

**FILED**

**AUG 30 2011**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 300102

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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SANDRA ARTIACH,  
*Respondent,*

v.

GMRI/DARDEN RESTAURANTS,  
*Appellant.*

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Brief of Appellant

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Michael P. Graham, WSBA#37391  
Jonathan James, WSBA#38285  
EIMS & FLYNN, P.S.  
Grand Central on the Park  
216 First Ave. S., Ste. 310  
Seattle, WA 98104  
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**Appendix**

Decision on Industrial Insurance Appeal

## I. INTRODUCTION

This is an appeal under the Industrial Insurance Act, Title 51 RCW. The self-insured employer, GMRI Inc./Darden Restaurants (Darden), appeals from a Yakima County Superior Court decision. After a bench trial, the Superior Court reversed the decisions of both the Board of Industrial Insurance Appeals (Board) and the Department of Labor and Industries (Department) which had determined that Ms. Artiach's left hand condition was medically fixed as of October 23, 2006, that she did not have a psychiatric condition proximately related to her claim, and that she was not entitled to further time loss compensation or pension benefits. Darden requests review because the trial court's conclusions, most notably the one awarding her a pension, are not supported by substantial evidence and are inconsistent with both its own findings and the law.

First, the **only** expert to testify that Ms. Artiach was unable to work in any capacity was her forensic psychiatrist, Dr. Williams, who opined that she was permanently and totally disabled (i.e. entitled to a pension) based on psychiatric diagnoses. Strangely, however, the trial court, like the Board before it, rejected the diagnoses from Dr. Williams and found that Ms. Artiach did **not** have any psychiatric conditions related to her industrial injury. All other testifying experts, including Ms. Artiach's attending physician, Dr. Kite, testified that she could work in some

capacity. Thus, the trial court's conclusion that Ms. Artiach is permanently and totally disabled does not flow from its own findings of fact nor is it supported by substantial evidence.

Second, to establish entitlement to time loss compensation and/or pension benefits, Ms. Artiach had the burden of proving an inability to perform light or sedentary work of a general nature. Outside of the discredited opinion of Dr. Williams, Ms. Artiach did not present any evidence of an inability to perform light or sedentary work of a general nature. Rather, she tried to improperly shift the burden of proof and prove her entitlement to time loss and/or pension benefits simply by showing that she could not perform work at three positions identified by Darden's vocational expert. However, while the trial court ultimately concluded that she was unable to work in any capacity and therefore entitled to both additional time loss compensation and a pension, the court's findings only support an inability to work at the three specific jobs, not an inability to perform light or sedentary work of a general nature. Not only did Ms. Artiach not meet her burden of proof, but the trial court's conclusions of law are not supported by substantial evidence or the court's own findings.

Third, the court erred because under RCW 51.32.090(4)(a) as well as *O'Keefe v. Dep't of Labor & Indus.* and *Glacier Northwest v. Walker*, Ms. Artiach is precluded from receiving time loss compensation since she

returned to a physician-approved modified duty position with her employer but was subsequently terminated for cause.

Finally, the trial court's determination that Ms. Artiach is both permanently partially disabled and permanently totally disabled is inconsistent and incorrect as a matter of law since an injured worker cannot be classified as both at the same time.

For the above reasons, Darden requests that this Court review and reverse the trial court's decision in this matter and affirm the decisions of the Board and Department as correct.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court erroneously reversed the October 23, 2006 order of the Department of Labor and Industries which closed Ms. Artiach's workers' compensation claim with an award for permanent partial disability of 8% for her left upper extremity and ended time loss compensation as paid through November 29, 2004. Conclusion of Law No. 6. The trial court's determination is unsupported by substantial evidence and is inconsistent with the law and the facts.

2. The trial court's Finding of Fact No. 4 is not supported by the record in that substantial evidence does not establish that Ms. Artiach has left arm or wrist pain increases with greater use.

3. The trial court's Finding of Fact No. 6 is unsupported by

the record in that substantial evidence does not establish that Ms. Artiach does not have sufficient use of her left arm to perform employment as a restaurant hostess, clerk or apparel stocker; cannot perform some or all functions of a restaurant hostess on a full or near full time basis; and that there is not full or near full time employment as a restaurant hostess available to Ms. Artiach or that will reasonably be available in the foreseeable future.

4. The trial court's Finding of Fact No. 7 is unsupported by the record in that substantial evidence does not establish that Ms. Artiach is not exaggerating her condition or that her pain levels and limitations on range of motion or grip strength vary.

5. The trial court's Finding of Fact No. 9 and Conclusion of Law No. 3 are unsupported by the record in that the record does not establish, either through substantial evidence or as a matter of law under RCW 51.32.090, that Ms. Artiach was precluded by the residuals of the industrial injury from engaging in reasonably continuous, gainful employment between November 30, 2004 and October 23, 2006.

6. The trial court's Finding of Fact No. 10 and Conclusion of Law No. 4 are erroneous as a matter of law only to the extent that they award Ms. Artiach permanent partial disability in addition to permanent and total disability benefits (see Finding of Fact No. 11 and Conclusion of

Law No. 5).

7. The trial court's Finding of Fact No. 11 and Conclusion of Law No. 5 are erroneous to the extent that they award Ms. Artiach permanent and total disability benefits in addition to permanent partial disability benefits (see Assignment of Error No. 6). Finding of Fact No. 11 and Conclusion of Law No. 5 are also unsupported by the record in that the record does not establish, either through substantial evidence or as a matter of law, that Ms. Artiach was precluded by the residuals of the industrial injury from engaging in reasonably continuous, gainful employment for the foreseeable future and is totally and permanently disabled pursuant to RCW 51.32.160.

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did the trial court err in finding Ms. Artiach temporarily and permanently totally disabled where substantial evidence did not support such a determination, Ms. Artiach did not meet her burden of proving entitlement to such benefits by a preponderance of competent, credible evidence, and the trial court's conclusions of law did not flow from its findings of fact? (Assignment of Error 1, 3, 5 7).

