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No. 37014-3

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

RUBEN C. LEON,

Respondent,

v.

MCCAIN FOODS,

Appellant.

BRIEF OF RESPONDENT

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III. COUNTERSTATEMENT OF THE FACTS

Mr. Ruben Leon was born in Mexico and at age 14 moved, by himself, to eastern Washington where an uncle resided. Mr. Leon believes he completed six years of education in Mexico but did not ever attend school in the United States. Spanish is his first language and although he can speak Spanish fluently and English fairly well, he cannot read well or write in either Spanish¹ or English. IQ and other academic testing completed by a psychiatrist, Dr. Antuna, on January 15, 2013, revealed the illiteracy and that Mr. Leon had a cognitive difficulty. The combination left Dr. Antuna “not very optimistic with respect to Mr. Leon’s academic abilities and literacy in [either] English [or] Spanish.” From a vocational standpoint, Dr. Antuna opined “it would be a challenge essentially to look at other types of training programs [for Mr. Leon] given his academic levels.” Added to that vocational challenge, Mr. Leon has had only two jobs in his lifetime. Approximately one month at Chef Reddy in Othello, WA and then approximately 25 years at McCain Foods, USA, Inc. (McCain), where he successfully worked his way up from potato peeler to maintenance worker. There is no dispute that he was an extremely hard worker and in nearly 25

¹ Mr. Leon stated he can read in Spanish but then admitted, “. . . some words that I - - I cannot understand it [Spanish language] correctly.” 10/26/16 Leon Tr. at 92.

years with McCain, missed work only one time² when he broke his finger on a malfunctioning machine at work. (CP 152-158, 173-174, 194-195, 197-199, 215-216)

On April 27, 2012, Mr. Leon was critically burned in a tragic on-the-job incident when, while working underneath a vat used for frying potatoes, a valve exploded spraying hot oil over his face, arms, and torso. His friend and co-worker, Fermin Aviles, pulled Mr. Leon out from under the pot and immediately started first aid measures. As soon as he was stable enough to travel, Mr. Leon was taken by ambulance from the McCain plant to the closest hospital where it was immediately determined he needed to be flown to Harborview Medical Center's Burn Unit in Seattle where he spent approximately two weeks, enduring daily debriding sessions that his family could not bear to witness. Mr. Leon underwent multiple surgeries, including skin grafts on his face, arms, chest, and back, both during his initial hospital stay as well as months after his release from Harborview, which required painful travel from Othello to Seattle for treatment. (CP 90-105, 106-112, 118-122, 130-145, 158-161, 168-172, 340-343)

In its Appellant's brief, McCain vastly underreports the severity of Mr. Leon's industrial injury of April 27, 2012, and the resulting mental and

² Mr. Leon missed approximately three weeks of work while his finger healed.

physical sequelae that continue to this day. Amend. Br. of App. at 1.³ Mr. Leon cannot function on a daily basis without twice daily doses of 30 mg of morphine to assist with the constant itching and pain resulting from the sequelae of the industrial injury. He also takes a prescription drug, Gabapentin, to help with the nerve pain he endures. The scars from Mr. Leon's burns are visible and he scratches at his arms almost constantly. He frequently has nightmares about the accident, which causes insomnia. He then naps throughout the day. Since the accident, he now has uncontrolled high blood pressure even though treatment with prescription medication is on-going. He is unable to go anywhere near the McCain plant and hasn't been back there since the accident. (CP 159-163, 168-172, 178-179)

All the medical professionals that examined Mr. Leon agree he has a severe form of Post-Traumatic Stress Disorder (PTSD) and major depression related directly to the industrial injury, which has caused him to withdraw socially. He had no prior psychological history before the industrial injury. He was outgoing and friendly and loved to fish and target practice. Post-industrial injury Mr. Leon actively avoids former friends and

³ Appellant, McCain Foods, USA, Inc. (McCain), filed two briefs in this appeal. The original was timely received by the Clerk of the Court of Appeals on November 7, 2019. An Amended Brief of Appellant was received by Respondent on November 25, 2019. Because the Amended Brief contains appropriately updated cites to the Clerk's Papers, all references to McCain's Appellant's brief found in this Response are to the Amended Brief of Appellant.

