

COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
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No. 39061-2-II

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON

DIVISION II

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GEORGIA-PACIFIC CORPORATION,

Appellant,

v.

CARL G. OLSON,

Respondent.

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APPEAL FROM THE SUPERIOR COURT FOR CLARK COUNTY

THE HONORABLE ROBERT L. HARRIS

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BRIEF OF RESPONDENT

CARL G. OLSON

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## I

### **Introduction**

This is an appeal from a jury verdict in Superior Court by the self insured employer, Georgia-Pacific Corporation, claiming there is not substantial evidence to support the need for treatment or time loss benefits as decided by the Board of Industrial Insurance Appeals in favor of the respondent, Carl Olson.

## II

### **Assignment of Error**

A. Is there substantial evidence to support the jury verdict and the Board's Finding of Fact that Carl Olson had not reached maximum medical improvement and was in need of further treatment for his bilateral wrist conditions as of April 12, 2006?

B. Is there substantial evidence to support the jury verdict and the Board's Finding of Fact that Carl Olson was temporarily totally disabled from December 4, 2004, through April 12, 2006?

C. If there is not substantial evidence to support the jury verdict that Carl Olson was in need of further treatment, was there substantial evidence to submit the case to the jury on the issues of permanent total disability and permanent partial disability?

### III

#### Statement of the Case

##### A. Facts

Carl Olson was born March 23, 1954, is 6 foot, 4 inches tall, and weighs 260 pounds. (CERTIFIED APPEAL BOARD RECORD, C. OLSON - Direct, 2-5-07, page 13, lines 45 and 49). In 1969, Carl and his family moved to St. John's, Arizona, so his father could teach school. His third day in Arizona, Carl was riding his little Honda 90 motorcycle on a gravel road outside of town. As he came over a rise, the road ended, and Carl went straight off onto solid rocks. He landed in 6 inches of water on the only flat rock in the area, and broke both wrists. (CABR, C. OLSON - Direct, 2-5-07, page 13, line 25, and page 14, lines 8, 14, 18, 24, 29 and 38). Carl was flown to Phoenix to see a specialist, and had reconstruction surgery on the left wrist and had the bones re-set in the right arm. Carl is right handed. (CABR, C. OLSON - Direct, 2-5-07, page 14, line 45, and page 15, lines 12 and 19).

After Carl had the motorcycle accident in March, the family moved back to Stevenson, Washington, in June 1969. By the fall of that year, Carl was playing high school football as a sophomore. (CABR, C. OLSON - Direct, 2-5-07, page 15, lines 27, 36 and 45). Carl played offensive tackle at 185 pounds. Carl had a little numbness in the bottom of his index, middle finger, and thumb of his left hand, which has continued. (CABR, C. OLSON - Direct, 2-5-07, page 16, lines 7, 16, 25, 36 and 45). Carl excelled

at football and played in all games his sophomore year. In his junior and senior years, he was first team offensive tackle, and in his senior year he made second team offensive tackle on the Columbia All Star Team. (CABR, C. OLSON - Direct, 2-5-07, page 16, line 49, and page 17, lines 6 and 16). Carl had no problems with his wrists playing high school football his junior and senior years, and graduated in 1972 with A's and B's. (CABR, C. OLSON - Direct, 2-5-07, page 18, lines 8, 27 and 38).

In 1976 Carl got a job at the Camas Paper Mill when it was owned by Crown Zellerbach Corporation. The paper mill was then sold to James River, which merged with Fort Howard Corporation and became Fort James, and then was bought by Georgia Pacific Corporation before Carl received his 25 year watch which has the Georgia Pacific insignia. (CABR, C. OLSON - Direct, 2-5-07, page 22, lines 32, 36, 43 and 47, and page 23, line 7). Carl started in the shipping department driving a forklift and grab truck. After 13 years in shipping, Carl bid into the maintenance department, where he started in the labor pool and rotated through the different trade shops. Carl was in the labor pool for 2 years before an opening occurred in the machine shop. Carl then did a 4 year apprenticeship program in the machine shop to become a journeyman machinist. (CABR, C. OLSON - Direct, 2-5-07, page 23, lines 17 and 29; page 25, line 34; and page 26, lines 8, 34 and 47).

In 1995 there was a mill-wide restructuring of maintenance, and the mill took people from the different maintenance departments and combined them into journeyman millwrights. They were all put into a large pool and used for different shutdowns in all the different departments of the mill.

(CABR, C. OLSON - Direct, 2-5-07, page 27, line 10). Carl had just become a journeyman machinist before the reorganization occurred. When the mill would have major breakdowns, or scheduled for maintenance work in a department, they would need so many millwrights to accomplish the task. (CABR, C. OLSON - Direct, 2-5-07, page 29, lines 27 and 43).

At first working as a millwright wasn't so bad. The mill would have 1 or 2 downs a week, but they started going from one down to another. Most of the time it would just be an 8 hour down, but, if they had a big down, sometimes it would be a week. (CABR, C. OLSON - Direct, 2-5-07, page 30, lines 7 and 23). The paper machines are anywhere from 8-22 feet wide, most of them are a city block long, and they are 40 feet high. (CABR, C. OLSON - Direct, 2-5-07, page 30, line 43, and page 31, lines 16 and 21).

Pulling on the big wrenches and using drive impact wrenches, sledgehammers, jackhammers, bumping bars, and channel locks was hard on Carl's wrists. (CABR, C. OLSON - Direct, 2-5-07, page 32, line 1). If Carl had a couple of days break between jobs, his wrists would recover, but, when he didn't get breaks between jobs and went from one down to the next, his wrists didn't get a chance to recover. (CABR, C. OLSON - Direct, page 32, line 36, and page 33, line 5).

Carl started to have pain over the thumb, mostly in the right hand, and the pain progressively kept getting worse, spreading to other parts of his hand and wrist. (CABR, C. OLSON - Direct, 2-5-07, page 33, line 12, and page 34, line 5). At nighttime it felt like somebody was sticking needles up the bones into the forearms, mostly in the right arm, but sometimes in the left.

(CABR, C. OLSON - Direct, 2-5-07, page 34, lines 10 and 21, and page 36, line 1). Carl was losing dexterity and dropping things all the time. He had real nimble fingers, and they slowly just got to where they didn't want to function. (CABR, C. OLSON - Direct, 2-5-07, page 33, line 12).

Carl saw Dr. Gaskell, his family physician in Camas in 2001, and Dr. Gaskell referred Carl to Dr. Schoepflin, a rheumatologist, who provided Carl with work restrictions of no repetitive striking or pulling on big wrenches, and to stay in the machine shop and not be doing millwright duties. (CABR, C. OLSON - Direct, 2-5-07, page 35, lines 12, 21, 25 and 36; page 36, line 40; and page 37, lines 3, 8 and 12). Part of the time the mill would comply with the restrictions, and part of the time they would send him out on the floor regardless of the restrictions. (CABR, C. OLSON - Direct, 2-5-07, page 37, line 43, and page 38, line 21).