2. Did the trial court err in finding Ms. Artiach temporarily and permanently totally disabled where RCW 51.32.090 precludes her from obtaining such benefits after she has returned to modified work and

is subsequently terminated for cause pursuant to *O'Keefe* and *Glacier Northwest*? (Assignment of Error 1, 3, 5, 7)

3. Did the trial court err where substantial evidence does not support the finding that Ms. Artiach does not have sufficient use of her left hand to perform employment, experiences pain when she uses her left arm or wrist and that the pain is greater with greater or more extended use? (Assignment of Error 2, 3).

4. Did the trial court err where substantial evidence does not support the finding that Ms. Artiach's pain levels and limitations on range of motion and grip strength vary from day to day, that her abilities may exceed those demonstrated to doctors, but that she is not exaggerating her condition overall? (Assignment of Error 4).

5. Did the trial court err as a matter of law in determining that Ms. Artiach is simultaneously entitled to both permanent partial disability and permanent total disability benefits where an injured worker cannot receive both types of benefits under the same claim? (Assignment of Error 6).

#### **IV. STATEMENT OF THE CASE**

This is Darden's appeal from the May 20, 2011 trial court decision in which the court reversed prior determinations by the Board of Industrial Insurance Appeals and Department of Labor and Industries which found

that Ms. Artiach's industrially-related left hand condition did not require further medical treatment, that she did not have a psychiatric condition related to her claim, that she was not temporarily or totally permanently disabled under her claim, and that she had permanent partial disability (PPD) of 8% of the amputation value of her left arm. CP 31-33; Appendix A.

The claim was initially filed by Ms. Artiach for an injury to her left hand after slipping and falling at work on June 26, 2002. Certified Appeal Board Record (CABR) 19.<sup>1</sup> She was a prep cook for Red Lobster (owned by GMRI Inc./Darden Restaurants) at the time. Tr. 9/20/07 at 6. She received medical treatment from Dr. Kite, a family and occupational medicine physician who served as Ms. Artiach's attending physician under the claim. Kite Dep. at 5, 29. He and other practitioners in his office began treating Ms. Artiach as of July 2, 2002. *Id.* at 7. Dr. Kite diagnosed her with a left wrist triangular fibrocartilage complex tear suffered as a result of the industrial injury. *Id.* at 28.

Ms. Artiach returned to Red Lobster in the position of hostess a couple of months after her injury. Tr. 9/20/07 at 11-12. However, she

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<sup>1</sup> The CABR contains the transcript of the hearing before the Board, as well as the deposition transcripts of the testifying experts. References to testimony at the Board hearing is by date of the hearing and page number of the transcript. *E.g.*, Tr. 9/20/07 at 8. Deposition testimony will be referenced by name of the deponent and page number. *E.g.*, Barnard Dep. at 10.

claimed difficulty with that position due to an inability to hold restaurant menus with her left hand. *Id.* She was subsequently moved to a greeter position but had difficulty with that as well. *Id.* at 13. Ms. Artiach testified that, in contrast to the hostess position, the greeter position simply required her to greet people who came in. *Id.* at 30-31. She admitted that as a greeter she did not have to handle menus. *Id.* at 31. Ms. Artiach testified that she performed the greeter position for approximately three months. *Id.*

By July 8, 2004, Dr. Kite felt that her left wrist condition was at maximum medical improvement and that no further curative treatment measures were necessary. Kite Dep. at 43. On August 20, 2004, he approved a return to work at a modified duty hostess position. *Id.* at 44. In September 2004, John Ostler, general manager of the Red Lobster store, prepared a job offer to Ms. Artiach for a modified-duty hostess position. Tr. 10/2/07 at 14. Mr. Ostler testified that the position simply required her to answer phones and greet guests as they came through the door but did not require her to carry menus. *Id.* As of September 14, 2004, Ms. Artiach returned to work after accepting the modified-duty hostess position offered by Red Lobster. Tr. 9/20/07 at 36-37.

However, immediately after her return to work there was a period where she missed 20 or more of 45 scheduled days of work. Tr. 10/2/07 at

14. Mr. Ostler testified that after discussing her performance with her in November 2004 she never returned to work. *Id.* at 15. He further stated that he sent two written warning letters but that she never returned and was subsequently terminated. *Id.* at 15-17. Mr. Ostler testified that, except for her termination for high absenteeism, there would be a hostess position available to her. *Id.* at 21.

Time loss compensation was ended as of November 29, 2004 and Ms. Artiach's claim was ultimately closed by Department order dated October 23, 2006. CABR at 22. Ms. Artiach appealed the Department's October 23, 2006 order, seeking further treatment, time loss compensation, increased permanent partial disability (PPD), or a pension. CABR at 24-25. She also sought benefits for an alleged mental health condition in addition to her left hand injury. *Id.* Hearings were held before the Board in September and October 2007.

At hearing, Ms. Artiach testified that she could not perform the hostess position on a full-time basis due to limitations with her left hand. Tr. 9/20/07 at 15-16. She further testified that she could not do constant lifting and pulling out of chairs, although she did not specify how that would be a problem physically. *Id.* In the end, she indicated that she would not go back to a hostess job because she would not be able to hold the menus and seat people. *Id.* at 25-26.

With respect to the alleged requirement that menus be carried in the left hand, Mr. Ostler testified that it was not true and that he was unaware of any training, policy or requirement that the menus be put in one hand versus the other. Tr. 10/2/07 at 18. Further, the modified-duty position offered to Ms. Artiach only required her to answer phones and greet guests, but did not require her to carry menus. *Id.* at 14.

