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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 33261-6-III

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

Leon Valdez,
Appellant.
v.
Department of Labor & Industries
Respondent

APPELLANT'S BRIEF

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I. INTRODUCTION

On June 8, 2012, the Department of Labor and Industries [hereinafter the Department] issued an order that set aside a prior order closing Mr. Valdez's claim thereby opening the claim up again. No protest or appeal of the June 8, 2012 order was ever received by the Department, and it became a final and binding order pursuant to RCW 51.32.050 and RCW 51.32.060. On July 10, 2012, the Department issued an order that paid Mr. Valdez time loss compensation for the time period of August 15, 2011 through July 9, 2012. No protest or appeal of that order was ever received by the Department, and it became a final and binding order pursuant to RCW 51.32.050 and RCW 51.32.060.

On July 23, 2012; August 6, 2012; August 20, 2012; and August 31, 2012, the Department issued time loss payment orders for the cumulative time period of July 10, 2012 through September 3, 2012. On September 6, 2012, the Department issued an order correcting and superseding those payment orders, and assessing an overpayment against Mr. Valdez for the time loss benefits paid in the amount of \$2376.08 for time loss paid during the period of July 10, 2012 through September 3, 2012.. The September 6,

2012 Department order assessing an overpayment was protested by Mr. Valdez. On October 1, 2012, the Department issued an order affirming the September 6, 2012 overpayment order. On November 1, 2012, Mr. Valdez protested the October 1, 2012 Department order. The Department chose not to reconsider the order and forwarded the protest of the October 1, 2012 order to the Board of Industrial Insurance Appeals [hereinafter the Board] as a direct appeal. The Board granted the appeal, and conducted hearings. On April 29, 2014, the Board issued an order affirming the October 1, 2012 Department order assessing an overpayment against Mr. Valdez.

On May 5, 2014, Mr. Valdez appealed the April 29, 2014 Board order to the Yakima County superior court. A bench trial was held on January 26, 2015. On March 2, 2015, findings of fact, conclusions of law, and a judgment were entered by the superior court granting the Department's Motion for Summary Judgment. The superior court's ruling affirmed the April 29, 2014 Board order, which had affirmed the October 1, 2012 Department order assessing an overpayment for time loss benefits paid for the time period of July 10, 2012 through September 3, 2012. Mr. Valdez appeals the March 2, 2015 findings of fact, conclusions of law, and judgment of the superior court to this court.

II. ASSIGNMENTS OF ERROR

A. The trial court erred in entering finding of fact 10 because there is not substantial evidence to support a finding that Mr. Valdez was able to perform and obtain gainful employment on a reasonably continuous basis from July 10, 2012 to September 3, 2012.

B. The trial court erred in entering finding of fact 9 because there is not substantial evidence to support a finding that Mr. Valdez was able to perform the light-duty job of conveyor monitor from July 10, 2012 through September 3, 2012.

C. The trial court erred in entering finding of fact 11 because there is not substantial evidence to support a finding that the overpayment for the time period July 10, 2012 through September 3, 2012 was correctly assessed.

III. STATEMENT OF THE CASE

In August of 2010, Mr. Valadez was working for the employer of injury, Cascade View, thinning apples when he injured his right knee. CP 117; 135. He was released to light-duty work by his attending physician, and asked his employer of injury (Cascade View) whether there was any

light-duty work available. *Id.* 118 He was told there was no light-duty work available for him with the employer of injury. *Id.* He continued working in his regular job despite his injury until November 2010. *Id.* 118-119. He then moved back to California, where had he had lived prior to coming to Washington and starting work with the employer of injury. *Id.* 119 While still living in California he received a light-duty job offer from Matson Fruit in the Yakima area to perform a modified/light duty job entitled stamper assistant or conveyor monitor. *Id.* 120; 151 He moved back to Washington specifically to accept the light-duty job with Matson Fruit, and started performing it on June 13, 2011. *Id.* 122 On August 12, 2011, Matson Fruit terminated his employment with them because they were informed that his Social Security number did not match his name. *Id.* 155

