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37014-3

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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RUBEN C. LEON, Respondent,

v.

MCCAIN FOODS, USA, INC., Appellant.

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AMENDED BRIEF OF APPELLANT

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## **I. INTRODUCTION**

While working at McCain Foods, USA, Inc., (McCain) as a Maintenance Worker on April 27, 2012, Mr. Ruben Leon sustained an injury as he unclogged a pipe attached to a potato fryer. Hot oil splashed onto his body as he loosened the pipe. Mr. Leon's burns eventually healed and he recovered from the injury. While the claim was open, McCain exercised their right under the law to offer him a new job. There is no dispute as to the validity of this job offer. Mr. Leon did not accept the job, and his benefits ended.

The Department of Labor and Industries (Department) eventually closed his claim on January 26, 2016, with time loss compensation benefits ending as paid through April 16, 2015. He was also awarded a total of \$96,363.84, for permanent partial disability as result of this industrial injury. Mr. Leon challenged that closing order and claimed he was temporarily totally disabled up to claim closure and then totally and permanently disabled as a result of this injury. The Board of Industrial Insurance Appeals (Board) heard evidence from both sides and affirmed the decision and order from the Department. Mr. Leon appealed to Adams County Superior Court, where the trial judge reversed the decision and awarded him time loss compensation and placed him on a pension. McCain now appeals to this court.

## **II. ASSIGNMENTS OF ERROR**

### Assignments of Error

1. Mr. Leon did not meet his burden of proof.
2. The Superior Court did not afford the attending physician's opinion special consideration.
3. The Superior Court ignored the preponderance of evidence in holding for Mr. Leon.

### Issues Pertaining to Assignments of Error

1. Was the Superior Court correct in granting Mr. Leon additional time loss compensation benefits and placing him on a pension when the sole medical testimony he offered from C. Donald Williams, M.D., was clearly based on flawed MMPI testing? Further, was the Superior Court correct in finding Mr. Leon totally temporarily and then totally permanently disabled when he did not present any evidence that he was unable to obtain or perform any form of gainful employment?
2. Was the Superior Court correct in finding for Mr. Leon when the testimony of Randel Bunch, M.D., Mr. Leon's attending physician on this claim, supported that he was physically and mentally capable of returning to work for McCain as a Forklift Driver on a full time basis at McCain's plant in Othello, Washington?

3. Was the Superior Court correct in finding for Mr. Leon when a preponderance of medical testimony, from Dr. Robinson, Dr. Friedman, and Dr. Bunch, as well as vocational testimony from Stephen Renz, VRC, all supported his ability to work as a Forklift Driver on a full time basis at McCain's plant in Othello, Washington?

### **III. STATEMENT OF THE CASE**

On April 27, 2012, Mr. Leon was working at McCain as a Maintenance Worker, when hot oil splashed onto him requiring considerable treatment and skin grafts. CP<sup>1</sup> at 153, lines 5-6, and at 419, lines 4-8. After Mr. Leon had reached maximum medical improvement, the assigned vocational counselor, Mr. Stephen Renz, VRC, prepared a job analysis for the job of Inside Packaging Forklift Driver. CP at 202, lines 16-17, at 200, lines 10-25; CP at 233-237. The attending physician, Randel Bunch, M.D., approved this job analysis for Mr. Leon on October 24, 2014. CP at 203, lines 7-8, at 418, line 22, at 420, lines 21-25, and at 428, lines 8-12.

Upon approval of the job analysis for an Inside Packaging Forklift Driver, McCain offered Mr. Leon this job on February 11, 2015. CP at 398, lines 21-22; CP at 231. Mr. Leon declined this job offer on February 25, 2015. CP at 231.

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<sup>1</sup> CP refers to Clerk's Papers, filed with the Court of Appeals.

Eventually, the Department issued an order on January 26, 2016, closing this claim. CP at 56-57. The order stated that time loss compensation benefits were ended as paid through April 16, 2015. *Id.* The order also awarded Mr. Leon \$96,363.84, for permanent impairment for the left upper extremity, for the skin, and for mental health. *Id.*

Mr. Christopher Childers, attorney for the claimant, Plaintiff and Respondent in this case, Mr. Ruben C. Leon, filed a timely appeal on February 17, 2016, from the January 26, 2016, closing order. CP at 58-59. The Board issued an Order Granting Appeal on March 2, 2016. CP at 60.

Following the taking of evidence at a hearing and from a review of perpetuation depositions on this case, Judge Heidi Bolong issued a Proposed Decision and Order on March 7, 2017. CP at 45-53. In that proposed decision she concluded Mr. Leon was temporarily totally disabled from April 17, 2015, through January 25, 2016, and permanently totally disabled as of January 26, 2016. CP at 53.