As far as her physical restrictions, Dr. Kite testified that she could lift, push, and pull up to 5 pounds with her left hand on an occasional basis. Kite Dep. at 29-30. He also limited her to occasional grasping and handling with her left hand. *Id.* In October 2005, Dr. Kite signed a statement indicating that Ms. Artiach could perform the modified hostess position on a full-time basis. *Id.* at 29.

Surveillance of Ms. Artiach was conducted in June 2007 by private investigator Lily Conant. Tr. 10/2/07 at 30, 33. Ms. Conant testified that she observed Ms. Artiach putting up umbrellas, changing water hoses, carrying rakes and shovels, pulling a rototiller out of a shed, and doing other activities with what appeared to be full movement of her left arm and wrist. *Id.* at 37, 39.

In August 2007, after reviewing the surveillance video from June 2007, Dr. Kite approved the positions of apparel clerk and cashier. Kite Dep. at 30. However, after questioning from Ms. Artiach's attorney at his

deposition on October 2, 2007, Dr. Kite subsequently changed his opinion and no longer felt that Ms. Artiach could perform the positions of apparel clerk and cashier. *Id.* at 30-31. His change in opinion was solely premised on the assumption that Ms. Artiach testified the umbrella she lifted weighed between three and five pounds and that the rototiller she moved weighed between eight and ten pounds. *Id.* at 31.

When asked by defense counsel whether he still agreed that she could perform the modified-duty hostess position, Dr. Kite indicated that she could have performed the hostess position on a reasonably continuous basis from November 29, 2004 forward. With respect to the cashier and apparel clerk positions, Dr. Kite indicated that, although he had not seen her since November 2004 and had felt she could perform those positions as recently as August 2007, his opinion as of his deposition in October 2007 was that he had “reservations” about her ability to work at those positions on a full-time basis. *Id.* at 58-60. However, Dr. Kite also agreed that Ms. Artiach’s estimate of the weight of the patio umbrella was speculative and that her estimate could be skewed by her own motivations. *Id.* at 55, 57. In addition, he testified that, after reviewing the videotape, Ms. Artiach’s actions on the video were inconsistent with her stated limitations and led him to feel that she was capable of more than she presented herself as able to do. *Id.* at 55-56. He also felt that she had not

been entirely truthful in representing her limitations and condition. *Id.*

Testimony from two board-certified orthopedic surgeons, Dr. Beshlian and Dr. Barnard, was also presented. Dr. Barnard saw Ms. Artiach for two separate independent medical examinations, the first on December 17, 2003 and the second on August 17, 2004. Barnard Dep. at 9, 26-27. Dr. Barnard noted several inconsistencies during his physical examination of Ms. Artiach, including the fact that she displayed full range of motion in her wrist despite her complaints of loss of motion. *Id.* at 17. He also noted that grip strength in her left hand was zero, which Dr. Barnard indicated would be equivalent to someone who had a completely flaccid or totally paralyzed hand, which she did not. *Id.* at 20. Further, when a Tinel's test of her left wrist was performed she complained of pain on the back of her wrist, which was completely inconsistent according to Dr. Barnard as such testing should have produced symptoms on the opposite side. *Id.* at 21. Dr. Barnard diagnosed her with a left wrist triangular fibrocartilage tear. *Id.* at 25-26. As of December 2003 he felt that she could perform gainful employment on a reasonably continuous basis with limitation on repetitive activities with her left hand. *Id.* at 26.

During his second examination in August 2004 Dr. Barnard again noted inconsistent findings. *Id.* at 30. For instance, Ms. Artiach exhibited giveaway weakness, which Dr. Barnard explained is an abnormal finding

that is nonphysical. *Id.* at 32-33. In addition, the sensory examination was inconsistent with nerve patterns. *Id.* at 33. He also considered her grip strength and range of motion to be invalid given her physical findings. *Id.* at 30-31. Finally, Dr. Barnard testified that during his IME, Ms. Artiach indicated that she could not lift anything and demonstrated grip strength equivalent to a two-year old, yet on the surveillance videotape she was capable of doing activities requiring far more than the zero or two kilograms of grip strength that she demonstrated during his examinations of her. *Id.* at 37, 43-45.

Dr. Barnard again diagnosed her with a TFC tear, but testified that one can have a TFC tear and still function without pain. *Id.* at 39. He further noted that many people have a TFC tear and do not have surgery or ongoing complaints from it. *Id.* Ultimately, it was Dr. Barnard's conclusion that Ms. Artiach's left wrist condition did not require further treatment and that she was capable of engaging in reasonably continuous gainful employment from November 29, 2004 forward. *Id.* at 40-41.

Dr. Beshlian is an orthopedic hand surgeon who examined Ms. Artiach on August 23, 2005. Beshlian Dep. at 5, 10. Dr. Beshlian testified that at the time of her examination Ms. Artiach reported diffuse pain complaints throughout her left hand and wrist. *Id.* at 14. On examination, Dr. Beshlian noted several inconsistencies, including the fact

that when she felt Ms. Artiach's left wrist with light to moderate touch she gasped in pain but when Ms. Artiach was observed rubbing her own left wrist in the same area there was no sign of pain. *Id.* at 18. Dr. Beshlian also noted inconsistencies with Ms. Artiach's range of motion which was quite limited when tested but showed more range when simply being observed during other portions of the examination. *Id.* Finally, Dr. Beshlian indicated that Ms. Artiach was not able to hold the grip strength tester gauge or pinch strength device with her left hand so measurements were not able to be taken. *Id.* at 22-23.

While Dr. Beshlian also diagnosed Ms. Artiach with a left wrist TFC tear, it was her opinion that there was nothing on examination that would point to the TFC tear as a significant source of her pain complaints. *Id.* at 25-26. She explained that TFC tears can often occur in wrists that are not symptomatic and that evidence of a TFC tear must correlate with physical examination findings and the patient's complaints to determine whether it is causing the pain and requires treatment. *Id.* at 26. Dr. Beshlian testified that Ms. Artiach's symptoms were not consistent with a TFC tear because she reported tenderness everywhere in her wrist and not just the area of the TFC. *Id.* at 26.

