NO. 45928-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

BRUCE BUTSON,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES
OF THE STATE OF WASHINGTON,

Respondent.

DEPARTMENT OF LABOR AND INDUSTRIES BRIEF OF RESPONDENT

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. STATEMENT OF THE ISSUES 1

III. STATEMENT OF THE CASE 2

A. Butson Received Medical Treatment for His Injury Until His Condition Became Fixed and Stable 2

B. The Department Suspended Butson's Vocational Benefits When He Stopped Cooperating With Vocational Services, and He Did Not Appeal That Order or Resume Cooperation 5

C. Butson Was Physically Able To Work 6

D. The Board Affirmed the Department's Decision To Close Butson's Claim 8

E. The Superior Court Granted the Department's Motion To Dismiss Butson's Appeal Because Butson Did Not Present a Prima Facie Case for Further Benefits 9

IV. STANDARD OF REVIEW 9

V. ARGUMENT 10

A. Butson Failed To Present a Prima Facie Case To Show Entitlement To Time-Loss Compensation 11

1. Any Inability to Work Was Caused by Butson's Noncooperation With Vocational Services, Not His 2004 Industrial Injury 11

2. The Res Judicata Effect of the June 2010 Order Establishes That Butson Did Not Have Good Cause For His Noncooperation With His Vocational Plan 15

3. Butson Failed To Present a Prima Facie Case That He Is Unable To Work as a Result of His Injury 17

B. Butson Cannot Argue That Vocational Services Should Be Restarted 20

C. Butson Failed To Present a Prima Facie Case That He Required Further Proper and Necessary Medical Treatment as of the Date That the Department Closed His Claim 22

D. Even if the Trial Court Considered the Department's Evidence Before Dismissing the Appeal It Would Not Have Changed the Result Because the Evidence Presented by the Department Only Supports Dismissal 27

VI. CONCLUSION 31

TABLE OF AUTHORITIES

Cases

Bonko v. Dep't of Labor & Indus.,
2 Wn. App. 22, 466 P.2d 526 (1970) 18

Brundridge v. Fluor Fed. Serv., Inc.,
164 Wn.2d 432, 191 P.3d 879 (2008) 28, 29

Chavez v. Dep't of Labor & Indus.,
129 Wn. App. 236, 118 P.3d 392 (2005) 16

Cowiche Canyon Conservancy v. Bosley,
118 Wn.2d 801, 828 P.2d 549 (1992) 21

Davis v. Microsoft Corp.,
149 Wn.2d 521, 70 P.23d 126 (2003) 10, 19

Dep't of Labor & Indus. v. Allen,
100 Wn. App. 526, 997 P.2d 977 (2000) 13

Fochtman v. Dep't of Labor & Indus.,
7 Wn. App. 286, 499 P.2d 255 (1972) 13, 14, 20

Hemmen v. Clark's Rest. Enter.,
72 Wn.2d 690, 434 P.2d 729 (1967) 10

Herr v. Dep't. of Labor & Indus.,
74 Wn. App 632, 875 P.2d 11 (1994) 13, 15, 18

Hunter v. Dep't of Labor & Indus.,
43 Wn.2d 696, 263 P.2d 586 (1953) 23, 24

Hyde v. Dep't of Labor & Indus.,
46 Wn.2d 31, 278 P.2d 390 (1955) 27, 30

In re Lyle Rilling,
No. 88 4865, 1990 WL 255034 (Wash. Bd. of Indus. Ins. Appeals Nov. 30 1990) 24

In re Tishchenko,
No. 11 21603, 2013 WL 3185961 (Wash. Bd. of Indus. Ins. Appeals March 18, 2013) 14

Joy v. Dep't of Labor & Indus.,
170 Wn. App. 614, 285 P.3d 187 (2012), *rev. denied*, 176 Wn.2d 1021 (2013) 28

Kuhnle v. Dep't of Labor & Indus.,
12 Wn.2d 191, 120 P.2d 1003 (1942) 18

Leeper v. Dep't of Labor & Indus.,
123 Wn.2d 803, 872 P.2d 507 (1994) 13, 14

Lenk v. Dep't of Labor & Indus.,
3 Wn. App. 977, 478 P.2d 761 (1970) 21

Malang v. Dep't of Labor & Indus.,
139 Wn. App. 677, 162 P.3d 450 (2007) 9

Marley v. Dep't of Labor & Indus.,
125 Wn.2d 533, 886 P.2d 189 (1994) 12, 15, 16, 22

Matthews v. Dep't of Labor & Indus.,
171 Wn. App. 477, 288 P.3d 630 (2012), *review denied*, 176 Wn.2d 1026 (2013) 20

McDonald v. Dep't of Labor & Indus.,
104 Wn. App. 617, 17 P.3d 1195 (2001) 13

Miller v. Dep't of Labor & Indus.,
200 Wash. 674, 94 P.2d 764 (1939) 23

Rogers v. Dep't of Labor & Indus.,
151 Wn. App. 174, 210 P.3d 355 (2009) 9

Singletary v. Dep't of Labor & Indus.,
166 Wn. App. 774, 784-85, 271 P.3d 356 (2012) 16

