

FILED

MAR 14 2013

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

BRIEF OF APPELLANT

Christopher L. Childers
WSBA No. 34077
Smart, Connell, Childers & Verhulp P.S.
309 North Delaware Street, PO Box 7284
Kennewick, WA 99336
509-735-5555
Attorneys for Appellant

FILED

MAR 14 2013

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

BRIEF OF APPELLANT

Christopher L. Childers
WSBA No. 34077
Smart, Connell, Childers & Verhulp P.S.
309 North Delaware Street, PO Box 7284
Kennewick, WA 99336
509-735-5555
Attorneys for Appellant

I. TABLE OF CONTENTS

I. TABLE OF CONTENTS..... i

II. TABLE OF AUTHORITIESiii

III. INTRODUCTION..... 1

IV. ASSIGNMENTS OF ERROR.....2

V. STATEMENT OF THE CASE3

VI. ARGUMENT 11

 A. Standard of review..... 11

 B. Analysis 12

 (1) TOTAL DISABILITY 12

 (2) TEMPORARY TOTAL DISABILITY 14

 (3) PERMANENT TOTAL DISABILITY – RCW 51.08.160211

 (4) ATTORNEY FEES.....26

VII. CONCLUSION27

II. TABLE OF AUTHORITIES

Cases

<i>Brand v. Dep't of Labor and Indus.</i> , 139 Wn.2d 659, 989 P.2d 1111 (1999).....	26
<i>Energy Northwest v. Hartje</i> , 148 Wn. App. 454, 463, 199 P.3d 1043 (2009).....	14
<i>Harrison Mem'l Hosp. v. Gagnon</i> , 110 Wn. App. 475, 40 P.3d 1221 (2002).....	12
<i>Hubbard v. Dep't of Labor & Indus.</i> , 140 Wn.2d 35, 992 P.2d 1002 (2000).....	14, 21
<i>Leeper v. Dep't of Labor & Indus.</i> , 123 Wn.2d 803, 872 P.2d 507 (1994).....	passim
<i>Morse v. Antonellis</i> , 149 Wn.2d 572, 70 P.3d 125 (2003)	12
<i>Spring v. Dep't of Labor & Indus.</i> , 96 Wn.2d 914, 640 P.2d 1 (1982)	22, 25, 26
<i>Watson v. Dep't of Labor & Indus.</i> , 133 Wn. App. 903, 138 P.3d 177 (2006).....	12
<i>Wenatchee Sportsmen Ass'n v. Chelan County</i> , 141 Wn.2d 169, 4 P.3d 123 (2000)	12
<i>Young v. Dep't of Labor & Indus.</i> , 81 Wn. App. 123, 913 P.2d 402, <i>review denied</i> 130 Wn.2d 1009 (1996)	13, 21, 22

Statutes

RCW 51.08.160..... 12, 21

RCW 51.52.130..... 26

Rules

RAP 18.1..... 26

III. INTRODUCTION

Smajo Mesan suffered repetitive use injuries while working as an employee at the Tyson Foods, Inc. (Tyson) packing plant in Wallula, WA. Relevant to this appeal are two different claims filed at two different times with the Department of Labor & Industries (Department). Claim W-957232 (Docket # 08 22054) concerned an occupational disease involving a right shoulder impingement while Claim SA-65806 (Docket # 09 16858) concerned occupational diseases involving bilateral carpal tunnel syndrome. The Department initially paid benefits on both claims pursuant to the Industrial Insurance Act, Title 51 RCW, making them prima facie employment-related. It closed the shoulder claim, determining time loss compensation¹ was ended as paid to November 3, 2008. No further award for time-loss or permanent partial disability was allowed. The carpal tunnel syndrome claim was closed on May 6, 2009 when the Department determined Mr. Mesan's medical condition was fixed and stable. It too was closed without any award for time loss or permanent partial disability. (CP 9, 16, 39, 62, 71, 104, 109)

¹ Time loss compensation is a benefit provided to a claimant when they are deemed temporarily totally disabled.

