

FILED
JUNE 23, 2020
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

RUBEN C. LEON,)	No. 37014-3-III
)	
Respondent,)	
)	
v.)	UNPUBLISHED OPINION
)	
McCAIN FOODS,)	
)	
Appellant.)	

LAWRENCE-BERREY, J. — McCain Foods USA, Inc. (McCain Foods)¹ appeals after the trial court awarded Ruben Leon additional time-loss compensation and pension benefits. McCain Foods mostly takes issue with the trial court’s factual findings. Because substantial evidence supports those findings, we affirm.

FACTS

Summary of injury

Ruben Leon worked for McCain Foods for approximately 25 years. On April 27, 2012, Leon and a coworker were sent to unplug a clogged valve underneath a fryer. They

¹ Ruben Leon’s initial pleading filed with the Adams County Superior Court is captioned “Ruben C. Leon v. McCain Foods.” Clerk’s Papers (CP) at 1. As reflected in the record, the employer’s correct name is McCain Foods USA, Inc.

were told the oil in the fryer was cool and they could safely work on the plug. This was not true. When Leon started to work on the valve, scalding hot oil gushed out over his face and upper body.

Leon's coworker pulled him to safety and put him in cold water. An ambulance arrived and took Leon to a nearby hospital. Due to the severity of his burns, Leon was flown from the local hospital to Harborview Medical Center in Seattle and admitted to the burn unit. Leon spent a considerable period of time at Harborview Medical Center where he received a number of surgeries and skin grafts. He continued to receive follow-up treatment from Harborview until his final skin graft in 2014. Leon takes morphine three times a day for pain, as prescribed by his doctor, Dr. Randel Bunch.

In February 2015, McCain Foods offered Leon a forklift driver position. Leon rejected the offer because he believed he could not safely operate a forklift, given his daily use of morphine and difficulty sleeping at night.

Procedure

The Department of Labor and Industries provided Leon time-loss compensation for almost three years. By order of January 26, 2016, the Department closed Leon's claim. The order awarded Leon time-loss compensation through April 16, 2015, and

\$96,363.84 for permanent impairment of his left upper extremity, his skin, and his mental health.

Leon timely appealed the Department's order to the Board of Industrial Insurance Appeals. He asserted he was temporarily totally disabled from April 17, 2015, through January 25, 2016, and permanently totally disabled thereafter. Industrial Appeals Judge (IAJ) Heidi Bolong scheduled an evidentiary hearing for late October 2016. The parties presented live and depositional testimony. Leon's lay witnesses described how the industrial accident changed Leon from a friendly, independent person into an angry, dependent person. These testimonies were punctuated by evidence that Leon had missed only one day of work during 25 years at McCain Foods, but now was dependent on others to perform simple tasks. In March 2017, IAJ Bolong issued her "Proposed Decision and Order" that granted Leon's requested relief. Clerk's Papers (CP) at 45.

McCain Foods appealed the Proposed Decision and Order to the Board. The Board disagreed with the proposed decision and entered its own findings of fact and conclusions of law that confirmed the Department's closing order and awards.

Leon then appealed the Board's decision to Adams County Superior Court. The court issued a brief letter decision, which we quote in part:

[A]fter reviewing the entire record on a de nov[o] basis, I believe 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 Industrial Appeals Judge Bolong of March 7, 2017.

I agree with Judge Bolong that the expert evidence and particularly the lay evidence, indicates that Mr. Leon's horrifying experience, functional illiteracy, twice [sic] daily morphine intake, PTS[D], major depression and untreatable mental health impairment prevented him from accepting even the substantially dumbed down forklift operator position offered by defendant at the same plant which plaintiff can't even stand to look at and which [exudes] the terrifying smell of hot potato frying oil. Mr. Leon would want nothing more but to get [sic] back to work, but he cannot do so and probably never will. He only missed one day of work in 25 previous years at the plant.

The Board's Decision and Order of May 19, 2017 shall be reversed and the matter shall be remanded to the Department to reinstate the March 7, 2017 proposed Decision and Order of the Industrial Appeals Judge and take action in conformity therewith.

CP at 497. Because the trial court found that the evidence conformed to the Proposed Decision and Order, we attach it as an appendix to this opinion.