Matson Fruit is a separate corporate entity that Cascade View. *Id.* 141-144 They have separate and distinct hiring and firing practices. *Id.* They have separate individuals employed by the respective corporate entities charged with hiring and firing employees. *Id.* They file separate corporate tax returns. *Id.* They have separate payrolls. *Id.* They have separate employer accounts with the Department of Labor & Industries. *Id.* Matson Fruit is entirely a packing facility, and Cascade View is an orchard. *Id.*

On June 8, 2012, the Department issued an order that set aside a prior order closing the claim, and indicated that the claim remained open for treatment. *Id.* 8; 37 That order contained protest language pursuant to RCW 51.52.050 and was consequently a determinative order. *Id.* On June 10, 2012, the Department issued in order that paid Mr. Valdez time loss compensation from August 15, 2011 through July 9, 2012. *Id.* That order contained protest language pursuant to RCW 51.52.050 and was consequently a determinative order. *Id.* On July 23, 2012; August 6, 2012; August 20, 2012; and August 31, 2012 the Department issued orders paying Mr. Valdez time loss compensation for the cumulative period of July 10, 2012 through September 3, 2012. *Id.* On September 6, 2012, the Department issued an order which corrected and superseded the July 23, 2012; August 6, 2012; August 20, 2012; and August 31, 2012 the Department orders paying time loss from July 10, 2012 through September 3, 2012, and assessed an overpayment against Mr. Valdez for the time loss benefits paid during that period of time. *Id.*

The Department did not receive a protest of the June 8, 2012 order setting aside the closure of the claim, and it is undisputed that it was a final and binding order pursuant to RCW 51.52.050 & RCW 51.52.060 before the September 6, 2012 overpayment order was issued by the Department. *Id.* The Department did not receive a protest of the June 10, 2012 time loss

payment order that paid time loss compensation from August 15, 2011 through July 9, 2012, and it is undisputed that it was a final and binding order pursuant to RCW 51.52.050 & RCW 51.52.060 before the September 6, 2012 overpayment order was issued by the Department. *Id.*

Dr. Larry Lefors is the only medical expert who testified in this case. Dr. Lefors is an osteopathic physician licensed in the state of Washington. *Id.* 161 He is board certified in family practice and pain management. *Id.* 162 He is on the faculty of Pacific Northwest University an osteopathic medical school. *Id.* He saw Mr. Valdez for the first time on June 28, 2011 and continued to see him on numerous occasions throughout 2011, 2012, and 2013. *Id.* 162-19. He saw him for the last time on June 13, 2013. *Id.* 179. He testified that Mr. Valdez had physical restrictions proximately caused by his industrial injury, and that those restrictions would have been appropriate for Mr. Valdez as of September 3, 2012. *Id.* 178-181 He testified that those restrictions include the following: 1) sitting occasionally; 2) standing occasionally; 3) walking occasionally; 4) climbing ladders/stairs seldom; 5) twisting seldom to occasionally; 6) bending and stooping seldom to occasionally; 7) squatting seldom; 8) kneeling seldom; 9) squatting seldom; 10) reaching occasionally to frequently depending on the force and position; 11) wrist flexion, extension, and grasp frequent; 12) wrist manipulation frequently; and 13) operating foot controls seldom to

occasional. *Id.* 178-179 Dr. Lefors also testified that Mr. Valdez would not be capable of gainful employment on a reasonably continuous basis in his job of injury as a harvest worker/farmworker during the overpayment period of July 10, 2012 through September 3, 2012, and that the cause of that inability was the industrial injury. *Id.* 182 He also testified that taking into account the residuals of Mr. Valdez's industrial injury and his education level Mr. Valadez would not have been capable of gainful employment on a reasonably continuous basis in work generally available in his labor market during the overpayment period of July 10, 2012 through September 3, 2012. *Id.* 183-184 He testified that the first time he reviewed a light duty job description for the light-duty job of conveyor monitor was on December 13, 2012, and that he felt that Mr. Valadez could physically perform the light duty job of conveyor monitor. *Id.* 182-183