Because no partial disability for an injury can be compensated with the award of a total disability pension for that same injury, Judge Bolong concluded that the greater permanent partial disability award of Category 4 for mental health impairment was no longer at issue. CP at 52; *Harrington v. Department of Labor and Industries*, 9 Wn.2d 1, 8 (1941); *McIndoe v. Department of Labor and Industries*, 100 Wn.App. 64, 70 (2000).

On April 13, 2017, Mr. Robert M. Arim, attorney for the employer, Defendant and Appellant in this case, McCain Foods, USA, Inc., filed a Petition for Review. CP at 20-36. The Board issued an Order Granting Petition for Review on May 3, 2017. CP at 16. On May 19, 2017, the Board issued a Decision and Order that concluded Mr. Leon was capable of obtaining and performing some form of gainful employment as of April 17, 2015, and that the Department order closing this claim was correct. CP at 8-13.

Specifically, the Board held Mr. Leon was not a temporarily totally disabled worker from April 17, 2015, through January 25, 2016, and was not a permanently totally disabled worker as of January 26, 2016. CP at 12. They also found that Mr. Leon's award for a Category 3 rating of permanent mental health impairment, per the Department closing order, was correct. *Id.*

On May 30, 2017, (sic) Mr. Childers filed a Notice of Appeal in Adams County Superior Court from the Board's May 19, 2017, Decision and Order. CP at 1. Following a bench trial before the Honorable Judge Steve Dixon on March 14, 2019, Judge Dixon issued a written decision on April 2, 2019. CP at 31-32. In that decision, Judge Dixon reversed the Board's May 19, 2017, Decision and Order, and remanded the matter to the Department to issue an order consistent with Judge Bolong's Proposed Decision and Order. *Id.*

Following a period of time for counsel to reach an agreement on the wording of the final order, the fees and costs, Judge Dixon signed the Findings of Fact, Conclusions of Law and Judgment on August 6, 2019, that was consistent with his written decision. CP at 34. On August 22, 2019, Mr. Arim filed a timely Notice of Appeal to the Court of Appeals, Division III, from the Superior Court's August 6, 2019, Findings of Fact, Conclusions of Law and Judgment. CP at 36.

#### **IV. ARGUMENT**

##### **A. Standard of Review.**

A modified standard of review applies in industrial insurance appeals. The Board's decision and order is presumed correct, and the party challenging that decision carries the burden on appeal to the superior court. RCW 51.52.115, *Gorre v. City of Tacoma*, 184 Wn.2d 30, 36 (2015).

The superior court can make its own findings or reach a different result only if the judge finds by a preponderance of the evidence that the Board's findings and decision are erroneous. *Id.* at 36. On appeal from superior court, the appellate court reviews the record to determine "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." *Id.* at 36, citing *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)).

In this case, it is abundantly clear that there was not substantial evidence to support the superior court findings, and the conclusions of law, copied from Judge Bolong's Proposed Decision and Order, do not therefore flow from the findings.

**B. Mr. Leon did not meet his burden of proof.**

The Appellant urges this court to follow the analysis of the Board in concluding that Mr. Leon's sole medical witness, Dr. Williams, was not persuasive and did not rely on accurate testing. Further, as the Board emphasized, Mr. Leon did not present evidence that he was unable to perform any form of gainful activity.

With regard to Dr. Williams, as the Board stated, "Dr. Williams described very little of the information he learned during his one-time clinical evaluation of Mr. Leon's mental health. From the record it appears that his conclusions were drawn almost exclusively from the results of the MMPI...and we are convinced that Dr. Williams inappropriately relied on the results of the MMPI that he administered, and that even he acknowledged would be considered invalid by the author of the criteria which mental health experts use in their interpretation of the results of the inventory." CP at 10, lines 1-10.

Dr. Williams did not review the map of the facility where Mr. Leon would have worked. CP at 271, lines 23-25, and at 272, lines 1-2. Dr. Williams' main explanation for Mr. Leon's inability to work as a Forklift Driver is that the McCain plant would result in continuous and distracting flashbacks. CP at 264, lines 6-8, 19-23.

Dr. Williams' explanation clearly showed that he had not reviewed the map of the plant, as he would have realized that the job of Forklift Driver is located in a separate, temperature controlled environment, and is not in proximity to hot oil facilities or equipment that would trigger any distracting flashbacks. In contrast, Drs. Bunch and Robinson reviewed the map of the McCain plant before opining that the location would not trigger Mr. Leon's psychiatric condition. CP at 363, lines 6-25, to 365, lines 1-12; CP at 429, lines 21-25, and 430, lines 1-25.

