

No. 39061-2-II

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

GEORGIA-PACIFIC CORPORATION,

Appellant,

v.

CARL G. OLSON,

Respondent.

REPLY BRIEF OF APPELLANT

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(over)

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Georgia-Pacific submits the following in reply to claimant's Brief of Respondent.

A. SCOPE OF REVIEW

Claimant quotes the Board's findings and conclusions in their entirety and states the issues on appeal are whether substantial evidence supports the Board's findings 5, 7 (ability to work from December 4, 2004 through April 12, 2006) and 8 (need for medical treatment). (BR 30-31). The superior court had *de novo* of the Board's decision and was free to substitute its findings for those of the Board. RCW 51.52.115; *Groff v. Department of Labor and Industries*, 65 Wn.2d 35, 43, 395 P.2d 633 (1964). Upon appeal from the superior court's decision, review is limited to whether substantial evidence supports the *superior court's* findings and whether the *court's* conclusions flow from the findings. *Groff*, 65 Wn.2d at 41; *Young v. Department of Labor and Industries*, 81 Wn.App. 123, 128, 913 P.2d 402 (1996). That is, this court reviews the superior court's findings, not the Board's unless the superior court expressly adopted the Board's findings.

Here, the superior court affirmed the Board's conclusion that claimant was temporarily and totally disabled from December 4, 2004 through April 12, 2006 and that claimant's wrist condition had

not reached maximum medical improvement as of the latter date. (CR 140-41). The court therefore affirmed the Board's ultimate decision on these issues. (CP 141). The court did not, however, adopt the Board's findings 5, 7 and 8, much less any of the Board's other findings. Therefore, none of the Board's findings are before this court or binding on the parties.

B. PROOF OF INABILITY TO WORK

Claimant does not dispute the fact that, to establish entitlement to time loss or pension benefits, he had the burden of offering expert testimony that affirmatively demonstrated his inability to perform light or sedentary work of a general nature at the relevant times. *Kuhnle v. Department of Labor and Industries*, 12 Wn.2d 191, 197, 120 P.2d 1003 (1942); *Spring v. Department of Labor and Industries*, 96 Wn.2d 914, 919, 640 P.2d 1 (1982). He also does not challenge the fact that testimony establishing only an inability to return to the job at injury is not sufficient to establish such proof. *Id.* Claimant offered no expert medical or vocational evidence that could affirmatively establish he was totally disabled at the relevant times. His argument on review provides the court no basis for concluding that he presented sufficient expert testimony on this issue.

Claimant relies in part on the testimony of Drs. Gritzka and Schoepflin that he could not return to his regular job as a millwright. (BR 34). Claimant's inability to perform his former heavy job is not relevant to, and does not establish, an inability to return to other work in the light to sedentary range of employments. *Kuhnle, supra; Spring, supra.*

Claimant otherwise relies only on his attempt to impeach the conclusion of Ms. Devine that claimant was employable in several light or sedentary positions. (BR 34-35). Claimant's criticisms of Ms. Devine are not well-taken and, regardless, do not provide *affirmative* expert evidence of an inability to perform light or sedentary work.

In attempting to impeach Ms. Devine, claimant first complains that Ms. Devine did not provide her opinion of his employability until she testified in February 2007. (BR 19, 34). Like claimant's medical expert, Dr. Gritzka, Ms. Devine participated in this matter solely for the purpose of providing an expert opinion, not to provide vocational assistance. Therefore, the fact she did not volunteer her opinion to claimant before testifying is of no consequence. The employer identified and scheduled Ms. Devine as its vocational expert at least two months before she testified and

claimant never sought to obtain her opinion through interrogatories or a discovery deposition. (CABR 106; Devine 71-72). Claimant could have obtained Ms. Devine's opinion before she testified and cannot reasonably criticize Ms. Devine because he elected not to do so.

Claimant also attempts to discredit Ms. Devine by referencing hearsay records from previous vocational counselors that were presented to Ms. Devine on cross-examination for the stated purpose of impeachment, not for the truth of the matters stated. (BR Devine 27, 42). Claimant made no attempt to present testimony from the prior counselors, which belies the suggestion that their opinions on the ultimate issue of employability would have contradicted Ms. Devine's testimony. Ms. Poier's statements have little relevance to Ms. Devine's testimony because they pertained to matters occurring 20 to 36 months before the period now in question and did not address claimant's ability to perform the light and sedentary jobs that Ms. Devine identified as appropriate for claimant. (*Compare* Devine 10, 17-18, 20, 23 *with* Devine 34, 39). Mr. Harrington's vague, conclusory statement did not address either claimant's ability to perform light or sedentary work generally or the specific jobs Ms. Devine had identified, and also was

generated substantially before the dates now in question. (Devine 39). These statements do not materially impeach Ms. Devine's conclusion that claimant was capable of performing light and sedentary work from December 4, 2006 through and as of April 12, 2006. Regardless, these statements provide *no affirmative evidence* that during this period claimant was unable to perform such work.