Four months later, the trial court entered findings of fact, including:

2. Ruben Leon sustained an industrial injury on April 27, 2012, when he was splashed with hot oil while unplugging a valve underneath a fryer, resulting in burns on his left arm, left leg, and the right side of his face, as well as post-traumatic stress disorder, somatic symptom disorder, and major depressive disorder.
3. Mr. Leon is a 49-year-old man with a sixth-grade education, work experience as a potato peeler, receiver, machine operator, and in maintenance, who is illiterate in English.

4. Mr. Leon is 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.
5. Mr. Leon [w]as unable to perform or obtain gainful employment on a reasonably continuous basis from April 17, 2015, through January 25, 2016, due to the residuals of the industrial injury and taking into account the claimant's age, education, work history, and preexisting conditions.
6. As of April 17, 2015, Mr. Leon's conditions proximately caused by the industrial injury were fixed and stable.
7. Mr. Leon was unable to perform or obtain gainful employment on a reasonably continuous basis as of January 26, 2016, due to the residuals of the industrial injury and taking into account the claimant's age, education, work history, and preexisting conditions.

CP at 500-01.

The trial court remanded the appeal to the Department with instructions to award Leon time-loss compensation from April 17, 2015, through January 25, 2016. It also ordered the Department to award pension benefits to Leon effective January 26, 2016, as a permanently and totally disabled injured worker.

McCain Foods timely appealed the trial court's decision.

ANALYSIS

McCain Foods argues (1) Leon failed to meet his burden of proof to overcome the correctness of the Board's decision, (2) the trial court erred by failing to give Leon's treating physician special consideration, (3) the preponderance of medical and vocational

opinions establishes Leon is capable of performing the offered forklift position, and (4) the Board correctly sustained the Department's finding that Leon had a category 3 permanent partial disability mental health impairment. We first address McCain Foods' second argument and then address its remaining three arguments together.

A. SPECIAL CONSIDERATION TO ATTENDING PHYSICIAN'S OPINIONS

McCain Foods contends the trial court erred by not giving sufficient consideration to the opinions of Dr. Bunch, Leon's attending physician.

In a workers' compensation case, the opinions of the claimant's attending physician must be given special consideration. *Hamilton v. Dep't of Labor & Indus.*, 111 Wn.2d 569, 571, 761 P.2d 618 (1988). However, the *Hamilton* court makes clear:

“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.”

Id. at 572 (quoting *Groff v. Dep't of Labor & Indus.*, 65 Wn.2d 35, 45, 395 P.2d 633 (1964)).

McCain Foods contends the trial court did not give Dr. Bunch's opinions special consideration. Leon contends it did, but it did not believe Dr. Bunch over the rest of the evidence. The disagreement boils down to a key question: Did the trial court give Dr.

Bunch's opinions special consideration? If it did, then the trial court's decision on whether it believed Dr. Bunch or not was a question of credibility, which this court will not examine. *Cantu v. Dep't of Labor & Indus.*, 168 Wn. App. 14, 22, 277 P.3d 685 (2012).

As stated in *Hamilton*, a trial court should enter a finding of fact that indicates it recognized the special consideration deserved by an attending physician. Here, the trial court failed to do this. But we do not believe this failure requires reversal or remand.

Both parties briefed this rule and later argued it to the trial court. The trial court itself mentioned this rule, calling it a "particular" consideration before defense counsel interrupted and noted the phrase was "special" consideration. Report of Proceedings at 21. Nothing in the record indicates the trial court did not know or correctly apply the rule. While it is true the trial court did not enter a written finding in this regard, that failure has more to do with claimant counsel's preparation of the findings of fact than any confusion on the part of the trial court. We are confident the trial court knew and correctly applied the rule that required it to give Dr. Bunch's opinions special consideration.

B. SUFFICIENCY OF THE EVIDENCE

McCain Foods contends the trial court's findings are not supported by substantial evidence. It argues the overwhelming medical and vocational evidence supports the Board's decision and this court should reverse the trial court's findings of fact. Leon notes McCain Foods failed to assign error to any of the trial court's findings and urges us to treat those findings as verities.

Failure to assign error to findings of fact

RAP 10.3(g) requires a party to separately assign error to each finding of fact the party challenges and refer to the challenged finding by number. An "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). Nevertheless, we will waive a strict application of this rule if the briefing makes clear the nature of the challenge, the violation is minor, there is no prejudice to the opposing party, and there is minimal inconvenience to the appellate court. *Union Elevator & Warehouse Co. v. State*, 144 Wn. App. 593, 601, 183 P.3d 1097 (2008). It is clear that McCain Foods is challenging the trial court's findings of fact 4, 5, and 7, and Leon provided a full rebuttal to the factual challenges in his brief. We are not inconvenienced by McCain Foods'

technical rule violation and will address its sufficiency of evidence challenge on the merits.

