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DIVISION III
STATE OF WASHINGTON
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NO. 30010-2-III

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OF THE STATE OF WASHINGTON**

SANDRA ARTIACH,

Respondent,

v.

GMRI INC./DARDEN RESTAURANTS,

Appellant.

**BRIEF OF RESPONDENT
DEPARTMENT OF LABOR & INDUSTRIES**

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I. INTRODUCTION

This is a workers' compensation case under RCW 51 involving worker Sandra Artiach. Employer GMRI/Darden Restaurants (Darden) has appealed the superior court's decision that determined that Ms. Artiach was entitled to further time loss benefits, was permanently totally disabled, and was permanent partially disabled. The Department of Labor and Industries (Department) agrees with the position taken by Darden that Ms. Artiach is not entitled to further time loss compensation or a pension, and will defer to Darden's briefing on these issues.¹ The Department's brief focuses on the issue of whether the trial court could determine that Ms. Artiach was both permanently totally disabled and permanently partially disabled.

Under the statutory scheme and case law, a worker cannot be totally and partially disabled at the same time. If the Court affirms the

¹ The issues of whether Ms. Artiach was entitled to further time loss compensation or a pension depend on whether she was capable of obtaining or performing reasonably continuous gainful employment. 6A Washington Practice, *Washington Pattern Jury Instructions: Civil* 155.07, at 130 (5th ed. 2005); *O'Keefe v. Dep't of Labor & Indus.*, 126 Wn. App. 760, 768, 109 P.3d 484 (2005). This is based on the definition of permanent total disability that finds total disability when there is a condition "permanently incapacitating the worker from performing any work at any gainful occupation." RCW 51.08.160. The superior court found that there was not any full-time or near full-time employment for her as a restaurant hostess. CP 32. RCW 51.08.160 does not require full-time employment, only gainful employment. Here there was no testimony that the available part-time work was not gainful, which was Ms. Artiach's burden to prove. See *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999); *Olympia Brewing Co. v. Dep't of Labor & Indus.*, 34 Wn.2d 498, 505, 208 P.2d 1181(1949), *overruled on other grounds by Windust v. Dep't of Labor & Indus.*, 52 Wn.2d 33, 323 P.2d 241 (1958).

superior court determination that Ms. Artiach was permanently totally disabled and thus entitled to a pension, it should reverse the superior court determination that Ms. Artiach had permanent partial disability.

II. ISSUE

Did the trial court err by determining that Ms. Artiach was simultaneously permanently totally disabled and permanently partially disabled?

III. STATEMENT OF THE CASE

A. **The Department and Board Found Ms. Artiach Able To Work and Awarded Her Eight Percent Permanent Partial Disability of the Arm**

Ms. Artiach injured her left hand at her work for Red Lobster (owned by Darden) in 2002. BR 19; BR Artiach 6.² After several years of treatment, her physician Dr. Kite found her able to work at a modified hostess job at Red Lobster. BR Kite 7-28, 43-44. On September 14, 2004, she returned to work after accepting the position. BR Artiach 36-37. However, because of persistent problems with absenteeism, her work at Red Lobster ended in November 2004. BR Ostler 14, 17, 20-21.

Time loss compensation was ended as of November 29, 2004, and the Department closed her claim on October 23, 2006. BR 19. The October 23, 2006 order awarded her permanent partial disability in the

² The certified appeal board record is cited as "BR," with testimony cited by the surname and page number.

amount of eight percent of the amputation value of her left arm at or above the deltoid insertion or by disarticulation of her shoulder. BR 19.

Ms. Artiach appealed to the Board of Industrial Insurance Appeals (Board), seeking further treatment; time loss compensation for the time period of November 29, 2004, to October 23, 2006; acceptance of a mental health condition; increased permanent partial disability; or a pension as of October 23, 2006. BR 17-18, 25. The Board judge decided that she did not have a mental health condition, and that she should not receive further treatment, time loss compensation, or a pension. BR 19-20. The Board judge affirmed the award of eight percent permanent partial disability. BR 20.

Ms. Artiach petitioned the full Board for review of the Board judge's proposed decision. BR 2. The Board declined review and adopted the proposed decision as its own. BR 1.