family, rarely leaving home except to take his daughter to school. He prefers not to drive and does so only when he can't find anyone else to drive him where he needs to go. His partner, Beth, had to change the locks on the gun safe because they are both worried about what Mr. Leon is capable of doing when he gets very depressed. (CP 160-161, 246-247, 258, 305, 343, 425)

Although briefly noted above, vital to the resolution of this appeal is the fact that Mr. Leon feels psychologically unable to go anywhere near the McCain plant and has not been there since the day he was burned. His partner of more than 25 years, Beth Cruz, testified that she used to ask Mr. Leon to bring her lunch at the plant but he always refused. On one occasion while driving home from Moses Lake, Ms. Cruz decided to see what would happen if she surprised Mr. Leon and took the road that passes in front of the McCain plant. Mr. Leon became very upset, began shaking and crying and even twisted his body in his seat so he didn't have to see the plant. He was quite angry with Ms. Cruz and told her to never do that again. (CP 135-138)

Mr. Leon's extreme fear of being anywhere near the McCain plant is well documented by medical providers. Mr. Leon's vocational rehabilitation counselor at the Department, Stephen Renz, determined Mr. Leon needed to get back to work. Mr. Leon himself testified he wants to be

employed – just not at the McCain facility in Othello. Mr. Leon made inquiries about jobs in the Othello area, but when he revealed he had to take twice-daily morphine medication, he was told he would never be hired. Despite Mr. Leon’s psychological aversion to being anywhere near the McCain plant, Mr. Renz determined that due to Mr. Leon’s cognitive disabilities and limited job experience the *only* job for which Mr. Leon was qualified was as a forklift operator at the McCain plant. The attending physician, Dr. Randel Bunch, approved Mr. Leon for the job. (CP 428) Soon thereafter, Mr. Leon received through the mail, a job offer from McCain dated February 11, 2015, for the position of forklift operator. (Exhibit 2 – page 1; CP 231) Mr. Leon’s daughter, Crystal, read him the letter.

McCain had made an offer of employment in an area of the plant that was away from the hot oil vats where Mr. Leon was burned. (CP 398-401) However, as Roy Enger testified, the smell of hot oil permeates the entire plant. (CP 404) Dr. Robinson, a forensic psychiatric examiner, testified about triggers for PTSD. He said, “the things that are difficult are hearing the same sounds, smelling the same smells, experiencing the same kind of sensory events that were present where the injury occurred.” He continued, “Those tend to take a toll and be difficult and interfere with employability. And I’ve seen that occur quite a number of times.” (CP 364)

Even so, Dr. Robinson approved Mr. Leon for the McCain job. This testimony goes directly to Mr. Leon's argument as there is nowhere at the McCain plant where Mr. Leon can escape the odor of hot potato oil.

Mr. Leon discussed McCain's job offer with a few people and a few days later asked Crystal what to write in response to the job offer. She initially did so on the face of the job offer, in her handwriting but in Mr. Leon's words. (CP 163-167) She later typed a formal response to the job offer. (CP 232)

In its brief, McCain argues it is fatal to his case that Mr. Leon turned down the job offer McCain presented. However, McCain offers no insight as to the reasons behind Mr. Leon's decision. Br. of App. at 3. Mr. Leon explained his reasons at the hearing before Industrial Appeals Judge (IAJ) Bolong. Through Mr. Leon's testimony it is clear he initially rejected McCain's offer of employment because he thought the McCain drug policy prohibited the use of narcotic medications by any employee while working. (CP 163-164) Common sense and prescription warnings lead most people to understand that driving heavy equipment while taking narcotic medication is dangerous. Mr. Leon testified he called the HR Department at McCain and spoke to "Roy," who told Mr. Leon that he correctly understood the McCain drug policy. Roy confirmed that if Mr. Leon was taking prescription morphine he would not be able to work at McCain

driving a forklift. (CP 162-167). Nearly two years later, during his deposition, Mr. LeRoy (Roy) Enger testified McCain currently has a policy whereby narcotics are allowed if prescribed by a medical professional. (CP 397-399, 402) Why the differing testimony? Perhaps within the two year period of time, McCain changed its drug policy or maybe the two men misunderstood each other back in 2015 when Mr. Leon first asked Roy to clarify the drug policy. In either scenario the trial court, as fact finder had to weigh the credibility of the competing testimony.

