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No. 36996-6-II
COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON
BY cm
DEPUTY

ROGER EWART, *Appellant*,

v.

TUMWATER SCHOOL DISTRICT, *Respondent*.

APPEAL FROM THE SUPERIOR COURT FOR THURSTON COUNTY
HONORABLE ANNE HIRSCH

BRIEF OF RESPONDENT

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I. RESTATEMENT OF THE CASE

Mr. Ewart is a former employee of Tumwater School District No. 33, where he worked as a carpenter. [CP—CABR West at page 12/23-28]. In the 1990s, while an employee there, he injured his left knee. [CP—CABR Ewart 10/1/03 at page 13/43]. For *residua* of that injury, he seeks continuing industrial insurance benefits on the basis that he is unemployable.

He is high school graduate with some college. [CP—CABR West 8/13-15]. He has had training in a variety of trades—refrigeration (certified), electrical work, heating, ventilation and air conditioning systems. [CP—CABR West at pages 8/13-34 & 21/19-42; Ewart 6/9/05 at pages 144/35-51 & 145/1-9]. He has also worked in construction, carpentry, apartment maintenance, and commercial fishing. [CP—CABR West at page 12/19-51].

Beginning in 1992, Mr. Ewart began having problems with his left knee. From 1992 through 1997, Dr. Smith treated Mr. Ewart for these problems. [See CP—CABR Peterson 6/7/05 at pages 9/20-25; 10/1-2; & 19/22-25]. First, in 1992, Mr. Ewart tore the medial meniscus of his left knee. [CP—CABR Ewart 6/9/05 at page 123/35-51]. That year, Dr. Smith performed arthroscopic surgery to repair that injury. [CP—CABR Peterson 6/7/05 at page 19/22-25]. Soon thereafter, Mr. Ewart returned to

work. [CP—CABR Ewart 6/9/05 at page 124/9-11]. Next, in 1996, he tore the anterior cruciate ligament (ACL) in his left knee. [CP—CABR Peterson 6/7/05 at page 7/1-2; Bays at pages 13/19-26 & 14/1-8]. That year, in October, Dr. Smith performed arthroscopic surgery to repair this ACL tear.¹ [CP—CABR Peterson 10/1/03 at pages 9/20-25 & 10/1-2]. Thereafter, Mr. Ewart resumed light duty work, but did not return to his regular work as a carpenter. [CP—CABR Ewart 6/9/05 at pages 130/25-51; 131/1 & 47-51; 132/1-7]. Since 1996, with the exception of the three months in which he had worked light duty for Tumwater School District, after his surgery, Mr. Ewart has not sought work. [CP—CABR Ewart 6/9/05 at page 138/39-49].

From August 27, 1997 through June 24, 2004, Dr. Peterson undertook treatment of Mr. Ewart's left knee. [CP—CABR Peterson 6/7/05 at page 6/19]. In January 1998, to increase the range of motion in Mr. Ewart's left knee, Dr. Peterson performed arthroscopic surgery in the form of debridement, notchplasty, and manipulation of the knee to loosen some scar tissue that had accumulated under the left knee cap. [CP--CABR—Peterson 10/1/03 at pages 10/20-25 & 49/11; Bays at pages 17/10-12; 22/13-26; & 23/1-20]. In October 2004, Dr. Kretschmer

¹ The famous football player, Jerry Rice, had this same surgery and within four months was playing football again. [CP—CABR Bays at page 15/10-15].

performed arthroscopic surgery on Mr. Ewart's left knee to remove some loose bodies and adhesions. [CP—CABR Ewart 6/9/05 at page 123/7-33].

In 1997, because Mr. Ewart could not return to his job at injury, in an effort to rehabilitate him vocationally, Tumwater School District hired Jeanne West, a vocational rehabilitation counselor. [CP—CABR West at pages 4/37-39 & 7/11-22]. With Mr. Ewart's help and the help of his attending physician, Ms. West developed a one-year retraining plan in computer assisted drafting (CAD) at South Puget Sound Community College. [CP—CABR West at pages 9/3-31 & 13/11-18]. This course was to enable Mr. Ewart to obtain a "drafting position or engineering technical position with the state of Washington." [CP—CABR West 11/1-7]. At that time, in finding Mr. Ewart eligible for vocational retraining, Ms. West had eliminated all of the lower probabilities for work that required no retraining. [CP—CABR West at page 39/29-51].

