

Case No. 47375-5-II

WASHINGTON COURT OF APPEALS, DIVISION II

AIRBORNE EXPRESS, INC.,

Appellant-Defendant.

v.

JAMES GOODMAN,

Respondent-Plaintiff,

APPELLANT'S BRIEF

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I. INTRODUCTION

This workers' compensation appeal concerns the scope of the Superior Court's review of orders issued by the Industrial Appeals Board (hereinafter, "the Board"), including its ability to reach an issue not appealed before the Board and the standard of proof applicable to that issue.

Causation of a left-sided carpal tunnel syndrome (CTS) is central to the Superior Court's ruling and this appeal. Both an industrial appeals judge and the Board found claimant's left-sided CTS related to the injury, and claimant did not dispute that relationship. However, the Board found the CTS condition not medically fixed and stable, and set aside closure as premature. Claimant then appealed to the Superior Court and argued for the first time that his CTS condition was not related to the injury, and contended he was permanently and totally disabled.

Reaching beyond the scope of review, the Superior Court found that a left-sided CTS was not related to the injury. Then, in a decision that lacks internal continuity, the Superior Court found claimant permanently totally disabled based on opinions from doctors who relied on the CTS to determine claimant's work ability.

The applicable law clearly establishes that claimant's failure to appeal the industrial appeal judge's finding that his CTS related to the

injury prevented the Superior Court from reversing that finding. Moreover, the Superior Court failed to apply the proper standard of proof, and its decision lacks substantial evidence.

Assuming *arguendo*, that the Superior Court correctly found CTS unrelated to the injury, its determination of permanent and total disability cannot stand. The Superior Court did not rely on substantial evidence to find claimant permanently and totally disabled. The expert opinions it relied on considered the CTS condition in determining claimant was permanently and totally disabled. The only expert opinions about employability that did not consider the CTS condition did not find claimant permanently totally disabled.

Therefore, the Superior Court's decision should be reversed and this Court should find as a matter of law that left-sided CTS is related to the injury and claimant is not fixed and stable. In the alternative, the Court should find claimant not permanently and totally disabled.

II. ASSIGNMENTS OF ERROR

A. First Assignment of Error

The Superior Court erred when it entered Finding of Fact 1.5 finding the industrial injury was not the proximate cause of left-sided CTS. Substantial evidence did not support the factual finding.

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B. Second Assignment of Error

The Superior Court erred when it entered Finding of Fact 1.11 and Conclusion of Law 2.3 finding claimant a permanently and totally disabled worker because it improperly narrowed the issues at trial and did not consider employability.

C. Third Assignment of Error

Substantial evidence does not support the Superior Court's Finding of Fact 1.11, 1.12, and Conclusion of Law 2.3, because no expert supports finding claimant a permanently and totally disabled worker based on the conditions the court found related to the injury.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Industrial Appeals Judge and the Board found claimant had left-sided CTS proximately caused by the injury. Claimant did not appeal this finding to the Board or to the Superior Court. Did the Superior Court go beyond its scope of review when it reached and reversed this finding of fact and found CTS unrelated to the injury? (Assignment of Error 1).
2. To reverse the Board's Decision and Order, the Superior Court had to find preponderant evidence supporting its findings and conclusions. Did the Superior Court's fail to apply this standard when it entered Finding of Fact 1.5? (Assignment of Error 1).

3. Does the Superior Court's Finding of Fact 1.5 lack substantial evidence in the record? (Assignment of Error 1).
4. The Superior Court ordered it would not find claimant employable because the employer did not file a cross-appeal. Did the Superior Court error in limiting employer's ability to present a defense of employability regarding the issue of whether claimant was permanently and totally disabled? (Assignment of Error 2).
5. If CTS is found to be unrelated to the injury, is the record absent of substantial evidence to support claimant is permanently and totally disabled? (Assignment of Error 3).
6. If the Superior Court properly determined CTS unrelated to the injury, does substantial evidence support finding claimant permanently and totally disabled when the expert medical opinions relied upon were in turn based in part on a related CTS condition? (Assignment of Error 3).

IV. STATEMENT OF THE CASE

A. Procedural Posture

Claimant sustained an industrial injury on March 5, 2002, while working as a delivery driver for employer, Airborne Express, Inc. CP 338. He injured his neck and shoulder in an automobile accident while delivering packages. *Id.* The claim closed on March 6, 2003, with

no permanent partial disability award. CP 117. On December 2, 2004, the Department reopened the claim for authorized treatment. CP 118. Six years later, on December 3, 2010, the Department closed the claim with temporary disability paid through August 21, 2008. It found the medical conditions related to the injury were fixed and stable. CP 106-107. Claimant was awarded 14% permanent impairment of the right arm at or above the deltoid insertion or by disarticulation at the shoulder and a Category 2 permanent cervical and cervico-dorsal impairment. CP 106-107. Claimant protested the Order, and the Department affirmed the Order on February 10, 2011. CP 108-109. Claimant appealed the February 10, 2011 closing order to the Board. CP 110.

The parties presented their respective cases to an Industrial Appeals Judge through lay, vocational, and expert medical testimony. On January 17, 2013, the judge issued a Proposed Decision and Order, reversed the closing order and remanding the case to the Department on the basis that closure was premature. It reasoned that CTS was a condition proximately caused by the injury and was not fixed and stable as of February 10, 2011. CP 86-99.

