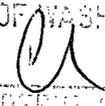


FILED  
COURT OF APPEALS  
DIVISION II

2016 DEC 27 AM 9:45

STATE OF WASHINGTON

NO. 49475-2-II

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DEPUTY

COURT OF APPEALS  
DIVISION II

IN THE STATE OF WASHINGTON

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BRANDON FOSTER,  
*APPELLANT/PLAINTIFF*

v.

FRITO LAY, INC.,  
*RESPONDENT/DEFENDANT.*

---

BRIEF OF APPELLANT

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## **ASSIGNMENTS OF ERROR**

### **Assignment of Error No. 1.**

The Superior Court erred when it denied Plaintiff's Motion for Summary Judgment by finding there is a genuine issue of material fact on whether questions of Mr. Foster's credibility is legally sufficient to overcome the absence of evidence that Mr. Foster could obtain work as a Pallet Jack Operator, Construction Laborer, Bulk Order Picker/Restocker, Motorized Handler/Belt Picker, and Material Handler/Belt Loader, in light of Mr. Foster's age, experience, training, and physical restrictions.

### **Assignment of Error No. 2.**

The Superior Court erred when it denied Plaintiff's Motion for Directed Verdict by finding there is a genuine issue of fact on whether Mr. Foster is able to obtain work as a Pallet Jack Operator, Construction Laborer, Bulk Order Picker/Restocker, Motorized Handler/Belt Picker, and Material Handler/Belt Loader, in light of Mr. Foster's age, experience, training, and physical restrictions.

### **Assignment of Error No. 3.**

Was there substantial evidence for the jury to conclude Mr. Foster was capable of performing and obtaining work as a Pallet Jack Operator, Construction Laborer, Bulk Order Picker/Restocker, Motorized Handler/Belt Picker, and Material Handler/Belt Loader, in light of Mr. Foster's age, experience, training, and physical restrictions where no evidence was presented to the jury of any employers in Mr. Foster's relevant geographic labor market who would hire someone like Mr. Foster.

## ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

**No. 1.** In a worker compensation appeal, which party bears the burden of proof an injured worker is unable to obtain and perform reasonably continuous and gainful employment?

The burden rests on the appealing party, in this case Mr. Foster, to make *prima facie* case must prove he cannot obtain or perform reasonably continuous gainful employment.

**No. 2.** If Mr. Foster meets his *prima facie* burden that he is unable to perform any reasonably continuous and gainful employment when taking into account his age, training, experience, education, and physical limitations, does the burden then shift to Frito Lay?

Yes, once the appealing party makes a *prima facie* case, the defending party, in this case Frito Lay, Inc., has a rebuttable burden to prove the injured worker is capable of obtaining and performing reasonably continuous and gainful employment.

**No. 3.** If the burden shifts to Frito Lay and it does not present evidence that Mr. Foster can perform his job at injury, must Frito Lay then present evidence the injured worker can perform and obtain reasonably continuous gainful employment when taking into account his age, training, experience, education, physical limitations, and availability of employers in the worker's relevant geographic labor market who can accommodate the claim-related restrictions?

Yes, absent evidence the injured worker can return to his job at injury without restrictions, Frito Lay must present evidence Mr. Foster has the residual physical ability to obtain and perform full-time employment.

**No. 4.** If no lay or expert testimony was presented there were employers in Mr. Foster's relevant geographic labor market who would hire someone like him, in light of his age, training, education, experience, and physical limitations, to perform work as a Pallet Jack Operator, Construction Laborer, Bulk Order Picker/Restocker, Motorized Handler/Belt Picker, and Material Handler/Belt Loader, was there substantial evidence for the jury to conclude Mr. Foster could obtain and perform these positions?

No, to find Mr. Foster employable the jury must decide whether the evidence supports a finding he can obtain and perform reasonably continuous and gainful employment, which requires evidence from a vocational counselor that employers exist in Mr. Foster's labor market who would accommodate his work restrictions for these positions.

**No. 5.** If Frito Lay presents no evidence of any employers in Mr. Foster's relevant geographic labor market who would hire someone with his age, training, education, experience, and physical limitations, did Frito Lay fail to meet its shifted burden of proof?

Yes, Frito Lay cannot prove Mr. Foster can obtain employment in the context of his injury-imposed work restrictions without evidence from a vocational counselor that employers in Mr. Foster's labor market could accommodate and would hire someone with Mr. Foster's work restrictions.

**No. 6.** If Frito Lay did not meet its shifted burden of proof, did the Clark County Superior Court err when it found a reasonable juror could conclude Mr. Foster was capable of obtaining and performing reasonably continuous gainful employment?

Yes, without evidence of potential employers able to accommodate Mr. Foster's work restrictions any finding that Mr. Foster can obtain employment is based upon impermissible speculation, which means the Superior Court should have granted Plaintiff's Motion for Directed Verdict.

**No. 7.** In the alternative, if the only vocational testimony was the Pallet Jack Operator position does not exist in Mr. Foster's relevant geographical labor market, did the Clark County Superior Court err when it denied, in whole or in part, Plaintiff's Partial Motion for Directed Verdict asking that the issue of Mr. Foster's ability to perform and obtain this position not be submitted to the jury?

Yes, even if the Superior Court did not err in granting complete directed verdict, it erred in allowing the jury to consider the Pallet Jack Operator position because the only vocational testimony was that job, as described, did not exist in Mr. Foster's labor market; the court must accept this as true and prejudicially erred in allowing the jury to consider whether Mr. Foster can obtain and perform this position.

#### **STATEMENT OF THE CASE**

On April 20, 2010, Mr. Foster was driving a triple-trailer tractor from the Frito Lay plant in Vancouver, Washington, to Hermiston, Oregon. (Certified Appeal Board Record "CABR" 11/6/14 Tr. pp. 40-41). The wind

was blowing as Mr. Foster was unloading in Hermiston. (CABR 11/6/14 Tr. p. 41). One or more slivers of metal were blown into his left/right eye. (CABR 11/6/14 Tr. p. 41).