Mr. Mesan appealed both claim closures to the Board of Industrial Insurance Appeals (Board). The two claims were consolidated for appeal. The Board ultimately determined that both Mr. Mesan's right shoulder condition and the carpal tunnel syndrome were medically fixed and stable and had reached maximum medical improvement making temporary total disability inapplicable. It also held that he was not permanently totally disabled although permanent partial disability was awarded on the shoulder condition. Mr. Mesan appealed the decision to the Benton County Superior Court which after a bench trial affirmed the Board's findings and conclusions, adopting them in toto. It did not enter any new findings or conclusions. Mr. Mesan then filed a timely notice of appeal with this court. (CP 9, 16-17, 59-60, 614-615, 617-618)

IV. ASSIGNMENTS OF ERROR

- (1) The trial court erred when it determined Mr. Meson was not temporarily totally disabled from November 4, 2008 through May 6, 2009.²

- (2) The trial court erred when it determined Mr. Mesan was not permanently totally disabled as of May 7, 2009.³

² Finding of Fact # 8; Conclusion of Law # 6 (CP 16-17)

V. STATEMENT OF THE CASE

Mr. Mesan is a Bosnian refugee. He immigrated to America in August 2000 with his family but does not speak or read English. He moved to Kennewick, WA in 2002 with his family and soon thereafter got a job cutting meat for Tyson. This was a fast-paced job, which required constant standing as well as repetitive reaching to lift and grasp pieces of meat (weighing up to 30 pounds) with his arms held away from his body. Mr. Mesan had no injuries or pre-existing medical conditions prior to starting employment with Tyson. On a pre-employment examination Mr. Mesan was physically cleared to work. (CP 10, 16, 38, 40, 141, 150-152, 444, 514, 572-573)

During his tenure at Tyson Mr. Mesan developed pain and other difficulties in his right shoulder and both hands. This was in addition to unknown but likely pre-existing arthritic neck and back problems, which were not work-related. Mr. Mesan also has hearing problems in both ears, has high blood pressure and is diabetic. Determining the shoulder injury and carpal tunnel syndrome were occupational diseases, Tyson placed Mr. Mesan

³ Finding of Fact # 9 (which is really a conclusion of law); Conclusion of Law # 7 (CP 16-17)

in light-duty jobs.⁴ He unsuccessfully tried several different light-duty positions but they all required repetitive reaching and grasping motions, which exacerbated the pain in his hands and right shoulder. Despite being advised by medical professionals to find another line of work Mr. Mesan continued employment at Tyson stating he could not find work elsewhere. In October 2006 Mr. Mesan's entire shift was eventually laid off. Tyson has not reinstated the second shift and Mr. Mesan has not obtained work since that time. (CP 10, 38, 42, 150, 152-155, 162, 164, 166, 209, 387, 394, 449-450, 454-456, 458, 466-467)

In 2005 Mr. Mesan sought treatment for his painful shoulder and carpal tunnel conditions with Dr. Higgs, an orthopedic surgeon. Dr. Higgs made his diagnosis of bilateral carpal tunnel syndrome based on moderately severe findings from nerve conduction studies, an objective medical test. He determined the occupational diseases arose naturally and proximately out of the repetitive reaching and grasping Mr. Mesan performed in his jobs at Tyson. Dr. Higgs initially prescribed various conservative treatments, including wrist splints, medications,

⁴ A light-duty job is any job an employer offers that's lighter than the job of injury." (CP 327-328)

cortisone injections and restriction to light duty positions at Tyson. Eventually he “hesitantly” recommended surgical intervention, which Mr. Mesan refused for health reasons. Dr. Higgs also diagnosed right shoulder impingement as a result of an MRI, another objective medical test. He recommended arthroscopic surgery. Again, Mr. Mesan chose not to pursue surgical intrusion, believing his health would suffer. Dr. Higgs treated only the initial conditions. He was not aware of Mr. Mesan’s pre-existing neck and back arthritis, high blood pressure or hearing loss. He was aware, however, that Mr. Mesan suffered from diabetes. (CP 10, 39-41, 153, 162, 164, 168, 188-194, 445, 447-450, 464-466, 560-561)