Spring v. Dep't of Labor & Indus.,
96 Wn.2d 914, 640 P.2d 1 (1982) 18, 19

State v. Costich,
152 Wn.2d 463, 98 P.3d 795 (2004) 29

Wenatchee Sportsmen Ass'n v. Chelan Ctny.,
141 Wn.2d 169, 4 P.3d 123 (2000) 10

Zipp v. Seattle Sch. Dist. No. 1,
36 Wn. App. 598, 676 P.2d 538 (1984) 25

Statutes

RCW 51.32.095(1) 21

RCW 51.32.099 17

RCW 51.32.099(3)(a) 17

RCW 51.32.099(3)(e) 12

RCW 51.32.099(5)(b) 16

RCW 51.32.110 ..... 6, 12

RCW 51.32.110(2) 12, 13, 22

RCW 51.32.160 ..... 27, 30

RCW 51.36.010 23

RCW 51.52.140 ..... 9, 28

Other Authorities

6A *Washington Practice: Washington Pattern Jury Instructions: Civil* 155.06 (6th ed. 2012) 14

Rules

CR 50 ..... 10, 27, 28

WAC 296-20-01002 ..... 20, 23, 24, 25

I. INTRODUCTION

This case arises out of the Industrial Insurance Act. The Department of Labor & Industries issued an order that closed Butson's claim, and Butson appealed, seeking temporary total disability benefits and further medical treatment.[1] However, the undisputed evidence establishes that Butson was not entitled to additional temporary total disability benefits because he did not establish he could not work. His own doctor testified he could do "plenty of work."

Butson also failed to establish that he required additional medical treatment as of the date the Department closed his claim. Indeed, both medical witnesses agreed that Butson's condition was fixed and stable at the time that Department closed the claim, meaning no need for further treatment exists.

The superior court correctly dismissed Butson's appeal, concluding that he was not entitled to additional benefits or treatment as a matter of law. This Court should affirm.

II. STATEMENT OF THE ISSUES

1. Did the superior court properly conclude that Butson was not entitled to further temporary total disability benefits as a matter of law, when he could have worked had he participated in vocational services and when his doctor testified he could do "plenty of work"?

[1] Temporary total disability benefits are wage replacement benefits, commonly known as time-loss compensation.

2. May Butson request additional vocational services when the Department suspended his participation in vocational services in a June 2010 order that he did not appeal?

3. Did the superior court properly conclude that Butson was not entitled to further medical treatment as of the date the Department closed his claim when the only treatment mentioned provided only short-term pain relief and not long-term changes?

4. Did the superior court commit reversible error when it declined to consider the Department's evidence when deciding whether to dismiss Butson's appeal, when error that does not affect the outcome of a case is harmless, and when the evidence presented by the Department only provided further support that the court should dismiss Butson's appeal?

III. STATEMENT OF THE CASE

A. Butson Received Medical Treatment for His Injury Until His Condition Became Fixed and Stable

In January 2004, Butson fell off a ladder and injured his left wrist and thumb. BR Butson 9.[2] Butson is right-handed. BR Butson 9-10. Butson was injured while working as a plumber's assistant, which he performed to help learn the general contracting trade. BR Butson 9. Over the next two years, Butson underwent several surgeries, and a series of casts were required. BR Butson 12. The last surgery was performed in February 2006. BR Butson 36.

[2] Testimony in the certified appeal board record is referenced by "BR" then the witness name or date of the transcript followed by the page number.

Dr. Paul Won first saw Butson in June 2010. BR Won 13. Butson complained of increased pain, which ranged from four to eight on a scale of one to ten. BR Won 13. Dr. Won reviewed a bone scan that showed some inflammation, and sent Butson for a surgical evaluation. BR Won 13. Surgery was not recommended, but the surgeon recommended a paraffin bath. BR Won 16. When Dr. Won saw Butson on December 2010, his pain still ranged from four to eight out of ten. BR Won 18.

Butson bought a paraffin bath. BR Butson 19-20. He uses this everyday, but it only gives him temporary relief. BR Butson 20. Butson noted that it helps relieve the pain in his wrist. BR Butson 20-21.

Other than the paraffin bath, Dr. Won did not recommend any further treatment for Butson as of January 2011, the last time he saw Butson. BR Won 23-24. The paraffin bath temporarily decreases the pain, but Dr. Won did not testify it would have any permanent effect. BR Won 24, 27-29. Dr. Won observed that the paraffin "may help in the healing." BR Won 29. He did not address whether this would increase Butson's ability to function, and was not sure how long the analgesic effect would last. BR Won 28. He noted that Butson would probably continue to feel pain in his wrist for the rest of his life. BR Won 28.

Dr. Won stated that Butson was not undergoing further medical treatment as of January 25, 2011, and that it was "reasonable" to close the claim as of that date. BR Won 23.

Dr. David Karges conducted an independent medical exam on October 30, 2010. BR Karges 5.[3] Dr. Karges determined Butson did not need any treatment at that time, although he may need further surgery in the next five to eight years. BR Karges 5-8, 29, 31, 49, 51-52. Dr. Karges questioned the necessity of paraffin baths, suggesting that, in this case, such treatment may have done more harm than good. BR Karges 24, 28, 49-50. This is because paraffin baths often cause swelling, stiffness, and discomfort, although they may temporarily alleviate some pain. BR Karges 28.

Dr. Karges determined that, as of January 25, 2011, the date of the Department's closing order, Butson's condition was fixed and stable. BR Karges 30.

[3] At superior court, the Department argued, and the court agreed, that the court should only consider the evidence presented by Butson's witnesses when deciding whether Butson's appeal should be dismissed. Consideration of the Department's evidence will not change the result; accordingly, the Department does not object for it to be considered for the purpose of this appeal only and cites to the entire record.