Mr. Foster saw a doctor the next day to remove one of the slivers, Mr. Foster began experiencing double-vision. (CABR 11/6/14 Tr. pp. 41-42, 43-44). Another sliver was later found and removed, but the double-vision persisted. (CABR 11/6/14 Tr. pp. 42-44). After extensive treatment and testing, the double-vision did not diminish. (CABR 11/6/14 Tr. p. 45). Instead, it continued to worsen. (CABR 11/6/14 Tr. pp. 45-46).

His attending physician, Bruce Wojciechowski tried several different therapies: prism lenses, vision therapy, etc. (CABR Dep. Dr. Wojciechowski pp. 19, 20-21, 28). When those did not help, Dr. Wojciechowski sent Mr. Foster to various specialists and for diagnostic testing. (CABR Dep. Dr. Wojciechowski Tr. pp. 21, 25). Ultimately, Dr. Wojciechowski concluded Mr. Foster's double vision was stable. (CABR Dep. Dr. Wojciechowski p. 77).

#### **1. Ability to Perform Job at Injury.**

Every testifying physician agreed the industrial injury caused Mr. Foster's double vision. Dr. Wojciechowski diagnosed double vision related to the industrial injury. (CABR Dep. Dr. Wojciechowski pp. 48-49). Dr. Shults agreed the double-vision was related to the industrial injury. (CABR Disc. Dep. Dr. Shults p. 66; Dep. Dr. Shults p. 17). Dr. Baer testified the industrial injury aggravated Mr. Foster's "tendency" towards double-vision. (CABR Dep. Dr. Baer pp. 20-21).

Every testifying physician agreed Mr. Foster had permanent work restrictions due to his double vision. Dr. Wojciechowski testified the restrictions prevented Mr. Foster from returning to his job at injury. (CABR Dep. Dr. Wojciechowski p. 50 ln. 1-15). Dr. Shults also agreed Mr. Foster could not be a commercial truck driver. (CABR Disc. Dep. Dr. Shults p. 66). Dr. Baer testified that Mr. Foster's double vision prevents him from maintaining his commercial driver's license. (CABR Dep. Dr. Baer p. 25, ln. 13-15).

## **2. Ability to Perform Transferable Skill Positions.**

There was less consensus on Mr. Foster's other transferable skill positions. Dr. Wojciechowski restricted Mr. Foster from any full-time position. (CABR Dep. Dr. Wojciechowski p. 50 ln. 1-15; p. 58). Dr. Baer testified Mr. Foster was not capable of working a job requiring depth perception. (CABR Dep. Dr. Baer p. 35, ln. 8-9).

Dr. Shults restricted Mr. Foster from working as a construction laborer. (CABR Disc. Dep. Dr. Shults p. 67). He restricted Mr. Foster from operating a forklift or working on a conveyor belt. (CABR Disc. Dep. Dr. Shults p. 68). Dr. Shults described Mr. Foster's work restrictions as follows:

I would not want him to work in an environment in which maintaining good depth perception was a requirement for his or others safety. A visually busy environment wouldn't necessarily meet that criterion. But if he says that he's having more difficulty maintaining control of his double vision in visually busy environments, I wouldn't refute that. And I would suggest that he not place himself in those kinds of situations, if he could avoid it.

(CABR Dep. Dr. Shults p. 25, ln. 10-17).

The Certified Appeal Board Record contained eight job analyses. These are the eight potential jobs that are in dispute whether Mr. Foster can obtain and perform. With regard to Mr. Foster's ability to perform each of these jobs, the three physicians had various opinions.

After reviewing all eight job analyses, Dr. Wojciechowski disapproved the following:

- Commercial Truck Driving (CABR Dep. Dr. Wojciechowski pp. 52-53);
- Construction Laborer (CABR Dep. Dr. Wojciechowski pp. 53-54);
- Forklift Operator (CABR Dep. Dr. Wojciechowski p. 54);
- Bulk Order Picker (CABR Dep. Dr. Wojciechowski pp. 54-55);
- Maintenance Mechanic (CABR Dep. Dr. Wojciechowski p. 55);
- Material Handler Belt Picker (CABR Dep. Dr. Wojciechowski pp. 55-56);
- Material Handler Belt Loader (CABR Dep. Dr. Wojciechowski pp. 56-57);
- Pallet Jack Order Filler (CABR Dep. Dr. Wojciechowski pp. 57-58).

Dr. Shults restricted Mr. Foster from working as a Construction Laborer. (CABR Disc. Dep. Dr. Shults p. 67). He restricted Mr. Foster from operating a forklift or working on a conveyor belt. (CABR Disc. Dep. Dr. Shults p. 68). This last restriction prevents him from working as a Forklift Operator, Belt Picker, and Belt Loader.

Dr. Shults testified Mr. Foster "might" be able to work as a maintenance mechanic, but would be inefficient. (CABR Dep. Dr. Shults p. 39). Upon further questioning, Dr. Shults testified it "might" not be safe for Mr. Foster to work around moving parts or machinery, depending on the situation. This excludes the Maintenance Mechanic position.

Dr. Shults was unsure whether Mr. Foster could work around forklifts, concluding that he would need to see the environment himself before saying one way or the other. (CABR Dep. Dr. Shults pp. 26-27). Later in his deposition, Dr. Shults agreed that Mr. Foster may be able to work in a warehouse, but not driving a forklift; however, it would depend upon the warehouse. (CABR Dep. Dr. Shults p. 39).

Dr. Baer approved Mr. Foster to work as a Construction Laborer. (CABR Dep. Dr. Baer p. 27). He approved the Bulk Order Picker/Restocker position. (CABR Dep. Dr. Baer p. 27). He approved the Maintenance Mechanic position. (CABR Dep. Dr. Baer p. 28). He approved the Material Handler/Belt Picker position. (CABR Dep. Dr. Baer p. 28). He approved the Material Handler/Belt Loader position. (CABR Dep. Dr. Baer p. 28). Finally, he approved the Pallet Jack Operator position. (CABR Dep. Dr. Baer p. 28). On cross examination, Dr. Baer did not waiver in his opinion, despite various identified job tasks that appear to be inconsistent with having double vision and loss of depth perception. (CABR Dep. Dr. Baer pp. 32-35).

