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Court of Appeals
Division III
State of Washington
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37014-3

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

RUBEN C. LEON, Respondent,

v.

MCCAIN FOODS, USA, INC., Appellant.

AMENDED REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

I. ARGUMENT.....1

 A. Claimed Errors were Disclosed in the
 Associated Issue Pertaining Thereto per RAP
 10.3(g).....1

 B. Substantial Evidence in the Board Record does
 not support Mr. Leon’s inability to work.....3

II. CONCLUSION.....5

TABLE OF AUTHORITIES

TABLE OF CASES

Ruse v. Department of Labor and Industries,
138 Wn.2d 1 (1999).....2, 3

Pellino v. Brink’s, Inc.
164 Wn.App. 668 (2011).....2

Moreman v. Butcher,
126 Wn.2d 36 (1995).....3

State v. Hill,
123 Wn.2d. 641 (1994).....3

State v. Halstien,
122 Wn.2d 109 (1993).....3

Young v. Department of Labor and Industries,
81 Wn.App. 123 (1996).....3

STATUTES

RCW 51.32.095.....5

I. ARGUMENT

A. Claimed Errors Were Disclosed in the Associated Issue Pertaining Thereto per RAP 10.3(g).

Mr. Leon argues that McCain Foods failed to assign error to any of the court's findings of fact. However, "The appellate court will only review a claimed error which is included in an assignment of error **or** clearly disclosed in the associated issue pertaining thereto." RAP 10.3(g) Emphasis added. In this case, McCain Foods identified the appropriate "claimed error" in both the assignment of error **and** in the associated issue pertaining thereto. Specifically, Findings of Fact #4 (attention, concentration, interactions), #5 (unable to perform or obtain gainful employment from April 17, 2015, through January 25, 2016), and #7 (unable to perform or obtain gainful employment as of January 26, 2016) were addressed. The preponderance of evidence was ignored by the superior court, and the superior court did not afford the attending physician's opinion special consideration, and thus Mr. Leon did not meet his burden of proof.

Further, the claimed errors were clearly disclosed in the Issues Pertaining to Assignment of Error.

McCain Foods clearly disputed the Superior Court's award of time loss compensation benefits and subsequent award of pension benefits, and the asserted inability to obtain and perform gainful employment, upon which such compensation benefits are based.

McCain Foods notably disputed the findings of fact by pointing out that the attending physician, Randel Bunch, M.D., as well as the opinions of Dr. Robinson, Dr. Friedman and Stephen Renz, VRC, supported that Mr. Leon was both physically and mentally capable of returning to work as a Forklift Driver on a full time basis at McCain's plant in Othello, Washington. Such claimed errors were clearly disclosed in the associated issue pertaining thereto per RAP 10.3(g).

The best way to determine if the claimed errors were "clearly disclosed" is by reading the context of Mr. Leon's brief. They had absolutely no problem understanding the errors claimed in 24 pages of their brief, and neither should this court. The real test and focus of this court is whether substantial evidence supports the superior court findings and whether the court's conclusions of law flow from the findings. *Ruse v. Department of Labor and Industries*, 138 Wn.2d 1, 5 (1999).

Mr. Leon argues a failure to assign error to any of the court's findings of fact makes them verities on appeal, and directs this court to *Pellino v. Brink's, Inc.*, 164 Wn.App. 668, 682 (2011).

That decision cites to *Moreman v. Butcher*, 126 Wn.2d 36, 39 (1995), which in turn cites to both RAP 10.3(g) and *State v. Hill*, 123 Wn.2d 641, 644 (1994), which thus cites to *State v. Halstien*, 122 Wn.2d 109, 128 (1993).

In *Hill*, the court stated, “Generally, findings are viewed as verities, provided there is substantial evidence to support the findings.” *State v. Hill*, 123 Wn.2d 641, 644 (1994). In *Halstien*, the court stated, “Substantial evidence exists where the record contains a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the allegation.” *State v. Halstien*, 122 Wn.2d 109, 128 (1993).