In September 1998, Mr. Ewart enrolled in this course. [CP--CABR West at pages 9/3-31 & 13/11-18]. He attended this course for five quarters. [CP—CABR Ewart 10/1/03 at pages 22/27-41 & 33/13-15]. During this time, Mr. Ewart satisfactorily completed the coursework, except for the final project of drafting a set of house plans. [CP—CABR West at page 11/23-51]. Said Ms. West, "the [CAD] instructor advised that he [Mr. Ewart] was at least an average student, [and] should have

been capable of completing the final work product.” [CP—CABR West at page 16/11-17]. Mr. Ewart said he failed to complete that final project because he had knee pain, insufficient sleep, and “didn’t do very well on the math.” [CP—CABR Ewart 6/9/05 at page 132/27-31].

At the hearing, Mr. Ewart complained that he was ill-suited for this course because he obtained barely passing grades in high school mathematics. [The association between CAD drafting and high school mathematics was not established.] Yet, when Mr. Ewart took an aptitude test to determine his placement in mathematics, he scored sufficiently well that he needed no remedial training in mathematics; he was placed directly in college level mathematics. [CP-CABR West at pages 49/39-41 & 53/37-44]. Moreover, during the CAD coursework, Mr. Ewart had no problems, from the perspective of his instructors, with the needed mathematics. [CP—CABR West at page 54/15-21]. Said Ms. West, “his math score was low in the GATB [general aptitude test battery], yet he got through the Auto-cad classes with A’s in some occasions, and that would have required some math aptitude to use the Auto-cad software to do the drafting.” [CP—CABR West at page 58/17-23].

Mr. Ewart was offered more time within which to finish the final drafting project, but he declined that offer. [CP—CABR West at page 57/31-37; Ewart 6/9/05 at page 144/11-33]. He was also offered tutoring,

but he declined that offer. [CP—CABR West at pages 58/47-51 & 59/1-3]. In late 1999, because Mr. Ewart had decided to abandon this program in its final stage, he failed to obtain his certificate as a CAD drafter. [CP—CABR West at page 47/7-11].

In early 2000, Mr. Ewart, soon after withdrawing from the CAD program, re-enrolled, on his own initiative, in a boat building program at Bates Technical College. [CP—CABR West at page 20/9-11]. Before his industrial injury, Mr. Ewart had completed about 30% of that boat building program. As a result, when he re-enrolled, he understood what the program demanded from him physically, and he obviously believed that he could satisfactorily do the required work. [See CP—CABR West at page 19/35-39]. In fact, since re-enrolling, he has continuously remained in that program part time, attending classes about five days a week. [CP—CABR Graydon at pages 9/45-50; 10/9-15 & 19/35-45; Ewart 6/9/05 at page 125/35]. For 147 hours of course work, he never missed a class. [CP—CABR Berg at page 86]. And he had earned a 3.0 grade point average. [CP—CABR Berg at pages 85/1-5 & 86/1-7]. Even so, at the time of the hearing, although he was qualified for a certificate from that program, he had not received his certificate. [CP—CABR Graydon at page 15/29-37]. It is unclear why he had not obtained that certificate. [See CP—CABR Graydon at page 15/31-37].

Because Mr. Ewart had declined to cooperate in his earlier vocational plan to develop his marketable job skills as a CAD drafter, the Department of Labor and Industries (DLI) determined him ineligible for further vocational services at the expense of Tumwater School District. [CP—CABR West at page 17/16-29].

On October 10, 2002, while Mr. Ewart was enrolled in the boat building program at Bates Technical College, Dr. Bays independently examined his left knee. Upon examination, Mr. Ewart had a range of motion on extension of his left knee (straightening) of minus 10 degrees (normal is 0 degrees) and on flexion (flexing) of 100 degrees (normal is 130 degrees). [CP--CABR—Bays 16/11-15]. [Note: In August 1997, three years earlier, Dr. Peterson found Mr. Ewart's range of motion to be minus 5 degrees of extension and 120 degrees of flexion and, on April 20, 2003, about six years after the industrial injury, he found Mr. Ewart's extension to be 0 degrees (normal) and flexion to be 120 degrees. [CP—Peterson 10/1/03 at pages 47/29-33; 52/29 & 59/31-41; Peterson 6/7/05 at page 16/13]].

Although Mr. Ewart complained of patellofemoral pain [pain under the knee cap], based on the objective evidence, Dr. Bays found “no evidence or explanation why this individual was having subjective complaints of pain to the knee.” [CP--CABR—Bays at page 29/22-24].