Carl was assigned to the converting plant from the millwright pool, where tissue and towels are made on paper machines. (CABR, C. OLSON - Direct, 2-5-07, page 39, line 40, and page 40, line 18). Carl was working on converting equipment in confined spaces, and it took a lot of manual dexterity to reach around and get fasteners that have to be removed and replaced. Carl found himself having a real problem getting up off the floor. His wrists were so sore he couldn't push himself off the floor, or couldn't grab to pull himself up. (CABR, C. OLSON - Direct, 2-5-07, page 38, line 29, and page 39, lines 3 and 8).

Carl worked in the converting plant for 4 years as a millwright up until February 2002, which is the last time he worked at Georgia Pacific

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Corporation. (CABR, C. OLSON - Direct, 2-5-07, page 25, line 29, and page 42, lines 3 and 12). Carl saw Dr. Schoepflin again, and Dr. Schoepflin put restrictions on him of no millwrighting, no driving more than 10 minutes, and no sweeping. (CABR, C. OLSON - Direct, 2-5-07, page 42, line 23). Carl's hands would go numb when he drives from vibrations through the steering wheel. While holding the steering wheel with one hand, Carl will shake the other hand to try and get the numbness out. (CABR, C. OLSON - Direct, 2-5-07, page 42, line 36).

One of the restrictions that Dr. Schoepflin imposed was that he only use the computer for so long. Carl used a computer on the job and typing was hard because of the dexterity of his fingers, and he couldn't use the mouse very long. (CABR, C. OLSON - Direct, 2-5-07, page 43, line 21, and page 44, line 10). Carl has a home computer now, but only is able to use it to check his e-mail. (CABR, C. OLSON - Direct, 2-5-07, page 44, lines 18 and 23).

Because Carl was having pain in his right hand, he was using his left hand more, and that was causing him problems. Carl gets pain in the bottom of the left hand, and then over the thumb, similar to pain in his right hand. (CABR, C. OLSON - Direct, 2-5-07, page 45, line 3, and page 47, line 25). Carl has been wearing wrist braces on both hands since he first saw Dr. Schoepflin. He wore fingerless gloves with wrist supports on the job. (CABR, C. OLSON - Direct, 2-5-07, page 45, lines 40 and 45, and page 46, lines 1 and 30).

Between December 4, 2004, and April 12, 2006, the condition of  
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Carl's wrists has not changed. He can only use a computer for 10 minutes at a time. He can't twist a bottle cap open with either hand. It aggravates his condition to hold a pencil, and to try and form letters. Usually his wife fills out forms for him. (CABR, C. OLSON - Direct, 2-5-07, page 49, lines 1, 25, 40 and 45, and page 52, lines 21 and 38). If Carl hits the back of his hand on a chair while walking, it will take a couple of days for the pain to go away. He drops things with either hand, and, if he goes to grab his car keys and thinks he has a hold on them, the next thing he knows they are on the floor. The pain in his wrists makes his fingers not want to move, and the pain is constant. (CABR, C. OLSON - Direct, 2-5-07, page 53, line 36; page 54, lines 34 and 45; and page 55, lines 23 and 32).

On January 23, 2004, Morris Button, M.D., an orthopedic surgeon, conducted a medical evaluation of Carl Olson's wrists at the request of Sedgwick Claims Management Services, the claim administrator for the self insured employer, Georgia-Pacific Corporation. (CABR, DR. BUTTON – Direct, page 8, line 5; Cross, page 32, line 16; and page 33, line 2). Dr. Button recommended that Carl see a real hand surgeon, and Carl had his treating physician, Dr. Schoepflin, refer him. (CABR, C. OLSON – Direct, page 56, line 27).

Carl consulted a hand surgeon, Dr. Buehler, who told him that if the pain got so bad he couldn't stand it anymore, he could clip the nerves to his wrists to stop the pain, and then told him that a fusion would be the last resort. (CABR, C. OLSON - Direct, 2-5-07, page 55, line 38). Carl will put cold on his wrists for 20 minutes, then do hot packs as hot as he can stand for 20

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minutes, and then sometimes he can get the pain to subside. (CABR, C. OLSON - Direct, 2-5-07, page 57, line 25). Dr. Buehler said that even if they do a fusion, it might not stop the pain. Carl understood that a total fusion would involve all of the moveable bones in his wrist, with a piece out of his hip to fuse the bones, and then he would have absolutely no movement at all in his wrists. (CABR, C. OLSON - Direct, 2-5-07, page 56, line 40).

Gerald Schoepflin, M.D., did a fellowship in rheumatology at Harvard Medical School from 1974 to 1977, and then entered private practice at Portland Adventist Medical Center. (CABR, DR. SCHOEPFLIN – Direct, page 4, lines 2, 14, 17 and 19, and page 5, lines 4, 6, 9 and 11). Dr. Schoepflin is Board Certified in internal medicine and rheumatology, and is a member of the Oregon Medical Association, the Northwest Rheumatism Society, the American College of Rheumatology, and the American College of Physicians. (CABR, DR. SCHOEPFLIN - Direct, page 7, lines 9, 12 and 18). Rheumatology is the field of medicine that involves the diagnoses and medical management of conditions that involve inflammation, particularly affecting the musculoskeletal system, and is commonly referred to as joint disease. (CABR, DR. SCHOEPFLIN - Direct, page 8, lines 1 and 12).

Dr. Schoepflin first examined Carl Olson on May 7, 2001, with a chief complaint of pain in both wrists, 8 over 10 on the right and 5 over 10 on the left, with 10 being unbearable pain. (CABR, DR. SCHOEPFLIN – Direct, page 8, lines 17 and 20). Dr. Schoepflin took a history from Carl that on March 24, 1969, he drove a motorcycle off a 25 foot cliff, landing on his outstretched hands on a flat rock under 6 inches of water. (CABR, DR.

SCHOEPFLIN - Direct, page 9, line 2). Carl suffered a compound fracture of the left forearm, and snapped the tendons and shattered the bones in his right forearm. He was treated at St. Joseph's Hospital in Phoenix with good response, and one year later was playing football with just residual numbness in the thumb, index, and long fingers of the left hand and no pain in either wrist. (CABR, DR. SCHOEPFLIN - Direct, page 9, lines 6 and 9).

As part of the history from Carl, Dr. Schoepflin learned that in 1975 Carl slipped off the back of a flatbed semi truck landing on his hands. He injured his left wrist and was seen by an orthopedist who diagnosed a floater in his left wrist. No surgery was performed and he recovered from that injury. (CABR, DR. SCHOEPFLIN - Direct, page 9, line 21). As recently as 1989 Carl had been able to drive nails in framing his house with no difficulty, and he was able to split wood. (CABR, DR. SCHOEPFLIN - Direct, page 10, line 3). He had gone to work at Georgia Pacific in 1976 and there had been a restructuring of the company in 1995, and he changed positions from machinist to millwright. Work as a millwright entailed heavier impact on his upper extremities that included running a 1 inch impact gun and striking metal with a 12 pound sledgehammer. (CABR, DR. SCHOEPFLIN - Direct, page 10, lines 9, 11 and 17).