Claimant otherwise attempts to impeach Ms. Devine's testimony by attributing to her statements she did not make. Contrary to claimant's suggestion, Ms. Devine did not testify claimant had no transferable skills. (BR 35). She did testify that claimant's ability to successfully perform his work as a millwright demonstrated he possessed the aptitudes and abilities that were necessary to perform and obtain the jobs she had identified. (Devine 8-9, 67; see BA 17-18). The aptitudes and abilities to which she testified constitute transferable skills. WAC 296-19A-010(7) ("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.")

Ms. Devine also did not testify that claimant needed to have one to three months of retraining before he could be found

employable, as claimant asserts. (BR 35). She testified claimant currently was employable in several positions, including security guard, sales of various products, office clerical, scale operator and fire watch. (Devine 10-15, 17-21). Claimant has not distinguished, either at hearing or on review, between a worker's qualification or *eligibility* for retraining services, and whether such services *necessarily* must be provided before the worker can be considered employable. He also has not distinguished between formal retraining that is necessary before a worker can be considered employable and on-the-job training that can be, and often is, provided in the employment context – and which is consistent with a finding of employability. At various points, Ms. Devine addressed all these matters. Claimant wrongly interprets each such reference as relating to formal retraining that is necessary to make a worker employable.

The testimony that claimant references in his brief addressed only the issue whether claimant qualified – *i.e.*, was *eligible* – for short-term retraining, *not* whether he needed to have such retraining before he could be considered employable, as claimant asserts. (BR 35). Ms. Devine expressly distinguished between claimant's qualification or eligibility for *optional* short-term

retraining and whether he needed retraining to be considered employable. (Devine 61-62). She referenced two contexts in which retraining would be required: motor vehicle sales (but not the other forms of sales she had identified) and the use of voice-activated software (only in those dispatching positions where it would be needed). (Devine 50, 53-54). Ms. Devine further testified that in other contexts claimant “would qualify for some short-term retraining. [But] [i]n the general labor market, if he wanted to go out and get a job on his own, he wouldn’t need to be trained.” (Devine 61-62). That is, she testified that claimant was eligible for optional retraining but did not need it to be employable. Her testimony on cross-examination was thus consistent with her ultimate conclusion that claimant currently was employable in several light or sedentary positions. Most important, however, the alleged inconsistencies in Ms. Devine’s testimony provide *no affirmative evidence* that claimant was unable to perform light or sedentary work at the relevant times.

Finally, claimant asserts that the testimony of his medical experts and Ms. Devine establish “there were no jobs available in the Vancouver labor market” that he could perform. (BR 35). This is a difficult statement to make given the fact that Dr. Gritzka

expressly based his opinion on claimant's ability to return to work as a millwright and disclaimed any actual knowledge of other available jobs in Vancouver or anywhere else. (Gritzka 49-50). Dr. Schoepflin likewise addressed solely claimant's inability to work as a millwright and offered no opinion about the suitability or availability of other jobs. (See Schoepflin 36). Ms. Devine affirmatively testified there were multiple jobs that claimant could perform that were available in the Vancouver labor market, as well as the surrounding areas. (Devine 12, 17, 25, 61). This evidence refutes claimant's assertion there were no available, suitable positions in the Vancouver labor market.

In summary, the only probative expert testimony in this record regarding claimant's ability to perform light or sedentary work was that of Dr. Button and Ms. Devine, which demonstrated that claimant had the physical capacity and transferable skills to perform and obtain gainful employment in the light or sedentary work category. Most important, claimant presented no expert testimony sufficient to sustain his burden of affirmatively proving his inability to perform such work. Accordingly, there is no substantial evidentiary support for the jury's finding that claimant was temporarily and totally disabled between December 4, 2004 and

April 12, 2006. There also is no such evidence to support a claim to permanent and total disability benefits as of April 12, 2006. The jury's resolution of the temporary disability issue should therefore be reversed and the court should find that Georgia-Pacific is entitled to judgment on both the temporary and permanent total disability issues.

C. PROOF OF ENTITLEMENT TO MEDICAL TREATMENT

Claimant effectively acknowledges that his wrist conditions must be considered fixed and stable¹ unless he needs surgery for his wrists. (BR 32-34). He also does not dispute the Board's analysis that a condition must be considered fixed and stable when the claimant declines the only curative treatment that has been offered – in this case, surgery. (CABR 4, I. 7-10). These points necessarily lead to the conclusion that to sustain his burden of proving entitlement to further treatment, claimant needed to offer evidence sufficient to prove that he would pursue the surgeries that have been recommended. Claimant offered *no such evidence* and his arguments on review provide the court no proper basis for reaching a contrary conclusion.

¹ "Fixed and stable" and "maximum medical improvement" are essentially synonymous.

Claimant argues solely that claim closure is not appropriate because he “is entitled to consider the option of surgical treatment.” (BR 33-34). This follows his consistent characterization of the surgical recommendations as having been made when Drs. Gritzka and Button testified in December 2006 and February 2007, respectively. (BR 16-17, 33). If claimant is attempting to suggest that the surgical recommendations were first made or changed as late as December 2006 and February 2007, then this is false because these recommendations were made beginning in January 2004. For this reason, claimant cannot reasonably argue he had no opportunity “to consider the option of surgical treatment” before the claim was closed in April 2006.