In summary, Dr. Wojciechowski disapproved Mr. Foster's ability to perform any of the eight job analyses (job at injury and seven transferable skill positions). Dr. Shults disapproved the job at injury, construction laborer, and forklift operator. Dr. Shults did not clearly approve or disapprove Mr. Foster's ability to perform the other five transferable skill positions. Dr. Baer also disapproved the job at injury, he approved some but not all of the other transferable skill positions.

### **3. Ability to Obtain Transferable Skill Positions.**

Todd Martin was the only vocational expert to testify. He summarized Mr. Foster's transferable skills (positions for which he has the skills, training, and experience to obtain) as follows:

Well, he would possess transferable skills to work as a truck driver, auto courier. He would possess skills to work in the construction industry such as a roofer or carpenter. He would also possess transferable skills to be a route sales driver, a loader-unloader in a warehouse environment. He would also qualify for work as a merchandiser and possibly, also, as a general laborer on a road crew. However, part of that work experience, apparently, included flagging. I imagine he doesn't have a flagging certification, so I would rule that out as a transferable skill.

(CABR 11/6/14 Tr. p. 18, ln. 20-26 to p. 19 ln. 1-4).

What was not included in this list of skills was any ability to work as a maintenance mechanic. (Board Exhibit No. 5; 11/6/14 Tr. p. 26). Stated differently, Mr. Foster does not have the training, education and experience to find work as a maintenance mechanic. Mr. Martin eliminated any commercial driving due to Mr. Foster's double vision problems, as did Dr. Shults, Dr. Baer and Wojciechowski. (CABR 11/6/14 Tr. p. 19). This would eliminate working as a truck driver, courier, route sales, etc.

All of these various job analyses require constant vision. Board Exhibit No. 1, p. 11, notes the job requires correctable vision. Board Exhibit No. 2, p. 4, states, "this job requires average depth perception to judge distances and good peripheral vision necessary to identify potential moving

hazards". Board Exhibit No. 3, p. 5, requires constant correctible vision. Board Exhibit No. 4, pp. 12-13, requires depth perception, accommodation, and the ability to recognize and select products. Board Exhibit Nos. 5, 6, and 7, notes on multiple pages that correctible vision was necessary to perform these jobs. Board Exhibit No. 8, p. 14, also notes that constant depth perception is required to perform this job.

Mr. Martin then testified to how Mr. Foster's double vision and peripheral vision problems create limitations performing warehouse work. (CABR 11/6/14 Tr. p. 20). These problems include being situationally aware to avoid hazards (fast moving forklifts), as well as being able to work at a production rate speed. (CABR 11/6/14 Tr. p. 20). Mr. Martin based his opinion upon his own background working as a forklift operator in a warehouse as well as inspecting over 50 warehouses over the last several decades as a VRC. (CABR 11/6/14 Tr. p. 21).

Specifically, Mr. Martin did not believe Mr. Foster could work as a Truck Driver (Board Exhibit No. 1), Construction Laborer (Board Exhibit No. 2), Forklift Operator (Board Exhibit No. 3), Bulk Order Picker (Board Exhibit No. 4), Maintenance Mechanic (Board Exhibit No. 5), Belt Picker (Board Exhibit No. 6), Belt Loader (Board Exhibit No. 7), and Pallet Jack Operator (Board Exhibit No. 8). (CABR 11/6/14 Tr. pp. 23-29).

Regarding the Pallet Jack Operator position, it was Mr. Martin's opinion that this job was not one found in the labor market unless it was paired with a merchandising/driving position. (CABR 11/6/14 Tr. p. 29). But the job analysis exhibit reviewed by the expert medical witnesses and

submitted to the jury does not include any description of driving requirements. In other words, pallet jack positions require commercial driving, which Mr. Foster is precluded from performing. Ultimately, it was Mr. Martin's opinion that Mr. Foster was not capable of obtaining full-time work based upon the restrictions imposed by his double-vision. (CABR 11/6/14 Tr. pp. 30-31).

Finally, except for the Pallet Jack Operator job, there was no other testimony given regarding the existence of any labor markets for these potential transferable skill positions. The Self-Insured Employer did not present evidence of what jobs were available as a warehouseman in Mr. Foster's relevant labor market. The Self-Insured Employer did not present any evidence on whether any employer, including itself, in Mr. Foster's labor market, could accommodate the permanent work restrictions imposed by Mr. Foster's claim-related double-vision.

**4. Ability to Perform and Obtain Reasonably Continuous Gainful Employment.**

The medical testimony was unanimous that Mr. Foster cannot return to work as a long-haul truck driver, his job at injury. The medical testimony was mixed on Mr. Foster's ability to perform the seven other transferable skill positions. Dr. Wojciechowski disapproved Mr. Foster's ability to perform all of them, Dr. Shults disapproved some and questioned the remainder, and Dr. Baer approved some but not all of the transferable skill jobs.

The only vocational evidence was that Mr. Foster did not have the skills to work as a maintenance mechanic. The only vocational evidence was that Pallet Jack Operator position did not exist in Mr. Foster's labor market. The only vocational evidence was Mr. Foster had the skills to perform to the remaining transferable skill jobs, but questioned whether Mr. Foster could safely perform those jobs. No vocational evidence was presented of any employer, including the Self-Insured Employer, who would hire someone, like Mr. Foster, with double vision, poor depth perception, and inconsistent peripheral vision.

#### **5. Procedural History**

After presented the above evidence, the Industrial Appeals Judge found Mr. Foster was capable of reasonably continuous and gainful employment. Mr. Foster timely filed a Petition for Review with the Board of Industrial Insurance Appeals, which was denied and the IAJ's opinion was adopted. The key Findings of Fact adopted by the Board were:

3. Brandon Foster had no physical restrictions caused by the industrial injury, from January 30, 2014, through May 5, 2014, and as of May 5, 2014.

