

NO. 44983-8

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

KIMBERLEY JOHNS,

Appellant,

v.

WASHINGTON STATE
DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent

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COURT OF APPEALS
DIVISION II

**BRIEF OF RESPONDENT
DEPARTMENT OF LABOR AND INDUSTRIES**

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I. INTRODUCTION

This case arises out of a workers' compensation appeal. The Department of Labor and Industries (Department) determined that Kimberley Johns was totally and permanently disabled, and eligible for a pension. However, under the Industrial Insurance Act, wage replacement benefits, including pensions, must be offset if an injured worker also receives social security benefits to prevent a duplication of benefits. Here, Ms. Johns receives social security benefits in an amount that exceeds any pension benefits, with an offset occurring to avoid duplication of benefits.

Ms. Johns appealed the Department's decision, arguing she is instead entitled to an award for permanent partial disability, but she failed to present any evidence indicating that her disability was only partial rather than total. Ms. Johns argues that she should nonetheless prevail because the Department purportedly did not affirmatively establish that she is totally and permanently disabled as a proximate result of her injury. However, at all stages of this appeal, it was Ms. Johns who bore the burden of proving that the Department erred when it found her to be totally and permanently disabled, and, as she did not meet that burden, the superior court and the Board of Industrial Insurance Appeals properly affirmed the Department, and this Court should affirm as well.

II. ISSUE

Total permanent disability refers to the inability to obtain or perform employment as a result of an industrial injury. Does substantial evidence support the superior court's determination that Ms. Johns is totally and permanently disabled when it is undisputed that Ms. Johns is completely incapable of working and that she suffered a low back injury that left her with extensive limitations in her ability to function that were not resolved through either of the surgeries that she received under her industrial injury claim?

III. STATEMENT OF THE CASE

A. **Ms. Johns' Industrial Injury Left Her With Permanent Low Back Difficulties That Were Not Resolved Through Medical Treatment**

Ms. Johns injured her low back while working as a certified nursing assistant in November 2003. CP 103. As a result of this injury, she underwent two surgeries under her workers' compensation claim. CP 104. First, in 2005, she underwent both a laminectomy (which involved the removal of a disc) and a fusion. CP 216. This first surgery was unsuccessful because the bone did not properly fuse together, and Ms. Johns required a second surgery in 2006. CP 217. She now has a solid fusion from L4 to S1.¹ CP 247. However, she continues to experience constant back pain, as well as intermittent sharp pain and numbness in her right leg, which Ms. Johns and her doctors all attribute to

¹ The vertebrae in the spine are referred to by a letter and a number; for example, "L" refers to the lumbar spine, the low back, and "S" refers to the sacrum, part of the pelvis. A fusion from L4 to S1 refers to three levels—L4, L5, and S1—as being fused together. L3 is the level immediately above this.

her industrial injury to her low back. CP 109-112; 217-220, 224-225; 247, 250-252.

The back injury also affects Ms. Johns in her activities of daily living. CP 111-112. It slows her down generally, and it causes her pain during mundane tasks such as loading her dishwasher. CP 111. She is unable to vacuum or to lift anything. CP 112. She struggles to stand and walk due to the numbness in her leg. CP 112. Occasionally she falls due to that numbness. CP 112. Even sitting is a source of discomfort. CP 112.

According to Ms. Johns, she also suffers from a number of additional conditions: depression, fibromyalgia, a heart condition, and post traumatic stress disorder. CP 104-105. The heart condition, diagnosed as “inappropriate sinus tachycardia,” became symptomatic in 2000. CP 108. It is unclear when the additional conditions developed; some may have pre-existed the back injury. *See* CP 114. Ms. Johns’ mother, Betty McCrory, testified the fibromyalgia and depression started following her workplace injury. CP 118. After she was injured at work, Ms. Johns applied for and received social security benefits. CP 104. Ms. Johns does not believe she is capable of working due to her pre-existing conditions, although she is unspecific as to what those are. CP 114.

Before Ms. Johns injured her back at work, she had been a “steady worker.” CP 117. She has not been able to return to work since the

injury. CP 117. The Department evaluated her ability to work and determined that Ms. Johns could not work and that she would not benefit from vocational retraining. CP 148. It therefore found her to be totally and permanently disabled. CP 126.

Ms. Johns appealed the Department's order to the Board, arguing that she is not totally and permanently disabled, and, instead, should be classified as permanently and partially disabled. CP at 42-43. In support of her appeal, Ms. Johns presented Dr. Guy Earle. The Department presented Dr. Lynn Staker.

B. Dr. Earle Did Not Testify That Ms. Johns Was Partially, Rather Than Totally, Disabled

Ms. Johns saw Dr. Earle at the request of her attorneys. CP 213. When Dr. Earle first saw Ms. Johns in May 2008, she struggled to sit in her chair, and, after 30 minutes, walked around the room, rather than sit any longer. CP 217. She was tender and had spasms in her low back, and her range of motion was very limited. CP 218. Dr. Earle conducted x-rays and determined Ms. Johns had some slipping at L2 related to her injury. CP 219.

Dr. Earle next saw Ms. Johns in June 2009. CP 219. She described ongoing low back pain, with pain and numbness going into her right leg. CP 220. If she had been walking for awhile, she would

experience weakness in her right leg and sometimes tripped because of it. CP 220. She was very inactive, and reported spending most of her time either in a recliner or in bed. CP 220. At this point Ms. Johns could only sit for 15-20 minutes and she walked with a limp. CP 222. She continued to have tenderness, lower back spasms, and a limited range of motion. CP 222-223. Imaging studies from that time showed changes at L3-4, the level above the fusion, and some changes at L2-3 and L1-2. CP 221. Related to the injury, Dr. Earle diagnosed lumbar strain, L4-5 disc herniation, aggravation of L4-5 spondylolisthesis, chronic mechanical back pain, facet joint degenerative changes at multiple levels, sensory radiculopathy of the legs with weakness during ambulation, and instability at L2-3. CP 224-225.

