

FILED

OCT 04 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 300102

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

Sandra Artiach,
Respondent.

v.

GMRI/Darden Restaurants,
Appellants

RESPONDENT'S BRIEF

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Verhulp, P.S.**
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I. ISSUES

There are two issues on review in this case. First, whether Ms. Artiach was temporarily totally disabled (TTD) due to the residuals of the industrial injury during the period of November 30, 2004 to October 23, 2006. Second, whether as of October 23, 2006 forward she was permanently and totally disabled (PTD) as a result of the residuals of the industrial injury. The trial court determined that Ms. Artiach was temporarily totally disabled due to the residuals of the industrial injury during the period of November 30, 2004 to October 23, 2006, and that she was permanently and totally disabled as of October 23, 2006 as a result of the residuals of the industrial injury. Ms. Artiach contends substantial evidence supports the trial court's findings and that its conclusions flow from its findings.

II. STANDARD OF REVIEW

It is important to take time to carefully review the standard of review in the court of appeals because the employer intermingles cases and discussion about the burden of proof at the Board and in the superior court with cases and discussion about the standard of review in the court of appeals. For instance, in discussing what "substantial evidence" is they

cited to the case of *Saylor v. Dep't of Labor & Indus.*, 69 Wn.2d 893, 896 (1966), and state that “substantial evidence” is more than a “mere scintilla of evidence. Br of App. At pg. 17. However, the *Saylor* case was discussing the burden of proof at the Board or in superior court and not the standard of review in the court of appeals.

In its de novo review of the Board record, the superior court must keep in mind that the Board’s findings and conclusions are prima facie correct and that Ms. Artiach had the burden of proving them incorrect by a preponderance of the evidence. RCW 51.52.115; *Young v. Dep't of Labor & Indus.*, 81 Wn. App. 123, 127, 913 P.2d 402, *review denied*, 130 Wn.2d 1009, 928 P.2d 414 (1996). However, the superior court is not bound by the Board’s findings unless the evidence is equally balanced. *Id.* at 128 (Citations omitted.) In addition, the presumption of correctness does not apply to subordinate findings of the Board such as conclusions as to the credibility of a witness. *Gaines v. Dep't of Labor & Indus.*, 1 Wn. App. 547 (1969).

Review at the Court of Appeals is governed by RCW 51.52.115, which directs that the superior court record is reviewed in order to determine whether substantial evidence supports the trial court's factual findings. Substantial evidence is that which is sufficient to persuade a

fair-minded, rational person of the truth of the matter asserted. *Ferenak v. Dep't of Labor & Indus.*, 142 Wn. App. 713, 719-20, 175 P.3d 1109 (2008). Once the findings have been analyzed, this court reviews de novo the trial court's conclusions of law to ensure they flow its findings. *Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 180, 210 P.3d 355 (2009). Throughout its review, the Court of Appeals is to consider the record in the light most favorable to Ms. Artiach, as she was the party that prevailed in superior court.

The Court of Appeals may not reweigh or rebalance the competing testimony of the doctors and vocational counselors. *Harrison Mem'l Hosp. v. Gagnon*, 110 Wn. App. 475, 485, 40 P.3d 1221, *review denied*, 147 Wn.2d 1011 (2002). In that regard it must defer to the superior court's credibility determinations. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

A. TOTAL DISABILITY

RCW 51 does not define temporary total disability. However, RCW 51.08.160 defines permanent total disability as the “loss of both legs, or arms, or one leg and one arm, total loss of eyesight, paralysis or other condition permanently incapacitating the worker from performing any work at any gainful occupation.” Washington courts have relied on

the definition of total disability in RCW 51.08.160 for addressing issues of temporary total disability as well as permanent total disability cases. *Hunter v. Bethel Sch. Dist.*, 71 Wn. App. 501, 508-09, 859 P.2d 652 (1993) (citation omitted). The nature of the disability for temporary total disability and permanent total disability is the same. The only distinction between the two is the duration of the disability. Given that the nature of the disability is the same both issues will be addressed simultaneously below.