A careful reading of the actual job description, written by Mr. Renz, reveals that reading and writing are a vital part of the fork-lift operator job McCain offered Mr. Leon. (See Exhibit 3 – CP 233-237) Two “Essential Functions” of the job are to “complete necessary paperwork and to communicate problems or changes in the department to supervis[or] or appropriate personnel.” (Ex. 3 – CP 233) “Job Qualifications and Skills” include: “Ability to read and comprehend simple instructions, short correspondence and memos. Ability to write simple correspondence.” There are some basic mathematic requirements and the necessity that Mr. Leon have the “[a]bility to apply common sense understanding to carry out detailed but uninvolved *written* or oral instructions.” (Ex. 3 – CP 234) These tasks make the forklift operator job cognitively impossible to perform for Mr. Leon, a man that is illiterate in Spanish and English and has another

cognitive disability. Once again, the court had to weigh the competing evidence from Mr. Leon, Mr. Renz, Dr. Bunch and “Roy.” The credibility decisions were for the trial court. From the findings and conclusions, it is clear the trial court believed Mr. Leon’s testimony.

IV. PROCEDURAL POSTURE

The Department of Labor & Industries (Department) initially covered the costs of Mr. Leon’s industrial injury claim but closed it on January 26, 2016 with time loss benefits paid through April 16, 2015 as well as several permanent partial disability awards for physical and mental health impairments. (CP 56) Mr. Leon appealed the decision, contending he is owed time loss payments from the date of the accident through January 26, 2016. (CP 58) He also contends that thereafter he is a permanently totally disabled worker as a result of his PTSD and his twice daily use of prescription morphine due to the residual pain from his burns, which leaves him tired and prone to fall asleep at odd times. He also maintains the Department should have determined his mental health impairment was at the Category 4 level noted by Dr. Williams. The Industrial Appeals Judge (IAJ) at the Board of Industrial Insurance Appeals (Board) agreed with him and reversed the Department order. (CP 45-54) The permanent partial disability ratings are not relevant once a party is determined permanently

totally disabled. The full Board review agreed with the Department and reversed the IAJ's decision. (CP 8-14) Mr. Leon appealed to the Adams County Superior Court, which reversed the Board's Decision and Order and reinstated the Proposed Decision and Order. (CP 1-2, 506-513) McCain filed an appeal with this court. (CP 504)

V. ARGUMENT

A. STANDARD OF REVIEW

The law regarding the standard of review for cases filed under the Industrial Insurance Act (IIA) is well settled. On appeal to the *superior court* the Board's findings and conclusions are prima facie correct and the burden of proof is on the party attacking them. RCW 51.52.115; *Ravsten v. Dep't of Labor & Indus.*, 108 Wn.2d 143, 146, 736 P.2d 265 (1987). However, the presumption of correctness is a limited one; the Board's decision will be overturned if the trier of fact finds from a preponderance of the credible evidence that the findings and decision of the board are incorrect. *Cantu v. Dep't of Labor & Indus.*, 168 Wn. App. 14, 20–21, 277 P.3d 685 (2012). It is only if the trier of fact determines the evidence is equally balanced does the presumption require the findings of the board to stand. *Allison v. Dep't of Labor & Indus.*, 66 Wn.2d 263, 268, 401 P.2d (1965).

Review by the Court of Appeals “shall lie from the judgment of the superior court as in other civil cases.” RCW 51.52.140. Review by this court is limited to an examination of the superior court decision not the Board’s decision in determining whether substantial evidence supports the superior court findings and whether the court’s conclusions of law flow from the findings.” *Ruse v. Dep’t of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999). Substantial evidence is evidence in the record sufficient to persuade a fair-minded, rational person that the premise is true. *Lewis v. Simpson Timber Co.*, 145 Wn. App. 302, 322, 189 P.3d 178 (2008).

B. ISSUES ON APPEAL

McCain assigns error to three issues: (1) Mr. Leon did not meet his burden of proof; (2) the superior court did not afford the attending physician’s opinion “special consideration;” and (3) the superior court ignored the preponderance of evidence in holding for Mr. Leon. McCain failed to assign error to any of the court’s findings of fact, making them verities on appeal. *See Pellino v. Brink’s, Inc.*, 164 Wn. App. 668, 682, 267 P.3d 383 (2011).