Further, Dr. Williams' diagnostic impression of Mr. Leon is based on an invalid test. Dr. Williams testified that he based his diagnostic impression on Mr. Leon's MMPI test, which yielded a T score of 92. CP at 254, line 25, to 256, line 25. However, the published validity rule from the creator of the MMPI test, indicates that in a forensic evaluation such as the one Dr. Williams performed, a test with a score greater than 90 is invalid. CP at 375, line 19, to 377, lines 1-5. Dr. Williams' test is thus invalid. Dr. Robinson also found clear, objective evidence of Mr. Leon's exaggeration on Dr. Williams' MMPI. CP at 377, lines 1-2.

Dr. Friedman administered an MMPI in Spanish, Mr. Leon's primary language, and concluded that the test was invalid based on Mr. Leon's exaggerated response. CP at 306, lines 1-12, at 307, lines 21-25, and at 308, lines 1-11. As Dr. Friedman explained, because his MMPI test was invalid, he could not make a reasonable diagnostic impression out of the test. CP at 308, lines 8-11. Thus, Mr. Leon did not present any medical opinion based on valid testing or actual knowledge of the McCain plant in support of his assertion he could not perform the position of Forklift Driver.

Critically, Mr. Leon also failed to demonstrate that he was unable to obtain or perform any form of gainful employment. A worker is totally disabled if he was able to work prior to the injury and unable to do so after the injury because of pain and nature of the injury; when medical experts have testified to the loss of function and limitations on the ability to work; and when vocational experts have concluded the worker is not employable. *Spring v. Department of Labor and Industries*, 96 Wn.2d 914 (1982). Temporary total disability differs from permanent total disability in duration of the disability and not in its character. *Bonko v. Department of Labor and Industries*, 2 Wn. App. 22 (1970).

Under *Kuhnle v. Department of Labor and Industries*, 12 Wn.2d 191 (1942), the measure of total disability is not the extent of the physical impairment but rather the effect of the injury on the worker's wage earning capacities. *Fochtman v. Department of Labor and Industries*, 7 Wn. App. 286, 288 (1972), defines total disability as the "inability as the result of a work-related injury, to perform or obtain work suitable to the workman's qualifications and training." Here, there is no issue of Mr. Leon's ability to obtain work as a Forklift Driver.

Had Mr. Leon accepted the job offer from McCain Foods for the position of Forklift Driver, that position would have been available to him. CP at 399, lines 10, 22. By resting solely on his failure to work as a Forklift Driver, Mr. Leon did not meet the burden of proof that he was unable to perform or obtain other work, and the trial court erred by focusing solely on Mr. Leon's subjective feelings about working at McCain. It was his burden to prove total temporary and total permanent disability, and he did not. Thus, the conclusion reached by the Board, which affirmed the Department's decision, should stand.

**C. The opinion of Dr. Bunch warrants special consideration.**

The superior court erred in not giving the opinion from Randel Bunch, M.D., special consideration. As noted, Mr. Leon only had one witness, Dr. Williams, who was hired by his attorney for this case.

On the other hand, Dr. Bunch is the attending physician for Mr. Leon, and he saw him first for this injury on December 13, 2013, and was still seeing him at the time of his deposition on December 21, 2016. CP at 418, lines 8-9, and lines 16-24. Dr. Bunch signed and approved the job analysis for Inside Packaging Forklift Driver for Mr. Leon on October 24, 2014. CP at 428, lines 8-12.

Not only had he reviewed the map of the plant used in this case to understand that the forklift area was in a separate building from the site of the injury, but he was very familiar with the McCain plant in Othello, where the job was located, and had even walked through the plant. CP at 427, line 25, at 428, line 2, and at 429, lines 4-21; CP at 230. He also noted that Mr. Leon was driving around Othello, a small town with two French fry factories, on more than one occasion. CP at 427, lines 4-17, at 404, lines 24-25, and at 405, lines 1-2.

According to the Washington State Supreme Court, “an attending physician...who has attended a patient for a considerable period of time for the purpose of treatment...is better qualified to give an opinion as to the patient’s disability than a doctor who has seen and examined the patient once.” *Spalding v. Department of Labor and Industries*, 29 Wn.2d 115, 128-129 (1947). See also *Hamilton v. Department of Labor and Industries*, 111 Wn.2d 569 (1988).

The court affirmed this rule recently when they said “In Hamilton, this court recognized a ‘long-standing rule of law in workers’ compensation cases that special consideration should be given to the opinion of a claimant’s attending physician.’” *Clark County v. McManus*, 185 Wn.2d 466 (2016).