Claimant filed a Petition for Review with the Board, assigning error to Finding of Fact Numbers 4, 5, 7, 8, and 9, and Conclusions of Law

Numbers 2, 3, 4, and 5. CP 64-71. Claimant did not assign error to Finding of Fact 3, the finding which identified left-sided CTS as a condition proximately caused by the injury. CP 23; 98. The Board issued a Decision and Order affirming the decision of the Industrial Appeals Judge. CP 43-46. Claimant appealed to Pierce County Superior Court. CP 1-2.

Prior to the bench trial, claimant filed a Motion to Clarify the Issues, arguing the sole issue for trial was whether claimant was permanently and totally disabled. CP 856-858; 871-872. Claimant argued that if the court did not find him permanently and totally disabled, then the Board's Decision and Order was correct and employer was prohibited from arguing claimant was employable. CP 857-858. Conversely, employer asserted if permanent and total disability was at issue, employability was also necessarily at issue. Therefore, employer contended the court could find claimant employable and affirm the Department's February 10, 2011 closing order. CP 860-893. The Superior Court sided with claimant and limited the issues at trial to temporary disability (i.e. upholding the Board's Order) or permanent total disability. CP 892.

At the June 6, 2014 bench trial, the Honorable Katherine M. Stolz, stated:

Well, when I reviewed this, I mean, I basically set aside the carpal tunnel, which may or may not be related to the original injury; but it does appear that even before the carpal tunnel, he was permanently totally disabled; and the Court is going to so find. I think he was -- one doctor said he was as fixed and stable as much as he was going to get; and they did not see him as being able to be employed either as a truck driver, an office worker, or anything else; so I'm going to find that he's permanently totally disabled.

RP 15 (June 6, 2014).

The parties disagreed whether the Court found CTS unrelated to the injury, and at oral argument on the Presentation of the Order on July 25, 2014, Judge Stolz stated:

Well, I think from what Counsel said is: I was not relating [CTS] to the injury. There were other things going on, obviously the neck and arm pain which had necessitated some sort of injury, but that was what I found was limiting him, not the carpal tunnel. I just don't think I had enough evidence one way or the other on that...

RP 5 (July 25, 2014).

The Superior Court entered its Findings of Fact, Conclusions of Law and Judgment on July 25, 2014, concluding:

Conclusion of Law 2.3: The plaintiff has been a permanent totally disabled worker within the meaning of RCW 51.32.090 since February 10, 2011.

Findings of Fact 1.5: The industrial injury of March 5, 2002, is not the proximately cause of ... left-sided carpal tunnel syndrome".

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Finding of Fact 1.11: Based on the above findings, Mr. Goodman has not been able to perform and obtain gainful employment on a reasonably continuous basis since January 7, 2009, and is a permanently and totally disabled worker.

CP 1030-1031.

The employer appealed the Judgment to the Court of Appeals.

CP 1033-1034.

B. Statement of Facts

1. Testimony of James Goodman

On March 5, 2002, claimant, a Delivery Driver for Airborne Express Inc., was involved in a motor vehicle accident while delivering packages. CP 171-172. He sought treatment with Dr. Todd Larson, Dr. Stephen Settle, and Dr. Kevin Schoenfelder. CP 173. Two surgeries were initially required to treat conditions caused by the industrial injury: a cervical fusion at C5-6 and a shoulder decompression. A third procedure involving a left-sided carpal tunnel release was performed in May 2011. CP 186-187. Claimant wanted to move forward with the release to make his “neck nerve feel better.” CP 187. The surgery improved his hand and wrist pain. CP 192.

Claimant obtained a masters degree and a teaching certificate from the University of Colorado and the University of Washington, respectively. CP 192. Claimant previously worked as a dispatcher, but

did not think he could get up to the “rigors of working a 40-hour week,” even with being able to alternate between sitting and standing. CP 180; 192. Claimant testified the biggest physical issues preventing him from returning to work were the neck radiation going down his left arm and headaches. CP 184. He admitted that he is capable of performing the dispatcher job but for pain. CP 199.

2. Testimony of Kevin P. Schoenfelder, M.D.

Dr. Kevin Schoenfelder is an orthopedic surgeon who treated claimant over the course of six years. CP 689; 692. He first examined claimant on February 28, 2005, for neck pain radiating into the left arm following the C5-6 anterior cervical fusion. CP 692. After the fusion, the neck symptoms resolved; however, claimant developed increasing pain on the left side. CP 693. Dr. Schoenfelder thought the increasing pain was left-sided CTS caused by double crush syndrome related to the injury. Double crush syndrome occurs when a nerve is pinched in one place causing the entire length of the nerve to swell. CP 699. The swelling causes increased compression on the nerve at the wrist which is attributed to focal weakness, numbness, and loss of functional abilities. CP 699-700. He found CTS related to claimant’s neck injury. CP 699; 711. Dr. Schoenfelder recommended and claimant underwent left carpal tunnel release on May 31, 2011. CP 699-700.

Dr. Schoenfelder concluded claimant could work at a sedentary position if he could change positions as needed. CP 704. He released claimant to perform work as a dispatcher. CP 703; 707-709.

3. Testimony of Carter Maurer, M.D.

Dr. Carter Maurer, an orthopedic surgeon, examined claimant on January 21, 2012. CP 723. Dr. Maurer diagnosed left-sided CTS related to the industrial injury based on a double crush syndrome. He explained claimant's CTS "is related to his cervical spine condition and the condition of his nerve roots. The left-sided nerve roots, specifically C-6 and C-6, demonstrate pathology that were caused by that surgery, and as a double crush phenomenon where the injury at a higher level can predispose a carpal tunnel syndrome." CP 754.