Maui Garza is a certified vocational expert who is employed on a consistent basis as a consultant for Tyson. He met with Mr. Mesan once on October 20, 2006 but did not review his employment file, which contained information in regard to the number of times Mr. Mesan had been seen by the company nurse during work hours due to pain in his hands and shoulder. Mr. Garza states he is familiar with every job at the Tyson plant. Based on job analyses of employment options for which Mr. Mesan might be qualified, Mr. Garza determined there were five

jobs Mr. Mesan could perform. The first two were chosen because of his past work history: (1) warehouse worker; and (2) forklift driver. Three jobs unique to the Tyson plant for which he was qualified were: (3) pick bone sparse lean; (4) bone picker; and (5) meat trimmer. Mr. Garza admitted the Tyson jobs were not available in the general labor market but were generally available in "this type of industry." He opined they were not "odd lot" jobs because they all were "generally available with this employer [Tyson]." On the other hand, he admitted there are no meat packing plants in Mr. Mesan's labor market other than at Tyson's Wallula plant. Mr. Garza failed to conduct a labor market survey for any jobs other than at Tyson nor did he offer Mr. Mesan any retraining services. Based solely on the opinion of Dr. Higgs, Mr. Garza concluded that Mr. Mesan was employable on a reasonably continuous basis at Tyson with no accommodation at the position of pick bone sparse lean. (CP 46-47, 522, 525-530, 549-550, 554, 561-562 582, 584).

Jill Falk is a vocational expert in the state of Washington. She offered testimony in stark contrast to that of Mr. Garza. She met with Mr. Mesan on two occasions, each lasting about 90 minutes. Prior to making her ultimate decision Ms. Falk

reviewed her own interview notes, medical and employment files, pertinent medical testimony as well as physician and physical therapist examinations and recommendations. She meticulously followed the proper the legal standard of looking at Mr. Mesan as a whole person prior to making her determination that Mr. Mesan was permanently and totally disabled. She concluded that Mr. Mesan's age, lack of English language skills, previous work experience and the limitations related to the shoulder and carpal tunnel injuries, in combination with his pre-existing medical conditions made any attempt at retraining him for a different job impractical and unnecessary. She opined that none of the jobs at Tyson fit into a sedentary category.

A physical capacities evaluation (PCE) was performed by Kirk Holle, a physical therapist. Based on the results of the PCE, Mr. Holle determined that none of the five job analyses recommended by Mr. Garza were appropriate for Mr. Mesan due to the constant repetitive grasping and reaching motions. Accordingly, Ms. Falk determined Mr. Mesan was not capable of performing and obtaining gainful employment in his labor market. She concluded that Mr. Mesan was permanently and

totally disabled. (CP 42, 47-48, 45, 290, 295-296, 298, 310, 321, 333-334, 347, 364-366, 368, 418-19, 526, 555, 559-560)

Dr. Gritzka, an orthopedic surgeon, performed an Independent Medical Examination (IME). He was also able to objectively document the Mr. Mesan's shoulder impingement and bilateral carpal tunnel syndrome. Dr. Gritzka noted Mr. Mesan's high blood pressure, diabetes as well as the neck and low back conditions. Dr. Gritzka ultimately concluded that Mr. Mesan, due to his low back and cervical conditions, should perform only sedentary work at which he could rise from the sitting position and move as needed. Additionally, after noting objective evidence of the shoulder injury, Dr. Gritzka determined that Mr. Mesan should keep his elbows resting on top of a desk. Dr. Gritzka opined that Mr. Mesan should avoid repetitive hand activities such as pulling things on and off production lines or keyboarding. Dr. Gritzka concluded that "if [Mr. Mesan] returned to work as a warehouseman or in a production situation, he would likely develop symptomology that would be disabling for that type of work." After reviewing the five job analyses recommended by Mr. Garza as employment possibilities, Dr. Gritzka opined that Mr. Mesan was not physically capable of

performing any of them. He concluded that “Mr. Mesan doesn’t fit very well anywhere, largely because of his age, basically age related [medical] conditions and his language handicap.” (CP 11, 42-43, 266-268, 270, 277)