IV. ARGUMENT

- A. **The trial court erred in entering finding of fact 10 because there is not substantial evidence to support a finding that Mr. Valdez was able to perform and obtain gainful employment on a reasonably continuous basis from July 10, 2012 to September 3, 2012.**

The determination of whether an injured worker is capable of obtaining and maintaining gainful employment requires a study of the injured worker. *Leeper v. Dept. of Labor and Indus.*, 123 Wn.2d 803, 814-815 (1994). Not only the residuals of the industrial injury itself must be considered, but also other factors such as the injured worker's age, education, training, experience, their reaction to their injury, and any other relevant factor. *Id.*

The Washington State Court of Appeals has explained that “[a]ccording to case law, a worker is incapable of performing any work at any gainful occupation if the worker’s injury, combined with his or her age, education, and training, has rendered the worker unable to obtain any kind of work within a reasonable degree of occupational continuity and fit only for odd jobs and special work, which are not generally available on the open job market.” *Hunter v. Bethel School Dist.*, 71 Wn. App. 501, 508 (1993). The Washington State Supreme Court has also explained that total disability does not mean that the “workman must be absolutely helpless or physically broken and wrecked for all purposes except merely to live.” *Kuhnle v. Dep’t of Labor & Indus.*, 12 Wn.2d 191, 197 (1942).

Total disability can be established by medical testimony that the injured worker is not capable of gainful employment. *Fochtman v. Dept. of Labor & Indus.*, 7 Wn. App. 286, 295-296 (1972). Testimony of a

vocational expert may be relevant to a determination of total disability, but it is not necessary to establish total disability. *Young v. Labor & Indus.*, 81 Wn. App. 123, 132 (1996). The court of appeal explained that while vocational testimony may be relevant and admissible “to show the labor market, a court need not consider expert testimony to determine total and permanent disability. . . .” *Id.* The *Young* court explained that they agreed with the trial court in that case that, “common sense, supported by the evidence, showed that Ms. Young’s limited employment skills and her physical inability to stand or sit for any consistent length of time prevented her from finding or retaining reasonably continuous gainful employment.” *Id.*

There is not substantial evidence to support finding of fact 10 that that Mr. Valdez was capable of obtaining and performing gainful employment during the period of July 10, 2012 through September 3, 2012 because the only evidence bearing on that question supports the conclusion that Mr. Valdez was not capable of gainful employment generally available in his labor market during the period of July 10, 2012 through September 3, 2012, and that as will be seen in the discussion below regarding finding of fact 9 there is not substantial evidence to support a finding that Mr. Valdez was able to perform the light duty job of conveyor monitor during the

overpayment period because there was no valid light duty job offer to Mr. Valdez under RCW 51.32.090(4)(b) applicable to the overpayment period.

The only evidence bearing on the question of Mr. Valdez's ability to engage in gainful employment generally available in his labor market is the testimony of Dr. Lefors. His testimony does not support finding of fact 10. He testified that Mr. Valdez was not capable of performing his job of injury during the time period July 10, 2012 through September 3, 2012, and that the cause of that inability was Mr. Valdez' industrial injury. CP 182. He also testified that Mr. Valdez was not capable of performing gainful employment on a reasonably continuous basis in any work generally available in the labor market during the time period of July 10, 2012 through September 3, 2012. *Id.* 183-184 He also testified that Mr. Valdez's August 6, 2010 industrial injury was the cause of Mr. Valdez' inability to engage in gainful employment. *Id.*

Neither the Department, nor the employer, called any medical witness to rebut the testimony of Dr. Lefors. The only evidence bearing on the question of whether Mr. Valdez was capable of reasonably continuous gainful employment in jobs generally available during the period of July 10, 2012 through September 3, 2012 is the testimony of Dr. Lefors, which stated that Mr. Valdez was in fact not capable of gainful employment generally available in the labor market. Since the only evidence bearing on Mr. Valdez's ability

to perform gainful employment generally available establishes that he was not capable of gainful employment in any generally available work, the only way there could be substantial evidence to support finding of fact 10 would be if there was substantial evidence to support finding of fact 9 regarding a valid light duty job offer under RCW 51.32.090(4)(b) which could act to terminate time loss and support the overpayment. However, as will be seen below, no such valid job offer was made during the relevant time period as would be required.

