

Case No. 47375-5-II

WASHINGTON COURT OF APPEALS, DIVISION II

AIRBORNE EXPRESS, INC.,

Appellant-Defendant.

v.

JAMES GOODMAN,

Respondent-Plaintiff,

APPELLANT'S REPLY BRIEF

Aaron J. Bass, WSBA No. 39073
Of Attorneys for Appellant

Sather, Byerly & Holloway, LLP
111 SW Fifth Avenue, Suite 1200
Portland, OR 97204 - 3613
Telephone: 503-225-5858

TABLE OF CONTENTS

	Page
I. REPLY ARGUMENT	1
A. The Department of Labor and Industries' Brief Must be Considered.	1
B. Claimant Mischaracterizes the Nature of the Board and Superior Court Decisions.....	5
1. The Superior Court did find CTS unrelated to the work injury.....	5
2. CTS surgery is related to CTS.	7
C. The Superior Court Exceeded its Authority When it Found the Injury Did Not Proximately Cause CTS.	8
1. Appeal of Department's Order does not preserve issues on appeal before the Board or Superior Court.	8
2. Claimant waived all exceptions not raised in his Petition for Review.	10
3. Superior Court lacks authority to reach issues not raised; no exception to that rule is warranted.	12
D. The Superior Court's Error is Prejudicial.	15
1. Claimant proposes an inaccurate legal theory about what is needed before a permanent and total disability finding.	16
2. The record shows that the CTS condition was not fixed and stable, so its relatedness to the injury is vital to permanent disability.....	18

E.	Alternatively, the Permanent and Total Disability Award Cannot Be Supported.	20
1.	Employability is a necessary component of a permanent and total disability award.	20
2.	Record lacks evidence of permanent and total disability if CTS condition unrelated.	21
II.	CONCLUSION.....	22

TABLE OF AUTHORITIES

	Page
CASES	
<i>Ackley-Bell v. Seattle School Dist. No. 1</i> , 87 Wn. App. 158, 940 P.2d 685 (1997).....	3, 4
<i>Allan v. Dep't of Labor & Indus.</i> , 66 Wn. App. 415, 832 P.2d 489 (1992).....	9, 11, 14
<i>Aloha Lumber Corp. v. Dep't of Labor & Indus.</i> , 77 Wn.2d 763, 466 P.2d 151 (1970).....	2, 4
<i>Belnap v. Boeing</i> , 64 Wn. App. 212, 823 P.2d 528 (1992).....	13
<i>Blue Chelan, Inc. v. Dep't of Labor & Indus.</i> , 101 Wn.2d 512, 681 P.2d 233 (1984).....	2, 4
<i>Cantu v. Dep't of Labor & Indus.</i> , 168 Wn. App. 14, 277 P.3d 685 (2012).....	15
<i>Condit v. Lewis Refrigeration Co.</i> , 101 Wn.2d 106, 676 P.2d 466 (1984).....	10
<i>Demelash v. Ross Stores, Inc.</i> , 105 Wn. App. 508, 20 P.3d 447 (2001)...	15
<i>Dep't of Ecology v. Campbell & Gwinn</i> , 146 Wn.2d 1, 43 P.3d 4 (2002).....	11
<i>DuPont v. Dep't of Labor & Indus.</i> , 46 Wn. App. 471, 730 P.2d 1345 (1986).....	16, 17
<i>Everett Concrete Prods., Inc. v. Dep't of Labor & Indus.</i> , 109 Wn.2d 819, 748 P.2d 1112 (1988).....	11
<i>Falk v. Keene Corp.</i> , 113 Wn.2d 645, 782 P.2d 974 (1989).....	12
<i>Harper v. Dep't of Labor & Indus.</i> , 46 Wn.2d 404, 281 P.2d 856 (1955).....	16

