

No. 39061-2-II

---

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

---

GEORGIA-PACIFIC CORPORATION,

Appellant,

v.

CARL G. OLSON,

Respondent.

---

**BRIEF OF APPELLANT**

---

Craig A. Staples, WSBA #14708  
P.O. Box 70061  
Vancouver, WA 98665  
(360) 887-2882

Attorney for Georgia-Pacific Corp.

*Craig A. Staples*  
BY \_\_\_\_\_  
STATE OF WASH. COURT  
COUNTY OF KING CO  
COMM. TO APPEAR  
2011/06/09 10:00 AM

*PM 8/6/09*

## TABLE OF CONTENTS

	<u>Page</u>
I. ASSIGNMENTS OF ERROR .....	1
A. <u>Assignments of Error</u> .....	1
B. <u>Issues Pertaining to Assignments of Error</u> .....	2
II. STATEMENT OF THE CASE .....	2
A. <u>Statement of Procedure</u> .....	2
B. <u>Statement of Facts</u> .....	5
III. SCOPE OF REVIEW .....	12
IV. ARGUMENT .....	13
A. <u>The Trial Court Erred in Denying Georgia-Pacific's Motions For Judgment as a Matter of Law Because Claimant Failed to Present Substantial Evidence Sufficient to Sustain His Burden of Proof on Each Contested Issue</u> .....	13
1. The Jury Erred in Finding That Claimant Was Temporarily and Totally Disabled From December 4, 2004 Through April 12, 2006 Because Claimant Presented No Expert Testimony Sufficient To Find That He Could Not Perform Light or Sedentary Work of a General Nature From December 4, 2004 Through April 12, 2006. Similarly, No Substantial Evidence Shows That Claimant Was Permanently Precluded From Performing Such Work As of April 12, 2006 ...	13
2. The Jury Erred in Finding That Claimant's Bilateral Wrist Conditions Had Not Reached Maximum Medical Improvement Because No Substantial Evidence Supports the Conclusion That Claimant Intended To Pursue Any Curative or Rehabilitative Treatment That Had Been Recommended .....	22

	<u>Page</u>
<b>3. Claimant Offered No Substantial Expert Medical Testimony That Distinguished Between Any Permanent Partial Disability Due to His Work-Related Wrist Conditions and That Due to Other Causes .....</b>	26
<b><u>B. Claimant Is Not Entitled To Assessed Attorney Fees and Costs</u> .....</b>	28
<b>V. CONCLUSION .....</b>	28

## TABLE OF AUTHORITIES

### CASES

	<u>Page</u>
<i>Buell v. Aetna Surety &amp; Casualty</i> , 14 Wn. App. 742, 544 P.2d 759 (1976) .....	23
<i>Coleman v. Prosser Packers</i> , 19 Wn.App. 616, 576 P.2d 1331 (1978) .....	26
<i>Fochtman v. Department of Labor and Industries</i> , 7 Wn.App. 286, 499 P.2d 255 (1972) ...	15, 16, 20, 21, 22
<i>Groff v. Department of Labor and Industries</i> , 65 Wn.2d 35, 395 P.2d 633 (1964) .....	12
<i>Hubbard v. Department of Labor and Industries</i> , 140 Wn.2d 35, 992 P.2d 1002 (2000) .....	14
<i>Hue v. Farmboy Spray Co., Inc.</i> , 127 Wn.2d 67, 896 P.2d 682 (1995) .....	12
<i>Hunter v. Bethel School Dist.</i> , 71 Wn. App. 501, 859 P.2d 652 (1993), rev den 123 Wn.2d 1031, 877 P.2d 695 (1994) ..	14
<i>Industrial Indemnity Co. of the Northwest, Inc. v. Kallevig</i> , 114 Wn.App. 907, 792 P.2d 520 (1990) .....	13
<i>Kuhnle v. Department of Labor and Industries</i> , 12 Wn.2d 191, 120 P.2d 1003 (1942) .....	14, 16
<i>Olympia Brewing Co. v. Department of Labor and Industries</i> , 34 Wn.2d 498, 208 P.2d 1181 (1949) .....	14, 23
<i>Orr v. Department of Labor and Industries</i> , 10 Wn.App. 697, 519 P.2d 1334 (1974) .....	27, 28
<i>Pybus Steel Co. v. Department of Labor and Industries</i> , 12 Wn. App. 436, 530 P.2d 350 (1975) .....	23