B. The trial court erred in entering finding of fact 9 because there is not substantial evidence to support a finding that Mr. Valdez was able to perform the light-duty job of conveyor monitor from July 10, 2012 through September 3, 2012.

In order for there to be substantial evidence to support finding of fact 9 there would need to be substantial evidence that not only could Mr. Valdez physically perform the light duty job of conveyor monitor, but that the light duty job was actually offered to Mr. Valdez after the August 15, 2011 and was available to Mr. Valdez as of July 10, 2012 and continuing through September 3, 2012.

RCW 51.32.090(4)(b) is the statute governing light duty job offers. It reads as follows:

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)(b) therefore requires that the following take place in order for a light-duty job offer to terminate time loss compensation benefits of an injured worker who is receiving time loss benefits:

1. The light duty job offer must be from the employer of injury.
2. The employer of injury shall provide a written statement of the job duties to both the attending physician and the injured

worker sufficient to allow the attending physician to relate the job activities to the restrictions of the worker.

3. The attending physician shall then review the description of the light-duty job and determine whether or not it is appropriate for the injured worker.
4. If the light-duty job proposed by the employer of injury is approved by the attending physician, then time loss benefits shall continue until the injured worker begins to work with the employer of injury in the light duty job.

Mr. Valdez became a worker “entitled to temporary total disability benefits” effective August 15, 2011 when the Department issued payment of time loss compensation from August 15, 2011 through July 9, 2012 on July 10, 2012. CP 37. That order is a final and binding order under RCW 51.32.050 and RCW 51.32.060. Because that order is final and binding it is an undisputed fact that as of August 15, 2011 Mr. Valdez was a temporarily and totally disabled worker. In order for there to be substantial evidence to support finding of fact 9 there would need to be substantial evidence of a valid light duty job offer for the job of conveyor monitor to Mr. Valdez under RCW 51.32.090(4)(b) sometime after August 15, 2011, the date as of which he was temporarily and totally disabled without dispute and before July 10, 2012 starting date of the overpayment period. The following elements would have

had to have been met sometime after August 15, 2011 and before July 10, 2012 in order for there to be a valid light duty job offer¹:

1. Review of the light duty job description for conveyor monitor by Dr. Lefors, the attending physician at the relevant time, sometime after August 15, 2011 and before July 10, 2012;
2. The employer of injury would have had to have sent a copy of the written job description to Mr. Valdez during that same time period;
3. Approval of the light duty job description by Dr. Lefors sometime after August 15, 2011, but before July 10, 2012;
4. A light duty job offer made by the employer of injury after August 15, 2011 and before July 10, 2012;
5. The employer of injury would have had to have allowed Mr. Valdez to start performing the job of conveyor monitor as of July 10, 2012.

There is no evidence that even one of the above elements of a valid light duty job offer under RCW 51.32.090(4)(b) were fulfilled by Cascade View, the employer of injury, or any other employer for that matter, at any time after August 15, 2011 and before July 10, 2012. Therefore there cannot be substantial evidence to support finding of fact 9.

¹ The May 27, 2011 job offer is irrelevant to the issues in this case as will be discussed in more detail later in the brief.

Dr. Lefors first reviewed the job description of conveyor monitor on December 13, 2012, which is well after July 10, 2012, and too late to meet that requirement of RCW 51.32.090(4)(b). CP 182-183. In addition, there is no evidence that a copy of a light duty job offer was sent to Mr. Valdez during the necessary period of time either. Further, no light duty job offer for the job of conveyor monitor was made to Mr. Valdez by the employer of injury, or any other employer for that matter, during the period of August 15, 2011 through July 10, 2012. *Id.* at 126

Since there is no evidence that even one, let alone all, of the necessary elements of RCW 51.32.090(4)(b) were met during the applicable period of time there cannot be substantial evidence to support finding of fact 9 either.

