95172-1

NO. 49475-2-II

COURT OF APPEALS
DIVISION II

IN THE STATE OF WASHINGTON

BRANDON FOSTER,
APPELLANT/PLAINTIFF

v.

FRITO LAY, INC.,
RESPONDENT/DEFENDANT.

PETITION FOR REVIEW TO THE SUPREME COURT

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Table of Contents

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

ISSUES PRESENTED FOR REVIEW

Issue No. 1: Must the Court make an individualized assessment of the worker's ability to obtain work in his competitive labor market?

The Court of Appeals wrongly focused its analaysis of earlier cases (*Kuhnle v. Dep't of Labor & Indus.*, 12 Wn.2d 191, 120 P.2d 1003 (1942), *Fochtman v. Dep't of Labor & Indus.*, 7 Wn. App. 286, 499 P.2d 255 (1972), and *Spring v. Department of Labor and Industries*, 96 Wn.2d 914, 640 P.2d 1 (1982)) to emphasize a worker's "general" ability to obtain work. The Court of Appeals overlooked the requirement that obtaining work requires an analysis on the "particular" evidence on the worker's ability to obtain work in his/her labor market. *Leeper v. Dep't of Labor & Indus.*, 123 Wn.2d 803, 818, 872 P.2d 507 (1994). The Court of Appeals wrongly affirmed the decision of the trial court by failing to analyze whether there was particular evidence Mr. Foster could obtain work in his labor market.

The Court should grant review to clarify *Leeper* through rejecting any use of the phrase "general" employability to obviate the need for specific evidence of a worker's ability to obtain work that accommodates his disabilities.

Issue No. 2: Where an injured worker meets his Thayer burden of proof he cannot perform any work, does the employer meet its Thayer burden when its evidence supports his ability to work with restrictions, but is silent on whether the labor market can accommodate those restrictions?

The Court of Appeals wrongly found Frito Lay presented sufficient evidence to meet its Thayer burden of proof in response to Mr. Foster's

directed verdict motion. *Spivey v. City of Bellevue*, 187 Wn.2d 716, 731-32, 389 P.3d 504 (2017). The Thayer burden is the ordinary burden of proof to survive directed verdict.

In this case, the Thayer burden is proving whether or not an Mr. Foster can perform and obtain reasonably continuous gainful employment. *Leeper*, 123 Wn.2d at 812. Here, the Court of Appeals rendered the obtain prong superfluous because it conflated Mr. Foster's ability to perform work with his ability to obtain work. *Leeper* 123 Wn.2d at 818 (expressly overruling *Graham v. Weyerhaeuser Co.*, 71 Wn. App. 55, 856 P.2d 717 (1993), to the extent it held the "obtain" prong was superfluous).

The Court should grant review to clarify that for a worker to prove he is not employable, he must present evidence that he either cannot perform work or he cannot obtain work, due to the residuals of the injury. Whereas, the employer's Thayer burden is proving the injured worker can perform and obtain work despite the residuals of the injury. Frito Lay met its Thayer burden that Mr. Foster can perform some work, but it did not meet its burden Mr. Foster could specifically obtain that work.

STATEMENT OF THE CASE

The Court should grant review because the facts of this case are stark: there is no evidence on whether Mr. Foster can obtain work despite his claim-related restrictions. Granting review will permit the Court to emphasize the role of obtain evidence and which party's case is fatally flawed by its absence.

On April 20, 2010, Mr. Foster was driving a triple-trailer tractor

from the Frito Lay plant in Vancouver, Washington, to Hermiston, Oregon. (Certified Appeal Board Record "CABR" 11/6/14 Tr. pp. 40-41). The wind was blowing as Mr. Foster was unloading in Hermiston. (CABR 11/6/14 Tr. p. 41). One or more slivers of metal were blown into his left/right eye. (CABR 11/6/14 Tr. p. 41). Mr. Foster began experiencing double-vision. (CABR 11/6/14 Tr. pp. 41-42, 43-44). After extensive treatment and testing, the double-vision did not diminish. (CABR 11/6/14 Tr. p. 45). Instead, it continued to worsen. (CABR 11/6/14 Tr. pp. 45-46). After trying various therapies, his attending physician, Dr. Bruce Wojciechowski, concluded the double vision was permanent. (CABR Dep. Dr. Wojciechowski pp. 19, 20-21, 28; p. 77). This appeal focuses on the evidence presented as to whether or not Mr. Foster's double-vision renders him unable to perform and obtain reasonably continuous gainful employment within his particular labor market.

1. Mr. Foster's Thayer burden.

Mr. Foster testified about his experiences over the course of his claim, plus his current symptoms and restrictions. Mr. Foster explained he could still drive his personal vehicle under limited circumstances and he had to choose between double-vision and closing one eye.

Dr. Wojciechowki testified that Mr. Foster's double vision was proximately caused by his on-the-job injury on a more probable than not basis. (CABR Dep. Dr. Wojciechowski pp. 48-49). Dr. Wojciechowski opined the double vision permanently prevented Mr. Foster from returning to his job at injury, operating commercial vehicles. (CABR Dep. Dr.

Wojciechowski p. 50 ln. 1-15).

As summarized by the Court of Appeals, after all testimony was taken only five of the seven occupations remained at issue, with the trial court finding (as a matter of law) that Mr. Foster could not perform his job at injury and two of the remaining occupations. Dr. Wojciechowski testified Mr. Foster was permanently unable to perform any of the five occupations on a permanent basis due to his double vision. (CABR Dep. Dr. Wojciechowski pp. 50-58).

Dr. Wojciechowski's testimony was sufficient to meet Mr. Foster's Thayer burden of proof that he was permanently unable to perform and obtain reasonably continuous and gainful employment. This is because Dr. Wojciechowski disapproved Mr. Foster's ability to perform any of these occupations. If he could not perform these occupations, he cannot obtain them either.

Turning to Mr. Martin, the only vocational expert: he testified that Mr. Foster had the transferable skills to perform seven of the eight potential occupations identified in this record. (CABR 11/6/14 Tr. p. 18, ln. 20-26 to p. 19 ln. 1-4). With one exception, nowhere did he express any opinion that Mr. Foster's competitive labor market could accommodate Mr. Foster's work restrictions.

The one exception identified by Mr. Martin was Mr. Foster's ability to obtain work as a pallet jack operator. It was his opinion that this job was not one found in the labor market unless it was paired with a merchandising/driving position. (CABR 11/6/14 Tr. p. 29). It was his

opinion that Mr. Foster was not capable of obtaining work as a pallet jack operator. This was because employers would not want the risk of a driver operating a company vehicle with double vision. (CABR 11/6/14 Tr. pp. 30-31). This opinion was unrebutted by Frito Lay, which means it was not possible for it meet its Thayer burden on Mr. Foster's partial directed verdict motion.

2. Frito Lay's Thayer burden,

Once Mr. Foster met his Thayer burden of proof, it then shifted to Frito Lay. Frito Lay's burden was to prove that Mr. Foster was capable to perform and obtain reasonably continuous gainful employment, and that such work was available within his competitive labor market. Evidence alone of an ability to perform work is insufficient, unless that evidence was the injury imposed no restrictions upon Mr. Foster.

Frito Lay presented the testimony of two physicians, Drs. Shults and Baer, and lay testimony from investigators who surveilled Mr. Foster. Frito Lay did not present any expert vocational testimony. Medical doctors are not qualified to comment on a worker's ability to obtain work. Frito Lay's record is silent on whether there is a competitive labor market who would particularly hire Mr. Foster. *Leeper*, 123 Wn.2d at 818.

The investigators and video surveillance was introduced to cast aspersions on Mr. Foster's credibility. It showed Mr. Foster operating a personal vehicle, not wearing sunglasses, and picking up long pieces of lumber. Despite reading these surveillance reports and despite all of the doctors' other concerns about Mr. Foster's credibility, Drs. Shults and Baer

diagnosed Mr. Foster with double vision proximately caused by the industrial injury. (CABR Disc. Dep. Dr. Shults p. 66; Dep. Dr. Shults p. 17; Dep. Dr. Baer pp. 20-21). The doctors also agreed Mr. Foster could not return to his job at injury. (CABR Disc. Dep. Dr. Shults p. 66; Dep. Dr. Baer p. 25, ln. 13-15).

Dr. Shults generally described Mr. Foster's work restrictions as follows:

> I would not want him to work in an environment in which maintaining good depth perception was a requirement for his or others safety. A visually busy environment wouldn't necessarily meet that criterion. But if he says that he's having more difficulty maintaining control of his double vision in visually busy environments, I wouldn't refute that. And I would suggest that he not place himself in those kinds of situations, if he could avoid it.

(CABR Dep. Dr. Shults p. 25, ln. 10-17). Dr. Shults waivered on whether it was safe for Mr. Foster to work in a warehouse, around moving forklifts and conveyer belts. (CABR Disc. Dep. Dr. Shults p. 68; Dep. Dr. Shults pp. 26-27, 39).

