

No. 41205-5-II
COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

MICHAEL D. HENDERSON,

Appellant,

Vs.

GLACIER NORTHWEST, INC. and DEPARTMENT OF LABOR
AND INDUSTRIES STATE OF WASHINGTON,

Respondents.

RESPONDENT'S BRIEF

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I. INTRODUCTION

This appeal is about three discrete issues. First, whether the Industrial Appeals Judge abused her discretion when she allowed the testimony of Dr. Michael Barnard. Second, whether the Superior Court abused its discretion when it denied the appellant's motion for a new trial. Third, whether substantial evidence supports the Superior Court jury's factual findings, when the record is viewed in the light most favorable to respondent. This latter issue involves a dispute over the payment of time loss and the payment of permanent partial disability.

Those are the assignments of error that are identified in appellant's brief. However, appellant's brief does not present argument on those issues using the correct standards of review. Rather, appellant's brief attempts to reargue the facts from trial. Appellant has not met his burden of proving any of the assignments

of error. There has been no reversible error in this case.

II. ASSIGNMENTS OF ERROR

The Respondent has no disagreement with the assignments of error as outlined by the Appellant. The parties litigated appellant's entitlement to further medical treatment. (Clerk's Papers at p. 84). That issue is not raised in these assignments of error.

III. STATEMENT OF THE CASE

Procedural History

The appellant, Michael D. Henderson, was injured on August 26, 2003 while working for the respondent. (Certified Appeal Board Record, hereinafter CABR at p. 33). An industrial insurance claim was allowed for a right knee injury. (CABR at p. 32). The claim was closed on April 08, 2005. (CABR at p. 37).

On October 03, 2005, appellant filed a notice of appeal challenging the closing order.

(CABR at 39). The Board of Industrial Insurance Appeals issued an Order Granting Appeal on October 10, 2005. (CABR at 45). A Proposed Decision and Order was issued on February 27, 2007. (CABR at pp. 23-35). In that Proposed Decision and Order, Industrial Appeals Judge Stockman concluded that: appellant was not temporarily totally disabled between December 31, 2003 and August 24, 2005; appellant's industrial condition was not in need of further treatment as of August 24, 2005; and appellant's industrial condition did not result in any permanent impairment as of August 24, 2005. (CABR at p. 34).

Appellant filed a Petition for Review to the Board of Industrial Insurance Appeals on April 6, 2007. (CABR at pp. 5-18). On April 25, 2007, the Board denied appellant's Petition for Review and adopted the February 27, 2007 Proposed Decision and Order. (CABR at p. 2).

On May 21, 2007, appellant filed a Notice of Appeal in Pierce County Superior Court. (Clerk's

Papers at p. 2). The Superior Court entered its judgment in favor of respondent on August 20, 2010. (Clerk's Papers at pp. 101-102). Appellant filed a Notice of Appeal to the Court of Appeals on September 16, 2010. (Clerk's Papers at pp. 105-111).

Testimony of Dr. Michael Barnard

Following appellant's appeal of the Department's closing order, the Board of Industrial Insurance Appeals issued an Order Granting Appeal on October 10, 2005. (CABR at p. 42). A scheduling conference was held on December 19, 2005 and an Interlocutory Order was issued on the same date; the respondent indicated it would call two physicians, then unidentified. (CABR at p. 52). That Order set a witness confirmation date of April 13, 2006. *Id.*

The respondent requested a hearing postponement on March 14, 2006 after ensuring that appellant's counsel had no objection. (CABR at p. 57). The Industrial Appeals Judge issued

an Amended Interlocutory Order on March 30, 2006, setting the respondent's revised witness confirmation deadline on May 15, 2006. (CABR at p. 58). On June 06, 2006, the respondent sent a letter to the Industrial Appeals Judge and requested permission to amend its witness list to include Dr. Michael Barnard. (CABR at p. 63). In the letter, respondent explained that the amendment was necessary because the results of Dr. Barnard's May 22, 2006 examination were not available by the witness confirmation deadline and he made observations that were relevant to the case. (CABR at p. 64). Furthermore, respondent's letter stated that Dr. Barnard's May 22, 2006 examination itself had been delayed to accommodate the appellant's schedule. *Id.* Without that delay, the exam results would have been available in time for the witness confirmation deadline. *Id.* The respondent's letter also explained that the requested amendment would not delay the date in which it expected to complete its case. *Id.*

