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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 311031

Superior Court No. 10-2-03101-1

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

SMAJO MESAN, individually,

Appellant

v.

TYSON FOODS, INC.,

Respondent

REPLY BRIEF

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II. TABLE OF AUTHORITIES

Cases

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III. RESPONDENT'S STATEMENT OF THE CASE

In its counterstatement, Tyson sets forth only the facts that are useful to its theory of the case. Its recitation of the facts, while technically correct, is misleading at times. For example it states: “. . . three of the four testifying physicians – including Mr. Mesan's attending physician – opined that [he] was fully capable of working at his job of injury at Tyson, *with or without restrictions.*” (Resp. Br. at 3) (Emphasis added.) As will be seen below, whether or not there were restrictions needed for his work environment directly impacts the resolution of this case.

Mr. Mesan fairly and accurately set forth the facts in his Appellant's brief. (App. Br. at 15-19) It is pertinent that Dr. Fife (with corroboration by Dr. Wong) testified that in order for Mr. Mesan to be successful at the Tyson production-line jobs, it would have to make significant accommodations, which included no overhead reaching, working at waist level with his arms at his side and the option to sit or stand as needed. (CP 406-408, 420-23) Tyson's brief implies otherwise when it repeats the testimony of its vocational expert, Mr. Garza, who “understood” that Dr. Fife reported Mr. Mesan could perform the job of injury without restrictions. (Resp. Br. at 8) Additionally, both Dr. Gritzka and

physical therapist Kirk Holle opined that Mr. Mesan could not perform the Tyson jobs even with accommodations. In reality only 2 medical professionals, Dr. Higgs and Dr. Bozarth, felt Mr. Mesan could perform the jobs without restrictions. However, as stated in the Appellant's brief, Dr. Higgs made his recommendation without reviewing the PCE he ordered even though the report was available to him. (CP 556, 566) Additionally, Dr. Bozarth was the only medical professional that opined the shoulder and carpal tunnel conditions were not even employment related although the Department accepted both claims. Significantly, the Board and lower court did not agree with Dr. Bozarth's assessment, making his opinion unreliable. (App. Br. at 11, 16, 18-19)

Tyson then repeats its contention that Dr. Fife found Mr. Mesan employable in all three Tyson production jobs, with only overhead lifting restrictions. (Resp. Br. at 11) As noted above, in addition to the overhead reaching restrictions there were restrictions on working with his arms at his side and the option to sit or stand as needed.

Next, Tyson completely misconstrues the testimony of Ms. Falk when it states that she "understood *all* testifying physicians in

this matter had found, to one degree or another, that Mr. Mesan's subjective complaints outweighed their own objective clinical findings." (Resp. Br. at 12) (Emphasis added.) In reality, the actual question asked stated: "Okay. Now, you've reviewed several medical records. You would agree that *some* physicians found that [Mr. Mesan's] subjective complaints far outweighed his objective findings?" To this question Ms. Falk answered "Yes." (CP 359) (Emphasis added.) This is a very important distinction and not one that should be glossed over as it supports Mr. Mesan's assertions in this matter.

Tyson devotes much time to the issue of "symptom magnification," claiming *all* testifying physicians, including Mr. Mesan's retained expert, recognized this behavior. (Resp. Br. at 12). Neither the Board nor the court below made any finding on this issue, which should preclude this Court's consideration as there was nothing to which Mr. Mesan could assign error. That said, the statement is simply not true. Mr. Mesan admits the record discloses Dr. Higgs and Dr. Bozarth determined there was symptom magnification during their examinations. However, contrary to Tyson's allegation, Dr. Fife made no comment on the issue. Tyson attempts to tie a statement he made, taken out of

context, to symptom magnification. (Resp. Br. at 13) However, it failed to include the entire sentence, which reads: “[Dr. Wong] states that Mr. Mesan said that he could not feel anything in either upper extremities [sic]. That’s not compatible with the known [spinal arthritis] abnormality that he had, *so I’m not sure why Mr. Mesan said that or how that came about.*” (CP 403) (Emphasis added.) In making this statement Dr. Fife was merely repeating what Dr. Wong noted in his report. He did not comment nor was he asked to comment on the issue of symptom magnification. Tyson then argues that Dr. Gritzka found evidence of symptom magnification. This is patently false. Dr. Gritzka actually testified: “*But as of the date that I saw him [May 6, 2009], there was no objective evidence that would back up any of these various complaints.*” (CP 279-280) What Tyson neglects to explain is that Dr. Gritzka’s examination took place two-and-a-half years *after* Mr. Mesan was laid off from his job with Tyson. Dr. Gritzka testified that because Mr. Mesan’s symptoms were caused by the repetitive work he performed, cessation of the work caused the symptoms to resolve. (CP 263, 269-270) When specifically asked whether he saw “pain behavior or symptom magnification” Dr. Gritzka said “Well, no, not really.” (CP 272) He went on to explain that it