Carl reported to Dr. Schoepflin that activities as a millwright bothered his wrists, and he would take several days to recover after such activities. He was experiencing pain in the wrists that increased for several days after performing heavier impact activities. (CABR, DR. SCHOEPFLIN - Direct,

page 10, line 21, and page 11, line 2). By early spring 2000 the referring physician, Arthur Gaskell, M.D., had restricted Carl to machinist work because of pain and swelling in his right wrist. (CABR, DR. SCHOEPFLIN - Direct, page 11, line 9). Carl reported swelling over both the back side of the wrists, the dorsum, as well as over the volar side of the right wrist. The symptoms of the right wrist had been continuous since switching to millwright work in 1995, and had progressively worsened. (CABR, DR. SCHOEPFLIN – Direct, page 11, line 22, and page 12, line 4).

On physical examination, Dr. Schoepflin found swelling over the dorsum side of both wrists, greater on the right, and swelling over the volar, or the front palmar side of the wrists. (CABR, DR. SCHOEPFLIN - Direct, page 17, line 18). Ulnar deviation was decreased in both wrists, greater on the left, and radial deviation on the right was decreased particularly as compared to the left. Ulnar deviation involves having the patient lay their forearms and hands flat on the examination table and deviating the wrist toward the little finger. Radial deviation is deviating the wrist toward the thumb side. (CABR, DR. SCHOEPFLIN - Direct, page 19, lines 16 and 22).

Dr. Schoepflin made a differential diagnosis between post-traumatic arthritis aggravated by work, versus development of a new inflammatory arthritis. (CABR, DR. SCHOEPFLIN – Direct, page 20, line 17). Dr. Schoepflin ordered wrist x-rays, a sero-active protein test, nerve conduction velocities, and an associated trial of prednisone, which is a cortisone and would be expected to have quite a beneficial effect if there was an underlying

inflammatory arthritis. The response would be expected to be less in the case of traumatic arthritis. (CABR, DR. SCHOEPFLIN - Direct, page 20, line 24, and page 21, lines 11 and 13).

Dr. Schoepflin saw Carl back on June 14, 2001, with continuing pain at a 6 over 10 level, and following a 12 hour work shift on Thursday, his wrist pain was 8 over 10 on Thursday and Friday. (CABR, DR. SCHOEPFLIN - Direct, page 21, lines 21 and 24). Carl had taken a course of prednisone, 30 milligrams a day for 2 days, and then 20 milligrams daily for 4 days, and that did not help. (CABR, DR. SCHOEPFLIN - Direct, page 22, line 6). The nerve conduction velocity testing on the upper extremities reported bilateral carpal tunnel syndrome, mild in severity on the right and mild to moderate on the left, suggesting injury to the median nerves at the level of the wrist that could be from swelling and compression on the nerve. (CABR, DR. SCHOEPFLIN - Direct, page 23, line 18, and page 24, line 2).

The sero-active protein test for inflammation was very mildly abnormal. This suggests there was very mild inflammation present, which was not sufficient to lean towards a diagnosis of primary inflammatory condition, such as lupus or rheumatoid, particularly in view of his lack of response to prednisone. (CABR, DR. SCHOEPFLIN - Direct, page 24, lines 19 and 22). Carl's left wrist appeared puffy over the dorsum and was tender at the radial and ulnar styloid regions. The right wrist also looked puffy over the radiocarpal joint, and was tender as well. (CABR, DR. SCHOEPFLIN - Direct, page 25, lines 5 and 8).

Based on reasonable medical probability, Dr. Schoepflin diagnosed  
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post-traumatic arthritis. X-rays were sufficient to document cartilage injury in his wrists, and Dr. Schoepflin concluded that this likely related to previous trauma, the combination of his two accidents before going to work for Georgia Pacific, and the result of heavy impact use of his wrists on the job as a millwright. (CABR, DR. SCHOEPFLIN - Direct, 1-24-07, page 25, lines 17 and 21, and page 26, lines 6 and 11).

Dr. Schoepflin addressed a letter to Georgia Pacific that Mr. Olson should not perform repetitive gripping of tools and equipment. His wrists should not be subject to impacts from hammering or use of wrenches, and he should not engage in sweeping for more than 10 minutes in an 8 hour day. He should not engage in computer keyboarding for more than 10 minutes at a time, or more than 2 hours in an 8 hour day. He should not drive a motorized vehicle for more than 15 minutes at a time, or more than 2 hours in an 8 hour day. (CABR, DR. SCHOEPFLIN - Direct, page 28, lines 1 and 8).

Dr. Schoepflin saw Carl back on February 5, 2004, and Carl was wearing black elastic wrist splints. The knuckles and fingers appeared normal, but there was diffuse enlargement over the back side of the wrist joint on both sides. (CABR, DR. SCHOEPFLIN - Direct, page 29, lines 2 and 25, and page 30, line 6). Wrist ranges of motion compared to the previous examination on May 7, 2001, showed some reduction in extension and flexion of the right wrist. (CABR, DR. SCHOEPFLIN - Direct, page 31, lines 2 and 10).

Dr. Schoepflin referred Carl to a hand and wrist surgeon, Mark Buehler, M.D., for an opinion and advice regarding wrist fusion and carpal  
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tunnel release surgery. Dr. Buehler reported that Carl's only option was wrist fusion, and at this point the pain was not severe enough to justify surgical intervention. (CABR, DR. SCHOEPFLIN - Direct, page 34, lines 7 and 15). Dr. Schoepflin would anticipate good relief of pain with a fusion, but it would leave Carl with a complete loss of mobility in the wrist, and whether to proceed with such surgery should be left to the patient. (CABR, DR. SCHOEPFLIN - Direct, page 35, line 16, and page 36, line 2).

Dr. Schoepflin opined, based on reasonable medical probability, that repetitive use of Carl's hands and wrists as a millwright aggravated his pre-existing condition of the motorcycle accident in 1969. The earlier injuries likely disrupted the ligamentous support for the wrists and initiated some damage to the cartilage, which set him up for impact injury to the wrist that might normally have been tolerated by one without underlying problems. (CABR, DR. SCHOEPFLIN – Direct, page 26, lines 19 and 22).

Thomas Gritzka, M.D., is a Board Certified orthopedic surgeon, who conducted a medical evaluation of Carl Olson on May 19, 2006, with a chief complaint of numbness that involved his hands and spread to both forearms, and bilateral wrist pain. (CABR, DR. GRITZKA - Direct, page 11, lines 20 and 22). Carl described to Dr. Gritzka very limited movement in his right hand and any sort of activity that involved moving either wrist aggravated his wrist pain. He had crepitus, or grinding, crunching and clicking noises with wrist movement, and any activity that involved striking or grasping, that is using a hammer or picking up anything heavy, made his wrists hurt. (CABR, DR. GRITZKA - Direct, page 13, line 11). He had been in a motorcycle

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accident at age 15 and had injuries to both wrists, including an open fracture on the left. (CABR, DR. GRITZKA – Direct, page 14, line 15). He had started working at the Camas Paper Mill at age 22, and his occupational experience had been as a machinist and millwright. (CABR, DR. GRITZKA - Direct, , page 16, lines 6 and 16).