Taken in a light most favorable to Frito Lay, Dr. Shults testimony approved Mr. Foster to perform the five occupations, but with restrictions proximately caused by the claim-related double vision. Dr. Shults' testimony did not answer the question of whether or not there were any employers who would accommodate (obtain) Mr. Foster's restrictions.

Dr. Baer also approved Mr. Foster to work the five occupations. (CABR Dep. Dr. Baer pp. 27 - 28). On cross examination, Dr. Baer did not waiver in those approvals, despite various identified job tasks that appeared

to be inconsistent with having double vision and loss of depth perception. (CABR Dep. Dr. Baer pp. 32-35). Yet, Dr. Baer agreed Mr. Foster had claim-related restrictions:

> Q. And is he capable of performing jobs that require constant near acuity, depth perception, field of vision and accommodation?
>
> A. When you mention depth perception, I think that's -- that that [sic] he may not be able to accomplish.

(Dep. Dr. Baer p. 35, ln. 5-9). Therefore, when Dr. Baer's testimony is viewed in a light most favorable to Frito Lay, Mr. Foster could perform these five occupations with restrictions on his depth perception.

Dr. Baer and Shults' testimony met Frito Lay's Thayer burden only regarding Mr. Foster's ability to perform work, albeit with restrictions. It did not meet the Thayer burden that Mr. Foster could obtain work despite those restrictions. Frito Lay did not meet its Thayer burden of proof.

3. Mr. Foster's Credibility

Mr. Foster acknowledges that a major element of Frito Lay's case lies in attacks of his credibility. The areas that his credibility was attacked regarded his visual acuity scores (20/25, 20/50, etc.), his alleged loss of visual field (black spots in his vision), and photophobia (light sensitivity). While credibility is always an issue of fact for the trier of fact to decide, all of these credibility attacks were collateral to his restrictions.

Not even Dr. Wojciechowski assigned any work restrictions to the visual acuity scores. Despite questioning Mr. Foster's credibility, Dr. Shults and Dr. Baer agreed he had depth perception loss sufficient to keep

him from maintaining a commercial driver's license. The credibility attacks should not be sufficient for the trier of fact to simply nullify the opinions offered by Drs. Shults and Baer that Mr. Foster does, legitimately, have claim-related work restrictions because of depth perception. Finally, Mr. Foster's credibility does not play any role in whether potential employers in his labor market can accommodate the work restrictions identified by Drs. Shults and Baer.

STANDARD OF REVIEW

As Plaintiff sought to have this matter decided below on a Motion for Summary Judgment and Motions for Directed Verdict, this Court should employ the same standards in determining whether there is any genuine issue of material fact presented in this case. *Tollycraft Yachts Corp. v. McCoy*, 122 Wn.2d 426, 431, 858 P.2d 503 (1993). The purpose of summary judgment is to avoid a useless trial. *Preston v. Duncan*, 55 Wn.2d 678, 681, 349 P.2d 605 (1960). A motion for summary judgment must be granted if, after considering the evidence in the light most favorable to the nonmoving party, there is no genuine issue of material fact and reasonable persons can reach but one conclusion. *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 690, 974 P.2d 836 (1999). A material fact is one on which the outcome of litigation depends. CR 56(c); *Fell v. Spokane Transit Auth.*, 128 Wn.2d 618, 911 P.2d 1319 (1996).

When reviewing a directed verdict ruling, this court applies the same standard as the trial court. *Chaney v. Providence Health Care*, 176 Wn.2d 727, 732, 295 P.3d 728 (2013). A directed verdict is appropriate if, as a

matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party. *Chaney*, 176 Wn.2d at 732.

ARGUMENT

In 1994, this Court in *Leeper* added to its precedents, *Kuhnle, Fochtman*, and *Spring* that when proving entitlement to permanent total disability, the animating purpose of the factual and legal analysis was to "insure against the loss of wage earning capacity." Leeper, 123 Wn.2d at 814. Therefore, to be employable, the injured worker must not only be capable of performing work, but capable of obtaining work. The *Leeper* Court specifically held the "obtain" determination was not superfluous, because disability hearings must focus on whether the "*particular* injured worker can obtain such a job." *Id.* at 818. (Emphasis in original).

Here, the Court of Appeals erroneously analyzed the appellate record for evidence of Mr. Foster's general ability to obtain work, rather than searching the record for *particular* evidence that employers in Mr. Foster's competitive labor market would and could hire someone to work these five occupations with diminished depth perception. See, Slip Opinion pp. 11-13. The Court of Appeals wrongly skipped that analysis because it relied upon this Court's pre-*Leeper* precedent that only required general evidence of being capable of obtaining work.

The Court of Appeals' error was two-fold: first, it did not require individualized evidence of whether Mr. Foster's competitive labor market could accommodate his restrictions; and second, it misapprehended the cases presented below by creating a false dichotomy between "general

employability" and "odd lot employability" when assessing whether an injured worker can obtain work.

The Supreme Court should grant review to clarify two questions not answered by its prior decisions: 1) when determining whether an injured worker can obtain work, must that involve an individualized analysis of that worker's specific labor market's ability to accommodate any claim-related disabilities; and 2) under the facts presented in this appeal, who bears the burden of proving whether the worker's labor market can accommodate his restrictions?

1. The Court should clarify that general evidence of employability is no longer valid.

The long arc of the Court's precedent on permanent total disability has been towards increasing individualization of the evidence and analysis. This culminated in the *Leeper* Court's whole person analysis. Unfortunately, the *Leeper* Court's requirement of individualized evidence has only been consistently applied to the "perform" prong but not to the "obtain" prong. Instead, the Court of Appeals analysis below does not go beyond a recitation that the injured worker must prove he cannot find work generally in his labor market. This is not the first time our appellate courts have failed to require particular labor market evidence. *See, Butson v. Dep't of Labor & Indus.*, 189 Wn. App. 288, 301, 354 P.3d 924 (2015); *Young v. Dep't of Labor & Indus.*, 81 Wn. App. 123, 132, 913 P.2d 402 (1996); *Herr v. Dep't of Labor & Indus.*, 74 Wn. App. 632, 636, 875 P.2d 11 (1994); *Valdez v. Dep't of Labor & Indus.*, No. 33261-6-III, 2016 Wash. App.

LEXIS 1753, at 13-14 (July 28, 2016).

Practitioners, the Board, and our courts know the trier of fact must understand the individual worker's response to an injury, the restrictions on their ability to perform work, combined with an analysis of the totality of their strengths, weaknesses, experience, education, and skills. In short, particular evidence on how the injury has affected the ability to perform work. Yet, that same individualized analysis has not been extended to whether an injured worker can obtain work in their particular labor market.

As highlighted by the Slip Opinion's analysis from pages 11 to 13, the same level of individualized analysis was not given to whether Mr. Foster could obtain work in his competitive labor market. Instead, in reliance on statements made in *Kuhnle*, *Fochtman*, *Spring*, and even *Leeper*, the Court of Appeals simply waived away Mr. Foster's arguments by only requiring generalized evidence of an ability to obtain work. Slip Opinion pp. 12-13.

The Court of Appeals also erroneously engaged in an analysis of the differences between "general" employment and "odd lot" employment. Slip Opinion pp. 13-15. Mr. Foster is not alleging he is only capable of odd lot employment, which is simply a special job, which is not found anywhere else in his labor market, created by an employer to allow him to work. Odd lot is an affirmative defense by employers who prove that despite a lack of general employability, there is an employer who will nonetheless hire the injured worker.

The Court should grant review because the Court of Appeals made

the same error it made in *Graham,*71 Wn. App. at 64. As rejected by this Court in *Leeper*, the Court of Appeals assumed "the general availability of light or sedentary jobs in the labor market implies a *particular* injured worker can obtain such a job." *Leeper*, 123 Wn.2d at 818 (emphasis in original). Nowhere in the Court of Appeals' analysis of whether Mr. Foster met his burden of proof, did it analyze whether there was evidence he could obtain one of these five occupations. Slip Opinion pp. 13-16. The Court of Appeals again treated the obtain prong as superfluous.

The Court should grant review to reformulate its test or statement of what it means for an injured worker to be permanently totally disabled. A restatement will make a clean break from prior precedent that referenced the concept of general employability. Any reformulation should be clear there must be individualized evidence of the injured worker's ability to obtain work in his competitive labor market because of the residual disabilities arising from an on the job injury.

Employability is the overlap between three types of individualized evidence: work restrictions, transferable skills, and labor market. Employability exists where these types of evidence overlap, such as in a Venn diagram. See Appendix A. This formulation is not being made out of whole cloth by Mr. Foster. It is a summation of the regulations adopted by the Department that it uses to judge whether an injured worker is permanently totally disabled (e.g. not employable). These rules are contained in WAC 296-19A-010, 296-19A-070, and 296-19A-140.

The first circle of evidence, work restrictions, must be related in part

to the claim. As correctly provided for in WAC 296-19A-010(1)(c), an injured worker without claim-related work restrictions is *per se* employable, which renders the rest of this analysis moot. However, if there are claim-related work restrictions, as there are here, then there must also be an analysis of the worker's pre-existing medical conditions and restrictions arising from conditions. See WAC 296-19A-010(1)(a)(ii). This is part of the whole person analysis of *Leeper*.

