

FILED

APR 15 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 311031

Superior Court No. 10-2-03101-1

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

SMAJO MESAN, individually,

Appellant

v.

TYSON FOODS, INC.,

Respondent

BRIEF OF RESPONDENT

Randall D. Leeland
WSBA No. 13788
The Law Office of Randall Leeland
6 South 2nd Street, Suite 1118
Yakima, WA 98901
509-248-4045
Attorney for Respondent

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I. INTRODUCTION

The Claimant/Appellant in this matter, Mr. Smajo Mesan, immigrated to the United States with an educational and professional background in mechanical engineering. On or about September 14, 2002, he began working for Iowa Beef Processors, the predecessor business to Tyson Fresh Meats, Inc., the employer and respondent in this matter (“Tyson”).

During the course of his employment, Mr. Mesan filed multiple workers’ compensation claims, including two that are the subject of the instant appeal. Claim W-957232 (Doc. No. 08 22054) concerned a right shoulder impingement condition; claim SA-65806 (Doc. No. 09 16858) was for bilateral carpal tunnel syndrome. The Department of Labor and Industries (“Department”) closed the shoulder claim with time loss compensation benefits terminated as of November 3, 2008, with no award for permanent partial disability. Likewise, the carpal tunnel syndrome claim closed May 6, 2009, again without time loss compensation or permanent disability benefits. (Clerk’s Papers (“CP”) 9-10, 39, 62, 71, 104 and 109.)

Mr. Mesan appealed both claim closures to the Board of Industrial Insurance Appeals (“Board”). Following consolidation of the claims, the Board ultimately determined both the right shoulder and carpal tunnel conditions had reached maximum medical improvement as provided in

Washington's Industrial Insurance Act, Title 51 RCW ("IIA"). Further, the Board affirmed Mr. Mesan was employable in the relevant labor market as a consequence of his Tyson-related industrial injuries and, thus, was not temporarily disabled for purposes of time loss compensation eligibility during the period November 4, 2008, to May 6, 2009. Likewise, the Board affirmed Mr. Mesan was not permanently totally disabled under the IIA as a consequence of his Tyson-related industrial injuries as of May 7, 2009.¹ (CP 15-17).

Mr. Mesan then appealed the Board's Decision to the Benton County Superior Court. Following a bench trial, the court affirmed the Board's findings and conclusions in full. The instant matter is before this Court following Mr. Mesan's appeal from the superior court decision. (CP 614-615, 617-618).

II. ISSUES PRESENTED

Claimant/Appellant seeks reversal of the superior court's August 17, 2012, Judgment and Order affirming all Findings of Fact and Conclusions of Law under the Board's Decision and Order dated November 10, 2012. Specifically, Claimant/Appellant assigns error to the trial court's determinations that: (1) he was not temporarily totally disabled and therefore

¹ The Board did, however, confirm a permanent partial disability award for Mr. Mesan's right shoulder condition. The PPD rating and award are not directly at issue in this appeal.

was ineligible for time loss compensation benefits during the period November 4, 2008, through May 6, 2009; and (2) that he was not permanently totally disabled as of May 7, 2009. (CP 16-17). Respondent Tyson seeks affirmance of the lower court's August 17, 2012, Judgment and Order.

III. RESPONDENT'S STATEMENT OF THE CASE

On appeal, Mr. Mesan once again seeks to overturn the Board's conclusion that he is capable of substantial, gainful employment. (CP 15). In reaching that conclusion, the Board (and subsequently, the superior court) specifically found Mr. Mesan was not temporarily totally disabled between November 4, 2008 and May 6, 2009. Consistent therewith, the Board (and subsequently, the superior court) found Mr. Mesan was not permanently and totally disabled as of May 7, 2009, within the meaning of the IIA. (CP 16-17). For all the reasons set forth herein, Respondent Tyson agrees with the conclusions of both tribunals below and, therefore, seeks affirmance by the Court.

A. The Medical Evidence Regarding Employability.

The record below reflects that three of the four testifying physicians – including Mr. Mesan's attending physician – opined that Mr. Mesan was fully capable of working at his job of injury at Tyson, with or without restrictions. (CP 206, 411, 504). Dr. Bozarth, who along with Drs.

Sears and Zografos, performed an IME panel exam on May 4, 2007, approved all five Tyson job analyses presented to him: Pick Bone Sparse Lean (Mr. Mesan's job of injury), Pick from Mixed Lean Belt, Peel Cap, forklift operator and warehouse worker. Dr. Bozarth's panel found Mr. Mesan to be medically fixed and stable, without any continuing impairment proximately caused by his occupational exposures. (CP 502-507).