B. The Superior Court Determined That Ms. Artiach Had Both Permanent Impairment of Eight Percent in Her Arm and That She Was Totally and Permanently Disabled

Ms. Artiach appealed the Board's decision to superior court. CP 1. The trial court found that between November 30, 2004, and October 23, 2006, Ms. Artiach was precluded by the residuals of the injury from engaging in reasonably continuous, gainful employment. CP 32. (If affirmed, this means she is entitled to time loss compensation for this time

period.) The trial court found that she was precluded by the residuals of the injury from engaging in reasonably continuous, gainful employment for the foreseeable future. CP 32. (If affirmed, this means she is entitled to a pension.) The trial court also found that Ms. Artiach had permanent impairment³ that was equal to eight percent of the amputation value of her left arm at or above the deltoid insertion or by disarticulation of the shoulder. CP 32. The trial court found no mental health condition proximately caused by the injury. CP 31.

The trial court concluded that as of October 23, 2006, Ms. Artiach was totally and permanently disabled. CP 33. The trial court concluded as of October 23, 2006, Ms. Artiach had permanent impairment that was equal to eight percent of the amputation value of her left arm. CP 33. The trial court also concluded that she was temporarily totally disabled for the time period of November 30, 2004, to October 23, 2006. CP 32. The trial court reversed the October 23, 2006 Department order, and remanded the case for further proceedings consistent with its decision. CP 33.

Darden appealed.

IV. STANDARD OF REVIEW

Review is governed by RCW 51.52.140, which provides that an appeal shall lie from the judgment of the superior court as in other civil

³ For the purposes of this brief, the terms impairment and disability are used interchangeably.

cases, and that ordinary practice in civil cases shall apply. *McClelland v. ITT Rayonier, Inc.*, 65 Wn. App. 386, 390, 828 P.2d 1138 (1992). The appellate court reviews the trial court's decision. *Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d 355 (2009). The appellate court reviews factual findings to determine if substantial evidence supports the findings made, and if the trial 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).

Questions of law are reviewed de novo. *Bennerstrom v. Dep't of Labor & Indus.*, 120 Wn. App. 853, 858, 86 P.3d 826 (2004). Although this Court may substitute its judgment for that of the Department, great weight is accorded to the agency's view of the law it administers. *Id.*

V. ARGUMENT

A. A Worker Cannot Receive a Pension and a Permanent Partial Disability Award at the Same Time

The trial court concluded both that Ms. Artiach was totally permanently disabled and that she had a permanent partial impairment of eight percent of her arm. CP 33-34.⁴ A person cannot receive a pension and an award for permanent partial disability at the same time under the plain meanings of RCW 51.32.060 (permanent total disability) and

⁴ The trial court did not order payment of both awards as there is no judgment, only findings of fact and conclusions of law. CP 31-33.

RCW 51.32.080 (permanent partial disability), and the statutes defining these terms, RCW 51.08.150 and .160.

When interpreting a statute, the court's goal is to effectuate the legislature's intent. *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). If the statute's meaning is plain, the court gives effect to that plain meaning as the expression of the legislature's intent. *Id.* Plain meaning is determined from the ordinary meaning of the language used in the context of the entire statute in which the particular provision is found, related statutory provisions, and the statutory scheme as a whole. *Id.*

RCW 51.32.060 provides for a pension when permanent *total* disability is proximately caused by the industrial injury. *Dep't of Labor & Indus. v. Auman*, 110 Wn.2d 917, 919, 756 P.2d 1311 (1988). RCW 51.32.080 provides for an award when there is a permanent *partial* disability. *Auman*, 110 Wn.2d at 919. Permanent total disability means "means 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." RCW 51.08.160. The definition contemplates total disability. In contrast, permanent partial disability does not contemplate total disability, as the term means "the loss of either one foot, one leg, one hand, one arm, one eye, one or more fingers, one or more toes, any dislocation where

ligaments were severed where repair is not complete, or any other injury known in surgery to be permanent partial disability.” RCW 51.08.150.