A finding of total disability is not purely a medical determination. “It is a hybrid quasi-medical concept in which there are intermingled in various combinations, the medical Fact of loss of function and disability, together with the inability to perform and the inability to obtain work as a result of his industrial injury.” *Fochtman v. Dep’t of Labor & Indus.*, 7 Wn. App. 286, 298 (1972).

The Washington Supreme Court has explained that “[t]he test for total disability requires a study of the whole person as an individual—their weaknesses and strengths, their age, education, training and experience, their reaction to the injury, their loss of function, and any other relevant factors that determine the question as to whether [the worker] is, as a result of the industrial injury, disqualified from obtaining or performing employment generally available in the labor market.” *Leeper v. Dep’t of*

Labor & Indus., 123 Wn.2d 803, 817, 872 P.2d 507 (1994) (citations omitted).

The employer argues that it is necessary for there to be a medical witness who specifically states that Ms. Artiach is totally disabled in order for a trier of fact to conclude that Ms. Artiach is totally disabled. (App Br. At 1, 19-22) However, that is not the law of Washington. In *Fochtman* the court held that it was not necessary for there to be medical testimony stating that the worker is totally disability. *Fochtman*, pg. 260-63. The *Fochtman* court explained that “a prima facie case of total disability may be established by medical testimony as to severe limitations imposed on a claimant's ability to work coupled with lay testimony concerning his age, education, training and experience and the testimony of an employment or vocational expert as to whether he is able to maintain gainful employment on the labor market with a reasonable degree of continuity.” *Id.* at 262.

The Court of Appeals has also explained that vocational testimony is not required for a showing of total disability. *Young v. Labor & Indus.*, 81 Wn. App. 123, 132 (1996). The *Young* court explained that “[w]hile vocational testimony is relevant and admissible to show the labor market, a court need not consider expert testimony to determine total and permanent disability. . .We agree with the trial court here because common sense, supported by the evidence, showed that Ms. Young’s

limited employment skills and her physical inability to stand or sit for any consistent length of time prevented her from finding or retaining reasonably continuous gainful employment.” *Id.* The *Young* court also explained that the determination of total disability should be made by making a “practical and reasonable interpretation” of the claimant's ability to obtain work. *Young*, supra at 130. (citations omitted). This is precisely what the superior court did in Ms. Artiach’s case.

As outlined above a determination of total disability requires a consideration of a number of factors: (1) strengths and weaknesses; (2) age; (3) education; (4) training; (5) employment experience; (6) reaction to the injury; (7) amount of the loss of function; and (8) any other relevant factors. *Young*, at 130-31. As will be outlined below when these factors are considered there is substantial evidence to support the trial court’s conclusion that Ms. Artiach was totally disabled as a result of her industrial injury.

Age, education, training & employment history

Ms. Artiach was 57 years old at the time she testified before the Board. (Tr. 9/20/07 at 4¹) She had a high school diploma, and was a “C

¹ Ms. Artiach agrees the employer’s citations to the Certified Appeals Board Transcript (CABR) and the depositions contained therein are proper and will

student.” She attended a junior college but did not graduate. (*Id.* at 5) Her prior employment history shows she was mostly an unskilled laborer although her job at the lumber mill carried much responsibility. Her jobs included: (1) assembly line worker at Goodwill; (2) stocker at K-Mart; (3) census taker; (4) salesperson (maintenance agreements) at Sears; (5) insurance clerk at a car dealer and lumber company; and (6) assembly line at a corn cannery. (*Id.* at 7; Williams dep. at 24, 26; CABR 14)

Weaknesses

Ms. Artiach suffered greatly both emotionally and physically, before and after her industrial injury. She survived a traumatic head injury which could have been sufficient for her to have stopped working and gone on disability. (Tr. 9/20/07 at 24). Because of the car accident she lost her right eye and had to wear a black patch over it. She was left with self-consciousness because her appearance. This brought a never-ending stream of questions from patrons of Red Lobster. (Tr. 9/20/07 at 15-17) There were periods in her adult life where she was treated for depression. (Dep. Of Vandenberg, pg. 45-46).