Subsequently, Drs. Fife and Wong performed an IME panel exam on May 6, 2008. That panel concluded Mr. Mesan was employable in light-to-medium duty jobs, with limitations on overhead lifting only. Based upon Tyson job analyses provided, Dr. Fife opined that Mr. Mesan was fully capable of performing all of the production jobs, i.e., Pick Bone Sparse Lean, Pick from Mixed Lean Belt and Peel Cap. (CP 407-409).

Dr. Owen Higgs was the attending physician in this matter. He examined and treated Mr. Mesan on numerous occasions between October 2005 and November 20, 2006 (CP 187, 200). Initially, Dr. Higgs endorsed various conservative (non-surgical) therapies to address Mr. Mesan's claim-related conditions, including braces and anti-inflammatory medications for carpal tunnel issues and cortisone injections for the shoulder. (CP 189, 191). By November 2006, however, Dr. Higgs concluded that conservative therapies could do nothing to further improve those conditions. Accordingly, he recommended bilateral carpal tunnel release surgery, as well

as an arthroscopic procedure to address Mr. Mesan's diagnosed right shoulder impingement condition. Mr. Mesan refused to undergo either procedure. (CP 189, 192-194). As such, Dr. Higgs determined Mr. Mesan to be medically fixed and stable. (CP 205).

Dr. Higgs initially met with Mr. Mesan's Tyson-assigned vocational counselor, Maui Garza, on September 1, 2007. At that time he determined Mr. Mesan could work permanently in a light-duty capacity. (CP 205-206). Dr. Higgs met with Mr. Garza again on September 22, 2008,² at which time they discussed Mr. Mesan's suitability for the Pick Bone Sparse Lean position. (CP 206). Dr. Higgs testified thusly:

Q. Did Mr. Garza provide you with a job analysis for Pick Bone Sparse Lean?

A. Yes.

Q. Okay, and was it your opinion that Mr. Mesan was able to perform that particular job *without restrictions* on a permanent basis?

A. Yes.

Q. Okay, and Mr. Garza also sent you a letter just confirming that was your opinion?

A. Yes. (Emphasis added).

Id.

² Dr. Higgs mistakenly testified to meeting with Mr. Garza on September 22, 2009. Mr. Garza separately testified that he and Dr. Higgs exchanged multiple letters during the period September – December 2008, following up on their September meeting and confirming Dr. Higgs' approval of the Pick Bone Sparse Lean job. (CP 533-534).

In connection therewith, Dr. Higgs testified that his employability conclusion following the September 2008 meeting with Mr. Garza was consistent with the performance-based physical capacities evaluation (“PCE”) report prepared by physical therapist Kirk Holle. (CP 197-199). Specific findings and recommended work restrictions for Mr. Mesan under Mr. Holle’s April 20, 2007, PCE included: lift 20 pounds occasionally from floor to waist height and from waist to shoulder height; carry 15 pounds frequently/25 pounds occasionally; push 20 pounds frequently/40 pounds occasionally; and pull 15 pounds frequently/35 pounds occasionally. Dr. Higgs concurred with these PCE restrictions specifically in connection with Mr. Mesan’s diagnosed bilateral carpal tunnel syndrome and right shoulder condition. *Id.*

Only Dr. Gritzka – Mr. Mesan’s retained medical expert – found Mr. Mesan to be unemployable at Tyson as a consequence of his industrial injuries superimposing on a variety of preexisting and unrelated conditions, including a “fragile” cervical and lumbar spine, trigger finger syndrome from a separate work-related injury, diabetes and hypertension. (CP 241, 269). Dr. Gritzka opined that Mr. Mesan would be best suited to a “sedentary” class of jobs with additional particularized restrictions, including limitations on heavy lifting, repetitive hand activity (e.g., computer keyboarding) and overhead reaching. (CP 266-268.) However, with respect

to actual objective clinical findings to support total disability, even Dr. Gritzka had to acknowledge, “As [Mr. Mesan] presented to me after basically being off work for a period of time, he had a generally normal physical exam.” (CP 269).

B. Vocational Counselor Testimony Regarding Employability.

Mr. Garza is a vocational expert certified as a vocational counselor in the state of Washington. He has worked with Tyson since 1996 on injured workers’ cases involving job modifications, return to work, and retraining. He consults on behalf of both employers and individual workers. He has visited the Wallula plant where Mr. Mesan was employed on numerous occasions; he is personally familiar with the particular requirements of all Tyson jobs, including production line positions, at that facility. (CP 522-528). Tyson initially hired Mr. Garza as the vocational rehabilitation counselor under Mr. Mesan’s claims in October 2006. At that time, Mr. Garza met with Mr. Mesan and conducted a vocational intake. Mr. Garza considered the jobs of Pick Bone Sparse Lean, Pick from Lean Belt and Peel Cap, as well as warehouse worker and forklift operator, relying upon job analyses his company had prepared. (CP 526-529). Following Dr. Higgs’ determination that Mr. Mesan was medically fixed and stable, Mr. Garza met personally with the doctor to discuss particular job analyses and

Mr. Mesan's suitability therefor, including necessary restrictions. (CP 531-532). And as noted, *supra*, Dr. Higgs approved the job of injury (Pick Bone Sparse Lean), without restrictions, specifically considering the residuals of both the bilateral carpal tunnel syndrome and right shoulder injury claims. (CP 533-534). As a claimant's job of injury is always the first priority in a meeting with the attending physician, Dr. Higgs' approval of the Pick Bone Sparse Lean job for Mr. Mesan effectively concluded the assessment, without need for review of the additional Tyson job analyses. (CP 534-535).