The majority of the evidence offered by the Department dealt with the irrelevant issue of the May 27, 2011 job offer to Mr. Valdez by Matson Fruit. CP 151 The May 27, 2011 job offer is irrelevant, and therefore cannot constitute substantial evidence in support of finding of fact 9 for two reasons. First, the job offer was made, and the job ended, before Mr. Valdez was subsequently determined to be temporarily and totally disabled again as of August 15, 2011 as a result of the final and binding July 10, 2012 time loss payment order which issued payment of time loss compensation from August 15, 2011 through July 9, 2012. CP 37. Even if the August 12, 2011 termination of that light duty job was for cause that does not make the job

offer relevant to the overpayment in this case since Mr. Valdez was determined to be temporarily and totally disabled again effective August 15, 2011 as a result of the final and binding July 10, 2012 Department order. CP 37. RCW 51.32.090(4)(a) provides that when the employer of injury for an injured worker that is entitled to temporary total disability benefits (time loss compensation) wants to offer a light duty job they must get the job approved by the attending physician and offer the job to the injured worker. Since as of August 15, 2011 Mr. Valdez was a worker entitled to temporary total disability benefits a light duty job could not be used to terminate those benefits and create an overpayment unless the requirements of the statute for a light duty job offer were met during that period of temporary total disability. Nowhere in RCW 51.32.090(4)(b) does it provide for terminating time loss benefits based on a job analysis approved in the past by a prior attending physician.

The fact that the prior light duty job had been terminated for cause is also irrelevant to the issue in this case. A situation similar to the case at bar was addressed by the Board in the case of *In Re Jennifer K. Soesbe*, BIIA 02-19030 (2003)² In *Soesbe* the injured worker was released to perform light-

² The *Soesbe* case references RCW 51.32.090(4). RCW 51.32.090 was amended subsequent to the *Soesbe* case and the former subparagraph (4) was renumber (4)(b). The substance of the return to work paragraph did not change. Significant decisions of the Board are not binding on the court, but they are considered persuasive authority.

duty work with her employer of injury by her attending physician, but on the first day of the light-duty job she was fired for cause. *Id.* Subsequently, her attending physician determined that she was not capable of gainful employment in any capacity for a period of time, and it was held that she was again entitled to time loss benefits once she was determined to be totally disabled again by her attending physician. *Id.* In the case at bar, as in *Soesbe*, after the termination for cause from the light duty job the injured worker returned to an inability to perform gainful employment in any work and there was a consequent return to total disability status and entitlement to time loss.

The fact that there is no medical testimony specifically stating that Mr. Valdez became physically unable to perform the light duty job of conveyor monitor after his August 12, 2011 termination for cause is irrelevant since the final and binding Department order dated June 10, 2012 that paid time loss from August 15, 2011 through July 9, 2012 established as a matter of law that Mr. Valdez had returned to a total disability status and was unable to perform any employment including the light duty job. CP 8; 37 The rationale used by the industrial appeals judge in the Proposed Decision and Order and adopted by the Board in their Decision and Order, and which in turn was adopted by implication by the trial court that the payment of time loss form

Weyerhaeuser Co. v. Tri, 117 Wn.2d 128, 138 (1991); O’Keefe v. Labor & Indus., 126 Wn. App. 760 (2005).

August 15, 2011 through July 9, 2012 is “not particularly persuasive. . .as there may be numerous reasons why time loss compensation benefits were paid during that time period, including payment while the Department obtained and verified relevant information about claimant’s ability to work and treatment needs” ignores the plan meaning of the time loss payment order and well establish case law. *Id.* 8-9; 43 There is only one reason that the Department pays time loss compensation benefits, and that is if the injured worker is temporarily and totally disabled. RCW 51.32.060; RCW 51.32.090 If there is a concern on the part of the Department about whether payment of the time loss may not be correct, but they want to pay it while they continue to gather information about the injured worker’s ability to work then they can issue payment of the benefits in an interlocutory order that does not include the protest language of RCW 51.52.050. However, in Mr. Valdez’s case the Department made payment of the time loss benefits in an order containing protest language from RCW 51.52.050, and that order became final and binding. *Id.* 8;37 Once an order is final it is binding on all parties to the claim. *Marley v. Dept. of Labor & Indus.*, 125 Wn.2d 533, 542-43 (1994). This is true even if the order contains a mistake of law. *Id.* The fact that July 10, 2012 time loss payment order paying time loss from August 15, 2011 through July 9, 2012 contained protest language, and became final and binding under RCW 51.52.050 & RCW 51.52.060 before the September 6, 2012 overpayment