Appellant objected to respondent's requested witness list amendment in a letter on June 12, 2006. (CABR at pp. 68-69). Respondent issued a letter in response to appellant's objections. (CABR at pp. 97-98). At oral argument on the issue, Industrial Appeals Judge Stockman ruled that Dr. Barnard would be allowed to testify instead of Dr. David Smith. (CABR, June 21, 2006 Telephone Conference at p. 14). In order to avoid any undue prejudice to appellant, Judge Stockman offered to grant a continuance if requested by appellant's counsel. (CABR, June 21, 2006 Telephone Conference at p. 15). Dr. Barnard did not actually testify until November 20, 2006. (CABR, Barnard at p. 2).

Motion For New Trial

Jury selection took place on June 21, 2010. (Clerk's Papers at pp. 31, 59). On June 22, 2010 the court informed the parties that two seated jurors shared the same last name and mailing address. (Verbatim Report of Proceedings,

hereinafter VRP, June 22, 2010 at p. 74). At that point, the parties agreed to bring the two jurors out for questioning and instruction. (VRP, June 22, 2010 at p. 76).

Juror No. 2 was brought in first for questioning. *Id.* Juror No. 2 revealed that she was the mother of Juror No. 6. (VRP, June 22, 2010 at p. 77). Juror No. 2 further indicated that her daughter worked nights and that they do not live together, just that they shared a ride to and from the court. *Id.* Juror No. 2 stated that she had abided by the court's instruction not to discuss the case. *Id.* Juror No. 2 also assured the court her relationship with Juror No. 6 would not be a problem during deliberations. *Id.* Counsel for the Appellant asked one question of Juror No. 2; counsel for the Respondent passed. (VRP, June 22, 2010 at 78).

Next, Juror No. 6 was brought before the court and confirmed that she was the daughter of Juror No. 2. (VRP, June 22, 2010 at p. 79). Juror No. 6 also confirmed that she did not live

with Juror No. 2 and that she had not and would not discuss the case with Juror No. 2. (VRP, June 22, 2010 at p. 80). Both counsel were give an opportunity to ask the Juror questions and passed. (VRP, June 22, 2010 at 81).

Following the questioning of Jurors No. 2 and 6, the parties discussed how to proceed. (VRP, June 22, 2010 at p. 81). Both parties indicated that they wished to proceed with the jury as it was then composed. *Id.* Specifically, for following colloquy took place:

"MR. ATWOOD: Let's go forward.

"MS. BODEN: It seems benign to me.

"THE COURT: Yeah. I think so too.

"MS. BODEN: Thanks." *Id.*

The Court issued its instructions to the jury on June 23, 2010¹. (Clerk's Papers at pp.

¹ Appellant's brief refers to jury deliberations on June 23, 2010 but does not cite to the Verbatim Report of Proceedings; it was not included in their October 18, 2010 Statement of Arrangements. The appellant's Statement of Arrangements violated RAP 9.2(c). It arranged for less than the entire Verbatim Report of Proceedings but did not include a statement of the issues it intended to present on review. Since the June 23, 2010 portion of the Verbatim Report of Proceedings was not included, he cannot cite to

62-83). The verdict was received June 24, 2010. (Clerk's Papers at 85 to 86).

Appellant moved for a new trial on July 6, 2010. (Clerk's Papers at pp. 87-92). On August 20, 2010 appellant's motion for a new trial was denied. (Clerk's Papers at p. 100).

Sufficiency of Evidence Supporting the Jury Verdict

The facts reported by Appellant are incomplete; we will supplement their statement of facts.

Ronnie Stabler testified for the employer; her title at the time she testified was barge dispatcher for Glacier Northwest. (CABR, Stabler, July 26, 2006 at p. 81. She previously worked as an Administrative Assistant. *Id.*

court proceedings from that date. Appellant's brief has cited its own July 2, 2010 Motion for New Trial when referring to the events of June 23, 2010. (Clerk's Papers at pp. 87-92). The motion contains appellant's unsworn statements, not citations to the record. Since appellant did not include the entire record, any reference to the June 23, 2010 proceedings should be disregarded.