Sufficiency of evidence

For cases involving the Industrial Insurance Act (IIA), Title 51 RCW, the trial court applies a modified standard of review. *Gorre v. City of Tacoma*, 184 Wn.2d 30, 36, 357 P.3d 625 (2015). RCW 51.52.115 grants a statutory presumption of correctness to the Board's decision. This presumption is overcome by a trial court finding that the preponderance of evidence is against the Board's findings. *Cantu*, 168 Wn. App. at 20. "Only if it finds the evidence to be equally balanced does the presumption require the findings of the board to stand." *Id.* at 20-21 (citing *Allison v. Dep't of Labor & Indus.*, 66 Wn.2d 263, 268, 401 P.2d 982 (1965)).

On appeal from the superior court's decision, this court reviews whether there is substantial evidence to support the superior court. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999). "'Substantial evidence' is evidence that would persuade a fair-minded person of the truth or correctness of the matter." *Erection Co. v. Dep't of Labor & Indus.*, 160 Wn. App. 194, 202, 248 P.3d 1085 (2011).

Dr. Donald Williams provided the only medical opinion to support Leon's contention that he could not return to work at McCain Foods. Dr. Williams testified that

Leon's posttraumatic stress disorder (PTSD) would cause flashbacks if he was required to return to McCain Foods and those flashbacks, prompted even by the smell of potato frying oil, would prevent him from returning to work there. McCain Foods makes worthy arguments why a trier of fact should not have believed Dr. Williams. Chief among these arguments are (1) medical tests indicated that Leon's answers describing his mental health limitations were unreliable, (2) Dr. Williams met with Leon only once, and (3) three other doctors disagreed with Dr. Williams.²

We reject McCain Food's sufficiency challenge for two reasons. First, the trial court did not base its decision solely on the weight of *medical* evidence. Rather, the trial court found that Leon and his witnesses who described Leon's severe limitations were credible. "I agree with Judge Bolong that the expert evidence and particularly the lay evidence, indicates that Mr. Leon's horrifying experience, functional illiteracy, twice [sic] daily morphine intake, PTS[D], major depression and untreatable mental health impairment" prevented him from accepting the forklift operator job offered by McCain Foods. CP at 497; *see Ellerman v. Centerpoint Prepress, Inc.*, 143 Wn.2d 514, 523 n.3, 22 P.3d 795 (2001) ("A memorandum opinion may be considered as supplementation of

² We note that IAJ Bolong set forth numerous reasons why she found Dr. Williams's testimony credible and the three other doctors' testimonies inconsistent and not credible. *See Appendix.*

formal findings of fact and conclusions of law.”). In addition, the trial court noted that Leon wanted to return to work, as shown by his 25 years of work with only one absence. The trial court credited this fact to Leon and impliedly rejected McCain Foods’ argument that Leon exaggerated his mental health disability.

Second, substantial medical and lay evidence supports the trial court’s findings in this regard. The testimonies of several witnesses described Leon both before and after his extensive injuries. Leon was once friendly and independent. He is now angry and unable to work with others. Leon’s partner of several years testified that Leon experienced great fear the one time she drove them past McCain Foods. Because substantial evidence supports the trial court’s contested findings, we reject McCain Foods’ sufficiency of the evidence challenge. We confirm the trial court’s award to Leon of additional time-loss compensation and pension benefits.³

C. ATTORNEY FEES

Leon requests attorney fees and cites RCW 51.52.130. In the context of the IIA, when a lower court’s decision is appealed by a party other than the injured worker and the

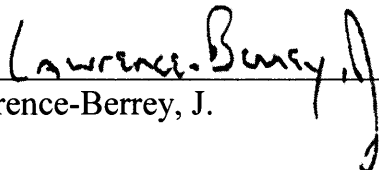
³ McCain Foods correctly notes that permanent partial disability for an injury cannot be compensated when a worker receives a total disability pension for the same injury. Appellant’s Br. at 5. Because Leon is entitled to pension benefits due to his mental health disability, we need not address McCain Foods’ final argument that Leon is entitled to a category 3 permanent partial disability mental health impairment award.