He concluded that as of February 10, 2011, the CTS was not fixed and stable because claimant had a carpal tunnel release in May 2011 that was helpful in addressing part of the double crush syndrome. CR 774. He opined claimant was able to work in a sedentary to light lifting capacity, capable of gainful employment, and able to perform the dispatcher job. CP 758; 762-769.

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4. Testimony of Mark W. Manoso, M.D.

Dr. Mark Manoso, an orthopedist, examined claimant on October 4, 2006 and August 31, 2009. CP 628; 636; 650. He diagnosed claimant with a double crush syndrome caused by left-sided CTS and C6 radiculopathy. CP 660. He found the injury caused C6 radiculopathy, but did not cause CTS. CP 657-658. He concluded claimant could work as a dispatcher and a delivery driver-light position. CP 664-665.

5. Testimony of D. Casey Jones, M.D.

Dr. Casey Jones, an orthopedic surgeon, examined claimant on June 27, 2007 and May 5, 2009. CP 555. At the time of his examinations, he found clinical symptoms did not correlate to left carpal tunnel findings. CP 589. He acknowledged CTS progresses overtime so it was possible claimant developed CTS after his last examination. CP 589-590. He acknowledged the 2010 EMG findings were consistent with CTS, but concluded that if claimant had CTS, it was not related to the industrial injury. CP 591-592.

He reviewed the dispatcher job analysis and opined claimant's ability to perform the dispatcher job was well within his capabilities without restriction. CP 595- 598.

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6. Testimony of Edward G. DeVita, M.D.

Dr. Edward DeVita, a neurologist, examined claimant on April 30, 2008 and August 31, 2009. CP 983. At the time of his examination, he found no objective manifestations to confirm CTS. CP 1002-1003. He restricted claimant to 30-pounds lifting as a result of the injury and released him to the dispatcher job; even with claimant's left arm and hand pain and weakness complaints. CP 1004; 1008; 1010; 1014.

7. Testimony of Todd Larson, M.D.

Dr. Todd Larson served as claimant's primary care physician prior to the date of injury. CP 474. He treated claimant for the injury until January 2011. CP 473-474. He diagnosed left CTS in January 2009, and noted it was not uncommon for people with nerve irritation in the cervical spine to develop CTS from a double crush syndrome. CP 493; 504. Dr. Larson felt the injury aggravated the CTS and treatment of the CTS would improve claimant's left arm pain caused by the industrial injury. CP 496-497; 503.

Dr. Larson concluded it was in claimant's best interest to proceed with the carpal tunnel release. CP 496. After claimant had his carpal tunnel release surgery, Dr. Larson noted an improvement in left hand symptoms. CP 504; 509-510.

In August 2008, Dr. Larson released claimant the dispatcher job. CP 491-492. In January 2009, he changed his position based upon the progression of claimant's reported symptoms, including CTS. CP 509. Dr. Larson testified claimant could likely perform a sedentary job if alternating positions was a possibility. CP 515. He assumed the dispatcher job required a "fair amount" of typing. CP 516.

8. Testimony of Stephen Settle, M.D.

Dr. Stephen Settle is a physical and rehabilitation medicine specialist who treated claimant starting December 21, 2009. CP 406; 408. Dr. Settle diagnosed left-sided CTS on January 25, 2010, based in part on changes in the EMG study from 2008, and positive a Tinel's sign at the left wrist. CP 421-423; 425-426. Dr. Settle concluded the work injury proximately caused the CTS and argued it might be based on a double pinch¹ phenomena. CP 433-434.

Dr. Settle examined claimant on June 6, 2011, after the carpal tunnel release and recommended pain management to improve functionality, but the claim had already closed. CP 426; 430; 455.

He concluded claimant had two conditions affecting the C6 nerve roots: carpal tunnel and chronic radiculopathy. CP 452. There was no

¹ Dr. Settle's explanation of double pinch phenomena is the same as the double crush syndrome described by other medical providers.

way to specifically determine which condition was causing claimant's left wrist extremity condition. CP 452. However, Dr. Settle noted that after the carpal tunnel release surgery, claimant's symptoms improved, and another PCE could show improvement on claimant's functional ability. CP 445-446; 451-452.

Dr. Settle concluded claimant could not work as a dispatcher based on his impressions of a dispatcher's job duties. CP 449. He found CTS was, in part, responsible for claimant's limitations to perform employment on a reasonably continuous basis. CP 452.

9. Testimony of H. Richard Johnson, M.D.

Dr. Richard Johnson, an orthopedic surgeon, examined claimant on an unknown date at the request of claimant's attorney. CP 215. Dr. Johnson diagnosed left CTS based on double crush syndrome, with ongoing symptoms despite carpal tunnel surgery. CP 241. He concluded the injury caused claimant's CTS. CP 252-253; 255.

He opined, based on all conditions related to the injury, including CTS, that claimant should be totally permanently disabled and could not perform the dispatcher position. CP 261; 267; 273; 277-278.

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V. ARGUMENT

A. **The Superior Court Erred in Finding the Industrial Injury was Not the Proximate Cause of Left-Sided Carpal Tunnel Syndrome.**

The Superior Court's Findings of Fact 1.5 states, as relevant: "The industrial injury of March 5, 2002, is not the proximate cause of ... left-sided carpal tunnel syndrome".