B. The Department Suspended Butson's Vocational Benefits When He Stopped Cooperating With Vocational Services, and He Did Not Appeal That Order or Resume Cooperation

The Department provided Butson with vocational rehabilitation services, and he was involved in a vocational rehabilitation plan from June 2008 until June 2010. BR Butson 7. Butson signed an accountability agreement regarding this plan in April 2008, promising to make reasonable efforts to comply with the plan and to advise his vocational rehabilitation counselor if he had difficulty participating in the plan. BR Exhibit (Ex.) 2. As part of his plan, Butson attended a community college and took accounting and business courses. BR Butson 6. He had some trouble with the plan and missed a quarter to attend to an ill sister, and additionally missed time due to an unrelated medical condition. BR Butson 13-15. His plan was extended to accommodate these absences. BR Butson 55-56. Although he was able to complete most of the program, Butson stopped attending classes during his final quarter because of pain in his left thumb caused by hitting the space bar. BR Butson 16-17, 34. No doctor excused Butson from attending classes; in fact, Dr. Won testified Butson could and should continue with his vocational plan, and noted that while Butson may want to limit his time typing, he could still attend and participate in his classes. BR Won 19-20, 31-32.

Butson did not, however, continue to attend his classes. BR Butson 26. The Department sent Butson a letter in April 2010 that warned him that his benefits would be suspended if he did not cooperate with his vocational plan, unless he could demonstrate that he had good cause for not cooperating, and instructed him on the steps he needed to follow to show cooperation. Ex. 4. Butson did not follow those instructions. BR Butson 58. The Department issued an order that suspended his vocational benefits due to this noncooperation in June 2010. Exs. 3, 4, 5. This order advised the suspension would be lifted if he resumed cooperation. Ex. 3. The Department also informed him that his time-loss compensation had been stopped due to his noncooperation, but could be resumed and again provided instructions for how to lift the suspension by cooperating with vocational services. Ex. 5; RCW 51.32.110.

Butson never resumed his classes, and he never asked the Department to lift the suspension. *See* BR Butson 58. And Butson did not appeal the June 2010 order. BR Butson 42, 62; Ex. 3.

C. Butson Was Physically Able To Work

In June 2010, Dr. Won continued restrictions that had been put in place by Butson's prior treating physician in 2007. BR Won 7, 15. Those restrictions were to avoid tight gripping and grasping with the left hand, avoid forceful and prolonged bending of the left wrist, avoid impact to the

left hand and wrist, and to limit left-hand lifting to fifteen pounds. BR Won 15. In December 2010, six months after the suspension order, Dr. Won told Butson to limit himself to twelve credits per quarter, based on his incorrect belief that Butson had been doing twenty-four when he quit attending his vocational program. BR Won 20, 30. Dr. Won did not know how much time Butson was actually spending typing, but also recommended a limit of two hours of typing, presumably with his left hand, per day. BR Won 31-32.

While Dr. Won did not believe Butson could return to his job of injury, he testified "[t]here's plenty of work" that Butson could do, if it was "modified," such as "answering phones" or other "observatory" work. BR Won 25, 26. Dr. Karges agreed that Butson was able to work as of June 4, 2010, in a clerical or other non-physical job. BR Karges 8. Dr. Karges testified that Butson was capable of using a keyboard for roughly five to six hours a day on average, and for even longer periods on an occasional basis. BR Karges 26, 27.

Butson had prior work experience of running the family business, a lumber dry kiln, for about thirteen years. BR Butson 7. This was a supervisory position that primarily involved oversight. BR Butson 39, 43. He had also worked in shipping and receiving, worked at a lumbar yard, started a trucking business, and had a commercial driver's license.

BR Butson 7, 8, 39, 41-43. He graduated high school and attended college for three years before operating the family business, and additionally took the classes at Clark College in accounting and business. BR Butson 6. During the entire time his claim has been open, Butson has also provided full-time care to his elderly mother and disabled sister. BR Butson 22-23, 28, 38-39.

Dr. Won thought that Butson would "most likely" be employable if he completed his retraining plan. BR Won 25. His vocational counselor concurred. BR Stuedli 91-92. Butson testified he could not work because he did not finish his vocational program, and he believed that the previous positions he had held were "too physically demanding." BR Butson 26-27.

D. The Board Affirmed the Department's Decision To Close Butson's Claim

Butson appealed the Department's January 2011 decision to close his claim to the Board of Industrial Insurance Appeals (Board). BR 47. Butson argued that he was entitled to temporary total disability benefits and that his claim should remain open for further medical treatment, but he expressly indicated that he was not seeking a determination that he was totally and permanently disabled because of his injury. BR 3/5/12 at 3. The proposed decision and order found that Butson was not entitled to any

additional temporary total disability benefits and that he was medically fixed and stable, and, therefore the judge agreed Butson had not met his burden of proof to show an inability to work, nor had he shown a need for further treatment. BR 40, 41, 43-44.

The three-member Board granted review and agreed with the proposed decision, affirming the Department's order. BR 1-3.

E. The Superior Court Granted the Department's Motion To Dismiss Butson's Appeal Because Butson Did Not Present a Prima Facie Case for Further Benefits

Butson appealed to superior court. CP 89. After the testimony of Butson's witnesses had been read to the jury, but before any of the testimony of the Department's witnesses had been read, the Department moved for judgment as a matter of law. RP 1-5. The court granted the Department's motion. RP 22-24. Butson appealed.

IV. STANDARD OF REVIEW

In an appeal from a superior court's decision involving a workers' compensation claim, this Court reviews the decision of the superior court, not the Board decision. *See Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d 355 (2009). The ordinary civil standard of review applies to this Court's review of the case. RCW 51.52.140; *Malang v. Dep't of Labor & Indus.*, 139 Wn. App. 677, 683, 162 P.3d 450 (2007).