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injured worker's right to recover is sustained, the court appealed to is required to grant attorney fees. RCW 51.52.130. Because we sustain Leon's right to recover additional time-loss compensation and pension benefits, we additionally award Leon reasonable attorney fees on appeal.

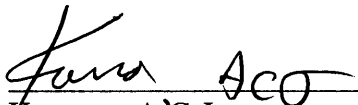
Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.




Lawrence-Berrey, J.

WE CONCUR:



Korsmo, A.C.J.



Fearing, J.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

1 IN RE: RUBEN LEON) DOCKET NO. 16 11510
2)
3 CLAIM NO. SA-74174) PROPOSED DECISION AND ORDER
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5 Heidi G. Bolong, Industrial Appeals Judge — Ruben Leon sustained an industrial injury on
6 April 27, 2012, when he was splashed with hot oil while unplugging a valve underneath a fryer,
7 resulting in burns on his left arm, left leg, and the right side of his face, as well as post-traumatic
8 stress disorder, somatic symptom disorder, and major depressive disorder. The Department closed
9 the claim with time-loss benefits paid through April 16, 2015, and permanent partial disability awards
10 of 4 percent of the amputation value of the left arm at or above the deltoid insertion or by
11 disarticulation at the shoulder, a Category 4 permanent skin impairment, and a Category 3 permanent
12 mental health impairment. Mr. Leon asserts that he was temporarily totally disabled from April 17,
13 2015, through January 25, 2016, and permanently totally disabled as of January 26, 2016. Mr. Leon
14 has shown by a preponderance of credible evidence that he has been unable to perform and maintain
15 generally available work of any kind on a reasonably continuous basis since April 17, 2015. The
16 Department order is reversed and remanded with direction to pay time-loss compensation benefits
17 from April 17, 2015, through January 25, 2016, and to find Mr. Leon permanently totally disabled as
18 of January 26, 2016.
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28 DISCUSSION

29 Ruben Leon is a 49-year-old, right-handed man who was born in Mexico and came to United
30 States alone at age 14. He attended school through the sixth grade, but had no schooling after he
31 came to the United States. He began working for the employer in 1988, working as a potato peeler,
32 receiver, machine operator, and finally in maintenance. Mr. Leon taught himself to speak English.
33 He can read and write in Spanish, but not very much in English. Prior to the injury at issue, Mr. Leon
34 broke his right middle finger at McCain Foods, and still has problems with stiffness in the finger.
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38 On April 27, 2012, Mr. Leon and a coworker, Fermin Aviles, were sent to unplug a valve
39 underneath a fryer. They were told that the fryer was cool enough to work on, but it was not. When
40 Mr. Leon started to work on the cylinder, hot oil gushed out over Mr. Leon's face. Mr. Aviles pulled
41 Mr. Leon out and put him in cold water. Mr. Aviles pulled off Mr. Leon's long-sleeve shirt and saw
42 burns on his left arm, left leg, and the right side of his face. Mr. Leon has a line on his forehead from
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1 where he was wearing a welding cap at the time of the incident. The oil splashed behind his head
2 on his neck and back. Mr. Leon is missing a piece of his left ear as a result of the burns.
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4 Before the industrial injury, Mr. Leon used to fish several times per week, work on cars, and
5 target practice. He does none of those things anymore. His wife, Beth S. Cruz, changed the
6 combination to his gun safe because he was panicked. Mr. Leon is taking morphine and gabapentin,
7 in addition to high blood pressure medications. Although McCain Foods offered work as a Hyster
8 driver, Mr. Leon rejected the offer because he cannot perform such work while on narcotics. Although
9 he would rather be working, he insists he will never go back to McCain Foods.
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13 Ms. Cruz described her husband as a hard worker prior to the industrial injury. They have
14 several rental properties that they bought approximately ten years ago and fixed up prior to the
15 industrial injury. The rentals do not require much work while they are rented, and in between rentals
16 a friend goes with Mr. Leon to help him. He still takes pain medications, including morphine, and
17 takes blood pressure medications even though he did not have high blood pressure prior to the
18 industrial injury. Mr. Leon will not return to the McCain Foods plant, and gets upset when she drives
19 him passed the plant. Because she still has to work, Ms. Cruz moved to another room because his
20 nightmares kept her awake. He thought she did not love him anymore. Where before the incident
21 he was loving and friendly, now she has to watch what she says to him. He is always clearing his
22 throat, scratching his arms, and is always tired. Forceful showers hurt his arms. Before the industrial
23 injury he did not abuse alcohol, but he drinks more now.
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29 Crystal T. Cruz, who was raised by Mr. Leon, described him as very friendly and outgoing
30 before the industrial injury. He loved fishing, working on cars, and hanging out with family. He never
31 missed work and loved being needed. Now Mr. Leon is distant, angry, and closed off from people.
32 He gets frustrated easily, avoids people, does not spend time with the family, and does not take
33 children fishing. Mr. Leon's stepson, Jerald W. Reichel, described Mr. Leon as being antisocial, and
34 drinking more. While Mr. Leon was in the hospital, he had blisters four to five inches in diameter on
35 his head and skin coming off of his arms. Although Mr. Leon was scared, Mr. Reichel said he is
36 tough and never cried despite his pain. Mr. Leon now cannot use a wrench because it hurts his arms,
37 and he asks Mr. Reichel to do things like climb a ladder to change a lightbulb, because Mr. Leon is
38 afraid of reinjuring himself. Mr. Aviles agreed that Mr. Leon does not do the things he used to do,
39 such as fishing and target practicing, and that he is now grumpy and gets tired.
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LeRoy Enger, HR Business Partner for McCain Foods since July 2014, wrote the job offer for the position of forklift driver, which position would have been available had Mr. Leon accepted it. The job analysis for forklift driver is an accurate representation of the position Mr. Leon was offered. Mr. Enger confirmed that the incident occurred in the employer's north building, while the position offered was in packaging in the southern area. Mr. Enger described the packaging area where French fries are being packaged as dry and noisy. There is no hot oil facility or any kind of cooking or high-temperature equipment in that building. One can access the employer's administrative offices from the packaging building without going through the area where the accident occurred. The company drug policy allows prescription drugs, such as morphine, if taken as prescribed, so that would not be a problem for Mr. Leon to work as a forklift driver. Mr. Enger conceded, however, that the smell of French fries permeates the entire facility.