1. Burden of Proof

McCain states “it is abundantly clear” that substantial evidence does not support the superior court’s findings⁴ and urges this court to adopt the Board’s Decision and Order dated May 19, 2017 analysis (CP 8-14) and reverse the superior court’s findings and conclusions. It claims that Mr. Leon failed to prove total temporary and total permanent disability mainly through its criticism of Dr. Williams’ deposition testimony.⁵ In considering McCain’s sufficiency of the evidence challenge, this court must admit the truth of Mr. Leon’s evidence as well as any inference drawn therefrom and the evidence must be viewed in the light most favorable to him. *Bott v. Rockwell Int’l*, 80 Wn. App. 326, 332, 908 P.2d 909 (1996). Credibility determinations are solely for the trier of fact and cannot be reviewed on appeal. *Cantu v. Dep’t of Labor & Indus.*, 168 Wn. App. 14, 22, 277 P.3d 685 (2012). Following these rules, substantial evidence amply supports the trial court’s findings and its conclusions flow from those findings.

McCain is free to criticize the sufficiency of Dr. Williams’ testimony, but credibility decisions lie solely with the fact finder. Additionally, the record consists of much more than just Dr. Williams’ report. While the Board decision may have been critical of Dr. Williams,

⁴ Amended Br. of App. at 7.

⁵ Amended Br. of App. at 8-11.

this court is not reviewing the Board decision, it is reviewing the findings and conclusions of the trial court. In so doing it must admit the truth of Mr. Leon's evidence as well as any inferences therefrom in the light most favorable to him.

Because McCain assigned no error, all seven of the court's findings of fact are verities on appeal. There is no dispute in the record that findings #1 and #2 are correct. (CP 507) Mr. Leon would add that he is illiterate in both English and Spanish, not just English as found by the trial court in finding #3. (CP 507) Evidence supporting finding #4 is found in the testimony of Dr. Williams, Mr. Leon, his step-children, his long-term partner, Beth, and his friend, Mr. Aviles. The lay witnesses are the people that knew Mr. Leon both before and after the industrial injury. The trial court, in its de novo review, determined the expert evidence, "particularly the lay evidence, indicates that Mr. Leon's horrifying experience, functional illiteracy, daily morphine intake, PTS, major depression and untreatable mental health impairment" prevented him from accepting the forklift operator job offered by McCain. (RP 497) The lay evidence supports the trial court's determination that Mr. Leon wants nothing more but to get back to work but he cannot work at a plant that exudes "the terrifying smell of hot potato frying oil." (RP 497) The professionals that examined Mr. Leon only after the injury did not know the bright, happy, friendly, vibrant,

mechanically talented man he used to be before he was burned. The psychiatrists that have examined him post injury applied scientific tests in an attempt to “understand” him but most of the mental health professionals failed to recognize the MMPI examinations were invalid because Mr. Leon is functionally illiterate and was guessing at the answers. His family and friends knew him then and now and the trial court recognized that was a vital fact in its decision making.

The Department closed Mr. Leon’s claim after he turned down the forklift operator job at McCain. The trial court immediately recognized two facts: (1) that rules and regulations require such action; and (2) that as a result of the industrial injury, Mr. Leon did not possess the psychological capacity to be anywhere near the McCain plant and the odor of hot oil. Mr. Leon did not benefit from mental health counseling and the facts reveal, the more times he “told his story” the more his mental health deteriorated. Findings #4 and #6 are supported by substantial evidence.

Finding #5 is the court’s explanation that Mr. Leon was a temporarily totally disabled worker pursuant to RCW 51.32.090, entitled to time loss compensation from April 17, 2015 through January 25, 2016. This finding explains the court considered the residuals of the industrial injury, including Mr. Leon’s psychological inability to be anywhere near the McCain plant. The court also recognized Mr. Leon was now past 50-years

old, had at most only six years of education in Mexico leaving him functionally illiterate with cognitive difficulties that would prevent retraining and had worked at McCain for 25 years. Additionally, Mr. Leon had dangerously high blood pressure and took multiple doses of morphine on a daily basis, making working around heavy machinery extremely dangerous. Finding #5 is supported by substantial evidence. Conclusion of law #2 follows directly from finding #5.