In October 2011, Dr. Earle again examined Ms. Johns, and his findings were largely similar to what he had previously found. CP 228, 229. After having her sit for ten minutes, he found her ability to raise her right foot had diminished. CP 229. When he retested her gait, he found she could not perform as well walking on her heels. CP 229-230. Additionally, her core strength was weak. CP 230.

When Dr. Earle saw Ms. Johns in 2008, he had found her to have a category 4 dorsolumbar impairment, as defined by WAC 296-20-280. CP 234. Dr. Earle testified that, based on his 2009 and 2011 exams;

Ms. Johns' back condition was best described as a category 5 impairment. CP 227, 233. This was due to loss of function in her low back, including her "severely restricted activities of daily living," in conjunction with the findings of spasm, limited range of motion, and correlative moderate x-ray findings. CP 227. He did not find neurological criteria, such as atrophy or weakness of a specific muscle group, present on his 2009 exam. CP 227-228. Later in his testimony, he attributed the change from category 4 to category 5 to neurological deterioration and instability at L2-3. CP 234.

Dr. Earle was not asked about Ms. Johns' ability to work during direct examination, nor was he asked whether it was caused by the industrial injury or not. CP 233. When the Department asked questions about her employability on cross-examination, Ms. Johns objected to questions regarding employability as beyond the scope of direct examination. CP 233, 235. Regardless, when asked about employability, Dr. Earle testified that reasonably gainful employment would be "highly unlikely for her, the reason being that she demonstrated in my office that after 10 minutes of sitting on the exam table she deteriorated neurologically." CP 233-235. Dr. Earle did not believe Ms. Johns was employable. CP 233, 234. He was not asked to, and did not, opine as to whether her inability to work was related to her industrial injury or to other causes. *See* CP 233, 234.

C. Dr. Lynn Staker Did Not Testify That Ms. Johns Was Partially, Rather Than Totally, Disabled

Dr. Staker, like Dr. Earle, first saw Ms. Johns at the request of her attorney. CP 246. During their first visit in June 2007, Ms. Johns noted that she had symptoms including pain and numbness in her right leg and some pain in her left leg. CP 246, 247. Despite this unresolved symptomatology, Dr. Staker did not feel Ms. Johns to be a good candidate for any further surgery. CP 248. Dr. Staker was Ms. Johns' attending physician from 2007 on. CP 251.

From the time that he first began seeing Ms. Johns, Dr. Staker has consistently held the opinion that she is unemployable. CP 252, 253. She can hardly walk. CP 252. In fact, as a result of the combined effects of her pain and weight, Ms. Johns is largely immobile. CP 252. She has significant physical limitations that keep her from being employed. CP 253. Dr. Staker felt so strongly that Ms. Johns is not employable that he told the Department "it was a waste of time and money to evaluate her any further" in this regard. CP 264. While Dr. Staker has been of this opinion since first seeing Ms. Johns, he did not expressly opine whether her inability to work was caused by her industrial injury or to other causes. CP 252.

At the Department's request, Dr. Staker performed a rating exam in April 2011. CP 252. Dr. Staker used the Department's worksheet to perform his rating. CP 253, 255.² He determined her impairment best fit category 4. CP 255. Dr. Staker would have elevated this to a category 5 if he had found significant neurological defects such as significant weakness in her foot or significant muscle atrophy, but he did not find these things on his exam. CP 255, 256.

D. The Board And The Trial Court Found Ms. Johns To Be Totally and Permanently Disabled

After receiving all the evidence, the industrial appeals judge hearing the appeal issued an order affirming the Department's order and determined that Ms. Johns was a permanently and totally disabled worker. CP 35-39. The judge found that Ms. Johns' impairment caused by the injury was best described as a category 4. Ms. Johns petitioned the full Board for review, which was granted. CP 25, 27-29. The Board, consistent with the hearing judge, affirmed the Department's order. CP 9, 10.

Ms. Johns appealed the Board's decision to superior court. CP 1, 2. Following a bench trial, the superior court agreed that "Kimberley Johns was a permanently totally disabled worker as a result of her

² This worksheet is available online at <http://www.lni.wa.gov/Forms/pdf/252006a0.pdf>.

November 6, 2003 industrial injury within the meaning of RCW 51.08.160, as of July 1, 2011.” CP 289, 90. It also found Ms. Johns’ permanent impairment was best described as a category 4. The superior court remanded the matter to the Department, however, to remove a sentence from its order stating “Medical treatment will not be covered after the effective pension date.” CP 290. All other aspects of the Department’s order were determined correct. Ms. Johns then appealed to this Court. CP 292-93.

IV. STANDARD OF REVIEW

When Ms. Johns appealed the Department’s decision to the Board, she had the burden of showing, by a preponderance of the evidence, that the Department’s order was incorrect. RCW 51.52.050; *Guiles v. Dep’t of Labor & Indus.*, 13 Wn.2d 605, 610, 126 P.2d 195 (1942); *see also In re: Barbara Binion*, No. 01 14940, 2003 WL 21129939, *3 (Bd. Indus. Ins. Appeals Feb. 11, 2003) (Persons claiming benefits under the Industrial Insurance Act are held to strict proof, by a preponderance of the evidence, of their right to receive benefits.). It is well-settled law that a claimant must provide strict proof of each element of his or her claim for benefits under the Act. *Lightle v. Dep’t of Labor & Indus.*, 68 Wn.2d 507, 510-11, 413 P.2d 814 (1966); *Jenkins v. Dep’t of Labor & Indus.*, 85 Wn. App. 7, 14, 931 P.2d 907 (1996); *see also Cyr v. Dep’t of Labor & Indus.*, 47

Wn.2d 92, 97, 286 P.2d 1038 (1955); *Olympia Brewing Co. v. Dep't of Labor & Indus.*, 34 Wn.2d 498, 505, 208 P.2d 1181 (1949), *overruled on other grounds by Windust v. Dep't of Labor & Indus.*, 52 Wn.2d 33, 323 P.2d 241 (1958).