<i>Hearst Corp. v. Hoppe</i> , 90 Wn.2d 123, 580 P.2d 246 (1978)	10
<i>Hill v. Dep't of Labor & Indus.</i> , 90 Wn.2d 276, 580 P.2d 636 (1978)	8
<i>Homemakers Upjohn v. Russel</i> , 33 Wn. App. 777, 658 P.2d 27 (1983)...	14
<i>In re Carolyn Bowers</i> , BIIA Dec., 10 18398 (2011)	18
<i>Leuluaialii v. Dep't of Labor & Indus.</i> , 169 Wn. App. 672, 279 P.3d 515 (2012), review denied, 176 Wn.2d 1018 (2013)	9, 14
<i>Merlino Const. v. City of Seattle</i> , 167 Wn. App. 609, 273 P.3d 1049, review denied, 175 Wn.2d 1003 (2012).....	9
<i>Miller v. Dep't of Labor & Indus.</i> , 200 Wash. 674, 94 P.2d 764 (1939).....	17
<i>Pend Oreille Mines & Metals Co. v. Dep't of Labor & Indus.</i> , 64 Wn.2d 270, 391 P.2d 210 (1964).....	17
<i>Pybus Steel Co. v. Dep't of Labor & Indus.</i> , 12 Wn. App. 436, 530 P.2d 350 (1975).....	3, 4, 17, 18
<i>Roberts v. Dep't of Labor & Indus.</i> , 46 Wn.2d 424, 282 P.2d 290 (1995).....	16
<i>Rogers v. Dep't of Labor & Indus.</i> , 151 Wn. App. 174, 210 P.3d 355 (2009).....	19
<i>Shafer v. Dep't of Labor and Indus.</i> , 140 Wn. App. 1, 159 P.3d 473 (2007).....	13, 16
<i>Smith v. Shannon</i> , 100 Wn.2d 26, 666 P.2d 351 (1983).....	12
<i>Spring v. Dep't of Labor & Indus.</i> , 96 Wn.2d 914, 640 P.2d 1 (1982)	15
<i>Upjohn v. Russell</i> , 33 Wn. App. 777, 658 P.2d 27 (1983).....	20

STATUTES

RCW 51.52.104 9, 10, 11, 14, 15
RCW 51.52.110 2, 3
RCW 51.52.115 8

RULES

RAP 2.5 12
RAP 2.5(a) 13, 15
RAP 10.1(g) 2
RAP 10.1(h) 5
RAP 12.1 12
WAC 296-15-450..... 4

I. REPLY ARGUMENT

The Superior Court erred as a matter of law when it found CTS not proximately caused by the industrial injury. This issue was not before the court because claimant did not preserve the issue when appealing to the three-member Board. The only issue before it was whether claimant was fixed and stable as of February 10, 2011. If, and only if he was fixed and stable on February 10, 2011, could the court consider permanent and total disability. Because the Superior Court erred, its decision should be reversed and remanded.

The primary issue on appeal pertains to (1) whether a party's Notice of Appeal from a Department Order to the Board of Industrial Insurance Appeals can be used to preserve issues before the Superior Court; or (2) whether, instead, an appeal from the Industrial Appeals Judge's (IAJ) Proposed Decision and Order to the Board (i.e. a Petition for Review) limits the issues before the Board and the Superior Court. Secondly, employer contends the Superior Court's findings that the CTS condition was unrelated and claimant has permanent and total disability, lack substantial evidence.

A. **The Department of Labor and Industries' Brief Must be Considered.**

The Department remains a party to all workers' compensation matters even if it decides not to actively participate. It has not waived its

right to participate in the appeal to the Court of Appeals. It could not predict the Superior Court would reach outside the scope of its authority to decide causation of the CTS condition. The resolution of this issue impacts more than this particular case; it implicates fundamental principles of the Industrial Insurance Act (“the Act”). The Department’s brief should be considered.

A self-insured workers’ compensation case has three parties: the Department, the employer, and the worker. In cases involving multiple parties, RAP 10.1(g) allows the parties to file separate briefs. Application of this rule turns on whether the Department is a “party” on appeal.