Dr. Gritzka conducted a physical examination focused on Carl's upper extremities, and he had abnormalities of the left wrist consisting of an ulnar positive wrist, which means the distal ulnar. The lower end of the smaller bone at the wrist, was longer than the radius, and the left wrist deviated , or bent, toward the thumb. He had a positive piano key sign, which is one of the findings for distal radioulnar joint derangement. Normally, if you push up and down on the ulnar styloid, or the prominence of the wrist on the little finger side, it doesn't move, but with piano key sign the joint is unstable and moves like a piano key. (CABR, DR. GRITZKA - Direct, page 16, line 19, and page 17, lines 1, 3, 12 and 15). When Carl moved his left wrist in a circle, Dr. Gritzka could feel and hear crepitus, or clicking and grinding, that came from the mid portion of the wrist, in the region of the triangular fibrocartilage complex. When the distal radioulnar joint is injured, often the triangular fibrocartilage complex is injured, so Carl had findings consistent with distal radioulnar joint derangement and triangular fibrocartilage complex problems also. (CABR, DR. GRITZKA - Direct, page 18, line 4).

On the right, Carl had an ulnar neutral wrist, meaning both the radius and the ulna were about the same length. Typically the radius is longer than the ulna. Carl had a mass on his right distal forearm on the top of the ulnar

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sides that was probably a ganglion cyst. When he flexed and extended his fingers, this produced crepitus in his wrist. (CABR, DR. GRITZKA - Direct, page 18, line 22, and page 19, line 4).

Carl had impaired wrist ranges of motion in both wrists. The wrist extension and radial deviation on the left were both greater than average, probably because of the underlying wrist fracture. (CABR, DR. GRITZKA – Direct, page 20, line 23). As to the right wrist, Dr. Gritzka has diagnosed post-traumatic fracture, right distal radius, and, as to the left wrist, Dr. Gritzka diagnosed post distal radial fracture with non union. (CABR, DR. GRITZKA - Direct, page 23, line 14). Age related arthritis usually involves the fingers and small joints of the fingers, the hips, the knees, and sometimes the shoulders, but usually not the wrists and elbows. Carl's work as a millwright aggravated his underlying conditions and made them progress more rapidly than they would have otherwise. (CABR, DR. GRITZKA - Direct, page 28, line 23, and page 30, line 23).

Morris Button, M.D., a hand surgeon, examined Carl Olson once on January 23, 2004, at the request of Sedgwick Claims Management Services on behalf of the self indured employer, Georgia Pacific Corporation. Dr. Button has done previous medical evaluation at the request of Sedgwick, and has done these medical evaluations since the inception of his practice 34 years ago. How long in regard to this company, he couldn't say, but it has probably been many years, and they are big "players". (CABR, DR. BUTTON - Direct, page 8, line 5, and Cross, page 33, line 2).

Dr. Button testified as to the hand and wrist pain that Carl Olson

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developed as a millwright working for Georgia Pacific Corporation. Pain is a protective response. The body is trying to send a message not to perform noxious activity. Pain is somewhat of a circuit breaker, and it shuts down the power system. In Mr. Olson's case any type of compression loading or motion maneuver utilizing the hand, results in forces being transmitted through the diseased wrist joints, precipitating pain. (CABR, DR. BUTTON - Direct, page 26, line 2; and Cross, page 38, line 21; and page 41, line 4).

Dr. Button also testified that Mr. Olson did not have any underlying inflammatory disease such as rheumatoid arthritis. (CABR, DR. BUTTON - Cross, page 40, line 22). His work activities over the years had accelerated the post-traumatic bilateral wrist arthritis. (CABR, DR. BUTTON - Cross, page 41, line 9). Mr. Olson's right and left wrist and hand conditions were aggravated by his work as a millwright. (CABR, DR. BUTTON - Cross, page 35, line 22).

When he testified on February 14, 2007, Dr. Button recommended a total wrist fusion on the right, and a proximal row carpectomy on the left. There are 8 small carpal bones in the wrist, and 4 of those in one row can be removed and the wrist then re-set. (CABR, DR. BUTTON - Direct, page 22, line 11, and page 24, line 19). People like proximal row carpectomies because they maintain motion. Having some degree of wrist motion is very important for basic activities of daily living, such as personal hygiene. Whereas, with a total wrist fusion of his dominant right hand, claimant would have no movements in flexion and extension of his wrist on the right. (CABR, DR. BUTTON - Direct, page 29, line 7; and Cross, page 35, line 25;

and page 36, line 3).

When he testified on December 7, 2006, Dr. Gritzka opined that there are surgical procedures that are available for the wrist problems that Carl Olson has. (CABR, DR. GRITZKA - Direct, page 31, line 9). Fusion would be a good choice in terms of eliminating pain in the wrist and making the wrist stronger, but he couldn't flex his wrist up and down or move it from side to side. It is locked in place, so whenever he wants to position his hand in space, he would have to do it all by rotating his forearm, bending the elbow, or moving the shoulder. He would also have impaired dexterity of his fingers. He wouldn't be able to move his wrist in any direction. It would be locked in place in whatever position it was fused, so that it would impair his overall dexterity. (CABR, DR. GRITZKA - Direct, page 34, line 16, and page 35, lines 5 and 12).

Dr. Gritzka opined that Carl could not return to work as a millwright with a fused wrist. Millwright requires fine dexterity and he has to reach into narrow spots and grab bolts and objects, moving the wrist from side to side, and he would not be able to do that. Carl would be able to do sedentary work, desk type work that involved minimal typing and keyboarding, being a dispatcher, or being a security guard watching screens at a mill. (CABR, DR. GRITZKA - Direct, page 35, line 21, and page 36, lines 1 and 15). Dr. Button acknowledges that being a millwright requires flexion and extension in tight places, and Carl would not have the ability to flex and extend his wrist if he had a fusion. (CABR, DR. BUTTON - Cross, page 36, line 24, and page 37, line 9).

Based on reasonable medical probability, Dr. Gritzka opined that Carl Olson was temporarily totally disabled since December 5, 2004. Based on his occupational history and his wrist injuries, he was not able to return to his job at injury, which was his sole occupational history since age 22. (CABR, DR. GRITZKA - Direct, page 37, lines 2 and 5). If he does not want to have wrist surgery, Carl Olson is at maximum medical improvement, and is permanently totally disabled. If Carl were younger, and Dr. Gritzka were his treating physician, he would encourage him to have surgery. But given his age of 52, and more unpredictable outcomes of surgeries after the age of 45 or 50, it is up to him, and it is a reasonable decision to decline surgery. These are not simple procedures. They have quite a list of morbidity associated with them, which means a lot of pain and a lot of rehabilitative effort, hand therapy afterwards. (CABR, DR. GRITZKA - Direct, page 31, line 16; page 37, lines 16 and 25; and page 38, line 9).