Dr. Button examined claimant in January 2004 and at that time recommended fusion surgery for claimant’s right wrist and a proximal row carpectomy for the left wrist. (Button 8, 22, 35). He testified to the same two surgical procedures in his January 2007 deposition. (Button 22-24). *No evidence* in this record supports the suggestion that Dr. Button’s testimony regarding surgery was in any respect new or unknown to claimant. Further, the record demonstrates that Dr. Schoepflin had recommended and discussed with claimant fusion surgery, and that claimant last saw Dr.

Schoepflin on February 4, 2004. (Schoepflin 29; Claimant 68; Gritzka 46). Dr. Schoepflin referred claimant to Dr. Buehler to discuss surgery and claimant saw Dr. Buehler on February 25, 2004. (Gritzka 45). Dr. Buehler concluded that claimant's only treatment option was a fusion for the right wrist, but felt claimant's symptoms were not sufficiently severe to warrant surgery at that time. (*Id.*; Claimant 56-57, 68). Claimant therefore elected not to proceed with surgery. (Gritzka 37-38; *see also* Claimant 56-57, 68).

Claimant's refusal to pursue the only treatment that had been recommended led to, and supported, the Department's decision to close the claim in April 2006. Claimant then saw Dr. Gritzka in May 2006. (Gritzka 11). At that time, Dr. Gritzka concluded that surgery was an option for claimant. (Gritzka 48). However, when Dr. Gritzka testified in December 2007 he confirmed that claimant had "opted to have no additional surgery" and that claimant had "elected to not seek surgery." (Gritzka 37). He also proceeded to discuss the surgical options that Dr. Button had recommended, *i.e.*, a fusion and proximal row carpectomy, indicating he was aware of Dr. Button's January 2004 recommendations even though Dr. Button had not yet testified.

(See Gritzka 31-36). No evidence in this record supports claimant's suggestion that Dr. Gritzka's testimony regarding surgery was new or previously unknown to claimant. On the contrary, when claimant testified in February 2007, he confirmed he was aware of the long-standing surgical recommendations and indicated he had decided not to pursue surgery based in part on Dr. Buehler's advice in February 2004. (Claimant 56-57, 68). Claimant also presented testimony through Dr. Gritzka that supported his decision not to pursue surgery, which further confirms that he had not changed his long-standing decision not to pursue surgery. (Gritzka 31-36, 38-39, 41-44).

In short, the record demonstrates that beginning in January 2004, surgery had been recommended for claimant and that claimant was aware of that recommendation and had even sought further consultation with Dr. Buehler in February 2004 to address it. The record further confirms that claimant decided not to have the recommended surgery after consulting with Dr. Buehler. That is, for a period extending from January 2004 through claim closure in April 2006, claimant had a considerable opportunity "to consider the option of surgical treatment" and he consistently refused to pursue surgery. Even as late as February 2007, claimant clearly had no

intention of seeking surgery. (Gritzka 37; see Claimant 56-57, 68). Under these circumstances, it is incredible that claimant would now suggest he previously had no opportunity “to consider the option of surgical treatment.” Clearly, he had ample opportunity to do so and he consistently refused to have surgery over an extended period of time. Claimant presented *no contrary evidence*.

Because claimant refused the only treatment that had been recommended, there is no record basis for finding that he sustained his burden of proving entitlement to further treatment. Similarly, no substantial evidence supports the jury’s finding that claimant’s condition had not reached maximum medical improvement because there is *no evidence* that claimant would pursue the treatment and therefore benefit from it. The jury’s resolution of this issue must therefore be reversed.

D. PROOF OF PERMANENT PARTIAL DISABILITY

Claimant does not dispute the fact that, to establish entitlement to permanent partial disability benefits, he needed to offer expert medical testimony that segregated his 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 previously, the record indisputably shows that claimant's prior non-industrial accidents caused permanent impairment of his hands and wrists based on both anatomical deformities and clinical evidence of impairment. Claimant refers the court to no medical testimony that distinguished between such preexisting impairment and any impairment due to the work exposure. *Ziegler, supra; Orr, supra.*

In discussing this issue on review, claimant references only Dr. Gritzka's opinion that he would have 30 and 24 percent impairment of his right and left upper extremities, respectively, *if* he proceeded with the recommended surgeries. (BR 35). This testimony is speculative and irrelevant since claimant had not proceeded with the surgeries. For this reason, and those stated in the Brief of Appellant, the court should conclude that claimant has not sustained his burden of proving entitlement to permanent partial disability benefits because he offered no evidence segregating his non-industrial and industrial disabilities. *Ziegler, supra; Orr, supra.*

CONCLUSION

For the foregoing reasons, the court should 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 judgment on all issues – treatment, time loss, a pension and permanent partial disability benefits – and affirm the Department's April 12, 2006 order that closed the claim.

DATED this 23rd day of November, 2009.

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

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CERTIFICATE OF MAILING

I certify that on November 23, 2009, I served the foregoing Reply 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 Portland, Oregon in a sealed envelope, with postage prepaid, and addressed to the following:

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