To be a party to the case, the Department need not appeal the issues. *Aloha Lumber Corp. v. Dep’t of Labor & Indus.*, 77 Wn.2d 763, 775-76, 466 P.2d 151 (1970); *see also Blue Chelan, Inc. v. Dep’t of Labor & Indus.*, 101 Wn.2d 512, 516, 681 P.2d 233 (1984) (Department necessary party though it may be unable to initiate a superior court appeal). The *Aloha* court considered whether the Department needed to separately appeal to participate at Superior Court. The Court held the Department was a “necessary party” that did not need to appeal. *Id.* The Court’s recognized the central role the Department serves under the Act:

The Department is made a necessary party by RCW 51.52.110. Having given the Attorney General the duty of advising and representing the Department, the legislature could have hardly

intended that he should abandon the Department on an appeal... The Attorney General must, of course, be guided by the interests of his client in determining the extent of his participation in the appeal. We merely rule that the Department remains his client, even though it is neither the appellant nor the prevailing party.

Similarly, in *Pybus Steel Co. v. Dep't of Labor & Indus.*, 12 Wn. App. 436, 440-41, 530 P.2d 350 (1975), the Court considered whether the Department could participate in an employer appeal of a case where the Department did not have the right to appeal due to the RCW 51.52.110 statutory limitation. The Court held that RCW 51.52.110 is an expression of legislative policy to allow the Department to defend its position on appeal even though not authorized to institute an appeal. *Pybus Steel*, 12 Wn. App. at 411. By virtue of originating every claim decision that may be appealed, it always remains a party to any appeal.

Finally, in *Ackley-Bell v. Seattle School Dist. No. 1*, 87 Wn. App. 158, 169, 940 P.2d 685 (1997), the self-insured school district moved to strike the Department's brief and argument at Superior Court. *Id.* at 163. The Department was aligned with the worker's appeal, but it did not separately appeal. *Id.* at 161. The Court of Appeals held even though the Department did not appeal, it was still entitled to appear and take part in the proceedings. *Ackley-Bell*, 87 Wn. App. at 161, 169 (quoting RCW 51.52.110).

Under *Aloha Lumbar*, *Blue Chelan*, *Pybus Steel*, and *Ackley-Bell*, the Department may participate in a judicial proceeding. The reason is obvious: the Department, as administrator of the Industrial Insurance Act, is always concerned with the proper application of workers' compensation law. The Act provides it with sole authority¹ to render claim determinations such as the one under appeal here. As such, the Department files appellate briefs in self-insured cases when the resolution of an issue impacts more than just the parties to the appeal. It would be contrary to the weight of authority and past precedent to hold the Department could not file a brief here.

The Department is entitled, although not required, to participate in *any* Board *or* Superior Court proceeding below and, by logical extension, any further appeal. The Department has not waived this right by not filing a separate appeal. When claimant filed his Notice of Appeal, the Department understood, as did employer, that the issue of whether CTS was related to the work injury was not before the Superior Court. Claimant failed to preserve the Board's specific finding. Claimant now attempts to challenge this finding. The Department's concern is not just

¹ There are limited instances when a self-insured can issue its own closing Order, though the Department has the authority to affirm or reverse such orders. WAC 296-15-450. Those limited instances do not apply here.

the outcome of the dispute between claimant and Employer, but rather the larger issue of (1) the Superior Court's ability to reconsider issues not preserved by the appellant²; and (2) the Court's ability to make a finding of permanent total disability when an allowed condition under the claim is in further need of necessary and proper treatment. Affirming the Superior Court's decision fundamentally undermines how workers' compensation claims are processed and how decisions of permanent total disability are made.

The Department's brief should be allowed; employer joins the arguments made by the Department on appeal.

B. Claimant Mischaracterizes the Nature of the Board and Superior Court Decisions.

1. The Superior Court did find CTS unrelated to the work injury.

Claimant attempts to avoid the true issue on appeal by arguing the Superior Court found he was permanently and totally disabled even if CTS was related; and therefore, the finding that CTS is unrelated to the work injury is irrelevant. He quotes the following from the Superior Court:

“All right. Well, when I reviewed this, I mean, I basically set aside the carpal tunnel, which may or may not have been related to the

² Should the Department's "respondent" role in any given case result in it providing briefing that other respondents did not have the opportunity to respond to, a supplement brief under RAP 10.1(h) would be appropriate.

original injury; but does appear that even before the carpal tunnel, he was permanently totally disabled; and the Court is going to so find.”