Said Dr. Bays, “[Dr. Krestschmer’s] operative report reveals very nearly a normal knee examination in the face of somebody who had had a prior menisectomy and a prior cruciate ligament reconstruction.”² “There is no evidence or explanation from this report of why this individual was having subjective complaints of pain to the knee.” [CP—CABR Bays at page 29/19-26].

Dr. Bays, after analyzing Mr. Ewart’s ability to return to work, found no medical basis for Mr. Ewart’s claim that he was unable to return to work. [CP--CABR—Bays 1/3/05 at pages 27/22-26; 28/1-20 & 30/1-3]. Said Dr. Bays, “... I have absolutely no justification for inability to work.” [CP—CABR Bays at page 30/1-3]. Dr. Bays reviewed and approved a job analysis for Mr. Ewart to work as a boat builder. [CP--CABR—Bays 1/3/05 at pages 30/10-24 and 31/1-3].

Between September 30, 2002 and June 24, 2004, Mr. Ewart also saw his attending physician, Dr. Peterson. During this period, Mr. Ewart’s primary complaint was pain under his left knee cap, probably from accumulated scar tissue. [CP—CABR Peterson 6/7/05 at pages 7/8-12; 12/10-14 & 20-21]. Mr. Ewart also complained of some tenderness along

² “[A]ccording to Dr. Krestschmer’s operative report, there was very minimal damage on the under surface of the kneecap.” “It was actually graded at grade one, which is the absolute most minimal damage that you can have of the articular cartilage.” ... “The anterior cruciate ligament was stable.” ... “There was minimal damage to the articular surface beyond the kneecap area.” [CP—CABR Bays at page 29/3-16].

the medial and lateral joint line of his left knee. [CP—CABR Peterson 6/7/05 at pages 12/10-12 & 24-25; & 13/4-5]. Said Dr. Peterson, Mr. Ewart had “some looseness to the ACL; however, felt he had a good end point, stressing that his ACL graft was intact and functioning [properly].” [CP—CABR Peterson 6/7/05 at page 14/10-13]. He had some atrophy in his left thigh related to his ACL surgery, owing partly to an incomplete post-surgical rehabilitation. [CP—CABR Peterson 6/7/05 at page 15/7-10]. Dr. Peterson said, “it’s something that, with his type of surgery, there will always be some degree of atrophy, in many patients.” [CP—CABR Peterson 6/7/05 at page 15/7-10].

In August 1997, when Dr. Peterson first saw Mr. Ewart, he found that Mr. Ewart lacked 5 degrees of full extension (normal is 0 degrees) and had flexion in the left knee of 120 degrees (normal is 130 degrees). [CP—Peterson 10/1/03 at page 47/29-33; Peterson 6/7/05 at page 16/13-21]. He noted that later, after he had performed arthroscopic surgery on Mr. Ewart in 1998 to remove scar tissue in the left knee, Mr. Ewart improved his extension and his upper thigh strength. [CP—CABR Peterson 10/1/03 at page 49/19-23]. On April 20, 2003, Dr. Peterson found Mr. Ewart’s extension to be 0 degrees and his flexion to be 120 degrees. [CP—CABR Peterson 10/1/03 at page 52/29]. In short, Mr. Ewart’s extension had improved 5 degrees from August 1997 (from minus 5 to 0 degrees).

Dr. Peterson stated that on January 14, 2003 “subjectively [Mr. Ewart] continues to have pain over the anterior aspect of his left knee...; however, objectively I cannot demonstrate any evidence that his condition has worsened [since his claim closed in 2001].” “His range of motion is equal to prior measurements in 1999 and 2000.” “His quad strength, demonstrated by thigh circumference measurements, has remained similar or possibly improved.” [CP—CABR Peterson 10/1/03 at page 62/17-46].

Dr Peterson believed, primarily based on Mr. Ewart’s subjective complaints, that Mr. Ewart had restrictions on squatting, kneeling, climbing, heavy lifting (no more than 20 pounds), prolonged standing and prolonged walking. [CP--CABR Peterson 6/7/05 at pages 8/14-15 & 26/14-19]. Dr. Peterson testified to a reasonable degree of medical probability that Mr. Ewart “could work at a light or sedentary level” between September 30, 2002 through June 24, 2004. [CP--CABR Peterson 6/7/05 at page 8/7-11]. He further testified that Mr. Ewart could work a 40 hour week from September 30, 2002 through May 30, 2004; and thereafter could work less than a 40 hour week. [CP--CABR Peterson 6/7/05 at pages 8/20-25 & 9/1-4]. He did approve Mr. Ewart to be vocationally trained as a CAD drafter. [CP--CABR Peterson 6/7/05 at page 22/17-19].