CP 1030.

1. **Standard of review**

The appellate court's review is governed by RCW 51.52.140, which provides that an appeal shall lie from the judgment of the Superior Court as in other civil cases, and that ordinary practice in civil cases shall apply. The appellate court review questions of law *de novo*. *Shum v. Dep't of Labor & Indus.*, 63 Wn. App. 405, 407, 819 P.2d 399 (1991). It also reviews for whether substantial evidence supports the Superior Court's factual findings and whether the Superior Court's conclusions of law flow from the findings. *Ruse v. Dep't of Labor and Indus.*, 138 Wn. 2d 1, 5, 977 P.2d 570 (1999); *Dep't of Labor & Indus. v. Shirley*, 171 Wn. App. 870, 878, 288 P.3d 390 (2012).

The Superior Court reviews decisions of the Board *de novo*, relying on the certified Board record. RCW 51.52.115; *Elliott v. Dep't of Labor & Indus.*, 151 Wn. App. 442, 445, 213 P.3d 44 (2009). "Only issues of law or fact that were included in the notice of appeal to the Board

or in the proceedings before the Board may be raised in the Superior Court.” *Elliot* at 446.

2. The Superior Court exceeded its scope of review when it found left-sided CTS unrelated to the injury.

The Superior Court erred as a matter of law when it reversed the Board’s uncontested finding of facts that left-sided CTS is causally related to the injury. Claimant did not request Board review of this finding or raise it before the Superior Court. As a result, it was not properly before the Superior Court.

Pursuant to RCW 51.52.115, the Superior Court is limited to review of issues of law or fact that were included in the Notice of Appeal to the Board or in the proceedings before the Board. *See e.g. Matthews v. State Dept. of Labor & Indus.*, 171 Wn. App. 477, 491, 288 P.3d 630 (2012); *Raum v. City of Bellevue* 171 Wn. App. 124, 286 P.3d 695 (2012), *review denied*, 176 Wash.2d 1024, 301 P.3d. The Board only considers and decides questions that are “fixed by the order from which the appeal was taken as limited by the issues raised by the notice of appeal.” *Lenk v. Dep’t of Labor & Indus.*, 3 Wn. App. 977, 982, 478 P.2d 761 (1970) (citations omitted). The Petition for Review to the Board “shall set forth in detail the grounds therefore and the party...filing the same shall be deemed to have waived all objections or irregularities not specifically set

forth therein.” RCW 51.52.104; *Leuluaialii v. Dep’t of Labor & Indus.*, 169 Wn. App. 672, 684, 279 P.3d 515 (2012).

Claimant did not contest the causal relationship between the CTS and injury in the Board record or in his Petition for Review; as a result, the Superior Court was prohibited from reaching and reversing that finding of fact. The Industrial Appeals Judge, in Finding of Fact Number 3, found left-sided CTS related to the injury. CP 98. Claimant’s Petition for Review to the Board took exception to Finding of Fact Numbers 4, 5, 7, 8, and 9. CP 65. He did not take exception to Finding of Fact No. 3, which found that the March 5, 2002 injury proximately caused left-sided carpal tunnel syndrome.² As a result, this finding was not at issue before the Board. In fact, the Board’s Decision and Order expressly acknowledged that claimant did not contest this finding: “Mr. Goodman does not dispute our industrial appeals judge’s determination to allow his left carpal tunnel condition under the claim.” CP 44. There is no evidence in the Board record that claimant disputed causation of the left-sided CTS.

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² Additionally, the employer did not contest this finding of fact before the Board or Superior Court. The employer, as the non-appealing party, could have but did not contest the Board’s factual finding that the CTS causal relationship to the injury. See *Cantu v. Department of Labor and Indus.*, 168 Wn. App. 14, 277 P.3d 685 (2012).

Claimant did not preserve the issue in the Board record or in the Petition for Review. Therefore, it was not properly before the Superior Court. The Superior Court erred when it found left-sided CTS unrelated to the injury.

3. The Superior Court failed to apply the proper standard of review to the Board's finding that left-sided CTS was causally related to the injury.

The Board's findings are *prima facie* correct in an appeal heard by the Superior Court. RCW 51.52.115. The Superior Court substitutes its own findings and decision for the Board's only if it finds from a fair preponderance of the credible evidence that the Board's findings and decision are incorrect. *McClelland v. ITT Rayonier, Inc.*, 65 Wn. App. 386, 390, 828 P.2d 1138 (1992). But, if the Superior Court finds the evidence to be equally balanced, then the findings of the Board must stand. *Jepson v. Dep't of Labor & Indus.*, 89 Wn.2d 394, 401, 573 P.2d 10 (1977).

Assuming it had the legal authority to re-consider the Board's finding that the injury caused left-sided CTS, the Superior Court failed to acknowledge that finding as *prima facie* correct and reverse only on a fair preponderance of the evidence. The statements of Judge Stolz at trial and in oral arguments on the Presentation of the Order establish that she did not afford the proper consideration to the Board's finding.