C. Donald Williams, M.D.

C. Donald Williams, M.D., a board-certified psychiatrist, conducted a psychiatric forensic evaluation of Mr. Leon on July 26, 2016. Dr. Williams noted no prior psychiatric history with Mr. Leon, but found a consistent and steady relationship history and work history which reflected a good work ethic. Dr. Williams administered for psychiatric tests: The PHQ-9, which assesses depression; the GAD-7, which is assesses anxiety; the PCL-5, which measures symptoms associated with post-traumatic stress disorder; and the MMPI-2, which assesses psychological functioning. Dr. Williams concluded that the MMPI-2 was valid and evidenced severe psychological trauma. Dr. Williams diagnosed post-traumatic stress disorder, somatic symptom disorder, and major depressive disorder, all related to the industrial injury. He did not believe Mr. Leon would benefit from treatment, as he has not obtained significant benefit from the sufficient and appropriate mental health treatment he has already had, due to a combination of his cultural and cognitive limitations and the severity of the injury and his PTSD symptoms. Mr. Leon has a particularly severe form of PTSD and his level of sophistication makes it difficult to treat. Dr. Williams determined that Mr. Leon's mental health condition as of January 25, 2016, is best described by Category 4 of WAC 296-20-340.

Michael Friedman, D.O.

Michael Friedman, D.O., a psychiatrist certified by the American Board of Psychiatry and Neurology, performed an independent medical evaluation of Mr. Leon on October 24, 2015. Mr. Leon reported he is always itching, having nightmares three times per week about the accident, waking

1 frequently at night, and having high blood pressure. He could not give a clear answer as to whether
2 he startles, but noted that he gets upset when his wife comes home from work at McCain Foods.
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4 Dr. Friedman noted that Mr. Leon is in good physical condition, with an affect that is distant,
5 guarded, and suspicious. He acknowledged past suicidal thoughts, without intent. Mr. Leon is a very
6 guarded individual with a profound disability conviction. The cognitive exam revealed no deficit.
7 Dr. Friedman administered the Minnesota Multiphasic Personality Inventory, but Mr. Leon responded
8 in an inconsistent fashion, which negated the validity of the test. Dr. Friedman noted that Mr. Leon
9 is resistant to further treatment. Dr. Friedman determined Mr. Leon was not in need of any further
10 psychiatric treatment for the residuals of the industrial injury as of January 26, 2016, and is fixed and
11 stable as of that date. Dr. Friedman diagnosed post-traumatic stress disorder related to the industrial
12 injury. While Mr. Leon may at times manifest Category 2 behavior with a tremendous sense of stress,
13 and occasionally Category 4 behavior, Dr. Friedman believes the Category 3 mental health
14 impairment rating is accurate as of January 26, 2016.
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21 Douglas P. Robinson, M.D.