	<u>Page</u>
<i>Queen City Farms, Inc. v. Cent. Nat'l Ins. Co. of Omaha</i> , 126 Wn.2d 50, 882 P.2d 703 (1994) .....	15, 20
<i>Rector v. Department of Labor and Industries</i> , 61 Wn.App. 385, 810 P.2d 1363, rev denied 117 Wn.2d 1004, 815 P.2d 266 (1991) .....	12
<i>Rose v. Department of Labor and Industries</i> , 57 Wn. App. 751, 790 P.2d 201, rev den 115 Wn.2d 1010 (1990) .....	12
<i>Ruse v. Department of Labor and Industries</i> , 138 Wn.2d 1, 977 P.2d 570 (1999) .....	12
<i>Safeco Ins. Co. v. McGrath</i> , 63 Wn.App. 170, 817 P.2d 861 (1992) .....	15, 20
<i>Sawyer v. Department of Labor and Industries</i> , 48 Wn.2d 761, 296 P.2d 706 (1956) .....	15, 20
<i>Sing v. John L. Scott, Inc.</i> , 134 Wn.2d 24, 948 P.2d 816 (1997)	13
<i>Spring v. Department of Labor and Industries</i> , 96 Wn.2d 914, 640 P.2d 1 (1982) .....	14, 15, 16, 20, 21
<i>Theonnes v. Hazen</i> , 37 Wn.App. 644, 681 P.2d 1284 (1984)	15, 20
<i>Ziegler v. Department of Labor and Industries</i> , 14 Wn.App. 829, 545 P.2d 558 (1976) .....	26, 27, 28

### STATUTES

RCW 51.32.080 .....	26
RCW 51.32.080(5) .....	27
RCW 51.36.010 .....	23
RCW 51.52.050 .....	23

	<b><u>Page</u></b>
RCW 51.52.115 .....	12
RCW 51.52.130 .....	28

**REGULATIONS**

WAC 296-20-01002 .....	23
------------------------	----

## I. ASSIGNMENTS OF ERROR

### A. Assignments of Error

1. The trial court erred in denying Georgia-Pacific's motions for judgment as a matter of law on the issues of claimant's entitlement to further treatment, time loss benefits, pension benefits and a permanent partial disability award. (CP 27).

2. The jury erred in finding that claimant was temporarily and totally disabled from December 4, 2004 through April 12, 2006. (CP 140).

3. The jury erred in finding that claimant's wrist bilateral conditions had not reached maximum medical improvement as of April 12, 2006. (CP 140).

### B. Issues Pertaining to Assignments of Error

1. Does substantial evidence support the conclusion that claimant temporarily could not perform light or sedentary work of a general nature from December 4, 2004 through April 12, 2006? (Assign. of Err. 1 and 2).

2. Does substantial evidence support the conclusion that claimant intended to pursue any curative or rehabilitative treatment

that had been recommended as of claim closure on April 12, 2006?

(Assign. of Err. 1 and 3).

3. Does substantial evidence support the conclusion that claimant permanently could not perform light or sedentary work of a general nature as of April 12, 2006? (Assign of Err. 1).

4. Did claimant offer substantial expert medical testimony that distinguished between any permanent partial disability due to his work-related wrist conditions and that due to other causes? (Assign. of Err. 1).

## II. STATEMENT OF THE CASE

### A. Statement of Procedure

In March 2002, Carl Olson (“claimant”), filed an application for workers’ compensation benefits for a bilateral wrist condition which he attributed to his work for Georgia-Pacific Corporation (“Georgia-Pacific” or “employer”). (CABR 5).<sup>1</sup> By order dated April 12, 2006, the Department of Labor and Industries allowed and closed the claim with time loss benefits as paid to December 3, 2004, with no award for permanent partial disability or a pension (permanent total disability). (*Id.*). Claimant appealed that decision

---

<sup>1</sup> “CABR” is the certified appeal board record, which is found in the Clerk’s Papers as an exhibit at page 3.

to the Board of Industrial Insurance Appeals, contending that he was entitled to further treatment, time loss benefits on and after December 4, 2004, a pension as of April 12, 2006, or a permanent partial disability award. (CABR 89).

The Board conducted hearings commencing in February 2007. The Board's appeals judge issued a Proposed Decision and Order dated June 28, 2007, in which he concluded that claimant needed further treatment, but that claimant was able to engage in regularly gainful employment and, therefore, was not entitled to time loss or pension benefits from December 4, 2004 through and as of April 12, 2006. (CABR 83). Georgia-Pacific petitioned the Board for review of the appeals judge's resolution of the treatment issue, and claimant petitioned for review on the time loss and pension issues. (CABR 23-52, 56-58). The Board granted review. (CABR 54-55).

By decision and order issued November 7, 2007, the Board found that claimant was entitled to further treatment and time loss benefits for the period from December 4, 2004 through April 12, 2006. (CABR 6-7). Because the Board remanded the claim for the provision of further treatment, it did not address the issue of

permanent partial or total disability benefits. Georgia-Pacific appealed the Board's decision to the Clark County Superior Court.

Georgia-Pacific thereafter filed a motion for judgment as a matter of law on the issues of claimant's entitlement to treatment, time loss and pension benefits, and a permanent partial disability award. (CP 19). A hearing on the motion was held before The Honorable Robert L. Harris on April 4, 2008. Judge Harris denied the motion. (CP 27).