At trial, the court stated, “Well, when I reviewed this, I mean, I basically set aside the carpal tunnel, which *may or may not* be related to the original injury...” RP 15 (June 6, 2014) (emphasis added). At the Presentation of Order, when the parties disagreed if the court had addressed the causation of the left-sided CTS condition, the court stated:

There were other things going on, obviously the neck and arm pain which had necessitated some sort of injury; but that was what I found was limiting him, not the carpal tunnel. *I just don't think I have enough evidence one way or the other on that...*”

RP 5 (July 25, 2014) (emphasis added).

These statements show the Superior Court did not credit the Board's finding as correct unless a preponderance of the evidence showed otherwise. At most, the Superior Court found the evidence equally balanced. If equivocal, a preponderance of evidence did not support a conclusion that the Board's finding was incorrect. Nonetheless, the Superior Court then issued Judgment concluding the left-sided CTS was unrelated to the injury.

The Superior Court's statements on the record reveal that it did not afford *prima facie* weight to the Board's finding of fact, and moreover reveal the court did not properly apply the preponderance of the evidence standard. The Superior Court erred when it did not apply the correct burden of proof to overturn the Board's finding.

4. Substantial evidence does not support the Superior Court’s conclusion that left-sided CTS was unrelated to the injury.

Significant medical evidence supports the Industrial Appeal Judge’s and Board’s finding that CTS was proximately caused by the injury. The term “proximate cause” means a cause which in a direct sequence, unbroken by any new independent cause, produces the condition complained of, and without which, such disability would not have happened. *Wendt v. Department of Labor & Indus.*, 18 Wn. App. 674, 571 P.2d 229 (1977). “The probability of a causal connection between the industrial injury and the subsequent physical condition must be established by the testimony of medical experts.” *Stampas v. Department of Labor and Indus.*, 38 Wn.2d 48, 227 P.2d 739 (1951).

Experts presented both by claimant and employer discussed how CTS was caused by “double crush” syndrome—where an injury to a nerve increases the likelihood of an injury to the nerve at a different location. Drs. Settle, Johnson, Schoenfelder, and Mauer all endorsed this theory. CP 31; 255-56; 699-700; 754, 774. And, even though Dr. Larson did not specifically relate CTS to the injury, he did opine the injury aggravated CTS, so a CTS release would improve left arm pain caused by the injury. CP 502-503; 509. *See Miller v. Dep’t of Labor & Indus.*, 200 Wash. 674, 679, 94 P.2d 764 (1939) (responsibility must be accepted for the full

effects and resulting disability for a condition that was activated or “lighted up” by an injury).

In contrast, the Superior Court’s determination that the left-sided CTS condition was unrelated was based on the absence of evidence. It did not find one opinion more persuasive than another when it said CTS “may or may not be related” and “I just don’t think I have enough evidence one way or the other.” RP 5; 15. Substantial and persuasive medical evidence supported the Board’s findings that the injury caused CTS; substantial evidence does not support the Superior Court’s determination to the contrary.

5. Effect of Superior Court’s error regarding CTS causation

The causation of claimant’s left-sided CTS condition was not properly before the Superior Court. The Superior Court’s review is limited to the Board’s record, which in turn is limited by the identification of issues in the Petition for Review. This causation issue was not before the Board, and hence, the Superior Court erred in reaching it. If this Court finds as a matter of law that the injury proximately caused CTS, the claim must remain open, as claimant was not fixed and stable at the time of the Department’s February 2011 closing order.

Medically fixed and stable is a requirement of claim closure. *Roberts v. Dep't of Labor & Indus.*, 46 Wn.2d 424, 425, 282 P.2d 290 (1995); *Harper v. Dep't of Labor & Indus.*, 46 Wn.2d 404, 407, 281 P.2d 856 (1955); *Miller*, 200 Wash. at 679. When an injured worker's condition is deteriorating or further medical treatment is contemplated, the condition is not "fixed" and the claim remains open for further treatment. *Pybus Steel v. Dep't of Labor & Indus.*, 13 Wn. App. 436, 439, 530 P.2d 350 (1975). The overwhelming medical evidence shows claimant needed further medical treatment—a carpal tunnel release—at the time of the closing order. CP 421-22, 510, 774. Further curative treatment needed on the date of the closing order is dispositive evidence the claim has been prematurely closed and should remain open for further treatment. RCW 51.32.055; *Pybus Steel* at 439.

The Judgment should be reversed and this case remanded to the Department for reopening; in the alternative, it should be remanded to the Superior Court to proceed with a determination of claimant's fixed and stable status that includes consideration of the left-sided CTS condition.

B. The Superior Court Erred in Finding Claimant Permanently, Totally Disabled.

The Superior Court concluded claimant is a permanent totally disabled worker:

Conclusion of Law 2.3: “The plaintiff has been a permanent totally disabled worker within the meaning of RCW 51.32.090 since February 10, 2011.”

Finding of Fact 1.11: “Based on the above findings, Mr. Goodman has not been able to perform and obtain gainful employment on a reasonably continuous basis since January 7, 2009, and is a permanently and totally disabled worker.” CP 1031.

The Superior Court’s conclusion of permanent and total disability hinged on its finding that left-sided CTS was unrelated to the injury. If the Superior Court’s decision on left-sided CTS is reversed, the appellate court should not reach the issue of permanent and total disability. Instead, the case must be remanded to consider if claimant is “fixed and stable”, as otherwise it is premature to consider permanent and total disability. *Miller*, 200 Wash. at 679. If the Court does reach this issue, it should find the Superior Court applied the wrong standard when it refused to consider employability, and did not rely on substantial evidence to support its finding that claimant is permanent and totally disabled.