Dr. Fife is an orthopedic surgeon. With Dr. Wong, a neurologist, Dr. Fife performed a one-time forensic exam (IME) on Mr. Mesan in May 2008 at Tyson’s request. They only evaluated Mr. Mesan for the right shoulder and carpal tunnel conditions. There was no consideration of his pre-existing, non-related medical conditions. Dr. Fife testified that Mr. Mesan had limited range of motion in his neck and that his right shoulder had only half the normal rotation it should have. Dr. Fife also noted the moderate bilateral carpal tunnel syndrome. He documented hearing loss in both ears – the right ear at a moderate to severe level. He found no ratable permanent impairments because he did not believe that Mr. Mesan’s shoulder injury and carpal tunnel syndrome were caused or aggravated by distinctive conditions of his work at Tyson. However, later in his testimony, Dr. Fife made the following admission:

Q: Okay. But you didn't find that [shoulder] impairment when you examined his right upper extremity?

A: That impairment was there but I did not relate it to the industrial claim. *But if the claim is accepted, then it would be related.*

(CP 422)(Emphasis added.) Since the claims were accepted and benefits paid it must be concluded that Dr. Fife would concede the shoulder impingement and carpal tunnel syndrome were employment related. The trial court agreed.⁵

Somewhat surprisingly, even though they said they approved the three Tyson jobs recommended by Mr. Garza, Drs. Fife and Wong placed strict limitations on Mr. Mesan's ability to perform the jobs by advocating that Tyson accommodate him by putting him into a job that allowed him to sit and/or stand as needed and work with his elbows generally at his sides.⁶ There is no testimony in this record that any of the Tyson jobs allowed an employee to sit and work with their elbows at their sides. (CP 43-44, 48, 374, 378-79, 387, 397, 409, 412-414, 416, 420-423, 558-559)

⁵ See, Findings of Fact # 8 and # 9 (CP 16)

⁶ Dr. Fife agreed these limitations eliminated the positions of forklift driver and warehouse worker. (CP 409)

Dr. Bozarth is a neurologist. He conducted a panel IME with Dr. Sears, an orthopedic surgeon and Dr. Zografos, a chiropractor.⁷ The examination took place in May 2007. In Dr. Bozarth's opinion, Mr. Mesan demonstrated some evidence of symptom elaboration during the examination. Dr. Bozarth concluded that none of Mr. Mesan's medical conditions constituted occupational diseases or were a result of distinctive circumstances of his work at Tyson. Dr. Bozarth did not place any restrictions on Mr. Mesan's employment abilities and was the only medical professional that approved of the forklift and warehouse worker positions suggested by Mr. Garza. (CP 44, 48, 430, 434-435, 504-506. 509, 511-513)

VI. ARGUMENT

A. Standard of review

The Court of Appeals reviews a trial court's decision on an industrial insurance appeal for "substantial evidence, taking the record in the light most favorable to the party who prevailed in superior court." *Harrison Mem'l Hosp. v. Gagnon*, 110 Wn. App.

⁷ Dr. Bozarth is the only physician on the panel that was deposed so all references to the opinions allegedly reached by the panel came through Dr. Bozarth's testimony.

475, 485, 40 P.3d 1221 (2002) (footnote omitted). It then reviews, de novo, whether the trial court's conclusions of law flow from the findings. *Watson v. Dep't of Labor & Indus.*, 133 Wn. App. 903, 909, 138 P.3d 177 (2006). Substantial evidence is that quantum of evidence sufficient to persuade a rational, fair-minded person that the premise is true. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). Credibility determinations are for the trier of fact and are not subject to review by the appellate court. *Morse v. Antonellis*, 149 Wn.2d 572, 574, 70 P.3d 125 (2003).

B. Analysis

(1) TOTAL DISABILITY

Total disability is a condition that permanently incapacitates a claimant "from performing any work at any gainful occupation." RCW 51.08.160. "The measure of total disability is not the magnitude of the physical impairment, which is a medical question, but the *effect* of the injury [or occupational disease] on the claimant's 'wage earning capacity.'" *Leeper v. Dep't of Labor & Indus.*, 123 Wn.2d 803, 812, 872 P.2d 507 (1994). (Emphasis added.) Case law has further defined the total disability statute.