probably wasn't necessary for Mr. Mesan to wear his wrist splints during the day any longer but that ". . . other than that, [] he was very straightforward, he didn't complain much and he just sort of did his thing." (CP 272)

Tyson's reference to the record whereby Dr. Gritzka refers to Mr. Mesan as a "loaded mousetrap" actually supports Mr. Mesan's theory on appeal. (Resp. Br. at 15) When asked to explain that term Dr. Gritzka explained that Mr. Mesan was dealing with a lot of medical conditions, which included a trigger finger, the potential recurrence of carpal tunnel syndrome if he were to work in a production line position, the potential worsening of his right shoulder condition with repetitive use combined with the effects of an unstable, which made him medically fragile. (CP 269) Dr. Gritzka concluded: "So as he presented to me after basically being off work for a period of time, [Mr. Mesan] had a generally normal physical exam. *But if he once started stressing his various parts, they would likely flare up again.*" Dr. Gritzka concluded: "So if he returned to work as a warehouseman or in a production situation, *he would likely develop symptomology that would be disabling for that particular work.*" (CP 269-270)

In this same regard, by mentioning only “testifying *physicians*” (Resp. Br. at 12) Tyson neglects to mention that Dr. Higgs sent Mr. Mesan to Kirk Holle, a physical therapist and medical professional, for a PCE (physical capacities examination). According to Dr. Higgs, a major reason for undertaking a PCE is to determine whether a patient shows signs of malingering or lack of motivation. (CP 195-196) Although he did not review the results of the PCE for several years, Dr. Higgs later admitted that Mr. Mesan’s PCE resulted in a valid test score of 95 out of 100. (CP 209-210)

Tyson also boldly claims that Mr. Mesan rejected surgical options to correct the claim-related conditions in order to avoid employment. (Resp. Br. at 14) This couldn’t be further from the truth. Mr. Mesan testified that he did not want to pursue surgical options because he was afraid of the risk and its effects on his body since he has diabetes and high blood pressure. (CP 153) He testified that he was given no guarantees that his medical conditions would improve after the surgery. (CP 168) This was echoed by Dr. Higgs who admitted that elective surgical intervention of this type, while usually effective, is not always so. (CP 200-201) He also testified that he offered the surgeries to Mr.

Mesan only “hesitantly.” (CP 210) Dr. Gritzka testified that any type of surgery carries with it serious risks. He made no judgment regarding Mr. Mesan’s decision not to undergo surgery, stating: “It’s a reasonable decision from his standpoint.” (CP 258-260) Dr. Gritzka also admitted that a patient can be left with a poorer result after surgery. He explained that Mr. Mesan’s diabetes is a known complication for surgery. (CP 282-283) The surgeries were elective procedures and Mr. Mesan was under no compulsion to agree to them.

IV. STANDARD OF REVIEW

Tyson correctly sets forth the standard of review. (Resp. Br. at 15-16) Findings of fact are to be reviewed under the substantial evidence standard. However, pursuant to the specific legal procedure followed in this case, Tyson fails to address one of the issues vital to the resolution of this case. Neither the Board nor the trial court made any findings of fact regarding the issue of permanent total disability. (CP 16) Only conclusions of law were set forth. (App. Br. at 21)(CP 16-17) This court reviews conclusions of law de novo, which makes this entire record relevant to the issue of permanent total disability.