1. Standard of review

The appellate court reviews the Superior Court’s factual findings for substantial evidence, and its legal conclusions based on those findings, *de novo*. *Shirley*, 171 Wn. App. 870, 878. “Substantial evidence” is “evidence of such a character and substance as to convince an unprejudiced, thinking mind of the truth of that to which the evidence

is directed.” *Ehman v. Dep’t of Labor and Indus.*, 33 Wn.2d 584, 597, 206 P.2d 787 (1949) (internal citations omitted). The evidence must be sufficient to convince a rational fact finder that an assertion is true. *Jenkins v. Weyerhaeuser Co.*, 143 Wn. App. 246, 254, 177 P.3d 180 (2008).

Claimant challenged the Board’s Decision and Order before the Superior Court, and as a result, had the burden to prove the Board’s Decision and Order was incorrect by a fair preponderance of the evidence. *Groff v. Dep’t of Labor & Indus.*, 65 Wn.2d 35, 43-44, 395 P.2d 633 (1964).

2. Standard for permanent, totally disabled.

The Superior Court found claimant permanently and totally disabled within the meaning of RCW 51.08.160. CP 1031. Case law interprets this statute to require both a medical aspect (the extent of physical impairment) and an economic aspect (the effect on wage earning capacity). *Leeper v. Dep’t of Labor & Indus.*, 123 Wash.2d 803, 812, 872 P.2d 507 (1994). The extent of physical impairment relates to a worker’s physical ability to perform, while the wage earning capacity relates to a worker’s ability to obtain employment. *Id.* at 814. The analysis requires a focus on a worker as a whole—including the person’s age, education, training and experience, reaction to the injury, loss of function, and other

relevant factors—to make an ultimate conclusion of employability. *Fochtman v. Dep't of Labor & Indus.*, 7 Wash. App. 286, 295, 499 P.2d 255 (1972). However, this analysis excludes subsequent conditions unrelated to the injury. Considering such unrelated conditions would make an employer “an insurer of the general health of every employee who has sustained” an injury while employed. *Robert L Gajewski*, No. 13 15414, Bd. of Ind. Ins. Appeals (July 14, 2014).

3. The Superior Court erred when it refused to consider if claimant is employable.

The Superior Court erred as a matter of law when it analyzed permanent and total disability because it refused to consider employability. The Court found that, because employer did not file a cross appeal, the Court could not consider if claimant is employable. RP 8 (May 9, 2014); RP 3 (June 6, 2014). Employability is a required element of the determination of permanent, totally disabled under RCW 51.08.160. Without reaching the substance of the trial court’s decision, this error requires remand.

At trial, the Superior Court limited the issues to whether claimant was entitled to temporary total disability (as the Board found) or permanently and totally disabled. RP 10 (May 9, 2014); CP 892. It is evident the Superior Court limited itself to finding claimant fixed and

stable and unemployable, or in the alternative in need of further treatment. It reviewed the record with this narrow interpretation of the issues, thereby discounting opinions finding claimant employable.³ Employer was precluded from arguing claimant was employable, an issue properly before the Superior Court by virtue of being included in claimant's general Notice of Appeal to the Superior Court.

Claimant appealed the Board's determination that he was not permanently and totally disabled. CP 1-2. Permanent and total disability puts into question both the extent of physical impairment and the impact on his ability to work. When determining whether claimant is permanently and totally disabled, the Superior Court must make findings about claimant's inability to obtain employment in the general labor market. *See Spring v. Dep't of Labor & Indus.*, 96 Wn.2d 914, 918, 640 P.2d 1 (1982).

³ In Finding of Fact 1.12, the Superior Court stated that even if claimant had not prevailed in the Motion to Clarify, it would not change the court's decision. This statement does not cure the failure of the Court to consider all prerequisites to finding a worker permanently and totally disabled, and employer also contends this finding is erroneous. The discussion by the Superior Court on the record, as well as the disconnect between its finding that CTS is unrelated and its finding that claimant is permanently and totally disabled, as outlined in Part V.B.4., reveal that the Court did not properly consider all aspects of employability and did not reasonably conclude claimant is permanently and totally disabled.

If claimant can argue he is unable to work, then the employer should be able to argue claimant is employable. Either party has a right to have its theory of case presented to the trier of fact when substantial evidence supports it. *Allison v. Dep't of Labor and Indus.*, 66 Wn.2d 263, 401 P.2d 982 (1965). Further, because the trial court's review is *de novo*, it has the ability to find claimant employable even though the employer did not file a cross appeal. Employability is a necessary component of permanent and total disability. The Superior Court erred by narrowing the issues and failing to address employability.

4. Substantial evidence does not support the Superior Court's conclusion that claimant is permanent and totally disabled.

The Superior Court necessarily relied on Dr. Settle, Dr. Larson, or Dr. Johnson to find claimant permanently and totally disabled, because only these three experts supported permanent and total disability. All three of these doctors also related claimant's left-sided CTS to the injury, and considered CTS' impact on claimant's disability and function when determining whether claimant can work. Because these opinions included consideration of an unrelated condition, the Superior Court's conclusion lacks substantial evidentiary support.