4. Brandon Foster was and is able to perform the jobs of construction laborer, United grocer bulk ordering picker/restocker, Frito-Lay maintenance mechanic, Frito-Lay motorized handler/belt picker, Frito-Lay material handler/belt loader and pallet jack order filler/picker from January 30, 2014, through May 5, 2014, and as of May 5, 2014.

5. Brandon Foster was able to perform and obtain gainful employment on a reasonably continuous basis from January 30, 2014, through May 5, 2014, and as of May 5, 2014.

(CABR pp. 54-55). These Findings of Fact, *inter alia*, were appealed to Clark County Superior Court by Mr. Foster and Frito Lay.

Frito Lay later dismissed its appeal and it is not a subject of the later trial and this appeal. Plaintiff filed a Motion for Summary Judgment, arguing no reasonable juror could find Mr. Foster can perform and obtain reasonably continuous gainful employment because of the lack of labor market evidence. (CP pp. 2-19). Defendant asked the Motion be denied. (CP pp. 20-46). The Court denied the motion finding questions of Mr. Foster's credibility created a genuine issue of material fact. (RP pp. 21-22; CP pp. 56-57).

The case then proceeded to trial. After the record was read to the jury and the parties rested, Plaintiff filed a Motion for Directed Verdict (Partial and Full). Plaintiff re-raised the argument made in his Motion for Summary Judgment: the absence of evidence on employers able to accommodate Mr. Foster's work restrictions is fatal to the Board's decision. (CP pp. 96-104; RP pp. 30-31).

Plaintiff also argued the Board's Finding of Fact No. 3 was wrong as a matter of law, because the unanimous medical testimony was Mr. Foster did have work restrictions related to his industrial injury. (CP pp. 96-104; RP p. 29). The Superior Court agreed and granted partial directed verdict on Finding of Fact No. 3. (CP pp. 88-90; RP pp. 44-46; Appendix A). Defendants have not appealed from this decision.

Plaintiff asked and the Court agreed that Mr. Foster was not capable of performing his job at injury, which requires a CDL. (CP pp. 96-104, 88-

90; Appendix A). The Court did not permit the jury to consider whether Mr. Foster was capable of working his job at injury. (CP pp. 88-90; RP p. 54 ln. 18-22' Appendix A). Defendants have not appealed this decision.

Next Plaintiff argued to the Court that the Board did not find Mr. Foster was capable of obtaining and performing work as a Forklift Operator in Finding of Fact No. 4. Therefore, a directed verdict should be entered and the jury asked not to decide whether Mr. Foster could obtain and perform this position. (CP pp. 96-104; RP pp. 52-53). The Superior Court agreed and excluded this job from the jury's consideration. (CP pp. 88-90; RP pp. 53-54; Appendix A). Defendants have not appealed from this decision.

Then, Plaintiff argued the jury should not consider whether Mr. Foster could obtain and perform work as a Maintenance Mechanic because the only evidence was he did not have the skills, training, or education to work this job. (CP pp. 96-104; RP p. 46). Again, the Superior Court agreed and excluded this job from consideration by the jury. (CP pp. 88-90; RP p. 47; Appendix A). Defendants have not appealed from this decision.

Plaintiff also asked the Court to exclude from the jury's consideration the Pallet Jack Operator position, because the only vocational testimony was this job does not exist in Mr. Foster's labor market. (CP pp. 96-104; RP pp. 47-48; CABR 11/6/14 Tr. pp. 29-31). The Court disagreed, denying this partial directed verdict, and allowing the jury to consider

Mr. Foster's ability to obtain and perform work as a Pallet Jack Operator. (CP pp. 88-90; RP p. 49-50; Appendix A). Plaintiff appeals this decision.

Therefore, the Court permitted (over Plaintiff's Motion for Directed Verdict) the jury to consider whether Mr. Foster could obtain and perform the following positions:

Construction Laborer;  
Bulk Ordering Picker/Restocker;  
Motorized Handler/Belt Picker;  
Material Handler/Belt Loader;  
Pallet Jack Order Filler/Picker.

(CP pp. 88-90; Appendix A). The jury affirmed the decision of the Board of Industrial Insurance Appeals finding that Mr. Foster was capable of obtaining and performing reasonably continuous and gainful employment in light of his skills, education, and experience within his relevant labor market.

Plaintiff appeals from this decision asserting the Superior Court erred in finding there is a genuine issue of material fact on whether Mr. Foster could obtain work in these positions, in light of his claim-related restrictions, within his labor market. Plaintiff also asserts the absence of evidence regarding the ability of employers to accommodate Mr. Foster's work restrictions means there is not substantial evidence supporting the jury's verdict.

#### **STANDARD OF REVIEW**

"When reviewing the Board proceedings, [the appellate court] only examine[s] 'the record to see whether substantial evidence supports the findings made after the superior court's de novo review, and whether the

court's conclusions of law flow from the findings.” *Gorre v. City of Tacoma*, 184 Wn.2d 30, 36 (2015), quoting *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5-6 (1999). “However, statutory interpretation remains a question of law [the appellate court] determine[s] de novo.” *Gorre*, 184 Wn.2d at 36, citing *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807 (2001).

As sought to have this matter decided below on a Motion for Summary Judgment, this Court should employ the same standards in determining whether there is any genuine issue of material fact presented in this case. *Tollycraft Yachts Corp. v. McCoy*, 122 Wn.2d 426, 431 (1993). The purpose of summary judgment is to avoid a useless trial. *Preston v. Duncan*, 55 Wn.2d 678, 681 (1960). A motion for summary judgment must be granted if, after considering the evidence in the light most favorable to the nonmoving party, there is no genuine issue of material fact and reasonable persons can reach but one conclusion. *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 690 (1999). A material fact is one on which the outcome of litigation depends. CR 56(c); *Fell v. Spokane Transit Auth.*, 128 Wn.2d 618 (1996).

When reviewing a directed verdict ruling, this court applies the same standard as the trial court. *Chaney v. Providence Health Care*, 176 Wn.2d 727, 732 (2013), citing *Hizey v. Carpenter*, 119 Wn.2d 251, 272 (1992). A directed verdict is appropriate if, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving

party. *Chaney*, 176 Wn.2d at 732, citing *Harris v. Drake*, 152 Wn.2d 480, 493 (2004).