Strengths

Ms. Artiach was a person of strong character both in her personal life and employment settings. She was hard-working, well-liked and

follow the same format in her brief. Likewise she will also reference the testimony at the Board hearing by date and page number.

consistently received excellent evaluations from her employer of injury—Red Lobster. She continued to work between surgeries following her car accident that destroyed her face. She was injured on the job at the auto dealer but did not miss work and did not file a worker’s compensation claim. Even after the current industrial injury Ms. Artiach wanted to keep working and do so to the best of her abilities. She even continued to work throughout her husband’s 18-month battle with pancreatic cancer, except for a short period of time off to be with him in his final days on earth. Her work during this period was an escape for her. (CABR 4; Tr. 9/20/07 at 8-9, 24-25, 34-35; 56-57, 67; Williams dep. at 23, 26, 38, 40, 60-61, 63-64; Tr. 10/2/07 at 6, 24-25; Kite dep. at 20; Vandenbelt at 55-56).

Reaction to the injury

Ms. Artiach continued to work the lunch shift immediately after the industrial injury. She sought medical treatment and continued to try to work in kitchen at the Red Lobster. In an effort to remain employed she worked through the pain but was forced to accept a “modified hostess job” and then a “greeter” position because she simply could not continue in her job of injury. Her pay was reduced because she was working fewer hours, sometimes as few as 1-2 hours per day depending on her pain level and the needs of the restaurant. The greeter position was difficult for her as it placed her at the front of the restaurant greeting patrons as they entered.

Several times each shift she was asked about her eye patch and the scars on her face, which was humiliating for her. The loss of her ability to use her left hand normally was devastating to Ms. Artiach. She explained that, “I could deal with my face. But without my hands and my legs, you know, that’s my movement. That’s my life, and for me to not be able to do something is—I can’t.” (Tr. 9/27/07 at 11-17, 25; Tr. 10/2/07 at 11-14, 17-18, 24-25, 28)

Loss of function

After the industrial injury to her wrist, the pain and swelling prevented Ms. Artiach from working as much as she wanted and needed to. Being gainfully employed was a source of great pride to her. As time went on Ms. Artiach began to miss work due to pain and swelling, which frustrated and saddened her. Eventually she was not able to remain gainfully employed when her hours were drastically cut because Red Lobster, in trying to accommodate her physical limitations, was no longer able to provide her enough hours to keep her gainfully employed. (Tr. 9/27/07 at 11-17, 25; Tr. 10/2/07 at 11-14, 17-18, 24-25, 28)

As noted above, Dr. Kite was Ms. Artiach’s attending doctor. In worker’s compensation cases the fact-finder must give special consideration to the attending physician’s medical opinion. *Young*, at 128-29 (citations omitted). This is because the attending physician has not

been hired by either side to give an opinion that favors their particular view of the case. *Id.* at 129 (citations omitted). Special consideration of the attending physician's testimony supports the purpose of the industrial insurance act, which is to ensure the protection of injured workers. *Id.*

Ms. Artiach tried to keep working after her industrial injury. Dr. Kite worked with her for more than two years trying to make that happen. He started with conservative treatment then ordered physical therapy. When that proved unsuccessful he began a series of physical restrictions that were designed to allow her wrist to rest and eventually heal. Those limitations ran the gamut from complete rest at home with no use of the left wrist to releasing her to work in a modified hostess position at Red Lobster with very limited use of her left wrist. At times, the employer was unable to "accommodate the restrictions." (Kite dep. at 10-16, 19-21, 24-27, 48, 65-67)

Dr. Kite last examined Ms. Artiach in November 2004. However, at the request of the employer he continued to review IME reports and surveillance videos after that time. (Kite dep. at 28, 50-52; Barnard, Beshlian and Vandebelt depositions, *infra*) In October 2004, Dr. Kite was asked to review an approximately 11-minute surveillance video that showed Ms. Artiach "moving a shopping cart and us[ing] her left hand." (Kite dep. at 47) As a result, he opined that Ms. Artiach may have been

exaggerating her symptoms and that she could actually do more with her left hand than she was reporting. However, he admitted a diagnosis of “malingering” was a psychological diagnosis and he would defer to a psychiatrist’s diagnosis regarding the issue of malingering. Nevertheless, he changed his mind after seeing her in his office a short time later when she came to his office in such genuine pain that he prescribed her pain medication and abandoned his negative suspicions. (*Id.* at 47, 49-50, 52, 61, 63-64, 67; Vandebelt dep. at 38)