The Superior Court found CTS unrelated to the injury, and as a result, that condition cannot be considered when determining whether the

injury renders claimant permanently and totally disabled.⁴ The CTS developed after the injury. In the Board's significant decision *V. Pearl Howes*, No. 58 356, Bd. of Ind. Ins. Appeals (April 15, 1982), the Board held that when determining permanent and total disability, an unrelated, subsequent disabling condition may not be considered in determining a worker's entitlement to total disability benefits. *Id.* Though Board decisions are not binding precedent for the appellate court, the courts give substantial weight to an agency's interpretation of the laws it is charged to enforce. *Lynn v. Dep't of Labor & Indus.*, 130 Wn. App. 829, 836, 125 P.3d 202 (2005); *Jensen v. Dep't of Ecology*, 102 Wn.2d 109, 113, 685 P.2d 1068 (1984). Further, it is consistent with the purpose of the Industrial Insurance Act to make employers responsible for injury-related conditions but not the "general health" of workers. *In re: Robert L Gajewski*, Docket No. 13 15414, Bd. of Ind. Ins. Appeals (July 14, 2014).

To determine if a worker is permanently and totally disabled, expert opinion must be relied upon. *Fochtman v. Dep't of Labor & Indus.*, 7 Wn. App. 286, 298 (1972). Because the only opinions supporting

⁴ As noted above, employer contends the Superior Court erred in finding left-sided CTS unrelated. But if the Court disagrees, and reaches the question of permanent and total disability, then for this argument, employer assumes the left-sided CTS condition is an unrelated condition.

permanent and total disability did so based on the CTS, substantial evidence does not support the Superior Court's conclusion.

- a. *The three doctors supporting permanent and total disability considered injury-related CTS, a subsequent and unrelated condition, in rendering their opinions.*

Three doctors arguably supported permanent and total disability: Dr. Settle, Dr. Larson, and Dr. Johnson. None of these doctors considered claimant's employability and function without the left-sided CTS.

Dr. Settle considered the effect of CTS on claimant's symptoms and ability to function prior to the release surgery. Moreover, he acknowledged he was unable to determine whether C6 radiculopathy or CTS impacts impairment post-CTS surgery when the conditions became fixed and stable. Dr. Settle testified in relevant part as follows:

Q. The carpal tunnel condition, based on my experience once a patient has surgery the condition generally resolves without impairment or limitations; is that consistent with Mr. Goodman's carpal tunnel?

A. No, he still had symptoms.

Q. The symptoms related to the carpal tunnel condition?

A. He had, you know, he had two conditions that affected C6 nerve roots; some which was related to carpal tunnel and some which was related to chronic radiculopathy. You can't really sort that out.

Q. So, if I understand you correctly, the left wrist extremity condition was based or caused by both the cervical condition and the carpal tunnel condition?

A. Yeah, I mean, there is potential for both of them to be involved - -

Q. And after Mr. Goodman had surgery, he reported an improved condition; correct?

A. Yes

Q. So, are we able to kind of rule out the carpal tunnel now and say, hey, it's coming from the cervical condition?

A. No, because he still continued to have numbness in a median nerve distribution in his left hand.

Q. So, the carpal tunnel then is in part responsible for his limitations?

A. Again, how much that is versus the C6 radiculopathy versus this double pinch phenomenon where they both kind of interact with each other, you know, it's one of these three or a combination of it.

CP 452. Dr. Settle also concluded claimant's symptoms improved after the surgery.

Q. ... did Mr. Goodman's symptoms improve after June 2011? ...

A. [witness reviewing documents] Yes, my impression was that they did improve.

CP 445.

Dr. Settle suggested that claimant could not perform the dispatcher position, partially due to conditions in claimant's left upper extremity. He noted that claimant would be sitting all day, inputting data with his hands, and his left hand would probably go numb. CP 448. Dr. Settle's opinion that claimant is unemployable was clearly based on CTS as well as injury-related conditions. He did not sort out claimant's disability based solely on conditions related to the injury and those due to the unrelated CTS at the time of the closing order. Therefore, his opinion cannot be relied upon to support permanent and total disability.

Dr. Larson's opinion about claimant's ability to work on a full-time continuous basis also relied on the left-sided CTS condition. Dr. Larson agreed claimant was able to work up until January 2009, when he could no longer work because of an increase in his symptoms complex. CP 509. At that time, Dr. Larson recorded an escalation in the CTS condition and recommended a CTS release. *Id.* Contemporaneously, he restricted claimant from working full time because of the severity of pain and arm weakness. CP 493. The condition that caused Dr. Larson to change his opinion on claimant's ability to work was the CTS condition.

Dr. Larson's subsequent opinions about the impact of CTS on claimant's ability to work are irrelevant because he takes into consideration the success of the surgery and not the state of claimant's

condition as of February 10, 2011, the date of closure. CP 513-514. For purposes of determining permanent and total disability at closure, the Superior Court can only consider claimant's condition on February 10, 2011. As of that date, Dr. Larson had restricted claimant from full time work because of escalating CTS symptoms causing pain and arm weakness and recommend further treatment. He felt the injury aggravated the CTS and treatment would improve claimant's left arm pain caused by the injury. CP 496-497; 503. The Court improperly relied on Dr. Larson's opinion to find claimant permanently and totally disabled because at the time of the closing order, Dr. Larson recommended additional treatment for CTS due to an escalation of claimant's symptoms.