## ARGUMENT

### 1. Summary of Argument.

In summary, Mr. Foster met his *prima facie* case that he was a temporary and/or permanently totally disabled worker. His *prima facie* case was made through his testimony, the testimony of Dr. Wojciechowski, and the testimony of Mr. Martin. This shifted the burden of proof to Frito Lay, Inc., to prove Mr. Foster was capable of obtaining and performing reasonably continuous gainful employment based upon a whole person analysis. *Spring v. Dep't of Labor & Indus*, 96 Wn.2d 914, 919 (1982); *Leeper v. Dep't of Labor & Indus.*, 123 Wn.2d 803, 814-15 (1994).

With the burden shifted to Frito Lay, it presented substantial evidence, primarily through Dr. Baer, that Mr. Foster could perform certain jobs. But even Dr. Baer testified that Mr. Foster had work restrictions due to his poor double vision, loss of peripheral vision, and poor depth perception. (CABR Dep. Dr. Baer p. 35, ln. 8-9). This meant Frito Lay had the burden to prove there was work Mr. Foster could obtain, in light of his skills and work restrictions. It presented no such evidence from a qualified vocational counselor.

The trial court granted partial directed verdict and only submitted the following jobs to the jury to decide whether Mr. Foster could obtain and perform them:

Construction Laborer;

Bulk Order Picker/Restocker;  
Motorized Handler/Belt Picker;  
Material Handler/Belt Loader;  
Pallet Jack Operator.

The jury concluded Mr. Foster could obtain and perform reasonably continuous and gainful employment when considering these five jobs. (CP pp. 91-92).

The trial court erred submitting this case to the jury. It erred because Frito Lay had the burden of proving there was available work for Mr. Foster in light of his work restrictions. *Spring*, 96 Wash.2d at 919. Frito Lay did not present any evidence whatsoever on whether there was available work for Mr. Foster in light of his work restrictions. The Court should set aside the jury's verdict and order the trial court to enter a judgment in favor of Mr. Foster finding he is a temporarily and permanently totally disabled worker.

Alternatively, the Court erred in submitting the Pallet Jack Operator position to the jury. (CP pp. 88-90). The only testimony was this was not a real job, by itself, found in Mr. Foster's labor market. (CABR 11/6/14 Tr. pp. 29-31). Frito Lay did not rebut this testimony. This means there was not substantial evidence Mr. Foster could obtain this job, because this Court must find no such job exists. Yet the jury was permitted to consider this position.

This error was prejudicial because the jury was asked to consider Mr. Foster's employability based upon this full set of positions. It is possible the jury could have rejected the first four positions, but found Mr. Foster capable of obtaining and finding work as a Pallet Jack Operator. If this is

the only error found by the Court, it should set aside the jury's verdict and order a new trial.

**2. Any finding Mr. Foster is employable means he can perform and obtain work in the five positions submitted to the jury; this requires evidence of Mr. Foster's labor market's ability to accommodate his restrictions.**

The Legislature has established to be entitled to time loss compensation and pension benefits, an injured worker must be totally disabled. RCW 51.32.060; RCW 51.32.090. Whether that total disability is temporary or permanent is irrelevant; the same standard of proof is used. *Bonko v. Dep't of Labor & Indus.*, 2 Wn. App. 22, 25 (1970). That standard is: whether an injured worker is capable of obtaining and performing reasonably continuous and gainful employment in light of his claim-related restrictions, pre-existing conditions, skills, education, experience, etc. *Fochtman v. Dep't of Labor & Indus.*, 7 Wn. App. 286, 295 (1972). This "is not a purely medical question. It is a hybrid quasi-medical concept in which they are intermingled in various combinations, the medical fact of loss of function and disability, together with the inability to perform and the inability to obtain work as a result of his industrial injury." *Leeper*, 123 Wn. 2d at 812 (1994). Our courts have required expert vocational testimony, in addition to medical testimony, to answer this question. *Fochtman*, 7 Wn. App. at 295-96; *Leeper*, 123 Wn.2d at 812-13, 815, 817.

The Department has enacted several regulations to apply the statute and our long-standing precedent to individual cases. First, if an injured

worker has no claim related work restrictions, then they are *per se* employable. RCW 51.32.095(2)(a); WAC 296-19A-010. The trial court below decided Mr. Foster does have claim related work restrictions and no party has challenged that determination. (CP pp. 88-90).

If the injured worker has work restrictions, then the Legislature has set forth a list of return to work priorities. RCW 51.32.095. The first handful of options involves returning to work with the employer at injury. RCW 51.32.095(2)(b)-(d). The record is silent on whether Frito Lay, the employer at injury, was willing or able to accommodate Mr. Foster's work restrictions. Therefore, no reasonable juror can conclude Mr. Foster could obtain work with Frito Lay.

Next, the statute provides for finding work with a new employer. RCW 51.32.095(2)(e)-(h). An essential element of making this determination is the transferable skills analysis because it identifies the skills of the injured worker, the skills required by the labor market for prospective employees, and whether employers can accommodate the injured worker's work restrictions. WAC 296-19A-065 and WAC 296-19A-070 provide the rules for assessing transferable skills, which must be done within the context of an injured worker's labor market. WAC 296-19A-140 provides rules for surveying a worker's labor market.

The point of these regulations is it is not sufficient to merely prove Mr. Foster has the skills, training, and experience to perform other jobs for new employers. What is required is specific evidence, specific vocational opinion based upon credible data (labor market survey), that there are

sufficient employers willing and able to hire workers similar to the injured worker. What is required is specific evidence the injured worker can obtain work. This record does not have such specific evidence, except for Mr. Martin's testimony about the Pallet Jack Operator position. (See below).

Our statute, case law, and regulations all require vocational evidence there are employers who will hire someone like Mr. Foster. These require evidence there are employers who will accommodate employees in a warehouse or construction site who have poor depth perception, loss of peripheral vision, and intermittent double-vision. Without such evidence, there is not substantial evidence that Mr. Foster can obtain reasonably continuous employment. Without this substantial evidence, this case should not have been submitted to the jury.