On appeal to superior court, the Board's decision is *prima facie* correct and the burden of proof is on the party challenging the decision. RCW 51.52.115; *Raum v. City of Bellevue*, 171 Wn. App. 124, 139, 286 P.3d 695 (2012), *review denied*, 176 Wn. 2d 1024 (2013). The superior court reviews the decision of the Board *de novo* on the certified appeal board record. RCW 51.52.115 (evidence and testimony limited to board record). The superior court may substitute its own findings and decision if it finds, from a fair preponderance of the evidence, that the Board's findings and decision are incorrect. *Raum*, 171 Wn. App. at 139.

The ordinary standard of civil review applies to this Court's review of the trial court's decision. RCW 51.52.140 (Appeal shall lie from the judgment of the superior court as in other civil cases.); *see Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d 355 (2009). The Court of Appeals reviews the findings of the superior court, not the Board. *See Rogers*, 151 Wn. App. at 179-81.

This Court limits its review to “examination of the record to see whether substantial evidence supports the findings made after the superior

court's de novo review, and whether the court's conclusions flow from the findings.'" *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999) (quoting *Young v. Dep't of Labor & Indus.*, 81 Wn. App. 123, 128, 913 P.2d 402 (1996)). Substantial evidence supports a finding when the evidence in the record is sufficient to persuade a rational, fair-minded person that the finding is true. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). The Court of Appeals does not reweigh the evidence. *Fox v. Dep't of Ret. Sys.*, 154 Wn. App. 517, 527, 225 P.3d 1018 (2009). Rather, the Court of Appeals views the evidence and all reasonable inferences from the evidence in the light most favorable to the prevailing party. *Korst v. McMahon*, 136 Wn. App. 202, 206, 148 P.3d 1081 (2006).

V. SUMMARY OF THE ARGUMENT

The Department, the Board, and the superior court determined that Ms. Johns is totally and permanently disabled as a result of her injury. This determination is supported by substantial evidence. It is undisputed that Ms. Johns cannot work; the evidence shows this is related to her industrial injury and there is no evidence that Ms. Johns instead suffered merely a loss of function or that her inability to work is wholly unrelated to her injury. Nor is there evidence that Ms. Johns is instead capable of part-time employment. Because Ms. Johns did not present evidence

showing the Department erred in its determination, the superior court and Board were correct in affirming the Department's decision.

There was not an improper enlargement of the issues before the Board because the issue squarely before the Board was whether the Department's order finding Ms. Johns to be a totally permanent disabled worker was correct. While Ms. Johns' pension benefits are currently completely offset by her receipt of social security benefits, this offset does not serve as a basis to reverse the superior court's finding of total and permanent disability. Because Ms. Johns is properly classified as totally and permanently disabled, her category of impairment is immaterial; however, substantial evidence supports the superior court's finding that she is best described as having a category 4 impairment. As it is supported by substantial evidence in all respects, the superior court's order should be affirmed.

VI. ARGUMENT

A. Substantial Evidence Supports The Superior Court's Determination That Ms. Johns Is Totally And Permanently Disabled As A Result Of Her Industrial Injury

Substantial evidence supports the superior court's determination that Ms. Johns is totally permanently disabled as a proximate result of her injury. Ms. Johns disagrees with this determination, but it is undisputed that she is incapable of obtaining and performing any form of gainful

employment, and she did not present any evidence demonstrating that her inability to obtain and perform gainful employment is unrelated to her industrial injury. To prevail, Ms. Johns would have needed to present medical testimony either (1) that she is able to work despite her back injury or (2) that her inability to work is completely unrelated to her back injury. She did not present any evidence supporting either of those propositions, and accordingly this Court should affirm the superior court's decision. Moreover, even though it was Ms. Johns' burden to prove the Department's order was incorrect, the evidence presented shows that the residuals of her industrial injury were a cause of her inability to the work, and this Court could affirm on this alternative basis.

1. **A worker who is incapable of employment as a result of an injury is totally and permanently disabled, while a worker who is capable of employment but who has suffered a loss of function is permanently and partially disabled**

The Department, Board, and superior court correctly found that Ms. Johns was a permanently and totally disabled worker, and, based on the record that presents no evidence disproving this status, correctly rejected Ms. Johns' argument she is a permanently and partially disabled worker. Permanent total disability is defined by RCW 51.08.160 as the "loss of both legs, or arms, or one leg and one arm, total loss of eyesight, paralysis or other condition permanently incapacitating the worker from

performing any work at any gainful occupation.” (Emphasis added).

Permanent partial disability, on the other hand, is defined as the loss of function of a particular body part: “the loss of either one foot, one leg, one hand, one arm, one eye, one or more fingers, one or more toes, any dislocation where ligaments were severed where repair is not complete, or any other injury known in surgery to be permanent partial disability.” RCW 51.08.150.