Dr. Schoepflin opined based on reasonable medical probability that Carl should not have worked as a millwright between December 4, 2004, and April 12, 2006, and should be permanently precluded from working as a millwright in absence of undergoing wrist fusion surgeries, and then his ability to use wrenches and reach into tight places would be severely compromised. (CABR, DR. SCHOEPFLIN - Direct, page 36, line 21). Dr. Schoepflin imposed work restrictions on Carl of no repetitive gripping of tools and equipment, and his wrists should not be subject to impacts from hammering or use of wrenches. He should not engage in sweeping more than 10 minutes in an 8 hour day. He should not engage in computer

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keyboarding activities for more than 10 minutes at a time, or more than 2 hours in an 8 hour day. He should not drive a motorized vehicle for more than 15 minutes at a time, or more than 2 hours in an 8 hour day. (CABR, DR. SCHOEPFLIN - Direct, page 28, lines 1 and 8).

The employer's vocational witness, Maureen Devine, revealed for the first time when she testified on February 8, 2007, that there were other jobs that Carl Olson could have performed between December 4, 2004, and April 12, 2006, namely security guard, sales, office clerk, scale operator, and fire watch. (CABR, DEVINE - Direct, page 11, line 23, and page 20, line 21). Sedgwick Claims Management Services did not previously communicate any employment opportunities that were available to Carl. (CABR, DEVINE - Cross, page 56, line 3).

Ms. Devine also reviewed the records of various vocational counselors who had previously been assigned to this claim by the claim administrator. Starting with April Poier, Ms. Devine reviewed her employability assessment report dated April 22, 2003. Ms. Devine then reviewed the record where Sedgwick Claims Management Services had found Mr. Olson eligible for plan development and authorized April Poier to proceed with the vocational services. (CABR, DEVINE - Cross, page 26, lines 11, 13 and 16; page 27, line 2; and page 29, line 1).

Ms. Devine then reviewed a vocational summary of April Poier dated September 15, 2003, in which she had explored several goals with Mr. Olson including para-educator, real estate agent, CAD drafter, office assistant, dispatcher and receptionist, and found all of them inappropriate for him based

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on the limitations imposed by Dr. Gaskell and Dr. Schoepflin. (CABR, DEVINE - Cross, page 33, line 25, and page 34, lines 7 and 16). Ms. Devine also reviewed the ability to work assessment report by another vocational counselor, Mark Harrington, dated October 29, 2004, that there was substantive evidence to support the opinion that Mr. Olson is totally and permanently disabled and unable to benefit from vocational services due to the combined effects of the industrial injury (occupational disease) and his pre-existing conditions. (CABR, DEVINE - Cross, page 39, lines 5 and 11).

None of the vocational positions testified to by Ms. Devine were identified to Mr. Olson before he sold his house in Washougal and moved down to Bay Center, Washington, in June of 2006. (CABR, C. OLSON - Direct, 2-8-07, page 75, line 4). Ms. Devine never requested the opportunity to meet with Mr. Olson, though, as a vocational rehabilitation counselor, she meets with injured workers to assess their ability to return to work. (CABR, DEVINE - Direct, page 4, line 25, and Cross, page 45, line 12). Ms. Devine acknowledges that Mr. Olson has never done any sales work. Nor has he had any experience or background in security guard, scaler or fire watch, office reception or clerical. (CABR, DEVINE - Cross, page 50, line 21, and C. OLSON - Direct, 2-8-07, page 74, line 19, and page 75, line 26).

Under Department of Labor and Industries' criteria, since Mr. Olson did not have direct transferrable skills from his work history, the Department would require a short term training and orientation program of 30 days to 3 months. Ms. Devine would recommend 1-3 months retraining for Mr. Olson, and the vocational services provided by Sedgwick Claims

BRIEF OF RESPONDENT - 20

Management Services in meeting the Department of Labor and Industries' criteria requires a determination of employability pursuant to state statute and regulation. (CABR, DEVINE - Recross, page 68, lines 16 and 24, and page 69, lines 5 and 7).

In working with vocational counselors assigned to him since he left the mill in February 2002, Carl has not been able to identify any job that he can do either at the mill or outside of the mill. Carl would prefer to be working, not working is hard and it is frustrating. Carl fixed all of his own cars, and is not able to work on his own cars anymore. (CABR, C. OLSON - Redirect, 2-5-07, page 78, lines 1, 14, 19, 23 and 36). Carl never knows from time to time what is going to cause pain. Doing the simplest things can all of a sudden make it unbearable. He never knows what at any time is going to make his pain severe. He can plan to do something the night before, have such severe pain that he can't sleep at night, and is just shot the next day. Just fastening his pants can cause severe pain. These episodes occur several times a month. (CABR, C. OLSON - Direct, 2-8-07, page 78, line 16; page 79, line 5; and page 81, lines 11 and 19).

Usually when he has severe pain, it takes Carl 2-3 days to 3-4 days to recover using hot and cold compresses. Usually at 20 minute intervals he puts ice on and takes ice off. If it doesn't help the pain he goes with heat, and then sometimes he does a combination of heat for 20 minutes and ice 20 minutes. This is the treatment recommended by Dr. Buehler, and is the only relief he has from severe pain. (CABR, C. OLSON - Direct, 2-5-07, page 55, line 38; and 2-8-07, page 82, lines 1 and 21; and page 83, line 3).

Using the American Medical Association Guides to the Evaluation of Permanent Impairment, Fifth Edition, if Carl had a right wrist fusion in an ideal position and with a good outcome, Dr. Gritzka rated a 30% impairment of the right upper extremity. On the left side, assuming he had an arthroplasty procedure, Dr. Gritzka rated Carl with a 24% impairment of the left upper extremity. (CABR, DR. GRITZKA - Direct, page 38, line 24).

### **B. Procedure**

On February 5, 2007, a hearing was commenced before Industrial Appeals Judge James M. Gilligan at the Board of Industrial Insurance appeals. The issues were identified as:

1. Whether Carl Olson should receive further, proper and necessary medical treatment.
2. Whether Carl Olson should receive time loss benefits from December 4, 2004, through April 12, 2006.
3. Whether Carl Olson was permanently totally disabled, or permanently partially disabled.

(CABR, COLLOQUY, February 5, 2007, page 4, lines 8-27)

In his 16 page Proposed Decision and Order dated June 28, 2007, Judge Gilligan reviewed all of the testimony presented on behalf of Carl Olson and Georgia-Pacific Corporation, entered his Findings of Fact and Conclusions of Law, and decided that as of April 12, 2006, the date of claim closure by the Department of Labor and Industries, that Carl Olson's bilateral

wrist conditions were in need of further necessary and proper medical treatment, but that during the period from December 4, 2004, through April 12, 2006, he was not temporarily totally disabled. (CABR, pages 69-84).