The definitions of the terms plainly provide that permanent total disability is for total disability and permanent partial disability is for partial disability. It makes no sense that a person would be both partially and totally disabled at the same time for the same injury.⁵ See *In re Cheryl Austin*, BIIA Dckt. Nos. 05 217130 & 05 21730-A, 2007 WL 4565295, *2 (2007) (industrial appeals judge erred in awarding both partial and total benefits “as an individual cannot logically be both simultaneously.”).⁶

The Supreme Court has recognized that a worker either receives a pension or an award for permanent partial disability: “If a temporarily disabled worker does not fully recover but instead reaches a static impaired condition, the worker’s classification is changed from temporarily disabled to permanently disabled and the worker receives *either* a pension *or* a permanent partial disability award.” *Hubbard v. Dep’t of Labor & Indus.*, 140 Wn.2d 35, 37 n.1, 992 P.2d 1002 (2000)

⁵ However, someone can receive permanent total disability and permanent partial disability for a partially disabling condition that is unrelated to the totally disabling injury. *McIndoe v. Dep’t of Labor & Indus.*, 144 Wn.2d 252, 263, 26 P.3d 903 (2001).

⁶ The Court defers to decisions of the Board interpreting the Industrial Insurance Act. See *Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 138, 814 P.2d 629 (1991). The Board designates some decisions as significant. RCW 51.52.160. The Board decisions cited in this brief are not designated significant, but still may be considered.

(emphasis added). Likewise the Board recognizes that there may not be “compensation for both permanent partial disability and permanent total disability.” *In re Allen Wood*, BIIA Dckt. No. 94 1328, 1995 WL 566037, *1 (1995). This is because permanent total disability and permanent partial disability are alternative remedies and the worker is not entitled to both for the same injury. *In re Donna Hutchinson*, BIIA Dckt. No. 05 15312, 2006 WL 2954304, *1 (2006).

That permanent partial disability and permanent total disability are alternative remedies is supported by the fundamental nature of these benefits. Permanent total disability classification means it has been determined that the worker’s condition is permanent and prevents the worker from returning to gainful employment. *McIndoe v. Dep’t of Labor & Indus.*, 144 Wn.2d 252, 262, 26 P.3d 903 (2001). Permanent partial disability benefits are awarded on the basis of loss of bodily function. *McIndoe*, 144 Wn.2d at 262. Partial disability crosses the line to total disability when a worker cannot work. *See Shea v. Dep’t of Labor & Indus.*, 12 Wn. App. 410, 415, 529 P.2d 1131 (1974). “If the claimant cannot engage in any gainful employment, the permanent disability is total; if she can engage in some type of gainful employment on a reasonably continuous basis notwithstanding her medical condition, the permanent disability is partial.” *Williams v. Virginia Mason Med. Ctr.*, 75

Wn. App. 582, 586-87, 880 P.2d 539 (1994). Here, assuming that the determination of permanent total disability is affirmed, Ms. Artiach has crossed the line from partial to total disability by her inability to work. Thus, she would no longer be partially disabled but totally disabled.

Ms. Artiach argues that there was not an order of permanent partial disability but rather the conclusion “simply states the percentage of impairment for Ms. Artiach’s left arm, which had already been awarded by Department order.” Artiach Resp. Br. 21. The conclusion of law does not limit its language to a historical reference of what had previously been paid, but rather finds and concludes that she has eight percent impairment of the arm as of October 23, 2006. The issue of whether she had permanent partial disability or permanent total disability was the issue presented by the October 23, 2006 Department order, which was the subject of the Board decision and the trial court decision. It was not an order in the past.

If this Court affirms the superior court’s conclusion that Ms. Artiach was totally permanently disabled, it should, based on the statutory language and case law, including *Hubbard*, reverse the superior court’s finding and conclusion about partial impairment.

B. Although RCW 51.32.080(4) Provides a Method of Recoupment To Recover Previously Paid Permanent Partial Disability Amounts When a Pension Is Awarded, It Does Not

Authorize Awarding a Pension and a Permanent Partial Disability Award In the Same Order

The Department agrees with Ms. Artiach (Artiach Resp. Br. 21) that in this case former RCW 51.32.080(4) (2007)⁷ would apply to recover the previously paid permanent partial disability since the permanent partial disability benefits were already paid. *See Stuckey v. Dep't of Labor & Indus.*, 129 Wn.2d 289, 299-300, 916 P.2d 399 (1996). This statute allows for recoupment under certain circumstances of previously paid permanent partial disability awards:

If permanent partial disability compensation is followed by permanent total disability compensation, any portion of the permanent partial disability compensation which exceeds the amount that would have been paid the injured worker if permanent total disability compensation had been paid in the first instance shall be, at the choosing of the injured worker, either: (a) Deducted from the worker's monthly pension benefits in an amount not to exceed twenty-five percent of the monthly amount due from the department or self-insurer or one-sixth of the total overpayment, whichever is less; or (b) deducted from the pension reserve of such injured worker and his or her monthly compensation payments shall be reduced accordingly.