Mr. Garza testified that he had reviewed Dr. Higgs' evaluation and treatment records, as well as the IME reports of the forensic physicians during the course of Mr. Mesan's claims administration, as well as transcripts of testimony by the forensic physicians and the other vocational expert who testified during the Board appeal. (CP 539-540). In connection therewith, Mr. Garza confirmed his understanding that both Drs. Bozarth and Fife agreed with Dr. Higgs that Mr. Mesan was capable of performing the Pick Bone Sparse Lean job without restrictions. Dr. Gritzka, he understood, would have imposed greater restrictions on Mr. Mesan. It bears mention, however, that Dr. Gritzka's key restriction on overhead lifting (which Dr. Higgs also endorsed) was fully consistent with the Pick Bone Sparse Lean job required, without modification, according to Mr. Garza. (CP 541-543).

Likewise, neither the Pick from Lean Belt nor Peel Cap jobs required any lifting of the arms above shoulder height. (CP 543).

Mr. Garza was asked about the role of medical testimony or evidence in the vocational counselor's ultimate employability assessment, particularly in cases, like the instant appeal, where there are conflicting physician opinions:

Well, there is [*sic*] two different barometers that we use. The first barometer is that we do go to the attending physician and obtain from the attending physician his medical opinion as to whether or not an individual can perform a particular occupation. In this case we had Dr. Higgs indicating that Mr. Mesan could perform the job of injury, and that as being the attending physician is more weight. ...

Our second barometer that we use is ... preponderance of medical opinions. In this case if we look at either barometer, we have the same conclusion. If we use the barometer of just the attending physician, Dr. Higgs, we indicate that Mr. Mesan can perform job at time of injury. If we use the second barometer where we have a preponderance of medical opinions, I arrive from a vocational opinion that Mr. Mesan can perform his job at time of injury ...

(CP 542-543).

Mr. Garza testified that, from a vocational perspective, employability considerations do take into account the availability of particular jobs in a general labor market. However, the initial assessment of an injured worker's ability to perform his job of injury does not require

consideration of the larger labor market. (CP 548). Mr. Garza testified that the specific Tyson production line jobs at issue were not readily available in the local labor – apart from Tyson itself. In the meat slaughter and packing industry, however, these jobs are generally available. (CP 549-550). And the Tyson production jobs at issue – including the job of injury, Pick Bone Sparse Lean – are, in fact, readily available at Tyson; they are routinely performed by a large number of workers with varying physical capabilities. They are not regarded as “odd lot” or specialized jobs at Tyson. *Id.*

Mr. Garza met with Dr. Higgs on two separate occasions concerning various job analyses and work restrictions appropriate for Mr. Mesan. As Mr. Garza testified:

Dr. Higgs, the attending physician, has indicated the Mr. Mesan is able to work and is able to work at job of injury. Then we also have the preponderance of medical opinions to include Dr. Higgs but also the independent medical evaluators that have indicated Mr. Mesan can perform the job of injury and is able to work. So that kind of strengthens my vocational opinion.

(CP 607).

Jill Falk is also a vocational counselor. She was retained by Mr. Mesan exclusively for litigation purposes in this matter. (CP 348.) Relying primarily upon workplace restrictions as recommended by Dr. Gritzka, Ms. Falk concluded that Mr. Mesan could not perform any of the

three Tyson production jobs for which she received job analyses: Pick Bone Sparse Lean, Pick from Mixed Lean Belt and Peel Cap/Meat Trimmer. (CP 324, 333). On the assumption Dr. Fife would also limit Mr. Mesan's work activity to sedentary jobs, Ms. Falk testified that, too, would preclude employment in any of those jobs. *Id.* (Dr. Fife actually testified to the contrary, finding Mr. Mesan to be employable in light-to-medium duty jobs, including all three Tyson production jobs, with overhead lifting restrictions only.³ (CP 407-409). Ms. Falk also testified to her belief that Mr. Mesan could not perform the warehouse worker or forklift driver positions at Tyson. (CP 339-340).