The second circle of evidence is the injured worker's transferable skills, as those are accurately defined in WAC 296-19A-010(7)&(8). These are the existing experiences, skills, and education that makes a worker a candidate for hiring. This is also required by the whole person analysis of *Leeper*.

The third circle of evidence is the injured worker's competitive labor market, as that term is defined in WAC 296-19A-010(4) & (5). This is the evidence of what types of jobs that are available in the injured worker's labor market. What is available in Vancouver can be different than what is available in Seattle or Yakima.

Employability exists where these three types of evidence or circles overlap. Physical restrictions and transferable skills overlap where an injured worker's restrictions are not so severe as to prevent him from being able to use or apply his existing skills. A concert pianist who suffers a finger amputation lacks overlap between these two circles. But a construction worker with a bad back, may still be able to lift 35 pounds.

Transferable skills and labor market overlap where there is evidence

the worker's skills remain relevant in his local market and sufficient employers exist to hire someone like the worker. A worker may be a hobby blacksmith, making horseshoes at home, but would not be able to find work living in Seattle using those skills. But that construction worker may have worked retail three years ago and still knows how to operate a modern, computerized cash register.

Physical restrictions and labor market overlap where there is evidence that local employers can and do accommodate workers with restrictions similar to the injured worker's restrictions. A back injury may limit a worker to sitting 20-minutes at a time, but office-based employers accommodate that restriction with a sit-stand workstation. Or for that construction worker with a 35-pound lifting restriction, there is evidence of multiple construction firms that will still employ him despite that restriction. This is the process the Department already follows in WAC 296-19A-140.

Employability is demonstrated where an injured worker's claim-related physical restrictions (plus pre-existing disabilities) still permit him to use his transferable skills in his local, competitive labor market and where employers in that local, competitive labor market will hire someone with the worker's skills and accommodate someone with the worker's restrictions. This is a better statement of what it means to be "employable." It creates a clean break from earlier formulations of general employability and preserves the particularized, individualized whole person analysis required by *Leeper*.

In granting review, the Court should re-emphasize the necessary individualized assessment of a worker's specific ability to obtain work in his competitive labor market. It should clarify that employability exists where there is evidence of an overlap between the worker's restrictions, transferable skills, and labor market. If one of those circles do not overlap, the worker is not employable.

2. The burden rests on the worker to prove he is unemployable, Mr. Foster met his burden; Frito Lay did not.

The Court of Appeals also misanalysed and misapplied the burden of proof in its analysis of Mr. Foster's Motions for Directed Verdict. See Slip Opinion pp. 14-16. As this Court recently analyzed in *Spivey,* 187 Wn.2d at 731-32, burden of proof encompasses two different types of analysis. The one that should apply here is the Thayer analysis, because it is the type used to determine if a party has survived a motion for directed verdict. *Id.* at 731. It simply means, that if a party presents sufficient evidence, the presumption disappears. *Id.*

It does, however, require the court to determine what is sufficient evidence in the context of this appeal. The Court of Appeals confused the parties' Thayer burdens of proof and the parties' burden of persuasion. As argued above, the Court of Appeals did not properly analyze whether the parties presented sufficient evidence because its application of general employability was so vague as to render the obtain prong meaningless.

The Court should grant review to disentangle what are the legal requirements of parties to meet their Thayer burdens in a permanent total

disability case per RCW 51.32.060. The injured worker bears the initial burden to prove he is not capable of either performing or obtaining employment within his specific, competitive labor market. During his case-in-chief, Mr. Foster met that Thayer burden because Dr. Wojciechowski testified he was not capable of performing any work due to the claim-related double vision.

It is not necessary for Mr. Foster to present evidence on his ability to obtain work, because of the evidence he could not perform any work. Stated differently, if he cannot perform the work, he cannot obtain the work. Had Frito Lay made its own directed verdict motion at the close of Mr. Foster's case, that motion would have failed. Counter-factually, had Mr. Foster presented medical testimony there was some work he could perform, only then would he need to prove his inability to obtain work in his specific, competitive labor market.

Once Mr. Foster met his Thayer burden, it shifted to Frito Lay. The Court should grant review to hold that its burden is to prove Mr. Foster could perform and obtain work within his specific, competitive labor market. This standard is different than the worker's so long as their medical testimony establishes there remains claim-related restrictions or disabilities. They must not only prove the ability to perform work, but also the ability to obtain that work despite those claim-related restrictions or disabilities. If there are no claim-related restrictions, then as held in *Leeper*, 123 Wn. 2d at 815, the inability to obtain work is attributable to fluctuations in the labor market.

Viewed in a light most favorable, Frito Lay proved Mr. Foster could perform the work required in these five occupations, but with restrictions due to his claim-related double vision. Therefore, to meet its Thayer burden of proof, Frito Lay was also required to demonstrate employers existed in Mr. Foster's competitive labor market, who would hire someone with his skills and would accommodate someone with his restrictions. It did not.

This failure has nothing to do with Mr. Foster's burden of persuasion. Mr. Foster concedes there is an issue of fact on his work restrictions. But that issue of fact is the degree of his work restrictions, not whether he has any at all. Even if the trier of fact agrees with Drs. Shults and Baer, this record is insufficient for it to conclude that Mr. Foster could obtain work in those five occupations despite his work restrictions.

If, instead, the Court agrees with Mr. Foster's reformulation of employability above, then Frito Lay still failed to meet its Thayer burden. Mr. Foster met his Thayer burden, because Dr. Wojciechowski's testimony established the work restrictions circle of evidence does not overlap with the transferable skill circle. Mr. Martin's testimony established the presence and scope of the transferable skill circle. That is sufficient to defeat a finding of employability, it is not necessary for Mr. Foster to present evidence about the labor market circle.

Drs. Shults and Baer's testimony agreed the work restriction circle exists and established it does overlap with the transferable skills circle from Mr. Martin's testimony. But Frito Lay presented no evidence on the labor market circle: whether Mr. Foster's skills were relevant to the current labor

market and whether the current labor market can accommodate his restrictions. Both are necessary to prove the labor market circle overlaps the other two circles of evidence. This failure means Frito Lay did not meet its Thayer burden of proof and directed verdict should have been granted.

Without this evidence, it was left to the jury to speculate whether Mr. Foster's particular labor market could accommodate his restrictions. Since its doctors agreed there were claim-related restrictions, it was Frito Lay's Thayer burden to prove Mr. Foster's inability to obtain work is not due to those restrictions, but was due to labor market fluctuations. This is not something that we can expect a reasonable juror to simply know or reason to from other circumstantial evidence. This requires specialized knowledge from an ER 702 vocational expert, and Frito Lay presented no such testimony.

Finally, on Mr. Foster's partial directed verdict motion. Mr. Martin did testify about the labor market for the pallet jack operator position. He testified it existed in the context of driving non-commercial company vehicles. No doctor testified about driving restrictions on personal vehicles, but the surveillance video and Mr. Foster's testimony established he does drive a non-commercial vehicle. The trier of fact could conclude Mr. Foster was capable of performing the driving tasks of the pallet jack operator position. But the trier of fact could not conclude, absent evidence contrary to Mr. Martin's testimony, that Mr. Foster could obtain such work despite his claim-related double vision.

Here again, the Court should grant review because the Court of

Appeals ignored whether there was evidence Mr. Foster could obtain work as a pallet jack operator. Slip Opinion pp. 17-18. The Court's analysis only extended to whether these jobs exist. *Id.* p. 17. Yet it ignored Mr. Martin's unrebutted testimony that he had significant concerns whether any company would hire someone to drive a company vehicle who has double-vision due to insurance issues. (CABR 11/6/14 Tr. p. 30).

This establishes that Mr. Foster cannot obtain this particular job because the "injury in some part caused the inability to obtain work, then the failure to obtain work is relevant evidence of total disability." *Leeper*, 123 Wn. 2d at 815. Alternatively, this proves for this particular job the labor market circle does not overlap the work restrictions circle. It was error to deny Mr. Foster's partial directed verdict motion. The Court should grant review to fix that error.

CONCLUSION

The Court should grant review to clarify that *Leeper* requires individualized evidence of a worker's specific ability to obtain work in his competitive labor market. The Court should set aside prior language that employability means a worker is generally able to obtain work. Instead, the Court should adopt a better articulation of employability: an injured worker's claim-related physical restrictions (plus pre-existing limitations) still permit him to use his transferable skills in his local, competitive labor market and employers in that local, competitive labor market will hire someone with the worker's skills and accommodate someone with the worker's restrictions. Employability is where physical restrictions,

transferable skills, and labor market overlap.

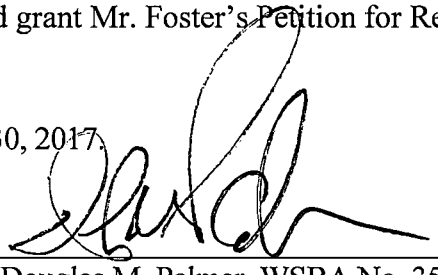
Proving Mr. Foster was not employable merely requires evidence that at least one of the three do not overlap. In this case, Mr. Foster met that Thayer burden as his claim-related disability was severe enough to prevent him from using his job skills regardless of his labor market.