Finding #7 is the court's explanation that Mr. Leon was permanently and totally disabled pursuant to RCW 51.08.160, as of January 26, 2016 because he was unable to perform or obtain gainful employment on a reasonably continuous basis due to the residuals of his industrial injury. The same facts set forth above provide substantial evidence to support the trial court's finding #7 because the only difference between temporary total disability and permanent total disability is the duration of the disability. The permanent total disability finding entitles Mr. Leon to a pension. Substantial evidence supports the trial court's determination that "Mr. Leon wants nothing more but to get back to work, but he cannot do so and probably never will." (CP 497) As set forth above, the lay testimony paints the brightest picture of Mr. Leon before the accident and Mr. Leon after the accident. One was the energizer bunny and a friend to all – a man that didn't know a stranger and that loved to fish and go target shooting. The other is

a broken spirit of a man who lives in constant pain, has nightmares and hides from the people he knows and loves. He no longer has access to his guns – they are locked away so he doesn't use them against himself. Most importantly, as much as he'd like to work, he is not psychologically able to force himself to go near the McCain plant with its constant smell of hot potato oil. Substantial evidence supports each of the trial court's findings and its conclusion that the Department order dated January 26, 2016 is incorrect and should be reversed. As such, McCain's first contention fails.

2. Special Consideration of Attending Physician

Although Mr. Leon is a patient of Dr. Bunch, who prescribes the morphine he uses on a daily basis, it is questionable whether Dr. Bunch has more than a minimal medical relationship with Mr. Leon. While it is true that Dr. Bunch is as close to an "attending physician" as anyone that provides medical care for Mr. Leon, the truth is that he sees Dr. Bunch only because he is the only physician in the area that is qualified to prescribe pain medication. (CP 419-420, 423-424) Nevertheless, for purposes of arguing this issue Mr. Leon agrees the trial court determined Dr. Bunch was Mr. Leon's attending physician. Mr. Leon strongly disagrees with McCain that the trial court failed to give Dr. Bunch's testimony special consideration

prior to making its decision regarding Mr. Leon's permanent and temporary disability.

Dr. Randel Bunch was Mr. Leon's attending physician before and during the appeal process. As noted above, Dr. Bunch prescribes the morphine Mr. Leon takes to keep his constant itching and pain at a tolerable level. McCain confidently asserts the trial court decision must be reversed because the superior court did not give Dr. Bunch's testimony special consideration⁶ as required by *Hamilton v. Dep't of Labor & Indus.*, 111 Wn.2d 569, 571, 761 P.2d 618 (1988). The *Hamilton* court, quoting *Groff v. Dep't of Labor & Indus.*, 65 Wn.2d 35, 45, 395 P.2d 633 (1964) stated:

We are not saying that the trier of the facts should believe the testimony of the treating physician; the trier of the facts determines whom it will believe; but it should, in its findings, indicate that it recognizes that we have, in several cases, emphasized the fact that special consideration should be given to the opinion of the attending physician. (Citations omitted.)

Hamilton v. Dep't of Labor & Indus., 111 Wn.2d 569, 572, 761 P.2d 618, 620 (1988).

Hamilton teaches us a trial court is not required to accept and agree with Dr. Bunch's opinion that Mr. Leon could perform the forklift operator job at the McCain plant and in fact, the trial court *disagreed* with Dr.

⁶ Amended br. of App. 11-14.

Bunch's opinion that Mr. Leon was physically able to work at the McCain plant.

A close reading of Dr. Bunch's testimony brings to light the fact that he had no particular insight into Mr. Leon's hopes and dreams for the future after his industrial injury or just how deeply the psychological sequelae of the industrial injury have affected him and his family and friends. The trial court picked up on this subtlety but neglected to include in any finding the special consideration it actually gave Dr. Bunch's testimony. Although the best practice would be to include such in a finding, not doing so does not require reversal of the trial court decision as McCain suggests. This court can remand the case to the trial court for such a finding. However, the record clearly reveals the trial court was familiar with the special consideration standard it had to apply. Each of the attorneys stated the rule during oral arguments and the court itself attempted to cite a case reciting the rule but was interrupted by counsel for McCain. (RP 20-21, 27-28)

Regarding the forklift operator position at McCain, Dr. Bunch testified: "I said, I agree that [Mr. Leon] can perform the *physical* activities described in this job analysis and can return to work."⁷ When initially asked whether he would defer mental health determinations to the psychiatric