Ms. Falk reviewed the medical treatment and forensic records in this case, but she never interviewed or communicated with any of the participating doctors, including the treating physician, Dr. Higgs. (CP 348.) She has never been to Tyson's facilities to personally view the performance of any Tyson jobs. (CP 353).

Ms. Falk acknowledged all of the participating doctors had determined – from a medical standpoint – that Mr. Mesan is capable of working in some capacity. (CP 358). And while she did not see much reference in Dr. Higgs' treatment notes with respect to Mr. Mesan's various

³ Dr. Fife testified that his IME report contained an error, insofar as it did not specifically approve the Tyson production jobs for Mr. Mesan. Dr. Fife confirmed these jobs to be compatible with objective findings under his IME. (CP 411-412).

non-claim related conditions, she conceded that Dr. Higgs' testimony reflected an understanding that Mr. Mesan, did, in fact, have these other conditions. (CP 366). Ms. Falk acknowledged some of the limitations on Mr. Mesan's employability are age-related and not related at all to the Tyson jobs she reviewed in this matter. (CP 359). She was very clear, nevertheless, that her vocational opinion made no distinction between Mr. Mesan's age-related physical limitations and those limitations directly attributable to his industrial injuries. (CP 368).

Ms. Falk put considerable weight, vocationally speaking, on what she considered to be Mr. Mesan's lack of facility with the English language; she acknowledged, however, Mr. Mesan's own admission that he understands English to some degree. (CP 313-314).

Ms. Falk understood all testifying physicians in this matter had found, to one degree or another, that Mr. Mesan's subjective complaints outweighed their own objective clinical findings. (CP359).

C. Evidence Regarding Symptom Magnification.

In addition to medical and vocational evidence concerning employability, the record also contains evidence of symptom magnification or embellishment by Mr. Mesan – a pattern of conduct recognized by all testifying physicians in this matter – including Mr. Mesan's retained expert, Dr. Gritza.

Dr. Bozarth diagnosed “multiple and diffuse pain complaints,” but without any evidence of neurologic deficit. Instead, the panel noted multiple “nonphysiologic” complaints and inconsistencies on exam, which, they concluded, evidenced symptom magnification. (CP 503, 507). Similarly, Dr. Fife, who performed an IME panel exam with Dr. Wong on May 6, 2008, noted Mr. Mesan’s remarkable and unsubstantiated complaint “that he could not feel anything in either upper extremities” in connection with Dr. Wong’s neurologic exam – a complaint Dr. Fife characterized as incompatible with Mr. Mesan’s reported claim conditions. (CP 403).

Mr. Mesan’s attending physician, Dr. Higgs, was similarly suspicious – not only about the substance of Mr. Mesan’s complaints, but also the motivation therefor:

Q ... You indicated in your chart note, you have a hard time deciding whether or not he, Mr. Mesan, is being totally straightforward in all the things he is telling you. Did you write that in your chart note? ...

A ... Yes.

...

A ... When I meet a patient ... as a physician I try to get an opinion as to how much a patient could be magnifying symptoms, how much they are truly affected by their symptoms...

... I mean, Mr. Mesan seemed to want to spend more time talking about how much he didn’t like his employers as opposed to what he wanted to do to make his shoulders better, and that was one of the things that

raised in my mind the question as to whether or not he truly had symptoms or if he were magnifying them for secondary gain issues.

(CP 201-202). And, Dr. Higgs confirmed having clear indications that Mr. Mesan was, in fact, magnifying his symptoms. (CP 210). Dr. Higgs' further testimony regarding Mr. Mesan's rejection of *bona fide* surgical options to improve claim-related conditions further calls into question his fundamental desire to return to work:

Q ... When you were asked about I think both the impingement surgery and the carpal tunnel surgery and ... if it is elective and...how many people would turn down arthroscopic decompression? ... Is it pretty unusual for someone to turn down a surgery like that?

A. .. Yes, for people who have tried all of the other less aggressive options and they have not improved with those options, it's been my experience the rare patient who would not want to have surgery if it had the chance of correcting the problem.

Q ... And... Is it unusual for someone in this situation to turn down a carpal tunnel release?

A ... Yes.⁴

Q ... And essentially is it your opinion that perhaps [Mr. Mesan] could get some relief out of both surgeries and it could actually enhance his ability to perform more functions?

A ... Yes.

⁴ Dr. Higgs testified that carpal tunnel release procedures achieve "excellent results" in 98 percent of patients. (CP 200).

Q ... And again, it was Mr. Mesan's choice to turn down these surgeries?

A. .. Yes.

(CP 607).

Mr. Mesan's retained medical witness, Dr. Gritzka, also acknowledged a consistent disconnect between Mr. Mesan's complained-of conditions and the objective medical evidence:

As of the date that I saw [Mr. Mesan], there was no objective evidence that would back up any of these various complaints ... for quite a while, his symptoms had resolved or at least the physical manifestations of his conditions had resolved and were back to normal.