Dr. Beshlian ultimately concluded that Ms. Artiach's left wrist condition was medically fixed and stable with 8% PPD and that she was

capable of performing the hostess, cashier and apparel clerk positions up to claim closure in October 2006. *Id.* at 25, 27, 33-34.

Testimony was also received from two psychiatrists, Dr. Williams and Dr. Vandebelt. Dr. Williams saw Ms. Artiach for a one time independent medical evaluation on May 8, 2007 at the request of her attorney. Williams Dep. at 8. He diagnosed her with pain disorder and adjustment disorder with depressed mood, both of which he related to her industrial injury. *Id.* at 32-33. He also felt that she had permanent mental health impairment equivalent to Category 3. *Id.* at 33-34. Due to his psychiatric diagnoses, it was his opinion that Ms. Artiach was not able to perform **any** reasonably continuous gainful employment between November 30, 2004 and October 30, 2006 or from October 30, 2006 forward. *Id.* at 35-36, 45.

Like Dr. Williams, Dr. Vandebelt also examined Ms. Artiach well after the Department order closing her claim. This was on August 23, 2007. Vandebelt Dep. at 13. In his opinion she did **not** have a psychiatric condition that was caused or aggravated by her industrial injury. *Id.* at 61-62. It was his further opinion that she did not have any work restrictions from a psychiatric standpoint and was capable of engaging in reasonably continuous gainful employment from November 29, 2004 forward. *Id.* at 63.

The final person to testify was Darden's vocational expert, Shuji Yamamoto. On November 15, 2005, Mr. Yamamoto prepared a vocational report after reviewing Ms. Artiach's medical records and meeting with John Ostler, a manager at Red Lobster. Yamamoto Dep. at 8-10. As of that time it was Mr. Yamamoto's opinion that Ms. Artiach was employable as a hostess based on a supportive labor market. *Id.* at 11-12. He further testified that in his professional opinion she would have been able to perform the hostess position as of November 29, 2004 and again as of October 23, 2006. *Id.* at 17. Finally, Mr. Yamamoto testified that Ms. Artiach could perform the positions of apparel clerk and cashier based on transferable skills. *Id.* at 21-24.

## V. ARGUMENT

### A. Scope and Standard of Review

Appellate review of decisions made by the Board of Industrial Insurance Appeals is governed by RCW 51.52.115, which provides that the findings and decision of the Board are *prima facie* correct. RCW 51.52.115. Thus, the party challenging the findings of the Board—in this case Ms. Artiach—has the burden to prove that the Board's findings are incorrect by a preponderance of competent, credible evidence. *Hadley v. Dep't of Labor & Indus.*, 116 Wn.2d 897, 903, 810 P.2d 500 (1991); *Frazier v. Dep't of Labor & Indus.*, 101 Wn. App. 411, 418-419, 3 P.3d

221, 225-226 (2000); *Belnap v. Boeing*, 64 Wn. App. 212, 217, 823 P.2d 528, 532 (1992).

While superior court review is de novo, it is solely based on the evidence and testimony received and considered by the Board. RCW 51.52.115. The Court of Appeals reviews the superior court's conclusions under the error of law standard, determining the law independently and applying it to the facts as found by the agency. *Dep't of Labor & Indus. v. Allen*, 100 Wn. App. 526, 530, 997 P.2d 977 (2000). The Court of Appeals must also examine the record, in the light most favorable to the party who prevailed in superior court, to determine whether the trial court's findings are supported by substantial evidence and whether the court's conclusions of law flow therefrom. *Harrison Mem'l Hosp. v. Gagnon*, 110 Wn. App. 475, 485, 40 P.3d 1221 (2002); *Grimes v. Lakeside Industries*, 78 Wn. App. 554, 560, 897 P.2d 431, 434 (1995).

The Supreme Court has defined substantial evidence as a sufficient quantity of evidence in the record to convince a "fair-minded, rational person" of the truth of the declared premise. *State v. Halstien*, 122 Wn.2d 109, 129, 857 P.2d 270 (1993). However, there must be "substantial evidence" and not just a "mere scintilla" of evidence. *Sayler v. Dep't of Labor & Indus.*, 69 Wn.2d 893, 896, 421 P.2d 362 (1966).

In this case, Ms. Artiach failed to prove by a preponderance of the competent, credible evidence that the Board's decision was incorrect. Nor is there "substantial evidence" to support the trial court's determination that Ms. Artiach was temporarily totally disabled (i.e. entitled to time loss) between November 30, 2004 and October 23, 2006 and permanently totally disabled (i.e. entitled to a pension) as of October 23, 2006.

**B. The trial court's findings are not supported by substantial evidence nor did Ms. Artiach meet her burden of proof**

"Temporary total disability is 'a condition that temporarily incapacitates a worker from performing any work at any gainful employment;' it differs from permanent total disability in duration, not character." *O'Keefe v. Dep't of Labor & Indus.*, 126 Wn. App. 760, 768, 109 P.3d 484 (2005), quoting *Hubbard v. Dep't of Labor and Indus.*, 140 Wn.2d 35, 43, 992 P.2d 1002 (2000).

A worker is not totally disabled solely because she is unable to return to her previous occupation. *Hunter v. Bethel Sch. Dist.*, 71 Wn. App. 501, 506-07, 859 P.2d 652 (1993). Rather, the burden is on the injured worker to prove an inability to perform light or sedentary work of a general nature. *Spring v. Dep't of Labor & Indus.*, 96 Wn.2d 914, 919, 640 P.2d 1 (1982); *Herr v. Dep't of Labor & Indus.*, 74 Wn. App. 632, 636, 875, P.2d 11 (1994). General work includes reasonably continuous

light or sedentary work within the range of the worker's capabilities, training and experience, and generally available on the competitive labor market. *Spring*, 96 Wn.2d at 918-20; *Graham v. Weyerhaeuser Co.*, 71 Wn. App. 55, 62, 856 P.2d 717 (1993).