⁷ 12/21/16 Dr. Bunch depo. at 18.

experts Dr. Bunch said he would. When later questioned whether the PTSD and other dysthymic conditions would prevent Mr. Leon from being able to work at McCain, Dr. Bunch said, “In my, in my impression he would.”⁸ This answer is subject to two completely different interpretations. Did Dr. Bunch answer the question and say: “yes, the psychological problems would prevent him from being able to work at McCain” or did he mean, “yes, Mr. Leon can work at McCain even though he has these psychological issues”? Dr. Bunch is not a mental health expert and his answer is not clear. Taking the evidence in the light most favorable to Mr. Leon, as we must, Dr. Bunch’s testimony is equivocal at worst and supportive of Mr. Leon’s position at best. Additionally, it is not known whether Dr. Bunch read the forklift job description or understood the necessary cognitive aspects of the forklift job he approved or whether he even knew Mr. Leon was functionally illiterate. Taking all this into consideration, Dr. Bunch was not a strong witness for McCain and the court was free to believe or disbelieve his testimony, *as long as* the court gave Dr. Bunch’s testimony the special consideration it deserved. (CP 418-419, 422-425, 428-429, 439-452).

⁸ 12/21/16 Dr. Bunch depo. at 18.

3. Substantial Evidence

The trial court determined that “a fair preponderance of the evidence overcomes the presumption of correctness enjoyed by the Board’s decision and instead preponderates in conformity with the Proposed Decision and Order . . . of March 7, 2017.” (RP 497) As is set forth above in Issue 1, substantial evidence supports the trial court’s findings regarding Mr. Leon’s circumstances as a result of the sequelae of his industrial injury of April 27, 2012: (1) his inability to his to perform or obtain gainful employment on a reasonably continuous basis from April 17, 2015, through January 25, 2016, taking into account his age, education, work history and preexisting conditions (Finding #5 regarding temporary total disability – CP 500); and (2) his inability to perform or obtain gainful employment on a reasonably continuous basis as of January 26, 2016, taking into account his age, education, work history and preexisting conditions. (Finding #7 regarding permanent total disability – CP 500)

Permanent total disability involves both a medical aspect, that is the actual physical and psychological impairments, as well as an employability aspect, which involves the impairments’ effects on wage earning capacity. *Adams v. Department of Labor & Indus.*, 128 Wn.2d 224, 230, 905 P.2d 1220 (1995). Temporary total disability is not defined by statute but “differs from permanent total disability only in duration of disability, and not in its

character.” *Hubbard v. Dep't of Labor & Indus.*, 140 Wn.2d 35, 43, 992 P.2d 1002 (2000). Dr. Williams’ testimony provided the medical aspect and Mr. Renz provided the information regarding the one job that he felt Mr. Leon was capable of performing post-industrial injury.

As stated above, the only job Mr. Renz believed Mr. Leon was qualified to do was the forklift driver at the McCain plant in Othello. This decision was made after meeting with Mr. Leon face-to-face on only *one* occasion and speaking by phone with him three or four times. (CP 193-203) Mr. Renz testified that he looked into other training programs “but given [Mr. Leon’s] very limited academic ability in both English and Spanish, retraining would have been difficult, so my suggestion . . . very early on was that we consider potential return-to-work options with [McCain].” (CP 199-200) When Mr. Leon turned down that job offer, Mr. Renz closed the vocational aspect of Mr. Leon’s worker’s compensation claim, which the Department accepted. (CP 204)

Dr. Williams, board certified in psychiatry, testified regarding his forensic psychiatric examination of Mr. Leon. (CP 245-274) He interviewed both Mr. Leon and his partner, Beth because of their consistent and steady relationship. (CP 248) He did admit that the validity of the MMPI-2 that he administered was indeterminate such that external information had to be obtained. (CP 255) Dr. Williams made three medical

diagnoses: (1) PTSD; (2) somatic symptom disorder; and (3) major depressive disorder. (CP 258) Dr. Williams opined that further mental health treatment would not benefit Mr. Leon because he had not achieved any meaningful benefit from the mental health treatment he had already received. Dr. Williams explained not every individual will benefit from mental health treatment. (CP 260-262) Dr. Williams opined Mr. Leon was not capable of performing or maintaining reasonably continuous gainful employment. (CP 264) He considered specifically the forklift operator job at McCain and determined there were three mental health barriers that would prevent Mr. Leon from being successful as a forklift operator at McCain: (1) his inability to maintain attention and concentration for extended periods; (2) his inability to get along with coworkers or peers without behavioral extremes; and (3) his inability to interact appropriately with the general public. (CP 265-266)