The reasoning for Judge Gilligan's decision that Carl Olson was in need of further treatment is at page 12, of the Proposed Decision and Order:

The physicians in this case agreed surgical treatment was available to Mr. Olson. Dr. Schoepflin referred Mr. Olson to Dr. Buehler, a hand and wrist surgeon, who indicated Mr. Olson's only option was a wrist fusion; however, at that point in time his pain was not severe enough to justify that surgical intervention. Dr. Buehler made no reference to carpal tunnel releases. Dr. Schoepflin, the claimant's treating physician, would anticipate good relief of pain with bilateral wrist fusions, with the ability to grip with full force, but with a lack of mobility in the wrists. He indicated the decision to proceed with such surgery was Mr. Olson's to make. Dr. Gritzka believed Mr. Olson had reached maximum medical improvement, unless Mr. Olson chose to have elective surgery on his wrists, including fusion, joint replacements, or joint modifications. He indicated it was up to Mr. Olson as to whether he had surgery or not. Dr. Button, a hand and upper extremity surgeon, believed Mr. Olson would benefit from surgery in either or both wrists. He recommended a total wrist fusion for the right wrist, and a proximal row carpectomy for the left wrist.

I find Mr. Olson's bilateral wrist conditions are not fixed and stable and that treatment is available for these conditions. Dr. Gritzka's testimony was persuasive that Mr. Olson would benefit from surgery in either or both wrists, which is supported by the testimony of Dr. Schoepflin and Dr. Button. The physicians pointed out that available surgical treatment included fusion, arthroplasty, and proximal row

carpectomy. The evidence shows that surgery for one or both wrists would be beneficial for Mr. Olson. Thus, the claimant has proved by a preponderance of the evidence that he is entitled to further proper and necessary medical treatment. Since his condition is not fixed and stable, Mr. Olson has not shown he is entitled to an award for permanent partial disability. (CABR, page 80, lines 9-30).

On August 29, 2007, Carl Olson filed a 30 page Petition for Review on the issue of time loss benefits from December 4, 2004, through April 12, 2006, when the Department of Labor and Industries closed his claim. (CABR, pages 23-52). Since the Proposed Decision and Order had already awarded further treatment and the claim would have to go back to the Department for further action, permanent total disability, or permanent partial disability, were not being sought. (CABR, page 51).

Then on November 7, 2007, the Board of Industrial Insurance Appeals entered their 6 page Decision and Order, deciding that Carl Olson was temporarily totally disabled from December 4, 2004, through April 12, 2006, as well as in need of further treatment. (CABR, pages 2-7). As to the issue of further treatment the Board reasoned:

It is not seriously disputed that Mr. Olson's work at the paper mill acted upon and aggravated the injuries he suffered as a teenager so that he could no longer work as a millwright. Morris Button, M.D., the expert called by the self-insured employer, also diagnosed bilateral post traumatic wrist arthritis, with a symptomatic and perhaps pathologic progression as a result of work. He further agreed that Mr.

Olson was significantly limited in his physical capacity so that he could not work in a production setting or as a millwright.

The experts who testified for the parties to this appeal agree that surgery is available. The right wrist could be treated with a fusion, which would reduce pain but would certainly result in greatly reduced mobility, perhaps even a complete loss of mobility of the wrist. A somewhat less drastic surgery, called a proximal row carpectomy, could be done on the left wrist. There is disagreement among the experts about the likely success of that surgery.

Although there is some indication in this record that Mr. Olson declined both surgeries, we are not satisfied from this record that Mr. Olson was actually offered surgery in a way that he could weigh the advantages and risks and make a decision on how to proceed. We believe that he should have that opportunity. For that reason we believe that it is premature to determine that Mr. Olson's conditions have reached maximum medical improvement and we return the claim to the Department for further adjudication.

There is also some indication in this record that the Department determined that Mr. Olson had in fact declined surgery and because he had, his claim was subject to closure without further benefits.

We have previously held that an injured worker cannot be required to accept treatment that carries unacceptable risks or consequences. *In re John Galen*, BIIA Dec., 03 18491 (2004). If Mr. Olson is offered surgery but declines it, and assuming that no other treatment is available, his condition has by definition reached maximum medical improvement and his claim is ready for closure. But his decision to decline surgery does not come at the cost of forfeiting benefits that he would otherwise be entitled to and his entitlement to benefits must be evaluated on the merits.

(CABR, page 3, line 18, through page 4, line 11).

On the issue of time loss benefits the Board decided:

We turn now to Mr. Olson's ability to obtain and perform gainful employment for the period of December 4, 2004, through April 12, 2006.

The vocational testimony came from Maureen C. Devine, a vocational rehabilitation consultant called by the self-insured employer. She learned that Mr. Olson was a high school graduate who had a journeyman level millwright machinist certificate. She did not interview Mr. Olson. She did not do any vocational testing. She expressed an opinion that aptitudes for millwrights are in the average to high range for all categories. She acknowledged that as of April 2003, the employer could not provide Mr. Olson with work that accommodated his medical restrictions and Mr. Olson was found eligible for plan development. She testified that there were positions that Mr. Olson could obtain and perform in the competitive labor market and gave as examples, security guard, sales, and office clerical.

We are not persuaded by that testimony. Ms. Devine did not perform labor market surveys in preparation for this appeal. Rather, she relied on surveys that had previously been completed. It is not clear who completed the surveys or when they were completed. She had not placed any workers in the jobs that she referred to for at least several years, and in some cases, she had never made such a placement. The labor market – which for the time relevant to this appeal was the Vancouver area – has changed over the years and may not reflect the circumstances that existed for the period of December 4, 2004, through April 12, 2006.

More to the point however, is the fact that the claimant did not have direct transferable skills to perform any of the jobs Ms. Devine mentioned. For any of them, he would require at least some retraining. Possessing good aptitude in many categories does not mean that an injured worker comes equipped with transferable skills to perform work that he has never done before. If a worker requires retraining to acquire the skills necessary to become employable, it follows that he is

not employable without retraining. There is no evidence that any retraining was offered to Mr. Olson or that any equipment that he might need to accommodate his medical restrictions was made available.

We find that no jobs were available in the claimant's labor market during the period of December 4, 2004, through April 12, 2006, which the claimant had the physical ability and the skills to perform. For that period he was a temporarily totally disabled worker, entitled to time-loss compensation benefits.

(CABR, page 4, line 12, through page 5, line 9).

The Board then entered its Findings of Fact and Conclusions of Law reversing the closing order of the Department of Labor and Industries dated April 12, 2006, and directing the Department to issue an order requiring the self insured employer, Georgia-Pacific Corporation, to provide proper and necessary medical treatment and to pay time loss benefits from December 4, 2004, through April 12, 2006. (CABR, page 7, lines 1-6).

On November 12, 2007, Georgia-Pacific Corporation filed an appeal in Superior Court for Clark County. (Clerk's Papers No. 2). The matter then proceeded to jury trial on January 26 and 27, 2009, when the transcripts of the testimony before the Board were read to the jury. The two volumes of the transcribed audio recorded in Superior Court have been filed with the Court of Appeals, but all references to the record on the briefs of the parties are to the Certified Appeal Board Record.