order was issued is of great significance in this case. That order establishes as “the law of the case” that as of August 15, 2011 Mr. Valdez was temporarily and totally disabled again, and that is binding on all parties—including the Department. CP 8;37; *Marley* 542-43 His return to temporary total disability status as of August 15, 2011 makes the prior May 2011 job offer and termination from that light duty job on August 12, 2011 irrelevant since both of those events happened prior to Mr. Valdez becoming temporarily and totally disabled effective August 15, 2011. To hold that an order issuing payment of time loss compensation means anything other than that the injured worker is temporarily and totally disabled during the time period for which time loss is paid would render the order meaningless.

The case of *O’Keefe v. Dept. of Labor & Indus.*, 126 Wn. App. 760 (2005) is distinguishable from the case at bar. In *O’Keefe* the injured worker was fired from a light-duty job with his employer of injury which had been approved by his attending physician. *Id.* However, there two key distinctions between *O’Keefe* and the case at bar.

First, in *O’Keefe* the termination from the light-duty job was not followed by a subsequent determination that he was again temporarily and totally disabled from all employment. *Id.* In the case at bar, however, following Mr. Valdez’s August 12, 2011 termination from the light-duty job he was determined, in a final and binding Department order, to be temporarily

and totally disabled again by the Department effective August 15, 2011. CP 37.

Second, the light-duty job in *O'Keefe*, and in *Soesbe*, was a light-duty job offered by the employer of injury as is required by RCW 51.32.090(4)(b) in order for a light duty job to be used to terminate time loss compensation. *O'Keefe*, pg. 762; *Soesbe*. In the case at bar the light-duty job offer on May 27, 2011 was not from the employer of injury, Cascade View, but rather from a separate employer, Matson Fruit. CP 134-135; 151-152. As outlined in the statement of case section above Matson Fruit and Cascade View were separate corporate entities operating separately. RCW 51.32.090(4)(b) is clear on its face that the job offer must come from the employer of injury.

The very first sentence of the first paragraph specifically references the phrase “employer of injury” two times. The sentence reads, “**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.” RCW 51.32.090(4)(b)³ (emphasis added). In describing the employer requesting that the injured worker return to work in a light-duty job, and in describing what employer the light duty work would be with, the legislature specifically referenced the "employer of injury." Had the legislature intended the statute to apply to a job offer being made by some employer other than the employer of injury the legislature would not have used language specifically referencing the “employer of injury.” They would have used a phrase such as “any employer” or “an employer” or “any interested employer.” The legislature did not do that, but rather specifically used the phrase "employer of injury." They used that phrase because they in fact were referring to the "employer of injury” when drafting the statute. There is no portion of the first sentence of RCW 51.32.090(4)(b) which references in any way an employer other than the "employer of injury."

The second sentence also specifically references the "employer of injury.” It states that, "[t]he 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.**” *Id.* (emphasis added). Here again, the

³ The *Soesbe & O'Keefe* cases reference RCW 51.32.090(4). RCW 51.32.090 was amended subsequent to those cases and the former subparagraph (4) was renumber (4)(b). The substance of the return to work paragraph did not change.

legislature specifically referenced the work beginning with the "employer of injury." They did not reference the work beginning with "any employer," or "any interested employer." Rather, they used language specifically referring to the employer of injury.

The third paragraph also specifically references only the "employer of injury." It reads, "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." *Id.* (emphasis added). The legislature again specifically referenced the employer of injury when referencing who the work was with.