An appellate court conducts a de novo review of a trial court's grant of a CR 50 motion, and applies the same standard as the trial court. *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 530-31, 70 P.23d 126 (2003); RCW 51.52.140 (appeal shall lie from the judgment of the superior court as in other civil cases). The court must grant a motion to dismiss when, viewing the evidence most favorable to the nonmoving party, the court can say as a matter of law that there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party. *Davis*, 149 Wn.2d at 530-31; *see also Hemmen v. Clark's Rest. Enter.*, 72 Wn.2d 690, 691-92, 434 P.2d 729 (1967) (noting that no element of discretion is involved: the court must dismiss the case if a party is entitled to judgment as a matter of law). Substantial evidence is evidence sufficient to persuade a rational, fair-minded person that the finding is true. *Wenatchee Sportsmen Ass'n v. Chelan Ctny.*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000).

V. ARGUMENT

The superior court properly dismissed Butson's appeal because Butson failed to establish that he was entitled to additional benefits. When Butson appealed the Department's decision to close his claim, he sought additional time-loss compensation and further medical treatment. His doctor testified that Butson would "most likely" be employable if he participated in vocational services. But Butson did not cooperate with his

vocational services and, if Butson cannot work now, this is the reason he cannot work. Moreover, Butson's own doctor believed he could do "plenty of work," just not the plumber's assistant work he had been doing before. Butson also presented no evidence that he needed any additional medical treatment as of the date that his claim was closed: his medical witness agreed that the Department had properly closed his claim. Because Butson is not entitled to further benefits as a matter of law, the superior court properly dismissed his appeal, and this Court should affirm.

A. Butson Failed To Present a Prima Facie Case To Show Entitlement To Time-Loss Compensation

1. Any Inability to Work Was Caused by Butson's Noncooperation With Vocational Services, Not His 2004 Industrial Injury

Butson failed to present a prima facie case that he was unable to work as a proximate result of his industrial injury. The evidence showed that any inability to work between June 2010 and January 2011 was caused by Butson's failure to cooperate with his vocational plan. Here, Butson's attending physician, Dr. Won, testified that he thought that Butson would "most likely" be employable if he had completed the Department's vocational retraining plan. BR Won 25. The testimony of the Department's witnesses, similarly, establishes that Butson would have been employable had he completed the plan. BR Stuedli 91-93 (stating

Butson would have been employable had he completed his retraining plan); BR Karges 35 (stating that he believed Butson was, in fact, capable of gainful employment during the relevant time frame). Thus, the experts in this case are united in the belief that Butson would have been employable if he had completed the Department's vocational retraining plan.

Under RCW 51.32.099(3)(e), a worker successfully participating in a vocational rehabilitation plan may receive time-loss compensation. After Butson stopped participating, he was suspended for his noncooperation under RCW 51.32.110, and his time-loss compensation benefits were stopped. Exs. 3, 5.[4] He did not appeal that order and it is final and binding. *See* BR Butson 42, 62; *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 542-43, 886 P.2d 189 (1994) (holding that a worker's failure to timely appeal a decision of the Department rendered that decision final and binding).

In the unappealed June 2010 order, the Department found that Butson did not cooperate with its efforts at vocational rehabilitation, and

[4] RCW 51.32.110(2) provides: "If the worker . . . does not cooperate in reasonable efforts at [vocational] rehabilitation, the department or the self-insurer upon approval by the department, with notice to the worker may suspend any further action on any claim of such worker so long as such refusal, obstruction, noncooperation, or practice continues and reduce, suspend, or deny any compensation for such period: PROVIDED, That the department or the self-insurer shall not suspend any further action on any claim of a worker or reduce, suspend, or deny any compensation if a worker has good cause for refusing to submit to or to obstruct any examination, evaluation, treatment or practice requested by the department or required under this section."

in doing so it implicitly determined that he did not have good cause for his noncooperation. *See* BR Ex. 3; RCW 51.32.110(2). The trial court found that the Department's suspension of vocational benefits was final and binding. RP 24; CP 89. Butson has not assigned error to this finding and it is a verity. *Dep't of Labor & Indus. v. Allen*, 100 Wn. App. 526, 530, 997 P.2d 977 (2000) (unchallenged findings of fact are verities on appeal).

As with any other benefit, a worker seeking time-loss compensation must establish that the worker's total disability was proximately caused by the worker's industrial injury. *See Leeper v. Dep't of Labor & Indus.*, 123 Wn.2d 803, 817, 872 P.2d 507 (1994) (the injury must cause inability to work); *Fochtman v. Dep't of Labor & Indus.*, 7 Wn. App. 286, 294, 499 P.2d 255 (1972) (worker is totally disabled when inability to work is the result of industrial injury); *see also Herr v. Dep't. of Labor & Indus.*, 74 Wn. App 632, 635, 875 P.2d 11 (1994) (total disability includes temporary total disability). While the injury need not be the sole cause of the worker's disability, it must at least be *a* proximate cause of it. *See McDonald v. Dep't of Labor & Indus.*, 104 Wn. App. 617, 624-25, 17 P.3d 1195 (2001) (instruction allowed party to argue that industrial injury was *a* proximate cause of condition).