The *Leeper* court determined that there is a significant difference in the “quantum and character of proof” needed in total disability cases. *Id.* It is not merely a medical question but 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 an injury or occupational disease. *Id.* (Emphasis added.)

In order to determine whether a worker is totally disabled, a study of the whole person is required. This includes their strengths, weaknesses, age, education, training and experience, pre-existing conditions, reaction to the injury, loss of function as well as other comparative factors. *Leeper*, at 813. Vocational experts’ opinions are utilized in determining whether a claimant can maintain gainful, continuous employment in their labor market. *Id.* But while vocational testimony is relevant and admissible to show the labor market and job availability, it is not necessary to find total disability. *Young v. Dep’t of Labor & Indus.*, 81 Wn. App. 123, 132, 913 P.2d 402, *review denied* 130 Wn.2d 1009 (1996).

(2) TEMPORARY TOTAL DISABILITY

Temporary total disability (TTD) is a condition that temporarily incapacitates a worker from performing or obtaining any work at any gainful employment. *Energy Northwest v. Hartje*, 148 Wn. App. 454, 463, 199 P.3d 1043 (2009) (citation omitted); *Leeper, supra* at 812. Temporary total disability differs from permanent total disability only in the duration of the disability, not its character. *Hubbard v. Dep't of Labor & Indus.*, 140 Wn.2d 35, 43, 992 P.2d 1002 (2000).

Here, the trial court found that: “[d]uring the period November 4, 2008 through May 6, 2009, [Mr. Mesan] was not prevented from performing reasonably continuous gainful employment.”⁸ For this reason it concluded “. . . Mr. Mesan was not temporarily totally disabled . . .”⁹ Substantial evidence in this record does not support this finding. Consequently, the conclusion of law does not flow from the finding.

As set forth above, the question of whether Mr. Mesan was temporarily totally disabled begins with an examination of him as a

⁸ Finding of Fact #8 (CP 16)

⁹ Conclusion of Law #6 (CP 17)

“whole person.” The facts are undisputed that he is a 56-year old Bosnian refugee that speaks no English. His Bosnian educational training as a mechanical engineer did not transfer to a like position in the United States. Since coming to the United States in 2000 his only work experience is as a warehouse worker or meat cutter. He has pre-existing, unrelated arthritis in his neck and back, high blood pressure, diabetes, severe hearing loss and a prior unrelated worker’s compensation claim affecting his left hand. Next, the record is clear that Mr. Mesan had no pre-existing medical conditions prior to commencing employment at Tyson. However, as a direct result of the Tyson jobs he performed, he suffered debilitating injuries to his right shoulder and both hands.¹⁰ Third, there is no disagreement that Mr. Mesan’s entire shift at Tyson was eliminated in October 2006 and has never been reinstated or that Mr. Mesan has not been employed since the lay-off.

Even after considering these factors Mr. Garza determined that Mr. Mesan had the ability to be gainfully employed on a reasonably continuous basis in three positions at Tyson. Mr. Garza came to this conclusion because Dr. Higgs said Mr. Mesan was capable of

¹⁰ This fact is supported by the testimonies of Dr. Higgs, Dr. Fife, Dr. Wong, Dr. Gritzka and Kirk Holle, who performed the PCE. Only Dr. Bozarth disagreed.

performing, without restrictions or limitations, the job of injury: pick bone sparse lean. This is the only job analysis that Mr. Garza asked Dr. Higgs to review. Once he had Dr. Higgs' opinion Mr. Garza's vocational work on Mr. Mesan's case terminated. Mr. Garza determined he did not need to perform a labor market survey or job availability analysis for Mr. Mesan. As will be seen below this was a significant mistake. (CP 534-535, 538, 548-550, 552)