(RP 06/06/2014 at 15). However, claimant conveniently fails to quote the full record. Judge Stolz again heard argument for the Presentation of Order which specifically centered on whether the injury caused CTS.

Claimant’s counsel stated:

“Everything is agreed except our interpretation of your finding about the carpal tunnel syndrome.

I construe that as you are saying you don’t think the carpal tunnel has met the burden of proof necessary to be established as part of the claim.”

(RP 07/25/14 at 4). Employer’s counsel offered its understanding that the issue was not before the judge, the parties were not allowed to offer argument on relatedness, and so the judge was in essence affirming the Board’s finding. (RP 07/25/14 at 5). The Court responded:

“Well, I think from what Counsel said is: I was not relating it to the injury.”

(RP 07/25/14 at 5). It was both the Superior Court and claimant’s opinion that CTS was unrelated to the work injury. It is clear from the testimony and from the Order itself that the Superior Court went beyond its authority and, over objection from employer, improperly re-decided a finding that was not challenged at the Board.

2. CTS surgery is related to CTS.

Similarly, claimant argues that the Board relied only on the CTS surgery, not the CTS condition itself, for its decision on temporary disability. (Claimant Brief, p. 8). The Board's order reveals the inaccuracy of this statement. The Board first confirmed the unchallenged finding that the left CTS condition was related to the injury, and then found it not fixed and stable because a curative surgery occurred after claim closure. Because that related condition was in need of further treatment as of February 10, 2011, the injury was not fixed and stable. CP 5-6.

Claimant contends the record does not establish a causal connection between the CTS surgery and the injury. It is too late for claimant to challenge that finding. He failed to challenge the issue before the Board or in the Petition for Review. He cannot now attempt to raise the issue. The record supports a finding that claimant had CTS and the CTS release surgery was needed to treat the condition. (See the testimony of Drs. Larson³, Settle, Schoenfelder, and Mauer at CP 496, 422, 699-700, and 774 respectively). As set out in detail in Appellant's Brief, substantial

³ Claimant inaccurately states Dr. Larson did not relate CTS to the accident. Please refer to Airborne's Opening Brief p. 20-21 to support Dr. Larson's opinion relating CTS to the work injury.

evidence does not support the Superior Court's contrary conclusion.

(App. Brief at 19-20).

C. The Superior Court Exceeded its Authority When it Found the Injury Did Not Proximately Cause CTS.

1. Appeal of Department's Order does not preserve issues on appeal before the Board or Superior Court.

Claimant argues his appeal from the Department to the Board automatically preserves the same issues in an appeal to Superior Court under RCW 51.52.115. In making this argument, claimant omits any discussion as to what affect the Petition for Review has in narrowing the issues.

The employer agrees claimant's appeal from the Department to the IAJ was broad. In fact, in that appeal, claimant contested that he was entitled to additional treatment, a position opposite to the one he takes now. And, he is correct the IAJ has broad authority when reviewing appeals from the Department. However, issues before the IAJ and the scope of its review do not transfer to the Board or the Superior Court unless a party preserves such issues on appeal.

Washington courts have held on numerous occasions that under RCW 51.52.104, a claimant waives legal arguments that are not presented to the Board in the claimant's Petition for Review. *See Hill v. Dep't of Labor & Indus.*, 90 Wn.2d 276, 280, 580 P.2d 636 (1978) (holding party

waived argument of IAJ's potential disqualification by failing to present argument to Board); *Leuluaialii v. Dep't of Labor & Indus.*, 169 Wn. App. 672, 684, 279 P.3d 515 (2012), *review denied*, 176 Wn.2d 1018 (2013) (holding claimant waived argument that closing Order was not final because she failed to raise it in her appeal to the Board or petition for review of the Board's decision); *Merlino Const. v. City of Seattle*, 167 Wn. App. 609, 616 n. 3, 273 P.3d 1049, *review denied*, 175 Wn.2d 1003 (2012) (holding claimant waived argument that a police officer was an independent contractor by failing to present argument to the Board or trial court); *Allan v. Dep't of Labor & Indus.*, 66 Wn. App. 415, 422, 832 P.2d 489 (1992) (holding claimant waived objection on grounds of insufficient notice because it was not set out in her Petition for Review to the Board).