Based solely on his review of the short video Dr. Kite revised his medical restrictions concerning Ms. Artiach’s ability to work. He opined that she could lift, push and pull with her left hand although it should be on only an occasional basis and should be limited to 5 pounds. For this reason he opined she could perform a modified hostess job at Red Lobster. (Kite dep. at 29-30, 47-48) However, according to Mr. Ostler, the hostess position was not a full-time position. A review of payroll records revealed her hours were drastically reduced by 2004. (Tr. 10/2/07 at 23-25, 28)

Dr. Kite reviewed a second surveillance video taken on June 8-9, 2007. It was taken by the same private investigator that shot the 2004 video. It lasted about 90-minutes. It showed Ms. Artiach taking out one sack of garbage on the first day and doing some yard work on the second day. (Tr. 10/2/07 at 33, 36, 42-44) After reviewing the video Dr. Kite

approved her to work full-time as an apparel clerk and a cashier, two jobs.
(Kite dep. at 30)

However, when he was more fully informed about the activities shown in the video such as that the umbrella being handled had a light plastic pole, the rototiller being handled weighed only about 8 pounds and was being rolled across cement, he revised his opinion and concluded that she was not capable of performing the jobs of cashier and apparel clerk. (*Id.* at 31-32, 56-60) He retained his opinion that she could perform the modified hostess (greeter) position he approved in August 2004, based on the fact there would be no use of the left hand. (Kite dep. at 56, 61-62, 67)

Dr. Kite ultimately concluded that Ms. Artiach had permanent restrictions of at most occasionally (1/3 of the day) lifting, pushing and pulling up to 5 pounds with her left hand. He also concluded that Ms. Artiach was restricted from any frequent or continuous pushing, pulling or lifting with her left hand. She was also limited to only occasional grasping and handling with her left hand. Dep. Of Kite, pg. 29-30.

Implicit in the consideration of Ms. Artiach's restrictions is the question of whether or not she was exaggerating her symptoms. Dr. Williams is a licensed psychiatrist that conducted an IME of Ms. Artiach. He conducted an in-depth medical examination, which included a review of all records received, her current and past medical and mental health

history as well as her employment history. (Williams dep. 8-29) He administered a number of psychological tests designed to diagnose psychiatric disorders and to assess whether or not she was malingering. He diagnosed her with pain disorder, which was later not accepted by the trial court. (Williams dep. at 30-37; See, the first sentence of Finding of Fact #4², Finding #5, second sentence of Finding #10³ and Conclusion of Law #4⁴) (CP 31-33) Because the trial court did not agree with the conclusion of Dr. Williams regarding Ms. Artiach's diagnosis of a pain disorder the employer suggests that Dr. Williams' entire testimony should be disregarded. This is not true. It was the trial court's decision to determine witness credibility and as long as substantial evidence supports a finding that incorporates a particular witness's testimony this court may not disturb the finding on appeal.

Dr. Williams excluded the diagnosis of malingering based on the results of the tests he administered such as the SIRS test and the MMPI II. (Williams dep. at 29-30) He also based his conclusion that Ms. Artiach was not malingering on the fact that (1) she continued to work after a serious head injury in 1978; (2) she continued to work at Red Lobster even

² "Plaintiff does not have a pain disorder caused by the industrial injury."

³ " . . . Plaintiff had not suffered permanent partial impairment of her mental health as a result of her industrial injury.

⁴ "However, Plaintiff had not suffered permanent partial impairment of her mental health as a result of her industrial injury."

though her movements were medically restricted and her husband was dying of pancreatic cancer; (3) that she did not blame all her problems on the 2002 industrial injury; and (4) her consistently positive employee evaluations while working at Red Lobster and all other former employers. (Williams dep. at 39-41) While the trial court did not accept Dr. Williams' diagnosis of a pain disorder it did accept his conclusion that Ms. Artiach was not malingering. See Findings of Fact 4 and 7.