The matter proceeded to a jury trial on January 26 and 27, 2009. After the evidence was presented to the jury but before the jury was instructed, Georgia-Pacific renewed its motion for judgment as a matter of law on the treatment, time loss, pension and permanent partial disability issues. (CP 143). Judge Harris denied the motion. (*Id.*). The matter was therefore presented to the jury, which affirmed the Board's determination that claimant required further treatment for his bilateral wrist conditions and that he was entitled to time loss benefits for the period from December 4, 2004 through April 12, 2006. (CP 140). A conforming judgment was therefore entered, which also granted claimant's counsel assessed attorney fees and costs in the amount of \$13,278.00.

(CP 139). Georgia-Pacific appealed to this court from the trial court's decision on the merits and the award of attorney fees and costs. (CP 162).

**B. Statement of Facts**

In 1969, when claimant was 15 years old, he drove a motorcycle off a 25-foot high cliff and landed with his hands and arms outstretched on a rock. (Schoepflin 9).<sup>2</sup> He sustained severe, compound fractures of both lower arms and also snapped tendons in the area. (*Id.*; Button 9). The accident left claimant with permanently deformed wrists, particularly on the left side, with associated permanent range of motion deficits. (Gritzka 21-22, 40; Button 12). Claimant re-injured his wrists in 1975 when he slipped off the back end of a flatbed truck and landed on his hands. (Schoepflin 9). This necessitated treatment with an orthopedist, who noted a "floater" (bone fragment) in claimant's left wrist. (*Id.*). The medical experts all testified that claimant's accidents, particularly the first one, caused post-traumatic arthritis in his

---

<sup>2</sup> All hearing and deposition transcripts are contained in the CABR. Record references are to the last name of the witness, followed by the page number for the hearing or deposition transcript. Claimant testified at the February 5, 2007 hearing. Ms. Devine testified at the February 8, 2007 hearing. The other witnesses referenced in this brief testified by deposition.

wrists, which progressively worsened over time, in addition to the wrist deformities. (Gritzka 23-24, 26; Button 17-18, 35; Schoepflin 25-26).

Claimant began working for Georgia-Pacific's predecessors in 1976 as a forklift driver and he became a machinist in approximately 1995. (CABR 70-71). Claimant's wrist symptoms worsened, which he attributed to his duties as a machinist. (*Id.*). The Department found claimant's occupational wrist disease became manifest in March 2000. (CABR 82). Additional facts, specific to each issue, are discussed below.

#### **Re: Treatment**

Before the Department closed this claim, claimant's attending physician, Dr. Schoepflin, and an independent examiner, Dr. Button, recommended that claimant undergo wrist surgery. (See Gritzka 12, 45-46; Schoepflin 34-35; Button 8, 35). No other curative or rehabilitative treatment was recommended. Claimant declined to pursue the surgery. (Gritzka 37-38). Dr. Gritzka testified that claimant had "opted to have no additional surgery..." and, similarly, that claimant had "elected to not seek surgery." (Gritzka 37). Dr. Gritzka further testified as to whether claimant's

decision not to pursue surgery was reasonable, thus confirming that claimant had decided not to pursue the surgery. (Gritzka 38). Claimant's testimony also was consistent with the conclusion that he had decided not to pursue the surgery. (See Claimant 56-57, 68).

Prior to the hearing before the Board, claimant reserved entitlement to treatment as a potential issue, but claimant's counsel expressly made pursuit of that issue subject to what the evidence would show. (2/5/07 Tr. 4). That is, counsel made reservation of the treatment issue contingent on whether claimant testified he wished to pursue surgery. Claimant presented no evidence that he had reversed his decision not to pursue surgery. Instead, he offered testimony – through Dr. Gritzka – that confirmed he did not intend to obtain surgery. (Gritzka 37-38).

**Re: Time Loss/Pension Benefits**

The employer's medical expert, Dr. Button, testified that claimant had the physical capacity to work in the light range of employments. (Button 19-21). Claimant acknowledged that he had no physical limitations other than those stemming from his wrist conditions. (Claimant 63). Dr. Button noted that the wrist

conditions restricted claimant only from heavy activities and those requiring a forceful grip or significant torquing of the upper extremities. (Button 20). He stated claimant had no limitations on his ability to perform fine manipulation with his fingers, computer keyboarding or mouse usage, or writing. (*Id.*). Dr. Button identified security and office work in particular as appropriate for claimant. (Button 19-20).