As the party appealing from the Board's decision, the burden of proof is on Ms. Artiach to establish a temporary or permanent inability to perform light or sedentary work of a general nature. Indeed, in any workers' compensation appeal where the issue is a workers' entitlement to benefits, the ultimate burden of proof is at all times with the worker.

*Olympia Brewing Co. v. Dep't of Labor & Indus.*, 34 Wn.2d 498, 505, 208 P.2d 1181 (1949) (persons claiming benefits under the Industrial Insurance Act held to "strict proof" of their right to receive benefits), *overruled on other grounds by Windust v. Dep't of Labor & Indus.*, 52 Wn.2d 33, 323 P.2d 241 (1958); *see also Cyr v. Dep't of Labor & Indus.*, 47 Wn.2d 92, 286 P.2d 1038 (1955).

As the evidence shows, Ms. Artiach has not met her burden here nor is there substantial evidence supporting the trial court's findings and conclusions.

1. Substantial evidence does not support a total inability to work

As noted above, substantial evidence is more than just a "mere scintilla of evidence; rather, it must be a sufficient quantity of evidence to

convince a fair-minded, rational person of the truth of the declared premise. *State v. Halstien*, 122 Wn.2d 109, 129, 857 P.2d 270 (1993); *Sayler v. Dep't of Labor & Indus.*, 69 Wn.2d 893, 896, 421 P.2d 362 (1966).

In Ms. Artiach's case there are no credible expert opinions supporting an inability to perform any light or sedentary work of a general nature as is required for a finding of temporary or permanent total disability. Indeed, out of the six experts who testified, only one opined that Ms. Artiach was permanently and totally disabled. Looking at that fact alone illustrates the lack of substantial evidence supporting the trial court's determination. However, when looking deeper it becomes even more apparent that there is not a sufficient quantity of evidence to convince a fair-minded, rational person that Ms. Artiach is permanently and totally disabled.

The only expert who did testify to a total inability to work was Dr. Williams, Ms. Artiach's forensic psychiatrist. Dr. Williams testified that he diagnosed her with depression and a pain disorder related to her industrial injury and that based on those conditions (primarily the pain disorder) she is permanently unable to work. Williams Dep. at 35-36, 45. Notwithstanding the fact that Dr. Williams was the only expert who testified to a permanent and total inability to work, the diagnoses which

form the basis for his opinion in that regard were thoroughly rejected not only by the Board, but the trial court as well. Both the Board and trial court specifically found that Ms. Artiach does not have a pain disorder or depression caused by her industrial injury. Not only does this not constitute a preponderance of evidence to support Ms. Artiach's burden of proof, but the lack of any foundation for his opinion illustrates the total lack of competent, credible medical opinion supporting a determination that Ms. Artiach is permanently totally disabled.

Second, even if one disregards the psychiatric testimony and focuses solely on her ability to work from a physical standpoint, Ms. Artiach still fails in meeting her burden to prove an inability to work due to her left hand condition. Out of the three doctors who testified about her physical condition, none of them testified that Ms. Artiach was completely unable to work. Darden's witnesses, Dr. Barnard and Dr. Beshlian, both testified that Ms. Artiach could work as a hostess, clerk or apparel stocker, the three positions identified by Mr. Yamamoto. Ms. Artiach's expert, Dr. Kite, likewise testified that Ms. Artiach could perform the hostess position but during his deposition changed his opinion about her ability to perform the clerk and apparel stocker positions. Regardless of his testimony about these three positions, however, he did not testify that Ms. Artiach could not perform any light or sedentary work of a general nature, nor was he

asked about that issue. Indeed, Ms. Artiach is not entitled to temporary or permanent total disability simply by virtue of the fact that all three doctors opined that Ms. Artiach could perform the hostess position. *See O'Keefe v. Dep't of Labor & Indus.*, 126 Wn. App. 760, 768, 109 P.3d 484 (2005) (injured worker held not entitled to temporary total disability because he was capable of performing the light duty job given to him by his employer). Further, Dr. Kite's testimony by itself does not constitute a preponderance of the evidence.

In sum, Washington appellate courts have held that on review of a decision and order of the Board, the superior court may substitute its own findings and decision for the Board's only if it finds from a fair preponderance of credible evidence that the Board's findings and decisions are incorrect. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 977 P.2d 570 (1999); *Jenkins v. Weyerhaeuser Co.*, 143 Wn. App. 246, 177 P.3d 180 (2008), *review denied*, 165 Wn.2d 1004, 198 P.3d 511; *Harrison Memorial Hosp. v. Gagnon*, 110 Wn. App. 475, 40 P.3d 1221 (2002) *review denied*, 147 Wn.2d 1011, 56 P.3d 565. No such preponderance of credible evidence exists here; thus, the trial court's substitution of its own findings and decision for the Board's is in error and should be reversed.

2. Ms. Artiach did not meet her burden of proof

Looking at the evidence in the light most favorable to Ms. Artiach does not change the fact that she did not meet her burden of proof in this case. Even if one construes Dr. Kite's testimony as ruling out all three positions (hostess, clerk and apparel stocker), Ms. Artiach still has not proven an inability to perform light or sedentary work of a general nature. At most she has provided evidence showing that she cannot work in the three positions identified by Darden's vocational expert, Mr. Yamamoto. However, it is not Darden's burden to prove Ms. Artiach's ability to work. While Darden did present evidence about her ability to perform these three positions, it did not have a burden or obligation to establish that Ms. Artiach could perform any light or sedentary work of a general nature. Rather, it was Ms. Artiach's burden to prove that she could not do so, a burden she did not meet. [T]hose who claim benefits ... must, by competent evidence, prove the facts upon which they rely." *Ehman v. Dep't of Labor & Indus.*, 33 Wn.2d 584, 595, 206 P.2d 787 (1949). See also *Ruse v. Dep't of Labor & Indus.*, 90 Wn. App. 448, 453, 966 P.2d 909 (1998) (it is the claimant who has the burden of producing evidence which supports his claim).