In considering the meaning of the surveillance video that is admitted as an exhibit it is important to put the contents in context. The video was shot over a 2-day period of time yet lasts only 90-minutes. (Tr. 10/2/07 at 42-44) Ms. Conant, the person shooting the video, testified that the 90-minutes shown on the video was the only time she saw Ms. Artiach outside her house during those 2 days. (*Id.* at 36-37) Significantly, when questioned about how the rest of her day went, Ms. Artiach testified that immediately after doing the yard work depicted in the video she "went inside and rested . . . because of the pain." (Tr. 9/20/07 at 24) By her own admission, yard work used to be one of her passions. Yet, even participating in an activity she loves Ms. Artiach cannot do so on a reasonably continuous basis without significant pain.

This 90-minute video does not begin to show the context of Ms. Artiach's activities in that 2-day period. Nor do the activities depicted in

the video correspond to the level of physical activity required to engage in reasonably continuous gainful employment on a consistent full time basis. The video shows someone capable of sporadic and intermittent activity. It shows a woman capable of a short period of activity, followed by a period of rest, which has been held not to equate to reasonably continuous gainful employment. “Sporadic competence, occasional, intermittent and limited earning capacity does not reduce what would otherwise be considered total to partial disability.” *Leeper*, supra at 811 (citation omitted).

The employer asserts the court’s findings are not supported by substantial evidence based in part on the fact there “are no credible expert opinions” to validate them. (App. Br. at 20) It argues that only employer’s “credible expert opinions” give rise to substantial evidence in this record. (App. Br. at 20) This is patently false. While it is true that conflicting medical evidence was presented, the substantial evidence standard does not mean that every piece of evidence in the record must support an injured worker’s position. Witness’ credibility must also be considered. From the findings presented it is clear the trial court reviewed the record and made its own credibility decisions, which are not reviewable on appeal to this court. *Watson v. Dep’t of Labor & Indus.*, 133 Wn. App. 903, 909, 138 P.3d 177 (2006) (citation omitted).

It is also interesting to note that the testimony of Mr. Yamamoto, the employer's own vocational expert, also supports the trial court's decision when the testimony is read in its entirety. He acknowledged that in November of 2004 he had concluded that "it would be difficult at this time to justify Ms. Artiach's employability through transferable skills due to her current ability to use—to only use one arm. An appropriate retraining goal may be difficult to identify at this present time." Dep. of Yamamoto, pg. 48-49. This conclusion was reached prior to Dr. Kite temporarily approving the jobs of cashier and apparel clerk during the period Dr. Kite did not fully understand the content of the 2007 surveillance video.

Mr. Yamamoto acknowledged that the opinion of Dr. Kite "played a big part" in the formation of his opinion that Ms. Artiach was employable. *Id.* at pg. 32. However, his understanding of Dr. Kite's opinions was incomplete because he had never read nor had he been made aware of Dr. Kite's testimony that Ms. Artiach could not perform the jobs of Cashier and Apparel Clerk. *Id.* pg. 45-47. Mr. Yamamoto's opinion about employability was therefore based on an incorrect understanding of Dr. Kite's opinions. Dr. Kite's disapproval of the jobs of Cashier and Apparel Clerk therefore renders Mr. Yamamoto's opinion based on a belief that Dr. Kite had approved the jobs without a foundation. Given Dr.

Kite's disapproval of those transferable skills jobs Mr. Yamamoto's November 2004 opinion that it would be hard to justify a finding of employability is a more accurate statement of his opinion regarding Ms. Artiach's employability when taking into account the reality of Dr. Kite's opinions. This is further evidence that supports the trial courts findings.

When considering all the relevant factors in determining whether or not Ms. Artiach is totally disabled, as outlined above, there is substantial evidence to support the trial court's determination that she was totally disabled. Significant restrictions were placed on her by her attending physician, Dr. Kite. When those restrictions are combined with her age, education, prior work experience, the residuals of her car accident that required multiple facial reconstruction surgeries, and her reaction to her industrial injury Ms. Artiach was left unable to obtain and maintain reasonably continuous gainful employment. The trial court correctly made a "practical and reasonable interpretation" of the Ms. Artiach inability to obtain and maintain employment taking her as a whole person. *Young*, supra at 130. (citations omitted).