On January 27, 2009, a jury of 6 persons rendered a unanimous verdict in favor of Carl Olson as follows:

QUESTION 1: Was the Board of Industrial Insurance Appeals correct in deciding that Carl Olson was temporarily totally disabled from December 4, 2004, through April 12, 2006?

ANSWER: Yes (Write "Yes" or "No")

QUESTION No. 2: Was the Board of Industrial Insurance correct in deciding that the condition of Carl Olson's wrists had not reached maximum medical improvement?

ANSWER: Yes (Write "Yes" or "No")

INSTRUCTION: If you answered "yes" to Question 2, do not answer any further questions. If you answered "yes" to Question 1 and "no" to Question 2, answer Question 3.

QUESTION 3: As of April 12, 2006, was Carl Olson permanently totally disabled?

ANSWER: \_\_\_\_\_ (Write "Yes" or "No")

INSTRUCTION: Only if you answered "no" to Questions 2 and 3, answer Question 4.

QUESTION 4: What percentage of loss of function best describes Carl Olson's wrist condition?

ANSWER: \_\_\_\_\_ % right (Write in number)  
\_\_\_\_\_ % left (Write in number)

DATE: January 27, 2009      /s/ Richard Wilson

Presiding Juror

(Transcript Volume II, page 159, and Clerk's Papers, page 39).

#### IV

##### Argument

##### A. Merits

Pursuant to RCW 51.52.115, the Board of Industrial Insurance Appeals' final decision is prima facie correct. An appeal of that decision in Superior Court is heard de novo. An appellant can attack the board's findings by demonstrating to a trier of fact at trial in Superior Court that the evidence preponderates against those findings. *Somsak v. Criton Techs/Health Tecna*, 113 Wn. App. 84, 91, 52 P.3d 43 (2002). The Court of Appeals' review of the Superior Court's decision is limited to examination of the record to see whether substantial evidence supports the Board's findings,

and whether the Board's conclusions flow from those findings. *Harrison Mem'l. Hosp. v. Gagnon*, 110 Wn. App. 475, 482, 40 P.3d 1221 (2002).

If a rational trier of fact could find on a more probable than not basis, viewed in a light most favorable to the non moving party, that the findings of the Board are correct, then the respondent prevails on appeal. *Harrison v. Gagnon* at page 483. The appellate court is not to reweigh or rebalance the competing testimony and inferences, or to apply anew the burden of persuasion. To do so would abridge the right to trial by jury. *Harrison v. Gagnon*, 110 Wn. App. at page 485.

The jury, not the appellate court, resolves contradictory evidence by making credibility determinations. *Somsak v. Criton*, 113 Wn. App. at page 96. The concurrence in *Harrison* points out that though respondent could not prove by blood testing that she did not acquire Hepatitis C from her previous employment, a doctor's testimony alone, contrary to another doctor, that respondent had acquired the disease from her current employment was sufficient. *Harrison v. Gagnon*, 110 Wn. App. at page 487.

The Decision and Order of the Board of Industrial Insurance Appeals dated November 7, 2007, made the following pertinent Findings of Fact:

2. On March 11, 2002, the claimant, Carl G. Olson, filed an application for benefits alleging a bilateral wrist condition as a result of his employment with Fort James Corporation, now known as Georgia-Pacific Corporation.
3. The claimant developed a condition that arose naturally and proximately from distinctive conditions of work diagnosed as post-traumatic arthritis in each wrist, the result of a severe injury to each wrist when the claimant was a teenager

that became symptomatic as a result of the mechanical stresses to the wrists encountered in the workplace starting in 1995 when he began working as a millwright.

4. For the period of December 4, 2004, through April 12, 2006, the claimant's physician restricted his activities to avoid repetitive gripping of tools or equipment; the use of hammers, wrenches, shovels or jackhammers; the use of a keyboard for more than fifteen minutes at a time or two hours in an eight hour day, driving a vehicle for more than fifteen minutes at a time or two hours in an eight hour day.

5. For the period of December 4, 2004, through April 12, 2006, the claimant was unable to return to work for Georgia-Pacific Corporation because no jobs were available that could be performed within the medical restrictions necessitated by the industrially related condition.

6. The claimant was born in 1954. He is a high school graduate. He was employed by Georgia-Pacific Corporation for 25 years performing manual labor. From 1995 to 2002, the claimant worked there as a millwright.

7. For the period of December 4, 2004, through April 12, 2006, there were no jobs available in the Vancouver labor market that the claimant could obtain and perform, given his physical restrictions, singular employment history, and lack of transferable skills.

8. As of April 12, 2006, surgical treatment was available for each wrist. The claimant is entitled to consider the option of surgical treatment.

The issue on appeal is whether there is substantial evidence to support Findings 5, 7 and 8.

The Board then made the following pertinent Conclusions of Law:

2. The claimant has an occupational disease within the meaning of RCW 51.08.140 diagnosed as post-traumatic arthritis in each wrist.

3. For the period of December 4, 2004, through April 12, 2006, the claimant was a totally temporarily disabled worker within the meaning of RCW 51.32.090 and therefore entitled to time-loss compensation.

4. As of April 12, 2006, the claimant's bilateral wrist condition had not reached maximum improvement and was in contemplation of RCW 51.36.010.

5. The order dated April 12, 2006, which affirmed the order dated October 27, 2005, and closed the claim with time-loss compensation as paid to December 3, 2004, without an award for permanent partial disability, is incorrect. The claim is reversed and remanded to the Department with directions to require the self-insured employer to pay the claimant time-loss compensation for the period of December 4, 2004, through April 12, 2006, to provide proper and necessary medical treatment, and to take such further action as is indicated by the facts and the law.

The issue on appeal is whether the Conclusions of Law No's. 3 and 4 flow from the Findings. (CABR, page 6).

### **1. Maximum Medical Improvement**

On January 23, 2004, Morris Button, M.D., a hand surgeon, conducted a medical evaluation of the respondent, Carl Olson, for the employer, Georgia-Pacific Corporation. Dr. Button told Carl that he needed

to see a real hand surgeon, and Carl Olson had his treating physician, Gerald Schoepflin, M.D., a rheumatologist, refer him to Mark Buehler, M.D., a hand surgeon. Dr. Buehler told Mr. Olson that if his pain got so bad that he could not stand it anymore, Dr. Buehler could clip the nerves to stop the pain, and that a fusion would be the last resort. (CABR, C. OLSON – Direct, 2-5-07, page 55, line 38).

When he testified on February 14, 2007, Dr. Button recommended a total wrist fusion on the right, and a proximal row carpectomy on the left. Patients like proximal row carpectomies because they maintain wrist motion, and some degree of wrist motion is very important for basic activities of daily living, such as personal hygiene. With a total wrist fusion of his dominant right hand, Mr. Olson would have no flexion or extension of his wrist. (CABR, DR. BUTTON – Direct, 2-14-07, page 29, line 7, and Cross, page 35, line 25, and page 36, line 3).