22 Douglas P. Robinson, M.D., a board-certified psychiatrist, performed an independent medical
23 examination of Mr. Leon on April 17, 2014. Mr. Leon reported that his supervisor, Alvin, did not follow
24 proper procedure to assure that the tank held no more hot oil, which would have prevented the
25 incident. Dr. Robinson concluded that Mr. Leon has post-traumatic stress disorder, although he noted
26 evidence of exaggeration of symptoms, and probable panic disorder with agoraphobia and probable
27 major depressive disorder. The PTSD developed as a result of the industrial injury, and the major
28 depressive disorder is likely related to the PTSD. Although Dr. Robinson did not explicitly state the
29 causation of the panic disorder, he did state that it is not uncommon for PTSD to lead to other
30 conditions, including panic disorder. Dr. Robinson noted inconsistencies, including the unvarying
31 nature of his nightmares, the level of avoidance and dysfunction being far greater than expected and
32 worsening over time rather than improving, and Mr. Leon's claim that he is unable to do any job.
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39 Dr. Robinson recommended more treatment given the severity of his symptoms. Based on
40 the records he reviewed, Dr. Robinson believes a Category 3 is an accurate impairment rating as of
41 January 26, 2016. Dr. Robinson conceded, however, that Mr. Leon has limited ability to write, low
42 education, and low psychological insight.
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1 Randel S. Bunch, M.D.

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3 Randel S. Bunch, M.D., a board-certified family medicine practitioner treated Mr. Leon from
4 December 13, 2013, through November 7, 2016. Mr. Leon does not tolerate most medications very
5 well, and it was difficult to find antidepressants, blood pressure medications, or PTSD medications
6 he could tolerate. Dr. Bunch believes Mr. Leon's itching is due to nerve damage from the burns.
7 Mr. Leon is on a low dose of morphine. His blood pressure has been very high since the industrial
8 injury. Dr. Bunch believes Mr. Leon has post-traumatic stress disorder, and is chronically depressed
9 or at least dysthymic. Mr. Leon complained about insomnia, which he believed would interfere with
10 his ability to work. At a visit on February 17, 2015, Mr. Leon was angry that he had been released to
11 the forklift job because his PTSD wakes him up several times per night and he did not think he could
12 stay awake for an eight-hour shift. At a visit on July 10, 2015, Dr. Bunch noted pruritus, post-traumatic
13 stress disorder, depression, and insomnia, all related to the industrial injury, hypertension probably
14 related to the industrial injury, and possible agoraphobia.

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20 Stephen Renz, VRC

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22 Stephen Renz, VRC, confirmed Mr. Leon's limited literacy in reading or writing in English and
23 in Spanish. Following cognitive and IQ testing of Mr. Leon, VRC Renz determined that retraining
24 would be difficult due to a cognitive disorder that was identified, and to Mr. Leon's limited academic
25 ability in English and Spanish. In 2014, VRC Renz understood Mr. Leon to be at maximum medical
26 improvement, and created the job analysis of forklift operator with McCain Foods, which the employer
27 agreed to offer but which Mr. Leon declined on February 25, 2015. VRC Renz did not believe
28 Mr. Leon's use of morphine was an issue because Dr. Bunch indicated the dose was so low that it
29 would not cause any functional impairment.

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33 Temporary and Permanent Total Disability

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35 The phrase "temporary total disability" means a claimant is temporarily incapable of performing
36 generally available work of any kind on a reasonably continuous basis.¹ The test for total disability
37 is the same whether it is temporary or permanent in nature.²

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39 Dr. Williams testified credibly that Mr. Leon has not been capable of performing reasonably
40 continuous gainful employment since April 16, 2015. Mr. Leon is specifically not capable of
41 performing the jobs of forklift operator, maintenance person, or belt inspector, because he is so
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47 ¹ *Hunter v. Bethel Sch. Dist.*, 71 Wn. App. 501 (1993).

² *Bonko v. Department of Labor & Indus.*, 2 Wn. App. 22 (1970).