Without substantial evidence Mr. Foster can obtain reasonably continuous employment, then he is a temporarily and permanently totally disabled worker. In summary, Mr. Foster need only prove he cannot obtain or perform work to prevail. Frito Lay must prove he can obtain and perform work to prevail.

The Court must set aside the judgment of the trial court. The trial court erred in denying Plaintiff's Motion for Direct Verdict because there is no substantial evidence to support a finding Mr. Foster is capable of obtaining employment. This Court must instruct the Clark County Superior Court to enter a judgment in favor of Mr. Foster that he is temporarily and permanently totally disabled.

**3. Mr. Foster's credibility is not relevant to whether there are employers in his labor market who are willing to hire workers with his set of skills and his work restrictions.**

Plaintiff anticipates that Defendants will argue Mr. Foster's credibility always creates genuine issues of material fact sufficient to defeat a motion for directed verdict. Defendants will likely point to the surveillance videos, which are not part of this appellate record. However, Defendant's arguments fail because of its choices to dismiss its cross-appeal in Superior Court and to not appeal the trial court's order granting partial directed verdict.

The Board's Finding of Fact No. 7 states, "Medical findings of 20/25-2 diminution of the left eye visual acuity with intermittent exotropia and diplopia support a permanent partial disability award." Neither the Plaintiff nor Defendants challenged this Finding of Fact. Unchallenged findings of fact are verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644 (1994).

Furthermore, the trial court found on directed verdict that no reasonable juror could conclude Mr. Foster could return to work at his job at injury. (CP pp. 88-90). There was no credible evidence presented that Mr. Foster could operate a fork lift; the trial court excluded it from consideration. (CP p. 88-90). The only legal conclusion that can be reached from the combination of unchallenged decisions from the Board and Superior Court is that Mr. Foster does have claim-related work restrictions, regardless of any aspersions on his credibility.

As argued above, once Mr. Foster is found unable to return to his job at injury, then there must be evidence that either Frito Lay would hire him in another position, with accommodations, or other employers would do the same. RCW 51.32.095; WAC 296-19A-010. Whether or not employers would hire Mr. Foster is not a question of Mr. Foster's credibility. Mr. Foster's credibility is no longer a relevant factor for deciding his Motion for Directed Verdict.

What remains is the mixed question of law and fact of the extent of those restrictions. However, physical work restrictions require expert medical testimony. *Leeper, supra*. Viewing the evidence in the light most favorable to Frito Lay, Dr. Baer's testimony provided the lowest level of work restrictions: unable to do jobs requiring depth perception. (CABR Dep. Dr. Baer p. 35, ln. 8-9). To reject even these restrictions because of allegations of poor credibility requires this Court to simply throw out all work restrictions, which it legally cannot. Instead, the Court must accept there is some level of work restrictions associated with poor depth perception, loss of peripheral vision, and intermittent double vision.

If the Court must accept that Mr. Foster has work restrictions, it must then determine whether there is substantial evidence that Mr. Foster can obtain employment in light of those restrictions. The Court then must decide whether there is substantial evidence of a sufficient labor market to find Mr. Foster can obtain employment. But there is no evidence of whether Mr. Foster has the right skills being sought by employers in his labor market. More importantly, there is no evidence whatsoever that any

employer can accommodate the least of his restrictions: poor depth perception.

For the finder of fact to conclude employers can accommodate requires speculation not inference. Inference means there is evidence from which a juror could deduce a reasonable conclusion. Speculation means wild guessing based on no data. A reasonable juror is not allowed to speculate, “Surely, there must be someone out there who operates a warehouse or construction company who would hire Mr. Foster.” Instead, the record must contain evidence about Mr. Foster’s labor market, but it does not.

Presently, we have no data and no substantial evidence that Mr. Foster can obtain work. The Court should set aside the jury’s verdict. Instead, it should find Mr. Foster is not employable as defined by the Industrial Insurance Act.

**4. The trial court’s analysis for denying directed verdict, complete or partial, is not supported by the law or evidence.**

The trial court’s decision to deny directed verdict was faulty in two major respects. First, the Court’s analysis on whether there was substantial evidence to support submitting the Pallet Jack Operator job to the jury was wrong. Second, the Court’s analysis on whether there was substantial evidence that Mr. Foster could obtain and perform reasonably continuous gainful employment in general was wrong.

**a. There is no Pallet Jack Operator job, *per se*, in Mr. Foster's labor market; there is no evidence any employer would let Mr. Foster drive a company vehicle with poor depth perception.**

As argued above, except for Mr. Martin's testimony regarding the Pallet Jack Operator position, there is no evidence on Mr. Foster's labor market. Mr. Martin testified the Pallet Jack Operator position does not exist in Mr. Foster's labor market. (CABR 11/6/14 Tr. pp. 29-31). Mr. Martin testified it was "possible" that Mr. Foster could perform this job, "possible" does not meet our standard of proof requiring opinions based upon probability. (CABR 11/6/14 Tr. p. 29; RP p. 50); *Sacred Heart Med. Ctr. v. Dep't of Labor & Indus.*, 92 Wn.2d 631 (1979); *Zip v. Seattle School District*, 36 Wn. App. 598 (1984); *see also, Grimes v. Lakeside Indus.*, 78 Wn. App. 554, 561 (1995). Yet the trial court ruled a "possible" expert opinion is legally sufficient evidence to submit to the jury. (RP p. 50, ln. 15-24).

Most importantly, Mr. Martin testified this job required driving a non-commercial vehicle, which no doctor was asked to comment upon. (CABR 11/6/14 Tr. p. 29). In other words, the record is silent on medical approval for doing the other aspects of the job, as it actually exists in the labor market; aspects which is not reflected in the job analysis reviewed by the doctors and given to the jury.