The worker's burden in this regard was also discussed in the case of *Herr v. Dep't of Labor & Indus.*, 74 Wn. App. 632, 875, P.2d 11

(1994). In *Herr*, the injured worker sought disability benefits as a result of his occupationally-related skin condition. *Id.* at 633-34. It was undisputed that he could not return to his job of injury; however, the primary question addressed by the Court in *Herr* was whether he was precluded from performing or obtaining any light or sedentary work of a general nature. *Id.* at 634, 636. In finding that he did not make a case for permanent total disability, the Court found that he made no attempt to explain a physical inability to perform or obtain work of a general nature. *Id.* at 636. The Court stated that there was “no reason to believe he suffers from any mental or physical deficit which would preclude him from engaging in the vast range of light and sedentary work, or even heavy work for that matter.” *Id.* Rather, the Court noted that he “staked his case on the premise that disability is established by demonstrating an inability to return to the same employment previously held. No serious effort was made to establish he could not engage in any gainful activity.” *Id.*

The facts in this case are similar in that Ms. Artiach made no serious attempt to prove that she had a physical inability to perform or obtain work of a general nature. Rather, she premised her case on trying to prove that she could not return to her job of injury or the three positions identified by Darden’s vocational counselor. However, there is no evidence in the record that the positions identified by Mr. Yamamoto were

the only positions she was able to obtain or perform or that she could not perform or obtain light or sedentary work of a general nature (other than the baseless opinion of Dr. Williams). Again, it is Ms. Artiach's burden to prove an inability to work, not Darden's. She did not do so here.

Finally, the trial court's findings of fact do not support its conclusions that Ms. Artiach is temporarily and permanently totally disabled. Once again, to reach such a conclusion the trial court must find that Ms. Artiach is unable to perform any light or sedentary work of a general nature.

However, the trial court only found that she was unable to work as a restaurant hostess, clerk or apparel stocker. As such, the trial court's conclusions as a matter of law do not flow from the court's own findings and must be reversed.

**C. The trial court erroneously determined that Ms. Artiach was temporarily totally disabled between November 30, 2004 and October 23, 2006 pursuant to RCW 51.32.090**

Under RCW 51.32.090(4)(a), an injured worker's entitlement to temporary total disability (i.e. time loss) benefits ends when the worker returns to work with the employer at injury in a capacity she is physically able to perform:

Whenever the employer of injury requests that a worker who is entitled to temporary total disability under this chapter be certified by a physician or licensed advanced registered nurse practitioner as able to perform available work other than his or her usual work, the employer shall

furnish to the physician or licensed advanced registered nurse practitioner, with a copy to the worker, a statement describing the work available with the employer of injury in terms that will enable the physician or licensed advanced registered nurse practitioner to relate the physical activities of the job to the worker's disability. The physician or licensed advanced registered nurse practitioner shall then determine whether the worker is physically able to perform the work described. The worker's temporary total disability payments shall continue until the worker is released by his or her physician or licensed advanced registered nurse practitioner for the work, and begins the work with the employer of injury. If the work thereafter comes to an end before the worker's recovery is sufficient in the judgment of his or her physician or licensed advanced registered nurse practitioner to permit him or her to return to his or her usual job, or to perform other available work offered by the employer of injury, the worker's temporary total disability payments shall be resumed. Should the available work described, once undertaken by the worker, impede his or her recovery to the extent that in the judgment of his or her physician or licensed advanced registered nurse practitioner he or she should not continue to work, the worker's temporary total disability payments shall be resumed when the worker ceases such work.

RCW 51.32.090(4)(a).

Furthermore, a worker who returns to work and is subsequently terminated from employment does not have a right to time loss compensation benefits. RCW 51.32.090(4)(a); *Glacier Northwest v. Walker*, 151 Wn. App. 389, 212 P.3d 587 (2009); *O'Keefe v. Dep't of Labor & Indus.*, 126 Wn. App. 760, 109 P.3d 484 (2005). The facts in Ms. Artiach's case are strikingly similar to those in the *O'Keefe* case and

illustrate why an award of further time loss compensation and a pension are not appropriate here.

In *O'Keefe*, the injured worker returned to a light duty job with his employer of injury. 126 Wn. App. at 762. However, he was subsequently terminated for various reasons, including missing most of his first two weeks back. *Id.* at 762-63. Among other things, he failed to return to work after appointments and rarely documented his absences from work. *Id.* He was ultimately warned by his employer to improve his attendance or be fired. *Id.* at 763. After another incident, he was ultimately terminated. *Id.* According to the employer, his light duty job would have remained available to him but for his termination. *Id.* The facts also indicate that his physician certified that he was physically capable of performing the position. *Id.*

The Department, Board, superior court and Court of Appeals all found that O'Keefe was not entitled to have his time loss reinstated. *Id.* at 763-64. In affirming the prior decisions, the Court of Appeals held that O'Keefe's work did not come to an end as contemplated by RCW 51.32.090(4)(a); rather, O'Keefe himself stopped performing the work because he had been fired. *Id.* at 766. The Court noted that requiring an employer to resume paying time loss after an employee had been fired would be "an absurd and unjust result." *Id.*, citing *Flanigan v. Dep't of*

*Labor & Indus.*, 123 Wn.2d 418, 426, 869 P.2d 14 (1994). It was further noted that a different interpretation of RCW 51.32.090(4) would have allowed O’Keefe to reinstate his time loss benefits “at any time by performing poorly and thereby forcing [the employer] to fire him. The legislature surely expects more from O’Keefe and other temporarily disabled workers.” *Id.* at 768.