Not only had Dr. Bunch approved the job analysis for Mr. Leon on October 24, 2014, but he still believed that he could perform the position of Forklift Driver as of April 17, 2015, and did not think he was totally and permanently disabled. CP at 420, line 21, at 428, lines 7-12, at 431, lines 18-21, at 435, lines 1-2, 4, 22-24, at 436, lines 5, 18, and at 438, lines 3-5. Mr. Leon’s prior attending providers, Dr. Spann and nurse Hull, also approved the job analysis for that position. CP at 203, lines 4-13, and at 209, lines 8-13.

Thus, Dr. Bunch is in a better position to observe and report on Mr. Leon’s barriers, or the lack thereof, for returning to work as a Forklift Driver. Dr. Bunch explained that he did not believe there is a psychiatric issue that would disqualify Mr. Leon from working as a Forklift Driver during the time periods in question. CP at 435, lines 13, 22-24. Dr. Bunch also concurred with the opinions regarding Mr. Leon from Dr. Robinson and Dr. Friedman. CP at 437, lines 4-6, 12-19.

In addition to approving the job analysis for Inside Packaging Forklift Driver for Mr. Leon, Dr. Bunch added at the time of his December 21, 2016, testimony, “I thought he could do it, and I still think it would probably be best for him.” CP at 438, lines 4-5.

Thus, not only did the Superior Court err by not affording special consideration to Dr. Bunch’s opinions in this case, but it is clear that substantial evidence does not support the findings made in the superior court’s de novo review and thus the conclusions of law do not flow from the findings. For this reason, the appellant urges this court to reverse the superior court’s erroneous findings and conclusions.

**D. The preponderance of medical and vocational opinions establishes that Mr. Leon is employable as an Inside Packaging Forklift Driver as of April 17, 2015.**

The job of Forklift Driver is located in the packing area, a temperature-controlled environment, and the job would not expose Mr. Leon to any hot oil facility or high-temperature equipment in that area. CP at 400, lines 23-25, and at 401, lines 1-10. A map of the packing area shows that it is in a separate building. CP at 230. Mr. Leon would not be required to drive the forklift or walk through the area where production, cleaning or frying of the potatoes takes place. CP at 401, lines 8-10.

Further, the packing area is primarily for loading cardboard-packing products on the pallets and putting the pallets down in an area where they are loaded on the trucks. CP at 405, lines 20-25, at 406, lines 1-2, 23-25, and at 407, lines 1-19. Dr. Robinson explained that individuals who go back to work at the same general location, as long as they are not around the same machine or circumstances that injured them, or the same equipment, tend to do well. CP at 364, lines 10-14. As the position of Forklift Driver is located in a separate building, does not expose Mr. Leon to any hot oil facility or high temperature equipment, and Mr. Leon will not be required to drive around the area where production, cleaning, and frying of the potatoes take place, Mr. Leon's psychiatric condition is not a barrier.

Further, Dr. Friedman testified that Mr. Leon is able to sustain concentration working as a Forklift Driver based on his independence with his activities of daily living. CP at 314, lines 4-7. Dr. Friedman explained that Mr. Leon is capable of driving and is in good physical condition. CP at 313, lines 18-20. Dr. Friedman also explained that Mr. Leon is capable of ensuring that his eight-year old daughter gets to school on time, and is able to focus on helping her with homework. CP at 313, lines 20-24.

Dr. Friedman concluded that those factors demonstrate that Mr. Leon could sustain concentration as a Forklift Driver. CP at 314, lines 4-9. Dr. Robinson testified that he is in agreement with Dr. Friedman's assessment. CP at 366, line 5.

Similarly, Mr. Leon did not offer any evidence that his disability conviction impacted his ability to perform the job of a Forklift Driver within the range of his qualifications and training. As Dr. Robinson explained, profound disability conviction means "resistance to treatment, lack of cooperation with treatment...so lack of cooperation and repetitive statements about 'I can't work' and has zero reflections on what Mr. Leon is able to do." CP at 379, line 25, and at 380, lines 1-9. There is likewise no evidence that Mr. Leon's narcotic prescription barred him from working as a Forklift Driver. As Mr. Enger testified, as long as Mr. Leon stayed within Dr. Bunch's prescribed dosage, he could work as a Forklift Driver. CP at 402, lines 4-15.

Lastly, Mr. Renz only submitted the claim for vocational closure after overwhelming support from Mr. Leon's attending providers, Dr. Bunch, Dr. Spann, and nurse Hull, that Mr. Leon was capable of performing the job of Forklift Operator. CP at 203, lines 1-13, and at 209, lines 8-13.