Regardless, Mr. Martin testified employers would have significant insurance/liability issues that would need to be resolved, even if Mr. Foster were medically released. (CABR 11/6/14 Tr. p. 30). Just because

Mr. Foster testified he limitedly drives his own personal vehicle does not support an inference that a potential employer would permit operation of a company vehicle. Again, Mr. Foster's credibility and abilities is distinct from what employers in his labor market are able to accommodate.

Also, there is no evidence in this record if Mr. Foster maintains personal liability insurance, let alone whether employers could insure Mr. Foster. Frito Lay presented no labor market evidence stating there were employers willing to let Mr. Foster drive their non-commercial vehicles with his double vision. It was Defendant's burden to present such evidence. Therefore, the trial court erred in finding substantial evidence to support consideration of this position by the jury.

This error was prejudicial. It was prejudicial because the jury could have rejected the other four jobs, yet found Mr. Foster could perform and obtain work as a Pallet Jack Operator. The only way submitting this job to the jury would not be prejudicial is if we knew they rejected it as a basis for affirming the Board. But we cannot know this because the jury was not asked, in the verdict form, to separately find on each job. Instead, it was asked to collectively determine Mr. Foster's ability to obtain and perform based upon all five positions together.

**b. The Court's analysis of whether a reasonable juror could find Mr. Foster was employable was fundamentally flawed.**

All of the expert testimony and evidence presented was focused on the specific job analyses. The medical experts were asked about Mr. Foster's ability to perform those jobs. The experts testified about his

ability to perform jobs, as well as providing other, general work restrictions based upon Mr. Foster's double vision. Mr. Martin testified about Mr. Foster's transferable skills. As argued multiple times, Mr. Martin did not testify about Mr. Foster's labor market (except for Pallet Jack Operator). No evidence was presented there were employers out there who would hire Mr. Foster in light of skills and accommodate his injury-imposed work restrictions.

Judge Gonzales, in denying Mr. Foster's Motion for Directed verdict, based his opinion on the following facts:

- Evidence of Mr. Foster going into a Koi Pond business where a barricade was being built. (RP p. 56, ln. 20-25).
- Evidence of Mr. Foster manipulating lumber at Home Depot. (RP p. 57, ln. 1-9).
- Evidence of Mr. Foster carrying a bag of tools into a restaurant in Sandy, Oregon, and holding a plumbing fixture. (RP p. 57, ln. 10-16).

Judge Gonzales concluded, based upon this recitation of the evidence, "Again the inference was that he could be employed as a handyman by way of the work that he was doing based upon the testimony of the investigator and their observations."

While Judge Gonzales is correct the reasonable inference from this evidence is that Mr. Foster perform work as a handyman, which is not the complete, necessary analysis. Dr. Baer's approval of the

Construction Laborer job would also support an inference that Mr. Foster could perform work as a handyman.

What the trial court missed is whether this evidence supports a reasonable inference that Mr. Foster could obtain work as a handyman. It is not sufficient that Mr. Foster could perform work, there must also be evidence he can obtain employment. No reasonable inference can be made on whether Mr. Foster can obtain work, absent speculation, because there was no evidence regarding Mr. Foster's labor market.

No juror can simply assume there are employers out there who will accommodate Mr. Foster's poor depth perception, lack of peripheral vision, and intermittent double vision. The finder of fact cannot make any assumptions about who will hire Mr. Foster because the Court must accept as true that Mr. Foster has claim-related work restrictions. Any finding there "must be" employers who will accommodate Mr. Foster's restrictions is rank speculation.

Speculation is not substantial evidence. Without substantial evidence of Mr. Foster's labor market, he cannot be found capable of obtaining work. If he cannot obtain work, then he is temporarily and permanently totally disabled per RCW 51.32.090 and RCW 51.32.060. The verdict of the jury, decision of the Board, and order of the Department must all be reversed.

**c. Conclusion.**

The failure of the record is fatal to Defendant's case. It is fatal because the shifted burden rests upon the Defendant to either prove

Mr. Foster has no restrictions (which it did not) or that Mr. Foster is capable of obtaining and performing work. *Spring*, 96 Wn.2d at 919. Evidence of an ability to perform, despite restrictions, is not evidence of an ability to obtain. Without evidence of his ability to obtain, this Court must conclude Mr. Foster is not capable of obtaining and performing reasonably continuous gainful employment. This Court must reverse the judgment of the trial court.

**5. Reasonable Attorney Fees and Costs.**

If the Court of Appeals finds in favor of Mr. Foster he is entitled to reasonable attorney fees and costs pursuant to RCW 51.52.130. RAP 18.1. This case involves a Self-Insured Employer, which means there is no requirement this appeal affect the State's accident fund. *Johnson v. Tradewell Stores*, 95 Wn.2d 739 (1981). Furthermore, the *Brand* Court held that it does not matter whether or not the injured worker prevailed on all issues. So long as he prevailed on at least one issue on appeal, all attorney fees are payable. *Brand v. Dep't of Labor & Indus.*, 139 Wn.2d 659, 674 (1999).

In *Cowlitz Stud Co. v. Clevenger*, 157 Wn.2d 569, 577 (2006), the Supreme Court awarded attorney fees where an injured worker appealed the trial court's grant of summary judgment. Like the present case, it involved a self-insured employer. Also, it resulted in the appeal being remanded to the trial court for a new trial.

Then there is the case of *Chuynk & Conley/Quad-C v. Bray*, 156 Wn. App. 246 (2010), where the injured worker appealed over failure to give a jury instruction. This case also involved a self-insured employer. The Court of

Appeals agreed the failure to give the instruction was prejudicial error and remanded the case for a new trial. *Id.* at 248. The Court awarded the injured worker attorney fees, per RCW 51.52.130, for prevailing on appeal. *Id.* at 256.

### **CONCLUSION**

There is not substantial evidence to support this verdict. The legal standard to deny further time loss benefits and a pension is evidence that Mr. Foster was capable of obtaining and performing reasonably continuous and gainful employment. Mr. Foster presented evidence the he was not capable of performing any employment.