Total permanent disability and permanent partial disability are two mutually exclusive categories of impairment: a person cannot be both partially and totally disabled at the same time as a result of the same injury. *Stone v. Dep’t of Labor & Indus.*, 172 Wn. App. 256, 271, 289 P.3d 720 (2012); *see also Nelson v. Dep’t of Labor & Indus.*, 175 Wn. App. 718, 725, 308 P.3d 686 (2013) (finding of permanent total disability precludes award for permanent partial disability based on same injury). This is logical, as they are separate concepts: if a worker is unable to work as a result of an industrial injury, the worker’s disability, by definition, is total rather than partial. *Stone*, 172 Wn. App. at 271; *McIndoe v. Dep’t of Labor & Indus.*, 144 Wn.2d 252, 261-62, 26 P.3d 903 (2001). On the other hand, if a worker has sustained a loss of bodily function as a result of an injury, but remains capable of employment, the worker’s impairment is partial rather than total. *Stone*, 172 Wn. App. at 271. It was therefore

necessary for the fact-finder to determine which classification of disability, partial or total, applied Ms. Johns as a proximate result of her industrial injury.

A determination of whether a worker has suffered a total permanent disability “requires a study of the whole person—weaknesses and strengths, age, education, training and experience, reaction to the injury, loss of function, and other factors relevant to whether the worker is, as a result of the injury, disqualified from employment generally available in the labor market.” *Leeper v. Dep’t of Labor & Indus.*, 123 Wn.2d 803, 814-15, 872 P.2d 507 (1994); WAC 296-19A-010. The industrial injury does not need to be the sole cause of the disability, but only a proximate cause. *Wendt v. Dep’t of Labor & Indus.*, 18 Wn. App. 674, 684, 571 P.2d 229 (1977). Where an injury causes a pre-existing and previously non-disabling medical condition to become symptomatic and disabling, the pre-existing condition is not considered a distinct cause of the worker’s total impairment, but a condition upon which the industrial injury acts in causing total impairment. *Miller v. Dep’t of Labor & Indus.*, 200 Wash. 674, 682-83, 94 P.2d 764 (1939); *see also* WAC 296-19A-010.

2. The evidence shows that the industrial injury was a proximate cause of Ms. Johns' total permanent disability

Both medical witnesses who testified in this case agreed that Ms. Johns is not able to work. Dr. Earle was Ms. Johns' medical witness, and he did not believe Ms. Johns was employable. CP 233, 234. He testified that reasonably gainful employment would be "highly unlikely" given that just 10 minutes of sitting in his office caused neurological deterioration. CP 233, 234. Dr. Earle's exam findings supported this conclusion. Due to her back injury, Ms. Johns can only "tolerate 15 to 20 minutes of sitting." CP 222. The range of motion in her back was severely limited. CP 222. She was having ongoing problems with low back pain, accompanied by both numbness and weakness in her legs which caused her to occasionally trip. CP 220. Dr. Earle testified that Ms. Johns is severely restricted in her activities of daily living, and she spends most of her time in bed or in a recliner. CP 220, 222. Dr. Earle provided an extensive list of diagnoses caused by the injury, and at no point did he relate any of Ms. Johns' problems to anything other than the industrial injury. CP 223, 225.

Dr. Staker, the Department's witness, who is also Ms. Johns' attending physician, agreed that Ms. Johns was completely incapable of employment. At least since 2010, he has been of the opinion that she

could not, and likely would not ever be able to, work. CP 264. Dr. Staker described symptoms similar to those from Dr. Earle that Ms. Johns suffers from due to her injury: pain and numbness especially in her right leg, an inability to walk, and a severe loss of motion. *Id.* at 5, 11, 14. Largely based on her immobility and pain symptoms, Dr. Staker opined that Ms. Johns is not employable. *Id.* at 11, 12.

Given both medical witnesses' nearly identical testimony, substantial evidence supports the superior court's order. *See Ruse*, 138 Wn.2d at 5. The superior court determined that Ms. Johns is a permanently, totally disabled worker as a result of her November 6, 2003 industrial injury, as the Department determined. The superior court's determination is supported by the fact that both doctors opined that Ms. Johns is not employable, neither suggested that this would ever change, and neither suggested that this was due to anything other than the industrial injury.

Furthermore, while neither doctor expressly linked Ms. Johns' inability to work to her industrial injury, it can be reasonably inferred from their testimony that her injury was at least a partial cause of her inability to work. *See Korst*, 136 Wn. App. at 206 (evidence and all reasonable inferences viewed in light most favorable to prevailing party). A medical opinion regarding the ultimate issue is not explicitly required: "it is

sufficient if the medical testimony shows the causal connection.” *Sacred Heart Med. Ctr. v. Dep’t of Labor & Indus.*, 92 Wn.2d 631, 636-37, 600 P.2d 1015 (1979); *see also Young*, 81 Wn. App. at 132 (common sense, supported by the evidence, sufficient to show claimant totally permanently disabled).

Here, as in *Sacred Heart*, the medical testimony shows the causal connection, and, as in *Young*, it can be reasonably inferred from a common sense standpoint when the doctor’s testimony is considered in conjunction with the lay testimony. *Sacred Heart*, 92 Wn.2d at 636-37; *Young*, 81 Wn. App. at 132. Both doctors were called to testify and were questioned solely regarding Ms. Johns’ industrial injury and its effect on her, and they described Ms. Johns’ extensive symptoms, limitations, and diagnoses caused by her industrial injury. Ms. Johns suffered an injury to her low back that left her with permanent residuals, including pain and numbness radiating into her right leg, that limited her ability to perform activities of daily living, and that were not resolved by either of the low back surgeries that were authorized and performed under her industrial injury claim. *See* CP 109-112; 217-220, 224, 225; 247, 250-252. Furthermore, in her own testimony, Ms. Johns described how she struggles to stand and walk due to numbness in her leg caused by the back injury. CP 111. Indeed, even sitting is a source of discomfort. CP 111.