Frito Lay met part of its Thayer burden through medical testimony that Mr. Foster can perform work, within his skills, despite the permanent work restrictions. Yet it did not present evidence Mr. Foster's labor market overlapped with those claim-related disabilities. This failure to meet its Thayer burden meant directed verdict, total or partial, should have been granted in favor of Mr. Foster.

Therefore, the jury should not have been tasked with whether Mr. Foster had met his burden of persuasion on whether or not he was employable. For the jury to have concluded he was employable was for it to speculate employers of those five occupations could accommodate his claim-related disabilities. A verdict cannot rest upon speculation.

The Court should grant Mr. Foster's Petition for Review.

Dated: October 30, 2017.



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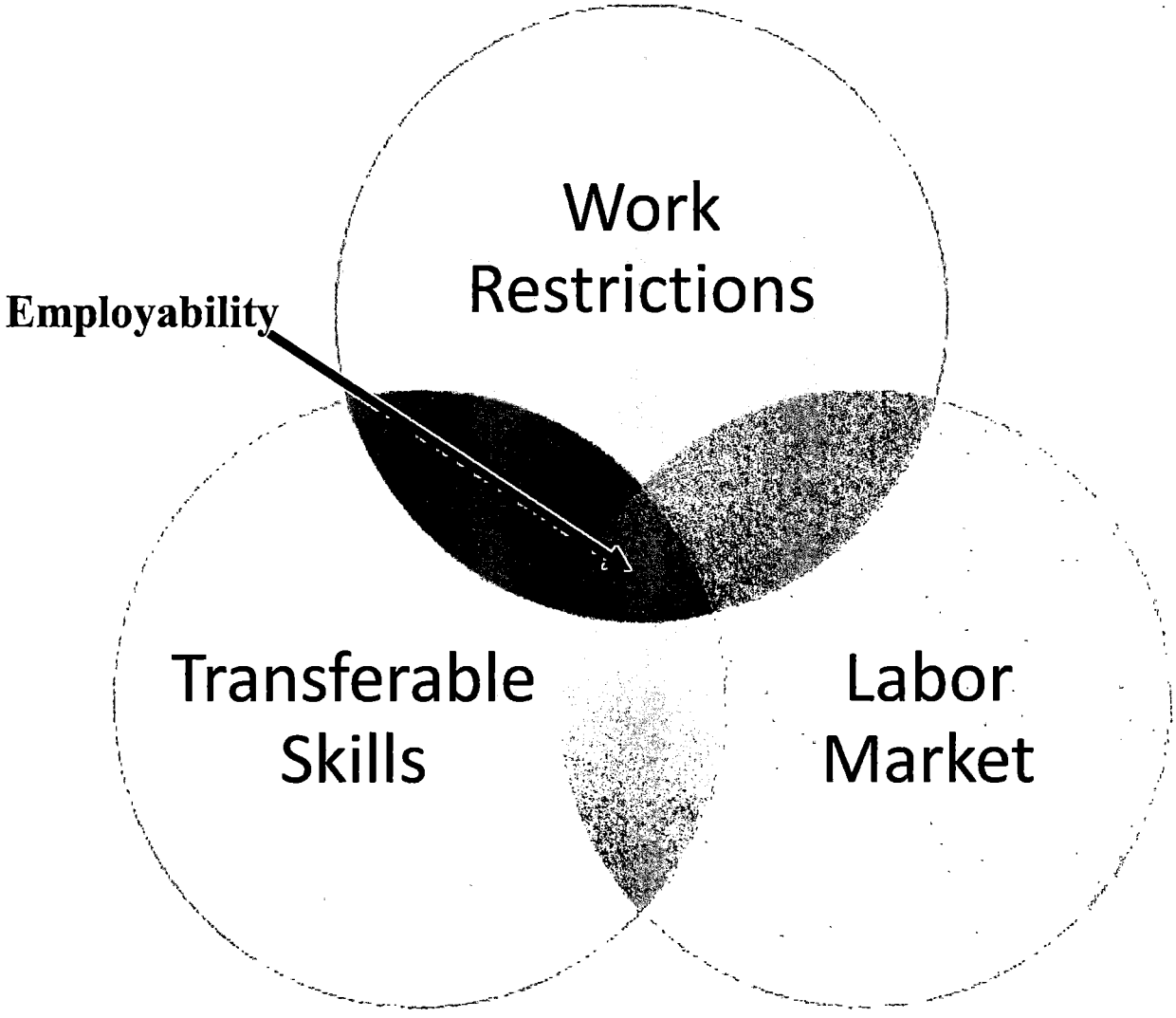
APPENDIX A

Diagram demonstrating the overlapping evidence that should be necessary to prove employability.



Appendix B

WAC 296-19A-010

Definitions.

(1) **What does it mean to say an injured worker is employable?**

(a) "Employable" means having the skills and training that are commonly and currently necessary in the labor market to be capable of performing and obtaining gainful employment on a reasonably continuous basis when considering the worker's:

(i) Age, education, and experience;

(ii) Preexisting physical and mental limitations; and

(iii) Physical and mental limitations caused, at least in part, by the worker's industrial injury or occupational disease.

(b) Physical and/or mental conditions that arose after the industrial injury/occupational disease that were not caused or aggravated by the industrial injury/occupational disease are not considered in determining whether the worker is employable under the Industrial Insurance Act.

(c) If there are no physical or mental restrictions caused by the worker's industrial injury/occupational disease, the worker must be found employable under the Industrial Insurance Act.

(2) **What are vocational rehabilitation services?** Vocational rehabilitation services are those provided by a vocational rehabilitation provider and include, but are not limited to, the following:

(a) Gathering industrially injured or ill workers' work and/or education histories and physical capacities information;

(b) Assessing industrially injured or ill workers' employability;

(c) Developing, documenting, and writing vocational rehabilitation plans;

(d) Monitoring injured workers' progress during training;

(e) Writing progress reports;

(f) Analyzing and documenting the transferable skills of the injured worker and writing transferable skills analyses;

(g) Performing occupational research;

(h) Conducting labor market surveys and writing labor market survey reports;

(i) Conducting and writing job analyses;

(j) Communicating with industrially injured or ill workers, employers, physicians and others;

(k) Developing job modifications and work site modifications, as well as prejob accommodations, and writing reports for this work;

(l) All work done to obtain any job with any employer for injured workers referred for vocational rehabilitation services; and

(m) Providing the Option 2 vocational services listed in WAC **296-19A-631**.

(3) **What is a vocational rehabilitation provider (provider)?** A provider is any person, firm, partnership, corporation, or other legal entity that provides vocational rehabilitation services to industrially injured or ill workers, pursuant to Title **51** RCW. A provider must meet the qualifications listed in WAC **296-19A-210**.

(4) **What is an injured worker's labor market?** Generally, the worker's relevant labor market is the geographic area where the worker was last gainfully employed. The labor market must be within a reasonable commuting distance and be consistent with the industrially injured or ill worker's physical and mental capacities. The exceptions to this rule are listed in the table below:

When a worker:	**Then the department:**
• Relocates to a labor market other than at the time of injury and • Returns to work and • Suffers an aggravation of the work-related condition.	Uses the labor market where the industrially injured or ill worker worked at the time of the aggravation. This applies whether the department closed and reopened the claim or whether the claim remained open during the period of aggravation.
• Relocates after the industrial injury/illness or aggravation and • Now lives in a labor market with more employment opportunities than where the industrially injured or ill worker worked at the time of injury.	Uses the industrially injured or ill worker's current labor market. For example, an industrially injured or ill worker was injured in Forks but after the injury, moves to Tacoma. Provider would use Tacoma as the industrially injured or ill worker's labor market.
• Relocates to a labor market other than at the	Uses the injured or ill worker's current labor market. For example, an

When a worker:	Then the department:
time of injury or onset of illness and • The move was proximately caused by the medical condition arising from the occupational injury or disease.	industrially injured or ill worker moves to a drier climate due to an accepted asthma condition. Provider would use the labor market in the drier climate.

(5) **What is a labor market survey (LMS)?** It is a survey of employers in an industrially injured or ill worker's labor market to obtain specific information (such as physical demands and qualifications) related to job possibilities.

(6) **What is a job analysis (JA)?** It is the gathering, evaluating, and recording of accurate, objective data about the characteristics of a particular job.

(7) **What is a transferable skill?** Transferable skills are any combination of learned or demonstrated behavior, education, training, work traits, and work-related skills that can be readily applied by the worker. They are skills that are interchangeable among different jobs and workplaces. Nonwork-related talents or skills that are both demonstrated and applicable may also be considered.

(8) **What is a transferable skills analysis?** It is a systematic study of the transferable skill or skills a worker has demonstrated to see if that skill set makes him/her employable.