The employer's vocational expert, Ms. Devine, testified that claimant was employable at all relevant times in a number of sedentary to light jobs, including but not limited to the positions of security guard, sales, office clerical, scale operator and fire (hazard) watch. (Devine 10, 20, 23). She explained that each of these positions involved no significant repetitive hand or wrist usage, and that all of them were within even the more restrictive limitations that Dr. Schoepflin, had placed on claimant.<sup>3</sup> (Devine 11-21). Ms. Devine testified that claimant's ability to work successfully as a millwright demonstrated that he possessed the aptitudes that would enable him to perform and obtain such work, including but not limited to average or above learning ability, verbal

---

<sup>3</sup> Georgia-Pacific does not concede the accuracy of Dr. Schoepflin's restrictions. (See Button 21, 29-30).

and numerical abilities, spatial perception, finger dexterity and the ability to work with others and responsibly satisfy the requirements of employment. (Devine 8-9). Claimant's own testimony confirmed Ms. Devine's assessment of his vocational capabilities. (Claimant 64-65). He also confirmed that his previous job provided him more experience than he would need working with computers. (Claimant 67). Ms. Devine testified that the above-noted jobs were available in claimant's labor market and that claimant could have successfully obtained them during the relevant times. (Devine 14-15, 18, 24). She therefore concluded that claimant was employable during the period in question. (Devine 10, 23-24).

Claimant did not present testimony from a vocational expert, but relied only on his medical witnesses. Dr. Gritzka offered only the bare conclusion that claimant was totally disabled. (Gritzka 37). However, he explained that he considered claimant totally disabled only because claimant could not return to his regular work as a millwright. (Gritzka 37, 49). Dr. Gritzka conceded that he merely *assumed* claimant had no other vocational skills and that no other suitable jobs were available; he did not state that as fact. (Gritzka 49-50). Dr. Gritzka also essentially acknowledged that he was not

qualified to provide an expert opinion on the issues of claimant's skills or the nature of other jobs. (*Id.*). He also conceded that claimant could perform work not involving much lifting or wrist usage. (Gritzka 44).

Dr. Schoepflin's stated only that claimant could not return to work as a millwright. (Schoepflin 36). He did not address claimant's ability to perform any other type of work, specifically including light or sedentary work of a general nature.

#### **Re: Permanent Partial Disability**

As discussed above, claimant sustained severe fractures and snapped tendons of both lower arms in a 1969 motorcycle accident. (Schoepflin 9; Button 9). This resulted in permanently deformed wrists, particularly on the left side, with associated permanent range of motion deficits that constituted ratable permanent impairment. (Gritzka 21-22, 40; Button 12). Claimant re-injured his wrists in 1975 and underwent surgery on the left wrist. (Schoepflin 9). These accidents caused post-traumatic arthritis in his wrists, which progressively worsened over time, in addition to the wrist deformities. (Gritzka 23-24, 26; Button 17-18, 35; Schoepflin 25-26). The degenerative arthritis likely became

symptomatic at least several years before claimant's occupational disease became manifest in March 2000. (CABR 83; Gritzka 26-27; Button 18, 31; Schoepflin 11-12). Claimant's testimony is consistent with that conclusion, although he dated the increased symptoms to the work change in 1995. (Claimant 30). The doctors also testified that the accident in 1969 had damaged claimant's median nerve, which produced permanent hand numbness and other symptoms of carpal tunnel syndrome. (Gritzka 19-20; Button 14, 40).

Dr. Gritzka testified that claimant's current impairment was due to a combination of the fractures and post-traumatic arthritis, as well as osteoarthritis resulting from daily activities and the work exposure. (Gritzka 26, 40). He did not identify the extent of disability due solely to the work exposure. Although Dr. Gritzka estimated that claimant had approximately 10 percent upper extremity impairment based on clinical findings not due to the fractures and related x-ray findings, he did not address the extent to which the clinical findings were due to the work-related aggravation of the preexisting degenerative pathology rather than the previously symptomatic pathology or carpal tunnel syndrome.

### III. SCOPE OF REVIEW

Appeals from Board of Industrial Insurance Appeals decisions to the superior and appellate courts are based solely on the record developed before the Board and the courts may not receive or consider any evidence not contained in that record. RCW 51.52.115; *Rector v. Department of Labor and Industries*, 61 Wn.App. 385, 810 P.2d 1363, *rev denied* 117 Wn.2d 1004, 815 P.2d 266 (1991). The scope of this court's review on workers' compensation appeals is the same as in other civil matters. *Groff v. Department of Labor and Industries*, 65 Wn.2d 35, 395 P.2d 633 (1964). That is, the court reviews the trial court's decision for errors of law and to determine if the trial court's findings are supported by substantial evidence, and whether the court's conclusions flow from the findings. *Id.* at 41; *Ruse v. Department of Labor and Industries*, 138 Wn.2d 1, 5-6, 977 P.2d 570 (1999). The court reviews questions of law *de novo*. *Hue v. Farnboy Spray Co., Inc.*, 127 Wn.2d 67, 92, 896 P.2d 682 (1995); *Rose v. Department of Labor and Industries*, 57 Wn. App. 751, 790 P.2d 201, *rev den* 115 Wn.2d 1010 (1990).