Given that it is undisputed that Ms. Johns is permanently incapable of employment and that she was gainfully employed before her injury, and given the limitations that Ms. Johns and her doctors described in the context of discussing her industrial injury, it is reasonable to infer that Ms. Johns' industrial injury was at least *a proximate cause* of her inability to work, and, therefore, such a finding is supported by substantial evidence. *Sacred Heart*, 92 Wn.2d at 636-37; *Young*, 81 Wn. App. at 132. In fact, it would be contrary to common sense to argue that Ms. Johns' industrial injury had *nothing* to do with her disabled status and played *no role* in rendering her unable to work. Therefore, she is properly classified as totally and permanently disabled. RCW 51.32.060; *Wendt*, 18 Wn. App. at 684.

3. There is no evidence to support Ms. Johns' argument that any inability to work is due to unrelated, post-injury conditions

In appealing the Department's determination that she is totally and permanently disabled, Ms. Johns had the burden of showing the determination was incorrect. RCW 51.52.050(2) (appellant shall have the burden of proceeding with the evidence to establish a prima facie case for the relief sought in such appeal). As with any other benefit that a worker may seek on appeal, a claimant must prove that he or she is entitled to those benefits by a preponderance of the evidence. *Guiles*, 13 Wn.2d

at 610. The claimant is held to a strict proof of her claim. *Lightle*, 68 Wn.2d at 510; *Cyr*, 47 Wn.2d at 97; *Olympia Brewing Co.*, 34 Wn.2d at 505; *Jenkins*, 85 Wn. App. at 14. At superior court, it was Ms. Johns' burden to prove that the Board's decision is not supported by a preponderance of the evidence. *Raum*, 171 Wn. App. at 139. Typically, a worker meets his or her burden only if he or she presents at least some medical testimony that supports the worker's arguments. *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 477, 745 P.2d 1295 (1987).

Ms. Johns did not meet her burden of making a prima facie case for relief. To do so, she needed to present medical testimony either (1) that she is able to work despite her back injury or (2) that her inability to work is completely unrelated to her back injury. She did not present any evidence supporting either of those propositions. In fact, it is undisputed that Ms. Johns is incapable of employment, and no witness testified that her disabled status is entirely unrelated to her industrial injury.

Ms. Johns had the opportunity to ask the medical witnesses any questions she wished. For whatever reason, she did not ask them whether her inability to work was not caused by her industrial injury. Notably, she objected when the issue of employability was broached. CP 233, 235. She now complains to this Court that neither doctor expressly linked his

opinion regarding employability to the industrial injury nor clearly identified which physical restrictions were caused by the injury. App.'s Br. at 12-13. While she is correct in stating that "Dr. Staker was never asked if the industrial injury was a cause of her inability to work . . ." (App.'s Br. at 13), she ignores the fact that it was her burden to prove that the Department erred, not the Department's burden to prove that its determination was correct. As she did not meet her burden of proof, Ms. Johns failed to present a prima facie case for the relief she sought. *See* RCW 51.52.050(2).

Ms. Johns argues "there must be evidence that the worker cannot work in the same pattern at the time of her industrial injury and evidence which proximately links that total disability to the industrial injury." App.'s Br. at 14. This argument fails for two reasons. First, as noted above, there is evidence that Ms. Johns is incapable of gainful employment as a result of her injury. Second, this argument misstates the parties' respective burdens of proof. It is proper for a superior court to affirm the Department when the appellant's evidence is not sufficient to meet his or her burden, even when the Department produces no evidence in support of its decision at all. *Boeing Co. v. Hansen*, 97 Wn. App. 553, 557, 985 P.2d 421 (1999).

In *Hansen*, the court affirmed the Department's order even though neither the Department nor the claimant presented any evidence that demonstrated that the Department's decision in that case was correct. In that case, the employer appealed a decision that granted the worker permanent partial disability, because the employer believed that the worker had a pre-existing impairment and that the worker's permanent partial disability award should be reduced accordingly. *Hansen*, 97 Wn. App. at 555. The employer presented a medical witness who testified that the worker had a pre-existing impairment, but the court concluded that the employer's evidence was inadequate because the employer's witness failed to present any evidence that the worker's pre-existing condition had resulted in a loss of physical function before the worker's injury. *Id.* Since the employer failed to meet its burden of proof on appeal, the Department's order had to be upheld even though no medical witness or other witness testified that that disability award was correct. *See Hansen*, 97 Wn. App. at 555-57; *see also ITT Rayonier, Inc. v. Dalman*, 122 Wn.2d 801, 804-06, 810, 863 P.2d 64 (1993) (Department order affirmed when only evidence presented did not meet requirements for review).

Similarly, here, Ms. Johns' evidence was insufficient to meet her burden on appeal. She argues that her inability to work is due purely to her post-injury conditions, rather than to her pre-existing medical

conditions and her industrial-injury. App.'s Br. at 11-12. However, Ms. Johns' own testimony directly contradicts this argument, and neither of the medical witnesses supported it. Ms. Johns testified that her inability to work is due to her pre-existing conditions. CP 114. Pre-existing conditions, and an industrial injury's effects on them, are considered in determining a worker's ability to work following an injury. *Miller*, 200 Wash at 682-83.

The record is largely unclear as to which of Ms. Johns' conditions pre-existed her injury, and which came on after it. Ms. Johns testified she suffers from inappropriate sinus tachycardia, post traumatic stress disorder, depression, and fibromyalgia. CP 104, 105. Her mother testified that the depression and fibromyalgia came after the injury. CP 117. The record does not support Ms. Johns' contention that each of these conditions are unrelated to her industrial injury: there are no Department orders that were issued that formally denied responsibility for either of these conditions, and no medical testimony was presented establishing that the conditions are unrelated.³ The two medical witnesses that testified did not offer opinions regarding Ms. Johns pre- or post-existing conditions,

³ Ms. Johns cites to the testimony of her prior claim manager Rex Johnson to support her contentions. Mr. Johnson testified that the listed conditions had not been accepted. CP 127-129. This does not prove that the conditions are unrelated, only that the Department has not formally accepted them as related.

whether any were not caused or exacerbated by her injury, or whether these had any effect on her employability.