Under claimant's theory, if an injured worker's appeal from a Department Order was sufficient to preserve all issues throughout all subsequent appeals, then RCW 51.52.104 would be superfluous. Why require a party to set forth in detail grounds for their appeal? A Petition for Review limits the issues before the Board, and claimant cannot reach back to his original notice of appeal as grounds that he preserved causation of CTS before the Superior Court.

///

///

2. Claimant waived all exceptions not raised in his Petition for Review.

Claimant's Petition for Review specifically omitted any contest of the CTS condition's relationship to the work injury. Claimant "disputed one issue, the [IAJ's] decision that his disability was temporary versus permanent." (Claimant Brief, p. 15). In fact, up until the Presentation of Order oral argument, claimant avoided stating CTS was unrelated to the work injury and instead argued the CTS surgery was not related to the work injury.

Claimant argues his Petition for Review sufficiently put the parties on notice because he contested permanent total disability; therefore, by inference, he was contesting whether CTS was related to the work injury. He suggests that because no case law interprets the specificity needed in a Petition for Review under RCW 51.52.104 and because the Act should be liberally construed, claimant's appeal requesting permanent total disability was sufficient to contest CTS causation. Claimant's position is contrary to the statute.

Claimant relies solely on the notion that the statute should be construed consistently with the purpose and policy of the Act, such as the policy statement contained in RCW 51.52.104. *See Condit v. Lewis Refrigeration Co.*, 101 Wn.2d 106, 110, 676 P.2d 466 (1984); *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 128, 580 P.2d 246 (1978). "While policy considerations may provide a valuable rule of statutory construction in interpreting an ambiguous statute, where the meaning is clear its meaning

must be given effect without resort to such a rule.” *Allan*, 66 Wn. App. at 418 (citations omitted).

The Court must first look to the relevant statutory language when trying to determine the meaning of a statute. *Everett Concrete Prods., Inc. v. Dep’t of Labor & Indus.*, 109 Wn.2d 819, 821, 748 P.2d 1112 (1988). Words in the statute are given their plain and ordinary meaning unless a contrary intent is evident in the statute or from related provisions which disclose legislative intent about the provision in question. *Dep’t of Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 11-12, 43 P.3d 4 (2002). If after going through these procedures the Court still finds the statute ambiguous, it is appropriate for it to use aids of construction, including legislative intent. *Id.* That is not needed when interpreting RCW 51.52.104.

The plain meaning of RCW 51.52.104 mandates that if an appealing party did not raise or contest a specific finding of fact or conclusion of law in the Proposed Decision and Order, that party has waived the issue. RCW 51.52.104 provides the “petition for review *shall* set forth in detail the ground therefore and the party...filing the same *shall* have be deemed to have waived all objections or irregularities not *specifically set forth therein.*” *Id.* No language in the statute suggests an appeal’s scope includes inferences that might be created from the appeal,

but are specifically left out. It does not cover issues that in hindsight, a party should have been appealed. As claimant states in his brief, “the appeal is necessarily limited to the issues the appellant chooses to raise.” (Claimant Brief p. 27). It is disingenuous to argue that by inference claimant was questioning the causation of CTS when he failed to specifically challenge that finding. The inference could not be clearer: claimant waived the issue because he did not specifically preserve it. As such, the Superior Court erred in deciding this issue.

3. Superior Court lacks authority to reach issues not raised; no exception to that rule is warranted.

Claimant limited the issues before the Board and chose not to contest causation of CTS. However, he contends that even if he did not raise that issue, it was within the Superior Court’s authority to decide the causation of the CTS condition because it was an issue critical to a proper decision. An appellate court may address an issue if it chooses; it is not bound to do so and usually refuses. *Smith v. Shannon*, 100 Wn.2d 26, 38, 666 P.2d 351 (1983). *Falk v. Keene Corp.*, 113 Wn.2d 645, 659, 782 P.2d 974 (1989). This is the exception to the rule, not the rule. RAP 12.1; RAP 2.5. Claimant cites no authority that this ability extends to the Superior Court.