1 preoccupied with continuous flashbacks, distracting thoughts, and dissociative reactions, leaving him
2 out of touch with what is going on around him and unsafe to perform those tasks. The main barriers
3 to Mr. Leon engaging in full-time employment are his inability to maintain attention and concentration
4 for extended periods, his inability to get along with coworkers or peers without behavioral extremes,
5 and his inability to interact appropriately with the general public. Dr. Williams is unaware of any
6 vocational services or retraining that would lead to Mr. Leon being able to return to full-time work.
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10 Dr. Robinson reviewed Mr. Leon's responses to Dr. Williams' MMPI, saw dramatic
11 overwhelming exaggeration and possibly malingering in those responses, found the test to be invalid
12 with major inconsistencies, and found Dr. Williams' conclusions to be inconsistent with the validity
13 rules. Dr. Williams, on the other hand, saw no evidence that Mr. Leon is consciously producing or
14 fabricating symptoms in order to achieve an external goal.
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17 Dr. Robinson determined that Mr. Leon is capable of reasonably continuous gainful full-time
18 employment as a forklift driver for McCain Foods as of April 17, 2015. Although Mr. Leon should be
19 restricted from working at the location where the injury occurred or around similar equipment that
20 presents a risk of burn or thermal injury, Dr. Robinson believes Mr. Leon could perform the job of
21 forklift driver at McCain Foods because it would be nowhere near the tank where the injury occurred.
22 This ignores the evidence that the smell of french fries permeates the entire facility. Dr. Robinson
23 concluded at the time of his examination that Mr. Leon is able to work, that it would be beneficial for
24 him to do so, and that his resistance to return to work was probably greater than any true barriers.
25 Although he initially recommended a gradual return to work, as of April 17, 2015, Dr. Robinson
26 believes a gradual return to work would undermine the process and that it would be better to withdraw
27 support for Mr. Leon's disability behavior. Dr. Robinson's opinions are somewhat undermined by his
28 belief that it would be helpful for Mr. Leon to have an ally at McCain Foods for his return to work,
29 although it would probably not be feasible.
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32 Dr. Friedman's testimony was inconsistent. Based on Mr. Leon's presentation, Dr. Friedman
33 believes he was capable of returning to work as a forklift operator at McCain Foods as of April 16,
34 2015. Dr. Friedman conceded that the number one concern with the forklift operator position is safety,
35 which requires concentration. Dr. Friedman believes Mr. Leon is capable of such concentration
36 because he is capable of driving, he is in good physical condition, he is able to get his daughter to
37 school on time, and can pay attention while driving and helping his daughter with homework.
38 Dr. Friedman believes this could be stepped up to being able to sustain concentration throughout an
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1 eight-hour workday. Dr. Friedman did not explain how being able to concentrate in the relatively
2 low-stress environment of helping one's child with homework or driving her to school translates into
3 the ability to maintain concentration in the high-stress situation of returning to the location of a
4 PTSD-inducing injury, particularly while on morphine and suffering from insomnia. Although
5 Dr. Friedman believes going back to work at McCain Foods may be therapeutic for Mr. Leon as a
6 form of exposure therapy, he also states Mr. Leon's prognosis for returning to employment is very
7 poor due to his belief that he cannot work. In his report, Dr. Friedman concluded that Mr. Leon's
8 disability conviction and behavioral reactivity would more than likely prevent him from gainful
9 employment. In a November 23, 2015 addendum, Dr. Friedman stated that Mr. Leon was capable
10 of gainful employment with the exception of his profound disability conviction, which Dr. Friedman
11 doubted Mr. Leon had prior to the industrial injury. Paradoxically, Dr. Friedman believes there are no
12 psychiatric restrictions regarding returning to gainful employment.
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19 Dr. Bunch, Mr. Leon's treating physician, approved the forklift operator job analysis on
20 October 24, 2014, after confirming that Mr. Leon's use of narcotics would be acceptable in the
21 position. Dr. Bunch believes Mr. Leon could start working half-time and work up to full-time over the
22 course of a month. Dr. Bunch believes Mr. Leon could have worked from April 17, 2015 on, unless
23 there was a psychiatric issue that would disqualify him, which Dr. Bunch doubted. Dr. Bunch
24 concurred with Dr. Friedman's independent medical examination report. Although Dr. Bunch agrees
25 that Mr. Leon could work and that it would probably be best for him, with people who are very
26 convinced they are disabled it is nearly impossible to convince them otherwise.
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31 In industrial insurance cases the opinions of attending physicians should be given special
32 consideration.³ This legal principle does not require the trier of fact to give more weight or credibility
33 to the attending physician's testimony, but to give it careful thought.⁴ Although Dr. Bunch is
34 Mr. Leon's treating physician, he is not a mental health professional. He and Dr. Friedman both
35 testified that Mr. Leon's disability conviction would prevent him from gainful employment. These
36 opinions support Dr. Williams' opinion that Mr. Leon is unable to work.
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40 Mr. Leon has shown by a preponderance of credible evidence that he has been unable to
41 perform and maintain generally available work of any kind on a reasonably continuous basis since
42 April 17, 2015. He was temporarily totally disabled and entitled to time-loss compensation benefits
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47 ³ *Hamilton v. Department of Labor & Indus.*, 111 Wn.2d 569 (1988).