The medical evidence did not explore Ms. Johns' other conditions. Notably, Ms. Johns' witness, Dr. Earle, did not mention any other conditions she might have. CP 224, 225. The sum of his testimony focused on her industrial injury. Dr. Staker, on the other hand, was asked about his awareness of Ms. Johns' other medical problems. CP 263. He stated he was aware she "has lots of other medical problems," including fibromyalgia, and agreed those other problems could be sources of pain. CP 263, 264. But Dr. Staker did not testify about, and was not asked whether, it was those other problems, separate and apart from the industrial injury and its effects, which caused Ms. Johns' inability to work. CP 263, 264. If it was Ms. Johns' theory that her inability to work was due solely to post-injury medical conditions, it was incumbent upon her to explore it with her medical witnesses in order to make a prima facie case for that position. *See* App.'s Br. at 8. No evidence in the record supports a finding that it is *all* unrelated conditions that caused Ms. Johns' present inability to work.⁴ Therefore, the superior court did not err when it

⁴ Ms. Johns argues that "it was only by including the non-industrially caused conditions that the Trial Court concluded Ms. Johns was unable to work." App.'s Br. at 11. Such is not clear from the judgment and order, which lists Ms. Johns' extensive medical conditions in the same finding of fact that provides her education history.

affirmed the Department's and the Board's determination that Ms. Johns is a totally and permanently disabled worker.

4. There is no evidence establishing that Ms. Johns is only partially permanently disabled

A worker cannot be both partially and totally permanently disabled at the same time as a result of the same injury. *Stone*, 172 Wn. App. at 271. The key distinction between partial disability and total disability is whether an injured worker is capable of working: “[i]f the claimant cannot engage in any gainful employment, the permanent disability is total; if she can engage in some type of gainful employment on a reasonably continuous basis notwithstanding her medical condition, the permanent disability is partial.” *Williams v. Virginia Mason Med. Ctr.*, 75 Wn. App. 582, 586-87, 880 P.2d 539 (1994). There is no evidence showing that Ms. Johns, notwithstanding her back injury, is still able to engage in gainful employment on a reasonably continuous basis. Rather, the undisputed evidence is that she cannot work, which indicates that her disability is total.

Contrary to Ms. Johns' argument, the Department is not imposing an “erroneous” disability classification on her. App.'s Br. at 23. Ms. Johns does not dispute that she is unable to work and argues only that

Regardless, employability is determined by looking at the whole person. *Leeper*, 123 Wn.2d at 814-15.

her inability to work is wholly unrelated to her injury: a contention that is not supported by any evidence. CP 104, 114. Her situation is unlike the one present in *Peterson v. Department of Labor & Industries*, 22 Wn.2d 647, 157 P.2d 298 (1945), where the worker who had appealed an order that determined that he was permanently totally disabled was, in fact, working at the time that the Department classified him as totally disabled. *Id.* at 651. In Mr. Peterson's situation, a partial permanent disability award was plainly more appropriate, both because it more accurately described his status and because, if he continued to work, he might suffer future accidents, and, if so, he would be eligible for industrial insurance benefits for such injuries. *Id.* Here, however, Ms. Johns is not working and almost certainly will never work again. The evidence supports the superior court's determination that this is due at least in part to her industrial injury, and Ms. Johns presented no evidence that rebutted this. Total permanent disability is, therefore, the correct classification.

5. There is no evidence that Ms. Johns is able to perform part-time employment

Ms. Johns also suggests that the possibility of part-time employment was not explored, contending that if a worker is capable of part-time employment before an injury and remains capable of working part-time following the injury, then the worker cannot be considered

totally and permanently disabled. App.'s Br. at 12-13. This argument misstates the burden: to prevail under such a theory, Ms. Johns would have to present evidence that supports it. No witness testified that Ms. Johns was working on a part-time basis at the time of her industrial injury, and no witness testified that Ms. Johns was capable of working part-time following her injury.⁵ Dr. Earle, over Ms. Johns' objection, testified that in 2009 Ms. Johns was "functioning in a sub sedentary part-time capacity." CP 235. He did not explain what he meant by this, and he did not state whether this ambiguous capacity continued into July 2011, when the Department determined Ms. Johns was totally and permanently disabled. CP 235, 238, 239; CP 44.⁶ There was, however, no evidence that Ms. Johns would be able to obtain and maintain reasonably continuous gainful employment in a "sub sedentary part-time" position. *See Leeper*, 123 Wn.2d at 817 (to be employable, worker must be able to obtain as well as maintain employment). No vocational testimony was provided to suggest such positions are available in Ms. Johns' labor market. *See Kuhnle v. Dep't of Labor & Indus.*, 12 Wn.2d 191, 199,

⁵ Ms. Johns asserts that her employment pattern was "working only 12 days a month at the time of the industrial injury." App.'s Br. at 9. There is no evidence in the record of Ms. Johns' employment pattern, and Ms. Johns does not cite to any.

⁶ Dr. Earle later clarified that when asked about reasonably continuous, gainful employment, he generally thinks in terms of full-time employment. CP 238. And Ms. Johns agrees that Dr. Earle did not offer an opinion regarding Ms. Johns' employability on a part-time basis. App.'s Br. at 13.