In rare circumstances, Division I has decided to address issues not preserved on appeal, deeming them “crucial.” In the cases claimant cites, Division I of the Washington Court of Appeals used its inherent power to address crucial issues. *Shafer v. Dep’t of Labor and Indus.*, 140 Wn. App. 1, 159 P.3d 473 (2007); *Belnap v. Boeing*, 64 Wn. App. 212, 823 P.2d 528 (1992). The *Shafer* court considered an argument for the first time on appeal that was not specifically raised in a claimant’s Petition for Review. However, it did so based solely on the fact the Department failed to object to the argument pursuant to RAP 2.5(a). Such is not the case here. At trial, Employer specifically argued that because claimant failed to challenge Finding of Fact Number 3, he is precluded from doing so now. Claimant’s reliance on *Shafer* is misplaced.

In *Belnap*, the court analyzed the “special errand” exception to the “going and coming” rule despite the fact it was raised for the first time on appeal. These well-established principles of claim compensability are necessary to determining whether a worker was injured in the course of employment. Because this was a case of first impression and the central issue in the appeal was whether the worker was in the course of employment, the *Belnap* court determined that it needed to decide whether any exceptions applied.

Division II is not as liberal in using its power to consider issues not properly raised on appeal. This Court strictly interprets RCW 51.52.104 and finds a party has waived an issue when it did not raise it in its Petition for Review. *See e.g. Leuluaialii v. Dep't of Labor & Indus.*, 169 Wn. App. 684 (2012), review denied, 176 Wn.2d 1018 (2013) (finding worker waived an issue when she did not raise it in her Petition for Review of the Board's decision); *Allan*, 66 Wn. App. at 422 (finding worker waived her objection that was not set out in her Petition for Review); *Homemakers Upjohn v. Russel*, 33 Wn. App. 777, 782-83, 658 P.2d 27 (1983) (finding plaintiff who did not file a Petition for Review, waived his right to object to any defect in the record).

An appellate court considering exceptions to claim allowance is patently different than a Superior Court considering a specific finding from a lower agency or court that was not appealed. The factual and legal analysis in determining whether the injury caused CTS is not interchangeable with determining whether claimant is permanently and totally disabled; they are two separate factual and legal analyses. For example, if the Department had issued two orders—one finding CTS caused by the injury and one determining claimant not permanently and totally disabled—and claimant only appealed the latter, there would be no question the CTS would be related to the injury as a matter of law.

Failing to challenge the specific IAJ finding is akin to failing to appeal a Department Order. Claimant tries to argue his CTS is not related to the injury on appeal because he is well aware it is the only way he can be determined fixed and stable, a prerequisite to a permanent total disability finding.

Claimant has put forth no persuasive reason why the Superior Court had the authority or this Court should exercise its equitable powers to allow him to assert an argument that he waived under RCW 51.52.104. Claimant failed to preserve the issue for appeal, and the Superior Court erred in reaching that issue.

D. The Superior Court's Error is Prejudicial.

Claimant devotes significant time to an argument that even if it erred, the Superior Court's error was harmless. Claimant did not preserve this argument at the Superior Court and it cannot be considered now. The Court of Appeals does not review an issue, theory, argument, or claim of error not presented at the trial court level. RAP 2.5(a); *Demelash v. Ross Stores, Inc.*, 105 Wn. App. 508, 527, 20 P.3d 447 (2001). Doing so now is inappropriate. Further, the Superior Court's error was prejudicial and the decision should be reversed and remanded. *See Spring v. Dep't of Labor & Indus.*, 96 Wn.2d 914, 921, 640 P.2d 1 (1982); *Cantu v. Dep't of Labor & Indus.*, 168 Wn. App. 14, 24, 277 P.3d 685 (2012).

1. Claimant proposes an inaccurate legal theory about what is needed before a permanent and total disability finding.

A disability award is made at closure of a claim, and closure is only appropriate when the related conditions are fixed and stable. *Shafer*, 166 Wn.2d at 716-17; *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); *DuPont v. Dep't of Labor & Indus.*, 46 Wn. App. 471, 477, 730 P.2d 1345 (1986). The Superior Court could not decide the temporary or permanent disability question presented by claimant without addressing the Board's determination that claimant was not fixed and stable. Had the Superior Court stayed within the scope of its review, it would have only been able to consider if the Board correctly decided whether claimant's conditions related to the industrial injury, including CTS, were fixed and stable on February 10, 2011. Only after answering this question could the Superior Court address whether claimant was permanently disabled.