V. ARGUMENT

It is important to reiterate the applicable rule of law. Total disability involves the medical fact of loss of function and disability, together with the inability to *perform* and the inability to *obtain* work within the range of a claimant's capabilities, training, education and experience as a result of injury or occupational disease. *Leeper v. Dep't of Labor & Indus.*, 123 Wn.2d 803, 812, 872 P.2d 507 (1994). (Emphasis added.) The record contains conflicting testimony regarding Mr. Mesan's ability to perform the three production-line jobs at Tyson. It insists the record provides substantial evidence that Mr. Mesan has the ability to work at its Wallula plant. However, Tyson failed to supply *any* information concerning Mr. Mesan's ability to obtain employment within its company or with any other employer in his labor market. In fact, the only information in the record pertaining to this element is that Tyson eliminated the entire second shift in 2006 and it has not ever been reinstated. It is uncontested that Mr. Mesan worked the second shift prior to suffering the shoulder and wrist injuries. He has no ability to obtain a job that no longer exists.

Tyson correctly points out that its specialized production jobs are not available at other employers within Mr. Mesan's labor market. (Resp. Br. at 18) It then makes a giant leap to conclude that "in light of the fact that numerous Tyson employees regularly and routinely perform all three of the production jobs at issue, including the job of injury, . . . substantial evidence supports the proposition that Mr. Mesan could both perform and obtain employment in the relevant labor market." (Resp. Br. at 18-19) The test of total disability does not rely on the fact that other workers can perform and obtain the jobs at Tyson. It depends solely on whether the specific claimant can both perform and obtain employment based on a study of the whole person. Tyson's argument is specious.

Citing a 1939 case, Tyson maintains that total disability requires a threshold determination that a worker is medically fixed and stable, implying that because Mr. Mesan refused the surgical repair option his condition was not fixed and stable. (Resp. Br. at 19) A 1975 Division III case expanded on this rule of law. In *Pybus Steel Co. v. Dep't of Labor and Indus.*, 12 Wn. App. 436, 530 P.2d 350 (1975), the court determined that "if a claimant's condition has stabilized to the point where no further medical treatment is

required the condition is ‘fixed’ for purposes of closing the claim and determining the disability award.” *Id.* at 439 (emphasis added). Because Mr. Mesan decided to pursue non-invasive curative measures and because surgical intervention was not *required* there is no disagreement that Mr. Mesan’s condition reached medical fixity.

Tyson also contends Mr. Mesan dramatically overstates the implications of Dr. Higgs’ employment decision without the benefit of reviewing the PCE he ordered. (Resp. Br. at 19) Tyson does so on the basis that when Dr. Higgs, in preparation for trial, was “later afforded the opportunity to review the PCE,” he agreed with the “basic physical limitations as recommended in the PCE.” (*Id.*) While this fact taken in isolation is technically true, being asked whether one agrees, after the fact, with the “basic physical limitations” provided by the PCE (CP 197-199) does not equate to being asked whether that agreement would have made a difference in a return-to-work recommendation made years earlier. This is an important distinction. Tyson’s contention ignores the fact that Dr. Higgs testified that he relies on PCE results in making his return-to-work recommendations. (CP 197) Especially enlightening is the testimony of Mr. Garza. He admitted that he did not have any

notes that said Dr. Higgs had reviewed or commented on the PCE prior to making his employment decision. Mr. Garza also admitted that through his own personal experience he knows there are times, prior to meeting with a vocational counselor, that attending physicians have not completely reviewed a claimant's medical file. This often results in "contradictory opinion[s] from the same attending physicians in the same case." Mr. Garza admitted that return-to-work decisions sometimes depend on the records that are "placed in front of the attending physician at the time of the meeting [with the assigned vocational counselor]." (CP 575-576) Dr. Higgs did not review the PCE until years after he made Mr. Mesan's return-to-work decision. This was certainly a critical error when it resulted in Mr. Mesan being denied total disability benefits.

Tyson misconstrues the testimony when it states: "three of four treating and/or forensic physicians who testified found Mr. Mesan to be employable at Tyson in regular production jobs." (Resp. Br. at 21) As noted above, this statement does not reveal the entire truth in that two medical professionals, Drs. Fife and Wong, determined the position of "pick bone sparse lean" would have to be modified to fit Mr. Mesan's physical limitations. Additionally, two medical professionals, Kirk Holle and Dr. Gritzka

opined Mr. Mesan could not perform the job under any circumstances. To be fair, Dr. Gritzka testified that Mr. Mesan could only work at “sedentary” or “sedentary light” positions. However, there was no testimony provided that stated the production-line jobs were sedentary or sedentary light positions. In fact, the testimony was to the contrary. Even so, Mr. Garza did not perform a market analysis, find an odd lot job or attempt to retrain Mr. Mesan for any other position after Dr. Higgs released Mr. Mesan to the job of pick bone sparse lean. Instead, Mr. Garza terminated his involvement in Mr. Mesan’s claim. (CP 548-550)