She observed the appellant on Glacier property operating a dump truck on August 17, 2005. (CABR, Stabler, July 26, 2006 at p. 82. At the time, he was not working for Glacier because he was off on his workers' compensation claim. (CABR, Stabler, July 26, 2006 at p. 83). The appellant picked up 92 loads of material at the yard between August 12, 2005 and August 17, 2005. (CABR, Stabler, July 26, 2006 at p. 87). He was driving his dump truck at a time he contended he could not drive a redi-mix truck.²

Dr. Romeo Puzon is a family practice physician. (CABR, Puzon, July 26, 2006 at p. 5). Part of his practice is to conduct Department of Transportation (DOT) evaluations. He performed one on the appellant on May 11, 2005, during a time the appellant contends he is entitled to time loss compensation. (CABR, Puzon, July 26, 2006 at p. 6). Dr. Puzon found no impairment to the leg; he noticed no limp or atrophy, no lack

² Assignment of Error C. raises as error the denial of time loss from December 31, 2003 to August 24, 2005. (Appellant's Brief at p. 2).

of mobility or lack of strength in the lower limb. (CABR, Puzon, July 26, 2006 at p. 9). The Appellant passed his DOT examination. (CABR, Puzon, July 26, 2006 at p. 10). Dr. Puzon later saw the Appellant on September 7, 2005. In his history, Dr. Puzon noted the appellant had been driving a CAT and was complaining of thigh pain. His examination was normal. (CABR, Puzon, July 26, 2006 at pp. 10-12). This examination occurred shortly after the time the Appellant contends he is entitled to time loss.

Dr. Michael Barnard testified for the Respondent on November 20, 2006. He is a board certified orthopedic surgeon. (CABR, Barnard, November 20, 2006 at pp. 3-4). He examined the appellant May 22, 2006. (CABR, Barnard, November 20, 2006 at p. 6). When asked about his chief complaint, his answer was low back pain, not knee pain. (CABR, Barnard, November 20, 2006 at p. 8). The Appellant told Dr. Barnard he had not returned to work at any time after he left Glacier. (CABR, Barnard, November 20, 2006 at p.

10). Dr. Barnard reviewed the surgical report from the surgery performed November 14, 2003 by Dr. Thompson; his reading indicated all surfaces were intact and no tear of any cartilage. The only finding was some hypertrophy and swelling. (CABR, Barnard, November 20, 2006 at p. 11). Dr. Barnard noted neither the final chart note from Dr. Thompson of March 1, 2004 nor the chart note of Dr. Zechmann in April and June of that same year demonstrated any clinical findings of impairment. (CABR, Barnard, November 20, 2006 at pp. 13-14). Following his examination, he noticed the Appellant getting into a large commercial vehicle and navigated a large step up without difficulty. (CABR, Barnard, November 20, 2006 at pp. 22-23).

Dr. Barnard was asked a number of questions based upon his review of the records, his history, his observations and his physical examination. He concluded the appellant's condition was fixed and stable and had remained fixed and stable since the examination by Dr.

Thompson of March 1, 2005 and needed no further treatment. (CABR, Barnard, November 20, 2006 at p. 32). He also concluded the appellant had sustained no ratable impairment as a result of the injury. (CABR, Barnard, November 20, 2006 at p. 33). He also approved a number of jobs he felt the appellant could perform. (CABR, Barnard, November 20, 2006 at pp. 33-35).

Dr. Johnson, appellant's expert, admitted no treatment had been provided since March 1, 2003. (CABR, Johnson, July 25, 2006 at pp. 129, 131).

The final witness to testify was the respondent's vocational expert, Ms. Merrill Cohen. She testified it was her opinion the appellant was employable in light delivery and had been employable since December 2003. (CABR, Cohen, November 20, 2006 at pp. 17-19).

IV. ARGUMENT

Standard of Review

The standard of review is material to resolution of this appeal because this case originated at the Board of Industrial Insurance appeals before moving to Superior Court and now the Court of Appeals.