120 P.2d 1003 (1942) (if worker is only capable of “odd-lot” work not widely available in labor market, proof must be offered showing such work available). Therefore, the theory she advances is a speculative one without evidentiary support, and the superior court would have erred had it found for her based on such an idea. In any event, evidence was presented that supports the inference that Ms. Johns is not capable of working—even on a part-time basis—as a proximate result of her injury, so the superior court did not err when it affirmed the Department’s decision in this case.

B. The Board Acted Within Its Scope Of Review When It Affirmed The Department’s Decision In This Case

Ms. Johns, citing *Brakus v. Department of Labor & Industries*, 48 Wn.2d 218, 292 P.2d 865 (1956), suggests that, because she did not identify whether she is totally and permanently disabled as an issue in this appeal, the Board exceeded its scope of review when it affirmed the Department’s order, which had concluded that she is totally and permanent disabled. App.’s Br. at 18-21. Her argument fails as it is not supported by *Brakus* and because, if it was accepted, this would lead to the absurd result of a party who has appealed a decision of the Department being able to automatically prevail on appeal, whether the evidence supports their contentions on appeal or not, simply by not identifying as an issue whether the Department’s decision in a given case was correct.

In *Brakus*, the Department granted a worker a partial disability award. *Brakus*, 48 Wn.2d at 219-20. The worker appealed, seeking a larger award, but failed to present any evidence establishing that he was entitled to any sort of award, let alone that he was entitled to a larger one than what the Department had provided to him. *See id.* Because no evidence supported granting the worker even the modest award that the Department had provided to him, the Board reversed the Department's decision and directed it to provide the worker with no disability award at all. *Brakus*, 48 Wn.2d at 219. The Supreme Court held this was an inappropriate enlargement of the issues on appeal: the Board was limited to either upholding the Department's award or reversing it and granting the worker a form of relief sought by the worker in the worker's notice of appeal. *Id.* at 222-23.

Here, the Department issued an order that determined that Ms. Johns was totally and permanently disabled. Ms. Johns appealed, contending that the Department erred in doing so and that she was permanently and partially disabled rather than totally and permanently disabled. Under *Brakus*, the Board had the authority—depending on what the evidence showed—to either uphold the Department's decision or to reverse it and direct the Department to provide Ms. Johns with a permanent partial disability award. *See Brakus*, 48 Wn.2d at 222-23.

What the Board could not have properly done, under *Brakus*, is reverse the Department's decision and direct that Ms. Johns be found to be *neither* permanently and totally disabled *nor* permanently and partially disabled. *See id.* The Board did not do so: it affirmed the Department's order because it concluded that the evidence did not support Ms. Johns' request for relief on appeal. CP 9-10. The Board plainly had the authority to do so under *Brakus*, and Ms. Johns' suggestion to the contrary lacks merit. *Brakus*, 48 Wn.2d at 222-23.

Furthermore, accepting Ms. Johns' strained interpretation of *Brakus* would lead to the anomalous result of a worker being able to guarantee that a decision of the Department be reversed by simply not identifying whether the Department's decision was correct as an issue on appeal. Workers have the right to appeal any decision of the Department and to identify whatever issues they wish to identify in their notice of appeal. If a worker could strip the Board of the ability to affirm a decision of the Department by not identifying whether the Department's decision was correct as an issue on appeal, this would allow a worker, through a simple procedural device, to automatically prevail on appeal, irrespective of the merits of the case. Such a result is neither contemplated by nor supported by *Brakus*, and this Court should reject it. *See Brakus*, 48 Wn.2d at 222-23.

C. The Social Security Offset Statute Is Being Correctly Applied In This Case

Under RCW 51.32.220, the Department must offset both pension benefits and time-loss compensation if a worker is also receiving social security benefits. Because pension benefits are subject to social security offsets but permanent partial disability awards are not, Ms. Johns would prefer to receive a permanent partial disability award to being classified as totally and permanently disabled. However, because the superior court and the Board properly determined that Ms. Johns was permanently and totally disabled, she is not entitled to the relief she seeks.

The offset statute, RCW 51.32.220, has dual purposes. “It is the purpose of the statutory scheme to see that a disabled person is fully compensated for his disability, but not permitted to collect overlapping awards.” *Ravsten v. Dep’t of Labor & Indus.*, 108 Wn.2d 143, 149, 736 P.2d 265 (1987). In addition to preventing duplicative benefits, the offset statute also limits the costs of industrial insurance by shifting costs to the federal government. *Harris v. Dep’t of Labor & Indus.*, 120 Wn.2d 461, 465, 467, 843 P.2d 1056 (1993). Both purposes are being served here: Ms. Johns is not receiving duplicative benefits, and the federal government is paying the cost of Ms. Johns’ disability.

Liberal construction of the Industrial Insurance Act does not require a different result. Ms. Johns states, without explanation, that the Act must be “interpreted in a fashion most advantageous to the injured worker.” App.’s Br. at 15. While it is true that the Act is subject to liberal construction, Ms. Johns has not identified any provision of the Act that is ambiguous or that is in need of liberal interpretation. RCW 51.12.010; *see Harris*, 120 Wn.2d at 474 (liberal construction rule does not apply to unambiguous terms in the Industrial Insurance Act). Rather, the issue here is whether the superior court’s finding that Ms. Johns is totally and permanently disabled is supported by substantial evidence. This is a factual issue to which liberal construction does not apply. *See Ehman v. Dep’t of Labor & Indus.*, 33 Wn.2d 584, 595, 206 P.2d 787 (1949) (liberal construction does not apply to questions of fact).

D. Although Not Material Here, The Superior Court’s Finding That Ms. Johns Is Best Described As Having A Category 4 Impairment Is Supported By Substantial Evidence

The superior court, like the Board, entered a finding that “the residuals from the industrial injury of November 6, 2003 were best described by category 4 of permanent dorsolumbar impairment WAC 296-20-280.” CP 289. Ms. Johns suggests that the Board and the superior court erred when they found her to be best described as having a category 4 impairment rather than a category 5 impairment. App.’s Br. at 28.