When reviewing a trial court's decision to deny a motion for judgment as a matter of law this court applies the same standard as the trial court. *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 29, 948 P.2d 816 (1997). Granting a motion for judgment as a matter of law is appropriate when, after viewing the evidence most favorable to the non-moving party, the court concludes there is no substantial evidence or reasonable inferences therefrom to support a verdict for the non-moving party. *Sing*, 134 Wn.2d at 29; *Industrial Indemnity Co. of the Northwest, Inc. v. Kallevig*, 114 Wn.App. 907, 915-16, 792 P.2d 520 (1990).

#### IV. ARGUMENT

**A. The Trial Court Erred in Denying Georgia-Pacific's Motions For Judgment as a Matter of Law Because Claimant Failed to Present Substantial Evidence Sufficient to Sustain His Burden of Proof on Each Contested Issue.**

**1. The Jury Erred in Finding That Claimant Was Temporarily and Totally Disabled From December 4, 2004 Through April 12, 2006 Because Claimant Presented No Expert Testimony Sufficient To Find That He Could Not Perform Light or Sedentary Work of a General Nature From December 4, 2004**

**Through April 12, 2006. Similarly, No Substantial Evidence Shows That Claimant Was Permanently Precluded From Performing Such Work As of April 12, 2006.<sup>4</sup>**

Claimant had the burden of proving his entitlement to time loss and pension benefits. *Olympia Brewing Co. v. Department of Labor and Industries*, 34 Wn.2d 498, 208 P.2d 1181 (1949). This required him to prove that, as a proximate result of his work exposure, he was incapacitated from performing or obtaining any work at any gainful occupation temporarily from December 4, 2004 through April 12, 2006, and permanently as of the latter date.<sup>5</sup>

*Spring v. Department of Labor and Industries*, 96 Wn.2d 914, 640 P.2d 1 (1982); *Hunter v. Bethel School Dist.*, 71 Wn. App. 501, 859 P.2d 652 (1993), *rev den* 123 Wn.2d 1031, 877 P.2d 695 (1994).

More important, claimant's burden of proof necessitated that he affirmatively prove an inability to perform light or sedentary work of a general nature. *Kuhnle v. Department of Labor and Industries*, 12

---

<sup>4</sup> The trial court did not address the issue of claimant's entitlement to permanent total disability (pension) benefits or a permanent partial disability award because it concluded claimant's medical condition was not yet fixed and stable, *i.e.*, permanent.

<sup>5</sup> Temporary total disability and permanent total disability differ only in duration, not in nature. *Hubbard v. Department of Labor and Industries*, 140 Wn.2d 35, 992 P.2d 1002 (2000).

Wn.2d 191, 197, 120 P.2d 1003 (1942); *Spring, supra*, 96 Wn.2d at 919. Evidence establishing only an inability to return to the job at injury is not sufficient to establish such proof. *Id.*

Claimant needed to sustain his burden of proving the elements of total disability through expert medical and/or vocational testimony. *Spring, supra*, 96 Wn.2d at 918; *Fochtman v. Department of Labor and Industries*, 7 Wn.App. 286, 298, 499 P.2d 255 (1972). A probative expert opinion must be based on facts supported by the record. *Sawyer v. Department of Labor and Industries*, 48 Wn.2d 761, 767-68, 296 P.2d 706 (1956); *Theonnes v. Hazen*, 37 Wn.App. 644, 648, 681 P.2d 1284 (1984). The opinion of an expert that is merely a conclusion, or is based on an assumption not supported by the record, is not probative or sufficient to present a viable issue to the finder of fact. *Sawyer, supra*; *Theonnes, supra*; *Queen City Farms, Inc. v. Cent. Nat'l Ins. Co. of Omaha*, 126 Wn.2d 50, 103-03, 882 P.2d 703 (1994); *Safeco Ins. Co. v. McGrath*, 63 Wn.App. 170, 177, 817 P.2d 861 (1992).

Claimant presented no expert medical or vocational testimony sufficient to sustain his burden of proving a work-related

inability to perform light or sedentary work of a general nature. For this reason, the Board's appeals judge correctly determined that claimant failed to prove either temporary total disability or permanent total disability. (CABR 82-83, findings 5 and 10). The persuasive expert testimony demonstrates that claimant was able to perform regularly gainful work at all relevant times. *At most*, the testimony of claimant's medical experts shows that claimant could not return to his regular job as a millwright. Claimant offered no expert testimony that could support the conclusion he was unable to perform light or sedentary work of a general nature. There is, therefore, no basis for finding that claimant was temporarily and totally disabled from December 4, 2004 through April 12, 2006, or permanently and totally disabled as of the latter date. *Kuhnle, supra; Spring, supra; Fochtman, supra.*

The testimony of Dr. Button and Ms. Devine demonstrated that claimant was employable in several light or sedentary positions at all relevant times. Dr. Button testified that claimant had the physical capacity to work in the light range of employments. (Button 19-21). Even claimant stated he had no physical limitations other than those stemming from his wrist conditions. (Claimant 63).