Ms. Artiach’s case closely mirrors the *O’Keefe* case. Like O’Keefe, Ms. Artiach returned to a light duty position for her employer, the position of hostess, but subsequently missed a substantial number of her scheduled days of work. Tr. 10/2/07 at 14. Ms. Ostler testified that he had a discussion with her about her performance and also sent two written warning letters to Ms. Artiach. *Id.* at 15-17. After she failed to return to work she was terminated by Red Lobster. *Id.* Ms. Ostler further testified that there would still be a hostess position available for her but for her termination. *Id.* at 21. Finally, Dr. Kite testified that she could perform the hostess position as far back as October 2004, but certainly from November 29, 2004 forward. Kite Dep. at 56, 61.

The *Glacier* case simply reinforces the principle from *O’Keefe* that an employer may stop paying time loss compensation after a worker has been terminated for cause. *Glacier Northwest v. Walker*, 151 Wn. App. 389, 212 P.3d 587 (2009). The primary difference in *Glacier* was that the

employee had not actually begun the light duty work with the employer at that time he was terminated. *Id.* at 392. Because of this fact and the language of RCW 51.32.090, the *Glacier* court held that the worker was entitled to time loss despite his termination. *Id.* at 394-95. Unlike the worker in *Glacier*, Ms. Artiach did in fact return to work in the modified hostess position.

Thus, there is simply nothing to distinguish Ms. Artiach's case from that of Mr. O'Keefe. The evidence shows she returned to a modified duty position with Red Lobster, was subsequently terminated, was determined able to continue working at that position by her physician and that position would have been available to her but for her termination. Accordingly, under RCW 51.32.090(4)(a), *O'Keefe* and *Glacier*, she is not entitled to temporary total disability compensation from November 30, 2004 forward. Likewise, as permanent total disability only differs from temporary total disability in terms of duration, the trial court's determination that she is permanently totally disabled is also in error and should be reversed.

**D. Substantial evidence does not support the trial court's findings regarding Ms. Artiach's left hand limitations**

Although ultimately not dispositive of whether Ms. Artiach proved an inability to perform light or sedentary work of a general nature, Darden

does take issue with the trial court's findings that Ms. Artiach does not have sufficient use of her left hand to perform employment and is not exaggerating her condition overall. (*See* Findings of Fact 4, 6, 7)

Again, the only expert opinion supporting the trial court's finding that Ms. Artiach is not exaggerating her condition comes from Dr. Williams, who opined that Ms. Artiach was not malingering. Williams Dep. at 38-39. Notwithstanding the fact that Dr. Williams' other diagnoses were summarily rejected, substantial evidence does not support the trial court's finding as every other medical expert who testified felt that her symptoms were not supported by the objective medical evidence and that she was misrepresenting her condition or limitations.

For instance, Dr. Kite felt that she had not been truthful in representing her condition or limitations after viewing the surveillance video and stated that there was probable malingering on her part. Kite Dep. at 47-48, 55. He further testified that even after reviewing the surveillance videotape he felt she could hold menus in her injured left hand, something Ms. Artiach claims she could not do as part of the hostess position. *Id.* at 56; Tr. 9/20/07 at 25-26.

Drs. Beshlian and Barnard offered similar opinions to those of Dr. Kite. Even before viewing the surveillance videotape Dr. Beshlian noted symptom magnification and nonorganic findings on examination.

Beshlian Dep. at 25. After viewing the video Dr. Beshlian stated that Ms. Artiach's actions were not consistent with her complaints or self-reported limitations. *Id.* at 35.

Dr. Barnard likewise testified that Ms. Artiach magnified her symptoms and complained of diminished range of motion while actually demonstrating full range of motion on examination. Barnard Dep. at 17, 44-45. He indicated that viewing the surveillance in 2007 only confirmed his original opinion that she was malingering or willfully misrepresenting her limitations. *Id.* at 51. Contrary to the trial court's finding that Ms. Artiach's limitations or abilities vary from day to day, Dr. Barnard explained that not only were her demonstrated activities medically inconsistent, but they would be medically "impossible" according to what she reported her limitations to be. *Id.* at 47.

Dr. Vandenberg confirmed the opinions of Drs. Kite, Beshlian and Barnard, noting that Ms. Artiach based her description of depression and anxiety symptoms on her reported pain and physical limitations as a result of the injury. Vandenberg Dep. at 62. However, it was clear to Dr. Vandenberg that she was able to perform activities that she said she could not do. *Id.* at 38-39.

In the end, the trial court's findings on this issue are not supported by substantial evidence. However, even if this Court finds that they are,

those findings in and of themselves are not sufficient to support a determination that she is temporarily or permanently totally disabled.

**E. The trial court erred in determining that Ms. Artiach was both partially and totally permanently disabled**

It is well established that an injured worker cannot be classified as both partially permanently disabled and totally permanently disabled at the same time. In other words, a person cannot receive both PPD compensation and a pension for the same injury. *See, e.g., Hubbard v. Dep't of Labor & Indus.*, 140 Wn.2d 35, 37 fn. 1, 992 P.2d 1002 (2000) (once worker moves from temporary to permanent disability the worker receives either a pension or a permanent partial disability award); *In re: Cheryl J. Austin*, BIIA Dckt. Nos. 05 21730 & 05 21730-A, 2007 WL 4565295 (September 25, 2007) (Industrial Appeals Judge erred in awarding both partial and total disability benefits “as an individual cannot logically be both simultaneously”); *In re: Donna E. Hutchinson*, BIIA Dckt. No. 05 15312, 2006 WL 2954304 (July 24, 2006) (permanent total disability and permanent partial disability are alternate remedies and worker is not entitled to both); *In re: Allen L. Wood*, BIIA Dckt. No. 94 1328, 1995 WL 566037 (March 8, 1995) (“A claim may not be closed with compensation for both permanent partial disability and permanent

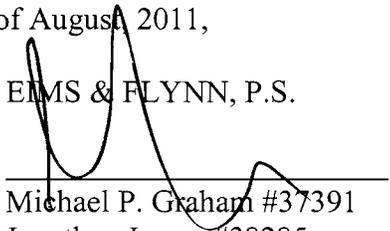
total disability.”).<sup>2</sup> Thus, the trial court erred in finding and concluding that Ms. Artiach had permanent partial impairment equal to 8 percent of the amputation value of her left arm at or above the deltoid insertion or by disarticulation at the shoulder but was simultaneously totally and permanently disabled under her claim.