Importantly, Dr. Higgs made his employment decision based on incomplete information. Mr. Garza did not discuss with Dr. Higgs Mr. Mesan's pre-existing medical conditions. Next, although Dr. Higgs ordered a PCE from Kirk Holle, Dr. Higgs did not read the report or have any knowledge of its contents prior to make his return-to-work recommendation for Mr. Mesan. This is inexcusable since Mr. Garza had the results of that PCE for nearly a year-and-a-half but did not ever give a copy to Dr. Higgs or discuss it in subsequent meetings or correspondence. This was a critical error that affected Dr. Higgs' decision because he testified that he relies on the findings of a valid PCE in making his return-to-work recommendations. The results of the Mr. Mesan's PCE were valid. Dr. Higgs learned after his decision was made that Kirk Holle, the

physical therapist that conducted the PCE, had found Mr. Mesan unable to perform any of the five jobs Mr. Garza suggested for Mr. Mesan, which included the one approved by Dr. Higgs. (CP 194-197, 209-210, 560-561, 563-564, 566-567, 570-571, 575)

Ms. Falk, another vocational expert, testified that she met with Mr. Mesan on 2 occasions for 90 minutes each. She performed a full vocational assessment for Mr. Mesan, which included his current physical capacities, his transferable skills and his physical ability. A transferable skill is any skill a worker has based on his work experience and/or education. What a vocational expert is trying to determine in evaluating transferable skills is whether an employer would hire a worker with the profile they present. Mr. Mesan's profile includes the fact that he suffered from two occupational diseases, has pre-existing medical conditions and does not speak English. His only transferable skills were as a warehouse worker and a laborer at Tyson. However, every expert except Dr. Bozarth testified that Mr. Mesan was not physically able to perform the job of warehouse worker or fork-lift driver. That leaves for consideration only the three Tyson jobs. And Tyson wasn't hiring a second shift. For these reasons Ms. Falk

determined Mr. Mesan was unable to perform or obtain reasonably continuous gainful employment in his labor market from November 4, 2008 to May 6, 2009, which made him temporarily totally disabled. For the same reasons she found him permanently totally disabled from May 7, 2009 forward. (CP 295-296, 298-299, 301, 348-349)

As noted above, Dr. Fife, Dr. Wong and Mr. Holle all testified that in order for Mr. Mesan to successfully work at Tyson given his physical limitations, it would have to make significant accommodations so that he could only work in a sedentary position with his arms at his side and have a sit/stand option. Additionally, Dr. Gritzka opined that Mr. Mesan could not perform any of the Tyson jobs even with accommodations. There is no evidence in this record that Tyson had a job that could meet these requirements. (CP 331-332, 342, 364-367)

Only Dr. Higgs and Dr. Bozarth felt Mr. Mesan could perform the three Tyson jobs with no accommodations. The problems with Dr. Higgs' opinion are set forth above. Dr. Bozarth's testimony is suspect because he didn't even believe the shoulder injury or

carpal tunnel syndrome were employment related. The court did not agree with his assessment.¹¹

Mr. Mesan contends the trial court committed reversible error when it entered Finding of Fact # 8, which states: “During the period from November 4, 2008, through May 6, 2009, the claimant was not prevented *from performing* reasonably continuous gainful employment.” (CP 16) As such, Conclusion of Law # 6¹² does not flow from that finding.

To reiterate the applicable rule of law: Total disability involves the medical fact of loss of function, together with the *inability to perform and the inability to obtain* work as a result of an occupational disease. *Leeper* 123 Wn.2d at 812 (emphasis added). Even if one assumes, without conceding, that Mr. Mesan was capable of *performing* the jobs of pick bone sparse lean, bone picker or meat trimmer the record is devoid of any evidence that he could *obtain* them. In fact, Tyson did not offer him those jobs because as noted above, Mr. Mesan’s shift at Tyson was

¹¹ Findings of Fact # 8 and # 9 (CP 16)

¹² “Between November 4, 2008, and May 6, 2009, Mr. Mesan was not temporarily totally disabled within the meaning of RCW 51.32.160.” (CP 17)

eliminated in 2006 and it has yet to be reinstated. On this issue, Mr. Garza's answers to the following questions are enlightening:

Q In Mr. Mesan's labor market there are no other meat packing plants?

A That's correct, to my knowledge.

Q So in this labor market, aside from Tyson Foods, the job of pick bone sparse lean, peel caps or meat trimmer, and pick from mixed lean or bone picket, those are not available to Mr. Mesan?

A That's correct.