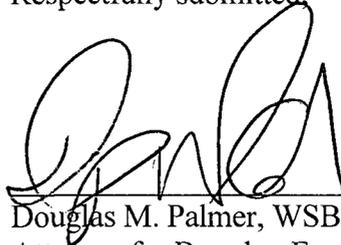
The burden then shifted to Frito Lay to prove Mr. Foster could obtain and perform reasonably continuous employment. Frito Lay presented evidence Mr. Foster could perform certain specific employments (the job analyses). Frito Lay presented no evidence that Mr. Foster could obtain employment in his labor market and within his restrictions.

The trial court erred when it denied Plaintiff's Motion for Directed Verdict. The Court found the evidence supports a reasonable inference Mr. Foster could perform work as a handyman. But the Court did not specifically find, nor is there substantial evidence to support a finding, there were employers in Mr. Foster's labor market who would hire someone with poor depth perception, loss of peripheral vision, and intermittent double vision. Therefore, the judgment should be set aside with instructions to enter a further judgment setting aside the decision of the Board of Industrial Insurance Appeals, awarding further time loss compensation and placing Mr. Foster on the pension rolls.

In the alternative, this Court should order a new trial. It was prejudicial error to submit the Pallet Jack Operator position to the jury. This Court should set aside the verdict of the jury and order retrial with instructions not to submit the Pallet Jack Operator position for consideration of Mr. Foster's employability.

Dated: December 22, 2016.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'D. Palmer', written over a horizontal line.

Douglas M. Palmer, WSBA No. 35198  
Attorney for Brandon Foster  
Appellant/Plaintiff

**APPENDIX A**

*Clark County Superior Court's Order on  
Parties' Motions for Directed Verdict*

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF CLARK

BRANDON S. FOSTER, ) No. 15-2-01211-1  
Plaintiff, )  
v. ) [PROPOSED]  
FRITO LAY INC., ) ORDER ON PARTIES' MOTIONS FOR  
Defendant(s). ) DIRECTED VERDICT

COMES NOW, Clark County Superior Court, after receiving Plaintiff's written Motion for Directed Verdict, Plaintiff's written Alternative Motion for Partial Directed Verdict, Defendant's oral Motion for Partial Directed Verdict on the issue of the Board of Industrial Insurance Appeals' 20% PPD award and after completion of presentation of the evidence to the jury, and

AFTER hearing the evidence presented and considering argument made by the parties, the Court finds there is legally sufficient evidence upon which relief may be granted and upon which the decision of the Board of Industrial Insurance Appeals may be affirmed;

THE COURT FINDS that no reasonable juror may conclude that Mr. Foster can work as an OTR Bin Driver because Mr. Foster is unable to obtain his CDL because of his industrial injury;

THE COURT FINDS, the Board of Industrial Insurance Appeals did not specify in its Findings of Fact that Mr. Foster was capable of obtaining and performing work as an OTR Bin Driver and that no party has challenged this omission in its appeal to this Court;

///  
///

1 THE COURT FINDS, the Board of Industrial Insurance Appeals did not specify in its Findings  
2 of Fact that Mr. Foster was capable of obtaining and performing work as a Bulk Loader/Forklift  
3 Operator and that no party has challenged this omission in its appeal to this Court;

4 THE COURT FINDS, there is no legally sufficient vocational evidence to affirm the Board of  
5 Industrial Insurance Appeals' Finding of Fact that Mr. Foster was capable of obtaining work as a  
6 Maintenance Mechanic because the only evidence presented, by Mr. Martin, concluded he did not  
7 possess the skills, education, knowledge or experience to obtain such employment;

8 THE COURT FINDS, there is legally sufficient evidence to deny Plaintiff's Motion for Partial  
9 Directed Verdict because a reasonable juror could conclude that Mr. Foster was capable of obtaining and  
10 performing work as a Pallet Jack Operator;

11 THE COURT FINDS, there is legally sufficient lay, medical and vocational evidence to deny  
12 Plaintiff's Motion for Directed verdict because a reasonable juror could conclude, based on the evidence  
13 presented, that Mr. Foster was capable of obtaining and performing reasonably continuous and gainful  
14 employment as a Construction Laborer, Bulk Order Picker/Restocker, Motorized Handler/Belt Picker,  
15 Material Handler/Belt Loader, and Pallet Jack Order Filler/Picker.

16 THE COURT FINDS, there is legally sufficient lay and medical evidence to deny Defendant's  
17 Motion for Partial Directed Verdict because a reasonable juror could decide that Dr. Shults' rating was  
18 influenced by bias against Mr. Foster and could be higher than 20%.

19 THE COURT CONCLUDES the Board of Industrial Insurance Appeals was incorrect in  
20 deciding Mr. Foster had no physical restrictions caused by the industrial injury;

21 THE COURT CONCLUDES the Board of Industrial Insurance Appeals was incorrect in  
22 deciding Mr. Foster was capable of performing the job of Maintenance Mechanic;

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FILED  
COURT OF APPEALS  
DIVISION II

2016 DEC 27 AM 9:45

IN THE COURT OF APPEALS DIVISION II  
OF THE STATE OF WASHINGTON

BRANDON FOSTER,	)	COA No. 49475-2-II
	)	
Appellant,	)	
	)	PROOF OF SERVICE
v.	)	
	)	
FRITO LAY, INC.,	)	
	)	
Respondent.	)	
_____	)	

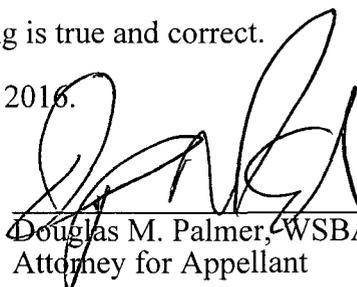
The undersigned states that on December 22, 2016, I served via US Mail, as indicated below, Brief of Appellant, as attached, addressed as follows:

Gary D. Keehne  
Keehne Kunkler, PLLC  
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Anastasia Sandstrom, AAG  
Attorney General of Washington  
800 - 5th Avenue, Suite 2000  
Seattle, WA 98104-3188

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

Dated: December 22, 2016.



\_\_\_\_\_  
Douglas M. Palmer, WSBA No. 35198  
Attorney for Appellant