An independent intervening cause will break this causal chain. The court gives the proximate cause instruction, Washington Pattern Instruction 155.06 in industrial insurance cases, which defines proximate cause as "a cause which in a direct sequence, *unbroken by any new independent cause*, produces the disability complained of and without which such disability would not have happened." 6A *Washington Practice: Washington Pattern Jury Instructions: Civil* 155.06 (6th ed. 2012) (emphasis added). Thus, where the chain of causation between the injury and a worker's disability is broken by an independent cause, the injury does not proximately cause the disability. *See id.*

Butson's failure to cooperate in his vocational plan is an intervening independent cause that breaks the causal chain and means Butson's disability, if any, is not due to his industrial injury, but rather, to his own actions. Since a worker is only entitled to time-loss compensation if the industrial injury was a proximate cause of the worker's inability to work, Butson is not entitled to such benefits as a matter of law. *See Leeper*, 123 Wn.2d at 817; *Fochtman*, 7 Wn. App. at 294; *In re Tishchenko*, No. 11 21603, 2013 WL 3185961 (Wash. Bd. of Indus. Ins. Appeals March 18, 2013) (worker did not receive further temporary or total permanent disability benefits because the worker was not cooperative

with vocational retraining plan).[5] Butson therefore cannot show entitlement to further time-loss compensation.

2. The Res Judicata Effect of the June 2010 Order Establishes That Butson Did Not Have Good Cause For His Noncooperation With His Vocational Plan

Under well-established res judicata principles Butson cannot now argue that he could not participate in vocational services because of his physical condition. *See Marley*, 125 Wn.2d at 542-43. If his physical condition was the cause of his noncooperation, Butson needed to either appeal the June 2010 order or provide the Department with such evidence at that time, as that might have shown good cause for not participating. He did neither. The res judicata effect of the June 2010 order is that Butson did not have good cause for his noncooperation. BR Ex. 3.

The time has passed for Butson to argue he had good cause for his noncooperation. Nonetheless, Butson argues that the jury could have concluded that he is entitled to time-loss compensation because his industrial injury made it impossible for him to complete his retraining plan. App's Br. at 17-18. Butson's argument cannot be accepted without concluding that the June 2010 order was issued in error, and a court cannot properly make that conclusion because Butson did not appeal that order.

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[5] *Leeper* and *Fochtman* involve *permanent* total disability as opposed to *temporary* total disability. The same standard is used for cases involving permanent total disability and temporary total disability as the only difference is the duration. *Herr v. Dep't. of Labor & Indus.*, 74 Wn. App. 632, 635, 875 P.2d 11 (1994).

See Marley, 125 Wn.2d at 542-43.[6] Since Butson did not appeal the June 2010 order, he conceded that he did not have good cause to stop participating in his plan, and, therefore, he cannot be heard to argue in the current appeal that his industrial injury prevented him from completing his plan. *See Marley*, 125 Wn.2d at 538, 542-43.

The res judicata effect of the June 2010 order precludes Butson's arguments that his physical condition prevented his participation in his vocational program. Yet he cites to RCW 51.32.099(5)(b) to argue that if vocational plan interruption is due to documented changes in the worker's accepted condition that prevent the worker from participating, then the interruption is beyond the control of the worker and the plan should be resumed. App's Br. at 17.[7] Any arguments regarding documented

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[6] *See also Singletary v. Dep't of Labor & Indus.*, 166 Wn. App. 774, 782, 784-85, 271 P.3d 356 (2012) (holding that unappealed decision of Department to reopen a worker's claim was entitled to res judicata effect even though this decision was erroneous in light of the fact that the worker's claim had not previously been closed through a final order); *Chavez v. Dep't of Labor & Indus.*, 129 Wn. App. 236, 239-43, 118 P.3d 392 (2005) (holding that unappealed decision of Department to exclude worker's health care benefits from the calculation of the worker's monthly wages at the time of injury was entitled to res judicata effect even though such health care benefits should have been included in the calculation as a matter of law).

[7] Butson actually cites to RCW 51.32.095(5)(b), which is likely a typographical error because no such subsection exists. It is likely he instead meant RCW 51.32.099(5)(b) which includes the language he references regarding plan interruption.

changes in his condition needed to be made in an appeal to the June 2010 order.[8] Further, RCW 51.32.099 clarifies that the Department is required to suspend vocational benefits when a worker does not abide by their accountability agreement. RCW 51.32.099(3)(a); Ex. 2. Butson did not abide by his accountability agreement and his benefits were therefore suspended by the June 2010 order. *See* BR Butson 52, 57-58.

As the undisputed evidence establishes that Butson would have been employable if he had completed his plan, and as res judicata precludes Butson from arguing that it was not possible for him to complete his plan, a reasonable trier of fact could only conclude that Butson's inability to work is due to his failure to participate in his plan rather than the residuals of his industrial injury. Therefore, it would have been improper to submit the case to a jury to decide whether Butson should receive additional time-loss compensation when no evidence supported that result and further time-loss compensation was precluded as a matter of law.

3. Butson Failed To Present a Prima Facie Case That He Is Unable To Work as a Result of His Injury

An additional reason why Butson is not entitled to further time-loss compensation as a matter of law is because he failed to present any evi-

[8] Even ignoring the res judicata effect of the June 2010 order, there were no documented changes in Butson's condition that prevented his participation in his plan. Dr. Won did not identify any such changes and accordingly did not testify that Butson could not participate in his plan. BR Won 15, 31-32.

dence that supports the conclusion that he is not capable of obtaining and performing *any* form of gainful employment. A worker is not totally disabled solely because of the inability to return to his or her former occupation. *Kuhnle v. Dep't of Labor & Indus.*, 12 Wn.2d 191, 198-200, 120 P.2d 1003 (1942); *see also Spring v. Dep't of Labor & Indus.*, 96 Wn.2d 914, 919, 640 P.2d 1 (1982); *Herr*, 74 Wn. App. at 636; *Bonko v. Dep't of Labor & Indus.*, 2 Wn. App. 22, 25, 466 P.2d 526 (1970). Rather, a worker must demonstrate that he or she is incapable of performing any light or sedentary work of a general nature. *Spring*, 96 Wn.2d at 919. Here, even when viewed in the light most favorable to Butson, the evidence can only reasonably be interpreted as establishing that he is in, in fact, capable of light work of a general nature, and, therefore, he failed to present a prima facie case supporting his claim for relief, even leaving aside the finality of the June 2010 order.