(CP 577)

Based on the facts set forth in this record, taken in the light most favorable to Tyson, substantial evidence exists that Mr. Mesan's occupational diseases, in combination with his pre-existing medical conditions, his age, his lack of transferable skills and most importantly his lack of English language skills prevented him from performing *or obtaining* continuous gainful employment. Consequently, he was temporarily and totally disabled from November 4, 2008 to May 6, 2009.

(3) PERMANENT TOTAL DISABILITY – RCW 51.08.160

The trial court, relying on the Board's findings, neglected to present any findings of fact regarding the issue of permanent total disability because Finding of Fact # 9,¹³ although labeled a finding is really a conclusion of law and is nearly identical to Conclusion of Law # 7.¹⁴ Because it is a conclusion of law, the issue of permanent total disability must be reviewed de novo.

The analysis regarding permanent total disability is the same as that for temporary total disability since the only difference is in the duration of the disability, not its character. *Hubbard, supra*, 140 Wn.2d at 43. For this reason, the arguments set forth above also apply to Mr. Mesan's claim that he is entitled to benefits for his permanent total disability as of May 7, 2009.

"Permanent total disability" (PTD) 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.

¹³ Finding of Fact #9 states: "As of May 7, 2009, Mr. Mesan has not been permanently totally disabled.

¹⁴ Conclusion of Law #7 states: "As of May 7, 2009, Mr. Mesan was not permanently totally disabled within the meaning of 51.08.160.

PTD does not mean a claimant has to be absolutely helpless or without any occupational capacity. *Young*, 81 Wn. App. at 130. As noted above, the definition of PTD supplied by case law involves two elements: (1) the ability to *perform* a job; *and* (2) the ability to *obtain* employment. Both elements must be found to apply on a reasonably continuous basis within the claimant's market area. *Leeper*, 123 Wn.2d at 814-15. The extent of a claimant's physical impairment relates to their ability to perform a job while the effect on wage-earning ability relates to their ability to obtain employment. *Young*, 81 Wn. App. at 130.

A claimant can make a prima facie case of total disability if they can establish that they were able to work before the occupational disease occurred but are unable to do so afterward due to the pain and nature of the injury/occupational disease. This is accomplished when medical experts have testified to the loss of function and the limitations on the claimant's ability to work and when vocational experts have concluded the claimant is not employable in the competitive job market. *Spring v. Dep't of Labor & Indus.*, 96 Wn.2d 914, 918, 640 P.2d 1 (1982).

Mr. Mesan was initially cleared to work at Tyson when he passed the pre-employment physical. Although the medical testimony is mixed a majority of the medical professionals in this case have determined that Mr. Mesan is unable to find reasonably continuous gainful employment without accommodation in his market area as a result of the occupational diseases from which he suffers. Likewise, the vocational testimony is mixed but Ms. Falk conducted a complete review of all available data and met with Mr. Mesan twice before concluding he was not a suitable candidate for any of the five jobs recommended by Mr. Garza. His review of the data was not as complete as Ms. Falk's beginning with the fact that he met with Mr. Mesan only one time. Additionally, Mr. Garza relied on Dr. Higgs' flawed opinion before finding that Mr. Mesan was able to return to the job of injury.

Instructive to Mr. Mesan's permanent total disability and his ability to perform general work are the five jobs recommended by Mr. Garza. As set forth above, all the testimony except for Dr. Bozarth's determine Mr. Mesan cannot perform the jobs of fork-lift operator or warehouse worker. Substantial evidence thus supports

the conclusion that Mr. Mesan could not perform or obtain those two positions.

Next, Dr. Higgs found that Mr. Mesan was able to perform only the job of pick bone sparse lean. He gave no opinion regarding the positions of bone picker or meat trimmer. However, as noted above, Dr. Higgs' recommendation was based on seriously inadequate information, which should be taken into account regarding the credibility of his recommendation.

Dr. Bozarth determined Mr. Mesan could perform all five jobs. However, even the Board and trial court did not find his testimony credible as can be seen in Findings of Fact # 8-9. (CP 16)

Drs. Fife and Wong opined that Mr. Mesan could do the three Tyson jobs *but only if* he was accommodated by allowing him to sit and stand as needed with his arms held by his sides. There is no information in this record that states Tyson can or would make such an accommodation. This must be considered when determining whether Mr. Mesan can perform or obtain employment at Tyson.