Chuck Graydon, Mr. Ewart's boat building instructor, believed that Mr. Ewart was working at half speed and taking frequent breaks. [CP—CABR Graydon at pages 38/49 & 39/21-25]. From this behavior, he inferred Mr. Ewart was having problems with his left knee. [See CP—CABR Graydon at pages 12/7-25 & 39/21-25]. Based on that subjective behavior, Mr. Graydon opined that Mr. Ewart could not work full-time in the boat building industry. [CP—CABR Graydon at page 14/1-12].

John Berg, a regular forensic vocational witness for claimants' counsel, was hired by Mr. Ewart's attorney to provide forensic testimony at the hearing favorable for Mr. Ewart. [CP--CABR Berg at page 65/19-22]. He met with Mr. Ewart twice. [CP--CABR Berg at page 66/47]. He was unacquainted with the CAD program in which Mr. Ewart had been enrolled. [CP--CABR Berg at page 69/35-39]. Even so, he opined that Mr. Ewart was unemployable. [CP--CABR Berg at page 84/9-15]. In that regard, he opined that Mr. Ewart could not work as a CAD designer; product assembler; boat builder; apartment home maintainer; courtesy van driver; gate access security guard; or HVAC installer. [CP--CABR Berg at pages 70-83]. He did not offer any other possibilities for work; he merely was there to nay say.

He said that Mr. Ewart could not work as a CAD drafter because he had poor math skills in high school and did not score well on an

aptitude test (GATB); CAD drafting was a skilled occupation requiring no less than two years to qualify; and in his anecdotal opinion the job market for CAD drafters was unfavorable. [CP--CABR Berg at pages 70-72]. Yet he acknowledged that Mr. Ewart had successfully passed all the tests in the one year long CAD drafting course and had only to complete an end-of-the-course project of drafting a set of home plans to graduate. [CP--CABR Berg at page 73/1-11]. He speculated that Mr. Ewart could not complete the CAD course because he had chronic knee pain. [CP—CABR Berg at page 75/37-39].

By March 28, 2005, Ms. West, VRC, had re-evaluated Mr. Ewart's employability. By then, she had more comprehensive medical evaluations of Mr. Ewart's left knee than she had had seven years earlier in 1998, when she and Mr. Ewart developed his plan of vocational rehabilitation as a CAD drafter. [CP—CABR West 13/23-33 & 39/51 & 40/1-3]. Based on a review of these subsequent more comprehensive medical evaluations, she concluded that Mr. Ewart could work from September 30, 2002 through June 24, 2004 without retraining. [CP—CABR West 13/23-33 & 39/51 & 40/1-3]. By this time, Ms. West had spoken with a number of medical experts (both those who testified and those who did not) and had met with Mr. Ewart eight times. [CP—CABR West at page 7/29-37]. Based not only on the medical opinions of these various physicians,

including Dr. Peterson, but also on Mr. Ewart's transferable skills, education and training; on her analyses of various types of jobs; and on a survey of the labor market, she found that Mr. Ewart was qualified for, capable of performing, and able to obtain a variety of jobs. In short, he was employable. [CP—CABR West at pages 8/14-37; 13/23-33 & 23/3-22].

Dr. Bays had approved Mr. Ewart for medium work, including boat building. [CP—CABR West at page 23/17-20]. Dr. Wilson had approved him for apartment house building maintenance. [CP—CABR West at page 23/19-22]. Mr. Ewart could also work as a fiberglass laminator. [CP—CABR West at pages 25/37-51; 26/11-52 & 27/1-13]. He could work as a courtesy van driver. [CP—CABR West at pages 27/37-51 & 28/1-52]. He could work as a gate access security guard. [CP—CABR West at pages 29/27-51; 30/1-4 & 31-32]. And he could work as a small parts assembler. [CP—CABR West at pages 32/41-51 & 33-35].

II. PROCEDURAL HISTORY

On January 11, 1996, Mr. Ewart injured his left knee in an industrial event while employed by Tumwater School District. For that injury, he filed an industrial insurance claim, and the DLI allowed the

claim. On February 6, 2001, Mr. Ewart's knee injury was deemed medically fixed and stable, and the DLI accordingly closed the claim.

On March 27, 2001, Mr. Ewart applied to the DLI to reopen his industrial insurance claim alleging that he had aggravated the earlier injury to his left knee. On September 30, 2002, the DLI reopened that claim. On June 25, 2004, the DLI awarded Mr. Ewart time-loss compensation for the period September 30, 2002 through June 24, 2004. Tumwater School District then appealed that compensation order.