Claimant misstates the law to argue the court's error was harmless. He contends all conditions related to the work injury do not need to be fixed and stable in order to render a decision of permanent total disability. (Claimant Brief, p. 23). He opines that as long as the conditions rendering a claimant permanently and totally disabled are fixed and stable, a worker

can choose whether to pursue treatment for other related conditions that are not fixed and stable. *Id.* As authority, he cites *Pend Oreille Mines & Metals Co. v. Dep't of Labor & Indus.*, 64 Wn.2d 270, 391 P.2d 210 (1964).

Pend Oreille Mines holds an injured worker cannot be deemed permanently and totally disabled until his conditions are fixed and stable. *Id.* at 272. It does not support claimant's argument. Claimant tries to apply this case by emphasizing it was the *employer* who argued not all conditions need to be fixed and stable to find a worker permanently totally disabled, not the injured worker. Therefore, he proposes, this means a worker can decide if he or she wants further treatment. This makes no sense. The *Pend Oreille Mines* decision does not assign any relevance to which party is appealing. No case law, rule, or statute supports claimant's proposition. All conditions related to claimant's work injury, including CTS, are required to be fixed and stable before finding claimant permanently and totally disabled. *Pybus Steel Co.*, 12 Wn. App. at 438-39; *Miller v. Dep't of Labor & Indus.*, 200 Wash. 674, 680, 94 P.2d 764 (1939).

///

///

///

As the Board stated in its Decision and Order:

“It is a long-established legal principle that industrial insurance claims should be kept open until all industrially related conditions have become fixed and stable. *See, Pybus Steel Co. v. Department of Labor & Indus.*, 12 Wn. App. 436 (1975). We recently reaffirmed this principle by holding this Board cannot adjudicate a worker’s eligibility for permanent total disability benefits if an industrially related condition still needs treatment. *In re Carolyn Bowers*, BIIA Dec., 10 18398 (2011). Therefore, we cannot determine that Mr. Goodman had become permanently totally disabled as of February 2011.”

CP 5. Claimant cannot be awarded permanent and total disability when a condition still needs treatment. Any suggestion that a permanent disability award can be based on part of a claim lacks merit.

2. The record shows that the CTS condition was not fixed and stable, so its relatedness to the injury is vital to permanent disability.

The error is not harmless because medical testimony shows claimant improved after the carpal tunnel release surgery. Evidence demonstrates claimant’s CTS condition was not fixed and stable, so a permanent disability determination was premature.

Dr. Settle examined claimant on June 6, 2011, after the carpal tunnel release, and recommended pain management to improve functionality. CP 426; 430; 455. He noted that after claimant’s carpal tunnel release surgery, his symptoms improved, and another PCE could show improvement in claimant’s functional ability. CP 445-446; 451-452.

Dr. Maurer, Dr. Larson and Dr. Schoenfelder all offered similar opinions that claimant's ongoing complaints stemmed in part from CTS and would be improved with surgery. CP 699-700; 774; 496-497. Dr. Larson and claimant noted improvement after that May 2011 carpal tunnel release surgery. CP 504; 509-510; 192. A post-closure surgery that in hindsight was curative or rehabilitative establishes that a condition was not fixed and stable at the time the closure order issued. *Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 184, 210 P.3d 355 (2009). The evidence shows that when CTS is considered, claimant was not fixed and stable as of February 10, 2011.

The Department, with sole jurisdiction to adjudicate the claim, has yet to review any necessary medical treatment related to CTS after February 10, 2011 and decide whether claimant is employable based on *all* conditions related to the work injury, including CTS. With the need for treatment and likelihood of improved function, it would be premature to determine permanent total disability; the condition is clearly not *permanent* at the time of closure. Accepting claimant's argument is analogous to rendering a permanent total disability decision immediately after an injury without the opportunity for treatment or improvement. By reaching an issue that was not properly before it, the Superior Court

deprived the parties of due process and the Department of its statutory jurisdiction.