There is not one reference in RCW 51.32.090(4)(b) that references any employer making a light duty job offer other than the employer of injury. RCW 51.32.090(4)(b) uses the exact phrase "employer of injury" on at least four occasions. To hold that the phrase "employer of injury" means any employer would deprive the phrase of any logical meaning, and would be inconsistent with the plain meaning of the phrase. It is a basic premise of statutory construction to interpret the meaning of words in statutes according to their plain meaning. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9 (2002). Also, it is a general rule of statutory

construction that when a term is not defined in the statute, the term must be accorded its plain and ordinary meaning unless a contrary intent appears. *Dennis v. Dept. of Labor & Indus.*, 109 Wn. 2d 467 (1987).

Another basic rule of statutory construction is that in statutes containing categories “the expression of one is the exclusion of the other. ‘Legislative inclusion of certain items in a category implies that other items in that category are intended to be excluded.’” *Landmark v. Development, Inc. v. City of Roy*, 138 Wn.2d 561, 571 (1999) (citations omitted). The fact that the legislature specifically referenced the “employer of injury” in RCW 51.32.090(4)(b) and did not include employers generally means the legislature intended to include employers other than the employer of injury.

Further, if the phrase “employer of injury” were interpreted to mean any employer that would render the phrase “employer of injury” meaningless and superfluous. This would violate the rule of statute construction that states statutes “must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.” *State of Wash. V. J.P.*, 149 Wn.2d 444, 450 (2003).

That the legislature intended the phrase “employer of injury” to mean the employer of injury can be seen by putting RCW 51.32.090(4)(b) into context by looking at the preceding paragraph of the statute, RCW 51.32.090(4)(a). That subsection states that “the legislature finds that long-

term disability and the cost of injuries is significantly reduced when injured workers remain at work following their injury. To encourage **employers at the time of injury to provide light-duty or transitional work for their workers,** wage subsidies and other incentives are made available to employers insured with the Department." *Id.* (emphasis added). Again this subsection specifically references "the employer of injury." This subsection also makes it clear that the purpose of RCW 51.32.090 in the overall is not to facilitate the injured worker's return to the work force for the sake of the worker, but rather it is to try to reduce costs for employers and the Department.

This is further illustrated in RCW 51.32.090(4)(c) which notes that "to further **encourage employers to maintain the employment of their injured workers,** an employer insured with the Department and that offers work to a worker pursuant to subsection (4) shall be eligible for reimbursement of the injured worker's wages for light duty or transitional work equal to. . . ." *Id.* (emphasis added). Again, the statute specifically references the relationship between the injured worker and the employer at the time of injury. The statute does not offer incentives to any and all employers who for some reason decide they want to offer an injured worker a light-duty job. Rather, the statute specifically provides an incentive to the **employer of injury** to provide light-duty to "**their injured workers.**" *Id.* (emphasis added).

The Board adopted the analysis in the Proposed Decision and Order of the industrial appeals judge, which in part relied upon the supposition that “[n]o testimony was provided indicating that the Matson Fruit job (conveyor monitor) was a job not otherwise available in claimant’s labor market. . .” *Id.* 42 This supposition ignores the evidence. It is correct that no witness specifically stated that “the job is not available in the general labor market,” but the evidence about the job makes it clear that the job was a light duty job, and consequently not one generally available in the labor market. The May 27, 2011 job offer letter, which was admitted as exhibit 1, specifically notes that the job “is a modified position” and that the “physical demands of the transitional job may be changed, as permitted by your medical provider.” *Id.* 151 The job analysis itself, page 2 of exhibit 1, specifically notes in the title of the job that it is a “new position” entitled “Stamper Assistant” *Id.* 152 The parties’ reference to the job as being called “conveyor monitor” in reality is not accurate, and the job should have been referred to as “stamper assistant” as noted on the job analysis itself. *Id.* 152 The employer themselves even acknowledged, in the testimony of Ms. Gutierrez, that the job was a light duty job. *Id.* 140