On appeal, the IAJ, after reviewing the testimony and observing the live witnesses, determined that Mr. Ewart was employable during the period in issue, and denied Mr. Ewart further compensation for time loss. Mr. Ewart then appealed to the BIIA.

On appeal to the BIIA, the BIIA, in a split decision, concluded that Mr. Ewart was not employable. Tumwater School District then appealed to Superior Court.

On appeal, the Superior Court, after reviewing the same record that the BIIA had reviewed, concluded that the IAJ was correct and Mr. Ewart was employable during the period in issue and therefore not entitled to further compensation for time loss. Mr. Ewart now appeals to this Court.

III. ARGUMENT IN REPOSE

A. Standard of Review

An appellate court reviews the trial court's decision under the ordinary standard of review for civil cases. RCW 51.52.140. The appellate court reviews the entire administrative record (CABR) to determine whether substantial evidence supports the trial court's factual findings and then reviews, *de novo*, whether the trial court's conclusions of law flow from the findings. Substantial evidence will support a finding when the evidence in the record is sufficient to persuade a rational, fair-minded person that the finding is true. *Ruse v. Dep't Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999); *Watson v Dep't Labor & Indus.*, 133 Wn.App. 903, 909, 138 P.3d 177 (2006).

B. Response to Arguments on Appeal

Mr. Ewart has asserted five arguments to support his requested relief to have this Court reverse the decision of the Superior Court. None of these arguments, upon close analysis, has merit.

1. Issue Not Properly Before the Court

Mr. Ewart first argues that the trial court decided this appeal on an issue not properly on appeal. This argument depends on Mr. Ewart identifying two issues: An "improper issue" upon which the trial court allegedly decided the case and the "proper issue" upon which the trial

court should have allegedly decided the case. These two issues will be termed, respectively, the “proper issue” and the “improper issue.”

Proper Issue: The proper issue is this: As a result of a left knee injury on January 11, 1996, was Mr. Ewart temporarily and totally disabled under RCW 51.32.090 during the period September 30, 2002 through June 24, 2004? That is, as a fact, did Mr. Ewart’s industrial injury preclude him from obtaining or performing reasonably continuous, gainful employment, generally available in the competitive labor market, in light of his age, education, training and pre-existing disabilities. WAC 296-20-01002; *Leeper v Dep’t Labor & Indus.*, 123 Wn.2d 803, 872 P.2d 507 (1994); *Hunter v. Bethel School District*, 71 Wn. App. 501, 859 P.2d 652 (1993); *Bonko v. Dep’t Labor & Indus.*, 2 Wn.App. 22, 466 P.2d 526 (1970); *Herr v. Dep’t Labor & Indus.*, 74 Wn. App. 632, 875 P.2d 11 (1994).

Improper Issue: The improper issue is this: Should Mr. Ewart be declared unemployable because he deliberately failed to complete his vocational re-training? Argues Mr. Ewart, because he failed to complete his vocational re-training, the trial court decided to reverse the BIIA’s decision granting him time loss for the period in question.

This argument is without merit. Initially, on October 30, 2007, the trial court appeared to base its decision that Mr. Ewart was not entitled to

time loss benefits for the period September 30, 2002 through June 24, 2004 because he failed to co-operate in a vocational plan to retrain himself as an engineering technician or CAD drafter. [Verbatim Transcript of Proceedings dated October 30 2007 at page 38, lines 3-18; see CP—CABR J. West at page 40/17-21].

Then, on November 16, 2007, when the trial court was asked to reconsider and explicate its earlier ruling, Mr. Ewart argued that his failure to complete his vocational re-training as an engineering technician or CAD drafter could not legally be the basis for a decision that he was thereby employable. [CP—Mr. Ewart's Motion for Reconsideration and Memorandum of Authorities in Support of Motion for Reconsideration dated November 8, 2007]. In response, upon considering that argument, on November 16, 2007, the trial court clarified the basis for its decision. To that end, it provided in writing that its decision was based on the following reasons:

(1) "Mr. Ewart's treating physician, to whom the court gave special consideration, states that Mr. Ewart was able to perform certain types of employment during the period at issue."

(2) "The vocational counselor testified that such work was available to Mr. Ewart."

(3) "... Mr. Ewart could have been retrained through the CAD program and made a decision not to complete the offered training."

(4) "...[T]he record supports a finding that he was employable during the relevant period and that such employment was obtainable." [CP—Opinion and Order of Judge Anne Hirsch denying Motion for Reconsideration dated November 16, 2007].