Butson's doctor testified that he could perform "plenty of work" during the relevant time period, and that this included, but was not limited to, an "observatory job" or work such as answering phones. BR Won 24-25. This is likely because Butson's primary complaint was pain in his left thumb. *See* BR Won 12 (pain centered in snuff box of left hand). Butson argues that Dr. Won's testimony that he could do an "observatory job" means that Dr. Won meant he could only "watch" or "see" and not do any

physical activity based on the dictionary definition of observatory. App's Br. at 16. But Butson ignores that Dr. Won said that he could do a "job," and this necessarily includes physical activity. Indeed, Dr. Won gave the example of answering phones. BR Won 25. And Dr. Won was giving this example in the context of disapproving Butson's job of injury, rather than providing any further restrictions that would limit Butson's ability to work. BR Won 25. It must be remembered that Butson's industrial injury affected his non-dominant left hand and wrist only, he has no other restrictions related to his ability to work.

There is no need for Dr. Won to testify to magic words about employability if he testifies as to employment commonly available. *See Spring*, 96 Wn.2d at 919. Although the evidence is taken in the light most favorable to Butson, it is "substantial evidence" that is looked at. *See Davis*, 149 Wn.2d at 531 (judgment as a matter of law appropriate when no substantial evidence or reasonable inference to sustain verdict for non-moving party). Under this standard, the court looks to the character of the evidence to see if would convince a reasonable person of the truth of the matter. *Id.* Here, the character of testimony that someone could do "plenty of work" and could do a job is that he or she could work. Butson's testimony regarding his education and employment history illustrated his qualifications to perform jobs ranging from driving to care-

taking, and even included supervisory positions, such as the work he performed at the dry lumber kiln, where his primary responsibility was to ensure that the workers at the kiln performed their jobs appropriately. BR Butson 6-9, 39-43. Butson additionally participated in the vocational program and completed much, although not all, of it, and he learned some accounting and business skills. BR Butson 6. The above testimony, even when viewed in the light most favorable to Butson, establishes that Butson was capable of obtaining and performing some form of gainful employment during the relevant time frame, and, therefore, he failed to show that he was entitled to additional temporary total disability benefits. *See Matthews v. Dep't of Labor & Indus.*, 171 Wn. App. 477, 494-95, 288 P.3d 630 (2012), *review denied*, 176 Wn.2d 1026 (2013); *Fochtman*, 7 Wn. App. at 294; WAC 296-20-01002 (definition of "total temporary disability").

B. Butson Cannot Argue That Vocational Services Should Be Restarted

Whether Butson should participate in vocational services is not before this Court. In passing, Butson claims that there is substantial evidence of a question of fact as to "whether the Department should restart his vocational plan as of January 25, 2011" and in his conclusion he asks for the restarting of his vocational plan as of January 25, 2012. App's Br.

at 18, 19.[9] He provides no authority for the proposition that a jury could award him vocational services as the result of this appeal, and this Court should not review his unsupported argument. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

The provision of vocational services is in the Department's discretion. RCW 51.32.095(1). Vocational services cannot therefore be ordered as a form of relief on appeal. *See id.* But more significantly, Butson did not appeal the June 2010 suspension order, which stated his right to vocational benefits was suspended until he cooperated. Ex. 3. He presented no evidence that he ever resumed cooperating with his vocational services. He did not ask the Department to lift the suspension due to a claim that he was now cooperating with vocational services. For this issue to be before a reviewing court, he would have had to request that the Department lift the suspension and then appealed a refusal of that request. *See Lenk v. Dep't of Labor & Indus.*, 3 Wn. App. 977, 982, 478 P.2d 761 (1970) (Board and courts only review matters already passed on by Department).

Ignoring the June 10, 2010 suspension order, Butson argues that his decision to stop cooperating with vocational services was justified because the residuals of his industrial injury made it necessary for him to

[9] Butson's reference to 2012 is likely a typographical error; the Department order on appeal in this case is dated January 25, 2011. BR 28.

stop participating in his vocational plan. App's Br. at 17-18. In effect, although he does not couch it in these terms, Butson argues that he had good cause to fail to cooperate with his vocational plan, because his industrial injury prevented him cooperating with it. *See* App's Br. at 17-18.

As already argued, Butson's argument is precluded by res judicata. *See Marley*, 125 Wn.2d at 538 (noting that "[i]f a party believes the Department erred in its decision, that party must appeal the adverse ruling."). The June 2010 order determined that Butson had failed to cooperate with vocational services, and it necessarily determined that Butson did not have good cause to fail to cooperate. *See* Ex. 3; RCW 51.32.110(2). The suspension order is a final and binding order. CP 89. The Department has not lifted the suspension order and Butson cannot now claim entitlement to vocational services.