Because the superior court concluded that Ms. Johns was permanently and totally disabled rather than permanently and partially disabled, the question of whether she would—hypothetically—be better described as having a category 4 impairment rather than a category 5 impairment is immaterial, since she cannot properly receive any sort of permanent partial disability award. However, assuming for the sake of argument that this Court concludes that Ms. Johns is permanently and partially disabled, substantial evidence supports the superior court’s finding that Ms. Johns is best described as having a category 4 impairment.

Because impairments stemming from back injuries are not defined by statute, workers suffering permanent functional loss from such injuries are rated under the category rating system defined by rule. WAC 296-20-19010(2). Lumbosacral impairment is further defined by WAC 296-20-280, which provides for several categories of impairment, including category 4 and category 5, which are defined as follows:

(4) Mild low back impairment, with mild continuous or moderate intermittent objective clinical findings of such impairment, with mild but significant X-ray findings and with mild but significant motor loss objectively demonstrated by atrophy and weakness of a specific muscle or muscle group.

This and subsequent categories include the presence or absence of a surgical fusion with normally expected residuals.

(5) Moderate low back impairment, with moderate continuous or marked intermittent objective clinical findings of such impairment, with moderate X-ray findings and with mild but significant motor loss objectively demonstrated by atrophy and weakness of a specific muscle or muscle group.

Dr. Staker, Ms. Johns' attending physician, rated Ms. Johns as having a category 4 dorsolumbar impairment. CP 259. Using a worksheet provided by the Department for making such ratings, Dr. Staker provided an objective explanation of his findings, and his findings correlate to those required by WAC 296-20-280. CP 254-257, 260, 261. Therefore, substantial evidence supports a category 4 impairment rating, as a reasonable person could accept Dr. Staker's opinion as correct. *See Wenatchee Sportsmen Ass'n*, 141 Wn.2d at 176.⁷

Ms. Johns contends that the superior court should have, instead, accepted Dr. Earle's opinion that Ms. Johns had a category 5 impairment. App.'s Br. at 24-28. However, Ms. Johns presents no argument under the substantial evidence standard, and, instead, appears to invite this Court to reweigh the evidence. *See* App.'s Br. at 24. This Court should decline

⁷ Ms. Johns argues there is something unseemly about Dr. Staker's use of the Department's worksheet. App.'s Br. at 26-27. The worksheet is simply a tool the Department makes available for physicians to use during their rating exams, and it correlates to the findings required WAC 296-20-080. It is available online, see Footnote 3, and this Court may take judicial notice of it as it can easily verify that the worksheet correlates to the categories contained within the rule. *Rogstad v. Rogstad*, 74 Wn.2d 736, 741-41, 466 P.2d 340 (1968) (court may take judicial notice of a fact verifiable by competent, authoritative resources). Regardless of how the doctor arrived at his impairment rating, it corresponds to the categories described in WAC 296-20-080, and is supported by substantial evidence.

that invitation, as it is well-settled that an appellate court reviews a superior court's findings solely to determine whether they are supported by substantial evidence. *See Ruse*, 138 Wn.2d at 5.

The similarity of both medical witnesses' findings relative to the impairment rating provides substantial evidence supporting the superior court's finding. Both doctors distinguished the difference between the two categories in terms of their neurological findings, and based on these, reached different conclusions. Regarding this final aspect, described as motor loss objectively demonstrated by atrophy and weakness of a specific muscle or muscle group, Dr. Earle first testified "that was not demonstrated on exam." CP 228. But later in his testimony, he explained he increased his finding to a category 5 due to neurological deterioration and instability at L2-3. CP 233. 234. Dr. Staker, on the other hand, found some neurological symptoms, such as the numbness Ms. Johns experienced, but did not feel there were significant neurological findings to support a category 5 rating. CP 256. If he had found a dropped foot, significant weakness in a foot, or significant muscle atrophy, he would have found category 5 appropriate. As the attending physician, Dr. Staker's opinion is afforded special consideration. *See Hamilton v. Dep't of Labor & Indus.*, 111 Wn.2d 569, 571, 761 P.2d 618 (1988). Thus, although the question of what category Ms. Johns should be rated is

immaterial given the evidence of total disability, substantial evidence supports the impairment finding of the superior court.

E. Because Ms. Johns Should Not Prevail In This Appeal, She Should Not Receive An Award Of Attorney's Fees Or Costs

Ms. Johns argues that, if she prevails on appeal, she should receive an award of attorney fees and cost. While it is true that RCW 51.52.130 supports an award if a worker prevails on appeal and the accident fund is affected as a result, Ms. Johns should not prevail here, because her arguments on appeal lack merit. Therefore, no attorney fees or costs should be awarded to her. *See Pearson v. Dep't of Labor & Indus.*, 164 Wn. App. 426, 445, 262 P.3d 837 (2011).

VII. CONCLUSION

The Department asks that this Court affirm the trial court.

RESPECTFULLY SUBMITTED this 13th day of February, 2014.

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

KIMBERLEY JOHNS,

Appellant,

v.

WASHINGTON STATE DEPARTMENT
OF LABOR AND INDUSTRIES,

Respondent.

DECLARATION OF
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DATED at Tumwater, Washington:

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I mailed the Department's Brief of Respondent and this Declaration of Mailing to the parties on record by depositing a postage prepaid envelope in the U.S. mail addressed as follows:

Carol L Casey
Casey & Casey, P.S.
219 Prospect Street
Port Orchard, WA 98366-5325

DATED this 3 day of February, 2014.


DEBORA A. GROSS
Legal Assistant 3