(9) **What are job modifications?** Job modifications are adjustments or alterations made to the way a job is performed to accommodate the restrictions imposed by an industrial injury or occupational disease. The purpose of job modification benefits is to encourage employers to modify jobs to retain or hire injured workers. Job modifications are used when an employer-employee relationship exists, and they may include worksite adjustment; job restructuring; and/or tools, equipment or appliances.

(10) **What are prejob accommodations?** Prejob accommodations are adjustments or alterations made to the way a job is performed to accommodate the restrictions imposed by an industrial injury or occupational disease. The purpose of prejob accommodation benefits is to make it possible for the worker to perform the essential functions of a job. Accommodations are used when an industrially injured or ill worker is

engaged in a vocational rehabilitation plan or in a job search, and they may include tools, equipment or appliances.
[Statutory Authority: RCW **51.04.020**, **51.04.030** and 2015 c 137. WSR 17-19-089, § 296-19A-010, filed 9/19/17, effective 10/20/17. Statutory Authority: RCW **51.04.020**, **51.04.030**, **51.32.095**, **51.36.100**, **51.36.110**. WSR 03-11-009, § 296-19A-010, filed 5/12/03, effective 2/1/04; WSR 00-18-078, § 296-19A-010, filed 9/1/00, effective 6/1/01.]

Appendix C
WAC 296-19A-070

What information must an assessment report include?

(1) The assessment report must include information and evaluation of the worker's:
(a) Age;
(b) Education, including information about education level, courses or transcripts, licenses, and certifications or registrations that the worker may have obtained in the past;
(c) Complete work history, addressing any gaps in employment;
(d) Transferable skills and experience, whether obtained from prior employment, prior courses and training, prior vocational rehabilitation services or plans, or nonwork related activities such as hobbies and/or volunteer experience;
(e) Physical and mental conditions proximately caused by the worker's injury or occupational disease, and the effect of those conditions on the worker's ability to work and/or benefit from vocational services;
(f) Preexisting physical and mental conditions and the effect of those conditions on the worker's ability to work and/or benefit from vocational services;
(g) Postinjury physical and mental conditions and the effect of those nonrelated conditions on the worker's ability to work and/or benefit from vocational services;
(h) Wage and employment pattern at the time of injury;
(i) Barriers to employment, including whether the barriers can be removed and/or what is needed to address the barriers; and
(j) Labor market information as defined in WAC 296-19A-140.
(2) If the vocational rehabilitation provider cannot obtain one or more of the above categories of information, the provider must document in the report all efforts made to obtain the information and why the information could not be obtained.
(3) The report must address whether the worker can return to work in any capacity with the employer of injury or if the worker is employable at a new job with transferable skills.
(4) The assessment report must also include one of the following recommendations:

(a) Able to work: The worker is employable at gainful employment. The report must include:
(i) Whether the worker is employable with the employer of injury or current employer, or if not, a list of job possibilities for which the worker is qualified;
(ii) A medically approved job analysis for the job or jobs at which the worker is able to work. When this is not obtainable, medically approved physical capacities information regarding the worker's ability to perform the job may be used; and
(iii) Labor market information as defined in WAC 296-19A-140 supporting the vocational rehabilitation provider's recommendation. Labor market information is not necessary when the worker is medically released to work for their job of injury at their previous work pattern;
(b) Further services appropriate: Vocational rehabilitation services are necessary and likely to enable the worker to become employable at gainful employment. The report must include:
(i) The specific return to work possibilities investigated and the reasons why they were ruled out which may include labor market information as defined in WAC 296-19A-140;
(ii) An analysis explaining how vocational rehabilitation plan development services are likely to enable the worker to become employable at gainful employment. The analysis may include but is not limited to:
(A) Vocational evaluation that addresses the worker's ability to benefit from vocational rehabilitation services;
(B) Information regarding the worker's medical and/or psychological condition(s);
(C) Labor market survey that was conducted as defined in WAC 296-19A-140;
(D) A discussion of the worker's participation in vocational activities to date; and
(E) Any other relevant information.
(c) Further services not appropriate: The worker is not likely to benefit from vocational services. The report must include:
(i) An analysis explaining why vocational rehabilitation services are not appropriate;
(ii) Barriers identified that will make it unlikely the worker will benefit from vocational rehabilitation services, consistent with the requirements in WAC 296-19A-010(1);
(iii) Medical, psychological or other vocationally relevant information; and

(iv) Labor market information as defined in WAC 296-19A-140 and other information, as necessary, supporting the vocational rehabilitation provider's recommendations.
(d) Return to work: The worker has returned to work. The report must specify and/or document attempts to obtain the following information:
(i) A description of the job the worker returned to;
(ii) The name of the employer;
(iii) The date that the worker returned to work; and
(iv) The worker's monthly wages.
(5) When the worker has returned to work to the job of injury or is medically released without restrictions, the vocational rehabilitation provider should complete the closing report. No other work should be performed without the prior authorization of the referral source.
[Statutory Authority: RCW 51.04.020, 51.04.030, 51.32.095, 51.32.099 and 51.32.0991 (2007 c 72). WSR 08-06-058, § 296-19A-070, filed 2/29/08, effective 3/31/08. Statutory Authority: RCW 51.04.020, 51.04.030, 51.32.095, 51.36.100, 51.36.110. WSR 03-11-009, § 296-19A-070, filed 5/12/03, effective 2/1/04; WSR 00-18-078, § 296-19A-070, filed 9/1/00, effective 6/1/01.]

Appendix D

WAC 296-19A-140

What information must a provider include in a labor market survey?

(1) The following information must be included in a labor market survey that is submitted to the department as documentation in support of a vocational recommendation. This information must be presented in the form of a summary report and accompanied by the results of the individual employer contacts:

(a) The specific job title surveyed and its DOT code. If the DOT code is not an accurate reflection/description of the job, then list the specific job surveyed, the occupational code and the source from which the occupational code was obtained;

(b) The name of the surveyor;

(c) A summary of all contacts and the dates of contact;

(d) A summary of whether or not the industrially injured or ill worker has the physical and mental/cognitive capacities to perform the job, based upon information from the attending physician or from a preponderance of medical information;

(e) A summary of whether the labor market matches the industrially injured or ill worker's work pattern;

(f) A summary of whether the labor market is considered positive or negative, as follows:

(i) If the labor market survey is conducted during an ability to work assessment, a labor market is considered positive if it shows that there are sufficient job opportunities in the worker's relevant labor market to enable the injured worker to become employable.

(ii) If the labor market is conducted during a plan development, a labor market is considered positive if it shows that jobs suitable for the injured worker for the proposed job goal exist in sufficient numbers to reasonably conclude that the worker will be employable at plan completion.

(g) Additional information may be presented in the summary, but only as a supplement to the labor market survey. Additional information may include, but is not limited to, published statistical data regarding occupations and projected job openings.

(2) The following information must be obtained from the individual employer contacts and submitted to the department with the summary report. If the information is not available, the VRC should document attempts made to obtain the information and why it was not available.

(a) The specific job title surveyed;

(b) All specific employer contacts, including their firm names, phone numbers, contact name and job title;

(c) Physical and mental/cognitive demands of the job in relation to the industrially injured or ill worker's physical and mental/cognitive capacities;

(d) Minimum hiring requirements and the skills and training commonly and currently necessary to be gainfully employed in the job;

(e) Work patterns;

(f) Number of positions per job title;

(g) Wage;

(h) Date of last hire;

(i) Number of current openings; and

(j) An indication of whether each contact was considered positive or negative. The provider must include specific documentation to support why a contact was positive or negative for the recommended occupation or proposed vocational goal.

IN THE COURT OF APPEALS DIVISION II
OF THE STATE OF WASHINGTON

BRANDON FOSTER,	)	COA No. 49475-2-II
	)	
Appellant,	)	
	)	PROOF OF SERVICE
v.	)	
	)	
FRITO LAY, INC.,	)	
	)	
Respondent.	)	
	)	

The undersigned states that on October 30, 2017, I served via US mail, as indicated below, Petition for Review to the Supreme Court of Washington, addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated: October 30, 2017.

Douglas M. Palmer, WSBA #35198
Attorney for Brandon Foster, Appellant

Filed
Washington State
Court of Appeals
Division Two

October 3, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

BRANDON FOSTER, Appellant, v. FRITO-LAY INC., Respondent.	No. 49475-2-II UNPUBLISHED OPINION

BJORGEN, C.J. — Brandon Foster appeals the superior court order affirming the Board of Industrial Insurance Appeal's (Board) determination that he was not totally and permanently disabled.[1] Foster argues that the superior court erred in denying his motions (1) for a directed verdict determining that he was a permanently and totally disabled individual and (2) for a partial directed verdict determining that he was not capable of performing and obtaining work as a pallet jack order filler. He also requests attorney fees on appeal. For the reasons below, we hold that the superior court did not err in either

[1] Foster also appeals the superior court's denial of his summary judgment motion. In his reply brief, however, Foster states, "Whether or not this Court can review the denial of summary judgment may have academic import, but has no practical effect on the outcome of this appeal." Reply Br. of Appellant at 17-18. Because Foster concedes that reviewing the summary judgment motion separately will have no practical effect on the outcome of this appeal, we decline to address this issue.

determination, and we deny Foster's request for an award of attorney fees. Accordingly, we affirm.