In short, the trial court determined that, based on the administrative record (CABR), Mr. Ewart's industrial injury did not preclude him from obtaining or performing reasonably continuous, gainful employment, generally available in the competitive labor market, in light of his age, education, training and pre-existing disabilities. That is a judicial determination of the "proper issue," not the "improper issue."

2. Incorrect Standard of Review

Mr. Ewart next argues that when the trial court decided this case, it applied an incorrect standard of review. Mr. Ewart appears to acknowledge that the standard of review that the trial court applied was *de novo* with factual issues being resolved by a preponderance of the evidence. [Appellant's Brief at pages 13 & 14]. Mr. Ewart objects that this standard, as a matter of law, is too lax, thereby allowing the trial court to overturn too easily the BIIA's decision. He argues that the standard of review should be changed. In that regard, he proposes that the trial court

not reverse the BIIA's decision unless Tumwater School District demonstrates "good cause" for reversal. [Appellant's Brief at page 14].

This argument is without merit. In Washington, in industrial insurance appeals, it is settled law that the trial court reviews the administrative record (CABR) *de novo* with factual issues to be resolved by a standard of proof of by a preponderance of the evidence. Under that standard, the court must be persuaded, considering all the evidence, that the proposition on which that party has the burden of proof is more probably true than not true. If the court finds the evidence equally balanced, then the findings of the Board must be affirmed. RCW 51.52.115; *Sawyer v. Dep't of Labor & Indus.*, 48 Wn.2d 761, 296 P.2d 706 (1956); *Scott Paper Co. v. Dep't of Labor & Indus.*, 73 Wn.2d 840, 844, 440 P.2d 818 (1968); *Ravsten v. Dep't of Labor and Indus.*, 108 Wn.2d 143, 146, 736 P.2d 265 (1987); *Layrite Products Co. v. Degenstein*, 74 Wn. App. 881, 880 P.2d 535 (1994). This Court has no power to change that rule.

3. Failure to Identify Reasons for Decision

Mr. Ewart next argues that the trial court failed to identify or to articulate adequately the reasons for its decision. [Appellant's Brief at pages 14 & 15]. Argues Mr. Ewart, when the trial court failed to identify

specific reasons for its decision, it effectively denied him an opportunity to obtain meaningful review of that decision.

This argument is without merit. The trial court did identify and articulate the reasons why it was reversing the BIIA's decision. Following are its stated reasons:

(1) "Mr. Ewart's treating physician, to whom the court gave special consideration, states that Mr. Ewart was able to perform certain types of employment during the period at issue."

(2) "The vocational counselor testified that such work was available to Mr. Ewart."

(3) "... Mr. Ewart could have been re-trained through the CAD program and made a decision not to complete the offered training."

(4) "...[T]he record supports a finding that he was employable during the relevant period and that such employment was obtainable." [CP—Opinion and Order of Judge Anne Hirsch denying Motion for Reconsideration dated November 16, 2007].

These reasons are specific enough for Mr. Ewart to refer, in the administrative record (CABR), to the testimony of his treating physician, William Peterson, M.D., and the independent medical examiner Patrick Bays, D.O, and the vocational counselor, Jeanne West, VRC, to determine whether their testimony supports a finding (given the appropriate standard

of appellate review) that he was employable within the meaning of the Industrial Insurance Act.

An appellate court reviews the trial court's decision under the ordinary standard of review for civil cases. RCW 51.52.140. The appellate court reviews the *entire* administrative record (CABR) to determine whether substantial evidence supports the trial court's factual findings and then reviews, *de novo*, whether the trial court's conclusions of law flow from the findings. Substantial evidence will support a finding when the evidence in the record is sufficient to persuade a rational, fair-minded person that the finding is true. *Ruse v. Dep't Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999); *Watson v Dep't Labor & Indus.*, 133 Wn.App. 903, 909, 138 P.3d 177 (2006).

The trial court's finding was that, as a fact, Mr. Ewart's industrial injury did not preclude Mr. Ewart from obtaining or performing reasonably continuous, gainful employment, generally available in the competitive labor market, in light of his age, education, training and pre-existing disabilities during the period September 30, 2002 through June 24, 2004 and that, accordingly, as a conclusion of law, he was not entitled to time loss benefits during that period. That finding is supported by substantial evidence in the record.