(CP 279-280).

Dr. Gritzka characterized Mr. Mesan as a "loaded mousetrap" as a consequence of a multiplicity of conditions – some workplace related and some not. (CP 269).

IV. ARGUMENT

A. Standard of Review.

The scope of this Court's review on workers' compensation appeals is the same as in other civil matters. RCW 51.52.140; *Du Pont v. Dep't. of Labor and Industries*, 46 Wn. App. 471, 476-77; 730 P.2d 1345 (1986). Therefore, this Court's role is to determine whether the trial court's

findings of fact, to which error is assigned, are supported by substantial evidence and whether the conclusions of law flow therefrom. *Id.*, citing *Bayliner Marine Corp. v. Perrigoue*, 40 Wn. App. 110, 113, 697 P.2d 277 (1985). Under the substantial evidence standard, this Court need find only “a sufficient quantum of evidence in the record to persuade a reasonable person that the declared premise is true.” *Wilson v. Employment Sec. Dep’t.*, 87 Wn. App. 197, 200-201, 940 P.2d 269 (1997).

Meanwhile, this Court reviews the superior court’s legal conclusions *de novo*. *Adams v. Great Am. Ins. Co.*, 87 Wn. App. 883, 887, 942 P.2d 1087 (1997). However, when an administrative agency is charged with application of a statute, the agency’s interpretation of an ambiguous statute is accorded great weight. *City of Pasco v. Pub. Emp’t. Relations Comm’n*, 119 Wn.2d 504, 507-08, 833 P.2d 381 (1992). And specifically with respect to the Department of Labor and Industries, reviewing courts “must accord substantial weight to the agency’s interpretation of the law.” *Littlejohn Const. Co. v. Dep’t of Labor and Industries*, 74 Wn. App. 420, 423, 873 P.2d 583 (1994).

B. The Industrial Insurance Act, Generally.

The purpose of the IIA is to provide benefits to workers and their dependents for disabilities or deaths caused by industrial injuries or occupational diseases. The Department is the state agency that administers

the Industrial Insurance Act and acts as the trustee of the funds collected pursuant to the Act. It is the Department's duty to determine what benefits are to be provided to a worker under IIA and to issue all orders relating to claims thereunder. Washington Pattern Jury Instructions: Civil ("WPI") 155.04. Although the IIA's statutory provisions are to be interpreted liberally, this "liberal construction doctrine" applies only to questions of statutory interpretation, not to issues of fact. *Hastings v. Department of Labor and Industries*, 24 Wn.2d 1, 12, 163 P.2d 142 (1945). On factual issues, claimants must be held to strict proof of their right to receive benefits. *Id.*; *Olympia Brewing Co. v. Department of Labor and Industries*, 34 Wn.2d 498, 505, 208 P.2d 1181 (1949).

C. Total Disability.

A worker is totally disabled for purposes of the IIA when he or she is incapacitated from performing any work at any gainful occupation. RCW 51.08.160. Total disability requires the loss of all reasonable wage-earning capacity. A worker is totally disabled if unable to perform or obtain regular gainful employment within the range of his or her capabilities, training, education, and experience. A worker is not totally disabled solely because of inability to return to his or her former occupation. However, total disability does not mean that the worker must have become physically or mentally helpless. WPI 155.05.

In order to establish total disability, a claimant must demonstrate: (1) that he was able to work at gainful employment before the industrial injury, but unable to do so following the injury; (2) that he has a loss of body function and severe limitations on his ability to work, as established by expert medical testimony; and (3) that, he is not employable in the competitive labor market, as established by expert vocational testimony that addresses the worker's history, personal testing and assumed medical facts. *Fochtman v. Department of Labor and Industries*, 7 Wn. App. 286, 292-293, 499 P.2d 255 (1972). Under this formulation, the relevant "labor market" must be within a reasonable commuting distance and be consistent with the industrially injured or ill worker's physical and mental capacities. *In Re: Richard M. Gramelt*, BIIA Dec., 09, 21629; 09, 21630; 09, 21726; 09, 23363; 10, 10725; 10, 10726; 10, 11821; 10, 12125 and 10, 12524 (2011); WAC 296-19A-010(4).

Mr. Garza testified that the specialized production jobs at Tyson, including Mr. Mesan's job of injury (Pick Bone Sparse Lean), are not available at other employers within the local labor market. Such jobs are, however, commonly performed in the meat packing industry. (CP 549-550). And it bears mention that Tyson is, in fact, a significant employer in Mr. Mesan's local labor market. As such, and in light of the fact that numerous Tyson employees regularly and routinely perform all three of the production

jobs at issue, including the job of injury (CP 549-550), substantial evidence supports the proposition that Mr. Mesan could both perform and obtain employment in the relevant labor market.