B. Substantial Evidence in the Board Record does not support Mr. Leon’s inability to work.

Both parties agree on one thing, the test before this court involves, “whether substantial evidence supports the findings made after the superior court’s de novo review and whether the conclusions of law flow from the findings.” *Ruse v. Department of Labor and Industries*, 138 Wn.2d 1, 5-6 (1999) (quoting *Young v. Department of Labor and Industries*, 81 Wn.App. 123, 128 (1996)). The evidence in the record is simply not sufficient, and not of a substantial level, to support the findings or conclusions.

Mr. Leon relied on one sole witness, Dr. Williams, who saw him on only one occasion at the behest of his attorney. McCain provided evidence of both a quantitative level and qualitative level to reinstate the decision of the Board of Industrial Insurance Appeals and Department of Labor and Industries in this matter.

Even when reviewing Dr. Williams' testimony in a light most favorable to Mr. Leon, this does not overcome the deficiencies of his evaluation and testing, particularly the invalid MMPI test score noted by Dr. Robinson. CP at 375, line 19 to 377, lines 1-5. On a psychiatric basis alone, McCain offered twice as much evidence from Dr. Robinson and Dr. Friedman, and they relied on more information than Dr. Williams ever considered.

However, there is substantially more evidence to support that Mr. Leon is able to work as a Forklift Driver. Not only did Dr. Bunch, Mr. Leon's treating physician, approve that position, the assigned vocational counselor, Steven Renz, recommended that Mr. Leon was able to do that job based on multiple medical opinions, including that from Dr. Spann and nurse Hull. CP at 203, lines 4-13, and at 209, lines 8-14.

As Mr. Leon pointed out, “Mr. Renz provided the information regarding the one job that he felt Mr. Leon was capable of performing post-injury¹.”

Mr. Leon offered no other evidence in the form of a professional vocational opinion, or any other medical opinion to refute Mr. Renz. The preponderance of the evidence supports the conclusion that Mr. Leon is employable. The findings and conclusions of the superior court are clearly not supported by a substantial level of evidence.

II. CONCLUSION

There is no dispute that Mr. Leon sustained burns in the course of his employment with McCain Foods on April 27, 2012. He was compensated for missed time following that injury until his benefits ended on April 16, 2015. His benefits ended because McCain Foods offered him a position at their plant, in a totally separate and environmentally controlled space as a Forklift Driver. They exercised their right, under the Industrial Insurance Act, RCW 51.32.095(2)(c), to offer a new job with the same employer in keeping with any limitations or restrictions. Mr. Leon declined that offer.

¹ Respondent’s Brief at 20.

At hearing he relied solely on one medical witness, not a treating or attending physician. He also critically failed to present evidence that he was unable to perform any form of gainful activity. Thus, his best argument is to establish sympathy for his injury, and to exaggerate his disability. Mr. Leon argues, “He has waited nearly eight years for the only compensation he will ever receive due to the worker’s (sic) compensation laws².” However, he received nearly three years of time loss compensation from April 2012 to April 2015, and a permanent partial disability award of \$96,363.84.

He voluntarily declined a valid job offer, but wants time loss compensation and a pension for that decision. He is capable of performing and obtaining work, and most importantly, he did not offer enough evidence to support his claim. Thus, because there is not substantial evidence in the Board record to support the findings of fact in superior court, the conclusions of law do not flow in his favor. Mr. Leon is capable of working as an Inside Packaging Forklift Driver as of April 17, 2015, and thereafter.

² Respondent’s Brief at 23.

Accordingly, McCain Foods, USA, Inc., again respectfully requests this Court reverse the August 6, 2019, Superior Court Findings of Fact, Conclusions of Law and Decision and Judgment, including the award for fees and costs, and any interest, and affirm the May 19, 2017, Decision and Order of the Board as correct, with directions to the Department to issue a further order consistent with this decision.

DATED this 10th day of March, 2020.

Respectfully submitted,



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COURT OF APPEALS DIVISION III OF THE STATE OF WASHINGTON

RUBEN C. LEON,)	No. 37014-3
Respondent,)	
)	CERTIFICATE OF SERVICE
v.)	
)	
MCCAIN FOODS USA, INC.,)	
<u>Appellant.</u>)	

I certify that I caused a true and correct copy of the foregoing AMENDED REPLY BRIEF OF APPELLANT to be served on the following parties in the manner specified on March 10, 2020:

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DATED this 10th day of March, 2020.

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