William Peterson, M.D. Dr. Peterson, Mr. Ewart's attending physician, testified to a reasonable degree of medical probability that Mr. Ewart "could work at a light or sedentary level" between September 30, 2002 through June 24, 2004. [CP--CABR Peterson 6/7/05 at page 8/7-11]. He further testified that Mr. Ewart could work a 40 hour week from September 30, 2002 through May 30, 2004; and thereafter could work less than a 40 hour week. [CP--CABR Peterson 6/7/05 at pages 8/20-25 & 9/1-4]. He did approve Mr. Ewart to be vocationally trained as a CAD drafter. [CP--CABR Peterson 6/7/05 at page 22/17-19].

Moreover, Dr. Peterson's description of Mr. Ewart's knee problems indicated that Mr. Ewart's physical limitations were not so much objectively structural but subjective—that is, based on Mr. Ewart's complains of pain under his left knee cap. [See CP—CABR Peterson 6/7/05 at pages 7/8-12; 12/10-25; 13/4-5; & 14/10-13]. In short, the validity of Mr. Ewart's perceived physical limitations were dependent upon Mr. Ewart being candid about what he could or could not do physically. In short, they were based on an assessment of Mr. Ewart's credibility and motivations.

Patrick Bays, D.O. On October 10, 2002, Dr. Bays performed an independent medical examination. He noted that in 1992, Mr. Ewart had had arthroscopic surgery to remove a portion of his medial meniscus.

[CP—CABR Bays at page 11/15-20]. He did well after that surgery. [CP—CABR Bays at page 13/17-19]. In 1996, he had reconstruction of his anterior cruciate ligament. [CP—CABR Bays at page 13/19-26]. After that, the anterior cruciate ligament was stable. [CP—CABR Bays at page 29/12-25]. In 1998, he had arthroscopic debridement, notchplasty, and manipulation under anesthesia to break up some scar tissue. [CP—CABR Bays at pages 17/10-12; 22/13-26; & 23/1-20].

Upon examination, Mr. Ewart had a range of motion on extension of his left knee was minus 10 degrees and on flexion was to 100 degrees. [CP—CABR Bays at page 16/11-15]. Contrast these findings with what Dr. Peterson found: Mr. Ewart's range of motion improved from minus 10 degrees to 0 degrees and from 100 degrees to 120 degrees. [CP--CABR Peterson 10/1/03 at page 52/29]. Although Mr. Ewart complained of pain under his left knee cap, Dr. Bays found minimal objective basis for that pain. [CP—CABR Bays at page 29/1-12].

Dr. Bays analyzed Mr. Ewart's ability to return to employment. [CP—CABR Bays at pages 27/22-26 & 28/1-20]. He found no medical reason why Mr. Ewart could not return to work. [CP—CABR Bays at page 30/1-3]. Dr. Bays reviewed and approved a job analysis for Mr. Ewart to work as a boat builder. [CP—CABR Bays at pages 30/10-24 & 31/1-3].

Jeanne West, VRC. Ms. West testified that she is a vocational rehabilitation counselor hired to assess whether or not Mr. Ewart was employable. [CP—CABR West at pages 4/37-39 & 7/11-22]. To assess his employability, she spoke with the medical experts (both those who testified and those who did not) and met with Mr. Ewart on eight occasions. [CP—CABR West at page 7/29-37]. Based not only on the medical opinions of various physicians, including Drs. Peterson and Bays; but also on Mr. Ewart's transferable skills, education and training; on her analyses of various types of jobs; and on a survey of the labor market, she found that Mr. Ewart was qualified for, capable of performing, and able to obtain a variety of jobs. In short, he was employable. [CP—CABR West at page 8].

Given that Mr. Ewart's credibility and motivation are the basis for the opinions about what he could or could not do physically, the trial court had a legitimate reason to focus on Mr. Ewart's credibility and motivation—namely on his conduct in deciding not to complete the CAD drafting course. Mr. Ewart had decided not to complete that course when he declined to complete the final project for that course even though he had completed the other course work. The DLI determined that he failed to complete that course because he chose not to cooperate in his retraining. [CP—CABR West at page 15/33-37]. The trial court apparently believed

that Mr. Ewart's failure to cooperate with his vocational rehabilitation reflected adversely on his credibility. If Mr. Ewart behaved in a way that reflected adversely on his credibility, then his alleged physical limitations based on his subjective complaints of pain were suspect.

4. Double Jeopardy

Mr. Ewart next argues that he was punished twice for failing to complete his vocational retraining in violation of the rule against "double jeopardy." [Appellant's Brief at page 15]. The rule against double jeopardy appears in the Fifth Amendment to the United States Constitution and applies to the States through incorporation into the Fourteenth Amendment. *Benton v. Maryland*, 395 US 784, 89 S. Ct. 2056, 23 L. Ed.2d 707 (1969).