Dr. Button noted that the wrist conditions restricted claimant only from heavy activities and those requiring a forceful grip or significant torquing of the upper extremities. (Button 20). He stated claimant had no limitations on his ability to perform fine manipulation with his fingers, computer keyboarding or mouse usage, or writing. (*Id.*). Dr. Button identified security and office work in particular as appropriate for claimant. (Button 19-20).

Ms. Devine's expert vocational testimony demonstrated that claimant was employable at all relevant times in a number of sedentary to light jobs, including but not limited to the positions of security guard, sales, office clerical, scale operator and fire (hazard) watch. (Devine 10, 20, 23). She explained that each of these positions involved no significant repetitive hand or wrist usage, and that all of them were within even the more restrictive limitations that Dr. Schoepflin placed on claimant. (Devine 11-21). Ms. Devine testified that claimant's ability to work successfully as a millwright demonstrated that he possessed the aptitudes that would enable him to perform and obtain such work, including but not limited to average or above learning ability, verbal and numerical abilities, spatial perception, finger dexterity and the ability to work

with others and responsibly satisfy the requirements of employment. (Devine 8-9). Claimant's own testimony regarding his abilities confirmed Ms. Devine's assessment. (Claimant 64-65). He also confirmed that his previous job provided him more experience than he would need working with computers. (Claimant 67). Ms. Devine testified that the above-noted jobs were available in claimant's labor market and that claimant could have successfully obtained them during the relevant times. (Devine 14-15, 18, 24). She therefore concluded that claimant was employable during the period in question. (Devine 10, 23-24).

Considered together, the expert testimony of Dr. Button and Ms. Devine established that claimant was not totally disabled at any time from December 4, 2006 through and as of April 12, 2006. As stated, claimant presented no expert testimony sufficient to support a contrary conclusion even considered in isolation, much less weighed against the testimony of Dr. Button and Ms. Devine.

In finding for claimant on this issue, the Board noted only its disagreement with Ms. Devine's testimony that claimant was able to perform various light or sedentary jobs. (CABR 4). The Board cited no affirmative expert medical or vocational evidence

establishing claimant's inability to perform such work. Even *assuming* the Board's criticism of Ms. Devine's opinion was well-founded, that affects only the weight given Ms. Devine's conclusion that claimant was capable of performing various light and sedentary jobs. It does not constitute affirmative evidence of claimant's inability to perform such work. Claimant presented no expert vocational testimony. His case therefore necessarily rests entirely on the opinion of his medical witnesses, Drs. Gritzka and Schoepflin. Neither of these doctors provided a probative opinion on the issue of claimant's ability to perform light or sedentary work.

Dr. Gritzka offered only the bare conclusion that claimant was totally disabled. (Gritzka 37). However, he proceeded to explain that he considered claimant totally disabled only because claimant could not return to his regular work as a millwright. (Gritzka 37, 49). Dr. Gritzka conceded that he merely *assumed* claimant had no other vocational skills and that no other suitable jobs were available; he did not state that as fact. (Gritzka 49-50). That is, Dr. Gritzka did not actually testify that claimant could not perform any light or sedentary work; he merely *assumed* that was the case. That *assumption* does not constitute an expert opinion

that claimant could not perform any other jobs. Dr. Gritzka also essentially acknowledged that he was not qualified to provide an expert opinion on the issues of claimant's skills or the nature of other jobs. (*Id.*). More important, Dr. Gritzka's statement that claimant was totally disabled constituted a bare conclusion based only on claimant's inability to return to his regular job and his unsupported *assumption* that claimant could not perform any alternative light or sedentary work. The opinion of an expert that is merely a conclusion, or is based on an assumption not supported by the record, is not probative or sufficient to present an issue to the finder of fact. *Sawyer, supra; Theonnes, supra; Queen City Farms, supra; Safeco Ins. Co. v. McGrath, supra.* Because Dr. Gritzka did not testify that claimant was unable to perform light or sedentary work, his testimony is legally insufficient to sustain claimant's burden of proving total disability. *Spring, supra; Fochtman, supra.*

Dr. Schoepflin's testimony also provided no sufficient basis for that conclusion. He stated only that claimant could not return to work as a millwright. (Schoepflin 36). Dr. Schoepflin did not address claimant's ability to perform any other type of work,

specifically including light or sedentary work of a general nature. His testimony is therefore not sufficient to support claimant's burden of proof. *Spring, supra; Fochtman, supra.*

Thus, the medical testimony of Drs. Gritzka and Schoepflin is, as a matter of law, insufficient to satisfy claimant's burden of proving his inability to perform light or sedentary work of a general nature. Because claimant offered no vocational testimony, the record supports only the appeals judge's finding that claimant was not totally disabled, either temporarily or permanently.