C. Butson Failed To Present a Prima Facie Case That He Required Further Proper and Necessary Medical Treatment as of the Date That the Department Closed His Claim

The undisputed medical testimony in this case establishes that it was proper for the Department to close Butson's claim based on its finding that there was no further "proper and necessary" medical treatment available to him. The Department closes a worker's claim when the worker's condition is "fixed," that is, when there is no further "proper and necessary" medical treatment that is likely to further improve the worker's con-

dition. RCW 51.36.010 (treatment required for "proper and necessary medical services"); *Hunter v. Dep't of Labor & Indus.*, 43 Wn.2d 696, 699-700, 263 P.2d 586 (1953) (observing that claim closure is proper when worker's condition has reached "a fixed state from which full recovery is not expected"); *Miller v. Dep't of Labor & Indus.*, 200 Wash. 674, 680, 94 P.2d 764 (1939).

The Department has defined "proper and necessary" medical treatment in WAC 296-20-01002. Under WAC 296-20-01002, "proper and necessary" medical treatment means treatment that is either "curative" or "rehabilitative," meaning the treatment will produce "long-term changes":

> Care must be of a type to cure the effects of a work-related injury or illness, or it must be rehabilitative. Curative treatment produces permanent changes, which eliminate or lessen the clinical effects of an accepted condition. Rehabilitative treatment allows an injured or ill worker to regain functional activity in the presence of an interfering accepted condition. Curative and rehabilitative care *produces long-term changes.*

WAC 296-20-01002 (emphasis added). No treatment is proper and necessary if the worker has reached maximum medical improvement. WAC 296-20-01002 provides that a worker has reached "maximum medical improvement" when no fundamental change is expected although there may be fluctuations in pain:

> Maximum medical improvement occurs when no fundamental or marked change in an accepted condition can be expected, with or without treatment. Maximum medical improvement may be present *though there may be fluctuations in levels of pain and function*. . . . Once a worker's condition has reached maximum medical improvement, treatment that results only in temporary or transient changes is not proper and necessary.

(Emphasis added); *see also In re Lyle Rilling*, No. 88 4865, 1990 WL 255034 (Wash. Bd. of Indus. Ins. Appeals Nov. 30 1990) (claim properly closed when condition is fixed because physical therapy would do no more than relieve symptoms on a temporary basis).

Here, the undisputed evidence establishes that as of January 2011, when the Department closed Butson's claim, there was no treatment that was likely to provide him with a long-term improvement to his condition, thus there was no curative or rehabilitative treatment available. BR Won 23; BR Karges 5-8, 29, 31, 49, 51-52. Therefore, his condition was fixed and it was proper for the Department to close his claim. *See* WAC 296--20-01002; *Hunter*, 43 Wn.2d at 699-700.

Butson's own attending physician testified that Butson does not need further treatment and that it was "reasonable to close" his claim on January 25, 2011. BR Won 23. The only evidence regarding further treatment Butson offered related to paraffin baths. Dr. Won testified this treatment would not end Butson's pain, but would only temporarily allevi-

ate it. BR Won 33. Butson agreed with this when he testified the paraffin bath "makes it feel at ease for a short period of time." BR Butson 20. As a treatment that results only in temporary changes, the paraffin baths are not proper and necessary. *See* WAC 296-20-01002 (treatment must produce long term changes). Additionally, Dr. Won did not state that these paraffin baths would improve Butson's ability to function. Dr. Won testified that the paraffin would help relieve pain, but could not definitively say it had any healing function, and agreed that Butson would probably use it for the rest of his life. BR Won 28, 29 ("It *may* help in the healing"). This is not sufficient to show that further treatment is medically necessary. Medical testimony must be expressed in terms of probability, not possibility. *Zipp v. Seattle Sch. Dist. No. 1*, 36 Wn. App. 598, 606, 676 P.2d 538 (1984).

While unfortunate, Butson's continuing experience of pain is also insufficient to keep the claim open for treatment. A worker can be at maximum medical improvement although he continues to experience fluctuations in pain and function. WAC 296-20-01002. It is therefore immaterial to the issue of treatment that Butson continues to feel pain from this injury. In any event, Dr. Won's testimony shows that Butson's pain levels were stable. When Butson visited Dr. Won on June 17, 2010, he rated his pain as ranging between four and eight on a scale of one to

ten. BR Won 13. Six months later, Butson continued to rate his pain as ranging between four and eight. BR Won 18. Additionally, Dr. Won did not recommend any further surgery or any other treatment to alleviate this ongoing pain. It was, as Dr. Won testified, reasonable to close Butson's claim on January 25, 2011.

Perhaps recognizing that Dr. Won's support of the paraffin bath does not establish a need for further treatment, Butson cites to the testimony of the Department's medical witness, Dr. Karges, to argue he needs further treatment. *See* App's Br. at 14. However, contrary to Butson's argument, Dr. Karges' testimony supports the Department's decision to close Butson's claim, not Butson's argument that his claim should remain open. Dr. Karges testified that Butson may need further surgery, if ever, in five to eight years, but does not need any treatment currently. BR Karges 5-8, 29, 31, 49, 51, 52. Dr. Karges's testimony supports the conclusion that Butson's claim should be closed, with the understanding that—in five to eight years—it may be appropriate to reopen Butson's claim, but it does not support the conclusion that the Department erred in closing Butson's claim in January 2011.

In order to show that the Department erred in closing his claim in January 2011, Butson was required to present evidence regarding his disability and need for medical treatment as of the date that the Department

closed his claim, not evidence regarding whether his claim might become aggravated at some point in the future. *See Hyde v. Dep't of Labor & Indus.*, 46 Wn.2d 31, 34-35, 278 P.2d 390 (1955) (holding that worker failed to present a prima facie case when he appealed a closing order and presented evidence that, at most, established that the worker may have suffered an aggravation of his condition at some point after the claim was closed).