Washington's Industrial Insurance Act provides for judicial review specific to workers' compensation cases. When the Court of Appeals reviews a workers' compensation case, it applies a standard of review that is different than under the Administrative Procedure Act.

Appellant's brief incorrectly stated the standard of review citing *Brown v. State*, 94 Wash.App. 7 (1999) to argue that the Court of Appeals may reverse an administrative order if it (1) is based on an error of law; (2) is unsupported by substantial evidence; (3) is arbitrary or capricious; (4) violates the constitution; (5) is beyond statutory authority;

or (6) when the agency employs improper procedure. However, the Court in *Brown v. State* applied the Administrative Procedure Act to review a decision by the Dental Disciplinary Board. The Administrative Procedure Act does not apply to workers' compensation cases, so appellant's reliance on that case is misplaced. RCW 34.05.030(2)(c); *Rogers v. Dep't of Labor and Indus.*, 151 Wash.App. 174, 180 (2009).

When a Superior Court decision is appealed, factual findings by the Superior Court are reviewed to determine whether they are supported by substantial evidence. *Watson v. Dep't of Labor & Indus.*, 133 Wash.App. 903, 909 (2006). The Court of Appeals then applies *de novo* review to the Superior Court's conclusions of law to determine whether they flow from the factual findings. *Id.* A more extensive appellate review of superior court factual findings would abridge the jury trial right provided by RCW 51.52.115. *Rogers*, 151 Wash.App. at 180.

Finally, when the Court of Appeals reviews a Superior Court factual finding for sufficient or substantial evidence, it takes the record in the light most favorable to the party who prevailed in Superior Court. *Id.* The Court of Appeals does not reweigh or rebalance competing testimony and inferences. *Id.*

The Industrial Appeals Judge did not abuse her discretion when she allowed the testimony of Michael Barnard, M.D.

The appellant has assigned error to the allowance of testimony by Dr. Michael Barnard at hearing on November 20, 2006. (CABR, Barnard at p. 2). The Court of Appeals reviews a trial court's evidentiary rulings for an abuse of discretion. *Lewis v. Simpson Timber Co.*, 145 Wash.App. 302, 328 (2008). A trial court abuses its discretion when its "decision is 'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" *Mayer v. Sto Indus.*,

Inc., 156 Wash.2d 677, 684 (2008); *Lewis*, 145 Wash.App. at 328. A decision by the trial court is manifestly unreasonable if it relies on unsupported facts or applies the wrong legal standard, if the decision is exercised on untenable grounds or for untenable reasons, or if it adopts a view that no reasonable person would take. *Id.* The appellant bears the burden of proving that the trial court abused its discretion. *Childs v. Allen*, 125 Wash.App. 50, 58 (2004). He has failed to do so in this case.

Appellant argues that the allowance of testimony from Dr. Barnard was "akin to allowing a CR 35 examination without the appropriate motion and without the appropriate evidentiary showing." (Appellant's brief at p. 23). This argument mischaracterizes the issue on appeal, which is whether Industrial Appeals Judge Stockman abused her discretion when she allowed the testimony of Dr. Barnard, not the examination of the claimant by Dr. Barnard.

CR 35 provides a mechanism to allow a physical examination by an expert of the other party. It provides a means to resolve a dispute, if a party objects to such an examination. The issue here is not whether the May 26, 2006 examination by Dr. Barnard was properly allowed. Appellant did not object to that examination at the time it was performed and attended voluntarily. (CABR at p. 85). This particular objection was not raised at hearing and the issue is not preserved on appeal. Presumably, appellant must reach for this argument because he recognizes that Industrial Appeals Judge Stockman did not abuse her discretion in allowing the testimony of Dr. Barnard.

A brief recitation of the pertinent facts shows that Industrial Appeals Judge Stockman was well within her discretion to allow the testimony of Dr. Barnard.