Total disability requires a threshold determination that a worker is medically fixed and stable. And medical fixity is properly established when a claimant rejects additional curative measures, including surgery, and the medical evidence suggests no further improvement can be expected without undertaking such additional measures. *Miller v. Dep't. of Labor and Industries*, 200 Wash. 674, 680-681, 94 P.2d 764 (1939). In this instance, Dr. Higgs concluded that Mr. Mesan's claim-related conditions were fixed and stable only upon Mr. Mesan's categorical rejection of the offered bilateral carpal tunnel release surgery and right shoulder arthroscopic procedure. (CP 205).

Appellant's brief in this Court dramatically overstates the implications of Dr. Higgs approving the Pick Bone Sparse Lean job for Mr. Mesan without having contemporaneous access to Mr. Holle's PCE.⁵ Emphatically, this did not constitute, as Mr. Mesan argues, a "critical error" – precisely because Dr. Higgs, when later afforded the opportunity to review the PCE, actually agreed with the basic physical limitations as recommended in the PCE. (CP 197-199). Only if Dr. Higgs would have reached a different

⁵ *Brief of Appellant*, at p. 16.

conclusion in September 2008 concerning Mr. Mesan's employability in light of the PCE would the validity of that conclusion be undermined. As Dr. Higgs testified, the PCE-recommended restrictions were not inconsistent with the job of injury. *Id.*

1. Mr. Mesan Was Not Temporarily Totally Disabled.

The IIA does not specifically define temporary total disability ("TTD"). Its meaning is derived from RCW 51.08.160, *supra*, and the holdings in *Leeper v. Department of Labor and Indus.*, 123 Wn.2d 803, 872 P.2d 507 (1994), and other appellate authorities, which establish that a worker is temporarily totally disabled when he or she is unable to obtain or perform any form of gainful occupation in the competitive labor market on a reasonably continuous basis because of conditions proximately caused by the worker's industrial injury or occupational disease. *In Re: Richard M. Gramelt, supra*. Temporary total disability differs from permanent total disability only in duration of disability, and not in its character. *Hubbard v. Dep't. of Labor and Industries*, 140 Wn.2d 35, 43, 992 P.2d 1002 (2000). Time loss compensation benefits are available to an injured worker for the duration of temporary total disability; those benefits terminate when the worker's earning power, at any kind of work, is restored to that existing at the time of the occurrence of the injury, or when the claimant's claim is closed. *Id.*; RCW 51.32.090.

In this instance, three of four treating and/or forensic physicians who testified found Mr. Mesan to be employable at Tyson in regular production jobs. (CP 206, 411, 504). Dr. Gritzka, meanwhile, testified Mr. Mesan is, from a medical perspective, capable of performing sedentary work. (CP 266). Under the “odd-lot” doctrine, if an accident leaves a worker unable to follow his previous occupation or any other similar occupation and fitted only to perform “odd jobs” or special work, not generally available, the burden shifts to the Department (or to the self-insured employer, as the case may be) to show there is, in fact, special work that he can obtain. *Spring v. Dep’t. of Labor and Industries*, 96 Wn.2d 914, 919, 640 P.2d 1 (1982). On the other hand, an ability to perform light or sedentary work of a general nature (as Dr. Gritzka found with Mr. Mesan) precludes a finding of total disability. *Id.*

At any rate, the issue of whether there were suitable sedentary or odd-lot jobs for Mr. Mesan at Tyson – or anywhere else in the local labor market – is of little importance. Substantial evidence shows Mr. Mesan could perform the regular duty production jobs at Tyson, including his job of injury, without restrictions. (CP 206, 411, 504). And Mr. Garza confirmed these jobs all are of the sort regularly performed by many Tyson employees; they are not specialized or “odd-lot” positions. (CP 549-550). In fact, the attending physician, Dr. Higgs, concluded Mr. Mesan was

employable in his job of injury – Pick Bone Sparse Lean, *without any restrictions*. (CP 206).

The testifying vocational experts, meanwhile, split as to their ultimate conclusions regarding employability. It should be noted, however, that Tyson's assigned vocational counselor, Mr. Garza, met with Dr. Higgs on two separate occasions to discuss Mr. Mesan's capabilities and limitations in relation to various Tyson job requirements. (CP 205-206). Ms. Falk, who was retained by Mr. Mesan exclusively for litigation purposes, never met with the doctor – or with any of the IME physicians in this matter. (CP 348).

Mr. Garza visited Tyson's Wallula plant where Mr. Mesan was employed on numerous occasions; he is personally familiar with the particular requirements of all Tyson jobs, including production line positions, at that facility. (CP 522-528). During his second meeting with Dr. Higgs in September 2008, the doctor determined Mr. Mesan fit for duty in the job of injury – Pick Bone Sparse Lean (CP 206), which made Dr. Higgs' consideration of other Tyson job analyses unnecessary. (CP 534-535). Mr. Garza confirmed, meanwhile, that the overhead lifting restriction (which Drs. Higgs and Gritzka both endorsed) did not preclude Mr. Mesan's performance of his job or injury, nor did it require any modifications to such job. (CP 541-543).