⁴ *Hamilton* at 572.

1 from April 17, 2015, through January 25, 2016, and is permanently totally disabled and entitled to a
2 pension as of January 26, 2016.
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4 Permanent Partial Disability

5 A total permanent disability pension is the greatest benefit which can be paid for a single injury,
6 and no partial disability for an injury can be compensated with the award of a total disability pension
7 for that same injury.⁵ As Mr. Leon has shown his entitlement to a pension for the April 27, 2012
8 industrial injury, his entitlement to a greater permanent partial disability award for the same injury is
9 no longer at issue.
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15 **DECISION**

16 In Docket No. 16 11510, the claimant, Ruben Leon, filed an appeal with the Board of Industrial
17 Insurance Appeals on February 17, 2016. The claimant appeals a Department order dated
18 January 26, 2016. In this order, the Department closed the claim with time-loss benefits paid through
19 April 16, 2015, and permanent partial disability awards of 4 percent of the amputation value of the
20 left arm at or above the deltoid insertion or by disarticulation at the shoulder, a Category 4 permanent
21 skin impairment, and a Category 3 permanent mental health impairment. This order is incorrect, and
22 is reversed and remanded.
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29 **FINDINGS OF FACT**

- 30 1. On April 5, 2016, an industrial appeals judge certified that the parties
31 agreed to include the Jurisdictional History in the Board record solely for
32 jurisdictional purposes.
33 2. Ruben Leon sustained an industrial injury on April 27, 2012, when he was
34 splashed with hot oil while unplugging a valve underneath a fryer, resulting
35 in burns on his left arm, left leg, and the right side of his face, as well as
36 post-traumatic stress disorder, somatic symptom disorder, and major
37 depressive disorder.
38 3. Mr. Leon is a 49-year-old man with a sixth grade education, work
39 experience as a potato peeler, receiver, machine operator, and in
40 maintenance, who is illiterate in English.
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⁵ *Harrington v. Department of Labor & Indus.*, 9 Wn.2d 1, 8 (1941); *McIndoe v. Department of Labor & Indus.*, 100 Wn. App. 64, 70 (2000); *In re Jack A. Wallace*, BIIA Dckt. No. 95 5365 (June 14, 1996).

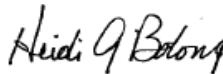
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4. Mr. Leon is unable to maintain attention and concentration for extended periods, to get along with coworkers or peers without behavioral extremes, and to interact appropriately with the general public, as of April 17, 2015.
5. Mr. Leon was unable to perform or obtain gainful employment on a reasonably continuous basis from April 17, 2015, through January 25, 2016, due to the residuals of the industrial injury and taking into account the claimant's age, education, work history, and preexisting conditions.
6. As of April 17, 2015, Mr. Leon's conditions proximately caused by the industrial injury were fixed and stable.
7. Mr. Leon was unable to perform or obtain gainful employment on a reasonably continuous basis as of January 26, 2016, due to the residuals of the industrial injury and taking into account the claimant's age, education, work history, and preexisting conditions.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter in this appeal.
2. Ruben Leon was a temporarily totally disabled worker within the meaning of RCW 51.32.090 from April 17, 2015, through January 25, 2016.
3. Mr. Leon was a permanently totally disabled worker within the meaning of RCW 51.08.160, as of January 26, 2016.
4. The Department order dated January 26, 2016, is incorrect and is reversed. This matter is remanded to the Department to pay time-loss compensation benefits from April 17, 2015, through January 25, 2016, and to find Mr. Leon permanently totally disabled as of January 26, 2016.

Dated: March 7, 2017



Heidi G. Bolong
Industrial Appeals Judge
Board of Industrial Insurance Appeals