On March 30, 2006, Industrial Appeals Judge Stockman issued an Interlocutory Order that set respondent's witness confirmation deadline on May

15, 2006. (CABR at p. 58). On June 06, 2006, the respondent sent a letter to Industrial Appeals Judge Stockman and requested permission to amend its witness list to include Dr. Michael Barnard. (CABR at p. 63). In the letter, respondent explained that the amendment was necessary because the results of Dr. Barnard's May 22, 2006 examination were not available by the witness confirmation deadline. (CABR at p. 64). Furthermore, respondent's letter stated that Dr. Barnard's May 22, 2006 examination itself had been delayed to accommodate the appellant's schedule. *Id.* Without that delay, the exam results would have been available in time for the witness confirmation deadline. *Id.* The respondent's letter also explained that the requested amendment would not delay the date in which it expected to complete its case. *Id.*

Appellant objected in a letter on June 12, 2006. (CABR at p. 68). At oral argument³ on the issue, Industrial Appeals Judge Stockman ruled

³ Appellant did not raise the CR 35 issue during argument.

that Dr. Barnard would be allowed to testify; however, the price for allowing Dr. Barnard to testify meant the waiver of the testimony of Dr. David Smith. (CABR, June 21, 2006 Telephone Conference at p. 14). This meant Judge Stockman would not allow the Respondent to call two orthopedic surgeons, forcing a choice between calling Dr. Smith or Dr. Barnard. Further, in order to avoid any undue prejudice to appellant, Judge Stockman offered to grant a continuance if requested by appellant's counsel. (CABR, June 21, 2006 Telephone Conference at p. 15).

Under these facts, Industrial Appeals Judge Stockman did not abuse her discretion when she allowed the testimony of Dr. Barnard. To show abuse of discretion, appellant must prove that Industrial Appeals Judge Stockman made a decision that was manifestly unreasonable, exercised on untenable grounds or adopted a view that no reasonable person would take. *Lewis*, 145 Wash.App. at 328. That is the applicable standard of review and appellant has not met her

burden of proof. She has not argued any of these grounds apply.

Appellant's focus on CR 35 misses the point. Dr. Barnard examined the appellant on a date prior to an examination conducted by his own expert, Dr. Johnson. Thus, the two doctors examined the appellant close in time. He did examine the knee. He made relevant observations of the appellant's movements at the time of the examination. He provided relevant and material testimony.

Appellant cannot establish the presence of prejudice. His expert had a copy of Dr. Barnard's report and reviewed it at the time of his final examination. The allowance of Dr. Barnard's testimony did not delay the proceedings. Dr. Barnard was substituted for Dr. Smith. (CABR, June 21, 2006 at p. 14). Thus, each party had one orthopedic surgeon to testify on its behalf.

Judge Stockman's decision was discretionary; she exercised it and there is nothing arbitrary

or capricious about it. Judge Arend's decision on the same issue is not even mentioned. Her decision was equally discretionary. This assignment of error must be denied.

The appellant's motion for a new trial was properly denied by superior court Judge Stephanie Arend.

Appellant has assigned error to the denial on his motion for a new trial. The first issue is whether appellant is precluded from moving for a new trial.

Unless court action would be inadequate to remedy the irregularity, a party is precluded from being granted a new trial if it fails to request appropriate court action to obviate the prejudice before the case is submitted to the jury. *Casey v. Williams*, 47 Wash.2d 255 (1955); *Spratt v. Davidson*, 1 Wash.App. 523, 526 (1969). A party is not permitted to speculate upon the verdict by awaiting the trial result and then

complain of irregularity in case the verdict is adverse. *Id.*

In *Casey*, the plaintiff moved for a new trial following a verdict for the defendant. A new trial was granted based upon Plaintiff's allegation that a sleeping juror prevented substantial justice. The Supreme Court reversed, holding that such conduct of a juror is prejudicial (if at all) when it occurs. *Casey*, 47 Wash.2d at 257. Therefore, a party with knowledge of the conduct in question must seek relief at that time rather than gamble on the verdict and seek relief thereafter.