FACTS

I. BACKGROUND

On April 20, 2010, Foster suffered a left eye injury while working as a driver for his employer, Frito-Lay Inc. He subsequently opened a claim for workers' compensation benefits with the Department of Labor and Industries (Department).

On February 7, 2014, the Department closed the claim with time loss compensation paid to Foster through January 29, 2014. The Department also found that he no longer needed medical treatment and that he was not entitled to a permanent partial disability award. Foster protested the February 17 order. On May 5, the Department affirmed its order. On May 16, Foster appealed that order to the Board.

II. EVIDENCE PRESENTED TO THE BOARD

The Board outlined the three issues before it, each dealing with the effects of Foster's 2010 injury: (1) whether Foster was a totally and temporarily disabled worker during the period January 30, 2014 through May 5, 2014, (2) what degree of permanent partial disability best described Foster's residual impairment, and (3) whether Foster was a totally and permanently disabled worker as of May 5, 2014.[2]

At the Board hearing, Foster presented evidence through the deposition of Dr. Bruce Wojciechowski, an optometrist, the testimony of Todd Martin, a vocational rehabilitation

[2] The parties also agreed that one of the issues was whether Foster required further proper and necessary medical treatment. However, Foster later withdrew this issue.

counselor, and the testimony of Foster himself. To aid in determining what, if any jobs, Foster could reasonably carry out, he also submitted exhibits outlining five positions: construction laborer, bulk order picker/restocker, materials handler-belt picker, materials handler-belt loader, pallet jack order filler.[3]

Wojciechowski concluded that Foster's industrial injury caused him to have photophobia,[4] diminished visual acuity of 20/40 to 20/80 in his left eye, diplopia,[5] and exotropia.[6] He also stated that these eye-related disabilities impeded Foster's ability to succeed at each of the five occupations.

Martin testified that, assuming Foster's diplopia and exotropia diagnoses were accurate, he would not be capable of performing all the requirements of the five occupations. As to the pallet jack order filler position specifically, Martin testified:

> Pallet Jack operation is very different than forklift operation. That's a manual jack that is pushed around a floor. *It's possible he might be able to do that.*
>
> However . . . *pallet jack operation it's not something that's commonly found in the labor market where that's all that individual is doing.* Typically, pallet jack operation you see a lot of times is with distributing companies where someone like Pepsi is bringing their product out to a store. The driver is unloading it via a pallet jack and then transporting it into the store.
>
> *That's more likely where you see pallet jacks used. So, it would entail more driving positions.*

Certified Appeals Board Record (CABR) at 29 (emphasis added).

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[3] Unless otherwise indicated, these five positions will be collectively referred to as the "five occupations."

[4] Photophobia refers to sensitivity to light.

[5] Diplopia refers to double vision.

[6] Exotropia refers to eye drifting.

In response to counsel's follow-up question about Foster's ability to drive a vehicle in light of his vision difficulties, Martin testified:

> I would say that question would need to be posed to a treating physician for them to opine if he would be able to do that.
>
> My concern would be, being a courier or light delivery driver, it's not uncommon to have to drive different times of the day in different weather conditions. . . . If he has difficulties with driving in days when its sunny, or driving at night due to headlights, he likely would not be able to do that job. In addition, I would anticipate that employers would have a significant concern about employing an individual who has double vision such as Mr. Foster due to liability issues, insurance issues.

CABR at 30. Martin also testified that Foster had the transferable skills to perform other jobs, such as an auto courier, roofer, carpenter, route sales driver, merchandiser, and a laborer on a road crew.

Foster testified consistently with Martin's and Wojciechowski's conclusions. He also admitted that he still drives his vehicle, though the weather can make it difficult to drive with his visual disabilities. On cross-examination, Frito-Lay elicited from Foster that he had no restrictions on his driver's license.

After Foster rested his case, Frito-Lay presented evidence through the depositions of Dr. William Shults and Dr. William Baer, ophthalmologists. After performing two medical examinations on Foster, Shults concluded that Foster likely had intermittent exotropia and diplopia, as well as moderate depth perception problems. Shults also opined that Foster's claimed diminished visual acuity was called into question by the result of the cross cylinder test. Shults explained that this test is administered with both eyes open so that patients cannot tell which eye is being tested. Shults opined that through this test, the examiner can

> determine whether the patient is telling the truth. And in this case on a day when he was claiming to be able to see no better than 20/60 he was, in fact, able to see at

> a 20/30 level, and so that tells you that he's not giving his best effort in providing the visual acuity data in his left eye.

CABR (Shults Deposition) (Sept, 17. 2014) at 21-22.

Baer also examined Foster twice. After the second examination, Baer opined that Foster had intermittent exotropia, but that it was probably pre-existing, as well as a "[h]istory of visual field defect, anomalous in nature." CABR (Baer Deposition) at 19. Baer further opined that even with his intermittent exotropia he was likely able to be employed in one of the five occupations. Baer also believed that Foster could do office work, such as on a computer. On cross examination, Foster's attorney elicited from Baer that Foster's depth perception issues may interfere with his ability to perform jobs.

Frito-Lay also admitted the deposition of James Ellis, a private investigator, and accompanying video surveillance footage[7] that he had recorded. In general, the video surveillance shows Foster on multiple occasions after the time of his injury driving his vehicle to and from various locations with little to no problems. The video surveillance also showed Foster loading and unloading large pieces of wood from a truck and delivering them to his friend's business. The video surveillance further showed that Foster was not wearing any kind of protective eye wear or a visor to protect his eyes, which would purportedly help someone with photophobia.

[7] In his opening brief, Foster stated that the surveillance videos were not part of the appellate record. However, this is incorrect.

III. THE BOARD'S DECISION

The Board issued a decision and order with the following pertinent findings of fact and conclusions of law:

FINDINGS OF FACT

. . . .

4. Brandon Foster had no physical restrictions caused by the industrial injury, from January 30, 2014, through May 5, 2014, and as of May 5, 2014.

5. Brandon Foster was and is able to perform the [five occupations] from January 30, 2014, through May 5, 2014, and as of May 5, 2014.

6. Brandon Foster was able to perform and obtain gainful employment on a reasonably continuous basis from January 30, 2014, through May 5, 2014, and as of May 5, 2014.

7. As of May 5, 2014, Brandon Foster's condition(s) proximately caused by the industrial injury were fixed and stable.

8. Medical findings of 20/25-2 diminution of the left eye visual acuity with intermittent exotropia and diplopia support a permanent partial disability award.

9. On May 5, 2014, Brandon Foster had a permanent partial disability proximately caused by the industrial injury equal to 20 percent of total bodily impairment.

CONCLUSIONS OF LAW

. . . .

2. Brandon Foster was not a temporarily totally disabled worker within the meaning of RCW 51.32.090 from January 30, 2014, through May 5, 2014.

3. Brandon Foster was not a permanently totally disabled worker within the meaning of RCW 51.08.160, as of May 5, 2014.

4. On May 5, 2014, Brandon Foster had a permanent partial disability, within the meaning of RCW 51.32.080, proximately caused by the industrial injury.

5. The Department order dated May 5, 2014, is incorrect and is reversed. This matter is remanded to the Department to issue an order finding that the

> claimant was not entitled to time-loss compensation benefits from January 30, 2014, through May 5, 2014. Brandon Foster was not a permanently and totally disabled worker within the meaning of RCW 51.08.160, as of May 5, 2014. The self-insured employer is ordered to pay a permanent partial disability award equal to 20 percent of total bodily impairment, less prior awards, if any, and to close the claim.

CABR at 54-55.

Both Foster and Frito-Lay filed a petition for review of this order. On April 27, 2015, the Board denied review.

IV. SUPERIOR COURT LITIGATION

Both parties appealed to the superior court and stipulated to consolidate their appeals. Foster moved for summary judgment, arguing that there was no genuine issue of material fact that he was a permanently totally disabled worker. Frito-Lay opposed the motion, contending that were genuine issues of material fact and a reasonable person could conclude that Foster was not totally permanently disabled. The trial court denied Foster's summary judgment motion, stating in its written order that there are

> genuine material issues of fact concerning plaintiff's credibility which is the foundation for the opinions of plaintiff's expert witnesses and plaintiff's ability to obtain and perform gainful employment.

Clerk's Papers (CP) at 57.

Frito-Lay subsequently stipulated to dismiss its appeal, which had contested the Board's determination that Foster was entitled to a 20 percent partial permanent disability award. Foster and Frito-Lay proceeded to a jury trial.

The CABR, as already detailed in Part II above, was read to the jury and exhibits contained therein were admitted. At the end of this evidence, Foster moved for a directed verdict and a partial directed verdict.

In his directed verdict motion, Foster argued that there was not substantial evidence to show that he could obtain work in light of his eye-related disabilities. The superior court disagreed, primarily on the basis of the video surveillance footage showing Foster's ability to do work as a "handyman," and denied his motion for a directed verdict. CABR (Transcripts) at 56-57.