Claimant wrongly argued below that under *Fochtman* the testimony of his medical experts was sufficient to satisfy his burden of proof on the basis an expert need not actually "conclude" that the claimant is totally disabled. (PFR 25). The quote from *Fochtman* that claimant extracted actually disproves his theory and demonstrates the deficiency of his evidence. The court stated that medical testimony of severe physical limitations coupled with expert vocational testimony of an inability to maintain gainful employment was sufficient to establish total disability. 7 Wn.App. at 298. The court concluded, "**If those conditions are met** [that is, where such medical *and* vocational testimony is offered] **the medical expert**

need not make the specific conclusion that the injured workman is totally and permanently disabled.” (Emphasis added.) (*Id.*). In other words, the court held the vocational expert could provide that conclusion. Claimant did not meet “those conditions” here because his medical testimony competently addressed only his ability to return to his former job, and he presented no vocational (or medical) testimony to establish an inability to perform light or sedentary work of a general nature.

As a matter of law, the evidence that claimant offered is not sufficient to sustain his burden of proving entitlement to time loss benefits for the period December 4, 2004 through April 12, 2006, or to a pension as of the latter date. Therefore, the trial court should have granted Georgia-Pacific’s motion for judgment as a matter of law as to claimant’s entitlement to time loss and pension benefits. For the same reason, the jury erred in finding that claimant was temporarily and totally disabled from December 4, 2004 through April 12, 2006. The Department’s closure of the claim without further time loss benefits or a pension should be affirmed.

**2. The Jury Erred in Finding That Claimant’s Bilateral Wrist Conditions Had Not Reached Maximum Medical**

**Improvement Because No Substantial Evidence Supports the Conclusion That Claimant Intended To Pursue Any Curative or Rehabilitative Treatment That Had Been Recommended.**

Claimant had the burden of proving that the Department erred in closing his claim. RCW 51.52.050; *Olympia Brewing Co. v. Department of Labor and Industries, supra*. From a medical standpoint, claim closure is appropriate when the claimant's condition has become fixed and stable (*i.e.* has reached maximum medical improvement). RCW 51.36.010; 51.32.095; *Buell v. Aetna Surety & Casualty*, 14 Wn. App. 742, 544 P.2d 759 (1976). A condition is fixed and stable when it has reached the point where no further curative, rehabilitative or diagnostic care is available or necessary. RCW 51.36.010; WAC 296-20-01002; *Pybus Steel Co. v. Department of Labor and Industries*, 12 Wn. App. 436, 530 P.2d 350 (1975). A condition must also be considered fixed and stable when, notwithstanding the availability of further medical treatment, the claimant has declined the only treatment that has been recommended. Treatment is not necessary unless it will benefit the claimant. A claimant cannot benefit from treatment that he will not obtain. Therefore, claimant's burden of proof included the need to

prove that he would pursue the recommended treatment and thus benefit from it.

The Board correctly noted that when a claimant declines surgery, and no other treatment is available, his condition has, by definition, reached maximum medical improvement and that claim closure is appropriate. (CABR 4, l. 7-10). The Board erred, however, in proceeding to conclude that Department's closing order should be reversed so claimant could consider the option of surgical treatment. (CABR 6, finding 5). Claimant's attending physician, Dr. Schoepflin, and Dr. Button, both saw claimant in early 2004 and recommended that claimant undergo wrist surgery. (See Gritzka 12, 45-46; Schoepflin 34-35; Button 8, 35). Claimant, however, consistently declined to pursue the surgery, which is why the Department closed the claim. Claimant's medical expert, Dr. Gritzka, testified that claimant had "opted to have no additional surgery..." and, similarly, that claimant had "elected to not seek surgery." (Gritzka 37). Dr. Gritzka's additional testimony as to whether claimant's decision not to pursue surgery was reasonable bears witness to the fact that claimant had decided not to pursue the recommended surgery. (Gritzka 38). Claimant's testimony also

was consistent with the conclusion that he had decided not to pursue the surgery. (See Claimant 56-57, 68). Clearly, long before the Department closed this claim in April 2006, claimant was presented with the option of surgery; he also considered and rejected that option. *There is no contrary evidence in this record.* That is, claimant never testified that he wanted to pursue surgery or otherwise presented any evidence to suggest that he had reversed his long-standing decision not to pursue surgery.

Given the absence of such evidence, the Board apparently found claimant entitled to treatment merely because claimant's counsel reserved that issue. However, the mere act of counsel reserving an issue does not constitute *evidence* that claimant wished to have treatment. Counsel expressly made his reservation of the treatment issue contingent on the evidence that claimant would later present. (2/5/07 Tr. 4). Claimant not only offered no testimony to show his intention to pursue surgery, but he offered testimony – through Dr. Gritzka – that affirmatively demonstrated he did *not* intend to obtain surgery.