Former RCW 51.32.080(4) (2007).

Application of this statute does not mean that permanent total and partial disability benefits should be awarded at the same time, as this is not contemplated by the statutory scheme, which provides that a worker is

⁷ This statute was amended by the Laws of 2011, ch. 37, § 401.

either totally or partially disabled due to an injury, not both. Indeed RCW 51.32.080(4) reinforces that permanent total and partial disability benefits do not coexist for the same injury. RCW 51.32.080(4) provides that the worker does not keep previously paid permanent partial disability when she or he is later classified as permanently totally disabled; a worker is entitled to one or the other benefit, not both.

Here, there is uncertainty as to whether former RCW 51.32.080(4) (2007) applies when there is a superior court decision that concludes that the worker is both totally and partially permanently disabled. This could potentially create issues of collateral estoppel or res judicata, although the Department would argue these theories did not apply under RCW 51.32.080(4). Holding that a worker cannot be both partially and totally disabled for the same injury avoids the potential for confusion.

A holding that the award of both permanent total and partial disability benefits may occur because former RCW 51.32.080(4) (2007) could then be applied could materially affect the Department in certain types of cases. If Ms. Artiach's interpretation is accepted, if there had been no previous award for permanent partial disability and the trial court ordered permanent partial disability and permanent total disability at the same time, then the Department would be forced to use RCW 51.32.080(4) to recover the payment. Under RCW 51.32.080(4), the

worker can choose whether to deduct the payments from the monthly benefit or from the pension reserve. This has an economic impact on the Department.

RCW 51.32.080(4) would not necessarily allow the Department to recover the full amount or even the majority of the permanent partial disability award. For example, if a worker was only marginally employed at the time of the industrial injury, the worker's monthly pension benefits might be so small that it is highly unlikely that either subtracting 25 percent from each pension benefit or subtracting the permanent partial disability award from the pension reserve fund would allow the Department to recapture a significant portion of the newly awarded permanent partial disability

Moreover, under the first instance rule in former RCW 51.32.080(4) (2007),⁸ if there had been a previous permanent disability award paid at any point over the life of the worker's claim, and the claim was later reopened and then closed again, then the date of the first

⁸ The first instance rule is no longer in the statute. Laws of 2011, ch. 37, § 401. The first instance rule in RCW 51.32.080(4) provides that if a worker is awarded permanent partial disability and is later classified to be permanently totally disabled that the Department must reduce the pension reserve fund or the monthly pension amount by the amount of the permanent partial disability award, less any pension payments that would have been made had the Department awarded total permanent disability in the "first instance." In essence, when deducting the amount of the permanent partial disability, the first instance rule credits the worker for payments he or she would have received had the worker originally received the pension instead of the permanent partial disability award. It serves as a retroactive credit for pension payments the worker would have received.

permanent disability award would be considered the “first instance.” Therefore, in a case like that, if the worker appealed the most recent closing order and the court granted him or her both a permanent partial disability award and a pension, then the worker would be left with a substantial windfall, since the Department would, at most, only be able to recover a small portion of the permanent partial disability award under the “first instance” statute. The Department would have to subtract from the most recent permanent partial disability award all of the pension benefits that the worker would have received had the worker been placed on a pension when the first order granting permanent partial disability was issued, and only the remaining amount, if any, would be subject to former RCW 51.32.080(4) (2007).

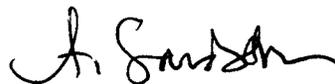
Indeed, if the first permanent partial disability award was issued several years before the worker was eventually granted both a permanent partial disability award and a pension, then, as a practical matter, it would almost certainly be the case that no portion of the most recent permanent partial disability award would be subject to former RCW 51.32.080(4) (2007). The legislature did not intend for such a windfall. It has provided alternative remedies in providing for permanent total disability and permanent partial disability that precludes such a result.

VI. CONCLUSION

The Department requests that the superior court order dated May 20, 2011 be reversed for the foregoing reasons and the reasons stated in the Brief of Appellant.

RESPECTFULLY SUBMITTED this 18th day of October, 2011.

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