As to the motion for a partial directed verdict, Foster argued that no evidence supported the Board's finding that he could work as a pallet jack filler picker.[8] Foster pointed out that Martin's testimony was unrebutted "that this is not a complete job in the labor market . . . [and] is . . . paired with other job duties that involve driving." CABR (Transcripts) at 47. The superior court denied the motion "because a reasonable juror could conclude that Mr. Foster was capable of obtaining and performing work as a Pallet Jack Operator,"[9] and allowed the jury to consider that position in its deliberations. CP at 89-90.

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[8] In its motion for partial directed verdict, Foster had also argued that the Board's order was silent as to Foster's ability to work as an over-the-road "bin driver and . . . forklift operator," and Frito-Lay did not challenge this omission. CABR (Transcripts) at 32. The superior court agreed and excluded these jobs from the jury's consideration. This determination is not challenged on appeal.

Foster also argued that the evidence did not support him working as maintenance mechanic. The superior court granted the motion as to maintenance mechanic because the only evidence presented, by way of Martin, "concluded he did not possess the skills, education, knowledge or experience to obtain such employment." CP at 89. The court thus excluded the maintenance mechanic position from the jury's consideration. This determination is not challenged on appeal.

Finally, the superior court also informed the jury that Foster had a restriction related to his inability to obtain a commercial drivers' license. This determination is not challenged on appeal.

[9] This position is also apparently called a "pallet jack order filler." CP at 89-90. Neither party argues that there is a difference between a pallet jack operator and a pallet jack order filler.

The jury determined that the Board was correct in deciding that the industrial injury did not make (1) Foster temporarily totally disabled between January 30 and May 5, 2014 or (2) permanently totally disabled as of May 5, 2014. The jury also determined that the Board was correct in deciding that Foster had a permanent partial disability equal to 20 percent of total bodily impairment as of May 5, 2014. Based on the jury's verdicts, the superior court affirmed the Board's order.

Foster appeals the superior court's denial of his motions for a directed verdict and partial directed verdict and its subsequent order affirming the Board.

ANALYSIS

I. STANDARD OF REVIEW

In all court proceedings under or pursuant to the Industrial Insurance Act (IIA), Title 51 RCW, "the findings and decision of the board shall be prima facie correct and the burden of proof shall be upon the party attacking the same." RCW 51.52.115. Further, in an industrial insurance appeal, "the practice in civil cases shall apply to appeals. . . . Appeal shall lie from the judgment of the superior court as in other civil cases." RCW 51.52.140. We thus review the superior court's ruling under the standard applicable rules governing a directed verdict on appellate review. *See Joy v. Dep't of Labor & Indus.*, 170 Wn. App. 614, 619, 285 P.3d 187 (2012).[10]

"We review motions for judgment as a matter of law de novo." *Joy*, 170 Wn. App. at 619. Under CR 50(a)(1),

[10] *Joy* refers to a directed verdict as a "motion[] for judgment as a matter of law." *Joy*, 170 Wn. App. at 619.

> [i]f, during a trial by jury, a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find or have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against the party on any claim, counterclaim, cross claim, or third party claim that cannot under the controlling law be maintained without a favorable finding on that issue.

"On review of a ruling on a motion for a directed verdict, the appellate court applies the same standard as the trial court." *Chaney v. Providence Health Care*, 176 Wn.2d 727, 732, 295 P.3d 728 (2013). "A directed verdict is appropriate if, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party." *Id.* "Substantial evidence is the quantum of evidence sufficient to persuade a rational, fair-minded person the premise is true." *Joy*, 170 Wn. App. at 619 (internal quotation marks omitted). A directed verdict "'can be granted only when it can be said, as a matter of law, that there is no competent and substantial evidence upon which the verdict can rest.'" *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 915, 32 P.3d 250 (2001) (quoting *State v. Hall*, 74 Wn.2d 726, 727, 446 P.2d 323 (1968)).

II. DIRECTED VERDICT – PERMANENT TOTAL DISABILITY

Foster argues that once he made a prima facie case that he had a permanent total disability, the burden of proof shifted to Frito-Lay to show that he was capable of both performing *and obtaining* employment in light of his vision-related impairments. We disagree.

A. Legal Principles

"'Permanent total disability' means 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. In interpreting this definition, the case law recognizes that "the purpose of workers' compensation, *and the principle*

which animates it, is to insure against the loss of wage earning capacity. Adherence to this principle focuses disability hearings on the particular claimant's ability to work in the competitive labor market." *Leeper v. Dep't of Labor & Indus.*, 123 Wn.2d 803, 814, 872 P.2d 507 (1994). The definition of "total disability" thus has a medical aspect, *i.e.*, the extent of physical impairment, and an economic aspect, *i.e.*, the effect on wage earning capacity. *Adams v. Dep't of Labor & Indus.*, 128 Wn.2d 224, 230, 905 P.2d 1220 (1995) (citing *Leeper*, 123 Wn.2d at 812.) These two aspects have been combined in a previously approved jury instruction that states: "'[A] worker is totally disabled if unable to perform or obtain regular gainful employment[.]'" *Adams*, 128 Wn.2d at 230 (quoting former WASHINGTON PRACTICE (WPI), 155.07 (3d ed. 1989)) (approved by *Leeper*).[11]

In *Fochtman v. Department of Labor and Industries*, 7 Wn. App. 286, 294, 499 P.2d 255 (1972)), we characterized total disability as

> a hybrid quasi-medical concept in which there are intermingled in various combinations, the medical [f]act of loss of function and disability, together with the inability to perform and the inability to obtain work as a result of his industrial injury.

Citing *Fochtman*, our Supreme Court in *Leeper*, 123 Wn.2d at 814-15 set out a "whole person" approach to determine the degree and extent of an individual's disability:

> the appropriate measure of disability requires a study of the whole person-weaknesses and strengths, age, education, training and experience, reaction to the injury, loss of function, and other factors relevant to whether the worker is, as a result of the injury, disqualified from employment generally available in the labor market. *See Fochtman*, 7 Wn. App. at 295. . . . The trier of fact must determine

[11] The language of WPI 155.07 has been updated since *Leeper* and *Adams* to state, "Total disability is an impairment of mind or body that renders a worker unable to perform or obtain a *gainful occupation with a reasonable degree of success and continuity*." (Emphasis added.)

from all relevant evidence whether an injury has left the worker totally disabled. Relevant evidence as to whether an injury has resulted in permanent total disability includes testimony from a vocational expert regarding the worker's inability to obtain work in the labor market due to his injury. *Fochtman*, 7 Wn. App. at 295; *Leeper*, 123 Wn.2d at 813.

In discussing how a claimant proves permanent total disability, *Kuhnle v. Department of Labor and Industries*, 12 Wn.2d 191, 199, 120 P.2d 1003 (1942), drew a distinction between an injured employee who "'can do light work of a general nature'" and one who "'is only fitted to do 'odd' jobs, or special work, not generally available'":

> "In the former, the burden is on the petitioner; the presumption being that his inability to obtain employment is due to the fluctuations in the labor market and not to the consequences of the accident. In the latter, the burden is on the employer to show that such special work is available to the petitioner."

(quoting *White v. Tennessee Consol. Coal Co.*, 162 Tenn. 380, 385, 36 S.W.2d 902 (1931)).

In *Leeper*, the Washington Supreme Court restated this rule from *Kuhnle*, referred to as the "odd lot doctrine," in the following terms:

> Under this rule, a claimant must prove he or she is incapable of performing light or sedentary work of a general nature. If the claimant proves this, the burden of proof shifts to the Department, and it must show odd jobs or special work exist in the local labor market that the claimant could obtain. *Kuhnle*, 12 Wn.2d at 199.

Leeper, 123 Wn.2d at 815 (emphasis omitted). To shift the burden to the Department under the odd lot doctrine, the claimant must make a prima facie case of disability. *Id.* *Leeper* is consistent with the court's prior decision in *Spring v. Department of Labor and Industries*, 96 Wn.2d 914, 919, 640 P.2d 1 (1982) (emphasis omitted), which held that

> Spring met the burden of proving that he could not obtain and maintain employment of a general light and/or sedentary nature. The burden then shifted to the employer to prove that odd lot or special work of a nongeneral nature was available to Spring.

In short, the burden remains with the claimant to show total permanent disability, unless he makes a prima facie showing under the odd lot doctrine that he cannot maintain employment of a general light/and or sedentary nature. If the claimant shows this, the burden shifts to the employer to show that special work of a nongeneral nature would be available to him. The case law Foster presents does not call this approach into question.[12] [13]

B. Application of the Odd Lot Doctrine

Foster argues that he met his prima facie case to show total disability through the testimony of Wojciechowski and Martin that his intermittent exotropia, diplopia, and diminished visual acuity in his left eye prevented him from being employed in one of the five occupations.