Dr. Gritzka testified that Mr. Mesan was not able to perform any of the Tyson jobs due to his occupational diseases. Likewise,

Kirk Holle's PCE determined Mr. Mesan could not perform any of the Tyson jobs.

In sum, only one medical professional¹⁵ opined that Mr. Mesan can perform the three Tyson jobs without accommodation. Another¹⁶ testified that Mr. Mesan had the ability to perform the pick bone sparse lean job. On the other hand, four medical professionals¹⁷ believe Mr. Mesan is incapable of performing the job of pick bone sparse lean, bone picker or meat trimmer without tremendous accommodation. The record is silent regarding whether or not Tyson can or would accommodate Mr. Mesan's disabilities. Nor is there any evidence that he can obtain employment with Tyson since his shift has been eliminated. Based on the above facts, substantial evidence in this record proves Mr. Mesan is permanently totally disabled as of May 7, 2009.

Once a claimant has carried the burden of proving they cannot perform general work, the "odd lot" doctrine shifts the burden to the employer to prove that a claimant can obtain and perform special work, i.e., work that is not generally available on

¹⁵ Dr. Bozarth

¹⁶ Dr. Higgs

¹⁷ Dr. Fife, Dr. Wong, Dr. Gritzka and Kirk Holle

the competitive labor market. *Spring*, 96 Wn.2d at 918-20. If a worker can perform special work they are not totally disabled. *Id.* at 919. Just as was the case in finding general work, Mr. Garza did not attempt to determine whether special work existed for Mr. Mesan either within the Tyson plant or outside it. Because Tyson offered no evidence that special work existed that was tailored to Mr. Mesan's limitations in his local labor market, it failed to disprove permanent total disability via the odd lot doctrine.

(4) ATTORNEY FEES

If successful in his appeal, Mr. Mesan requests attorney fees pursuant to RAP 18.1, RCW 51.52.130¹⁸ and *Brand v. Dep't of Labor and Indus.*, 139 Wn.2d 659, 989 P.2d 1111 (1999). In deciding an attorney fee request this court is to look to both the statutory scheme and the historically liberal interpretation of the Industrial Insurance Act in favor of the injured worker. Additionally, it is vital to recognize that the purpose behind the statutory attorney fees award is to ensure adequate representation for the injured

¹⁸ The relevant portion of RCW 51.52.130(1) provides: "If, on appeal to the superior or appellate court from the decision and order of the board, said decision and order is reversed or modified and additional relief is granted to a worker or beneficiary ... a reasonable fee for the services of the worker's or beneficiary's attorney shall be fixed by the court."

worker who is forced to appeal from Department rulings in order to obtain compensation due on their claim. *Id.* at 667-70.

VII. CONCLUSION

Substantial evidence does not support the findings of fact and conclusions of law of the Board of Industrial Insurance Appeals affirmed by the trial court below. The record below dictates finding that Mr. Mesan was temporarily and totally disabled from November 4, 2008 through May 6, 2009, and permanently and totally disabled as of May 6, 2009. Mr. Mesan respectfully requests reversal and modification of the Board's Findings of Fact numbers 8 and 9 and Conclusion of Law numbers 6 & 7.

Respectfully submitted this 10th day of March, 2013



Christopher L. Childers, WSBA #34077
Smart, Connell, Childers & Verhulp P.S.
309 North Delaware Street
Kennewick, WA 99336
(509) 735-5555
Attorneys for appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of March, 2013, I sent for delivery a true and correct copy of Appellant's Brief by the method indicated below, and addressed to the following:

U.S. Mail (Original and one (1) copy)

Renee S. Townsley, Clerk Administrator
The Court of Appeals of the State of Washington Division III
500 North Cedar Street
Spokane, WA 99201-1905

U.S. Mail (One (1) copy)

Randy Leeland
6 South 2nd Street, Suite 1118
Yakima, WA 98901

U.S. Mail (One (1) copy)

Penny Allen
Office of the Attorney General
PO Box 40121
Olympia, WA 98504

Vallari Royer

Vallari Royer