The trial court correctly determined that "[b]etween November 30, 2004 and October 23, 2006 [Ms. Artiach] was precluded by the residuals of the industrial injury from engaging in reasonably continuous, gainful employment." (Finding of Fact #9) It also correctly determined that as "of

October 23, 2006, [Ms. Artiach] was precluded from by the residuals of the industrial injury from engaging in reasonably continuous gainful employment for the foreseeable future.” (Finding of Fact 11) That decision was made after careful consideration of the evidence presented regarding the level of pain in her left arm and wrist when used for an extended period of time. (Finding #4) The trial court acknowledged the evidence demonstrated she could “perform some or all of the functions of a restaurant hostess” but was “not able to do so on a full or near full time basis.” (Finding #6) It went on to find that Ms. Artiach’s “pain levels and limitations on range of motion and grip strength” varied from day to day. It admitted the evidence showed that there were “some days during which her abilities” exceed[ed] those demonstrated to the medical professionals but that “overall she [was] not exaggerating her [medical] condition.” (Finding #7) Based on its findings it concluded that “[b]etween November 30, 2004 to October 23, 2006, [Ms. Artiach] was totally and temporarily disabled pursuant to RCW 51.32.090. (Conclusion of Law #3) (CP 31-33) Conclusion #3 and Conclusion#5, which found Ms. Artiach totally disabled, do necessarily follow from its Findings #4, 6-7,9, and 11.

The employer also contends that the trial court erred because Ms. Artiach was fired from the light duty job for cause, and that therefore

under RCW 51.32.090(4) she could not have been entitled to temporary total or permanent total disability benefits. It should first be pointed out that RCW 51.32.090(4) applies to the issue of temporary total disability only. There is no part of the statute that indicates the statute should apply to the issue of eligibility for permanent total disability benefits.

The The employer cites to the case of *O'Keefe v. Dep't of Labor & Indus.*, 126 Wn. App. 760 (2005) in support of its position, however, that case is distinguishable from the case at bar. In *O'Keefe* the injured worker was fired for cause for misconduct that had no relationship to his industrial injury. The worker failed to return to work after appointments, he failed to document his absences with the employer, was seen sleeping in his truck, missed work for appointments with the dentist, missed work because of daycare issues, and missed work because of court appointments. *Id.* at pg.762-63. Ultimately, he was fired because he refused to return to work after an appointment when the employer requested that he do so. *Id.* In short, he was fired for being a bad employee, and not because of any residual of his injury.

Ms. Artiach was not fired because of misconduct that was unrelated to her industrial injury, but instead because of restrictions on her ability to work that were directly related to her industrial injury. When she missed work it was primarily because of pain related to her injured left

hand. (Testimony of Ostler, pg. 7-9. 14-20) Her issues with being sleepy at work were caused by the medication she was taking for her industrial injury. *Id.* Consequently, Ms. Artiach's case is far different from the facts of the *O'Keefe* case.

Further, the light duty job was not a job that would be considered reasonably continuous gainful employment. The job offer was originally only for 5 hours a day, and with time the hours available were reduced even further to 2 hours or less a day and only four days a (Testimony of Ostler, pg. 24-28; Testimony Artiach, pg. 14-15). This was considerably less than the number of hours Ms. Artiach worked per week in the year prior to her industrial injury. (Testimony of Ostler, pg. 28). It eventually just became impractical and too much for Mr. Artiach to tolerate continuing to try and work, and she eventually just could not do it any longer and stopped coming in. (Testimony of Artiach, pg. 14-15)

In addition, the job was only a temporary job that was only being offered until she was able to return to her normal job of injury. (Testimony of Ostler, pg. 24-25) She was never able to return to her job of injury. A temporary job offer could not be a bar to permanent total disability benefits since it would not have been permanently available to Ms. Artiach even had she been able to continue performing the modified job..

B. Partial v. Total Disability

As its last argument the employer claims that reversible error was committed by the trial court in awarding Ms. Artiach both partial and total disability *at the same time*. This is erroneous and a misleading recitation of the relevant facts.

Conclusion #4 states that as of October 23, 2006, she “had” an 8% permanent partial disability (PPD) impairment. This follows directly from Finding # 10 whereby the trial court determined, as of that same date, the Department had made that PPD award. This is supported in the record. (CABR 35) However, contrary to the interpretation set forth by the employer, Conclusion #4 does not direct the employer to again award a permanent partial disability award. Rather it simply states the percentage of impairment for Ms. Artiach’s left arm, which had already been awarded by Department order.