Under RCW 51.32.160, Butson may apply to reopen his claim if he can show that his medical condition has worsened and that he needs additional medical treatment. Thus, if Butson's medical condition deteriorates and he needs further treatment in the next five to eight years, it would be proper for him to apply to reopen his claim. However, there is no support for Butson's suggestion that the January 2011 closing order should be reversed even though his condition was undisputedly fixed at the time that that order was issued, simply because his medical condition might become aggravated five to eight years later.

D. Even if the Trial Court Considered the Department's Evidence Before Dismissing the Appeal It Would Not Have Changed the Result Because the Evidence Presented by the Department Only Supports Dismissal

The trial court's consideration of Butson's evidence only was not error under CR 50, which states that a motion to dismiss can be made after

"a party has been fully heard with respect to an issue" and RCW 51.52.140, which provides "the practice in civil cases shall apply to appeals" under the Act. *See Joy v. Dep't of Labor & Indus.*, 170 Wn. App. 614, 619, 285 P.3d 187 (2012), *rev. denied*, 176 Wn.2d 1021 (2013) (court applied RCW 51.52.140 to consider judgment as a matter of law under CR 50).

Nonetheless, the Department does not object, for the purposes of this appeal only, to the Court considering all the evidence, because even if the trial court's ruling was error, the error is harmless. Error is harmless if it does not affect the outcome of a case. *Brundridge v. Fluor Fed. Serv., Inc.*, 164 Wn.2d 432, 445-48, 191 P.3d 879 (2008) (holding erroneous admission of evidence to be harmless, since there was not a material probability that the outcome of the case would have been different had that evidence been excluded). A review of all the evidence shows that there is no substantial evidence to support Butson's case. Even assuming the superior court should have considered all of the evidence before granting the Department's CR 50 motion, the Department's evidence would not have changed the outcome of the case. Furthermore, this Court may affirm the superior court's decision on any basis that is supported by the record, and may do so on a basis that is different from the one that the

superior court relied upon in reaching its decision. *See State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

Here, dismissal of Butson's appeal was proper because evidence shows that Butson was not eligible for either of the forms of relief he sought on appeal. The undisputed evidence established that Butson never resumed cooperating with vocational services, that Butson would have been employable had he completed his plan, and also that his doctor believed Butson could work. No need for treatment was shown because the medical experts agreed that his condition is fixed and stable and that his claim was ready for closure. Thus, dismissal of his appeal would be proper regardless of whether a court confined its review of the record to the evidence presented by Butson or whether the court also considered the evidence presented by the Department. Therefore, not considering the evidence presented by the Department was harmless error, because considering that evidence did not—and could not have—changed the outcome in this case. *See Brundridge*, 164 Wn.2d at 445-48.

The evidence presented by the Department provides further support for the conclusion that Butson is not entitled to relief on appeal as a matter of law. The Department's witnesses reinforce the conclusions that Butson 1) failed to cooperate with reasonable efforts at vocational rehabilitation, (BR Stuedli 82-90); 2) would have been employable had he com-

pleted his vocational plan (BR Stuedli 91, 92) (BR Karges 35); and 3) was fixed and stable as of the date of that the Department issued the order that closed his claim (BR Karges 5-8, 29, 31, 49, 51, 52). Thus, consideration of the Department's evidence would have given the superior court a more complete understanding as to why Butson's appeal should be dismissed, but would have not have changed the fact that dismissal was proper.

Dr. Karges's opinion that Butson would likely need treatment in the next *five to eight years* provides no support for Butson's arguments in this case. BR Karges 52. As discussed above, to show that the Department erred in closing a claim because the worker needed further medical treatment, a worker must show that his or her condition needed further treatment as of the date that the closing order was issued, not that the worker would likely need treatment several years after that closing order was issued. *See Hyde*, 46 Wn.2d at 34-35. Dr. Karges's suspicion that Butson will need additional treatment in the future supports the conclusion that Butson will likely have the right to have his claim reopened in the future, but it provides no support for the idea that the Department erred when it closed his claim. *Id.*; *see also* RCW 51.32.160.

Thus, if the judge erred in not considering Dr. Karges's testimony, it was harmless error, because considering Dr. Karges's testimony would not change the fact that Butson's appeal was properly dismissed.

VI. CONCLUSION

The superior court properly dismissed Butson's appeal because Butson failed to show that he was entitled to any of the forms of relief he sought on appeal. No further proper and necessary treatment is required. And Butson cannot now claim entitlement to time-loss compensation because it was his own actions that precluded him from working since he failed to cooperate with vocational services. Moreover, Butson's own doctor thought his claim should be closed and that he could perform "plenty of work." Thus, Butson failed to establish either entitlement to time-loss compensation or further treatment.

This Court should affirm.

RESPECTFULLY SUBMITTED this 7th day of August, 2014.

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No. 45928-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

BRUCE BUTSON, Appellant, v. DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, Respondent.	DECLARATION OF MAILING

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 Respondent's Brief and this Declaration of Mailing to the parties on record by depositing a postage prepaid envelope in the U.S. mail addressed as follows:

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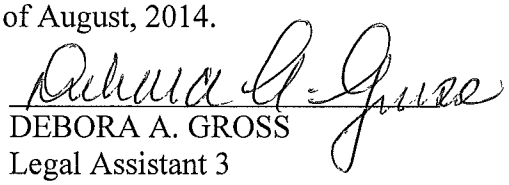

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