Likewise, Dr. Johnson relied on left-sided CTS to find claimant permanently and totally disabled. Dr. Johnson concluded the C6 radiculopathy diagnosis encompassed the CTS condition. CP 255-256. When reviewing imaging studies prior to the CTS release, Dr. Johnson opined claimant's C5-6 fusion was solid, but claimant's pain in the left upper extremity area had progressively worsened and required a carpal tunnel release procedure. CP 239. When he provided an employability opinion, Dr. Johnson based that opinion on all diagnoses related to the industrial injury, including CTS. "The combination of these ongoing

residuals renders [claimant] incapable of performing any level of work on a regular continuous basis.” CP 267. Dr. Johnson’s testimony does not account for limitations due solely to the conditions caused by the injury, without consideration of the CTS, as of February 10, 2011. Thus, his opinion cannot be used to support permanent and total disability at the time of the closing order.

Because the Superior Court found CTS unrelated to the injury, it cannot find claimant permanent and totally disabled based on opinions from doctors who relied on the impact of the “unrelated” CTS. A finding of permanent and total disability is not supported by substantial evidence when the finding is based on picking and choosing which pieces of each expert’s testimony to rely upon while ignoring the foundation upon which each was based.

b. Doctors who did not consider CTS also did not find claimant permanently and totally disabled.

Three experts in the record found the left-sided CTS unrelated to the injury: Dr. Manoso, Dr. Jones, or Dr. DeVita⁵. While their opinions on claimant’s ability to work did not take the CTS into account, they also did not find claimant permanently and totally disabled.

⁵ The Superior Court never stated whose opinion(s) it relied on when making its Findings of Facts and Conclusions of Law.

Dr. Manoso did not diagnosis CTS. He opined the early electro-diagnostic studies showed no carpal tunnel, but later studies evidenced CTS. CP 668. He found C6 radiculopathy related to the injury, but did not find CTS or a double crush syndrome. CP 659-660. As a result, he found claimant fixed and stable as of February 10, 2011, even though he acknowledged claimant's CTS release was after that date. CP 668. Dr. Manoso concluded that claimant could perform the dispatcher job based solely on the work injuries as of February 10, 2011. CP 669.

Dr. Jones found "no reasonable medical way" to relate CTS to the 2002 injury. CP 591. He opined a single traumatic event that does not involve the carpal tunnel area would not produce left-sided CTS. CP 591. In addition, he noted there were no electro-diagnostic tests evidencing CTS under a double crush syndrome theory. CP 593. In this context, Dr. Jones considered claimant's ability to work relevant to the injury. On an objective clinical basis, he concluded claimant had the functional capacity to perform sedentary work, including the dispatcher job. CP 595; 610. He based his employability determination on conditions related to the injury, excluding the CTS.

Dr. DeVita, a neurologist, did not find evidence of left-sided CTS or a double crush syndrome. CP 1002. He weighed in on claimant's employability, based on conditions related solely to the industrial injury,

excluding any impairment from CTS. Even when he considered claimant's left arm complaints and hand pain, Dr. DeVita still opined claimant could perform the dispatcher job on a full time basis. CP 1009.

Because only Drs. Manoso, Jones, and DeVita stated the left-sided CTS was unrelated to the injury, the Superior Court necessarily must have relied on them to conclude the CTS condition was not proximately caused by the injury. But then, the Superior Court ignored these experts' ultimate conclusions that claimant was employable. These experts provided well-reasoned opinions based on the entire medical record, and based on the conditions the Superior Court found related to the injury. This highlights a flaw in the logic and legal analysis of the Superior Court. It makes no sense to rely on these experts for causation, and then reject their opinions on ability to work. All other expert opinions about claimant's ability to engage in continuous employment relied in part on CTS. The Superior Court could not rely on those opinions to establish permanent and total disability because it found CTS unrelated to the injury. In short, there is no expert opinion in this record that provided an opinion supporting permanent and total disability on February 10, 2011 based on the conditions the court related to the injury.

In light of the Superior Court's conclusion that CTS is unrelated to the injury, its conclusion that claimant is permanently and totally disabled

goes against the evidence and was unreasonable. Employer asks the appellate court to reverse the Superior Court, hold that claimant is not permanently and totally disabled, and remand to the Board to determine the amount of permanent disability.

VI. CONCLUSION

The Superior Court erred as a matter of law when it reversed the Board's Finding of Fact that claimant's left-sided CTS was proximately caused by the injury. Because left-sided CTS is related to the injury, claimant was not fixed and stable on the date of the closing order. The Superior Court's Order should be reversed and remanded to the Superior Court to address if closure on February 10, 2011 was premature and if, considering the CTS, claimant is permanently and totally disabled.

In the alternative, if the appellate court finds no error in the Superior Court's determination that CTS is unrelated to the injury, then employer requests the Court reverse the finding of permanently and totally

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disabled as unsupported by substantial evidence, and remand this matter to the Board for entry of an Order awarding permanent impairment.

Dated: December 5, 2014

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'Sarah Ewing', written over a horizontal line.

for Aaron J. Bass, WSBA No. 39073
Sarah Ewing, WSBA No. 46776
Of Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this date, I filed the **APPELLANT'S BRIEF via e-filing** with the Washington State Court of Appeals, **Division II**, and mailed a copy via first class mail, postage prepaid, with the United States Postal Service to the following:

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950 Broadway, Ste 300
Tacoma WA 98402

I further certify that on this date, I mailed a copy of the foregoing **APPELLANT'S BRIEF** via first class mail, postage prepaid, with the United States Postal Service to the following:

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DATED: December 5, 2014


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SATHER BYERLY & HOLLOWAY

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