Mr. Garza (who provided vocational assessment services for Mr. Mesan for more than two years prior to litigation in this matter) ultimately reached the vocational determination that Mr. Mesan could perform his job of injury at Tyson – not only because Dr. Higgs as attending physician endorsed that opinion, but also because it represented the preponderance of medical opinion among the participating forensic doctors. (CP 542-543.)

On the other hand, Ms. Falk's conclusions regarding employability were premised, in large part, on the opinions of Dr. Gritzka – the lone dissenting medical opinion concerning Mr. Mesan's employability at Tyson. She found Mr. Mesan incapable, vocationally speaking, of performing any of the Tyson jobs without ever having observed the actual performance of those jobs at the Tyson facility. (CP 353). Her vocational opinion ran counter to the medical opinion of Dr. Higgs, whom, she acknowledged, deserves some deference in his capacity of attending physician. (CP 357).

In summary, there was substantial medical and vocational evidence on which the Board (and, in turn, the superior court), found Mr. Mesan capable of performing reasonably continuous gainful employment during the period November 4, 2008, through May 6, 2009. And from that finding, the legal conclusion that Mr. Mesan was not

temporarily totally disabled under the IIA flowed therefrom. (CP 8-10, 614-615).

2. Mr. Mesan Was Not Permanently Totally Disabled.

Permanent total disability (“PTD”) means loss of both legs, or arms, or one leg and one arm, total loss of eyesight, paralysis or other condition permanently incapacitating the worker from performing any work at any gainful occupation. RCW 51.08.160. The determination of PTD necessarily requires examination of the “whole man” as an individual, including age, education, training and experience and other factors that inform the ultimate conclusion of whether, as a result of industrial injury, he is disqualified from employment generally available in the labor market. *Fochtman*, 7 Wn. App. at 295.

There are, nevertheless, reasonable limits on the “whole man” analysis. PTD is properly found only when a claimant’s injury-caused impairments are of such severity that he or she is unable to perform any substantial gainful work within his/her qualifications which exists in the competitive labor market. *In Re. Violet Canfield*, BIIA Dec., 60, 811 (1983). In *Canfield*, claimant, a 73 year-old woman, contended she was eligible for PTD benefits as a consequence of a work-related partial leg disability and in light of her age. The Board rejected that contention, finding claimant to be a person of average intelligence, with average mathematical and vocabulary

skills and a high-school diploma and physically able of perform regular full-time jobs with moderate physical demands. With respect to claimant's contention that her age (73) further disqualified her from access to job opportunities in her labor market, the Board stated:

While it is true that Mrs. Canfield's age makes it very unlikely she can obtain any of the several jobs in the competitive labor market which are within her qualifications, this fact is not sufficient. One is permanently totally disabled only if his or her injury-caused impairments are of such severity that he or she is unable to perform any substantial gainful work within his/her qualifications which exists in the competitive labor market. Certainly "age" is a factor to be weighed when superimposed upon the effects of the injury. However, here the claimant's age is the predominant feature impairing her ability to be hired. Her physical impairment from injury is not substantial enough to prevent the performance of gainful employment.

Id. *Canfield* is instructive in the instant matter, where, again, three of the four physicians found Mr. Mesan capable of performing his job of injury at Tyson. In that light, it should be remembered that Ms. Falk's dim view concerning Mr. Mesan's employability was predicated, in substantial part, on what she perceived to be age and language-related limitations unrelated to Mr. Mesan's claim-related conditions. (CP 313-314, 359).

Similarly, Dr. Gritzka opined that Mr. Mesan is unemployable as a consequence of both his industrial injuries and multiple

preexisting and unrelated conditions, e.g., cervical and lumbar spine fragility, trigger finger syndrome from a separate work-related injury, diabetes and hypertension. (CP 241, 269). Dr. Gritzka's characterization of Mr. Mesan as a "loaded mousetrap" as a consequence of this multiplicity of conditions is telling insofar as there is inadequate evidence to show how the industrial injuries under these claims, either acting upon or in conjunction with these preexisting conditions, had incapacitated Mr. Mesan at the time of claim closure. Dr. Gritzka, it will be remembered, admitted that, "As [Mr. Mesan] presented to me after basically being off work for a period of time, he had a generally normal physical exam." (CP 269). Dr. Gritzka nevertheless opined that if Mr. Mesan were to return to employment and "started stressing his various body parts, they would likely flare up again." *Id.* Apparently, even Dr. Gritzka – the lone dissenting medical opinion on employability in this case – acknowledged a lack of contemporaneous, objective, clinical findings to support total disability. Rather, his conclusion that Mr. Mesan was not gainfully employable at Tyson was premised, it seems, on the *possible* future impact of unspecified workplace stressors – the existence and intensity of which cannot be predicted with any certainty.