This exact scenario is contemplated in the worker’s compensation statutes. RCW 51.32.080 discusses permanent partial disability. It sets forth compensation tables and calculation guidelines for how those tables are to be utilized. RCW 51.32.080(4) explains that a permanent partial disability determination, as was the case below in Ms. Artiach’s claim, is sometimes “followed by a permanent total disability” determination

(emphasis added). This subsection of the statute goes on to discuss how the overpayment should be corrected.

Likewise, our Supreme Court has held RCW 51.32.080(4) applies “in all cases where permanent partial disability compensation is followed by permanent total disability compensation.” *Jacobsen v. Dep’t Labor & Indus.*, 110 App. 384, 390, 110 P.3d 253 (2005) (quoting, *Stuckey v. Dep’t of Labor & Indus.*, 129 Wn.2d 289, 299-300, 916 P.2d 399 (1996) (emphases added)). This is because the purpose of the permanent partial disability statute is to guarantee that injured workers who initially receive permanent partial disability awards and later receive total disability pensions do not obtain greater benefits than workers who were awarded permanent total disabilities pensions in the first place. *Jacobsen*, 110, Wn. App at 390-91 (quoting *Stuckey* at 296 (emphases added)).

The trial court’s findings and conclusions are clear. On October 23, 2006 the department made a determination that Ms. Artiach was permanently partially disabled. Ms. Artiach appealed this order. Upon review, the trial court reversed that decision instead concluding she was temporarily and totally disabled between November 30, 2004 and October 23, 2006 and permanently totally disabled after that time. Nowhere does it begin to set forth factual findings relevant to the elements of permanent

partial disability. The employer's argument to the contrary is a red herring.

VI. CONCLUSION

Substantial evidence supports the trial court's finding that Ms. Artiach constantly experiences real pain when she uses her left arm or wrist. (Findings #4 and 7) Additionally, substantial evidence supports its determination that she did not have sufficient use of her left hand such be employed on a continuous and gainful basis as a restaurant hostess, clerk, apparel stocker, or any other reasonably continuous gainful employment during both disputed time periods. (Findings #6, 9 and 11) As a result the trial court's Conclusions #3 and #5, wherein the court concluded that Ms. Artiach was totally disabled during the relevant periods, are correct. Based on the above, the trial court's Conclusion # 6, whereby it reverses the Board's decision and order is supported by the trial court's Findings. Accordingly, the trial court's decision regarding total disability, both temporary and permanent, should be affirmed.

VII. ATTORNEY FEES

If this court agrees and affirms the trial court decision, Ms. Artiach respectfully requests attorney fees and expenses pursuant to RAP 18.1 and RCW 51.52.130(1), which provides in relevant part:

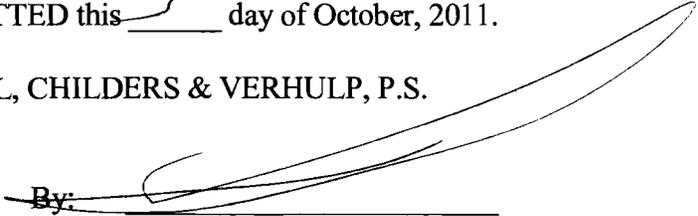
If, on appeal to the superior or appellate court from the decision and order of the board, ... a party other than the worker or beneficiary is the appealing party and the worker's or beneficiary's right to relief is sustained, a reasonable fee for the services of the worker's or beneficiary's attorney shall be fixed by the court.

Here, the employer was the appealing party in this action and Ms. Artiach was forced to defend the trial court decision. If successful, Ms. Artiach's pension will increase her worker's compensation benefits. See, *Young*, supra at 132-33. She has incurred expenses in the preparation of this appeal, including this request for attorney fees. A cost bill will be

submitted at a later date pursuant to RAP 18.1.

RESPECTFULLY SUBMITTED this 3 day of October, 2011.

SMART, CONNELL, CHILDERS & VERHULP, P.S.

By: 

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