In *Spratt*, the plaintiff moved for a new trial after a verdict for the defendant. Plaintiff's motion was based upon two incidents during closing argument: (1) the physical difficulty experienced by one juror who asked to be excused and (2) the illness experienced by defendant's counsel who asked for a recess. *Spratt*, 1 Wash.App. at 524. The court granted plaintiff's motion and stated that the two

incidents "could have influenced the jury favorably toward the defendant." *Id.* On review, the granting of a new trial was reversed. *Id.* at 527. The Court of Appeals explained that any prejudice that could have occurred in connection with the two incidents might have been obviated if the plaintiff had requested a precautionary instruction or even moved for a mistrial. *Id.*

As in *Casey and Spratt*, the appellant in this case was on notice of the relationship of these women before the jury rendered its verdict. (VRP, June 22, 2010 at p. 74). The time to raise that issue was when it was presented and the jurors were questioned by the judge. Each party was given the opportunity to object and neither did. (VRP, June 22, 2010 at p. 81). That was the time to correct the situation, if correction was needed. Neither party thought so at the time and agreed to allow the two women to continue on the jury. *Id.* Appellant took his chances with the jury while fully aware of the relationship between these two jurors. Like *Casey and Spratt*,

appellant should not be granted a new trial because the asserted irregularity was raised too late.

Even if appellant's motion for a new trial is evaluated on review, a new trial should not be granted. When the Court of Appeals reviews a trial court's denial of a motion for a new trial, it will not reverse that denial absent a showing of abuse of discretion. *Aluminum Co. of America v. Aetna Cas. & Sur. Co.*, 140 Wash.2d 517, 537 (2000); *Safeway, Inc. v. Martin*, 76 Wash.App. 329, 332 (1994). As with the first assignment of error, appellant has not applied the correct standard of review in his argument.

Appellant essentially speculates that a mother-daughter relationship between two jurors prevented a fair trial. Appellant does not and cannot identify a single fact that occurred during the trial to support his speculation. Speculation does not establish an abuse of discretion in the trial court's denial of the motion for a new trial.

The essence of the appellant's motion for a new trial was that the mother-daughter relationship was an irregularity that prevented substantial justice. Appellant has still not shown anything more than the possibility of prejudice. Appellant cites unsupported statements in his motion for a new trial. He did not provide the Court with the transcript of the proceedings when the jury first brought its verdict and was then sent back for further proceedings. Thus, this argument should be rejected for failure to cite the proper portions of the record.

To be clear, there was confusion amongst the jury regarding the third jury question. Upon polling after the first jury verdict, juror number 6 expressed confusion and stated that she didn't think she had voted for disability. The jury was sent back for further deliberations. There is nothing in the record that indicates the confusion was due to the relationship of the two jurors at this here. The following day during

continued deliberations, the jury requested instruction regarding the distinction between impairment and limitation. (Clerk's Papers at p. 84). This request suggests that there was legitimate confusion over the meaning of the third jury question. However, the record does not tell us who asked the question or whether the mother daughter relationship had anything to do with the question. The request is not consistent with Appellant's theory of collusion and strong-armed tactics. No facts are cited to establish a mother-daughter voting block.

Appellant's theory of a mother-daughter voting block is further weakened because there is no explanation of a motive. Appellant does not and cannot explain why a mother-daughter relationship between two jurors would lead them to the same verdict and then to subvert the will of other jurors. The more likely explanation is that there was legitimate confusion over the terminology of the third jury question and that confusion was eventually overcome after receiving

additional instruction from the court. Under these circumstances, a new trial is not warranted.

We can all speculate what happened before the jury came out the first time and when they came out the second time. However, that is all that we can do, speculate. That is insufficient to order a new trial.

When the record is viewed in the light most favorable to respondent, the superior court jury verdict was supported by substantial evidence.

Appellant has argued that the jury verdict was not based on sufficient evidence. Appellant then cited selected testimony from the record provided by his expert to argue that the jury should have reached a different conclusion. Appellant's argument seems to misunderstand the applicable inquiry. On review, the Court of Appeals does not reweigh or rebalance competing testimony and inferences and it does not apply

anew the burden of persuasion. *Rogers*, 151 Wash.App. at 180, 181. To undertake such a reweighing or rebalancing would abridge the right to trial by jury. *Id.*

The appellant's argument hardly merits serious consideration on review. Appellant made absolutely no effort show that the superior court jury verdict was not supported by substantial evidence. Rather, a handful of record citations are offered in support of the factual findings sought by appellant at trial. This is exactly the sort of factual reweighing that is not permitted on appeal because it would abridge the right to trial by jury. In fact, appellant doesn't even rise to the level of factual reweighing because contrary facts are not addressed.