On December 3, 2006, Thomas Gritzka, M.D., orthopedic surgeon, testified that there are surgical procedures that are available for Mr. Olson's wrist problems, including various kinds of wrist fusions and arthroplasties, or joint replacements, and joint modification that could be done, including a proximal row carpectomy. (CABE, DR. GRITZKA – Direct, 12-3-06, page 31, line 9, and page 33, line 19).

The testimony of Mr. Olson, Dr. Button, and Dr. Gritzka support the Board's Finding of Fact No. 8 that as of April 12, 2006, surgical treatment was available for each wrist, and Mr. Olson is entitled to consider the option

of surgical treatment. Conclusion of Law No. 4 follows from that Finding that Mr. Olson's bilateral wrist condition had not reached maximum medical improvement and he was in need of further necessary and proper medical treatment.

## **2. Time Loss Benefits from December 4, 2004, through April 12, 2006**

Based on reasonable medical probability, Dr. Gritzka opined that Carl Olson was temporarily totally disabled from December 4, 2004. With an occupational history and his wrist injuries, Mr. Olson was not able to return to his job at injury, which was his sole occupational history since age 22. (CABR, DR. GRITZKA – Direct, page 27, lines 2 and 5).

Dr. Schoepflin imposed work restrictions on Carl Olson of no repetitive gripping of tools and equipment, no impact from hammering and use of wrenches, no sweeping for more than 10 minutes in an 8 hour day, no computer keyboarding for more than 10 minutes at a time, or more than 2 hours in an 8 hour day, and no driving a vehicle for more than 15 minutes at a time, or more than 2 hours in an 8 hour day. (CABR, DR. SCHOEPFLIN – Direct, page 28, lines 1 and 8).

Prior to her testimony on February 8, 2007, neither Maureen Devine, the employer's vocational witness, or Georgia-Pacific Corporation had communicated any employment appropriate for Carl Olson. Ms. Devine then identified jobs of security guard, sales, office clerk, scale operator, and fire watch that she thought he could perform. Ms. Devine acknowledges that

Mr. Olson had never had any experience or background in any of these jobs. Since Mr. Olson did not have any transferable skills from his work history, Ms. Devine recommended 1-3 months retraining for Mr. Olson, before he could be found employable. (CABR, DEVINE – Direct, page 11, line 23; page 26, line 11; Cross, page 68, lines 16 and 24; and page 69, lines 5 and 7.

The testimony of Dr. Schoepflin, Dr. Gritzka, and Ms. Devine supports Finding of Fact No.'s. 5 and 7 that from December 4, 2004, through April 12, 2006, there were no jobs available in the Vancouver labor market that Mr. Olson could obtain and perform, given his physical restrictions, singular employment history, and lack of transferable skills. Conclusion of Law No. 3 follows from that finding that from December 4, 2004, through April 12, 2006, Carl Olson was temporarily totally disabled within the meaning of RCW 51.32.090 and therefore entitled to time loss benefits.

### **3. Permanent Disability**

Since the Board of Industrial Insurance Appeals found that Carl Olson had not reached maximum medical improvement, they did not address the issue of permanent partial disability, or permanent total disability. If Mr. Olson has reached maximum medical improvement, there is substantial evidence to support a finding on permanent partial disability and permanent total disability, and the case should be remanded to Superior Court for Clark County for re-trial on that issue.

As to permanent partial disability, using the American Medical Association Guides to the Evaluation of Permanent Impairment, Fifth Edition, if Carl Olson had a right wrist fusion in an ideal position with a good outcome, Dr. Gritzka rated a 30% impairment of the right upper extremity. If Mr. Olson had an arthroplasty procedure on the left wrist, as recommended by Dr. Gritzka and Dr. Button, Dr. Gritzka rated Carl with a 24% impairment of the left upper extremity. (CABR, DR. GRITZKA – Direct, page 38, line 25). As to permanent total disability, Dr. Gritzka testified that without surgery, Carl Olson was permanently totally disabled. (CABR, DR. GRITZKA – Direct, page 37, line 16)

#### **B. Reasonable Attorney Fees**

Under the Industrial Appeals Act, RCW 51.52.130, the court must award reasonable attorney fees to the worker in cases where a party other than the worker is the appealing party and the worker's right to relief is sustained, and respondent requests reasonable attorney fees pursuant to RAP 18.1.

#### **V**

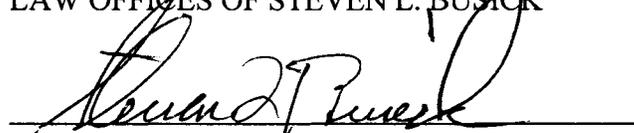
#### **Conclusion**

In review of the testimony presented before the Board of Industrial Insurance Appeals, there is substantial evidence to support the Board's

Findings and Conclusions that as of April 12, 2006, Carl Olson had not reached maximum medical improvement and that he was temporarily totally disabled from December 4, 2004, through April 12, 2006.

DATED this 7th day of October, 2009.

LAW OFFICES OF STEVEN L. BUSICK

A handwritten signature in black ink, appearing to read "Steven L. Busick", is written over a solid horizontal line.

Steven L. Busick, WSBA #1643  
Attorney for Respondent

RCW 51.52.130 states:

(1) *If, on appeal to the superior or appellate court from the decision and order of the board, said decision and order is reversed or modified and additional relief is granted to a worker or beneficiary, or in cases where a party other than the worker or beneficiary is the appealing party and the worker's or beneficiary's right to relief is sustained, a reasonable fee for the services of the worker's or beneficiary's attorney shall be fixed by the court. . . . If in a worker or beneficiary appeal the decision and order of the board is reversed or modified and if the accident fund or medical aid fund is affected by the litigation, or if in an appeal by the department or employer the worker or beneficiary's right to relief is sustained, or in an appeal by a worker involving a state fund employer with twenty-five employees or less, in which the department does not appear and defend, and the board order in favor of the employer is sustained, the attorney's fee fixed by the court, for services before the court only, and the fees of medical and other witnesses and the costs shall be payable out of the administrative fund of the department. In the case of self-insured employers, the attorney fees fixed by the court, for services before the court only, and the fees of medical and other witnesses and the costs shall be payable directly by the self-insured employer.*

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

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

GEORGIA-PACIFIC CORPORATION,	)	
	)	
Appellant,	)	NO. 39061-2
	)	
v.	)	
	)	
CARL G. OLSON,	)	PROOF OF SERVICE
	)	
Respondent.	)	
	)	

The undersigned states that on Wednesday, the 7th day of October, 2009, I deposited in the United States Mail, with proper postage prepaid, Brief of Respondent, addressed as follows:

Craig A. Staples  
ATTORNEY AT LAW  
P.O. Box 70061  
Vancouver, WA 98665-0035

I declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

October 7, 2009 Vancouver, WA

  
\_\_\_\_\_  
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