4. Liberal Construction

Mr. Leon's appeal concerns a workers' compensation claim under the IIA. The IIA was promulgated in order to provide "sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy[.]" RCW 51.04.010. To achieve the goal of providing

compensation to all covered workers injured in their employment, the supreme court has held the IIA should be liberally construed, with all doubts resolved in favor of the injured worker. *Dennis v. Department of Labor & Indus.*, 109 Wn.2d 467, 470, 745 P.2d 1295 (1987).

This is Mr. Leon's one opportunity to be compensated for a lifetime of pain and mental anguish caused by a tragic on-the-job injury. He was once a vibrant, exuberant, hard-working and hard-playing individual. His relationship with his partner was happy and strong and they stayed busy all the time. He has been reduced to a shell of a man that has to rely on pharmaceuticals to get through each day. He often abuses alcohol and refuses to nurture relationships with his family and friends. Nightmares control his sleep habits. The trial court, knowing full-well the special consideration he was required to give the attending physician, weighed all the evidence and determined Mr. Leon had proven he was entitled to a pension as a totally and permanently disabled worker. Substantial evidence supports the trial court's findings and its conclusions flow from those findings.

VI. ATTORNEY FEES

An award of attorney fees in industrial insurance cases is governed by RCW 51.52.130. They may be awarded to an injured worker whose

appeal to the superior or appellate court results in a reversal or modification of the Board decision, as well as to an injured worker whose right to relief is sustained when the Department or, as here, the employer appeals. *Id.* Attorney fees in industrial insurance cases are awarded in order to ensure injured workers adequate legal representation in presenting their claims on appeal without incurring legal expenses or the potential resulting decrease of their award. *Spivey v. City of Bellevue*, 187 Wn.2d 716, 741, 389 P.3d 504 (2017).

Mr. Leon has been devastatingly and tragically injured while working at McCain. He has not been able to work since 2012. He has waited nearly eight years for the only compensation he will ever receive due to the worker's compensation laws. If this court affirms the trial court decision Mr. Leon respectfully requests an award of attorney fees and costs on appeal.

VII. CONCLUSION

Mr. Leon provided the trial court with substantial evidence, that as a result of the sequelae of his industrial injury of April 27, 2012, he had been unable to perform or obtain gainful employment on a reasonably continuous basis from April 17, 2015 through January 25, 2016, taking into account his age, education, work history and preexisting conditions. The

same substantial evidence supports the trial court's conclusion that as a result of the sequelae of his industrial injury of April 27, 2012, he has been unable to perform or obtain gainful employment on a reasonably continuous basis as of January 26, 2016, taking into account his age, education, work history and preexisting conditions. Based on the above cited evidence, arguments and citations Mr. Leon respectfully requests this court affirm the trial court's findings and conclusions and final judgment.

Mr. Leon recognizes the best practice is to acknowledge the application of the special consideration rule for attending providers. Although it was well-known to the trial court and was properly applied to Dr. Bunch's testimony, it was inadvertently left out of the trial court findings. If this court requires a specific finding regarding the trial court's application of the special consideration rule afforded the attending physician, remand to the trial court to include such a finding would cure the deficiency.

DATED this 28th day of January, 2020.

 #34077
for Darrell K. Smart, WSBA 15500
Attorney for Ruben Leon

No. 37014-3

COURT OF APPEALS FOR DIVISION III
OF THE STATE OF WASHINGTON

Ruben C. Leon,

Respondent,

vs.

McCain Foods USA,

Appellant.

DECLARATION OF SERVICE

I certify that I caused a true and correct copy of the foregoing Brief of Respondent to be served on the following parties in specified manner on January 28, 2020:

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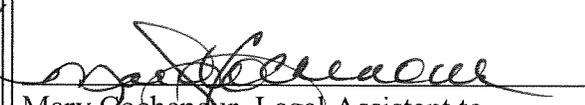
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DATED this 28th day of January 2020.


Mary Cochendur, Legal Assistant to
Darrell K. Smart

SMART LAW OFFICES

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