In contrast, Mr. Leon did not provide any rebutting vocational evidence in support of temporary total disability during the time period from April 17, 2015, through February 25, 2016, or permanent and total disability as of February 26, 2016.

Therefore, the overwhelming preponderance of medical and vocational opinions establishes that Mr. Leon was capable of gainful continuous employment as a Forklift Operator as of April 17, 2015. As such, the Board correctly determined that Mr. Leon was not temporarily totally disabled during the time period from April 17, 2015, through January 25, 2016, and not permanently totally disabled thereafter.

**E. The Board correctly found that Mr. Leon sustained a Category 3 permanent partial disability mental health impairment as a result of the industrial injury.**

When the Superior Court followed the Proposed Decision and Order from Judge Bolong, the issue of a permanent partial disability award, as explained above, becomes moot in the case of awarding a pension. However, in urging this court to reverse the Superior Court and reinstate the decision of the Board, and thus of the Department, it is important to note that the Board correctly found that the preponderance of medical opinion from Drs. Robinson and Friedman establishes that Mr. Leon sustained a Category 3 mental health impairment rating, pursuant to WAC 296-20-340, as related to the industrial injury.

As Dr. Friedman testified, “[t]his is a man who at times in his day-to-day activities – for example, his ability to drive, take care of himself, take his daughter places – actually in some ways fits more into a Category 2.” CP at 291, lines 6-10.

As Dr. Robinson testified, he did not see very poor judgment. CP at 369, lines 17-21. Dr. Robinson also testified that Dr. Williams’ diagnosis of Mr. Leon’s psychomotor retardation is incorrect, as “[p]sychomotor retardation is an unusual psychiatric manifestation. It’s kind of similar to the person who doesn’t move, doesn’t speak, doesn’t react when you address them, that kind of thing. It’s just a little bit more movement in speech than that. There is very little inflection in tone, there’s a slowness of voice, there’s limited facial expression, limited adventitious movement. That’s not Mr. Leon.” CP at 369, lines 21-25, and at 370, lines 1-5 (emphasis added). Further, as Dr. Robinson testified, Mr. Leon did not have misperceptions, including sense of persecution or grandiosity, nor any thought disturbance causing memory loss. CP at 370, lines 11-14. Dr. Robinson also testified that Mr. Leon did not have any frequent, recurrent, and disruptive organ dysfunction, with pathology or organ or tissues, as Mr. Leon did not have any atrophy and there was no record of disrupted organ dysfunction or regression of tissue. CP at 370, lines 5-11.

Dr. Robinson testified that Mr. Leon's alleged frequent dissociative reactions sound greatly exaggerated, far beyond what he observed, and inconsistent with what would be expected. CP at 371, lines 1-6.

Thus, as the Board correctly found, the record documented the existence of only two of the seven symptoms that Dr. Williams said supported his rating, and no evidence existed that Mr. Leon experienced, if any, more than a few of the multiple other symptoms included in the rating. Therefore, the preponderance of medical evidence establishes that Mr. Leon was correctly rated at a Category 3 mental health impairment, pursuant to WAC 296-20-340, from the April 27, 2012, industrial injury. CP at 340, lines 6, 8, at 316, lines 15-25, and at 317, lines 1-5

## **V. CONCLUSION**

Although the Superior Court may have felt sympathy for Mr. Leon, the simple truth is that there was not substantial evidence in the record to support the Superior Court's findings of fact that Mr. Leon was unable to maintain attention and concentration for extended periods, to get along with coworkers or peers without behavioral extremes, and to interact appropriately with the general public as of April 17, 2015.

Further, there is not substantial evidence, or really any evidence, that he is unable to perform or obtain gainful employment on a reasonably continuous basis from April 17, 2015, through January 25, 2016, and as of January 26, 2016, due to the residuals of the industrial injury. Because of the error on the part of the Superior Court to reach these findings of fact from the evidence in the record, and considering both the special consideration that should be afforded to Dr. Bunch, and the clear preponderance of medical and vocational evidence that Mr. Leon is capable of working as an Inside Packaging Forklift Driver as of April 17, 2015, and thereafter, the conclusions of law do not flow from these facts.

For the foregoing reasons, McCain Food, USA, Inc., 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 21<sup>st</sup> day of November, 2019.

Respectfully submitted,



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COURT OF APPEALS DIVISION III OF THE STATE OF WASHINGTON

RUBEN C. LEON, )  
Respondent, )  
v. )  
MCCAIN FOODS USA, INC., )  
Appellant. )

No. 37014-3

CERTIFICATE OF SERVICE

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DATED this 21<sup>st</sup> day of November, 2019.

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