Again, there was substantial medical and vocational evidence on which the Board (and, in turn, the superior court), found Mr. Mesan capable of performing reasonably continuous gainful employment

commencing May 7, 2009. As a legal matter, therefore, both tribunals properly found that Mr. Mesan was not permanently totally disabled as of that date. (CP 8-10, 614-615).

D. Mr. Mesan’s Pattern of Symptom Magnification Further Supports the Superior Court’s Rejection of Total Disability.

As described above, substantial evidence supported the Superior Court’s affirmance of the Board’s factual and legal determinations below, insofar as purely objective medical findings and vocational opinions are concerned. In this instance, however, there is also substantial evidence of symptom magnification by Mr. Mesan, which directly bears on credibility – and indirectly on the reliability of medical and vocational opinions that are premised on his assorted complaints and self-imposed physical limitations.

As noted, *supra*, all testifying physicians in this matter – even Dr. Gritzka – acknowledged a fundamental and continuing inconsistency between Mr. Mesan’s complained-of conditions and the objective medical evidence, to wit: Dr. Bozarth found “multiple and diffuse pain complaints” without corresponding neurologic findings, accompanied by multiple “nonphysiologic” complaints and inconsistencies on exam. (CP 503, 507). Drs. Fife and Wong noted exaggerated and incompatible complaints in connection with their neurologic exam. (CP 403). The attending physician, Dr. Higgs, found clear evidence of symptom magnification for secondary

gain by Mr. Mesan in connection with both his physical complaints and his rejection of widely performed surgical procedures for his claim related conditions. (CP 201-202, 206, 210). Meanwhile, Dr. Gritzka had to acknowledge:

As of the date that I saw [Mr. Mesan], there was no objective evidence that would back up any of these various complaints ... for quite a while, his symptoms had resolved or at least the physical manifestations of his conditions had resolved and were back to normal.

(CP 279-280).

In this instance, the Board's Decision and Order, which was affirmed by the superior court without elaboration, contains multiple references to the testifying physicians' findings regarding Mr. Mesan's symptom magnification or embellishment, as well as his categorical refusal to undergo appropriate surgical procedures (which would, in all probability, have improved his physical well being and further improved his vocational opportunities even beyond Tyson). (CP 10-12). As such, the Board and, in turn, the superior court, properly considered Mr. Mesan's credibility, including the accuracy of medical and vocational opinions predicated upon his claims, in concluding Mr. Mesan was not totally disabled at any time relevant to this appeal.

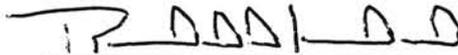
V. CONCLUSION

For all the reasons set forth herein, substantial evidence supported the superior court's affirmance of the Board's Decision and Order in this matter to the effect that Mr. Mesan was capable of performing reasonably continuous gainful employment at all times commencing November 4, 2008. As such, Mr. Mesan was not properly eligible for either TTD or PTD benefits at any time thereafter. In connection therewith, the trier of fact properly considered Mr. Mesan's consistent magnification of subjective complaints, as acknowledged by all testifying physicians, in weighing the evidence.

Respondent Tyson requests, therefore, this Court affirm the superior court's Judgment and Order.

RESPECTFULLY SUBMITTED this 12th day of April, 2013.

The Law Office of Randall Leeland
Attorneys for Respondent



Randall D. Leeland
WSBA No. 13788

CERTIFICATE OF SERVICE

I, KRISTY CARMACK, hereby certify under penalty of perjury under the laws of the State of Washington that the following is true and correct.

I am the assistant to Randall D. Leeland, the attorney for Respondent Tyson Fresh Meats, Inc., and am competent to be a witness herein.

On April 12, 2013, I caused to be mailed by U.S. Mail, postage pre-paid, the original and one copy of the foregoing Brief of Respondent to the following:

Clerk, Court of Appeals, Div. III
500 N. Cedar St.
Spokane, WA 99201

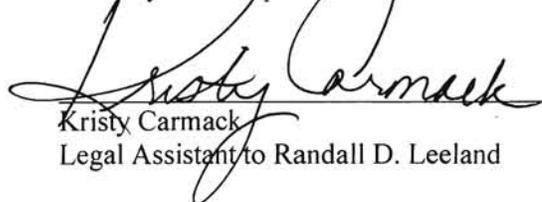
On April 12, 2013, I caused to be mailed by U.S. Postage, postage pre-paid, one true and correct copy of the foregoing document to the following:

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DATED THIS 12th day of April, 2013.

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