## VI. CONCLUSION

For the foregoing reasons, Darden respectfully requests that this Court reverse the Superior Court Decision on Industrial Insurance Appeal and affirm the decision of the Board of Industrial Insurance Appeals which in turn affirmed the determination of the Department of Labor and Industries closing the claim with benefits as provided.

Respectfully submitted this 29<sup>th</sup> day of August, 2011,

EMMS & FLYNN, P.S.

  
\_\_\_\_\_  
Michael P. Graham #37391  
Jonathan James #38285  
Attorneys for Appellant

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<sup>2</sup> Board decisions are not precedential but appellate courts can consider them for their persuasive value. *Walmer v. Dep't of Labor & Indus.*, 78 Wn. App. 162, 167, 896 P.2d 95 (1994)). Most decisions of the Board, both those that have been designated as significant and those that have not been so designated (significant decisions are cited as “BIIA Dec.” and non-significant as “BIIA Dckt.” herein), can be accessed on WESTLAW at WAWC-ADMIN.

Lisa M. Nelson, under penalty of perjury under the laws of the State of Washington, declares:

1. I am a paralegal at Eims & Flynn, P.S., attorneys of record for Appellant GMRI/Darden Restaurants in the above-captioned action.

2. On the date last shown below, I caused, by Federal Express, the Brief of Appellant to be filed with this court with copies to the following:

Michael Connell  
Smart, Connell, Childers & Verhulp  
501 N. 2<sup>nd</sup> Street  
Yakima, WA 98907

Sarah Martin, AAG  
Office of the Attorney General  
800 Fifth Avenue, Ste. 2000  
Seattle, WA 98104

DATED this 29<sup>th</sup> day of August, 2011, at Seattle, Washington.

EIMS & FLYNN, P.S.

By

  
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Lisa M. Nelson, Paralegal

## APPENDIX

RECEIVED  
MAY 23 2011  
EIMS & FLYNN, PS

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

SANDRA ARTIACH,

Plaintiff,

vs.

GMRI INC./DARDEN RESTAURANTS  
Defendant.

NO. 08 2 01590 3

DECISION ON INDUSTRIAL  
INSURANCE APPEAL

This is an appeal by claimant/Plaintiff Sandra G. Artiach from a final order of the Board of Industrial Insurance Appeals (Board) dated April 1, 2008, which affirmed the Proposed Decision and Order (PDO) dated January 24, 2008. Only those Findings of Fact and Conclusions of Law listed in the Statement of Errors section of the Petition for Review will be addressed. All others in the PDO will be considered verities. All factual decisions have been made based upon the preponderance of the evidence standard.

FINDINGS OF FACT

4. Plaintiff does not have a pain disorder caused by the industrial injury. However, she does experience real pain when she uses her left arm or wrist. The greater or more extended the use, the greater the pain.

5. Plaintiff did not develop depression due to her industrial injury.

6. Plaintiff does not have sufficient use of her left hand to perform employment on a continuous and gainful basis as a restaurant hostess, clerk, or apparel stocker either in

1 Yakima, WA, or in and around Nyssa, OR. Although she can perform some or all of the  
2 functions of a restaurant hostess, she is not able to do so on a full or near full time  
3 basis. Furthermore, there has not been available for Plaintiff, and there will not  
4 reasonably be available in the foreseeable future, full or near full time employment as a  
5 restaurant hostess.

6 7. Plaintiff's pain levels and limitations on range of motion and grip strength vary from  
7 day to day. There may be some days during which her abilities exceed those  
8 demonstrated to doctors, but overall she is not exaggerating her condition.

9  
10 9. Between November 30, 2004, and October 23, 2006, Plaintiff was precluded by the  
11 residuals of the industrial injury from engaging in reasonably continuous, gainful  
12 employment.

13 10. As of October 23, 2006, Plaintiff had permanent impairment that was equal to 8  
14 percent of the amputation value of her left arm at or above the deltoid insertion or by  
15 disarticulation at the shoulder. However, Plaintiff had not suffered permanent partial  
16 impairment of her mental health as a result of her industrial injury.

17 11. As of October 23, 2006, Plaintiff was precluded by the residuals of the industrial  
18 injury from engaging in reasonably continuous, gainful employment for the foreseeable  
19 future.

#### 20 CONCLUSIONS OF LAW

21  
22 3. Between November 30, 2004, and October 23, 2006, Plaintiff was totally and  
23 temporarily disabled pursuant to RCW 51.32.090.

24 4. As of October 23, 2006, Plaintiff had permanent impairment that was equal to 8  
25 percent of the amputation value of her left arm at or above the deltoid insertion or by

1 disarticulation at the shoulder RCW 51.32.080. However, Plaintiff had not suffered  
2 permanent partial impairment of her mental health as a result of her industrial injury.

3 5. As of October 23, 2006, Plaintiff was totally and permanently disabled pursuant to  
4 RCW 51.32.160.

5 6. The Department Order dated October 23, 2006, is reversed and this matter is  
6 remanded for further proceedings consistent with this decision.  
7

8 Dated this 20<sup>th</sup> day of May, 2011.  
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11 BLAINE G. GIBSON  
12 Superior Court Judge  
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