.[3] Foster bore the burden of proof

[2] And even assuming there was a rebuttable presumption at the outset of this case that Foster was employable, neither applying the Thayer theory to the presumption nor the Morgan theory to it would lead to the conclusion that Foster's presentation of evidence shifted the burden of proof on to Frito Lay. *Spivey*, 187 Wn.2d at 731-32. Under the Thayer theory, Foster's presentation of evidence would cause the presumption to disappear, while, under the Morgan theory, the presumption would continue to encumber Foster's case; in neither instance would the burden of proof shift from Foster to Frito Lay. *Id*. But more to the point, there is no such presumption here and thus no reason to ponder whether that presumption operates according to the Thayer or Morgan theory.

[3] Furthermore, contrary to Foster's argument, the Court of Appeals opinion did not, as the *Graham* opinion did, erroneously comment that it is unnecessary to even consider whether a worker can obtain work. Pet. at 11-12. *Graham v. Weyerhaeuser*, 71 Wn. App. 55, 65, 856 P.2d 717 (1993), *overruled by Leeper*, 123 Wn.2d at 817-19. *Graham* predated *Leeper* and had an incorrect holding on the obtain prong of the test. *Leeper*, 123 Wn.2d at 817-19. But here, the Court of Appeals determined that substantial evidence showed that Foster could both perform and obtain employment. This analysis is entirely consistent with *Leeper*. Foster also points to regulations that outline how the Department decides if a worker should receive vocational assistance but the rules are inapplicable here. Pet. at 12-14. These rules relate to the process that vocational counselors should follow when preparing reports to the Department regarding a worker's employability and they do not determine what evidence an employer must present in an appeal involving a worker's request for a disability pension. Ans. 1; *see* WAC 296-19A-010, -065, -070, -140.

at all times and under no plausible theory of how rebuttable presumptions operate did that burden somehow end up on Frito Lay's shoulders.

### B. No Issue of Substantial Public Interest Is Raised by the Application of Substantial Evidence Principles

Foster's position fails to raise an issue of substantial public interest that should be determined by this Court as RAP 13.4(b)(4) contemplates. Aside from his unsupported argument that the burden of proof shifted from him to Frito Lay, the case involves nothing more than a routine application of the substantial evidence standard.

Substantial evidence supports the superior court's finding that Foster was not permanently and totally disabled and Foster was not entitled to judgment as a matter of law on this issue. Frito Lay presented medical evidence that Foster could perform six jobs with no restrictions and Foster's own vocational expert conceded that he had the skills to do at least five of those jobs based on his employment history. AR Baer at 27-28; AR 11/6/14 at 18. Foster presented no vocational evidence indicating that the jobs did not exist in Foster's labor market or that he could not obtain them for some reason independent of his medical restrictions. Based on the record and viewing the evidence in the light most favorable to Frito Lay, a trier of fact could find in Frito Lay's favor. Foster's argument that Frito Lay failed to meet its burden of proof falsely

presupposes that Frito Lay had such a burden. Pet. 15. Foster had the burden of proof and substantial evidence supports the jury's verdict against him.

No issue of substantial public interest is presented by reviewing the jury's routine application of the standards to prove a pension.

## V. CONCLUSION

Foster's novel theories neither show a conflict between the Court of Appeals opinion and the case law nor an issue of substantial public interest. His petition for review should be denied.

RESPECTFULLY SUBMITTED this 21st day of December 2017.

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