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[12] In his reply brief, Foster argues that *Graham v. Weyerhaeuser Co.*, 71 Wn. App. 55, 60, 856 P.2d 717 (1993), *overruled in part by Leeper*, 123 Wn.2d 803, "clearly required labor market evidence to prove employability." Reply Br. of Appellant at 2. The cited portion of *Graham* states:

> Whether work is general or special depends on whether it is generally available on the competitive labor market. General work is work, including light or sedentary work that is reasonably continuous within the range of the worker's capabilities, training, education and experience and generally available on the competitive labor market

(Emphasis omitted.) This standard indicates that whether work is available on the labor market is relevant, but it does not state that it is the employer's burden to prove availability beyond that set out in the odd lot doctrine.

[13] Foster also argues that under the third prong of *Leeper*, Frito-Lay must present evidence that he can obtain work in the labor market. The third prong, which is more akin to a conclusion, states:

> Third, our opinions *require a claimant to show* the workplace injury, not fluctuations in the labor market alone, caused the inability to obtain work. *If the claimant* shows the injury in some part caused the inability to obtain work, then *the failure to obtain work is relevant evidence of total disability.*

The third conclusion in *Leeper* reflects that it is the claimant's burden to show that an injury impairs his ability to obtain work. It does not shift the burden to the employer to prove the availability of jobs beyond that established in the odd-lot doctrine approved by *Leeper*.

Foster also points out that Baer, Frito-Lay's expert, stated that a job involving use of depth perception may be difficult to accomplish for Foster. Thus, Foster contends, the burden shifted to Frito-Lay to provide substantial evidence that he could *obtain* work in light of his work restrictions.

Under the odd lot doctrine, however, only if Foster had shown that he could not obtain and maintain employment of a general light and/or sedentary nature would Frito-Lay have been required to show special work of a nongeneral nature that was available to him. *Chaney*, 176 Wn.2d at 732; *Leeper*, 123 Wn.2d at 815; *Spring*, 96 Wn.2d at 919. The record discloses multiple issues of fact as to whether Foster made this showing.

First, even if we assume that the five occupations were examples of light or sedentary work of a general nature, whether Foster's disabilities prevented him from performing these jobs was plainly disputed. Baer testified that even with his intermittent exotropia, Foster could still work in any of the five occupations. Martin, on the other hand, testified that Foster would be unable to perform any of the five occupations, assuming that Wojciechowski's conclusion regarding Foster's disabilities was true. The parties' experts also disagreed as to whether Foster could do office work, such as using a computer. Common sense would dictate that an office job would fall into the category of a general light and/or sedentary nature. *See Young v. Dep't of Labor & Indus.*, 81 Wn. App. 123, 132, 913 P.2d 402 (1996).

Perhaps more to the point, Martin, Foster's expert, testified that Foster had the transferable skills to perform jobs other than the five occupations, such as auto courier, roofer, carpenter, route sales driver, merchandiser, and a laborer on a road crew. Taking that at face

value, Foster has not shown that he is unable to perform light or sedentary work under the odd lot doctrine.

Further, as Frito-Lay argues, both Martin's and Wojciechowski's opinions were grounded on the veracity of Foster's representation of his condition. Although it was undisputed that Foster had some disability, Frito-Lay presented a case that consistently undermined Foster's credibility. Shults testified that the cross cylinder test showed that he had exaggerated his visual impairment. The videos of Foster showed that he was driving to different locations and performing tasks without eye protection, which would have purportedly helped with his photophobia. Because both Martin's and Wojciechowski's opinions were based on Foster's credibility, those opinions were compromised by the questions raised about Foster's credibility. Foster has failed to present a prima facie case sufficient to shift the burden of persuasion under the odd lot doctrine.

Foster also argues that even if he did not meet his burden as a matter of law under the odd lot doctrine, the standards governing permanent total disability should be modified. Specifically, he argues that because it was undisputed that he had some work restrictions, the employer was required to put evidence on that he could obtain work in light of those work restrictions.

Foster cites to former RCW 51.32.095 (2008) for the proposition that his employer was required to present a "specific vocational opinion . . . that there are sufficient employers willing and able to hire workers similar to the injured worker." Br. of Appellant at 20-21. Former RCW 51.32.095, however, dealt with the priority of vocational rehabilitation services that should be provided to an injured worker when such services are necessary and likely to enable the injured worker to become employable. WAC 296-19A-020; *see also Winchell's Donuts v. Quintana*, 65

Wn. App. 525, 526-27, 828 P.2d 1166 (1992). Nothing in former RCW 51.32.095 indicated that an employer is *required* to put on labor market evidence to rebut permanent and total disability.

Foster also cites to several Department regulations, WAC 296-19A-065, -070, and -140, as further supporting the view that the employer carries the burden to show that Foster can achieve gainful employment in the market. These rules are related to former RCW 51.32.095. They set forth how vocational rehabilitation providers may complete assessment reports, WAC 296-19A-070(2), which require "labor market" information, WAC 296-19A-140, in order for an employer to determine whether an injured worker should receive vocational rehabilitation services, WAC 296-19A-065. However, the relevancy of labor market information to the determination whether vocational rehabilitation services are needed does not imply that an employer must present labor market information when an injured worker is claiming a permanent total disability.

Foster's arguments from these statutes and rules do not warrant our spurning the odd lot doctrine and crafting a standard contrary to well-established opinions such as *Leeper*. We decline the invitation.

C. Conclusion

Foster appeals the trial court's denial of his motion for a directed verdict. As noted, "[a] directed verdict is appropriate if, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party." *Chaney*, 176 Wn.2d at 732. Foster argues this standard is met because the burden of persuasion shifted to Frito-Lay under the odd lot doctrine and Frito-Lay presented no evidence that work was available to Foster.

With the evidence that Foster was able to perform jobs other than the five listed occupations, the conflicting evidence whether he was able to perform the five occupations and office work, and the expert opinion that Foster had exaggerated his visual impairment during testing, we cannot say that Foster made a prima facie showing that he was incapable of performing light or sedentary work of a general nature. Therefore, the burden of persuasion did not shift to Frito-Lay under *Leeper* and the odd lot doctrine. With that, the record summarized above contains evidence from which a jury could reasonably reach a verdict for the employer, and the trial court properly denied Foster's motion for a directed verdict.

III. PARTIAL DIRECTED VERDICT – PALLET JACK ORDER FILLER

Foster argues that the superior court erred in failing to grant his motion for a partial directed verdict and in allowing the jury to consider the position of pallet jack order filler. In support, Foster cites to Martin's testimony that "pallet jack operation [is] not something that's commonly found in the labor market where that's all that individual is doing." CABR (Transcripts) at 29. According to Martin, pallet jack operation usually occurs in tandem with a driving position where the employee distributes products to stores.

Taking this evidence in the light most favorable to the nonmoving party, Martin's testimony shows that a pallet jack order filler position exists, but that it commonly requires an individual to be able to drive a vehicle. Frito-Lay does not appear to argue that this position does not typically require driving.

Foster argues that the record lacks evidence showing that he could drive a non-commercial vehicle, which often would be required of a pallet jack order filler. We disagree.

On one hand, Martin, among others, testified that Foster's vision defects would make it difficult to carry out driving needed for any job. However, Frito-Lay presented evidence that Foster had an unrestricted driver's license and that he did not have trouble driving in the video surveillance footage. Foster also contends that Martin's statement that it was "possible" for him to be a pallet jack order filler was not enough to submit the matter to the jury because "'possible' does not meet our standard of proof requiring opinions based upon probability." Br. of Appellant at 25. However, Baer testified that Foster could be a pallet jack order filler. Thus, regardless of Martin's opinion, Baer's testimony supplied substantial evidence to show that Foster could perform the duties of a pallet jack order filler.

For these reasons, this record does supply substantial evidence or reasonable inferences from that evidence to sustain a verdict for the nonmoving party, Frito Lay. *Chaney*, 176 Wn.2d at 732. Thus, the trial court properly denied Foster's motion for a partial directed verdict.[14]

IV. ATTORNEY FEES

Foster also requests reasonable attorney fees and costs pursuant to RCW 51.52.130. RCW 51.52.130(1) provides:

> If, on appeal to the superior or appellate court from the decision and order of the board, said decision and order is reversed or modified and additional relief is granted to a worker or beneficiary, or in cases where a party other than the worker or beneficiary is the appealing party and the worker's or beneficiary's right to relief is sustained, a reasonable fee for the services of the worker's or beneficiary's attorney shall be fixed by the court. . .

[14] Foster further contends that no doctor was allowed to comment upon his ability to drive a non-commercial vehicle, and even if he could drive his own vehicle, this does not support an inference that he could drive a company vehicle. However, the evidence showed that he had an unrestricted license and was able to drive to some extent. Thus, a juror could have inferred that Foster could drive well enough to be a pallet jack order filler.

Because Foster does not prevail, we do not award attorney fees and costs under RCW 51.52.130.

CONCLUSION

We affirm the superior court and deny Foster's request for attorney fees on appeal.

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.

Bjorgen, C.J.

BJORGEN, C.J.

We concur:

Melnick, J.

MELNICK, J.

Sutton, J.

SUTTON, J.