The reality is that there was no dispute between the parties about the job being a light duty job not generally available in the labor market. It should therefore be no surprise that there was not a witness asked that specific

question. Additionally, the fact that the Department relied upon the light duty job offer as the basis for the overpayment underscores the fact that there was no dispute over the fact the job was not generally available in the labor market. If the job had been a generally available job then there would have been no need to rely upon a light duty job offer under RCW 51.32.090(4)(b) as the basis for the overpayment, but rather the Department could have simply concluded Mr. Valdez was capable of gainful employment generally available in the labor market under subsection (3)(a) of RCW 51.32.090 rather than relying on subsection (4)(b) regarding light duty job offers.

The testimony of Ms. Gutierrez that the job would have been available to Mr. Valdez during the overpayment period had there not been a problem with his social security number in connection with the May 27, 2011 job offer does not constitute substantial evidence that Mr. Valdez would have been able to obtain and perform the light duty job during the overpayment period. CP 140 First, as outlined above RCW 51.32.090(4)(b) requires approval of the job by the attending medical provider during the relevant period of time. Second, her statement that the job would have been available is not supported by any testimony or evidence that the fact the job was allegedly still available to Mr. Valdez was ever communicated to him via a new job offer after he returned to temporary total disability status effective August 15, 2011. CP 126 How was he to know the job was still available to him if Matson Fruit

never communicated that to him? Nothing in the termination letter advised him of that. *Id.* 155

It is likely the Department will argue that there would have been no reason for Matson to make a new offer because they knew Mr. Valdez could not have accepted the job, or that they were precluded from doing so because they believed his social security number was not valid, however, that argument does not constitute substantial evidence of a valid job offer either since it is only an argument and not evidence. Further, in order for that argument to be persuasive there would need to be evidence that Matson knew Mr. Valdez social security number issue had not been corrected as of the start of the overpayment period on July 10, 2012, however, there is no evidence that they even inquired about that issue at any point after August 15, 2011 when Mr. Valdez became totally disabled again, and before July 10, 2012. So there is not substantial evidence to support the argument.

In summary, there is no evidence of a valid light duty job offer under RCW 51.32.090(4)(b) to Mr. Valdez for the job of conveyor monitor after August 15, 2011 and before July 10, 2012 by any employer, let alone by the employer of injury Cascade View, that can serve as substantial evidence to support finding of fact 9.

C. The trial court erred in entering finding of fact 11 because there is not substantial evidence to support a finding that the overpayment for the time period July 10, 2012 through September 3, 2012 was correctly assessed.

Finding of fact 11 can only be supported by substantial evidence if there is substantial evidence to support findings of fact 9 and 10. As outlined above finding of fact 10 is not supported by substantial evidence because there is no evidence to support the finding that Mr. Valdez was capable of reasonably continuous gainful employment generally available in his labor market during the period of July 10, 2012 through September 3, 2012. Finding of fact number 9 is not supported by substantial evidence because there is no evidence that a valid light-duty job offer for the job of conveyor monitor under RCW 51.32.090(4)(b) was made after August 15, 2011 and before July 10, 2012. Because there is no evidence to support findings of fact 9 and 10, there is no evidence to support finding of fact 11 either.

V. Conclusion

There is not substantial evidence to support finding of fact 10 because the only evidence addressing the question of whether Mr. Valdez was capable of gainful employment from July 10, 2012 through

September 3, 2012 was the testimony of Dr. Lefors, and he testified that Mr. Valdez was not capable of gainful employment.

There is not substantial evidence to support finding of fact 9 because there was no valid light duty job offer for the job of Conveyor Monitor subsequent to Mr. Valdez becoming temporarily totally disabled again effective August 15, 2011. There is not substantial evidence to support finding of fact 11 because in order for there to be substantial evidence to support it there would have to be substantial evidence to support either finding of fact 9 or 11, and as outlined above there is not.

VI. Request for Attorney Fees & Expenses

Mr. Valdez requests attorney fees and costs in this matter pursuant to RCW 51.52.130 and RAP 18.1.

DATED this 30 day of July, 2015



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