With respect to this assignment of error, the issue is whether the superior court verdict was based upon substantial evidence. *Rogers*, 151 Wash.App. at 180. Appellant must meet that burden with the record taken in the light most

favorable to the prevailing party at superior court, respondent. Appellant has not met that.

The Appellant is not entitled to time los from December 31, 2003 to August 24, 2005.

Substantial evidence supports the finding that appellant was not temporarily totally disabled between December 31, 2003 and August 24, 2005. Dr. Michael Barnard testified the appellant was not temporarily totally disabled between December 31, 2003 and August 24, 2005. (CABR at p. 30). Merrill Cohen, vocational rehabilitation counselor, testified appellant was not temporarily totally disabled between December 31, 2003 and August 24, 2005 based upon her review of restrictions outlined by Dr. Barnard. (CABR at p. 31). Taken together, their testimony is substantial evidence, sufficient to support the verdict.

Further, Dr. Thompson was the attending physician who performed the surgery. He did not

provided or recommend treatment or authorize treatment after December 2003. The Appellant was seen by Dr. Zechmann, who did not provide treatment or authorize time loss compensation. Dr. Broman was the Appellant and did not authorize time loss.

Even Dr. Johnson, Appellant's expert admitted no treatment was provided after he was last seen by Dr. Thompson; he provided not treatment.

The testimony of Ronnie Stabler established the Appellant was working at least in August 2005, when he picked up 92 loads from Glacier; this occurred during a time he was seeking time loss. His testimony admitted he was doing some work. The testimony of Dr. Puzon noted no complaints in the knee in May 2005 and established he was operating a Cat in September 2005. He was observed by Dr. Barnard in May 2006 to be driving a commercial size truck to his examination.

These observations impeached the Appellant's testimony he could not and did not work substantially. When all of this evidence is examined, there is substantial evidence to support the jury's verdict on the issue of time loss compensation.

The Appellant is not entitled to an award of permanent partial disability.

With respect to the second issue, substantial evidence supports the finding that appellant industrial condition did not result in permanent impairment as of August 24, 2005. That finding is supported by testimony from Dr. Barnard. (CABR, Barnard at pp. 14, 15, 19, 33). He not only worked off his examination findings, he also evaluated the findings of Dr. Thompson, Dr. Zechmann, Dr. Broman and Dr. Smith; using their findings, he concluded no impairment was due.

Further, Dr. Puzon examined the Appellant in May 2005. No impairment was noted and he passed the Appellant for his DOT examination.

When the record is viewed in the light most favorable to respondent, substantial evidence supports the findings of the superior court jury. Therefore appellant has not met his burden of proof on review and this assignment must be denied.

VI. CONCLUSION

Appellant has not met his burden of proof on any of the assignments of error. All relief should be denied.

DATED this 14th day of June 2011.

RONALD W. ATWOOD, P.C.

By:



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CERTIFICATE OF SERVICE BY MAIL

I, Elizabeth J. Martin, hereby declare and state:

I am over the age of eighteen years, employed in the City of Portland, County of Multnomah, State of Oregon, and not a party to this action. My business address is Ronald W. Atwood, P.C., 333 S.W. Fifth Avenue, 200 Oregon Trail Building, Portland, Oregon, 97204.

On June 14, 2011, I served the original **RESPONDENT'S BRIEF** on the parties by placing a true copy in a sealed envelope with postage prepaid in the United States Post Office at Portland, Oregon, addressed as follows:

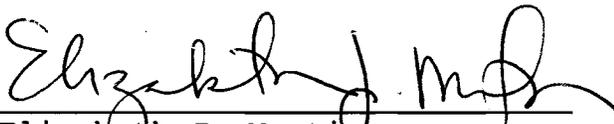
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I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED June 14, 2011 at Portland, Oregon.


Elizabeth J. Martin
Legal Secretary