The relevant clause of the Fifth Amendment reads:

"...nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb...".

Mr. Ewart argues that he was "punished" twice for his failure to complete his vocational retraining. This argument depends upon Mr. Ewart identifying two separate punishments. Those two punishments, argues Mr. Ewart, are as follows:

First Punishment: The Department denied Mr. Ewart benefits and closed his claim ostensibly because he failed to complete his vocational retraining. [Appellant's Brief at page 15].

Second Punishment: The trial court punished Mr. Ewart when it considered arguments referring to his failure to complete his vocational retraining. [Appellant's Brief at page 15].

This argument is without merit both factually and legally. First, Mr. Ewart has not been "punished." Neither the DLI nor the trial court penalized Mr. Ewart for failing to complete his vocational retraining. Secondly, Mr. Ewart, assuming only for the sake of argument that he was punished once, has not been punished twice. The trial court did not punish him; it determined, based on the administrative record, that he was employable for reasons other than that he had failed to complete his vocational retraining as a CAD drafter. Thirdly, as a rule, the right against double jeopardy does not apply to civil or administrative proceedings. *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 169 (1874); *Helvering v. Mitchell*, 303 U.S. 391, 58 S.Ct. 630, 82 L.Ed. 917 (1938); *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 63 S.Ct. 379; 87 L.Ed. 443 (1943); *Rex Trailer Co. v. United States*, 350 U.S. 148, 76 S.Ct. 219; 100 L.Ed. 149 (1956).

5. Issue Preclusion

Mr. Ewart finally argues that Tumwater School District is precluded from raising, at the trial court, issues about his employability. The reason why is that it could have raised those issues, but did not, in litigation over Mr. Ewart's application to re-open his claim in March 2001. In that litigation, the BIIA directed the DLI to reopen the claim that had been closed in February 2001. That litigation over whether to reopen the claim was concluded when Tumwater School District withdrew its notice of appeal on June 16, 2004.

This argument is without merit both factually and legally. This argument depends on the existence of two different proceedings. These two different proceedings will be termed (1) "previous proceeding" and (2) "current proceeding."

Previous Proceeding: The previous proceeding was an adjudication whether Mr. Ewart's application to reopen his claim should be allowed. The criteria for determining whether to allow Mr. Ewart's application to re-open are as follows: medical testimony establishes that the condition caused by the injury became aggravated or worsened at least in part objectively between the terminal dates of the aggravation period. *E.g., Cooper v Dep't Labor & Indus.*, 20 Wn.2d 429, 147 P.2d 522 (1944); *In Re Marven Sandven*, BIIA Sign. Dec., 89 3338 (1990).

Current Proceeding: The current proceeding was an adjudication whether Mr. Ewart was employable from September 30, 2002 through June 24, 2004. That issue was not an issue properly litigated in previous proceeding to determine whether Mr. Ewart could re-open his claim. Only once Mr. Ewart's re-opening application was allowed could the DLI decide whether Mr. Ewart was entitled to benefits under the re-opened claim. In that regard, it determined that he was entitled to time loss benefits from September 30, 2002 through June 24, 2004, a faulty decision which is the subject of the current proceeding.

The legal requirements for issue preclusion are as follows:

(1) The issue decided in the prior adjudication must be identical with the one presented in the second;

(2) the prior adjudication must have ended in a final judgment on the merits;

(3) the party against whom the pleas is asserted was a party or in privity with a part to the prior adjudication; and

(4) application of the doctrine must not work an injustice. *E.g.*, *Barr v. Day*, 124 Wn.2d 318, 879 P.2d 912 (1994); *Dep't of Ecology v. Yakima Reservation Irrigation District*, 121 Wn.2d 257, 850 P.2d 1306 (1993).

Criteria one has not been satisfied. The issues that could be raised and that were raised in previous proceeding and current proceeding were different. The Department action that became the issue litigated in the previous proceeding was a legal precondition to the DLI's action that became the issue litigated in the current proceeding. In short, the issue in previous proceeding had to be resolved before the issue in the current proceeding could arise. As a result, the issue in the current proceeding could not have been litigated in the previous proceeding.

IV. CONCLUSION

For the preceding reasons, this Court should affirm the trial court's findings of fact and conclusions of law.

Respectfully submitted this 12th day of June 2008.

Wallace, Klor & Mann, P.C.

A handwritten signature in black ink, appearing to read "W. Masters", written over a horizontal line.

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