Because the uncontradicted evidence demonstrates that claimant decided not to pursue the only treatment that had been

recommended, there is no basis for finding that claimant sustained his burden of proving entitlement to further treatment. Therefore, the trial court should have granted Georgia-Pacific's motion for judgment as a matter of law on this issue. For the same reason, the jury erred in finding that claimant's medical condition had not reached maximum medical improvement as of April 12, 2006. The Department's closure of the claim should be affirmed.

**3. Claimant Offered No Substantial Expert Medical Testimony That Distinguished Between Any Permanent Partial Disability Due to His Work-Related Wrist Conditions and That Due to Other Causes.**

To establish entitlement to a permanent partial disability award, claimant had the burden of proving, through expert medical testimony, that the workplace exposure proximately caused ratable permanent impairment. RCW 51.32.080; *Coleman v. Prosser Packers*, 19 Wn.App. 616, 576 P.2d 1331 (1978). Where, as here, the evidence demonstrates the existence of preexisting disability, the medical expert must segregate the industrial and non-industrial disabilities in accordance with their respective causes. *Ziegler v. Department of Labor and Industries*, 14 Wn.App. 829, 545 P.2d 558

(1976); *Orr v. Department of Labor and Industries*, 10 Wn.App. 697, 519 P.2d 1334 (1974).

As discussed above, the record demonstrates that claimant had substantial permanent wrist impairment resulting from the non-industrial injuries in 1969 and 1975, long before his occupational disease became manifest in March 2000. Specifically, the evidence shows that claimant had preexisting range of motion deficits from his wrist deformities, as well as symptomatic degenerative arthritis and median nerve neuropathy with probable associated clinical findings. Claimant is not entitled to permanent partial disability benefits for such preexisting disability. RCW 51.32.080(5).

To establish entitlement to a permanent partial disability award, claimant needed to offer medical testimony that distinguished between the impairment resulting from his distant injuries and any due to the work exposure. *Ziegler, supra; Orr, supra*. He failed to do so.

Dr. Gritzka testified that claimant's current impairment was due to a combination of the non-industrial fractures and post-traumatic arthritis, as well as osteoarthritis resulting from daily

activities and the work exposure. (Gritzka 26, 40). He did not identify the extent of disability due solely to the work exposure. Although Dr. Gritzka estimated that claimant had approximately 10 percent upper extremity impairment based on clinical findings not due to the fractures and related x-ray findings, he did not address the extent to which the clinical findings were due to the work-related aggravation of the preexisting degenerative pathology rather than the previously symptomatic pathology or carpal tunnel syndrome. In the absence of such evidence, no permanent partial disability award is appropriate. *Ziegler, supra; Orr, supra.*

**B. Claimant Is Not Entitled To Assessed Attorney Fees and Costs.**

Assessed attorney fees and costs are authorized only when the claimant prevails on appeal. RCW 51.52.130. As stated, this court should reverse the trial court's decision and conclude that Georgia-Pacific is entitled to judgment on all issues. In that event, the award of assessed attorney fees and costs must be reversed because claimant would not have prevailed on any issue.

**V. CONCLUSION**

The court should hold that claimant failed to present

substantial evidence sufficient to support his burden of proof on each contested issue. The court should therefore reverse the jury's findings that claimant is entitled to time loss benefits for the period December 4, 2006 through April 12, 2006, and to further medical treatment. The court should grant Georgia-Pacific's motion for judgment as a matter of law on all issues – treatment, time loss and pension benefits, and permanent partial disability benefits – and affirm the Department's April 12, 2006 order that closed the claim.

DATED: August 6, 2009.

A handwritten signature in black ink, consisting of a large, stylized 'C' followed by a series of loops and a long horizontal stroke extending to the right.

Craig A. Staples, WSBA #14708  
Attorney for Georgia-Pacific

**CERTIFICATE OF MAILING**

I certify that on August 6, 2009, I served the foregoing Brief of Appellant on the following persons by mailing them each a true copy by first class mail with the U.S. Postal Service at Vancouver, Washington in a sealed envelope, with postage prepaid, and addressed to the following:

Steven L. Busick  
P.O. Box 1385  
Vancouver, WA 98666

John Wasberg, AAG  
Attorney General's Office  
Labor & Industries Division  
800 Fifth Avenue, Ste. 2000  
Seattle, WA 98104-3188

I further certify that I filed the original and a copy of the same document by first class mail on the above date in a sealed envelope, with postage prepaid, and addressed to the following:

David C. Ponzoha, Clerk  
Court of Appeals, Division II  
950 Broadway, Suite 300  
Tacoma, WA 98402-4454

COPIES TO APPELLANT  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
2009 AUG 11 10:00 AM  
CLERK OF COURT

By:   
\_\_\_\_\_  
Craig A. Staples WSBA #14708  
Attorney for Georgia-Pacific Corp.