Vital to the resolution of this case, whether or not Tyson could or should have modified the relevant positions to accommodate Mr. Mesan’s limitations, only half of the elements of a total disability claim have been resolved. Even Tyson notes that not only must a claimant be able to perform reasonably available, gainful employment, it must be shown that they are able to obtain such employment. Tyson insists that Mr. Mesan can perform the production-line jobs but it did not and cannot show that any of those jobs are obtainable by Mr. Mesan.

Tyson properly sets forth the necessary rule of law as it relates to permanent total disability i.e. the whole person analysis. (Resp. Br. at 24) Mr. Mesan has already set forth the analysis of his employability as it relates to this standard. (App. Br. at 14-15) Tyson, citing a Board decision, focuses on the age factor. Age is probably the least of Mr. Mesan's worries in attempting to perform and obtain gainful employment. The physical restrictions caused by his occupational disease combined with his lack of English language skills, pre-existing medical conditions and lack of relevant employment skills are much more of a roadblock.

Tyson's repeated recitation of its symptom magnification argument should not be considered. (Resp. Br. at 27-28) As noted above, no such finding was included in the Board's decision or by the court below. (CP 28)

VI. CONCLUSION

Pursuant to the rule of law set forth in *Leeper, supra*, when considering whether Mr. Mesan is totally disabled the fact-finders are required to apply a "whole person" analysis. For the reasons set forth in Mr. Mesan's briefing he contends that substantial

evidence fails to support the Board's Finding of Fact #8,¹ (which was adopted by the trial court) regarding his ability to perform reasonably continuous gainful employment. Even if this Court disagrees, the ability to *obtain* reasonably continuous gainful employment must also be determined when making a decision regarding total disability. Tyson insists that Mr. Mesan had the physical capability to work at its Wallula plant. However the record is lacking any evidence that reveals Mr. Mesan had the opportunity to obtain such employment nor was any finding entered in this regard. As such, finding Mr. Mesan was not temporarily or permanently totally disabled was erroneous and reversible error.

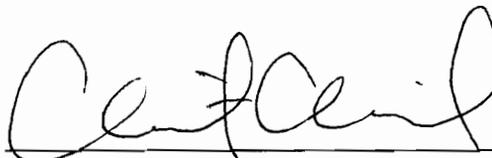
Likewise, the trial court's affirmation of the Board's "Finding of Fact" #9² (CP 16), which is really a conclusion of law, is not supported by substantial evidence. This "conclusion" must stand on its own merits after a *de novo* review of the record as there is no finding of fact on the issue of permanent total disability. Because there is no consideration of the ability to obtain employment at

¹ "During the period November 4, 2008, through May 6, 2009, [Mr. Mesan] was not prevented from performing reasonably continuous gainful employment." (CP 16)

² "As of May 7, 2009, Mr. Mesan has not been permanently totally disabled." (CP 16) As this court can see, this so-called finding of fact is almost identical to Conclusion of Law #7.

Tyson, the conclusion that Mr. Mesan is not permanently totally disabled is erroneous. For the same reasons, Conclusions of Law #6³ and #7⁴ are likewise erroneous. The record is clear that as a result of the occupational diseases in his wrists and shoulder in combination with his English language barrier, age, lack of employment skills and pre-existing medical conditions Mr. Mesan is unable to perform and obtain reasonably continuous gainful employment making him totally disabled, temporarily from November 4, 2008 to May 6, 2009 and permanently from May 7, 2009 forward. The trial court decision should be reversed and attorney fees awarded Mr. Mesan.

Respectfully submitted this 14th day of May, 2013



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³ "Between November 4, 2008, and May 6, 2009, Mr. Mesan was not temporarily totally disabled within the meaning of RCW 51.32.090." (CP 17)

⁴ "As of May 7, 2009, Mr. Mesan was not permanently totally disabled within the meaning of RCW 51.08.160." (CP 17)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of May, 2013, I sent for delivery a true and correct copy of Reply Brief by the method indicated below, and addressed to the following:

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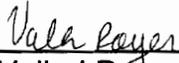
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