E. Alternatively, the Permanent and Total Disability Award Cannot Be Supported.

If the Court of Appeals agrees that the Superior Court's erred in reaching the issue of the relatedness of the left-sided CTS, then it should reverse and not reach these secondary issues. If the Court reaches the issue, the finding of permanent and total disability must be reversed because 1) the Superior Court improperly narrowed the scope of what must be found to award permanent and total disability, and 2) its factual findings lack substantial evidence.

1. Employability is a necessary component of a permanent and total disability award.

Claimant appears to concede that employability is a component of a finding of permanent and total disability, yet still contends the Superior Court did not err in barring employer from arguing employability at trial. He relies on *Upjohn v. Russell*, 33 Wn. App. 777, 658 P.2d 27 (1983) as requiring employer to appeal the Board's decision to preserve the employability issue. That case, as claimant discusses, held that a party has the obligation to appeal an order from which it is aggrieved to preserve an issue, but no obligation to appeal from an order from which it is not aggrieved. In this case, the Board did not find claimant permanently

unemployable or award a permanent and total disability award; it only made findings of temporary disability. CP 6-7. In other words, employer was not aggrieved, so had no obligation to appeal employability.

Claimant also contends that the Superior Court's statement that it would not change its opinion if it considered employability makes the issue moot. This contention is also wrong. Because the court refused to consider employability, this "even if" comment has no reasoning or foundation to support it. The Superior Court very clearly ruled that it would not consider employability, and that was prejudicial error.

2. Record lacks evidence of permanent and total disability if CTS condition unrelated.

Finally, claimant's argument that the Superior Court could pick and choose parts of medical testimony to rely on fails to address the substantial evidence issue presented by the court's permanent and total disability finding. Because it found left-sided CTS unrelated to the injury, the Superior Court had an obligation to segregate disability from that unrelated condition in determining permanent and total disability. The opinions supporting permanent and total disability did so expressly including the CTS condition. Claimant does not cite to any testimony from a doctor that supports permanent and total disability after separating out disability from the CTS condition. As addressed in Appellant's Brief,

the record simply does not support a permanent and total disability award in the absence of the CTS condition. (App. Brief at 27-35).

II. CONCLUSION

For the reasons stated above and in Appellant's Brief, as well as the arguments in the Department's Brief, the Superior Court erred as a matter of law when it decided CTS was not related to the work injury. Its error was prejudicial and its Order should be reversed and remanded to the Superior Court to determine the only issue properly before it: whether the Board correctly decided to remand for further treatment because claimant's conditions related to the work injury were not fixed and stable on February 10, 2011.

Dated: April 14, 2015

Respectfully submitted,



Aaron J. Bass, WSBA No. 39073
Of Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this date, I efiled electronically

APPELLANT'S REPLY BRIEF on the following:

David C. Ponzoha
Washington Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 97402-4454

I further certify that on this date, I mailed a copy of the foregoing

APPELLANT'S REPLY BRIEF via first class mail, postage prepaid,

with the United States Postal Service to the following:

Mark C. Wagner	Timothy R. Gosselin
Law Office of Mark C. Wagner	Gosselin Law Office, PLLC
PO Box 65170	1901 Jefferson Ave., Suite 304
6512 20th St. Ct. W., Ste. A	Tacoma, WA 98402-1611
Tacoma, WA 98464-1170	

Anastasia Sandstrom
Assistant Attorney General
Office of the Attorney General State of Washington
800 Fifth Ave., Suite 2000
Seattle, WA 98104-3188

DATED: April 14, 2015



Aaron J. Bass, WSBA No. 39073
Of Attorneys for Appellant

SATHER BYERLY & HOLLOWAY

April 14, 2015 - 1:14 PM

Transmittal Letter

Document Uploaded: 3-473755-Reply.PDF

Case Name: Airborne Express, Inc., v. James Goodman

Court of Appeals Case Number: 47375-5

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: Reply

Brief: _____

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Teresa Beristain - Email: tberistain@sbhlegal.com

A copy of this document has been emailed to the following addresses:

rwatkins@sbhlegal.com

abass@sbhlegal.com

tberistain@sbhlegal.com